

PANORAMIC

SHIPPING 2025

Contributing Editors

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Seward & Kissel LLP



 LEXOLOGY

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Panoramic guide (formerly Getting the Deal Through) enabling side-by-side comparison of local insights into newbuilding contracts; ship registration and mortgages; limitation of liability; port state control; classification societies; collision, salvage, wreck removal and pollution; ship arrest; judicial sale of vessels, carriage of goods by sea and bills of lading; shipping emissions; ship recycling; jurisdiction and dispute resolution; international conventions; and recent trends.

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

The parties may agree by contract when the title in the ship is to pass to the shipowner. If the contract does not specify when the title passes, the title will pass at the earlier of the following events:

- completion and delivery; or
- completion and approval by the purchaser.

Subject to normal considerations around variations of contracts (such as execution of a deed of variation) the parties may agree to change when the title will pass.

Law stated - 23 April 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

Refund guarantees are governed by common law with the usual formalities, such as the demand conforming with the requirements of the guarantee, the guarantee being unexpired at the time it is triggered and the guarantee covering the events claimed.

Law stated - 23 April 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Shipbuilding contracts are governed by the ordinary law of personal property and the sale of goods. A purchaser may seek specific performance of the contract if damages for breach is an inadequate remedy.

Law stated - 23 April 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Claims by a purchaser for a defective vessel could be brought under the construction contract's warranty provisions (if a warranty has been provided) or breach of contract. A third party that has sustained damage could bring an action in tort. Product liability provisions in the Australian Consumer Law are limited to products sold for less than A\$40,000 before 1 July 2021 and less than A\$100,000 for products sold any time after.

Law stated - 23 April 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

All Australian-owned or operated commercial and demise chartered ships, 24 metres and over in tonnage length and capable of navigating the high seas must be registered.

All other craft, including government ships, fishing and pleasure craft need not be registered but may be if the owner or operator desires.

Registration is administered by the Australian Maritime Safety Authority (AMSA) and is regulated under the Shipping Registration Act 1981 (Cth) and Navigation Act 2012 (Cth).

Law stated - 23 April 2024

6 | Who may apply to register a ship in your jurisdiction?

Registration in the General Register is open to all Australian-owned ships. The Shipping Registration Act (Cth) provides that an Australian-owned ship is a ship that is:

- owned by an Australian national or Australian nationals and by no other person;
- owned by three or more persons as joint owners, where the majority of those persons are Australian nationals; or
- owned by two or more persons as owners in common, where more than half of the shares in the ship are owned by an Australian national or Australian nationals.

Registration in the International Register is restricted to Australian-owned commercial ships that are engaged in international trade. These must be at least 24 metres in tonnage length and trading ships that are Australian-owned, wholly owned and operated by Australian residents or nationals, or on demise charter to Australian-based operators.

Australian national means an Australian citizen, a body corporate established by or under a law of the Commonwealth or of a state or territory or the commonwealth or a state or territory.

An application to register a ship is made by lodging a written application that is signed by the ship's owner with the Registrar.

Law stated - 23 April 2024

Documentary requirements

7 | What are the documentary requirements for registration?

The documents required for registration are as follows:

- application for registration (AMSA 168);
- declaration of ownership and nationality (AMSA 208);
- notice of appointment of registered agent (AMSA 157);
- builder's certificate (AMSA 211) or statutory declaration for builder's certificate (AMSA 222);
- evidence of ownership (often by way of Bill of Sale);
- certificate of deletion, if applicable;
- demise charter party, if applicable;
- tonnage certificate, if applicable;
- call sign licence, if applicable;
- evidence of marking of ship; and
- registration fee.

Full details of the documents required for registration are available on [AMSA's website](#).

Law stated - 23 April 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Pursuant to section 17 of the Shipping Registration Act 1981 (Cth) the Registrar must not enter a ship on the register if it is registered under a law of a foreign country. Where an owner/operator is seeking registration of a ship last registered under a foreign law they are to provide evidence from the foreign registration authority showing that the registration is closed. This must be done before a registration certificate can be issued.

Law stated - 23 April 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

Since 30 January 2012, the [Personal Property Securities Register](#) (PPSR) has been the single national register of security interests in personal property, including vessels.

To search for security interests registered against a vessel on the PPSR, it is necessary to know the vessel's 14-character hull identifier number (Boatcode) or its six-digit official number. It is also possible to conduct a search against the current owner of the vessel.

Law stated - 23 April 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The Convention on Limitation of Liability for Maritime Claims 1976 (CLLMC), as amended by the 1996 Protocol, has the force of law in Australia under the Limitation of Liability for Maritime Claims Act 1989 (Cth) (LLMCA). The new limits applied from 8 June 2015.

Shipowners (including owner, charterer, manager and operator of a seagoing ship) and salvors may limit their liability per article 1 for the claims set out in article 2.

The LLMCA does not apply to ships that belong to foreign naval, military or air forces.

The liability regimes established by the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on Civil Liability for Bunker Oil Pollution Damage regarding pollution damage resulting from the escape or discharge of oil and fuel apply in Australia.

Law stated - 23 April 2024

Procedure

11 | What is the procedure for establishing limitation?

Pursuant to section 25 of the Admiralty Act 1998 (Cth)(Admiralty Act), a party wishing to constitute a limitation fund may commence limitation proceedings in the Federal Court before any claims have been made. Limitation funds are commonly established by paying the limitation amount into court or producing an acceptable protection and indemnity (P&I) club letter of undertaking.

The fund is calculated using the method set out in the CLLMC. A party may apply to limit their liability without constituting a limitation fund, but this is the exception rather than the rule.

A person may apply to constitute a limitation fund where a claim has been made or is expected to be made, which may be limited under the CLLMC.

Law stated - 23 April 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

In accordance with article 4 of the CLLMC, a person liable shall not be entitled to limit his or her liability if it is proved that the loss resulted from his or her personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

The limit has not been broken in Australia. However, in *Strong Wise Limited v Esso Australia Resources Pty Ltd* [2010] FCA 240, the court ordered that two limitation funds be constituted for claims arising from the navigation of one vessel over the course of one hour.

Law stated - 23 April 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Australia is not a party to the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea and limitation of liability for passenger and luggage claims is governed by the terms of the contract.

Under article 2 of the CLLMC (see the Limitation of Liability for Maritime Claims Act 1989 (Cth)), claims regarding loss of life and loss resulting from delay in the carriage by sea of passengers or their luggage are subject to the limitation of liability.

Article 7 provides that, in respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 46,666 SDRs (equal to the value of the national currency where limitation is sought at the date the limitation fund shall have been constituted, payment is made, or security is given that under the law of that state is equivalent to such payment – see article 8 of CLLMC) multiplied by the number of passengers the ship is authorised to carry according to the ship's certificate, but not exceeding 25 million SDR. Notwithstanding the limit of liability prescribed in article 7, a state party may regulate by specific provisions of national law the system of liability to be applied to claims for loss of life or personal injury to passengers of a ship, provided that the limit of liability is not lower than that prescribed in article 7.

Law stated - 23 April 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The Australian Maritime Safety Authority (AMSA) is the port state control agency in Australia. AMSA operates under the Australian Maritime Safety Authority Act 1990 (Cth).

Law stated - 23 April 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

Under the Navigation Act 2012 (Cth) (Navigation Act), AMSA may detain a vessel or bring it to another appropriate place if AMSA reasonably suspects that the vessel, a seafarer or a person on board is unseaworthy, has been or will be involved in a contravention of the Navigation Act, or if the master or a seafarer of the vessel do not produce certificates or documentary evidence when requested.

If the detention is reasonable, the owner of the vessel is liable to pay AMSA compensation of a reasonable amount in respect of its detention.

Criminal and civil penalties apply for failing to comply with the directions of AMSA.

Law stated - 23 April 2024

Appeal

16 | What is the appeal process against detention orders or fines?

AMSA's decision to detain a vessel may be reviewed by application to the Administrative Appeals Tribunal.

Per section 251(1) of the Navigation Act, if the detention was not reasonable, AMSA is liable to pay compensation to the owner for costs of or incidental to the detention and any loss or damage incurred by the owner because of the detention. Section 251(1) has not been the subject of judicial consideration yet.

If the parties cannot agree on the amount of compensation, they may commence proceedings in an eligible court, usually the Federal Court of Australia.

A person who receives an infringement notice may apply to AMSA within 28 days for it to be withdrawn and bring any relevant facts and matters to AMSA's attention.

Law stated - 23 April 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The Australian Maritime Safety Authority (AMSA) recognises the following classification societies:

- American Bureau of Shipping;
- Bureau Veritas;
- China Classification Society;
- Det Norske Veritas-Germanischer Lloyd;
- Korean Register of Shipping;
- Lloyd's Register;
- Nippon Kaiji Kyokai; and
- Registro Italiano Navale.

Law stated - 23 April 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

Classification societies may be held liable for breach of contract, or for negligence if a duty of care can be established.

In *Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor* [2002] QCA 284, the court held that Det Norske Veritas did not have a duty of care to warn the plaintiffs that the manner in which the vessel was built was not compliant with the Department of Harbours and Marine's requirements.

Law stated - 23 April 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

The Australian Maritime Safety Authority (AMSA) may order the removal of any wreck of an Australian or foreign vessel or remove a wreck if necessary to save human life, secure the safe navigation of vessels or protect the marine environment. AMSA derives these powers from the Navigation Act.

Law stated - 23 April 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The proportionate fault rule for losses caused by the fault of two or more vessels found in the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 is given effect by the Navigation Regulation 2013 (Cth).

Australia is not a party to the Nairobi International Convention on the Removal of Wrecks 2007. The Navigation Act regulates wrecks and addresses the same points as that Convention, except for insurance.

Australia has ratified the International Convention on Civil Liability for Oil Pollution Damage, which is given effect by the Protection of the Sea (Civil Liability) Act 1981 (Cth). Australia has also ratified the International Convention on Civil Liability for Bunker Oil Pollution Damage, which is given effect by the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Cth).

Australia has acceded to the International Convention on Salvage 1989. The Navigation Act regulates salvage and gives effect to the main parts of the Convention. The provisions apply to territorial waters.

Law stated - 23 April 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement and Lloyd's Standard Form of Salvage Agreement is commonly used.

A salvor must be a volunteer, but can be motivated by self-interest if they intend to rescue maritime property for its owner. A salvor acting at the request of AMSA is still considered a 'volunteer' in obeying a statutory obligation. A salvor must obtain permission from the owner of the salvable property and local authorities to carry out salvage operations.

Law stated - 23 April 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Australia is not a party to any international convention regarding the arrest of ships. Ship arrest is governed by the Admiralty Act 1988 (Cth).

Law stated - 23 April 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Under the Admiralty Act, claims can be made in rem against a ship for maritime liens (section 15), proprietary maritime claims (section 16), general maritime claims (section 17) and demise charterer's liabilities (section 18).

A time-chartered vessel cannot be arrested for claims against the time charterer (though in theory, if not in practice, bunkers owned by a time charterer on a time chartered vessel may be enjoined if the requirements for an injunction can be satisfied).

Maritime liens attach to a ship and are enforceable against the ship notwithstanding changes in ownership. The four maritime liens actionable in Australia are for:

- salvage reward;
- damage done by a ship;
- wages of the master or a member of the crew; and
- master's disbursements.

Australia follows the UK position, whereby a maritime lien will only be enforceable if it corresponds to a local Australian maritime lien.

Proprietary maritime claims attach to a ship in rem and include claims relating to:

- the possession, title, ownership or mortgage of a ship or of a share in a ship or of a ship's freight;
- claims between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship;
- enforcement of a judgment against a ship; and
- interest in relation to the above.

General maritime claims attach to a ship in rem and include claims in connection with:

- damage done by a ship (whether by collision or otherwise);
- liability of the owner of a ship arising under the Protection of the Sea (Civil Liability) Act 1981 (Cth);
- loss of life, or personal injury;
- an act or omission of the owner or charterer of the ship in the navigation or management of the ship, including in connection with the loading of or unloading of goods, embarkation or disembarkation of persons, and the carriage of goods or persons on the ship;
- loss or damage of goods carried by a ship;
- an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by a charter party or otherwise;

- salvage, general average, towage or pilotage of a ship;
- goods, materials or services for a ship's operation or maintenance;
- the construction of a ship, alteration, repair or equipping of a ship;
- a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of a similar kind, or a levy in relation to a ship;
- disbursements incurred by a master, shipper, charterer or agent on account of a ship;
- an insurance premium, or for a mutual insurance call, in relation to a ship;
- wages or other amounts owing to a master or a member of the crew;
- the enforcement of, or a claim arising out of, an arbitral award made in respect of a proprietary or general maritime claim; and
- interest in respect of the above claims.

Under section 18, proceedings against a demise charterer can be commenced against a demise-chartered ship if the demise charterer was the owner, charterer or in possession and control of that ship when the cause of action arose.

In order to effect an associate or surrogate arrest in Australia, the provisions of section 19 of the Admiralty Act must be satisfied. Section 19 provides that a general maritime claim concerning a ship can be pursued against another ship if:

- a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of the first-mentioned ship; and
- that person is, when the proceedings are commenced, the owner of the second-mentioned ship.

For the purposes of section 19, an owner includes an equitable owner.

Law stated - 23 April 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Maritime liens are recognised in Australia. Maritime liens attach to a ship and are enforceable against the ship notwithstanding changes in ownership. The four maritime liens currently recognised in Australia (see section 15 of the Admiralty Act) are for:

- salvage reward;
- damage done by a ship;
- wages of the master or a member of the crew; and
- master's disbursements.

Australia follows the UK position, whereby a maritime lien will only be enforceable if it corresponds to a local Australian maritime lien.

Law stated - 23 April 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

Pursuant to section 34 of the Admiralty Act, a claim can be made for damages for unjustified arrest by a person with an interest in the ship or who has suffered loss or damage as a direct result when:

- a party unreasonably and without good cause:
 - demands excessive security in relation to the proceeding; or
 - obtains the arrest of a ship or other property; or
- a party or other person unreasonably and without good cause fails to give the consent required for the release from arrest of a ship or other property.

Section 34 was considered in *Delaware North Marine Experience Pty Ltd v Ship 'Eye-Spy'* [2017] FCA 708 where the Court accepted at [292] that the test under section 34 was comprised of two requirements:

- 'acting unreasonably', which looks at the person's conduct to see if it is unreasonable; and
- acting 'without good cause', which looks to the grounds on which a person has acted to see whether such grounds constitute acting without good cause.

Obiter in other cases and leading commentary recognises that the threshold to establish unjustified arrest in Australia is very high and will only be satisfied where a party 'unreasonably and without good cause' obtains the arrest of a ship.

Law stated - 23 April 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

No. Under the Admiralty Act, the relevant person who may be sued must be a person who would be liable in personam and the owner of the ship.

A bunker supplier could (in theory) obtain a freezing order or a *Mareva* injunction.

Law stated - 23 April 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

The solicitor applying for an arrest warrant must give the court an undertaking to pay the Marshal's costs and expenses associated with the arrest. The Marshal will obtain indemnity for the period the vessel is in the custody of the Marshal. The costs of that insurance will be an expense incurred by the Marshal payable by the party issuing the application for the arrest of the vessel.

No other security is required.

Law stated - 23 April 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

Security is not generally ordered by a court but is negotiated by the parties. Security can be in the form of a letter of undertaking, letter of guarantee, bank guarantee or cash deposited with the court. Once the arresting party has been offered adequate security it will generally consent to the release from arrest. A failure to consent to release when offered adequate security may render the continued arrest wrongful.

The alternative to negotiated security is a bail bond under Part VII of the Admiralty Rules 1998 (Cth) (Admiralty Rules).

The arresting party is entitled under Australian law to security for its best arguable case. This will normally include:

- total claim;
- interest, often six to nine months up to the likely date of judgment; and
- costs associated with enforcement including legal costs, including potential appeals.

In practice, a party will rarely provide security in excess of the value of the arrested vessel, in which case the court may order a judicial sale of the vessel.

Law stated - 23 April 2024

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

The lawyer authorised to make an arrest application must be an Australian legal practitioner. No power of attorney is required.

The arresting party will need to prepare an affidavit in support of the application for arrest. The affidavit will annex supporting documents that will need to be in English or in translation and the deponent can be the local solicitor or the arresting party as appropriate. Original documents are not required; scanned and emailed copies of originals will generally be sufficient.

Once the affidavit has been prepared, proceedings can be commenced and the vessel arrested within a matter of hours.

Law stated - 23 April 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

The Marshal who arrests a ship has custody of the vessel while under arrest. The arresting party will need to provide funds for the maintenance of the vessel.

Law stated - 23 April 2024

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

If security is provided and the terms of the underlying contract provide for the proceedings on the merits to be determined elsewhere, an Australian court will usually stay the arrest proceedings.

Law stated - 23 April 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Parties can also consider applying for a freezing order (also known as *Mareva* orders or asset preservation orders). The court is empowered to make a freezing order, with or without notice to the respondent, to prevent the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied.

Freezing orders are not a general security for a potential judgment: they prevent the disposal of assets to frustrate the court's processes by depriving the plaintiff of the fruits of any judgment.

A freezing order is an exceptional order. They are not granted lightly and will be tailored to the specific circumstances of the case. They must generally be supported by an undertaking as to damages.

Law stated - 23 April 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Yes.

Law stated - 23 April 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Generally, no. The ability to commence in rem proceedings against the bunkers or fuel on board a ship independently of any proceeding against the ship itself has been significantly constrained (if not ruled out completely) by the decision and dicta of the Full Court of the Federal Court in *Scandinavian Bunkering AS v the bunkers on board the fishing vessel 'Taruman'* (2006) 151 FCR 126.

However, parties can potentially apply for a freezing order to have the bunkers discharged from the ship. Such orders can be difficult to obtain.

Law stated - 23 April 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

The court may, on application by a party to a proceeding or on its own motion, and either before or after final judgment in the proceeding, order that a ship or other property that is under arrest in the proceeding:

- be valued;
- be valued and sold; or
- be sold without valuation.

Law stated - 23 April 2024

Procedure

- 36** | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

If it becomes apparent that the in rem proceedings are unlikely to be defended, the court may order on application by the arresting party or on the court's motion, that the vessel be sold.

Once such orders are made the Marshal will generally oversee the process and a broker will be appointed to conduct the sale.

We estimate the costs of this will be:

- legal fees: A\$50,000;
- advertising: A\$30,000;
- broker's commission: 1 per cent of the sale price; and
- insurance: A\$70,000.

The Marshal will usually prepare an estimate of the costs of the Marshal's expenses concerning the valuation and sale of the vessel. The broker may be the best (only) valuer. This estimate is usually based on a period of eight weeks from the date the order for sale was made to the date of delivery of the ship.

If the defendant does not appear, the vessel can be sold, the proceeds paid into court and then distributed subject to priorities. If it becomes obvious that the defendant owners will not appear, the sale process could commence within three weeks and could be finalised within two months.

The Admiralty Rules require the party applying for the sale to pay the costs and expenses of the Marshal in complying with orders under the rules for valuation, valuation and sale, or sale without valuation. That is an unexceptionable requirement to take account of any risk of a shortfall on sale, leaving the Marshal out of pocket.

The cost of a Marshal retaining safe custody of a ship or property (including carrying out a judicial sale or performing other functions) is calculated at the hourly rate of salary payable to the Marshal plus a 20 per cent loading for overheads. It also includes an on-call allowance paid to the Marshal.

Law stated - 23 April 2024

Claim priority

- 37** | What is the order of priority of claims against the proceeds of sale?

The Admiralty Act is silent about the principles governing the priority of claims on a fund representing the proceeds of sale but the equitable principles referred to in the English cases are followed by Australian courts in determining priorities.

Broadly speaking, a maritime lien on a vessel takes priority over any interests including a mortgage on the vessel, whether registered or unregistered, and whether prior or later in time.

The priority of other registered and unregistered security interests in respect of the proceeds of sale are determined in accordance with the regime created by the Personal Property Securities Act 2009 (Cth).

Law stated - 23 April 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The legal effect of a judicial sale is that clean title is given to the purchaser and is free of all charges or encumbrances of whatever nature and is good against the world. The judicial sale extinguishes all prior liens and encumbrances on the vessel, including maritime liens.

Law stated - 23 April 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Australian courts will recognise the judicial sale of a ship in a foreign jurisdiction.

Law stated - 23 April 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Law stated - 23 April 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state

ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Carriage of Goods by Sea Act 1991 (Cth) incorporates into Australian local law a variant of the Hague-Visby Rules (the amended Hague Rules). The amended Hague Rules apply to all shipments out of Australia.

In the case of imports, the Australian court will apply the version of the relevant convention (being either the Hague, Hague-Visby or Hamburg Rules) applicable to the shipment by agreement or law.

The amended Hague Rules apply 'CY to CY', that is from the container yard at the port of export in Australia to the container yard at the place of import.

Australia has not ratified the United Nations' Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules).

Law stated - 23 April 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

No.

Law stated - 23 April 2024

Title to sue

43 | Who has title to sue on a bill of lading?

Under the Sea-Carriage Documents Acts, all rights under the contract of carriage in the case of a bill of lading are transferred to each successive lawful holder of the bill, all rights under a contract of carriage in the case of a sea waybill are transferred to the specified consignee, and all rights under a contract of carriage in the case of a ship's delivery order are transferred to the person to whom delivery of the goods is to be made following the order (see, for example, section 8(1) of the Sea-Carriage Documents Act 1997 (NSW)).

The rights are vested in the transferee as if the person had been an original party to the contract (for example, section 8(2) of the Sea-Carriage Documents Act 1997 (NSW)) and the transfer extinguishes the rights (but not liabilities) of the original party to the contract of carriage (for example, section 9 of the Sea-Carriage Documents Act 1997 (NSW)).

Law stated - 23 April 2024

Charter parties

- 44** | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Generally, provisions of a specified charter party directly relevant to the subject matter of a bill of lading such as shipment, carriage and delivery of goods will be recognised as being incorporated into the bill of lading. However, clauses that are not directly relevant to the bill of lading may not be incorporated into the bill of lading unless it is explicitly clear in either the bill of lading or charter party (discussed in *Hi-Fert Pty Ltd v United Shipping Adriatic* [1998] FCA 1622). Also, charter party terms, which are inconsistent with the terms of the bill of lading, will not be incorporated into the bill of lading.

If the incorporating clause in the bill of lading does not expressly mention an arbitration clause, for example, it will generally be inadequate to incorporate the arbitration clause unless it is broad enough to, for instance, include disputes under the bill of lading. An arbitration clause in a charter party should be expressly referred to in the bill of lading for it to be recognised by an Australian court.

In any event, Australian courts have mandatory jurisdiction in respect of both import and export bills of lading pursuant to section 11 of the Carriage of Goods by Sea Act.

The recent decision of the NSW Supreme Court in *Woollongong Coal Ltd v PCL (Shipping) Pte Ltd* [2020] NSWSC 184 has confirmed the English common law position in relation to the notation 'freight payable as per charter party' on bills of lading, under Australian law.

Law stated - 23 April 2024

Demise and identity of carrier clauses

- 45** | Is the 'demise' clause or identity of carrier clause recognised and binding?

In relation to the existence of carrier clauses and demise clauses, Australian courts are likely to follow the English House of Lords decision in *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571, where it was held that where the bill of lading was signed on its face by an agent for the charterer that was described on the face of the bill as the carrier, the charterer was clearly identified as the contractual carrier and there was no need to consider the demise clause on the reverse side of the bill of lading.

Law stated - 23 April 2024

Shipowner liability and defences

- 46** | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Shipowners can be liable in bailment or tort or negligence for cargo damage even when not the contractual carrier.

Forbearance to sue and circular indemnity clauses in bills of lading have been held to be effective in Australian jurisdictions.

Sub-bailment on terms of the bill of lading would also be an avenue of defence as would a Himalaya clause, both of which have been upheld in Australian jurisdictions.

Law stated - 23 April 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

At common law, the carrier impliedly promises that the contractual voyage will be undertaken without unjustifiable deviation. Also, article 4, rule 4 of the Hague-Visby Rules and the Australian modification provides that any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, should not be considered a breach of the rules or of the contract of carriage. Departure from the normal route in these circumstances will not be a deviation.

However, when there is a deviation, this will be a breach of contract rendering the carrier liable for losses caused by the deviation, and if a loss arises while the vessel is deviating the carrier will only escape liability if it can prove that the loss would have happened anyway. In usual circumstances, the contractual route is the direct geographical route from the port of loading to the port of discharge and deviation will occur if the ship leaves that route.

Where there is a liberty clause in the contract that gives the carrier rights over and above those provided in the Hague-Visby Rules, the carrier is entitled to follow any route permitted by the clause and is entitled by article 4, rule 4 to make reasonable deviations from that route.

Law stated - 23 April 2024

Liens

48 | What liens can be exercised?

A shipowner can register rights to lien sub-freights as charges against the charterer in order to obtain protection under the Personal Property Securities Act 2009 (Cth) in the event that the charterer becomes insolvent.

An Australian court is likely to recognise a properly drafted and incorporated lien and cesser clause.

Law stated - 23 April 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Australian courts have held carriers liable for delivery without bills of lading (see, for example, *Westpac Banking Corporation v 'Stone Gemini'* [1999] FCA 434).

Law stated - 23 April 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

At common law, in a contract for carriage of goods by sea the shipper impliedly undertakes:

- to pay freight for the carriage of its goods; and
- that the goods shipped are not dangerous, unless the carrier has agreed to carry them in circumstances where it knows or ought to know of their dangerous nature.

The recent decision of the NSW Supreme Court in *Woollongong Coal Ltd v PCL (Shipping) Pte Ltd* [2020] NSWSC 184 has confirmed the English common law position under Australian law.

In contracts of carriage governed by the Australian modification of the Hague-Visby Rules, an additional obligation is imposed on the shipper to guarantee the accuracy of any particulars of the goods furnished to the carrier.

Law stated - 23 April 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Australian Maritime Safety Authority (AMSA) Marine Notice 2024/02 imposes a limitation on sulphur emissions from cruise vessels while at berth in Sydney Harbour. Otherwise, there are no ECAs in force in Australian domestic waters.

Law stated - 23 April 2024

Sulphur cap

52 |

What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

Australia has adopted a series of amendments to the International Convention for the Prevention of Pollution from Ships (MARPOL) to control and limit sulphur emissions. The sulphur requirements are prescribed in MARPOL Annex VI, the Protection of the Sea (Prevention of Pollution from Ships) Act 1983, and Marine Order 97. The limit for the sulphur content of ships' fuel oil has been reduced to 0.5 per cent mass by mass. Also, as of March 2020, ships cannot carry fuel oil with a sulphur content of more than 0.5 per cent m/m unless the fuel is being carried as cargo. Port State control regimes will be enforcing the carriage ban.

Under AMSA Marine notice 12/2022, the use of an Exhaust Gas Cleaning System (EGCS) is permitted in Australian waters as an option to comply with the low sulphur fuel requirements of MARPOL Annex VI, as set out in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983, section 26FEGA, provided it is approved by the vessel's flag State Administration or a recognised organisation appointed by the flag State. The EGCS must also be operated in accordance with International Maritime Organization (IMO) requirements, including the 2021 Guidelines for Exhaust Gas Cleaning Systems (resolution MEPC.340(77)).

The requirements apply to all vessels including those operating in Australia. The AMSA's approach to compliance and enforcement of the sulphur limit will be in line with Australia's existing Port State control (PSC) regime and the International Maritime Organization Guidelines. For initial PSC inspections, AMSA will rely on documentation, such as bunker delivery notes and oil record books and shipboard procedures. To verify compliance, the AMSA may also conduct a more detailed inspection including a fuel oil sample analysis. The penalties for failing to comply with the 2020 low sulphur fuel regulation are significant and are set out in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 and the Navigation Act 2012. Vessels that are found to be non-compliant may also be subject to detention, refused access or granted conditional entry to Australian ports.

The maximum penalty for a reckless or negligent breach of the provisions is A\$444,000. A strict liability penalty may be up to A\$111,000. AMSA may also detain vessels that pose a risk to the environment.

Law stated - 23 April 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is given effect in Australia under the Commonwealth Hazardous Waste (Regulation of Exports and Imports) Act 1989. This act applies controls in the import

and export of vessels that may contain hazardous waste, such as asbestos. It reflects recent amendments to the Basel Convention made to strengthen transboundary controls on unsorted plastic wastes and plastic wastes containing hazardous substances.

There are currently no established commercial ship recycling facilities in this jurisdiction, although a facility in a South Australian port has the capacity for ship deconstruction, scrapping and recycling.

Law stated - 23 April 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The Federal Court of Australia and the Supreme Courts of each state and territory have jurisdiction in respect of proceedings that may be commenced under the Admiralty Act 1988 (Cth) in rem, such as proceedings on a maritime lien or a proprietary maritime claim.

The Federal Court, the Federal Circuit Court and the courts of each state and territory have jurisdiction over actions in personam on a maritime claim (defined in section 4 of the Admiralty Act) or on a claim for damage done to a ship.

Law stated - 23 April 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

For in rem proceedings, sections 22 and 23 of the Admiralty Act prohibit service of court proceedings brought under that Act on a defendant located out of the jurisdiction (at any place outside Australia, including a place outside the limits of the territorial sea of Australia).

For in personam proceedings, the service of documents outside Australia is governed by the Uniform Civil Procedure Rules (UCPR), which implement the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (Hague Convention). Leave of the court is not required for originating processes to be served under the Hague Convention, or for the claims set out in Schedule 6 of the UCPR.

If leave of the court is required, the court may grant an application for leave if it is satisfied that:

- the claim has a real and substantial connection with Australia;
- Australia is an appropriate forum for the trial; and
- in all the circumstances, the court should assume jurisdiction.

Law stated - 23 April 2024

Arbitration

- 56** | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The Australian Maritime and Transport Arbitration Commission, which is part of the Australian Centre for International Commercial Arbitration, and the Maritime Law Association of Australia and New Zealand both keep a register of arbitrators and mediators with experience in maritime and transport matters. No statistics are published but they are reasonably active.

Law stated - 23 April 2024

Foreign judgments and arbitral awards

- 57** | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The Foreign Judgments Act 1991 (Cth) (FJA) provides for the registration of foreign judgments handed down by superior courts of the countries set out in Schedule 1 to the Foreign Judgments Regulations 1992, and certain inferior courts of Canada, Poland, Switzerland and the United Kingdom. Judgments must be money judgments and be final and conclusive.

Judgments of New Zealand courts are recognised under the Trans-Tasman Proceedings Act 2010 (Cth).

Judgments not covered by the FJA, for example, judgments of courts in China, may be enforced under the common law if the foreign court had jurisdiction over the defendant according to Australian rules of private international law, the judgment is for a fixed monetary sum, the defendant in the foreign judgment is shown to be same as the defendant in Australian proceedings, and the judgment is final and conclusive (even if it is subject to appeal).

Australia is a signatory to the New York Convention on the Recognition and Enforcement of Arbitration Awards 1958, which is substantially reflected in the International Arbitration Act 1974 (Cth).

Law stated - 23 April 2024

Asymmetric agreements

- 58** | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Yes.

Law stated - 23 April 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Subject to contractual interpretation, Australian courts have the discretion to stay proceedings where parties have agreed to exclusively bring proceedings in relation to the particular dispute in a forum other than that in which the proceedings were commenced. Australian courts will generally only refuse to stay proceedings commenced contrary to an exclusive jurisdiction clause where there is 'strong reason' to do so.

There is a mandatory stay of any court proceedings commenced in breach of an arbitration agreement.

Law stated - 23 April 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

Subject to contractual interpretation, Australian courts have the discretion to stay proceedings where parties have agreed to exclusively bring proceedings in relation to the particular dispute in a forum other than that in which the proceedings were commenced. Australian courts will generally only refuse to stay proceedings commenced contrary to an exclusive jurisdiction clause where there is 'strong reason' to do so.

There is a mandatory stay of any court proceedings commenced in breach of an arbitration agreement.

Law stated - 23 April 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Various limitation periods are set out in state and territory legislation. In general, claims for breach of contract and liability in tort may be made up to six years after the cause of action arose (except in the Northern Territory, where the limitation is three years). Limitation periods may generally be altered by agreement (subject to applicable consumer laws).

The Limitations Act 1969 (NSW) imposes a two-year limitation period on actions in rem in admiralty, but this may be extended on such terms as a court thinks fit, including if there has not been a reasonable opportunity to arrest the vessel.

Under the Admiralty Act 1988 (Cth), a proceeding may be brought on a maritime claim, or a claim on a maritime lien or another charge, at any time before the end of the limitation period that would have been applicable if the proceeding had not been brought under the act. If no proceeding could have been so brought, a proceeding may be brought before the end of three years after the cause of action arose.

Law stated - 23 April 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Courts have the power to extend limitation periods in certain circumstances, such as in cases of disability, fraud and deceit, or if there are exceptional circumstances requiring an extension of time.

Limitations Acts enacted in the states and territories generally apply to arbitration in like manner as they apply to court proceedings.

Law stated - 23 April 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Australia has ratified the Maritime Labour Convention, which is given effect in Australia by Marine Order 11 made under the Navigation Act 2012 (Cth) and associated delegated legislation. The Convention will apply to Australian vessels and foreign-flagged vessels in Australian ports.

Law stated - 23 April 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Generally, no. In the absence of an appropriately worded force majeure clause, contracts relating to shipbuilding, sale or purchase or hire of a ship and contracts for the carriage of goods on a ship are not generally interpreted to contain relief in circumstances of changed economic conditions.

Law stated - 23 April 2024

Other noteworthy points

- 65** | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

The report from the Australian Productivity Commission's inquiry into vulnerable supply chains noted the effects of Australia's covid-19 health and biosecurity measures on shipping. The report noted the disruptions to the sector caused by maritime crews being unable to disembark in Australian ports, exacerbated delays in shipping owing to biosecurity processes and additional costs and capacity constraints faced by industry participants. The report canvassed changes to regulation to address labour constraints, streamline customs procedures and remove barriers to competition across different transport modes. It also flagged investment in Australia's domestic maritime shipping fleet to build capacity in certain routes, and to protect against nations restricting access to vessels.

Law stated - 23 April 2024

UPDATE AND TRENDS

Key developments of the past year

- 66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

Australia is still considering accession to the Nairobi International Convention on the Removal of Wrecks 2007, which would bring Australia's wreck removal regulation into line with most major flag States.

Australia is also considering accession to or ratification of:

- The Hong Kong Ship Recycling Convention 2009. The Hong Kong Convention would apply to Australian ships or vessels over 500GT that operate internationally, including submersibles, floating craft, floating platforms, self-elevating platforms, Floating Storage Units (FSUs), Floating Production Storage and Offloading Units (FPSOs), irrespective of whether the vessel is stripped of its equipment or being towed.
- The United Nations Convention on the International Effects of Judicial Sales of Ships (Beijing Convention). The Beijing Convention aims to create a uniform regime for the international effects of judicial sales of ships and to protect the interests of purchasers, shipowners, and creditors by recognising clean title internationally upon acquisition. Currently, the judicial sale of ships is governed by the Admiralty Rules in Australia.

The Australian government's comprehensive review of the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (National Law) and associated legislative

framework for domestic commercial vessels (which excludes foreign and regulated Australian vessels) commenced in January 2022. The Independent Review Panel issued its report in September 2023. The report made several recommendations to improve the flexibility of the regulatory model, improve the safety under the current regime, increase enforcement and investigatory powers and improve the accreditation scheme.

A productivity commission report into Australia's maritime logistics system was released on 9 January 2023. It examines the performance of Australia's maritime logistics system, long-term trends in system performance, competition, industrial relations, infrastructure constraints and technology uptake. The findings of the commission could spark further changes to Australia's maritime logistics system and several options are earmarked for testing and implementation. See further details [here](#).

In 2022, the Commonwealth Government appointed a Strategic Fleet Taskforce to provide guidance and advice to the government on the establishment of a strategic fleet: 12 privately owned commercial vessels that will be available for requisition by the government in times of need. The Taskforce issued its report in June 2023 and the government issued its response to the report in November 2023 in which it agreed with 12 of the 16 recommendations made by the Taskforce report. The government is steadily working to implement and establish a strategic fleet.

In March 2024, Australia and Singapore entered into a memorandum of understanding (MOU) to formally collaborate on establishing the Singapore-Australia Green and Digital Shipping Corridor. Under the MOU, both countries will work with industry stakeholders to explore opportunities to develop zero or near-zero greenhouse gas emission fuel supply chains for the maritime industry. This includes building necessary infrastructure, formalising standards and developing and implementing training requirements for the production, storage and supply of green marine fuels. The establishment of a digital shipping corridor will also enable both countries to explore the exchange of digital information, which will result in efficient port clearance, port calls and an uptick in the flow of vessels between Singapore and Australia. This will include collaboration with the Maritime and Port Authority of Singapore (MPA), Australian federal, state and territory governments, and industry stakeholders.

Law stated - 23 April 2024



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Pursuant to Law No. 7,652/1998, a Brazilian vessel may be acquired through newbuilding, private or public sale or any other way permitted by law. The title will be consolidated and effective only once it is registered with the Admiralty Court, Maritime Court Registry Office or the competent port captaincy in the case of vessels not subject to registration with the Admiralty Court.

However, the parties may agree at which stage of construction the title will be transferred to the owners. Once the agreement between the builder and owner regarding the transfer of the vessel or hull under construction is registered before the Admiralty Court, the title will be considered transferred. Commonly, the preliminary registration of a hull under construction is effected in the name of the shipowner and not the shipbuilder.

Law stated - 30 March 2023

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

There are no legal requirements for refund guarantees, which depend on the negotiations between the parties. However, usually, the shipowner requests that the vessel be certified by a first-class classification society, be approved on all the equipment tests and pass all ocean navigation trials required by the equipment's manufacturer and Brazilian maritime authorities.

Law stated - 30 March 2023

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

If there is a default or an unlawful refusal to deliver the vessel by the shipyard, and the shipowner is capable of providing evidence that they are in compliance with their contractual obligations and have acquired ownership of the vessel or hull under construction, it is possible to pursue an injunction before the competent forum of choice, seeking immediate possession of the vessel and authorisation to move her out of the shipyard. The Brazilian Civil Procedural Code allows the offended party to request a precautionary measure if the plaintiff can demonstrate *periculum in mora* (an imminent risk) and *afumus boni iuris* (a prima facie case) (ie, reasonable grounds for the request).

Law stated - 30 March 2023

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

The contractual relationship between the shipyard and the shipowner is regulated by the general provisions of the builders' obligations under the Brazilian Civil Code for piecework contracts and, as per article 618, the builder remains responsible for the integrity and safety of the works for five years. However, any claim that may arise from defects or inherent faults of the design must be filed within 180 days from the date of the discovery of such defects. Some academics argue that the provisions of the Brazilian Consumer Act also apply to such contracts under a 'service and supplier' relationship; however, the time bar period in these cases is also five years.

A third-party claim by a purchaser from the original shipowner against the shipyard would be barred by the absence of a direct relationship and would fail under the *res inter alios acta* principle.

Law stated - 30 March 2023

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Brazil has two vessel registration systems for Brazilian-flagged vessels: the Brazilian Vessel Ownership Registry and the Brazilian Special Registry.

The Brazilian Vessel Ownership Registry is an obligatory registry for all Brazilian vessels of over 20 gross tonnage (GT), for seagoing vessels, and of over 50 GT, when employed in any kind of inland waterway. For this purpose, Brazilian vessels are considered to be those owned by Brazilian citizens or Brazilian companies.

This registry is to be effected with the Brazilian Admiralty Court, the purpose of which is to establish the nationality and validity, and to make public their ownership of the vessels. The title to a hull or a vessel under construction under the Brazilian flag may be registered with the Brazilian Special Registry.

The Brazilian Special Registry is an optional registry for Brazilian vessels operated by Brazilian shipping companies, and foreign-flag vessels under bareboat charter to Brazilian shipping companies, with temporary suspension of the foreign flag.

The Brazilian Special Registry is a Brazilian government initiative, which grants several tax and operational benefits for the shipowner and, more precisely, an initiative of the Ministry

of Transport to increase the competitiveness of Brazilian shipping companies in relation to foreign shipowners operating their vessels at reduced costs under flags of convenience.

During the construction of a vessel, the shipowner can apply for a registration of its hull with the Brazilian Special Registry, to receive legal and tax benefits, especially for the incorporation of imported equipment. The registration of the hull is called 'pre-REB' while the definitive registration with the Brazilian Special Registry (REB) will be issued after the hull becomes a complete vessel, delivered to the owner and in possession of the proper classification certificates.

Law stated - 30 March 2023

6 | Who may apply to register a ship in your jurisdiction?

According to Law No. 7,652/1998, individuals resident in the country or Brazilian companies may apply to register a ship in Brazil.

Law stated - 30 March 2023

Documentary requirements

7 | What are the documentary requirements for registration?

The documentary requirements are as follows:

- filing of an application (Form of the Directory of Ports and Coasts);
- application to the port captaincy requesting the vessel's registration, duly acknowledged by a notary (model provided by the port captaincy);
- the bulletin detailing updates to the vessel;
- a copy of the shipowner's certificate;
- authorisation from the Ministry of Agriculture, Livestock and Supply (for fishing boats);
- a copy of the vessel's safety certificate;
- a copy of the vessel's tonnage certificate or tonnage records;
- a copy of the vessel's freeboard certificate; and
- copy of the vessel's shipbuilding licence or permit, including:
 - the record of technical activities or the responsible engineer's log;
 - the vessel's specifications;
 - the vessel's general plans;
 - the vessel's half-breadth plan;
 - hydrostatic curves and cross curves or tables;
 - the vessel's safety plan;

- arrangement plan of the vessel's navigation lights;
 - the vessel's capacity plan;
 - the vessel's sheer plan;
 - the vessel's heeling test report; and
 - the vessel's trim and definitive stability;
-
- proof of owner's nationality:
 - if an individual:
 - copy of ID card;
 - individual taxpayer's ID; and
 - marriage certificate, birth certificate, military service status certificate; or
 - passport, in the case of foreigners; and
 - for a legal entity:
 - Finance Ministry/corporate taxpayer's ID;
 - articles of incorporation or association;
 - Board of Trade registration; or
 - company by-laws;
-
- proof of the vessel's acquisition and full and general release;
 - a copy of an invoice or receipt of release, or a private instrument, for the engine containing:
 - details on the engine;
 - purchase price;
 - details of the buyer and the seller; and
 - the buyer's and seller's signatures, duly certified and acknowledged by a notary;
 - a copy of the invoice and receipt of release, or a private instrument, for the hull containing:
 - the vessel's details;

- the vessel's purchase price;
 - details of the buyer and the seller; and
 - the buyer's and seller's signatures, duly certified and acknowledged by a notary;
-
- proof of residence of the party applying to register the ship in Brazil;
 - a dated 15x21-centimetre colour photo of the vessel taken abeam;
 - a copy of the compulsory insurance certificate (this must be provided only after the availability of the vessel's intended name has been confirmed with the Port Captaincy);
 - payment voucher paid at the bank (original counterpart);
 - proof of compliance with all tax obligations;
 - Admiralty Court costs payment voucher; and
 - the shipowner's, the owner's or their legal representative's email address.

Law stated - 30 March 2023

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Brazilian law does not contemplate the suspension of the Brazilian flag. Therefore, the dual registration and flagging out of Brazilian vessels are not processed by the Admiralty Court and Register. On previous occasions, the Superior Court of Justice has understood the impossibility of suspension of the Brazilian flag given the lack of legal provision and also due to a violation of the public interest.

Law stated - 30 March 2023

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The Admiralty Court maintains the register of mortgages on Brazilian vessels.

To be considered valid and in effect under Brazilian law, all maritime mortgages over Brazilian-flagged vessels must be constituted through a public deed and registered with the Admiralty Court. A public deed is required to create a mortgage on a Brazilian-registered vessel. The deed must contain the following requirements:

- the amount of credit – an estimate or maximum amount thereof;
- the term established for repayment;
- the rate of interest, if any;

- the vessel's specifications, such as gross tonnage, deadweight tonnage and other identifying data; and
- the certificate of insurance of the vessel.

Law stated - 30 March 2023

LIMITATION OF LIABILITY

Regime

- 10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Brazilian law provides for administrative, civil and criminal liability. The Brazilian Civil Code establishes that anyone who causes damage to the other party must fully compensate for the damage caused. If the relationship arises out of a contract of carriage, liability will be limited up to the amount of the cargo value declared in the bill of lading.

Brazilian law also provides for some eventualities of strict civil liability, where the liability for the damage lies regardless of fault, such as the liability of the employer for acts of an employee and liability resulting from the activity carried out by the individual or company. Strict civil liability can only be excluded if it is proven that the damages were caused by force majeure or by the victim's actions.

Regarding the amounts of indemnity, Brazilian law does not provide for punitive damages. Therefore, indemnity is limited to the direct damages suffered, including the actual losses and reasonable loss of earnings. Direct damages include both material and moral damages. Indirect damages or consequential losses are expressly excluded unless otherwise agreed by the parties.

Besides being a party to the 1924 Brussels Convention (1924 International Convention for the unification of certain rules relating to the limitation of the liability of owners of seagoing vessels) and the CLC-69 (International Convention on Civil Liability for Oil Pollution Damage), Brazil is not a signatory of some relevant international conventions that exclude or minimise shipowners' liability, including:

- 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules);
- the Hague-Visby Rules;
- the Hamburg Rules;
- the International Convention for the Limitation of Liabilities on Maritime Claims, London 1976; and
- the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources, London 1977.

Nevertheless, it is possible under Brazilian law for the parties to limit their liability towards each other under a contract.

Law stated - 30 March 2023

Procedure

11 | What is the procedure for establishing limitation?

There is no established procedure for obtaining limitation in Brazil. Parties can limit their liabilities towards each other under a contract. Nevertheless, if the contract is considered abusive, without freedom of negotiation, the clauses that exclude or limit the liability of one of the parties might be considered null and void by Brazilian courts.

Law stated - 30 March 2023

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

Not applicable.

Law stated - 30 March 2023

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Brazil is not a signatory to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea or its protocols.

Brazilian and foreign passengers, while being transported or on cruise trips, are protected by the Brazilian Civil Code and the Consumer Act, which establish the right to full reparation of the passenger or consumer, and normally does not allow for limitations provided in contracts of adhesion.

Law stated - 30 March 2023

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

Port state control in Brazil is performed by qualified naval inspectors accredited by the Directorate of Ports and Coasts (DPC), as per regulations set forth in the Maritime Authority

Standard NORMAM-04 Ordinance (the Ordinance). The DPC has, among other things, the authority to contribute to:

- the guidance and control of the merchant marine and related activities in the interests of national defence;
- the safety of waterway traffic;
- the prevention of pollution by vessels, platforms and the support stations thereof;
- the formulation and enforcement of national policies relating to the sea;
- the implementation and inspection of laws and regulations at sea and in inland waterways; and
- the qualification and certification of personnel for the merchant marine and related activities.

According to article 3 of the Ordinance, for the attainment of its purposes the DPC may:

- prepare guidelines for:
 - the qualification and registration of professional and amateur seamen;
 - traffic and stay of vessels in waters under national jurisdiction, and the entry and exit thereof to and from ports, anchorages and marinas;
 - naval inspections and surveys;
 - gross tonnage, the establishment of freeboard, capacity, identification and classification of vessels;
 - vessel registry and inspection of the registry of ownership thereof;
 - ceremonial protocol and use of uniforms on board Brazilian vessels;
 - registry and certification of helipads on vessels and platforms for homologation by the competent agency;
 - execution of works, dredging, research and exploration of minerals under or on the shores of waters under Brazilian jurisdiction to ensure the maintenance of the waterway spaces and safety of navigation, without prejudice of obligations before other competent agencies;
 - registry and functioning of marinas, clubs and nautical sports entities, in respect of the safeguarding of human life and navigational safety in the open sea and inland waterways;
 - registry of shipping companies, experts and class societies; and
 - application of penalties by the master;
- regulate pilotage services, establish pilotage zones where the use of that service is obligatory and specify the vessels exempted from the service;
- establish the safety crew of vessels, assuring the interested parties the right to appeal when in disagreement with the established complement;
- establish the equipment and accessories that must be homologated for use aboard vessels and platforms and establish the requirements for homologation;

- establish the minimum requirements for safety equipment and accessories for vessels and platforms;
- establish the limits of interior navigation;
- establish the requirements referent to safety and for pollution prevention of vessels, platforms or support installations thereof;
- define maritime and interior areas for the construction of temporary refuges where vessels can anchor or beach for the performance of repairs;
- execute surveys either directly or through delegation to specialised entities;
- support the Admiralty Court and the Special Navy Prosecutor's Office regarding inquiries into navigational accidents or facts;
- manage the Maritime Professional Education Development Fund;
- organise and maintain the Maritime Professional Education System;
- exercise the functional supervision of the port captaincies, river captaincies and their respective offices and agencies; and
- maintain exchanges with public or private similar entities, both domestic and foreign, and represent the navy at gatherings related to matters under its responsibility.

In situations of conflict, crisis, state of siege, state of defence, federal intervention and special regimes, it is incumbent upon the DPC to undertake the tasks involving mobilisation and demobilisation attributed to it by the norms and guidelines related to maritime mobilisation and those issued by the director-general of navigation.

Law stated - 30 March 2023

Sanctions

15 | What sanctions may the port state control inspector impose?

The port state control may impede vessels from sailing if there are any technical deficiencies affecting the safety of or exposing any risk to navigation, human life and the environment within Brazilian territorial waters, or if approval of statutory certificates relating to the vessel is pending. Local port captaincies may impose penalties and fines related to oil pollution and violation of the Brazilian Maritime Regulations.

Law stated - 30 March 2023

Appeal

16 | What is the appeal process against detention orders or fines?

Detention orders and fines can be challenged by an administrative defense to be filed with the port captaincy. Furthermore, if the detention is groundless or unlawful, the shipowner

or operator may resort to the federal courts and file a writ of mandamus or an annulment lawsuit against the maritime authority aiming to revoke the detention or fine.

Law stated - 30 March 2023

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The classification societies authorised to issue valid certifications of conformity with the applicable law and regulations regarding the safety of navigation, human life and avoidance of environmental pollution on behalf of the Brazilian government are:

- American Bureau of Shipping;
- Bureau Veritas Ltda;
- Bureau Colombo Ltda;
- DNV GL;
- Lloyd's Register do Brasil;
- Nippon Kaiji Kiokai do Brasil;
- RINA;
- Registro Brasileiro de Navios e Aeronaves (RBNA);
- Certificadora Brasileira de Embarcações e Sistemas (CBES);
- Autoship;
- ABS Group Services do Brasil;
- Record Certificação Naval Ltda;
- AWS Engenharia, Consultoria, Inspeção e Certificação;
- JVC Engenharia, Consultoria e Certificação;
- Certificadora CBS Ltda; and
- Certificadora Intercontinental Bureau Classification Ltda (IBC).

Such entities are authorised by the Brazilian Navy Authority, through Navy Ordinance Rule NORMAM 6.

Each classification society is authorised to perform one or more certifications and it is important to verify whether the chosen classification society is authorised to issue the required certification. In addition to the classification societies, the Brazilian Navy also recognises some certification entities, duly accredited by the Directory of Ports and Coasts.

Law stated - 30 March 2023

Liability

18 | In what circumstances can a classification society be held liable, if at all?

The activities and duties of the classification societies are regulated by the Directorate of Ports and Coasts (DPC) under the Maritime Authority Standards NORMAM–06 Ordinance.

Classification societies, in general, do not undertake any liability in respect of the vessels certified by them and there is no specific law regulating their responsibility to third parties and the government. However, if an affected party can evidence gross negligence or an unlawful act by a classification society, it is possible to file a claim under section 189 of the Brazilian Civil Code.

Law stated - 30 March 2023

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Yes. The wreck removal procedural rules are regulated by Law No. 7,542/1986, which grants the Brazilian maritime authorities, or any other authority with delegated powers, the power to order wreck removal by the responsible party, if it is deemed to be a danger or an obstacle to navigation or a threat of damage to third parties or the environment. Navy Ordinance NORMAM–10 also establishes the requirements and procedures for obtaining a permit for wreck removal.

Law stated - 30 March 2023

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Brazil has signed the following international conventions regarding the liability of shipowners and carriers, in relation to collisions, salvage and pollution:

- the International Convention of Private Law (Bustamante Code), executed 1928;
- the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea (Brussels 1910);
- the Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (Brussels 1928);
- the Convention for the Unification of Certain Rules relating to Immunity of State-owned Vessels (Brussels 1928);
-

- the Convention for the Unification of Certain Rules related to Limitation of Liability of Owners of Seagoing Vessels (Brussels 1924);
- the International Convention for the Safety of Life at Sea (SOLAS 74);
 - the SOLAS Protocol of 1978;
 - the International Convention on Load Lines (London 1966);
 - the International Convention on Tonnage 1969;
 - the International Convention on Regulation for Preventing Collisions at Sea 1983;
 - the International Regulations for Preventing Collisions at Sea;
 - the International Convention on Civil Liability due to damages caused by Oil Pollution 1969;
 - the Convention on Facilitation of International Maritime Traffic;
 - the International Convention on Maritime Search and Rescue;
 - the International Convention on prevention of pollution caused by ships – MARPOL (73-78), OMI 1973;
 - the United Nations Convention on Law of the Sea 1982;
 - the Agreement to implement the United Nations Convention on Law of the Sea; and
 - the International Convention on Salvage 1989.

Brazil is not a signatory to the following conventions:

- the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules);
- the Hague-Visby Rules;
- the Hamburg Rules;
- the International Convention for the Limitation of Liabilities on Maritime Claims (London 1976);
- the Convention on Civil Liability due to Oil Pollution resulting from exploration and exploitation of subsea mineral resources (London 1977);
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention) 1971;
- the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention) 2001; and
- the Nairobi International Convention on the Removal of Wrecks 2007.

Law stated - 30 March 2023

Salvage

I

- 21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

According to Brazilian law, all vessels are obliged to assist others in distress, in accordance with the International Convention on Salvage 1989. Traditional international salvage companies are usually engaged in such operations. Lloyd's standard salvage agreement is acceptable. Brazilian law accepts the 'no cure, no pay' clause. However, Brazilian law provides that all the expenses resulting from the incident, if damage to third parties and the environment was avoided, shall be reimbursed by the owner.

Law stated - 30 March 2023

SHIP ARREST

International conventions

- 22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Brazil has not ratified any international convention regarding the arrest of ships. Neither the International Convention to the Arrest of Seagoing Ships 1952 nor the International Convention on Arrest of Ships 1999 have been ratified.

Law stated - 30 March 2023

Claims

- 23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

If the arrest is in rem, the creditor shall have the privileged credit properly constituted. If the arrest is filed in personam, the claimant shall demonstrate the likelihood of success on the merits of the case through the presentation of a clear and indisputable debt (a prima facie claim), while the danger of delay may be shown by providing evidence that the debtor might leave Brazilian territorial waters without having other assets in the country; that the debtor might dispose of its assets; or any other mean to justify an immediate court injunction, rather than awaiting the developments on the proceedings until a decision is rendered on the merits.

There are no provisions dealing with the arrest of sister ships in Brazilian law. If the claim is exclusively based on privileged credits with effects in rem on the vessel, the claimant would be unlikely to obtain the arrest of another vessel of the debtor's fleet. However, if the arrest is in personam, it may be possible to file a precautionary lawsuit against the shipowner to detain a sister ship and request security, even if the obligations are not directly related to such vessel.

In respect to a bareboat or time-chartered vessel, considering that the arrest order is normally rendered ex parte, a Brazilian judge can be convinced to order the arrest of the vessel as a means of guarantee for a substantive claim, although the head owner can eventually intervene in the proceedings in the capacity of a third party harmed by the arrest measure, and to try to lift the arrest of its vessel.

Law stated - 30 March 2023

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Maritime liens in Brazil are governed by the Commercial Code and the 1926 Brussels Convention on Maritime Liens and Mortgages. Under the code and the convention, the claims that give rise to maritime liens and the priority of same under Brazilian jurisdiction are as follows:

- federal taxes;
- legal costs and expenses;
- claims resulting from the employment of master, crew and ship personnel;
- indemnities due for salvage;
- general average contributions;
- obligations undertaken by the master outside the port of registry for actual maintenance needs or continuation of the voyage;
- indemnities due as a result of collisions, or any other maritime accident;
- ship mortgages;
- port dues, other than taxes;
- outstanding payments due for depositaries, storage and warehouse rentals and ship equipment;
- expenditure for the upkeep of the ship and her appurtenances, maintenance expenses at the port of sale;
- short delivery and cargo losses;
- debts arising out of the construction of the vessel;
- expenses incurred for repairs of the vessel and her appurtenances; and
- the outstanding price of the vessel.

Law stated - 30 March 2023

Wrongful arrest

25 | What is the test for wrongful arrest?

The arrest is granted by means of an injunction that precedes the discussion of the merits of the claim. If an arrest is granted and, afterward, the injunction is overturned or the claim is dismissed, the Civil Procedural Code allows the defendant to seek an indemnity for the losses suffered due to the wrongful arrest. This indemnity can be assessed and liquidated in the same legal proceedings.

Law stated - 30 March 2023

Bunker suppliers

- 26** | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Under Brazilian Law, credits arising out of ship suppliers out of the port of registry, including bunkers, are considered privileged. Therefore, based on the nature of such credits, they have in rem effects and follow the vessel, not the debtor, being possible to arrest the vessel if the bunker supply contract was entered with the charterer and not with the owner.

Law stated - 30 March 2023

Security

- 27** | Will the arresting party have to provide security and in what form and amount?

The court may require a guarantee from claimants who present an arrest request, to compensate eventual losses sustained by the vessel's interests in the case of a 'wrongful arrest'. However, this will be at the judge's discretion, in the light of the evidence of the credit and the legal grounds of the claim presented by the plaintiff.

Other guarantees will be requested in the form of a pro expensis for foreign claimants with no assets within Brazilian territory. In this case, the judge may demand security of between 10 and 20 per cent to guarantee the legal costs and opponent lawyer's fees.

Normally, the guarantee is granted using a judicial deposit in cash or a letter of credit issued by a first-line bank headquartered in Brazil. P&I club letters of undertaking are not recognised by the Brazilian courts but may be admitted by the judge if accepted by the opposing party and translated into Portuguese.

Law stated - 30 March 2023

- 28** | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

In substitution for the arrest of the vessel, the court may allow the arrested party to provide security, which is normally established in accordance with the amount of the claim indicated

by the plaintiff or at an amount the judge understands reasonable. Since it is at the court's discretion, the amount of this security can eventually exceed the value of the ship, although it is not usual nor reasonable. This security can be reviewed subsequently.

Law stated - 30 March 2023

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

The appointment of a lawyer to represent a party in an arrest claim must be made through a power of attorney, issued by a representative of the company, duly empowered as per the by-laws or certificates. Such documents must be signed, notarised or certified with an apostille by the competent authorities at the place of Issuance, to be presented to the courts in Brazil. In the case of urgent measures, such as an arrest, the Brazilian Code of Civil Procedures allows the party 15 days to present the power of attorney to the records following the presentation of the claim. This deadline can be extended for an additional 15 days.

Preparing an arrest application, including the draft of the claim and the payment of the court costs, should not take longer than one business day. However, the challenge is to gather all the supporting documents and meet the formal requirements for presenting them in court, which, depending on the number of documents, may take longer.

Foreign documents that support the claim will have to be translated into Portuguese by a sworn translator. In the case of insufficient time to comply with such formality before the filing of the arrest application, it is possible to set the arrest procedure in motion and request the judge to grant an extension for the presentation of these documents. However, should the judge understand that these supporting documents were necessary to analyse the arrest request, he or she may postpone deciding until all documents are properly translated.

Some Brazilian courts are fully operational with electronic proceedings, thus accepting electronically filed documents. This means that, in principle, scanned copies may be sufficient and originals are not necessarily needed unless requested by the court.

Finally, Brazil is a signatory to the Apostille Convention, which helps to avoid time and costs with legalisation and consularisation procedures.

Law stated - 30 March 2023

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

Usually, the debtor or owner of the arrested vessel is responsible for keeping the vessel duly crewed, maintained, and in class. The court may appoint a local representative or agent of the owner to act as a faithful custodian while the arrest is in place.

Law stated - 30 March 2023

Proceedings on the merits

- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Brazil has not ratified the International Arrest Convention, thus preventing a party from seeking security in Brazil for a claim or arbitration to be submitted to a foreign jurisdiction.

This means that the arresting party will have to evidence the jurisdiction of the Brazilian courts not only for the arrest but also for judging the merits of the claim. Arbitration clauses are exceptions where the party may seek a preventive arrest before the Brazilian courts as a preparatory measure for a future arbitration to be initiated.

Law stated - 30 March 2023

Injunctions and other forms of attachment

- 32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Yes. The Brazilian Civil Procedural Code establishes other forms of measures and injunctions sought to obtain security, either by attachment of values or seizure of assets and values.

Law stated - 30 March 2023

Delivery up and preservation orders

- 33 | Are orders for delivery up or preservation of evidence or property available?

Yes. The Brazilian Civil Procedural Code provides for the possibility of precautionary measures and injunctions to allow, among other things, the urgent production of evidence, disclosure of documents, and preservation of evidence or assets.

Law stated - 30 March 2023

Bunker arrest and attachment

- 34 |

Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Although it is possible, the arrest of bunkers is not a common practice in Brazil and there is no specific domestic provision dealing with such measure.

The arrest of bunkers, therefore, should follow the general rules of the Brazilian Procedural Code.

Under these rules, a party is entitled to request the arrest of assets or security in general if that party can demonstrate both the liquidity of its credits (unpaid bills or a promissory note) and a risk that the debtor and its assets may disappear shortly (in the instance of an insolvency or similar situations).

The other important aspect is the jurisdiction of the Brazilian judge to rule on the merits of the dispute.

The arrest of bunkers may involve logistical and cost difficulties for the arresting party, as the claimant must nominate a fiduciary agent to be responsible for the bunker and arrange a licensed facility to unload and receive the bunker eventually arrested.

Law stated - 30 March 2023

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Mortgages on ships are enforced through judicial actions and a forced sale at public auction.

If the debt is not paid, the creditor or arresting party may apply for the judicial sale of an arrested vessel during the enforcement stage or if the vessel is deteriorating due to abandonment.

Law stated - 30 March 2023

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The judicial sale of vessels follows the same general rules as asset bidding. Court bidding procedures are conducted by the public auctioneer, who charges between 2 and 5 per cent of the value of the sale. The minimum initial bid is set by the judge based on the accounting report. The vessel cannot be sold at the first auction for an amount below its official appraisal. However, at the second auction (10 to 20 days after the first auction), the

vessel may be sold at any price that the court considers proper (within a limit of 40 per cent of the appraised value). The highest bidder deposits 20 per cent of the bid in cash or by certified cheque immediately after the auction, with the balance to be paid within a certain deadline. If the residual amount is not paid, the auction may be aborted and the vessel offered to the next bidder.

Once the sale has been duly performed, the judge will release an order of sale and the bidder will register ownership with the Admiralty Court.

Law stated - 30 March 2023

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

When distinct privileged creditors claim the product of the judicial sale, the release of the amount deposited by the winning bidder will obey the order of priority and the chronology of each judicial attachment.

The order of priority, based on the harmonious application of the rules of the Brazilian Commercial Code and the Brussels Convention of 1926 is the following, from highest to lowest:

- federal taxes;
- legal costs and expenses;
- claims resulting from the employment of master, crew and ship personnel;
- indemnities due for salvage;
- general average contributions;
- obligations undertaken by the master outside the port of registry for actual maintenance needs or continuation of the voyage;
- indemnities due as a result of collisions or any other maritime accident;
- ship mortgages;
- port dues, other than taxes;
- outstanding payments due for depositaries, storage and warehouse rentals and ship equipment;
- expenditure for the upkeep of the ship and her appurtenances, maintenance expenses at the port of sale;
- short delivery and cargo losses;
- debts arising out of the construction of the vessel;
- expenses incurred for repairs of the vessel and her appurtenances; and
- the outstanding price of the vessel.

Law stated - 30 March 2023

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The judicial sale extinguishes any claims on the vessel that existed on the date of sale under section 477 of the Commercial Code. The acquisition of an asset at a judicial auction is equivalent to the initial acquisition of the asset: all prior burdens, liens and encumbrances are extinguished and thus are not transferred to the new owner of the asset. The cancellation of burdens on the vessel must be requested before the Admiralty Court through the appropriate procedures.

Once the vessel has been acquired at public auction, the purchaser must initiate proceedings before the court for the cancellation of the mortgage. Foreign buyers must initiate export procedures to transfer ownership of the vessel within 15 days of the effective acquisition.

Law stated - 30 March 2023

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

All foreign decisions and awards concerning vessels registered in Brazil must be previously ratified by the Superior Court of Justice to become valid and effective in Brazil. Furthermore, the title over a vessel is only consolidated and effective in Brazil once that title is registered with the Admiralty Court, the maritime court registry office, or a competent port captaincy for vessels not subject to registration with the Admiralty Court. This registry establishes the nationality and validity of ownership of the vessel and makes these details public.

If these requirements are met, a judicial sale of a Brazilian vessel in a foreign jurisdiction can be recognised in Brazil. Judicial sales of foreign vessels in foreign jurisdictions, however, are recognised by Brazilian courts if the vessel is duly registered at the flag state registry.

Law stated - 30 March 2023

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Brazil is not a signatory to the International Convention on Maritime Liens and Mortgages of 1993.

Law stated - 30 March 2023

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

- 41** | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Brazil is not a signatory of the main international conventions that exclude or minimise the responsibility of carriers, including the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules), the Hague-Visby Rules and the Hamburg Rules.

Brazil has followed the discussions concerning the Rotterdam Rules with formal representation at the United Nations but has not yet signed the Rules. The concept adopted by the Rotterdam Rules is already in force under Brazilian domestic law and under the multimodal law (Law No. 9,611/98) the responsibility of the carrier begins when cargo is received and only ends with final delivery to the consignee.

Law stated - 30 March 2023

Multimodal carriage

- 42** | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Law No. 9,611/98 regulates the multimodal transport of cargo in Brazil and sets out the rules for issuance of the multimodal bill of lading and rights and obligations of the multimodal transport operator.

Law stated - 30 March 2023

Title to sue

- 43** | Who has title to sue on a bill of lading?

All parties to the contract of carriage represented by the respective bill of lading have title to sue. The consignee, the shipper or the carrier may file a claim in the case of a breach of the respective contractual obligations. The endorsee of the bill of lading also has title to sue and the subrogated underwriters of the cargo may take recovery action against the carrier under the bill of lading.

Law stated - 30 March 2023

Charter parties

- 44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

According to Brazilian law, the bill of lading has three characteristics:

- receipt of the cargo shipped and delivered;
- it evidences the contract of carriage; and
- it represents a title of credit and ownership of the goods by its holder.

The bill of lading is evidence of the contract of carriage, including some of the terms and conditions of the charter party. According to the Brazilian Commercial Code, the following information must be necessarily included in the bill of lading:

- name of the issuer;
- number of the bill of lading;
- name and head offices of the carrier of the cargo;
- name and flag of the vessel;
- port of shipment and delivery port;
- name and head offices of the receiver of the cargo;
- description of the cargo;
- conditions and status of the cargo;
- value of freight and form of payment; and
- name and signature of the master.

Notwithstanding the above, because of the speed of the negotiations, often some of these requirements are not fulfilled. However, the absence of some of the requirements does not result in the annulment or invalidity of the bill of lading.

The reverse of the bill of lading must contain the general terms and conditions of the transportation agreement and can include additional information by reference, such as the terms of a charter party as agreed by the parties. In this sense, it is important to include a clause specifying which document (charter party or bill of lading) will prevail in the case of conflict, as the general rule is that the bill of lading will prevail.

However, shipowners usually have standard bills of lading, and it is rather difficult in practical terms to include the terms of each specific charter party in the related bill of lading.

A bill of lading may be considered an adhesion contract under Brazilian law if the issuer (shipowner) establishes its clauses without minimum negotiation with the owner of the cargo. Negotiations and remarks made during the booking stage may fulfil these requirements. Jurisdiction or arbitration clauses are valid and binding in adhesion contracts

if the contracting parties expressly agree. This requirement being observed, the arbitration clause could be binding on any third party holding the bill of lading.

Law stated - 30 March 2023

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

Under Brazilian law, the bill of lading may be considered an adhesion contract; in this sense, the clauses to exclude or transfer liability from the issuer or the carrier to any third party, including the owner, can be considered not written, that is, null and void, depending on the circumstances of each case.

Law stated - 30 March 2023

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Brazilian courts understand that the carrier bears strict liability for the due delivery of the cargo. This strict liability can only be excluded due to *force majeure*, an inherent defect of the goods, or exclusive fault of the shipper or consignee (eg, bad packaging of the cargo by the shipper) or a third party.

When the carrier is not the owner, the carrier is liable for the cargo damage. However, the vessel itself may respond for such damages, just as the shipowner may eventually be liable in regard to the cargo owner, even when a non-vessel operating common carrier is acting as the contractual carrier. In this sense, it is reasonable to state that the owner may respond for such damage under a joint liability regime, reserving the right of redress action against the carrier.

Law stated - 30 March 2023

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Under Brazilian law, deviation from the vessel's route can result in claims for late delivery of the goods if parties with an interest in the cargo can demonstrate that the normal period of the sea voyage was affected and if losses are proven by consignees. The deviation may also generate administrative penalties from the National Waterway Agency against the carrier and may constitute a fact of navigation to be investigated by the Navy Authority. The contractual terms will prevail if the deviation clause is not considered abusive and, in this

case, the fixture conditions and previous negotiations between carrier and cargo interests will have an important function if a dispute is brought to Brazilian courts.

Law stated - 30 March 2023

Liens

48 | What liens can be exercised?

The liens that can be exercised against the vessel include some relevant liens in the context of a discussion of carriage of goods by sea and bills of lading.

Maritime liens in Brazil are governed by the Commercial Code and the 1926 Brussels Convention on Maritime Liens and Mortgages. Under the code and the convention, the claims that give rise to maritime liens and the priority of same under Brazilian jurisdiction are as follows:

- federal taxes;
- legal costs and expenses;
- claims resulting from the employment of master, crew and ship personnel;
- indemnities due for salvage;
- general average contributions;
- obligations undertaken by the master outside the port of registry for actual maintenance needs or continuation of the voyage;
- indemnities due as a result of collisions, or any other maritime accident;
- ship mortgages;
- port dues, other than taxes;
- outstanding payments due for depositaries, storage and warehouse rentals and ship equipment;
- expenditure for the upkeep of the ship and her appurtenances, maintenance expenses at the port of sale;
- short delivery and cargo losses;
- debts arising out of the construction of the vessel;
- expenses incurred for repairs of the vessel and her appurtenances; and
- the outstanding price of the vessel.

Law stated - 30 March 2023

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The bill of lading is the receipt of the cargo received and also names the consignee. In this sense, if the carrier delivers the cargo without presenting an original bill of lading, the carrier may be liable for not fulfilling its duty and for delivering the cargo to the wrong party.

The presentation of the original bill of lading is mandatory under Brazilian law for the release of cargo in a private commercial relationship, despite a minority of court decisions allowing the release by consignees without such production. Although the presentation of the original BL may be exempted for Custom's purposes, this does not prevent the need for presentation to the carrier or its representative, as established in the Commercial and Civil Codes. In the case of wrongful delivery, the carrier may be liable for all direct material damages, including the value of the cargo, loss of earnings, and eventual moral damages, without limitation, unless otherwise provided in the bill of lading or in an agreement between the carrier and owner of the cargo.

Law stated - 30 March 2023

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

As per the Brazilian Civil Code, the shipper is obliged to provide an accurate description of the cargo embarked, indicating its nature, value, weight, and quantity, with the correct particulars of the consignee. The cargo must be adequately packaged. The shipper is responsible before the carrier for damaged or packaged goods and also for any error on the cargo or consignee particulars or information. The shipper may choose to declare the cargo value in the BL, and consequently pay an *ad valorem* freight, or not to declare it in the BL, and consequently pay a lower freight based on the cargo weight, triggering the effects of a limitation of liability clauses established in the BL.

Law stated - 30 March 2023

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Brazil follows International Maritime Organization 2020 requirements established in Annex VI of MARPOL, throughout its jurisdictional waters. There are no other specific emission control areas in force in Brazilian territorial waters.

Law stated - 30 March 2023

Sulphur cap

52 |

What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The cap on the sulphur content of fuel oil in Brazilian waters is 0.5 per cent m/m, as of 1 January 2020, as provided by the National Oil, Natural Gas and Biofuels Agency (ANP), National Standards Organisation Technical Norms and Annex VI of MARPOL, unless if the vessel contains gas cleaning systems (scrubbers), to prevent irregular emissions.

The producers and importers of fuel oil must analyse a sample of the product being put up for sale and issue a certificate of quality, to be numbered and signed by a chemical expert and kept available to the ANP for a minimum of 12 months. Invoices for the fuel oil must indicate the product description and the certificate number, followed by a copy of the same. At any time ANP may hold technical inspections to investigate whether the legal requirements are met. In the case of non-compliance, in addition to administrative sanctions (fines from 5,000 reais to 5 million reais depending on the infraction; seizure of goods, suspension of activities and others), civil and criminal penalties may be applied.

Law stated - 30 March 2023

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted in Brazil through Decree No. 875/1993, being regulated by CONAMA Resolution No. 452/2012. On 8 July 2016, Normative Instruction No. 02/2017 of the Ministry of Defence and Ministry of Environment was published, which provides rules for the export of hulls of former vessels that should follow the Basel Convention. This normative instruction establishes some rules for the export of hulls of former vessels for recycling, such as the need to request authorisation from the Environmental Agency.

The Brazilian Navy Authority has already understood that the normative instruction should not be applied to vessels that are still operating, with crew and class in place and destined for recycling.

In Brazil, the National Policy for Solid Waste (Law No. 12,305/2010) is also applicable, establishing directives for the handling of solid waste.

Despite having a consolidated shipbuilding industry, so far there are no special ship recycling facilities in Brazil. Nonetheless, Bill No. 1584/21 is underway before the National Congress seeking to regulate the dismantling and recycling of vessels and offshore installations, aiming to stimulate these activities and this market in Brazil.

Law stated - 30 March 2023

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The Brazilian legal system provides for a state court system. In this sense, each state organises its courts as best suits its needs. Generally, maritime disputes are subject to the state's civil courts, except in Rio de Janeiro, which has specialised courts for corporate and commercial issues, and such courts are competent to rule on maritime disputes. When a state-owned or naval vessel is involved, the federal courts have jurisdiction. Nevertheless, Brazil has an Admiralty Court with jurisdiction to rule on maritime accidents and facts and to resolve the culpability of shipowners, officers and seamen, imposing fines and penalties. The Admiralty Court is an administrative tribunal subordinate to the Ministry of Defence and, although considered relevant technical evidence by judicial courts, its decisions are challengeable by the state or federal courts.

Law stated - 30 March 2023

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

In the event of a defendant being domiciled abroad and with no branch office, agency, or any legal representative in Brazil, summons on the said defendant must be served by a letter rogatory issued by the Brazilian court and addressed to the foreign judicial authority through diplomatic channels after having been translated into the language of the country where the summons is to be served.

In 2018, Brazil acceded to the Hague Service Convention (1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters), which, as of 1 June 2019, establishes a more simplified means for parties to effect service in other contracting states.

Law stated - 30 March 2023

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

There are domestic arbitral institutions with arbitrators specialising in maritime matters, such as:

- the Brazilian Centre of Mediation and Arbitration (CBMA);
-

the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM–CCBC);

- the Brazilian Maritime Law Association (ABDM);
- the Brazilian Centre of Maritime Arbitration (CBAM); and
- the Mediation and Arbitration Chamber of the Getúlio Vargas Foundation (FGV).

The CBMA, for instance, has a specialised commission to deal with maritime and port-related disputes, with qualified practitioners and arbitrators with expertise to attend to the growing number of disputes in this sector.

This method of conflict resolution is increasingly practised in Brazil, following the enactment of the arbitration law (Law No. 9,307/96), the ratification of the New York Convention in 2002, the ratification of the United Nations Convention on Contracts for the International Sale of Goods in 2013, the enactment of a mediation law in 2015, the reform of the Arbitration Act in 2015 and the Civil Procedural Code of 2015, which provides for a mandatory mediation procedure before judicial disputes.

Brazilian arbitral institutions are increasingly active in maritime arbitration, to the extent that CBMA is not only included in ICMA's list of maritime arbitration associations but also co-hosted the ICMA XXI conference in 2020 in Rio de Janeiro with CAM–CCBC.

Law stated - 30 March 2023

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Brazil has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 10 June 1958). The enforcement of foreign judgments and awards in Brazil depends on an exequatur to be obtained through a procedure regulated by the internal procedural rules of the Superior Court of Justice and by the provisions of the new Civil Procedural Code of 2015. The exequatur is the authorisation granted by the Superior Court of Justice for all procedures requested by a foreign judicial authority to be validly executed in the jurisdiction of the competent Brazilian judge.

If the exequatur is granted, the foreign judgments and awards will be forwarded to the federal judge of the state in which the foreign award will be enforced and complied with.

The Brazilian Superior Court of Justice recognises foreign judgments and awards and their enforceability, provided they are not contrary to the Brazilian legal order, public policy, national sovereignty and good moral conduct.

Law stated - 30 March 2023

Asymmetric agreements

58 |

Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

In principle, an agreement with different forum selection clauses for each party to choose from would be valid in Brazil, as long as the parties have equal bargaining power in negotiating the contractual provisions and express consent in a way that the will and real intent of the parties are preserved.

Law stated - 30 March 2023

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

The defendant may challenge the jurisdiction in the defence, alleging the lack of jurisdiction of the court owing to the existence of a jurisdiction clause. Since the enactment of the 2015 New Civil Procedural Code, an express rule has been inserted in section 25 providing that 'no Brazilian judicial authority is responsible for the processing and trial of the lawsuit when there is a choice of exclusive foreign jurisdiction clause in the case of international contracts if raised by the defendant in the defence'. This provision was not inserted in the previous Civil Procedural Code and, therefore, for the contracts entered after the enforcement of the new Civil Procedural Code (ie, after January 2016) in the event of a foreign jurisdiction having been elected, the lawsuit filed in Brazil will be extinguished should the mentioned clause be considered valid.

If the selected jurisdiction is in Brazil, the records of the proceedings will be forwarded to the competent court.

Law stated - 30 March 2023

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

It is for the defendant to challenge the court's jurisdiction during the defence, alleging that the foreign court or arbitral tribunal election clause should be observed.

If the judicial lawsuit is filed in breach of an arbitration clause, the case can be extinguished in accordance with the Brazilian Procedural Code, if the defendant invokes the arbitration clause in the defence. Since the enactment of the 2015 Civil Procedural Code, an express rule has been inserted in section 25 providing that 'no Brazilian judicial authority is responsible for the processing and trial of the lawsuit when there is a choice of exclusive foreign jurisdiction clause in the case of international contracts if raised by the defendant in the defence'.

This type of clause when inserted in contracts that can be construed as contracts of adhesion (ie, contracts that provide no room for negotiation by the contracting party), can

be rejected by the Brazilian courts on the understanding that the will of the contracting party was not freely expressed.

Law stated - 30 March 2023

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

In general, in relation to indemnity and civil lawsuits related to unlawful acts, the Brazilian Civil Code provides three years for filing the judicial lawsuit. Specifically, for cargo claims resulting from ocean carriage, Federal Decree No. 116/1967 provides a one-year time bar as of the date of discharge, similar to the Law on Multimodal Transportation (Law No. 9.611/98) and the Law for Inland Carriage (Law No. 11.442/2007). However, when the Consumers Act applies, the time bar is five years.

It is not possible to extend the time limit by an agreement between the parties, as this is a question of public policy that cannot be changed by the will of the parties. What is admitted is a time-bar interruption at court, through a judicial notification. Once interrupted, the time bar is renewed for an equal period. The interruption can occur only once.

Law stated - 30 March 2023

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

The time limit can be interrupted by the party only in a single opportunity. This must be made before a Brazilian court and will renew the time limit for an additional equal period. Agreements between the parties with respect to time limits are not valid in Brazil. The time limit is a question of public policy that cannot be extended by the parties, nor arbitral tribunals, but can only be extended and renewed by an equal period by the Brazilian courts in a single opportunity.

Law stated - 30 March 2023

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention entered into force in Brazil on 7 May 2021, being applicable to vessels flying the Brazilian flag.

Law stated - 30 March 2023

Relief from contractual obligations

- 64** | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Yes. The 'unpredictability theory', provided for in the Civil Code, articles 478 to 480, under the title 'Dissolution for Excessive Onerousness', may be used in contract renegotiations in the case of an excessive burden.

Those articles establish that in contracts with continuing or deferred performance, if the obligation of one of the parties becomes excessively onerous, with extreme advantage to the other by virtue of extraordinary or unforeseeable events, the debtor may apply for dissolution of the contract. The effects of the judgment that declares dissolution shall be retroactive to the date of notification.

Dissolution may be avoided if the defendant offers to modify the conditions of the contracts on an equitable basis. However, this theory may only be applied in very specific cases, where supervening, extraordinary, irresistible and unforeseen acts alter the balance of the original financial and economic equation of the contract.

Law stated - 30 March 2023

Other noteworthy points

- 65** | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

As per Law No. 9,432/97, Brazil has a closed market for cabotage, port support and maritime support navigation, which are restricted to Brazilian shipping companies duly authorised by the government authority National Waterway Transport Agency. Brazil is also closed to the import or export of certain goods on foreign-flagged vessels.

In this sense, foreign-flagged vessels can only operate in cabotage, port support and maritime support navigation when chartered by a Brazilian shipping company, provided that there are no Brazilian-flagged vessels available, or if it is a matter of public interest or the foreign vessel is being chartered as a substitute of a vessel owned by the Brazilian shipping company under construction at a Brazilian shipyard. Another possibility for a foreign vessel to operate in Brazil is if she is bareboat-chartered by the Brazilian shipping company and flies the Brazilian flag in place of her original flag.

Law stated - 30 March 2023

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

Maritime arbitration is on the rise in Brazil.

After the XXI International Congress of Maritime Arbitrators (ICMA XXI) held in Rio de Janeiro in 2020, some important industry players, including the Brazilian major oil company Petrobras, started to include arbitration as a standard dispute resolution method in their charter contracts.

With solid arbitration institutions and an arbitration-friendly legal landscape, the rise of arbitration procedures in Brazil has been noticeable in the past couple of years, especially in offshore charter contracts.

Regarding the cargo carriage scenario, arbitration is also in the spotlight.

Brazilian judicial courts have been increasingly accepting the arbitration provisions established in the contracts of carriages and bills of lading and dismissing judicial claims, in accordance with the provisions of the Code of Civil Procedure.

In fact, in 2023 the Superior Court of Justice decided, on special appeal No. 2.074.780/PR, that an arbitration clause provided in the bill of lading is valid not only between the parties involved in the contract of carriage but may also be transmitted to a non-signatory third party, such as the subrogated cargo insurer, thus confirming that Brazilian courts should not have jurisdiction over disputes that are subject to arbitration.

This decision is being treated as an important case law and has been driving several other decisions in the same sense, serving as grounds to dismiss judicial proceedings related to cargo claims based on bills of lading with foreign jurisdiction clauses or arbitration provisions and reinstating the validity and recognition of arbitration clauses in Brazil.

Law stated - 30 March 2023



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Under the Civil Code, the transfer of title in movable property is effective from the time of delivery, unless otherwise provided by law. The Regulations on Ship Registration provide that the transfer of ownership of a ship shall be registered with the ship registration authority; without registration, it shall not be enforceable against third parties. The title in a ship shall pass when it is delivered by the shipbuilder to the shipowner, and without registration with authority, such transfer cannot be enforceable against third parties.

Law stated - 5 July 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

If the refund guarantee that the shipowner desires is on a demand guarantee, according to the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Independent Guarantee Dispute Cases, the refund guarantee should be issued by a bank or non-bank financial institution containing the following contents:

- the guarantee is stated to be payable on demand;
- the guarantee states that the ICC Uniform Rules for Demand Guarantee and other model rules for independent guarantee transactions are applicable; and
- according to the text of the letter of guarantee, the payment obligation of the issuer is independent of the underlying transaction relationship and the legal relationship of the letter of guarantee application, and the issuer only bears the responsibility of payment in accordance with the delivery of relevant documents.

If the nature of a refund guarantee is not recognised as an independent letter of guarantee, the issuer's payment obligation is subject to the shipbuilder's obligation to the shipowner under the shipbuilding contract.

Law stated - 5 July 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

The shipowner can apply to the court for an injunction ordering the shipbuilder to deliver the ship to them. The application can be made prior to litigation or in the course of the

litigation in respect of claims under the shipbuilding contract. The shipowner shall adduce proof that the shipbuilder is in breach of the shipbuilding contract, and this shall be rectified, and the situation is very urgent so that if the injunction order is not made, loss and damage will increase. In addition to the injunction order, the shipbuilder is obliged to fulfil the court judgment of delivering the ship to the shipowner.

Law stated - 5 July 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Under the Law of Product Quality, the producer shall be responsible for the quality of the products they produce and shall fulfil mandatory requirements, one of which is that the product must not be defective. The defect refers to unreasonable danger of endangering the safety of persons and property. If a product is defective and causes damage to a person or another person's property, the victim may claim compensation from the producer of the product or from the seller of the product. The seller has the right to recover damages from the producer if the producer is responsible for the defective product.

The shipowner can claim against the shipbuilder either on the basis of the shipbuilding contract or according to the Law of Product Quality. The purchaser from the original shipowner can either claim against the shipbuilder, as producer, according to the Law of Product Quality, or against the original shipowner, as seller, on the basis of the sale and purchase contract or according to the Law of Product Quality unless the purchase and sale contract exclude the seller's liability for defect. A third party can claim against the shipbuilder according to the Law of Product Quality.

Law stated - 5 July 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

According to the Measures for the Registration of Ship, following vessels are eligible for registration under the flag of China:

- ships owned or bareboat chartered by Chinese citizens who have their domicile or principal place of business in the territory of China;
- ships owned or bareboat chartered by an enterprise established under Chinese law whose principal place of business is in the territory of China. If there is foreign investment in the registered capital of the enterprise, the Chinese investor shall contribute no less than 50 per cent in the registered capital.

- Chinese enterprise with foreign capital contribution of more than 50 per cent for the sole purpose of the enterprise's internal production and use, and not engage in the operation of waterway transport barges and floating docks;
- official ships of Chinese government and ships owned or bareboat chartered by institutional corporation, association corporations and other organisations; and
- ships owned or bareboats chartered by enterprise registered in the Free Trade Zone.

It is possible to register the ownership of ships under construction under the flag of China.

Law stated - 5 July 2024

6 | Who may apply to register a ship in your jurisdiction?

According to the Regulations on the Work of Ship Registration, the persons who may apply for registration of ownership of ships in China include Chinese citizens, Chinese legal persons and non-legal persons established in the territory of China under Chinese law. Non-legal persons include sole proprietorships, partnerships and professional services organisations with no legal personality. Branches of legal persons lawfully established may apply for ship ownership registration in their own name.

Law stated - 5 July 2024

Documentary requirements

7 | What are the documentary requirements for registration?

According to the Regulations on the Ship Registration and the Regulations on the Work of Ship Registration, the applicant for registration of ship ownership shall submit the following materials to the authority:

- application for registration of ownership of the ship;
- proof of legal identity of the applicant;
- proof of acquisition of ownership of the ship;
- for a newbuilding and existing ships, ship inspection certificates; for ships purchased abroad, if there is a need for ship inspection agencies to carry out technical surveys, submission of the old ship import inspection report; as for other ships, submission of the original ship inspection certificate;
- photographs of the ship's main transverse, side bow, stern, chimney, etc.
- in the case of a shared ship, proof of the shared status of the ship;
- where the owner of the ship is a joint venture, proof of the amount of the joint venture's capital contribution;
-

for ships that have already been registered, a certificate of cancellation of the registration of ownership of the ships issued by the original ship registration authority; and

- where a mortgage has been registered, a statement that the owner of the ship is aware of the registration of the mortgage on the ship.

For registration of ownership of a ship under construction, the following documents shall be submitted to the authority:

- shipbuilding contract, and if the contract is unclear as to the ownership of the ship under construction, a certificate of ownership of the ship under construction jointly signed by all parties;
- basic technical parameters of ships under construction issued by a ship inspection organisation;
- five or more photographs taken from different angles that reflect the overall conditions of the completed part of the ship;
- a statement that the ship has not been registered for ownership in any registry;
- in the case of shared ship, proof of the shared status of the ship; and
- if the owner of the ship is a joint venture, proof of the amount of contributions of the joint venture.

Law stated - 5 July 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Under the Regulations on the Ship Registration, due registration is not allowed. Any ship registered in a foreign country may not acquire Chinese nationality without suspending or cancelling the nationality of the country of the original registration.

Law stated - 5 July 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The ship registry in the port of registry issues and maintains a certificate of registration of ship mortgage and shall allow public access to the registration status of the ship mortgage. The information registered includes the names and address of the mortgagee and mortgagor, the name and nationality of mortgaged ship, issuing authority and number of certificates of ship ownership registration, the amount of secured claim, the rate of interest and period of time for which the claim is payable.

Law stated - 5 July 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

China has not acceded to the Convention on Limitation of Liability for Maritime Claims 1976, but the Maritime Law has formulated corresponding provisions on limitation of liability for maritime claims, taking into account the provisions of the Convention. According to the provisions of article 207 of the Maritime Law, the liable person may limit liability for the following maritime claims:

- claims for compensation for personal injury or death, or loss of or damage to property, including damage to port works, harbour pools, fairways and navigational aids, occurring on board a ship or directly related to ship operation or salvage operations, and for consequential losses arising therefrom;
- claims for compensation for losses caused by delay in the carriage of goods by sea or delay in the arrival of passengers and their luggage;
- claims for compensation for other losses caused by the infringement of non-contractual rights in direct connection with the operation of the ship or salvage operations;
- claims for compensation for measures taken by persons other than the liable person to avoid or minimise losses for which the liable person's liability may be limited in accordance with the provisions of this Chapter, as well as claims for compensation for further losses caused by such measures; and
- the claims listed in the preceding paragraph may limit liability irrespective of the manner in which they are made. However, the provisions on limitation of liability of this article shall not be invoked in respect of the liability of the person responsible for payment of remuneration contractually agreed upon in subparagraph (4).

According to article 204 of the Maritime law, the following parties can limit liability:

- registered shipowner;
- charterer (maritime courts have different views on whether voyage charter can limit liability);
- ship operator (NVOCC is not included);
- salvager; and
- insurer.

Law stated - 5 July 2024

Procedure

11 | What is the procedure for establishing limitation?

A plea for limitation of liability must be raised at the latest before the judgment of the first instance is rendered. To constitute the limitation fund is not the precondition of the plea for limitation of liability. The liable party may or may not apply for constitution of the limitation fund.

The limitation fund may be established in cash or by guarantee. The guarantee recognised by the maritime court shall mean the guarantee issued by a bank or other financial institution within the territory of the People's Republic of China.

The procedure of constitution of the limitation fund is as follows:

- The applicant files the statement of application for the constitution of the limitation fund to a competent maritime court, which shall state the name, address and means of communication of the applicant; the name, nationality and tonnage of the ship involved; the amount of the fund; reasons for applying for the constitution of a limitation fund; the name, address and method of communication of the known interested party, together with proof.
- The maritime court shall, within seven days of acceptance of the application, notify the known interested parties or issue announcement through a newspaper or other news media.
- The interested parties shall, within seven days from the date of receipt of the notice or within 30 days from the date of announcement if no notice is received, raise objection to the application for constitution of limitation fund, if any.
- The maritime court shall, within 15 days of the 30th day after the last announcement, examine the objection and render a ruling. The ruling is appealable.
- The applicant shall constitute the limitation fund within three days after the ruling is effective and enforceable. If the fund is not established within the time limit, the application is deemed to be automatically withdrawn.

The amount of the limitation fund constitutes the limit of compensation and interest calculated from the date of the maritime accident to the date of the constitution of the fund. The limit of compensation is calculated by reference to the tonnage of the ship involved in a maritime accident and units. The calculation is the same as the provision of the 1976 Convention. The interest is calculated according to the loan market quotation rate published by China National Inter-bank Lending Center during the same period.

For ships engaged in the transport of goods between the ports of the People's Republic of China or in coastal operations, the limit of compensation for non-personal injuries and deaths shall be calculated at 50 per cent of the standard of limit of compensation. Where the maritime accident involves international navigation ships and coastal transport or operation ships, the limit of compensation of the coastal transport or operation ships shall be equally calculated according to the standard of international navigation ships.

Law stated - 5 July 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

According to article 209 of the Maritime Law, the liable person shall not be entitled to limit his or her liability if the loss resulting from the maritime claim is caused by the person's deliberate action or reckless action or omission with knowledge of such loss. Chinese courts have a precedent of breaking the limitation of liability for maritime claims.

Law stated - 5 July 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

China acceded to the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea and the 1976 Protocol.

Law stated - 5 July 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

Local maritime safety administrations (MSAs) carry out port control inspection according to regulations and authorisations. The National MSA is responsible for ship safety supervision throughout China. The Ministry of Transport is in charge of ship safety supervision throughout China.

Law stated - 5 July 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The MSA may impose the following measures on ships in violation of the regulations:

- warning and education;
- correcting defects before sailing;
- correcting defects within the time limit after the voyage;
- detention;

- prohibiting ships from entering the port;
- restricting the operation of the ship;
- ordering the ship to sail to the designated area;
- ordering the ship to leave port; and
- fines.

Law stated - 5 July 2024

Appeal

16 | What is the appeal process against detention orders or fines?

If the registered shipowner, ISM operator and flag state are not satisfied with the detention, they may file a reconsideration application with the relevant regional MSA (provincial) within 60 days of the date of detention. The relevant MSA shall, within 60 days of the date of acceptance, review the application for reconsideration and make a decision. If the applicant does not accept the decision, the regional MSA may forward the reconsideration application to the state MSA for re-examination. Reconsideration application may also be submitted directly to the state MSA. However, under normal circumstances, after receiving the reconsideration application, the state MSA will transfer it to the regional MSA for preliminary review, and then the state MSA will reply to the reconsideration applicant for decision. If the applicant for reconsideration refuses to accept the reconsideration decision, he or she may file an administrative lawsuit with the court.

Law stated - 5 July 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

Classification societies must pass the qualification accreditation and obtain the qualification accreditation certificate in accordance with the requirements of regulations before engaging in ship inspection and issuing inspection certificates. Foreign classification societies must obtain approval from the National MSA to set up a ship inspection company in China before they can lawfully carry out ship inspection in China.

Law stated - 5 July 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

Chinese law does not specifically provide a classification society's liability. The classification society can be liable on basis of contract or tort. In judicial practice, Chinese court is cautious about a classification society's liability.

Law stated - 5 July 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

According to the Measures for Management of Removal of Wrecks, the Regulations on Prevention and Control of Marine Pollution from Ships, Maritime Traffic Safety Act as well as the Nairobi International Convention on the Removal of Wrecks 2007, the MSA can order wreck removal.

Law stated - 5 July 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

China acceded the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910, the Nairobi International Convention on the Removal of Wrecks 2007, which don't apply to China territorial waters, and the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969, and the International Convention on Salvage 1989.

Law stated - 5 July 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement. Lloyd's standard form of salvage agreement may be acceptable subject to negotiation of the parties concerned. There is no specific requirement as to the identity of the rescuer. The official salvage body is the Maritime Rescue and Salvage Bureau.

Law stated - 5 July 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

China is not a party to the two international ship arrest conventions.

Law stated - 5 July 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

In accordance with article 21 of the Maritime Law, the application for arrest of a ship may be made in respect of following maritime claims:

- loss of or damage to property caused by the operation of a ship;
- personal injury or death directly related to the operation of a ship;
- rescue in the case of maritime disaster;
- damage or threat of damage caused by ship to the environment, coast or interested parties; measures taken to prevent, reduce or eliminate such damage; compensation paid for such damage; costs of reasonable measures actually taken or intended to be taken for the restoration of the environment; losses suffered or likely to be suffered by a third party as a result of such damage; and damages, costs or losses of a nature similar to those referred to in this subparagraph. losses of a similar nature to those referred to in this subparagraph;
- costs relating to the floating, removal, recovery or destruction of, or rendering harmless, a sunken ship, a wreck, a stranded ship, an abandoned ship, including costs relating to floating, removing, recovering or destroying, or rendering harmless, an object that is or has been on board such a ship, as well as costs relating to the maintenance of the abandoned ship and the maintenance of its crew;
- an agreement for the use or hire of a ship;
- an agreement for the carriage of goods or the carriage of passengers;
- loss of or damage to goods (including baggage) carried on board ship or in connection therewith;
- general average;
- towing;
- pilotage;
- provision of goods or services for the operation, management, maintenance and repair of ships;

- construction, alteration, repair, conversion or equipping of ships;
- harbour, canal, wharf, harbour and other waterway charges and fees;
- wages and other payments to crew members, including repatriation and social security payments payable in respect of crew members;
- fees payable in respect of ships or shipowners;
- ship insurance premiums (including mutual insurance premiums) payable by or on behalf of the shipowner or demise charterer;
- commissions, brokerage or agency fees payable by or on behalf of the shipowner or demise charterer in respect of the ship;
- disputes as to ownership or possession of a ship;
- disputes between co-owners of a ship as to the use or benefit of the ship;
- mortgages or rights of the same nature in respect of ships; and
- disputes arising out of contracts for the sale of ships.

Associated vessels cannot be arrested in China. A demised chartered vessel can be arrested for a maritime claim against the bareboat charterer. A time-chartered vessel cannot be arrested for a claim against the time charterer.

Law stated - 5 July 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

China recognises maritime liens. Article 22 of the Maritime Law provides that the following maritime claims have maritime liens:

- claims for payment of wages, other labour remuneration, crew repatriation costs and social insurance costs incurred by the master, crew members and other persons working on board on the ship in accordance with labour laws, administrative regulations or labour contracts;
- claims for compensation for personal injuries or deaths occurring in the course of the operation of the ship;
- requests for payment of tonnage tax, pilotage, harbour dues and other port charges;
- claims for payment of salvage money in respect of salvage in the case of maritime disasters; and
- claims for property compensation arising from torts in the operation of the ship.

Law stated - 5 July 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

The applicant for arrest has acted wilfully or with gross negligence in applying for arrest or if there has been a clear violation or procedural impropriety in the procedure of the application for preservation. The burden of proof of the foregoing lies with the respondent of the arrest.

Law stated - 5 July 2024

Bunker suppliers**26** | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

In principle, a bunker supplier cannot arrest a vessel in connection with a claim for the price of bunkers supplied pursuant to a contract with the charterer unless it is with the bareboat charterer. However, in practice, it is not uncommon that the bunker supply contract is not signed and the bunker supplier and the ship side sign a voucher for bunker supply only. In such circumstances, the shipowner is likely to be liable for the price of bunkers and accordingly, the vessel may be arrested by the bunker supplier.

Law stated - 5 July 2024

Security**27** | Will the arresting party have to provide security and in what form and amount?

In a normal case, the maritime court will request the arresting party to provide security to secure damages for wrongful arrest. The security acceptable to the court include letters of guarantee issued by Chinese banks, insurance companies and other financial institutes and cash. Security by way of a charge or mortgage of property is generally not acceptable to the court. Where the ship arrest is conducted prior to litigation or arbitration proceedings of the underlying maritime claim, the security amount should be equal to the claim amount plus ship maintenance costs as requested by some maritime courts. Where the ship arrest is conducted in the course of litigation or arbitration proceedings, the security amount may be less than the claim amount, which will be dependent on the circumstances of the individual case.

In two unusual circumstances, the court may not request the arresting party to provide security. First, it is objectively impossible for the arresting party to provide security, such as in the case of a claim for remuneration of crew members or claim for compensation for personal injury or death or claim for damages for collision with a fishing vessel. Second, the arresting party is reputable companies established in China such as banks, insurance companies, shipowners' P & I associations, etc, with huge assets and good credit status.

Law stated - 5 July 2024

- 28** | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

In a normal case, the amount of security put up by the arrested party cannot exceed the value of the arrested ship. The security amount may be negotiated on basis of the claim amount. The court may review the security amount subsequently upon application.

There is no specific form of security for release of a vessel. Some maritime courts publish a template of a letter of guarantee on their websites. The requirements of each maritime court are slightly different. In general, cash and letters of guarantee issued by banks or reputable financial institutions in China such as shipowners' mutual insurance associations and insurance companies can be accepted by the court.

Law stated - 5 July 2024

Formalities

- 29** | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

The authorisation materials for the application for arresting a ship are basically the same as those in a lawsuit, which generally include a power of attorney and documents certifying the identity and legal representative of the arresting party.

If a lawyer is commissioned to apply for the ship arrest, the authorisation materials must be submitted to the court, and the statement of application in writing should include a specific request, reasons for the application and the amount of security required, together with proof.

If the arresting party is a foreign company, it needs to complete a notarisation and legalisation procedure of the authorisation materials. China has acceded to the Hague Apostille Convention.

Whether or not the court would agree the arresting party to supplement the notarised and legalised authorisation materials at a later stage will depend on the maritime court's decision. Some maritime courts may accept a scanned copy of signed application documents if the case is very urgent, while some maritime courts may not and insist on an original copy.

A Chinese translation of English text should be submitted to the court. There is no requirement of translation form. Lawyers can do the translation.

Law stated - 5 July 2024

Ship maintenance

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30 | Who is responsible for the maintenance of the vessel while under arrest?

The owner or demise charterer is responsible for the maintenance and management of the ship during the period of arrest. If the shipowner or demise charterer fails to perform its management duty, it may be performed by the applicant or a third person appointed by the court, and the corresponding costs, which are judicial in nature, are to be paid as a matter of priority out of the proceeds of the auction of the ship in the future.

Law stated - 5 July 2024

Proceedings on the merits**31** | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

The arresting party need not pursue the claim on its merits in Chinese court. It is possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere according to the jurisdiction agreement with the defendant.

Law stated - 5 July 2024

Injunctions and other forms of attachment**32** | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

In addition to ship arrest, the claimant can apply to the court for freezing of a bank account, arrest of cargo and preservation of property other than ship and cargo.

Law stated - 5 July 2024

Delivery up and preservation orders**33** | Are orders for delivery up or preservation of evidence or property available?

The claimant can apply to the court for a preservation order for the preservation of property and evidence.

Law stated - 5 July 2024

Bunker arrest and attachment**34** | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

In theory, it is possible but since arrested bunkers need to be discharged and stored on shore, which is inconvenient to arrange, Chinese courts rarely grant bunker arrest applications.

Law stated - 5 July 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Maritime claimants can make the application for judicial sale of an arrested vessel.

Law stated - 5 July 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The applicant can apply for judicial sale of a vessel during proceedings or at the stage of enforcement of a court judgment or arbitration award. After the tribunal of the court grants the application, it follows the procedure below to conduct the sale:

- Constitution of the Committee for the Auction of Ships;
- inspection of the ship;
- valuation of the ship;
- publication of notice of auction;
- display of the ship for auction;
- determination of reserved price;
- registration for bidding;
- auction of the ship; and
- transfer of the ship.

On average, it would take about at least three months from issuing the order of judicial sale until completion of the sale. The costs relating to the judicial sale include ship maintenance costs (if the shipowner abandons the ship), ship valuation and inspection fee and auction fee. These fees will be distributed from the proceeds of the sale. Depending on the condition and status of the vessel, the court may request the applicant to undertake to reimburse the court for these fees if the vessel is unsold in the end or request the applicant to pay part of these fees in advance.

Law stated - 5 July 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The order of priority of claims is as follows:

- court fees and expenses incurred for the preservation, auctioning and distribution of the price of the ship, as well as other expenses incurred for the common benefit of the creditors;
- maritime lien;
- possessory lien;
- mortgage; and
- other maritime claims that are related to the auctioned ship.

Law stated - 5 July 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

When a ship is sold at judicial auction, the corresponding claims, such as maritime liens, are extinguished and the buyer acquires the clean title of the vessel.

Law stated - 5 July 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

China is a signatory of the Beijing Convention, but the Convention has not come into effect. So far, there are no legal provisions in China relating to the recognition of judicial sale of a vessel in a foreign jurisdiction.

Law stated - 5 July 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

China is not a party to the Convention.

Law stated - 5 July 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

- 41** | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

China has not acceded to the Hague Rules, Hage-Visby Rules, Hamburg Rules and Rotterdam Rules, but the Maritime Law has adopted relevant provisions of the conventions.

Law stated - 5 July 2024

Multimodal carriage

- 42** | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

The Maritime Law and the Civil Code contain relevant provisions that apply to the stage of road, rail and air transport under multimodal transport. China has acceded to the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention 1999) and Agreement on International Goods Transport by Rail.

Law stated - 5 July 2024

Title to sue

- 43** | Who has title to sue on a bill of lading?

The lawful holder of the original bill of lading has the title to sue.

Law stated - 5 July 2024

Charter parties

- 44** | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The terms of a charterparty may be incorporated into the bill of lading. Article 95 of the Maritime Law provides that if the bill of lading states that the terms of the voyage charterparty are applicable, the terms of the voyage charterparty shall apply. In general, the incorporation statement must be clear, and the date of the charterparty should be stated on front of the bill of lading. Otherwise, if there are several charterparties, dispute will arise as to which charterparty should be incorporated. Not all provisions of the charterparty can be incorporated into the bill of lading. The freight, demurrage and other expenses at a loading port may not be incorporated if they are not stated to be payable by the consignee on the bill of lading. Jurisdiction or arbitration clauses in the charterparty cannot be incorporated by general terms. The jurisdiction or arbitration clause must be described expressly and specifically on the front of the bill of lading so that such clause can be binding upon a third-party holder or endorsee of the bill.

Law stated - 5 July 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

The demise and identity of carrier clause may not be recognised by the court. Article 42 of the Maritime Law provides that 'Carrier' means a person who enters a contract of carriage of goods by sea with a shipper in its own name or on behalf of another person. In general, the court determine the identity of the carrier by identifying which party intends to enter a contract of carriage with the shipper and, if the bill of lading is issued by or on behalf of the master, who instructs or authorises the master to issue the bill of lading.

Law stated - 5 July 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

The shipowner may be liable for cargo damage even if they are not the contractual carrier. If the shipowner has been entrusted by the contractual carrier or its sub-contractor with the carriage of goods or part thereof, the shipowner shall be liable for cargo damage that occurred during the period when they are entrusted with such carriage. The shipowner can raise the defence that the contractual carrier can rely on either under the Maritime Law or under the bill of lading terms, which, however, should not be in violation of the mandatory provisions of the Maritime Law.

Law stated - 5 July 2024

Deviation from route

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47 | What is the effect of deviation from a vessel's route on contractual defences?

Article 57 of the Maritime Law provides that the carrier shall not be entitled to claim limitation of liability if it is proved that the loss of, damage to, or delay in delivery of the goods is caused by an intentional act or reckless act or omission of the carrier with the knowledge that such loss would probably result. If the deviation is intentional or reckless act, the carrier may lose the right of limitation of liability.

Law stated - 5 July 2024

Liens**48** | What liens can be exercised?

Liens can be exercised of cargo, ship and other property by operation of law.

Law stated - 5 July 2024

Delivery without bill of lading**49** | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Carriers shall be liable to the lawful holder of a bill of lading for damages due for delivery of cargo without production of the original bill of lading. The liability is either based on a bill of lading contract or on tort. Carriers cannot limit such liability.

Law stated - 5 July 2024

Shipper responsibilities and liabilities**50** | What are the responsibilities and liabilities of the shipper?

According to articles 66 to 69 of the Maritime Code, the shipper's responsibilities are as follows:

- properly pack the goods and ensure to the carrier that the name, mark, number of packages or pieces, weight or volume of the goods loaded on board are correct;
- timely conduct procedures required by port authorities, customs, quarantine, inspection and other competent authorities for the transport of goods, and deliver certificates of the procedures to the carrier;
- properly pack, mark and label dangerous goods in accordance with provisions on the carriage of dangerous goods by sea, and notify the carrier of the formal name and nature of dangerous goods and precautionary measures to be taken; and
- pay freight and other charges to the carrier as agreed.

The shipper shall be liable to the carrier for the damages if they fail to fulfil the responsibilities.

Law stated - 5 July 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Presently, there are three ECAs in China. They are the Pearl River Delta, the Yangtze River Delta and the Bohai Bay.

Law stated - 5 July 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

As of 1 January 2019, ships entering emission control areas should use fuel oil with sulphur content 0.5 per cent m/m. The authorities will impose a fine of not less than 10,000 yuan but not more than 100,000 yuan on ships using non-compliance fuel oil in ECAs.

Law stated - 5 July 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

China is not a party to the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships. China's domestic regulations relating to ship recycling include:

- Law on Marine Environmental Protection;
- Law on Promotion of Circular Economy;
- Law on Promotion of Cleaner Production;
- Regulations on Prevention of Environmental Pollution from Shipbreaking;
- Regulations on Administration of Preventing and Combating Pollution of the Marine Environment by Ships;

- Measures for Administration of Ship Scheduled Dismantling;
- Regulations on Safety and Environmental Protection in Shipbreaking;
- Regulations on Prevention and Control of Environmental Pollution of Inland Waters by Ships
- Opinions on Regulating Development of the Shipbreaking Industry;
- Ship Scrapping, Dismantling and Ship Type Standardisation Subsidy Funding Scheme for Ship Scrapping and Dismantling Subsidies; and
- Catalogue of Prohibited Imported Solid Wastes.

There are shipbreaking yards in China.

Law stated - 5 July 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

Maritime courts have exclusive jurisdiction over maritime disputes. China has now established 11 maritime courts in main port cities, namely (in order from north to south), Dalian Maritime Court, Tianjin Maritime Court, Qingdao Maritime Court, Wuhan Maritime Court, Nanjing Maritime Court, Shanghai Maritime Court, Ningbo Maritime Court, Xiamen Maritime Court, Guangzhou Maritime Court, Beihai Maritime Court and Haikou Maritime Court.

Law stated - 5 July 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Service of proceedings on a defendant outside of the jurisdiction shall be conducted according to following convention or treaties or in ways below:

- service on international treaties:
- Hague Convention on Service Abroad of Documents in Civil or Commercial Proceedings and Non-Contentious Instruments; and
- bilateral treaties on judicial assistance;
- diplomatic channels based on the principle of reciprocity;
- embassy or consulate service on persons of Chinese nationality;
- service on agent ad litem in China;

- service on representative office established by the person to be served in China, or at a branch office or business agent entitled to receive service;
- service by mail subject to the country where the person to be serviced allowing such service;
- service by fax, email and other electronic service subject to the person to be served acknowledge receipt of the service; and
- service by public notice in the case that the service in above ways cannot be achieved.

Law stated - 5 July 2024

Arbitration

- 56** | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

China Maritime Arbitration Commission (CMAC) specialises in maritime arbitration. In 2023, CMAC received more than 1,000 cases. In addition to CMAC, some other arbitration institutions have arbitrators specialising in maritime arbitration, such as China International Economic and Trade Arbitration Commission (CIETAC), Shanghai International Arbitration Centre (SHIAC).

Law stated - 5 July 2024

Foreign judgments and arbitral awards

- 57** | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

China is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitration Awards made in the country party to the New York Convention can be recognised and enforced according to the Convention. Foreign judgments may be recognised and enforced in China according to international conventions and principles of reciprocity.

Law stated - 5 July 2024

Asymmetric agreements

- 58** | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Asymmetric jurisdiction clause is valid and enforceable in China unless the jurisdiction clause involves the rights and interests of consumers or workers or violates the exclusive jurisdiction provisions of the Civil Procedure Law.

Law stated - 5 July 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

The defendant can apply to the court for an objection to the jurisdiction or apply to the court for an injunction order to stop the proceedings elsewhere. However, maritime courts are very cautious about injunction orders.

Law stated - 5 July 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant can apply to the court for objection to the jurisdiction and apply to the court for an injunction order to stop the proceedings elsewhere.

Law stated - 5 July 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The ordinary time limit is three years. Special time limits apply to maritime claims as follows:

- one year for carriage of goods by sea, towage and general average;
- two years for charterparty, ship collision, salvage and marine insurance; and
- three years for oil pollution.

The time limit cannot be extended by agreement.

Law stated - 5 July 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

In special circumstances, courts may decide to extend the time limit on basis of application.

Law stated - 5 July 2024

MISCELLANEOUS

Maritime Labour Convention

- 63** | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

China is a party to the MLC. The MLC applies to international and coastal navigation vessels flying the Chinese flag and crews working on board those vessels.

Law stated - 5 July 2024

Relief from contractual obligations

- 64** | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

According to the Civil Code, if, after the conclusion of a contract, there is a significant change in the conditions underlying the contract that was not foreseeable by the parties at the time of the conclusion of the contract and is not a business risk, and if the continued performance of the contract is manifestly unfair to one of the parties, the party adversely affected may renegotiate the contract with the other party; and, if such negotiation fails to take place within a reasonable period of time, the party may request the court or arbitration institution to alter or terminate the contract.

Law stated - 5 July 2024

Other noteworthy points

- 65** | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

China has no specific law on electronic bill of lading based upon blockchain technology. Legislation on electronic bill is under development. In 2022, the Supreme People's Court published the Opinions on Strengthening the Judicial Application of Blockchain, and Shanghai Maritime Court published Guidelines for the Review of Blockchain Evidence. The Maritime Law revision panel adds provisions on electronic transport records, taking into account the provisions of the Rotterdam Rules, and makes it clear that the electronic transport record has the function of proof of delivery of the goods.

Law stated - 5 July 2024

UPDATE AND TRENDS

Key developments of the past year

- 66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Maritime Law (Amendment) is expected to be submitted by the State Council to the National People's Congress for consideration and adoption between 2025 and 2027. The revision of the Law on Special Procedure on Maritime Proceedings is in progress. It is expected that the revised substantive and procedural law will have a certain impact on the industry.

Law stated - 5 July 2024



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Title in a newly built ship is evidenced by the issue of a builder's certificate, that is to say, a certificate signed by the builder of the ship, and containing a true account of the ship's particulars and of the name of the person on whose account the ship was built and if there has been any sale, the bill of sale under which the ship, or share therein, has become vested in the owner. As ships are movable objects, it follows that upon transfer of title taking place between the builder and the owner, there must be a contemporaneous 'physical' delivery of the ship by builders to owners.

Consequently, absolute title in a ship passes by the builders to the shipowners by means of a builder's certificate (and bill of sale, where applicable) and the physical delivery of such ship to the owner.

Law stated - 15 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

There are no statutory requirements applicable in Cyprus for refund guarantees issued by builders to shipowners to be valid, other than the general legal requirements for the underlying shipbuilding contracts to have become effective in the first place.

Law stated - 15 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

An owner may apply to the Cypriot courts and request the issue of an order for 'specific performance' compelling the builder to deliver the ship physically. Specific performance is, however, a discretionary power of the court and is applied in cases where an alternative remedy is not possible.

Law stated - 15 May 2024

Defects

- 4 |

Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

A shipowner would have a cause of action against the builder for defects to their ship, both under the relevant shipbuilding contract and the warranty clause contained therein and, under certain circumstances, the provisions of the law on the sale of goods.

In a sale of a newly built ship that continues under the builder's warranty, and where such warranties are assigned to the purchaser, with the builder's consent, then such purchaser would stand in the same legal position as the original shipowner against the builder in relation to these warranty claims. Where such warranties are not applicable, then considering that the rule of 'privity of contracts' applies in Cyprus, the purchaser would not have a right of claim against the builder, but only against the seller of the ship, and would be based upon the terms of the contract of sale of the ship between them. This is usually a memorandum of agreement based on the Norwegian sales form.

Law stated - 15 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

All vessels used in navigation and not propelled by oars are eligible for registration in Cyprus provided that they meet the age restrictions set out in the official government policy regulating the registration of old ships in the Cyprus Ships Register. Vessels under construction are registrable in Cyprus.

Law stated - 15 May 2024

6 | Who may apply to register a ship in your jurisdiction?

A citizen of, or a corporation or partnership established in Cyprus, the European Union, the European Economic Area, which includes Norway, Iceland and Liechtenstein), or in a third country where its control or ownership vests in EU interests may apply to register a ship under the Cyprus flag.

Law stated - 15 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

The documentary requirements are those pertaining to the passing of title in the ship to the buyer such as the bill of sale or builder's certificate, the passing of proper corporate authority to acquire the ship, various forms relating to the technical and safety aspects of the ship, and payment of the relevant fees.

Law stated - 15 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration and flagging out are both possible in Cyprus. The basis for such types of registration is the bareboat chartering of a ship by a shipowner to a charterer, on the condition that the respective laws of the underlying registry and the bareboat registry explicitly permit dual registration, and contain preventive covenants on matters relating to ownership, and to mortgages over the ship, which shall be exclusively governed by the laws of the ship's underlying register. The bareboat charterer must also undertake to maintain the same safety standards as the ship, even though the chosen bareboat register applies safety standards that are lower than those applied by the ship's underlying register.

Law stated - 15 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The Register Book is entrusted under the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law 1963, as amended, to the Registrar of Cypriot Ships, and contains a description of the ship, and of the particulars of mortgages registered thereon. As there are two types of mortgage: one securing a principal amount and interest; the other securing a current account, the information that is entered in the Register consists of the name and address of the mortgagee, the date of the mortgage instrument, time of registering, the form of the registered mortgage and its ranking.

Law stated - 15 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The effect of Law No. 20(III)/2005 has been to ratify the 1976 Convention on Limitation of Liability for Maritime Claims and the first amendment thereof as effected via the 1996 Protocol, which was adopted on 2 May 1996 and entered into force on 13 May 2004.

The Convention on Limitation of Liability for Maritime Claims of 1976 and of its Protocol of 1996 amending the said Convention (Ratification) and for Matters Connected Therewith Law of 2005 (Law No. 20(III)/2005) applies.

The following claims are subject to limitation:

1. claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss;
2. claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
3. claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
4. claims in respect of the raising, removal, destruction or the rendering harmless of a ship that is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
5. claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship; and
6. claims of a person other than the person liable in respect of measures taken to avert or minimise loss for which the person liable may limit his or her liability in accordance with this convention, and further loss caused by such measures.

The claims set out under (4), (5) and (6) are not subject to a limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

The owner, charterer, manager and operator of a seagoing ship and salvors can limit their liability. An insurer of liability for claims is subject to limitation.

The LLMC 96 liability limits were increased under the tacit acceptance procedure provided by article 8 of the 1996 LLMC Protocol.

The new increased liability limits have been adopted by virtue of Resolution LEG 5 (99) of the IMO Legal Committee dated 19 April 2012.

Law stated - 15 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Provision is made in the conventions ratified by Cyprus. The matter has not been tested before the Cypriot courts.

Law stated - 15 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The limit can be broken when the actual fault or privity of the shipowner is proved. There were incidents where limitation was broken. As the matter has not been tested in Cyprus there is no precedent; however, Cypriot courts would be guided with English case law.

Law stated - 15 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

The Athens Convention limitation regime applies.

Law stated - 15 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The port state control agency is entrusted to the Deputy Ministry of Shipping and operates under the Paris Memorandum of Understanding of Port State Control.

Law stated - 15 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The port state control inspector may impose all sanctions provided for under the Paris Memorandum, including the detention of ships.

Law stated - 15 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

Orders made or fines imposed under port state control fall under normal government administration practice, all of which is subject to recourse to the Supreme Court of Cyprus within 75 days of the giving of the order or of the imposition of the fine.

Law stated - 15 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

All members of the International Association of Classification Societies are recognised by Cyprus.

Law stated - 15 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

A class society would be held liable if the cause of the action falls within the criminal domain.

For civil actions, a class society would generally be held accountable if it does not contractually disclaim liability with the shipowner.

Law stated - 15 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Yes.

Law stated - 15 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Collisions

- The Convention on International Regulations for Preventing Collisions at Sea 1972 (Ratification) and for Matters Connected Therewith Law of 1980 (Law No. 18/80), and the following amendments:
 - the Convention on International Regulations for Preventing Collisions at Sea 1972 (Ratification) and for Matters Connected Therewith (Amendment) Law of 1981 (Law No. 8/81);
 - the Convention on International Regulations for Preventing Collisions at Sea 1972 (Ratification) and for Matters Connected Therewith (Amendment) Law of 1982 (Law No. 66/82);
 - the Convention on International Regulations for Preventing Collisions at Sea, 1972 (Ratification of Amendments) Law of 1989 (Law No. 4/89);
 - the Convention on International Regulations for Preventing Collisions at Sea, 1972 (Ratification and for Matters Connected Therewith (Amendment) Law) of 2009 (Law No. 14(III). 2009; and
 - the International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in Matters of Collision 1952 (Ratification) Law of 1993 (Law No. 31(III)/93).

Salvage

- The Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea and Protocol of Signature, Brussels 23 September 1910 (extended to Cyprus on 1 February 1913).

Pollution

- The Convention for the Protection of the Mediterranean Sea Against Pollution and for Connected Protocols (Ratification) Law of 1979 (Law No. 51/79) (Gazette No. 1524, supplement I, dated 8 June 1979);
- the Convention for the Protection of the Mediterranean Sea Against Pollution and for Connected Protocols (Ratification) (Amendment) Law of 2001 (Law No. 20 (III)/2001) (Gazette No. 3537, Supplement I (III), dated 15 October 2001);
- the Convention for the Protection of the Mediterranean Sea Against Pollution and for Connected Protocols (Ratification) (Amendment) Law of 2007 (Law No. 35 (III)/2007);
- the Convention for the Protection of Mediterranean Sea Against Pollution and for Connected Protocols (Ratification) (Amendment) Law of 2013 (Law No. 2(III)/2013);
- the Convention for the Protection of Mediterranean Sea Against Pollution and for Connected Protocols (Ratification) (Amendment) Law of 2019 (Law No. 17(III)/2019);

- the International Convention for the Prevention of Pollution of the Sea from Ships of 1973, its Protocol of 1978 and the Resolutions MEPC 14(20) of 1984, MEPC 16(22) and MEPC 21(22) of 1985 (Ratification) and for Matters Connected Therewith Law of 1989 (Law No. 57/89) and its amendments:
 - the International Convention for the Prevention of Pollution of the Sea from Ships of 1973, its Protocol of 1978 and the Resolutions MEPC 14(20) of 1984, MEPC 16(22) and MEPC 21(22) of 1985 (Ratification) and for Matters Connected Therewith (Amendment) Law of 1995 (Law No. 11(III)/95);
 - the International Convention for the Prevention of Pollution of the Sea from Ships of 1973, its Protocol of 1978, as Amended by the Resolutions of 1987–1995 (Ratification) and for Matters Connected Therewith (Amendment) Law of 2001 (Law No. 11 (III)/2001);
 - the International Convention for the Prevention of Pollution of the Sea from Ships (Ratification) and for Matters Connected Therewith (Amendment) Law of 2003 (Law No. 38 (III)/2003);
 - the International Convention for the Prevention of Pollution of the Sea from Ships (Ratification) and for Matters Connected Therewith (Amendment) Law of 2004 (Law No. 46 (III)/2004) (EU harmonisation law); and
 - the International Convention for the Prevention of Pollution of the Sea from Ships (Ratification) and for Matters Connected Therewith (Amendment) Law of 2005 (Law No. 36 (III)/2005) (EU harmonisation law), including:
 - the Submarine Pipe-Lines for the Transfer of Oil and Other Hydrocarbon Products Regulations 1995;
 - the Port Reception Facilities for Ship-generated Waste and Cargo Residues Regulations 2003; and
 - the Port Reception Facilities for Waste from Ships and Cargo Residues Regulations 2022 (which transposed EU Directive 2019/883 and repealed the Port Reception Facilities for Ship-generated Waste and Cargo Residues Regulations of 2003 to 2017);
- the International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971 and of its Protocol of 1976 (Ratification) and for Matters Connected Therewith Law of 1989 (Law No. 109/89), and its amendment;
- the Protocol of 1992 Amending the International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971 (Ratification) and Matters Connected Therewith (Amendment) Law of 1997 (Law No. 15(III)/97); and
- the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and the Resolutions LDC5(III), LDC6(III) of 1978 and LDC12(V) of 1980 (Ratification) and for the Matters Connected Therewith Law of 1990 (Law No. 38/90).

The Nairobi International Convention on the Removal of Wrecks 2007 was ratified by Cyprus in August 2015 and entered into force on 22 October 2015.

Law stated - 15 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local salvage form. Lloyd's standard form is acceptable in Cyprus. Any person may carry out salvage operations.

Law stated - 15 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Cyprus is not a party to the 1952 Arrest Convention; however, the United Kingdom passed the Administration of Justice Act 1956 to ratify the Convention, and the Administration of Justice Act 1956 applies to Cyprus by virtue of its Constitution and section 29 of Law No. 14/60.

Law stated - 15 May 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

A vessel may be arrested pursuant to any permissible in rem action under the Administration of Justice Act 1956. An associated vessel may be arrested if, at the time of the cause of action, it was entirely beneficially owned by the relevant owner or charterer. It is unclear if a demise chartered vessel may be arrested for a claim against the bareboat charterer. A contractual claim against a time-charterer of a vessel does not provide a basis for the claimant to arrest such a vessel since the vessel to be arrested must belong beneficially, with respect to all the shares therein, to the person liable for the claim in personam.

Law stated - 15 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Maritime liens are recognised in Cyprus, and the law is similar to that applicable in England. These are:

- lien for damage, being a lien for the amount of a claim arising only in tort against a vessel as a result of her negligent navigation or operation such as collision (excluding damage to cargo or injury to persons on board such a vessel);
- the lien for salvage;
- the lien of the master, officers and crew for wages and other emoluments; and
- the lien of the master for disbursements made on account of the vessel provided that they were made on behalf of the owner of the vessel and not a demise-charterer or a time-charterer, in which case there is only a contractual claim of the master for the disbursements.

Law stated - 15 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

The test for wrongful arrest is 'bad faith'.

Law stated - 15 May 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Yes, provided the bunker supplier shows that the claim falls within one of the sections of the Administration of Justice Act 1956 and, in particular, shows that the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer or in possession or control of the ship, the admiralty jurisdiction (whether the claim gives rise to a maritime lien on the ship or not) may be invoked by an action in rem against that ship if, at the time when the action is brought, the ship is beneficially owned as respects to all the shares therein by the owner, charterer or the person otherwise in possession or control of the ship.

Law stated - 15 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

Yes, in the form of a local bank guarantee.

Law stated - 15 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The amount varies as there is no general rule. In practice, a figure usually representing 10 to 15 per cent of the amount claimed is ordered to be put up. It is highly unlikely that the security ordered will exceed the value of the ship.

Law stated - 15 May 2024

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

No particular formalities are required to make an arrest application. The claimant must engage a local lawyer who will agree to undertake the case. The documents supporting the claim may be photocopies and must be in a language understood by the court; if they are not, they have to be translated into Greek, with the translator swearing an affidavit that the translation is true and correct. Arrest applications can be dealt with within two to three days.

Law stated - 15 May 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

The initial arrest expenses are paid by the arresting party to the admiralty marshal who is responsible for the maintenance of the vessel while it is under arrest. Such expenses are paid out first in any priority proceedings.

Law stated - 15 May 2024

Proceedings on the merits

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- 31** | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Not necessarily. An arrest may be obtained provided that a substantive action is filed on or before applying for the arrest. The action could then be stayed, pending the determination of proceedings elsewhere.

Law stated - 15 May 2024

Injunctions and other forms of attachment

- 32** | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

A claimant may apply for an injunction freezing any movable property belonging to the defendant. There are also other types of injunction orders available, such as Norwich Pharmacal and Chabra.

Law stated - 15 May 2024

Delivery up and preservation orders

- 33** | Are orders for delivery up or preservation of evidence or property available?

A party may apply, after closing of pleadings, for the discovery and inspection of documents. The party against whom such order is directed will not be at liberty to produce any documents during the trial that are not discovered. Any documents discovered may then be inspected. Further, any party may apply to the court for leave to administer interrogatories.

Law stated - 15 May 2024

Bunker arrest and attachment

- 34** | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is possible to obtain an injunction in respect of bunkers.

Law stated - 15 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

- 35** Who can apply for judicial sale of an arrested vessel?

The arresting party or the admiralty marshal in whose custody the arrested ship is can apply for judicial sale.

Law stated - 15 May 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

A judicial sale of a vessel can take place either:

- after judgment (in rem) is obtained whereby the admiralty marshal orders the appraisalment (by a valuator) of the vessel, which is then sold by public auction; the admiralty marshal may, in some circumstances, request the court to order sale by private treaty; or
- before judgment, on the application of the arresting party or the admiralty marshal, provided that the court is convinced that the vessel is a 'wasting asset'.

The approximate costs (apart from legal fees) would depend on the value of the vessel (as a percentage is usually charged on the appraisalment) and then form part of the admiralty marshal's expenses. An approximate figure would be around €10,000.

Law stated - 15 May 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The order is, from highest to lowest priority:

- admiralty marshal's expenses;
- maritime lien (apart from salvage: *pari passu*);
- mortgages;
- statutory claims in rem (*pari passu*);
- claims of in personam creditors of the owner of the *res*; and
- the owner of the *res* for the (if any) balance.

Law stated - 15 May 2024

Legal effects

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38 | What are the legal effects or consequences of judicial sale of a vessel?

It gives the purchaser good title extinguishing all prior liens and encumbrances on the vessel.

Law stated - 15 May 2024

Foreign sales**39** | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Yes, provided it took place in a country with which Cyprus has entered into a treaty.

Law stated - 15 May 2024

International conventions**40** | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Yes, Cyprus is a signatory.

Law stated - 15 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING**International conventions****41** | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and Protocol of Signature, Brussels, 25 August 1924 (extended to Cyprus on 2 June 1931) applies in Cyprus.

Carriage at sea begins on loading of the cargo and ends on discharge from the ship (on passing the ship's rails).

Law stated - 15 May 2024

Multimodal carriage**42** |

Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

There are no conventions or domestic laws in force.

Law stated - 15 May 2024

Title to sue

43 | Who has title to sue on a bill of lading?

There is little or no Cypriot case law on the matter and the position under Cypriot law would be identical to that under English law. The Supreme Court of Cyprus in its admiralty jurisdiction applies the law that was applied by the English High Court of Justice up to 1960. Any case law up to 1960 is of binding effect and any subsequent authorities are of a very persuasive nature to the Cypriot courts.

Thus, the Bills of Lading Act 1855 is applicable in Cyprus (see *Southfields Industries Ltd v M/V Adriatica K and Others* (1989) 1 CLR 301, and *Stavros Georgiou & Son (Scrap Metals) Ltd v the Ship 'Lipa' ibid*). Section 1 of the Bills of Lading Act 1855 reads as follows:

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Law stated - 15 May 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The parties are free to expressly incorporate the terms of the charter party in the bill of lading.

General words in a bill of lading incorporating into it all the terms and conditions, or all the terms, conditions and clauses of such charter party, are not sufficient to bring such arbitration clause into the bill of lading so as to make its provisions applicable to disputes arising under that document (*Elie Sadek and another v Efpalinos Shipping Company Limited and another* (1983) 1 CLR 696).

Law stated - 15 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

Yes, it is recognised and binding.

Law stated - 15 May 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

A charterer may be the carrier and whether the bill of lading is an owner's or charterer's bill is a matter of fact. English case law would be followed to determine such a question.

Law stated - 15 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

The principles of English law are to be followed (ie, liability as common carrier). Where the Carriage of Goods by Sea Law applies, any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, is not deemed to be a breach of the contract of carriage.

Law stated - 15 May 2024

Liens

48 | What liens can be exercised?

The following liens can be exercised:

- contractual liens, that is, those arising under a charter party, for example, against cargo or sub-charter hire or freight or sub-freights;
- at common law against the goods for freight, general average contributions, and expenses incurred by the shipowner or master in preserving the goods;
- maritime liens and statutory lien (once action in rem has been instituted) and a possessory lien, all against the ship; and

- the claims of the Republic of Cyprus for fees, dues or tonnage taxes chargeable and leviable under the Merchant Shipping (Fees and Taxing Provisions) Law of 1992, constitute a lien on the ship.

Law stated - 15 May 2024

Delivery without bill of lading

- 49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

It is the duty of the shipowner to see that the goods are delivered to the person to whom he or she has contracted to deliver them. Delivery to a person not entitled to the goods without production of the bill of lading is prima facie a conversion of the goods and a breach of the contract of affreightment (*Archangelos Domain Limited v Adriatica Societa Per Azione Di Navigazione* (1978) 1 CLR 439).

Law stated - 15 May 2024

Shipper responsibilities and liabilities

- 50 | What are the responsibilities and liabilities of the shipper?

The principles of English law are to be followed.

Law stated - 15 May 2024

SHIPPING EMISSIONS

Emission control areas

- 51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Yes, there is and it covers the whole of the Republic of Cyprus. Enforcement, however, is possible only in the areas that are under the control of the Cyprus government.

Law stated - 15 May 2024

Sulphur cap

- 52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The maximum permitted sulphur content in fuel is 0.1 per cent while the ship is at berth. Detailed evidence must be maintained showing the steps taken to achieve compliance on those ships that have not been designed to use diesel and gas oil, or have not got the necessary technical adaptation to use such fuel. During a changeover, specific entries must be entered in the official engine log of a ship. Enforcement is performed through port state control (PSC) inspections. In addition to detention of the ship under PSC, the sanctions impose criminal liability on all the responsible persons with fines of up to €50,000, imprisonment of up to five years, or both, and an administrative fine of up to €50,000 on the responsible surveyor.

Law stated - 15 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

European Union regulations apply in Cyprus as regards recycling of ships. There are no recycling facilities locally.

Law stated - 15 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

Arrest proceedings and maritime claims (in rem and in personam proceedings) must be brought before the Supreme Court of Cyprus, in its admiralty jurisdiction. This court has exclusive jurisdiction over such questions or claims as defined by the Act. A recent amendment of the Courts of Justice Law 1960 as amended, has conferred limited admiralty jurisdiction upon the various district courts in Cyprus to hear certain admiralty actions subject to their referral by the Supreme Court.

Law stated - 15 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The courts generally have discretion on the method they may direct service to be affected. Otherwise, depending on the country in which the defendant resides, there are numerous bilateral treaties and international conventions that Cyprus has ratified.

Law stated - 15 May 2024

Arbitration

- 56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

No, there is no domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration.

Law stated - 15 May 2024

Foreign judgments and arbitral awards

- 57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

EU judgments

By article 33 of the EC Regulation, a judgment, including a decree, order, decision or writ of execution, given in a member state may be recognised in the other member states without any special procedure being required, and under no circumstances may a foreign judgment be reviewed as to its substance.

Foreign judgments

The 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and supplementary protocol thereto are ratified by Law No. 11/76.

A decision rendered in one of the contracting states is entitled to recognition and enforcement in another contracting state under the terms of this convention.

If not within the above convention, the judgment creditor may apply to the district court at any time within six years after the date of the judgment, to have the judgment registered in the district court, pursuant to the Foreign Judgments (Reciprocal Enforcement) Law. Alternatively, he or she may sue on the foreign judgment at common law.

Foreign arbitral awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 (the New York Convention), and in force as of 29 March 1981.

Law stated - 15 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

So long as the parties have a clear agreement on the choice of jurisdiction, this would be recognised in Cyprus, unless a party pleads otherwise, in which case the court would have discretion in considering otherwise.

Law stated - 15 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

There are no specific remedies available. The defendant might file an action seeking a declaration that the claimants' (foreign) action is null and void and should be stayed; however, Cypriot courts, as a matter of public policy, based on the principle of the comity of nations, would be reluctant to entertain such an action and would prefer to leave the matter to the foreign court to decide.

Law stated - 15 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant may apply for a stay of proceedings; however, the court always has discretion whether to grant such an application.

Law stated - 15 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The Law for the Limitation of Actions, Law 66(I) of 2012, came into force on 1 July 2012.

Actions based on torts are time-barred if not filed within six years (three years for negligence, nuisance and breach of statutory duty) from the date the cause of action arose.

Actions for breach of contract are time-barred if not filed within six years from the date the cause of action arose.

The court has the discretion to extend the various time limits. Even though no case law exists on the matter, the court would most probably accept the parties' agreement to extend the time limits.

Law stated - 15 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Yes, they have the discretion to do so, provided they are satisfied certain requirements are met.

Law stated - 15 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention will apply fully in Cyprus, and the Deputy Ministry of Shipping is the responsible body to ensure application on all Cypriot ships.

Law stated - 15 May 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Yes, it is possible to seek relief provided that economic conditions have prevented the performance of contractual obligations, but not merely made them more onerous to perform.

Law stated - 15 May 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Law stated - 15 May 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

On 2 June 2022, the Establishment of the Commercial Court and Admiralty Court Law N 69(I)/2022 (hereinafter referred to as the Admiralty Court Law) came into force, which provides for the establishment of a new Admiralty Court with exclusive first-instance jurisdiction over admiralty cases (article 18). Pursuant to article 32(3) of the Admiralty Court Law, the new Admiralty Court shall be established and its jurisdiction shall come into force upon the publication of a relevant notification by the Supreme Court of Cyprus in the Official Gazette of the Republic. At the time of writing, no such notification has been published.

Procedural regulations that will govern the procedure of cases before the new Admiralty Court have been published by the Supreme Court of Cyprus in the Official Gazette of the Republic on 3 July 2023 as Part 43 of the New Civil Procedure Rules of 2023.

Until the publication of the Supreme Court Notification establishing the Admiralty Court, the Supreme Court and the District Courts retain their first-instance jurisdiction to hear admiralty cases.

Law stated - 15 May 2024


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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

The Civil Code of Ecuador provides that a construction contract can be assimilated either into a service agreement or a sale agreement depending on which party provides the materials.

Therefore, in a shipbuilding contract, if the main materials are provided by the person who commissions the work, then the title belongs to the shipowner and not to the shipbuilder. In contrast, if the materials are provided by the shipbuilder and approved by the shipowner then the contract shall be considered a sale contract.

Moreover, in a sale contract, the title is passed to the shipowner when it is executed by public deed before a notary public and registered before the harbour master. Registration is mandatory for the transfer of property of vessels.

In addition, the Code of Commerce 2019 states that parties in a shipbuilding contract can agree when title will pass from the shipbuilder to the shipowner but must maintain the requirement for a public deed. In the case of vessels with less than 10 gross register tonnage, there is no need for a public deed but the signatures in the sales contract should be witnessed by a notary.

To clarify, the law of Ecuador differentiates a public deed from a document whose signatures are witnessed by a notary. In the case of a public deed, the notary public certifies that the agreement was executed before them and the original document is maintained in the public deed files of the notary who provides copies to the parties or any other interested person. For authentication of signatures on a contract, the contract is a private document and the notary public certifies the signatures in the document.

Law stated - 2 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

A refund guarantee is a financial document that can only be executed by a bank or financial institution. Ecuador does not have specific provisions for refund guarantees in a shipbuilding contract. Therefore, the terms of the agreement are to be considered as well as the terms of the issuance of the refund guarantee. Notably, general rules of the law also apply. For example, if parties amend the original contract with a new term to comply with the delivery of the vessel then the guarantee may no longer be valid.

Moreover, it is recommended that the refund guarantee be provided as unconditional, for immediate payment and with automatic renovation upon its expiry date or upon the sole petition of the beneficiary. The idea is that the issuer shall pay the guaranteed funds or

risk being accused of non-compliance by the buyer and no evidence is required, nor any previous declaration of rights by a judge or an arbitration award.

Law stated - 2 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

General rules of the law of Ecuador apply in the case of breach of a shipbuilding contract by the shipyard. Therefore, according to article 1505 of the Civil Code, if the shipyard has not delivered the vessel at the agreed time the buyer can file a lawsuit before the Civil Court or request arbitration if this method of conflict resolution has been agreed upon, with the following two options:

- to request termination of the contract; or
- to request compliance with the agreement.

In both cases, the claimant can pursue monetary compensation.

Moreover, if the yard refuses to deliver the vessel owing to a failure of payments in relation to the shipbuilding contract, then it is understood that the shipbuilder holds a lien against the subject vessel following article 925 of the Code of Commerce. Also, the law recognises that if one party is in non-compliance the other party is justified in not continuing to comply.

Law stated - 2 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

The Equadorian law of sales contracts applies. If the vessel is defective then the shipowner may ask for the contract to be terminated or for a reduction in the price. These are also known as redhibitory defects.

Article 1798 of the Civil Code details the test to claim under redhibitory defects, as follows:

- that the defective condition existed at the moment of the sale;
- that if the buyer had known about the defect then the decision would have been not to buy or to buy at a lower price as the goods sold are worthless; or
- that the seller was silent on the matter of the defect and thus the buyer was unaware of them.

Moreover, if the shipbuilder (the seller) was advised of the defective condition and this was not communicated to the shipowner (the buyer) then the latter may claim damages.

These rules will also apply if the shipowner sells the vessel to a third party. Therefore, the third party may have a claim against the original shipowner.

Also, if the defective condition causes harm to any other third party, then the affected party may claim in delict against the shipowner, the shipbuilder and any other entity that the claimant considers liable, being the producers or entities in charge of the maintenance of the vessel's defective material, if the malfunction of such material is to be attributed as the proximate cause of the loss.

In certain cases, the contractual relations may fall under the Consumer Protection Law. This occurs when the buyer is not a merchant and when an individual buys or orders the construction of a boat for their personal use.

Law stated - 2 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

According to the Ecuador Navigation Act 2021, it is possible to register shipbuilding contracts. This is the same for mortgage contracts concerning vessels under construction, as stated in the Code of Commerce 2019.

Law stated - 2 May 2024

- 6 | Who may apply to register a ship in your jurisdiction?

The Code of Commerce 2019 states that all persons or entities with the capacity to agree contracts may own a ship. There is no current restriction on foreign nationals.

Law stated - 2 May 2024

Documentary requirements

- 7 | What are the documentary requirements for registration?

With the first-time registration of a vessel built in Ecuador, these documents must be provided:

- the certificate of property registered in the harbour master's office;
- ship construction plans approved by the National Directorate of Aquatic Spaces;

- the tonnage certificate, appraisal and classification; and
- certification of representation of the buyer entity, if applicable.

Moreover, if the vessel has been built outside Ecuador, a certificate of cancellation of the foreign registration and evidence of clearance of the ship from customs must be provided.

Law stated - 2 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Ecuadorian law allows for bareboat charter registration. This provides special benefits for the charterer that include the possibility of operating with the Ecuadorian flag, cabotage and tax exemptions, as stated in the Strengthening and Development of Maritime Transport Act. At least 70 per cent of the crew must be local, among other obligations of a national vessel. According to a regulation on safe manning, the master is allowed to be a foreign national.

To obtain this benefit the charterer first must qualify and obtain approval from the maritime authorities. This information is shared with the customs service for the import process.

The bareboat charter must be registered before the maritime authorities no more than 30 days after its execution.

Law stated - 2 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

Mortgage registration is subject to Decision 487 of the Cartagena Agreement (Andean Community). Moreover, the Code of Commerce 2020 has similar provisions regarding the mortgage of vessels. The general rule is that the registration of mortgages is valid for vessels already registered in a member country. In the case of Ecuador, the registry office is the harbour master.

The registration of mortgages is based upon the execution of a public deed by the parties involved, in which certain information must be included as follows:

- identification of parties in the mortgage contract;
- the name, number class, call sign and registration of the vessel;
- gross tonnage, maximum length and other specific characteristics of the ship;
- delimitation of the guarantee (if freights are included, etc); and
- the amount guaranteed, agreed interests and terms of payment.

Law stated - 2 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Ecuador is not a party to the Convention on Limitation of Liability for Maritime Claims 1976. The Code of Commerce 2019 includes provisions in regard to the limitation of liability for carriers, but these provisions only rely on Andean Community law and the international conventions to which Ecuador is a party.

There is no general Andean Community regulation in regard to the limitation of liability for maritime claims but for multimodal transportation, there is a limitation regime.

In relation to international conventions that include specific regimes for the limitation of liabilities, Ecuador is a party to the Hague-Visby Rules and the International Convention on Civil Liability for Oil Pollution Damage 1992.

Law stated - 2 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Ecuadorian law does not consider any specific procedure. Therefore, limitation of liability is generally to be alleged as a defence. However, there is an option to raise a demand claiming limitation of liability as an action. Moreover, Ecuadorian law does not have provisions regarding the constitution of a fund for limitation of liability.

Law stated - 2 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The Ecuador Code of Commerce 2019 states that limitation of liability is not to be invoked by the carrier or agents when the loss results from malice or from actions carried out in the knowledge that they would probably result in damage.

Law stated - 2 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Ecuador is not a party to the Athens Convention. However, the Code of Commerce states a ceiling of 100 unified basic salaries (for 2024: US\$46,500) that the carrier can pay to claimants in the case of death or injuries of a passenger. The same provision maintains that, despite this general rule, claimants may file a lawsuit for what they consider proper compensation for damages.

Law stated - 2 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

Under the Ecuador Navigation Act 2021, full authority regarding port state control belongs to the Ecuadorian Navy and is administered by DIRNEA, its agency. The Ecuadorian Navy oversees coastal, flag and port state matters, and under the Act is considered the national maritime authority.

Law stated - 2 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

Ecuador is a party to the Latin American memorandum of understanding, the Latin American Agreement on Port State Control of Vessels also known as Viña del Mar Agreement. Hence, a vessel can be detained because of a port state control inspection. These inspections are currently carried out by inspectors from the Ministry of Transportation.

Inspections are normally based on documents and certifications to verify the normal condition of the ship, her equipment and crew. Detailed inspections are to be conducted if documents are not available or if there are grounds for the existence of risks for safety or the environment. Any non-conformities must be rectified before the vessel is allowed to sail.

Nevertheless, vessels are not to be detained if deficiencies found are not possible to be corrected in the same place. The maritime authority will, therefore, authorise the vessel to sail to any other port subject to appropriate conditions and provided it is not exposed to excessive risks regarding safety and the environment.

Vessels that have been subject to accidental damage en route to the specific port are not to be detained if adequate notice was given to the flag state administration and the port state control, and under specific requirements.

Law stated - 2 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

There are no relevant provisions in the Navigation Act 2021 regarding appeals against detention orders or fines as a result of port state control inspections. Therefore, the general rules for appeals apply under the Organic Administrative Code, meaning that an appeal will be acknowledged by the Minister of Defence or their delegate.

If a fine is the result of an investigation into a marine casualty, it may be appealed before the national or regional director of the DIRNEA.

Also, in certain cases regarding breaches of constitutional rights, a constitutional action may be an option instead of an appeal. This must be submitted to a judge, who can order the immediate suspension of the administrative decision.

Law stated - 2 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

Certifications by classification societies that are members of the International Association of Classification Societies (IACS) are accepted in Ecuador. Any classification society that is not a member of IACS must register with the National Maritime Authority.

Law stated - 2 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

Under the general principles of Ecuador's civil law, a classification society can be held liable. For example, if a certification has been issued by negligent actions or omissions.

Law stated - 2 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

According to the Navigation Act, the Harbour Master can order the removal of wrecks when it constitutes a hazard to safe navigation.

Moreover, wreck removal orders are also based on environmental law. The Ecuador Constitution includes a strict liability principle for pollution incidents. Therefore, the shipowner is obliged to minimise or prevent any pollution that may come from wrecks.

Law stated - 2 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Ecuador is not a party to the Brussels Collision Convention 1910 but most of its principles have been introduced in the new Code of Commerce 2019 in regard to apportioning liabilities, time bars (prescription) and the non-existence of legal presumptions of fault, which also apply to internal waters.

Moreover, Ecuador is not a party to the Nairobi International Convention on the Removal of Wrecks 2007, but it is a party to the International Convention on Civil Liability for Oil Pollution Damage CLC. In regard to pollution, the Constitution of Ecuador states that actions in regard to pollution have no prescription term.

Ecuador is a party to the International Convention on Salvage 1989 and the Code of Commerce reflects its principles.

Law stated - 2 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement, but the Lloyd's Standard Form is normally used for international vessels. For some incidents involving towage services, confusion may arise over whether the service is merely a towage service or a salvage operation, thus involving discussions on the fees. Certain towage services have specific rates determined by port authorities.

Salvage operations are regulated under the Ecuador Navigation Act 2021 and the Code of Commerce 2019.

The Ecuador Navigation Act 2021 states that no salvage operation may be undertaken without the consent of the vessel's master or shipowner, according to the principles of international maritime law. It mentions that costs, expenses and rewards are to be paid according to a regulation that will be issued in the future. Salvage operations must be authorised by the harbour master and failure to comply is a breach of law that results in a fine.

The Code of Commerce 2019 regulations are the principles and rules of the International Convention on Salvage, 1989.

Law stated - 2 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Ecuador is a party to the International Convention on the Arrest of Ships 1999.

As a member of the Andean Community, Ecuador is subject to Community Decision 487 related to Maritime guarantees (mortgages and liens) and the arrest of ships. This Decision is aligned with the provisions contained in the International Convention on Maritime Liens and Mortgages 1993, and the International Convention on Arrest of Ships 1999.

Law stated - 2 May 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

A petition to arrest a ship can be filed to obtain security but only for maritime claims. For a definition of what a maritime claim is our Code of Commerce submits to community law and international conventions to which Ecuador is a party. Therefore, the International Convention on Arrest of Ships 1999 and the Andean Community Decision 487 are to be applied. They are similar in terms of provisions regarding the arrest of ships.

Sister-ships can be arrested in Ecuador regarding maritime claims. Both the above-mentioned pieces of legislation state the general rule that with the exceptions of claims related to the possession or ownership of the vessel, an arrest can be executed of any other vessel that belongs to the person who is liable in the maritime claim, with the condition that when the credit or the claim arose that person was its shipowner, demise, time or voyage charterer. This does not apply to claims related to ownership or possession.

Concerning associated ships, Ecuadorian legislation does not contemplate pursuing claims against the beneficial owner for private purposes. There is a trend towards this, but to date, this is only related to credits in which the state appears to be the creditor.

Law stated - 2 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Ecuador is a party to the International Convention on Maritime Liens and Mortgages, 1993. Decision 487 of the Andean Community introduces the rules of this Convention. Therefore, the concept of maritime liens or 'privilege credits' is duly recognised under Ecuadorian law.

Moreover, the Code of Commerce 2019 submits the regime for maritime liens to International Conventions to which Ecuador is a party, and to community law.

Therefore, maritime liens are, in brief, related to these claims:

- monies to be paid to the master, officers and crew, their repatriation and social insurance contributions;
- personal injury or death, on land, on board or in water concerning the operation of the ship;
- salvage rewards;
- port, canal, pilotage fees, etc; and
- claims based on delict arising out of property loss or damage caused by the operation of the ship other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

In addition, the Code of Commerce grants the right of retention to the shipyard either for works related to shipbuilding or repairs.

Law stated - 2 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

According to Ecuadorian civil procedure law, the claimant has 15 days to file a lawsuit on the merits. If the lawsuit is not filed then the other party can claim compensation.

Wrongful arrests fall under a general rule of civil law stating that all damage that can be attributed to malice or negligence of another person is to be compensated. Therefore, if a person or entity obtains the arrest of a vessel with the knowledge that its petition is not legitimate, then the affected party may claim damages.

Nevertheless, wrongful arrest actions are rare in Ecuador.

Law stated - 2 May 2024

Bunker suppliers

26 |

Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

It may not be the case that a bunker supplier can arrest a vessel in relation to contractual relations with a time charterer and not with the shipowner. It may be possible if the case is related to the demise charterer.

Law stated - 2 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

According to Andean Community law and the Code of Commerce, judges may require security for the arrest of vessels. The amount is to be decided by the judge.

Law stated - 2 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

No provision allows for the amount of security to be calculated. Anyway, according to the Code of Commerce, the amount of security shall not exceed the value of the ship. The judge is entitled to determine the value of the security, and this amount can be changed upon request by the arrested party.

Law stated - 2 May 2024

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

Claimants or their representatives must sign the arrest petition. Therefore, unless the claimant is personally in Ecuador, a power of attorney is mandatory to file the petition. The arrest petition is a complaint. Therefore, the same rules as for filing complaints apply.

Moreover, in Ecuador, powers of attorney for representation before courts of law must be executed before a notary public, and only in favour of a lawyer. If the power of attorney is issued outside Ecuador then the document must be authenticated by the Ecuadorian Embassy. However, the Embassy's authentication can be skipped if the document is apostilled. Ecuador is a party to the Hague Apostille Convention.

Ecuador courts are very formal and always require originals or certified copies for documents to be admitted as evidence. Translations executed abroad are recognised if they are notarised and apostilled (or legalised). Notably, local translations of documents are also admitted in court.

Law stated - 2 May 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

The judge appoints a judicial depository to oversee the vessel and formally the depository is in charge of her maintenance. In practice, this is not often the case.

Law stated - 2 May 2024

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

The general rule is that if a vessel in Ecuador is subject to an arrest, then the judges in Ecuador have jurisdiction over the merits of the claim unless parties have agreed on a different jurisdiction or arbitration.

Law stated - 2 May 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

The Code for Administrative Affairs includes a provision in which the administration can order the arrest of a vessel as a precautionary measure. Moreover, the Ecuador Navigation Act 2021 states that the harbour master can request security to guarantee third-party claims regarding a marine casualty investigation before a ship sails.

In relation to pollution incidents, the Ecuador Navigation Act 2021 forbids a vessel involved in a pollution incident from sailing until security is provided in the amount stated by the harbour master to guarantee payment of damages without prejudicing the payment of fines and the costs of cleaning, remediation, mitigation and compensation.

Law stated - 2 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Yes, our Procedural Code states several options for the preservation of evidence as a preliminary action. These options include, for example, judicial inspection and depositions.

Regarding criminal law, prosecutors and criminal judges may exercise urgent actions to preserve evidence of retention of property for investigative purposes.

Law stated - 2 May 2024

Bunker arrest and attachment**34** | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

The arrest of bunkers falls under the scope of general rules for the arrest of goods stated in Ecuador's Code of Procedure. Therefore, according to the Code's specific terms, the arrest of bunkers could be an option.

Law stated - 2 May 2024

JUDICIAL SALE OF VESSELS**Eligible applicants****35** | Who can apply for judicial sale of an arrested vessel?

Creditors in a final judgment and mortgagees can apply for judicial sale of an arrested vessel.

Law stated - 2 May 2024

Procedure**36** | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The Code of Commerce 2019 states that the judicial sale of a vessel shall be conducted according to general rules of procedural law. In the case of vessels of more than 10 deadweight tonnage (DWT), the judicial sale is to be conducted as if the vessel were real estate.

The arrest is a precautionary measure. After the arrest, and if the losing party has not paid the debt, the judge will issue a new decree ordering the seizure of the vessel and the registration of the seizure.

After this, the judge will order the appraisal of the vessel by a judicial expert. Once the expert files its report the appraisal is discussed and decided in a hearing called by the judge. Once the appraisal is approved the judge names the date for the auction. All auctions, unless agreed by the parties, are to be conducted through the official website of the Council for the Judiciary.

During the first round, bids for the auction must be at least for the same amount the property was valued at, with an advance payment of at least 10 per cent. If offers include payment in instalments, then the initial payment shall be 15 per cent. Offers that include payment in instalments shall not include more than five years for payments. The creditor is not obliged to execute any advance payment.

Once offers have been submitted, then the judge will call a hearing to acknowledge all offers and to evaluate them to determine the winner of the auction. After this, payment should be made by the winning offer. With this requirement, the judge issues the decision that will serve as the title of the property to be registered in the harbour master's register of vessels.

Law stated - 2 May 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

Interested parties must appear before the judge in the relevant lawsuit and claim their respective priorities. Priority is conferred on maritime liens in the same order as stated in the International Convention on Maritime Liens and Mortgages, 1993. Hence, those mentioned maritime liens have priority over registered mortgages, hypothecs and charges. The Code of Commerce 2019 provides a right of retention to shipyards regarding claims for the construction or repair of ships that are ranked after the maritime liens and mortgages that were registered before the registration of the right of retention.

All costs related to the arrest and judicial sale of the vessel shall be paid before distributing the monies.

Law stated - 2 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

In the case of a valid judicial sale of a vessel the buyer will enjoy a clean title. All mortgages, hypothecs and charges are to be considered extinct. This is the same for maritime liens. However, there is a condition that the vessel shall be in Ecuadorian waters at the moment of the judicial sale and that all steps for the judicial sale have complied with what is stated in the International Convention on Maritime Liens and Mortgages 1993 and the Code of Commerce 2019.

Law stated - 2 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

A judicial sale of a vessel in a foreign jurisdiction would be recognised by maritime authorities but previous homologation will be needed before the Ecuador judiciary.

Law stated - 2 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Ecuador is a party to the International Convention on Maritime Liens and Mortgages 1993. It was published on 15 April 2004 in the Official Gazette number 314.

Law stated - 2 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Ecuador is a party to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and protocol of signature 1924 and its Protocol 1968 (Hague-Visby Rules) but is not a party to the SDR Protocol 1979.

Moreover, the Rotterdam Rules have not been ratified by Ecuador.

Law stated - 2 May 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Yes, as Ecuador is a member of the Andean Community, its Multimodal Transportation regulations apply. These regulations state that they are binding whether multimodal transportation begins or ends in a member state.

Law stated - 2 May 2024

Title to sue

43 | Who has title to sue on a bill of lading?

The general rule is that the lawful holder of the bill of lading has title to sue. However, other cargo interests can file lawsuits in delict for any alleged damages. Also, insurers can exercise subrogation actions.

Law stated - 2 May 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The Code of Commerce 2019 contemplates the possibility that the terms in a charter party are incorporated in the bill of lading. Also, a jurisdiction clause in a charter party in which terms are incorporated in the bill of lading is to be considered valid. This is a topic that has been much discussed, as in several cases judges have denied the validity of clauses in which the local party submits to a foreign law and jurisdiction and foreign arbitration application.

Law stated - 2 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

The general rule under the Code of Commerce 2019 is that the party executing the bill of lading as the carrier is liable. The Code also states that the transportation contract can include a clause that a performing carrier will take care of the transport and liability will be with the performing carrier. This provision is new and appears in article 1019 but it is ambiguous, generating confusion that may lead the validity of demise clauses to be rejected.

Law stated - 2 May 2024

Shipowner liability and defences

- 46** | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Liability can be determined by way of statute or the contract. For example, if cargo damage is a result of defective stowage by the vessel, then the Code of Maritime Police would be invoked because there is a provision that assigns the harbour master responsibility for proper stowage. The same applies to cargo damage owing to defects in the machinery or persons operating such machinery.

Moreover, the general principle is that according to the Code of Commerce 2019, the performing carrier is jointly liable with the contractual carrier.

Law stated - 2 May 2024

Deviation from route

- 47** | What is the effect of deviation from a vessel's route on contractual defences?

According to the Code of Commerce 2019, in a time charter, the shipowner must comply with the voyages according to contractual terms and agreed navigation zones. The owners are liable for damages to the cargo if those damages are the result of a breach of their obligations. The owners are also liable for damages to the charterer due to nautical fault of the master or crew unless they arose from instructions by the charterer in relation to the commercial management or use of the ship. These rules in the case of deviation may involve a voyage charter.

In regard to the liability to carriers, as stated in Rule 4.4 of the Hague-Visby Rules, there is no liability for damages that arise from a reasonable deviation or a deviation whose objective is to save lives or attempting to save lives or property.

Moreover, the charterer will be liable to pay all relevant costs upon its decision to deviate, to discharge cargo in any port or place on the vessel's route.

Law stated - 2 May 2024

Liens

- 48** | What liens can be exercised?

Liens that can be exercised are those determined in the International Convention Maritime Liens and Mortgages 1993. Besides, the Code of Commerce 2019 determines that the shipyard has a right of retention upon the vessel for claims in regard to construction or repairs of said vessel.

In regard to cargo, freight and sub-freight the Code of Commerce 2019 includes several provisions in which the owner has the right to claim against the charter and sub-charterers for non-payment of freight by the charterer.

The first rule states that the contract will state all rights to the owner in the case of non-payment of freight. Moreover, in the case of non-compliance in the payment of freight, the owners have the option of terminating the charter and petitioning a judge for the judicial sale of the cargo to recover the freight.

Law stated - 2 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

There are two relevant general rules in the Ecuador Code of Commerce 2019 regarding a carrier's obligations of delivery. First, the carrier must deliver cargo to a person determined against the receipt of the original bill of lading. Second, the carrier will be the custodian of the goods until they are delivered to the consignee.

If the bill of lading has been endorsed to a third person as a bank or other merchant and the cargo is delivered to the initial consignee without production of the original of the bill of lading, then the carriers will incur liability.

Law stated - 2 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

Under the Code of Commerce, the shipper is responsible for losses sustained by the carrier or damage to the ship if the losses are the result of fault or negligence by the shipper, as in the case of dangerous cargo. If the shipper does not declare the nature of the cargo, it will be liable before the carrier for any damages.

Law stated - 2 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Ecuador has not subscribed to the Annex VI of MARPOL. There is no ECA in force under local laws.

Law stated - 2 May 2024

Sulphur cap

- 52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

Currently, there is no cap under local law.

Law stated - 2 May 2024

SHIP RECYCLING

Regulation and facilities

- 53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

Ship recycling is regulated under the General Shipping Act 1972 and the Navigation Act 2019, by which the Undersecretariat of Maritime Transportation and the DIRNEA need to provide a licence and authorisation. In the resolution of 9 January 2014, the Undersecretariat of Maritime Transportation issued several rules for ship recycling.

Currently, there are two ship recycling facilities authorised to operate in Ecuador.

Law stated - 2 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

- 54 | Which courts exercise jurisdiction over maritime disputes?

Civil judges exercise jurisdiction over private maritime disputes.

Law stated - 2 May 2024

Service of proceedings

- 55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

According to the Code of Commerce, in the case of a lawsuit filed against a shipowner whose domicile is outside Ecuador, it is possible to execute the service through its agent.

Law stated - 2 May 2024

Arbitration

- 56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

There are several arbitration centres though they do not specialise in maritime arbitration. The most active are the Commercial Chambers arbitration centres.

Law stated - 2 May 2024

Foreign judgments and arbitral awards

- 57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Ecuador is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

In addition, the General Code of Procedure includes specific provisions for the recognition of foreign judgments.

Recognition or homologation must be performed before a panel of judges of the provincial court in the domicile of the defendant. The court will verify the external formalities to be considered as authentic according to Ecuador law: that the decision is final, duly translated if applicable, that the service of process was adequately executed and that parties involved had the proper opportunity to exercise a defence.

Once the suit is filed, the defendant is served and opposition can be filed in five days. The decision of the Provincial Court is final.

In relation to arbitration awards and agreements in mediation, a Presidential Decree has stated that they need no homologation.

Law stated - 2 May 2024

Asymmetric agreements

- 58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

In our opinion, asymmetric jurisdiction and arbitration agreements are valid. However, in Ecuador, there is an ongoing discussion as to whether submission clauses are valid in foreign law and jurisdictions. Several court cases have decided not to recognise these clauses as a breach of public law but other judges consider foreign jurisdiction submissions valid.

Law stated - 2 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Contesting jurisdiction must be done in the same lawsuit as a defence. The judge will issue its decision in the preliminary hearing. Another remedy is to file a jurisdiction claim before the judge who holds jurisdiction. This judge will then require the initial judge to step down from the case. If the initial judge declines, then the case will be decided in a provincial court.

Law stated - 2 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendants must provide the allegation of lack of jurisdiction as a defence in the same lawsuit. The judge will decide on jurisdiction in the first hearing. The decision can be appealed.

Law stated - 2 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

According to the Code of Commerce 2019, a prescription term can be suspended if agreed upon by the person who benefits from it.

The general terms are as follows:

Term	Duration of suspension
Payment of freight/demurrage	one year
Declaration of General Average (GA)	six months
Recovery of GA contribution	one year
Cargo claims under a bill of lading	one year
Collision	two years *

Claims for damages in delict by non - passengers †	four years
Other actions	two years ‡
Cargo claims in international multimodal transportation to/from a member of the Andean Community	nine months
* Three years if the ship could not be detained or sued while she was in national waters	
† Injury or death cases, property damages cases	
‡ Contractual or in delict	

In relation to subrogation actions, there has been a discussion regarding a time bar. Currently, the Ecuador Code of Commerce 2019 states that insurance-derived relations are prescribed for three years as opposed to the Code of Commerce 1960, which stipulated a two-year time bar. In contrast, the Code has always kept the principle that defendants in a subrogation action have the same defences that they would raise against the insured. This principle was ratified by the decision of the National Court on 10 May 2011 in relation to *La Union v Panalpina*, in which the judges decided that the prescription time was the same related to the insured's right to sue. In this case, the claimant's attempt to have a two-year prescription term was dismissed.

Contrary to said decision, on 12 November 2012 in *Ecuadoriano Suiza v Maersk del Ecuador* the judge decided that even when the prescription for a direct claim is one year the claim by the insurer originated in subrogation rights under an insurance agreement and, therefore, the two-year prescription term applied.

Finally, with the enactment of the Code of Commerce 2019 judges have begun deciding with the principle that the defendant is able to raise the same defences. As an example, said principle was applied in *Zurich v NYK Bulk and Project Carriers*, in which the judges accepted the time bar defence for one year in relation to transportation by sea under a bill of lading as stated in local law and Hague-Visby Rules.

Law stated - 2 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

If a claim in a lawsuit is served on process within six months of being filed then the interruption of prescription shall be considered as the moment the complaint was filed, according to the Procedural Code.

Moreover, the Code of Commerce states that prescription terms for merchants are to be counted from the date those actions or rights can be enforced. The understanding is that this provision relates to the *contra non valentem* doctrine, but there are no other provisions to apply this principle.

Courts or arbitral tribunals cannot extend time limits in relation to prescription unless the benefited party agrees, but they can declare that terms in the specific lawsuit are not valid because of an agreement by the parties or a force majeure situation, to avert a declaration abandoning the lawsuit.

Law stated - 2 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Ecuador is not a party to the Maritime Labour Convention (MLC) 2006 nor to the Work in Fishing Convention 2007.

In January 2022, the legislature approved the Convention and is now pending a decision by the President of the Republic for ratification purposes.

Law stated - 2 May 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

The general rule is that a contract is law for the parties involved. Therefore, any change to contractual obligations must come via the agreement of the parties. The option in regard to a change of economic conditions or any other condition is to verify whether this situation could be considered as force majeure.

Law stated - 2 May 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Yes. [A new statute for aquaculture and fishery was introduced in 2020.](#)

Law stated - 2 May 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Ecuador Navigation Act 2021 was recently enacted. This is a fundamental change in Ecuadorian maritime law that confers the Ecuador Navy with full power as the maritime authority. Upon enactment of the Act, the President issued the general regulation and more regulations will likely come in the future to adapt internal regulations to the new Act.

Moreover, the Maritime Labour Convention (MLC, 2006) was recently ratified. It is expected that internal regulations will be enacted for the application of the Convention.

In addition, it is pending ratification to The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea HNS, which was accepted by the Constitutional Court.

Law stated - 2 May 2024



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UPDATE AND TRENDS

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

The ownership of the ship shall be held by the shipbuilder, and shall not be transferred to the principal ordering its building except after the ship is handed over and tested by the principal. However, the Egyptian Maritime Law allows the parties to agree on other conditions determining the period for transferring the ownership of the ship.

Law stated - 15 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

There are no specified formalities by law, as the legislator leaves this to mutual agreements between parties.

Law stated - 15 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Egyptian law gives the principal ordering the building of the ship the right to resort to a competent court seeking to oblige the yard to deliver the ship. However, the court will investigate the reason for refusing to let the yard deliver the vessel and whether the principal performed its obligations as per the conditions of the contractual agreement between the parties to build the vessel.

Law stated - 15 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Under Egyptian Maritime Law, the shipbuilder will be liable for hidden damage or defects resulting from manufacturing faults. Furthermore, the shipbuilder shall guarantee that the ship will be free of hidden damages and defects, even if the principal ordering its construction accepts the ship after testing it. Moreover, the Egyptian Maritime Law defines

that the action to guarantee that a ship is free of hidden damages and defects shall lapse after one year, calculated from the date the damage or the defect was known. Likewise, the action shall lapse after two years from the time the ship is handed over, unless the shipbuilder is proven to have deliberately hidden the defect in advance.

Law stated - 15 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Generally, all types of ships are eligible for registration under the Egyptian flag. A vessel shall acquire Egyptian nationality if it is registered in an Egyptian port with a name accepted by the competent administrative quarter, which will review the vessel's certificates and sketches. The ship's name and register number shall be put up in a prominent place, according to such provisions prescribed in a decree by the competent minister. However, foreign cargo vessels that can acquire the Egyptian flag shall not exceed 20 years from the year of build. This period is reduced to 15 years in the case of passenger ships.

It is also not possible to register a ship under construction under the Egyptian flag. The shipowner is entitled to apply for registration while the vessel is under construction, but the registration will not be executed until the construction is complete and the vessel is in the water.

Law stated - 15 May 2024

6 | Who may apply to register a ship in your jurisdiction?

The physical or juridical Egyptian person. If the vessel is jointly owned, the majority of shares should be held by Egyptians for the ship to acquire Egyptian nationality.

Law stated - 15 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

The essential documents required for registration are:

- a construction certificate in the case of newly built vessels or the vessel's bill of sale clarifying that it has been sold to an Egyptian company or person, and detailing that there is no mortgage on the vessel and the vessel's classifications;
- Egyptian party documents, such as the commercial registry that details the purpose of the company that owns vessels and the company's article of association; and

- the deletion certificate.

The technical documents required are:

- a general chart of the vessel (accredited by one of the International Association of Classification Societies (IACS) rating agencies);
- balance and immersion calculations;
- load measurements according to Egyptian rules (Oslo 47);
- a capacity plan approved by one of the IACS rating agencies;
- the plate thickness report at the beginning of the design and the latest sheet thickness measurement report;
- ship compliance report for the requirements of the International Rules for the Prevention of Collisions at Sea 1972;
- a fire scheme (certified by a member of IACS);
- a certificate of validity issued by the previous flag state as well as classification bodies;
- ship plans (marine oil pollution plan, garbage disposal plan, maritime security plan, ballast water management plan); and
- a report concerning dry dock for the ship and the works carried out and approved by one of the IACS classification societies.

Law stated - 15 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Egyptian vessels may not fly another flag as such an act is not commensurate with Egyptian law.

Law stated - 15 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

An official copy of the mortgage contract shall be submitted to the ship's registration office, accompanied by two statements signed by the applicant for registration comprising, in particular, the following:

- the names of each of the creditor and the debtor and their respective addresses and professions;
- the date of the contract;

- the amount of the debt as indicated in the contract;
- the conditions for debt settlement;
- the name of the mortgaged ship and its descriptions, including the date and number of the registration certificate or a declaration of ship construction; and
- the creditor's elected domicile in the precinct of the registration office where the entry was processed.

Law stated - 15 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The Egyptian Maritime Law allows the shipowner to limit its liability, even if the debt is in favour of the state or the public sector, if the damages falls under the following categories:

- damage caused by the ship to the harbour's installation, dockyards, watercourses, or navigational aids;
- physical or material damages occurring on board the ship; and
- physical or material damages directly connected with maritime navigation or the operation of the ship.

The shipowner is not the only party who has the right to limit liability. Pursuant to the provisions of Egyptian Maritime Law, the limitation of liability can also be applied in respect of the ship's operator, who is not the owner, charterer, manager, master or seaman, in addition to other subordinates of the owner, operator, charterer or manager, as regards the performance of their duties and according to the same conditions as those applicable to the owner, provided always that the owner's liability, as well as his or her subordinates, shall not exceed the limits set down in the Egyptian Maritime Law with regard to the same accident. The law also grants the right to apply a limitation to the master or seamen if proceedings are brought against them.

Egypt has ratified the London Convention on Limitation of Liability for Maritime Claims (LLMC 1976). Therefore, if a claim is brought before the Egyptian courts and involves the persons defined in the LLMC 1976 as parties to the convention, the said persons shall be entitled to seek the application of the convention's limitation of liability provisions. However, we cannot yet ascertain when the new limits will come into effect as Egypt has not yet adopted the 1996 protocol. The provisions of any international convention Egypt does not ratify do not come into effect until local legislation (a law or decree, as appropriate) is rendered, allowing the implementation of such a convention.

Law stated - 15 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Although Egypt is a signatory to the LLMC 1976, there are no specification formalities for establishing a limitation fund in Egypt. Also, the Egyptian Maritime Law does not regulate the procedure for setting one up. Meanwhile, the shipowner must present a limitation defence before the court when the litigation process starts and insist on applying it to the claim brought against it.

Law stated - 15 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The limitation rules are to be considered as a defence to be raised before the court during the litigation process and thus it will be up to the court's own discretion as to whether it allows such a defence or not, especially as the formalities of establishing a fund are not specified or regulated by the Egyptian Maritime Law.

Limitation of liability shall not be applied to:

- floating a sunken, stranded or deserted ship, lifting wrecks or cargo, and objects found on them;
- salvaging the ship;
- participating in general average;
- nuclear damage;
- the rights of the ship's master, crew and all other subordinates to the shipowner working on the ship or whose job is related to serving the ship. This right is also determined for the successors and heirs of the said persons; and
- damage resulting from oil pollution and contamination by other materials.

The limitation rules shall not also apply in cases where the claimant established by proof that damage resulted as a result of:

- a deliberate act on the part of the carrier;
- the carrier deliberately refraining from carrying out an act with the aim of causing harm; or
- the carrier's recklessness accompanied by an awareness that the act might result in causing such damage.

Law stated - 15 May 2024

Passenger and luggage claims

- 13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Egypt has acceded to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (PAL 1974). However, if the Convention is not applied in certain cases the Egyptian Maritime Law will be applicable, which determines the limitation of the carrier's liability in the event of a passenger's death or injury. This law also determined a limitation for damage or loss occurring to the passenger's recorded luggage, as well as for cars or other vehicles. The limitation may not be applied if the accident occurred due to an act by the carrier, or negligence of the carrier designee combined with the aim of causing harm, or owing to carelessness or recklessness coupled with a perception that harm could occur.

Law stated - 15 May 2024

PORT STATE CONTROL

Authorities

- 14 | Which body is the port state control agency? Under what authority does it operate?

The Port State Control of Egypt is a department of the Egyptian Authority for Maritime Safety, which is one of the Ministry of Transport's 'Maritime Sector' institutions.

Law stated - 15 May 2024

Sanctions

- 15 | What sanctions may the port state control inspector impose?

The Port State Control inspector has the authority to prevent a vessel from departing any Egyptian port or delaying a vessel for a designated period until the vessel carries out the requested rectification work or completes the necessary certificates. In some cases, the inspector will leave the vessel with a warrant to carry out the requested repairs at the next port of call.

Law stated - 15 May 2024

Appeal

- 16 | What is the appeal process against detention orders or fines?

In general, the ship's classification society, or in some cases its flag state, are the ones that tend to meet the requirements of the Port State Control.

A ship can always protest against the decisions of the Port State inspector to higher-ranked officials of the same authority if it is deemed that the original inspector's decisions are somehow arbitrary.

Finally, there is always an option to resort to litigation to challenge any decision that can be proven to be lacking legal grounds or that is abusive.

Law stated - 15 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The Port State approves most, if not all, of the classification societies. However, the Egyptian flag only recognises the 12 International Association of Classification Societies member societies.

Law stated - 15 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

Usually, a classification society is not to be held liable for deficiencies or any remarks, and the observations the port state control inspectors may have with respect to a particular vessel, despite the fact that the classification society is responsible for issuing and validating the majority of a vessel's certificates except for the following four certificates, which are to be issued by the ship's flag:

- the ship's register certificate;
- the ship's station licence;
- the ship's minimum safe manning certificate; and
- the ship's continuous synopsis record.

Should inaccurate or falsified certificates (in the eyes of the port state control) be issued by a specific classification society, the society will lose its credibility before the Port State Control, which will have the right to double-check any certificates issued by the society or, in a worst-case scenario, temporarily suspend dealings with that society.

Law stated - 15 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Yes, a competent local authority can order wreck removal.

Law stated - 15 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Egypt acceded to the Convention for the Unification of Certain Rules of Law with respect to Collisions Between Vessels 1910, as well as the International Convention on Salvage 1989, but concerning International Convention on Salvage 1989, it has not yet been implemented because the parliament has not yet passed a law on it. The provisions of any international convention Egypt may ratify do not come into effect until a local legislation is rendered allowing the implementation of such convention.

Moreover, Egypt acceded to the Protocol to the International Convention on Civil Liability for Oil Pollution Damage 1969 and the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage 1969.

Law stated - 15 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

We must differentiate between whether the salvors are a governmental authority or entity or not, as in the latter case, the form or conditions of the salvage agreement will be decided upon freely between the ship's owners and the salvors, whereas if the salvors that are governmental entities dictate the terms.

Whenever the salvage operation is carried out within port limits or within the Suez Canal waters, the operation will be carried out by the use of the Port Authority or the Suez Canal Authority tugboats. In some cases, the Egyptian Navy may attempt to take matters into its own hands. In addition, the Lloyd's standard form is acceptable in Egypt.

Law stated - 15 May 2024

SHIP ARREST

International conventions

- 22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Egypt ratified the Brussels Convention 1952 and has not ratified the International Convention on the Arrest of Ships 1999.

Law stated - 15 May 2024

Claims

- 23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

An arrest could be applied for security owing to a claim, which would fall within 'maritime claims' as defined in the 1952 Arrest Convention, a concept that the Egyptian Maritime Law has adopted. Moreover, in the event that the ship subject to the creditor's claim is not available, under Egyptian Maritime Law the creditor can apply to arrest a sister ship owned by the claim debtor. However, for claims related to disputes over the ship's ownership, or disputes over common ownership of the ship, disputes over holding or exploiting and using it, or a marine mortgage, the arrest shall be applied only to the ship subject to the debt.

Generally, the concept of arrest is to determine a security on the creditor over the ship that is related to his or her debt. Therefore, there are no restrictions on a third party applying an arrest for security on the ship, subject to his or her debt. Meanwhile, the shipowners could raise the defence on his or her liability under bareboat charter party or time charter party before the court if an arrest has been successfully applied.

Law stated - 15 May 2024

Maritime liens

- 24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

The Egyptian Maritime Law recognises the concept of maritime liens, as the creditor could exercise a lien on cargo that is in the creditor's custody and owned by the debtor.

Law stated - 15 May 2024

Wrongful arrest

- 25 | What is the test for wrongful arrest?

If an aggrieved party proves that a wrongful arrest occurred in bad faith or due to the ultimate failure of a claim, they have the right to instigate a compensation or recovery action against the arrest applicant.

Law stated - 15 May 2024

Bunker suppliers

- 26** | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

The bunker supplier could apply to arrest a vessel in connection with a claim for the price of the bunker supplied to that vessel as a security, even if that debt is exclusively the responsibility of the charterer who assumes the vessel's navigational management.

Law stated - 15 May 2024

Security

- 27** | Will the arresting party have to provide security and in what form and amount?

No security from the arresting party is required to be provided as a security to apply before the competent judge for obtaining an arrest order.

Law stated - 15 May 2024

- 28** | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

As stipulated in the Egyptian Maritime Law, the competent judge is entitled to issue another order to lift the arrest if the execution debtor submitted a security sufficient to cover the debt under which the arrest is imposed. And, in such cases, the effect of the arrest will be transferred to the security, the vessel will be allowed to sail and the security will be held by the court until final judgments are issued in the consequential legal actions to be filed by both litigants (the affirmation of arrest or objection on the arrest).

Egyptian courts are familiar with banks' letters of guarantee as acceptable security for transferring the effect of the arrest from the vessel to the submitted letter of guarantee.

Practically and legally speaking, the amount of security is not bonded by the value of the vessel and, in some cases, it does exceed the value of the ship.

Law stated - 15 May 2024

Formalities

- 29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

First, the arrest application shall be submitted through a lawyer according to a power of attorney (POA) empowering them to attend before the court on behalf of the arrestor. Second, a detailed explanation of the claim must be prepared by the lawyer of the arrestor including reasons for applying for security and detailing the claim amount. Third, all of the relevant documents must be submitted in hard copy by the applicant before the court proving the claim and its quantum, showing that the debt is a maritime claim and the subject vessel is berthing at an Egyptian port. However, the supporting documents should be original documents and officially translated into Arabic to be accepted by the Egyptian courts, otherwise, the chances of obtaining an arrest order from the court will not be good. The preparation for submitting the arrest application can take between two and three days if the POA and the supporting documents are ready.

Law stated - 15 May 2024

Ship maintenance

- 30 | Who is responsible for the maintenance of the vessel while under arrest?

The owner of the vessel is the party responsible for the vessel's maintenance as the vessel is under his or her custody and management. Furthermore, the owner of the vessel will be the aggrieved party if any harm is sustained to the vessel during the arrest period.

Law stated - 15 May 2024

Proceedings on the merits

- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

According to Egyptian Maritime Law, if accepted, the applicant is entitled to file a court case affirming the arrest order within an appropriate time from the date of executing the arrest order, otherwise the arrest order will be considered null and void. So, any granted arrest order is usually followed by an affirmation action to be issued by the arresting party in which the arrestor will try to establish the righteousness of the merits of his or her claim.

Having said that, theoretically and legally speaking, the Egyptian courts shall be competent to deal with the provisional and conservative measures that are carried out in Egypt, even if they are not competent to examine in the original case. And in such cases, the applicant may request the court in the affirmation of the arrest legal action to suspend

the proceedings associated with the arrest taking place in Egypt until the competent court abroad decides on the merits of the dispute. It will be at the Egyptian's court discretion whether to allow the request of suspending the proceedings.

Law stated - 15 May 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

There are no other forms of attachment orders or injunctions available to obtain security.

Law stated - 15 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

It is possible under Egyptian law to file an urgent case before the court seeking to deliver evidence or property available from the opponent.

Law stated - 15 May 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

The principal rule under Egyptian law is that the creditor may apply before the court to obtain an order to arrest the assets of the debtor as security for the claimed debt. The court would consider such an application and may or may not grant the said order.

On the other hand, as far as the arrest of bunkers is concerned, from our vast experience in such disputes, Egyptian courts are extremely reluctant to grant these kinds of orders of arrest. Furthermore, if the courts grant such an order it would be difficult to enforce it owing to the facilities needed to execute it.

Law stated - 15 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

The creditor who has an executive deed accepted by the Egyptian courts may apply for judicial sale of an arrested vessel owned by the debtor.

Law stated - 15 May 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

If a court orders the sale of a vessel the creditor shall prepare a notice about the sale, which shall be published in a daily newspaper. The sale conditions shall also be affixed at the office of registration of the ship, on the ship itself, and at any other place to be determined by the court. The notice shall include all the required information on the vessel and the sale details. The sale process may take around three to six months from the date of the court order by selling the vessel provided that none of the parties who requested the sale or the creditors has instigated legal actions to challenge the sale procedure.

The court's dues for selling a vessel in an auction are up to 2.5 per cent of the sale's proceeds.

Law stated - 15 May 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The following would exclusively constitute privileged rights against the proceeds of sale:

- court dues incurred in selling the vessel and distribution of the proceeds of sale;
- dues and taxes owed to the state or any public body, tonnage dues, port, towage and pilotage dues;
- the cost of watching and preservation and other maritime services;
- claims arising out of the contract of engagement of the master, crew and other persons hired on board;
- remuneration for assistance and salvage, and the contribution of the vessel in general average;
- indemnities for collision or pollution or other accidents of navigation, and indemnities for damages sustained to harbour installations, basins and navigable ways, indemnities for personal injury to passengers or crew, indemnities for loss of or damage to cargo or baggage; and
- claims resulting from contracts entered into or acts done by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its

voyage, whether the master is at the same time owner of the vessel, and whether the claim is his or her own or that of ship chandlers, repairers, lenders or other contractual creditors or because of an agent's acts.

Law stated - 15 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

Yes, the legal effect of the judicial sale of vessel is giving the purchaser clean title.

Law stated - 15 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Yes, according to the applicable law.

Law stated - 15 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Egypt is not a signatory to the International Convention on Maritime Liens and Mortgages 1993.

Law stated - 15 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Egypt has ratified the United Nations International Convention on the Carriage of Goods by Sea (the Hamburg Rules) and its conditions are applicable in Egypt.

Law stated - 15 May 2024

Multimodal carriage

- 42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Egypt is a signatory to the Montreal Convention 1999. In the case of combined transportation or multimodal bill of lading, each stage of transportation will be governed by its own law.

Law stated - 15 May 2024

Title to sue

- 43 | Who has title to sue on a bill of lading?

In general, the three parties of the bill of lading or any third party who has received any right from those three parties or the legitimate holder of the bill of lading are the parties entitled to instigate any legal action relating to the contract of carriage.

Law stated - 15 May 2024

Charter parties

- 44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The terms of a charterparty could be incorporated with the bill of lading if the bill of lading is issued pursuant to a charter party, and the charter party's terms govern the relationship between the carrier and the holder of the bill of lading, who is not the charterer.

If the charter party contains a provision by referring the disputes to arbitration and a bill of lading issued pursuant to the charter party. The arbitration clause provision must clearly state that the clause is binding on the bill of lading holder, otherwise the carrier's chances of invoking the provision against the third-party holder or endorsee will be poor.

Law stated - 15 May 2024

Demise and identity of carrier clauses

- 45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

Demise and identity of carrier clauses are not recognised or binding under the Egyptian Maritime Law.

Law stated - 15 May 2024

Shipowner liability and defences

- 46** | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Normally the cargo interests' claim should be oriented against the contractual carrier and the latter should be entitled to implicate the shipowner in the proceeding by means of a collateral sub-lawsuit.

If it is proved that the damage giving rise to a particular cargo claim occurred while the cargo was in the custody of the actual carrier and not the contractual carrier, the shipper will be entitled to claim jointly and severally from both the actual and contractual carrier for the value of the loss.

Law stated - 15 May 2024

Deviation from route

- 47** | What is the effect of deviation from a vessel's route on contractual defences?

Normally the cargo interests' claim should be oriented against the contractual carrier and the latter should be entitled to implicate the shipowner in the proceeding by means of a collateral sub-lawsuit.

If it is proved that the damage giving rise to a particular cargo claim occurred while the cargo was in the custody of the actual carrier and not the contractual carrier, the shipper will be entitled to claim jointly and severally from both the actual and contractual carrier for the value of the loss.

Law stated - 15 May 2024

Liens

- 48** | What liens can be exercised?

In the charter party, the owner of the vessel is legally entitled to exercise a lien on the cargo owned by the charterer if the latter fails to pay the required amounts to the owner. Another right given to the owner by Egyptian law is to exercise a lien on cargo that has not been delivered by the consignee.

Law stated - 15 May 2024

Delivery without bill of lading

- 49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

If the carrier fails to issue a bill of lading, it may run high legal risks. When a person other than the real receiver of the goods legally possesses the bill of lading, it usually constitutes a false delivery by the carrier.

Law stated - 15 May 2024

Shipper responsibilities and liabilities

- 50 | What are the responsibilities and liabilities of the shipper?

Once the shipper submits to the shipping line or agency a shipping declaration that includes the cargo's particulars, this is a clear disclosure of its intention to ship the goods via that shipping line to its desired route. Accordingly, the shipper has to withdraw the assigned empty container from the shipping agency's yard for stuffing and sealing, gating-in the container prior to the vessel's arrival for shipping on board the assigned vessel. It receives the original copies of bills of lading from the shipping line or agency once the vessel sails and sends these originals to the assigned consignee, enabling it to receive the goods at the port of discharge. If the receiver nominated by the shipper does not deal with the carrier's agent at the port of discharge, the shipper is then liable as regards the carrier for compensation because of undelivered cargo. Moreover, the shipper is responsible for loss or damage sustained by the carrier or the ship resulting from the shipper's cargo or shipper's fault or neglect, its agents or its servants.

Law stated - 15 May 2024

SHIPPING EMISSIONS

Emission control areas

- 51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Within the limits of the ports and the Suez Canal waters, the competent authorities are entitled to impose fines on vessels emitting heavy smoke.

Law stated - 15 May 2024

Sulphur cap

- 52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

So far, Egypt has not ratified the MARPOL Annex VI regarding provision. The prevention of air pollution from ships is presently governed by both the Egyptian law for the environment and internal ports' regulations. According to Egypt's environmental law, the percentage of sulphur should not exceed 1.5 per cent. In the case of non-compliance, the port authority normally asks the vessel's local agents to pay the penalty and may deduct this amount from the agents' bank guarantee, which it withholds.

Law stated - 15 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction?
| Are there any ship recycling facilities in your jurisdiction?

No, there are no laws or regulations controlling ship recycling in Egypt. The vessels usually come to dry dock for scrapping and not for recycling.

Law stated - 15 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The Egyptian Economic courts are the only ones that deal with maritime dispute cases, in the light of a new legislation adopted in Egypt.

Law stated - 15 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The laws governing the service of the court proceedings are the general rules stipulated in the Egyptian Procedure Law for Civil and Commercial Matters.

If the defendant is located abroad and has an agent in Egypt, notification should be given to the defendant's agent. In the absence of a local agent in Egypt, the law requires such documents to be served through diplomatic channels.

Law stated - 15 May 2024

Arbitration

- 56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The Cairo Regional Centre for International Commercial Arbitration is an internationally recognised arbitration centre in Egypt that deals with maritime cases.

Law stated - 15 May 2024

Foreign judgments and arbitral awards

- 57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Egypt has duly acceded to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards, and the Egyptian Procedures Law for Civil and Commercial Matters stipulates the formalities of enforcing the foreign judgments and arbitral awards.

Law stated - 15 May 2024

Asymmetric agreements

- 58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

The Egyptian legislator recognises the principle that agreements must be kept, and thus the disputing parties should be entitled to agree resorting to arbitration and the arbitration clause should be binding on both contracting parties.

Law stated - 15 May 2024

Breach of jurisdiction clause

- 59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

The principle of domestic jurisdiction is not one of the public order rules, and thus a defendant who insists on the application of the arbitration clause has to clearly raise, and insist on, the defence related to the local court's competency to rule over such dispute before raising any subjective defence related to the merits of the dispute itself. In normal cases, the court should examine the jurisdiction's defence and decide upon it before examining the subjective aspects of the case.

Law stated - 15 May 2024

- 60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The principle of domestic jurisdiction is not one of the public order rules, and thus a defendant who insists on the application of the arbitration clause has to clearly raise, and insist on, the defence related to the local court's incompetency to rule over such dispute before raising any subjective defence related to the merits of the dispute itself. In normal cases, the court should examine the jurisdiction's defence and decide upon it before examining the subjective aspects of the case.

Law stated - 15 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

- 61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The Egyptian maritime law stipulates a time bar of two years for most claims of a maritime nature, whereas Egyptian civil law stipulates a time bar of three years with respect to the liability in tort. Such periods are binding and it is not permissible to agree on the appliance of different periods. However, the party beneficiary of the statute of limitations is entitled to waive the time bar defence provided that this waiver is presented following the completion of the limitation period.

Law stated - 15 May 2024

Court-ordered extension

- 62 | May courts or arbitral tribunals extend the time limits?

The courts or arbitral tribunals cannot extend time limits.

Law stated - 15 May 2024

MISCELLANEOUS

Maritime Labour Convention

- 63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

According to Egyptian law, conventions are legally binding and have force over the law.

Law stated - 15 May 2024

Relief from contractual obligations

- 64** | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

A party can seek relief from its obligation without compensating the other party for non-execution if it becomes impossible for the obligation to be executed. In this respect, at its own discretion, the court may allow the aggrieved party's request for a partial relief of its obligations to proportionate unexpected new economic conditions.

Law stated - 15 May 2024

Other noteworthy points

- 65** | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Law stated - 15 May 2024

UPDATE AND TRENDS

Key developments of the past year

- 66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Egyptian government is currently drafting a new law for Egyptian Maritime safety, which shall affect the procedures for the registration process, the Egyptian flag and the cabotage. It is under review.

Law stated - 15 May 2024



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Germany is one of the few jurisdictions that makes a difference between passing of the title and payment of the price owed on the basis of the underlying contract. In a way, the transfer of title of a separate agreement between the parties with the sole aim to agree on the passing of the title. This is referred to as the principle of separation and abstractions under German law. The parties are therefore free to agree that the title in the ship can change at any time, which is mostly made upon payment of the last instalment under a newbuilding contract.

There are also rules regarding the transfer of title by law, like when a part is used in a new, bigger segment or if supplies are changed in structure when used. However, it is also possible and common to retain the title until payment is received in full, thus to determine when the title was actually passed, the whole situation including first the shipbuilding contract, and then the contracts with third-party suppliers, the process of manufacturing. German law also allows registration of a vessel under construction after keel laying in a dedicated register that can secure the later transfer of title by a specific caveat together with the registration of mortgages.

Law stated - 22 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

The form and the content of a refund guarantee are only limited by general legal principles regarding the validity of an agreement and the parties are basically free to agree on every mechanism they deem fit. If the guarantee should be directly enforceable, it must be made in writing (wet ink signature). It is further common to detail the duration of the guarantee, which can also be established by a certain action or event, and to include waivers of defences against the enforcement, such as making the guarantee due in the first demand of the creditor.

Law stated - 22 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

If the delivery of the vessel is refused by the yard despite the obligation under the shipbuilding agreement to do so, it would be possible to compel the yard to release

the vessel with a temporary injunction. The court will then test on the basis of prima facie evidence whether the right to have the vessel released has been wrongfully denied. However, to be eligible for such temporary court judgment, the applicant needs to also provide sufficient evidence of the urgency of the release, otherwise only the general application to release the vessel, made to the competent German court is possible.

For an application to release the vessel on the basis of a temporary injunction, the competent court at the location of the vessel will have jurisdiction unless the main action is already otherwise pending. Under Brussels I Regulation, German courts will also acknowledge and implement rulings of European courts as temporary injunctions if the basic requirements of article 42 paragraph 2 and article 2 lit a of the Regulation are met. In case there are judgments from foreign courts outside the European Union, it remains to be established first whether they can be enforced in Germany as well.

Law stated - 22 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

The codified German contractual law does allow for an unlimited claim for rectification first of any defects and will, if such rectification fails, is denied by the yard, or is not possible, grant a claim for compensation of damages in an unlimited amount, up to the total interest in a vessel free of defects, including consequential losses such as loss of profit, loss of business and even loss of goodwill.

It is therefore very common to detail the rights and obligations in case of defects in the shipbuilding agreement and limit the compensation of damages to any direct losses and include time bare periods for any claims to be made. This limitation is possible, unless any defects are caused by wilful misconduct, or a person is harmed. German law will recognise the shipbuilding agreement as the primary source of any liability unless it conflicts with the named mandatory rules.

Thus, the liability is first established between the parties of the agreement only but can be assigned to any subsequent buyer of the vessel, up to the extent originally agreed under the shipbuilding contract.

Further, the German Product Liability Code only details liability if the product causes damage because of its deficiencies, not damage to the product itself, but would apply in case the yard does not fulfil its obligations and therewith causes harm to other items or persons, which is a liability towards third parties.

Law stated - 22 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

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5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

In the German register of seagoing commercial vessels, a distinction is made between:

- the registers of seagoing vessels (also called the first register); and
- the International Shipping Register (ISR, also called the second register).

There is no German nationwide uniform first register, but the registers of seagoing vessels are kept by certain district courts. The respective jurisdiction depends on the home port of a ship. Sea-going vessels over 15 metres in length owned by German owners have to be entered in a maritime register. Shorter ships can be registered if the owner wishes. A tonnage certificate needs to be provided as pre-requisite for the registration. If a vessel is owned by a non-German owner, it can be registered in Germany in the first register upon application of the owner, but it is mandatory to have a German flag agent, assuming the responsibilities towards the German authorities for the vessel.

If a vessel is only supposed, either by its construction or operation, to trade solely within German inland water, it will be registered in the ship register with this purpose.

The German first register also allows for the registration of natural persons as owners as well as joint owners, or owners by share.

The ISR, on the other hand, is a uniform register and is administered by the Federal Maritime and Hydrographic Agency. Entry in the ISR (second register) is not mandatory, but allows vessels owned by German owners to fly a foreign flag while remaining registered in a German register as underlying register.

A separate ship construction register is kept at the local court at the location of the yard and allows ships or floating docks (ship constructions) that have not yet been completed to be entered if they are to be encumbered or foreclosed. The registration is voluntary and only possible if a ship mortgage is registered at the same time, or a compulsory auction is applied for. The entries must therefore be complete and credible, as they are required for the purposes mentioned.

Law stated - 22 May 2024

6 | Who may apply to register a ship in your jurisdiction?

Every vessel owned by a German citizen or German company must be registered in one of the German ship registries. The German register rules follow the principle of territoriality. However, upon application to register the vessel in the German second register, approval can be granted for the vessel to fly a foreign flag. The German register allows both natural persons and companies to be registered as owners, as well as joint owners or owners of shares.

All non-German citizens can apply for the registration of their vessel in the German first register, including the German flag, and are eligible to be registered in their foreign legal form as well, but have to appoint a German flag agent who will then assume the responsibility for the registration of the vessel towards the German authorities.

Law stated - 22 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

To register a vessel in one of the German ship registers, the notarised application needs to state the details of the requested registration and include the following documents:

- international tonnage certificate;
- copy of the bill of sale (for a ship already in service) or shipyard construction certificate (for newbuildings);
- copy of commercial register extract;
- copy of the personal identification document of the managing director of the shipowning company; and
- on the day of changing the flag, deletion certificate from the previous flag registry (for ships already in service).

To be allowed to fly the German flag, all requirements regarding the safety of the vessel and its operations need to be met. A complete list of the necessary documents and certificates can be found [here](#).

Law stated - 22 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

As the registration of a vessel owned by a German citizen or company is mandatory in one of the two German ship registers, it is very common to apply for the permit to fly a foreign flag and register the vessel in the second German register. The permit can be granted up to the maximum duration of two years and is subject to a compensation fee for the support of the German shipping trade. Upon receipt of this approval, the vessel can be bareboat registered in every other register that allows a bareboat registration or provides a flag registration only. The same applies to all foreign owners who voluntarily registered their vessel in a German register.

Upon bareboat registration in a foreign register, vessels will continue with the German register as underlying register, evidencing the ownership.

Due to the structure of the German ship registers, no bareboat registration or flag registration without full registration of the ownership in Germany at the same time is possible.

Law stated - 22 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

Each German ship register has a separate register for mortgages, kept for each registered vessel. An instrument duly notarised is eligible for registration. The information to be published is at the discretion of the creditor, however, it needs to be sufficient to identify the secured obligation and the creditor beyond doubt. It is not necessary to register the amount, but very common. The same applies to the underlying finance document. It is also possible to register mortgages as cross-collateral or as joint security.

Upon registration, the register will also record the date of the registration and the name of the person making the recordation.

If there are more than one mortgage, the rank will be determined on the basis of first registered, first served.

Law stated - 22 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Germany has ratified the Convention on Limitation of Liability for Maritime Claims of 19 September 1976 (CLL 1976). Likewise, the Protocol of 02 May 1999 (P-CLL 1999), which essentially provided for the increase of the maximum amounts as well as the introduction of the tacit acceptance procedure with regard to the amendment of the amounts, was also ratified. From a technical point of view, however, no incorporation of the norms into German substantive law has taken place; rather, section 611 paragraph 1 sentence 1 of the German Commercial Code indicates that liability for maritime claims can take place on the basis of the 1976 CLL and the P-CLL 1999.

According to section 611 paragraph 1 sentence 2 and paragraph 2 of the German Commercial Code, both the Bunker Oil Convention of 23 March 2001 (BOC) and the Oil Pollution Damage Convention of 27 November 1992 (OPC) apply in the same way.

Under article 15 of the CLL 1976, it is possible to establish national rules besides the convention. Germany did so to a rather small extent by sections 611 to 617 of the German Commercial Code containing provisions, such as the limitation of liability for small ships in section 613 of the German Commercial Code or the limitation of the pilot's liability in section 615 of the German Commercial Code.

As the aforementioned conventions apply exclusively to seagoing vessels, different rules apply to inland water vessels in Germany. Ultimately, the Strasbourg Convention of 27 September 2012, ratified by Germany, applies to inland vessels in the context of limiting liability in the event of damage.

However, unlike for seagoing vessels, there is no parallel provision to section 611 of the German Commercial Code. Rather, the provisions of the Strasbourg Convention have been incorporated into German national substantive law into sections 4 to 5L of the Inland Navigation Act. As the regulations correspond to the Strasbourg Convention, a look directly at the Convention is also sufficient.

Due to the applicability of the various conventions, many claims are limitable. Here is a non-enumerative list of the most important claims that can be limited by establishing a liability limitation fund:

- claims for death or personal injury, article 2 a CLL 1976;
- claims for loss of or damage to property, article 2 a CLL 1976;
- claims for delay in the carriage of goods, passengers or their baggage, article 2 a CLL 1976;
- claims arising out of bunker oil pollution, BOC; and
- damage resulting from oil pollution, OPC.

By virtue of the application of article 1 paragraph 1 and 2 CLL 1976, the following persons may limit their liability:

- the owners of the vessel, that is:
 - the registered owner;
 - the outfitter according to section 477 of the German Commercial Code;
 - the shipowner according to section 476 of the German Commercial Code;
 - the charterer;
 - the manager: This is not mentioned in the official German translation. Nevertheless, the manager can also limit liability because he is explicitly named in the binding English version of the CLL 1976;
- the liability insurer of the ship, article 1 paragraph 6 CLL 1976;
- the salvor of the ship, article 1 paragraph 2 CLL 1976; and
- any person whose conduct is attributable to the owner, article 1 paragraph 4 CLL 1976.

The change (increase) in the maximum amounts, which took place within the framework of the tacit acceptance procedure with effect from 8 June 2015, also applies in Germany. The change was implemented at national level by adapting the Maritime Liability Limitation Ordinance.

Law stated - 22 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Regarding the procedure, Germany decided in favour of a special jurisdiction of the Hamburg District Court according to section 2 of the Shipping Distribution Order. In this respect, all German applications for the establishment of a liability limitation fund must be addressed to the Hamburg District Court.

After the application, the district court determines the liability sum by order, which must then be paid in by the party initiating the liability limitation proceedings. After the payment of the corresponding sum, the proceedings are opened by order of the Hamburg Local Court. Pursuant to § 8 paragraph 1 sentence 1 of the Shipping Distribution Order, the liability limitation fund is deemed to be established from this point in time.

As soon as this has been completed, a custodian is appointed, and a public summons is issued to identify the creditors in question. The creditors now approach the court and register their claims in accordance with sections 13–16 of the Shipping Distribution Order before these are determined by the court. The debtor can lodge an objection against this determination. As soon as the claims have been finally determined, the distribution of the fund begins.

Law stated - 22 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

There is a possibility that the limitation of liability may be broken. The CLL 1979 states in article 4 as follows: 'a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result.'

Under German law, the examination of a possible breach of the limitation of liability takes place in a three-step process. First, it must be examined whether there is a duty of liability at all. If this is affirmative, it is examined whether damage has occurred that is limitable under the CLL 1979 and would also have to be limited in amount because it exceeds the maximum amount of liability. If this is also the case, it must ultimately be examined whether the liable party has lost its right to limit liability under article 4 CLL 1979. The burden of proof for this is, of course, borne by the person entitled to compensation.

The answer to this question depends very much on the individual case and is hardly predictable due to the rather vague wording. Although no proceedings are known to date in which the limitation of liability has been broken, this is rather due to the small number of established limitation of liability funds and less to the fact that the legal hurdles of article 4 CLL 1979 are too high.

Law stated - 22 May 2024

Passenger and luggage claims

13 |

What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Germany has not ratified either the Athens Convention relating to the Carriage of Passengers and their Luggage of 1974 or the Protocol of 2002.

German law has created its own provisions in sections 536 to 552 of the German Commercial Code, which essentially correspond to the provisions of the 2002 protocol to the Athens Convention.

Law stated - 22 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

In German ports, port state controls are conducted by the Ship Safety Division of the German Professional Association for Transport. The primary base for their work is the Paris Agreement on port state controls, the Paris Memorandum of Understanding (Paris MoU), among the following:

- the SOLAS Convention (Chapter 1 Regulation 19);
- IMO Resolution A.1155(32);
- European law the Directive 2009/16/EC; and
- German law section 12 of the Ship Safety Ordinance and section 138 of the German Maritime Labour Act.

Law stated - 22 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

Often port state control officers reveal deficiencies during the inspection of a ship. The inspector shall first discuss these deficiencies with the ship's master and notes them in his or her inspection report. He determines a deadline for the rectification of each deficiency.

A port state control officer has various options to require rectification:

- the deficiency has to be rectified prior to the ship's departure;
- the deficiency has to be rectified latest in the next port of call;
- the deficiency has to be rectified within 14 days;
- the inspector informs the flag state of the ship; and
-

the inspector requests corrective measures by the shipping company according to the International Safety Management-Code (ISM-Code).

As all deficiencies and required rectifications are entered into the European control database THETIS, other port states can check whether the deficiencies have been rectified. Port state control officers may impose detention on ships with major deficiencies (ie, the ship must not leave the port of inspection). A ship is detained when it is unfit to proceed to sea or the deficiencies pose an unreasonable risk to the ship, its crew or the environment.

The ship is kept under detention until the rectification of all deficiencies has been verified by a port state control officer by means of a re-inspection.

Law stated - 22 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

When a ship is detained the port state control officer will inform the shipowner on his or her right of appeal. The appeal shall be made either by the shipping company or the operator.

The appeal shall be made by letter or fax within one month of the date of notification of the detention order of the Trade Association For Transport, Postal Logistics And Telecommunications (current contact details can be found [here](#)).

An appeal by email will only be effective if the email contains a document that is personally signed by the appellant as an attached document.

In accordance with the provisions of section 80 paragraphs 2 and 4 of the Code of Administrative Procedures, any such appeal will not suspend the detention if immediate enforcement is ordered. The reinstatement of the suspensory effect can be applied for separately at the Administrative Court Hamburg.

Law stated - 22 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The following classification societies are approved by the German Federal Hydrographic Office:

- American Bureau of Shipping;
- Bureau Veritas;
- DNV;
- Korean Register;

- Lloyd's Register of Shipping;
- Nippon Kaiji Kyokai;
- Registro Italiano Navale; and
- China Classification Society.

While the China Classification Society is not entitled to deliver service for security and Maritime labour law purposes, all other classifications societies are. Besides that, all the listed classification societies are entitled to deliver service with regard to ship safety and marine environmental protection as well as Radio and navigation equipment.

In the context of radio and navigation equipment, there are other classification societies that can be accessed via the website of the German Federal Hydrographic Office. The website can be found under the following [link](#) and is also available in English.

Law stated - 22 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

Under German law, the classification societies are not liable as guarantors for the safety of the ship. Nevertheless, they establish the rules that must be observed and control them.

Should a third party suffer damage due to the fault of the classification society, the classification society can be held liable according to the principles of the so-called contract with protective effect for the benefit of third parties.

Law stated - 22 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

If the Waterways Act (WaStrG) applies to the removal of the wreck, which is the case for inland waters, it allows the state authority in article 30 WaStrG to remove the wreck itself and to impose the costs on the shipowner, charterer, owner or outfitter of the ship.

If the Nairobi International Convention on the Removal of Wrecks 2007 applies due to the location of the wreck, which is the Free Economic Zone of Germany, article 9 paragraph 2 requires the owner to remove the wreck within a reasonable time. If this does not happen, the respective state can remove the wreck and claim the owner for the costs according to article 10. There is an insurance obligation for this claim according to article 12 of the Convention.

Law stated - 22 May 2024

International conventions

- 20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The Convention for the Unification of Certain Rules of Law Relating to Collisions between Vessels from 1910 was originally incorporated into German substantive law but was denounced by Germany in 2002. Therefore the 1989 Convention on Salvage was ratified by Germany, which is not applied domestically. Domestically, the regulations of section 574 et seq of the German Commercial Code apply. These originally go back to the 1910 Convention, but now essentially correspond to the provisions of the 1989 Convention.

Law stated - 22 May 2024

Salvage

- 21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory form in Germany as far as the salvage contract is concerned. Therefore, the Lloyd's standard form is accepted and commonly used.

A salvor is anyone who becomes active in the sense of section 574 paragraph 1 of the German Commercial Code to render assistance to an endangered object. There are no further requirements as to whether and how the person rendering assistance is required to do so, so that in particular no professional status as a salvor is a prerequisite.

If several companies or persons participate in a salvage operation, it is to be assumed that each of them is to be regarded as a salvor in its own right.

Law stated - 22 May 2024

SHIP ARREST

International conventions

- 22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Germany has ratified the 1952 Arrest Convention by statute dated 21 June 1972. When making this ratification, Germany used the option to make reservations in accordance with article 10 lit. a and lit. b of the said Convention. Together with this ratification, the German legislator made small adaptations to the German law to implement the 1952 Arrest Convention but decided against fully incorporating the provisions of the Convention in the relevant German codifications. Therefore, the 1952 Arrest Convention – within its scope of application – is of direct application in Germany and will supersede the general provisions on the arrest of a debtor's assets as a preliminary and protective measure.

Germany has not ratified the Arrest Convention 1999, Maritime Liens and Mortgages Convention 1926 and Maritime Liens and Mortgages Convention 1993. However, the 1972 statute on a reform of certain aspects of the maritime law implemented to a large extent the contents of the 1967 Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages. Hence, national German law largely reflects the content of the 1967 Convention, despite this Convention not having entered into force.

Law stated - 22 May 2024

Claims

- 23** | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Regarding vessels flying the flag of a contracting state of the 1952 Arrest Convention, article 2 of that Convention applies, meaning that such vessels can be arrested only on grounds of maritime claims as defined in the Convention, except for the arrest made by public authorities for their claims under German law.

For vessels flying the flag of a non-contracting state or vessels flying the German flag, article 8 paragraph 2 of the Convention provides that those may be arrested in respect of any other claim for which the law of the relevant contracting state permits arrest. In the case of Germany, that means that there is no limitation to specific grounds: All payment claims against the legal owner of the vessel (*in personam* claims), irrespective of the specific grounds for such claims, can justify an arrest of the vessel (and of any other assets of that owner within the jurisdiction of the court) to secure said payment claim. The same applies to claims that are not yet payment claims of a specific amount, but which may be transformed into such payment claim in the future: a typical example would be a statutory or contractual indemnity against third-party claims.

The concept of an *in rem* action is not familiar to German law. Where the arrest is not based on a maritime lien, a vessel can be arrested in order to obtain security for *in personam* claims against the legal owner of the vessel at the time of the arrest. Hence, to seek an arrest in connection with a claim against, for instance, the former owner, or the bareboat charterer, the applicant would have to show that there is a concurring personal liability of the current owner in relation to such claim (for instance, based on tort or an applicable fraudulent transfer statute). An arrest of the vessel in order to secure a claim against the time charterer is therefore not possible. However, German law would allow the arrest of other assets, such as the bunker.

Law stated - 22 May 2024

Maritime liens

- 24** | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

When the maritime lien is recognised under the applicable law, such as the law of the relevant transaction or the law of the flag state, German courts will recognise the maritime lien as well.

Where German law applies, only the following liens are recognised (section 596 of the German Commercial Code):

- wages due to the master and other members of the crew;
- public dues relating to the vessel, navigation, port call or pilotage;
- liability for personal injury or loss of life or for damage to property in connection with the operation of the vessel, excluding, however, claims relating to damage to property capable of being based on contract;
- salvage rewards, special remuneration and salvage cost; claims for general average contribution against the owners or against the carrier entitled to payment of freight; wreck removal claims; and
- claims of social security bodies (including loss of employment insurance) against the owners.

Law stated - 22 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

Section 945 of the German Civil Procedure Code provides that the applicant for an arrest is liable for loss sustained by the defendant (ie, usually the legal owner of the vessel) in cases where the arrest was not justified at the time the arrest warrant was issued, or where the arrest is lifted because main proceedings for payment are not commenced within the time limit set by the court.

The provision only applies to loss suffered as a result of the enforcement of an arrest order. This liability does not depend on whether the applicant acted negligently or in bad faith, it is a strict liability. The liability is unlimited. However, a general rule is that the defendant in the arrest proceedings being entitled to claim under section 945 may only ask for compensation of its own loss, but normally not for loss sustained by third parties (for instance, charterers). This general rule has been confirmed by the German Federal Court of Justice; however, this decision leaves some room to argue that there might be specific circumstances under which the owners should be entitled to claim for third-party damage as well.

Law stated - 22 May 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Article 45 paragraph 2 of the Introductory Law to the Civil Code provides specific rules of conflict of laws for statutory liens on means of transport, such as a maritime lien. The creation of a maritime lien is subject to the law of the secured claim, so *lex causae*. That means that German courts will recognise, for instance, a maritime lien for necessities securing the purchase price claim of a supplier of bunkers, if the law applicable to the relevant purchase price claim (ie, the law of the contract) recognises such maritime lien for necessities, which is not known to German law. Most legal authors take the view that the reference to the law of the secured claim excludes a *renvoi* under the international private law of that jurisdiction. This will most probably only apply to a very limited number of cases.

It is, however, possible, to arrest the bunker with court order in accordance with the rules of the German Civil Code, if it can be established that German courts have jurisdiction and if the applicant can prove the urgency of the arrest, whereas the procedural standards are quite high.

Law stated - 22 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

Under sections 921, 108 of the Civil Procedure Code, the judge has a discretionary power to decide on whether the applicant is required to provide security, and if so, for what amount.

Where judges have a discretionary power, decisions are less predictable. However, a general rule of thumb could be described as follows: The more solid the claim documentation in the arrest application, the greater the chance of obtaining an arrest without having to provide security.

Furthermore, there are cases where the applicant may have an interest in developing and sharing (with the court) thoughts on the likely loss that could be caused to the defendant as a result of the enforcement of the arrest, because this potential exposure should determine the security amount.

It is also in the discretion of the judge whether he or she allows any other means of security. The default security is a cash deposit with the competent department at the court.

Law stated - 22 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The Civil Procedure Code provides (in section 923) that an arrest order needs to specify a specific amount of money to be deposited (in cash) in order to have the arrest lifted. This is a reference to a cash deposit with the local court or other competent public body under the applicable regional statutes. The amount will be the amount of the arrest claim plus a

lump sum for expected cost of the main proceedings, as well as interest accruing during the main proceedings.

The court is entitled to order an alternative type of security to be provided.

Even without a specific court order, the cash deposit can be replaced by an irrevocable bank guarantee issued by a bank authorised to do business in Germany. The defendant can apply for permission to provide security by other means than cash deposit or German bank guarantee, in accordance with section 108 of the Civil Procedure Code. The court has a discretionary power to grant such permission. In maritime matters, some judges may be willing to permit a guarantee from a foreign bank or insurer (including a club letter). Other judges may be reluctant to grant such permission. Hence, often the parties will try to reach an agreement on the type and wording of the security. The court will not interfere if the parties agree on any other type of security.

Law stated - 22 May 2024

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

The arrest procedure starts with an application filed by a German qualified lawyer, although this is not compulsory. No POA is required but advisable to avoid delay if so requested. The application must be in the German language and supported by prima facie evidence as to the claim. This is mostly provided by a sworn affidavit of a competent manager of the creditor confirming that the facts stated in the application are true. Some courts request that all attached documents be translated into German. The application and all attachments will have to be provided electronically only.

When all documents are available, an arrest may be prepared in a day. The statutory time limits are then as follows: The arrest order, once received, may only be executed within one month from its delivery to the applicant. The execution will be done by the court's bailiff on a special order of the applicant, not by the court. The applicant also has to make sure that service of the arrest order to the ship's owners is duly made or at least applied for within one week after the ship has been arrested and within the one-month time limit mentioned before. If one of these time limits has not been observed the arrest will be lifted if the ship-owners apply so to the court. Once the vessel left the arrest port, the arrest can no longer be executed.

Law stated - 22 May 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

In order to understand the position of German law, one needs to bear in mind that there is a clear distinction between (1) the arrest warrant, which is a court order allowing the applicant to have assets of the defendant (such as a vessel) arrested, and (2) the execution of the arrest warrant (ie, the attachment of the vessel).

The attachment of tangible assets (including a vessel) in Germany is handled by bailiffs, which are court officers. Such attachment is a two-step process:

- As a first step, the bailiff takes the relevant asset into his or her possession.
- This is (usually immediately) followed by a second step, which consists of one of the following:
 - The bailiff marking the item as attached, but handing it back to the person who had possession before the first step being executed, this person is supposed to hold the item in custody until enforcement proceeds further (ie, until a forced sale will be initiated), or the bailiff taking the item into his or her custody.
 - According to the relevant statutory law, handing the marked item back into the custody of the former possessor is the normal procedure, and taking it into the bailiff's custody is the exception. However, in the case of the arrest of a (seagoing) vessel, there will usually be exceptional circumstances justifying the taking over into the bailiff's custody: In the first alternative (item being marked and handed back), the former possessor is entitled to use the item; in the case of a vessel, that would often mean leaving the jurisdiction of the court; accordingly, this standard approach is not workable for an arrest of vessels.
- When the bailiff carries out the attachment of the vessel, he or she would therefore usually take it in his or her custody, which includes a duty to guard the vessel and to keep it insured. The bailiff will be requiring the applicant to make advance payments covering the expected expenses, including an insurance premium.

The procedure described above regarding insurance of the vessel after seizure is not clearly governed by the relevant statutory and administrative rules but reflects the current practice of the bailiffs acting in German ports.

Law stated - 22 May 2024

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

An application to arrest the vessel does not provide an obligation of the applicant to also start a procedure regarding the merits of the case in Germany. This will have to be determined on the basis of the underlying conflict or agreement.

This question, however, is relevant with regard to the strict liability under German law for wrongful arrest and a later proceeding of the defendant, claiming compensation of damages: Under German law, obtaining an arrest warrant requires the applicant to put

forward a specific claim for which security is sought. To obtain the arrest, there is no need to fully prove such claim. Therefore, if it later turns out that there was no justified claim to be secured that would mean that the arrest was – from the beginning – not justified. That would be a typical case for liability under section 945 of the Civil Procedure Code.

In proceedings for compensation under section 945 of the Civil Procedure Code, the court would have to follow the decision on the merits in the main action if that decision (of a court or arbitral tribunal) is considered to be binding on the defendant or arrestor. That is determined under the general rules on the binding effect of German court judgments or the recognition of foreign judgments or arbitral awards. Thus, in the typical case that the judgment or arbitral award rendered in the action on the merits (and rejecting the claim on the merits) will be considered binding on the defendant or arrestor, the court deciding on a liability claim will find that the defendant or arrestor is liable under section 945 without having to review the case on its own.

Law stated - 22 May 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

No, not with regard to the vessel as asset.

Law stated - 22 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

German Civil Procedure Code provides for independent evidence proceedings, also referred to as evidence preservation proceedings, a fundamental step in German civil procedure law in many cases. The aim of this procedure is to secure and establish evidence of a certain fact before main proceedings take place or are intended. Independent evidence proceedings are a way to obtain a judicial determination and have a variety of applications within civil procedure law.

Other than within the limits of this independent procedure, the comprehensive disclosure of documents is alien to German civil law. If a party is not willing to disclose any documents or facts, it may simply lose a procedure due to the burden of proof.

Law stated - 22 May 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is possible to arrest the bunker in accordance with the general rules of the German Civil Procedure Code. While the arrest of a vessel is privileged with regard to the procedural rules, a bunker can be arrested on the basis of the general rules regarding the attachment of tangible assets. Besides providing evidence of the underlying claim, the applicant also needs to provide sufficient justification for the urgency of the security measure.

Law stated - 22 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Every creditor that has an enforceable legal title against the owner of the vessel can apply for the judicial sale of the vessel if the vessel is within the competence of German courts.

Law stated - 22 May 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

A judicial sale of a German flagged vessel can be applied for as a ship auction, with is mainly governed (with minor deviations) by the provisions on the compulsory auction of real estate and will be conducted by the bailiff. The district court in whose district the ship is located has jurisdiction as court of enforcement. The applicant needs to provide evidence of his title, which could either be an enforceable judgment or a mortgage, including a clause that it can be enforced directly.

Once the judicial sale starts, the ship will be guarded and preserved if the forced auction is ordered and the date of the auction is announced in a shipping journal.

A foreign flagged vessel can also be put through a judicial sale, but this procedure will follow the procedural rules of the auction of any other assets than real estate (execution of chattel). The procedure is quite similar to the forced auction of a German flagged vessel; however, there are some privileges regarding the minimum purchase price that must be obeyed for German flagged vessels but are more lenient for foreign flagged vessels.

The costs depend on the actual value of the claim and the target auction price of the vessel. As an example, for a claim amount and later purchase price of €5 million, the creditor needs to assume costs of about €62,000, including legal fees and court fees. It is in the discretion of the bailiff in charge of the vessel to request advances for the costs of security and other upkeep. In any case, the costs will be deducted from any proceeds of the auction first, but the court and bailiff might nonetheless request cost advances.

The duration of the proceeding depends on the court of execution and its general workload. Courts in the bigger German seaports of Bremerhaven and Hamburg might be more willing to react within a reasonable time due to previous experience and the personal competence of the judges. It might, however, be reasonable to assume an average duration of about 12 months from application to distribution of the proceeds after a successful auction.

Law stated - 22 May 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The priorities under German law, in case of the forced sale of a sea-going vessel registered in Germany, or a similar foreign vessel, are as follows:

1. costs of the forced sales' proceedings (section 109 paragraph 1 of the Forced Sales Act);
2. rarely applicable: in case of bankruptcy of the owners, costs of the insolvency estate for the valuation of the assets to be auctioned (section 10 paragraph 1 no. 1a of the Forced Sales Act);
3. creditors secured by a maritime lien (sections 10 paragraph 1 no. 4 and 11 paragraph 1 of the Forced Sales Act and section 602 of the Commercial Code); among those creditors, the following priorities apply (see section 603 (1) of the Commercial Code):
 - wages due to the master and other members of the crew;
 - public dues relating to the vessel, navigation, port call or pilotage;
 - liability for personal injury or loss of life or for damage to property in connection with the operation of the vessel, excluding, however, claims relating to damage to property capable of being based on contract;
 - salvage rewards, special remuneration and salvage cost; claims for general average contribution against the owners or against the carrier entitled to payment of freight; wreck removal claims; and
 - claims of social security bodies (including loss of employment insurance) against the owners;

Note: If a maritime lien secures interest or other periodic claim items, only the positions for the current year and the two years before that are sharing this priority;

1. creditors secured by a mortgage (section 10 paragraph 1 no. 4 and 11 paragraph 1 of the Forced Sales Act and section 602 of the Commercial Code) or a mortgage-like position obtained by a ship arrest; amongst those creditors, the following priorities apply (see section 11 paragraph 1 of the Forced Sales Act and section 25 of the Act on Ownership and Mortgages in Vessel);
- 2.

- claim of the creditor(s) initiating the forced sales' proceedings (unless such claim is already covered by one of the items listed above);
3. claim of secured creditor(s) having acquired their security rights after commencement of the forced sales' proceedings; and
 4. interest claims or other periodic claims of creditors secured by a maritime lien or by a mortgage (or other creditors under 4 above) for time periods earlier than two years prior to the current year.

Law stated - 22 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

As the legal transfer is made by auction, the purchase is the highest bidder and will receive the title free and clean of all encumbrances, whether registered or not. All creditors will have to apply for distribution of the proceeds of sale and will be considered following the mandatory ranking of creditors, while the costs of the judicial sale will always be satisfied first.

Law stated - 22 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

This depends on the legal quality, such as judgment equivalent of the judicial sale in the respective foreign jurisdiction, and whether the judicial order made therein is enforceable without additional enforcement procedure in Germany. This question might, however, only be of relevance if the vessel is registered in the German ship register and the transfer of title of deletion of the vessel from the German ship register needs to be applied for on the basis of the foreign judicial sale.

Law stated - 22 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Germany is neither a member of the International Convention on Maritime Liens and Mortgages 1967 nor 1993 but has transformed the 1967 Convention into the German Commercial Code. However, cargo claims arising out of charter parties or other contracts have been deleted.

Law stated - 22 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING**International conventions**

- 41** | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Germany is a contracting state to the Hague Rules, so they are binding under international law. The Hague Rules were implemented by incorporating them into the German Commercial Code. Thus, the German Commercial Code applies domestically, although it corresponds to the Hague Rules. Consequently, the Hague Rules themselves are not applicable domestically.

Unlike regarding the Hague Rules, Germany is precisely not a contracting state to the Hague-Visby Rules. Nevertheless, these rules were also implemented by incorporating them into the German Commercial Code.

In some places, the incorporation of the Hague–Visby Rules conflicts with the Hague Rules of 1924. Because Germany is only bound by the Hague Rules of 1924 from the perspective of international law, article 6 Introductory Act to the Civil Code exists. This provision always modifies the rules in the event of a conflict (Hague Rules apply and German law deviates by incorporating the Hague–Visby Rules) in such a way that effectively not the Hague–Visby Rules but the Hague Rules apply.

Unlike the Hague and Hague–Visby Rules, Germany is neither a contracting state to the Hamburg Rules nor have they been incorporated into German national maritime law.

Germany has neither ratified the Rotterdam Rules nor incorporated them into German law.

The central provision for the carrier's liability in German law is section 498 of the German Commercial Code (HGB). According to this, the carrier is liable for damage caused by loss or damage during the period of custody.

The period of custody means the time between the taking over of the goods for carriage and the delivery of the goods. Accordingly, the time of taking over is the time from which the goods for carriage have come into the direct possession of the shipper. Since the carrier must accept responsibility for the conduct of his or her auxiliaries, this usually does not occur with the loading of the goods by the carrier himself, but with the acceptance of the goods by the quay handling company commissioned by the carrier.

Delivery is completed when the carrier hands over the goods after carriage to the legitimate consignee in such a way that the latter comes into possession of the goods.

Law stated - 22 May 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

In principle, the provision of section 452 of the German Commercial Code applies to multimodal transport within Germany. Most of the provisions of this section are referral provisions that apply the German transport law for road transport from section 407 of the German Commercial Code to the entire transport.

However, there are various exceptions to this principle resulting from unimodal agreements that extend their scope to the relevant leg of the multimodal carriage:

- **CMR:** According to article 2 CMR, the rules of the CMR for 'pickaback transports', where the goods and the truck are loaded together onto another means of transport, apply to the entire transport. If the damage occurs on a leg of the journey and the event giving rise to the damage can only have occurred on this special leg of the journey, the hypothetical law of this leg of the journey shall apply in accordance with article 2 paragraph 1 sentence 2 CMR.
- **Montreal Convention:** The Montreal Convention applies to multimodal carriage in accordance with article 38 for the air leg of the transport.
- **CIM 1999:** If carriage by means of transport other than carriage by rail is only of a complementary nature, the provisions of CIM in accordance with article 1 section 4 apply to the entire transport operation.

Law stated - 22 May 2024

Title to sue

43 | Who has title to sue on a bill of lading?

In principle, the carrier is obliged to issue a bill of lading. However, a precise distinction must be made as to the contractual situation of the parties. If a so-called contract of carriage of general cargo according to section 481 of the German Commercial Code is in question, the obligation to issue a bill of lading exists according to section 513 paragraph 1 of the German Commercial Code. This obligation also exists for voyage charters under section 527 paragraph 2 of the German Commercial Code. The time charter does not, in principle, require the issue of a bill of lading, although the requirement may be agreed by the shipowner.

The party entitled to the issue of a bill of lading is regularly the consignor.

Law stated - 22 May 2024

Charter parties

- 44** | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The compulsory information to be included in a bill of lading can be found in section 515 of the German Commercial Code. The bill of lading usually concerns the last contract in a long chain of contracts.

The different contracts are all legally independent. Thus, if a ship is chartered out by the owner to a time charterer and an arbitration clause in favour of an English arbitration court is agreed in this agreement, this does not prevent an arbitration clause in favour of a German Arbitration court from being effective in the bill of lading.

Law stated - 22 May 2024

Demise and identity of carrier clauses

- 45** | Is the 'demise' clause or identity of carrier clause recognised and binding?

The highest German court in civil matters, the Federal Court of Justice, classifies identity of the carrier clauses in the bill of lading conditions as general terms and conditions. These are examined very comprehensively to prevent abuse. According to the Federal Supreme Court, identity of the carrier clauses are invalid clauses if the bill of lading clearly indicates on the front a party other than the shipowner. The provision from which the ineffectiveness finally results is section 305 b of the German Civil Code, which prefers individual agreements to general terms and conditions in their effectiveness.

Law stated - 22 May 2024

Shipowner liability and defences

- 46** | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Charter parties and the bill of lading are two different contractual relationships. In this respect, the direct contractual partner of the charterer is the holder of the bill of lading. A major exception to this basic rule is the so-called adjective liability of the shipowner.

This type of liability is laid down in section 480 of the German Commercial Code. According to this provision, the shipowner becomes a co-debtor vis-à-vis the injured party in addition to the charterer if a member of the ship's crew or a pilot working on board has made him or herself liable for damages to third parties in the course of his or her work. This type of liability covers not only contractual but also tortious claims that have arisen in the course of an activity for the shipowner.

To avoid unfair liability on the part of the shipowner who has chartered out his or her ship and is hardly involved with the operation of the ship anymore, the provision of section 477 of

the German Commercial Code was established. According to it, the 'outfitter' is treated as the shipowner in relation to third parties. An outfitter is one who uses a ship not belonging to him or her for acquisition. This is usually the charterer. Accordingly, the effect of adjectival liability ultimately affects mostly the person who would already be liable under the bill of lading and precisely not the actual owner of the ship.

Law stated - 22 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Unless otherwise stipulated in the contract, the carrier's only obligation is to deliver the goods to the destination on time and without defects. In this respect, German law does not have a separate provision on what happens if a route other than the one originally planned is used.

However, if the change of route results in a delay in delivery, this is quite problematic for the carrier. Unlike cargo damage and total loss, there are no special regulations within the German Commercial Code for delay. Accordingly, the party whose cargo is delivered in default has to resort to the German Civil Code. According to section 286 BGB, the injured party has a claim for damages if non-delivery has taken place despite the due date and a reminder. This claim for damages is not only limited to compensation for value, but also includes other damage items, such as loss of profit. The provisions of general German civil law also do not know a limitation of liability in terms of amount.

Law stated - 22 May 2024

Liens

48 | What liens can be exercised?

The most important liens in Germany are the so-called ship creditors' rights. These ship creditor rights arise by law to secure certain claims against the ship. If it is a seagoing vessel, these ship creditors' rights, which can be used within the framework of a lien, can only arise if the ship is operated commercially. If the ship is an inland waterway vessel, the ship creditor's rights also arise if the ship is not operated commercially.

The claims that legally give rise to a ship creditor's right are listed in the catalogue of section 596 of the German Commercial Code:

- wage claims of the master and the other persons on the ship's crew;
- port dues as well as pilotage dues;
- claims for damages for death or injury to persons and for loss of or damage to property, insofar as these claims arose out of the use of the ship; however, claims for loss of or damage to property are excluded if the claims are derived from a contract or can also be derived from a contract;

- claims for salvage, special compensation and salvage costs; claims against the owner of the ship and against the creditor of the cargo for a contribution to general average; claims for the removal of the wreck; and
- claims of social security institutions including unemployment insurance against the shipowner.

Because the ship creditor's right is inseparably linked to the claim from the catalogue of section 596 of the German Commercial Code, it expires if the claim itself has also expired.

Any international conventions on this issue have neither been ratified nor implemented in Germany and are therefore without relevance.

Law stated - 22 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

If the carrier delivers the goods to someone who was not authorised in the bill of lading, liability arises from section 521 paragraph 4 of the German Commercial Code. Because this is, strictly speaking, a case of loss of cargo, the provisions on loss of cargo within the contract of carriage of general cargo apply mutatis mutandis. This means that the carrier, if he or she has delivered to a non-authorized party, is liable under the bill of lading as if the goods had been lost, but he or she can adhere to the limitations of liability under the contract of carriage for general cargo. Only the limitation of liability to compensation for loss of value according to section 502 HGB is no longer available to the carrier, so that he or she must also compensate the loss of profit of the person entitled under the bill of lading.

Law stated - 22 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper shall effect the unloading of the goods to be shipped within the contractually agreed time in accordance with section 486 paragraph 1 sentence 1 of the German Commercial Code.

Furthermore, according to section 482 paragraph 1 of the German Commercial Code, the shipper is obliged to provide the information on the goods necessary for the performance of the carriage before handing over the goods. If the goods to be transported are dangerous, the shipper's labelling obligations under section 483 of the German Commercial Code are extended to the effect that the exact nature of the danger must be described and precautionary measures to be taken must be given. As the last secondary obligation, the

shipper must pack the goods properly in accordance with the requirements of section 484 of the German Commercial Code.

However, the foremost duty of the skipper is, of course, according to section 481 paragraph 2 HGB, to pay the carrier for the proper performance of the contract of carriage.

Law stated - 22 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Yes, within the North Sea and the Baltic Sea area.

Law stated - 22 May 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The German Shipowners' Association (VDR) has issued guidance on compliance with the sulphur limit value of 0.10 per cent in an emission control area (ECA) (Industry Guidance on Compliance with the Sulphur ECA Requirements). This includes, in particular, information on the conversion process from heavy fuel oil to low-sulphur marine fuels as well as information on the use of new low-sulphur marine fuels (such as HDME50).

In accordance with the United Nations Convention on the Law of the Sea (UNCLOS) national states can check and enforce against foreign flagged vessels in their ports for noncompliance with marine environmental regulations (especially article 212, 222 UNCLOS) within their national law. Only as regards vessels under flags of MARPOL ANNEX VI States, a port state may also enforce against vessels in their ports in respect of violations of the sulphur emission limits, which occurred beyond the internal waters, territorial waters or exclusive economic zone (EEZ), where the evidence so warrants (especially article 211, 218 UNCLOS). In accordance with German law, this would include all measures that are necessary to prevent further breach of the rules, such as a detention until the status is rectified.

Under UNCLOS, coastal states only have restricted at-sea enforcement powers as to foreign vessels navigating in their territorial sea or its EEZ. Foreign vessels enjoy the right of innocent passage in the territorial sea (article 17 pp. UNCLOS) and the freedom of the high seas in the EEZ (article 58 paragraph 1, 87 paragraph 1 a) UNCLOS). The coastal state may only undertake physical inspections on the spot of foreign vessels navigating in its territorial sea, where there are clear grounds for believing the vessel has, during its passage in the territorial sea, violated its laws and regulations adopted in accordance with UNCLOS or applicable rules and standards for the prevention, reduction and control of

pollution from vessels, such as sulphur limits under MARPOL ANNEX VI. Inspections of foreign vessels under flags of MARPOL ANNEX VI states navigating in its EEZ or territorial sea may only be undertaken, where there are clear grounds for believing the vessel has, in its EEZ, committed a violation of the sulphur limits under MARPOL ANNEX VI, resulting in a substantial discharge causing or threatening significant pollution of the marine environment (article 211, 220 UNCLOS).

The full guideline of the German Shipowner's Association can be downloaded [here](#).

Law stated - 22 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction?
| Are there any ship recycling facilities in your jurisdiction?

The International Convention for the Safe and Environmentally Sound Recycling of Ships, or Hong Kong Convention, is meant to address these problems. This Ship Recycling Convention was adopted by the International Maritime Organization (IMO) in 2009 will enter into force on 26 June 2025, which has become possible since Bangladesh and Liberia have recently joined the agreement. Germany is already a member state. The convention contains regulations for shipowners, shipbuilders, manufacturers, suppliers and for recycling yards.

The Hong Kong Convention will apply to all new and existing sea-going vessels with a gross tonnage of 500 or more. The new convention introduces two key components to be considered in future:

- Ship-specific Inventory of hazardous materials, which lists all hazardous materials such as asbestos, PCB, ozone depleting substances and antifouling paints containing TBT as well as their location and approximate amount.
- Authorisation of recycling facilities. Sea-going vessels may only be recycled by authorised yards complying fully with all environmental and safety requirements of the Hong Kong Convention.

Regulation EU 1257/2013 on ship recycling already implements some of the requirements for all ships:

- on international voyages;
- flying an EU flag; and
- with a size of 500 GT or more.

The above-mentioned Regulation on the recycling of ships applies and it contains, among other things, the following requirements:

- These ships may only be recycled on authorised recycling yards on the EU list of recycle yards.

- These ships must carry a ship-specific Inventory of Hazardous Materials/IHM stating as a minimum the hazardous materials on board (structure and equipment) listed in Annex II as well as their location and the approximate amount.
- These ships must hold a Certificate on Inventory of Hazardous Materials.
- Existing ships only require the Inventory of Hazardous Materials and the associated certificate from 31 December 2020.
- The Inventories of Hazardous Materials and the associated certificates are approved by the respective Flag State.
- The ships intended to be passed to be recycled must have a Ready for Recycling Certificate.
- Further information can be found in ISM Circular 03/2019.

Ships flying a flag of a non-EU state that call on a European port are required to carry an Inventory of Hazardous Materials as well as a Document of Compliance.

According to the EU Regulation, every member state designates a contact point that informs and advises on the topic. The contact point of Germany is the Federal Maritime and Hydrographic Agency.

Law stated - 22 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

In Germany, with the exception of some special jurisdictions, all courts are in principle capable of deciding maritime disputes. In the absence of a choice of law, local jurisdiction under the rules of the Code of Civil Procedure is usually determined by the seat of the legal entity being sued. However, as the majority of Germany's maritime industry is located in Hamburg, Hamburg courts are regularly entrusted with maritime disputes. Due to this wealth of experience, the Hamburg courts are renowned for this type of dispute and regularly reach comprehensible and appropriate decisions through their expertise.

In this respect, it is not surprising that the Hamburg courts are regularly chosen by the parties as the competent court even before a potential dispute arises in the context of a choice of law.

Law stated - 22 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

With regard to service on the defendant, a distinction must be made.

If service is to be effected within the European Union, it is governed by Regulation (EC) No. 1393/2007, the EuZVO. This regulation is also applicable in relation to Denmark by means of an additional protocol and, in addition to civil and commercial matters, also covers insolvency proceedings, for example.

According to the EuZVO, service must be effected in two ways, whereby both ways have equal priority and the court decides at its own discretion as to the way is to be used:

- Service by postal services, by means of a registered letter with international advice of delivery, article 14 of the Regulation in conjunction with section 1068(1) of the Code of Civil Procedure.
- Service by transmitting agencies, article 4 EuZVO. In this case, the German court delivers the document to the foreign court that initiates service.

A translation of the document in non-German-speaking EU countries is generally not required. However, the service of a German document may result in the defendant or addressee refusing to accept it. In this case, the sender can submit the translation or prove that the defendant or addressee understands German.

In addition to the EuZVO, the rules of the Hague Service Convention of 1965 also come into consideration, as Germany is a member of this convention. However, it only applies to civil and commercial matters.

The Hague Service Convention also has several ways of transmission. The most popular are the following:

- Service by post, article 10 of the Hague Service Convention. However, many countries – including Germany – have objected to service by ordinary mail.
- Transmission by direct communication, article 3, 5 of the Hague Service Convention. In this form of service, documents are served by the court in the plaintiff's state to a central office in the recipient state.

In the case of documents served under the Hague Service Convention, a translation must always be added.

Service in countries that are neither EU member states nor contracting states to the Hague Service Convention depends on rules that the countries (Germany and the country to be served) have agreed among themselves.

Law stated - 22 May 2024

Arbitration

- 56** | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The German Maritime Arbitration Association (GMAA) has been in existence since 1983. It was founded by maritime lawyers and shipping merchants from Hamburg and Bremen and is based in Hamburg. The aim of this renowned arbitration court is to provide a cost-effective alternative to foreign arbitration courts (especially in London).

Since Hamburg and Bremen are major shipping locations in Germany and thus many maritime lawyers are also based in both cities, an arbitration clause in favour of proceedings before the GMAA is regularly found in contractual clauses of standard maritime contracts in the event of errors in the execution of the contract.

Law stated - 22 May 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

In the context of recognition and enforcement of judgments of state courts, a distinction must be made as to which court the judgment originates from and where it is to be enforced.

If the judgment was issued in a member state of the European Union and is to be enforced in another member state, recourse must be made to European law. Within the European Union, there is Regulation 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This regulation enables the enforcement of a judgment issued in one country of the European Union against a party located in another country of the European Union in the country of destination. The procedural rules of enforcement are always based on those of the country in which the judgment debtor is domiciled.

In the context of judgments from non-EU member states, it is much more complicated. First of all, it must be checked whether an agreement under international law has been concluded with this state. If this is the case, recognition and enforcement are governed by the agreement. If this is not the case, the foreign judgment must be declared enforceable in accordance with section 722 paragraph 1 of the German Code of Civil Procedure. The German court now examines the case in a complex procedure. The outcome of this can hardly be predicted with legal certainty in advance.

With regard to the recognition of foreign arbitral awards, the situation is somewhat different. Germany is a member state of the New York Convention of 1958, which obliges Germany to recognise and enforce arbitral awards rendered in another member state, subject to very narrow limits.

In summary, it can be said that the recognition of a foreign arbitral award coming from a member state can, through the application of the New York Convention, with high probability find recognition and the possibility of enforcement in Germany. The same applies to the decision of a court of the European Union. The situation is much more difficult with regard to the recognition of state judgments from non-EU countries.

Law stated - 22 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Although asymmetrical jurisdiction clauses are agreements that generally disadvantage one party, they are generally considered permissible by German state courts. The limit of what is permissible under German law is reached when the clause is found to be immoral under section 138 of the German Civil Code. This is primarily the case when one party forces the other party into an unfavourable asymmetrical agreement due to its superior market power.

On the other hand, an asymmetrical jurisdiction clause agreed in a form contract may fail due to the sometimes quite high requirements for general terms and conditions from German civil law. A recognised example here is the case where an asymmetrical jurisdiction clause does not clearly regulate the exercise of the right to choose, because the law on general terms and conditions requires that the provision be 'clear and comprehensible'.

There is also no general prohibition for asymmetric jurisdiction agreements in favour of arbitral tribunals. Moreover, the review of arbitral awards in Germany is only possible within very narrow limits. From these two factors, it can be concluded that asymmetric choice of court agreements in favour of arbitral tribunals are even more easily valid and enforceable in Germany than those in favour of state courts.

Law stated - 22 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

If the question is to be understood in such a way that the claimant conducts the proceedings outside of Germany, European law should be consulted. According to article 31 paragraph 2 of Regulation 1215/2012 of the European Parliament, the court first entrusted (in the context of this question, the court wrongly entrusted) with the case suspends further proceedings until the correct court according to the choice of law has ruled. From the point of view of the defendant, in addition to the possibility of pointing out the lack of jurisdiction to the court that does not have jurisdiction, the defendant would also have the possibility of filing an action with the court that actually has jurisdiction. This would then take the form of a negative declaratory claim to the effect that the claims of the original claimant brought before the court without jurisdiction do not exist.

However, the aforementioned is only promising if the court without jurisdiction and accessed by the claimant is located within the European Union. National measures against proceedings in foreign courts that are not members of the European Union do not exist in German law.

Law stated - 22 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

If the defendant is confronted with an inadmissible action in Germany due to a breach of a jurisdiction clause, he or she has the right to point out to the court that it lacks jurisdiction as soon as he or she receives the claim.

However, the defendant must make this reference until the first oral hearing. As soon as the defendant appears at the oral hearing and is heard there, the German court before which he or she has proceeded in this way is deemed to have jurisdiction pursuant to section 39 of the Code of Civil Procedure and the defendant can no longer assert a lack of jurisdiction afterwards.

Law stated - 22 May 2024

LIMITATION PERIODS FOR LIABILITY**Time limits****61** | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The standard limitation period in Germany is three years – from the end of the year in which the claim arose and the creditor became aware or should have become aware of the circumstances giving rise to the claim (subjective period).

The objective, knowledge-independent maximum limit of the limitation period is 10 or 30 years. In the law on sales and contracts for work and services, the limitation period is even only two years from the date of purchase or acceptance – except in the case of goods for or the erection of buildings. Knowledge of the defect is irrelevant here. Especially in recourse cases, this period can be reached quickly. In Germany, claims are therefore usually pursued very consistently.

If several duties are breached at the same time – eg, several material or work defects, consultancy contract with several false statements – the limitation period starts separately for each breach of duty. This is particularly important in the case of knowledge-based limitation, if the claimant only gradually learns about the individual breaches.

If parties agree to longer time limits in an underlying agreement, this would be valid unless it can be ruled as an unfair clause in a standard agreement. It is always possible to agree the extension of the time limit between the parties for a foreseeable duration or until the end of a certain action, too.

Law stated - 22 May 2024

Court-ordered extension**62** | May courts or arbitral tribunals extend the time limits?

The statute of limitations can be suspended by certain measures such as the initiation of a court procedure or arbitration. This has the effect that the period – for which the limitation is suspended – is not included in the limitation period. The statute of limitations is thus interrupted and continues to run after the end of the period of suspension. This is mandatory by law and will not have to be applied for explicitly.

In practice, the suspension of the statute of limitations is particularly relevant in the case of active proceedings – such as the initiation of certain proceedings or preparatory measures. The suspension of the statute of limitations during negotiations between the parties also plays a major role in German legal practice and has basically the same legal effect. There are also other actions suspending the time limits, such as the registration of a claim with an insolvency table in Germany.

Law stated - 22 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention (MLC) of the International Labour Organization (ILO) is known to many experts as the 'fourth pillar' of the international maritime regulatory regime. For good reason, as the Convention sets out mandatory minimum standards for decent working and living conditions for more than 1.2 million seafarers all over the world. Compliance with these regulations is controlled by means of periodical inspections by flag states and port states.

The convention globally entered into force on 20 August 2013. Germany ratified the MLC on 16 August 2013.

For vessels under the German flag, the Maritime Labour Act is the core of the implementation of the Maritime Labour Convention of the ILO in German law.

Basically, the Maritime Labour Act applies to each person, irrespective of the nationality, who is employed or engaged on board a ship under the German flag. The procedure for the determination of medical fitness, apprenticeship on board and medical equipment have been placed on a uniform legal basis that corresponds with practical experience. The objectives of the Maritime Labour Convention concerning recruitment and placement, inspections on board and the social security of seafarers have been newly defined. The existing system of flag state and port state control has been extended to the inspection of seafarers' working and living conditions.

Law stated - 22 May 2024

Relief from contractual obligations

64 |

Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Under German law, it would be possible to include price adjustment clause in an agreement, it also make such adjustment depending on indices or price valuations. But even without such explicit adjustment options under the agreement, German law provides a mandatory rule that a contract needs to be amended if the substantive commercial basis is changed, in accordance with this test: If the circumstances that have become the basis of the contract have changed so seriously after the conclusion of the contract that the parties would not have concluded the contract in such a way if they had foreseen this change, a disturbance or discontinuation of the basis of the contract pursuant to section 313 German Civil Code comes into consideration.

In principle, the primary legal consequence is the adjustment of the contract pursuant to section 313 paragraph 1 German Civil Code. This takes place *ipso iure*. Only if an adjustment is not possible or is unreasonable for one party can rescission or termination be considered as an exception under section 313 paragraph 3 German Civil Code. For continuing obligations (eg, rent, lease, loan) there is also a special provision in section 314 German Civil Code.

German courts will also adjust any claim for compensation of damages to a fair amount if a change of circumstances led to an unfair burden and even refuse any compensation beyond the actual damage if this could be deemed punitive damage, which infringe the *ordre public*.

Law stated - 22 May 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Law stated - 22 May 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

Against the background of global warming and climate change, the European Union has decided that ships of 5,000 GT and above must participate in international emissions trading.

However, this only applies to voyages between ports within the EU and those leading from the EU to third countries. Only half of the emissions from ships travelling from the EU to third countries will be covered to ensure that there is still an incentive to visit European ports.

From 2024, ship operators will have to buy emission allowances for 40 per cent of the emissions they produce. From 2025, the share will rise to 70 per cent, and from 2026, any emissions will be chargeable to operators.

In addition to the exciting question of whether implementation will work smoothly, there is also the question of who will have to bear these costs.

After some back and forth, the European legislator was able to decide to legally stipulate in the near future that the 'commercial users' of the ship have to bear the costs. Unfortunately, it remains unclear who exactly these commercial users are.

According to the abstract definition, they are those who use a ship for commercial purposes. However, because ship management agencies only do this indirectly and for the charterer or the owner of the vessel, they are not likely to be the ones who have to pay in the end. Rather, as things stand, the cost burden will have to be borne by the charterers or the owners of the vessels. Which of the two will ultimately have to pay has not yet been finally clarified.

Because the answer to this question of who pays is of utmost relevance and no clear answer has yet been found, the issue is currently attracting a great deal of attention, particularly with a view to the obligation to purchase emissions taking effect from 2024.

Law stated - 22 May 2024

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Generally, title in the ship passes from the shipbuilder to the shipowner whenever the parties intend it to. In practice, the parties to the shipbuilding contract may agree that title passes from the shipbuilder to the shipowner by either of the following means.

- The parties may agree that the vesting of title in the shipowner is a process that continues as the construction of the ship progresses. Therefore, title may finally pass at the completion of construction or upon the achievement of specified and ascertainable milestones by the shipbuilder.
- Alternatively, where the shipbuilding contract is financed in instalments, the parties may agree that the shipbuilder will retain title until a substantial portion, or the final instalment, of the purchase price, is paid. Here, final payment and delivery would be simultaneous.

However, where there is no express provision in the shipbuilding contract stipulating when the title will pass, title passes from the shipbuilder to the shipowner when the ship is delivered to the shipowner.

Law stated - 12 June 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

First, contracts of guarantee are required to be in writing and signed by the guarantor in order to be valid. Second, as a contract, the validity of a guarantee may be affected by factors such as fraud, undue influence, mistake, illegality, and all other factors on the basis of which a contract may be vitiated. Third, the guarantee must be unexpired at the time it is called on.

Law stated - 12 June 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

The court may order specific performance of the contract if the yard refuses to deliver the vessel. This is because 'delivery of a vessel' is a condition of the contract and the builder is contractually bound to deliver the vessel at the date and time agreed by the parties. The

court may order specific performance of the contract without giving the builder the option of retaining the ship, on payment of damages to the buyer.

However, the order of specific performance is an equitable remedy that is granted at the discretion of the court, generally where an award of damages will not be an adequate remedy. So, a court may likely not order specific performance of a shipbuilding contract, to compel the shipbuilder to build and deliver the ship.

Law stated - 12 June 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

A claim may lie in contract or product liability, at the suit of the shipowner or a third party who has sustained damage. A purchaser from the original shipowner may likely not have a claim in contract, unless the contract between the shipbuilder and the original shipowner grants some third-party rights the new purchaser may rely on.

With respect to contract claims, the original shipowner may sue the shipbuilder under the Sale of Goods Act 1962 (Act 137), if the vessel is defective. This is because, under the Sale of Goods Act 1962, it is an implied condition of a contract of sale that the goods are free from defects that are not declared or known to the buyer before or at the time when the contract is made. This implied condition, however, does not apply where the buyer has examined the goods and the defects are such that they should have been revealed by the examination. This provision applies to shipbuilding contracts because 'goods' are defined broadly under the Sale of Goods Act to include 'movable property'.

Also, a purchaser from the original shipowner or another third party may initiate a claim in contract against the shipbuilder by relying on the third-party provisions in the Contracts Act 1960 (Act 25) or any relevant right conferred on the third party in the contract. Similarly, a third party may also initiate a product liability claim against the shipbuilder under the general common law tort of negligence.

Law stated - 12 June 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Registration of ships in Ghana and the right to fly the Ghanaian flag are governed by the Ghana Shipping Act 2003 (Act 645). Ships that are eligible to fly the Ghanaian flag are ships that are either registered with, or licensed by, the Ghana Maritime Authority.

However, ships that are exempt from both registration and licensing may fly the Ghanaian flag in Ghanaian waters. A ship qualifies for registration as a Ghanaian ship if it is a vessel used in navigation and is owned by:

- a Ghanaian;
- a body corporate registered in Ghana;
- a partnership registered in Ghana; or
- a foreign individual or foreign company in a registered joint venture with a Ghanaian or a Ghanaian company.

Also, ships owned on a bareboat charter by Ghanaians, body corporates or partnerships registered in Ghana are Ghanaian ships. Canoes and watercraft propelled by oars are not ships under Ghana law. All Ghanaian ships must be registered, except ships owned by foreign individuals or companies in a registered joint venture with a Ghanaian or a Ghanaian company, and ships licensed to operate solely within Ghanaian waters or ships that are exempt from being licensed.

Ghanaian ships less than 24 metres in length, in excess of 150 gross tonnage, or that, irrespective of length or weight, trade or operate solely within the inland waters, are required to be licensed. Ships exempt from being licensed are:

- pleasure craft of less than five metres in length and not equipped with propulsion machinery; and
- pleasure craft of less than three metres in length and equipped with propulsion machinery of not more than 3.75 kilowatts.

Therefore, although the exempt ships are neither registered nor licensed, they are Ghanaian ships and have the right to fly the national flag in Ghanaian waters. Under Ghanaian law, a ship under construction may be registered in a register book designated for ships under construction. Such registration may be done on the execution of a contract for the construction of the ship. Once the ship is built or construction is complete, the ship may be removed from the register book for construction and then registered as a merchant ship or a fishing ship.

Law stated - 12 June 2024

6 | Who may apply to register a ship in your jurisdiction?

Only Ghanaian ships may be registered in Ghana. The application for registration must be made by either the shipowner or the authorised agent of the shipowner. The application for registration is a request to be registered as the owner of the ship. Therefore, the applicant must satisfactorily prove ownership for the application to be granted.

Where a ship has multiple owners, one or more of the owners or their authorised agent may apply for registration. Also, where the owner of the ship is a body corporate, then the body corporate or its agent may apply for registration.

With respect to multiple ownership, it is important to note that under Ghanaian law, property in a ship may only be divided into 64 shares. Therefore, only 64 people may be registered as owners of a ship at any point in time. However, it is possible for a share in a ship to be registered in the name of multiple persons as joint owners of the share.

Law stated - 12 June 2024

Documentary requirements

7 | What are the documentary requirements for registration?

Generally, a person applying for registration of a ship must present the following documents to the GMA:

- an application to register a ship;
- the declaration of ownership;
- the builder's certificate;
- a notice of the name proposed for the Ghanaian ship;
- the allotment of signal letters; and
- the survey application form.

The applicant must also submit a bill of sale if there has been a sale by virtue of which the ship or shares in the ship have become vested in the applicant. A bill of sale is, however, not required for newly built ships. Note that the application to register a ship, declaration of ownership, notice of name proposed for a Ghanaian ship, survey application form and allotment of signal letters are forms that must be purchased from the GMA.

If the applicant is a body corporate, the applicant must also submit copies of its certificate of incorporation, certificate to commence business and any other incorporation document requested by the GMA. Where the ship sought to be registered is foreign-built, and the applicant cannot provide a builder's certificate, a declaration that the date and place of building the ship are unknown to the applicant, and that the builder's certificate cannot be procured, will suffice. Where the ship has been condemned by a competent authority, the applicant must also submit an official copy of the condemnation document.

Once all the above-mentioned documents have been submitted, a surveyor will be appointed by the GMA to survey and measure the ship. On completion of the survey and measurements by the surveyor, the applicant must obtain:

- a survey certificate; and
- carving and marking notes issued by the surveyor.

These must also be submitted to the GMA and the applicable registration fees must be paid before a certificate of registration will be issued to the applicant.

Law stated - 12 June 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Under the Ghana Shipping Act, dual registration is not permitted. A foreign ship may only be registered in Ghana where that ship is deregistered from the registry of the foreign country. The registration of a ship in Ghana may be cancelled in circumstances where it is found that the ship is also registered in another country.

Law stated - 12 June 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

Details of mortgages created over registered ships are recorded by the Registrar of Ships in the register book in which details of the ship's registration are entered.

There is no separate register book kept for mortgages. Therefore, once a mortgage is created or sought to be created over a registered ship, the relevant register will contain the following information.

- On an application by a registered owner to mortgage a ship: the name and address of the person with authority to mortgage the ship, the maximum amount of the mortgage, if any, the place where the ship may be mortgaged, and the time limit within which the authority to mortgage may be exercised.
- On creation of a mortgage: details of the mortgage including the time the mortgage was presented to the Registrar for registration, as well as the names of the parties and the amount secured on the mortgage.
- On discharge of a mortgage: details of discharge of the mortgage.
- Where interest in the mortgage is transmitted by death, bankruptcy or some other lawful means: particulars of the transfer of mortgage and the transfer instrument.
- Particulars of a notice revoking the mortgage.

Law stated - 12 June 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Although Ghana is not a party to the Convention on Limitation of Liability for Maritime Claims 1976, the Ghana Shipping Act provides for a similar limitation regime. The claims subject to limitation under the Ghana Shipping Act are:

1. claims in respect of loss of life and property, personal injury or damage to property, including damage to harbour works, basins and waterways and aids to navigation, that occur on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting from such operations;
2. claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
3. claims in respect of any other loss resulting from infringement of rights other than contractual rights, that occur in direct connection with the operation of the ship or salvage operations;
4. claims in respect of the raising, removal, destruction or the rendering harmless of a ship that is sunk, wrecked, stranded or abandoned, including anything that is or has been on board the ship;
5. claims in respect of the removal, destruction or the rendering harmless of the cargo of a ship; and
6. claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit liability in accordance with this part, and further loss caused by those measures.

The claims listed are subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise, except that the claims referred to in (4), (5) and (6) are not subject to limitation of liability where the claims relate to remuneration under a contract with the person liable. The parties who can limit their liabilities are shipowners and salvors. 'Shipowner' includes charterer, manager or operator of a ship. An insurer of liability for claims subject to limitation is entitled to the benefit of limitation to the same extent as the assured.

Law stated - 12 June 2024

Procedure

11 | What is the procedure for establishing limitation?

The procedure for establishing limitation is to initiate limitation proceedings. A party anticipating that a liability claim is likely to be made against it may apply to the High Court to determine whether its liability can be limited under the Ghana Shipping Act.

The application must be served on persons who may have maritime claims against the applicant in respect of which the applicant seeks to limit its liability. Where the court establishes that the applicant is entitled to a limitation of its liability, the court may determine the limit of the liability, and order the applicant to deposit into court the limited amount in the form of a security or guarantee.

The limit of liability for claims that arise on a distinct occasion is calculated as follows:

- in respect of claims for loss of life or personal injury:
 - a ship with a tonnage not exceeding 500 gross tonnage (GT): 333,000 units of account;
 - a ship with a tonnage exceeding 500 GT, the following amounts in addition to the 333,000 units of account:
 - for each gross tonnage from 501 to 3,000 GT: 500 units of account;
 - for each gross tonnage from 3,001 to 30,000 GT: 333 units of account;
 - for each gross tonnage from 30,001 to 70,000 GT: 255 units of account; and
 - for each gross tonnage in excess of 70,000 GT: 167 units of account; and
- for any other claims:
 - a ship with a tonnage not exceeding 500 GT, 167,000 units of account;
 - a ship with a tonnage exceeding 500 GT, the following amounts in addition to the 167,000 units of account:
 - for each gross tonnage from 501 to 30,000 GT: 167 units of account;
 - for each gross tonnage from 30,001 to 70,000 GT: 125 units of account; and
 - for each gross tonnage in excess of 70,000 GT: 83 units of account.

The owners of a dock, canal, harbour or port are not liable for a loss or damage caused to:

- a vessel; or
- goods, merchandise or other things whether on board a vessel or not, in excess of an aggregate amount equivalent to 70 units of account for each ton of the tonnage of the largest ship which has visited that dock, canal, harbour or port within five years to the occurrence of the loss or damage.

Law stated - 12 June 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

A person is not entitled to limit their liability if it is proven that the loss resulted from that person's act or omission with the intent to cause the loss, or from that person's recklessness and with the knowledge that the loss would probably be the result. There is, however, no reported court decision on this limit being broken in practice.

A limitation of liability security or guarantee deposited into court is available only for the payment of claims in respect of which limitation of liability can be invoked.

Law stated - 12 June 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

The applicable limitation regime for passenger claims is the statutory regime provided in the Ghana Shipping Act. Ghana is not a party to the Athens Convention 1974.

The limitation of the liability of a shipowner in respect of claims on a distinct occasion for loss of life or personal injury to passengers of a ship is an amount of 46,666 units of account multiplied by the number of passengers which the ship is authorised to carry according to the ship's certificate, but not exceeding 25 million units of account. For purposes of the passenger limitation of liability regime, claims for loss of life or personal injury to passengers of a ship means a claim brought by or on behalf of a person carried in that ship:

- under a contract of passenger carriage; or
- who, with the consent of the carrier, is accompanying a vehicle or live animals covered by a contract for the carriage of goods.

Law stated - 12 June 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The port state control agency in Ghana is the Ghana Maritime Authority. The Authority was established by the Ghana Maritime Authority Act 2002 (Act 630) to, among others, implement the provisions of the Ghana Shipping Act and fulfil flag state and port state responsibilities in an effective and efficient manner, having due regard to international maritime conventions, instruments and codes.

Law stated - 12 June 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

Detention of unseaworthy ships, and imposition of fines or a term of imprisonment upon summary conviction by a court.

Law stated - 12 June 2024

Appeal

16 | What is the appeal process against detention orders or fines?

Where the director-general of the Ghana Maritime Authority is satisfied that a ship is not seaworthy, he or she may cause the ship to be detained until he or she is satisfied that the ship is fit to proceed to sea. The master or owner of the ship may appeal to the High Court, sitting as the Court of Survey. The Court of Survey comprises a High Court judge and two assessors. The judge and each assessor may survey the ship and board the ship for inspections.

The Court may appoint a competent person to survey the ship and report to the Court. The Court may order the ship to be released or finally detained, but unless one of the assessors agrees with an order to detain the ship, the ship shall be released wherever it is detained. The Court may also make orders with respect to the costs of an inquiry or investigation, and the costs are recoverable in the same manner as a judgment debt. The master or shipowner may appeal against the decision of the Court to the Court of Appeal.

Law stated - 12 June 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The Ghana Maritime Authority has agreements with three classification societies as recognised organisations authorised to conduct statutory surveys and certification. These are:

- American Bureau of Shipping;
- Korean Register of Ships; and
- Lloyd's Register.

Law stated - 12 June 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

There is no reported local court decision on the potential liability of classification societies. But it is possible that a classification society may be liable in contract (if liability is not expressly excluded) or in tort if the claimant can establish a duty of care, breach of that duty and resultant injury, loss or damages from that breach of duty by the classification society.

Law stated - 12 June 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Yes.

Where a vessel is wrecked in a port, harbour, lake, river, waterway or watercourse in the country under the control of a public authority in a manner that, in the opinion of the authority, is likely to be an obstruction or dangerous to navigate or to lifeboats engaged in lifeboat service in that port, harbour, lake, river, waterway or watercourse, the relevant authority shall serve notice on the owner of the vessel to remove the vessel within 30 days of receipt of the notice. If the owner fails to remove the vessel within the specified period, the relevant authority may:

- take possession of, and raise, remove or destroy the whole or a part of the vessel;
- lift or buoy the vessel or part of the vessel until it is raised, removed or destroyed; and
- sell in a manner that it thinks fits the vessel or the part raised or removed, and also any other property recovered, and out of the sale proceeds reimburse itself for the expenses incurred and hold the remainder in trust for the persons entitled to it.

The remainder of the sale proceeds shall be paid to the relevant authority unless it is claimed by a person entitled to it within one year of the sale. Suppose the proceeds of the sale are less than the cost incurred by the relevant authority. In that case, that authority may recover the difference from the vessel's owner concerned by civil action.

Where the owner pays the relevant authority the expenses of the removal and the storage and the cost of the notice issued by the authority before the property is sold, the property shall be delivered to the owner.

Also, where the property recovered from a wrecked vessel is perishable or is likely to deteriorate in value by delay the sale shall not be made until at least seven clear days' notice of the intended sale has been given by advertisement in a local newspaper circulating in or near the district in which the relevant authority is located or in any other manner that the relevant authority thinks fit.

It is important to note that wreck removal applies to every article or thing that is or forms part of a vessel's tackle, cargo, stores, bunkers or ballast.

Law stated - 12 June 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

There are no international conventions or protocols in relation to wreck removal in force in Ghana. The conventions and protocols relating to collision, salvage and pollution in force in Ghana are the following:

- the International Convention on Salvage 1989;
- the International Convention for the Safety of Life at Sea 1974 (and its Protocol of 1978);
- the International Regulations for Preventing Collisions at Sea 1972;
- the International Convention on Civil Liability for Oil Pollution Damage 1992;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990;
- the 1992 Fund Convention;
- the International Convention on Maritime Search and Rescue 1979;
- the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969;
- the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978); and
- the 1996 Protocol to the International Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972 (MARPOL).

Law stated - 12 June 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of a salvage agreement, so Lloyd's standard form of salvage agreement is acceptable. The master of a Ghanaian vessel may, with the owner's consent, conclude contracts for salvage operations on behalf of the owner of the vessel and the master and the owner of a Ghanaian vessel shall have the authority to conclude contracts on behalf of the owner of the property on board the vessel.

It is important to note that only Ghanaian vessels may engage in salvage operations that are performed within the coastal and inland waters of Ghana.

Law stated - 12 June 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Neither the International Convention Relating to the Arrest of Sea-Going Ships, 1952 nor the International Convention on the Arrest of Ships 1999 is in force in Ghana.

However, ship arrest in Ghana is regulated by the Courts Act 1993 (Act 459), the High Court (Civil Procedure) Rules 2004 (CI 47) and the Ghana Shipping Act 2003 (Act 645).

Law stated - 12 June 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Generally, a vessel may be arrested in respect of the following claims:

- a claim for the ownership of a ship or for the proceeds of the sale of a ship arising in actions relating to possession, salvage, damage, necessaries, wages or bottomry;
- a claim between co-owners of a ship registered in Ghana over the possession, ownership, employment or earnings of a ship; a claim for damage done to or by a ship; and a claim for salvage for services rendered to a ship;
- a claim for loss of or damage of goods carried on a ship;
- a claim for loss of life or personal injury due to a defect in a ship;
- a claim for goods or materials supplied to a ship for its operation or maintenance
- a claim in the nature of towage;
- a claim for necessaries supplied to a foreign ship and a claim for necessaries supplied to a ship elsewhere than in the port to which the ship belongs;
- a claim by a seaman or shipmaster for wages or salary earned on board the ship;
- a claim in respect of the mortgage of a ship;
- a claim for building, equipping or repairing a ship; and
- a claim arising out of an agreement relating to the use of hire of a ship, or the carriage of goods or persons in a ship, or in a tort in respect of goods or persons carried in a ship.

A ship may be arrested irrespective of the ship's flag or the law governing the claim, so far as the ship is found in Ghana after a claim is made against it or another ship wholly or beneficially owned by the person, who would be liable on the claim. In cases where

the claim is made for damages or injuries caused by a foreign ship, the Ghana Shipping Act 2003 (Act 645) provides that, either the ship in question or any other ship wholly and beneficially owned by the same owner may be detained if found in Ghana.

A bareboat chartered vessel can be arrested for a claim for which the bareboat charterer is liable. But a time-chartered vessel cannot be arrested for a claim against a time-charterer.

Law stated - 12 June 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Yes, Ghana recognises the concept of maritime liens. The following claims against an owner, demise charterer, manager or operator of a vessel would give rise to a maritime lien on the vessel:

- claims for wages and any other sums due to the master, officers and the other members of the vessel's complement in respect of their employment on the vessel including costs of repatriation and social insurance contributions payable on their behalf;
- claims in respect of loss of life or personal injury in direct connection with the operation of the vessel;
- claims for a reward for salvage of the vessel;
- claims for ports, canal and other waterway dues and pilotage dues; and
- claims based on tort arising out of physical loss or damage caused by the operations of the vessels other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

Law stated - 12 June 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

An arrest is wrongful if it is carried out in bad faith or negligence. Here, the person procuring the arrest carries out the arrest without the belief that the arrest is legitimate.

Thus, a wrongful arrest may arise where a warrant for arrest is issued against a ship with respect to which a caveat against arrest is in force and the person procuring the arrest does not have good and sufficient reasons for doing so.

A caveat against arrest may be entered in a caveat book maintained by the High Court Registry, pursuant to an order made by the High Court, on application by a person who wants to prevent the arrest of the ship. A person at whose instance a caveat against arrest is entered may apply to the High Court for an order discharging the warrant of arrest or

for the payment of damages in respect of the loss suffered as a result of the arrest. It is at the hearing of such an application that the court will determine whether the arresting party had a good and sufficient reason for procuring the arrest of the vessel in spite of the caveat against arrest.

Law stated - 12 June 2024

Bunker suppliers

- 26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Yes. A person making a claim for necessaries supplied to a foreign ship or a claim for necessaries supplied to a ship elsewhere than in the port to which the ship belongs, may apply to the High Court for the arrest of the ship in question. Since the application is against the ship, it does not matter that the bunkers were supplied pursuant to a contract with the charterer rather than with the owner of the ship.

Law stated - 12 June 2024

Security

- 27 | Will the arresting party have to provide security and in what form and amount?

The arresting party is not required to provide security before securing the arrest of the ship. The arresting party would, however, have to undertake in writing to pay the fees and expenses of the bailiff who will execute the warrant of arrest.

Law stated - 12 June 2024

- 28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The conditions precedent to the issue of a caveat against arrest include an undertaking signed by the lawyer of the party seeking to prevent the arrest to provide bail within 14 days after receiving notice that an action has commenced. Bail is security provided by the party who seeks to avoid the arrest and is required to be a sum not exceeding an amount specified in the request for a caveat.

However, it is important to note that, the caveat against arrest does not prevent the ship from being arrested. Therefore, upon the arrest of a ship, the High Court may exercise any of its powers to make just and equitable orders and prescribe the amount of security to be paid by the arrested party, in the event that the arresting party is successful in his claim. The amount of money to be paid is likely to be such an amount that would be sufficient to satisfy the claim of the arresting party whether or not it exceeds the value of the ship.

Law stated - 12 June 2024

Formalities

- 29** | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

There are no special formalities required for the appointment of a lawyer to make the arrest application. Accordingly, there is no need to execute a power of attorney or other document in favour of the lawyer that must be provided to the court.

Where a lawyer signs an undertaking but fails to comply with it, or fails to file appearance in the action or to give bail or pay any money in court in lieu of bail, the lawyer shall be liable to committal for contempt.

Law stated - 12 June 2024

Ship maintenance

- 30** | Who is responsible for the maintenance of the vessel while under arrest?

Generally, the Registrar of the High Court is responsible for the maintenance of the vessel while it is under arrest. However, in circumstances where a foreign ship is detained under the Ghana Shipping Act in respect of damage or personal injury caused, the ship may be detained by an authorised officer of the following institutions, as designated by the Board of the Ghana Maritime Authority:

- the Ghana Armed Forces;
- the Customs Excise and Preventive Service; and
- the Ghana Maritime Authority.

Law stated - 12 June 2024

Proceedings on the merits

- 31** | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

The arresting party must pursue the claim on its merits in the courts of Ghana. The power of the High Court to issue a warrant of arrest against a ship is based on the existence of a maritime action in the Court. Therefore, an application for the arrest of a vessel can only be made in circumstances where a writ has been issued.

Law stated - 12 June 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Generally, the High Court may give just and equitable relief in the circumstances. Such just and equitable reliefs may include injunctions ordered by the court. Therefore, an arresting party in respect to an action in personam may apply for a Mareva injunction against a defendant, seeking the court's orders to prevent the defendant from taking the ship out of Ghana.

To succeed in such an application, generally, the applicant must satisfy the elements of an interlocutory injunction. This includes proving to the court that the applicant has a right or interest (not remediable by payment of damages) that would be lost if the injunction is not granted. Furthermore, if a shipowner is a judgment debtor in a suit unrelated to the ship, the ship may still be attached to the execution process to satisfy the judgment debt.

Law stated - 12 June 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

In hearing a maritime claim, the High Court has the power to make orders that are just and equitable in the circumstances. Accordingly, where it is necessary during the pendency of a suit, the High Court may make such orders, including orders for the delivery up or preservation of evidence or property, to ensure that justice is done between the parties.

Law stated - 12 June 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

While the law does not specifically provide for the arrest of bunkers, parties to a maritime action may apply for an arrest warrant to be issued against any property (which may include bunkers) against which the claim or counterclaim is brought. A party to a maritime action may also apply for a freezing injunction with respect to bunkers, after issuing a writ of summons.

Law stated - 12 June 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

A party at whose instance an arrest warrant is issued may apply for the judicial sale of the ship, to satisfy the claim in respect of which the ship was arrested. Such persons may include mortgagees or persons holding a maritime lien over the vessel.

Law stated - 12 June 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

Generally, to initiate the judicial sale of a vessel, the party seeking to sell the arrested vessel must apply for a commission for appraisal and sale of property in the High Court.

Such a party would be required to undertake in writing to pay the fees and expenses of the Registrar (being the costs and expenses arising out of the arrest, seizure, management and subsequent sale of the vessel) on demand. After the undertaking has been lodged at the registry of the court, the registrar shall sell the vessel and pay into court the gross proceeds of the sale of the vessel.

The registrar shall take account of the sale to the court and then the court shall hear any party who claims to be interested in the proceeds of the sale with regard to the accounts of the registrar. In the case of maritime liens over a vessel, the party seeking the judicial sale of the vessel is first required to give notice to:

- the authority in charge of the register of the state of registration;
- holders of registered mortgages, which have not been issued to the bearer;
- holders of registered mortgages issued to the bearer and all holders of maritime liens; and
- the registered owner of the vessel.

Law stated - 12 June 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

After the judicial sale, the first payment made out of the proceeds of the sale are the costs awarded by a court and arising out of the arrest and subsequent sale of the ship. The balance shall be distributed in order of priority to the following, as listed, to the extent necessary to satisfy their claims:

- persons who hold a maritime lien under the Ghana Shipping Act;
- holders of preferential rights in relation to shipbuilding and ship repairing; and lastly
- holders of the mortgages and any other preferential rights registered under the Ghana Shipping Act.

Once these claims have been satisfied accordingly, the residue of the proceeds shall be paid to the owner.

Law stated - 12 June 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

Upon the judicial sale of a vessel in Ghana, the registered mortgages, except those assumed by the purchaser with the consent of the holders, and the liens and any other encumbrances of whatever nature, shall cease to attach to the vessel provided that:

- at the time of the sale, the vessel is within the jurisdiction of Ghana; and
- the sale was effected in accordance with the provisions of the Ghana Shipping Act.

Law stated - 12 June 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

A valid judicial sale of a vessel in a foreign jurisdiction is likely to be recognised in Ghana.

Law stated - 12 June 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Ghana is not a signatory to the International Convention on Maritime Liens and Mortgages 1993.

However, the Ghana Shipping Act provides that where a vessel registered in a state party to the International Convention on Maritime Liens and Mortgages 1993 is the subject of a forced sale in any state party, the Ghana Maritime Authority shall, at the request of the purchaser, issue a certificate to the effect that the vessel is free of all registered mortgages, except those assumed by the purchaser, and of all liens and encumbrances, provided that:

- at the time of the sale the vessel is within the jurisdiction of Ghana; and
- the sale was effected in accordance with the Ghana Shipping Act.

Law stated - 12 June 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

- 41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hague Rules have been ratified and incorporated into Ghanaian law by section 1 of the Bills of Lading Act 1961 (Act 42). Ghana has signed but not ratified the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008.

For purposes of the Bills of Lading Act 1961 (Act 42) (which incorporates the Hague Rules), the contract of carriage by sea covers the period from the time when the goods are loaded on board to the time they are discharged from the ship. In the Supreme Court case of *Delmas America Africa Line Inc v Kisko Products Ghana Ltd* [2005-06] SCGLR 75, Atuguba JSC reiterated at page 104 that, 'from the moment the defendants so received the goods, the contract of carriage began.'

Law stated - 12 June 2024

Multimodal carriage

- 42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Apart from the Ghana Civil Aviation Act 2004 (Act 678), there is no comprehensive domestic legislation on multimodal transport. The Ghana Civil Aviation Act incorporates the Montreal Convention, and provides for the application of the Tokyo Convention, the Cape Town Convention, the Chicago Convention and the Rome Convention in Ghana.

Law stated - 12 June 2024

Title to sue

43 | Who has title to sue on a bill of lading?

The shipper, consignee or endorsee of the bill of lading may sue on the bill of lading. In *Delmas America Africa Line Inc v Kisko Products Ghana Ltd* [2005-06] SCGLR 75, the Supreme Court of Ghana confirmed the decision of the High Court and Court of Appeal that the real owners not mentioned in the bill of lading could sue directly on a contract for the carriage of goods.

Law stated - 12 June 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

A bill of lading may contain an incorporation clause that expressly incorporates specific terms of a charter party or by reference. Once incorporated into the bill of lading, the terms of the charter party will be binding on a third-party holder or endorsee of the bill of lading. So, a jurisdiction arbitration clause in a charter party will be binding on a third-party holder or endorsee of the bill of lading once it is expressly referred to in the incorporation clause.

Law stated - 12 June 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

There are no reported local court decisions on the validity of 'demise' or identity of carrier clauses under Ghanaian law. However, it is unlikely that such clauses will be recognised and enforced in Ghana for two reasons.

First, by virtue of the incorporation of the Hague Rules into the Bills of Lading Act, it may be argued that article 3(8) of the Hague Rules has outlawed 'demise' or identity of carrier clauses in Ghana. Second, Ghanaian courts do not appear to give an inflexible adherence to the notion of privity of contract and will most likely not recognise a 'demise' clause or identity of carrier clause.

For example, in the case of *Relish Company Limited v Maritime Agencies* [unreported] of 20 April 2004, the defendant shipping agent argued that he was not liable for damage to the plaintiff's car because he was merely a 'discharging' agent for the carrier at the port of discharge. The court found that the defendant was an agent of the carrier. But the court examined all the options available to the plaintiff to pursue the defendant's principal who had no place of business in Ghana, and concluded:

It sounds reasonable, more convenient and in accord with commercial prudence for any agent identified in Ghana as agent for carriers, to be held responsible for acts and omission in tort or contract of these carriers or shippers. There is no reason why the common law principles of principals and agent should not be ignored if their application creates injustice, hardship and inconvenience to the business community.

The court found the defendant liable as agents of the carrier for the loss the plaintiff suffered. The practice is to name the vessel, the owner, the charterer and the ostensible carrier on the writ and then obtain orders against the party the court finds to be liable after investigation of the facts at trial.

Law stated - 12 June 2024

Shipowner liability and defences

- 46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Generally, shipowners will not be liable for cargo damage where they are not the contractual carrier. But a shipowner's ability to disclaim liability under a charterer's bill of lading will depend on the facts of each case. If the bill of lading names the shipowner as a co-carrier or after investigating the facts the court finds that the shipowner is in fact the carrier, he or she may be liable in tort for damage to the cargo. In theory, the shipowner may be able to rely on the terms of a bill of lading where it is able to rely on the Himalaya clause in a bill of lading, although there is no reported case of enforcement of a Himalaya clause in Ghana.

Law stated - 12 June 2024

Deviation from route

- 47 | What is the effect of deviation from a vessel's route on contractual defences?

Generally, shipowners will not be liable for cargo damage where they are not the contractual carrier. But a shipowner's ability to disclaim liability under a charterer's bill of lading will depend on the facts of each case. If the bill of lading names the shipowner as a co-carrier or after investigating the facts the court finds that the shipowner is in fact the carrier, he or she may be liable in tort for damage to the cargo. In theory, the shipowner may be able to rely on the terms of a bill of lading where it is able to rely on the Himalaya clause in a bill of lading, although there is no reported case of enforcement of a Himalaya clause in Ghana.

Law stated - 12 June 2024

Liens

48 | What liens can be exercised?

A carrier may be able to exercise a shipowner or carrier's possessory lien on the cargo for unpaid freight both at common law and in contract. In addition, there are statutory liens prescribed in the Ghana Shipping Act for a maritime claim against the vessel, where the party personally liable on the claim is, both at the time the cause of action arose and at the time the action is brought, the owner or demise charterer, manager or operator in possession and in control of the vessel. A lien on the vessel is exercisable by an action in rem commenced by arresting the vessel.

Also, the Ghana Shipping Act provides for liens on the ship in favour of both seafarers and masters of the ship.

Law stated - 12 June 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The obligation of the carrier is to deliver the cargo to the consignee or other lawful holder of the bill of lading. Where the carrier delivers the cargo without production of the bill of lading, the carrier will be liable in damages for the value of the cargo to the holder of the bill of lading entitled to immediate possession of the cargo. The practice is for the carrier to take indemnity by way of a letter of indemnity from the recipient of the cargo if for some reason it was contemplated that the bill of lading will not be available at the time of delivery.

The carrier may also limit their liability for such losses or damages if they have included a clause in the bill of lading or contract of carriage that limits their liability. Such limitation of liability clauses are generally enforceable under Ghanaian law, as long as they are reasonable and not contrary to public policy.

Law stated - 12 June 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper is responsible for providing the carrier with accurate information and particulars such as the marks, number, quantity and cargo weight.

Under article 3(5) of the Hague Rules (incorporated into Ghanaian law), the shipper is deemed to have guaranteed to the carrier the accuracy at the time of shipment of such particulars, and the shipper will indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in the particulars he provides the carriers.

The responsibility of the shipper is also to appropriately label as dangerous, inflammable, explosive or other nature of the danger and to obtain the carrier's consent to carry.

Goods of an inflammable, explosive or dangerous nature to which the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods will be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment (article 4(6) of the Hague Rules). Also, even where such goods are shipped with consent and knowledge but become a danger to the ship or cargo, they may also generally be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier.

Law stated - 12 June 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

No. There is no ECA in force in Ghana's domestic territorial waters.

However, Ghana is a signatory to the International Maritime Organization (IMO)'s International Convention for the Prevention of Pollution from Ships (MARPOL), which sets out regulations to prevent pollution from ships, including air pollution from engine emissions. Under MARPOL Annex VI, which regulates air pollution, ships operating in designated emission control areas are subject to stricter emission limits.

Law stated - 12 June 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The maximum sulphur content of fuel oil used in Ghana's domestic territorial waters is 0.5 per cent m/m. This is in accordance with the International Maritime Organization's (IMO) 2020 Sulphur Cap Regulation, which came into effect after the amendment to MARPOL's Annex VI.

Ghana has ratified all six Annexes of MARPOL 73/78. Consequently, all ships entering Ghana's territorial waters must comply with the new limit or in the alternative use light fuels such as diesel.

There are no specific enforcement procedures for the regulations relating to low-sulphur fuel. However, under the Maritime Pollution Act 2016 (Act 932), the Ghana Maritime Authority is mandated to:

-

conduct inspections of ships to ensure compliance with the regulations and may also take action against non-compliant ships, which includes detention and fines;

- use appropriate and practicable means as approved by the IMO for the detection of contraventions and environmental monitoring;
- adequate procedures for reporting and accumulation of evidence of enforcement;
- institute legal proceedings against persons responsible for the contravention of any provision on pollution from ships; and
- deny entry to ships that are not in compliance with the air pollution regulations but are proposing to enter into Ghanaian ports or an offshore terminal, if the Authority is satisfied that such ships present a threat of harm to the environment.

Law stated - 12 June 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction?
| Are there any ship recycling facilities in your jurisdiction?

There is no specific international ship recycling regulation in force in Ghana. However, Ghana is a Contracting Party to the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009, which is not yet in force.

Other international ship recycling regulations that apply in Ghana are the International Maritime Organization (IMO)'s International Convention for the Prevention of Pollution from Ships (MARPOL) 73/78, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, the Bamako Convention and the UNCLOS.

The domestic regulation on ship recycling in Ghana is also not extensive. Domestic laws, such as the Ghana Shipping Act, provide that written permission of a receiver is required for the breaking up of a vessel before its removal from Ghana.

Other laws, such as the Environmental Protection Act 1994 (Act 490) and the Hazardous and Electronic Waste Control and Management Act 2016 (Act 917), regulate the protection of the environment from various forms of pollution, and the control, management and disposal of hazardous waste, electrical and electronic waste respectively.

Ship recycling in Ghana is conducted with permission and supervision from the government authorities, primarily the Ghana Maritime Authority. However, there is no ship recycling facility in Ghana.

The Ghana Maritime Authority currently pursues a membership policy under which companies desirous of engaging in ship recycling activities apply to be registered with the authority.

Law stated - 12 June 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The High Court of Ghana is the court of first instance for all maritime disputes. A party aggrieved by the decision of the High Court may appeal to the Court of Appeal. An appeal against the decision of the Court of Appeal is heard by the Supreme Court of Ghana, which is the apex court of the land.

Law stated - 12 June 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Where a plaintiff intends to issue a writ of summons on a defendant outside Ghanaian territorial jurisdiction, the plaintiff would have to seek leave of the High Court to serve notice of the writ of summons on the defendant. If leave is granted, the High Court will indicate on the notice the time limit within which the defendant must put in an appearance.

Service of notice of a writ of summons and other court proceedings may be affected by either the government of the country in which the defendant resides, the judicial authorities of that country or the Ghanaian consul in that country. Once service has been effected on the defendant, the High Court will accept as proof of service on the defendant, a certificate issued by either the government or judicial authority of that country or by a Ghanaian consul in that country, stating that the defendant was either served personally or in accordance with the laws of that country.

Law stated - 12 June 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The most widely-used domestic arbitral institution is the Ghana Arbitration Centre. Other institutions include the Ghana ADR Hub, the Ghana Association of Certified Arbitrators and Mediators, and the Marian Conflict Resolution Centre. These arbitral institutions have a list of arbitrators with varying specialties. There is no publicly available information on the number and frequency of arbitrations at the above-mentioned institutions.

Law stated - 12 June 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Foreign arbitral awards are enforceable in the High Court if the court is satisfied that:

- the award was made by a competent authority under the laws of the country in which the award was made;
- a reciprocal arrangement exists between the Republic of Ghana and the country in which the award was made or the award was made under the New York Convention for the enforcement of foreign arbitral awards or under any other international convention on arbitration ratified by the parliament of Ghana;
- the party seeking to enforce the award has produced the arbitral award or a certified copy of the agreement pursuant to which the award was made or a duly authenticated copy of the award (the authentication must be done in accordance with the law of the country where the award and the agreement were made); and
- there is no appeal pending against the award in any court under the applicable law to the arbitration.

The party seeking to enforce the award must produce as evidence of the arbitral award, the original copy of the award or an authenticated copy and the agreement pursuant to which the award was made. A foreign arbitral award may not be enforced where:

- there is an appeal pending against the award in any court under the law applicable to the arbitration;
- the award has been annulled in the country in which it was made;
- the party against whom the award is invoked was not given sufficient notice to enable the party to present their case;
- a party, lacking legal capacity, was not properly represented;
- the award does not deal with the issues submitted to arbitration;
- the award contains a decision beyond the scope of the matters submitted for arbitration; or
- more than six years has passed since the award was granted.

With respect to the enforcement of foreign judgments, a judgment creditor may apply to the High Court to have a foreign judgment enforced. A foreign judgment may only be enforced in Ghana, if it is a judgment of a superior court of a country in respect of which there is in force in Ghana a legislative instrument of reciprocity of treatment of judgments.

A person seeking to enforce a foreign judgment from a country that is not covered by a legislative instrument of reciprocity of treatment of judgments is required to commence a fresh action to enforce the judgment.

A party seeking to enforce a foreign judgment must first register the judgment in the High Court. When the judgment is registered, it is considered as a decision of the registering court, and the judgment creditor may levy execution against the judgment debtor provided that:

- the judgment is final and conclusive between the parties; and
- there is payable under it a sum of money, not being a sum payable in respect of taxes or other charges of a similar nature or in respect of a fine or another penalty.

Law stated - 12 June 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

The Ghanaian courts have not pronounced on asymmetric jurisdiction and arbitration agreements. However, the courts generally treat the parties' choice of forum and mode of resolution of disputes as valid and enforceable. Where the parties have agreed to asymmetric jurisdiction and arbitration, the courts are likely to enforce the same.

If one of the agreed fora is a foreign forum, although the Ghanaian courts will generally treat the asymmetric jurisdiction and arbitration clause as enforceable, they may assume jurisdiction if they are of the opinion that, based on the facts of the case before them, Ghana is more closely connected to the dispute.

Law stated - 12 June 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

A party not in breach may:

- sue for breach of contract;
- apply for an anti-suit injunction; or
- apply for a stay of proceedings in the forum where the claimant initiated the proceedings.

Law stated - 12 June 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

Where a party institutes domestic proceedings in breach of a contractual provision for a foreign court or arbitral tribunal to have jurisdiction, the defendant may apply to the court for a stay of the proceedings of the court.

Where the breach is in reference to the jurisdiction of a foreign court, the court may consider issues such as the jurisdiction that has the closest connection to the dispute. However, where an arbitration clause has been breached, the court is mandated to refer the matter back to arbitration in accordance with the terms of the contract.

Law stated - 12 June 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Under the Limitation Act 1972 (NRCD 54) (Limitation Act), the time limit for actions founded on tort or contracts, including quasi-contracts, is six years from the date on which the cause of action accrued. This limitation period applies to an action to recover seamen's wages.

However, the limitation period does not apply to maritime claims which are enforceable in rem. Where the claim is for damages for personal injury the limitation period is three years from the date of the act or omission that caused the personal injury, or knowledge if later. It is important to note that, the limitation periods stated above do not apply to any proceedings in respect of the forfeiture of a ship or of an interest in a ship under any enactment relating to merchant shipping.

Further, under the Shipping Act, the time limit for instituting an action in respect of salvage services is two years after the date of completion of the salvage operations. The person against whom the claim is made in respect of salvage services may at any time during the two years extend the period by a declaration to the claimant. Parties cannot by agreement extend the limitation period provided by the statutes unless the statute specifically confers that right on the parties.

Under the Bill of Lading Act (incorporating the Hague Rules), the carrier and the ship shall be discharged from all liability in respect of loss of damage unless the suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. Also, under the Ghana Ports and Harbour Authority Act 1986 (PNDCL 160), a civil action against the Ghana Ports and Harbour Authority or its employees for acts done or intended to be done pursuant to a duty shall abate unless the action is commenced within 12 months of the act, neglect or default complained of occurred, or where the injury or damage continues, within 12 months of it ceasing.

Law stated - 12 June 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Generally, the court has no power to extend the limitation period stated under the Limitation Act, unless there is a basis for the extension under a statute. There are several situations in which a special application may be made to initiate an action out of time or in which time does not begin to run. These include cases of a legal disability of the person to whom the cause of action accrued, cases in which the action is based on the fraud of the defendant, and cases where material facts relative to the cause of action and a decisive character were outside the knowledge of the plaintiff until two years or more after the commencement of the three-year limitation period.

Under section 403 of the Shipping Act, the court has the discretion to extend the limitation period for instituting an action in respect of salvage service on justifiable grounds and on the conditions that it considers fit.

Also, the court has the power to extend procedural time limits in maritime claims. For instance, the court has the power to grant the claimant an extension of time to serve proceedings on the defendant in certain circumstances. An arbitral tribunal is likely to extend the time limits if the parties agree.

Law stated - 12 June 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Ghana ratified the Maritime Labour Convention on 16 August 2013 and passed the Ghana Shipping (Maritime Labour) Regulations 2015 (LI 2226) (the Regulations), which specifically deal with the application of the Maritime Labour Convention in Ghana. In Ghana, ships of 500 gross tonnage or more, which are in the territorial waters of Ghana and fly the flag of a member state of the Maritime Labour Convention must obtain certification from the Ghana Maritime Authority. The certification is referred to as the Maritime Labour Certificate. The Maritime Labour Certificate is prima facie evidence that the ship complies with the Maritime Labour Convention.

Under the Regulations, no shipowner can operate a ship in Ghana unless the ship has been issued with a valid Declaration of Maritime Labour Compliance and a Maritime Labour Certificate.

The shipowner is required to keep the Declaration of Maritime Labour Compliance and Maritime Labour Certificate in a conspicuous place at all times on board the ship.

An authorised officer of the Ghana Maritime Authority may inspect a Ghanaian ship and a foreign ship when it arrives at a Ghanaian port to ensure that the ship complies with the Maritime Labour Convention. The Regulations also provide rules for seafarer compensation, for loss or foundering of the ship, manning levels, conditions of employment, accommodation, health protection, medical care and security protection of seafarers.

Law stated - 12 June 2024

Relief from contractual obligations

- 64** | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

The Ghanaian courts strictly enforce the legal rights and liabilities of parties to any shipping contract once the parties have freely entered into the contract and are of similar bargaining power.

Generally, the court would refuse to grant any party to a contract a relief from the enforcement of any right or liability against the person based on mere inconvenience or hardship caused by economic conditions.

However, the court may, in exceptional circumstances, grant relief from the enforcement of legal rights and liabilities of the parties if the economic conditions affected the fundamental obligations of either party under the contract or affected the subject matter of the contract in a way that makes the contractual obligation radically different from what was originally undertaken under the contract, or where the terms of the contract have become oppressive or unconscionable as a result.

It is important to note that parties are free in Ghana to incorporate as an express term (force majeure clause) in their agreement that a change in the economic conditions that makes the contractual obligations onerous to perform would relieve either party of any liability. In this case, the court would honour the wishes of the contracting parties.

Law stated - 12 June 2024

Other noteworthy points

- 65** | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Although Ghana has signed many international conventions relating to shipping, few have been ratified by the Ghanaian parliament. Unless an international convention is ratified by an act of parliament or a resolution of parliament, it does not have the force of law in Ghana.

Law stated - 12 June 2024

UPDATE AND TRENDS

Key developments of the past year

- 66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

As a member of the International Maritime Organization (IMO), Ghana is obliged to work towards the IMO's goal of achieving net zero greenhouse gas emissions in the

shipping industry by 2050. In recognition of this obligation, in 2023, Ghana hosted the first International Green Shipping Conference in Africa, where the Minister of Transport affirmed the government's commitment to drastically reducing Ghana's emissions in the shipping industry. This will involve policy, legal and regulatory changes.

Also, since 1 January 2024, the EU has extended the EU Emissions Trading System (EU ETS) to the shipping industry. As Ghana consistently trades with many EU countries, there is an urgent need for legal and regulatory changes to reduce greenhouse gas emissions in Ghana's shipping industry.

Law stated - 12 June 2024



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Under a shipbuilding contract, once the full consideration for the ship or vessel is paid and a bill of lading is issued in favour of the shipowner, the title to the ship passes onto the shipowner. Lastly, the said transfer of title of the ship is entered with a registry.

Law stated - 29 April 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

There are no prescribed formalities or forms for a refund guarantee to be valid. The terms of a refund guarantee are subject to the agreement entered into by the shipbuilder and the shipowner. The terms of the agreement should provide a valid consideration for the refund guarantee to be enforceable.

Law stated - 29 April 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

In the event the yard refuses to deliver the vessel, the delivery of such vessel could be compelled by approaching local courts for seeking specific performance of the ship-building contract. Interim reliefs can also be sought against the yard by making out a prima facie case for breach of contract.

Law stated - 29 April 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

In the case of a defect in a vessel delivered to a shipowner by a yard, the shipowner can initiate proceedings against the yard for deficiency. However, a purchaser from the original shipowner or a third party who sustains damages will not have any remedy available

against the shipbuilder as there is no privity of contract between the second purchaser and the shipbuilder.

Law stated - 29 April 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Any merchant vessel, bulk carrier, tankers, barges, tugs, dredgers, etc, can be registered under the Indian flag by following procedure and requirements enlisted in Part V of the Merchant Shipping Act 1958.

Vessels under construction cannot be registered in India, and only fully built vessels can be registered under the Indian flag.

Law stated - 29 April 2024

6 | Who may apply to register a ship in your jurisdiction?

Under the Merchant Shipping Act, 1958 only the following persons are eligible to register a ship in India:

- a citizen of India;
- a company or a body established by or under the central or state enactments that has its principal place of business in India; and
- a cooperative society that is registered or deemed to be registered under the Co-operative Societies Act 1912.

Law stated - 29 April 2024

Documentary requirements

7 | What are the documentary requirements for registration?

In order to register a ship in India, the following documents are required for registration:

- the surveyor's certificate;
- the builder's certificate;
- any instrument of sale by which the ship was previously sold;
- all declaration of ownership including a statutory declaration of ownership; and
- the following forms:

- application to register a ship; and
- declaration of ownership and nationality.

For second-hand ships, the instrument of sale under which the property of the ship was transferred to the applicant who requires it to be registered in his or her name is also required.

All the documents should be in the format prescribed under Part V of the Merchant Shipping Act, 1958.

Neither dual registration nor dual flagging is not permitted in India.

Law stated - 29 April 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

No, neither dual registration nor dual flagging is permitted in India.

Law stated - 29 April 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The Mercantile Marine Department (MMD) maintains the register of mortgages. The register of ship mortgages among other things contains the following:

- information of the ship (eg, name, flag, IMO number);
- information of the mortgagee and the mortgagor (eg, name and contact details); and
- the amount of the debt, date of repayment, interest, payment date of interest, ranking of the mortgage, former registered mortgage, etc.

For inland vessels, such register is maintained by the officer appointed under Inland Vessels Act 2021.

Law stated - 29 April 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The following regimes are applicable to limitation of liability in India and are a part of the local laws:

- the Limitation of Liability for Maritime Claims 1976 applies to claims raised thereunder;
- the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976; and
- the Merchant & Shipping Act 1958 (Part X–A) (Limitation of Liability for Maritime Claims 1976, except for article 4, is incorporated in this act).

Under the Merchant Shipping Act, Part X-A, the following claims can be limited:

- claims arising from loss of life or personal injury to, or loss of or damage to, property (including damage to harbour works, basins and waterways and aids to navigation) occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- claims arising out of loss resulting from delay in the carriage by sea of cargo and passengers or their luggage;
- claims arising out of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
- claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit his or her liability in accordance with the provisions of the Convention or the rules made in this behalf prescribe as the case may be, and such further loss caused by such measures; and
- claims for the loss of life or personal injury to passengers of a ship brought by or on behalf of any person:
 - under the contract of passenger carriage; or
 - who, with the consent of the carrier, is accompanying a vehicle for live animals that are covered by a contract for the carriage of goods carried in that ship.

The following parties can limit their claims:

- the shipowner;
- a salvor;
- any person for whose act, neglect or default the shipowner or salvor, as the case may be, is responsible; and
- an insurer of liability for claims to the same extent as the assured him or herself.

Law stated - 29 April 2024

Procedure

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11 | What is the procedure for establishing limitation?

The procedure for establishing limitation is as per the procedure prescribed in Part X-A of the Merchant & Shipping Act 1958. Where any liability is alleged to have been incurred by the owner of a vessel in respect of claims arising out of an occurrence and the aggregate of the claims exceeds or is likely to exceed the limits of liability of the owner, then the owner may apply to High Court for the setting up of a limitation fund for the total sum representing such limits of liability.

The High Court to which the application is made may determine the amount of the owner's liability and require him or her to deposit such amount with the High Court or furnish such security in respect of the amount that, in the opinion of the High Court, is satisfactory and the amount so deposited or secured shall constitute a limitation fund for the purposes of the claims and shall be utilised only for the payment of such claims.

After the fund has been constituted, no person entitled to claim against it shall be entitled to exercise any right against any other assets of the owner in respect of his or her claim against the fund, if that fund is actually available for the benefit of the claimant.

Cash deposits or bank guarantees are the predominant forms accepted for setting up a fund.

Law stated - 29 April 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The limitation cannot be broken for any damages except for damages caused due to pollution or when the damages are of such nature where the International Convention on Civil Liability for Oil Pollution Damage would apply.

The Merchant & Shipping Act 1958 (Part X-A), which governs the statute on limitation of liability, does not incorporate the principles of article 4 of the Limitation of Liability for Maritime Claims 1976.

Law stated - 29 April 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

For claims relating to passenger and luggage in India, the following regimes apply:

- Limitation of Liability for Maritime Claims 1976;
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Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976;

- Merchant & Shipping Act 1958 (Part X–A); and
- the International Convention on Civil Liability for Oil Pollution Damage, in cases of oil pollution.

The Athens Convention is not applicable in India.

Law stated - 29 April 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The Directorate General of Shipping is the port control agency in India. It operates the Mercantile Marine Department and is under the control of the Ministry of Ports, Shipping and Waterways.

Law stated - 29 April 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The port state control inspector may impose sanctions in accordance with the Safety of Life at Sea (SOLAS) Convention.

Law stated - 29 April 2024

Appeal

16 | What is the appeal process against detention orders or fines?

In India, detention orders and fines are levied by the Directorate General of Shipping. There is no appeal provision against these orders or fines, however, an aggrieved party may invoke writ jurisdiction before the High Court concerned challenging the arbitrariness of detention orders and quantum of fines.

Law stated - 29 April 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

In India, the two approved classification societies are the International Association of Classification Societies and the Indian Register of Shipping.

Law stated - 29 April 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

A classification society may be held liable for breach of its contract or for violation of the regulations in respect of the duties (eg, survey, inspection) commissioned by the government authorities.

Law stated - 29 April 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

The state, through the office of the Directorate General of Shipping, can order shipowners to remove a wreck. If the wreck consists of a vessel other than an Indian vessel, the office of the Directorate General of Shipping shall send a written intimation giving particulars of the wrecked vessel to the nearest consular officer of the country in which the vessel is registered, under intimation to the principal officer.

Wreck removal is regulated by the Merchant Shipping (Wrecks and Salvage) Rules, 1974 framed under the Merchant Shipping Act, 1958.

Law stated - 29 April 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The Nairobi International Convention on the Removal of Wrecks and the International Convention on Civil Liability for Oil Pollution Damage (CLC) is applicable in India. However, India is only a signatory to the said convention and has not yet incorporated it in its local laws and regulations.

The Merchant & Shipping Act 1958 is the statute governing the issues related to collision, wreck removal, salvage and pollution.

Law stated - 29 April 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement in India. The Lloyd's Standard Form of Salvage Agreement is acceptable. The owner is responsible to carry out salvage operations through registered salvors.

Law stated - 29 April 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Both the International Convention Relating to the Arrest of Sea-Going Ships 1952 and the International Convention on the Arrest of Ships 1999 were predominately the governing conventions applicable regarding the arrest of ships in India. However, the arrest of ships is now strictly governed by the provisions of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017. In case of any inconsistency, the statute will prevail over the conventions.

Law stated - 29 April 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Vessels can be arrested for Maritime claims. Section 4 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017 enlists maritime claims as follows:

1. disputes regarding the possession or ownership of a vessel, or the ownership of any share therein;
2. disputes between the co-owners of a vessel as to the employment or earnings of the vessel;

3. mortgage or a charge of the same nature on a vessel;
 4. loss or damage caused by the operation of a vessel;
 5. loss of life or personal injury occurring whether on land or on water, in direct connection with the operation of a vessel;
 6. loss or damage to or in connection with any goods;
 7. agreement relating to the carriage of goods or passengers on board a vessel, whether contained in a charter party or otherwise;
 8. agreement relating to the use or hire of the vessel, whether contained in a charter party or otherwise;
 9. salvage services, including, if applicable, special compensation relating to salvage services in respect of a vessel which by itself or its cargo threatens damage to the environment;
 10. towage;
 11. pilotage;
 12. goods, materials, perishable or non-perishable provisions, bunker fuel, equipment (including containers), supplied or services rendered to the vessel for its operation, management, preservation or maintenance including any fee payable or leviable;
 13. construction, reconstruction, repair, converting or equipping of the vessel;
 14. dues in connection with any port, harbour, canal, dock or light tolls, other tolls, waterway or any charges of similar kind chargeable under any law for the time being in force;
 15. claim by a master or member of the crew of a vessel or their heirs and dependants for wages or any sum due out of wages or adjudged to be due that may be recoverable as wages or cost of repatriation or social insurance contribution payable on their behalf or any amount an employer is under an obligation to pay to a person as an employee, whether the obligation arose out of a contract of employment or by operation of a law (including operation of a law of any country) for the time being in force, and includes any claim arising under a manning and crew agreement relating to a vessel, notwithstanding anything contained in the provisions of sections 150 and 151 of the Merchant Shipping Act, 1958 (44 of 1958);
 16. disbursements incurred on behalf of the vessel or its owners;
 17. particular average or general average;
 18. dispute arising out of a contract for the sale of the vessel;
 19. insurance premium (including mutual insurance calls) in respect of the vessel, payable by or on behalf of the vessel owners or demise charterers;
 20. commission, brokerage or agency fees payable in respect of the vessel by or on behalf of the vessel owner or demise charterer;
 21. damage or threat of damage caused by the vessel to the environment, coastline or related interests;
1. measures taken to prevent, minimise, or remove such damage;

2. compensation for such damage;
 3. costs of reasonable measures for the restoration of the environment actually undertaken or to be undertaken;
 4. loss incurred or likely to be incurred by third parties in connection with such damage; or
 5. any other damage, costs, or loss of a similar nature to those identified in this clause;
-
22. costs or expenses relating to raising, removal, recovery, destruction or the rendering harmless of a vessel which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such vessel, and costs or expenses relating to the preservation of an abandoned vessel and maintenance of its crew; and
 23. maritime liens.

For the purposes of clause (17), the expressions 'particular average' and 'general average' have the same meanings as assigned to them in sub-section (1) of section 64 and sub-section (2) of section 66 respectively of the Marine Insurance Act, 1963 (11 of 1963).

These are the only classes of maritime claims for which vessels can be arrested. The arrest of associate ships is not permissible in India. A bareboat chartered vessel can be arrested, provided the liability is against the bareboat charterer.

A time-chartered vessel cannot be arrested for a claim against the time-charterer. The maritime claim has to be against the owner of the vessel or against the vessel at the instance of the owner.

Law stated - 29 April 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

India recognises the concept of the maritime lien and has incorporated it into its local laws. The claims contemplated under section 9(1)(a)-(e) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017 are the only forms of maritime liens existing. They are as follows:

1. claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
2. claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

3. claims for reward for salvage services including special compensation relating thereto;
4. claims for port, canal, and other waterway dues and pilotage dues and any other statutory dues related to the vessel;
5. claims based on tort arising out of loss or damage caused by the operation of the vessel other than loss or damage to cargo and containers carried on the vessel.

Law stated - 29 April 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

The test for wrongful arrest is malafide intention and bad faith by the arresting party. On an application by owners, the Admiralty Court may declare the arrest of the vessel as wrongful. The shipowner will have to prove the losses suffered on account of wrongful arrest and the court at its own discretion may grant damages in favour of the shipowner.

Law stated - 29 April 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

The bunker supplier cannot arrest the vessel if the supply is at the instance of the charterer and not at the instance of the owner or bareboat charterer.

Law stated - 29 April 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

The arresting party need not provide any counter-security at the time of filing for the arrest. Such a party will have to provide an undertaking on an affidavit at the time of filing the suit and application for arrest. However, the court may at its discretion or application by the owners, order the arresting party to furnish countersecurity.

Law stated - 29 April 2024

- 28** | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

On the basis of the claim made by the arresting party, the court will test whether a claim has prima facie justification and fix the security amount accordingly at its discretion. It may be equivalent to the claim of the plaintiff or less. The owner may apply for a review of such security amount fixed by the court by filing an application for reduction of security.

Security provided is predominantly in the form of a bank guarantee or cash deposits. It can exceed the value of the ship; however, the shipowner can limit his or her liability.

Law stated - 29 April 2024

Formalities

- 29** | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

The formalities that any claimant is required to undertake to make an application for arrest are as follows:

- A *vakalatnama* (note of appearance) is required to be executed in favour of the lawyer.
- A power of attorney or board resolution and copies of other documents relied upon in support of the claim are required to be filed in court.
- At the time of filing the arrest application, copies of the documents would suffice.
- However, when the matter goes to trial, original documents are required to be produced in court.
- If a power of attorney is issued in a foreign country, the same will have to be notarised and legalised as per the laws applicable of that country where the power of attorney is executed. Since India is a signatory to the Apostille Convention (Hague Convention), apostilled documents are also accepted by courts.
- A substantive suit is required to be filed in India and therefore all documents in support of the case or in defence are to be annexed or exhibited to the pleadings. In case the documents are not in the English language, the same will be required to be officially translated and the official translation will have to be filed along with the said document.
- In case of any affidavits affirmed by any person based outside India, the same will be required to be notarised and legalised or apostilled in the home country as per the laws applicable of that country.
- In case any of the formalities cannot be complied with, owing to limited time, an undertaking can be given to the court that compliance with the pending formalities shall be completed within a specific time, which the court normally grants.

- At present, the documents can be filed electronically in certain jurisdictions (High Courts), but the same if only for a limited period, following which physical copies will have to be filed before the respective court.
- Once all documents are made available, the arrest application can be made within 24 hours.
- The application for arrest is required to be made to the admiralty court of the coastal state, in whose jurisdiction the vessel is found.

Law stated - 29 April 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

The shipowner is responsible for the maintenance of the vessel while under arrest. In case the owner fails to maintain the vessel or abandons her, the arresting party will be required to maintain the vessel and the cost incurred for maintaining the vessel will be treated as sheriff's expenses and paid in priority accordingly.

Law stated - 29 April 2024

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Parties cannot merely arrest a vessel for the purposes of obtaining security for proceedings elsewhere. The arresting party will have to file a substantive admiralty suit for a maritime claim. However, if there is an arbitration clause arrest is permissible for the security of the award. If the defendant provides security, the dispute may be referred to arbitration and the substantive suit may be adjourned sine die. The security so provided will remain deposited in court bearing interest. If the defendant does not enter an appearance or provide security, the matter will be prosecuted in an Indian court.

Law stated - 29 April 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Yes, there are other forms of attachment orders, such as attachment before judgment available to the party for securing its claim. However, the shipowner or defendant must

be within the jurisdiction of the court and such a claim is a claim in personam against the shipowner or the defendant.

Law stated - 29 April 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Indian courts grant orders of delivery up or preservation of evidence or property by appointing a receiver or a court commissioner on reports of surveyors and assessors.

Law stated - 29 April 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Bunkers cannot be independently arrested unless there is a claim against a vessel.

Law stated - 29 April 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

A party arresting through court or other statutory authorities can apply for judicial sale of an arrested vessel.

Law stated - 29 April 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

A vessel is surveyed and a valuation of the vessel is undertaken. The price of the vessel is then determined and fixed and an advertisement for sale is published. The vessel is then sold by a bidding process.

Generally, it takes one to three months to complete the sale process after an order for the sale of the vessel is passed. In the event no bids are received within the stipulated time, bids will be called again and this may delay the conclusion of judicial sale.

The expenses incurred by the sheriff for appraisal and valuation of the vessel, expenses relating to the publication of the auction and conducting the auction (ie, costs incurred by a court) are calculated at actuals and settled from the sale proceeds as sheriff's expenses.

Law stated - 29 April 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The priority of maritime claims against the sale proceeds is determined under section 10 of the Admiralty Act, as follows:

1. A claim on the vessel where there is a maritime lien;
2. Registered mortgages and charges of same nature on the vessel;
3. All other claims.

The following principles shall apply in determining the priority of claims:

- if there are more claims than one in any single category of priority, they shall rank equally; and
- claims for various salvages shall rank in inverse order of time when the claims thereto accrue.

Law stated - 29 April 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

A vessel is sold through judicial sale is free from all encumbrances including liens and mortgages.

Law stated - 29 April 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Judicial sale of a vessel in a foreign jurisdiction is recognised in India.

Law stated - 29 April 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

India is a signatory to the International Convention on Maritime Liens and Mortgages 1993.

Law stated - 29 April 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Admiralty courts in India follow the Hague Rules and the Hague-Visby Rules. However, they are yet not statutorily incorporated or ratified.

Law stated - 29 April 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

The laws applicable to the different modes of transport other than sea are:

- the Carriers Act 1965;
- the Carriage of Goods by Road Act 2007;
- the Carriage by Air Act 1972; and
- the Multimodal Transportation of Goods Act 1993 (as amended in 2000).

Law stated - 29 April 2024

Title to sue

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43 | Who has title to sue on a bill of lading?

A party to whom the title and property have passed as per section (1) of the Bills of Lading Act 1955 can sue on a bill of lading. Normally, the consignee or the holder of a bill of lading duly endorsed is entitled to sue on a bill of lading.

Law stated - 29 April 2024

Charter parties**44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?**

The terms of the charter party can be incorporated in a bill of lading, including the arbitration clause to the extent that the reading of the same does not lead to an absurd and unworkable situation. The reference to an arbitration clause has to be specific for it to be incorporated in the bill of lading.

Law stated - 29 April 2024

Demise and identity of carrier clauses**45 | Is the 'demise' clause or identity of carrier clause recognised and binding?**

Yes, 'demise' clauses or identity of carrier clauses are recognised in India, subject to provisions in the contract.

Law stated - 29 April 2024

Shipowner liability and defences**46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?**

A contract between the shipper and shipowner is under the master bill of lading. However, a bill of lading issued by a freight forwarder or a non-vessel operating common carrier (house bill of lading) cannot foist liability on the shipowner. Such a shipowner can use the defence of absence of privity of contract.

Law stated - 29 April 2024

Deviation from route

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47 | What is the effect of deviation from a vessel's route on contractual defences?

The effect of deviation from a vessel's route on contractual defences would depend on the terms of the contract.

Law stated - 29 April 2024

Liens

48 | What liens can be exercised?

Liens can be exercised on cargo and freight either contractually or by operation of law.

Law stated - 29 April 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The carrier is liable for damages for loss in delivery of cargo without production of the bill of lading and in some cases for the entire cost of the consignment. The carrier's liability can be limited under the provisions of the Carriage of Goods by Sea Act, 1925. Additionally, the parties can enter into an agreement to limit the carrier's liability, however, the amount shall not be lesser than mentioned in the Carriage of Goods by Sea Act, 1925.

Law stated - 29 April 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The responsibilities and liabilities depend entirely on the nature of the contracts (ie, cost, insurance and freight or free on board).

Law stated - 29 April 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

There is no ECA in force within India's territory.

Law stated - 29 April 2024

Sulphur cap

- 52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

In MARPOL Annex VI, Regulation 14, the International Maritime Organization, of which India is a member state, set the sulphur content of fuel oil used by ships outside ECAs to 0.5 per cent mass by mass. This limit is followed by India. The Directorate General of Shipping has released a circular providing guidance and requirements for Indian shipping companies regarding compliance with this regulation.

Law stated - 29 April 2024

SHIP RECYCLING

Regulation and facilities

- 53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

The state of Gujarat has the largest ship recycling industry in India and is governed and regulated by the Ship Recycling Regulations 2015, issued by the Gujarat Maritime Board. The ship recycling industry is primarily governed by the Recycling of Ships Act, 2019.

Law stated - 29 April 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

- 54 | Which courts exercise jurisdiction over maritime disputes?

The coastal High Courts of Bombay, Karnataka, Kolkata, Orissa, Kerala, Andhra Pradesh, Telangana and Madras exercise jurisdiction over maritime disputes in India. Appeals from the High Court lie before the Supreme Court of India.

Law stated - 29 April 2024

Service of proceedings

- 55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Where there is a maritime claim against a vessel or its owner, service is by warrant of arrest being affected on a vessel. In personam claims are governed by the Code of Civil Procedure, 1908.

Law stated - 29 April 2024

Arbitration

- 56** | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The Indian Council of Arbitration is the most active arbitral institution specialising in maritime arbitration.

Law stated - 29 April 2024

Foreign judgments and arbitral awards

- 57** | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The Arbitration and Conciliation Act, 1996 (as amended in 2015) governs and recognises the enforcement of foreign arbitral awards. India is a signatory to the New York Convention 1958 and the Geneva Convention 1927.

Law stated - 29 April 2024

Asymmetric agreements

- 58** | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

The enforceability depends on the seat of arbitration and the substantial law of the contract. Also, if the award is to be enforced in India, then the test in sections 47 and 48 of the Arbitration and Conciliation Act 1996 has to be satisfied.

Law stated - 29 April 2024

Breach of jurisdiction clause

- 59** | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

An application to stay the proceeding can be filed challenging the jurisdiction. Additionally, parties may also choose to initiate their own proceedings before the appropriate courts having jurisdiction as per the jurisdiction clause.

Law stated - 29 April 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

An application, challenging the jurisdiction can be filed to stay the domestic proceedings. Additionally, parties may also choose to initiate their own proceedings before the appropriate foreign courts or arbitral tribunal.

Law stated - 29 April 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Breaches of contract and claims in tort are subject to a time limit of three years; inward cargo to three years; and outward cargo, one year.

A limitation period may be extended provided there is a continuous cause of action or a fresh promise to pay by the party who is liable to pay. Such fresh promises to pay ought to be within the expiry of the original limitation period.

Law stated - 29 April 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Courts or tribunals in India cannot extend a period of limitation.

Owing to the covid-19 pandemic, the Supreme Court of India, using its extraordinary powers, has passed several orders that the period of the pandemic will not be considered or count towards the computation of limitation.

Law stated - 29 April 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

India is a signatory to the Maritime Labour Convention 2006 and has enacted the Merchant Shipping (Maritime Labour) Rules, 2016. It will apply to Indian flagged vessels.

Law stated - 29 April 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Yes, by way of seeking specific performance of the shipping contract.

Law stated - 29 April 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Law stated - 29 April 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Indian government has proactively focused on the shipping, maritime and port industries, and is in the process of developing and modernising its rules and legislation.

Law stated - 29 April 2024



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

In principle, the parties are allowed to decide and agree on when the ownership title of the ship will pass. There is neither statutory guidance nor standard form on the terms of transfer of title. Parties may agree to pass the title to the buyer upon delivery and full payment or during construction.

[Law No. 17 2008 on Shipping](#), as last amended by [Law No. 6 2023](#) on Stipulation of Government Regulation in lieu of Law No. 2 2022 on Job Creation into Law (the Shipping Law) and Minister of Transportation No. 39 2017 on Registration and Nationality of Vessel (MoTR No. 39/2017), has provided guidance on the requirements for registration of ship (deed of registration), among others that it has obtained a measurement certification and that the purchase from the shipbuilder must be accompanied by documents such as the shipbuilding contract, the minutes of handover or delivery, builder certificate and proof of full payment.

Law stated - 23 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

The law is silent on this matter. The validity of the terms regarding the guarantee between the shipbuilder and shipowner will be subject to the Indonesian Civil Code's general contract principles regarding the validity of the contract.

Law stated - 23 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

This remedy may be pursued through a general civil claim against the yard to the relevant court under the grounds of breach of contract or unlawful act (tort). The court with jurisdiction may compel delivery in the interim or following the final decision of a substantiated claim.

Law stated - 23 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Referring to the consumer protection law, the definition of 'consumer' is a person who uses a product or service for their personal use or that of other people. Therefore, the product liability claim may not apply to the second condition. If there is a specific shipbuilding or sale and purchase contract, the claim for defects and damages of the vessel should be based on the agreed terms under the contract. In the event of a third party sustaining damage to defects of a vessel that is not bound to contracts with the shipbuilder or shipowner, the aggrieved third party may make a claim against the party that caused the harm based on an unlawful act (tort) claim.

Law stated - 23 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Registration of vessels is governed under Ministry of Transport Regulation (MoTR) No. 39/2017. Vessels eligible to be registered are ships, fishing boats and vessels that sail on rivers and lakes.

According to article 5(2) of MoTR No. 39/2017, the requirements to register a vessel are as follows:

- a vessel with at least seven gross tonnage;
- a vessel owned by Indonesian nationals or a legal entity established under Indonesian law and domiciled in Indonesia; and
- a vessel belonging to an Indonesian joint-venture legal entity whose majority shares are owned by Indonesian nationals.

Regarding vessels under construction in Indonesia or outside Indonesia, the law allows their registration under the Indonesian flag temporarily as written in article 14 of MoTR No. 39/2017. The registered vessel should at least possess a hull, main deck and the entire upper structure in the final stages of construction.

Law stated - 23 May 2024

- 6 | Who may apply to register a ship in your jurisdiction?

As regulated by MoTR No. 39/2017, the following may apply to register a ship in Indonesia:

- Indonesian nationals;

- a legal entity established under Indonesian law and domiciled in Indonesia; or
- a legal entity in a joint venture, the majority of whose shares are owned by Indonesian nationals.

Based on the letter from the Ministry of Transportation dated 4 August 2017 on MoTR No. 39/2017, a vessel registered by a joint venture company should be a ship owned by an Indonesian private legal entity with the majority shareholders being Indonesian nationals or a ship owned by an Indonesian public legal entity with foreign shareholders not exceeding 49 per cent.

Law stated - 23 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

To register a vessel under the Indonesian flag, the following documents are needed:

- An application letter.
- Evidence of vessel ownership:
 - for vessels under construction at the shipyard:
 - a shipbuilding contract or shipbuilding agreement letter;
 - minutes of the ship handover;
 - a shipyard certificate (builder certificate); and
 - proof of payment for ship construction;
 - for vessels under construction by a traditional shipbuilder:
 - a builder certificate acknowledged by the head of the district; or
 - a builder certificate accompanied by a certificate of ownership issued by the head of the district;
 - for vessels that were previously registered under another flag:
 - a bill of sale legalised before and attested by a public notary or by a government official authorised by the original flag country; and
 - protocol of delivery and acceptance;
 - for vessels that are granted by individuals, a legal entity grant certificate before the notary is required;
 - for inherited vessels, an inheritance statement issued by the court is required;
 - for vessels obtained as a result of a dispute between individuals or Indonesian entities, the final and binding court decision is required; and
 - for vessels obtained by a government auction, the auction minutes are required.

- The shipowner's identity.
- The shipowner's tax registration number.
- The vessel's measurement certificate.
- The vessel's safety examination report, issued by a marine inspector.
- Power of attorney if the application submission and ship registration process is represented, provided that:
 - the owner is an individual or group;
 - the owner is a legal entity;
 - the owner resides in a place other than the place of registration; or
 - the owner is a ministry or an institution.
- Proof of payment of ship transfer fees in accordance with the laws and regulations.
- A recommendation letter from the responsible ministry regarding special fishing vessel activities.

For used foreign-flagged vessels obtained through import, the original deletion certificate from the original flag country must be submitted for registration.

Law stated - 23 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Under articles 160 and 167 of the Shipping Law, dual registration and flagging out are prohibited.

Law stated - 23 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

As stipulated under article 60 of the Shipping Law, registration of a mortgage is completed by a registration official through a mortgage deed.

Pursuant to article 30 of MoTR No. 39/2017, a mortgage deed includes:

- the number and date of the deed;
- the name and domicile of the registrar and ship transfer registrar;
- the name and domicile of the mortgage giver and recipient;
- the number and date of the registration deed or deed of transfer of name;

- ship data;
- the basis for changing the mortgage;
- the mortgage value; and
- other information as agreed.

Law stated - 23 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Indonesia has yet to ratify the International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships 1957 and the International Convention on Limitation of Liability for Maritime Claims 1976.

However, the Indonesian Commercial Code provides certain limitations of liability as follows:

- As stipulated under article 470(2), the carrier may limit their liability over packages unless they have been informed of the value and characteristics of the packages before or while receiving them. The package value must be less than 600 Netherlands Indies guilders.
- The carrier may limit their liability on the damages suffered by the carried packages to 50 Netherlands Indies guilders per cubic metre of the net tonnage of the ship. For a mechanically propelled ship, the gross tonnage of ship weight is deducted from the weight of space occupied by the means of propulsion. This is as provided under article 474.
- Regarding collision cases, article 541 provides that the ship is only liable for a maximum of 50 Netherlands Indies guilders per metre cubic of her net tonnage. If the ship is self-propelled, the net tonnage should be calculated by deducting the weight of space occupied by the engine.

The Commercial Code has not been revised or developed since Indonesia's independence in 1945. Furthermore, there is no guidance regarding the equivalent amount of Netherlands Indies guilders to the present Indonesian rupiah or other currencies. However, several court decisions have referred to the gold price at that time in interpreting Netherlands Indies guilders, to determine the amount of compensation.

Under article 476 of the [Commercial Code](#), the liability limitation provisions may not apply if the damage is a result of intent or serious fault by the carrier, prompting claims of full compensation. Any conditions made that contravene this will be void.

Law stated - 23 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Indonesian law has specifically regulated the procedure for establishing limitation. Further, article 316a of [Reglement op de Rechtsvordering](#) (RV) (the former Dutch civil procedural law) provides that a cash deposit must be submitted to the court's clerk or registrar at the court where the vessel is registered.

Law stated - 23 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

There is no precedent regarding the breaking of liability limitation. Generally, this limit may be broken in cases of serious negligence of the master or crew, force majeure, an act of God or failure from the shipper to properly inform the carrier of the nature of the goods or the parties' consent.

Law stated - 23 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Indonesia has not ratified the International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships 1957. However, the Commercial Code recognises the following carriers' limitations of liability:

- based on article 470(2) of the Commercial Code, stipulated related to the package limitation of liability;
- based on article 474(2) of the Commercial Code, stipulated related to the tonnage limitation of liability; and
- based on article 541 of the Commercial Code, stipulated related to collision cases in particular.

Law stated - 23 May 2024

PORT STATE CONTROL

Authorities

|

14 | Which body is the port state control agency? Under what authority does it operate?

The port state control officer (PSCO) is regulated under Minister of Transportation Regulation (MoTR) No. PM 119 of 2017 (MoTR No. 119/2017) regarding PSCO of Safety and Seaworthiness of Foreign Vessel. This regulation is supplemented by Regulation No. H-103/1/9/DJPL-18 regarding the Implementation of Safety and Seaworthiness of Foreign Vessel Inspection. This implementing regulation provides that the PSCO is an official or officer at the Directorate General of Sea and Transportation at the Ministry of Transportation who must supervise the safety and seaworthiness of foreign vessels in accordance with the relevant international conventions. Further, the authority of the PSCO is delegated to the harbour master, to supervise the safety and seaworthiness of vessels, as stipulated under article 208 of the Shipping Law.

Law stated - 23 May 2024

Sanctions**15** | What sanctions may the port state control inspector impose?

A vessel may be detained by the PSCO if, through an inspection, a 'detainable deficiency' is found.

Law stated - 23 May 2024

Appeal**16** | What is the appeal process against detention orders or fines?

The shipowner or operator may submit a complaint against the PSCO's decision to detain a vessel under detainable deficiency pursuant to MoTR No. 119/2017. A follow-up or re-inspection can be requested and there will be a non-tax state revenue tariff imposed in the amount of US\$350 as regulated by Government Regulation No. 15 2016 concerning Type and Tariff of Non-Tax State Revenue at the Ministry of Transportation.

Additionally, article 11 of MoTR No. 119/2017 provides that the flag state may submit a report to the Tokyo memorandum of understanding panel to conduct a review (a detention review panel) to obtain clarity with regard to the procedure and technical aspects used by the PSCO in stating the results of the inspection.

Law stated - 23 May 2024

CLASSIFICATION SOCIETIES**Approved classification societies****17** | Which are the approved classification societies?

Referring to article 3 of [Minister of Transportation Regulation No. PM 61 2014](#) (MoTR No. 61/2014) on Amendments to MoTR No. PM 7 of 2013 on Classification Obligations for Indonesian Flag Ships at Classification Bodies, below are the approved foreign international classification societies:

- American Bureau of Shipping;
- Bureau Veritas;
- China Classification Society;
- Croatian Register of Shipping;
- Det Norske Veritas;
- Germanischer Lloyd;
- Indian Register of Shipping;
- Korean Register of Shipping;
- Lloyd's Register;
- Nippon Kaiji Kogokai;
- Polish Register of Shipping;
- Registro Italiano Navale; and
- Russian Maritime Register of Shipping.

Indonesia has its own national classification society (PT Biro Klasifikasi Indonesia (Persero) (BKI)). As stipulated in MoTR 61/2014, every Indonesian flagged vessel must be classified either by BKI or one of the aforementioned approved foreign classification societies that have fulfilled the statutory requirements, including having an Indonesian national surveyor in all of their Indonesian branch offices.

Law stated - 23 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

The MoTR No. 61/2014 does not provide any provisions on whether a classification society can be held liable. However, in practice, it is possible to file a claim against BKI on the grounds of unlawful acts, as was done in North Jakarta District Court Decision No. 418/Pdt.G/2017/PN Jkt Utr. The plaintiff demanded that BKI issue a class maintenance certificate; however, the claim was rejected and further information on the panel of judges' decision is not publicly available.

Law stated - 23 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Based on Ministry of Transportation Regulation (MoTR) No. 27 2022 on Salvage and/or Underwater Works, if the wreck or cargo, or both, is dangerous to its surroundings, the harbour master may order the shipowner to remove the wreck into the port that has jurisdiction.

Law stated - 23 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Indonesia has not ratified the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910. However, Indonesia has ratified the Convention on the International Regulations for Preventing Collisions at Sea 1972 by enactment of Presidential Decision No. 50 1979.

Indonesia has ratified the Nairobi International Convention on the Removal of Wrecks 2007 (the Nairobi Convention), as seen in Presidential Decision No. 80 2020 on the Ratification of the Nairobi International Convention on the Removal of Wrecks. Therefore, all provisions stated in the Nairobi Convention are in force and apply to vessels operating in Indonesian waters.

Indonesia has also ratified the International Convention on Civil Liability for Oil Pollution Damage 1969 and enacted Presidential Decision No. 18 1978. In addition, Presidential Decision No. 52 1999 was enacted to ratify the 1992 protocol and to amend the convention. Indonesia has not ratified any international conventions concerning salvage.

Law stated - 23 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

Indonesia does not strictly regulate salvage agreements and Lloyd's standard form of salvage agreement is not prohibited. However, the MoTR concerning Salvage and/or Underwater Works as last amended by MoTR No. PM 27 2022 states that salvage must be carried out within 180 days of the ship sinking or running aground.

According to article 3 of the above-mentioned regulation, salvage operation is to be carried out by a business entity specifically established to conduct salvage operations, underwater works or both.

Law stated - 23 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Indonesia is not a party to either the International Convention Relating to the Arrest of Sea-Going Ships 1952 or the International Convention on the Arrest of Ships 1999.

Law stated - 23 May 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Pursuant to article 222 of the Shipping Law, a ship that is involved in a criminal investigation or civil claim may be arrested. Associated ships cannot be enforced or arrested in Indonesian jurisdiction according to the Shipping Law.

The Shipping Law defines a maritime claim as one arising out of, and that must have a direct connection to, the operation of the vessel. According to the Law, this includes:

- any loss or damage caused by the operation of the ship;
- any salvage operation;
- any salvage agreement or pilotage; or
- any agreement relating to the use or hire of the ship.

The Shipping Law does not provide any regulations or guidance on claims against the bareboat, time charterer, or both. If the vessel is involved in a criminal investigation or civil claim, or there is a claim against the bareboat or time charterer directly operating the vessel, then the vessel is subject to arrest for these claims.

Law stated - 23 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Indonesia has ratified the International Convention on Maritime Liens and Mortgages 1993 by the enactment of Presidential Decree No. 44 2005. Article 4 of this convention is reflected in article 65 of the Shipping Law. However, currently, no regulation under Indonesian law provides guidance or any time frame when enforcing a maritime lien against a vessel.

Law stated - 23 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

No Indonesian law regulates specifically on wrongful arrest of a vessel. However, in general, if the grounds of or conduct of arrest in civil or criminal proceedings are not in accordance with the prevailing laws (eg, conducted by authorities without lawful grounds or court order) then a wrongful arrest may be argued.

Law stated - 23 May 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

According to article 223 of the Shipping Law, cost-related bunkering activities provide a legitimate basis for a maritime claim. However, for a vessel to be arrested the general civil proceeding applies. This means there must be a contractual relationship between the shipowner and the bunker supplier.

Law stated - 23 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

Article 722 of [Reglement op de Rechtsvordering](#) (RV) allows the court to order the arresting party to pay a security (guarantee fee) upon the arrest of a ship. However, in practice, it is rare for courts to apply this provision considering that the nature of such a provision is not imperative.

Law stated - 23 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

There is no law regarding the specific security amount required.

Law stated - 23 May 2024

Formalities

- 29** | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

There are no specific formalities to make an arrest application in Indonesia.

As the arrest of a ship occurs through civil or criminal proceedings, a specific power of attorney (PoA) should be provided to the court or the police. If the PoA is issued in a foreign language then it must be prepared in Bahasa Indonesian too. Furthermore, in cases where the PoA is issued or executed outside of Indonesia, it should be notarised by a public notary and legalised by a diplomatic representative, such as the Republic of Indonesia's embassy. However, if the issuing or executing country is also a signatory of the Apostille Convention then the PoA need not be legalised by the diplomatic representative.

All documented evidence in a foreign language must be submitted along with the formal or sworn Indonesian translation.

Law stated - 23 May 2024

Ship maintenance

- 30** | Who is responsible for the maintenance of the vessel while under arrest?

Indonesian law does not specifically regulate the responsibility for vessel maintenance during arrest. In practice, this cost is usually borne by the owner or operator of the vessel, or arresting party.

Law stated - 23 May 2024

Proceedings on the merits

- 31** | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Generally, the arresting party must first submit a claim on its merits in court before submitting other orders, such as obtaining security by arresting the vessel before the same court that has jurisdiction over the claim.

Law stated - 23 May 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

The claimant can request for attachment of the opposing party's known assets other than the vessel to obtain monetary security before the final court decision. According to Indonesian law, several types of attachment orders can be requested from the panel of judges, namely security attachment for the defendant's goods and security attachment for the plaintiff's goods. Based on article 1131 of the Indonesian Civil Code, security attachment of the defendant's goods can be carried out on movable and immovable goods, both existing and future. Furthermore, based on article 226 of the Indonesian Civil Procedural Law Herzien Inlandsch Reglement (HIR), it is stated that, in principle, the owner of any movable goods can submit a request orally or in writing to a judge to have the goods confiscated if they are in the hands of another person.

Law stated - 23 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Indonesian law does not regulate orders for delivery up or preservation of evidence or property.

Law stated - 23 May 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Indonesian law does not regulate the arrest of a bunker separately from the arrest of the vessel. The Shipping Law only regulates the arrest of vessels.

Law stated - 23 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

The plaintiff may submit the judicial sale of an arrested vessel.

Law stated - 23 May 2024

Procedure

- 36** | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The judicial sale of the vessel is carried out within general civil court proceedings that have obtained a final and binding judgment in favour of the claimant. This is part of the execution proceedings. If the respondent refuses to voluntarily comply with the judgment, then the claimant must apply to the district court to enforce the judgment against the respondent.

The respondent will be given a maximum of eight days to comply with the judgment after appearing before the court chair. Otherwise, the district court will issue an order to seize the respondent's vessel, which will be sold at a public auction (judicial sale). The proceeds of the auction must be distributed to the claimant to satisfy the claim awarded in the judgment and, if applicable, to the relevant parties. The claimant must pay the cost of the public auction to the court in advance, which shall include costs related to the public announcement.

The auction office must make two public announcements before the auction is held. The first will be by flyer, physical media, electronic media or newspaper. The second will be by newspaper and must be published within 14 days of the first announcement and at least 14 days before the date of the auction.

After the auction, each district court may charge different court costs for the judicial sale. This cost may also be incurred from the process within the auction office and for the change or transfer of ownership of the vessel.

Law stated - 23 May 2024

Claim priority

- 37** | What is the order of priority of claims against the proceeds of sale?

The priority of claims based on Indonesian Law is as follows:

- the cost of the auction or execution;
- any debt occurred from the seafarer's agreement;
- any costs of salvage, pilotage and shipping dues; and
- any debt from the collision (in collision cases).

Law stated - 23 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The judicial sale of a vessel occurs as an execution or enforcement of a final and binding court decision. It should be carried out following a court decision against the vessel owner as the debtor in the case, whereby the judicial sale of the vessel must pay monetary compensation over the monetary damages or carry out a criminal decision that concerns the vessel.

When a party purchases or procures a vessel through a judicial sale, they obtain the rights and title as purchaser or owner in good faith. Information related to whether prior liens and encumbrances on the vessel are all lifted may or may not be known and thus not declared by the court or the auction house. If a vessel is sold with liens and encumbrances, the security right holder may file a rebuttal claim against the sale.

Law stated - 23 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

There are no specific regulations governing this matter, but if the sale is carried out in accordance with the statutory provisions in that jurisdiction and is not in violation or conflict with Indonesian law then it shall be recognised by Indonesian law.

Law stated - 23 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Indonesia has ratified the International Convention on Maritime Liens and Mortgages 1993 by virtue of Presidential Decree No. 44 2005.

Law stated - 23 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Indonesia has not ratified any of the rules mentioned.

Law stated - 23 May 2024

Multimodal carriage

- 42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

In Indonesia, multimodal carriage is governed by [Government Regulation No. 8 2011](#) concerning Multimodal Carriage and [Minister of Transportation Regulation No. 8 2012](#) concerning the Implementation and Commercialisation of Multimodal Carriage. The regulations do not specifically mention a bill of lading but there is a multimodal marriage document as the contractual basis for carriage.

Indonesia has been a signatory to the ASEAN Framework for Multimodal Transport since 17 November 2005. This framework is ratified through Presidential Regulation No. 14 2016 concerning the Ratification of the ASEAN Framework Agreement on Multimodal Transport (the ASEAN Framework Agreement on Multimodal Transport).

Law stated - 23 May 2024

Title to sue

- 43 | Who has title to sue on a bill of lading?

Article 510 of the Commercial Code states 'The legal holder has the right to demand delivery of the goods at the destination in accordance with the contents of the bill of lading.' However, besides the legal holder, cargo owners or the cargo insurers (by subrogation) are entitled to bring cargo claims against the carrier for any loss or damage arising out of the carrier's alleged fault for the carrier's default.

Law stated - 23 May 2024

Charter parties

- 44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

In general, provisions based on the charter party can be included in the bill of lading. This is because the bill of lading can contain matters agreed upon by the parties, including regarding jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsement of the bill.

Law stated - 23 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

There is no specific regulation or definition that recognises the demise clause or identity of carrier clause in Indonesia. The validity and bindingness of the clause will be based on the principle of freedom of contract.

Law stated - 23 May 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Generally, the shipowner is fully responsible for the cargo carried by the shipowner. However, if the shipowner can prove that the damage to the cargo was not the fault of or did not result from any negligence of the shipowner, then they are not responsible for the cargo.

Law stated - 23 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Generally, any consequences of deviation from a vessel's route is governed in the contract.

Law stated - 23 May 2024

Liens

48 | What liens can be exercised?

The Shipping Law permits liens from being exercised. Article 65 of the Shipping Law states that the following claims will give rise to a maritime claim attached to the vessel:

- *claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;*
- *claims in respect to loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;*
- *claims for reward for the salvage of the vessel;*

- *claims for port, canal, and other waterway dues and pilotage dues; and*
- *claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.*

Law stated - 23 May 2024

Delivery without bill of lading

- 49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The carrier is liable for the delivery of cargo without producing the bill of lading. There are no provisions that limit the carrier's liability in such a situation and, in theory, the parties can regulate and limit the carrier's liability by considering the applicable laws and regulations.

Law stated - 23 May 2024

Shipper responsibilities and liabilities

- 50 | What are the responsibilities and liabilities of the shipper?

The shipper must hand over the goods or cargo carried in accordance with when they received the goods and at the agreed time. Any failure to fulfil this obligation due to the shipper's fault or negligence may result in the shipper being held liable for the damages.

Law stated - 23 May 2024

SHIPPING EMISSIONS

Emission control areas

- 51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

The ECA is based on Annex IV of the Protocol of 1997 to the International Convention for the Prevention of Pollution from Ships 1973. There is no ECA in force in the domestic territorial waters of Indonesia.

Law stated - 23 May 2024

Sulphur cap

- 52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The sulphur content of fuel oil is regulated in [Circular Letter of Director General of Sea Transportation No. SE 35 2019](#) concerning the Obligation to Use Low Sulfur Fuel and the Prohibition of Transporting or Carrying Fuel that Does Not Meet the Requirements and Management of Waste from Exhaust Gas Recirculation from Ships. Since 1 January 2020, vessels sailing in Indonesia must use fuel with a sulphur content of a maximum 0.5 per cent by mass. However, there are no sanctions for non-compliance.

Law stated - 23 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction?
| Are there any ship recycling facilities in your jurisdiction?

Indonesian law does not yet specifically regulate ship recycling. However, the Shipping Law defines 'ship scrapping' as cutting and destroying ships that are no longer used in a safe and environmentally sound manner that must be done in line with the marine environment protection requirements.

Law stated - 23 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

There is no specific court in Indonesia for shipping dispute settlements. All shipping disputes are submitted to and examined by the relevant district court. The Civil Procedural Law provides the jurisdiction applicable for dispute settlement by a certain district court as being:

- the district court where the defendant is domiciled; or
- if the defendant's domicile is unknown, the claim will be submitted to the district court in the plaintiff's domicile.

Indonesia does have a maritime court, but its authority is limited to the following:

- to examine the causes of ship accidents and determine whether there were breaches of the code of ethics and seafaring professional standards carried out by the master or ship officers, or both, in the event of ship accidents; and
- to carry out further examination of investigation results issued by the Directorate General of Sea and Communication at the Indonesian Ministry of Transportation.

Law stated - 23 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The Indonesian Civil Procedural Laws consisting of *Herzien Inlandsch Reglement*, *Rechtreglement voor de Buitengewesten (HIR)*, and [Reglement op de Rechtsvordering \(RV\)](#) govern the service of court proceedings on defendants. If the party or defendant is domiciled in another country, the court will summon the party through diplomatic channels.

Law stated - 23 May 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

No.

Law stated - 23 May 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

In Indonesia, arbitration is governed under [Law No. 30 1999](#) concerning Arbitration and Alternative Dispute Resolution (the Arbitration Law). The Law recognises foreign arbitration awards, including those related to maritime disputes, as Indonesia has ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards through the enactment of Presidential Decree No. 34 1981.

For a foreign arbitral award to be recognised and enforced in Indonesia, the award must be examined by the Central Jakarta District Court. This foreign arbitral award must also satisfy the requirements laid out in article 66 of the Arbitration Law.

Law stated - 23 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

There is no Indonesian law that regulates usage of the asymmetric jurisdiction clause. However, the general principle is that parties have the freedom to decide which forum they would like their dispute to be settled in, including any court. In practice, the court usually

declines to hear cases where the parties have chosen arbitration as their dispute settlement mechanism in their agreement.

Law stated - 23 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

The party may submit an objection or demurrer regarding the non-competence of the jurisdiction to challenge the submission relating to any breach of a jurisdiction clause.

Law stated - 23 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The party may submit an objection or demurrer on the breach of dispute settlement clause in the agreement. This can also be supported by citing Indonesian court decisions that have declared repeatedly that Indonesian courts have no jurisdiction to adjudicate the case as the parties in the agreement have agreed to elect a foreign court or arbitral tribunal as the dispute settlement forum.

Law stated - 23 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

According to article 1967 of the [Indonesian Civil Code](#), generally there is a 30-year time limit for any legal claim. However, specifically for maritime claims, the time limit for cargo claims is one year (article 481 in conjunction with article 741 of the Commercial Code) and for all legal claims regarding compensation for damages due to collisions, it is two years (article 741 of the Commercial Code).

The restriction of the time limit for claims may also be decided by the parties based on the principle of freedom of contract.

Law stated - 23 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Indonesian law is silent regarding the extension of time limits by courts or arbitral tribunals.

Law stated - 23 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Indonesia has ratified the Maritime Labour Convention 2006 and enacted Law No. 15 2016 concerning the Ratification of the Maritime Labour Convention 2006. The Ministry of Transportation has also enacted Minister of Transportation Regulation No. PM 58 2021 concerning Maritime Labour Convention Certification.

Law stated - 23 May 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Legally, all provisions contained in the shipping contract must be implemented by the parties. If there are matters that hinder or interfere with the implementation of the shipping contract, the parties can agree on this matter if it is based on good faith in implementing the shipping contract.

Law stated - 23 May 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Shipping Law requires that domestic sea transportation must be carried out by an Indonesian shipping company using an Indonesian-flagged vessel and Indonesian crew. In Indonesia, this is known as the cabotage principle. The MoTR No. PM 2 of 2021 on the procedures and requirements for the granting of foreign vessel utilisation approval for activities other than the domestic carriage of passengers or goods, or both, lists the types of activities for which foreign vessels may be used, namely:

- oil and gas surveys;
- drilling;
- offshore construction;

- offshore operational support;
- dredging;
- salvage and underwater works;
- electricity activities (performed by power plant vessels); and
- jetty construction.

Any foreign-flagged vessels must be approved to use a foreign vessel after obtaining their standard shipping licence.

Law stated - 23 May 2024

UPDATE AND TRENDS

Key developments of the past year

- 66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

Regulations related to the Indonesian Shipping Law have been furthered by the issuance of Law No. 6 of 2023 on the Stipulation of Government Regulation in lieu of Law No. 2 of 2022 on Job Creation into Law (the Job Creation Law). Further, the Indonesian government recently enacted Government Regulation No. 13 2022 on the implementation of security, safety and law enforcement in Indonesian waters and Indonesian jurisdictions to provide authority to the Indonesian Maritime Security Agency to inspect the vessel, where it is alleged that shipping regulations have been violated.

The Minister of Transportation has also issued Regulation No. 27 of 2022, which serves as the third amendment to Minister of Transportation Regulation No. 71 of 2013 on salvage and wreck removal works, wherein it emphasises the implementation of the Nairobi Convention, namely, that any vessel sailing within Indonesian waters must have wreck removal insurance.

Law stated - 23 May 2024



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

The civil shipbuilding industry in Israel is not extensive. Transfer of title in a shipbuilding contract will pass in accordance with the contractual terms. Contractual freedom is safeguarded in Israel and governed by the Israeli Contracts (General Part) Law 1973 and the Contracts (Remedies for Breach of Contract) Law 1970. The usual position regarding the transfer of title in sale of goods cases is that title passes upon delivery and this will also be the position in shipbuilding contracts, even if the newbuilding has been financed by instalments; see section 33 of the Sale Law 1968, which provides that ownership of the object sold passes to the buyer upon its delivery, unless the parties agreed upon some other time or manner for the transfer of ownership. At the same time it should be noted that the nature of a shipbuilding contract (ie, whether it should be regarded as a pure contract for the sale of goods or a contract having the elements of a construction contract has not yet been decided by the Israeli courts), albeit it is likely that the Israeli courts would accept the rationale behind the two leading English House of Lords decisions in *Hyundai Heavy Industries Co v Papadopoulos and Others* (1980) and *Stocznia Gdanska SA v Latvian Shipping Co, Latreefer Inc and Others* (1998) that a shipbuilding contract is also a contract to build, launch, equip, deliver and sell a vessel.

Thus, the courts would recognise the validity of a contractual provision whereby conditional title passes to the buyer in the course of construction, with the buyer entitled to reject the vessel and rescind the contract if the vessel does not meet contractual terms with the result that title would revert to the builder.

Law stated - 20 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

The refund guarantee, being issued by the builder's bank, need not be registered to be valid, nor are there foreign currency regulations that would prevent execution of the guarantee. Guarantees issued by non-financial institutions would potentially have to be registered with the Registrar of Companies before they would become enforceable.

Law stated - 20 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Under sections 2 and 3 of the Contracts Law (Remedies for Breach of Contract) 1970, a party injured by a breach of contract is entitled to the remedy of specific performance. Section 2 of the Law provides that the main remedies available to a party injured by a breach of contract are specific performance, termination and damages. Section 3 states that specific performance is subject to limited exceptions, among them impossibility of performance. The Israeli courts have moved away from the traditional approach whereby specific performance is to be considered a secondary remedy and instead take the view that enforcement of a contract is the desirable outcome in light of the obligatory nature of contracts. The result is that the above exceptions are narrowly construed. This judicial policy will also apply to the grant of specific performance in cases where builders breach shipbuilding contracts by wrongfully failing to make delivery.

Law stated - 20 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Defects in vessels could potentially give rise to claims in contract or in tort. Issues of non-conformity are governed by the Sale Law 1968. Section 13 of the Law provides that the buyer is under an obligation to examine the thing sold immediately after its receipt. Section 14 states that the buyer will notify the seller of any non-conformity immediately after examination or upon discovery of the non-conformity, whichever is earlier. If no notice is given, the buyer may not rely on it, save in the case of latent non-conformity which was not discoverable upon reasonable examination. Under section 15 of the Law, in the case of sale of movable property (such as a vessel) the buyer is not entitled to rescind the contract if notice is given more than two years after delivery and is not entitled to other remedies for breach of contract if notice is given more than four years after delivery. These limitation periods do not apply in cases of concealment of the non-conformity.

An alternative cause of action could lie in tort under either the Civil Wrongs Ordinance or the Defective Products Law to the extent that the defect has caused personal injury. To succeed in a negligence action, the buyer would have to show the existence of a duty of care, breach of the duty by the builder and a causal connection between the breach the resultant damage. Under the Defective Products Law, there is no need to prove negligence on the part of the manufacturer, a plaintiff need show only that the product was defective and that the injury was caused by the manufacturing defect. A product is considered defective if the circumstances of the case are more consistent with that conclusion than with the conclusion that it was not. The Consumer Protection Law also provides, inter alia, that a dealer should disclose to the consumer any defect or quality inferiority that materially diminishes the value of the product.

Law stated - 20 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

A vessel owned by the State of Israel, an Israeli citizen or a company registered in Israel or owned by a foreign company, where more than 50 per cent of the shares in the vessel are owned by an Israeli citizen, must be registered in the Israeli vessel registry. Israeli law allows the registration of a vessel, less than 50 per cent of which is Israeli-owned, to register in Israel, upon making a special request to the Minister of Transport. Similarly, where more than 50 per cent of a vessel is Israeli-owned, the owner may apply to the Minister of Transport for permission not to register the vessel.

The Shipping (Foreign Vessel Under Control by Israeli Interests) Law 2005 provides that any vessel that is not eligible for registration in the Israeli Ship Register in accordance with the relevant Israeli shipping laws, but is controlled by Israeli interests (as statutorily defined) must be registered in Israel in a registry book, known as the Secondary Register (or the Grey Register), regardless of its ownership registration in a foreign registry.

A vessel under construction in Israel or abroad that complies with the above regulations may be registered in Israel.

Law stated - 20 May 2024

6 | Who may apply to register a ship in your jurisdiction?

Israeli nationals, Israeli residents and corporations incorporated in Israel, but excluding foreign corporations registered as such under the relevant provisions of the Companies Law 1999 that has control over a foreign registered vessel, may apply to register a vessel in the Israeli Registry.

Law stated - 20 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

In order to register a vessel in the Israeli Register, an owner must provide the registrar with a builder's certificate or bill of sale plus certificate of deletion of the vessel from the prior registry (in the case of a second-hand ship) as well as proof that the vessel is free from registered encumbrances. In the case of a vessel subject to a mortgage or charge, the owner must produce the consent of the mortgagee or chargee to register the vessel in Israel.

Law stated - 20 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration is not permitted, except in the case of foreign vessels controlled by Israeli interests. Thus, the Shipping (Foreign Vessel Under Control by Israeli Interests) Law 2005 provides that any vessel that is not eligible for registration in the Israeli Ship Register in accordance with the relevant Israeli shipping laws, but is controlled by Israeli interests (as statutorily defined) must be registered in Israel in a registry book, known as the Secondary Register (or the Grey Register), regardless of its ownership registration in a foreign registry.

Under Israeli law flagging out is not possible as all Israeli vessels must be registered, using the same process without distinction as to the size or purpose of the vessel concerned, albeit details of small boats of less than seven metres in length are maintained in a separate small boats' registry. Vessels under construction in Israel or abroad may also be registered in certain circumstances. Separate registries are kept for each port.

Law stated - 20 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The Mortgage Register is maintained by the Registrar of Vessels. The process of registration of the mortgage is initiated with the submission of a simple commercial financing instrument, setting out the degree of the mortgage and conditions for repayment. The parties must appear personally before the Registrar at the same time, complete a mortgage deed and sign it before the Registrar. The Registrar will assign a mortgage number, which is subsequently recognised as the mortgage on the vessel (this number will appear on the mortgage deed and all other deeds relating to this mortgage). If the ship owner is a company or corporation, the company or its representatives must also provide the Registrar with the minutes of the corporate management meeting, stating explicitly that a legal quorum of members has resolved to register the lien or mortgage in the Mortgage Register.

Law stated - 20 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The Israeli Shipping Law (Limitation on a Ship-Owner's Liability) 1965 adopts the International Convention relating to the liability of Owners of Sea-Going Ships (Brussels, 10 October 1957).

As Israel has not ratified the LLMC 1976, no limitation is available for those claims introduced by the LLMC 1976 and not found in the 1957 Convention.

Accordingly, the types of claims subject to limitation of liability are those set out in articles 1(a), 1(b) and 1(c) of the 1957 Convention. The claims that are not subject to limitation of liability are as set out in article 1(4) of the 1957 Convention.

Pursuant to the terms of the 1957 Convention, the right of limitation is granted to a broad class of individuals and entities including charterers, managers and operators of seagoing vessels, as well as masters and members of the crew acting in the course and scope of their employment.

The Israel Shipping (Limitation on a Ship-Owner's Liability) (Amendment) Law 1987 amended the 1965 Law previously referred to by adopting the 1979 Protocol and replacing Gold Francs with Special Drawing Rights (SDR). Pursuant to the 1979 Protocol, the limitations of liability applicable in Israel are SDR 66.67 per tonne for cargo claims and SDR 206.67 per tonne for personal claims.

It should be noted that the Shipping (Limitation on a Ship-Owner's Liability) (Amendment) Bill, 2015 proposes that Israel adopt the 1976 Convention, together with the Protocols of 1996 and 2012. The proposed law intends to allow salvors to limit their liability.

Law stated - 20 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Ship owners can apply to the Admiralty Court to establish a Limitation Fund, calculated as set out in the 1957 Convention on Limitation of Liability for Maritime Claims. The court will give orders as to the ship owner's deposit and the manner in which notices will be published to creditors.

It should be noted that the Israeli courts accept the deposit of funds in Israeli shekels, in a sum determined by the court. However, parties will often agree on the provision of local bank guarantees. The Israeli Admiralty Court has accepted letters of undertaking issued by P&I Clubs as security for the release of vessels from arrest and it is likely that they would also accept letters of undertaking issued by P&I Clubs in lieu of arrest.

Once a fund is constituted, claims by local creditors must be filed within 30 days. Foreign creditors are given 60 days to file their claims.

According to section 9(a) of the Law, constitution of a fund creates a bar to other actions.

Law stated - 20 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

In view of the fact that Israel is a signatory to the International Convention relating to the liability of Owners of Sea-Going of 1957, article 1 of that convention applies, to the effect that ship owners may limit their liability 'unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner'. In view of the fact that the creation of a limitation fund often provides an incentive for settling the underlying dispute, the Israeli courts have not had occasion to discuss in depth the legal tests for breaking a limitation fund.

Law stated - 20 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Israel has not adopted the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea and there is no Israeli legislation relating to passenger rights or creating limitation regimes in respect of passenger claims, albeit the death or personal injury of a passenger gives rise to a statutory lien on a vessel by virtue of section 41(6) of the Shipping (Vessels) Law 1960. It is doubtful whether the Israeli courts would recognise the validity of contractual limitations of liability in personal injury cases, including in cases governed by foreign law.

Law stated - 20 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The Israel Ministry of Transport has established the Shipping and Ports Administration (SPA) to regulate all activities relating to Israel's maritime activities. The SPA is responsible for the safety of Israeli shipping.

Port Regulations provide very detailed regulations relating to the conduct of vessels, safety, and order in the Israel ports. The State of Israel implemented the Port State Control (PSC) inspection system in 1997, in accordance with International Maritime Organization (IMO) and International Labour Organization (ILO) resolutions.

PSC inspections are conducted to ensure that foreign vessels calling at Israeli ports comply with international regulations and conventions. The SPA is responsible for all PSC activities, and aims to inspect each and every tanker and passenger ship arriving at Israeli ports, as well as 25 per cent of the container ships and general cargo ships, with an emphasis on bulk carriers.

Law stated - 20 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

Pursuant to the Ports (Shipping Safety) Regulations 1982, the Port State Inspector may order the renewed inspection of a vessel found to be deficient and order the detainment of foreign vessels found to be unseaworthy. The Inspector may also refuse to allow a foreign vessel entry to Israeli territorial waters if to do so would be considered unsafe to shipping, the environment or an individual.

Law stated - 20 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

A ship owner or master may file an appeal against a port inspector's decision regarding unseaworthiness or detention to the head of the Shipping and Ports Administration. The latter is required to make a decision on the appeal within 24 hours. The owner or master may also file an administrative petition to the District Court in accordance with the provisions of administrative law.

Law stated - 20 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

It should be noted that for the purpose of confirming the safety of containers under the Ports (Container Safety) Regulations – 1982, a recognised association includes, inter alia, the following classification societies (apart from the Israel Standards Institute): American Bureau of Shipping (ABS); Bureau Veritas (BV); DNV GL; Lloyd's Register of Shipping (LR); Nippon Kaiji Kyokai (NKK); and Registro Italiano Navale (RINA).

Law stated - 20 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

To date, the Israeli courts have not had occasion to consider the liability of a classification society.

Law stated - 20 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION**Wreck removal orders****19** | Can the state or local authority order wreck removal?

The Ports Ordinance 1971 provides that the Israel Ports Company may demand that owners remove a vessel that has been lost or abandoned in Israeli waters where that vessel poses a danger to navigation or docking.

The Wrecks and Salvage Fees Ordinance 1926 provides that where any services are rendered wholly or in part within the waters of Israel in saving life from any vessel, or in assisting any vessel that is wrecked, stranded or in distress, or saving the cargo or apparel of that vessel, or any part thereof, there shall be payable to the salvor, by the owner of the vessel, cargo, apparel or wreck, a reasonable amount of salvage, to be determined in the case of dispute.

Law stated - 20 May 2024

International conventions**20** | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Israel has ratified the International Regulations for Preventing Collisions at Sea 1972 (COLREG 72) and incorporated them into Israeli law via the Ports (Preventing Collisions at Sea) Regulations 1972.

Israel is not a party to the Salvage Convention 1989.

Section 41(7) of the Shipping (Vessels) Law 1960 creates a statutory lien for damages resulting from collisions or damage caused by the vessel to port installations, buildings and dry docks, as well as loss or damage to cargo and passengers' personal effects.

Israel is a party to the following International Conventions relating to pollution:

- the International Convention for the Prevention of Pollution from Ships, 1973 as modified by Protocol 1978 (MARPOL 73/78);
- Protocol to the International Convention on Civil Liability for Oil Pollution Damage, (CLC PROT 1992);
- Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (FUND PROT 92);
- International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 as amended (OPRC 1990); and
- Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean 1995.

Local legislation relating to pollution includes:

- Prevention of Sea-Water Pollution by Oil Ordinance [New Version] 1980;
- Regulations for the Prevention of Sea-Water Pollution by Oil (Guarantee for Fine Payments and Cleaning Expenses) 1983; and
- Regulations for the Prevention of Sea-Water Pollution by Oil (Marine Environment Protection Fee) 1983.

The Prevention of Sea-Water Pollution by Oil Ordinance applies to Israeli territorial waters and inland waters and its provisions may be applied to non-Israeli vessels outside Israeli territorial waters that threaten to pollute Israeli territorial waters. The Ordinance specifies actions to be taken in the case of oil discharges and creates a fund for the Prevention of Sea-Water Pollution to create financial resources for the fight against and prevention of pollution of seawater and the seashore and for their cleansing and inspection. In cases of discharge of oil into the sea, the Minister of Transport may, by notice, request the owner of the vessel to take specified measures aimed at preventing, stopping or reducing the discharge. A 'marine environment protection fee' may be imposed on owners or operators of vessels, as well as on owners or operators of installations on land or at sea from which oil might be discharged or allowed to escape into the sea. The Ordinance and regulations provide for offences, fines and penalties as well as legal and procedural matters, and indeed in recent years, there have been cases where the Ministry of the Environment has enforced the Prevention of Sea-Water Pollution by Oil regulations by bringing criminal charges against infringing owners.

After considerable delay, in January 2022, the Knesset's Economic Committee finally approved Ministry of Transport Regulations designed to protect the marine environment, by drastically reducing the amount of organic and non-organic sewage dumped by vessels at sea. The regulations give effect to the International Convention for the Prevention of Pollution from Ships (MARPOL) 1973, Annex IV. The new regulations provide for the removal of waste stored in the vessels while in port, and sanctions for infringement.

Law stated - 20 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory form of salvage agreement operating in Israel and the Lloyd's standard form agreement is frequently seen and enforced. Salvage services may be performed by professional or non-professional salvors and insofar as the services are offered wholly or in part in Israeli waters their fees are guaranteed under the Wrecks and Salvage Fees Ordinance 1926.

Law stated - 20 May 2024

SHIP ARREST

International conventions

- 22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Israel is not a party to either the 1952 or the 1999 Arrest Conventions.

Law stated - 20 May 2024

Claims

- 23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

The Admiralty Court in Israel has jurisdiction to arrest a vessel insofar as the claim falls either within the scope of the Colonial Courts of Admiralty Acts 1840-1861, a relic from the time of the British Mandate which now form part of Israeli domestic law, or is the subject of a statutory right of action in rem under the Shipping (Vessels) Law 1960. Thus, under the Courts of Admiralty Acts, the Admiralty Court may order the arrest of a vessel, inter alia, in respect of a claim concerning title or ownership of a vessel, salvage, towage, services rendered to a vessel, damage done by any ship, necessaries supplied to a ship, building, equipping or repairing a ship, or damage to goods imported to Israel under a bill of lading. Additionally, the Admiralty Court can order the arrest of a vessel for a claim giving rise to a statutory lien under the Shipping (Vessels) Law 1960, including, for example, damages for personal injuries to passengers, crew wages and mortgages.

The Israeli Admiralty Court has no jurisdiction to order the arrest of a sister ship or associate ship. This was recently reconfirmed in the case of *M/V Huriye Ana*. A ship can be arrested in respect of an obligation of a bareboat charterer; however, there is no jurisdiction to arrest a time-chartered vessel for a claim against a time charterer in the absence of personal liability of the owner as well.

Nonetheless, within the context of a civil suit against the ship-owner as opposed to admiralty proceedings, the court may order the corporate veil to be lifted and consequently the attachment of sister ships or vessels owned by affiliated companies. Attachment orders in civil proceedings are comparable to arrest orders except in so far as they require the provision of collateral security.

Law stated - 20 May 2024

Maritime liens

- 24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

The Israeli Shipping (Vessels) Law 1960 sets out the maritime liens which give allow the Court to exercise its jurisdiction to order the arrest of a vessel. This law widens and elaborates on the Admiralty Court's jurisdiction as established by the Colonial Courts of Admiralty Acts.

Section 40 establishes the existence of maritime liens against the vessel and also creates maritime liens on the freight due and the ancillary rights stated in section 43. Section 41 determines the liens on the freight due and the ancillary rights stated in section 43. Section 41 determines the liens and their priorities, as [follows](#):

1. the official expenses of selling a vessel pursuant to a judicial sale;
2. port and port related charges and expenses;
3. the costs of preserving a vessel pending judicial sale;
4. payments due to the master and crew including damages for personal injury;
5. salvage expenses relating to the vessel, its cargo and equipment on board and expenses incurred in saving the lives of the crew and passengers;
6. damages for personal injuries to passengers;
7. damages resulting from collisions or damage caused by the vessel to port installations and buildings, dry docks, and loss or damage to cargo and to passengers personal effects;
8. mortgages – no distinction is drawn between a local or foreign registered mortgage; and
9. necessities.

Section 43 extends the maritime liens to include unpaid damages due to the ship owner for damage caused to the vessel or for loss of freight and for amounts due to the ship owner under general average or for amounts due to the ship owner for salvage services rendered by the vessel.

Law stated - 20 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

There is no decisive authority in the Admiralty Court regarding the definition of wrongful arrest or the amount of damages due in such cases. A party seeking an interim remedy (such as an attachment or order of arrest) may potentially be liable in tort if they have acted unreasonably or maliciously (CA 732/80 *Arens v Bet-El*, where the Supreme Court considered the applicant's duty to present the court with the full factual basis).

Alternatively, in the relatively unusual case that the Admiralty Court has required a guarantee to be put up at the time of arrest, that guarantee could be forfeit in the appropriate

circumstances should bad faith be shown. Failure of the claim, per se, would not usually give rise to a successful claim for wrongful arrest.

Law stated - 20 May 2024

Bunker suppliers

- 26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

A supplier cannot arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel. While there is no statutory requirement in Israel that owners be personally liable in order for a right in rem to arise, recent case law suggests that the Admiralty Court will not enforce a maritime lien in the absence of personal liability on the part of the owner (ALA 851/99 *M/V Ellen Hudig* (2004)). Similarly, in CF 45897-02-12 *M/V Emmanuel Tomasos* (2014) the actual bunker supplier's claim was denied on the ground that only the contractual supplier who had contracted with the owners could be a creditor under the necessities' lien. Likewise, in AF 24399-05-15 *M/V Nissos Rodos* (2016) it was held that the local agent who had been nominated by the operator of the vessel, and paid the port dues for the numerous calls of the vessel at Haifa Port, was not entitled to enforce a maritime lien for 'port dues of any kind . . . paid by a third party' on the ground that the agent had no agreement with the owners and that therefore the owner was not personally liable to pay the agent.

Again, in AF 22358-02-14 *M/V Captain Harry* (2016), a supplier's claim was dismissed due to a lack of owner's liability; nonetheless, the Admiralty Court noted that there were different types of maritime liens and that, for example, the maritime lien for salvage existed, even if the owners were not liable for the circumstances leading to the salvage event.

Law stated - 20 May 2024

Security

- 27 | Will the arresting party have to provide security and in what form and amount?

Other than in exceptional circumstances, an arresting party usually will not have to provide security prior to being granted an order of arrest. In ALA 201/93 *Fullwood Marinated Inc v Lofobunker Co SA (The Arctic Hunter)*, it was held that such exceptional circumstances might arise where the application for arrest is based on documents of doubtful veracity. This is in contrast to the comparable order of attachment in civil proceedings, where the court will order security to be put up, usually in the form of a personal letter of undertaking as well as a letter of undertaking by a suitable financial institution undertaking to reimburse the defendant should the application be set aside and/or the claim be dismissed on the merits causing the defendant to incur a loss. The court may exempt the claimant from providing the third-party LOU where it is deemed just and proper to do so. The court has discretion

to determine the amount of the LOU after balancing the interests and competing rights of the parties.

Law stated - 20 May 2024

- 28** | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The court may agree that the arrested vessel be released upon the provision of suitable security. Such security usually takes the form of a P&I letter of undertaking, or Israeli bank guarantee with the amount of the security agreed following negotiations between the parties and usually equal to the value of the claim. The security will generally not exceed the value of the ship.

Law stated - 20 May 2024

Formalities

- 29** | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

A party wishing to appoint a lawyer to make an arrest application must provide the attorney with a power of attorney to act. While not a strict requirement, it is advisable to support an ex parte application with an affidavit setting out the facts. These documents need not be notarised although they should be authenticated by an attorney in accordance with Israeli rules of evidence. Israel is a signatory of the Apostille Convention; however, it is not necessary to notarise and apostille documents prior to submitting them in evidence. Scanned documents suffice in view of the fact that documents are filed in court electronically using a dedicated program. Original documents will only be required if an issue arises between the parties as to the authenticity of a document. Generally, preparation of an arrest application takes a number of hours, depending on the availability of evidence. Translations are not required where documents are in English.

Law stated - 20 May 2024

Ship maintenance

- 30** | Who is responsible for the maintenance of the vessel while under arrest?

The owners will be responsible for the vessel's maintenance insofar as they file a notice of appearance in the claim in rem within the appropriate time limit. In the event that no such notice is filed and the claimant applies for the appointment of a liquidator or receiver, the Admiralty Court may grant such an application and the liquidator or receiver will then become responsible for the maintenance of the vessel until she is sold at judicial auction.

Law stated - 20 May 2024

Proceedings on the merits

- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

The Admiralty Court has jurisdiction to order the arrest or attachment of a vessel as security for foreign judicial or arbitral proceedings, upon provision of prima facie evidence that the ship-owner will not be in a position to satisfy a judgment or arbitral award. Moreover, interim relief in the form of ship arrest or temporary attachment may be obtained before the foreign arbitration proceedings have been initiated (CA 102/88 *Silver Goose Delicatessen Ltd v Cent or S.A.R.L.*).

Law stated - 20 May 2024

Injunctions and other forms of attachment

- 32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Apart from in rem proceedings, a vessel or other asset may be attached in ordinary civil proceedings. The Admiralty Court may also grant other forms of injunction available under the Israeli Rules of Civil Procedure to the extent that plaintiffs are able to prove that these are necessary to secure their claim.

Law stated - 20 May 2024

Delivery up and preservation orders

- 33 | Are orders for delivery up or preservation of evidence or property available?

The court may grant an order to deliver up or preserve evidence, but this is a fairly uncommon measure. More common is an order allowing a witness statement to be taken from the master or crew or orders enabling court-appointed surveyors to examine the vessel and documents on board.

Law stated - 20 May 2024

Bunker arrest and attachment

- 34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

An order of arrest made by the Admiralty Court will usually apply to the vessel, her freight and bunkers. Similarly, it is possible to obtain an order of attachment against bunkers in the same way as any other chattel, subject, of course, to the applicable rules of retention of title.

Law stated - 20 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

An application for the judicial sale of a vessel is usually made by the claimant and will follow judgment entered against the vessel or ship owner. Such an application is generally made upon it becoming apparent that the owner is unable to pay the judgment sum. Occasionally, however, a sale order will be made on the application of an interested party, when the vessel deteriorates in value and there are outstanding or increasing debts, for example, for crew payments and suppliers. In such a case, the sale will precede the judgment and the fund will be held in court in lieu of the res, subject to the priorities listed in section 41 of the Shipping (Vessels) Law 1960.

Law stated - 20 May 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The procedure for judicial sale of a vessel is set out in the Vice Admiralty Rules 1883. Under these provisions, in the event that no Notice of Appearance is filed on behalf of the shipowner within seven days after service of the writ of summons, or where owners fail to maintain the arrested vessel, the Admiralty Court may order the judicial sale of the vessel. Such sales are usually handled by a receiver appointed by the court and are carried out by public auction although the court will, in rare circumstances, order the vessel to be sold by private contract. A judicial sale will usually be completed within a time period of 30–45 days as of the date of the sale order. The court costs will vary from case to case and consist of disbursements and the court-appointed receiver's fees determined in accordance with regulations applicable to appointed office-holders' fees.

Law stated - 20 May 2024

Claim priority

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37 | What is the order of priority of claims against the proceeds of sale?

Priorities are set out in section 41 of the Shipping (Vessels) Law 1960. All the maritime liens set out in section 41, except necessities, rank higher than the statutory right in rem granted by a mortgage. The first debt which will be paid by the sale proceeds are the expenses incurred in the judicial sale, followed by port dues and fees and then the costs of guarding and maintaining the vessel until her sale. Next on the list of priorities are the master and crew's wages, followed by salvage and general average, death and personal injuries on board, collision and property damage claims, necessities and mortgages.

Law stated - 20 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

Judicial sale will have the effect of extinguishing all prior liens, including maritime liens, and thereby giving the purchaser clean title.

Law stated - 20 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

The recognition of foreign judgments in Israel is mainly regulated in the Foreign Judgment Enforcement Law. Once a foreign judgment, including an order of sale by a competent court, is declared to be enforceable, it has the same validity as an Israeli judgment for the purposes of execution.

Law stated - 20 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

The State of Israel is not a party to the above convention.

Law stated - 20 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

|

- 41** | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Israel has adopted the [Hague-Visby Rules](#), by virtue of the Carriage of Goods by Sea Ordinance 1926, as amended in 1992. Israel is not a party to the Hamburg Rules or Rotterdam Rules.

For the purpose of the Hague-Visby Rules, carriage at sea begins when the goods are loaded onto the vessel and ends when they are discharged from the vessel.

Law stated - 20 May 2024

Multimodal carriage

- 42** | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Israel has not adopted any conventions or local laws specifically relating to combined transport.

Law stated - 20 May 2024

Title to sue

- 43** | Who has title to sue on a bill of lading?

The consignee has title to sue under a bill of lading.

Law stated - 20 May 2024

Charter parties

- 44** | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Clauses of the charter party that are reproduced in the bill of lading, and that have been accepted by the holder of the bill of lading are considered binding; mere reference to a charterparty clause may not be considered sufficient, albeit the issue will be one of construction in each case.

However, a charterparty jurisdiction or arbitration clause incorporated into a bill of lading held by a third party will in most circumstances be considered binding.

Law stated - 20 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

It is a question of construction in each case whether the 'demise' clause and 'identity of carrier' clause will be recognised by the court. They will not automatically be binding.

Law stated - 20 May 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

The Israeli courts have not yet had occasion to consider the issue of shipowners' liability under charterers' bills of lading where the owner is not stated to be the contractual carrier (ie, where no reference is made to the owner as carrier). It is likely that the owners' liability will depend on circumstances extraneous to the bill of lading.

Law stated - 20 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Pursuant to article IV Rule 4 of the Hague–Visby Rules, any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be a breach of the contract of carriage, and the carrier will not be liable for any ensuing loss or damage. An unjustified deviation may be considered a breach of the contract of carriage and would preclude the carrier from relying on any exclusion clause limiting his or her liability.

Law stated - 20 May 2024

Liens

48 | What liens can be exercised?

The Shipping (Vessels) Law 1960 provides a list of maritime liens that can be exercised on the vessel, cargo and freight. In addition, the Israeli courts will recognise possessory liens, floating charges and other contractual liens set out in charter parties and bills of lading.

Nonetheless, the Admiralty Court has rejected its jurisdiction to order the arrest of a vessel on the basis of a contractual lien only.

Law stated - 20 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Delivery without the production of a bill of lading may result in the carrier becoming liable for any ensuing loss. This difficulty is usually overcome by the consignee presenting a letter of indemnity to indemnify the carrier for such loss. The courts have not yet considered the validity of such LOIs.

Law stated - 20 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper's duties are as set out in article 111(5) of the Hague Visby Rules, namely to properly mark, number, quantify and weigh the goods as well as indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. In addition, the shipper will have the responsibilities and liabilities arising from the sale contract with third parties.

Law stated - 20 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Israel has not yet established ECAs in its territorial waters, although domestic regulation does control air and marine pollution.

Law stated - 20 May 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The Shipping and Ports Authority, in collaboration with the Ministry of Environmental Protection has drafted regulations to prevent air pollution from vessels. These regulations, first published in 2019, have not yet been signed into force.

The draft regulations are in compliance with (and even more stringent than) the requirements in IMO 2020, the term used to describe the implementation of the Regulations to Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL). IMO 2020 aims to improve air quality and to protect the environment by reducing sulphur oxide produced by ships. Israel will only be able to ratify Annex 6 after the regulations take effect. Once in effect, ships entering Israeli territorial waters and Israeli registered ships will be required to use fuel oils with a sulphur content of 0.5 per cent m/m or lower; an approved equivalent means of compliance such as exhaust gas cleaning systems (EGCS) commonly referred to as ‘scrubbers’; or non-fuel oil alternatives such as switching to liquefied natural gas (LNG) as fuel.

A 2016 task force funded by the Ministry of Environmental Protection recommended a number of measures to reduce pollution in the marine sector at both the Haifa and Ashdod ports.

Law stated - 20 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction?
Are there any ship recycling facilities in your jurisdiction?

Not applicable.

Law stated - 20 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The Admiralty Court seated in Haifa has exclusive jurisdiction to hear cases in rem and also hears cases in personam. The jurisdiction is still being exercised in virtue of the British Admiralty Courts Acts of 1840 and 1861 with the proviso that said jurisdiction does not exceed that exercised by the High Court in England in 1890.

Law stated - 20 May 2024

Service of proceedings

55 |

In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Procedure in the Admiralty Court is governed by the Vice Admiralty Rules 1883, and in the event of lacuna by the Israeli Rules of Civil Procedure 2018. Service on a defendant located outside the jurisdiction requires leave of the court.

Law stated - 20 May 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

There are no domestic arbitral tribunals operating in Israel specialising in maritime arbitrations.

Law stated - 20 May 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Israel is a party to the 1958 New York Convention on the Enforcement and Ratification of Foreign Arbitral Awards, which provides for the stay of judicial proceedings in the case of a foreign arbitration agreement, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

Section 29 of the Israeli Arbitration Law 1968 provides that matters regarding enforcement or cancellation of an arbitration award governed by an international convention to which Israel is a party will be dealt with according to the provisions of that convention. As a result, a court considering the ratification of a foreign arbitral award would consider matters such as whether recognition and enforcement of the award is consistent with Israeli public policy.

Law stated - 20 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Courts will recognise the validity of asymmetric jurisdiction and arbitration agreements, subject, of course, to the rules applicable to the construction of such clauses.

Law stated - 20 May 2024

Breach of jurisdiction clause

- 59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

The Israeli court will not accept jurisdiction to stay proceedings initiated abroad.

Law stated - 20 May 2024

- 60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The court may order the Israeli claim to be stayed within the framework of an application for an anti-suit injunction, after considering various issues such as whether the foreign jurisdiction clause is exclusive, delay and forum non conveniens.

Law stated - 20 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

- 61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

As a general rule, claims not relating to land are subject to limitation periods of seven years. Certain specific laws provide for shorter periods. The statute of limitations begins to run on the date the cause of action accrues, with a number of exceptions, such as in cases of fraud or where the damage was unknown to the claimant. Time limits may be extended by agreement in non-land cases, this is most often seen in insurance cases where the time limit for submitting a claim is often three years. Cargo claims are subject to the 12-month limitation under the Hague-Visby Rules and maritime liens are subject to three-year limitation periods. In a recent interesting case, *ALA 2279/24 Harel Ins Co v Mediterranean Shipping Co SA*, the Supreme Court held that an Israeli insurance company that had instituted proceedings against the ocean carrier before the lapse of the one-year Hague-Visby limitation period but before it had made payment to the cargo owner was not properly subrogated to the cargo owners' claim under the Israeli Insurance Contract Law - 1981 and upheld the District Court's dismissal of the proceedings.

Law stated - 20 May 2024

Court-ordered extension

- 62 | May courts or arbitral tribunals extend the time limits?

Courts and arbitral tribunals do not have power to extend time limits in the absence of the parties' agreement.

Law stated - 20 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

As of 2019, Israel has ratified 49 International Labor Organization Conventions and one Protocol, among them all eight Fundamental Conventions. The Technical Conventions include the Placing of Seamen Convention, 1920 (No. 9); Paid Vacations (Seafarers) Convention (Revised) 1949 (No. 91); C092 – Accommodation of Crews Convention (Revised), 1949 (No. 92); C133 – Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133); C134 – Prevention of Accidents (Seafarers) Convention, 1970 (No. 134); C147 – Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147).

Israel is not a member of the Maritime Labor Convention 2006; however, the Israel Ports Administration is working with the Ministry of Transport on plans to allow its adoption.

Law stated - 20 May 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

According to Israeli law, a contract will not be considered to have been frustrated merely because the contractual obligations are more onerous to perform. The test for frustration is set out in section 18 of the Contracts (Remedies for Breach of Contract) Law 1970, the principal requirement being that the frustrating event could not have been anticipated. The Israeli courts tend to construe this defence very narrowly, even holding that 'hostilities' or omissions in government activities preventing the issue of permits, are not a frustrating event in view of the fact that they are foreseeable.

Law stated - 20 May 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Not applicable.

Law stated - 20 May 2024

UPDATE AND TRENDS

Key developments of the past year

- 66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Supreme Court has issued two important judgments recently.

In the first, Civil Appeal 206/20 *Teva Pharmaceutical Industries Ltd et al v T&M Goshen Security Services Ltd*, the Supreme Court reversed the decision of the Tel Aviv District Court and set a new precedent with regard the ability of foreign (ie, not licensed in Israel) insurers, to file subrogation claims in Israeli courts. The Supreme Court ruled that a foreign insurer may file a direct subrogation claim or an indemnification claim against the third-party wrongdoer who caused the harmful event, as a result of which the insured incurred damages compensated by the foreign insurer. Consequently, Israeli licensing is not a prerequisite for subrogation rights under Israeli law. It is sufficient for a foreign insurer to prove a contractual obligation of the insurer towards the insured in accordance with a valid insurance policy; payment in accordance with the aforesaid obligation; and a third party that has a duty to compensate the insured for the relevant event. This overturns the previous situation under which foreign insurers could only submit subrogation claims by means of the insured (ie, that the insured would submit the claim against the third-party wrongdoer, in trust for the insurer).

In the second case, ALA 6493/21 *Legaziel v R.S. Design Ltd*, the Supreme Court held by a majority that an older judicial policy should be restored whereby a foreign jurisdiction clause will be interpreted in a literal and precise manner, contrary to the 'softer' approach according to which the jurisdiction clause does not apply save where it is express and clear. Moreover, in the appropriate circumstances, third parties will also be able to rely on these clauses.

Law stated - 20 May 2024

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Normal practice in Italy is that transfer of ownership of the ship under construction is governed by provisions to this effect agreed by the parties in the contract.

Most commonly, it is agreed that ownership will be transferred upon delivery. In this case, pre-delivery instalments are usually secured by refund guarantees or by a mortgage on the ship under construction.

Although not common, it is also possible to agree that ownership will be transferred step by step, concurrent with payment of pre-delivery instalments.

In the absence of any contractual clause (which, in practice, will occur very rarely), it has been held that ownership will pass upon delivery (see Court of Cassation Judgment No. 4350/1998).

Law stated - 2 May 2022

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

There are no specific rules regarding the wording of refund guarantees and common international standards are generally followed.

As to form, the refund guarantee must be in writing and an authenticated Society for Worldwide Interbank Financial Telecommunication message is often required. No permission from financial, banking or currency authorities is required for an Italian bank to issue a refund guarantee.

Law stated - 2 May 2022

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

If the yard refuses to deliver the vessel, the most effective remedy available to the party is to file an application in the local courts to obtain a court order for delivery, seizure or both.

To do so, the applicant must provide written proof of its right to have the vessel delivered.

Furthermore, the court can grant the order with provisional enforceability if there is a serious danger in delay. It is on the applicant to request provisional enforceability and present arguments concerning the prejudice that a delay would cause.

Law stated - 2 May 2022

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

The claim of the shipowner against the shipbuilder for damages caused by defects of the vessel lies in contract. Under article 1490 of the Italian Civil Code, the seller must guarantee the purchaser in respect of hidden and apparent defects of goods. The parties can agree to extend the duration of the guarantee or to fix a maximum cap for the damages to be paid.

In the case of purchase from the original shipowner, the purchaser can, alternatively, sue the shipowner according to article 1490, or bring a claim against the shipbuilder in tort. It is also possible for the purchaser to become an assignee of the shipowner's rights so that the purchaser can bring a direct action against the shipbuilder under contract law.

A third party that has sustained damage can, alternatively, bring an action in tort against the shipowner or shipbuilder.

Law stated - 2 May 2022

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Under article 143 of the Code of Navigation, registration of a ship in the Italian registry is subject to the following requirements:

- the ship is owned, for at least half of the shares of property, by an Italian or European person or entity; or
- the new build or ship previously registered in a non-European country is owned by a non-European person or entity that directly assumes the operation of the ship through a branch in Italian territory.

For ships under construction, there is a separate registry (article 234 of the Code of Navigation). The shipbuilding contract and a declaration that construction has been started must be registered. The registration is made in the name of the builder or the buyer,

depending on who holds the title in construction. Any deed transferring title on the ship must be registered with the relevant registry to be effective towards third parties.

As of 1 January 2020, pleasure vessels are registered in a specific electronic register named Yacht Central Telematic Register (YCTR).

Law stated - 2 May 2022

6 | Who may apply to register a ship in your jurisdiction?

The only party who may apply to register a ship is the shipowner, who can be a private or public entity.

The shipbuilder must register ships under construction with the relevant registry.

Law stated - 2 May 2022

Documentary requirements

7 | What are the documentary requirements for registration?

If the nationality requirements as per article 143 of the Code of Navigation are met, the documents required for the registration of the vessel are those listed in article 315 of the Regulation for Maritime Navigation, namely:

- the document that certifies the ownership of the vessel;
- the tonnage certificate; and
- the authorisation for using the specific name of the vessel.

Law stated - 2 May 2022

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Italian law excludes, in principle, the possibility of applying for registration of a ship that is already registered in another country. However, if the vessel registered in a foreign country is bareboat chartered to someone who fulfils the requirements of article 143 of the Code of Navigation, and the foreign registry allows it, the vessel could be entered in a special Italian registry.

Flagging out in relation to a bareboat charter is also possible, but subject to prior notice as per article 156 of the Code of Navigation, in order to protect creditors.

Law stated - 2 May 2022

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

Maritime mortgages are recorded in the registry in which the vessel is registered. For vessels that are bareboat chartered, the registration of mortgages remains in the primary registry.

Law stated - 2 May 2022

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Italy has not ratified the Convention on Limitation of Liability for Maritime Claims (LLMC). According to the Italian law provision on limitation of liability (article 275 of the Code of Navigation), the amount of limitation is equal to the value of the vessel (ie, the insured value) at the time the limitation is applied for, provided the limitation fund cannot be less than one-fifth nor higher than two-fifths of the value of the ship at the beginning of the voyage to which the limitation refers, plus the profits earned on the voyage.

However, by means of Legislative Decree No. 111/2012, the Italian government has enacted the provisions of EU Directive 2009/20/EC on the insurance of shipowners for maritime claims. The decree also introduces into Italian law a new regime of limitation of liability of shipowners. Articles 7 and 8 of the decree have introduced, for vessels with a gross tonnage (GT) of more than 300GT, limits of liability identical to those provided for under Chapter II of the LLMC Convention, as amended by the protocol of 1996.

The decree has given rise to several problems including:

- the definitions of those entitled to limitation (which does not correspond to the one of the LLMC);
- the absence of a list of credits that are subject to limitation and those excepted from limitation;
- the absence of any provisions regarding cases where a shipowner may lose title to the limitation; and
- the decree was not amended to enact in Italy the new limits that took effect from June 2015.

In addition to the above, the decree does not contain procedural rules applicable to limitation proceedings. The procedural rules contained in the Code of Navigation – adopted having in mind the old regime provided under the Code of Navigation and which remains valid for vessels of 300 GT or less – should, in our view, remain in force. This solution was adopted by a decision of the Court of Nola in 2017.

For vessels with a gross tonnage of less than 300 GT, article 275 of the Code of Navigation remains applicable. However, such a regime is based on the value of the vessel rather than tonnage. A recent decision of the Court of Appeal of Palermo in 2019 has confirmed the principle that the value of the vessel for limitation corresponds to the insured value. The same decision has also confirmed that it is lawful that two different regimes of limitation presently exist in Italy and that it is reasonable and consistent with the Constitution that (according to the regime of the Code of Navigation) the right to limitation is lost in case of gross negligence or wilful misconduct of the owner only (and not also of his or her servants or agents).

Law stated - 2 May 2022

Procedure

11 | What is the procedure for establishing limitation?

Pursuant to the rules of the Code of Navigation, a shipowner who intends to avail himself or herself of the benefit of limitation must present an application with the relevant documents to a judge, along with a cash deposit for the limitation fund. After ascertaining the existence of the conditions required by the applicable law, a tribunal will declare the limitation procedure open. A shipowner is entitled to constitute a limitation fund even before legal proceedings have been instituted by claimants but not before a claim has been purported. In fact, among the documents that the shipowner must present to the court is included the list of the claimants and the amount of each claim relating to the specific voyage.

Law stated - 2 May 2022

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The rules concerning the circumstances in which the limit can be broken are, currently, confused, because Decree No. 111/2012 does not include a rule similar to article 4 of the LLMC Convention. It is also impossible to refer to article 275 of the Code of Navigation, because article 12 of Decree No. 111/2012 has restricted its application to vessels under 300 GT.

The creditors have 15 days from the date when the judgment that establishes the fund is published to lodge an appeal in which they can raise issues in respect to the shipowner's title to limitation.

Should the right to limitation be overruled, the shipowner is entitled to recover the fund and all creditors are entitled to enforce their claim in full on all assets and properties of the shipowner. As of May 2024, there is no case law in Italy on limitation being broken.

Law stated - 2 May 2022

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Pursuant to article 8 of Decree No. 111/2012 in relation to credits arising from a single event, the limitation of liability of the owner of a passenger ship in relation to the death or personal injury of a passenger is equal to 175,000 special drawing rights multiplied by the number of passengers that the vessel can carry.

The EU recently implemented two important pieces of legislation on passengers' rights, namely Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterways and Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents, implementing the Athens Convention 1974 relating to the Carriage of Passengers and their Luggage by Sea, as amended by the protocol of 2002 on the carriage of passengers (according to the 2006 International Maritime Organization guidelines for implementation of the Athens Convention).

Law stated - 2 May 2022

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

From a national point of view, the port state control officer is the harbour master.

Italy is a party to the Paris Memorandum of Understanding on Port State Control of 1982 (Paris MoU).

For EU member states such as Italy, the provisions of the Paris MoU are reinforced by Directive No. 2009/16/EC on port state control, which substantially endorses the content of the Paris MoU. Italy put this directive into effect by means of Legislative Decree No. 53 of 24 March 2011.

Law stated - 2 May 2022

Sanctions

15 | What sanctions may the port state control inspector impose?

According to the Paris MoU, when deficiencies are found that render the ship unsafe to proceed to sea or that pose an unreasonable risk to safety, health or the environment, the ship may be detained. The harbour master will issue a notice of detention to the master, which will also contain the information that the ship's owner or operator has the right of appeal.

Law stated - 2 May 2022

Appeal

16 | What is the appeal process against detention orders or fines?

The appeal must be filed to the territorially competent regional administrative tribunal within 60 days of the notification of detention and made against the Ministry of Transport. A complaint may also be addressed by all the interested parties (including classification societies, flag states and International Safety Management Code operators) to the harbour master's headquarters.

Law stated - 2 May 2022

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

Pursuant to Legislative Decree No. 104/2011, which implemented in Italy Directive 2009/15/EC, if a classification society meets certain special requirements, the Italian administration can authorise it to become an approved classification society and perform statutory activities (ie, activities relating to the implementation and enforcement of statutory regulations on safety, security and environmental protection) on its behalf. The classification societies authorised by the Italian flag are RINA Services SpA, Bureau Veritas SA and DNV GL AS.

Law stated - 2 May 2022

Liability

18 | In what circumstances can a classification society be held liable, if at all?

The only precedent is the decision rendered by the Tribunal of Genoa in 2010 in a case regarding the claim of a charterer against a classification society for the damages suffered due to the detention of the vessel, after an inspection under the Paris MoU had been carried out.

The Genoa Tribunal held that the liability of the classification society could be based on the reliance placed by the charterer on the class certificate in deciding to charter the Redwood and upheld the claim. However, such a decision has been overruled by the Court of Appeal of Genoa (though for reasons related to the merits of the case and not for the legal principle mentioned above). The decision of the Court of Appeal was then confirmed by the Italian Supreme Court of Cassation in March 2018.

In a judgment dated 10 December 2020, the Italian Supreme Court ruled for the first time on the right of classification societies to benefit from immunity from jurisdiction when performing state functions when delegated to do so by states.

By a recent judgment in 2022, the Italian Supreme Court further held that the activities directly commissioned or delegated by classification societies have as their main objective a public interest, (ie, the protection of maritime safety), but they incorporate activities of a private nature that are regulated under contract law (Judgment No. 30484 of 18 October 2022).

Law stated - 2 May 2022

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Pursuant to article 73 of the Italian Code of Navigation, in the event that the wreck of a vessel in a port, bay, canal or within the territorial sea is, in the judgement of the maritime authority, a danger or hindrance to navigation, the maritime authority can order the owner to effect, at his or her own expense, the removal of the wreck, and fix the date for the removal.

If the owner does not comply with the order by the fixed date, the authority itself carries out the removal and can sell the wreck on behalf of the state.

If the situation is urgent, the authority can immediately act on behalf and at the expense of the owner. In all cases, the owner will eventually be responsible for the costs of removal.

Law stated - 2 May 2022

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The 1910 Collision Convention is in force. Jurisdiction will be founded on the 1952 Brussels Convention on Civil Jurisdiction in Collision Matters. Therefore, an Italian court will have jurisdiction if Italy is:

- the place where the defendant has his or her habitual residence or place of business;
- the place where an arrest has been effected of the defendant ship or of any other ship belonging to the defendant that can be lawfully arrested, or where an arrest could have been effected and bail or other security has been furnished; or
- the place where the collision occurred.

The Court of Cassation (judgment No. 4686 of 9 March 2015) held that the special criteria of a jurisdiction of the Collision Convention 1952 prevail over the general discipline of Brussels I. Brussels I, as well as the new Brussels I bis, do not affect any conventions to which the member states are parties and that govern jurisdiction in relation to particular matters.

A party can claim all damages that are immediate and direct consequences of the collision, including physical damages and loss of earnings.

Italy has ratified the 1989 London Convention on Salvage, which, therefore, applies as a general rule. By Judgment No. 7149 dated 13 March 2020, the Italian Supreme Court clarified a number of issues relating to the 1989 London Salvage Convention:

- The Court confirmed that the Convention applies also to purely domestic salvage cases.
- The Court stated that the Convention can be supplemented by national legislation on certain issues indicated in the Convention itself, one of which being the joint liability of the owners of the salvaged goods.
- The Court considered the long-debated issue of the existence or not of joint liability of the owners of the salvaged goods. In this respect, the Court restated the law by holding that:
 - the owner of the ship is the 'main debtor' and therefore can also be liable for the portion of the salvage award relating to cargo; and
 - cargo owners are liable only for the portion of the salvage award relating to their own goods.

The limitation period for enforcing salvage claims in our jurisdiction is two years from the day on which the salvage operations are completed (article 500 of the Code of Navigation).

The salvor can arrest the salvaged ship (or a sister ship) under the 1952 Brussels Convention on the arrest of ships. They can also arrest the cargo within 15 days of discharge and before it has been lawfully delivered to a third party.

So far, Italy has not enacted the Nairobi International Convention on Removal of Wrecks 2007.

Italy has ratified the International Convention on Civil Liability for Oil Pollution Damage as amended in 1992 (CLC Convention), as well as the Fund Convention as amended in 1992 and the supplementary Fund Protocol of 2003.

Furthermore, a general obligation of clean-up is imposed by the Code of Environment (Legislative Decree No. 152/2006) on the party responsible for pollution of the sea. In the case of omission, the clean-up is carried out by the public administration, which can then claim relative costs from the responsible party (article 250 of the Code of Environment).

Italy has not ratified the Nairobi International Convention on the Removal of Wrecks, 2007, which entered force in 2015.

Finally, EU Regulation No. 1257/2013 provides for a new discipline in ship recycling. The regulation introduces the same standards for ship recycling as imposed by the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009

(not yet in force), and establishes a list of recycling facilities authorised to conduct ship recycling operations. The Regulation entered into force in 2013 and has been applicable since 31 December 2018.

As at December 2022, there were 45 authorised recycling facilities, out of which 36 in Europe (including UK) and nine outside Europe.

Since the previous edition, two yards located in Turkey have been removed from the List as they did not comply with the requirements of the Ship Recycling Regulation.

The only Italian authorised recycling facility is San Giorgio del Porto SpA.

Law stated - 2 May 2022

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement. According to Regulation (EC) No. 593/2008 (Rome I), the applicable law for salvage agreements is chosen by the parties. Thus, Lloyd's standard form of salvage agreement is acceptable.

There are no specific rules on who may carry out salvage operations, which can be performed by occasional or professional salvors or by the Italian coastguard.

Law stated - 2 May 2022

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

The International Convention Relating to the Arrest of Sea-Going Ships 1952 is in force. The 1999 version of the Convention has not been ratified by Italy.

Law stated - 2 May 2022

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Under the Brussels Convention 1952, a vessel registered in a contracting state can only be arrested for maritime claims as defined and listed in article 1 of the Convention. Ships flying the flag of a non-contracting state can be arrested in Italy for any claim.

Sister ships can be arrested in Italy while, save for exceptional cases, associated ships cannot.

Italian courts are, in fact, very reluctant to pierce the corporate veil, as it is a settled rule that each company is a separate and autonomous business entity, liable only for its own debts and having its own assets. It has been held by Italian courts that, under article 3(1)(2) of the 1952 Brussels Convention, it is possible to arrest a ship when the shares of the owning company are owned by the same companies or persons owning the ship in respect of which the maritime claim arose. The burden of proof of ownership is on the claimant.

The possibility of obtaining an arrest of the vessel if the debtor is a person other than the shipowner is controversial.

It is disputed whether article 3, paragraph 4 of the Brussels Convention may be interpreted as allowing the arrest of the vessel even when the claim is not assisted by a lien on the vessel. While the trend of the Italian courts in recent years has traditionally been more favourable to claimants, allowing arrests even in the absence of a lien on the vessel (see Tribunal of Savona in 2019), a significant number of recent decisions have ruled that a lien on the vessels should assist the maritime claim according to the law of the flag (see Tribunal of Oristano in 2019; Tribunal of Venice in 2019; Tribunal of Siracusa in 2019; Tribunal of Venice in 2022; Tribunal of Taranto in 2024).

In the case of a claim against the bareboat charter of an arrested vessel, on the assumption that a lien assisted the claim, the arrest was granted even though the debtor was a bankrupt company and despite the provisions of the bankruptcy law that prohibits claimants bringing enforcement and precautionary proceedings after the bankruptcy is declared (Tribunal of Ravenna in 2020).

Law stated - 2 May 2022

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Maritime liens are recognised in Italy both by international and domestic legislation.

Italy is, in fact, party to the 1926 Convention on Maritime Liens and Mortgages, but not to the 1993 International Convention on Maritime Liens and Mortgages.

As for domestic legislation, maritime liens are listed in articles 552 (liens on the ship and the charter) and 561 (liens on cargo) of the Italian Code of Navigation.

Liens on the ship and freight are provided for the following claims:

- judicial expenses due to the state or made in the interests of the creditors;
- credits arising from seafarers' employment contract;

- credits for sums anticipated by Italian authorities for repatriation of seafarers and payments to social security bodies;
- indemnities for salvage and general average;
- indemnities for maritime accidents; and
- credits arising from contracts entered by the master for the conservation of the ship.

Liens on cargo are provided for the following claims:

- judicial expenses due to the state or made in the interests of the creditors;
- credits of the customs agency related to such cargo;
- indemnities for salvage and general average;
- credits arising from the contract of carriage; and
- sums due for obligations undertaken by the master on the cargo for supplies, repairs or other urgent need for prosecution of the voyage.

Law stated - 2 May 2022

Wrongful arrest

25 | What is the test for wrongful arrest?

A claimant may be liable for damages for wrongful arrest if the claim for which the arrest has been granted does not exist and if he or she has acted without due care.

A recent decision of the Tribunal of Oristano established that damages for wreckless litigation resulting from wrongful arrest of a ship shall be liquidated in an amount corresponding to the costs incurred by the ship in the port where the arrest was made during the arrest period, plus the daily freight for the period from the end of commercial operations to the release of the ship.

Law stated - 2 May 2022

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Article 1(k) of the Brussels Convention 1952 provides the right to arrest a ship in respect of a maritime claim arising out of goods or material wherever supplied to a ship for her operation or maintenance. Thus, when the debtor is the shipowner itself, the claimant may secure the claim with an arrest of the supplied vessel.

More controversial is the possibility to obtain an arrest of the vessel in case a debtor is a person other than the shipowner, like the charterer. It is disputed whether article 3,

paragraph 4 of the Brussels Convention may be interpreted as authorising the arrest of the vessel even when the claim is not assisted by a lien on the vessel.

According to some recent decisions of the Italian courts, article 3.4 of the Brussels Convention allows the arrest of the supplied vessel only when the debtor (other than the shipowner) has control over the vessel, like a time or bareboat charterer, but in no other cases.

Law stated - 2 May 2022

Security

27 | Will the arresting party have to provide security and in what form and amount?

A court may, at its discretion, order the applicant to provide a counter-security in favour of the owner to cover damages if the arrest is eventually found to be wrongful. However, although contemplated by the Code of Civil Procedure, counter-securities are not frequently ordered.

Law stated - 2 May 2022

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

When granting an arrest, the judge must also state the amount for which the arrest has been granted. The security that the court orders the arrested party to provide is, therefore, equal to that sum.

The form of security is usually agreed upon by the parties. If they fail to reach an agreement, the form of security is decided by the judge, and will normally be a cash deposit. The judge may also authorise the release of the ship against other forms of security, such as a bank guarantee.

Although it is very unlikely to happen, the amount of the security can in theory exceed the value of the ship.

Nonetheless, in such a case the owner can apply to the court, giving evidence of the value of the ship, to reduce the amount of the arrest.

Law stated - 2 May 2022

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

To make an arrest application, the lawyer must be empowered by a duly authenticated power of attorney.

A power of attorney issued abroad needs to be notarised and legalised by apostille (except for some European states such as Belgium, France, Germany, etc), while a power of attorney issued in Italy must be authenticated by a notary or, if signed before the lawyer, by the lawyer himself or herself.

The judge may require a translation from time to time.

Italy is a signatory country of the Apostille Convention 1961 and also ratified the Brussels Convention 1987 abolishing the legalisation of documents in the member states of the European Communities.

When filing an arrest application, the original copy of the power of attorney must be attached, but in the case of an emergency, a scanned copy might be accepted on the condition the original will be filed as soon as possible.

No further formalities are required and therefore, if a scanned copy of the power of attorney is provided and found acceptable by the court, an arrest application could be, in theory, filed by the following day (applications can be filed Monday to Saturday between 8am to 1pm).

This does not take into consideration that drafting and preparing an arrest application will generally require at least two days.

Law stated - 2 May 2022

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

Normal practice is that the shipowner, being already in possession of the vessel and responsible for its maintenance and operations, continues to take care of it while under arrest.

In particular circumstances, such as the vessel being abandoned, the court will appoint a custodian according to article 676 of the Italian Code of Civil Procedure, who will guard the vessel and be responsible for its maintenance. The court can also decide to appoint the claimant as custodian.

Law stated - 2 May 2022

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Rules related to jurisdiction are not affected by the arrest procedure in Italy. It is, therefore, possible to arrest a vessel in Italy and then carry out arbitration or start proceedings on the merits in another country. However, proceedings on the merits must be started within 60 days from the day the order of arrest is issued by the court.

Law stated - 2 May 2022

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Yes. According to article 646 of the Code of Navigation, the court or, in case of particular urgency, the harbour master or judicial police, can take suitable measures in order to prevent the ship from leaving the port.

Law stated - 2 May 2022

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Yes, it is possible to preserve property or evidence by means of an arrest ordered by the court according to articles 670 and 671 of the Italian Code of Civil Procedure.

Law stated - 2 May 2022

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is possible to arrest bunkers in Italy, although it is unusual in practice as major practical problems arise in connection with evidence of property of the bunker and the actual enforcement of the arrest.

Law stated - 2 May 2022

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

As stated by article 474 of the Italian Code of Civil Procedure, enforcement proceedings can only be commenced on the basis of an enforceable judgment or notarial deed.

Law stated - 2 May 2022

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

Rules concerning the judicial sale of a vessel can be found in articles 643 to 686 of the Code of Navigation and articles 483 to 542 of the Italian Code of Civil Procedure.

The procedure for carrying out the judicial sale of a vessel must start with service by the court bailiff on the shipowner of an order to pay and a deadline to do so, with the notice that, in case of non-compliance, the creditor will proceed with the attachment of the debtor's goods. To do so, the creditor must have an enforceable title, usually a judgment.

If the debtor fails to pay within the deadline, the creditor will be entitled to serve a writ of attachment to the debtor and the master of the vessel, through the bailiff. The same writ of attachment must be sent to the harbour master of the port where the ship is registered so that it can be recorded in the registry. The procedure can be joined by other creditors, in accordance with articles 499 and 500 of the Italian Code of Civil Procedure.

Once the vessel is attached, it cannot leave the port without the specific permission of the court. If the debtor persists in not paying, a creditor is entitled to apply for the judicial sale of the vessel not before 30 days and not after 90 days from the date of attachment. The application must be served, through the bailiff, on the debtor and on all other creditors who joined the procedure.

Within 30 days of the application being served, it must be filed at the competent court so that an expert can perform a survey to render an estimated value of the vessel. After hearing all interested parties, the judge will then order the sale of the vessel. The sale is carried out through a public auction. The sale operations can be delegated by the judge to a notary public, a lawyer or an accountant.

The judicial sale of the vessel may be ordered even when the vessel is under arrest and if, in the opinion of the judge, there is a danger that the vessel is lost or deteriorated pending the arrest proceedings. After the sale, the judicial seizure is transferred from the vessel to the proceeds of the sale.

Law stated - 2 May 2022

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The order of priority of claims on the proceeds of a judicial sale of a vessel is as follows:

- legal costs related to the entire proceedings for the sale of the vessel;
- creditors with privileges or maritime liens;
- mortgagees;
- unprivileged or unsecured creditors who intervene promptly in the proceedings;
- unprivileged or unsecured creditors who do not intervene promptly in the proceedings; and
- all other unsecured claims.

Law stated - 2 May 2022

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

Judicial sale of a vessel will extinguish prior liens, mortgages and other encumbrances. As provided by article 678 of the Code of Navigation, after the judicial sale the judge will issue a decree adjudicating the vessel to the new shipowner. In addition, with the same decree, the judge will order the competent registry to delete any mortgage on the vessel.

Law stated - 2 May 2022

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Pursuant to article 157 of the Italian Code of Navigation, in the case of award of a ship to a non-EU entity, the successful bidder must file a notice to the registry in which the vessel is registered, within 60 days from the date of award, to obtain deletion from the registry.

Law stated - 2 May 2022

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Italy is a party to the 1926 Convention on Maritime Liens and Mortgages, but not the 1993 Convention.

Law stated - 2 May 2022

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

- 41** | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hague Rules of 25 August 1924 on bills of lading were ratified by Italy on 7 October 1938 and entered into force on 7 April 1939.

On 22 August 1985, Italy ratified the protocols of 1968 and 1979 (Hague-Visby Rules), which entered into force on 22 November 1985.

The Hague-Visby Rules are to be considered as 'special' Italian law and overrule the Code of Navigation's 'general' laws.

Italy has not ratified the Hamburg Rules or the Rotterdam Rules.

Law stated - 2 May 2022

Multimodal carriage

- 42** | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

In cases of combined or multimodal transport, Italian courts have stated that the Civil Code shall apply.

Italy has also ratified the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention).

Law stated - 2 May 2022

Title to sue

- 43** | Who has title to sue on a bill of lading?

According to Italian law, only the legitimate holder of the original bill of lading has title to sue. Once the bill of lading has been surrendered to the carrier against delivery of the goods, the cargo owner can also sue.

Therefore, the shipper cannot sue unless he or she has retained possession of the original bill of lading or has become an assignee of the rights of the consignee or cargo owner.

Insurers may bring a suit in their own name, but must be properly subrogated in the rights of their assured by means of a receipt and assignment of rights.

Law stated - 2 May 2022

Charter parties

- 44** | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

According to case law, the clauses of a charter party are only binding on the third-party holder of the bill of lading if the charter party is specifically mentioned in the bill of lading. The courts consider as sufficiently specific the mention of the place of issue and the date of the charter party.

With regard to arbitration or jurisdiction clauses, case law states that such clauses must be specifically incorporated into the bill of lading, with a clause worded as follows: 'all terms and conditions of the charter party dated on [date] in [place of issuance], including the arbitration or jurisdiction clause, apply'.

Law stated - 2 May 2022

Demise and identity of carrier clauses

- 45** | Is the 'demise' clause or identity of carrier clause recognised and binding?

Certain judgments of Italian courts have stated that the identity of carrier clauses are to be considered null and void pursuant to article 3(8) of the Hague-Visby Rules, although none of these judgments is recent.

Law stated - 2 May 2022

Shipowner liability and defences

- 46** | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Article 2049 of the Civil Code and article 274 of the Code of Navigation set the rules governing the vicarious liability of the shipowner for the acts or omissions of the crew. On the basis of such rules, the shipowner can, in principle, be held liable towards cargo interests even if he or she is not the contractual carrier.

However, in January 2019, the Tribunal of Genoa held that a claim in tort against the actual carrier (shipowner) other than the contractual carrier was subject to the same regime, the Hague-Visby Rules, governing the liability of the carrier including the one-year time bar

period. Such decisions were rendered also on the basis of a non-recent judgment of the Court of Cassation (1983), according to which the Hague-Visby Rules apply to both the actual and the contractual carrier, and under the Himalaya clause included in the bill of lading, which gave the shipowner the benefit of all contractual and law provisions applicable to the carrier. Indeed, if a properly drafted Himalaya clause is included in the contract, shipowners can rely on the terms and conditions of the bill of lading even if they are not the contractual carriers. In April 2022, the decision of first instance was upheld by the Court of Appeal of Genoa. As at May 2024, proceedings before Italian Supreme Court are still pending.

Law stated - 2 May 2022

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Deviation, if not reasonable or not effected under article 4(4) of the 1924 Brussels Convention, is considered a breach of contract that entitles the claimant to damages. The deviation, if made solely in the carrier's interest, excludes the possibility to benefit from the carrier's limitation of liability. Therefore, the carrier should prove that the deviation occurred to save human life, for humanitarian reasons or from force majeure. If the issue is disputed the courts will decide on a case-by-case basis.

Law stated - 2 May 2022

Liens

48 | What liens can be exercised?

Liens can be exercised on a ship and on cargo.

Liens on a ship are regulated by article 552 of the Code of Navigation, which states that they can be exercised for:

- judicial expenses due to the state or done in the interest of creditors for conservative actions on the vessel;
- duties of anchorage, lighthouse, port and other duties and taxes of the same type;
- pilotage, custody and maintenance of the ship after arrival in the last port;
- credits arising from the crew contract or from the contract of employment of the master;
- credits for the sums advanced by the ministry or the consular authority for the maintenance or repatriation of crew members;
- credits for social security contributions;
- indemnities for salvage and general average;
- indemnities for collision and damages to port, dry docks and navigable ways;

- indemnities for death or injuries of passengers or crew and for loss or damage of cargo and baggage; and
- credits arising from the contract or operations carried out by the master, even when he or she is the shipowner, for the maintenance of the ship or for the prosecution of the voyage.

Liens on cargo are regulated by article 561 of the Code of Navigation and can be exercised for judicial expenses due to:

- the state;
- customs duties;
- indemnity for salvage and the sum due to the general average;
- credits arising from the contract of carriage, including discharging expenses and storage costs; and
- for the master's obligations on the cargo if he or she needs to collect money for the prosecution of the voyage.

Law stated - 2 May 2022

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The carrier incurs liability under the contract if it delivers the cargo without production of the original bill of lading. In principle, limitation of liability should be excluded under article 1693 of the Civil Code and article 422 of the Code of Navigation, because wrongful delivery could be considered as a voluntary default of the carrier.

Law stated - 2 May 2022

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper could be liable for deficiency in packaging, not providing the carrier with customs documentation, false declarations regarding the nature of goods and false declarations regarding the carriage of hazardous goods.

Law stated - 2 May 2022

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Italy is a member of the IMO and has adopted the International Convention for the Prevention of Pollution from Ships (MARPOL), which was ratified by Law No. 662 of 29 September 1980, and Law No. 438 of 4 June 1982. Annex VI of the Convention, which sets emissions limits for ship exhausts, entered into force on 19 May 2005.

The EU adopted Directive 2012/33/EU, which modified earlier Directive 1999/32/EU, regarding the sulphur content of marine fuels. Through Legislative Decree No. 112/2014, Italy has adapted its legislation to comply with Directive 2012/33/EU.

On 17 June 2021, the IMO adopted amendments to MARPOL Annex VI at MEPC 76, introducing the Efficiency Existing Ship Index (EEXI) (regulations 23 and 25) and the requirement to reduce Operational Carbon Intensity through the Carbon Intensity Indicator (CII) (Regulation 28), which will enter into force on 1 November 2022. On 1 January 2023, both measures came into effect: from that date, it is mandatory for ships falling under the scope of the Regulations to calculate their attained Energy Efficiency Existing Ship Index, and to start the collection of data to report their annual operational carbon intensity indicator (CII) and associated CII rating (from A to E, where A is the best).

The EU has set its targets for the decarbonisation of the shipping sector with the 'Fit for 55' package, a set of proposals aimed at the revision and update of EU legislation to meet the EU's target of climate neutrality by 2050. In this context, on 5 June 2023, with the entry into force of Directive (EU) 2023/959 and Regulation (EU) 2023/957 (MRV Regulation), the European Emission Trading Scheme was officially extended to the shipping sector.

Responsibility for EU ETS compliance lies with the 'shipping company', defined as 'the shipowner or any other organization or person, such as the manager or the bareboat charterer, that has assumed the responsibility for the operation of the ship from the shipowner and that, on assuming such responsibility has agreed to take over all duties and responsibilities for the safe and clean operation of the ship'. However, the Directive follows the 'polluter-pays' principle by contemplating the pass-through of ETS costs to the commercial operators of vessels: member states shall, therefore, take 'the necessary measures' to ensure that the Shipping Company is entitled to reimbursement for the costs arising from the surrender of allowances from the entity that is ultimately responsible for the purchase of the fuel or the operation of the ship. Shipping companies can request the opening of a maritime operator holding accounts (MOHA) to their assigned administering authority, which will allow them to surrender carbon allowances. At the same time, the allocation of costs arising from the surrendering of allowances will be negotiated between contractual parties.

The 'Fit for 55' package also includes the FuelEu Maritime initiative, which will introduce limits on the greenhouse gas intensity of fuels used onboard and impose zero emissions at berth for certain types of vessels. In particular, on 25 July 2023, the EU adopted a new regulation that lays down uniform rules imposing a limit on the GHG intensity of energy used on board by a ship arriving at, staying within or departing from ports under the jurisdiction of a member state and an obligation to use an onshore power supply (OPS) or zero-emission technology in ports under the jurisdiction of a member state. The regulation will apply from 1 January 2025, except for articles 8 and 9 – concerning the monitoring plan – which will be applied as of 31 August 2024.

In December 2022, MEPC 79 adopted amendments to Marpol Annex VI to designate the Mediterranean Sea as an Emission Control Area (ECA) for Sulphur Oxides (SOx) and particulate matter, under MARPOL Annex VI. In such an Emission Control Area, ships will be required to burn fuel oil with a sulphur content not exceeding 0.10 per cent mass by mass (m/m), while outside these areas the limit is 0.50 per cent m/m. The amendment will enter into force on 1 May 2024 and come into effect on 1 May 2025.

Law stated - 2 May 2022

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

In 2014, by means of several amendments and integrations of the already existing Code of Environment (Legislative Decree No. 152/2006), Italy has implemented Directive 2012/33/EU, which contains the applicable cap on the sulphur content of fuel oil. The directive contains different caps depending on the geographical areas in which the vessel is navigating:

- pursuant to article 4a of the Directive, member states shall take all necessary measures to ensure that marine fuels are not used in the areas of their territorial seas, exclusive economic zones and pollution control zones if the sulphur content of those fuels by mass exceeds 0.1 per cent from 1 January 2015; and
- outside the emission control areas, the sulphur content by mass shall not exceed 0.5 per cent from 20 January 2020.

According to article 296 of the Code of Environment, in the case of combustion of marine fuels with a sulphur content above the prescribed caps the master and the shipowners are jointly punished with a fine between €15,000 and €150,000. Most serious violations may also result in the suspension of the professional title of the master and banning the master and the vessel from Italian ports.

Law stated - 2 May 2022

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

There is no domestic regime on ship recycling. However, EU Regulation No. 1257/2013 provides for a new regime on ship recycling. The regulation introduces the same standards of ship recycling as are imposed by the Hong Kong Convention (not yet in force) and establishes a list of recycling facilities authorised to conduct ship recycling operations. The

regulation entered in force in 2013 and is applicable since 31 December 2018. The updated European list of ship recycling facilities was issued in December 2022. With effect from December 2018, the list also includes an Italian facility, San Giorgio del Porto (SGdP).

SGdP is the main ship recycling facility in Italy and is the first and only shipyard entered in the Italian Register of Naval Demolishers. SGdP dealt with the dismantling and recycling of the *Costa Concordia*, one of the most important green ship recycling projects ever carried out in Europe.

Law stated - 2 May 2022

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

There are no specific courts in which shipping disputes are litigated, although the courts of the main maritime districts have divisions that mainly deal with these types of claims and have significant experience in maritime matters.

Choice of forum clauses will be considered valid by Italian courts if they comply with the provisions set out by article 25 of Council Regulation (EC) No. 1215/2012, which replaced Council Regulation (EC) No. 44/2001. In particular, article 25 provides that an agreement on jurisdiction is valid if it is concluded:

[In] a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

In accordance with article 25, choice-of-forum clauses included in a bill of lading are usually considered valid and binding by Italian courts. In a recent judgment, the Court of Cassation also affirmed the validity of a jurisdiction clause included in a multimodal document of transport.

If proceedings are commenced before an Italian court with no jurisdiction, this must be challenged by the defendants in their first pleadings.

Law stated - 2 May 2022

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The service of court proceedings abroad is governed by the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

Should the service be performed on a person resident or domiciled in a country not a party to the Convention, it shall be performed through diplomatic channels.

If the service cannot be performed under the Convention or through diplomatic channels, article 142 of the Code of Civil Procedure applies. In this case, the service is effected directly by registered mail to the addressee, and another copy is forwarded by the public prosecutor to the Ministry of Foreign Affairs, which will execute the service. Within the EU, as of July 2022 Regulation (EU) 2020/1784 (which overrides Regulation No. 1393/2007) applies.

Law stated - 2 May 2022

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

There are no domestic arbitral institutions in Italy dealing with maritime arbitration. Arbitration clauses in shipping contracts, even if between Italian parties, very often provide for arbitration in London.

Arbitration can be instituted in Italy according to article 806 et seq of the Italian Code of Civil Procedure and it can be 'ritual' or 'informal'. The main difference between the two procedures is that in ritual arbitration the arbitrators actually replace the ordinary courts and their award is enforceable, like a judgment, while in informal arbitration the arbitrators are deemed to act as agents to whom the parties have delegated the function of settling the dispute by means of a document (the award) that is in the nature of a settlement agreement rather than a judicial decision. An award in informal arbitration cannot, therefore, be directly enforced, but must be litigated like a contract and effected through the enforcement of the judgment rendered on it.

Under Italian law, arbitration clauses must be in writing (ie, in a document signed by the parties), and Italian courts are very strict in enforcing such provisions.

Since September 2013, compulsory mediation has been in force in Italy for certain kinds of claims. As far as shipping is concerned, mediation is compulsory for insurance claims and must be carried out before any proceedings against insurers are brought in court.

Law stated - 2 May 2022

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The rules on the recognition and enforcement of judgments rendered in other EU member states are set out by Regulation (EC) No. 1215/2012. For all other countries, international and bilateral conventions may apply (eg, judgments rendered in Denmark, Iceland, Norway and Switzerland will be recognised and enforced according to the Lugano Convention 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (succeeding the Lugano Convention 1988), which is, in fact, very similar to EU legislation).

If EU Regulation No. 1215/2012 or international conventions do not apply, Italian courts will apply articles 64 to 71 of Italian Law No. 218/1995, which provides a test that only considers the regularity of proceedings followed in rendering the judgment, without any consideration of the merits.

Regarding the enforcement of foreign arbitral awards, Italy is a signatory party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Pursuant to this Convention, Italian courts will consider the arbitral awards rendered in another contracting state as directly binding in Italy. Enforcement will be provided by means of an exequatur procedure that involves a petition being filed with the competent court of appeal, whose decision on whether to grant or reject the enforcement of the award – which is immediately enforceable after the latest reform entered in force on February 2023 – can be challenged by any interested party within 30 days.

As far as awards rendered in countries not party to the 1958 New York Convention are concerned, Italian courts will apply articles 839 to 840 of the Italian Code of Civil Procedure, whose test for recognition and procedure for enforcement is very similar to those described above.

Law stated - 2 May 2022

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

The Italian Supreme Court held in Judgments Nos. 9314/2008 and 3624/2012 that asymmetric jurisdiction and arbitration clauses are valid and enforceable under Italian law.

The only exceptions are set by article 1341 of the Italian Civil Code, which provides that jurisdiction and arbitration clauses included in general terms and conditions drafted by one party are ineffective if not specifically approved in writing by the other party, and article 33 of the Italian Consumer Code, which provides that jurisdiction and arbitration clauses in contracts entered between a company and a consumer are considered invalid if not favourable to the consumer.

Law stated - 2 May 2022

Breach of jurisdiction clause

59 |

What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Under Italian law, the defendant must raise the objection of lack of jurisdiction of Italian courts at the beginning of his or her case.

Italian law does not provide for anti-suit injunctions.

Law stated - 2 May 2022

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant must formally raise an exception of a lack of Italian court jurisdiction in their first pleadings, failing which Italian jurisdiction is deemed accepted.

However, until the case is decided on the merits in first-degree proceedings, any party may request the Italian Supreme Court to resolve the matters relating to jurisdiction.

Law stated - 2 May 2022

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Limitation periods depend on the nature of the claim. According to article 2951 of the Italian Civil Code, a one-year time limit applies to claims arising under a contract of domestic rail or road carriage. If a claim arises under a contract of domestic sea carriage, the time limit will be six months if the carriage is within Europe or Mediterranean countries (article 438, paragraph 1 of the Code of Navigation). Otherwise, the time limit is one year (article 438, paragraph 2 of the Code of Navigation).

When the contract of carriage by sea is governed by the Hague-Visby Rules, the one-year time limit of article 3(6) will apply.

Other limitation periods in shipping are one year for charter parties (six months or one year for voyage charter or contracts of carriage), two years for collision damages and salvage remunerations, and three years for oil pollution damages.

The general rule for liability in tort provides a five-year time limit.

Time limits cannot be extended or shortened by agreement between the parties but, if the claimant serves a writ of notice of claim with a request of payment, domestic law time limits may be interrupted and a new period will commence.

The one-year time limit of article 3(6) of the Hague-Visby Rules can be extended by agreement.

Law stated - 2 May 2022

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Courts or arbitral tribunals cannot extend the time limits provided by internal laws or international conventions.

Law stated - 2 May 2022

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Italy ratified the Maritime Labour Convention 2006 on 12 September 2013.

Law stated - 2 May 2022

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

The Italian Civil Code provides that a party can only require the termination of a contract where the performance has become too onerous for contracts in which there is a lapse of time between stipulation and performance, if the performance has become too onerous for one of the parties and if this is due to unforeseeable events. The concept of 'too onerous' must be examined in light of the economic conditions of the whole contract.

Law stated - 2 May 2022

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Law stated - 2 May 2022

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The hottest topics of the past year for both the global and Italian maritime sectors are related to the war in Ukraine and the terrorists' attacks in the Red Sea, concerning economic sanctions and contractual disputes on charterparty and war risk coverage.

With respect to sanctions, in 2023 the Italian government amended article 20 of legislative decree 221/2017, on penalties for violation of sanctions. Previously, the article focused on punishing the illicit export of listed goods. Article 20 now provides that it shall be punishable by imprisonment of up to six years whoever, in violation of the prohibitions contained in the (EU) regulations concerning restrictive measures, carries out export or import transactions of listed products, or provides services of any nature subject to union restrictive measures. The wording of the article is, therefore, broader and encompasses all conduct that violates sanctions.

In the past months, Italy has also implemented various freezing measures on assets (eg, villas or yachts) belonging to or traceable to sanctioned individuals and entities.

An interesting case concerns the freezing of a 52-meter superyacht with an estimated value of €65 million, which was considered to be controlled by a Russian businessman designated by the EU due to his close links with the Russian government. In the freezing order, the Italian competent authority stated that, although the yacht formally belonged to a non-designated ship-owning company, it was cited by numerous 'open sources' as being used by the owner. The ship-owning company appealed against the freezing order, maintaining that there was no formal evidence of the connection between the yacht and the owner. However, the administrative court confirmed the freezing order holding that, in the absence of other official sources, 'open sources' can be used as one element in assessing the concept of 'control', as long as they are (1) managed by qualified professionals within the scope of their professional activities (eg, newspapers); (2) genuinely open, accessible and verifiable, to allow widespread and critical scrutiny by any interested party and (3) not contradicted by other sources of the same type.

Law stated - 2 May 2022



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UPDATE AND TRENDS

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

There is no clear provision as to the timing of the title transfer in the Japanese Civil Code or Commercial Code. The shipbuilding contract form of the Japan Shipping Exchange provides that the fourth instalment (the final instalment) shall be paid upon delivery of the ship but has no clear provision about the time of the title transfer. In this case, the title shall be seen to pass from the shipbuilder to the shipowner upon delivery of the ship. It is possible to agree to change the time when the title will pass.

Law stated - 31 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

A refund guarantee is usually provided by way of a letter of guarantee issued by a bank acceptable to the buyer in accordance with the shipbuilding contract. The letter of guarantee shall be stamped by the company's signature seal or signed by the person representing the bank or the surety. The guarantee should be in writing and PDF style is also accepted under Japanese law (Civil Code, article 448(2)(3)). If Japanese law is the governing law, it should be clearly stated that the bank or the surety shall guarantee the shipbuilder's refund obligation 'jointly and severally' with the shipbuilder. If the guarantee is issued without joint and several obligations, the bank or the surety can be entitled to ask the buyer to claim against the shipbuilder and attach the shipbuilder's assets first if they exist (Civil Code, articles 452 and 453).

Law stated - 31 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

If the yard refuses to deliver the vessel, a provisional delivery order can be obtained at a local court. The buyer should prove that all contractual conditions have been fulfilled by the buyer but the yard has refused to deliver the ship at the agreed delivery time and place. Security by way of a cash deposit or a bank guarantee will be requested by the court. The security amount would be between one-fifth and one-third of the value of the vessel.

Law stated - 31 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

If the ship is defective, the shipowner is entitled to request that the shipbuilder repair the ship or reduce the purchase price (Civil Code article 565,563), make a claim against the shipbuilder for loss or damage caused by the defect and terminate the contract (Civil Code article 565,564).

Similarly, the purchaser of a defective ship from its original shipowner may claim against the original shipowner to reduce the ship's purchase price, claim loss or damage and terminate the purchase contract. The purchaser may also issue the same claims against the shipbuilder if the purchase contract with the original shipowner includes the right to make claims against the shipbuilder. Such claims should be made within one year from when a defect is found but the agreed claim period may differ in a ship's sale contract.

Under the Japanese Product Liability Law (PLL), if the vessel is defective and loss of life or personal injury or any damage to properties other than the ship itself results, a product liability claim is possible by the shipowner, a purchaser from the shipowner or any third party that has sustained damage (PLL, article 3). The time bar will be three years from the time the claimant notices the damage or loss and the identity of the liable party (PLL, article 5).

It is possible in the contract to limit or exclude the shipbuilder's liability to the shipowners as long as it is not against public policy in Japan. However, it is not possible to exclude the shipbuilder's liability towards the third party based on the PLL by the contract.

Law stated - 31 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Japanese-flagged ships must be owned by:

- the Japanese government or a public entity;
- Japanese persons;
- a company established by Japanese law, all of whose representatives and two-thirds or more of the directors are Japanese; or
- another legal entity established by Japanese law whose representatives are all Japanese (the Ship Law, article 1).

It is possible to register vessels under construction (Commercial Code, article 851).

Law stated - 31 May 2024

6 | Who may apply to register a ship in your jurisdiction?

Article 1 of the Ship Law provides that owners of Japanese ships may apply to register a ship.

Law stated - 31 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

For registration, applicants must present the ship's certificate of tonnage and certificate of shipbuilding.

Law stated - 31 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration is not possible but flagging out is possible. When the ship loses Japanese nationality, the shipowner shall close the ship registration and return the certificate of the ship's nationality (Ship Law, article 14).

Law stated - 31 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The registry office maintains the register of mortgages.

The mortgage registration should contain:

- the date when the mortgage registration is applied;
- the date when the ship is mortgaged and for what reason;
- the name and the address of the mortgagee or mortgagees;
- the name and the address of the debtor or debtors;
- the credit amount;
- the interest rate or penalty, if any; and

- any conditions of the credit.

Law stated - 31 May 2024

LIMITATION OF LIABILITY

Regime

- 10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Japan ratified the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976 and amended the Japanese Law of Limitation of Liability of Shipowners (LLS), becoming effective on 1 August 2006. Japan amended the LLS in May 2015 and the new limitation became effective on 9 June 2015.

The following claims are subject to a limitation of liability (LLS, article 3):

- claims in respect of loss of life or personal injury or loss of or damage to property occurring on board or in direct connection with the operation of the ship or with salvage operation and consequential loss therefrom;
- claims in respect of loss resulting from delay of the carriage by sea of cargo, passengers or their luggage;
- claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations; and
- claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person may limit his or her liability in accordance with the law.

However, passengers' claims in respect of loss of life or personal injury shall be excepted from the limitation proceedings. Shipowners cannot limit their liability for passengers' death or injury claims.

Shipowners, salvors and their employees may limit their liability. 'Shipowner' means the owner or charterer, including a bareboat charterer. The liability of the managers and the operators of the ship will be subject to the limitation proceedings. A non-vessel operating common carrier shall not limit its liability in the limitation proceedings.

Law stated - 31 May 2024

Procedure

- 11 | What is the procedure for establishing limitation?

Shipowners or salvors or their employees may file an application to commence the procedure to limit shipowner's liability. They should present the court with prima facie

evidence that the claim amount, which may be subject to the limitation of liability, may exceed the limitation amount and the list of the potential claimants' names and addresses (LLS, article 18).

If the court considers that the limitation procedure should be commenced, it will order the applicants to provide the cash deposit. The limitation fund should be the limitation amount plus 6 per cent interest from the accident to the date when the cash deposit is provided or the date when the guarantee contract is filed in the court. The current exchange rate of the special drawing right (SDR) to yen shall be used at the date when the cash deposit is actually provided or the date when the guarantee contract is filed in the court (LLS, article 19).

Instead of a cash deposit, a guarantee contract with a bank, an insurance company or a protection and indemnity (P&I) club with its office in Japan may be acceptable upon the approval of the court (LLS, article 20).

A shipowner or other entitled person can apply to constitute a limitation fund before legal proceedings have been initiated. They should provide prima facie proof that the total claim may exceed the limitation amount.

Law stated - 31 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

A liable shipowner or salvor shall not be entitled to limit his or her liability if it is proved that the loss resulted from his or her personal act or omission committed with intent to cause such loss or recklessly and with the knowledge that such loss would probably result (LLS, article 3, paragraph 3).

There was no precedent case in which the limitation was broken.

The claimants are able to appeal to the court decision to start the limitation proceedings within one week from the announcement of the decision (LLS, article 29).

If the limitation proceedings are abolished, the owners are able to claim to refund the fund more than one month after the decision (LLS, article 32).

The claimant may attach the owner's right to refund the fund within one month after the decision.

Law stated - 31 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

There is no limitation of liability in respect of passenger claims provided in any law. Their luggage claim shall be subject to the Limitation of Shipowner's Liability in Japan. If any limitation to the passenger's claim for his or her life or injury is provided in the contract, it may be null and void as it is against public policy. There are some contracts that provide ¥150,000 per person as the limitation of liability for luggage. Japan is not a signatory of the Athens Convention.

Law stated - 31 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The Foreign Ship Control Agency will conduct port state control inspections in accordance with:

- the Convention on the International Regulations for Preventing Collisions at Sea 1972;
- the International Convention on Load Lines 1966;
- the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships 1973;
- the International Convention for the Safety of Life at Sea 1974; and
- the International Convention on Standards of Training Certification and Watchkeeping for Seafarers 1978.

Law stated - 31 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The Ministry of Land, Infrastructure, Transport and Tourism may order an inspection of a ship in order to take the necessary steps to fulfil the conditions required by the conventions. If the master does not follow the order, the ship shall not be allowed to enter the port or be ordered to go out of the port and the master may be fined at or less than ¥300,000.

If the ministry considers that the ship may be dangerous, the ship may be detained and moved to the designated place.

Law stated - 31 May 2024

Appeal

|

16 | What is the appeal process against detention orders or fines?

The shipowner may apply to the ministry to re-inspect the ship and if this does not work, the shipowner will commence proceedings at a competent court.

A fine may be imposed by a court. The shipowner may appeal to the higher court.

Law stated - 31 May 2024

CLASSIFICATION SOCIETIES**Approved classification societies****17 | Which are the approved classification societies?**

These are:

- Nippon Kaiji Kyokai;
- Lloyd's Register;
- Det Norske Veritas; and
- American Bureau of Shipping.

Law stated - 31 May 2024

Liability**18 | In what circumstances can a classification society be held liable, if at all?**

A classification society shall be liable by breach of contract or in tort if it is negligent in its performance.

Law stated - 31 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION**Wreck removal orders****19 | Can the state or local authority order wreck removal?**

The Japanese Coast Guard may order the shipowner to remove the wreck or to take necessary steps to protect against pollution to the sea when it considers that the sea is being polluted or might be polluted by a sunken or grounded ship (the Law on Prevention of Sea Pollution, article 40).

Law stated - 31 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Japan has ratified:

- the Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels 1910;
- the Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea 1910;
- the International Convention on Civil Liability for Oil Pollution Damage;
- the international Convention on Civil Liability for Bunker Oil Pollution Damage; and
- the Nairobi International Convention on the Removal of Wrecks 2007.

It has not ratified the International Convention of Salvage 1989.

Law stated - 31 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is a salvage agreement form (on a 'no cure, no pay' basis) implemented by the Japan Shipping Exchange as a local form but it is not mandatory. Lloyd's standard form of salvage agreement is popular in Japan. Nippon Salvage Co Ltd and Fukada Salvage & Marine Works Co Ltd are popular salvage companies in Japan.

Law stated - 31 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Japan has not ratified either the International Convention on the Arrest of Seagoing Ships 1952 or the International Convention on the Arrest of Ships 1999.

Law stated - 31 May 2024

Claims

- 23** | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

The claimant can arrest or attach the vessel, or other assets in Japan, owned by the defendant, by means of a provisional attachment order. It is possible but difficult to arrest an associated vessel that is virtually under the same ownership. In order to pierce the corporate veil, it is necessary to prove that the shipowning company is a sham company or that its establishment is regarded as abusing its right.

The claimants can arrest the vessel if they have a lien over the ship under Japanese law. The claim against a bareboat charterer may have the lien over the ship. Under the newly amended Commercial Code, the claim against the time charterer may have the lien over the ship.

Law stated - 31 May 2024

Maritime liens

- 24** | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

The Commercial Code, article 842, provides for a statutory lien (called a 'preferential right' in Japanese law) over the ship, its appurtenances and unpaid freight. The claims that have preferential right are:

1. the claim for personal life and or injury directly related to the operation of the vessel;
2. salvage remuneration and the ship's contribution to general average;
3. the port entering charge or port using charge and other all public dues levied on the ship in respect of the voyage which shall be collected by the National Tax Collection Law and pilotage dues and towage dues;
4. claims that have arisen from the necessity for the continuance of the voyage; and
5. claims of the master and other mariners that have arisen from the employment contract.

The priority of the claims shall be determined by the above order.

However, if there are two or more of the claims mentioned in items (2) to (4) above, a claim arising later shall take precedence over an earlier one (Commercial Code, article 843).

A claim, subject to the limitations of the shipowners' Liability Law (LLS, article 95) and on oil pollution claims (Oil Pollution Damage Compensation Guarantee Law, article 55), shall have a lien over a ship (article 95). The priority of claims as preferential right shall be below item (5) above. Therefore, a cargo claim or collision claim shall have a lien over the ship.

The lien shall be valid for one year from when the claim has arisen (Commercial Code, article 846). No extension is allowed. The claimants should arrest the ship within one year.

A maritime lien has priority over the ship's mortgage (Commercial Code, article 848).

Law stated - 31 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

If the claimant arrested the vessel negligently, the claimant shall be liable in tort for the owner's loss.

Law stated - 31 May 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

A bunker supplier can arrest the vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to the contract with the owners, the bareboat charterers or the time charterer but not with the voyage charterer.

Law stated - 31 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

In the case of provisional attachment, the security by way of cash deposit or the letter of guarantee issued by a Japanese licensed bank or insurance company amounting to one-fifth to one-third of the claim shall be required.

In the case of attachment by lien, no security shall be required.

Law stated - 31 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

In the case of provisional attachment, the security amount is about one-fifth to one-third of the claim amount but the ship's value will be considered. The security amount shall not exceed the value of the ship. The security amount will not be changed subsequently.

In the case of attachment by maritime lien, no security is required.

Law stated - 31 May 2024

Formalities

- 29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

In the Japanese arrest proceedings, the power of attorney (POA) and the authorised copy of the company register or any other document to prove the authority of the signor or the issuer of the power of attorney are necessary. The POA should be signed by the president or any other person who is authorised to represent the company. The evidence of the signer's authority is required. The POA is not necessarily notarised but the notarised POA is recommendable. Japan is the signatory of the Hague Apostille Convention. The original POA is required. However, in urgent cases, we usually present the copy of the POA first and the original later. The court will not accept the documents electronically. If the documents are sufficient, two to three days notice is sufficient, but four to five days will usually be required for safety reasons. However, this all depends on the case merit and the available evidence.

Law stated - 31 May 2024

Ship maintenance

- 30 | Who is responsible for the maintenance of the vessel while under arrest?

The ship administrator shall be appointed by the court at the expense of the arresting party. While the vessel is under arrest, the necessary maintenance costs including insurance premium are paid by the arresting party.

Law stated - 31 May 2024

Proceedings on the merits

- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

The vessels may be arrested by preliminary arrest, maritime lien or mortgage, or final judgment.

When claimants initiate a preliminary arrest of a vessel, they will prove a prima facie claim against the shipowners and pay the security ordered by the court, which is usually about one-third to one-fifth of the claim amount. If a preliminary arrest of a ship has been effected, the claim on the merits will be litigated at the forum of the claim, not necessarily in Japan. If the ship is arrested by maritime lien or mortgage or final judgment, the claim on its merit should be decided in the same court that issued the arresting order, unless otherwise agreed between the parties, and the ship is released. The ship may be released if the letter of guarantee is issued. The proceedings on the merits will be pursued at the agreed jurisdiction in the letter of guarantee.

Law stated - 31 May 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

The attachment of the bank account or any other property owned by the shipowner is possible.

Law stated - 31 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Orders for the preservation of evidence can be issued by the court.

Law stated - 31 May 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is theoretically possible to arrest the bunker, but, usually, the bunker is owned by the charter. In such a case, the owner's approval is necessary if the bunker is under the control of the owner.

Law stated - 31 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Judicial sale can be applied for by claimants with a maritime lien or mortgage over the ship or with the final judgment of the arbitration award with the execution order by a Japanese court against the ship owners in favour of the claimants.

Law stated - 31 May 2024

Procedure

- 36** | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The vessel shall be arrested by court order and evaluated by the court. The date for the judicial sale shall be fixed and notified to the public. It takes about six months to sell the vessel but maybe more subject to the size or the type of the vessel. The court may order the claimants to deposit the costs in advance for the sale, which includes costs for maintenance, evaluation, etc, and will vary subject to the size or the type of the vessel. It is difficult to estimate the amount but it will not be less than ¥1.5 million.

Law stated - 31 May 2024

Claim priority

- 37** | What is the order of priority of claims against the proceeds of sale?

The first priority of claims are maritime liens, as provided in the Commercial Code, article 842.

A maritime lien has priority over a mortgage. Claims without any priority are eligible after the priority claims protected by maritime liens or mortgage.

Law stated - 31 May 2024

Legal effects

- 38** | What are the legal effects or consequences of judicial sale of a vessel?

Judicial sales serve to extinguish all prior liens and encumbrances on the vessel, including maritime liens and thereby give the purchaser clean title (Civil Execution Law, article 59).

Law stated - 31 May 2024

Foreign sales

|

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Usually, judicial sale of a vessel in a foreign country will be recognised, provided that it is not against Japanese public policy. There is no precedent case concerning this problem in Japan.

Law stated - 31 May 2024

International conventions**40** | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No, Japan is not a signatory to the convention.

Law stated - 31 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING**International conventions****41** | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Japan has ratified the Hague-Visby Rules. The Japanese Carriage Of Goods by Sea Act (JCOGSA) is basically the same as the Hague-Visby Rules.

The JCOGSA shall apply to international sea carriage from port to port. It provides the carrier shall be liable from the receipt to the delivery of the cargo but a special clause beneficial to the carrier may be valid before loading or after discharge.

Japan has not yet ratified the Rotterdam Rules.

Law stated - 31 May 2024

Multimodal carriage**42** | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

The Commercial Code is applicable to road transport, domestic water transport and domestic air transport and does not provide for any limitation of liability. The limitation set out in the contract may be valid subject to the public policy. The time bar is one year.

The Rules for Carriage by Rail are applicable to rail transport. The limitation of liability is ¥40,000 per kilogram and the maximum liability is ¥4 million per package. The time limit is one year.

The Montreal Convention is applicable to international air carriage. The limitation liability is 22 special drawing rights per kilogram. The time limit is two years.

Law stated - 31 May 2024

Title to sue

43 | Who has title to sue on a bill of lading?

A bona fide bill of lading holder has the title to sue on a bill of lading.

Law stated - 31 May 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

It is possible to incorporate the terms in a charter party into the bill of lading by a bill of lading clause, but it may be regarded as invalid if it is to relieve the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault or failure in the duties and obligations, or lessening such liability provided in Hague-Visby Rules.

There is no clear precedent about the validity of a jurisdiction clause or arbitration clause in a charter party, the terms of which are incorporated in the bill of lading. The Supreme Court of Japan held regarding the validity of a jurisdiction clause of the bill of lading on 28 November 1975 that:

It shall be sufficient as the style of the agreement of international jurisdiction, if the court in a specified country is clearly identified in the document presented by one of the parties and the existence and the contents of the jurisdiction agreement are clear.

Therefore, the jurisdiction or arbitration agreement incorporated into a bill of lading is considered to be valid as long as the place or the country is clearly identified in the charter party.

Law stated - 31 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

On 27 March 1998, the Supreme Court of Japan held that demise clauses are valid. However, there are still contradictory judgments. Therefore, the present situation is that the demise clause or the identity of carrier clause may be regarded as basically valid, but still arguable, in a Japanese court.

Law stated - 31 May 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

If the shipowner is not the contractual carrier, he or she may be claimed against in tort. He or she may be entitled to rely on the bill of lading defence, as long as the necessary Himalaya clause exists in the bill of lading. A Himalaya clause is regarded as legally valid in Japan (Civil Code, article 537).

Law stated - 31 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Any deviation to save or attempt to save life or property at sea or any other reasonable deviation shall not be deemed to be an infringement or breach of the contract. Otherwise, deviation shall be regarded as the fault of the carrier and if loss of or damage to the cargo was caused by the deviation, the carrier shall be liable. However, the carrier shall still be entitled to rely on the package or weight limitation or the one-year time limit. The deviation itself has no special effect under Japanese law. If the claimants try to break the limitation of liability, they should prove the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with the knowledge that damage would probably result (JCOGSA, article 13-2).

Law stated - 31 May 2024

Liens

48 | What liens can be exercised?

The Commercial Code, article 741, provides the master may exercise a lien over the cargo, if the freight, extra charge, disbursement, port charge, general average contribution or salvage charge is not paid.

Law stated - 31 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The carrier is liable for the loss of the cargo caused by a delivery without a bill of lading (Civil Code, article 764). However, the carrier shall be entitled to rely on a package or weight limitation unless it is proved that loss or damage resulted from an act or omission of the carrier done with the intent to cause damage or recklessly in the knowledge that cargo loss or damage would probably result (COGSA, article 9(1)).

The carrier is entitled to rely on the one-year time limit from the time of possible delivery to the holder of the bill of lading (Commercial Code, article 585).

Law stated - 31 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper shall declare the dangerous cargo to the carrier (Commercial Code, article 572). Otherwise, the shipper may be liable for damages arising from an accident caused by the dangerous cargo.

The bill of lading holder shall be liable for unpaid freight and other charges over the cargo if he or she receives the cargo (JCOGSA, article 20).

Law stated - 31 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

No ECA exists in Japan.

Law stated - 31 May 2024

Sulphur cap

- 52** | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The 0.5 per cent m/m cap on sulphur is applicable. No sanctions are available.

Law stated - 31 May 2024

SHIP RECYCLING

Regulation and facilities

- 53** | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

There is no ship recycling regulation on international ships.

Law stated - 31 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

- 54** | Which courts exercise jurisdiction over maritime disputes?

There is no maritime court specialising in maritime claims. The relevant district court will have jurisdiction over a maritime dispute.

If the defendant has a registered office, the local court at the defendant's office address has the jurisdiction over any claim against the defendant (Civil Procedure Law (CPL), article 4) otherwise:

- the court of the place of delivery has jurisdiction over a bill of lading claim (CPL, article 5-1);
- the court of the Ship Registry has jurisdiction over claims in respect of charter or voyage against shipowners and charterers (CPL, article 5-6);
- the court where the ship is present has jurisdiction over liens or ship arrest (CPL, article 5-7);
- the court where an accident occurs or loss or damage was found has jurisdiction over claims in tort (CPL, article 5-9);
- the court where the ship first arrives after a collision or maritime accident has jurisdiction over the claim in respect of the collision or the maritime accident (CPL, article 5-10); and
- the court of the jurisdiction where the ship is salvaged or first arrives after the salvage has jurisdiction over the case (CPL, article 5-11).

The court agreed by the parties has jurisdiction over the claim.

Law stated - 31 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Japan ratified the Hague Convention on Civil Procedure Matters in 1954 and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in 1965. The conventions shall be applicable to the service to the signatory countries.

All service to foreign countries shall be done through the authority of the foreign countries or Japanese diplomatic authority (CPL article 108).

Law stated - 31 May 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The Japan Shipping Exchange has the Tokyo Maritime Arbitration Commission (www.jseinc.org/en/tomac/index.html). They have 10 to 20 cases a year.

Law stated - 31 May 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The foreign judgment may be enforceable if all the following conditions are fulfilled (Civil Procedure Law, article 118):

- the foreign court holding the judgment has jurisdiction over the case in accordance with the applicable law or convention;
- the defeated defendant was served with the necessary writ or order at the commencement of the procedure or defended to the litigation;
- the content of the judgment or the procedure is not against Japanese public policy; and
- there is reciprocity.

Japan ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958. The award of the signatory country of the New York Convention shall be enforceable as long as the enforceable condition of the Convention is fulfilled.

To enforce the foreign judgment or arbitral award in Japan, the claimants should obtain the enforcement decision at a Japanese court. In the proceedings of the enforcement decision, only the question of the legality of the procedure shall be considered and not the merits of the case.

Law stated - 31 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

The jurisdiction agreement in writing (Civil Procedure Code, article 11) and the arbitration agreement (Arbitration Law, article 36(1)) are basically valid under Japanese law. The jurisdiction or arbitration agreement even asymmetric may be considered invalid only if they are regarded to be against public policy.

Law stated - 31 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Even if claimants issue proceedings in a foreign country in breach of a Japanese jurisdiction clause, anti-suit injunctions do not exist in Japan. The defendants may claim the aggravated loss or expenses incurred by defending themselves at the foreign proceedings from the claimants, but no precedent for this exists.

Law stated - 31 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendants may be entitled to oppose the jurisdiction and to ask the court to dismiss the proceedings. Proceedings shall be dismissed, not stayed, if the exclusive jurisdiction clause or arbitration clause is considered valid.

Law stated - 31 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Type of claim	Time limit or prescription time
Breach of contract	Prescription time: Five years (Civil Code, article 166)
Liability in tort	Prescription time: Three years for property damage (Civil Code, article 724) Prescription time: Five years for death or personal injury (Civil Code, article 724 - 2)
Shipowner's claim against a charterer, shipper or consignee	Prescription time: One year (Commercial Code, article 586)
Claim based on the contract of carriage of goods including international carriage of good by sea	Time limit: One year (Commercial Code, article 585; COGSA article 15)
Claim based on collision	Prescription time: Two years for property damage (Commercial Code, article 789) Prescription time: Five years for personal death or injury (Civil Code 724)
Claim based on collision (Convention applicable)	Prescription time: Two years (Collision Convention, article 7)
Insurance claim based on policy	Prescription time: Three years (Insurance Law, article 95)

It is possible to extend by one year the time limit for the contract of carriage of goods including by sea by mutual agreement under the Commercial Law article 585 and Carriage of Goods by Sea Act article 15.

The prescription of time can be extended for six months by serving the debtor with a demand letter (Civil Code, article 150(1)). Only one extension created by a demand letter can be used (Civil Code, article 150 (2)). The time limit for agreeing to a prescription time extension to negotiate the claim is one year or an agreed period that is less than one year from the date the agreement was executed (Civil Code, article 151 (1)). If the debtor refuses to negotiate during the agreed time, the claimant should take legal steps within six months of the refusal. It is possible to agree to further extensions, but they cannot extend more than five years in total.

Law stated - 31 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Neither courts nor arbitral tribunals have any legal basis on which to extend the time limit.

Law stated - 31 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Japan has not ratified the Maritime Labour Convention.

Law stated - 31 May 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

If the Civil Reorganisation Law or the Company Rehabilitation Law is applied, the debt or the obligation shall be subject to the applicable law.

Law stated - 31 May 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Japan has ratified the following conventions in respect of oil pollution damage:

- the International Convention on Civil Liability for Oil Pollution Damage 1992;
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992; and
- the Protocol 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992.

Law stated - 31 May 2024

UPDATE AND TRENDS

Key developments of the past year

- 66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Japanese government is currently considering whether to recognise electronic bills of lading in law.

Law stated - 31 May 2024

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- Formalities
- Ship maintenance
- Proceedings on the merits
- Injunctions and other forms of attachment
- Delivery up and preservation orders
- Bunker arrest and attachment

JUDICIAL SALE OF VESSELS

- Eligible applicants
- Procedure
- Claim priority
- Legal effects
- Foreign sales
- International conventions

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

- International conventions
- Multimodal carriage
- Title to sue
- Charter parties
- Demise and identity of carrier clauses
- Shipowner liability and defences
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- Delivery without bill of lading
- Shipper responsibilities and liabilities

SHIPPING EMISSIONS

- Emission control areas
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- Regulation and facilities

JURISDICTION AND DISPUTE RESOLUTION

- Competent courts
- Service of proceedings
- Arbitration
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- Asymmetric agreements
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LIMITATION PERIODS FOR LIABILITY

- Time limits
- Court-ordered extension

MISCELLANEOUS

- Maritime Labour Convention
- Relief from contractual obligations
- Other noteworthy points

UPDATE AND TRENDS

- Key developments of the past year

NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

The contents of the shipbuilding contract (including passage of title) will depend on what the shipbuilder and the shipowner have agreed. Very often, standard form contracts that are in international use form the basis of shipbuilding contracts, and the parties will make any necessary modifications to suit their needs.

The parties may and often do agree that title to the vessel passes to the shipowner with the physical delivery of the vessel and supporting documentation, including the builder's certificate, the bill of sale, or both, to the shipowner. Otherwise, the parties may agree that the shipowner acquires ownership as the work progresses or as instalments of the price are paid.

Maltese law does not contain any specific provisions regulating shipbuilding contracts.

If a shipbuilding contract is taken as being similar to a contract of works, where the builder supplies the materials and in the event that the thing has to perish before it is delivered, the loss is borne by the builder unless the employer has been in default in delay for receipt of the thing (article 1634 of the Civil Code). Thus, the title to the ship would only pass once its building is complete. In the case of a work consisting of several pieces, the work shall remain at the risk of the builder until the employer has examined the whole work unless the parties have agreed that each part will be examined as soon it is completed (article 1637 of the Civil Code). This reinforces the theory that title (together with risk) would pass upon delivery of the item.

By virtue of a recent amendment to the Civil Code provisions regulating the contract of sale, a provision has now been inserted to the effect that any agreement relating to the sale or purchase of ships shall be governed by the terms and conditions agreed by the parties as well as by the international usages of trade (which are to prevail in case of any conflict with Maltese Civil Code provisions) as well as the special laws relating to merchant shipping.

Law stated - 9 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

In terms of Maltese law, any suretyship shall on pain of nullity be expressed in a public deed or a private writing (article 1233(1) of the Civil Code).

Law stated - 9 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

It is possible for the shipowner to request the local courts to order specific performance under the shipbuilding contract.

Under the general provisions of sale, if the seller fails to make delivery at the time agreed upon, the buyer may demand that he or she be placed in possession of the thing sold, provided the delay has been caused solely by the seller (article 1385 of the Civil Code).

Law stated - 9 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Maltese law provisions relating to liability for defective goods do not automatically apply in a newbuilding contract regulated by Maltese law although the contracting parties are free to agree and insert provisions as to product liability in the case of defects in the ship in the shipbuilding contract.

Under general principles of civil law, the seller is bound to warrant the vessel sold against latent defects that render it unfit for the use for which it is intended or that diminish its value to such an extent that the buyer would not have bought it or would have tendered a lesser price had he or she been aware of them (article 1424 of the Civil Code). By mutual agreement of the contracting parties, any of the above warranties may be excluded from the shipbuilding contract.

Furthermore, in terms of the law of tort, every person is responsible for the damages that occur through his or her fault (article 1031 of the Civil Code). The shipowner and any third party that has sustained damage are protected by Maltese law.

Law stated - 9 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Pleasure boats, commercial yachts, merchant ships, pontoons, barges, floating establishments, installations or structures and oil rigs are all eligible for registration as Maltese vessels. A ship of less than six metres in length is not eligible for registration under the Maltese flag.

As a rule, merchant ships that are 25 years old and over are not eligible for registration under the Maltese flag. Merchant ships that are 15 years old and over but less than 25 years may be registered under the Maltese flag following the satisfactory outcome of a pre-registration inspection by an authorised flag inspector. The registration of ships of 10 years and over but less than 15 years is subject to a satisfactory inspection by an authorised flag inspector within one month before registration (Merchant Shipping Notice No. 127 Rev 1 – Guidelines for the ascertainment of seaworthiness of vessels being registered as Maltese ships).

It is possible to register a vessel under construction under the Maltese flag. In such case, the requirements relating to surveying of the vessel and the declaration of ownership when the builders have not yet effected delivery to the owners are suspended until construction of the vessel or until delivery of the vessel is complete. It is also possible to register a Maltese mortgage over a ship that has been registered under the Maltese flag as a ship under construction, as long as the declaration of ownership requirement has been satisfied.

Law stated - 9 May 2024

6 | Who may apply to register a ship in your jurisdiction?

To be eligible for registration under the Maltese flag, according to article 4 of the Merchant Shipping Act (MSA), a vessel is to be wholly owned by:

- citizens of Malta;
- bodies corporate established under and subject to the laws of Malta, having their principal place of business in Malta or having a place of business in Malta and satisfying the minister responsible for shipping that they can and will ensure due observance of the laws of Malta relating to merchant shipping; or
- such other persons as the minister may by regulations prescribe.

By virtue of the Ships Eligible for Registration Regulations 2003 (SL 234.23), a citizen of the European Union, the European Economic Area (EEA), Switzerland or the United Kingdom residing in Malta, as well as an international owner, was declared as qualified to own a Maltese ship or a share therein. An international owner is any citizen of the European Union, the EEA, the United Kingdom or of Switzerland not residing in Malta or a non-Maltese body corporate or other entity enjoying legal personality in terms of the law under which it has been established or constituted who has appointed a resident agent in Malta. The resident agent acts as the channel of communication between the international owner and the Maltese authorities and also acts as the shipowner's judicial representative in Malta.

A ship may also be bareboat registered under the Maltese flag when it is chartered to a citizen of Malta, or to Maltese bodies corporate or other persons qualified to own a Maltese ship (as explained above).

Law stated - 9 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

Entry to the Maltese flag is through provisional registration, eventually followed by permanent registration when all the necessary requirements have been satisfied.

An applicant must submit an application for registration as well as a declaration of ownership wherein the owner declares that the ship is free from registered encumbrances, accompanied by a scanned copy of the builder's certificate or bill of sale on the basis of which the vessel is being registered under the Maltese flag. A copy of the present international tonnage certificate would be required as well as a confirmation that there is no halon aboard the vessel.

The Malta Transport Authority would require evidence of seaworthiness in the form of confirmation from an approved classification society.

To obtain the operational certificate with which the vessel can trade, one would have to provide proof of liability insurance referring to, in particular, bunker pollution and oil pollution (as applicable), copies of valid safety statutory certificates, valid safety management certificates and a valid maritime labour certificate, as well as a copy of the long-range identification and tracking of ships conformity report. Applications must also be submitted to receive the relative minimum safe manning certificate and radio licence.

Permanent registration is attained by submitting the original builder's certificate or bill of sale, the original deletion certificate, the certificate of survey and the international tonnage certificate issued under the authority of Malta as well as a duly endorsed carving and marking note.

Depending on the vessel's age, a satisfactory flag state inspection may be required as a condition for vessel registration under the Maltese flag.

Law stated - 9 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

The MSA allows for both the bareboat charter registration of foreign ships in the Maltese bareboat charter ship registry, as well as for the bareboat charter registration of Maltese ships in a foreign bareboat charter ship registry.

It is essential for the country that is to be the underlying registry or the bareboat registry for any given case to be declared to be a compatible registry with the Maltese registry by the minister responsible for shipping. To date, around 46 countries have been declared to be compatible registers with the Maltese Ship Registry.

In the case of the bareboat registry, questions as to title and ownership are regulated by the underlying registry, whereas operational matters of the vessel are regulated by the bareboat registry.

In the case of a vessel that is bareboat registered in Malta, the vessel is to be bareboat chartered to a person qualified to own a Maltese ship.

Apart from the usual requirements for the registration of a ship under the Maltese flag, there are additional requirements for registering a ship in the Maltese Bareboat Charter Ship Registry, such as a transcript of registration from the underlying registry and the consent of the underlying registry and of any registered mortgagee. Within 30 days following the issuance of the bareboat registry certificate of the ship under the Maltese flag, the charterer shall deliver a declaration to the Maltese ship registrar confirming that all the certificates issued by the underlying registry have been surrendered to the underlying registry.

The duration of the bareboat charter registration shall not exceed the duration of the bareboat charter or the expiry date of the underlying registration, whichever is the shorter period, but in no case for more than two years. This period of bareboat registration may be extended further for subsequent periods of a maximum of two years at a time.

Bareboat charter registration of a Maltese-registered ship in a foreign bareboat charter ship registry may be effected on obtaining the consent of the registrar of shipping to that effect. Such consent will be forthcoming upon the satisfaction of certain conditions, including an application to the Maltese registrar of shipping by the shipowner for permission to bareboat charter register the ship in a foreign registry, consent of any registered mortgagee and an undertaking by bareboat charterers in favour of the Maltese registrar of shipping confirming that the Maltese maritime flag will not be hoisted on the ship for the duration of the bareboat charter registration of the ship in the foreign registry.

Law stated - 9 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The Registrar of Shipping maintains the register of vessels with all entries required to be made in terms of the MSA.

The date and time of the recording of the mortgage would result from the vessel's register. The vessel's register would also indicate the name and address of the mortgagee as well as a synopsis of the mortgage deed.

Any prohibition in the mortgage deed on the mortgagor from creating any further mortgages or from transferring the vessel or any share therein without the prior written consent of the mortgagee is recorded in the vessel's register (article 39 of the MSA).

When any mandate or power of attorney has been granted by the mortgagor to the mortgagee by way of security, granting powers relating to the exercise of rights relating to the vessel or the closure of register on behalf of the registered owner, it is possible to submit such power of attorney to the registrar of shipping for registration and the vessel's register would indicate the details of such mandate or power of attorney (article 17 of the MSA).

Law stated - 9 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The Limitation of Liability for Maritime Claims Regulations 2004 (SL 234.16) provide a regime of limitation of liability for maritime claims and give effect to the Convention on Limitation of Liability for Maritime Claims 1976 as amended by the Protocol of 1996.

The following claims, whatever the basis of liability may be, are subject to limitations of liability:

- claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
- claims in respect of the raising, removal, destruction or the rendering harmless of a ship that is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
- claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship; and
- claims of a person other than the person liable in respect of measures taken to avert or minimise loss for which the person liable may limit his or her liability in accordance with this convention, and further loss caused by such measures.

The following persons are entitled to limit liability:

- shipowners, meaning the owner, charterer, manager and operator of a seagoing ship. The liability of a shipowner shall include liability in an action brought against the vessel herself;
- salvors, meaning any person rendering services in direct connection with salvage operations;
- any person for whose act, neglect or default the shipowner or salvor is responsible; and
- an insurer of liability for claims subject to limitation in accordance with the rules of the convention, to the same extent as the assured him or herself.

The act of invoking limitation of liability shall not constitute an admission of liability.

The Limitation of Liability for Maritime Claims Regulations 2004 (SL 234.16) were amended to reflect the limits of liability that have been in effect in Malta since 8 June 2015.

Law stated - 9 May 2024

Procedure

11 | What is the procedure for establishing limitation?

The procedure for establishing limitation, where liability is alleged to have been incurred by a person entitled to a limitation in respect of a claim giving rise to limitation, is for that person to make an application to the First Hall of the Civil Court for the determination of the amount of his or her liability and, where several claims are made or apprehended in respect of that liability, for the distribution of that amount rateably among the claimants.

A person claiming limitation may constitute a limitation fund by paying to the court the equivalent in euros of the number of special drawing rights to which he or she claims to be entitled to limit his or her liability in terms of the convention, together with 8 per cent interest thereon from the date of the occurrence giving rise to liability up to the date of payment to the court.

Limitation of liability may be invoked under the convention even if a limitation fund has not been constituted.

A person claiming limitation may apply to constitute a limitation fund before legal proceedings have been initiated and before such a person has been required to respond to a claim that has already been commenced.

Law stated - 9 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

A person shall not be entitled to limit his or her liability if it is proved that the loss resulted from his or her personal act or omission, committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result.

We are not aware of any instance where the limitation has been broken in Malta.

In the opinion of the writers, if a limitation is broken after a fund has been established, such a fund will continue to subsist, with the shipowner remaining liable for any amounts due in excess of the fund. To the best of the writers' knowledge, this point has never arisen and therefore has never been tested before a Court of Law in Malta.

Law stated - 9 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

The applicable limitation regime in Malta for passenger and baggage claims is the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the Protocol of 2002 on the carriage of passengers.

The Merchant Shipping (Carriage of Passengers by Sea) Regulations 2014 (SL 234.52) have been made pursuant to EC Regulation No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, which, in turn, is based on the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the Protocol of 2002 on the carriage of passengers, as well as the International Maritime Organization guidelines for implementation of the Athens Convention, adopted in 2006.

Law stated - 9 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The Port State Control Section within the Technical Department of the Malta Transport Authority is responsible for the inspection of ships calling at Maltese ports or in territorial waters.

Directive 2009/16/EC on Port State Control has been implemented in Malta by the Merchant Shipping (Port State Control) Regulations (SL 234.38).

Law stated - 9 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

If, during the inspection, the port state control inspector discovers deficiencies that are clearly a hazard to safety, health or the environment, the port state control inspector shall order the detention of the ship or shall order the stoppage of the operation during which the deficiencies are revealed.

Any detention order or order stopping a particular operation shall not be lifted until the hazard is removed or until the Malta Transport Authority has established that the ship can proceed to sea or the operation be resumed without risk to the health and safety of passengers or crew, or risk to other ships, or without there being an unreasonable threat of harm to the marine environment.

In exceptional circumstances where the overall condition is evidently substandard, the Malta Transport Authority may also suspend the inspection of that ship until steps have been taken to bring the ship in line with international conventions. In the meantime, such a ship shall be considered as detained.

Where deficiencies cannot be rectified in Malta, the Malta Transport Authority may allow the ship concerned to proceed without undue delay to the appropriate repair yard nearest to the port of detention as chosen by the master and the authorities concerned, subject to any conditions determined by the flag state and the Malta Transport Authority being complied with.

The Malta Transport Authority is responsible for ensuring that no access to any port in Malta shall be granted if a particular ship has been detained for a third time within a specified period and where a refusal of access has been issued by a state signatory to the Paris Memorandum of Understanding (Paris MoU).

A ship risks being permanently refused access to any port and anchorage within Paris MoU territories in the case of a subsequent detention in a port or anchorage within those territories after the third refusal of access.

Law stated - 9 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

The owner or operator of a ship or his or her representative in Malta may appeal against a decision for detention or refusal of access taken by the Malta Transport Authority by means of an application before the Maltese courts. Such appeal is to be filed within 20 days of the service of the detention order or stoppage of operation or the day of refusal of access, as applicable, and shall be served on the Malta Transport Authority, which shall file a reply within 10 days of notification. The court may award the owner compensation in respect of actual loss suffered by him or her in consequence of the detention or refusal of access. It is up to the owner or the operator to satisfy the court that the matter did not constitute a valid basis for the relevant inspector's opinion and that there were no reasonable grounds for the inspector to form that opinion. The court is to state whether there existed a valid basis or otherwise for the detention order or refusal of access. Where the court concludes that the matter in question did not constitute a valid basis for the inspector's opinion, the court shall either cancel the detention order or refusal of access, or shall affirm the order with any modifications that it deems fit.

Law stated - 9 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

By virtue of Merchant Shipping (Ship Inspection and Survey Organisations) Regulations, SL 234.37, the criteria in accordance with which classification societies may be authorised for the purpose of implementation of Directive 2009/15/EC are prescribed.

The following are all classification societies recognised by the Malta Transport Authority:

- American Bureau of Shipping;
- Bureau Veritas;
- China Classification Society;
- Class NK;
- Croatian Register of Shipping;
- DNV;
- Indian Register of Shipping;
- Korean Register of Shipping;
- Lloyd's Register of Shipping;
- Polish Register of Shipping; and
- Registro Italiano Navale.

Law stated - 9 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

A classification society may be held liable in tort or contractually (assuming that the contract provisions do not seek to limit or exclude liability).

In the absence of any agreement between the parties and in the event that Maltese law had to apply, the principle insofar as tort is concerned is that every person shall be liable for damage that occurs through his or her fault (article 1031 of the Civil Code). The standard used in assessing whether a person is at fault is the prudence, attention and diligence of *abonus paterfamilias*.

A person may also be held liable when he or she, with or without intent to cause injury, voluntarily or through negligence, imprudence or lack of attention, is guilty of an act or omission constituting a breach of the duty imposed by law.

Any classification society that the Maltese administration recognises is to have its working relationship with the Maltese administration set out in writing, listing the specific duties and functions assumed by that particular organisation. This agreement must include at least the provisions of financial liability laid down in Directive 2009/15/EC concerning liability from a marine casualty where:

- the Malta Transport Authority, as a flag administration, had to be held liable by a court of law or through arbitration procedures and had to be ordered to compensate

any injured parties for loss of or damage to property or for personal injury or death; and

- the court had to find that the loss, damage, injury or death was caused by the recognised organisation carrying out inspection or survey duties on behalf of the flag administration.

In such case, the recognised classification society is liable to pay financial compensation to the flag administration for any wilful act of omission or gross negligence or negligent or reckless act or omission of the recognised classification society or its employees or agents or persons acting on its behalf giving rise to such loss, damage, injury or death.

Law stated - 9 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Where there is any wreck on or near the coasts within the territorial jurisdiction of Malta that the minister responsible for shipping believes is or is likely to become an obstruction or danger to navigation, then the minister may take possession of, remove or destroy the wreck, as well as sell the wreck and any property recovered from it to be reimbursed for the expenses related to wreck removal, subject to any surplus of funds being held for the benefit of those persons entitled thereto (article 339 of the Merchant Shipping Act (MSA)).

Law stated - 9 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The Convention on the International Regulations for Preventing Collisions at Sea 1972 is given force of law in Malta through the Merchant Shipping (Prevention of Collisions) Regulations, SL 234.20. The aforesaid Collisions Convention shall apply to all Maltese ships and all other ships while they are in Maltese waters as determined by the convention.

The Nairobi International Convention on the Removal of Wrecks 2007 is part of Maltese law in virtue of the Merchant Shipping (Wreck Removal Convention) Regulations, SL 234.53. These regulations apply to all Maltese ships wherever they may be and to all other ships while they are in Maltese waters, including Maltese territorial waters.

Malta is not a party to the International Convention on Salvage 1989. There are some salvage provisions in the MSA.

The International Convention for Pollution from Ships 1973 (MARPOL), as amended by the 1978 protocol, is part of Maltese law through the Merchant Shipping (Prevention of Pollution

from Ships) Regulations 2004 (SL 234.32). MARPOL Annex IV relating to the prevention of pollution by sewage and MARPOL Annex VI relating to prevention by air pollution have also been implemented in Malta (SL 234.47 and SL 234.33).

Malta has acceded to the International Convention on Civil Liability for Oil Pollution Damage 1969, as amended by the 1992 Protocol, as well as the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, as amended by the 1992 Protocol through the enactment of the Oil Pollution (Liability and Compensation) Act 1999, Chapter 412, which is in force in Malta.

The Bunkers Convention 2001 has been implemented in Maltese law through the Merchant Shipping (Liability for Bunker Oil Pollution Damage) Regulations 2009 (SL 234.46).

Maltese-registered vessels as well as any vessels that enter a Maltese port must comply with anti-fouling legislation in terms of EU law.

Law stated - 9 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement applicable in Malta, and the parties are at liberty to employ any form of contract, including the Lloyd's standard form, which would be the approach in practice. Nor is there any requirement for a contract to be entered into to give rise to a legitimate claim for customary or traditional salvage, although a contract would, of course, have evidentiary value, leaving open only the issue of quantum. There is no restriction under law as to who may carry out salvage operations.

Law stated - 9 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Malta is not a signatory to the International Convention for the Unification of Certain Rules Relating to Arrest of Sea-going Ships 1952 nor the International Convention on Arrest of Ships 1999.

Ships are arrested in Malta by a warrant of arrest issued on any one of the grounds listed in article 742B of the Code of Organisation and Civil Procedure giving rise to the in rem jurisdiction of the Maltese courts. These include all maritime claims recognised under the Arrest Conventions.

Law stated - 9 May 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

A total number of 25 maritime claims giving rise to in rem jurisdiction are provided for under paragraphs (1) to (25) of article 742B of the Code of Organisation and Civil Procedure. These closely follow the British Supreme Court Act 1981, but also incorporate both Arrest Conventions of 1952 and 1999.

The basic claims may be summarised as follows:

1. claims to possession, ownership or title to a ship;
2. questions arising between co-owners as to the ownership, possession, employment or earnings of a ship;
3. claims in respect of a mortgage or hypothec or charge on a ship;
4. claims arising out of a contract of sale;
5. claims for damages received by a ship;
6. claims for damage caused by a ship;
7. claims for loss of life or personal injury caused by a ship;
8. claims for loss or damage to goods carried in a ship;
9. claims arising out of an agreement for the carriage of goods or use or hire of a ship;
10. claims for salvage;
11. claims for damage to the environment by a ship;
12. claims relating to wrecks;
13. claims for towage;
14. claims for pilotage;
15. claims for supplies or services rendered to a ship;
16. claims for construction, repair, conversion or equipping of a ship;
17. claims for port, dock or harbour dues;
18. claims by crew for wages or repatriation;
19. claims for disbursements made;
20. claims for commissions, brokerage or agency fees;
21. claims arising out of an act of general average;
22. claims arising out of bottomry;
23. claims for forfeiture of a ship;
24. claims for insurance premiums; and
25. claims for fees due to the registrar or tonnage dues.

No warrant of arrest may be issued if the monetary value of the claim is less than €7,000.

Because ship arrest is exclusively a *lex fori* issue, the vessel's flag and the law governing the merits of the claim have no relevance whatsoever in regard to the grounds on which a vessel can be arrested. However, this only holds true with regard to ship arrest taken out in the context where proceedings on the merits of the claim are to be brought before the Maltese courts. In cases where an arrest is possible in the security of a foreign process, then the *in rem* jurisdiction of the Maltese courts is not a relevant factor and the law governing the merits of the claim would assume relevance.

In cases concerning any one of the maritime claims listed in (1), (2) and (3) above, an action *in rem* may only be brought against that ship in connection with which the claim arises.

In all other cases concerning the remaining maritime claims listed in (4) to (25), an action *in rem* may be brought against that ship, where the person who would be liable on the claim for action *in personam* (the relevant person) is, when the cause of action arose, an owner or charterer of, or is in possession or in control of, the ship and if, at the time when the action is brought, the relevant person is either an owner or beneficial owner of that ship or the bareboat charterer of it. In such cases, an action *in rem* may also be brought against any other ship of which, at the time when the action is brought, the relevant person is the owner or beneficial owner as regards all shares in it.

In these cases, therefore, sister ship and associated ship arrest is possible.

The requirement that the relevant person is the owner or beneficial owner of the particular ship or the bareboat charterer of it at the time when the action is brought does not apply in regard to those maritime claims secured by a special privilege in accordance with article 50 of the Merchant Shipping Act (MSA), which survive the voluntary sale of the vessel by up to one year.

Law stated - 9 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Although the concept of a maritime lien is not recognised as such under Maltese law, the MSA recognises many special privileges on vessels. These survive for one year following the voluntary sale of the vessel concerned (thereby assuming the *droit de suite* character of maritime liens) and are also relevant in the context of the ranking of creditors.

Maltese law also confers a possessory lien over the ship in favour of any ship repairer, shipbuilder or another creditor into whose care and authority such ship has been placed for the execution of works or other purposes. This lien entitles the creditor to retain possession over the ship on which he or she has worked until he or she is paid the debts due to him or her for such building, repairs or activity. The possessory lien is extinguished upon the voluntary release from the custody of the creditor.

The claims that give rise to the aforementioned special privilege on vessels are as follows:

1. judicial costs incurred in respect of the sale of the ship and the distribution of the proceeds thereof;
2. fees and other charges due to the registrar of Maltese ships arising under the MSA;
3. tonnage dues;
4. wages and expenses for assistance, recovery of salvage, and for pilotage;
5. the wages of watchmen, and the expenses of watching the ship from the time of her entry into port up to the time of her sale;
6. rent of the warehouses in which the ship's tackle and apparel are stored;
7. the expenses incurred for the preservation of the ship and of her tackle, including supplies and provisions to her crew incurred after her last entry into port;
8. wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
9. damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman;
10. monies due to creditors for labour, work and repairs previously to the departure of the ship on her last voyage, provided the debt has been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner;
11. ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and any disbursements incurred during such period not enjoying a privilege in paragraphs (1) to above, although in any case for a sum in the aggregate not exceeding 4,000 units;
12. monies lent to the master for the necessary expenses of the vessel during her last voyage, and the reimbursement of the price of goods sold by him or her for the same purpose;
13. monies due to creditors for provisions, victuals, outfits and apparel, previously to the departure of the ship on her last voyage: provided that such privilege shall not be competent where the debt has not been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner;
14. damages and interest due to the freighters for non-delivery of the goods shipped, and for injuries sustained by such goods through the fault of the master or the crew;
15. damages and interest due to another vessel or to her cargo in cases of collision of vessels; and
16. the debt specified in article 2009(d) of the Civil Code for the balance of the price from the sale of a ship.

Law stated - 9 May 2024

Wrongful arrest

I

25 | What is the test for wrongful arrest?

Maltese law acknowledges and penalises wrongful arrest. The test for wrongful arrest is whether it is subsequently ascertained by the court that the request for the issuance of a warrant of arrest was based upon a demand maliciously made or unjustly obtained. Essentially this will be the case where the underlying claim on the basis of which the warrant of arrest is issued is malicious, frivolous or vexatious; or where the arresting party fails to bring the action on the merits within the time established by law without a valid reason. In such eventuality, the court may condemn the arresting party to pay a penalty of not less than €11,600 in favour of the person against whom the warrant of arrest was issued.

Law stated - 9 May 2024

Bunker suppliers**26** | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Owing to the requirement of underlying in personam liability, this would only be possible in the event that the charterer who contracted the bunkers happens to be the bareboat charterer of the vessel, and then always provided the vessel is arrested while still under bareboat charter.

However, if at the time the action is brought the charterer were to have become the owner or beneficial owner of that same vessel or the bareboat charterer of it, then it would become possible for the bunker suppliers to arrest that vessel.

Law stated - 9 May 2024

Security**27** | Will the arresting party have to provide security and in what form and amount?

The arresting party is not required to provide security in conjunction with the arrest. However, the person whose vessel has been arrested may request the court, on good cause being shown, to order that the party requesting the warrant of arrest puts up sufficient security for the payment of the penalty, damages and interest, in an amount being not less than €11,600 within a time to be fixed by the court; and in default to rescind the warrant. Security must be provided either in cash or by a guarantee from a local bank.

Law stated - 9 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

For the vessel to be released, the arrested party must deposit the claim amount as security. Such an amount would only be available (partially or in full) to the arresting party in case of a successful outcome of the case on the merits. Security must be provided either in cash or by local bank guarantee. There is no provision for subsequent review of the security put up by the arrested party. Since the security must be related to the value of the claim, then it follows that the amount of security could potentially exceed the value of the ship, saving any possible remedy on the part of the arrested party to contest the warrant of arrest on grounds permitted by law, for example, if it is shown that the amount claimed is not prima facie justified or is excessive.

Law stated - 9 May 2024

Formalities

- 29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

The lawyer engaged by the arresting party, should such arresting party be non-resident in Malta, should be appointed as the arresting party's special attorney in Malta unless the arresting party appoints another special attorney in Malta for the purpose. In either event, a power of attorney would be required. The power of attorney should be executed by an authorised representative of the arresting party but no other formalities are required. In particular, there is no requirement for the power of attorney to be notarised, legalised or authenticated, although it might be prudent for this to be done. Malta is a signatory to the Apostille Convention. A scanned copy of the power of attorney could initially be attached to the arrest application. The original power of attorney is usually submitted later in the proceedings, usually in any proceedings on the merits. In addition to the power of attorney, it would also be advisable to attach scanned copies of the documents substantiating the claim sought to be secured by the arrest. There are no procedures for electronic filing. An arrest application may be prepared very expeditiously even on the same day instructions are given.

Law stated - 9 May 2024

Ship maintenance

- 30 | Who is responsible for the maintenance of the vessel while under arrest?

The Malta Transport Authority is deemed by law to be the authority having in its control the arrested vessel, and therefore it is to be considered as the official consignee responsible for the maintenance of the vessel while under arrest.

Having said that, from the moment that the warrant of arrest is served on the Authority, all expenses as may be necessary for the preservation of the arrested vessel are to be borne by the person issuing the warrant of arrest, saving his or her right to recover such expenses together with his or her claim.

Law stated - 9 May 2024

Proceedings on the merits

- 31** | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Ships that are physically present within the territorial jurisdiction of the Maltese courts may be arrested in Malta both in the security of maritime in rem claims, as well as in the security of in personam claims in those instances where the shipowner may be personally subject to the ordinary jurisdiction of the Maltese courts. In such instances, the arresting party must pursue the claim on its merits before the Maltese courts.

Ship mortgages constitute executive titles under Maltese law, so in cases concerning the enforcement of a mortgage, the mortgagee need only proceed to render such executive title enforceable according to law. This is achieved by filing a judicial demand in the form of an official letter accompanied by an affidavit confirming the amount due under and secured by the mortgage.

Finally, ships may also be arrested in Malta pursuant to the provisions of article 35 of Regulation (EU) No. 1215/2012, dealing with provisional including protective measures, in cases where the courts of another member state have jurisdiction as to the substance of the matter; the law also allows for ship arrest as a security measure in all cases where an arbitration clause has been stipulated in the underlying contract giving rise to the claim. However, in all these cases, the ship must always be arrested in virtue of the warrant of arrest, which remains the only way that a ship may be arrested in Malta; and proceedings on the merits whether before the competent foreign court or arbitration must be initiated within 20 days of the date on which the warrant of arrest is issued.

Law stated - 9 May 2024

Injunctions and other forms of attachment

- 32** | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

It is possible for any person claiming a right in or over a ship to apply for an order to the Maltese Court prohibiting any dealing with a Maltese-registered ship or any share therein for a specified time. Such order would be entered in the vessel's register by the registrar of shipping. Any claim based on:

- a right of ownership; or that is secured by a mortgage;
- a registered encumbrance; or a privilege or a lien over the ship arising by operation of Maltese law or the law applicable to the claim; or
- any other claim that gives rise to a claim in rem against a vessel under Maltese law, would give the claimant the right to apply for this caveat on the ship's register.

Such order only affects the register of the ship and does not affect the commercial operation of the vessel. This order, which is akin to a caveat, is precautionary and is not to be confused with a warrant of arrest. It may be revoked by the respondent depositing in court the amount of the claim in the currency indicated therein or by giving satisfactory security to the court.

Law stated - 9 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

No such orders are specifically available, although a witness may be subpoenaed to produce evidence in court during the course of a hearing or a suit.

Law stated - 9 May 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Pursuant to the provisions of section 2009(d) of the Civil Code, the unpaid seller of bunkers would enjoy a privilege over the bunkers themselves. Accordingly, it is possible to seize bunkers in Malta, as well as to obtain an injunction in respect thereof. There will, however, be practical difficulties in carrying this out. For instance, in connection with storage and the appointment of a consignatory to take physical possession of the seized bunkers. The claimant's position would be stronger if a reservation of ownership clause was included in the bunkers supply agreement. In appropriate cases, such a warrant of seizure of bunkers could be coupled with an arrest of the vessel.

Law stated - 9 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Any creditor having an executive title, namely final judgment (*res judicata*) creditors and creditors enjoying any other executive title may apply for the judicial sale of an arrested vessel. The law provides for both a precautionary as well as for an executive warrant of arrest. Creditors seeking to arrest a ship in security of a claim that is not yet judicially acknowledged must have recourse to the precautionary warrant. Creditors in possession of an executive title may immediately proceed to issue an executive warrant and this is then followed up by an application for the judicial sale by auction of the arrested vessel.

Law stated - 9 May 2024

Procedure

- 36** | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

Any creditor having an executive title may apply to the court for the judicial sale by auction of the arrested ship, judicial sale by auction being one of the executive acts recognised by law. Bids are made orally. The procedure for the judicial sale could be concluded within six to eight weeks from the application for sale being filed. Following the judicial sale and the deposit of the proceeds in court, proceedings are then initiated for the ranking of creditors upon the conclusion of which the fund is distributed accordingly. Court costs associated with the judicial sale result from the Code of Organisation and Civil Procedure and are taxed by the court registrar accordingly.

Law stated - 9 May 2024

Claim priority

- 37** | What is the order of priority of claims against the proceeds of sale?

The order of priority of claims is as follows:

1. judicial costs incurred in respect of the sale of the ship and the distribution of the proceeds thereof;
2. fees and other charges due to the registrar of Maltese ships arising under the Merchant Shipping Act (MSA);
3. any debt secured by a possessory lien or privilege (according to article 54 of the MSA) over a ship, provided that such debt arose before the debts of the creditors enjoying any one of the special privileges listed in (4) to (6) hereunder; if such debt as secured by a possessory lien or privilege arose after any of the debts of the creditors enjoying any one of the special privileges listed in paragraphs (4) to (6) hereunder, then such debt as secured by a possessory lien or privilege would rank immediately after such special privilege;
4. tonnage dues;
5. wages and expenses for assistance, recovery of salvage, and for pilotage;
6. the wages of watchmen, and the expenses of watching the ship from the time of her entry into port up to the time of her sale;
7. rent of the warehouses in which the ship's tackle and apparel are stored;
8. the expenses incurred for the preservation of the ship and of her tackle, including supplies and provisions to her crew incurred after her last entry into port;

9. wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
10. damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman;
11. monies due to creditors for labour, work and repairs previously to the departure of the ship on her last voyage, provided the debt has been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner;
12. ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and any disbursements incurred during such period not enjoying a privilege in points (1), (2), (4), (5), (6), (7), (8), (9) and (10) above, although in any case for a sum in the aggregate not exceeding 4,000 units;
13. debts secured by a registered mortgage;
14. monies lent to the master for the necessary expenses of the vessel during her last voyage, and the reimbursement of the price of goods sold by him or her for the same purpose;
15. monies due to creditors for provisions, victuals, outfits and apparel, previously to the departure of the ship on her last voyage: provided that such privilege shall not be competent where the debt has not been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner;
16. damages and interest due to the freighters for non-delivery of the goods shipped, and for injuries sustained by such goods through the fault of the master or the crew;
17. damages and interest due to another vessel or to her cargo in cases of collision of vessels; and
18. the debt specified in article 2009(d) of the Civil Code for the balance of the price from the sale of a ship.

The debts secured by a possessory lien or privilege as referred to under (3) are the debts due to any ship repairer, shipbuilder or another creditor into whose care and authority a ship has been placed for the execution of works or other purposes.

Law stated - 9 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The legal effects of an adjudication of the arrested vessel in a judicial sale by auction are to the effect that the successful bidder obtains legal title to the vessel free of all liens and encumbrances.

The same legal effect is obtained pursuant to a court-approved private sale of an arrested vessel.

Law stated - 9 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

The judicial sale, or any other court-approved sale, of a vessel in a foreign jurisdiction will be recognised. If the vessel concerned happens to be a Maltese-registered vessel, then a consequence of this will be to the effect that the vessel's Maltese registry will be closed in case of a reflagging by the new owner, or transferred in favour of the new owner should it be decided to retain the vessel's Maltese registry.

With regard to a registered mortgage that may have encumbered a vessel sold by judicial sale in a foreign jurisdiction, the MSA provides that a registered mortgage shall attach to the ship or share therein in respect of which it is registered until it is discharged. There is an ensuing proviso to the effect that where a ship has been sold pursuant to an order or with the approval of a competent court within whose jurisdiction the vessel was at the time of the sale, the interest of the mortgagees as well as of any other creditor in the ship shall pass on to the proceeds of the sale of the ship. In this, Maltese law conforms to international standards.

However, in a recent decision delivered by the Court of Appeal on 8 February 2019 in the *Bright Star* case (Application No. 653/2018 in the records of the Executive Warrant of Arrest No. 998/2018 in the names Dr Marion Borg as special mandatory or the foreign company *Jebmed SRL v MV Bright Star formerly Trading Fabrizia* IMO No. 9481960), the Court refused to consider that the judicial sale by auction of the then-Maltese registered vessel *Trading Fabrizia* under the authority of the competent court in Jamaica where the vessel had been arrested by third-party creditors had the effect of transferring ownership of the vessel free of encumbrances, in particular free of the mortgage that has been recorded in the Maltese ship registry in favour of the applicant *Jebmed SRL*. This was because, in the deliberations of the Court of Appeal, the mortgage was not accorded similar status as an executive title in Jamaica as it was under Maltese law and, therefore, the 'interest' of the mortgagee could not be said to have passed on to the proceeds of the sale.

However, the case might have been decided differently on this particular issue had the Court of Appeal not deliberated on the procedure for enforcing foreign judgments in Jamaica to which a Maltese mortgage, being an executive title under Maltese law, was equated, and had focussed on the highly privileged status enjoyed by mortgagees (including mortgagees under a foreign mortgage, as Jamaican law recognises mortgages as constituting maritime liens) and on the ranking of creditors procedures under Jamaican law pursuant to a judicial sale by auction of a ship in that jurisdiction. This decision caused a stir in local and international maritime circles, and highlighted the need for an international convention dealing with the reciprocal recognition of the legal effects of judicial sales of vessels.

Some hope of recovery from the shockwaves generated by the Court of Appeal's decision may lie in the separate ad hoc proceedings that the new owners filed against the Mortgagee on 14 August 2018 before the First Hall of the Civil Court, which remain pending. In that action, the applicants are requesting, among other things, that the executive warrant of

arrest concerned be declared null and void and unenforceable against the ship in terms of the provisions of the MSA. In a preliminary judgment handed down on 14 January 2020, the Court rejected a res judicata plea raised by the respondents on the reasoning that the original proceedings previously instituted by the applicants and determined by the Court of Appeal were summary in nature, intended only to investigate whether there was any irregularity or defect in the executive warrant of arrest, and not in the executive title itself based on which such an executive act was issued.

Law stated - 9 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Malta is not a signatory to the International Convention on Maritime Liens and Mortgages. However, the MSA does recognise a number of special privileges on vessels having characteristics akin to maritime liens. The Act also accords recognition to foreign mortgages, extending under principles of reciprocity equal treatment thereto as to a Maltese mortgage.

Law stated - 9 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Malta has ratified the Hague Rules, and these are in force in Malta, incorporated into domestic law in virtue of the Carriage of Goods by Sea Act 1954. The Maltese courts do, however, apply the Hague-Visby Rules when dealing with a dispute relating to a bill of lading incorporating those Rules. Malta has not yet ratified, accepted, approved or acceded to the Rotterdam Rules.

For the application of the Hague Rules, 'carriage of goods' covers the period from the time when the goods are loaded to the time when they are discharged from the ship.

Law stated - 9 May 2024

Multimodal carriage

42 |

Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

With regard to road transport, the provisions of the Convention on the contract for the international carriage of goods by road (CMR), (Geneva, 19 May 1956) apply by virtue of the International Carriage of Goods by Road Act 2006, if the carriage is subject to the CMR Convention. Where air transport is concerned, the Carriage by Air (International and non-International Carriage) Regulations 2003, SL 499.24, as subsequently amended, apply the provisions of the Warsaw Convention and the Montreal Convention.

Law stated - 9 May 2024

Title to sue

43 | Who has title to sue on a bill of lading?

The holder or endorsee of a bill of lading has title to sue thereon for damages in respect of the short delivery or the non-delivery of the goods covered by the bill of lading.

Law stated - 9 May 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The terms in a charter party can be incorporated into the bill of lading by means of an appropriate generic incorporation clause inserted therein. However, the scope of application of such incorporation clause will not extend to any arbitration clause as may be contained in the charter party, as an arbitration clause requires a specific agreement. Such arbitration clause only binds the owner and the charterer as parties to the charter party, and not the third-party holder or endorsee of the bill of lading.

Where a bill of lading is issued to the charterer in respect of goods shipped by him or her pursuant to a charter party, the bill of lading in such a scenario merely functions as a receipt in respect of such goods and not as the contract whose terms remain contained in the charter party.

Law stated - 9 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

There is no relevant provision in Maltese domestic law recognising or rejecting demise or identity of carrier clauses in bills of lading, and Malta does not embrace the doctrine of binding judicial precedent. The only Maltese case that we are aware of where the Court of Appeal considered, but did not apply, the demise clause or identity of carrier clause was *Advocate Dr Philip Manduca nomine v Sun Maritime Limited*, decided on 26 June 2009. The court held that the ruling of the House of Lords in *The Starsin* [2003] UKHL 12 was substantially compatible with the system of Maltese mercantile law.

Law stated - 9 May 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

In a chartering scenario where shipowners are not the contractual carriers, their only liability would arise in the event that they have not exercised due diligence to make the vessel in all respects seaworthy.

Where a vessel has been subcontracted by the contractual carrier, the shipowner of the subcontracted vessel may rely on the terms of the bill of lading, as appropriate, and may raise the same defences as a contractual carrier would be able to raise.

Law stated - 9 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Unless the carrier is in a position to demonstrate that any deviation from a vessel's route was a permissible one, then such a deviation will be deemed to be an infringement or breach of the contract of carriage and the carrier will be liable for any loss or damage resulting therefrom.

Deviation is permissible for the purpose of saving or attempting to save life or property at sea, as is also any reasonable deviation.

Law stated - 9 May 2024

Liens

48 | What liens can be exercised?

In terms of article 2009(c) of the Civil Code, the debt due to the carrier for the carriage of goods is a privileged debt giving rise to a special lien or privilege over the particular goods. The Commercial Code extends this special privilege or lien also to average contributions

and other charges. Such special privilege or lien ceases on the expiration of 15 days from the day of delivery of the goods, notwithstanding that such goods have not yet passed into the hands of third parties.

Article 50(m) of the Merchant Shipping Act considers damages and interest due to freighters for non-delivery of the goods shipped, and injuries sustained by such goods through the fault of the master or the crew, as giving rise to a special privilege over the ship.

Law stated - 9 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Delivery of cargo without the production of the relevant bill of lading would be tantamount to misdelivery. In such a scenario, the holder of the bill of lading could sue the carrier for breach of contract and the carrier would be held wholly responsible for all damages incurred without any possibility of limiting liability.

Law stated - 9 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

If the shipper, following the receipt of the goods, exercises his or her right to demand the issuance of a bill of lading from the carrier or master or agent of the carrier, then he or she is deemed to have guaranteed in favour of the carrier as at the time of shipment the accuracy of the marks, number, quantity and weight as furnished by him or her; and the shipper will be obliged to indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars.

The shipper is also responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause with the act, fault or neglect of the shipper himself, his or her agents or his or her servants.

Law stated - 9 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Although there is no emission control area in force in Maltese territorial waters, Malta imposes strict requirements for bunker fuel in Maltese territorial waters in accordance with Malta's obligations under Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EC.

Law stated - 9 May 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The use of marine fuels with a sulphur content exceeding 0.1 per cent m/m by ships at berth in ports in Malta is prohibited. Furthermore, placing on the market marine gas oils with a sulphur content exceeding 0.1 per cent m/m is prohibited.

The Malta Resources Authority is obliged and empowered to obtain samples and analyse the sulphur content of marine fuel for onboard consumption while being delivered to ships and in tanks, where feasible, as well as in sealed bunker samples on board ships. The Malta Resources Authority can also inspect ships' logs and bunker delivery notes to check the documentation of the sulphur content of marine fuels. Sampling is to take place with sufficient frequency and in sufficient quantities so that the samples will be truly representative of the fuel examined and of the fuel being used by ships while in relevant sea areas and ports.

Non-compliance with the Quality of Fuels Regulations, SL 545.18 is tantamount to a criminal offence. The offender may be sentenced to a fine or imprisonment or to both fine and imprisonment. Where any person is found guilty of committing an offence in terms of the aforesaid regulations using a vehicle, the owner of the vehicle is held liable in the same manner and degree, with the added possibility of such person being ordered to pay for the expenses incurred by the public entities and having the relevant permit issued by the public entity revoked and furthermore, there is the risk of the vessel, as the *corpus delicti*, being confiscated.

Law stated - 9 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

EU Regulation No. 1257/2013 on ship recycling is directly applicable in Malta. In addition, the Merchant Shipping (Ship Recycling) Regulations establishing a system of penalties for failing to comply with the obligations set out in the aforesaid EU Recycling Regulation (SL 234.56) have been adopted. There are no ship recycling facilities in Malta.

Law stated - 9 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

Malta does not have a specialised admiralty court, so the ordinary civil courts exercise jurisdiction over maritime disputes. Typically, the competent court would be the First Hall of the Civil Court, which is vested with jurisdiction to entertain claims whose monetary value exceeds €15,000. Lesser claims would fall within the competence of the Court of Magistrates, but it is to be noted that no warrant of arrest may be sued for, and hence no action in rem may be instituted, for any claim being less than €7,000. In recent times the incidence of ship arrests and maritime disputes has risen considerably so that the courts have become much more familiar with such cases.

The Malta Arbitration Centre also handles international arbitrations, including maritime disputes.

Law stated - 9 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Maritime claims, which are usually brought forward by an action in rem against the vessel being physically present within the territorial jurisdiction of the Maltese courts, do not present any particular problem with regard to service of process. All relevant warrants and judicial acts may be served either upon the master of the vessel or its local agents.

Service of process in claims that might be advanced by an action in personam against the owners of the vessel would depend upon whether the owners are residents in an EU member state or not. If resident in an EU member state, then service is effected through the Office of the Attorney General in Malta (as the receiving or transmitting agency) pursuant to Council Regulation (EC) No. 1348/2000 of 20 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters. If resident outside the European Union, then service is effected upon curators appointed by the court to represent the interests of the foreign non-resident owners.

In all cases, warrants of arrest are always served upon the master representing the vessel, and in his or her absence upon the local agent of the vessel. The Malta Transport Authority, which functions as an official consignee in such cases, is also always under pain of nullity to be indicated as such in the warrant of arrest and is also to be notified therewith.

In the case of proceedings initiated in Malta against an EU citizen (other than a Maltese citizen), not resident in Malta or a non-Maltese company in whose name a vessel is or was registered under the Maltese flag (an international owner), such international owner

shall be deemed to have submitted to the jurisdiction of the Maltese courts for any action in connection with the ship while it is or was so registered. In terms of Maltese law, the resident agent acts as the judicial representative of the international owner for proceedings in Malta.

Law stated - 9 May 2024

Arbitration

- 56** | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

There is an established Malta Arbitration Centre, which also handles international arbitrations, that has a panel of maritime arbitrators specialising in maritime arbitration. Only a handful of maritime arbitrations have been handled by the Malta Arbitration Centre to date.

Law stated - 9 May 2024

Foreign judgments and arbitral awards

- 57** | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

With regard to foreign judgments, the answer to this question depends entirely upon whether the foreign judgment concerned was delivered by a court within an EU member state or not. In the former instance, Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, being the applicable EU Regulation, will apply. In the latter case, the ordinary procedural rules for the recognition and enforcement of foreign judgments enshrined in article 826 of the Code of Organisation and Civil Procedure will apply. Essentially, an application is required to be made to the competent court in Malta containing a demand that the enforcement of such judgment be ordered, and this is acceded to following certain judicial inquiries.

Foreign arbitration awards, being awards to which any of the following treaties, namely the Protocol on Arbitration Clauses (Geneva 1923), the Convention on the Execution of Foreign Arbitral Awards (Geneva 1927) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), are applicable, shall upon their registration by the Malta Arbitration Centre, be enforced by the courts of Malta in the same manner as if such awards were delivered in domestic arbitration. Such awards, therefore, when registered, are enforceable as an executive title, thereby allowing the award creditor to issue any executive acts against the award debtor including an executive warrant of arrest against a vessel and an application for judicial sale by auction in respect of an arrested vessel.

Law stated - 9 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

We are not aware of any case where the Maltese courts have had an opportunity to pronounce on the validity and enforceability of unilateral jurisdiction clauses. However, we would be of the view that in such cases, the courts would uphold the principle that agreements must be kept.

Law stated - 9 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

The defendant would have to raise as part of their defence in the foreign jurisdiction the fact that proceedings have been instituted in a foreign jurisdiction in breach of a jurisdiction clause. Ultimately, it would be up to the lex fori as to whether to uphold such defence.

Law stated - 9 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant would bring to the attention of the court that there exists between the parties a clause providing for a foreign court or arbitral tribunal to have jurisdiction. It is expected that the court would stay proceedings and give any order or direction that it deems fit.

Law stated - 9 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Prescription is generally regulated by the Civil Code, as well as by the Commercial Code, which contains provisions dealing with prescription in certain commercial matters, although particular prescriptive periods are also stipulated in other special laws such as the Carriage of Goods by Sea Act. As a general rule, unless a specific period of prescription applies to any specific category of claim, contractual claims are time-barred after five years, whereas claims in tort not arising from a criminal offence are time-barred after two years from the date on which the relevant action could be exercised.

The law does, however, provide for several particular periods of prescription. Thus, by way of example, under the Commercial Code, the following actions are barred after one year:

- for payment of freight, from the completion of the voyage;
- for the payment of victuals supplied to seamen by order of the master, from the date of such supply;
- for the payment of timber and other things necessary for the construction, equipment and provisions of a ship, from the date on which such timber or other things have been supplied;
- for the payment of wages of workmen and work done, from the completion of their work or the delivery of the work; and
- for the delivery of goods, from the arrival of the vessel.

The Carriage of Goods by Sea Act imposes a time limit of one year from the discharge of the cargo for the consignee to file a claim against the issuer of a bill of lading.

It is generally possible to interrupt prescription by filing a judicial act unless the prescriptive period concerned is a peremptory one, as is the case, for instance, concerning the particular prescriptive periods applicable under the Commercial Code and the Carriage of Goods by Sea Act.

It is not possible to extend time limits specified by law for the bringing forward of an action by agreement. However, once a precautionary warrant of arrest is filed, the arrested party can concede in favour of the arresting party further time for the bringing forward of the action on the merits by filing an appropriate minute in the warrant records.

Law stated - 9 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Courts or arbitral tribunals cannot extend the time limits prescribed by law for the filing of a claim, although upon good cause being shown a court may allow further time to a contumacious defendant to file defence pleas in contestation of a claim.

Law stated - 9 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention has been implemented in Malta through the publication of Merchant Shipping (Maritime Labour Convention) Rules 2013.

The rules apply to all Maltese seagoing ships wherever they may be and to all other ships as determined by the Maritime Labour Convention while they are in Maltese ports and to all seafarers serving on board such ships.

The rules do not apply to Maltese-flagged vessels that are fishing vessels, ships of traditional build, small ships that navigate exclusively in internal waters or waters closely adjacent to Malta, yachts in non-commercial use and warships or naval auxiliaries.

Law stated - 9 May 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

No, it is not possible. The courts have consistently applied the law and contractual provisions irrespective of any economic or financial consideration.

Law stated - 9 May 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Any creditor with an executive title may apply to the Maltese courts for the private sale of an arrested ship that is within the Maltese jurisdiction in favour of an identified buyer and for a determined price. The sale of any ship in terms of this procedure gives the buyer a title that is free from all privileges and encumbrances.

Law stated - 9 May 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Maltese Parliament has recently enacted a law authorising the establishment of an exclusive economic zone by Malta and laying down the groundwork for regulations to be adopted for the regulation of the exploration, exploitation, conservation, management and preservation of natural resources of such designated exclusive economic zone or environment protected area.

It has been a challenging time for shipping with the sanctions minefield with the landscape changing frequently due to new sanctions packages being adopted. The national competent authority in Malta for sanctions implementation is the Sanctions Monitoring Board, which has issued several guidance notes on interpreting certain aspects of the sanctions.

Law stated - 9 May 2024



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

A shipbuilder constructing a vessel out of raw materials, components and equipment will acquire title to the vessel under construction, provided the shipbuilder owns the raw materials, components and equipment. Moreover, if the shipbuilder does not already own all the chattels it uses to build the vessel, it nevertheless becomes the owner of the vessel it constructs, unless the costs of the value added by the shipbuilder are so modest that they do not justify this result. If the commissioning party owns the raw materials, components and equipment with which the shipbuilder is constructing a vessel, then the commissioning party will become the owner of the vessel built. In practice, the parties to a shipbuilding contract will contemplate what time suits them best to let title and ownership pass. The parties are free to contract that the title will pass from the builder to the buyer during construction. The earliest moment during construction that this passing of title can be recorded in the Dutch Ships Register is the laying of the keel of the vessel or reaching a similar milestone in the construction process. The title will pass immediately to the buyer; it will not pass gradually. By registering the vessel as a vessel under construction it will be possible, but not compulsory, to record a vessel's mortgage in the Dutch Ships Register. Upon its completion, the vessel can be deleted from the Dutch Ships Register to register it abroad provided the mortgagee, if any, consents to this.

Law stated - 30 April 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

If the contract price is payable by the buyer in pre-delivery instalments according to certain milestones, a refund guarantee from the builder will usually be in the form of an undertaking from its bank to refund the relevant instalment upon the buyer's first written demand. The parties are at liberty to draft the wording of a refund guarantee, which may vary from an irrevocable first-written-demand type of guarantee to a guarantee whereby the beneficiary will have to submit an enforceable judgment or arbitration award before being allowed to claim under the guarantee. A refund guarantee issued by financial institutions and banks will usually have to be signed by two persons authorised to do so. Proof of authority to bind the guarantor for the maximum amount of the refund guarantee can be requested by the Society for Worldwide Interbank Financial Telecommunication. This request should be made to the issuing bank by the beneficiary's bank. If refund guarantees are issued by, for example, parent companies, the beneficiary should ensure that the company's articles (or memorandum) of association allow the issuance of guarantees and that the parent company is creditworthy. Issuance of a guarantee may be considered to be ultra vires if the articles (or memorandum) of association do not allow it or the transaction is not ratified by all shareholders. In such a case, the issuance of the refund guarantee will be voidable.

Law stated - 30 April 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Under article 35 of Council Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([the \(recast\) Brussels I Regulation](#)), an application may be made to the Dutch court of competent jurisdiction (where the vessel under construction is located) for provisional measures to be taken, including a court order for the release of a vessel over which a yard exercises a lien (also referred to as a right of retention). This also applies if, under this regulation, the court of another member state or arbitrators have jurisdiction as to the substance of the matter. Shipbuilders are granted a statutory right of retention (articles [3:290](#) and [6:52](#) of the Dutch Civil Code). The right of retention is the power a creditor has to suspend the performance of an obligation to surrender goods to the debtor until payment of the outstanding debt is made. If the shipowner requests delivery of the vessel, and the yard relies on its right of retention, the local court will have to test whether under the circumstances of the case the shipyard is justified to invoke its right of retention. The test applied here will be the reasonableness and fairness of the yard's standpoint taking into account all circumstances.

Law stated - 30 April 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Where the vessel is defective and damage results, a claim by the shipowner will be delimited by the warranty provisions of the shipbuilding contract. The warranty provisions to which only the parties to the contract will be bound, customarily exclude the liability of the shipbuilder for all indirect and consequential losses. Although section 3, Title 3 of the sixth book of the Dutch Civil Code implements the provisions of the Council Directive (EC) No. 85/374/EEC of 25 July 1985 (OJEC No. L210) on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products, this section 3 is supplemental to the first section of Title 3, containing general provisions in respect of tort.

If, after delivery, the vessel has been transferred to a third party by the original shipowner, the former can only claim if the original shipowner has transferred any residual rights for the warranty it may have had under the shipbuilding contract to this third party (the purchaser). Without such a transfer of rights, a purchaser can only claim in tort, provided the vessel's

defect is so serious that a court would consider it a tort to the general public when the product was put into circulation.

Product liability is limited to 'damage'; damage caused by death or personal injury and damage to an item of property intended for private use or consumption, with a lower threshold of €500. The Dutch Act to implement the European Directive on Product Liability entered into force on 1 November 1990 and the relevant provisions can be found in [articles 6:185 to 193 of the Dutch Civil Code](#). In cases of pure economic loss and damage to commercial goods caused by a product, the rule of law developed by the Dutch Supreme Court is that it is unlawful to put into circulation a product that causes damage during its normal operation in accordance with its purpose. The difference between the liability regime of the Directive as also contained in Dutch law and the liability regime of the Dutch general tort law is that the latter regime requires that the unlawful act can be attributed to the manufacturer of the goods (fault).

Law stated - 30 April 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

The law on the registration of vessels is mainly contained in the Dutch Civil Code, whereas the nationality of seagoing vessels is dealt with in accordance with the provisions of the Dutch Commercial Code. The regulatory provisions are found in the Act on the Public Registers and the Royal Decree on Registered Vessels 1992. Vessels eligible for registration under the Dutch flag are seagoing vessels and inland barges (inland waterway vessels).

A 'vessel' is defined as any object, with the exclusion of an aircraft, constructed to float in or on water, either actually floating or having been afloat. As a consequence, the definition includes all floating equipment, such as dry docks, pontoons, cranes, tunnel caissons, drilling rigs and elevators. However, if a tunnel caisson or a drilling rig becomes permanently anchored to the seabed it loses the status of 'vessel'.

'Seagoing vessels' are those vessels registered as such and, if not registered, the vessels that by their construction are intended to float or sail exclusively or mainly in or on the sea ([article 8:2\(i\) of the Dutch Civil Code](#)). Seagoing vessels must comply with [article 8:194 of the Dutch Civil Code](#) to be included in the Dutch Ships Register.

'Inland barges' are vessels registered as such, or, if not registered, vessels that by their construction are neither exclusively nor mainly intended to float in or on the sea ([article 8:3\(i\) of the Dutch Civil Code](#)). Owners of inland barges are obliged to register their vessel within three months after the vessel in question complies with the provisions of [article 8:784 of the Dutch Civil Code](#). There is no statutory registration for inland barges with a carrying capacity of less than 20 tons and for other inland barges if they are under 10 cubic metres of dead weight.

The Netherlands is a party to the Convention on Registration of Inland Navigation Vessels with protocols (Geneva, 25 January 1965). An inland barge is eligible for registration under the following conditions:

1. the barge is operated from the Netherlands, irrespective of the nationality of its owner;
2. the barge is owned by a Dutch individual or the individual has a domicile in the Netherlands; or
3. the barge is owned by a legal entity or a company that has its corporate seat or principal place of business in the Netherlands.

If joint owners own a barge, the majority of these owners must comply with either condition (2) or (3).

Further to the definition of a vessel, a vessel under construction is constructed to float on water, but neither floats nor has been afloat. To enable registration of a mortgage on a vessel under construction or reservation of title of machinery and vessel ancillaries, the Dutch legislator decided that a vessel under construction should be considered a 'vessel' as well. Hence, registration of a vessel under construction in the Dutch Ships Register is possible. However, such registration does require the vessel to be constructed in the Netherlands. The Dutch Supreme Court has decided that it is not possible to register a barge hull built abroad that has already floated abroad in the Dutch Ships Register as a vessel under construction, in the event this hull still needs completion by a yard either abroad or in the Netherlands and ruled that a registration to that effect is null and void (Dutch Supreme Court, 28 February 2014).

Law stated - 30 April 2024

6 | Who may apply to register a ship in your jurisdiction?

The owner of a seagoing vessel, or its representative, may apply for registration in the Dutch Ships Register. However, such request will only be granted if the vessel qualifies as a Dutch vessel. This is the case if:

- the vessel is owned by one or more nationals of a member state of the European Union, or of a member state of the European Economic Area (EEA), Switzerland or persons who are equated with EU citizens, or the vessel is owned by one or more partnerships or legal entities established in accordance with the law of a member state of the European Union, one of the countries, islands or areas referred to in article 299, paragraphs 2 to 5 and 6c of the Treaty establishing the European Community, a member state of the EEA or Switzerland, or the vessel is owned by other individuals, companies or legal entities, who can invoke the freedom of establishment rules by virtue of an agreement between the EU and a third state; and
- the owner or ship manager has a head or branch office established in the Netherlands under Dutch law.

If it concerns an inland barge, registration may be applied for by the owner if one of the following requirements is met:

- the barge is operated from the Netherlands, irrespective of the nationality of its owner;
- the barge is owned by a Dutch individual or the individual has domicile in the Netherlands; or
- the barge is owned by a legal entity or a company that has its corporate seat or principal place of business in the Netherlands.

If it concerns a seagoing vessel or inland barge under construction, the owner must show that the vessel or barge is indeed under construction in the Netherlands. This can be demonstrated by submitting a letter from the shipyard confirming the construction on behalf of the applicant.

In all cases, the owner of the vessel applying for registration must choose a domicile in the Netherlands, for example, at the office of a Dutch lawyer.

Law stated - 30 April 2024

Documentary requirements

7 | What are the documentary requirements for registration?

Before applying for registration of the vessel in the Dutch Ships Register, the following documents are required to obtain the necessary certificate of nationality and the provisional certificate of registry from the Dutch Human Environment and Transport Inspectorate (an agency of the Ministry of Infrastructure and Water Management):

- power of attorney, if the owner does not apply for the registration itself;
- if the owner is a company or legal entity, a copy of the extract from the trade register and a copy of the articles of association;
- if the owner is a private person, a copy of his or her passport;
- if a ship manager is appointed and this is a company or legal entity, a copy of the extract from the trade register and a copy of the articles of association;
- if the vessel is already registered abroad, a copy of the foreign registration;
- copy of the certificate of tonnage;
- copy of the bill of sale or other proof of ownership;
- copy of the class certificate; and
- copy of a certificate that includes details on the vessel's motor (ie, a machinery certificate or an air pollution prevention certificate).

After obtaining the certificate of nationality and the provisional certificate of registry, the Dutch Ships Register requires the following documents:

- original bill of sale or other original proof of ownership;
- certificate of nationality;
- provisional certificate of registry (to be replaced by a definite certificate of registry in due course); and
- if the vessel was previously registered abroad, the original certificate of deletion (to be submitted within 30 days after the provisional registration in the Dutch Ships Register).

Law stated - 30 April 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Flagging in of seagoing vessels in the Bareboat Register kept by the Dutch Ministry of Infrastructure and Water Management is possible, provided the seagoing vessel in question remains registered in another country. The Act on the Nationality of Seagoing Vessels in Bareboat Charter (Act of 8 October 1992, as amended) sets out the requirements. According to article 3 of this Act, a seagoing vessel registered abroad can be bareboat registered in the Netherlands if:

1. the vessel has been let under a bareboat charter to one or more:
 - individuals who have the nationality of a member state of the EU, EEA or Switzerland or who are equated with EU citizens;
 - companies that are incorporated in accordance with the law of an EU or EEA member state or Switzerland; or
 - individuals, companies or legal entities, other than those mentioned under the top sub-bullet who can invoke the freedom of establishment rules by virtue of an agreement between the European Union and a third state;
2. the bareboat charterer has its main office or branch office in the Netherlands;
3. one or more individuals who have their management office in the Netherlands are responsible on behalf of the bareboat charterer for the vessel, the master, the other crew members, as well as for all related matters, and who, either alone or together, have the power of decision and the power to represent;
4. one or more individuals as mentioned under (3) or, in the case of absence, if a deputy is permanently available and has the powers to act without delay if so required;
5. the owner and the bareboat charterer, if another person or entity than the owner, approves in writing of the acquiring of the status of a Dutch vessel;
6. the bareboat charterer accepts the responsibility for the vessel and those on board, which arises from the status of a Dutch flag vessel; and
7. pursuant to the laws of the state in which the vessel has been registered, there are no impediments to acquiring the status of a Dutch vessel in connection with

entering into the bareboat charter agreement with a bareboat charterer located in the Netherlands.

By registration in the Bareboat Register, the bareboat charterer qualifies for the tonnage tax system. Upon registration, a bareboat chartered vessel loses Dutch nationality and flagging out is therefore only possible if the vessel is removed from the Dutch Ships Register. In that event there is no residual right to fly the Dutch flag, the president of the district court of the place of registration of the vessel will have to authorise the deletion of such vessel from the Dutch Ships Register. After having received such authorisation from the court, the Dutch Ships Register will complete the deletion.

It is not possible to register a seagoing vessel that is already registered in public registers, either as a seagoing vessel or as an inland waterway vessel, or in any similar foreign register.

Law stated - 30 April 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The register of mortgage entries concerning the judicial status of a registered property is kept at the Dutch Ships Register. The law provides which public registers will be kept, the manner and place of making an entry, the kind and contents of the documents to be filed with the registrar, the manner of registration and the consultation procedure. Registers are maintained in Rotterdam, Amsterdam and Groningen, but the Dutch Ships Register in Rotterdam also operates as a central register in which all other registries are duplicated ex officio. The following particulars in respect of a mortgage will be recorded:

- the name and address of the mortgagee;
- the original principal sum or the maximum sum secured; and
- the date of the mortgage deed and the date and time the mortgage deed was recorded against the vessel.

The rank of entries pertaining to the same registered property is determined by the order in which they have been registered unless a different order results from the law. Where two entries are made at the same time, and where they would lead to mutually incompatible rights of different persons to the same property, the precedence shall be determined accordingly: if the deeds presented for registration have been executed on different days, in order of the day the deeds were presented; and if both deeds, being notarial deeds and including notarial declarations, have been executed on the same day, in order of the time of execution of those deeds or declarations ([article 3:21 of the Dutch Civil Code](#)).

Law stated - 30 April 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The Convention on Limitation of Liability for Maritime Claims 1976 (LLMC) allows shipowners and certain other parties to limit their liability for particular claims by constituting a limitation fund. The size of the fund depends on the type of claim and the tonnage of the ship. Articles 2(1)(a) to (f) of the LLMC list the types of claims that may be subject to limitation, while article 3 determines which claims are excluded.

Under article 18 of the LLMC, states can reserve the right to exclude the application of articles 2(1)(d) and (e) to wreck and cargo removal claims. This means that if a state has made a reservation based on article 18, it is impossible to limit liability for these claims unless limitation of liability is provided for through other mechanisms.

The Netherlands has made a reservation under article 18 of the LLMC and established in Dutch national law that limitation of liability for wreck and cargo removal claims can be effected by constituting a separate wreck fund, to be distinguished from the property and personal claim funds. The amount of a wreck fund equals that of the property fund so that, in the event of an incident that involves wreck and/or cargo removal, these claims do not have to compete with other claims in the property fund.

The LLMC shall apply in cases described in article 15 of the LLMC. The Netherlands denounced the LLMC 1976 but is a Contracting State to the LLMC Protocol 1996. Amendments to increase the limits of liability in the LLMC Protocol 1996 to amend the LLMC Convention entered into force on 8 June 2015. The new limits are also applicable in the Netherlands.

For inland navigation, the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI) shall apply. The Netherlands has incorporated the provisions of CLNI in the Dutch Civil Code in [articles 8:1060 to 1066](#). On 1 July 2019, the CLNI 2012 superseded the CLNI 1988. Liability may be limited for claims set out before, even if brought by way of recourse or for indemnity under a contract or otherwise. Persons entitled to limit liability by constituting one or more limitation funds are the shipowner (including the charterer, the hirer, or any other user of the vessel including the operator and the salvor). Under the CLNI, persons entitled to limit liability are also the vessel owner, including the hirer, charterer, manager and operator, and salvors.

Law stated - 30 April 2024

Procedure

11 | What is the procedure for establishing limitation?

Provided legal proceedings are instituted in the Netherlands, the person entitled to limit liability can file a petition with the Dutch district court of competent jurisdiction requesting limitation of liability. Legal proceedings therefore must already have been

instituted, although the concept of ‘legal proceedings’ is to be interpreted broadly. In its judgment dated 20 December 1996 (*Sherbro*), the Dutch Supreme Court declared that legal proceedings do not only include the normal proceedings on the merits initiated by a writ of summons, but also requests for conservatory measures, applications to appoint an expert and applications to conduct pretrial witness hearings.

Over the years, the Dutch courts have demonstrated a willingness to adopt a clear and singular approach to the global limitation of liability issues arising from maritime casualties. The Court of Appeal in The Hague rendered a judgment on 20 December 2016, adding to the body of rulings in this respect. The dispute had its origins in a 2010 collision in Turkish waters between two containerships, the *Odessa Star* and the *CMA CGM Verlaine*. Neither the parties to the dispute nor the ships involved in the collision had any direct connection to the Netherlands, but the owners of both vessels had signed a jurisdiction agreement to have the liability dispute heard in the Rotterdam court. At the time of the collision, the Netherlands, in direct contrast to many other countries, applied the lower limitation of liability levels applicable under LLMC 1976, as opposed to the increased levels adopted under LLMC Protocol 1996. The Rotterdam District Court held that the agreement to have the dispute over liability heard in the Netherlands was a lawful procedure allowing the *Odessa Star*’s owners to establish a limitation fund in Rotterdam. The Court of Appeal in The Hague upheld this ruling following a strict application of article 11’s wording.

In its judgment of 29 May 2020 (ECLI:NL:HR:2020:956, *Stolt Commitment*), the Dutch Supreme Court answered the question if the courts of a state where a lawsuit is filed are automatically competent with respect to the fund formation and ruled that article 11 LLMC is not a jurisdictional provision. Fund formation in the Netherlands is henceforth subject to a double, cumulative condition: legal proceedings with respect to limitable claims must have been instituted in the Netherlands, and the Dutch court must find a ground of jurisdiction in the (procedural) law applicable to it on the basis of which it can take cognisance of a fund formation request. However, the grounds on which the Supreme Court reached its judgment are not beyond criticism. The outcome in the *Stolt Commitment* case – ultimately the Dutch courts were found to have jurisdiction – will not always and obviously be the outcome in future limitation cases.

To invoke limitation, a fund must be established as per articles 642(a) to 642(z) of the Dutch Code of Civil Procedure. The petition requesting limitation of liability shall be heard in a session of the court and it will result in a court order ordering the petitioners to constitute one or more limitation funds by either making a cash deposit or submitting a letter of undertaking in favour of all creditors from a guarantor reasonably acceptable, such as a reputable bank or protection and indemnity (P&I) club. By the same court order, a delegated judge and a fund liquidator will be appointed to deal with the limitation proceedings. There is no separate right to plead limitation without setting up a fund.

Property damage that arises in connection with wreck removal or salvage of cargo and other chattel will not be compensated from the property fund but from the wreck removal fund. On 2 February 2018, the Dutch Supreme Court ruled on how to determine which claims under the LLMC 1976 (as amended by its protocol of 1996) are paid out of the property fund and which are paid out of the wreck fund if a party has chosen to constitute both funds (ECLI:NL:HR:2018:140). The dispute had its origins in an October 2008 collision between Dutch inland waterways vessel the *Riad* and Dutch seagoing vessel the *Wisdom* on the Oude Maas, which resulted in the *Riad*’s sinking. The owner of *Wisdom* had limited

liability by establishing both a property and a wreck fund. The Dutch state initially ordered the wreck's removal. The cargo interests of the *Riad* provided security of €600,000 for the costs that might be incurred in the wreck and cargo removal operation. The Dutch state eventually took matters into its own hands and paid for the wreck and cargo removal operation, following which it obtained payment under the guarantee of €560,790.72, which the cargo interests of the *Riad* sought to recover from the wreck fund. The owner of *Wisdom* argued that the claim of the cargo interests should be paid out of the property fund. It maintained that the claim of the cargo interests was a recourse claim and therefore not a claim for the raising, removal, destruction or rendering harmless of a ship that had been wrecked or whose cargo had been lost. The Dutch Supreme Court ruled that the subject of each claim, and not its legal basis, is the decisive factor in determining which fund is made available for its payment. Thus limitation of liability for wreck and cargo removal claims can be achieved only by constituting a separate wreck fund, including by way of a recourse claim. The Dutch Supreme Court considered that the wording and context of article 2 of the LLMC should be interpreted in accordance with articles 31 to 33 of the Vienna Convention on the Law of Treaties, even though the wreck fund as such is a rule of Dutch law. Article 2 of the LLMC refers to the specific subjects of claims and includes the text 'whatever the basis of liability may be' and 'even if brought by way of recourse or for indemnity under a contract or otherwise'.

Law stated - 30 April 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

No one shall be entitled to limit his or her liability if it is proven that the loss resulted from the personal act or omission of said person, committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result. It is clear from the words 'intent to cause such loss' that in order to deprive the person liable of the right to limit, it must be proved that the person liable has the subjective intent (*mens rea*) to cause the loss. Therefore, it is not sufficient if the parties suffering the loss prove that a reasonably competent person could not have failed to conclude that his or her act or omission would cause the loss. The test to be applied to understand the consequences of the words 'or recklessly and with the knowledge that such loss would probably result' was the subject of two cases of the Dutch Supreme Court on 5 January 2001. In these cases, the Dutch Supreme Court ruled that conduct is to be regarded as reckless and with the knowledge that the loss would probably result therefrom if the person conducting him or herself in this way knew the risks connected to that conduct and was conscious of the fact that the probability that the risk would materialise was considerably greater than that it would not, but all this did not restrain said person from behaving the way he or she actually did. This very strict test has meanwhile been applied by lower courts in cases in respect of limitation of liability of shipowners (Court of Appeal of The Hague, 22 February 2002, the *Pioner Onegi* and Amsterdam District Court 12 May 2004, the *Arcturis*). In both cases, the Dutch courts have decided that the limitation could be broken since the conduct was reckless and with the knowledge that such loss would probably result. The test developed by the

Supreme Court in 2001 has been confirmed by the Supreme Court in 2002 (*CGM* case and *CTV/K-Line* case). The fund will remain at the disposal of the creditors that have filed a claim. The shipowner will, of course, be liable to reimburse these creditors for any claims that transcend the amount of the fund.

Law stated - 30 April 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Regulation (EC) 392/2009 implements the provisions of the Athens Convention and entered into force on 31 December 2012. The provisions of the regulation are nearly identical to the convention, but some provisions do offer more protection to passengers. Article 6 of the regulation provides for an advance payment to passengers, without constituting liability, within 15 days after the shipping incident causing death or personal injury. Additionally, article 7 stipulates that carriers shall ensure that passengers are provided with appropriate and comprehensible information regarding their rights under this regulation. Not surprisingly, some articles related to jurisdiction, recognition and enforcement are excluded, as other European instruments already exist in this field.

The 2002 Protocol amending the Athens Convention was ratified by the Dutch legislator on 26 September 2012 and entered into force on 23 April 2014. The Athens Convention 2002 is subsequently implemented in [articles 8:500 to 8:529k of the Dutch Civil Code](#). The Netherlands reserved the right to limit the liability in respect of death and personal injury caused by any of the risks (eg, war, terrorism and expropriation) mentioned in section 2.2 of the International Maritime Organization (IMO) Guidelines for implementation to 250,000 SDR in respect of each passenger or 340 million units of account overall per ship on each distinct occasion, whichever amount is the lower. For other risks and categories of damage, the regular limits of the Athens Convention 2002 apply. The above-mentioned means that even when the Athens Convention is not applicable (eg, for national carriage of passengers), similar or identical provisions to those of the Athens Convention will apply, provided that Dutch law or the regulation applies to the claim.

Thus the Athens Convention 2002 limits the liability concerning individual claims, whereas the LLMC offers possibilities to limit the liability for a particular incident.

Law stated - 30 April 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

Vessels flying a foreign flag and calling at a Dutch port are regulated on the basis of the Paris Memorandum of Understanding on Port State Control (the Paris MoU). One

of the agencies of the Ministry of Infrastructure and Water Management, the Human Environment and Transport Inspectorate in Rotterdam, performs inspections on vessels focusing on safety, construction, environmental items and quality and number of crew. Moreover, the living and working conditions on board are inspected. These inspections take place unannounced. They aim to inspect a quarter of all foreign vessels visiting a Dutch port. This body also verifies compliance with the International Ship and Port Facility Security Code. As of 1 January 2011, vessels flying the flag of states participating in the Paris MoU are required to issue the following notifications:

- notification 72 hours before arrival at the port or anchorage if vessels are eligible for an expanded inspection;
- notification 24 hours before arrival at the port; and
- notification of hazardous materials on board.

The vessels eligible for an expanded inspection are:

- vessels that have a high-risk profile and have not been inspected in the last five months;
- oil, gas and chemical tankers, bulk carriers or passenger vessels more than 12 years old with a standard-risk profile that have not been inspected in the past 10 months; and
- oil, gas and chemical tankers, bulk carriers or passenger vessels more than 12 years old with a low-risk profile that have not been inspected in the past 24 months.

The master or the vessel's agent must report that the vessel is eligible for a mandatory expanded inspection. The information to be provided is listed in Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control. The vessel's risk profile is calculated according to article 10 of Directive 2009/16/EC and an online calculator is available on the website of the Paris MoU.

Law stated - 30 April 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The sanctions that may be imposed for substandard vessels are:

- to order rectification of deficiencies without detention;
- to detain the vessel: the violation should be rectified before the vessel is allowed to leave; or
- to ban the vessel: after multiple detentions, the vessel will not be allowed to enter into ports of states that have adopted the Paris MoU.

Notorious examples of vessels, berthed in Dutch ports, that were posing an unreasonable risk to the environment (asbestos) and were, therefore, detained before being scrapped, are the *Otapan* and the *Sandrien*.

Law stated - 30 April 2024

Appeal

16 | What is the appeal process against detention orders or fines?

In the case of detention on account of the Port State Control Act or the Pollution Prevention by Ships Act, an appeal can be made by any party interested to the Minister of Infrastructure and the Environment. The appeal shall be made within six weeks of the date of notification of the detention and shall be sent to the inspector-general of the Human Environment and Transport Inspectorate in Rotterdam. Appeals have to be duly signed and at least comprise the following information:

- name, address and interest of appellant;
- date of appeal;
- date of detention and details of the case against which the appeal is directed; and
- the reason for lodging the appeal against the decision.

It is possible to draft the appeal in English and if the appeal is sent by fax a signature may be omitted. An appeal shall not cause the detention to be suspended. The detention shall not be lifted until, according to the professional judgement of an officer of the Human Environment and Transport Inspectorate in Rotterdam, all deficiencies notified in the detention order have been rectified and until full payment has been made or an authorised payment guarantee has been given for the reimbursement of the costs (if applicable).

Law stated - 30 April 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The Dutch Ministry of Infrastructure and Water Management has authorised several classification societies (recognised organisations) to act on behalf of the Human Environment and Transport Inspectorate, which has a delegated public task as laid down by law of performing statutory surveys, verifications and certification as required in the international conventions (such as the International Convention for the Safety of Life at Sea 1974 (SOLAS), the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) and EU Directive No. 96/98/EC). Eight authorised recognised organisations carry out surveys of vessels applying to transfer to the Dutch Ships Register and issue the certificates required. The eight authorised organisations are:

- American Bureau of Shipping (represented by ABS Europe Ltd, Rotterdam);
- Bureau Veritas (represented by Bureau Veritas, Rotterdam);
- DNV AS (represented by DNV, Barendrecht);
- Indian Register of Shipping (represented by Indian Register of Shipping Netherlands BV, Leiden);
- Lloyd's Register Group (represented by Lloyd's Register Group, Rotterdam);
- Nippon, Kaiji Kyokai (Class NK) (represented by Nippon Kaiji Kyokai BV, Barendrecht);
- RINA Services SpA (Rotterdam office); and
- RHC BV (Register Holland Classebureau Zeevaart is a classification society with national recognition, only for surveys concerning non-convention or non-European legislation (Directives/Regulations), or both.

Register Holland, a foundation with its office in Meppel, the Netherlands, is a national classification society recognised by the Human Environment and Transport Inspectorate. Register Holland is allowed to classify all kinds of inland vessels, such as tugs, barges and passenger vessels for non-convention and non-European legislation as well as inland pleasure (sailing) yachts. Its knowledge of both traditional and modern rigging is unique and surveys for Dutch certificates are conducted by Register Holland following their own classification rules.

In respect of inland vessels, the respective classification societies are:

- Bureau Veritas (Rotterdam);
- Lloyd's Register (Rotterdam); and
- DNV (Barendrecht).

The authorised inspection bodies are:

- Bureau Scheepvaart Certificering (Lelystad);
- Stichting Nederlands Bureau Keuringen Binnenvaart (NBKB) (Rotterdam); and
- Register Holland BV (Meppel).

Law stated - 30 April 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

Supervisors can only be held liable if they have caused damage by an imputable, unlawful act. In this regard, courts will take as a starting point that a supervisor is exercising a public task and thus enjoys a certain amount of policy freedom. The policy freedom is limited by the fact that supervisors have to comply with general principles of good governance and

with obligations arising from the European Court of Human Rights and EU law. Despite this certain amount of policy freedom, supervisors run the risk of being held liable both by supervisees and by third parties who have incurred damage as a result of inadequate enforcement supervision. If a supervisor fails in the performance of a general supervisory task, for example, the failure to recognise dangerous situations, it will largely be a matter of the policy freedom of the supervisor. However, if a supervisor fails to recognise and address a particularly dangerous situation, it will be easier for a court to establish a causal link between the failure of the supervisor and the damage that has occurred.

The responsibility and liability for statutory certification as a public task was addressed by the Dutch Supreme Court in the *Duwbak Linda* case (Dutch Supreme Court 7 May 2004, NJ 2006/281, RvdW 2004/67). Although none of the well-known classification societies were involved, the considerations and grounds for this judgment are illustrative of the reluctance of the Dutch legislature to hold supervising authorities' inspection or certification institutes liable for the (non-)performance of a delegated public task. In this leading case, the Dutch Supreme Court expressed its opinion that, under Dutch law, an owner of a vessel is not entitled to rely on a statutory certificate as a guarantee to the owner that the vessel has been soundly constructed and, moreover, that it is not the purpose of the certificate to guarantee safety, but merely to provide a vessel's certificate (in order to comply with port entry requirements, obtain insurance coverage or liability covers, or comply with carriage of goods by sea). Under charters, sales, shipbuilding contracts or towing contracts, it is a warranty or even a condition that the subject vessel is classed and class-maintained or meets a standard classification standard.

Moreover, the Dutch Supreme Court decided that, although the Dutch government has chosen to take care of safety within its territorial waters and has introduced a certification system for that purpose supervised by classification societies, neither the government's intention for introducing liability for damages of these supervisors towards third parties can be derived from that choice, nor is such a liability caused by operation of law. Although in the *Duwbak Linda* case, the supervisor had acted in an imputable unlawful manner, it did not automatically mean that this supervisor was liable for the damage. In the first place, the legal norm infringed by the supervisor must be intended to protect against the damage suffered by the injured party. This is the relativity requirement, and in *Duwbak Linda*, the Dutch Supreme Court suggested that this requirement can serve as a barrier to extensive liability on the part of the supervisor. The Court of Appeal Den Bosch followed the Dutch Supreme Court in a more recent decision (20 March 2012) in respect of the sudden sinking of the brand new inland barge *No Limit*.

The above does not mean that classification societies cannot be held liable on the basis of a private contract, instead of a delegated public task (to which in most situations general conditions of the classification societies, excluding liability clauses, shall apply) or in tort by third parties when not performing a public task (the *Blue Danube* case, Rotterdam District Court, 11 July 2002, S&S 2003/18). It is worth mentioning that, in the Netherlands, other private entities with a delegated public task, have been held liable for failing supervision when using their own developed rules and standards exceeding a statutory minimum for supervision. These stronger requirements will then have to be fulfilled. Therefore, assuming for the sake of argument that classification societies make use of their own developed rules and standards, the liability of classification societies may be at stake when they do not meet their own standards. Third parties can rely on legitimate expectations that requirements and standards have been met. This may be suitable for analogous application, but for now, there

is still no case law on the liability of classification societies to be reported. However, the most important and unanswered question still remains whether the Dutch courts will follow the recent French decision in the *Erika* case (judgment of January 2008 as upheld in appeal on 30 March 2010) in such a way that classification societies do not have blanket immunity from a public law perspective, nor can they be qualified as 'any person' as stipulated in article III, subsection 4 under (b), Civil Liability Convention, from a private law perspective. The *Erika* verdict is, from a public law perspective, diametrically opposed to the decision of the Dutch Supreme Court in *Duwbak Linda*.

The conclusion of the above seems to be that a supervisor who acts reasonably in performing a publicly delegated task does not run any real risk of becoming liable. The injured party will have to overcome a considerable number of hurdles to be able to establish an imputable unlawful act on the part of the supervisor with regard to supervision and enforcement. Even in cases where such an imputable unlawful act has been established, a lack of relativity and causality can ultimately result in the denial of a claim for damages.

Law stated - 30 April 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

The Netherlands are a party to the Nairobi International Convention on the Removal of Wrecks 2007. This Convention has been implemented in Dutch law in the Maritime Accidents Response Act. This Act gives the Dutch state and operator of the waterways the authority to order the registered owner of a seagoing vessel to remove the vessel or have the vessel removed if it is wrecked or stranded in the Dutch Exclusive Economic Zone and is causing danger to shipping (articles 10 and 13 Maritime Accidents Response Act).

For wrecked inland waterway vessels, the Dutch state has a similar authority based on article 10 of the Dutch Wrecks Act.

Law stated - 30 April 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

In the Netherlands, the International Convention on Salvage 1989 is in force in relation to salvage. The convention has been incorporated into national statute, by means of provisions in Book 8 of the Dutch Civil Code.

The Nairobi International Convention on the Removal of Wrecks entered into force in the Netherlands on 19 April 2016 and has been transposed into Dutch law by the Maritime Accident Response Act. In accordance with paragraph 2 of article 3 of the Nairobi

Convention, the Netherlands declares, for the European part of the Netherlands, that it will apply this convention to wrecks located within its territory, including the territorial sea. The Maritime Accident Response Act applies to wrecked seagoing vessels (and lost cargo) located in the Dutch exclusive economic zone and inland waters. On the basis of this domestic act, the state may dispose of wrecks and may seek recourse against the owners of the vessel liable for sinking the other vessel or cargo.

The Netherlands is a party to two conventions on vessel collisions. The first, the 1910 Brussels Convention (the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, 23 September 1910), applies to collisions between seagoing vessels or between seagoing vessels and inland navigation vessels. The second, the 1960 Geneva Convention, applies to collisions between inland navigation vessels only. The 1910 and 1960 conventions have the force of law in the Netherlands and may, therefore, apply in their own right. Nevertheless, the conventions have also been incorporated into national statutory law, by means of provisions in Book 8 of the Dutch Civil Code. However, the legislature has taken the liberty of extending the application of the conventions to all events where 'damage is caused by a ship'.

In the area of pollution, many international, multilateral and bilateral conventions apply, such as, among other things, the Agreement for Cooperation in dealing with pollution on the North Sea by oil and other harmful substances (Bonn, 13 September 1983); the Convention for the Protection of the Marine Environment of the North-East Atlantic, which was adopted by the Netherlands on 22 September 1992 and entered into force in the Netherlands on 25 March 1998; the International Convention for the Prevention of Pollution from Ships 1973, as modified by the protocol of 1978; and the International Convention on Oil Pollution Preparedness, Response and Cooperation (30 November 1990) ratified on 13 May 1995, but not yet in force. Also included are:

- the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) (Trb 1970, 196), as ratified by the Netherlands in the Act of 11 June 1975 and again adopted by a Protocol of 27 November 1992 (Trb 1994, 228-229) (which came into force in the Netherlands on 18 September 1996);
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 18 December 1971) (Trb 1973, 101) (CLC), as ratified by the Netherlands and again adopted by the Protocol of 29 November 1992 (Trb 1994, 228-229). This convention, also known as the International Fund Convention, came into force on 18 September 1996;
- the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 3 May 1996). The Netherlands has signed the convention, but it is subject to ratification and has not entered into force yet. If this convention comes into force, Dutch law will have to be amended accordingly;
- the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (Geneva 10 October 1989), which closely resembles the CLC;
- EU Directive No. 2005/35/EC on vessel source pollution and on the introduction of penalties for related infringements is implemented in the Dutch Act on the Prevention of Pollution by Vessels; and

- MARPOL, supplement 1, IMO, 2 November 1973), as ratified by the Netherlands, adopted on 2 November 1973, and that came into force in the Netherlands on 2 October 1983.

Law stated - 30 April 2024

Salvage

- 21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory Dutch form of salvage agreement and Dutch law does not require that a salvage agreement is concluded in writing. In practice, Lloyd's Standard Form of Salvage Agreement (LOF) is frequently agreed upon in the Netherlands. If parties do not agree upon salvage under the applicability of LOF, salvors often carry out salvage operations under the Salvage Conditions 1958. Operators of floating sheerlegs use the general terms and conditions of the Sheerlegs Conditions 1976.

Law stated - 30 April 2024

SHIP ARREST

International conventions

- 22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

The International Convention relating to the Arrest of Seagoing Ships (Brussels, 10 May 1952) (the Brussels Convention) is in force in the Netherlands.

Law stated - 30 April 2024

Claims

- 23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

The Brussels Convention only applies to vessels flying the flag of a state party to this convention. If an arrest is made in the Netherlands in respect of a vessel flying the flag of a non-member state, the convention does not apply and, consequently, Dutch law applies, which means that an arrest can be made for any claim against the shipowner or non-maritime claims within the meaning of the Brussels Convention. This exception also applies if the vessel flying the Dutch flag is arrested in the Netherlands by a Dutch arresting party. Article 1 of the Brussels Convention provides for a definition of the concept

of 'maritime claim' and in article 1 of the Brussels Convention, 17 different types of maritime claims are mentioned. Claims for which an arrest is not possible under the Brussels Convention include outstanding insurance premiums (including calls of P&I clubs), claims in respect of a sale and purchase agreement regarding a vessel, oil pollution claims, broker's commission and probably also claims of stevedores. In the *River Jimini* case, the Rotterdam District Court decided (29 June 1984) that the claim for payment of container hire due by the shipowner falls within the scope of 'goods or materials wherever supplied to a vessel for her operation or maintenance'. The Rotterdam District Court also decided (as upheld by the Court of Appeal in The Hague) in the *IBN Badis* case that advance payments to the Algerian company CNAN to cover disbursements also fall within the scope of article 1 of the Brussels Convention. The Brussels Convention does not apply to an attachment of bunkers (the *Gabion* case, Rotterdam District Court, 24 February 2010).

Article 3 of the Brussels Convention provides for the possibility to arrest a sister vessel and such vessels shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons. It has been held that this does not allow the possibility to pierce the corporate veil since article 3(ii) of the Brussels Convention refers to shares in the vessel, not shares in the company that owns the vessel.

In another judgment, the Dutch Supreme Court (9 December 2011) ruled that article 3 of the Brussels Convention does not prevent the arrest of a vessel of a debtor, not being the owner of the vessel to which the maritime claim is related. This would mean, for instance, that an arrest of vessels owned by a time-charterer based on a claim of charter hire is possible, provided the Brussels Convention is applicable and other legal requirements for an arrest can be met.

Under the applicable Brussels Convention an arrest may be made on a vessel in respect of which the maritime claim arose, when the owner is liable for the claim or when, under the applicable law, recovery against the vessel following that arrest is possible. Under Dutch (international) private law, a claim is recoverable against a vessel when that is the case:

1. under the law which applies to the claim; and
2. under the law of the flag of the vessel.

As for (1), under Dutch substantive law, recovery of a bunker claim for which the owner is not liable is not possible. When the claim is against the bareboat charterer, it should be instituted against the bareboat charterer and the registered owner, claiming that the latter allows the claims to be enforced against the vessel. When a vessel is time-chartered and the time-charterer orders the bunkers, it is the time-charterer who is liable and not the owner. The *Celine* (Rotterdam District Court, 24 February 2012) dealt with a ship arrest for a claim for bunkers supplied under Turkish law to a Turkish-flag vessel. Under Turkish law, a claim for bunkers against a time-charterer was recoverable against the vessel when the invoices were sent to the owner ('master and owners') and where there was an involvement of the owner (such as the signing of the bunker receipt by the master or chief engineer), and when the claim concerned 'necessities'. Under these circumstances, vessel arrest was allowed in the Netherlands.

Law stated - 30 April 2024

Maritime liens

- 24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

The Netherlands is not a party to any of the international conventions on maritime liens. Furthermore, Dutch law does not recognise the concept of maritime liens and therefore provides no mechanism by which such a lien can be enforced. Foreign liens are recognised in the Netherlands if they are created in accordance with the Dutch conflict rules. Pursuant to [article 10:129 of the Dutch Civil Code](#), it should be determined to what extent the rights of lien – which may exist under the foreign law applicable to the contract – fit into the Dutch legal system. A maritime lien can, for example, be transformed into a right of retention (ie, a right to withhold goods). Such right cannot be registered.

Law stated - 30 April 2024

Wrongful arrest

- 25 | What is the test for wrongful arrest?

The test to be met by the alleged debtor to prove an arrest was wrongful is the test of proving an unlawful act under [article 6:162 of the Dutch Civil Code](#) (tort). If the claim for which the arrest was made ultimately fails in the court or arbitral proceedings on the merits, the arrest was wrongful and the arresting party can be held liable for any and all damages and losses. In its decision of 5 December 2003, NJ 2004,150 the Dutch Supreme Court has formulated the following rule about liability for wrongful arrest: a creditor is strictly liable for the consequences of an arrest if the claim for which the arrest was made is found to be completely unfounded (ie, the court deciding on the merits of the case has found no basis for the claim at all). However, if the claim for which the arrest was made is partially awarded, this does not mean that the arrest was wrongful.

In cases where it is established that the arrest made was with hindsight for a too high amount, or where the arrest was unnecessarily prolonged, courts will apply an abuse of right test to verify if the creditor acted vexatiously and therefore wrongfully.

Law stated - 30 April 2024

Bunker suppliers

- 26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

In general, a claim can only be recovered from the assets of the debtor, unless that claim has droit de suite. Dutch law does not provide for droit de suite in respect of a bunker claim. Such claim is therefore not considered a bunker claim against the vessel that received the

bunkers. When the bunker claim is against the bareboat charterer, it should be instituted against the bareboat charterer and against the registered owner, claiming that the latter allows the claims to be enforced against the vessel. When a vessel is time-chartered and the time-charterer orders the bunkers, it is the time-charterer who is liable and not the owner. *The Celine* (Rotterdam District Court, 24 February 2012) dealt with a ship arrest for a claim for bunkers supplied under Turkish law to a Turkish-flag vessel. Under Turkish law, a claim for bunkers against a time-charterer was recoverable against the vessel when the invoices were sent to the owner ('master and owners') and where there was an involvement of the owner (such as the signing of the bunker receipt by the master or chief engineer), and when the claim concerned 'necessities'. Under these circumstances, vessel arrest was allowed in the Netherlands.

The bunker supplier may as an alternative wish to proceed to attach the bunkers on board the vessel, provided these bunkers are still (partially) owned by the charterer who was the original debtor for the price of the bunkers supplied. The effect of an attachment of bunkers is similar to a ship arrest: the vessel is not allowed to sail since the attached bunkers would have to be used, which would violate the attachment and is considered to be a crime. De-bunkering is not always allowed since bunkers may be considered as waste under the European Waste Regulation (1013/2006).

Law stated - 30 April 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

The president of the district court granting permission for arrest has discretionary power to order the arresting party to provide counter-security to secure any claims for wrongful arrest. In practice, this discretionary power is hardly ever exercised. The amount of security is also discretionary and to be determined by the president in the arrest order. The form of the security shall be agreed upon between the seizer and the debtor, failing which, the president shall decide. The Rotterdam Guarantee Form is for a bank guarantee regularly used and accepted in the Netherlands (if both the arresting party and the debtor are of Dutch nationality, the NVB form is used for a bank guarantee to be issued).

Law stated - 30 April 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

If the arrested party makes an offer to the arresting party to put up sufficient security, the arresting party is obliged to lift the arrest, attachments, or both, provided that the security offered is sufficient and under acceptable terms. In general, the amount of security that needs to be provided by the arrested party will be equal to the amount for which the court has granted permission to make the arrest or attachments in the arrest order (the principal amount claimed by the arresting party).

In the arrest order courts use the following schedule for including interest and costs in the amount of security:

- for principal amounts up to €300,000: 30 per cent;
- if the principal amount is between €300,000 and €1 million: 30 per cent of the first €300,000 plus 20 per cent of the balance of the principal amount up to €1 million;
- for claims between €1 million to €5 million: 30 per cent of the first €300,000 plus 20 per cent of the balance of the principal amount until €1 million plus 15 per cent of the balance of the principal amount up to €5 million; and
- for principal amounts exceeding €5 million: 30 per cent of the first €300,000 plus 20 per cent of the balance of the principal amount until €1 million plus 15 per cent of the balance of the principal amount until €5 million plus 10 per cent of the balance of the principal amount over €5 million.

Depending on the amount for which the court has granted permission to make the arrest or attachments in the arrest order, the amount of security to be provided could exceed the value of the ship. The form of the security shall be agreed upon between the arresting party and the debtor, failing which, the president of the court shall decide.

The Rotterdam Guarantee Form is a wording for a bank guarantee regularly used and accepted in the Netherlands (where both the arresting party and the debtor are of Dutch nationality the NVB form is used).

Law stated - 30 April 2024

Formalities

- 29** | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

Dutch law requires no formalities for the appointment of a lawyer to make the arrest application, other than that the application must be filed by a Dutch lawyer admitted to the Dutch Bar Association. A power of attorney is not required. None of the documents accompanying the arrest application needs to be notarised, legalised and authenticated.

Law stated - 30 April 2024

Ship maintenance

- 30** | Who is responsible for the maintenance of the vessel while under arrest?

The shipowner remains responsible for the maintenance of the arrested vessel. However, if an arrest is made enforcing a vessel's mortgage, the mortgagees, although not under the obligation to do so, will normally ensure the vessel is safe and properly maintained during

the time of the arrest. Any amounts spent in that regard will usually be recoverable under the mortgage, ranking above other claims.

Law stated - 30 April 2024

Proceedings on the merits

- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

The arresting creditor does not have to pursue the claim on its merits in the Dutch Court. An arrest to obtain security for a claim will be allowed, provided the creditor initiates proceedings on the merits before the court of competent jurisdiction or the arbitration panel within the number of weeks or months set by the president of the district court granting permission for the arrest. Authoritative writers have also argued that even initiation of a third-party ruling (binding advice) meets the requirement to initiate the claim on the merits.

Law stated - 30 April 2024

Injunctions and other forms of attachment

- 32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

A creditor is allowed to seek recourse against all assets of its debtor. Consequently, other forms of attachment, for instance, a third-party attachment of bank accounts, claims of the debtor on third parties but also attachment of chattels (eg, bunkers or real estate owned by the debtor) are possible. Next to that, security for a claim can be asked for in summary injunction proceedings provided that the president of the district court applied to is competent and that there is an urgent interest. From a time and costs perspective, however, attachment or arrest of assets may be a more attractive option, provided that there are assets.

Law stated - 30 April 2024

Delivery up and preservation orders

- 33 | Are orders for delivery up or preservation of evidence or property available?

In general, the Dutch Code of Civil Procedure provides for the possibility of a pre-judgment attachment for the purpose of delivery or surrender of assets and evidence. The Dutch Supreme Court decided in September 2013 that under specific conditions it is possible to seize evidence in all civil cases.

Article 843a of the Dutch Code of Civil Procedure regulates the right of access to information. A party with a legitimate interest may demand in court inspection or copies of documents from another party with whom the applicant has a legal relationship. The applicant should indicate which documents the request concern and prove his or her legitimate interest. Fishing expeditions are not allowed.

Law stated - 30 April 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is possible to attach bunkers within the Dutch territory provided that the arresting party has a claim against the owner of the bunkers. In most cases, this will be the time-charterer. The effect of an attachment of bunkers is similar to a ship arrest: the vessel is not allowed to sail since the attached bunkers would have to be used, which violates the attachment and is considered to be a crime. De-bunkering is not always allowed since bunkers may be considered as waste under the European Waste Regulation (EC) No. 1013/2006 and a permit may be required. However, in more recent cases the European Court of Justice (ECJ) ruled that contaminated fuel does not have to be classified as waste (*Shell/Netherlands*, joint cases C-241/12 and C-242/12). The ECJ recalled the fact that, in accordance with settled case law, the concept of 'waste' must not be understood as excluding substances and objects that have commercial value and that are capable of economic re-utilisation (*Palin Granit Oy/Vehmassalon*, C-9/00). Having regard to the requirement to interpret the concept of 'waste' widely, the reasoning should be confined to situations in which the reuse of the goods or substance in question is not a mere possibility but a certainty (eg, when the holder of the consignment intends to place the consignment back on the market).

Law stated - 30 April 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

A creditor who has an enforceable legal title (enforcement order) against the owner of the vessel as debtor is entitled to apply for a judicial sale of an arrested vessel. Such legal titles are:

- a monetary judgment from a court in the Netherlands;
- a notarial deed from a notary public holding offices in the Netherlands (including the Dutch Antilles);
- a monetary judgment by a foreign court, if enforceable in the Netherlands;

- a notarial deed by a foreign notary, if enforceable in the Netherlands;
- an arbitral award from a Dutch domestic arbitral tribunal;
- a foreign arbitral award, if enforceable in the Netherlands (eg, the New York Convention 1958); and
- an EU European Enforcement Order (pursuant to EU Regulation (EC) No. 805/2004 of 21 April 2004).

One of the aforementioned legal titles enables the creditor to apply for a judicial sale of a vessel under arrest (even though this creditor is not the arresting party).

Law stated - 30 April 2024

Procedure

- 36** | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

To initiate and effect a judicial sale of a vessel, the debtor should be served an order to comply with a judicial order for payment within 24 hours. If the debtor fails to do so, a public civil notary (or a Dutch court in the case of a vessel flying a foreign flag) should be instructed to conduct the judicial sale. A judicial sale by auction can only take place 14 days after proper announcement and publication in a local daily newspaper is made of the same. If the creditor decides to organise a judicial sale before a Dutch court regarding a vessel flying a foreign flag, the court will determine in which newspaper of the state of the vessel's flag the judicial sale should be announced and also which period has to be taken into account before the judicial sale actually takes place. The creditor enforcing its title has to give notice of the sale to the owners, to any creditors registered in the Dutch Ships Register and to creditors that have arrested the vessel. The auction will be conducted in the Dutch language. Prospective buyers are invited by the public civil notary or the court to verbally tender higher bids. The amount of the higher bid can be determined by the party tendering the bid. If no higher bids are made, the identity of the highest bidder and his or her bid will be recorded. After a short break, the second part will be commenced to offer the vessel for sale at diminishing prices. The intervals between prices are announced. The first person to shout 'It is mine!' will be awarded the vessel.

If a foreign legal title is already available and enforceable in the Netherlands, the estimated time frame for a judicial sale is six to eight weeks. The court registration fee amounts to approximately €676. The executing parties' costs will be assessed by the court on the basis of a draft invoice. The costs are calculated on a time-spent basis and in addition, the disbursements for costs of the bailiff, and publications, will be added.

Law stated - 30 April 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The order of priority of claims on vessels according to Dutch law is the following, from highest priority to lowest:

- costs of execution and wreck removal, costs of preservation made after the arrest of the vessel, claims in respect of labour agreements, claims in respect of salvage and contribution of the vessel in general average;
- claims secured by mortgage or pledge;
- claims relating to the operation of the vessel and claims against the carrier under a bill of lading;
- collision claims;
- claims in respect of which the shipowner may limit his or her liability (overall limitation) (these claims are equal in rank); and
- all other claims (no preference).

Law stated - 30 April 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The statutory effects of a judicial sale can be summarised as follows. First, all arrests of the vessel, whether conservatory or enforcing a title will cease to exist. The purchase price paid by the buyer in the public auction replaces the vessel. Second, the restricted rights that cannot be invoked against the purchaser will cease to exist, although article 578 of the Dutch Code of Civil Procedure, paragraph 1, intends to provide the buyer with a 'clean' vessel, that is, without any (restricted) rights or limitation thereon. Some rights amount to an action in rem and have *droit de suite*: they can also be invoked against the vessel after the ownership has transferred in title to a third party. Consequently, a judicial sale of a vessel does not release the vessel from these specific claims. Moreover, a vessel might be encumbered with the right of retention, in which case a creditor that has possession of the vessel postpones delivery of the vessel until his or her claim is settled. A right of retention can be enforced, even if the vessel is to be judicially sold. The party entitled to exercise the right of retention against a vessel does not have a preferential claim that can be recovered from the sale proceeds or the vessel but should recover his or her claim from the purchaser. As a consequence, the potential buyer shall have to redeem the right of retention before he or she can take possession of the vessel. The judicial sale will extinguish the previous ownership.

Law stated - 30 April 2024

Foreign sales

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39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

The purchaser of a vessel through a judicial sale in our jurisdiction acquires a clean title over the vessel, which should be recognised throughout the world. However, recognition of a judicial sale is based on international convention or reciprocity. The EU Regulation on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (the (recast) Brussels I Regulation), is applicable in the Netherlands and all other member states of the EU. However, a foreign registration within the EU is not automatically cancelled or deleted on the basis of a court order issued by the court of another member state and may sometimes only be obtained by commencing separate acknowledgement and enforcement proceedings. It may be difficult to have a court order from foreign jurisdictions outside the EU and member states of other conventions recognised and to cause (deletion of) registration.

Law stated - 30 April 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

The Netherlands is not a signatory to the International Convention on Maritime Liens and Mortgages 1993.

Law stated - 30 April 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hague-Visby Rules are in direct force in the Netherlands. Pursuant to [article 8:371, paragraph 3 of the Dutch Civil Code](#), articles 1 to 9 inclusive of the modified Convention of 25 August 1924 for the Unification of Certain Rules relating to Bills of Lading (Trb 1953, 109) apply to each bill of lading pertaining to the carriage of goods between ports in two different states, if the bill of lading has been issued in a contracting state, or the carriage takes place from a port in a contracting state, or the contract embodied in the bill of lading or if the bill of lading evidencing the contract provides that the contract is governed by the provisions of the modified convention or of any legislation that declares those treaty provisions to be in force, irrespective of the nationality of the vessel, the carrier, the consignor, the consignee or any other person involved. The Hague-Visby Rules apply to the period from the time the goods are loaded to the time they are discharged from the vessel. However, the exact

moment may differ depending on the nature of the goods. In Dutch case law, it is generally decided that the rules apply from the time the goods are hooked to be loaded on board to the time they are actually discharged from the vessel (and released from the crane).

The Netherlands has made active contributions to the development of the Rotterdam Rules and Rotterdam was appointed by the United Nations Commission on International Trade Law to host the signing ceremony of the new convention. On 23 September 2009, 16 countries officially expressed their support for the new convention during the official signing ceremony. To date, the convention has been signed by 25 countries and ratified by five countries: Spain on 19 January 2011; Togo on 17 July 2012; the Republic of the Congo on 28 January 2014; Cameroon on 11 October 2017 and Benin on 7 November 2019. The Netherlands has signed the Rotterdam Rules.

Law stated - 30 April 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

If the (combined) carrier and the consignor have agreed upon a contract of combined carriage, the Dutch Civil Code applies the 'chameleon system' or the 'network system', pursuant to which each part of the carriage is governed by the juridical rules applicable to that part. The uniform system as laid down in the United Nations Convention on International Multimodal Transport of Goods (Geneva, 1980) has been explicitly rejected by the Dutch government. In respect of international carriage by road, the Convention on Carriage by Road (Geneva, 1956) is mandatorily applicable. The Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 1999) is mandatorily applicable to international carriage by air. Regarding international carriage by rail, the Convention concerning International Carriage by Rail 1980, Berne, and its 1999 Protocol, are applicable.

Law stated - 30 April 2024

Title to sue

43 | Who has title to sue on a bill of lading?

Pursuant to [article 8:441 of the Dutch Civil Code](#) excluding any other party, only the rightful and regular holder of a bill of lading has the right to demand delivery of the goods from the carrier under the bill of lading according to the obligations resting upon the carrier or to claim damages for loss of or damage to the goods unless he or she has not become a holder lawfully.

Law stated - 30 April 2024

Charter parties

- 44** | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Generally, the terms of a charter party, including a jurisdiction or arbitration clause, are allowed to be incorporated into a bill of lading. Such terms must be referred to in a sufficiently clear manner in the document itself before they can be validly invoked towards a third-party bill of lading holder. If a contract of carriage has been entered into and furthermore if a bill of lading has been issued, the judicial relationship between the original consignor and the carrier is governed by the stipulations of a contract of carriage, which prevail over those of the bill of lading.

Law stated - 30 April 2024

Demise and identity of carrier clauses

- 45** | Is the 'demise' clause or identity of carrier clause recognised and binding?

Under Dutch law, the carrier under a bill of lading is generally considered to be the person who has signed the bill of lading or on whose behalf it was signed, as well as the person whose form has been used. If a bill of lading is signed by the master, or on behalf of the master, the shipowner or the charterer last in the chain of contracts shall be bound as the carrier, in addition to the persons mentioned in the first sentence. Much will depend on the actual wording of such a clause, but it can be said that the basis to assess the validity of a demise or identity of carrier clause is laid down in [article 8:461, paragraph 3 of the Dutch Civil Code](#). This article provides that only the last bareboat charterer or the shipowner is deemed to be the carrier under the bill of lading, if the bill explicitly designates the bareboat charterer as such or, as the case may be, the shipowner, and in addition, in the case of designation of the bareboat charterer, if his or her identity is apparent from the bill of lading. If a demise or identity of carrier clause is not sufficiently clear, this cannot be held against the holder of the bill of lading.

Law stated - 30 April 2024

Shipowner liability and defences

- 46** | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

If the shipowner is sued extra-contractually by his or her co-contracting party with respect to damage that has occurred in the operation of the vessel, the shipowner shall be liable towards the latter no further than he or she would be pursuant to the contract they have entered into ([article 8:362 of the Dutch Civil Code](#)). [Article 8:363 of the Dutch Civil Code](#)

states that if the shipowner is sued extra-contractually in respect of damage that has occurred in the operation of the vessel by another party to such a contract, the shipowner shall be liable towards the latter no further than he or she would be, as if he or she were a co-contracting party to the contract of operation that has been entered into by the party that sues him and that, in the chain of contracts of operation, lies between him and the latter. According to [article 8:364, paragraph 1 of the Dutch Civil Code](#), the shipowner, sued extra-contractually in respect of the death or bodily injury to a person, or in respect of damage to goods by a person who is not a party to a contract of operation, shall be liable no further than he or she would be pursuant to the contract.

Law stated - 30 April 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Notwithstanding any specific provisions contained in the contract of carriage or bill of lading on the basis of which the carrier may be entitled indeed to limit or exclude its responsibility in this regard, pursuant to [article 8:379 of the Dutch Civil Code](#), the carrier is under the obligation to conduct the transportation without delay. In the case of a non-permissible delay, the compensation owed must be calculated by taking into account what value the goods would have had at the time and place they should have been delivered, and the time and place they have actually been delivered.

Law stated - 30 April 2024

Liens

48 | What liens can be exercised?

Dutch law does not recognise a maritime lien as such. First one must determine any contractual rights of retention or liens and the extent thereof or limits or conditions thereto under the law applicable to such contract (of carriage), and then determine, under [article 10:163 of the Dutch Civil Code](#), to what extent such rights fit into the Dutch legal system, and in particular the concept of the right of retention and the right to withhold the goods. [Article 8:30, paragraph 1 of the Dutch Civil Code](#) stipulates that the carrier may refuse to hand over the goods that he or she holds in connection with the contract of carriage, to any person who has a right to the delivery of those goods pursuant to a title other than the contract of carriage, unless the goods have been attached and the continuation of this attachment results in an obligation to hand over the goods to the attachor. In addition, [article 8:30, paragraph 2 of the Dutch Civil Code](#) stipulates that the carrier shall be entitled to exercise the right of retention on the goods that he or she holds in connection with the contract of carriage for what the recipient owes or will owe the carrier for the carriage of those goods. The carrier may also exercise this right for the charge due for those goods by way of cost on delivery.

Law stated - 30 April 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Normally a carrier will be liable no further than he or she would be under the provisions of the contract of carriage or bill of lading. However, a carrier generally loses the right to rely on the contractual exclusions and limitations of liability in case of his or her gross negligence or wilful misconduct. Not necessarily, but should cargo be (intentionally) delivered without requesting the submittal of the original bill of lading involved, such an act pertaining to gross negligence or wilful misconduct could give rise to unlimited liability of the carrier.

It is well understood a bill of lading, amongst other functions, acts as a key to the warehouse which, when available at the discharge port, is presented to the Master to release the cargo to the holder of the bill of lading. Where such a key is not available at the discharge port or there is no release confirmation by the shipper, a letter of indemnity is frequently used. It must be realised that a letter of indemnity will not absolve the carrier from liability if the cargo is delivered to the wrong party (commonly referred to as a misdelivery claim). In a recent case decided by the Rotterdam District Court, the shipper had instructed the carrier to only release the shipment against the bill of lading or a telex release. Neither happened and part of the goods were delivered. In its judgment of 19 February 2020, the Court held the carrier liable for the resulting claims and losses now that it released the consignment without presentation of the original bill of lading or telex release.

Law stated - 30 April 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

According to [article 8:383, paragraph 3 of the Dutch Civil Code](#), in a contract of carriage under a bill of lading, the shipper shall not be liable for any loss or damage suffered by the carrier or the vessel and any that result or arise from whatever cause, without there being an act, fault or omission on the part of the shipper, his or her agents or servants.

Pursuant to [article 8:394 of the Dutch Civil Code](#), the shipper must promptly provide the carrier with all those indications regarding the goods, as well the handling thereof, that he or she is or ought to be able to provide, and of which he or she knows or ought to know are of importance to the carrier, unless he or she may assume that the carrier knows of these data. According to [article 8:395, paragraph 1 of the Dutch Civil Code](#), the shipper must compensate the carrier for the loss the latter suffers because, for whatever reason, the documents and information that are required from the shipper for carriage, or the fulfilment of customs and other formalities before the delivery of the goods, are not adequately available. [Article 8:397, paragraph 1 of the Dutch Civil Code](#) stipulates that the shipper must compensate the carrier for the loss the latter has suffered from equipment that the former has made available to the carrier or from goods that the carrier has received for

carriage or from the handling thereof, except to the extent that this loss has been caused by a fact that a prudent shipper of the goods received for carriage has been unable to avoid and the consequences of which such a shipper has not been able to prevent.

Pursuant to [article 8:398, paragraph 1 of the Dutch Civil Code](#), the carrier may at any time and at any place unload, destroy or otherwise render harmless goods received for carriage that a prudent carrier would not have wanted to receive for carriage, had he or she knew that, after taking receipt thereof, they could constitute a risk. The same applies to goods received for carriage that the carrier knew to be dangerous, but only when they present an imminent risk. The carrier does not owe any damages in respect hereof and the shipper is liable for all costs and any damage that result for the carrier from the presentation for carriage, from the carriage or from the measures themselves.

Based on [article 8:411 of the Dutch Civil Code](#), the shipper is deemed to warrant the carrier as to the accuracy, at the time of receipt, of the marks, number, quantity and weight that he or she has declared, and he or she shall indemnify the carrier for all losses, damage and costs resulting from inaccuracies in the declaration of these particulars. [Article 8:423, paragraph 1 of the Dutch Civil Code](#) stipulates that in a contract of carriage under a bill of lading, goods of an inflammable, explosive or dangerous nature that the carrier, captain or agent of the carrier would not have consented to be loaded had he or she known the nature or condition thereof, may be unloaded at any place, destroyed or rendered harmless at any time before unloading by the carrier and this without compensation, and the shipper of these goods shall be liable for all damage and costs that have directly or indirectly resulted or arisen from the loading thereof.

In addition to the general obligations to pay freight and other charges, or make a contribution in general average, only these last obligations for costs, etc, can be imputed to the third-party consignee as receiver of the cargo together with any other obligation that shows for the bill of lading document itself, which includes the obligation to take delivery against presentation of the bill of lading to the carrier and under full compliance with all conditions set thereto.

Law stated - 30 April 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Yes, two examples of ECAs in force in Dutch territorial waters are the North Sea Area and the adjacent Baltic Sea Area.

Law stated - 30 April 2024

Sulphur cap

52 |

What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

Under the revised MARPOL 73/78 Annex VI, the global sulphur cap has been reduced to 0.5 per cent as of 1 January 2020. Since 1 January 2015, the limits applicable in the ECAs for sulphur dioxide and particulate matter are 0.1 per cent.

In line with the international conventions, the Dutch authorities prescribe that the sulphur concentration of fuel may not exceed 0.5 per cent and that the sulphur concentration of fuel for use in an ECA may not exceed 0.1 per cent. During inspections (port state and flag state control), samples of fuel may be taken to determine the sulphur content of the fuel in use. If the sample indicates a sulphur content exceeding 0.1 per cent, this is deemed a 'deficiency' and the vessel may be detained until fuel is on board with a sulphur percentage of less than 0.1 per cent.

According to Directive 2005/33/EC, ships at berth in all ports of the European Union shall not use marine fuels with a sulphur content exceeding 0.1 per cent m/m. Following the directive, ships at berth in Dutch ports are not allowed to use marine fuels with a sulphur content exceeding 0.1 per cent m/m. This fuel requirement only applies to ships at berth, meaning ships securely moored or anchored in port. The requirement does not apply to ships manoeuvring or on their way to enter or leave a port.

Following the EU directive, the Dutch Regulation on Prevention of Pollution from Ships has been amended to include the new provisions.

In short, the following rules apply for ships lying at berth in Dutch ports:

- when at berth, seagoing ships irrespective of flag (including non-EU ships) shall not use any marine fuel with a sulphur content exceeding 0.1 per cent m/m;
- in case fuel changeover is necessary this operation shall commence as soon as possible after the berthing of the ship. The time of change-over shall be recorded on board the ship;
- if the required fuel is not on board, appropriate fuel shall be taken on by the ship immediately after berthing. The arrival of the ship shall be so planned and coordinated to ensure the immediate supply of the fuel;
- ships staying at a berth for less than two hours are exempted from the above provisions; and
- the port state control authority is entitled to control on board the ship documents and the fuel delivery notes. Upon request of the port state control authority the ship's crew assist in taking a sample of the fuel actually used at berth.

The above rules do not apply to inland waterway vessels as referred to in article 2 of Directive 1999/32/EC, with a certificate that shows that they comply with the requirements of SOLAS, when the ships are at sea and to ships that shut down all engines and use land-based power supply while they are in a port at their berths.

If during an inspection performed by port state control, flag state control or special sulphur inspectors it is proven that the vessel was not in compliance with the sulphur directive

the vessel may be detained, prosecuted or both. Non-compliance with the new provisions could result in a fine. The maximum penalty in the Netherlands at this time is €1,000,030.

Law stated - 30 April 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

The Netherlands has several ship recycling facilities and is one of few EU countries with the capacity to recycle large ships. Nevertheless, only a small part of the available capacity is used. The Netherlands is often not a favourable location for ship recycling owing to high labour costs.

The general waste disposal provisions from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989, Regulation (EC) No. 1013/2006 on shipments of waste (EWSR) and Regulation (EU) No. 1257/2013 on ship recycling (Recycling Regulation) are applicable. The Recycling Regulation applies to ships flying the flag of an EU country and to non-EU vessels calling at an EU port or anchorage. Ships of less than 500 gross tonnage do not fall under the new Regulation. All EU-flagged vessels recycled after 31 December 2018 are required to have a Ready for Recycling Certificate, which means, among others, these vessels shall only be sent to recycling facilities included in the European List of Ship Recycling Facilities (EU List). For vessels in operation and flying the flag of an EU member state, the certified Inventory Hazardous Material (IHM) has been required since 31 December 2020. The Recycling Regulation also affects non-EU-flagged vessels, since vessels flying a third-country flag (non-EU flag) calling at a port or anchorage of an EU member state need to have a certified IHM as of 31 December 2020.

The Netherlands has signed the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 and has ratified the Hong Kong Convention. The Hong Kong Convention will enter into force 24 months after ratification by 15 contracting states, representing 40 per cent of world merchant shipping by gross tonnage, and a combined maximum annual ship recycling volume of not less than 3 per cent of their combined tonnage. The date of entry into force of the Hong Kong Convention is 26 June 2025.

In a judgment of the Rotterdam District Court of 15 March 2018, Seatrade, a Dutch reefer shipping group, and two of its directors have been found guilty of violating Regulation (EU) No. 1013/2006 of 14 June 2006 on shipments of waste (EWSR). Seatrade has been imposed with fines ranging between €50,000 and €75,000. Furthermore, two of its executives have been banned from exercising the profession as director, commissioner, adviser or employee of a shipping company for one year. A third director has been acquitted. The prison sentence, previously sought by the prosecution, has been waived amid the company's lack of a previous criminal record that was accepted as a mitigating factor. Seatrade appealed against the judgment. Following Seatrade's announcement of appeal,

the Public Prosecutor's office and Seatrade entered into settlement negotiations, resulting in a transaction deal, as a result of which Seatrade and two of its directors paid a fine of €2.6 million for illegally having scrapped the vessels abroad.

In 2012, Seatrade sold four reefer vessels for scrapping. The vessels sailed from the ports of Rotterdam and Hamburg to India, Bangladesh and Turkey, where they were beached and then scrapped. The Dutch public prosecutor charged the directors of Seatrade with violations of EWSR. The Rotterdam District Court examined the internal email exchanges, as well as exchanges between the accused and the shipbrokers before and during the last voyages of the ships, which established that it had been the intention from the very beginning to sell the vessels for scrap. The court rejected the argument that an operational ship could not be regarded as waste and found that 'waste' is defined in the EU legislation as 'any substance or object which the holder discards or intends or is required to discard'. The court further found that all the circumstances of the case must be taken into account when assessing whether the holder of an object actually intended to discard it (which, in this case, it did) and that the term 'discard' cannot be interpreted restrictively.

In the court's view, at the time that the ships left the ports of Rotterdam and Hamburg, they were within the meaning of waste under the EWSR. The court emphasised that the fact that three of the ships were still in commercial service and carried cargo during part of the voyage to their final destination did not affect this conclusion.

The judgment of the Rotterdam District Court potentially has wide-reaching implications for shipowners based in Europe and beyond who are considering scrapping their vessels. The judgment highlights the interaction between EWSR and the EU Regulation No. 1257/2013 on ship recycling (Recycling Regulation). The Recycling Regulation clarifies that transboundary movement to recycle ships is regulated by the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal and the EWSR, except for ships falling under the scope of the Recycling Regulation as defined in article 2 of that Regulation.

In accordance with the Recycling Regulation, since 31 December 2018 seagoing vessels flying the flag of an EU member state must be recycled at a recycling facility that meets the requirements set out in the Regulation. In December 2016, the EU adopted the list of approved ship recycling facilities, which is updated from time to time. The European List was last updated on 27 July 2023. The updated list came into effect on 17 August 2023 and is divided into two parts. Part A contains 36 ship recycling facilities located in an EU member state. Part B contains twelve ship recycling facilities located outside the EU: nine in Turkey, two in the United Kingdom and one in the United States. Five Dutch ship recycling facilities are included in the European List. The EWSR will continue to apply to non-EU-flagged vessels.

In November 2020, the European Commission observed that the EU Ship Recycling Regulation is ineffective because many EU-flagged ships are reflagged to a non-EU flag just before they go for recycling.

Law stated - 30 April 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The Rotterdam District Court has, within the boundaries of EU rules, exclusive jurisdiction in nearly all shipping cases within the Netherlands. The Maritime Chamber of the Rotterdam District Court deals with these maritime cases. However, the Rotterdam District Court has refused to accept jurisdiction in a case where the parties had agreed to an international choice of forum clause, stipulating that the Amsterdam District Court had exclusive jurisdiction and referred the matter to Amsterdam when adjudicated.

Jurisdiction clauses are recognised by the Dutch courts if they comply with article 25 of the recast EU Brussels I Regulations 1215/2012. Bill of lading holders, in principle, are bound by jurisdiction clauses referring to jurisdictions under the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (ie, EU member states, Iceland, Norway and Switzerland).

In the case of a jurisdiction clause for a court outside this jurisdiction, the Netherlands has a particular rule on jurisdiction in maritime matters. Article 629 of the Dutch Code of Civil Procedure states that in the case of a contract of carriage of goods by sea to the Netherlands between a carrier and a consignee that was not the shipper, the court at the final place of destination will be the competent court. This rule cannot be set aside contractually unless the contract of carriage contains a jurisdiction clause that declares competent the court of a named place in the country where either the carrier or the receiver of the goods has its place of business or the contract contains a valid arbitration clause.

Law stated - 30 April 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

If a defendant has no known domicile or residence in the Netherlands but does have a known address abroad, a distinction must be made between a defendant who resides in:

- a state to which Council Regulation (EC) No. 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (the EU Service Regulation) applies;
- a state that is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 (the Hague Service Convention) or the Hague Convention on Civil Procedure of 1954 (the 1954 Hague Convention); or
- another state.

While the EU Service Regulation contains mandatory and exclusive rules for service to be completed in EU member states, the Hague Service Convention and the 1954

Hague Convention contain rules that are additional to the service requirements for foreign defendants in the Dutch Code of Civil Procedure. Under the Dutch Code of Civil Procedure, service on defendants residing abroad is completed if a bailiff serves the writ at the office of the public prosecutor of the court that is competent to hear the case and at the same time mails a copy of the writ to the defendant's address outside the Netherlands.

Although neither the EU Service Regulation nor the Hague Service Convention prescribes a translation of the writ of summons, it is nevertheless advisable to provide one as, under the EU Service Regulation, a defendant may otherwise refuse to accept the writ and under the Hague Service Convention, the Central Authority has the power to require such a translation if it deems this necessary. For service under the 1954 Hague Convention, a translation is compulsory.

If the defendant has no known address in the Netherlands or abroad, the above-mentioned conventions and regulation do not apply and the writ must be served at the office of the public prosecutor. In addition, an abstract of the writ must be published in a Dutch national newspaper.

Law stated - 30 April 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

Since its establishment in 1988 by the major maritime law firms in the Netherlands, the Transport and Maritime Arbitration Rotterdam-Amsterdam institute – now named Unum Transport Arbitration & Mediation – has offered a platform for conducting professional arbitration in the areas of shipping, shipbuilding, transport, storage, logistics and international trade. Unum Transport Arbitration & Mediation is organised in the form of a foundation with the major Dutch shipping firms as founding members. It has been offering arbitration services for years but has now also incorporated a mediation service, for the maritime and trade industry.

Law stated - 30 April 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Although a distinction must be made between recognition and enforcement of a foreign judgment, recognition will generally lead to enforcement. In practice, foreign judgments will be recognised by a Dutch court if the following three conditions are met:

- the judgment is a result of proceedings compatible with the Dutch concept of due process;
- the judgment does not contravene public policy; and

- the non-domestic court must have found itself competent on grounds that are internationally accepted (for example, a forum chosen by the parties).

All types of EU judgments (including but not limited to decrees, orders (interim or permanent), decisions or writs of execution) issued by an EU member state court are enforceable pursuant to the relevant EU regulations. The (recast) Brussels I Regulation applies in civil and commercial matters, excluding revenue and customs administrative matters. A judgment given in an EU member state that orders a penalty is enforceable only if the amount of the payment has been finally determined by the court of origin. A provisional or protective measure by another EU member state's court is enforceable only if that court also has jurisdiction as to the substance of the matter. Ex parte judgments are enforceable only if the measure is served upon the defendant before enforcement.

In respect of judgments rendered in a state that is a party to a treaty, the applicable treaty will describe in general which judgments can be enforced on the parties to the treaty. To be enforceable in the Netherlands, the judgment should also be enforceable in the state of origin. In the case of judgments rendered in any other state without a treaty, the following applies. Article 431 of the Dutch Code of Civil Procedure applies only to condemnatory judgments that are enforceable. Constitutive judgments, declaratory judgments and judgments dismissing a claim fall outside the scope of this chapter. However, according to case law, the judge may attach his or her own conclusion on the law applicable to these judgments and will, in principle, recognise such judgments if they comply with the conditions as set out in the Dutch Supreme Court case law (the *Gazprombank* case).

As regards enforcement, judgments delivered outside the Netherlands can only be directly enforced within the Netherlands on the basis of an enforcement treaty or EU instrument. The most important enforcement and recognition 'treaties' are the EU Service Regulation and the Lugano Convention. On the basis of these Community instruments, judgments delivered in the member states of the European Union and in Iceland, Norway and Switzerland are enforceable in the Netherlands once leave to do so has been obtained from the preliminary relief judge of the District Court. In addition to these treaties, the Netherlands has concluded bilateral treaties regarding enforcement with European countries as well as Suriname and the United States (the latter only as regards maintenance obligations).

Foreign judgments to which no treaty applies must, in principle, be enforced by commencing a new cause of action before the Dutch courts, but if the three above-mentioned criteria for recognition are met, no litigation on the merits will be required.

The Netherlands is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Arbitral awards made in countries that are party to the New York Convention are enforceable in the Netherlands in accordance with the provisions of the New York Convention. Foreign arbitral awards made in countries that are not party to the New York Convention can also be enforced in the Netherlands. Pursuant to [article 1076 of the Dutch Code of Civil Procedure](#), the preliminary relief judge may only refuse to enforce an award on grounds that are exhaustively enumerated in the Arbitration Act.

Law stated - 30 April 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Generally, asymmetric jurisdiction and arbitration agreements are valid and enforceable in the Netherlands. Although the Dutch Code of Civil Procedure and the EU Brussels I (recast) Regulation do not explicitly stipulate that such agreements are allowed, they are accepted on grounds of the principle of party autonomy. The Dutch Supreme Court has upheld an asymmetric jurisdiction and arbitration clause in a judgment of 21 March 1997, ECLI:NL:HR:1997:AG7212 (*Meijer/OTM*). On the other hand, lower courts have occasionally dismissed such clauses. This is considered possible in Dutch legal literature if the asymmetric jurisdiction and arbitration agreement is contrary to the principles of reasonableness and fairness.

Law stated - 30 April 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

In the Netherlands, no remedies are available should the claimants commence proceedings elsewhere, in breach of a contractual jurisdiction clause stipulating that the Dutch courts or arbitral tribunals have exclusive jurisdiction. The defendants should file a motion to dismiss the proceedings for lack of jurisdiction in these proceedings abroad.

Law stated - 30 April 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

If a court does not have international, absolute or relative jurisdiction over a dispute, a defendant may file a motion to dismiss for lack of jurisdiction, either prior to or in his or her statement of defence (articles 11, 110 and 1022 of the Dutch Code of Civil Procedure). Such a formal defence should first be dealt with by the Dutch court before the case can continue on the merits.

Law stated - 30 April 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The time limits applying to claims as contained in Dutch law are:

- for breach of contract: five years;
- for liability for an unlawful act: five years;
- for collision damage: two years;
- for cargo claims: one year; and
- for claims based on a forwarding contract: nine months.

Claims for breach of contract and liability for an unlawful act are also subject to a time limit of 20 years, which period starts running the day after the event giving rise to the damages. The shorter prescription period of five years starts running the day after the party suffering loss or damage becomes aware, not only of the loss or damage but also of the identity of the person liable. It is possible to extend the time limit by agreement. However, such an agreement should be concluded after the event giving rise to the claim.

Law stated - 30 April 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Courts shall only apply a time limit if it is being relied upon by the defendant. In the event of a cargo claim where the defendant becomes in default, the court will verify whether the plaintiff has claimed that the 12-month time limit has been extended by mutual agreement or has been suspended by writing a notice to the defendant before the time ran out, reminding the defendant that he or she should still be prepared to answer a claim by the plaintiff.

Law stated - 30 April 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Netherlands ratified the Maritime Labour Convention (MLC) on 13 December 2011. The MLC entered into force on 20 August 2013 and has been designed to improve the labour conditions of seafarers worldwide. The most important effect on Dutch legislation was the modernisation and modification of legislation governing maritime shipping and employment in the Netherlands (including the Dutch Commercial Code, the Ships' Manning Act, Book 7 of the Dutch Civil Code and the Occupational Safety and Health Act). The MLC is primarily a confirmation of existing maritime standards, with several new components. These include the certification of living and working conditions of seafarers on board, and the Maritime Labour Certificate. This certificate is proof that a shipowner

and his or her ship meet the requirements of the MLC. The Human Environment and Transport Inspectorate has mandated the issuing of these certificates in the Netherlands to accredited classification societies.

Law stated - 30 April 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

As the parties to a shipping contract have the freedom of contract, the rights and liabilities provided for in that contract are in principle upheld, meaning that if the contractual provisions do not offer relief from the strict enforcement thereof, in principle no relief is possible. That said, [article 6:248 of the Dutch Civil Code](#) provides that the consequences of a contract between parties can be set aside if these consequences, in light of the circumstances of the case and the principle of reasonableness and fairness, would be deemed unacceptable. This abridging effect of reasonableness and fairness must, however, be limitedly applied by the courts.

In addition, Dutch law contains a specific provision ([article 6:258 of the Dutch Civil Code](#)) for unforeseen circumstances that cause hardship in a given situation. The provision provides that the court may, at the request of one of the parties, amend the consequences of the contract, or even partly or wholly rescind the contract based on unforeseen circumstances of such nature that the contractual counterparty may not reasonably expect the continuous and unaltered existence of the contract. The test is not whether the circumstances were foreseeable at the time the contract came into existence, but rather on which presumptions the parties based the contract. Again, this possibility must be limitedly applied.

Finally, [article 6:94 of the Dutch Civil Code](#) allows the court to reduce contractual penalties, should the principle of fairness require such reduction.

Law stated - 30 April 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

A bunker spill does not always lead to a limitation of liability based on the Bunker Convention. Following the Rotterdam District Court (9 November 2018, ECLI:NL:RBROT:2018:9174), the Court of Appeal of The Hague (27 October 2020, ECLI:NL:GHDHA:2020:2055) ruled that it is not the Bunker Convention but the Civil Liability Convention (CLC) that applies to bunker pollution in the port of Rotterdam caused by the seagoing vessel *Bow Jubail*. In the assessment, the standard of proof and the manner of gathering evidence play a decisive role. In its judgment, the Court of Appeal gives a clear warning to 'hide-and-seek players'.

The conclusion is that the Court of Appeal, following the District Court, rules that the *Bow Jubail* qualifies as a combination ship within the meaning of the CLC 1992. The shipowner NCC is, therefore, not entitled to invoke the Bunker Convention and the limit of the LLMC 1996 (and must pay the costs of the proceedings). A subsidiary request for limitation of liability based on the CLC has not been made by the shipowner. The shipowner's liability for the incident is therefore unlimited.

Shipowner NCC lodged an appeal in cassation against the judgment of the Court of Appeal. On 31 March 2023, the Dutch Supreme Court rendered its decision. The Supreme Court has reviewed the complaints made by NCC against the Appeal Court's decision, and the outcome of this review is that the complaints cannot lead to setting aside that judgment. Based on article 81 paragraph 1 of the Dutch Judicial Organization Act, the Supreme Court does not have to state its reasons for arriving at this decision, because when evaluating these complaints, it is not necessary to answer questions of importance for the development of the unity of the law.

NCC lost the case in all three instances, and, for the time being, NCC's liability for the incident with the *Bow Jubail* is thus unlimited.

Law stated - 30 April 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

In response to Russia's invasion of Ukraine, countries including the EU, the UK and the USA have imposed various sanctions on Russia, Russian entities and Russian individuals. On 23 February 2024, the EU adopted the 13th sanctions package. At the time of writing, some 2000 Russian entities and individuals have been listed on various sanctions lists, with travel bans and asset freezes in place.

Like almost all sectors, shipping and transport are affected by the sanctions. Currently, the following measures are in place in the Netherlands:

- a ban on exports, sales, supply or transfer of all aircraft, aircraft parts and equipment to Russia;
- a ban on the provision of all related repair, maintenance or financial services;
- closure of EU airspace to all Russian-owned, registered or controlled aircraft, including private jets of oligarchs;
- restrictions on the export of maritime navigation goods and radio communication technology;
- a full ban on Russian and Belorussian freight road operations working in the EU (certain exceptions will cover essentials, such as agriculture and food products, humanitarian aid as well as energy);
-



an entry ban on Russian-flagged vessels to EU ports (exceptions apply for medical, food, energy and humanitarian purposes); and

- a full ban on the import of steel, coal, oil and oil products from Russia.

Law stated - 30 April 2024

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UPDATE AND TRENDS

- Key developments of the past year

NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Title will pass in accordance with the terms of the contract, or, pursuant to the provisions of section 144 of the Contract and Commercial Law Act 2017 (CCLA) (title passes when the parties intend it to pass, with regard to the terms of the contract, the conduct of the parties and circumstances of the case). Typically, title will pass on delivery.

Law stated - 7 June 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

Under the Property Law Act 2007, section 27, a contract of guarantee must be in writing and signed by the guarantor. (Note that it is not common for refund guarantees to be issued in the New Zealand shipbuilding industry.)

Law stated - 7 June 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

An order for specific performance is available, but it is a discretionary remedy and will only be given where an award of damages is inadequate.

Law stated - 7 June 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Typically, a claim would lie in contract against the shipbuilder, at the suit of the shipowner.

Law stated - 7 June 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

The Ship Registration Act 1992 created the New Zealand Register of Ships (the Register) for commercial vessels and pleasure craft. The Register comprises two parts. Part A, which is aimed principally at larger commercial vessels, confers nationality, provides evidence of ownership and enables registration of a mortgage, whereas Part B, which is mainly for recreational vessels, only confers nationality, is less expensive and easier to achieve.

All New Zealand-owned ships exceeding 24 metres register length must be registered in Part A, except for pleasure craft, ships engaged solely on inland waters and barges that do not proceed on voyages beyond coastal waters (although they may register). Vessels on demise charter to New Zealand-based operators may also register in Part A. New Zealand-owned ships that are pleasure vessels, or do not exceed 24 metres register length, or ships jointly owned or majority-owned by New Zealand citizens or residents, may register in Part B.

It is not possible to register a vessel under construction (the vessel would not be a 'ship' as defined in the Ship Registration Act 1992).

The Fisheries Act 1996 separately established a Fishing Vessel Register for fishing vessels operating in New Zealand fisheries waters.

Law stated - 7 June 2024

- 6 | Who may apply to register a ship in your jurisdiction?

Only New Zealand nationals (whether individuals or companies) are entitled to register a ship (or where the majority of the owners are New Zealand nationals).

Law stated - 7 June 2024

Documentary requirements

- 7 | What are the documentary requirements for registration?

An application for Part A registration must be made in the prescribed form, together with a declaration of ownership and nationality, builder's certificate, tonnage certificate, any documents relating to a change in ownership (eg, bill of sale, deletion certificate of previous registry) and any other document required by the registrar, depending on the ship concerned (a list is available on the Maritime New Zealand website). The requirements of Part B are less demanding. Only the prescribed form and evidence of the closure of any previous registration are required.

Law stated - 7 June 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

The Ship Registration Act 1992 provides that vessels on demise charter to New Zealand-based operators may register in Part A.

Law stated - 7 June 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

Maritime New Zealand, through the Registrar, shall record the particulars of the mortgage in the Register and endorse on the instrument of mortgage the fact that it has been entered and the date and time of entry.

Law stated - 7 June 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Limitation of liability is governed either by contract, by legislation or by default statutory regimes incorporating international conventions on limitation of liability.

Both the Hague-Visby Rules (incorporated into New Zealand law by virtue of section 209 of the Maritime Transport Act 1994 (Maritime Transport Act)) and the Contract and Commercial Law Act 2017 (Part 5) govern limitation of liability relating to the carriage of goods.

Limitation of liability under the Maritime Transport Act was reformed in 2013 to give the Convention on Limitation of Liability for Maritime Claims 1976 as amended by the 1996 Protocol (LLMC) the force of law in New Zealand (see section 84A and Part 7 of the Maritime Transport Act generally). The LLMC regime allows shipowners (owners, charterers, managers or operators of a seagoing ship), salvors and insurers to limit their liability for the claims listed in article 2 of the LLMC Convention. However, section 86(4) of the Maritime Transport Act states that articles 2, 3 and 9 of the LLMC Convention do not limit or affect claims related to the removal of wrecks by either a regional council or the director of Maritime New Zealand, the removal of hazards to navigation, or personal injury. In those cases, the provisions of the Maritime Transport Act or the Accident Compensation Act 2001 will take precedence. New Zealand adopted the new 2015 LLMC liability limits on 8 June 2015.

New Zealand's position in relation to limitation of liability is slightly different from that of its Pacific neighbours. Fiji is not a party to the LLMC nor the 1996 Protocol: as noted in *Cruz Holdings Limited v Concrete Solutions (Fiji) Limited* [2021] FJHC 273 at [45] Fiji has acceded to the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (the 1957 Convention) only. However, under Part 5 of the Maritime Transport Act 2013 (Fiji), a charterer is entitled to rely on a limitation fund constituted by an owner. Tonga is a signatory to both the LLMC and the 1996 Protocol. However, *DS Venture Limited v Tonga Cable Limited* [2019] TOSC 119 held that the liability limits provided for in the 1957 Convention should be imposed, as provided for in section 2 of the Shipping (Limitation of Liability) Act 1980 (Tonga).

Law stated - 7 June 2024

Procedure

11 | What is the procedure for establishing limitation?

Pursuant to the Admiralty Act 1973, the New Zealand High Court has jurisdiction over admiralty in rem and in personam proceedings (the District Court has jurisdiction over admiralty in personam proceedings where the amount in dispute does not exceed NZ\$350,000). Part 25 of the High Court Rules relates to the High Court's admiralty jurisdiction. The High Court Rules does not contain any specific provisions governing the constitution of a limitation fund or whether limitation can be pleaded without setting up the fund. Currently, the courts are left to apply the LLMC provisions (which have the force of law in New Zealand) and adopt whatever procedure is necessary in the circumstances of the case, using the inherent jurisdiction of the court and general powers under the High Court Rules. However, the High Court Rules do state that actions for limitation of liability must be in the form of an action in personam and require the person seeking relief to name at least one person (with claims against it) as the defendant in the proceeding.

The limits that apply are calculated on the basis of the vessel's tonnage as prescribed by the LLMC.

Law stated - 7 June 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

Article 4 of the LLMC applies: the limit can only be broken if the loss resulted from a personal act or omission, committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result. Limitation has never been broken in New Zealand.

Law stated - 7 June 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

New Zealand is not a party to the Athens Convention. The Contract and Commercial Law Act 2017 (CCLA) applies to domestic carriage and will cover damage to luggage. Under the CCLA, a carrier will be strictly liable for loss or damage up to a limit of NZ\$2,000 per piece. A carrier has unlimited liability for loss of or damage to hand luggage if caused by the negligence or wilful default of the carrier.

The Accident Compensation Act 2001 contains a statutory bar on claims for personal injury suffered in New Zealand or suffered by New Zealand residents during international carriage (if the injury would have been covered by the Act).

Law stated - 7 June 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

Port state control is governed by the Maritime Transport Act and is carried out in accordance with the Tokyo Memorandum of Understanding. The regulatory body is Maritime New Zealand, and the Maritime Transport Act gives the director of Maritime New Zealand certain powers of inspection, investigation, detention and rectification.

Law stated - 7 June 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

Under section 55 of the Maritime Transport Act, the director of Maritime New Zealand may detain a vessel or impose conditions on the operation of the vessel. It is an offence to contravene or fail to comply with a prohibition or condition notified by the director. On conviction, a person committing an offence is liable to a fine or imprisonment.

Law stated - 7 June 2024

Appeal

16 | What is the appeal process against detention orders or fines?

It is possible to appeal to the New Zealand District Court.

Law stated - 7 June 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

Maritime New Zealand keeps a list of recognised classification societies. These are:

- American Bureau of Shipping;
- Bureau Veritas;
- DNV GL;
- Nippon Kaiji Kyokai; and
- Lloyd's Register.

Law stated - 7 June 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

It is unlikely that a classification society will be held liable for breach of duty of care to subsequent purchasers in circumstances where class certificates are issued in a statutory capacity for the purpose of safety (see *Attorney-General v Carter* [2003] 2 NZLR 160 (CA)). It is unclear whether a classification society will owe a duty of care in other circumstances.

Law stated - 7 June 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Where a 'wreck' will be hazardous to navigation, the director of Maritime New Zealand may:

- require a vessel's owner, its master (or person in command) or agent of the owner, to remove the whole or any part of that hazard in a manner specified by the director and within a time specified by the director; or
- arrange to have the hazard removed, if:
 - the vessel's owner has not complied with the notice to remove the hazard;
 -

no regional council has jurisdiction over the place where the hazard is located; and

- any action taken to remove the hazard is not inconsistent with the Resource Management Act 1991.

Similarly, regional councils have the power to remove a wreck under Part 3A of the Maritime Transport Act. Under those provisions, a regional council may take steps in accordance with the Maritime Transport Act to remove and deal with any wreck within its region that is hazardous to navigation. These include requiring the vessel's owner or agent of the vessel's owner to remove the wreck within a time and in a manner satisfactory to the regional council. In addition, the council may destroy, dispose of, remove, take possession of, or sell a wreck (or any part of it) if the regional council has made reasonable efforts to find the owner or agent and that owner or agent either cannot be found or fails to remove the whole of the wreck within the time specified or in a manner satisfactory to the council.

Law stated - 7 June 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The following international conventions are in force in New Zealand:

- the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969;
- the International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL);
- the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC);
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992;
- the United Nations Convention on the Law of the Sea (UNCLOS);
- the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC Convention);
- the Marine Pollution by Dumping of Wastes and Other Matter, 1971 (London Dumping Convention) and 1996 Protocol;
- the International Convention on Salvage 1989;
- the Convention on the International Regulations for Preventing Collisions at Sea 1972; and
-

the International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910.

The following conventions are not in force in New Zealand:

- the Nairobi International Convention on the Removal of Wrecks 2007; and
- the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision 1952 (although the Admiralty Act nonetheless reflects its provisions).

Law stated - 7 June 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement. The Lloyd's standard form of salvage agreement is acceptable.

Typically, salvage operations will be undertaken by professional salvage operators.

Law stated - 7 June 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

New Zealand is not a signatory to any international convention regarding the arrest of ships. Ship arrest is instead provided for in the Admiralty Act 1973 and Part 25 of the High Court Rules.

Law stated - 7 June 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Vessel arrest is a remedy available for claims listed under section 4(1) of the Admiralty Act 1973, or for claims that are maritime liens in common law in New Zealand. The particular vessel's flag is immaterial for the purpose of New Zealand law.

Section 4(1) of the Admiralty Act 1973 lists 19 different claims, which include those:

- concerning possession or ownership of a ship;
- in respect of a mortgage or charge on a ship;
- for damage done or received by a ship;
- for death or injury due to a defect in a ship (or its equipment);
- arising out of a carriage of goods or hire agreements for a ship;
- in the nature of salvage, towage or pilotage;
- in respect of goods, materials or services supplied to a ship;
- in respect of construction, repair or equipment of a ship;
- for crew wages or disbursements;
- arising out of a general average act;
- arising out of bottomry; and
- for the forfeiture or condemnation of a ship or carried goods.

If the claim is one listed in section 4(1), the in rem claim and warrant for arrest generally may only be against the subject vessel. However, sister or associated vessels may be arrested in the following circumstances:

- the claim must be one listed in section 4(1)(d) to (r) of the Admiralty Act 1973 (including, for example, claims for damage done or received by a ship, damage to goods carried on the ship, or in respect of goods, materials or services supplied to a ship);
- the person who would be liable on such claim by an action in personam must, when the cause of action arose, be the owner or charterer of, or in possession or in control of, the subject vessel; and
- the other vessel must, when the claim is brought, be beneficially owned or on charter by demise to such person.

Law stated - 7 June 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

New Zealand does have the concept of a maritime lien.

The Admiralty Act 1973 provides that maritime liens include:

- damage done by a ship;
- salvage;
- seafarers' wages;

- master's wages and disbursements; and
- bottomry and respondentia.

A mortgage or charge against the vessel is also a maritime lien.

Law stated - 7 June 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

Wrongful arrest requires bad faith or subjective recklessness (*Transpac Express Ltd v Malaysian Airlines* [2005] 3 NZLR 709 (HC)).

Law stated - 7 June 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Generally, no, but a supply confirmed by the Master may give rise to a statutory lien under the Admiralty Act giving rise to an *in rem* claim against the vessel.

Law stated - 7 June 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

Counter security is not required, although the arresting party must provide with the application for arrest a written indemnity to the Admiralty Registrar covering any fees and expenses including harbour dues (and to cover the Admiralty Registrar against any liability relating to lawfully executing the warrant).

The Admiralty Registrar also typically requires payment of funds into court as security for such fees and expenses at the same time the application is filed. The amount varies and is dependent on the Admiralty Registrar's view of what his or her initial upfront costs will be for the particular vessel to be arrested. In our experience, it tends to be in the region of NZ\$10,000 to NZ\$20,000. From time to time, the Admiralty Registrar may request additional security to cover fees, expenses and harbour dues as the original payment is exhausted.

Law stated - 7 June 2024

- 28** | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

Generally, the parties will agree on security issues without court intervention (eg, if a ship is arrested and the claim is covered by insurance, the insurer will typically offer security). Otherwise, at the first level, the registrar will normally address any security issues. If the parties disagree on security or one party wants to challenge the registrar's decision, an application may be made to the High Court.

There is no prescribed upper limit on security, but it would not exceed the value of the ship plus all relevant costs. The arresting party is formally entitled to an amount paid into court reflecting its reasonably arguable best case, together with interest and costs. However, in practice the court will usually release the vessel on the provision of an irrevocable undertaking from an International Group P&I Club.

Law stated - 7 June 2024

Formalities

- 29** | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

Neither particular formalities nor a power of attorney is required. The court papers on the application must include an affidavit from the applicant (outlining the claim, whether any caveat against the issue of an arrest warrant has been filed, and any other relevant information). If the affidavit is to be sworn overseas, it may be sworn before a commissioner of the High Court of New Zealand, a person who is authorised to administer oaths by the law of the foreign country, notary public, someone otherwise authorised by a judge to administer the oath. If translations are necessary (whether for the body of the affidavit or relevant documents exhibited), the arresting party also needs a separate interpreter's affidavit exhibiting both the original foreign language document and its translation. Translations will generally be required to be certified.

Either the arresting party or its solicitor also needs to sign an indemnity for the Admiralty Registrar's costs of arrest and taking care and custody of the vessel. Other court papers where a signature is required can also be signed by the solicitor.

The court will require originals of the papers making up the in rem claim and arrest application for filing (although where relevant documents have been appended to affidavits, these need only be copies). But if the deponent for an affidavit is overseas and time requires it, a copy could be filed to put matters in motion together with an undertaking from the person filing to forward the original once received. In only limited cases (typically, a memorandum of counsel) will the court accept an electronic filing.

An arresting party should allow ideally 48 hours to prepare and file an arrest application and for the Admiralty Registrar to put matters in motion. Where there is urgency and the ship is at port, the arrest may be applied for and effected that same day.

Law stated - 7 June 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

The Admiralty Registrar takes custody of the arrested vessel and is responsible for its care, and the arresting party will need to pay his or her costs of doing so. If the plaintiff is successful and a fund is constituted, the plaintiffs' costs of arrest are given a priority over claims other than the court or registry costs.

Law stated - 7 June 2024

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

A party is not required to pursue the claim on its merits in the New Zealand courts, but there must be a substantive claim in an appropriate jurisdiction. Vessels may be arrested in support of foreign proceedings.

Law stated - 7 June 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

A party could seek a 'freezing order' from the court, restraining a respondent from removing assets located in or outside New Zealand (and disposing of, dealing with or diminishing the value of, those assets). The application must be accompanied by an undertaking to pay any damages the court awards against the applicant. Where the application is 'without notice', the applicant must provide full and detailed disclosure of all material facts, including any possible defences, and all information casting doubt on its ability to comply with its undertakings.

It could be harder to obtain a freezing order than to arrest a vessel, as there are more onerous requirements. The court would need to be satisfied that:

- the applicant has a good arguable case and a cause of action recognised by the New Zealand courts;
- there are assets to which the order can apply (which may be outside the jurisdiction); and

- there is a real risk the respondent will dissipate or dispose of those assets.

Law stated - 7 June 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Interim orders are available for the detention, custody or preservation of any property (subject to any ordered conditions). The court can also order the sale of property where it is perishable or likely to deteriorate or for any other good reason the court considers justifies it being sold before the hearing. Charging orders (operating as 'stop' orders preserving property) are available, charging the defendant's property with the payment of a sum the entitled party may obtain or has obtained by judgment.

Search orders are aimed at preserving evidence and are normally sought without notice at the very start of a proceeding. They may direct the defendant to hand over documents or other property. Because they are so invasive, the court is likely to require multiple undertakings, and must be satisfied the plaintiff has a strong prima facie case, the potential loss or damage to the plaintiff, if the search order is not made, will be serious, there is sufficient evidence the defendant has the relevant evidentiary material, and there is a real possibility the defendant will destroy such material.

Law stated - 7 June 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is unlikely bunkers can be arrested separately and as distinct from the vessel. The High Court has expressed the view that a vessel would include permanent structures, and its components and accessories, but not its bunkers. A freezing order may be available in respect of bunkers.

Law stated - 7 June 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Any party to the proceeding (including interveners) may request a commission for the appraisal and sale.

Law stated - 7 June 2024

Procedure

- 36** | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

Either before or after judgment, a party may make a request for commission for appraisal and sale. The commission issued by the court directs the registrar to arrange for the vessel to be appraised and sold for the highest price that can be obtained. The sale proceeds are then paid into court together with a filed certificate of appraisal showing an account of the sale. Generally, the mode of sale will be by tender using brokers the registrar has appointed. Timing will depend on whether the application for sale is opposed, the state of the vessel and whether there is a market for it. Costs for advertising and conducting the sale will be the amount paid by the registrar.

Law stated - 7 June 2024

Claim priority

- 37** | What is the order of priority of claims against the proceeds of sale?

The order of priority is not immutable but, subject to any discretionary element taking into account the circumstances of the case, the customary order is as follows:

- costs and expenses of the court and registrar;
- costs and expenses of the producer of the fund (generally the arresting party);
- maritime liens (excluding ship mortgages);
- possessory liens;
- ship mortgages;
- statutory claims under section 4(1) of the Admiralty Act 1973; and
- other claims.

Law stated - 7 June 2024

Legal effects

- 38** | What are the legal effects or consequences of judicial sale of a vessel?

A judicial sale will give the purchaser clear title free of encumbrances (including maritime liens).

Law stated - 7 June 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Yes, where the foreign court has competent jurisdiction.

Law stated - 7 June 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Law stated - 7 June 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hague-Visby Rules have the force of law in New Zealand by virtue of section 209 of the Maritime Transport Act. The Hague-Visby Rules are appended to schedule 5 of the Maritime Transport Act. Under article 1(e) of the Hague-Visby Rules, carriage by sea covers the period from the time when the goods are loaded to the time they are discharged from the ship.

New Zealand is not a signatory to the Rotterdam Rules. There is no indication that it is likely to sign in the near future.

Law stated - 7 June 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

The Contract and Commercial Law Act 2017 (CCLA) (Part 5) almost always governs domestic carriage of goods by land, water or air.

Law stated - 7 June 2024

Title to sue

43 | Who has title to sue on a bill of lading?

Under the CCLA, the following persons have right of suit on a bill of lading:

- the lawful holder of the bill of lading;
- the consignee identified in a sea waybill as being entitled to delivery under the contract of carriage; or
- the person entitled to delivery of goods specified in the undertaking of a ship's delivery order.

Law stated - 7 June 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Unless it is specifically referred to in a bill of lading incorporation clause, a charter party jurisdiction or arbitration clause will not be incorporated into the bill of lading. However, a validly incorporated jurisdiction or arbitration clause will be binding on a third party lawful holder of the bill of lading.

Law stated - 7 June 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

Yes, so long as it is clearly set out in the bill of lading.

Law stated - 7 June 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

For domestic carriage, under the CCLA, a shipowner as the actual carrier may be liable to the contractual carrier, who may seek compensation from the shipowner as an actual carrier for loss or damage to goods (eg, where the contractual carrier has incurred a liability to the owners of the goods). In addition, the contractual carrier of goods may retain a common law right to sue the shipowner as an actual carrier in tort or bailment.

For international carriage, where a shipowner is not a carrier under the Hague-Visby Rules, they are able to benefit from the terms of a bill of lading, as a sub bailee. They may also raise any reasonable terms within the charter party as a defence to the cargo interests. In practice, normally cargo interests will sue the relevant 'carrier' under the bill or take an assignment of rights from the contractual carrier against the actual shipowner.

Law stated - 7 June 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

What amounts to deviation will depend on the terms of the contracted carriage terms. There is a common law right to deviate from the normal route for reason of avoiding danger to the ship or cargo or to save human life. This right is also contained in article IV(4) of the Hague-Visby Rules.

Where there has been an unlawful deviation, this will be a breach of contract that could result in the shipowner or carrier being held liable for any losses.

Law stated - 7 June 2024

Liens

48 | What liens can be exercised?

A shipowner's lien for freight on cargo arises out of common law and contract. A lien on sub-freight or sub-hire arises only in contract.

Law stated - 7 June 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Delivery without production of the bill of lading will potentially expose the carrier to a claim for misdelivery by the lawful bill of lading holder. Liability can probably not be limited under unmodified Hague-Visby Rules.

Law stated - 7 June 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

Under the Hague–Visby Rules, the shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him or her, and is obliged to indemnify the carrier against all loss arising or resulting from inaccuracies of any of the above.

Common law requires the shipper not to ship ‘dangerous goods’ without the consent of the carrier. Article IV(6) of the Hague–Visby Rules extends this definition to include any cargo that directly or indirectly causes or threatens to cause loss of life, damage to the ship or other cargo, delay or expenses to the carrier.

Law stated - 7 June 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

New Zealand does not currently have any ECAs in force.

Law stated - 7 June 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

New Zealand is a signatory to MARPOL Annex VI. The sanction for non-compliance is a fine of up to about NZ\$50,000 depending on the offence for each breach. The relevant rules are embodied in the Marine Protection Rules Part 199: Prevention of Air Pollution from Ships and the Engine Fuel Specification Regulations.

Law stated - 7 June 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

There are no commercial ship recycling facilities in New Zealand. New Zealand is not a party to any ship recycling conventions.

Law stated - 7 June 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

If the amount in dispute is more than NZ\$350,000 or is an in rem claim, it will be brought to the High Court. In personam claims of NZ\$350,000 and less may be determined by the District Court.

Law stated - 7 June 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Generally, the rules governing such service are set out in Part 6 of the High Court Rules. But Part 6 does not apply to initiating documents that may be served in Australia under the Trans-Tasman Proceedings Act 2010 (TTPA) (for which the TTPA itself governs and broadly requires such documents to be served in Australia in the same way as those documents would be served in New Zealand under domestic rules).

Otherwise, Part 6 provides that an originating document may be served outside New Zealand without leave for particular claims (such as tort, breach of contract) where such claims have a connection with New Zealand as specified in Rule 6.27 (for example, for tort, the act or omission was done, or the damage suffered, in New Zealand). Leave is also not required in certain other limited cases such as where the subject matter of the proceeding is land or other property in New Zealand, or where the person to be served has submitted to the jurisdiction of the court.

For proceedings when service is not allowed under Rule 6.27, the leave of the court is required to serve an originating document out of New Zealand, and a formal 'on notice' application will need to be brought (Rule 6.28). If service has nevertheless been effected without leave, the plaintiff runs the risk the court may dismiss the proceeding. The court can, however, still decide to assume jurisdiction under Rule 6.29 where the plaintiff can establish the court should assume jurisdiction or would have granted leave if it had been requested under Rule 6.28, or it is in the interests of justice the failure to seek leave should be excused.

For personal service of documents other than originating documents, the court's leave is required for service abroad (Rule 6.30).

Service must comply with both New Zealand procedure and the procedure of the foreign jurisdiction. As a result, subject to any relevant treaty, service in civil law jurisdictions will normally only be allowed by diplomatic means through the court. This is a lengthy process but can be shortened by applying for substitute service.

Law stated - 7 June 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The most prominent arbitration institute in New Zealand is the Arbitrators' and Mediators' Institute of New Zealand. Two smaller arbitration institutes also exist: the New Zealand Dispute Resolution Centre and the New Zealand International Arbitration Centre. None of these institutes have specialist maritime expertise. The Maritime Law Association of Australia and New Zealand has issued arbitration rules, which parties may adopt, and has a panel of recommended arbitrators.

Law stated - 7 June 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Foreign judgments may be enforced in New Zealand by registering the judgment under the Reciprocal Enforcement of Judgments Act 1934 (REJA), under the TTPA, registering a memorial of the judgment under the Senior Courts Act 2016 or by bringing an action at common law.

REJA includes judgments from the United Kingdom and other countries specified by Order in Council (including France, Hong Kong and Singapore). A judgment registered under Part I of REJA has, for the purpose of enforcement, the same effect as if the judgment had been originally given in the High Court on the date of registration. The TTPA is directed at registrable Australian judgments. Similarly to REJA, a registered Australian judgment has the same force and effect as if it were a judgment given by a New Zealand court (subject to some limitations).

The Senior Courts Act 2016 concerns judgments made by a court in a British Commonwealth country for a sum of money. A memorial may be filed in the High Court and sealed. The New Zealand court may then require the person against whom the judgment was issued to show why the judgment should not be executed. If the person fails to appear or fails to show sufficient cause, the court may order execution. The judgment may be enforced as if it were a judgment of the High Court. Finally, subject to common law rules, foreign judgments both in personam and in rem are enforceable.

Arbitration awards are enforceable under the Arbitration Act 1996. Further, New Zealand is a signatory to the Convention of the Recognition and Enforcement of Arbitral Awards 1958 (New York Convention). The New York Convention makes arbitral awards of Convention states enforceable in all other Convention states as if they were domestic arbitral awards.

Law stated - 7 June 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Asymmetric jurisdiction agreements are uncommon in New Zealand, but it is expected that, in principle, they would be considered valid and enforceable. However, section 210 of the Maritime Transport Act provides that clauses limiting the jurisdiction of the New Zealand courts in respect of a bill of lading or similar document relating to the sea carriage of goods from or to any place in New Zealand have no effect.

Law stated - 7 June 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

If the claimants are amenable to a New Zealand court's personal jurisdiction, the New Zealand court could on application grant an injunction restraining the claimants from commencing or pursuing the foreign proceedings. However, the circumstances must be such that commencement or pursuit of the foreign proceedings would be oppressive or vexatious to the applicant; that means either the proceedings cannot possibly succeed, are in breach of a New Zealand jurisdiction (or arbitration) clause or the claimants are suing in more than one jurisdiction without substantial reasons for doing so, or the conduct of the foreign proceeding would interfere with the domestic court's due process (*Maritime Mutual Insurance Association of (NZ) Ltd v Silica Sandport Inc* [2023] NZHC 793).

The oppressive or vexatious threshold will not be met simply because the claimants have brought proceedings in two jurisdictions (New Zealand and elsewhere) and New Zealand is forum conveniens.

Law stated - 7 June 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant may protest jurisdiction and apply to the New Zealand court to dismiss (or, alternatively, stay) the proceeding on the basis it has no or should not exercise jurisdiction

(forum non conveniens). A contractual non-exclusive submission to a foreign court or arbitral tribunal will be a relevant consideration but is not conclusive.

In practice, where a plaintiff has served proceedings without leave of the court, he or she will carry the burden of showing New Zealand is the appropriate forum. In exceptional circumstances, a plaintiff can ask the New Zealand court to exercise its discretion to refrain from stay proceedings in favour of a more appropriate foreign court, if it is in the interests of justice.

Law stated - 7 June 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Under the Limitation Act 2010, New Zealand has a generally applicable limitation period of six years after the date of the act or omission that is the basis of the claim. However, there are several exceptions, including the following:

- A late knowledge date applies to claims where the claimant has gained knowledge of all the relevant facts as specified by the Limitation Act 2010 section 14(1).
- Under the Hague-Visby Rules, there is a one-year limit for claims in respect of loss or damage to goods under a contract of carriage governed by the Hague-Visby Rules.
- A general 12-month limit applies to offences under the Resource Management Act.
- Under the Contract and Commercial Law Act 2017, there is a one-year time limit for claims (however, the contracting carrier must be notified of any loss or damage within 30 days).
- Under the Maritime Transport Act:
 - a general one-year time limit applies to all offences, which does not run while a person charged with the offence is beyond territorial seas;
 - under section 97, a two-year time limit applies on claims for damage caused by a ship; and
 - under section 361, unless the proceedings commenced no later than three years after the date on which the claim arose or no later than six years after the event that caused liability to be incurred, no action may be brought in respect to:
 - the discharge or escape of oil from an International Convention on Civil Liability for Oil Pollution Damage 1992 ship; or
 - the discharge or escape of bunker oil from an International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 ship.
- Under article 23 of the Salvage Convention, salvage claims are subject to a two-year time limit, but this does not apply to claims reliant on maritime liens.

In addition to these statutory limits, the Admiralty jurisdiction draws on the equitable concept of laches in other instances of delay. When considering laches, the court may apply the by analogy with reference to the Limitation Act 2010 provisions.

The Limitation Act 2010 applies equally to arbitral and civil proceedings. Foreign law time bars are matters of substance and not procedure.

Law stated - 7 June 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

The Limitation Act 2010 provides a complete defence to claims made against a defendant after the expiry of a limitation period. The act specifies some exceptions to limitation periods and start dates. However, it does not grant the courts a general discretion outside these exceptions. The Limitation Act 2010 applies equally to courts and arbitral tribunals.

Law stated - 7 June 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention came into force in New Zealand in March 2017. It applies to New Zealand ships of over 200 gross tonnes or smaller vessels engaged in international voyages that are engaged in commercial activities and to foreign vessels in a New Zealand port.

Law stated - 7 June 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Economic hardship will not entitle a party to avoid a contract, subject to the express terms of the contract.

Law stated - 7 June 2024

Other noteworthy points

- 65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

In relation to shipping, the New Zealand government is particularly focused on issues of the environment. A national debate about clean seas and inland waters led to the introduction in May 2018 (and updated in November 2018) of a Craft Risk Management Standard to prevent bio-fouling from ships' hulls and the adoption of international regulations for ballast water. This has led to the detention in or rejection from New Zealand waters of a number of foreign-flagged vessels.

Law stated - 7 June 2024

UPDATE AND TRENDS

Key developments of the past year

- 66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

New Zealand has now acceded to MARPOL Annex VI and it is in force.

The High Court in successive decisions has given an anti-suit injunction in favour of a New Zealand arbitration clause (*Maritime Mutual Insurance Association (NZ) Limited v Silica Sandport Inc* [2023] NZHC 793) and anti-enforcement judgments to prevent New Zealand resident trusts from enforcing potentially fraudulently obtained decisions (*Kea Investments Ltd v Wikeley Family Trustee Ltd* [2022] NZHC 288 [2023] NZHC 466).

The High Court has also left open the Court's ability to not follow the English approach to time bar and amending intituling under the Hague-Visby Rules because of the different procedural rules (*Silver Fern Farms Ltd v AP Møller Maersk* [2022] NZHC 3120).

The New Zealand courts have upheld orthodox views of marine insurance policy interpretation with respect to warranties (*JDA Co Ltd v AIG Insurance New Zealand* [2022] NZCA 532, [2023] NZSC 41). However, there is still uncertainty about the effect of exclusion and limitation clauses in freight forwarder terms and conditions (*Vienna Group Ltd v Kerry Logistics (Oceania) Ltd* [2022] NZHC 1743, [2023] NZHC 846).

Maritime New Zealand, the national maritime regulator, continues to take an increasingly active approach to health and safety regulation, bringing a number of prosecutions against vessel owners, operators, ports and stevedores for breaches of health and safety regulations.

Supply chain delays continue to be an issue for the shipping industry, but these issues have substantively improved. There is still a shortage of workers.

Finally, in the wake of the Russian invasion of Ukraine on 24 February 2022, New Zealand has introduced its first set of autonomous sanctions. These are contained in the Russia Sanctions Act 2022 and the Russia Sanctions Regulations 2022. Broadly, they prohibit

various sanctioned persons from entering or remaining in New Zealand; prohibit ships owned or controlled by the Russian government or sanctioned persons from entering a New Zealand port; and prohibit dealing with the assets or securities of a sanctioned person.

Law stated - 7 June 2024

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UPDATE AND TRENDS

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Title in the ship usually passes from the shipbuilder to the shipowner upon the execution of the Protocol of Delivery and Acceptance. However, parties may agree otherwise pursuant to the terms of their contract.

Law stated - 30 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

A refund guarantee is simply an undertaking issued by the bank or financial institution on behalf of a shipbuilder to the extent that any pre-purchase remittances made by the shipowner or purchaser towards the building of the ship, will be refunded upon the happening of certain occurrences that will affect the building and/or delivery of the vessel within the terms of the agreement.

For the refund guarantee to be valid, it must be:

- written and properly worded to conform with the terms of the shipbuilding contract. A case in point is the English case of *Rainy Sky SA & Ors v Kookmin Bank* [2011] UKSC 50; [2012] 1 All ER (Comm);
- issued by an authorised bank official; and
- by a deed duly registered.

Law stated - 30 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Where the shipyard refuses to deliver a vessel upon becoming due, it falls as a maritime claim under sections 2(2(a)) & (3(l)) of the Admiralty Jurisdiction Act 1991 (AJA), which relates to a claim arising from possession, title to, ownership of or share in a ship as well as a claim relating to a vessel before it was launched. The shipowner may, pursuant to an application under Order 28 of the Federal High Court (Civil Procedure) Rules 2019, seek a declaratory relief based on the agreement of the parties and accordingly pray for a mandatory order of the court directing the shipyard to deliver the said vessel. The

application is usually by a motion on notice but may be by motion ex parte in the event of urgency.

Law stated - 30 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Should damage occur as a result of a defect in the vessel and the person who suffers the damage is any of these three: the shipowner or a purchaser from the original shipowner or a third party, a general maritime claim may lie against the shipbuilder in the following manner.

A shipowner can either maintain a claim in contract pursuant to section 2(3)(l) of AJA, which relates to a claim in respect of the construction of a ship. The shipowner's claim may also lie under product liability pursuant to section 2(3)(a) of AJA, which relates to claims for damage done by a ship in whatsoever manner or under section 2(3)(c) of AJA if the damage relates to loss of life or for personal injury.

The claims of the purchaser from a shipowner and a third party may lie under section 2(3)(a), being damage done by the ship and section 2(3)(c) if the damage relates to loss of life or for personal injury.

Law stated - 30 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

The Nigerian Maritime Administration and Safety Agency (NIMASA) is the agency of government under which the Ship Registry is anchored. The said Ship Registry makes provision for various forms of registration and the types of vessels eligible for registration under their specific registries, which include:

- merchant ships;
- fishing vessels;
- vessels under construction;
- bareboat chartered vessels of 12 months and above;
- licensed vessels below 15 gross tonnage;
- floating, production, storage and offloading and floating, storage and offloading vessels;

- vessels licensed to operate in coastal and inland waters of Nigeria;
- vessels weighing from 15 gross tons; and
- vessels owned by citizens of Nigeria or Nigerian registered bodies corporate.

It should be noted that vessels under construction are eligible for registration in Nigeria and under the flag of Nigeria.

Law stated - 30 May 2024

6 | Who may apply to register a ship in your jurisdiction?

Persons who may apply and/or are eligible to apply to register their vessels in Nigeria are:

- Nigerian citizens;
- bodies corporate; and
- partnerships established under the laws of the Federal Republic of Nigeria and having their principal place of business in Nigeria.

Law stated - 30 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

For requirements of registration, we shall consider two types of registration: flag registration and bareboat chartered vessel registration.

Flag registration

- formal letter of application by the owner or authorised representative;
- copy of the certificate of incorporation;
- copy of Certified True Copy (CTC) of memorandum and articles of association;
- copy of CTC of Form CAC7 (particulars of directors) and Form CAC2 (allotment of shares); 25 million naira minimum share capital;
- copy of the company's current tax certificate;
- copy of bank reference letter;
- duly completed declaration of ownership form with passport photograph attached (Ship Registry Form);
- duly completed application for approval of ship's name form (ship registry form);
- duly completed application for registration of ship form (ship registry form);
- expired provisional certificate of registry (where applicable);

- copy of vessel insurance policy;
- copy of the certificate of registration as a shipping company;
- copy of class certificate (where applicable);
- copy of bill of sale with warranty against encumbrances and liens from the seller;
- copy of deletion certificate (foreign flagged vessel only);
- copy of the builders' certificate (new builds only);
- certificate of approved plan specifications and drawings (for new builds only);
- certificate for tonnage measurement;
- condition survey report;
- photos of the bow and stern of the vessel showing her name and port of registry duly marked permanently and conspicuously and the official number and the registered tonnage; and
- letter of assurance (fishing vessels).

Bareboat chartered vessel registration

- copy of certificate of incorporation;
- copy of CTC of memorandum and articles of association;
- copy of CTC of Form CAC7 (particulars of directors) and Form CAC2 (allotment of shares);
- 25 million naira minimum share capital;
- copy of the company's current tax certificate;
- copy of bank reference letter;
- duly completed declaration of ownership form with passport photograph attached (ship registry form);
- duly completed application for approval of ship's name form (ship registry form);
- duly completed application for registration of ship form (ship registry form);
- copy of the class certificate for conventional vessels only;
- copy of bareboat charter party agreement;
- copy of evidence of suspension from the original registry;
- certificate for tonnage measurement; and
- condition survey report.

Law stated - 30 May 2024

Dual registration

8 ¹ Is dual registration and flagging out possible and what is the procedure?

Dual registration of a vessel, wherein a vessel has more than one flag registration at a given time, is prohibited. The only circumstance where a vessel primarily registered under a different flag can be registered under the Nigerian flag is if the vessel is bareboat chartered for a minimum period of 12 months to a Nigerian entity. In such a situation, the original registration of the vessel at the country of registration will be suspended throughout the entire period of such bareboat charter arrangement with evidence of such suspension furnished at the time of the bareboat registration.

Law stated - 30 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

NIMASA is the government agency that maintains the Register of Mortgages upon application by the vessel owner or representative attaching copy of the executed deed of mortgage duly stamped at Federal Inland Revenue Service (FIRS) and with Certificate of Registration of same at the Corporate Affairs Commission, a board Resolution approving the mortgage, if a body corporate, and duly completed or executed and stamped NIMASA statutory mortgage forms. The Register contains the parties (mortgagor and mortgagee), the details of the vessels as well as details of the mortgage such as the mortgage sum.

Law stated - 30 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The applicable limitation regime in Nigeria is the Convention on Limitation for Maritime Claims (LLMC), 1976 (1976 Convention) as well as the Protocol to Amend the Convention on Limitation for Maritime Claims (the 1996 Protocol) by virtue of Nigeria being a state party to the Convention and also domestication of the 1976 Convention and the 1996 Protocol in the Merchant Shipping Act (MSA) 2007 pursuant to section 351(1)(f) of MSA.

Pursuant to section 351 of MSA and section 9 of the Admiralty Jurisdiction Act 1991, the following persons may be able to limit their liability in the event of a claim:

- shipowners, which includes charterers, managers and operators of a seagoing ship;
- salvors; and
- insurer of liability of claims subject to limitation.

In the same vein, the claims for which the above persons can apply to limit their liability pursuant to section 352 MSA include claims in respect of:

- loss of life or personal injury, loss or damage to property occurring on board or in direct connection with the operation of a ship or salvage operations, and consequential loss resulting therefrom;
- a person other than the person liable in respect of measures taken to avert or minimise loss for which the person liable may limit his or her liability under the Convention, and further loss caused by such measures;
- loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
- the raising, removal, destruction or the rendering harmless of a ship that is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship; and
- the removal, destruction or rendering harmless of the ship's cargo.

Nigeria is a signatory to the 1976 Convention and also took steps to domesticate the said 1976 Convention and the 1996 Protocol in the MSA pursuant to section 335 thereof. However, following the express provision of section 356 of MSA as per the general applicable limits and limits for passenger claims, the limits set by the 1996 Protocol could not and did not take effect as at June 2015. This will remain the position pending any amendment of the relevant provisions of the Act in consideration of the new limits.

Law stated - 30 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Limitation proceedings usually commence by way of an action in personam at the Federal High Court, wherein at least one of the respondents is named on the originating summons. Any other respondents may also be named or merely identified as respondents to the originating summons by referencing them as belonging to a specified class of people. In constituting the limitation fund, it is necessary pursuant to Order 15 Rule 6 of the Admiralty Jurisdiction Procedure Rules (AJPR) 2023 for the ship owner to pay the limitation fund, as may be ordered, into court to abide by the result of the consideration of the claim. The limitation fund is calculated based on the special drawing rights (SDRs) as defined by the International Monetary Fund, which in the absence of any agreement by the parties, is converted into naira at the date of the constitution of the limitation fund, payment made or security given.

The ship owner or any other entitled person can rightly opt to plead the defence of limitation of liability by merely filing a defence to any claim commenced against him or her by any claimant. They do not need to set up a Limitation Fund in such a case. The ship owner can proceed to institute an action for setting up the limitation funds pursuant to Order 15 of the AJPR and section 351 of the MSA without necessarily waiting for such an action

to be commenced by any person who may have suffered a direct loss resulting from any damage done by the ship.

It must be emphasised that a ship owner can conveniently proceed to institute a limitation action aimed at setting up a limitation fund without necessarily admitting liability or having a claim against him or her pursuant to section 351(6) of the MSA.

Law stated - 30 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

By the provisions of the MSA (section 354) the ship owner is prevented from relying on limitation of liability if the claimant can prove that 'the loss or damage resulted from the ship owner's or operator's act or omission or by the act or omission of ship owner's servants or agents acting in the course or within the scope of their employment, and that such act or omission was committed with the intent to cause such loss or damage or recklessly and with the knowledge that such loss would probably result.' In such a situation, the limit is said to be broken and the ship owner would be made to pay the full liability resulting from the act or omission.

Limitation of liability was broken in a notable case in Nigeria – in the *Shipcare Nigeria Ltd (Owners of The M/N African Hyacinth) v The Owners of The M/V Fortunato* (2011) 7 NWLR (Pt 1246) 205, wherein the Supreme Court upheld the decision of the trial court as well as the Court of Appeal in holding that the appellant cannot limit its liability following their failure to ensure a pilot was onboard the vessel within a district of compulsory pilotage by the Nigeria Ports Authority or a licensed pilot, when the accident occurred. The courts held that the said failure to have a qualified pilot man the vessel at the material time when their vessel collided with the respondent's vessel, amounts to actual fault or privity that acts or omission, defeats the defence of limitation of liability.

It is not certain what the courts would have held had other elements necessary for the successful breaking of the limits of liability, been relied upon by the appellants and astutely canvassed before the trial court and on appeal, which is the proof that '... such act or omission was committed with the intent to cause such loss or damage or recklessly and with knowledge that such loss would probably result.' It will be interesting to see how the courts will consider these elements in future.

Once limitation is broken, any order establishing the fund so established is set aside by the court in favour of a reversal to the claim as constituted by the claimant, upon the successful claim thereto after trial.

Law stated - 30 May 2024

Passenger and luggage claims

13 |

What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

The applicable limitation Regime in Nigeria is the LLMC, as well as the Protocol to Amend the Convention on Limitation for Maritime Claims (the 1996 Protocol) by virtue of Nigeria being a state party to the Convention and also domestication of the 1976 Convention and the 1996 Protocol in the MSA pursuant to section 351(1)(f) of MSA.

The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 and its Protocol of 1990 also apply in Nigeria by virtue of section 215 of MSA and the Minister of Transportation is required to have due regard to the said 1974 Convention in making regulations relating to carriage of passengers and their luggage by sea under section 333 of the MSA.

Law stated - 30 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The NIMASA through its Maritime Safety and Security (MSS) is the Port State Control agency in Nigeria charged with the responsibility of inspecting vessels to ensure they are not unseaworthy or substandard which is aimed at maintaining safety in the international marine transport sector. NIMASA operates its Port State Control inspections under the Nigerian Maritime Administration and Safety Agency Act 2007 as well as the Merchant Shipping Act (MSA) 2007, both of which give credence to the International Maritime Organisation (IMO) procedures for Port State Control as may be amended from time to time, being part of international Conventions and treaties recognised by Nigeria.

Law stated - 30 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

Following the inspection of ships by MSS or any person acting under their instruction, any ship found to be deficient or unseaworthy may be issued a deficiency notice and accordingly detained pending when the deficient conducts are restored and payment of fines so imposed. The vessel may alternatively be delayed for the deficiency to be corrected if very minor, although a deficiency notice may still be issued with attendant imposition of fines. MSS, following the detention or release of any ship, notifies all relevant classification societies, the flag state and IMO of same.

Law stated - 30 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

A ship owner or operator aggrieved over the detention and/or imposition of fine following the Port State Control inspection exercise may pursuant to sections 223, 432 and 433 of the MSA 2007 appeal to the Minister of Transportation who shall convene a board of survey (the body charged with matters involving the survey of ships) or forward the appeal to a Scientific Referee operating at the port where the ship is located. The Board of Survey or Scientific Referee shall then investigate and make a report to the Minister. Where the Minister is satisfied with the Report and can confirm that every other requirement has been made, he or she may issue a Certificate of Survey.

It is also possible for the shipowner, where still dissatisfied with outcome of the appeal to the Minister, to resort to the Court (Federal High Court) to seek redress against the Agency (NIMASA) provided the conditions for instituting such an action are met (ie, the action is commenced within the time allowed under the NIMASA Act and a pre-action notice is duly served on NIMASA).

Law stated - 30 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The following are the classification societies as approved by the Nigerian Maritime Administration and Safety Agency (NIMASA):

- International Naval Survey Bureau;
- American Bureau of Shipping;
- Lloyds Register;
- International Register of Shipping;
- Det Norske Veritas-Germanischer Lloyds;
- Bureau Veritas Nigeria Limited;
- Phoenix Register of Shipping;
- Indian Register of Shipping – IR Class;
- Overseas Maritime Certification Service; and
- Conarina Nigeria Limited.

Law stated - 30 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

It is true to say, governments, which are state parties or signatories to certain international conventions on safety, as it were, delegate their statutory responsibilities in respect of those conventions to classification societies, to ensure compliance with set standards.

While it is not a common practice in Nigeria to hold classification societies liable in carrying out these responsibilities, there is no provision of law that exonerates them from liability over their actions or omissions. So, it may be possible to hold them liable, either in contract or in tort, as the case may be.

Law stated - 30 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

The Minister of Transportation of the Federal Republic of Nigeria appoints a wreck receiver and assistant receivers of wreck as may be appropriate who are charged to implement the provisions of the Merchant Shipping Act (MSA) 2007 as it concerns wreck removal. By the provisions of the MSA and the Nigerian Maritime Administration and Safety Agency (NIMASA) Act, the Receiver of Wrecks in Nigeria is NIMASA. Pursuant to its appointment by the state, the Receiver of Wrecks determines when a wreck constitutes a hazard and accordingly orders the ship owner to remove same.

Law stated - 30 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The international Regulation in relation to collision in Nigeria is the Convention on International Regulation for Preventing of Collision at Sea 1972 (COLREGS).

In relation to wreck removal, there are presently no international Conventions or Protocols in force in Nigeria.

The principal international convention or protocol in force in relation to salvage in Nigeria is the International Convention on Salvage 1989. Other related international conventions and protocols are as provided in section 215 of the Merchant Shipping Act (MSA) 2007 and include:

- International Convention for the Safety of Life at Sea 1974;

- Protocol Relating to the International Convention for the Safety of Life at Sea, 1988 and Annexes I to V thereto;
- International Convention on Maritime Search and Rescue 1979;
- The Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 and its Protocol of 1990;
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and the Protocol thereto;
- Placing of Seamen Convention 1920;
- International Ship and Ports Facility Security Code; and
- International Convention for Safe Containers 1972.

The international conventions applicable in Nigeria in relation to pollution are as detailed in section 335 of MSA and include the following:

- International Convention for the Prevention of Pollution from Ships 1973/1978 and the Annexes thereto;
- Convention Relating to Intervention on the High Seas in Cases of Threatened Oil Pollution Casualties 1969;
- International Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972;
- International Convention on Oil Pollution Preparedness, Response and Co-operation 1990;
- International Convention on Civil Liability for Oil Pollution Damage 1992;
- Convention on Limitation of Liability for Maritime Claims, 1976 and the 1996 Protocol thereto;
- Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 and its Protocol of 1992; and
- Basel Convention on the Control of Transboundary Movements of Wastes and their Disposal 1989.

Nigeria is a signatory to the Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels 1910. However, Nigeria reserves its rights, pursuant to article 4 of the Convention, not to implement the provisions of certain articles of the Convention in certain instances. In any event, the said Convention is not in force in Nigeria as it is yet to be enacted as a law of the National Assembly in compliance with the provisions of section 12 of the Constitution of the Federal Republic of Nigeria 1999.

Nigeria is a signatory to the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi Convention). However, the Nairobi Convention is not in force in Nigeria as it is yet to be enacted as a law of the National Assembly and accordingly domesticated in compliance with the provisions of section 12 of the Constitution of the Federal Republic of Nigeria 1999. The domestication of the Nairobi Convention would automatically repeal the provisions of Part XXVI of the MSA 2007.

The International Convention on Civil Liability for Oil Pollution Damage is in force in Nigeria having been domesticated in our laws by virtue of section 335 of the MSA 2007.

The International Convention on Salvage 1989 is in force in Nigeria having been domesticated in our laws by virtue of section 387 of the MSA 2007.

Law stated - 30 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

Nigeria is a signatory to the International Convention on Salvage 1989 (Salvage Convention) which was accordingly domesticated and in force in Nigeria pursuant to section 387 of MSA (Part XXVII) 2007.

There is no mandatory form of salvage agreement in Nigeria. To that extent, a salvage operation can be carried out pursuant to an agreement between the salvor and the owner/master of the vessel or property on board the vessel. Salvage operations can also be rendered without any formal agreement or engagement, by any person (master/operator of a vessel) who appreciates the vessel in distress and offers salvage services as provided by section 401 of MSA 2007, which is in accordance with article 10 of the Salvage Convention. Lloyd's standard form of salvage agreement is also acceptable in Nigeria.

It is trite that salvage operations may be carried out by any vessel. However, pursuant to the provisions of section 399(1)(a) of MSA, it would appear that, if the salvage is in respect of operations within the inland waters of Nigeria in which all the vessels involved are of inland navigation, only vessels registered under the Cabotage Registry (which are vessels wholly owned by Nigerian citizens) under the Coastal & Inland Shipping (Cabotage) Act 2003, can engage in such salvage operations. However, a close review of section 4(2) of the Cabotage Act, says 'nothing in the Act shall preclude a foreign vessel from assisting persons, vessels or aircrafts in danger or distress within Nigerian waters.' Also, section 8(1)(a) and(b) of the Cabotage Act 2003 expressly allows foreign vessels to carry out salvage operations within Nigerian inland waters where the operations are beyond the capacity of a Nigerian salvage vessel or company, provided the approval of the Minister is obtained.

Law stated - 30 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Nigeria is a party to the International Convention Relating to the Arrest of Sea-Going Ships 1952. The 1952 Convention is widely accepted with over 70 ratifications but with a closed or limited list of claims for which a vessel may be arrested, thereby creating a situation where

a defendant may claim damages for wrongful arrest if he or she can prove that the arrest was in bad faith. One of the outstanding features under the Convention is the practice of being able to arrest a sister ship in the absence of the ship in question.

Law stated - 30 May 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

In the event of an in rem action concerning a proprietary maritime claim where the claim arises in connection with a ship, however, there is no requirement to specify the person who would be liable (relevant person). However, in the event of an in rem action in relation to a general maritime claim where the claim arises in connection with a ship and the person who would be liable (relevant person) if a claim in personam were to be commenced, was, when the cause of action arose, the owner or charterer of or in possession or control of the ship, in an action in rem. This is as provided by Order 5 Rules 1 and 2 of the Admiralty Jurisdiction Procedure Rules (AJPR), 2023.

A sister ship or associated ship belonging to the same owner may be arrested provided the owner owns the offending ship in relation to all the shares therein. Only a ship under a demise (bareboat) charter wherein the charterer controls the ship and is the relevant party liable for the act for which the arrest is being made, can be arrested. To this extent, a time-chartered vessel cannot be arrested since the relevant person would not have owned all the shares in the ship.

Law stated - 30 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Nigeria recognises the concept of maritime liens, which is enforceable pursuant to an action in rem. Section 2(5)(3) of the Admiralty Jurisdiction Act (AJA) provides that the claims that may give rise to a maritime lien include claims involving:

- salvage;
- damage done by a ship;
- wages of the master or a member of the crew of a ship; or
- master's disbursements.

Law stated - 30 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

Where the Court, upon the application of a party, orders the arrest of a ship and it turns out that the Court ought not to have made the order of arrest and/or the security, the arrest is usually termed wrongful and accordingly vacated pursuant to the application of the owners of the ship. Circumstances that could warrant such declaration are rife and include instances where the arrest was procured in bad faith, gross negligence or unlawfully.

Pursuant to section 13 of AJA and Order 11 Rule 2(a)&(b) of AJPR, 2023, the following would amount to wrongful arrest:

- where a party in bad faith, in gross negligence or unlawfully demands excessive security. This obtains even where the party would have had a good cause to arrest the vessel;
- where a party in bad faith, or in gross negligence or unlawfully obtains the arrest of a vessel or property; and
- where a party or other person in bad faith, or in gross negligence or unlawfully fails to give the consent required under the AJA for the release from arrest of a vessel or other property.

The defendant may either choose to commence a fresh action for wrongful arrest pursuant to Order 11(3) of AJPR, 2023 or orally apply at the end of the trial of the substantive suit, for substantive cost for wrongful arrest pursuant to Order 11(4) AJPR, 2023.

Law stated - 30 May 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

A claim with respect to bunkers is maintainable as a maritime claim pursuant to section 2(1)(k) of AJA, 1991 being 'a claim with respect of goods, materials or services supplied to a ship for her operation.' However, to be able to maintain an in rem action against a vessel in connection with bunker services rendered or supplied to the vessel, the plaintiff must ascertain that the relevant person, with whom the contract for the supply of bunker was entered into, who will ordinarily be liable in personam, (the relevant person) was when the cause of action arose, the owner or charterer of or in possession or in control of the ship if the relevant person is either the beneficial owner of the ship as it respects all the shares in it or the charter under a charter by demise as provided by section 5(4)(a) of the Admiralty Jurisdiction Act, (AJA) 1991. To this end, the only circumstances, wherein the bunker supplier can validly maintain an in rem action against the vessel pursuant to a contract with the charterer, and accordingly arrest the vessel, is where the charter in question is in respect of a bareboat charter and not any other kind of charter whatsoever,

such as a time charter or voyage charter arrangement. See section 5(4) AJA, 1991 and Order 7 Rule 6(b)(iii) of AJPR, 2023.

Law stated - 30 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

Ordinarily, the arresting party is not expected, pursuant to the Rules of Court, to provide security to secure the arrest of a vessel, but is required to file an 'undertaking as to damages' in the event of a wrongful or needless arrest. However, upon the arrested party's application as provided in Order 13 Rules 1(1)&(2) AJPR, 2023, the court may order security for cost if the claim is above 10 million naira (or its equivalent in foreign currency) or where the arresting party does not have any assets in Nigeria.

Furthermore, the court, pursuant to Order 9 Rule 1 of AJPR, as a condition for granting an application for the issuance of a warrant of arrest of the ship, demands that the application be accompanied by an undertaking to pay the Admiralty Marshal's fees being the amount equal to the expenses of the Admiralty Marshal in relation to the arrest, which is usually not less than 100,000 naira and not more than 500,000 naira as deposit towards meeting such liability. More payment demands are made every two weeks in this regard. Where there is more than one arresting party in respect of the same ship, they shall jointly and severally pay the Admiralty Marshal's fees. This will continue until such a time when the owner or owners of the ship put up a bank guarantee as security for the claim of the arresting party should the claim succeed and accordingly secure the release of the vessel from arrest.

Law stated - 30 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

Where a ship is under arrest by the order of the court at the instance of the arresting party, the same may be released by the court if satisfied that 'an amount or bail bond equal to the amount claimed by the arresting party or an amount or bail bond equal to the value of the ship, whichever is less, has been paid or deposited into court. It shall be noted that the court may, by order, increase or reduce the amount in which bail bond has been provided.

The security in this regard takes the form of either a deposit of the sum specified by the court or a guarantee or undertaking supplied by a Protection & Indemnity (P&I) Club, a bank or an insurance company.

In a nutshell, the security to be provided to secure the release of an arrested vessel must not exceed its value.

Law stated - 30 May 2024

Formalities

- 29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

In Nigeria, there are no formalities required for the appointment of a lawyer in respect of an arrest application. It is not a requirement to provide a power of attorney or other document to the court and as such there are no formalities or forms to be adopted in this regard.

Nigeria is not a signatory to the Apostille Convention and as such the attendant requirements applicable for procuring an arrest order under the Convention are not required in Nigeria.

The requirements for an application to procure an arrest order in Nigeria are as follows:

- The applicant commences an in rem action at the Admiralty Division of the Federal High Court.
- The applicant searches the Caveat Register to ascertain that there is no caveat in place against the arrest of the vessel.
- The applicant files an ex parte application for the warrant of arrest of the vessel or other property against which the proceeding was commenced. The vessel or other property must, at the time of filing, be within the jurisdiction of the Federal High Court or expected to arrive within three days.
- The applicant or his agent files an affidavit showing the nature of the claim, the nature of the contract, the name of the vessel in issue, the name of the vessel to be arrested and her port of registry (if known). In the event of an in rem action in relation to a general maritime claim the name of the owners of the vessel (the relevant person) who was the owner of the vessel or in control when the cause of action arose and who was the beneficial owner of all the shares in the vessel at the time. However, there is no requirement to specify the person who would be liable (relevant person) for an in rem action in relation to a proprietary maritime claim where the claim arises in connection with a ship. The content of the affidavit depends, essentially, on the nature of the claim.
- In accordance with the Rules of the Federal High Court, for an in rem action commenced by a writ of summons, the statement of claim shall be accompanied by documents to be relied upon, a list and copies of documents as well as a list of non-documentary exhibits and a list of witnesses to be called at the trial shall be frontloaded.
- The applicant usually files an 'undertaking as to damages' before or shortly after the arrest warrant is issued, as the court may direct.
- The application for a warrant of arrest shall constitute an undertaking to the court to pay the Admiralty Marshal's fees, which shall equal the expenses of the Admiralty Marshal upon demand.
- The warrant of arrest, where issued, lasts for six months from the date of issue and may be renewed for another six months.

- A warrant of arrest shall be executed by the Admiralty Marshal or their substitute, either after the writ of summons would have been served on the vessel or together with the writ of summons and same, can be executed on any day.

The applicant does not need to have the original documentary evidence for the arrest application. It will be sufficient to have the documents scanned and sent via an electronic medium. Where translations are required from another language to English, they must be from a sworn (or notarised) translator.

Should there be insufficient time to comply with all the required formalities for filing the arrest application, it is possible to set the arrest procedure in motion while undertaking to the court to complete the formalities within a specified period. Order 3 Rule 3(2) provides that a 'plaintiff shall within 7 days of filing the summons, file written statements of the witnesses, which shall be adopted on oath' during the trial. All that is required at this stage is to file a list of witnesses among other originating processes.

The Federal High Court, the court having jurisdiction over admiralty matters, provides in Order 58 of its Civil Procedure Rules, 2019, for an electronic Filing (E-Filing) Registry. Matters commenced electronically shall conform to E-Filing Rules and are meant to be concluded via the same process. However, this has not taken full effect.

There is no laid-down notice period to prepare an arrest application. There is usually an attendant urgency that naturally attaches to in rem proceedings owing to the short berthing time of vessels within the jurisdiction of the court. In recognition thereto and from experience, we strive to prepare such arrest processes within 24 to 36 hours of being properly briefed/engaged by the client.

Law stated - 30 May 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

The Admiralty Marshal or its substitute is charged with the responsibility of maintaining the vessel whilst under arrest provided the arresting party continues to meet the financial obligation on a bi-weekly basis, of providing the Admiralty Marshal's fees equal to the expenses so incurred in relation to the arrest, which is usually not less than 100,000 naira and not more than 500,000 naira as deposit towards meeting such liability. This is usually the case where the owner or owners of the vessel refuse or fail to pay or deposit, into court, a bank guarantee, in the amount of the claim of the arresting party, as a form of security for the claim if the claim succeeds.

Law stated - 30 May 2024

Proceedings on the merits

31 |

Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Nigerian courts, pursuant to section 10 AJA, entertain situations wherein an arresting party may secure the arrest of a vessel for purposes of securing the claim in the event of a successful proceedings commenced before another court or tribunal sitting in a different jurisdiction. In such situations, the court after granting such an arrest of the vessel, would be minded to stay proceedings pending the hearing and determination of the claim on its merits commenced at any other jurisdiction, on the condition that the arrest of the ship subsist or satisfactory security for its release be given as security for the satisfaction of any judgment or award that may be made in that jurisdiction.

Law stated - 30 May 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

A *Mareva* injunction is another form of order of attachment of property aimed at ensuring the security of a claim before its determination. The said *Mareva* order attaches to a defendant's assets preventing them from being taken outside the jurisdiction of the court, which in certain cases, may be the *res* (subject matter of the suit). Once a *Mareva* Order of injunction is issued against an asset, other courts and tribunals in most jurisdictions of the world, give credence to it by obeying such an order notwithstanding that the order was issued from a foreign court.

There is also the practice of interim attachment of property, pursuant to Order 30 of the Federal High Court (Civil Procedure) Rules 2019, in situations where a defendant portends to delay or obstruct the execution of any law that may be passed against him or her by disposing his or her property, in part or in full, or removing same from jurisdiction. Here the plaintiff may apply to the court, at any time before final judgment, to call upon the defendant to furnish sufficient security to fulfil any judgment or order that may be made against him or her and to accordingly attach any property (movable or immovable) belonging to him or her pending him or her posting security.

Law stated - 30 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Yes. Order 28 of the Federal High Court (Civil Procedure) (FHC) Rules 2019 allows a party who fears that the *res* may be dissipated to apply for an injunction seeking a court order for the detention, custody or preservation of any property that is the subject or for the

inspection of such property in possession of a party to the action. This application may be brought, in cases of urgency, before the commencement of the action.

It is instructive that Order 30 FHC Rules 2019 relating to 'interim attachment of property' has the same effect as Order 28 FHC Rules 2019 but to the extent that the interim attachment is to ensure the defendant provides some form of security to satisfy the judgment of the court.

Law stated - 30 May 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Yes. Section 2(3) of AJA, 1991 provides for a general maritime claim. Paragraph (k) relates to a claim in respect of goods, materials or services supplied or to be supplied to a ship for its operation or maintenance.' Bunkers fall under the category of supplies for the operation of a vessel and to that extent may either be the cause for the arrest of the vessel if the person who would be liable in personam, (the relevant person) was when the cause of action arose, the owner or charterer of or in possession or in control of the ship (a) if the relevant person is either the beneficial owner of the ship as it respects all the shares in it or the charter under a charter by demise as provided by section 5.(4)(a) AJA or the bunkers may qualify as what amounts to 'other property' as envisaged in Order 7 Rule 1 of the AJPR, 2023.

Order 7 Rule 1 provides that a ship or 'other property' may be arrested in a proceeding commenced as an action in rem if at the time of the application for the arrest the ship or other property is within the jurisdiction of the court or expected to be within the court's jurisdiction within three days.

Law stated - 30 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Under Order 16 Rules 1 and 2 of the Admiralty Jurisdiction Procedure Rules (AJPR), 2023, a party in the suit in which a warrant of arrest of a vessel has been successfully executed may apply to the court for the valuation and sale of the vessel.

The Court may, suo moto and upon notice to the parties, order the arrested vessel to be valued and sold, if and where it considers that the vessel is deteriorating in value following the arrest.

Law stated - 30 May 2024

Procedure

- 36** | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The procedure for initiating and conducting the judicial sale of a vessel is as follows:

- a party applies to the court for, or the court directs, the sale of the vessel;
- the application of the party for the sale of the vessel constitutes an undertaking to pay, on demand, an amount equal to the expenses of the Admiralty Marshal in complying with the order of the court;
- the Admiralty Marshal conducts the sale pursuant to the order of the court and advertises the sale in two national daily newspapers. However, section 73 of the Merchant Shipping Act (MSA), 2007 provides that the court shall issue a 30-day written notice of the time and place of sale to:
 - holders of registered mortgages and preferential rights that have not been issued to the bearer;
 - the holders of registered mortgages and rights issued to the bearer and to the holders of the maritime liens whose claims have been notified to the officers; and
 - the Registrar of ships;
- the sale shall be by auction, on a day not less than 21 days after the advertisement in the national dailies, unless the court directs otherwise;
- the Admiralty Marshal shall within 21 days of the sale of the vessel:
 - file a return of sale;
 - pay into court the proceeds of sale; and
 - file an account of sale and the vouchers of the account;
- computation of the Admiralty Marshal's expenses towards the valuation and sale of the vessel;
- the Admiralty Marshall deducts 2 per cent from the proceeds of sale to cover expenses and bank charges; and
- a person interested in relation to the proceeds of the sale may apply to the court for taxation of the expenses of the Admiralty Marshal.

On the average duration for the judicial sale of a vessel upon the application for sale, it must be borne in mind that every interlocutory application by a party must be served on the other party or parties who shall have a minimum of seven days, from the date of such service, to respond to same by way of a counter affidavit. Following the order of sale and direction for advert placements in the dailies, there shall be a period of 21 days (or 30 days

under MSA 2007) before auction sale is held in respect of the vessel. There is yet another 21 days within which the Admiralty Marshal shall file a return of sale and account of sale as well as pay the money into court. In the circumstances, the minimum time frame is a period of 49 days, all things being equal. However, in practice, it takes an average period of three to six months bearing in mind any likely oppositions and/or counter applications to which the court is mandatorily obligated to entertain and give its ruling one way or the other.

The court costs associated with the judicial sale are computed with respect to the Admiralty Marshal's expenses towards the valuation, advertisement, sale of the vessel as well as bank charges.

The Admiralty Marshall's expenses or costs are calculated on the basis of 2 per cent deductions from the proceeds of sale of the vessel.

Law stated - 30 May 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The priority of claims pursuant to section 75 of MSA, 2007 are as follows:

- The first payment is towards the costs awarded by a court and arising out of the arrest and subsequent sale of a ship, proceeds of sale and the distribution of the proceeds.
- The balance of the proceeds of the sale shall then be distributed among the holders of:
 - maritime liens under section 66 of MSA, namely, claims in respect to salvage, damage done by a ship, wages of the master or a crew of the ship and the master's disbursements;
 - preferential rights under section 69 of MSA, namely, shipbuilders and repairers; and
 - mortgages and other preferential rights registered under the MSA.

The Admiralty Jurisdiction Procedure Rules 2023 (AJPR) now provide a clear order of priority for claims against the ship in Order 1 Rule 2 as follows:

1. statutory or court charges and expenses like the Admiralty Marshal's expenses in connection with the ship or property;
2. salvage, wreck removal and contribution in general average;
3. wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship;
4. disbursements of the master on account of the ship;
- 5.

- loss of life or personal injury occurring whether on land or water in direct connection with the operation of the ship;
6. ports, canals and other waterways, dues and pilotage dues;
 7. possessory liens (repairer's lien – where the ship is still in possession);
 8. mortgages – priority of mortgages is determined by the date on which the mortgage is recorded in the register and registered mortgages have priority over unregistered mortgages;
 9. in rem action for possession or ownership of a ship;
 10. in rem action in relation to a dispute between co-owners, possession or use of a ship;
 11. in rem action in relation to loss or damage to cargo carried on a ship;
 12. lien in rem action in relation to damage received by a ship;
 13. in rem action in relation to a dispute arising out of contracts for carriage of goods or use of a ship; and
 14. in personam action.

Law stated - 30 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The concept of maritime lien, which is a proprietary right, is directly enforceable against the vessel in an *in rem* action. Nigeria is a signatory to the International Convention on Maritime Liens and Mortgages 1993. Pursuant to the Convention, maritime lien claims follow the vessel notwithstanding any change of registration or ownership as the case may be.

This presupposes that the right follows and is enforceable against the vessel even when sold and/or transferred to a new owner for value pursuant to the judicial sale even where the purchaser did not have any notice of any previously done liability that attaches to the vessel. However, owing to the prior written notification, pursuant to section 73 of MSA 2007, by the court, to holders of various rights that attach to the vessel, including holders of maritime liens, such persons are given the opportunity to register their claims prior to the sale of the vessel to ensure payment and avoid subsequent claims against the vessel, except those assumed by the purchaser.

Law stated - 30 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

A judicial sale in a foreign jurisdiction will be recognised in Nigeria. However, such sale should be manifestly confirmed with a certificate to the effect that the sale has been devoid of any encumbrances and/or mortgages and liens except those assumed by the purchaser. This will enable the Registrar of ships to accord the necessary registration to the vessel, etc.

Law stated - 30 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Nigeria is a signatory to the International Convention on Maritime Liens and Mortgages 1993. Nigeria acceded to the Convention on 5 March 2004.

Law stated - 30 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hague Rules and the Hamburg Rules have been ratified and domesticated in Nigeria. Accordingly, they have the force of law. The Hamburg Rules were domesticated without repealing the Hague Rules or complying with the process for denunciation under the Hague Rules. Nigeria also failed to denounce or notify Belgium of its denunciation of the Hague Rules on becoming a contracting state of the Hamburg Rules as stipulated in the Hamburg Rules. As the Hamburg Rules do not provide for the consequences of non-denunciation, the Hamburg Rules apply.

Although this matter has not been subject to specific judicial consideration, the Supreme Court holds that the Hague Rules may apply to inbound carriage contracts through a Paramount Clause – which incorporates it into the contract. It follows therefore that the Hamburg Rules, however, may apply to both inbound and outward carriages without a clause paramount.

Nigeria has neither ratified nor domesticated the Hague-Visby Rules. Nevertheless, Nigeria has ratified the Rotterdam Rules, which are not yet in force.

In Nigeria, carriage at sea begins on the carrier's receipt of goods and ends on the carrier's delivery to the receiver at the place so designated in the contract of carriage.

Law stated - 30 May 2024

Multimodal carriage

- 42** | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

There are no conventions or domestic laws in force in respect of road, rail or air transport applicable to stages of the transportation except by sea under a combined transport or multimodal bill of lading.

Law stated - 30 May 2024

Title to sue

- 43** | Who has title to sue on a bill of lading?

The carrier, the shipper, the consignee and an endorsee of a bill of lading can sue under a bill of lading. It is noteworthy that a notified party cannot sue under a bill of lading except if the bill of lading is so endorsed to him or her.

Law stated - 30 May 2024

Charter parties

- 44** | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The terms of a charter party can be incorporated into the bill of lading by general or specific reference. All terms of the charter party may be incorporated. The terms of a charter party incorporated into a bill of lading, including jurisdiction and arbitration clauses, are binding on an endorsee of the bill of lading or a third-party holder. However, where such terms are not expressly incorporated, the arbitration clause will not bind a third-party holder of the bill of lading except where the bill of lading has been specifically marked to make the arbitration clause binding.

Law stated - 30 May 2024

Demise and identity of carrier clauses

- 45** | Is the 'demise' clause or identity of carrier clause recognised and binding?

The Hague and Hamburg Rules both apply in Nigeria. However, the Court has held that the Hague Rules may apply by a clause paramount in an inbound contract of carriage. Accordingly, the demise clause or identity of carrier clause may be recognised and binding

in such instances. However, this will not be the case where the Hamburg Rules apply as the demise or identity clause derogates from the Hamburg Rules, which prohibits any provision that derogates from it.

The demise or identity clause treats the carrier as an agent of the shipowner, thereby excluding the carrier from liability where the ship is not owned or chartered by the carrier. The Hamburg Rules create responsibilities for both the carrier and shipowner. It distinguishes between a carrier – a person in whose name a contract of carriage of goods by sea has been concluded by the shipper, and an actual carrier – any person to whom performance of the carriage or part of the performance of the carriage has been entrusted by the carrier. The rules make the carrier liable for the entire carriage and the actual carrier liable for the part of the carriage that he performs. As the demise or identity clause seeks to exclude the carrier from liability despite the strict responsibilities of the carrier under the Hamburg Rules, it will not be recognised and binding because it derogates from the provision of the Hamburg Rules.

Law stated - 30 May 2024

Shipowner liability and defences

- 46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Ship owners are not liable for cargo damage where they are not contractual carriers. The Bill of lading is a contract between the parties to it. Where ship owners are not contractual carriers, they cannot rely on the terms of the bill of lading unless they have acted as the carrier's agents and the bill of lading, pursuant to the Himalaya clause, provides that the carrier's agents may rely on its terms.

Law stated - 30 May 2024

Deviation from route

- 47 | What is the effect of deviation from a vessel's route on contractual defences?

Fundamentally, deviation is a breach of the carrier's obligations that disentitles him or her of any defences under the contract, such as the right to limit liability. The carrier will be liable for any resulting damages or loss arising from such deviation, except it was for the purposes of saving life or property or for any other purposes that may be agreed in the carriage contract.

Law stated - 30 May 2024

Liens

- 48 | What liens can be exercised?

The two broad descriptions of liens are maritime and statutory liens. Maritime liens attach to the vessel and can be exercised against the vessel irrespective of the fact that ownership in the vessel would have changed hands. They are essentially claims bordering on salvage, damage done by a ship, master or crew member wages, or master's disbursements. Statutory liens, on the other hand, can only be exercised where the person who will ordinarily be liable *in personam* (the relevant person) was when the cause of action arose, the owner or charterer of or in possession or in control of the ship if the relevant person is either the beneficial owner of the ship as it respects all the shares in it or the charterer under a charter by demise as provided by section 5(4)(a) of the Admiralty Jurisdiction Act (AJA) 1991. The claims here include wreck removal, loss of life and personal injury, and ports, waterways, canal and pilotage dues as prescribed by the Admiralty Jurisdiction Act 1991 and Merchant Shipping Act 2007.

Maritime liens can also be exercised on a sister ship- beneficially owned by the liable party when the action is brought. The carrier may exercise a possessory lien on the cargo for unpaid freight and a charterer can exercise a lien arising in common law on the cargo for unpaid hire.

Law stated - 30 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The carrier will be liable for the entire loss or damage resulting from the delivery of cargo to any person without the production of the bill of lading. The carrier's liability in this instance cannot be limited.

Law stated - 30 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper is responsible for marking and labelling dangerous goods and informing the carrier of the dangerous nature of goods upon handover.

Where the carrier and actual carrier has no knowledge of the goods' dangerous character due to the fault or negligence of the shipper and/or his or her agents, the shipper is liable to the carrier and actual carrier for any loss resulting from the shipment.

The shipper is also responsible for the contents, quantity and state of the goods when the bill of lading is described as said to contain, shipper's load and count or in such similar phrase, which presupposes that the carrier did not take part in the stowing, packing or loading of the goods and as such not responsible for any loss or misstatement contained thereto.

Law stated - 30 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Although Nigeria has domesticated the International Convention for the Prevention of Pollution from Ships 1973/1978 and the Annexes thereto and accordingly the Convention is in force in Nigeria, there is yet to be any Regulation in place setting out an Emission Control Area (ECA). Consequently, there is currently no ECA in force in Nigerian territorial waters.

Law stated - 30 May 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

Petroleum products are regulated by the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA), which has specified sulphur cap of 0.5 per cent m/m. Although Nigeria has ratified and domesticated the International Convention for the Prevention of Pollution from Ships, 1973/1978 MARPOL Annexes I-V, it has not, however, made Annex VI Regulations. However, the Flag and Port Regulators have, through notices, engagements and residual powers begun to implement the 0.50 per cent sulphur cap specified by MARPOL Annex VI Regulations introduced in January 2020.

Enforcement

The Port Regulator, the Nigerian Ports Authority (NPA), vide Public Notice No. 4148, informed all mariners that effective 1 April 2021, that the Authority shall commence enforcement of the MARPOL Annex VI Regulation in line with the International Maritime Organization Convention on Sulphur limit on marine bunker fuel oil.

The Flag Regulator, NIMASA, has developed draft regulations for implementing MARPOL and continue to push for its domestication. It has engaged with fuel suppliers to ensure quality and availability of fuel with a 0.50 per cent sulphur cap in liaison with the NMDPRA (the then Department of Petroleum Resources), liaised with Standard Organisation of Nigeria to modify petroleum standard to 0.50 per cent sulphur cap, and placed marine notices on the sulphur cap limit implementation.

Section 32(nn) of the Petroleum Industry Act, 2021 gives the NMDPRA the power to monitor and ensure that the quality of petroleum products sold in Nigeria conforms to defined specifications.

Sanctions

An infraction of the Sulphur Cap Regulation attracts a US\$2,000 penalty imposed by the Nigerian Ports Authority in its Marine Notice, while the NMDPRA will not grant entry or permit the discharge of fuel cargo that does not conform to the sulphur cap.

Law stated - 30 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction?
| Are there any ship recycling facilities in your jurisdiction?

No international ship recycling regulations apply in Nigeria. The Merchant Shipping Act 2007 and Nigerian Maritime Administration and Safety Agency (NIMASA) guidelines regulate ship recycling in Nigeria. The NIMASA guidelines are similar to the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009, which has neither been ratified nor domesticated in Nigeria by entitling NIMASA to issue ship scrapping and ship scrapping facility permits.

Yes, there are ship recycling or scrapping facilities in Nigeria, approved and published by NIMASA.

Law stated - 30 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The Constitution of the Federal Republic of Nigeria and the Admiralty Jurisdiction Act (AJA) vests exclusive jurisdiction over any admiralty matter in the Federal High Court (FHC). In practice, there have been some complexities, however, in matters regarding seamen and wages. A constitutional amendment introduced the National Industrial Court of Nigeria (NICN) and vested it with jurisdiction over matters relating to labour, wage payment, employment and entitlement, among others. This provision was made despite the statutory recognition of claims relating to wage and entitlements payment of masters, officers, and other crew members of the ship regarding their employment on the ship as a top ranking maritime lien over which an action can be brought against the ship itself.

The complexity is that the NICN does not have any jurisdiction to arrest a ship as security for claim like the FHC does. Accordingly, seamen are divested of their right to bring an action against the ship, where the ship can be arrested as security for the claim, as the FHC does. Accordingly, seamen are divested of their right to bring an action against the

ship, where the ship can be arrested as security for their claim. There have been a number of pronouncements on this matter in the FHC and NICN. So presently, we have a situation where a master, who wishes to claim for wages, may commence an *in rem* action at the Federal High Court, for the purposes of obtaining security for the claim and then proceed to the National Industrial Court for trial in the suit.

The Court of Appeal, recently stretched the dichotomy further when it held in *The Vessel MT Sam Purpose (Ex MT Tapti) & Anor v Amarjeet Singh Bains & 6 Ors* that the NICN by virtue of section 254C(1) of the Constitution of Nigeria, is clothed with jurisdiction to hear claims with respect to wages of the crew of a ship.

Law stated - 30 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The Rules of Court that govern service of court proceedings on a defendant located out of jurisdiction in shipping and admiralty matters are the Federal High Court (Civil Procedure) Rules 2019, the Admiralty Jurisdiction Procedure Rules 2011 and the Sheriffs and Civil Process Act, Laws of the Federation of Nigeria 2004.

Generally, for service of court processes outside the jurisdiction of the court, the applicant must first obtain the leave of the Court, which said leave must prescribe the mode of such service. There must be a record of such service, in every Registry, which must be entered by the officer who executed same in addition to filing an affidavit/proof of service in the Court's file.

Law stated - 30 May 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

Yes, there are several domestic arbitral institutions in Nigeria.

The Chartered Institute of Arbitrators (Nigeria) is well disposed to set up specialised panel to address specific challenges such as a panel of specialist maritime arbitrators.

The Maritime Arbitrators Association of Nigeria is, however, a specialised maritime arbitral institution that is significantly active in resolving maritime disputes.

Law stated - 30 May 2024

Foreign judgments and arbitral awards

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57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The rules that govern foreign judgments and arbitral awards differ.

Foreign judgments

The Foreign Judgment (Reciprocal Enforcement) Act 2004 (FJA) and Reciprocal Enforcement of Judgment Act Ordinance 1958 (REJ) both govern the Enforcement of Foreign Judgments in Nigeria. The FJA and REJ make the registration and enforcement of foreign judgments dependent on the principle of reciprocity. However, reciprocal status is granted to countries listed in the REJ, while the FJA authorises the Minister of Justice to make orders regarding countries to benefit from the reciprocal enforcement regime for the provisions of the FJA to apply. The FJA remains inoperative as the Minister of Justice has made no order and the FJA, the latter legislation, did not repeal the REJ. The Supreme Court has held that the REJ applies until the required orders are made by the Minister of Justice under the FJA.

Arbitral awards

Although the FJA includes arbitral award in the definition of judgment and provides for the enforcement of such awards on a reciprocal basis, the FJA is still inoperative as the minister has made no pronouncement on countries to enjoy reciprocal enforcement.

The Arbitration and Conciliation Act 2004 provides for two ways to enforce an award, which are:

- recognition of an award as binding on the parties despite the jurisdiction wherein it was granted. The party seeking to enforce an award shall present the court with an authenticated original award and the original arbitration agreement or certified true copies. Where the award was not granted in English, the party shall provide a duly certified English translation; and
- the domestication of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards by Nigeria as part of the Arbitration and Conciliation Act 2004, which recognises and enforces awards from contracting states on a reciprocal basis.

An arbitration award under the International Centre for Settlement of Investment Disputes can also be enforced by a deposit of the award certified by the Secretary-General of the Centre with the Supreme Court and its enforcement as a judgment of the Supreme Court.

Law stated - 30 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Jurisdiction and arbitration agreements are treated differently in maritime disputes.

The AJA provides a wide ambit of matters over which the Nigerian courts may exercise jurisdiction, thereby eliminating the Common Law principle of the court exercising its discretion to assume jurisdiction or not through the Brandon Tests and the assessment of whether a foreign jurisdiction clause is 'real, genuine, bona fide, legal, reasonable and not capricious and absurd'.

According to section 20 of the AJA, any agreement seeking to oust the Court's jurisdiction shall be null and void if:

- Nigeria is the place of performance, execution, delivery or where default takes place;
- Nigeria is or was the place of residence of any of the parties;
- payment was made or will be made in Nigeria;
- under any convention in force to which Nigeria is a party; and
- the Nigerian Court opines that the matter, action or cause should be adjudicated upon in Nigeria.

Accordingly, an asymmetric jurisdiction agreement that seeks to deprive the Nigerian courts of exercising jurisdiction in the above circumstances will not be valid and enforceable in Nigeria.

Arbitration is, however, treated differently as an arbitration agreement is binding on its parties unless any of the vitiating elements of contract is proved. The Nigerian courts are increasingly demonstrating a strong commitment to uphold arbitration agreements and giving effect to the intention of the parties thereunder.

Law stated - 30 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

If the claimants issue proceedings in a jurisdiction other than that specified in the agreement, the defendant may enter a conditional appearance and file an application in protest requesting the court to stay proceedings or decline jurisdiction to hear the matter and order that parties comply with the terms of their contract. In shipping and admiralty matters in Nigeria, the defendant may issue proceedings in Nigeria as specified in the agreement and may file an application for anti-suit injunction stopping the proceedings. It should be noted that section 20 of the AJA, 1991 nullifies any agreement that seeks to oust the jurisdiction of Nigerian courts on admiralty matters under the AJA. Accordingly, Nigerian courts will entertain any matter that falls under the wide ambit of matters in section 20 of the AJA 1991 over which it will exercise exclusive jurisdiction despite a foreign jurisdiction clause unless there are compelling and extenuating circumstances to act otherwise.

Law stated - 30 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

Where domestic court proceedings breach a clause for a foreign Court or tribunal to exercise jurisdiction over a matter, the defendant, while filing a conditional appearance, may apply to the Court to stay proceedings for it to commence the action in the Court or tribunal specified in the agreement without filing a defence. If the matter falls within the wide ambit of matters over which the court will exercise mandatory jurisdiction under section 20 of the AJA, the clause will be considered null and void.

Where it does not, the Court will exercise its discretion on whether to grant the stay based on certain principles. These include determining whether the defendant seeking for a stay genuinely desires and has taken steps to commence proceedings in the agreed court or arbitral tribunal and if they are merely seeking procedural advantages or their readiness to proceed with the arbitration, considering the impacts of the stay on the justice of the case, among others. Please see section 5 of the Arbitration and Conciliation Act as interpreted in *Onward Enterprises Ltd v MV Metrix* (2010) 2NWLR (Pt. 1179) p.530 @ p554 to the effect that such a defendant must have commenced arbitration proceedings to show commitment to be entitled to a stay order. The burden of convincing the Nigerian courts to adjudicate over a matter despite a foreign Court or tribunal provision in the agreement is on the claimant – the party initiating proceedings in Nigeria.

In domestic arbitral proceedings, a clause providing for a foreign tribunal to have jurisdiction is enforceable in Nigeria.

Law stated - 30 May 2024

LIMITATION PERIODS FOR LIABILITY**Time limits****61** | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The Admiralty Jurisdiction Act provides that except where a statute stipulates a different time limit, the time limit for bringing a maritime claim is three years.

If the contract of carriage under the bill of lading is pursuant to the Hamburg Rules, applicable in Nigeria, the limitation period will be two years, as stipulated therein.

However, if the claim is exclusively commenced under the tort of negligence, for example, bailment, the limitation period will be six years.

It is unlikely for the courts to uphold or enforce an agreement extending the time limit. However, where the breach of contract relates to failure to pay debt, any letter or memorandum acknowledging the debt will operate to renew the time limit from the date of such acknowledgment.

It is necessary to point out that in the case of arbitration, both the arbitral proceedings and the enforcement of any award arising therefrom must be undertaken within the limitation period as held by the Supreme Court in *City Engineering (Nig.) Ltd v Federal Housing*

Authority (1997) 9 NWLR (Pt.530) p. 224; 1997 LPELR-868(SC). See also section 7(1)(d) of the Limitation Act 1966.

Law stated - 30 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Courts and arbitral tribunals do not extend time limits specified in a statute. However, where the time limits are specified in Rules of Courts or Arbitral Rules and meant to guide proceedings, a court or an arbitral tribunal may extend the time limit pursuant to any provisions of the Rules allowing for such.

Law stated - 30 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention was ratified by Nigeria in 2006 but is yet to be domesticated in Nigeria. According to Nigerian law, an international convention will not come into force until its enactment as a law of the Federal Republic of Nigeria. Nevertheless, certain provisions of the Merchant Shipping Act are similar to those of the Maritime Labour Convention. Accordingly, the Nigerian Maritime Administration and Safety Agency (NIMASA) enforces these provisions, such as issuing Maritime Labour Certificates and a countersigned Declaration of Maritime Labour Compliance to Nigerian flagged vessels, among others.

Law stated - 30 May 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

The court upholds the principle that parties are bound by their contracts and rarely interferes with the agreement of the parties except where fraud, undue influence, duress and misrepresentation can be proved. The courts are inclined to enforcing the contracts as agreed by the parties unless a force majeure situation beyond the parties' control occurs. The courts do not recognise economic conditions making contractual obligations more

onerous to perform as a ground for granting relief from the strict enforcement of the legal rights and liabilities of parties to a shipping contract.

Law stated - 30 May 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Yes.

The Coastal and Inland Shipping (Cabotage) Act 2003 (Cabotage Act) being implemented by the NIMASA and the Nigerian Oil and Gas Industry Content Development Act 2010 (Local Content Act) being implemented by the Nigerian Content Development and Monitoring Board have a huge impact on shipping in Nigeria. The aim of the two Acts of the National Assembly is to develop local content in shipping business by encouraging and/or facilitating more participation of Nigerian citizens in the shipping industry through joint venture, technology transfer and human capital development, including training of seafarers. In this regard, the Cabotage Act and the Local Content Act give preference to vessels wholly built, owned and manned by Nigerians to operate in Nigerian territorial waters and used as offshore support vessels. The Cabotage Act also mandates all vessels engaged in Nigerian coastal trade to pay 2 per cent of the contract sum into the established Cabotage Vessel Financing Fund, which is meant to assist indigenous shipowners to acquire vessels. The effect of the local content policy initiated by the Nigerian government on shipping participation, vessel acquisition and manning has led to the increase recorded in the number of Nigerian registered fleet, more business opportunities and manpower and seafarers' development in recent years.

It needs also to be emphasised that the Minister of Transport, through NIMASA, may grant waivers to any person, upon application, where he or she is satisfied that no Nigerian vessel with the necessary requirements is available to perform the service described in the application.

The increase in freight and clearing charges is another issue of concern. Recently, the Nigerian government through the Nigeria Customs Service (Customs) introduced a Vehicle Identification Number Valuation Policy for vehicles imported into Nigeria. The effect of the policy is that duty on imported vehicles is determined by the value ascribed to the vehicle as generated electronically through the VIN as against the actual price the vehicle might have been bought by the consignee. The introduction led to strike action by freight forwarders and other stakeholders. The policy was suspended but Customs has announced resumption of the policy. The policy runs contrary to established economic principles as prices are hardly uniform and mostly determined by forces of demand and supply and parties' bargaining strength.

Law stated - 30 May 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Chief Judge of the Federal High Court, Honourable Justice Terhemba Tsoho, in the exercise of his powers, passed the latest Admiralty Jurisdiction Procedure Rules (AJPR), 2023, which has introduced some dynamic and transformative changes within the Nigerian admiralty practice within the past year. The AJPR 2023 revoked the earlier AJPR 2011.

There are several bills for fresh enactments or amendments to existing laws currently pending at the National Assembly relating to Shipping. They include:

- the Nigerian Ports and Harbours Authority Bill;
- the Maritime Security Agency (Establishment) Bill;
- the Nigerian Maritime Zones Act (Repeal & Re-enactment) Bill;
- the National Inland Waterways Authority (Amendment) Bill;
- the Coastal and Inland Shipping (Cabotage) Act Amendment Bill; and
- the National Transport Commission Bill.

Law stated - 30 May 2024



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

The question of when the title to a ship passes is subject to contractual freedom. This means that the parties are free to agree when the title shall pass from the shipbuilder to the shipowner. The parties normally agree that the title to a ship passes at the completion of the building process upon delivery of acceptance. This is also the standard regulation in article XI 1 of the Norwegian Standard Form Shipbuilding Contract (SHIP 2000). An alternative is to agree that the title shall pass to the shipowner during construction, either progressively or in stages. This will be a suitable solution for security should the shipbuilder be unable to provide a refund guarantee for any pre-delivery instalments.

If the parties have not agreed on when the title shall pass to the shipowner, the question will be resolved on the basis of Norwegian background law. The Norwegian Sale of Goods Act of 13 May 1988 No. 27 (the Sale of Goods Act) applies to the purchase of ships. However, the act does not explicitly regulate when the title to goods, such as ships, passes. Thus, the passing of title has to be determined by what specific rights the seller and the buyer have in the goods at the different stages of the transaction process. If the seller no longer has the right to exercise retention and rescission, the title is normally considered to have passed. In general, the seller will lose its right to retention and rescission upon delivery.

The transfer of ownership to the ship will normally be evidenced by a bill of sale, a builder's certificate or both, and a protocol of delivery and acceptance.

The buyer will obtain legal protection against competing third parties, including protection against possible attachments from the creditors of the shipbuilder, by registering the ownership in one of the Norwegian registries (Norwegian Ordinary Ship Register or Norwegian International Register) or a foreign ship registry. If the parties agree that the transfer of title shall pass during construction, the ownership may be legally protected through registration in the Register of Ships under Construction (BYGG) until complete ownership is obtained.

Law stated - 2 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

Assessing the validity of a refund guarantee is, in principle, the same exercise as evaluating any other promise under Norwegian law. Legal commitment requires that the person giving the promise is authorised to bind the principal, or at least appear to have such powers. There are no formal requirements as to the format of the guarantee. However, the guarantee has to constitute an intention to be legally bound. If the guarantee is unclear with respect to essential items of its content, such as the secured amount or under what

conditions it becomes due, the guarantee is less likely to be considered as an intention to be legally bound by Norwegian courts. The same will be the case if the alleged guarantee undertaking is given in an unusual format.

Law stated - 2 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Local courts and enforcement authorities have the authority to enforce the definite delivery of the vessel. Definite delivery requires a ground for enforcement that must be enforceable. This will typically be an enforceable judgment or arbitration award stating that the yard must deliver the vessel in exchange for the buyer paying a specific amount to the shipyard. The process of obtaining a ground for enforcement is normally time-consuming.

If time is of the essence, the shipowner may seek to obtain temporary delivery of the vessel until a final decision is made by applying to the local courts for a preliminary injunction. To be granted a preliminary injunction, the shipowner has to substantiate that the claim for delivery is most likely to succeed, as well as a basis of security. A basis of security will be present when a temporary arrangement must be made to avert considerable loss or inconvenience. This may be the case if the shipowner has ordered the vessel to serve under a charter party and risks defaulting under its terms owing to the shipbuilder's rejection of delivery. In addition, it is a requirement that the loss or inconvenience inflicted upon the yard by such a measure cannot clearly be disproportionate to the interests of the shipowner.

The court may also require the claimant to provide security for any compensation to the shipyard that the shipowner may be liable for. This could be a deposit of an amount that equals the shipbuilders's demand payment or a bank guarantee.

Law stated - 2 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Shipowner

Claims from the shipowner may, in principle, be based on the Sale of Goods Act. However, as the act is not mandatory, and the shipowner in practice always enters into a contract with the shipbuilder that provides for the regulation of liability, any claims will foremost be subject to the provisions of the shipbuilding contract. SHIP 2000 is the standard form of contract most commonly used in Norway. Norwegian shipyards have their own standard contracts; however, most of such contracts are in line with the principles of SHIP 2000. With

respect to defects discovered before the delivery and acceptance, article VII (d) provides that the shipowner will be entitled to reject delivery provided that the deficiencies are not of minor importance or the shipbuilder cannot rectify the matter within a reasonable time. The shipbuilder may, however, require the buyer to take delivery provided that the shipbuilder undertakes to rectify the defect as soon as possible and indemnify the shipowner for any loss incurred as a consequence thereof. With respect to deficiencies discovered after delivery, article X provides that the shipbuilder's liability is limited to remedying the defect itself, and that the shipbuilder shall have no liability for any damage or loss caused as a consequence of the defect, except for repair or renewal of the vessel's parts that have been damaged as a direct and immediate consequence of the defect without any intermediate cause, and provided such part or parts can be considered to form a part of the same equipment or system. However, the limitation of liability only applies as long the deficiencies are remedied within a reasonable time. If the deficiencies are not remedied within a reasonable time, the shipowner may claim all remedies made available in the background law, under the Sale of Goods Act.

The shipowner will generally not be entitled to raise claims towards the shipbuilder based on rules of product liability as these do not cover damage to the product itself. Nor will the shipbuilder generally be entitled to claim compensation based on ordinary principles of tort law. This is because liability for unsatisfactory performance will normally be considered exhaustively regulated by the shipbuilding contract. To claim compensation based on ordinary principles of tort law the shipowner must justify that the negligent act alleged to establish liability is not comprised by the contract in a wider sense, which generally will be hard to prove. That said, if the shipbuilder has breached the contract wilfully or by gross negligence, the Norwegian courts are likely to set aside any limitation of liability, making the remedies in the background law available to the shipowner.

Purchaser

A purchaser who has taken legal assignment of the shipbuilding contract will be in the same position as the original shipowner with respect to making claims against the shipbuilder. Pursuant to SHIP 2000 article X fifth paragraph, the buyer can assign its rights under the warranty, but only subject to the shipbuilder's consent. Consent cannot, however, be unreasonably withheld or delayed. A valid reason for not giving consent may be that the assignment will lead to extra costs or additional work. If the purchaser has not taken assignment of the shipbuilding contract, the purchaser will, in principle, be in the same position as any other third party. This said, the purchaser may under certain conditions make direct claims against the shipbuilder based on general principles of Norwegian contractual law. A minimum condition to make such direct claim is that the purchaser was cautiously unaware of an eventual assignment restriction.

Third party

A third party may make claims against the shipbuilder based on the provisions of the Norwegian Product Liability Act of 23 December 1988 No. 104 (the Product Liability Act), which is based on EC Council Directive 85/374/EEA. Pursuant to the Product Liability Act the shipbuilder is liable for personal injury or death caused by security defects in the vessel.

The shipbuilder may therefore face claims from crew and other personnel being injured by unsecure installations on the vessel. Furthermore, the Product Liability Act states that the shipbuilder is liable for damage to property caused by security defects on the vessel. However, only to the extent the damaged property is intended and used for private use or consumption. For this reason, the shipbuilder is only likely to face claims for damage to property if the vessel's operations involve consumers (eg, passenger ferries). Pure economic loss (not related to physical damage) is not in any case recoverable under the Product Liability Act.

In addition to claims based on product liability, the shipbuilder may face claims from third parties based on general principles of tort law. However, for a third party to be heard with such an allegation, the third party must justify that incurred loss is not too remote to be recognised as compensable and further that the damage has a causal connection to negligent behaviour by the shipbuilder (eg, during the construction), which generally will be demanding to prove.

Finally, the shipbuilder may be held liable by a third party based on rules of strict liability for products with inherent extraordinary risks, which have obvious parallel to the product liability.

Law stated - 2 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Registration of vessels

Vessels flying the Norwegian flag are either registered in the Norwegian Ordinary Ship Register (NOR) or the Norwegian International Register (NIS).

NOR

To be eligible for registration in NOR, the vessel must be a Norwegian ship. A ship is considered Norwegian if, firstly, it has a sufficiently close link to Norway, demonstrated by the fulfilment of certain ownership and management requirements, and it is not registered in the ship registry of another country. The latter requirement applies to all ships except those bareboat registered in Norway.

Second, the ship cannot be registered in NIS.

Third, the ship has to be either 7 metres long, subject to a registration requirement under the Act of 26 March 1999 No. 15 relating to the right to participate in fishing and catching or used exclusively or mainly in trade.

Registration is mandatory for all vessels of 15 metres or more fulfilling the three above-mentioned requirements.

NIS

To be eligible for registration in NIS, the vessel must be categorised as either a self-propelled passenger or cargo ship, a hovercraft, a drilling platform or other type of mobile floating installation. Other types of vessels, such as fishing and pleasure vessels, cannot be registered in NIS.

NIS is open for registration for both Norwegian ships (see requirements above) and non-Norwegian vessels. However, for non-Norwegian vessels, there are some additional requirements with respect to the management of the vessel and the owner's representation in Norway.

Registration in NIS has certain disadvantages compared to registration in NOR, (eg, NIS-registered cargo and passenger ships are not permitted to carry cargo or passengers between Norwegian ports or to engage in regularly scheduled passenger transport between Norwegian and foreign ports).

Registration of vessels under construction

Vessels under construction in Norway or contracts for the construction of vessels in Norway may be registered in the Shipbuilding Register (BYGG), a sub-division of NOR, provided that the vessel's length is at least 10 metres. An application for registration must be made by the owner if the vessel is under construction, or by the buyer in the case of a shipbuilding contract.

Law stated - 2 May 2024

6 | Who may apply to register a ship in your jurisdiction?

Shipowner

NOR

A shipowner may apply to register a ship in NOR, provided that certain ownership and management requirements are fulfilled (in addition to the other eligibility requirements set out above). The ownership and management requirements are set out in the Norwegian Maritime Code of 24 June 1994 No. 39 (the Norwegian Maritime Code) section 1 (and in section 4 with respect to certain ships). The ownership requirements demonstrate that the ship has a genuine link to Norway.

If the shipowner is an individual, the person has to be a Norwegian national. If the vessel is owned by a company where the participants have unlimited liability for company debts, Norwegian nationals must hold at least 60 per cent of the company. If the vessel is owned

by a limited partnership, Norwegian nationals must hold at least 60 per cent of the general partnership capital and at least 60 per cent of the limited partnership capital. If the vessel is owned by a company with limited liability, 60 per cent of the shares and their voting rights must be held by Norwegian nationals, the company's head office and registered address must be in Norway and the majority of the directors, including the board chairman, have to be Norwegian nationals who are resident in Norway and have lived in Norway for the past two years.

However, entities and nationals of another country within the European Economic Area (EEA) will receive equal treatment to Norwegian entities and nationals. It is a requirement that the vessel is a part of the shipowner's commercial activities established in Norway and that the ship is operated from Norway. A ship used for recreational purposes and for commercial activities may be owned by a person who is residing in Norway and is a citizen of a state connected to the EEA Agreement. If the shipowner does not have permanent residency in Norway, the shipowner shall appoint a representative resident in Norway who is a national of an EEA country with the authority to accept the legal process on behalf of the shipowner.

If the shipowner does not satisfy the ownership requirements, the Ministry of Trade, Industry and Fisheries, Maritime Department may grant dispensation. For as long as the applicant demonstrates that the vessel otherwise has a genuine link to Norway, our experience is that exemptions may be granted easily.

NIS

Shipowners being eligible to register a ship in NOR, may also apply to register a ship in NIS. In addition, NIS is also open for shipowners not qualifying for NOR registration. However, it is required that the shipowner have a representative in Norway who can accept writs on behalf of the shipowner. In addition, the technical or commercial management of the vessel must be carried out by a Norwegian shipping company with its head office in Norway or by one of its management offices abroad.

Bareboat charterer

NOR

A bareboat charterer is allowed to register a ship in NOR for a period of up to 10 years (not exceeding the term of the bareboat charter party), provided that the bareboat charterer meets the ownership and management requirements for NOR registration set out above and the ship is otherwise eligible for NOR registration.

NIS

A bareboat charterer may also register a ship in NIS for a period of up to 10 years (not exceeding the term of the bareboat charter party), provided that the bareboat charterer

meets the requirements for NIS registration set out above, and the ship is otherwise eligible for NIS registration.

Law stated - 2 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

The documentation requirements for mandatory registration in NOR are:

- application for a certificate of name;
- notification for a registration form;
- tonnage certificate;
- confirmation of survey;
- documentation evidencing ownership (eg, original bill of sale, original builder's certificate or another title document):
 - if the vessel is a new building, a builder's certificate and (usually) a protocol of delivery and acceptance are required; and
 - signatures on a title document issued abroad must be notarised and thereafter legalised with an apostille;
- documentation of the shipowner's nationality:
 - all entities (not individuals) must submit a declaration of nationality demonstrating the fulfilment of the ownership requirements in the Norwegian Maritime Code section 1;
 - additional documentation requirements apply to non-Norwegian shipowners within the EEA who are not resident in Norway;
 - companies and private individuals have to fill in a form confirming the appointment of a Norwegian representative; and
 - companies have to provide a management agreement confirming that the vessel is a part of the shipowner's economic activities established in Norway and that the vessel is operated from Norway;
- statement of deletion or non-registration from the vessel's previous ship registry or country; and
- applicable ship certificates and certificates for maritime personnel.

The documentary requirements for registering in NIS are similar to those required for NOR, except for the shipowner not being required to declare national affiliation to Norway or another country within the EEA. However, foreign shipowners outside the EEA have to provide documentation confirming the appointment of a Norwegian process agent and documentation confirming that the vessel is operated by a Norwegian shipowner. The latter may be demonstrated by a management agreement. In addition, if the shipowner

is a foreign-registered company, the shipowner must produce corporate documentation equivalent to a Norwegian certificate of registration.

As of 1 January 2024, the Norwegian Maritime Code was amended to allow for electronic registration of deeds and mortgages in NOR, NIS and BYGG.

Law stated - 2 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration has been allowed in Norway since 1 July 2020. Vessels registered in NOR and NIS are allowed to be temporary bareboat registered in a foreign ship registry, and vessels registered under the flag of a foreign ship registry are allowed to be temporarily bareboat registered in NOR or NIS. The vessel shall sail under the flag of the state where the vessel is bareboat registered and will operate under the laws and jurisdiction of such state. However, private law aspects, such as ownership and mortgages over the vessel, remain governed by the primary register and the laws of that state.

To bareboat register a vessel in NOR or NIS, the bareboat charterer must prove the fulfilment of the same ownership and management requirements that apply to ordinary applicants. In addition, the bareboat charterer has to provide, among other things:

- a copy of the bareboat charter party;
- a transcript of the ship registry in the primary state that states who is the owner of the vessel and all other persons with rights in the vessel;
- written consent to bareboat registration in the relevant Norwegian registry from the shipowner and all others with registered rights in the vessel; and
- documentation from the ship registry in the primary state showing that the vessel is allowed to be bareboat registered in the relevant Norwegian registry and sail under the Norwegian flag.

Vessels sailing under the Norwegian flag are allowed to be bareboat registered in the registry of a foreign country, provided that the shipowner provides, among other things:

- a copy of the bareboat charter party;
- written consent to bareboat registration in the relevant foreign registry from the shipowner and all others with registered rights in the vessel; and
- documentation from the foreign ship registry showing that the vessel is allowed to be bareboat registered in the registry.

The period for bareboat registration will be limited to the term of the bareboat charter party and can be a period of up to 10 years, however, it is possible to apply for an extension.

Law stated - 2 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

Ship mortgages are registered in ship registries (NOR, NIS and BYGG), which are subject to the administrative control of the Norwegian Maritime Authority. The registry contains information on registered rights in the vessel and their priority. If the mortgages registered contain clauses stating that sale and further mortgages are forbidden, this will also be noted in the registry.

Law stated - 2 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Norway is a party to the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC), and the amendment in the 1996 Protocol. The convention and the amendments are implemented in the Norwegian Maritime Code. The increased limits on liability announced by the International Maritime Organization on 19 April 2012 have also been implemented in the Norwegian Maritime Code.

The persons entitled to limit their liability include the shipowner, the ultimate owner, the charterer and managers, operators and salvors, as well as any person for whose act, neglect or default those parties are responsible, and the liability insurers of any of those parties. The right to limitation also applies internally between the mentioned parties, which, for example, means that the charterer will be able to limit liability for claims made by the owner.

The limitation regime is only available for claims associated with ships. To be defined as a ship, the construction must have certain minimum dimensions and must be capable of carrying passengers or goods.

The Norwegian Maritime Code sections 172 and 172a describe the types of claims that liability can be limited. The legal basis for the claim is irrelevant (eg, a limitation is available irrespective of the claim being based on tort law, strict liability or contract). The right to limit liability applies to claims in relation to:

- loss of life, personal injury or property damage, provided that the damage has occurred on board or in direct connection with the operation of the ship or salvage;
- losses resulting from delay in the carriage by sea of goods, passengers or their luggage;
- other damage of a non-contractual nature arising in direct connection with the operations of the ship or salvage;
-

expenses to avert or minimise liability that otherwise would have been subject to the limitation regime, as well as loss due to such measures; and

- certain expenses related to clean-up measures after maritime accidents.

The Norwegian Maritime Code section 173 lists claims that are exempted from limitation:

- claims for salvage and general average contributions, as well as agreed remuneration for measures to avert or minimise liability and agreed remuneration for wreck removal, etc;
- claims relating to oil pollution damage, as these are subject to a different set of rules;
- claims relating to nuclear damage;
- claims related to damages or injury caused to an employee being engaged in the operations of the ship; and
- claims for interests or costs associated with a claim for which liability can be limited.

Law stated - 2 May 2024

Procedure

11 | What is the procedure for establishing limitation?

The right to limit liability is available irrespective of a limitation fund being established. Thus, the party being liable can invoke the right to limit claims made by the creditors without establishing a fund and is free to settle any claims directly and informally with the creditors. However, if a new creditor comes forward after the settlement, the debtor will remain liable and obliged to pay the new creditor as if the claim had been made before the settlement. This risk is avoided by establishing a limitation fund.

A limitation fund can only be established after the creditors have initiated legal proceedings to enforce a claim being subject to limitation or after the creditors have filed a petition for arrest to temporarily secure such a claim. The authority to establish a fund is given to the court where the arrest or other relief has been sought or in the district where arbitration proceedings are initiated. The fund is established by a court order made on the request of the liable party or its liability insurer and requires payment of the amount to which limitation is limited or other security. In practice, the latter will be an indemnity from the insurer. Once the fund is established, the creditors are given a deadline for notifying claims. Claims filed after the deadline will be disregarded. However, if the fund is released following a settlement, the claim will still be valid and can be pursued.

Law stated - 2 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The Norwegian Maritime Code Section 174 incorporates article 4 of the LLMC and provides that liability cannot be limited if the liable person has caused the loss intentionally or through gross negligence and with the knowledge that such loss is likely. In the Supreme Court judgment Rt. 1989 p.1318 (p.1322) the court describes gross negligence as 'a clear deviation from ordinary reasonable expectable behaviour. There must be behaviour that is particularly blameworthy, where the person is significantly more to blame than where there is a question of ordinary negligence'. As to the second condition, it is not sufficient that the person who caused the damage ought to have understood that damage would probably result. To trigger unlimited liability, the person in question must in fact have had this knowledge.

Entities being subject to liability will be identified with the top management when assessing whether the limitations shall be broken. This means that if one of the top management has caused loss by gross negligence and with the knowledge that such loss was likely to incur, this will make the entity incur unlimited liability. However, it is unclear to what extent the liable entity will be identified with other employees and persons acting on its behalf. However, in legal theory, it is assumed that the negligent person at least must have a significant level of authority to be identified with the entity itself.

In Norway, there have been no Supreme Court cases where the limitation has been broken. Thus, it is unclear what happens with any fund that has been established. However, it is assumed that the liable person would be liable for the full financial loss and that the creditors are entitled to pursue compensation for any loss not covered by the fund.

Law stated - 2 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

With respect to injury or damage to persons or luggage, the Norwegian limitation regime is based on the Athens Convention of 1974 (as amended by the 2002 Protocol), and Regulation (EC) 392/2009. The convention and regulation are implemented in the Norwegian Maritime Code Chapter 15, Part III. With regard to delay, the Norwegian limitation liability regime is mainly based on Regulation (EU) 1177/2010. The regulation is implemented in the Norwegian Maritime Code Chapter 15, Part IV.

Law stated - 2 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The port state control agency is the Norwegian Maritime Authority. The agency is subordinate to the Ministry of Trade, Industry and Fisheries and the Ministry of Climate and Environment. The Port State Control has the authority to inspect foreign vessels in Norwegian ports (mainland Norway and Svalbard) to verify that the vessel's condition and equipment comply with provisions of international conventions and that the vessel is safely manned and operated in compliance with applicable international law.

The conduct of the port state control agency is regulated in the Regulation of 24 November 2014 No. 1458 on port State Control. The regulation is based on the Paris Memorandum of Understanding on Port State Control of 1982 and the EU Council Directive 95/21/EC, which gave the Paris Memorandum a legal framework. Today the regulation incorporates EU Directive 2009/16/EC with amendments and supplements, which replaced the EU Council Directive 95/21/EC. The regulation, inter alia, requires vessels calling at Norwegian ports to submit a notification of the estimated time of arrival, the actual time of arrival and the actual time of departure through the national reporting system SafeSeaNet.

Law stated - 2 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The sanctions that the port state control inspector may impose are found in Chapter 4 of the Regulation of 24 November 2014 No. 1458 on port State Control and Chapters 8 and 9 of the Ship Safety and Security Act. The sanctions include:

- orders to implement measures to ensure compliance with requirements in statute or regulations within a specific time limit;
- coercive fines issued to the company or employer, as appropriate, for not complying with orders;
- withdrawal of certificates;
- orders stating that the ship must detain (detention notice), call at a new port or follow other instructions, and if necessary enforce such orders;
- stopping and boarding a ship while it is underway to carry out an inspection to investigate any suspicion of non-compliance with international provision or requirements, and if necessary by force;
- denial access to Norwegian territorial waters; and
- violation fines on anyone who, on behalf of the company, willfully or negligently infringes relevant regulations.

In addition, the port state inspector may request the public prosecutor to pursue and investigate if an infringement of a regulation may be subject to criminal liability. Persons who have intentionally or negligently infringed certain regulations may be made to pay fines or imprisoned.

Law stated - 2 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

The Regulation of 24 November 2014 No. 1458 on Port State Control section 21 provides that the company or the company's representative in Norway may appeal against a decision on a detention or refusal of access order made by the Norwegian Maritime Authority. Appeals shall be directed to the Norwegian Maritime Authority. The lodging of an appeal will not cause the detention or refusal of access to be suspended. The Norwegian Maritime Authority may reverse its own decision, or forward the appeal to relevant superior appeal authority, who will conduct a new substantive examination of the grounds for ordering detention or fines. The superior appeal authority will be the Ministry of Trade, Industry and Fisheries or the Ministry of Climate and Environment, depending on the area of law. A decision made by the appeal authority is final, and may only be challenged by instituting legal proceedings. Criminal convictions can be appealed to the Courts of Appeal.

Law stated - 2 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The Norwegian Maritime Authority has delegated its authority to carry out surveys, inspection and issuing statutory certificates to the following recognised classification societies:

- American Bureau of Shipping;
- Bureau Veritas;
- DNV GL;
- Lloyds Register of Shipping;
- RINA SpA; and
- Nippon Kaiji Kyokai – ClassNK.

The authority delegated to the classification society is regulated by a standard form class agreement, which is prepared in accordance with the European Union's Council Directive 94/57/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.

Law stated - 2 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

The classification society may be held liable towards the Ministry of Trade and Industry and the Norwegian Maritime Directorate (NMD) for being in breach of an obligation to perform a specific service under the class agreement. If a court rules that NMD is required to compensate an injured party for loss or damage to property or personal injury or death, which is proven to be caused by a wilful act or omission or gross negligence of the classification society or any person that act on their behalf, then the classification society shall indemnify NMD for to whole amount being payable to the party suffering loss. If the loss, however, only is considered to be caused by a negligent act or reckless act or omission of the classification society or any person acting on their behalf, then the liability to compensate NMD shall be limited to E5 million for personal injury or death or E2.5 million for loss or damage to property.

The classification society may also be held liable towards the shipbuilder or the shipowner for being in default of a contractual obligation to perform a certain service, such as ensuring compliance with class rules. However, classification societies usually limit their liability in the contract. Shipbuilders or shipowners being in a contractual relationship with the classification society will generally not be entitled to claim compensation based on ordinary principles of tort law, as the liability for unsatisfactory performance is considered exhaustively regulated in the contract. To claim compensation based on ordinary principles of tort law, the act alleged to establish liability must not be comprised by the contract in a wider sense, which will generally not be the case. This said, if the classification society has breached the contract willfully or by gross negligence the Norwegian courts are likely to set aside any limitation on liability, making the remedies in the background law available to the shipbuilder or shipowner.

Other parties, not in a contractual relationship with the classification society, may hold the classification society liable based on information liability, which can be considered as a sub-group of ordinary tort liability. Making a claim based on information liability might be relevant in a situation where a classification society wrongfully has issued a certificate that the buyer of a ship has taken into consideration when accepting the purchase price.

The Supreme Court has stated that three requirements have to be fulfilled to hold a party liable for a loss based on information liability. First, there has to be misleading information provided through negligent behaviour in a professional context. Second, the party suffering the loss must have reasonable grounds to trust and rely on the information provided. Third, information has to be intended for the party suffering loss or at least for small group persons where the party pertains. However, currently, there are no examples in Norwegian case law where a classification society has been held liable on these grounds.

Law stated - 2 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

The Norwegian Coastal Administration, the Norwegian Environment Agency and municipalities are given authority to order wreck removal under the Pollution Act or the

Harbour and Naval Fairways Act. Both the acts open to direct an order for wreck removal to the responsible, which may cover other entities than the owner.

The Supreme Court has ruled that the liability regime in the Norwegian Maritime Code does not apply to orders for wreck removal, as the order is not a monetary claim. However, if the public or local authorities choose to carry out the wreck removal itself, and later claim the expenses refunded by the responsible, the claim will be subject to the limitation regime. That said, the liability regime in the Norwegian Maritime Code imposes an increased liability on wreck removal.

Law stated - 2 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

With respect to collision, the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 is implemented in the Norwegian Maritime Code.

With regard to wreck removal, the Norwegian parliament has signed the Nairobi International Convention on the Removal of Wrecks 2007 and adopted a new act to implement the convention. However, the act is not in force as it is pending ratification.

With respect to salvage, the International Convention on Salvage 1989 is implemented in the Norwegian Maritime Code Chapter 16.

With respect to pollution, the Ship Safety and Security Act incorporates the International Convention for the Prevention of Pollution from Ships of 1973, as amended by the 1978 Protocol (MARPOL 73/78) and subsequently amended by the 1997 Protocol. Further, the Norwegian Maritime Code incorporates the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

Law stated - 2 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

The Norwegian Maritime Code Chapter 16 incorporates the International Convention on Salvage from 1989 and contains detailed rules on salvage operations and the salvage award. However, pursuant to the Norwegian Maritime Code section 443(1), the provisions in the chapter do not apply where alternative regulation has been agreed by way of a contract. As the provision does not refer to a specific salvage contract, Lloyd's standard form of salvage agreement is acceptable and is often also used. That said, it is also allowed to agree on an alternative regulation.

This said the Norwegian Maritime Code section 443(3) provides that a salvage agreement can be set aside or amended if the agreement is entered into under unreasonable pressure or exposure of danger and it will be unreasonable to rely on it, or where the agreed salvage award or special compensation is not reasonably proportionate to the salvage work that has been performed. The provision is seldom used in practice.

As a starting point, any person or legal entity may carry out salvage operations. However, the shipowner or master of the vessel subject to salvage has the right to appoint the person who will perform the salvage operation and thereby reject other persons from conducting such operations. A party who disregards express and justifiable orders from the shipowner or master has no right to a salvage award or special compensation. If not, the shipowner of the disabled vessel appoints a particular salvor, and the principle of 'first in time, first in right' will apply.

Law stated - 2 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Norway is a party to the International Convention Relating to the Arrest of Sea-Going Ships 1952. The convention is implemented in the Norwegian Maritime Code Chapter 5 and hence is in force.

Norway has also signed the International Convention on the Arrest of Ships 1999. However, the Convention has not been ratified and is not implemented or in force yet.

Law stated - 2 May 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

A vessel can only be arrested based on 'maritime claims' as listed and defined in section 92 of the Norwegian Maritime Code (unless a specific enforcement lien is granted in execution or satisfaction of a judgement). Maritime claims include claims such as crew wages claims, salvage claims, claims by shipyards or suppliers relating to construction, repair or equipment on the vessel, claims for damage caused by the vessel either in a collision or otherwise, claims relating to the loss of life or personal injury caused by the vessel, mortgage claims and ownership claims.

According to the Norwegian Maritime Code section 93(b), arrests can be made of associated vessels (other vessels that were owned by the person or entity liable for the

maritime claim when the maritime claim arose). This right to arrest associated vessels does however not apply in case the maritime claim is based on disputes as to ownership of a vessel, or to a dispute between co-owners of a vessel as to the ownership, possession, employment or earnings of that vessel, where the arrest can only be effected against the vessel to which the claim relates.

In general, an arrest claim can only be made based on a claim against the owner, not against the bareboat charterer or a time-charterer of a vessel (unless the claim qualifies to be a maritime lien of the Norwegian Dispute Act of 17 June 2005 No. 90 (the Dispute Act) section 33.2(3)).

According to the Norwegian Dispute Act of 17 June 2005 No. 90 (the Dispute Act) Chapter 33, the claimant must either prove that the debtor's behaviour gives reason to fear that enforcement of the claim otherwise will be lost or made significantly more difficult, or that enforcement otherwise has to take place outside of Norway (arrest ground), and that it is more likely than not that the claimant will succeed in its claim in a subsequent court case (balance of probability test). The aforesaid requirements do not apply to claims secured by a mortgage or maritime lien on the vessel if such claims have fallen due (Dispute Act section 33-2(3)).

Law stated - 2 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Yes, Norwegian law has the concept of maritime liens.

The Norwegian Maritime Code section 51 lists the claims secured by maritime liens in the vessel. These claims are:

- wages and other sums due to the master and other persons employed on board in respect of their employment on the vessel;
- port, canal and other waterway dues and pilotage dues;
- damages in respect of loss of life or personal injury occurring in direct connection with the operation of the vessel;
- damages in respect of loss of or damage to property, occurring in direct connection with the operation of the vessel, provided the claim is not capable of being based on contract; and
- salvage reward, compensation for wreck removal, and general average contribution.

A maritime lien in the vessel also arises if the claim is against the charterer, manager or any person to whom the owner has delegated its functions (eg, under a bareboat charter party).

The Norwegian Maritime Code section 61 lists the claims secured by maritime liens in the cargo. These claims are:

- a claim in respect of salvage reward and general average contribution;
- a claim arising in consequence of the fact that the carrier or the master in accordance with its statutory authority has entered into a contract, taken action or incurred expenditure on the account of the cargo owner, and a cargo owner's claim for compensation for goods sold for the benefit of other cargo owners; and
- a claim by the carrier arising out of the chartering agreement, insofar as the claim can properly be brought against the person claiming delivery.

Law stated - 2 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

If the claim ultimately fails, the claimant will be liable for loss that the defendant has sustained as a result of the arrest or as a result of the measures that have been necessary to avoid the arrest or have it set aside, see the Dispute Act section 32-11, first paragraph, first sentence. This applies irrespective of whether the claimant has acted negligently or not. The claimant will also be liable if it shows that the information provided by the claimant with respect to the grounds for security was false or misleading, to the extent the claimant has acted wilfully or with negligence (see the Dispute Act section 32-11, first paragraph, second sentence). Hence, in Norwegian law, there is a strict liability regime for wrongful arrest if the claim does not exist, and a liability regime based on negligence with respect to the ground for obtaining security.

Law stated - 2 May 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

No, the bunker supplier may not arrest the vessel if the claim is against the charterer and not the owner. However, the bunker supplier may be able to arrest the bunkers in such a scenario.

Law stated - 2 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

Yes, the arresting party will be required to provide security for port dues that will accrue during the arrest. The security shall cover port dues for the next 14 days, the Norwegian Maritime Code section 97, paragraphs one and two. The court may at its own discretion make an exception to this requirement if the arresting party is the public authority of a country and this requirement does not apply in case of claims from crew secured by a maritime lien.

The arresting party may be ordered, at the court's discretion, to provide security for wrongful arrests cf. the Dispute Act section 33-3. The security amount will be set as a fixed sum high enough to cover likely loss suffered by the debtor relating to a wrongful arrest. In practice, the courts normally do not order counter-security to be put up; however, this will depend on the specific circumstances on a case-by-case basis. Relevant factors in the court's assessment include the certainty of the creditor's position or claim (the more uncertain the claim is, the more likely it is that the court will order security for wrongful arrest to be established, the magnitude of the damages the arrest may cause to the debtor, and the financial solidity of the arresting party, amongst other).

The forms of security acceptable are set out in the Enforcement Act section 3-4. The security can either be a cash deposit in a Norwegian bank, with an appropriate declaration by the bank to the enforcement authority, or a bank guarantee from a Norwegian bank or other financial institution with the enforcement authority as beneficiary, without any expiry date of the guarantee. Other forms of security are not acceptable (eg, the arresting party cannot satisfy this requirement by providing a parent company guarantee or similar).

Law stated - 2 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The arrested party can avoid arrest by providing security for the arresting party's claim, see the Dispute Act section 33-5, third paragraph. The arrested party may also lift an arrest by providing security after the arrest has been granted. The security amount shall correspond to the amount for which the court has granted the arrest. The security must be in the form stipulated in the Enforcement Act section 3-4 (bank deposit or bank guarantee).

Law stated - 2 May 2024

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

There are no specific formalities required for the appointment of a lawyer to make the arrest application (there are no requirements for notarised power of attorney or similar to be provided to the court). Consequently, an arrest application can be made quite swiftly. Provided that the necessary supporting documents are available to prove that the claim

exists and that a ground for arrest exists, the arrest application can be filed on the same day as the instructions are received. The application will be submitted to Aktørportalen (the Norwegian courts' web-based portal), which is now mandatory to use for attorneys in most courts in Norway.

Law stated - 2 May 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

The owner is usually responsible for the maintenance of the vessel while under arrest, while the arresting party is responsible for ensuring that the port dues that may accrue during the arrest period are paid, hence the requirement for security for port dues. The owner is, however, still responsible for the port dues towards the arresting party.

Law stated - 2 May 2024

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

There is no requirement for the merits of the claim to be pursued in Norwegian courts. Provided that the conditions for the arrest are satisfied, the vessel may be arrested for security only.

Law stated - 2 May 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

With few exceptions, it is possible to arrest all assets owned by the debtor, as security for monetary claims pursuant to the general rules on arrest in the Enforcement Act. An injunction order may be obtained for non-monetary claims, as an interim security measure. Furthermore, the creditor can obtain a charge on assets belonging to the debtor, which also can serve as grounds for the forced sale of the assets, subject to the rules in the Enforcement Act.

With respect to the arrest of assets and injunction orders, a sufficient cause for the security measure must be demonstrated (the Dispute Act sections 33-2(1) and 34-1 respectively). Even though sufficient cause can be demonstrated, such security measures may be denied

by the court on a discretionary basis if there are strong considerations in favour of not arresting the object or granting the injunction order.

Law stated - 2 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Orders for securing and accessing evidence before litigation has commenced can be obtained pursuant to the Dispute Act Chapter 28. To access or secure evidence pursuant to the Dispute Act section 28-2 there must be an impending risk of the evidence being lost, destroyed, significantly impaired or another reason that makes it particularly important to access or secure it.

It is also possible to obtain an order for the confiscation of an asset of the defendant to be taken into custody or administration as an interim measure pursuant to Chapter 34 of the Dispute Act. The reason for such confiscation must either be that the defendant's conduct gives reason to believe that the legal proceedings or the enforcement of the claim will be significantly impeded, or that it is necessary in a disputed legal region to prevent substantial damage or inconvenience or to avoid repercussions that the conduct of the defendant gives reason to fear.

Law stated - 2 May 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Bunkers may be arrested in accordance with the same rules that apply to other assets. The claim must be against the owner of the bunkers, and a sufficient cause for the arrest must be shown. From a practical point of view, the arrest of the vessel's bunkers may be as effective as arresting the vessel itself. The courts may, at their own discretion, deny granting the arrest if the practical difficulties and inconvenience caused to the vessel owner or other third parties are disproportional to the interests of the arresting party.

Law stated - 2 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

A judicial sale of a vessel arrested in Norway can inter alia be applied for by a beneficiary under a registered mortgage having a claim that is due for payment, or beneficiary under

a registered enforcement lien in the vessel, see the Enforcement Act Chapter 11. An arrest of a vessel will not give the arresting party an automatic right to initiate judicial sale proceedings of the vessel.

To petition for an enforcement lien, the claim must be eligible for enforcement under the Enforcement Act, which means that the claim must have fallen due and the claim must be eligible for enforcement. Such basis for enforcement can, inter alia, be a final and binding judgment on the claim, a court settlement or an arbitration award. Foreign judgments from EU countries, Switzerland and Iceland will be recognised and enforced subject to and in accordance with the Lugano Convention. With regard to foreign arbitration awards, Norway is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and will recognise and enforce arbitral awards on the same terms. However, Norway has made the reservation that only awards made in the territory of another contracting state of the convention will be recognised and enforced.

Law stated - 2 May 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The claimant must file a petition for the judicial sale of the vessel. Unless the claimant already has a mortgage or enforcement lien in the vessel, the petition can only be filed after the enforcement lien is registered. The owner will be allowed to present its case before the court deciding if it shall grant or reject the petition for judicial sale. At this stage, and up until one month after the petition has been served, the owner can avoid the judicial sale by paying the claim and the costs in connection with the proceedings, including port dues, court fees etc.

If or when the petition is granted, the court will decide whether the sale shall be carried out by auction (auction sale) held by the court or an enforcement officer, or by ordinary (judicial) sale through a court-appointed administrator (normally a shipbroker) (assisted sale), based on which procedure will give the highest sale price for the vessel. The claimant decides whether the final offer is to be affirmed by the court however the court cannot affirm the bid if the price in the bid does not cover all claims, if any, with higher priority than the claimant's claim. See the Enforcement Act section 11-28 (for assisted sale) and section 11-50 (for auction sale). Further, the court cannot affirm the bid if it considers that further efforts to effect a sale may result in a higher sale price, the Enforcement Act section 11-30. If and when the offer is affirmed, and after the sale proceeds are received, the court will distribute the sales proceeds according to the priority of the relevant claims. If the claimant's claim is not on first priority, all claims with higher priority will be covered to the full amount secured before the claimant's claim.

The timeline for a judicial sale process depends on several factors, most importantly the court's workload, whether the court's decision is appealed and whether the state of the sale and purchase market for the relevant vessel is liquid enough to get an acceptable offer.

The court decision process on the judicial sale generally takes approximately one to three months, whereas the judicial sales process usually takes between two and six months.

The court fees for 2024 are:

- arrest petition: 3,192 kroner;
- enforcement petition (judicial sale): 1,404 kroner;
- additional fee if the court decides to carry out the judicial sale: 8,045 kroner;
- appeal to the appeal court: 7,662 kroner; and
- daily fees in the district court:
 - day 1: 6,385 kroner;
 - days 2-5: this amount will increase by 3,831 kroner per day; or
 - from day 6: this amount will increase by 5,108 kroner per day.

A judicial sale may also incur port dues and remuneration for the shipbroker or administrator.

Law stated - 2 May 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

If the claimant does not have the highest priority on its security for the claim, all claims with higher priority will have to be covered to the full secured amount before the claimant will receive any proceeds of the sale of the Enforcement Act sections 11-20 and 11-21. This entails that the court cannot accept a bid if not all encumbrances in the vessel with higher priority than the claimant's security will be covered to the full amount by the bid.

The proceeds of the sale shall be distributed in accordance with the following order:

- court fees and the court-appointed administrator's remuneration;
- costs in connection with the accession that the buyer shall not cover itself, such as document and registration fees (if this has not been agreed to be covered by the buyer);
- maritime liens (in order of priority as listed in section 51 of the Norwegian Maritime Code, of section 52 of the Norwegian Maritime Code);
- mortgages, similar registered encumbrances based on contract and enforcement liens (all including interest); and
- unsecured debt.

Law stated - 2 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

All liens and encumbrances on the vessel, including maritime liens, will be extinguished by the judicial sale so that the buyer will have a clean title. However, if there are non-monetary rights registered in the vessel with higher priority than the claimant's claim, those rights will follow the vessel (eg, a registered pre-emption). For non-monetary rights with the same priority as the claimant or lower, such rights may be discharged by the court should it be necessary for the sale of the vessel, the Enforcement Act section 11-21, second paragraph.

Law stated - 2 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Norway is a member of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967. If a judicial sale of a Norwegian vessel takes place in a foreign jurisdiction, such sale will be recognised provided the vessel is within the jurisdiction of a contracting state of the convention at the time of sale, and the judicial sale is performed in accordance with both the national law of that jurisdiction and the provisions of the convention, see the Norwegian Maritime Code section 76.

Law stated - 2 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Norway is a signatory to the International Convention on Maritime Liens and Mortgages 1993, but the convention has not been ratified and is not in force in Norway.

Law stated - 2 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Norway is a signatory to the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. The Hague-Visby Rules are the only rules that have been ratified. The Norwegian Maritime Law Commission has recommended that the Rotterdam Rules should be ratified, but only after it becomes clear that this will be the new standard – presumably not before the US or the largest EU states ratify the Convention.

The Hague-Visby Rules have been implemented in the Norwegian Maritime Code, with certain modifications. With regard to the Hamburg Rules, the Norwegian Maritime Code has certain elements from it (the Hamburg Rules were of great importance when drafting the Norwegian Maritime Code, however, such elements were only implemented to the extent deemed compatible with the Hague-Visby Rules).

Norway has amended some of the rules so that the rights are more favourable for the cargo owners than the Hague-Visby rules stipulate unless expressly waived by the cargo owner. This relates particularly to the following two categories:

- the owner is responsible for the goods from the time and place when the owner is left in charge of the goods. This replaces the tackle-to-tackle principle of the Hague-Visby Rules, which only applies if the cargo owner expressly waives such right; and
- livestock and deck cargo are made subject to special liability provisions that cannot be contracted out of. For deck cargo, this includes that transportation of goods on deck with an express provision to transport below deck leads to loss of the liability limits set out in Chapter 13 of the Norwegian Maritime Code as well as strict liability for damage caused solely by the cargo being placed on deck. As regards transportation of livestock, the liability will follow the general liability rules in Chapter 13, unless loss or damage is caused by any particular risks associated with livestock.

Law stated - 2 May 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Norway has domestic legislation that incorporates the Convention on the Contract for the International Carriage of Goods by Road 1956, the Convention concerning International Carriage by Rail 1980 (as amended by the protocols of 1990 and 1999) and the Convention for the Unification of Certain Rules for International Carriage by Air 1999, all of which Norway is a party to.

Law stated - 2 May 2024

Title to sue

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43 | Who has title to sue on a bill of lading?

Any lawful holder of the bill of lading will normally have a title to sue pursuant to the Dispute Act, provided that the bill of lading is subject to Norwegian jurisdiction. The legal claim must be based in law, contract or tort, the claimant must have an adequate connection to the dispute, normally by having a legal or equitable interest, and legal proceedings must be reasonably required to maintain the claimant's rights.

Law stated - 2 May 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Provisions of the charter party may be invoked against a third party if the bill of lading includes a reference to such provisions and provided the relevant provisions are not contradictory to mandatory law.

The Norwegian Maritime Code contains specific limitations as to agreements in terms of legal proceedings. Any agreement in advance that limits the right of the plaintiff to have a legal dispute relating to the carriage of general cargo according to the relevant legal provisions settled by legal proceedings, is invalid in so far as it limits the right of the plaintiff at its own discretion to bring an action before the court at the place where:

- the defendant's principal place of business is situated, or place of residence if the defendant has no principal place of business;
- the contract of carriage was concluded, provided the defendant has a place of business or an agent there through whom the contract was concluded;
- the place of receipt for carriage according to the contract of carriage is situated; or
- the agreed or actual place of delivery according to the contract of carriage is situated.

This does not prevent an action from being brought before the court of the place designated in the contract of carriage with a view to legal proceedings.

If a bill of lading is issued pursuant to a charter party that contains a provision concerning the settlement of disputes by legal proceedings or arbitration, but the bill of lading does not expressly state that the provision is binding on the holder of the bill of lading, the carrier cannot invoke the provision against a holder of the bill of lading who has acquired it in good faith.

Further, an action concerning a contract for the carriage of general cargo in trade between two states can in any case be brought at the place or at one of the places to which the case has such connection as mentioned above or at another place in Norway agreed on by the parties.

The above does not apply if neither the agreed place of delivery nor the agreed or actual place of delivery is located in Norway, Denmark, Finland or Sweden, or if the Lugano Convention of 2007 provides otherwise.

Law stated - 2 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

The main principle under the Norwegian Maritime Code is that the carrier remains liable under the relevant provisions as if the carrier had performed the entire carriage itself.

Depending on the circumstances, an 'identity of carrier' clause may be considered void as it contradicts the above principle, which in many cases is mandatory.

If it has been expressly agreed that a certain part of the carriage shall be performed by a named sub-carrier, the carrier may, however, make a reservation exempting itself from liability for any loss caused by an event occurring while the goods are in the custody of the sub-carrier. The burden of proving that the loss was caused by such an event rests on the carrier. Such reservation can nevertheless not be invoked if an action against the sub-carrier cannot be brought before a court competent in according to the Norwegian Maritime Code.

Law stated - 2 May 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

If the carriage is performed wholly or in part by a sub-carrier, the carrier in general remains liable as if the carrier had performed the entire carriage itself. The carrier may however make certain reservations while the goods are in the custody of the sub-carrier.

If both the carrier and the sub-carrier are liable, they are jointly and severally liable.

If the bill of lading issued contains other terms than those stated in the chartering agreement and this increases the liability of the carrier, a voyage charterer or time charterer shall hold the carrier harmless.

Law stated - 2 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

The Norwegian Maritime Code does not address specific deviations (as opposed to previous legislation). The general regulation in terms of breach of contract and liability will apply.

If a vessel intentionally deviates from its route, this will normally be considered a breach of contract.

Under the Norwegian Maritime Code, the carrier is liable for losses resulting from the goods being lost or damaged while in its custody (unless the carrier shows that the loss was not due to its personal fault or neglect or that of anyone whom the carrier is responsible), including as a result of the delay. If the goods have not been delivered within 60 days of the day when they should have been delivered, damages can be claimed for loss of goods. The carrier is, however, not liable for losses resulting from measures to rescue persons or reasonable measures to salvage ships or other property at sea.

Law stated - 2 May 2024

Liens

48 | What liens can be exercised?

Under the Norwegian Maritime Code, claims against an owner are in general secured by maritime liens against the vessel, in so far as they relate to:

- wages and other sums due to the master and other persons employed on board in respect of their employment on the vessel;
- port, canal and other waterway dues and pilotage dues;
- damages in respect of loss of life or personal injury occurring in direct connection with the operation of the vessel;
- damages in respect of loss of or damage to property, occurring in direct connection with the operation of the vessel, provided the claim is not capable of being based on contract; and
- salvage reward, compensation for wreck removal, and general average contribution.

A maritime lien also arises against the vessel if the claim is against the shipowner, charterer, manager or any person to whom the owner has delegated its functions.

Under the Norwegian Maritime Code, a maritime lien is attached to cargo for the security of:

- a claim in respect of salvage reward and general average contribution;
- a claim arising in consequence of the fact that the carrier or the master in accordance with its statutory authority has entered into a contract, taken action or incurred expenditure on the account of the cargo owner, and a cargo owner's claim for compensation for goods sold for the benefit of other cargo owners; and
- a claim by the carrier arising out of the chartering agreement, insofar as the claim can properly be brought against the person claiming delivery.

The carrier in general also has a right to retain the cargo until the receiver has either paid the claims or given security for them.

A lien or mortgage may also be established by agreement. There are separate requirements to have such security perfected.

Law stated - 2 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

A receiver can only demand delivery if the receiver deposits the bill of lading and issues receipts as and when the goods are delivered.

If the carrier delivers the cargo without presentation of a bill of lading, and a bill of lading holder later appears, the carrier has no defence and will be liable towards the holder of the bill of lading.

The carrier cannot avoid liability by referring to the fact that the position was carefully considered prior to delivery. The carrier can also not rely on contractual exemptions or limitation clauses.

If the goods are delivered to a receiver that does not present a bill of lading, the carrier should request an undertaking or a guarantee (letter of indemnity). If a holder of a bill of lading later appears and directs a claim towards the carrier, the carrier can claim indemnity under such undertaking or guarantee.

Law stated - 2 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The Norwegian Maritime Code distinguishes between the 'sender', being the person who enters into a contract with a carrier for the carriage of general cargo by sea, and the 'shipper', being the person who delivers the goods for carriage.

There are several provisions under Norwegian law setting out the responsibilities and liabilities of the shipper and the sender. The main responsibilities and liabilities under the Norwegian Maritime Code are as follows.

The goods shall be delivered by the shipper at the place and within the period indicated by the carrier. It shall be delivered in such a way and in such a condition that it can be conveniently and safely brought on board, stowed, carried and discharged.

The shipper is responsible to the carrier for the accuracy of the statements relating to the goods entered in the bill of lading at the request of the shipper. If the shipper has undertaken

to indemnify the carrier for losses arising from the issuing of a bill of lading containing incorrect information or containing no reservation, the shipper is, nevertheless, not liable if the issuing was intended to mislead an acquirer of the bill of lading.

If the goods need to be handled with special care, the sender shall in due time give notice thereof, and state the measures that may be required.

If the sender renounces the contract before the carriage has commenced, the carrier is entitled to damages for loss of freight and other losses. If the sender or the receiver requests interruption of the carriage and delivery of the goods elsewhere than at their destination, the carrier is entitled to damages for loss of freight and other losses

If the goods are delivered to the receiver without payment of such claims against the sender as the receiver should have paid, the sender remains liable, unless the delivery entails losses for the sender and the carrier must have realised this.

Dangerous goods shall be marked as dangerous appropriately. The sender shall in due time notify the carrier and the subcarrier to whom the goods are delivered of the dangerous nature of the goods and indicate the necessary safety measures. If the sender otherwise is aware that the goods are of such a nature that their carriage may involve danger or significant inconvenience to persons, ships or cargo, the sender shall also give notice of this fact.

The sender is not liable for losses caused to the carrier or sub-carrier, including damage to the ship, which arises without any fault or neglect on the part of the sender personally or of anyone for whom the sender is responsible. No one the sender is responsible for is liable for losses that arise without any fault or neglect of that person personally or that of anyone for whom such person is responsible.

If the sender has delivered dangerous goods to the carrier or a subcarrier without informing them of the dangerous properties of the goods and the necessary precautions, and if the person receiving the goods is not otherwise aware of their dangerous properties, the sender is, however, liable to the carrier and to any subcarrier for costs and other losses in consequence of the carriage of such goods.

Law stated - 2 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

International Convention for the Prevention of Pollution from Ships (MARPOL) Annex VI is implemented in Norwegian law.

The North Sea area is designated as an ECA under Regulation 14 of MARPOL Annex VI.

Norway has also adopted certain specific regulations for SO_x and NO_x emission, including in the Norwegian world heritage fjords.

Law stated - 2 May 2024

Sulphur cap

- 52** | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The International Convention for the Prevention of Pollution from Ships (MARPOL) Annex VI is implemented in Norwegian law. The EU Sulphur Directive (Directive (EU) 2016/802) is also implemented in Norwegian law.

The following sulphur emission cap applies through MARPOL:

- outside an ECA established to limit SO_x and particulate matter emissions: 0.5 per cent m/m (on and after 1 January 2020); and
- within an ECA (as per above, the North Sea area is designated as an ECA) established to limit SO_x and particulate matter emissions: 0.10 per cent m/m.

In addition, there are certain specific requirements (including as a result of the EU Sulphur Directive):

- for ships or movable installations moored at berth or at anchor in port: 0.10 per cent m/m;
- for passenger ships sailing on a route to or from harbours in the European Economic Area that are located in Norwegian territorial water or economic zone: 1.50 per cent m/m; and
- for ships in Norwegian world heritage fjords: 0.10 per cent m/m.

There are various sanctions available, including orders, fines, withdrawal of permits, detentions as well as prison in case of serious breaches, typically in case of gross negligence or wilful misconduct.

Law stated - 2 May 2024

SHIP RECYCLING

Regulation and facilities

- 53** | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

The EU Ship Recycling Regulation (Regulation (EU) 1257/2013) on safe and sound ship recycling is implemented in Norwegian law.

The Basel Convention, implemented in the European Economic Area through the Waste Shipment Regulation (EU 1013/2006), is also implemented in Norwegian law and is applicable to ships being taken out of service and considered waste.

There are also several more general regulations, such as those related to health, safety and the environment, that will cover ship recycling.

Under the EU Ship Recycling Regulation ships flying the flag of a member state may be recycled only in ship recycling facilities included in the European List of ship recycling facilities. Eight recycling facilities in Norway have been included on the European List.

Norway is also a signatory to the Hong Kong International Convention for the safe and environmentally sound recycling of ships (the Hong Kong Convention). The convention will enter into force on 26 June 2025.

Law stated - 2 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The ordinary courts of Norway have jurisdiction over maritime disputes that are subject to the jurisdiction of Norway, provided the parties have not agreed otherwise. There are three court instances: the district courts, the courts of appeal and the Supreme Court. The first court of instance is the relevant district court. Decisions by the district court may be subject to appeal to the courts of appeal. A decision by the courts of appeal may be subject to appeal to the Supreme Court.

The parties may agree that an agreement or a matter shall be subject to arbitration.

Law stated - 2 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Norway has ratified the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and the convention has been implemented in Norwegian law. Service of court proceedings on a defendant located out of the jurisdiction may be completed in accordance with the regulation of the Convention.

Law stated - 2 May 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

Maritime agreements are often agreed between the parties to be subject to arbitration. In Norway, maritime arbitration has previously been subject to ordinary ad hoc arbitration, which remains the most common way of solving a dispute under arbitration, however, with a practice to nominate maritime specialists as arbitrators.

In 2017, the Nordic Offshore and Maritime Arbitration Association (NOMA) was established on the initiative of the Danish, Finnish, Norwegian and Swedish Maritime Law Associations. This has provided Norway with an arbitration venue that will serve as an alternative to, for example, arbitration in London, and is a natural choice when an agreement is governed by Norwegian law or another Nordic law.

NOMA has established separate rules for the arbitration based on UNCITRAL Arbitration Rules, as well as Best Practice Guidelines.

While NOMA is a relatively newly established institution, it is gaining traction. Nordic players are increasingly opting for NOMA as a dispute resolution mechanism, and the NOMA Best Practice Guidelines are often used in non-NOMA ad hoc arbitrations, being recognised as a codification of Nordic best practice.

New fast-track arbitration rules were established by [NOMA](#) in 2021.

Law stated - 2 May 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

In Norway, both domestic law and treaties govern the recognition and enforcement of foreign judgments.

Norway is a party to several international treaties for the recognition and enforcement of foreign judgments. It should be mentioned:

- the convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of (the Lugano Convention);
- the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- the convention between Norway, Denmark, Finland, Iceland and Sweden on recognition and enforcement of judgments in civil matters; and
- bilateral treaties and treaties within specific legal areas.

Law stated - 2 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Asymmetric jurisdiction and arbitration agreements are, in principle, valid and enforceable between commercial parties.

There are certain possibilities to having such agreement set aside such as under the European Convention on Human Rights article 6, as well as under the Contract Act where there are certain limited possibilities to set aside contracts in whole or in part if it will be considered unreasonable or contradictory to sound business practice to enforce the agreement.

Law stated - 2 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

The judgment may be challenged and not recognised in accordance with the provisions of relevant treaties, such as the Lugano Convention section 11 (Recognition).

Law stated - 2 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

If there is an agreement between the parties for a foreign court or arbitral tribunal to have jurisdiction, the Norwegian courts will, in most circumstances, be considered to not have jurisdiction over the case, and the case shall then be rejected by the courts.

Law stated - 2 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The general limitation period under Norwegian law is three years.

Special circumstances and special regulations may entail other limitation periods, extensions, or both. The Norwegian Maritime Code contains certain special rules relating to time limitations that will supersede the general rules. Certain examples: claims for salvage reward or special compensation, claims related to collision and claims that arise under a passage contract are subject to a time limitation of two years. Claims for a share of a salvage reward or of special compensation, claims in connection with the carriage of goods or of incomplete or incorrect statements in a bill of lading and claims in connection with the general average are subject to a time limit of one year.

The debtor may agree to an extension of the time limit for three years at a time, up to a maximum of 10 years from the original expiry. It can, however, not be agreed in advance that time limitations shall not apply.

Law stated - 2 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

No. Commencement of legal proceedings will suspend the time limitation.

Law stated - 2 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention has been ratified by Norway. The Maritime Labour Convention is implemented in the Ship Labour Act and the Ship Safety and Security Act.

Both acts apply to vessels flying the flag of Norway (however, the regulation may also apply to other vessels).

The Norwegian Maritime Authority (NMA) issues the DMLS Part I. The shipowner should complete the DMLC Part II. The NMA or one of the recognised organisations (RO) (typically certain nominated classification societies) will complete an MLC inspection upon request by the shipowner, following which the MLC certificate will be issued. The MLC Certificate is issued based on the issued DMLC Part I, DMLC Part II and the completed MLC inspection.

Law stated - 2 May 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

The main principle under Norwegian law is the principle of contractual freedom. There are limited possibilities to seek relief from the strict enforcement of the legal rights and liabilities of the parties.

There is a possibility to set aside contracts in whole or in part if it will be considered unreasonable or contradictory to sound business practice to enforce the contract. Norwegian courts will, however, rarely use this possibility to revise contracts between

professional parties – this possibility will only be applied by the courts in exceptional circumstances.

Law stated - 2 May 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Norway has a tonnage tax regime, being a special tax regime for the shipping industry where qualifying shipping companies are exempt from tax on their shipping income. Instead, the companies within the regime pay a moderate tax calculated on tonnage owned – and to a certain extent leased – by the company. The regime is only available for Norwegian (private and public) limited liability companies. The regime is ‘ring fenced’, meaning there are strict rules governing what assets a company within the regime must and can own, and also on what business can be conducted. In broad strokes, a company within the regime can only conduct business in the form of owning and operating qualifying vessels; which are traditional shipping vessels and offshore service vessels (the operation and capabilities of the latter must be limited against ‘core’ oil production activities). To qualify, a company within the regime must directly or indirectly own a minimum of 3 per cent of the qualifying vessel. A tonnage-taxed company may also own certain permitted assets, such as listed securities, but other assets than ‘qualifying’ and ‘permitted’ assets are disqualifying. Although shipping income is tax exempt, certain financial income will be taxable, such as interest income and certain currency gains, etc.

Law stated - 2 May 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Norwegian regulatory requirements are continuously affected by the rapid changes in the European and international regulatory landscape of the green shift in general, and regulations from the EU and IMO in particular.

Norway participates in the EU Emission Trading System (ETS). Norway has incorporated the legislative framework, including the recent legislation on the inclusion of maritime emissions with effect from 1 January 2024. This means that for vessels of 5000 gross tonnage or larger that carry cargo or passengers for commercial purposes, 100 per cent of the emissions from voyages within the EEA, and 50 per cent from voyages to and from, must be reported and paid for by buying EU allowances. The first date for surrendering ETS allowances is 30 September 2025.

We expect Norway to incorporate the FuelEU Maritime Regulations. The regulation contains a limit on the greenhouse gas intensity of energy used on board by a vessel arriving at, staying within or departing from ports in the EU for vessels of 5000 gross tonnage or larger that carry cargo or passengers for commercial purposes. The regulations further contain obligations to use on-shore power supply or zero-emission technology in ports in the EU. The FuelEU rules will apply in the EU from 1 January 2025.

In relation to the war in Ukraine, EU has implemented several sanctions packages against Russian individuals, and Russian entities. Norway has supported all the sanctions packages against Russia, with some national adjustments. The twelfth sanctions package prohibits any person or legal entity in the EU from transferring tankers for the transport of crude oil to any person or legal entity in Russia or for use in Russia, without authorisation. Persons and legal entities in the EU must also notify the national authorities prior to the transfer of tankers to a third country. Norway has implemented the prohibition on the sale of tankers to Russia, and the notification rules, and notifications and applications for authorisation must be submitted to the Ministry of Foreign Affairs.

Historically, Norway has imposed minimal requirements regarding the pay and working conditions for ship workers on board foreign vessels operating in Norwegian waters and on the Norwegian continental shelf. The government, however, has recently proposed new legislation aimed at ensuring that ship workers on foreign ships receive the same conditions as those employed on Norwegian-registered (NOR) ships, by including non-Norwegian ships in the Act relating to General Application of Wage Agreements.

Law stated - 2 May 2024

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UPDATE AND TRENDS

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

According to the law applicable to newbuilding contracts, the parties may establish in the contract the rules applicable to their relationship; therefore, title will pass from the shipbuilder to the shipowner as agreed by the parties. Where nothing is agreed by the parties, the shipbuilder will remain the owner of the vessel during the construction period and title will pass to the shipowner on delivery of the vessel.

Law stated - 30 April 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

The rules applicable to the refund guarantee are established by the parties in the shipbuilding contract.

Law stated - 30 April 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Disputes in such cases normally refer to the purchase price; the shipowner can deposit the amount in dispute within the court and obtain the delivery of the vessel, while the parties will keep on discussing the 'quantum' until a final decision is obtained.

Law stated - 30 April 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

According to the law applicable to shipbuilding contracts, the shipbuilder guarantees the vessel against defects for one year after delivery of the vessel; the parties may agree on different time limits in the shipbuilding contract. A claim for defects lies in the contract. A purchaser from the original shipowner will enforce the rights of the original shipowner; a

third party that has sustained damage may have a right of action against the shipbuilder based on a non-contractual relationship.

Law stated - 30 April 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

All ships are eligible for registration under the Portuguese flag provided that they comply with the applicable rules in force regarding the type of vessel in question. Vessels under construction can be registered; the registration is considered provisional and later confirmed after the construction has been finished.

Law stated - 30 April 2024

- 6 | Who may apply to register a ship in your jurisdiction?

Shipowners or their representatives may apply to register a ship. Shipbuilders can register a vessel under construction and charterers can apply for temporary registration.

Law stated - 30 April 2024

Documentary requirements

- 7 | What are the documentary requirements for registration?

The documentary requirements for registration include the shipowner's full identification and a valid title of ownership, as well as details of the vessel's full characteristics in the form of a building certificate or the vessel's last issued certificates.

A deletion certificate will be necessary when the vessel was previously registered elsewhere. Further, the vessel will have to pass a technical inspection for registration approval and establishment of the necessary flag technical certificates (eg, the minimum crew on board and safety conditions necessary for the operation of the ship).

Law stated - 30 April 2024

Dual registration

- 8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration is possible for vessels under bareboat charter for the duration of the contract. The bareboat charterer applying for dual registration must provide evidence of the charter contract and permission to register from the shipowner, from the authorities of the country where the vessel is currently registered and from the mortgagee when there are mortgages registered. Flagging out is also permitted.

Law stated - 30 April 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The register of mortgages is maintained by the commercial registration office and the information provided therein includes details of:

- the type of mortgage;
- the parties involved (ie, the mortgagor and the mortgagee); and
- the total amount covered including capital and interests.

Reference to other assets covered by the same mortgage contract is also included. The register is public and the information thereon is available on request.

Law stated - 30 April 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Portugal is a signatory to the Convention on Limitation of Liability for Maritime Claims 1976 as amended by the 1996 Protocol (LLMC). The Convention came into force in January 2018, including the list of credits allowing limitation set out in article 2, and the new limits set out in articles 3 and 4.

According to article 1 of the LLMC, 'shipowners' – defined as owners, charterers, managers, operators of seagoing ships and salvors – can limit their liability.

Law stated - 30 April 2024

Procedure

11 | What is the procedure for establishing limitation?

To establish limitation, an application must be submitted to the courts stating:

- the grounds for limitation;
- the size of the limitation fund to be established and how it will be calculated;
- how the fund will be established (eg, cash deposit or bank guarantee); and
- a list of creditors known to the applicant entitled to be paid from the limitation fund.

The application for establishing the limitation fund may be presented before or after a claim has been presented to the shipowner.

After analysing the application – and provided that it is considered correct and the capital deposited or guaranteed is sufficient – the court will issue an order to establish the fund. The listed creditors will be informed and ads will be published to inform third parties of the fund's establishment, giving them a time frame to present their claims or oppose the fund's establishment. The distribution of fund capital will take place at the very end of the procedure.

Law stated - 30 April 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The limitation of liability will not apply where it is proved that the loss resulted from a personal act or omission of the person applying for the limitation, committed with the intent to cause such a loss or recklessly and with the knowledge that such a loss would probably result. Decisions are made on a case-by-case basis, depending on the evidence produced before the court on the facts of the case.

Law stated - 30 April 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

As Portugal is a signatory to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the 2002 Protocol, the claim amounts set out in the Convention apply. The EU Passenger Liability Regulation (392/2009) also applies.

Law stated - 30 April 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The port state control authority is the Directorate-General for Natural Resources, Safety and Maritime Services. This is an independent service within the state's central administration.

Law stated - 30 April 2024

Sanctions**15 | What sanctions may the port state control inspector impose?**

Sanctions are imposed according to EU Directive 2009/16/EC on port state control. For instance, access to a port may be denied and vessels may be ordered to take the necessary measures to correct any deficiencies found by port state control inspectors. Vessels may be detained until the deficiencies found and notified are satisfactorily corrected. Port state control inspectors may also impose fines.

Law stated - 30 April 2024

Appeal**16 | What is the appeal process against detention orders or fines?**

Once a decision is duly served, the vessel's representative can challenge the detention order or fine before the port state control authority. If the port state control authority upholds the decision, the vessel's representative may appeal to the competent courts.

Law stated - 30 April 2024

CLASSIFICATION SOCIETIES**Approved classification societies****17 | Which are the approved classification societies?**

Registo Internacional Naval (RINAVE) is the approved Portuguese classification society. The following classification societies are also formally recognised:

- ABS – American Bureau of Shipping;
- BV – Bureau Veritas ;
- CCS – China Classification Society;
- ClassNK – Nippon Kaiji Kyokai;
- DNV GL – Det Norske Veritas (DNV) and Germanischer Lloyd (GL);

- LR – Lloyd’s Register of Shipping;
- RINA – Registro Italiano Navale; and
- KR – Korean Register of Shipping.

Law stated - 30 April 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

Classification societies may be held liable under civil and criminal law and for contravening the applicable rules on the issuance of certificates as established by Decree-Law 13/2012.

Law stated - 30 April 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Yes, when there is a risk of pollution or if the shipowner does not comply with the competent harbour authority’s order for the vessel’s removal; the authorities will then be allowed to choose the most suitable entity to remove the ship, bunkers or other polluting substance on board. The shipowner or the vessel’s disponent owner are liable for the expenses incurred.

Law stated - 30 April 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Collisions are governed by:

- the Brussels Convention for the unification of certain rules of law relating to collision between vessels 1910;
- the Brussels Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation 1952; and
- the Brussels Convention on certain rules concerning civil jurisdiction in matters of collision 1952.

Salvage is governed by:

-

the Brussels Convention for the unification of certain rules of law relating to assistance and salvage at sea 1910; and

- Decree-Law 203/98 of 10 July 1998, in accordance with the Salvage Convention 1989.

Wreck removal is governed by the Nairobi International Convention on the Removal of Wrecks, dated 18 May 2007.

Pollution is governed by:

- the International Convention for the Prevention of Pollution from Ships (as amended in 1978);
- the International Convention on Civil Liability for Oil Pollution Damage 1992;
- the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage 1992 and subsequent 2003 protocol;
- the International Convention on Oil Pollution Preparedness, Response and Cooperation 1990;
- the Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances 2000;
- the Bunkers Convention 2001;
- the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004; and
- the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009.

Law stated - 30 April 2024

Salvage

- 21** | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement, so parties may choose the most suitable agreement form. Salvage may be carried out by specialised vessels or any vessel in an emergency provided that it can perform salvage operations.

Law stated - 30 April 2024

SHIP ARREST

International conventions

- 22** | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Portugal is a party to the Brussels Convention 1952 on the Arrest of Sea-Going Ships.

Law stated - 30 April 2024

Claims

- 23** | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Portugal is a party to the Brussels Convention Relating to Arrest of Sea-Going Vessels; the credits set out in article 1 thereof as maritime credits may justify the arrest of a vessel.

An associated ship belonging to the same debtor may be arrested. Further, a vessel may be arrested for a claim against a charterer provided that the claim may be considered a maritime credit; however, the enforcement of any decision on the merits after the arrest will depend on the existence of a lien on the vessel according to the law of the contract or law of the flag of the vessel.

Law stated - 30 April 2024

Maritime liens

- 24** | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Portugal recognises the concept of maritime liens; the ranking of the credits that give rise to a lien on a vessel is established by article 578 of the Commercial Code. The ranking order is as follows:

- court costs and expenses made in the common interest of the creditors;
- salaries due for assistance and salvage;
- credits guaranteed by a mortgage or pledge on the vessel;
- pilotage and tug expenses for entering ports;
- tonnage, lighthouse, anchor, public health and any other port dues;
- expenses relating to the watchkeeping of the vessels and warehousing of their belongings;
- wages for the master and crew;
- expenses incurred and repairs made for the needs of the vessels and their equipment;
- reimbursement of the price of cargo that the master had to sell;
- insurance premiums;
- amounts in debt referring to the vessel's last purchase price;

- expenses incurred from repairs of the vessel and equipment during the three years before a voyage and starting from when the repairs were concluded;
- debts arising from the contracts for the vessel's construction;
- insurance premiums if all of the vessel is insured or only part of its accessories are not included in the insurance premiums listed above; and
- indemnities due to the shippers for lost or damaged cargo.

Law stated - 30 April 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

Civil law applies to evaluations of wrongful arrests. An arrest may be considered 'wrongful' if the claimant did not act as a normally prudent person when applying for the arrest or did not engage in the main proceedings subsequent to the arrest within the established time frame.

Law stated - 30 April 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

According to recent decisions by the Lisbon Maritime Court, the competent court for all of Portugal's continental territory, a bunker supplier can arrest a vessel in connection with a claim for the price of bunkers supplied to the vessel at the charterer's request. However, suppose the debtor (charterer) is not the owner of the vessel. In that case, the arresting party will have difficulties in enforcing the security obtained unless there is a lien on the vessel arising from the law of the flag of the vessel or the law applicable to the supply contract.

Law stated - 30 April 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

In principle, no security is requested from the arresting party. The courts have the legal authority to determine the counter security to be provided; however, to date, such security has never been requested.

Law stated - 30 April 2024

- 28** | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The amount of security that the court will order the arrested party to provide corresponds with the amount claimed on the arrest application, provided that the court considers such amount to correspond with the claim following a prima facie evidence evaluation. The amount may be reduced if the preliminary arrest decision is changed after hearing the arrested party's defence arguments.

The security must be considered acceptable by the arresting party. If there is no agreement with the arresting party, a cash deposit paid to the court or a bank guarantee from a Portuguese bank (wording to be accepted) will be considered adequate by the court. Protection and indemnity insurance letters of undertaking will be accepted only with the agreement of the arresting party. The security amount is unrelated to and may be higher than the ship's value.

Law stated - 30 April 2024

Formalities

- 29** | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

No formalities are necessary for the appointment of a lawyer; however, to submit an arrest application or any other request to the court, a power of attorney must be attached to the court file. Power of attorney should be notarised and legalised with an apostille. Alternatively, the appointed lawyer must obtain sufficient evidence that the person signing the power of attorney has the necessary power to represent the signatory company.

The application is submitted electronically to the court's data basis, with all the attached documents scanned. The judge may, if considered necessary, order the lawyer to present to the court the original power of attorney or any other documents attached to the application.

Translation of documents is necessary. The translator does not need to be a sworn public translator but a sworn declaration from the translator should be included; such declaration may be made before a lawyer.

The application is submitted with all the relevant documents attached. The judge will make a first evaluation of the claim, within 24 hours, based on the arguments and documents presented therefore the relevant documents should be attached and translated if necessary.

The time necessary to prepare the arrest application will depend on the difficulty of the case and on the quality of the information provided by the documents to be attached.

Law stated - 30 April 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

A trustee will be appointed by the court once the vessel is arrested. Trustees are chosen by the arresting party unless otherwise ordered by a court. The master of the arrested vessel may be appointed as the trustee if the crew remains on board the vessel. The shipowner or crew are responsible for the maintenance of the vessel; the trustee will take responsibility for the vessel in the absence of the crew and for any extraordinary decisions or expenses, subject to previous agreement by a judge and the interested parties.

Law stated - 30 April 2024

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Proceedings on the merits should be engaged before the competent court according to the law applicable to the contract at the origin of the arrest. Portuguese courts will be competent to decide on the merits if the parties agree and the claim falls within the scope of the circumstances set out in article 7 of the Brussels Convention 1952 Relating to Arrest of Sea-Going Vessels.

Law stated - 30 April 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

A creditor must arrest the vessel to obtain security for maritime credits; arrests of other assets of the debtor in Portugal are permitted under regular civil law rules.

Law stated - 30 April 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Special proceedings may be initiated to obtain preservation of evidence orders.

Law stated - 30 April 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Yes – civil law rules must be followed, meaning that the arresting party must provide evidence of:

- the credit's existence;
- the property of the bunkers to be arrested; and
- the fact that unless the bunker's arrest is granted, the arresting party will have no other means of obtaining security for its credit because of the debtor's poor financial situation.

Law stated - 30 April 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Any interested party with a valid enforceable title may apply for the judicial sale of a vessel.

An arresting party, the vessel's trustee or any interested party may apply for the anticipated sale of a vessel while the vessel is under arrest and her situation is deteriorating because she has been abandoned by the owner, has no crew on board or the owner failed to appoint a shipping agent.

Law stated - 30 April 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

A request for the judicial sale must be presented to the judge supported by the necessary arguments justifying that the sale is legally possible; the decision on the sale will be given after the interested parties (ie, the shipowner and arresting parties) have been heard. The judge will appoint a person in charge of the sale, indicating the minimum sale price and the sale modality, normally through private negotiation. The person in charge of the sale will have to publicise the sale in the best way possible and receive the various offers. The list of offers will be presented to the court and the ship will be sold for the best price. If the offers do not reach the minimum sale price established by the court, the person in charge

of the sale will have to inform the judge thereof and obtain permission to sell for the best price offered; before any relevant decision, the various intervening parties (eg, claimants, arresting parties and trustees) will be heard by the court.

This process usually takes at least six months. The person in charge of the sale will present to the court the list of costs incurred and if they are considered acceptable, they will be paid from the proceeds of the sale deposited at the court order; the person in charge of the sale will be entitled to receive a percentage (approximately 5 per cent) of the sale price obtained as remuneration for the services rendered.

Law stated - 30 April 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The order of priority of claims against the proceeds of sale is established by the law of the flag of the vessel. Court costs and expenses incurred during the sale must be paid first.

Law stated - 30 April 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

All claims against a vessel will be transferred to the proceeds of the sale. The vessel will be sold by the court free of any charges or encumbrances. The proceeds of the sale will remain deposited at the court order until all creditors obtain their enforceable title and the decision on the ranking of the credits is given.

Law stated - 30 April 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

All judicial sale decisions from foreign jurisdictions must be revised and confirmed in Portugal and recognition will depend on the rules applicable to the country of origin of the decision.

Law stated - 30 April 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Law stated - 30 April 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

- 41** | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Portugal is a party to the Brussels Convention 1924, Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules).

A national law of October 1986 applies to situations not covered by the Brussels Convention. This law updated some of the concepts not clearly defined in the Brussels Convention. Further, it extended the convention's rules on the liability of carriers and the limits of liability that apply to cargo carried:

- on deck with the shipper's approval;
- on container ships; and
- on deck based on mandatory legal provisions.

Carriage at sea begins when the cargo crosses the ship's rail at the port of loading and ends when the cargo crosses the ship's rails at the port of destination.

Law stated - 30 April 2024

Multimodal carriage

- 42** | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

There are no conventions or domestic laws applicable to multimodal carriage; the rules applicable to the particular contract of carriage at the origin of the claim in dispute will apply.

Law stated - 30 April 2024

Title to sue

- 43** | Who has title to sue on a bill of lading?

In principle, the parties entitled to sue on a bill of lading are those identified on the bill of lading (the shipper, carrier and consignee) as well as the holder of an endorsed bill of lading.

Law stated - 30 April 2024

Charter parties

- 44** | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The Brussels Convention 1924 on the unification of certain rules of law relating to bills of lading, protecting cargo owners and establishing the liability of carriers also applies to bills of lading when a third party possesses the documents.

Jurisdiction or arbitration clauses incorporated in the bill of lading will be binding on a third-party holder or endorsee of the bill if the third party was made aware of the existence of the clause before receiving the bill of lading and providing there are no applicable rules stating the exclusive competence of the Portuguese courts.

Law stated - 30 April 2024

Demise and identity of carrier clauses

- 45** | Is the 'demise' clause or identity of carrier clause recognised and binding?

The carrier should be identifiable from the elements on the bill of lading. The bill of lading will be considered null and void if issued by a party other than the carrier.

Law stated - 30 April 2024

Shipowner liability and defences

- 46** | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Under Portuguese law, when the carrier is unidentifiable from the elements on the bill of lading and when the bill of lading was issued by a party other than the carrier, the vessel in rem (represented by the shipowner) may be sued; otherwise, the carrier identified on the bill of lading is the suable party.

Law stated - 30 April 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Although no specific rules apply in such circumstances, the rules stated on the bill of lading – provided they do not conflict with the Hague Rules – may apply. Essentially, the deviation should be reasonable and determined by unforeseeable reasons.

Law stated - 30 April 2024

Liens

48 | What liens can be exercised?

Liens on vessels, cargo and unpaid freight can be exercised.

Law stated - 30 April 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Carriers are responsible for damages incurred by cargo owners if they deliver cargo without production of one of the original bills of lading.

Law stated - 30 April 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper is responsible for:

- the payment of the freight, unless otherwise agreed with the carrier;
- the correctness of the elements to be included on the bill of lading and consequences thereof in case of false declarations;
- the timely delivery of the cargo, as indicated by the carrier; and
- any damage caused by the cargo in general or by high-risk cargo.

Law stated - 30 April 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Operational and non-operational vessels in national waters must comply with the maximum sulphur content rules, as determined by Decree-Law 170B/2014 of 7 November 2014, and subsequent updates, in line with the Sulphur Directive (Directive (EU) 2016/802).

Law stated - 30 April 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The cap on the sulphur content of fuel oil for vessels in ports is 0.1 per cent.

Since November 2014, the maximum sulphur content of fuel oil for vessels in exclusive economic zone territories and emission control areas has been 3.5 per cent. From 1 January 2020, this percentage was reduced to 0.5 per cent.

The Maritime Administration Services Directorate – a branch of the Directorate General for Natural Resources, Safety and Maritime Services – enforces the regulatory requirements relating to low-sulphur fuel – namely, by inspecting vessels' registration books. The inspecting authorities will issue a contravention notice and impose the corresponding fine on non-compliant vessels.

Law stated - 30 April 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

Portugal has recently ratified the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009.

Regulation (EU) No. (1257/2013) on ship recycling was also transposed in Portugal through Decree-Law 66/2020, dated 14 September 2020.

Navalria-Docas, Construções e Reparações Navais, a Portuguese shipyard located at Aveiro, was a recognised ship recycling facility but its licence ended on 31 December 2021 and was not renewed. Navalria was, therefore, withdrawn from the list of facilities included on the Commission's Implementing Decision (EU) 2022/691 of 28 April 2022.

Law stated - 30 April 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The Lisbon Maritime Court is the sole maritime court with competence over maritime disputes within the Portuguese mainland territory. In the islands of Madeira and the Azores, the local civil courts have jurisdiction in this regard.

Law stated - 30 April 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Service of documents is made by the court directly on a defendant. For maritime cases, the shipping agent assisting the vessel may receive service of documents from the court on behalf of the registered owner, the shipowner and the vessel's manager.

Service of documents is normally made by a registered letter with acknowledgement of receipt or a rogatory letter, depending on the country of destination and applicable international conventions.

In general, the time limit to reply is 30 consecutive days from the date of receipt of the service; an additional 30 consecutive days may be added for service abroad.

For urgent proceedings (eg, arrests), the time limit to reply is 10 consecutive days and the additional time limit cannot exceed 10 days.

Law stated - 30 April 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

Concórdia - Centro de Conciliação, Mediação de Conflitos e Arbitragem, a Portuguese arbitration association, recently created a Maritime Arbitration Center with a panel of arbitrators specialising in maritime matters.

Law stated - 30 April 2024

Foreign judgments and arbitral awards

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57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Portugal is an EU member state so the recast EU Brussels Regulation (1215/2012) on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters applies. Non-EU judgments must be subject to the recognition of foreign judgment procedures of the appeal courts before they can be enforced. This recognition procedure aims at verifying that:

- the foreign judgment is authentic;
- the decision is final and not subject to appeal;
- the defendant has been regularly served;
- the decision contains no provision contrary to the principles of international public order in force in Portugal; and
- the decision does not concern matters within the exclusive competence of Portuguese courts.

Portugal is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Law stated - 30 April 2024

Asymmetric agreements**58** | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Arbitration clauses are generally accepted, provided that they have been agreed by the parties in writing or have been clearly disclosed to the other party. In the case of a dispute, the party benefiting from the contents of the jurisdiction or arbitration clause must provide evidence that the opposing party had been clearly informed of its contents before entering into the contract.

Law stated - 30 April 2024

Breach of jurisdiction clause**59** | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Matters relating to claimants which, in breach of a jurisdiction clause, issue proceedings elsewhere are handled by the jurisdiction where the proceedings were issued.

Law stated - 30 April 2024

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60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant will have to raise the issue when submitting the defence paper and put forward all the arguments and supporting documents to justify the breach of the clause; the judge will decide on the competence of the court in the first place before any other decision on the merits of the dispute between the parties. The decision given is subject to appeal.

Law stated - 30 April 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The standard time limit for contractual obligations under article 309 of the Civil Code is 20 years.

For non-contractual obligations, the standard time limit is three years from the moment the claimant was made aware of the existence of the claim (ie, the date of the incident).

Shorter time limits may apply depending on applicable national or international laws.

The parties may agree not to raise the issue of time limit as a defence argument. An extension of the time limit is only possible by way of a judicial service of documents, that is, service of an application stating the intention to claim and the reasons thereof.

Law stated - 30 April 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

In principle, no. The courts or arbitral tribunals may only extend time limits for the submission of papers by the parties involved. However, a judicial notification by the court at the request of the claimant may have the effect of interrupting the time limit, that will restart again.

As regards maritime cargo claims, an extension of the time limit to act against the carrier may validly be granted by the carrier.

Law stated - 30 April 2024

MISCELLANEOUS

Maritime Labour Convention

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- 63** | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention 2006 has been in force since 12 May 2016. The port state control rules were updated to ensure compliance with the convention.

Law stated - 30 April 2024

Relief from contractual obligations

- 64** | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

According to article 437 of the Civil Code, it is possible to end a contract or request to change the contractual obligations of the parties when there is an abnormal change in the contractual conditions agreed at the start of the performance of a contract, providing there is no breach of contract and the changes in question are not a consequence of the expected risks associated with the contract's performance.

Law stated - 30 April 2024

Other noteworthy points

- 65** | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

In August 2019, the government established rules allowing armed private security services to board vessels sailing under the Portuguese flag that cross high piracy risk areas.

Decree-Law 92/2018 (in force since 1 January 2019) established a special tax regime for shipping companies with head offices in Portugal based on the tonnage of the vessels, referred to as the 'tonnage tax'. Other tax benefits are also granted regarding crew and activities on board passenger vessels.

Law stated - 30 April 2024

UPDATE AND TRENDS

Key developments of the past year

- 66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

Recent Lisbon Maritime Court decisions have granted the arrest of vessels as a guarantee for the payment of debts arising out of contracts established with the charterer only, allowing the arrest of assets that are not the registered property of debtors.

In such cases, if a shipowner places security with the court to obtain the vessel's release, the relevant issue seems to be whether, according to the law of the flag of the vessel or the law of the contract, there is a lien on the vessel allowing the creditor to later enforce any subsequent decision in the main proceedings after the arrest. This issue is still to be clarified.

Law stated - 30 April 2024

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UPDATE AND TRENDS

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

It is usual for title to remain with the builder until delivery. On delivery, title and risk pass to the purchaser. While the vessel is being built, the builder will take out an appropriate builder's risk insurance to protect its investment. The builder will also be able to raise finance by giving a charge or debenture over the vessel being built. The purchaser will secure his or her milestone payments through refund guarantees issued by the builder's bank. The purchaser can raise construction finance by giving an assignment of the shipbuilding contract in favour of its bankers or financiers. This will include an assignment of the refund guarantees issued by the builder's bank.

Law stated - 18 April 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

A refund guarantee issued by the builder's bank need only comply with the corporate requirements of the builder's bank. Usually, the builder's bank and the purchaser's bank verify the authenticity of the refund guarantee by establishing the document by telex.

Law stated - 18 April 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

If the title to the vessel remains with the builder until delivery of the vessel and is transferred to the purchaser in exchange for the final milestone payment, then a refusal by the builder to deliver the vessel will only entitle the purchaser to claim damages for breach of the shipbuilding contract.

The purchaser cannot compel the builder to deliver the vessel unless under the shipbuilding contract the title to the vessel belongs to the purchaser. If the purchaser attempts to take delivery of the vessel then no claim can be brought under the refund guarantee.

Law stated - 18 April 2024

Defects

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- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Under a shipbuilding contract, the builder's responsibility for defective work is limited to correcting the defect. Such an obligation is contractual and is available during the warranty period, usually for 12 months from delivery under the shipbuilding contract. The builder usually limits its liability to direct expenses to remedy the defect from bad workmanship or materials, and not for indirect or consequential losses.

A purchaser from the original shipowner would usually request an assignment of the shipbuilder's warranty if the purchase is completed during the validity of the warranty period.

The above legal position is concluded upon analysis of the governing terms of the respective underlying contracts (shipbuilding contract and, for example, the Singapore Ship Sale Form) and the Sale of Goods Act. This may necessitate the application of the conflicts rules. Remedies of the purchaser may lie against the original shipowner (as the immediate seller) for breach of the express or implied terms of the contract of sale, for there exists a contractual relationship.

The builder will in turn be liable to any subsequent purchaser or a third party if these third parties can bring themselves within the principle of *Donoghue v Stevenson*, as explained and expanded by subsequent case law. The claim is in tort under product liability against the shipbuilder as the manufacturer of the ship for construction of an unsafe ship (for example, error in design or defective equipment). The legal principles in this regard are similar to those applied by Commonwealth courts.

Law stated - 18 April 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Any kind of vessel used in navigation, however propelled or moored, including a barge, lighter, air cushion vehicle and offshore industry mobile unit.

It is possible to register vessels under construction at a certain stage of construction provided that certain requisite certificates have been issued, for example, the builder's certificate, the classification certificate and the tonnage certificate.

Law stated - 18 April 2024

- 6 | Who may apply to register a ship in your jurisdiction?

Only Singapore citizens or Singapore-incorporated companies, whose paid-up capital is at least S\$50,000 and in which 51 per cent of the issued shares are owned by a Singapore citizen or a Singapore permanent resident, may register a vessel whose tonnage is less than 1,600 gross tonnage (GT), or a vessel that is not self-propelled, at the Maritime and Port Authority of Singapore (MPA). Save as stated, vessels may be registered with the MPA by Singapore citizens, or Singapore-incorporated companies whose paid-up capital is at least S\$50,000.

Law stated - 18 April 2024

Documentary requirements

7 | What are the documentary requirements for registration?

The documentary requirements for registration are the reservation of the name with the Accounting and Corporate Regulatory Authority (ACRA) of Singapore, and filing of application forms and draft memoranda and articles of association at ACRA and payment of an incorporation fee. The company must have a minimum of one shareholder (who can be an individual or a company) and one Singapore-resident director.

The first step for any vessel registration in Singapore would be to apply to the MPA to reserve a name for the vessel and for MPA to allocate the official number and call sign for the vessel. Thereafter, the applicant may apply for the carving and marking note for the vessel from MPA and forward the same to the classification surveyor of the vessel. Once this is done, the applicant may proceed with the registration of the vessel as follows.

Provisional registration of newbuilding

The applicant must submit copies of:

- the builder's certificate of the vessel duly notarised, and duly apostilled or legalised by the Singapore Consulate;
- the builder's power of attorney duly notarised, and duly apostilled or legalised by the Singapore Consulate (in the event that the builder's certificate is signed by the builder's attorney);
- the classification certificate or class attestation and the tonnage certificate or tonnage attestation together with the originals of the application form for registration;
- the MPA's appointment of manager form;
- the MPA's appointment of agent form (in the event the applicant is a company and the application for registration is being signed by a person other than a director or the company secretary of the applicant);
- the cheque in favour of the MPA for the registration fee and annual tonnage tax;
- the carving and marking note duly endorsed by the classification surveyor; and
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the companies registry business profile on the applicant (where the applicant is a company) issued by ACRA.

If the carving and marking note is not ready, the applicant may issue a letter of undertaking to the MPA to submit the same within one month from the provisional registration. The provisional registration will be for one year.

Provisional registration of a second-hand vessel

The applicant must submit copies of:

- the bill of sale of the vessel duly notarised, and duly apostilled or legalised by the Singapore Consulate;
- the seller's power of attorney duly notarised, and duly apostilled or legalised by the Singapore Consulate (in the event the bill of sale is signed by the seller's attorney);
- the classification certificate;
- the class confirmation certificate free from conditions or recommendations dated not less than 72 hours before the date of submission for registration or such other longer period as the MPA shall permit;
- the tonnage certificate together with the original application form for registration;
- the MPA's appointment of manager form;
- the MPA's appointment of agent form (in the event the applicant is a company and application form for the registration is being signed by a person other than the director or a company secretary of the applicant);
- the cheque for the registration fee and tonnage tax;
- the carving and marking note duly executed by the classification surveyor;
- the companies' registry business profile on the applicant (in the event that the applicant is a company) duly issued by ACRA; and
- the free from encumbrances transcript or certificate issued by the vessel's existing registry dated within three Singapore working days prior to registration.

If the carving and marking note is not ready, the applicant may issue a letter of undertaking to the MPA to submit the same within one month from the provisional registration. The provisional registration will be for one year.

Final registration of newbuilding

The applicant must submit the following within the time limit specified by the MPA:

- the originals of the notarised, and legalised or apostilled, builder's certificate;

- the notarised, and legalised or apostilled, builder's power of attorney (if applicable);
- the carving and marking note (if not submitted earlier);
- copies of the full-term classification and trading certificates;
- International Safety Management (ISM) declarations and ISM certificates; and
- Continuous Synopsis Record (for which the applicant will have to apply to the MPA).

Final registration of a second-hand vessel

The applicant must submit the following within the time limit specified by the MPA:

- the original notarised, and legalised or apostilled, bill of sale;
- the notarised, and legalised or apostilled, seller's power of attorney;
- the carving and marking note (if not submitted earlier);
- the deletion certificate and closed CSR of the vessel from the previous registry;
- copies of the full-term classification and trading certificates issued under the new ownership and flag of the vessel; and
- the new CSR (for which the applicant will have to apply to the MPA).

Law stated - 18 April 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration or flagging out of a Singapore-registered vessel is possible, to enable the vessel to be registered in a bareboat charter registry by the bareboat charterer, provided that the Singapore registration of the vessel is suspended during the period of flagging out.

The MPA also approves registration of vessels in MPA's bareboat charter-in register on a case-by-case basis. For such bareboat charter-in registration, the underlying foreign registration of the vessel will have to be suspended for the period of the bareboat charter-in registered in Singapore.

Law stated - 18 April 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The register of mortgages is maintained by the MPA. It contains the date of the mortgage, the date of registration of the mortgage at the MPA, the name and address of the mortgagee, and the priority of the mortgage.

Law stated - 18 April 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

'Package' limitation

The Hague-Visby Rules regime

As per article IV, rules 5(a) and (d), the carrier's and the ship's liability for any loss or damage to or in connection with the cargo is limited to S\$1,563.65 per package or unit, or S\$4.69 per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

The Hague Rules regime

The basic limitation for the same claims is at £100 gold value per package or unit.

'Tonnage' limitation

Claims from incidents occurring before 1 May 2005 will be time-barred in Singapore.

Incidents occurring after 30 April 2005

The Convention on Limitation of Liability for Maritime Claims 1976 regime, with the (new) sections 134 to 144 in Part VIII of the [Merchant Shipping Act \(1995\)](#) edition as amended by the [Merchant Shipping \(Amendment\) Act 2004](#).

Claims, whatever the basis of liability, that can be limited are:

- claims for loss of life or injury or damage to or loss of property (eg, harbour works, basins, waterways and navigational aids) occurring on board or 'in direct connection with the operation of the ship' or with 'salvage operations' and consequential damages;

- loss resulting from delay in the carriage of passengers, luggage and cargo;
- 'other loss' resulting from infringement of non-contractual rights, occurring 'in direct connection with the operation of the ship' or 'salvage operations';
- expenses for removal or rendering harmless of wreck or of cargo of the ship; and
- third parties' claims in respect of measures taken to avert or minimise loss, except where there is a contractual relationship.

Parties entitled to limit are:

- the shipowner;
- the charterer;
- any person with an interest in or in possession of the ship;
- the manager or operator of the ship;
- the salvor;
- any person for whose act or default the shipowner or salvor is responsible; and
- an insurer.

The 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims has not been the subject of legislation for application in Singapore.

Carriage by air

The applicable conventions are the Warsaw Convention, the Warsaw-Hague Convention and the Warsaw-Hague-Montreal Convention, implemented by the [Carriage By Air Act 1988](#) and the [Carriage By Air \(Montreal Convention 1999\) Act 2007](#).

These conventions set out the bases for the carriers' liability for:

- death or injury of passengers sustained during the carriage by air;
- loss of or damage to baggage or cargo; and
- damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

Parties affected are:

- carriers;
- carriers' employees and agents;
- passengers;
- consignors and consignees; and
- other persons.

Law stated - 18 April 2024

Procedure

11 | What is the procedure for establishing limitation?

Limitation fund under the Convention on Limitation of Liability for Maritime Claims 1976

Any eligible party potentially liable may constitute a limitation fund with the court, either by depositing the sum or by furnishing an acceptable guarantee. Upon the occurrence envisaged in the convention and claims being apprehended, the liable party may apply to limit its liability and the court may, inter alia, determine and distribute the limitation amount and may stay any related proceedings pending in another court.

The calculation of the limitation fund is divided into two groups: first personal 'injury' claims, which includes death; and second 'other' claims, with the former ranking higher in priority. The result is that where the total fund is insufficient to satisfy all the injury claims, the shortfall shall rank alongside the other claims.

The convention sets out a sliding scale with the amount expressed in special drawing rights (SDR) working in inverse order to the ship's tonnage and modified for its applicability to Singapore.

The limitation fund can be constituted by a cash deposit and possibly by a protection and indemnity (P&I) club letter of undertaking or guarantee acceptable to the Singapore court. The latter has not yet been decided by the Singapore courts but as the English courts have already permitted a limitation fund to be constituted by an acceptable P&I club letter of guarantee or undertaking, we expect that a Singapore court will not have objections in this regard.

The limitation fund is calculated as set out in the convention plus interest. To avoid any dispute, the Maritime and Port Authority of Singapore (MPA) can be requested to certify the conversion rate from SDR to Singapore dollars for the limitation fund.

It is not settled law as to whether a shipowner or other entitled person can apply to constitute a limitation fund before legal proceedings have been initiated and before it has been required to respond to a claim that has already been commenced.

Ship licensed as a harbour craft

For injury claims and other claims, the limit of liability is the same for each category, namely equivalent to 'the sum insured under the insurance policy for the time being required by the Port Master under the Maritime and Port Authority of Singapore ([MPA Act](#)) to be in force in relation to that harbour craft in respect of third-party risks'.

Other ships and claims

Any other ship with a tonnage less than 300 gross tonnage:

- for injury claims: 166,667 SDR; and
- for other claims: 83,333 SDR.

Tonnage in excess of 300 GT injury claims:

- 301 to 3,000 GT: 500 SDR per ton plus 333,000 SDR;
- 3,001 to 30,000 GT: 333 SDR per ton plus 333,000 SDR;
- 30,001 to 70,000 GT: 250 SDR per ton plus 333,000 SDR; and
- 70,001 GT and above: 167 SDR per ton plus 333,000 SDR.

Other claims:

- 301 to 30,000 GT: 167 SDR per ton plus 167,000 SDR;
- 30,001 to 70,000 GT: 125 SDR per ton plus 167,000 SDR; and
- 70,001 GT and above: 83 SDR per ton plus 167,000 SDR.

For injury claims relating to passengers, instead of the above amounts, liability is limited for each distinct occasion to a sum of 46,666 SDR multiplied by the authorised passenger-carrying capacity of the ship, up to a maximum of 25 million SDR.

The equivalent for the sums in SDR shall be the amounts set by the MPA for a particular day.

Limitation of liability

Limitation of liability may be invoked even though a limitation fund has not been constituted. Claims and counterclaims of the prescribed types and arising out of the same occurrence must be offset against each other, and limitation applies only to the balance payable.

Invocation of limitation may be achieved by one of two methods:

- the party can plead limitation as a form of defence so that where damages would have exceeded the limit of liability, judgment would be given for such limit. This obviates the constitution of the limitation fund; or
- the party can commence limitation proceedings to establish its right to such limit, but it is not necessary to constitute a fund until the right to such limit has been decided.

Law stated - 18 April 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

A claim to limit liability would be defeated if the loss was occasioned by a 'personal act or omission committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result'.

It is incumbent upon those seeking to deny limitation to prove that the 'person liable' definitely intended to cause such loss. The alternative criterion is 'recklessly': the recklessness is coupled with that person's knowledge that such loss would probably result.

The same test applies to package limitation and tonnage limitation.

The limit can be broken if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with the knowledge that damage would probably result (article IV of the Convention on Limitation of Liability for Maritime Claims 1976 applies). There is no known case of limitation being successfully broken in Singapore.

In the event limitation is broken, it is open to the party who obtained the order to constitute the limitation fund to apply to a court for an order for the limitation fund to be returned to the provider of the fund. However, this will be subject to any condition that the court may impose in making the order.

Law stated - 18 April 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Singapore has not ratified the Athens Convention relating to Carriage of Passengers and their Luggage by Sea. There is no limitation regime operating in Singapore in respect of carriage of passengers and their luggage by sea. Limitation, if any, will have to be covered by the terms of the contract entered into between the carrier and the passenger.

Law stated - 18 April 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The Maritime and Port Authority of Singapore (MPA) is the body that represents the Singapore government and exercises powers as the port state control agency. The port master has wide powers to regulate, restrict or prohibit movement of vessels in the port and approaches to the port and can direct the berthing and removal of any vessel in the territorial waters of Singapore under the Maritime and Port Authority of Singapore Act (MPA Act). The authority exercises regulatory functions in respect of merchant shipping and particularly in respect of safety at sea, the manning of vessels and prevention of pollution

at sea. The authority acts internationally as the national body representative of Singapore in respect of sea transport, marine and port matters.

Law stated - 18 April 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The MPA can refuse to grant port clearance to a vessel that does not comply with its orders or directions. It has wide powers under section 8 of the MPA Act and may exercise powers given to it under the second schedule of the Act. The powers under this schedule include powers to levy such charges and fees for the granting of licences, approvals, permits, consents and for services and facilities that the authority is required or empowered to provide under the Act.

Law stated - 18 April 2024

Appeal

16 | What is the appeal process against detention orders or fines?

Under section 101 of the Act, a magistrate's court or a district court shall have jurisdiction to hear and determine all offences under the Act or the regulations.

An appeal from these subordinate courts will go to the Supreme Court of Singapore.

Law stated - 18 April 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

To be registered at the Singapore Registry of Ships (the Shipping Division of the Maritime and Port Authority of Singapore), the candidate vessel must possess statutory certificates issued by its shipping division, or classification and statutory certificates issued by one of the nine recognised classification societies:

- American Bureau of Shipping;
- Bureau Veritas;
- China Classification Society;
- DNV GL;
- Korean Register of Shipping;

- Lloyd's Register of Shipping;
- Nippon Kaiji Kyokai; or
- Registro Italiano Navale.

All the above classification societies, with the exception of Registro Italiano Navale, have been appointed as recognised security organisations.

Law stated - 18 April 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

The general principles of the law of torts apply. If a duty of care is owed by the classification society not to cause pecuniary loss by negligent misstatement to the claimant, then liability may exist. Policy considerations as to whether the Singapore courts will be prepared to make inroads to include such duty situations in our Law of Negligence is the issue. There is no case in point in Singapore where a claimant has succeeded against a classification society.

Law stated - 18 April 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Under Part IX of the Maritime and Port Authority of Singapore (MPA) Act, the MPA is empowered to require the owner or agent of any vessel, aircraft or another object to raise, remove or destroy the whole or any part of a vessel, aircraft or object, which in its opinion, is stranded, sunk or abandoned within the port of Singapore or the approaches thereto.

If the owner or agent fails to act, the MPA can take possession of and raise, remove or destroy such vessel, aircraft or object. In that event, the MPA can seek to reclaim its expenses from the owner.

Law stated - 18 April 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Collision

- The [Maritime Conventions Act 1911 \(2004 Edition\)](#), giving effect to the conventions as a result of the conference held at Brussels in 1910 dealing with collisions between vessels (the rule as to the division of loss) and with salvage; and
- the [Merchant Shipping \(Prevention of Collisions at Sea\) Regulations](#), incorporating the International Regulations for Preventing Collisions at Sea 1972 with the subsequent amendments.

Wreck removal

The Nairobi International Convention on the Removal of Wrecks is in force in Singapore.

Salvage

The International Convention of Salvage 1989 is not in force in Singapore. Therefore, the pre-existing law of salvage applies.

Pollution

- The International Convention for the Prevention of Pollution from Ships 1973 and the Protocol of 1978 (carried into effect by the [Prevention of Pollution of the Sea Act \(Chapter 243\)](#));
- the International Convention on Civil Liability for Oil Pollution Damage 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 implemented by the [Merchant Shipping \(Civil Liability and Compensation for Oil Pollution\) Act \(Chapter 180\)](#); and
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, implemented by the [Merchant Shipping \(Civil Liability and Compensation for Bunker Oil Pollution\) Act 2008](#).

Law stated - 18 April 2024

Salvage

- 21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement. Lloyd's standard form of salvage agreement is acceptable.

Under section 80 of the MPA Act, no person can carry on the business of rendering salvage services in the territorial waters of Singapore without a valid licence granted by the authority for that purpose.

Law stated - 18 April 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

None. However, the Singapore statute in this respect, namely the [High Court \(Admiralty Jurisdiction\) Act](#), reproduced the Administration of Justice Act 1956 of the United Kingdom, which was passed to implement the International Convention Relating to the Arrest of Seagoing Ships 1952 and the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision 1952. The 1956 act was re-enacted in the United Kingdom by the Supreme Court Act 1981, which was in turn followed in Singapore with the addition of certain words to section 4(4) of the Singapore statute.

Law stated - 18 April 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

A writ in rem endorsed with a claim of the type within the admiralty jurisdiction of the High Court may be served, and a vessel can be arrested in one of the circumstances prescribed by section 3(1) of the High Court (Admiralty Jurisdiction) Act.

The above may be performed only against the particular ship in connection with which the claim arose in the case of:

- possession or ownership of a ship;
- employment and earnings of a ship, in the case of co-owners;
- mortgage or charge on a ship; or
- the forfeiture or condemnation of a ship as 'prize'.

The above may be performed against the particular ship, or against a sister ship, in the case of:

- damage caused or received by a ship;
- loss of life or injury occurring in the course of the navigation or management of a ship;
- loss of or damage to goods carried in a ship;
- agreement for the carriage of goods, or hire of a ship;
- salvage services;
- towage;
- pilotage;
- goods or materials supplied for the ship's operation or maintenance;
- construction or repair of a ship, or dock charges;
- master and crew wages;
- master's or agent's disbursements on account of a ship;
- general average act; or
- a claim arising out of bottomry.

The Admiralty jurisdiction is also created by special statute to implement conventions for:

- a claim in respect of a liability under the oil pollution legislation; or
- limitation of liability.

The vessel's flag or law governing the claim makes no difference to the claimant's entitlement to invoke the admiralty jurisdiction of the court, so long as the claim is of the prescribed type and the criteria applicable to the mode of exercise of such jurisdiction are fulfilled.

The ascertainment of beneficial ownership of a vessel is a matter of Singapore law as it relates to the admiralty jurisdiction of the Singapore courts. However, the court would have regard to the governing (foreign) law, to the extent that it is applicable from the 'conflict of laws' viewpoint, for instance, in relation to a foreign ship's mortgage. The requisite formality for the creation of the maritime mortgage in accordance with the vessel's flag, the nature of the right created by the mortgage in favour of the creditor or mortgagee and the extent of that right will be determined by the law of the (foreign) country.

The epithet 'associated' or 'affiliated' is usually employed only in relation to the shipowning entities in a group. For vessels, the juridical word is 'sister' or 'sister ship', that is, another ship in the same ownership as the particular ship. Section 4(4) deals with the beneficial ownership aspect that must be satisfied for a successful invocation of admiralty jurisdiction. The weight of authorities (originating from a Singapore decision and subsequently considered by the Hong Kong and English courts) suggests that a vessel owned by the charterer of the particular ship is also open to arrest by the owners of the particular ship. Although it was not stated in such terms in the decisions, the upshot is that such a vessel can to that extent be considered a sister ship, whereas the relationship between these vessels is nowhere near the natural meaning of the expression 'sister ship'.

A ship owned by a wholly-owned subsidiary company is not beneficially owned by the defendant holding company and thus is not amenable to an in rem action under section 4(4). Nor does the right to arrest extend to a ship owned by a sister company of the company owning the particular ship.

A bareboat (demise) chartered vessel may be arrested for a claim against the bareboat charterer, for example in circumstances where:

- the bareboat charterer was the bareboat charterer of the vessel in connection with the claim at the time when the claim arose and was the liable party; and
- that vessel remained under bareboat charter to him or her when the writ is issued.

Insofar that where the liable party is the time charterer who was the time charterer of the vessel in connection with the claim at the time the claim arose, and at the time of issuing of the writ he or she remained the time charterer of that vessel, no arrest of the offending ship is permitted.

Law stated - 18 April 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Yes, Singapore recognises the concept of maritime liens. Under Singapore law, the following claims give rise to maritime liens against a vessel:

- wages claims of master and crew and claims of the master for disbursements incurred for the vessel;
- salvage claims; and
- collision claims.

Law stated - 18 April 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

Where a ship is arrested when she ought not to have been, the question of whether the owner is entitled to recover the loss suffered would depend on whether the arresting party is guilty of bad faith or gross negligence, which implies malice.

The ultimate failure of the claim per se is not the test and would not entitle the shipowner to damages for wrongful arrest. Likewise, damages are not recoverable in respect of a mere error of judgement in arresting the vessel where there was no bad faith.

On the other hand, if at the conclusion of the trial it is apparent that the sum demanded by way of security for the release from arrest exceeds by a substantial margin the sum recovered then the plaintiffs will be ordered to pay the cost of providing that part of the security that the court regards as being unreasonably excessive.

Law stated - 18 April 2024

Bunker suppliers

- 26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Section 4(4) of the High Court (Admiralty Jurisdiction) Act governs the outcome of the answer to this. The bunker supplier could have a right of arresting the particular ship if, and only if, the charterer, as 'the relevant person' liable in personam and as 'the relevant person' in the second limb of the test, is a bareboat or demise charterer at the time when the action in rem is brought. Thus, this test would not be satisfied if the bareboat charter had already come to an end when the writ in rem was issued at the request of the bunker supplier. Any challenge by a defendant shipowner to the bunker supplier's reliance on the identity of the defendant shipowner as 'the relevant person' is not a jurisdictional matter to be dealt with at the interlocutory stage but is properly a dispute on the merits of the bunker supplier's claim unless it is determined to be 'hopeless'.

Since it is not uncommon in a shipping group to have the same entity operating ships both owned as well as chartered by it, it is possible to postulate this scenario on the authorities from Singapore, Hong Kong and the UK: the bunker supplier may arrest a ship owned by or chartered by demise to the charterer at the time the writ in rem is issued.

Law stated - 18 April 2024

Security

- 27 | Will the arresting party have to provide security and in what form and amount?

The arresting party does not have to provide security in the sense of (reciprocally) securing its ability, to the advantage of the shipowner, to pay damages occasioned by, for example, what subsequently turns out to be a wrongful arrest or the ultimate failure of the claim.

Law stated - 18 April 2024

- 28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The usual practice of the court is only to order release, unless successfully negotiated by the parties, upon the provision of sufficient security to cover the amount of the claim

calculated on the basis of the claimants' best arguable case. The amount of the security (eg, for a cargo claim) comprises the sound arrived value of the goods with interest (for two to three years at 5.33 per cent per annum of the claimed amount) and costs (S\$150,000) added.

The security amount does not exceed the value of the ship. This amount can be reviewed subsequently by the court upon application. The claimants may be ordered to pay the additional costs incurred by the shipowner in putting up the security if the amount is determined to be excessive.

The security is by way of a bank guarantee or an acceptable P&I club's letter of undertaking.

Law stated - 18 April 2024

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

The Singapore Rules of Court require every solicitor representing any party in any cause or matter to obtain from such party or their duly authorised agent a warrant to act for such party, either generally or in the said cause or matter (eg, arrest application). The warrant to act need not be provided to the court unless the solicitor's authority to act is disputed. No power of attorney is required.

The arrest application is made by filing a summons-in-chambers and affidavits, which will also exhibit documents in support of the application for the arrest of the ship. Documents can be exhibited in copy form and originals are not required. Any translations should be made by qualified translators and their qualifications with the accompanying certificates produced. Where available, court interpreters may be engaged but other qualified translators may also be used. The documents need not be notarised, legalised or authenticated (as to the notary) and may be filed electronically.

It is unlikely that an arrest order will be given by the court based merely on an undertaking to comply with all the formalities as soon as practicable. Depending on the complexity of the matter, it takes about one to two days or more to prepare the papers for an arrest application.

Law stated - 18 April 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

Such responsibility lies with the claimants (plaintiffs) at whose instance the ship is arrested, through their solicitors, who at the time of applying for the warrant of arrest must undertake to indemnify the Sheriff in respect of the costs and disbursements in effecting and maintaining the arrest.

Law stated - 18 April 2024

Proceedings on the merits

- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

The Singapore statute conferring Admiralty jurisdiction on the Singapore High Court has not included in its provisions the power of the court to order retention of security obtained by arrest of a vessel in admiralty proceedings in Singapore to secure satisfaction of the judgment of some other court in another forum.

However, the Singapore court may find these English judicial observations particularly persuasive:

*It seems to me that, by the maritime law of the world, the power of arrest should be, and is, available to a creditor – exercising it in good faith in respect of a maritime claim – wherever the ship is found – even though the merits of the dispute have to be decided by a Court in another country or by an arbitration in another country – and, I would add (contrary to *The Golden Trader* . . .), even though the arbitration is mandatory.*

The Lisboa [1980] 2 Lloyd's Rep. 546 per Lord Denning, MR, at pp 549–550.

[It] would not, I think, normally be wrong to allow a plaintiff to keep the benefit of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum.

The Spiliada [1987] 1 Lloyd's Rep. 1 per Lord Goff at p15.

In the case of an arbitral award, the effect of the [International Arbitration Act](#), sections 6 and 7, is that where the court has ordered a stay of the (admiralty) proceedings, it may order the vessel (the property) retained as security for the satisfaction of any award made by the tribunal.

Consideration of whether it is 'possible to [. . .] pursue proceedings on the merits elsewhere' would also depend on the judicial approach of the particular forum 'elsewhere'. For there must be reciprocity of jurisprudence and if that forum is, for instance, English, the Singapore court would likely adopt the approach like that in the International Arbitration Act, mutatis mutandis.

Law stated - 18 April 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

One of the functions of the court is to assist creditors by its procedure to obtain satisfaction of their just claims. Except for ship arrest, there is a general proposition that the procedure of common law jurisdictions is less well equipped than many of the continental counterparts to provide security.

A plaintiff in pending proceedings in the Singapore jurisdiction may, upon satisfying certain conditions, seek a *Mareva* injunction in respect of the defendants' assets within the jurisdiction to prevent them from removing their assets from the jurisdiction. A *Mareva* injunction, which has been called 'an injunction by way of foreign attachment', results in the substitution of security (eg, a bank guarantee) for an asset.

The plaintiffs in appropriate cases may also apply for an injunction restraining the defendants from dealing with the asset in a manner calculated to defeat or render nugatory a judgment or court order which on the evidence appears irresistible.

Law stated - 18 April 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

On an application by a party to the proceedings under Order 13 rr 2 and 3 of the Rules of Court, the court may make an order for the interim detention, custody or preservation of the subject property and for the obtaining of full information or evidence in the proceedings. The court also has jurisdiction, for the purpose of preserving the subject matter of the proceedings or of documents relating thereto, to grant an *Anton Piller* order, which in essence is a mandatory injunction requiring the defendant to permit the plaintiff to enter the defendant's premises to inspect and remove materials into safe custody.

Law stated - 18 April 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

No procedure in rem is available to arrest bunkers in the same manner as the arrest of ships and aircraft. The only possible way is by the process of execution upon obtaining a judgment against the owner of the bunkers as with any other type of property within the jurisdiction. A *Mareva* injunction in respect of bunkers is possible if the prerequisites are satisfied, though such cases are quite rare, unlike, for example, proceeds of insurance on a vessel sunk after a casualty or other form of substantial assets with the bank.

Law stated - 18 April 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

The application is usually made by the arresting party, though it is equally open to any interveners, or even the owners of the vessel.

Law stated - 18 April 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

A sale may be ordered upon judgment or during litigation. Upon the plaintiff's request, the commission for appraisal and sale will be issued by the registrar and lodged with the sheriff. The sheriff engages surveyors for the appraisal and advertises the vessel for sale in the Singapore newspapers and other publications abroad. Prospective bidders may inspect the vessel. Sale is by sealed tenders and subject to the court's standard terms.

The average length of the period between the application and the conclusion of the judicial sale is two to three months.

The court's costs are:

- stamp fee on the commission for appraisal and sale (S\$250 for a claimed amount of up to S\$1 million, and S\$500 if the amount is above S\$1 million);
- sheriff's commission (at 5 per cent on the first S\$1,000 of the sale proceeds, and 2.5 per cent on the amount in excess of that sum); and
- the auctioneer's commission, if applicable.

Law stated - 18 April 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The ranking for the purpose of priority in the distribution of a limited fund is based on the well-settled principles applied by the court, which are generally as follows:

- the sheriff's charges and expenses including expenses for preserving the ship or her value;
- costs of the plaintiffs in whose action the ship was arrested and in maintaining that arrest, up to the time of the order for appraisal and sale;
- salvage claim;
- collision damage claim;
- wages and disbursements of master and crew;
- possessory lien of shipyard;
- mortgage claim; and
- another claimant with the statutory right of action in rem under the High Court (Admiralty Jurisdiction) Act.

There are other determining factors affecting the ranking of priorities, for example, some with relevance to sequentially different occasions for the same category of maritime liens, and between class and class, whether these should rank *pari passu* or in inverse order of the happenings.

Law stated - 18 April 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The sale of a vessel by the court in admiralty proceedings in rem gives the purchaser title free of all maritime liens and other charges or encumbrances, including a repairer's common-law possessory lien and a mortgagee's right of sale.

The rights of the claimants are transferred to and preserved against the proceeds of sale in court. Thereafter all claims against the ship can only be enforced against the proceeds.

Law stated - 18 April 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Such a judicial sale by a foreign court in admiralty proceedings is conclusive and will be recognised by the Singapore court provided that the vessel was within the lawful control of the state under the authority of which the foreign court sits and the foreign court has acted within its admiralty jurisdiction conferred by the state (as opposed to the case of a personal remedy against the owners or in the case of a writ to a sheriff for executing a judgment).

Law stated - 18 April 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Law stated - 18 April 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Singapore acceded to the relevant 1924 Convention and gave effect to the Hague Rules, without variation.

The current Singapore statute is the [Carriage of Goods by Sea Act](#) enacted to give effect to the Hague-Visby Rules, as scheduled to the act without variation.

The Hamburg Rules are not in force.

Singapore has not ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules).

For the purpose of the Hague Rules and the Hague-Visby Rules, sea carriage begins with the loading of the goods and ends with their discharge from the carrying ship.

Law stated - 18 April 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

A unimodal carriage by any of the respective modes is governed by individual conventions. One of these conventions is the Convention on the International Carriage of Goods by Road, which has not been ratified or adopted in Singapore. The liability of carriers of goods by road in Singapore is governed by the common law principles in contract, tort or bailment.

However, a carrier in a contract governed by Singaporean law with the owner of the goods may accept responsibility for the whole transit, even though he or she may actually

perform only part of the carriage, or even none at all, and may choose to incorporate in his or her Multimodal Transport Document, for example, the United Nations Convention on International Multimodal Transport of Goods 1980, which does not need, for it to take effect, to include a sea carriage in its prerequisite of a minimum of two different modes of transport.

Law stated - 18 April 2024

Title to sue

43 | Who has title to sue on a bill of lading?

As bill of lading holder

Simply, a party who becomes the lawful holder of a transferable bill of lading thereby possesses all rights of suit under the bill of lading as if it had been a party to the bill.

In certain circumstances, the holder has the rights of suit only if it becomes the holder:

- pursuant to a (sale) agreement affording it a pre-existing right against the carrier to possession of the goods; or
- upon the rejection by another party of goods or shipping documents pursuant to the (sale) agreement.

For damage suffered

Where a party entitled to the goods covered by the bill of lading sustains loss or damage in consequence of a breach by the carrier but the relevant rights of suit are vested in another party, the latter may exercise those rights to like extent for the benefit of the first-mentioned party.

Law stated - 18 April 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Bills of lading issued under a charter party may contain general words of incorporation by which the charter party terms or clauses are incorporated into the bills.

The effect is that a clause in the charter party that is directly germane to the subject matter of the bill of lading (ie, germane to the shipment, carriage and discharge or delivery of goods) can be incorporated into the bill of lading contract by general words in the bill of

lading, as only such a clause is reasonably applicable to the bill of lading. But if the clause is one that is not thus directly relevant (eg, an arbitration clause), it would not be incorporated into the bill of lading contract unless it is explicitly so stated in clear words either in the bill of lading or in the charter party. It could not otherwise be said with certainty whether, for example, the dispute between the parties is a dispute under the charter party or the bill of lading. Therefore, the charter party arbitration clause would not be binding on a third-party holder or endorsee of the bill.

Law stated - 18 April 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

The effect of the demise clause is to notify the bill of lading holder of the possibility of a charter, and therefore that the shipowner is the carrier and the bill of lading is a shipowner's bill. However, the charterer might not go very far with the demise clause without more. Although the demise clause could be considered inconsistent with basic standards of commercial honesty, nevertheless it is recognised by the court and is binding, but only if none of the prerequisites is missing.

A 'carrier', as defined in the bill of lading identity of carrier clause, in order to be subject to the obligations and entitled to the rights and immunities conferred in the Hague-Visby Rules, must be a party to the contract of carriage covered by a bill of lading, or similar document of title relating to the sea carriage.

'Carrier includes the owner or charterer who enters into a contract of carriage with the shipper' (article I(a)).

Law stated - 18 April 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Under the Hague-Visby Rules, parties other than owners and charterers may be 'carriers'.

In an appropriate arrangement, such as by means of a Himalaya clause, a shipowner may be an independent (sub)contractor of a charterer. Where a carrier has chartered a vessel to perform the sea carriage that that carrier has contracted with the shipper to perform, the carrier or charterer (in such case a 'contracting carrier') has in effect employed the shipowner ('actual carrier') to carry out the substantial part of its own contractual obligations. Such a carrier or charterer has therefore employed the shipowner as an independent contractor, just as if it had employed a stevedore to carry out the handling of the goods at the port.

The shipowner is thus enabled to rely on the bill of lading terms, including in the appropriate cases the carrier's immunities under the Hague-Visby Rules. But having regard to article III, Rule 8 of the Rules, the Himalaya clause is to be read as limiting the protection of the shipowner (as an independent contractor) against liability to the cargo owner in tort to the protection available to the carrier upon whom the positive obligations such as in article III, Rules 1 and 2 are laid. In other words, the complete exemption open to the shipowner is equally restricted by article III, Rule 8.

Law stated - 18 April 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Breach by deviation is like any other breach of a fundamental condition (or, a fundamental breach) that constitutes the repudiation of a contract by the party, in this case the carrier; the innocent party may elect not to treat the repudiation as being final, but to treat the contract as subsisting, and to that extent may waive the breach, any right to damages being reserved. If the innocent party with full knowledge of the deviation affirms the contract, then it is bound by its provisions (ie, including the benefit to the carrier of the contract conditions). For example, the shipowner, as against the cargo owners, or, in the appropriate case, the charterers, could rely on the exception of perils of the sea in respect of events occurring after the affirmation, but a waiver of the breach does not mean a waiver of the right to damages for that breach unless the contractual defences upon their construction are held by the court to be effectual.

It has been remarked that if there is a breach by deviation accepted by the innocent party the contract is at an end; the guilty party cannot rely on any special terms in the contract. If not so accepted the clauses of exception remain in force like all other clauses of the contract and applicable to a casualty occurring before or after the deviation, and the shipowner will be liable only for damages resulting from the deviation itself.

Law stated - 18 April 2024

Liens

48 | What liens can be exercised?

The types of lien, within the context of a contract of affreightment, are as follows.

Liens for freight under a bill of lading

On the back of the bill of lading are printed the carrier's various standard terms and conditions. A lien clause allows the shipowner to retain the cargo until freight and any other charges (eg, general average contributions or for the preservation of the goods)

and dues are paid. In the Singapore context, the shipowner may notify the wharfinger or warehouseman of its right to lien at the time any goods are landed from the ship: section 127 of the Merchant Shipping Act. These latter parties are entitled by section 132 to exercise certain powers and have a lien on the goods for the rent and expenses.

Liens enumerated in charter party

These liens usually conferred by a lien clause (which may be followed by the cesser clause) are for freight, advance freight, dead freight, demurrage and general average. Some of these exist in common law but are nevertheless included in the charter party to avoid adverse inference. The shipowner's lien on the cargo can only be enforced against the bill of lading holder if such charter party terms have been incorporated into the bill of lading's terms.

Liens for sub-freights

The view in the preceding paragraph applies to sub-freights *mutatis mutandis* where, for example, the shipowner's lien is contractually extended to cover time charter hire.

Liens by operation of law on the vessel

Maritime lien, possessory lien and statutory lien, that is, the claimant's statutory right of action against the ship if the claim is of the type within one of the paragraphs enumerated in the High Court (Admiralty Jurisdiction) Act.

Law stated - 18 April 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Delivery of cargo otherwise than against a bill of lading would result in a claim by the consignees against the carrier and, if warranted by the circumstances, stevedores, for conversion of the goods or for breach of their duty (negligence), not to deliver goods except in exchange for shipping documents.

Whether the carriers are entitled to limitation is not entirely clear. Such an act has itself been regarded as analogous to 'deviation' for which the court (the Privy Council, on an appeal from the Singapore decision in *Sze Hai Tong Bank Ltd v Rambler Cycle Company Ltd* [1959]) once adopted the 'fundamental breach' approach and disallowed limitation.

However, this position needs to be reappraised in light of the subsequent House of Lords approach to the fundamental breach doctrine in its *Suisse Atlantique* [1966] and *Photo Production* [1980] decisions. The more sustainable view appears to be that adopted by the Australian court in *PS Chellaram & Co Ltd v China Ocean Shipping Co* [1989], following the Privy Council's decision in *The New York Star* [1980], in which it was held, on the facts, that the misdelivery there without presentation of the bill of lading – the agents wrongly assumed that the shippers' consent for the release had been obtained – was the result of mere negligence and nothing more, and that the Hague Rules limitation under article IV Rule 5 was applicable.

Law stated - 18 April 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper is liable for all damages and expenses directly and indirectly resulting from the shipment of dangerous goods (Hague-Visby Rules, article IV Rule 6), and this liability does not depend on their knowledge that the goods are dangerous. Goods of a nature that is inflammable, explosive or dangerous to the shipment to which the carrier has not consented with knowledge may be landed at any place or destroyed without compensation, and the shippers will be liable for the damage caused to the vessel or other cargo and expenses incurred by the carrier resulting from such shipment.

By Rule 5(h) the carrier shall not be responsible for loss of or damage to the goods if the nature or value thereof has been knowingly misstated by the shipper on the basis of which the bill of lading is drawn up.

Law stated - 18 April 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

There are no emission control areas in force in the Singapore domestic territorial waters.

Law stated - 18 April 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

By the [Prevention of Pollution of the Sea \(Air\) Regulations 2022](#), in which Annex VI of the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) is incorporated in the first schedule, the sulphur content of any fuel oil used in Singapore, as well as foreign-flagged ships, while they are in Singapore waters shall not exceed 0.5 per cent m/m.

A surveyor inspects ships in Singapore waters to verify that they possess a valid International Air Pollution Prevention certificate. In the absence of a valid certificate, the ship shall not be permitted to sail until it can proceed to sea without presenting an unreasonable threat of harm to the atmosphere or sea. If there is evidence that a particular ship has violated the regulations, the matter would be investigated and the ship may be inspected.

The owner and the master of any ship that fails to comply with any requirement of the regulations shall on conviction each be liable to a fine not exceeding S\$10,000 or to imprisonment for a term not exceeding two years or to both.

Law stated - 18 April 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction?
| Are there any ship recycling facilities in your jurisdiction?

There are no domestic or international ship recycling regulations applicable in Singapore. There are no ship recycling facilities in Singapore.

Law stated - 18 April 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The High Court of Singapore exercises admiralty jurisdiction over maritime claims in admiralty actions in rem or in personam. Other (inferior) courts are not thereby deprived of non-Admiralty jurisdiction to hear disputes, albeit of a maritime nature, for example, in the sense of being on a charter party, which are more commercial.

Law stated - 18 April 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The invocation of the admiralty jurisdiction by an action in personam and other non-Admiralty claims might necessitate obtaining the court's leave under Order 8, Rule 1 of the Rules of Court to serve a writ (process) on a defendant out of jurisdiction. There are, broadly speaking, 19 circumstances permitting service of the writ out of the jurisdiction, for example, where the claim is brought to enforce a contract made within Singapore, or to enforce any judgment or arbitral award.

The application for leave is made ex parte on an affidavit setting out the relevant facts. Full disclosure is necessary, including the disclosure of facts that cast doubt on the plaintiff's case. Therefore, the affidavit must be clear and frank and the plaintiff must establish a good arguable case.

There can be no service out of jurisdiction of a writ in an admiralty action in rem.

The question of which is the forum conveniens is also a matter to be considered by the court in exercising its discretion under this order.

Law stated - 18 April 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The [Singapore Chamber of Maritime Arbitration](#) (SCMA) provides the international maritime community with an independent, efficient and reliable forum for dispute resolution.

The SCMA is very active. Forty-three references were made to the SCMA in 2020.

Law stated - 18 April 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Order 60 of the Rules of Court governs the registration and enforcement of foreign judgments pursuant to the [Reciprocal Enforcement of Foreign Judgments Act](#) and the [Reciprocal Enforcement of Commonwealth Judgments Act](#). These acts provide for the reciprocal enforcement in Singapore of judgments and awards obtained respectively, as the titles suggest, in the courts of foreign and Commonwealth countries.

The acts deal with applications by a judgment creditor in Singapore for registration of the foreign judgment (ie, procedural) and, conversely, also applications by 'any party against whom a registered judgment may be enforced' to set aside the judgment under certain circumstances, such as on grounds of absence of jurisdiction of the foreign court or judgment being obtained by fraud (the substantive).

Order 37 of the Rules of Court governs the registration and enforcement of foreign judgments pursuant to the [Choice of Court Agreements Act](#) (CCAA). The CCAA gives effect to the Convention on Choice of Court Agreements (CCA Convention) done at The Hague on 30 June 2005. Pursuant to, and subject to, the provisions of the CCAA, it is possible for a judgment creditor to apply for the registration and enforcement in Singapore of a judgment issued by a court in a country that has ratified the CCA Convention, provided that foreign court had exclusive jurisdiction to resolve the dispute pursuant to which the judgment is issued.

An award made by an arbitral tribunal, whether the place of arbitration is in Singapore or elsewhere, pursuant to an arbitration agreement may, with leave of the court, be enforced in the same manner as a judgment or order of the Singapore court, according to section 46 of the [Arbitration Act](#).

Enforcement of a judgment or arbitral award may necessitate a judgment creditor's application in Singapore under Order 8, Rule 1(1)(m) of the Rules of Court for leave of court to effect service on the judgment debtor who is out of Singapore.

Law stated - 18 April 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Yes, asymmetric jurisdiction and arbitration agreements are valid and enforceable in Singapore.

Law stated - 18 April 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Asymmetric jurisdiction and arbitration agreements are valid and enforceable in Singapore, so the legal position regarding a breach of a Singapore jurisdiction clause would be the inverse. Also, in appropriate and opportune circumstances, the defendant may apply to the Singapore court for an anti-suit injunction if, for example, the bill of lading contains an anti-suit clause.

Law stated - 18 April 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

Foreign jurisdiction clause

The defendant may apply for a stay of proceedings. The Singapore court, assuming the claim to be otherwise within its jurisdiction, is not bound to order a stay but has discretion over whether to do so or not, regardless of whether it is an exclusive or non-exclusive jurisdiction clause.

Generally, the discretion should be exercised by granting a stay unless the plaintiff shows strong reasons why the court should not do so. In exercising its discretion, the court will take into account all the relevant circumstances.

The doctrine has been expressed thus: that in cases where jurisdiction has been founded as of right, that is, where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may apply to the court to exercise its discretion to stay the proceedings on the ground that is usually called *forum non conveniens*, namely, that the domestic forum is inappropriate. The onus is on the defendant to satisfy the court that there is another forum to which jurisdiction he or she is amenable in which justice can be done between the parties at substantially less inconvenience and expense. In addition, the court must regard that granting a stay would not deprive the plaintiff of a legitimate personal or juridical advantage that would be available to him or her if he or she invoked the jurisdiction of the domestic court.

The purpose is to identify the forum with which the action has the most real and substantial connection. The court must look for connecting factors; these include not only factors affecting convenience or expense (such as availability of witnesses), but also others such as the law governing the relevant transaction and places where the parties respectively reside or carry on business.

Arbitration clause

Where the claim is within an arbitration agreement and the plaintiff nevertheless has resorted to litigation, the defendant may apply to the court for the proceedings to be stayed so that the matter can be referred to arbitration. The grant of a stay is mandatory unless the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

Law stated - 18 April 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Collision claims

The basic limitation period under the Maritime Conventions Act 1911 is two years, applicable to a shipowner claiming against the other ship, or to claims in respect of damage or loss to cargo or property or loss of life or personal injury against the 'other' (ie, the non-carrying) vessel as a result of a collision.

The court has the discretionary power to extend the two-year period upon the plaintiffs showing exceptional or special circumstances or where there exists a good reason for doing so.

Salvage claims

Similarly, the basic limitation period is two years (which, incidentally, is also now contained in the International Convention on Salvage 1989, which has the force of law in certain other countries).

With regard to these categories, the court has the discretionary power to extend the two-year period upon the plaintiffs showing exceptional or special circumstances or where there exists a good reason for doing so.

Claims for loss of or damage to cargo arising out of contracts of carriage subject to the Hague Rules or the Hague-Visby Rules

Within one year of delivery of the goods or of the date when they should have been delivered. This one-year period may be extended by the parties. Indemnity actions against a third party for such cargo claims may be brought even after the expiration of one year as prescribed by the *lex fori*.

Charter parties

Being a consensual agreement, these usually stipulate a shorter period than the normal six years, for example, within three months for the appointment of arbitrators.

Torts in general

Six years.

Contracts in general

Six years, with the exception of contracts under seal, for which the limitation period is 12 years.

Law stated - 18 April 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

As is often the case, a cargo claimant may be the endorsee of a bill of lading that incorporates appropriate clauses in effectual terms: a charter party; a particular statute that gives effect to the Hague Rules making it a 'clause paramount'; and certain clauses, including arbitration clauses, of the 'Centrocon' charter party. In reality, it may be a charter-party chain. Thereby the cargo claim is subject to a one-year time limit.

The time limit for commencing arbitration proceedings is the same as for judicial proceedings; in a contract case, the relevant period is six years from the date of the breach if the relevant (eg, salvage) agreement, though it contains an arbitration clause, does not specify any special period within which an arbitration in respect of claims must be commenced. In many cases, where a contract contains an arbitration clause, that clause specifies a (special) time limit for commencing an arbitration that is much shorter than the statutory time limit that would otherwise be applicable.

The court has power to extend the time 'previously fixed by agreement or by a previous [court] order' for beginning arbitral proceedings. The court retains an overriding discretion. This provision is mandatory and its operation may not be excluded by agreement. One ground upon which the time limit can be extended relates to the conduct of the other party such as makes it 'unjust to hold [the claimant] to the strict terms of the [time limitation] provision'. A standstill agreement, express or implied, justifies an application to extend.

When the claimant commences arbitration proceedings against the shipowners (respondents), it is open to the latter to contend that the claim is time-barred under the Hague Rules (12 months). The claimant may then apply to the court: for a declaration that its claim against the respondent is not time-barred; or alternatively, it may ask for an order under section 10 of the Arbitration Act that the time for commencing arbitration proceedings be extended. In exercising its discretion the court will consider: whether at the time of the commencement the claim was time-barred; if so, whether the claimant is entitled to invoke section 10; and if so, whether the discretion should be exercised in its favour.

Law stated - 18 April 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

By the Maritime Labour Convention 2006, in force internationally since 20 August 2013, all Singapore-flagged ships ordinarily engaged in commercial activities are required to comply with the convention. Additionally, such ships of 500 gross tonnage and above that are engaged in international voyages must carry and maintain a maritime labour certificate and a declaration of maritime labour compliance. But ships below 500 gross tonnage need not be so certified, though they may at the request of their owners attain the Maritime Labour Convention certification.

Law stated - 18 April 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

The scenarios in this situation are amenable to legal analysis through the doctrine of frustration. The possible applicability of the doctrine ('frustrated adventure' and 'frustration of the commercial purpose') depends on the true construction of the terms that are, in the shipping contract, to be read in the light of the nature of the contract and the surrounding circumstances when the contract was entered into. The court decides the issue *ex post facto* on the actual circumstances. If a consideration of the facts shows that the parties never agreed to be bound in a fundamentally different situation that has now unexpectedly emerged, the shipping contract ceases to bind at that point.

By the basic principle of the law of contract, the prospect of a contract proving financially unprofitable, however certain the prospect may be, is not of itself prevention and is no ground for relief or release from the obligations of the contract. A shipowner, for instance, may have made an unwise bargain, or the shipping contract may have proved more expensive in performance than he or she had anticipated; but neither fact entitles him or her to claim that he or she is in a commercial sense prevented from carrying out his or her promise. The law says simply that if he or she has made what proves to be a bad bargain that is his or her misfortune, but that it does not afford him any excuse for non-performance; and that is because such a release would not be in accordance with the contract, correctly interpreted.

The question is whether the shipping contract which they made is, on its true construction, wide enough to apply to the new situation brought about by the adverse economic conditions (as opposed to, for instance, political conditions). It may also be relevant to consider whether the hire of a ship is a long-term tonnage, quantity or freight contract for a big volume. The supervention of, for example, emergency legislation requisitioning ships or shipbuilding materials may render the implementation of contracts illegal. But here it is very difficult to formulate a condition and still more difficult to imply it as a necessary, though unwritten, term of the contract, for example, in regard to a change in the economic conditions affecting the profitability expected by either party. The supervening event must be such that the court will form the view that reasonable persons in the position of the parties would not have made that contract, or would not have made it without inserting another term if they had known what was going to happen; that is to say, economic

conditions of such a character and proportion that to hold the parties to their contract would be to impose upon them a new and different contract.

There may be included in the terms of the shipbuilding contract or charter party itself a stipulation that provides for the merely partial or temporary suspension of certain of the parties' obligations, should some (economic) event so occur as to impede performance.

On these facts alone, where the performance of their contractual obligations is rendered more onerous, none of the afflicted parties in the various scenarios is entitled to relief by resorting to the doctrine of frustration. The shipping contract could not be said to be fundamentally or radically different. If a shipping contract for a long period (such as a long-term charter) or that otherwise involves a complex project (such as a shipbuilding contract) incorporates, for example, the 'force majeure' and 'hardship' clauses similar to those of the International Chamber of Commerce publication, then the parties may adequately cover unforeseen eventualities such as credit restriction, or policies or restrictions of governments in the list of force majeure events.

Law stated - 18 April 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

The High Court (Admiralty Jurisdiction) Act (HCAJA) is the relevant legislation governing the arrest of ships in Singapore. In *Vallianz Shipbuilding & Engineering Pte Ltd v Owner of the vessel 'Eco Spark'* [2023] SGHC 353, the Singapore High Court had to decide whether a barge converted to a floating fish farm is a 'ship' under section 2 of the HCAJA. The Court held that if a vessel is designed and capable of being used for navigation, then that should be a weighty consideration to determine that the vessel falls within the definition of 'ship' under Clause 2 of HCAJA. The Court ruled that the barge, although converted to a fish farm, was a ship for the purposes of section 2 of the HCAJA and as such, the arrest of the barge was valid.

Law stated - 18 April 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

Law stated - 18 April 2024



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Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

There is no clear provision as to the timing of the title transfer in the Korean Commercial Act (the KCA). The Shipbuilders' Association of Japan form is widely used in Korea as a shipbuilding contract (it is usually agreed, however, that the governing law is English law and the jurisdiction is the London Maritime Arbitrators Association), and the title passes from the shipbuilder to the shipowner upon delivery of the ship.

Nonetheless, the parties can agree as to when title will pass. However, the change of title in the ship cannot be contested against a third party unless it is registered and recorded on the certificate of a ship's nationality (article 743 of the KCA).

Law stated - 13 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

As a contract of guarantee, there are no specific formalities necessary for a refund guarantee to be valid, as long as there is proof of the existence of a guarantee contract. A refund guarantee is usually provided by way of a letter of guarantee issued by a bank (sometimes by an insurance company), acceptable to the buyer in accordance with the shipbuilding contract. The letter of guarantee is stamped by the company's signature seal or signed by the person representing the bank or insurance company.

Law stated - 13 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

If the yard refuses to deliver the vessel, an order for provisional disposition of delivery can be applied to a local court. The buyer should prove that it has fulfilled all contractual requirements but the yard is refusing to deliver the ship at the agreed delivery time and place. Security by way of a cash deposit or a surety bond will be requested by the court. The security amount will be about one-tenth of the value of the ship.

Law stated - 13 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Under the shipbuilding contract, the builder is responsible for defective work (liability in contract).

However, under the Korean Product Liability Act, if a vessel is defective and results in loss of life, personal injury or any damage to properties other than the ship itself, a product liability claim can be brought by the shipowner, a purchaser from the original shipowner or any third party that has sustained damage (article 3 of the Product Liability Act). The time bar will be three years from the time the claimant notices the damage or loss and the identity of the liable party.

Law stated - 13 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Korea maintains two different types of registration of vessels. The first is the recording system (Register Book) maintained by the register office of the district court. The title to the vessel and the mortgage are publicly announced via the Register Book. The other type is the registration records maintained by the local port authority (Regional Maritime Affairs and Port Administration) regarding obtaining the Korean flag. Vessels recorded in Korea have the right to fly the Korean flag.

Korea-flagged ships can be owned by:

- the Korean government or a public entity;
- Korean citizens;
- a commercial corporation established under Korean law; or
- a corporate body other than those mentioned above, whose principal place of business is located in Korea and whose representatives are all Korean (article 2 of the Korean Ship Act).

It is not possible to register vessels under construction under the Korean flag. However, it is possible to record a mortgage on a vessel under construction (articles 787 and 790 of the KCA).

Law stated - 13 May 2024

- 6 | Who may apply to register a ship in your jurisdiction?

Owners of Korean ships may apply to register a ship under the Korean flag.

Law stated - 13 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

To register under the Korean flag, applicants must present the ship's certificate of tonnage and a certified copy of the ship registry (article 8(1) of the Ship Act and article 10 of the Enforcement Decree).

Law stated - 13 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration is not possible, but flagging out is possible.

Law stated - 13 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The court register office maintains the register (recording) of mortgages. The mortgage registration contains the date when the mortgage registration was applied for, the date when the ship was mortgaged, the name and address of the mortgagee, the name and address of the debtor, and the credit amount.

Law stated - 13 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Korea is not a contracting party to either the 1976 International Convention on Limitation of Liability for Maritime Claims (LLMC) or the 1996 Protocol to the 1976 LLMC. However, the Korean Commercial Act (the KCA) adopted most provisions in the 1976 LLMC. There is also the Korean Act on the Procedure for Limitation of Liability of the Shipowners, and suchlike, that provide procedures for shipowners' limitation proceedings.

The following claims are subject to limitation of liability (article 769 of the KCA):

- claims in respect of loss of life or personal injury or damage to goods or property other than the ship herself, which have occurred on board or in direct connection with the operation of the ship;
- claims in respect of loss resulting from delay of the carriage of cargo, passengers or their luggage;
- claims in respect of other loss resulting from infringement of rights other than contractual rights that have occurred in direct connection with the operation of the ship; and
- claims in respect of measures taken to avert or minimise loss arising from the cause of claims described in the first three points of this list.

Registered shipowners, charterers, managers and operators can limit their liability.

Law stated - 13 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Shipowners or others entitled to limit their liability may file an application to commence the procedure of limitation of liability. They should present the court with prima facie evidence that the claim amount, which may be subject to the limitation of liability, may exceed the limitation amount and the list of the potential claimants' names and addresses.

If the court considers that the limitation proceeding should be commenced, it will order the applicant to provide a deposit. Instead of a cash deposit, a letter of guarantee from a bank, insurance company or a protection and indemnity club is usually acceptable upon the approval of the court.

The limitation fund is calculated according to the law of the vessel's flag country.

Law stated - 13 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

A shipowner shall not be entitled to limit his or her liability if it is proven that the loss resulted from his or her personal act or omission committed with intent to cause such loss or recklessly with the knowledge that such loss would probably result.

Also, a shipowner shall not limit his or her liability in certain circumstances set out in article 773 of the KCA, which provides the following.

No shipowner shall limit liability for the following claims:

- a claim on a shipowner by a person whose duties are related to the affairs of a ship as a shipmaster, a crewman, or any other employee, or his or her inheritors, dependants, or other interested persons;
- a salvage charge due to rescue operations at sea and a claim concerning a share in general average;
- a claim for oil pollution damage governed by the International Convention on Civil Liability for Oil Pollution Damage concluded on 29 November 1969 or the amended provisions of the Convention;
- a claim for a ship sunken, wrecked, stranded, abandoned, or involved with other marine accidents, and salvage, removal or scrapping of, or non-invasive measures for cargo and other goods that are or were in such ship; and
- a claim for nuclear damages.

The limitation on a shipowner's liability has never been broken in Korea.

However, in relation to the similar issue of an act or omission of the carrier itself, there is one Korean Supreme Court decision (Case No. 2004Da27082 dated 26 October 2006), in which the carrier's package or weight-based limitation was broken.

Law stated - 13 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Korea has not ratified the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Instead, similar to the 1996 LLMC, article 770, section 1, paragraph 1 of the KCA provides that the limit of liability in respect of claims for loss of life or personal injury to passengers of a ship is 175,000 special drawing rights (SDR) multiplied by the number of passengers that the ship is authorised to carry in accordance with the ship's inspection certificate. This is a global limitation regime and not an individual limitation of 175,000 SDR per passenger.

The luggage claims are subject to the package limitation of 666.67 SDR per package or two SDR per kilogram, whichever is higher, as provided in article 797 of the KCA. The luggage claims are also subject to global limitation, as provided in article 770, section 1, paragraph 3 of the KCA, which reads that the limit of liability in respect of any other claims than paragraphs 1 and 2 shall be calculated as follows:

- 83,000 SDR for a ship with a tonnage below 300;
- 167,000 SDR for a ship with a tonnage not below 300 but not exceeding 500 tonnes;
- for a ship with a tonnage in excess of 500, the following amounts shall be added to 167,000 SDR:
- for each tonne from 501 to 3,000 tonnes, 167 SDR;

- for each tonne from 30,001 to 70,000 tonnes, 125 SDR; and
- for each tonne in excess of 70,000 tonnes, 83 SDR.

Law stated - 13 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The Ministry of Oceans and Fisheries is the body responsible for the port state control.

The staff of the Regional Maritime Affairs and Port Administration of the Ministry of Oceans and Fisheries carry out the port state control.

Korea is a member of the Memorandum of Understanding on Port State Control in the Asia-Pacific Region (the Tokyo MoU), which came into effect in April 1994. The Tokyo MoU is one of the most active regional port state control organisations in the world. The organisation consists of 18 member authorities in the Asia-Pacific region.

Law stated - 13 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

Port state control inspectors are entitled to issue an order to rectify deficiencies or an order prohibiting the departure of a vessel until the vessel's deficiencies have been rectified.

Law stated - 13 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

The shipowner may apply for an objection to the Minister of Oceans and Fisheries within 90 days after receipt of the deficiency correction order or departure prohibition order (the minister should then notify the result within 60 days). The shipowner may also commence an administrative action without applying for an objection.

Law stated - 13 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The Korean Register of Shipping (KR) is the approved classification society.

Law stated - 13 May 2024

Liability**18** | In what circumstances can a classification society be held liable, if at all?

A classification society may be liable based on breach of contract or in tort if it is negligent in its performance. However, there seems to have been no court case seeking the KR's liability.

Law stated - 13 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION**Wreck removal orders****19** | Can the state or local authority order wreck removal?

The Minister of Oceans and Fisheries can order wreck removal to the owner or possessor of the drifting or sunken object when such an object is found that may obstruct the navigation of a vessel or where there is such a risk of obstruction (article 26 of the Korean Public Order in Open Ports Act).

Law stated - 13 May 2024

International conventions**20** | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Korea is not a party to the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910, but several provisions were adopted in articles 876 to 881 of the Korean Commercial Act (the KCA).

Korea is also not a party to the International Convention on Salvage 1989, but many provisions were adopted in articles 882 to 895 of the KCA.

Korea is not a party to the Nairobi International Convention on the Removal of Wrecks 2007. Korea is a party to the International Convention on Civil Liability for Oil Pollution Damage.

Law stated - 13 May 2024

Salvage

- 21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement, and Lloyd's standard form of salvage agreement is quite popular in Korea. There are several Korean private salvage companies, including Korea Salvage Co Ltd, and international salvage companies.

Law stated - 13 May 2024

SHIP ARREST

International conventions

- 22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Korea has neither ratified the International Convention Relating to the Arrest of Sea-Going Ships 1952, nor the International Convention on the Arrest of Ships 1999.

Law stated - 13 May 2024

Claims

- 23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

There are two types of vessel arrest available in Korea: the first is the provisional arrest and the second is the maritime lien arrest.

Provisional arrest is available to a claimant and may be obtained to secure his or her claim (any type of claim including cargo claim and outstanding amount owed by the shipowner) against the shipowner. For a provisional arrest, a counter-security is required. A counter-security is usually about one-tenth of the claim amount. If the court allows, a claimant may deposit such a counter-security by way of a surety bond issued by an insurance company. As regards claims giving rise to provisional arrest, any claim can do so regardless of whether such a claim is maritime in nature, provided that the registered owner is the debtor. Maritime lien arrest is the other type of arrest available in Korea for those claims that give rise to a maritime lien. A claimant who is entitled to a maritime lien or to foreclose the mortgage on the vessel may arrest a vessel for an auction sale of the vessel. For a maritime lien arrest, a counter-security is not required. However, when an application for the arrest is made, the auction costs including appraisal fees must be paid to the court. These advanced auction costs will be paid back to the claimant prior to other

claims from the auction proceeds. The amount of auction costs that must be paid to the court differs depending on the size of the claim.

Under the Korean Conflict of Laws Act, whether a claim gives rise to a maritime lien will be determined under the law of the vessel's flag country.

An associated or sister ship may be arrested by way of pre-judgment attachment so long as such ship is owned by the debtor. However, if the ship is owned by a different entity, piercing the corporate veil is required to justify such pre-judgment attachment.

In principle, neither a bareboat-chartered nor a time-chartered vessel can be arrested by way of pre-judgment attachment, unless the bareboat charterer or the time-charterer is the registered owner of the vessel. However, a maritime lien arrest will be available if the claim against the bareboat charterer or the time-charterer gives rise to maritime liens.

Law stated - 13 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

There are two types of vessel arrest available in Korea: the first is the provisional arrest and the second is the maritime lien arrest.

Law stated - 13 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

When it manifestly turns out that the claim itself does not exist at all or provisional arrest of an associated vessel.

Law stated - 13 May 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

This is generally difficult. However, a bunker supplier can affect a maritime lien arrest (not provisional arrest) in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than the owner, of that vessel, provided that bunker supplies give rise to a maritime lien under the law of the vessel's flag country.

Law stated - 13 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

There are two types of vessel arrest available in Korea: the first is the provisional arrest and the second is the maritime lien arrest.

Provisional arrest is available to a claimant and may be obtained to secure his or her claim (any type of claim including cargo claim and outstanding amount owed by the shipowner) against the shipowner. For a provisional arrest, a counter-security is required. A counter-security is usually about one-tenth of the claim amount. If the court allows, a claimant may deposit such a counter-security by way of a surety bond issued by an insurance company. As regards claims giving rise to provisional arrest, any claim can do so regardless of whether such claim is maritime in nature, provided that the registered owner is the debtor. Maritime lien arrest is the other type of arrest available in Korea for those claims that give rise to a maritime lien. A claimant who is entitled to a maritime lien or to foreclose the mortgage on the vessel may arrest a vessel for an auction sale of the vessel. For a maritime lien arrest, a counter-security is not required. However, when an application for the arrest is made, the auction costs including appraisal fees must be paid to the court. These advanced auction costs will be paid back to the claimant prior to other claims from the auction proceeds. The amount of auction costs that must be paid to the court differs depending on the size of the claim.

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An associated or sister ship may be arrested by way of pre-judgment attachment so long as such ship is owned by the debtor. However, if the ship is owned by a different entity, piercing the corporate veil is required to justify such pre-judgment attachment.

In principle, neither a bareboat-chartered nor a time-chartered vessel can be arrested by way of pre-judgment attachment, unless the bareboat charterer or the time-charterer is the registered owner of the vessel. However, a maritime lien arrest will be available if the claim against the bareboat charterer or the time-charterer gives rise to maritime liens.

Law stated - 13 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The arrested party has to provide the full amount claimed by the arresting party in cash, or a letter of undertaking (usually issued by the vessel's protection and indemnity insurance club) if the arresting party agrees to accept it in exchange for withdrawal of the application for provisional arrest or maritime lien arrest.

The amount of security can exceed the value of the ship.

Law stated - 13 May 2024

Formalities

- 29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

A power of attorney and certificate of incorporation of the applicant must be provided to the court. The documents need not be notarised or legalised. Korea is a signatory to the Apostille Convention. The original documents are not required and scanned copies suffice. The Korean translation of the power of attorney or certificate of incorporation (Col) must be provided, but it need not be from a sworn public translator. A free translation suffices. The relevant documents can be filed electronically. On average, three days' notice at least is required to prepare an arrest application. Note, however, that a notarised and legalised original power of attorney or Col is needed when receiving a refund of the counter-security from the court.

Law stated - 13 May 2024

Ship maintenance

- 30 | Who is responsible for the maintenance of the vessel while under arrest?

Upon the arresting party's application to the court, a company that is specialised in the maintenance and preservation of a vessel is usually appointed by the court.

Law stated - 13 May 2024

Proceedings on the merits

- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

As regards provisional arrest, it is possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere (usually at a competent tribunal according to the terms of the carriage contract or the bill of lading). A provisional arrest in Korea does not automatically create jurisdiction on the merits in Korea.

In the case of maritime lien arrest, the auction sale of the vessel is also carried out in Korea, so the arrested party, if he or she wishes, should object to the auction sale of the vessel at the Korean court.

Law stated - 13 May 2024

Injunctions and other forms of attachment

- 32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

The attachment of real estate, bank account, account receivables or chattel owned by the shipowner is possible.

Law stated - 13 May 2024

Delivery up and preservation orders

- 33 | Are orders for delivery up or preservation of evidence or property available?

Upon the claimant's application, an order for delivery or preservation of evidence or property and an order for production of documents can be issued by the court.

Law stated - 13 May 2024

Bunker arrest and attachment

- 34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is theoretically possible to arrest the bunkers, but this would be difficult in practice.

Law stated - 13 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

- 35 | Who can apply for judicial sale of an arrested vessel?

Judicial sale can be applied for by a claimant who has a maritime lien claim or mortgage over the ship or the final and conclusive judgment against the shipowners in favour of the claimant.

Law stated - 13 May 2024

Procedure

- 36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application

| for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The procedure for initiating and conducting a judicial sale of a vessel will be in the following order: application by the arresting party, the court's order for the arrest and judicial sale of the vessel, appraisal of the vessel, advertisement of the auction, sale procedure (bidding), payment by the successful bidder and distribution of the auction proceeds.

The process would usually take six to 18 months, depending on the market situation.

Law stated - 13 May 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The order of priority is determined according to the law of the vessel's flag country.

For Korea-flagged vessels, maritime lien claims have priority over pledge and mortgaged claims.

The auction costs (service costs, appraisal fees and costs for, inter alia, maintenance, preservation of the vessel and wharfage during the auction proceeding) will, in principle, be paid prior to other claims from the auction proceeds. Also, crew members' claims for salary for the past three months and for accident compensation have priority over maritime lien claims.

Law stated - 13 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

Judicial sales serve to extinguish all prior liens and encumbrances on the vessel, including maritime liens, and thereby give the purchaser clean title.

Law stated - 13 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Usually, judicial sale of a vessel in a foreign jurisdiction will be recognised, unless it is against Korean public policy.

Law stated - 13 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No, Korea is not a signatory to the International Convention on Maritime Liens and Mortgages 1993.

Law stated - 13 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

While Korea has neither ratified nor acceded to the Hague Rules 1924, the Hague-Visby Rules 1968, the Hamburg Rules, or the UN Convention on Contracts for the International Carriage of Goods, Korea has adopted most provisions of the Hague-Visby Rules 1968 in the Korean Commercial Act (the KCA).

The carriage of goods by sea begins from the receipt of goods at the loading port and ends upon delivery of goods at the discharge port (port to port).

Korea has not yet decided to ratify the Rotterdam Rules.

Law stated - 13 May 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

The KCA is applicable to road transport. There is no separate law applicable to rail transport. However, the Railroad Enterprise Act (article 25) provides that article 135 of the KCA applies mutatis mutandis with respect to loss, damage or delay of cargo during railroad transport.

As Korea has ratified the Montreal Convention, such Convention is applicable to international air carriage. Articles 895 to 935 of the KCA have similar provisions to the Montreal Convention, which would be applicable for domestic air carriage and air carriage between Korea and non-signatory countries.

Law stated - 13 May 2024

Title to sue

43 | Who has title to sue on a bill of lading?

A holder of the original bill of lading has the title to sue on a bill of lading.

Law stated - 13 May 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The terms in a charter party can be incorporated into the bill of lading, as long as the date of the charter party is described on the bill of lading. A jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, is binding on a third-party holder or endorsee of the bill.

Law stated - 13 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

A previous decision of a Korean court recognised the validity of the 'demise' clause or identity of the carrier clause. However, more recent Korean court decisions seem to put more emphasis on the description on the front of a bill of lading (ie, who is described and signed 'as carrier' at the bottom right of the signature section on the front of a bill of lading) (thus it seems that the demise clause or identity of carrier clause in the reverse terms of a bill of lading is no longer valid and binding).

Law stated - 13 May 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Even if the shipowners are not the contractual carrier, they can be liable for cargo damage in tort. If they are the actual carrier or the subcontractors named under the Himalaya clause in the bill of lading, they can rely on the defences and limitation of liability available under the KCA or the terms of the bill of lading, as long as such terms are not invalid under the KCA.

Law stated - 13 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

The carrier shall not be liable for any loss or damage to cargo resulting from any deviation to save life or property at sea or any other reasonable deviation. However, the majority academic view is that an unreasonable deviation is a breach of the contract of carriage, despite the existence of a liberty clause.

Law stated - 13 May 2024

Liens

48 | What liens can be exercised?

The statutory maritime lien recognised over the ship, its appurtenances and unpaid freight under the KCA (article 777) are the following:

- court-related expenses, port dues, pilotage, towing charges and preservation expenses or survey fees for the vessel after entering the port;
- claims of the crew or servants of the owner arising from the employment contract;
- salvage remuneration and the ship's contribution to general average; and
- claims for collision and other maritime accidents, damages to the navigational aids, port facilities and fairway, and claims for loss of life or damages to crew or passenger.

The lien shall be valid for one year from when the claim has arisen (article 786 of the KCA). No extension is allowed.

The master has a lien on the cargo for the unpaid freight, demurrage, contribution for general average or salvage, etc (article 807 of the KCA), and the carrier can place the cargo on auction sale so as to receive the said outstanding amount (article 808 of the KCA). The carrier also has a commercial lien on the cargo (owned by the debtor) in their possession for an outstanding amount arising from a commercial transaction (article 58 of the KCA).

Law stated - 13 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The carrier shall be liable for the loss of cargo caused by the delivery without receipt of the original bill of lading. However, the carrier can rely on the package (666.67 special drawing rights (SDR) per package or unit) or weight limitation (two SDR per kilogram) under the KCA, unless it is proven that loss or damage resulted from an act or omission of the carrier himself or herself (representative director or managerial level officers in the case of a corporation) done with intent to cause damage or recklessly with the knowledge that cargo loss or damage would probably result.

In a case where a carrier sought to limit its liability contending that the words 'carrier himself or herself' provided in the KCA should be narrowly construed to senior officers of a company, at or close to board level, the Korean Supreme Court held that the carrier shall not limit liability where damage to or loss of the cargo can be attributable to intention or recklessness of an employee who has been delegated part of its management functions although such employee was not at board level, and therefore that the act or omissions of the employee should be imputed to the carrier himself or herself.

Law stated - 13 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper shall deliver the cargo at the time and place as agreed between the parties or according to the custom of the loading port (article 792 of the KCA), pay the freight, declare the dangerous cargo to the carrier (article 801 of the KCA) and not provide dangerous goods (article 800 of the KCA). The bill of lading holder shall be liable for unpaid freight and other charges over the cargo if he or she receives the cargo.

Law stated - 13 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

There is no ECA in force in Korean domestic territorial waters.

Law stated - 13 May 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The 3.5 per cent m/m on the sulphur content of fuel oil (bunker C oil) is applicable (article 42, paragraph 2 of the Enforcement Decree on Marine Environment Management Act). Port state control inspectors inspect ships in Korean waters to verify that they possess a valid International Air Pollution Prevention Certificate certificate, and in the absence of a valid certificate, they can issue an order to rectify the deficiency or an order prohibiting the departure of a vessel.

A shipowner that fails to comply with the said requirement shall be liable for a fine not exceeding 10 million won or to imprisonment for a term not exceeding one year (article 129, section 1, paragraph 6 of the Marine Environment Management Act).

Law stated - 13 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction?
| Are there any ship recycling facilities in your jurisdiction?

Korea is not a signatory to the International Convention for the Safe and Environmentally Sound Recycling of Ships, but domestic statutes, such as the Marine Environment Management Act, the Ship Safety Act, the Public Waters Management Act and the Wastes Control Act, may apply when a ship is dismantled in Korea. For example, under the Marine Environment Management Act, a declaration paper containing a ship recycling plan should be submitted to the Korea Coast Guard where a ship with a gross tonnage of 100 or more or an oil tanker is going to be dismantled.

There are dozens of recycling facilities in Korea, although the industry has been declining over recent years mainly owing to an increase in environmental regulation and awareness.

Law stated - 13 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

There is no maritime court specialising in maritime claims. The relevant district court will have jurisdiction over a maritime dispute. Usually, the court having jurisdiction over the port (eg, the Busan District Court or the Seoul Central District Court) has jurisdiction over a maritime dispute.

Law stated - 13 May 2024

Service of proceedings

I

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Korea ratified the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in 1965. All service to foreign countries shall be done through the Korean diplomatic authority.

In the case of provisional arrest or maritime lien arrest of a vessel, the service will be effected on the master, and in the case of action on the merits, the service will be on the place if the place of service has been designated or otherwise, service overseas.

Law stated - 13 May 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The Korean Commercial Arbitration Board (KCAB) has a panel of maritime arbitrators specialising in maritime arbitration. In addition, the Seoul Maritime Arbitrators Association (SMAA) was founded in 2018 to conduct ad hoc arbitration in respect of maritime disputes.

The KCAB reported that 66 new cases (comprising 21 for maintenance of vessels, 35 for carriage by sea, four for marine insurance and six for other admiralty-related cases for domestic and international arbitrations) were referred to the arbitration tribunals for the period from 2019 to 2022. This number of references has been continuously increasing.

The SMAA made its first award in May 2019. The award was handed down by the writer, Mr Sung Keuk Cho, who was appointed as the sole arbitrator. However, there has been no case referred to SMAA since then.

Law stated - 13 May 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Foreign judgments may be enforceable if all the following conditions are fulfilled:

- the foreign court holding the judgment has jurisdiction over the case in accordance with the applicable law or convention;
- the defeated defendant was served with the necessary writ or complaint at the commencement of the procedure or defended his or her case at the litigation;
- the contents of the judgment or procedure is not against Korean public policy; and
- there is reciprocity.

As for arbitration, Korea ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

To enforce the foreign judgment or arbitral award in Korea, claimants should obtain an enforcement judgment from a Korean court. In the proceedings of the enforcement judgment, only the question of the legality of the procedure shall be considered, not the merits of the case.

Law stated - 13 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

It is unclear whether asymmetric jurisdiction and arbitration agreements are valid and enforceable in Korea as there has been no case decided in respect of the validity of such agreements.

However, Korean courts would be reluctant to hold an asymmetric jurisdiction and arbitration agreement as valid. If such clauses were held invalid, Korean courts would have jurisdiction over the underlying dispute.

Law stated - 13 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Even if the claimants issue proceedings in a foreign country in breach of the exclusive jurisdiction clause providing for a Korean court, a Korean court or Korean law does not have any remedies for the defendant. Anti-suit injunctions do not exist in Korea. On the other hand, a Korean defendant in a foreign court proceeding may be entitled to commence legal proceedings in Korea based on the Korean court exclusive jurisdiction clause and to raise defences and limitation of liability according to Korean law.

Law stated - 13 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant would be entitled to argue the foreign court or arbitral tribunal jurisdiction and to request that the court dismiss the proceedings. Proceedings shall be dismissed, not stayed, if the jurisdiction clause is deemed valid.

Law stated - 13 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Claim under a bill of lading: one year (article 814 of the Korean Commercial Act (the KCA)), extendable by parties' agreement, which can be reached even beyond the one-year time bar (Korean Supreme Court Decision on 9 June 2022, 2017Da247848 Judgment). However, this decision is unique and has raised questions and criticism, but it is something that should be taken note of.

A claim under the charter party: two years (articles 840, 846 and 851 of the KCA), extendable by the parties' agreement.

Collision claim: two years (article 881 of the KCA), extendable by the parties' agreement.

Law stated - 13 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

No, neither courts nor arbitral tribunals can extend the time limits.

Law stated - 13 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Korea ratified the Maritime Labour Convention on 9 January 2014.

Law stated - 13 May 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

In principle, it is impossible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract. However, if the Debtor Rehabilitation and Bankruptcy Act is applied, the debt or obligation shall be subject to this act.

Law stated - 13 May 2024

Other noteworthy points

- 65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Although it is not new, environmental, social and governance (ESG) issues have attracted considerable attention in the Korean shipping industry. Faced with emerging contractual and regulatory requirements, the industry put more emphasis on these issues than ever before to achieve sustainable shipping.

Law stated - 13 May 2024

UPDATE AND TRENDS

Key developments of the past year

- 66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Korean Seafarers Act was amended on 24 October 2023 and came into effect on 25 January 2024. The important amendments to the Seafarers Act include (1) Prohibition of Harassment on Board (article 25-3), (2) Measures in Cases of Harassment on Board (article 25-4) and (3) Preparation and Reporting of Rules of Employment (article 119, section 1, paragraph 11). The term 'harassment on board' in article 25-3 of the Seafarers Act defines that a shipowner or seafarer may cause physical or mental suffering to other seafarers or deteriorate the work environment beyond the appropriate scope of work by taking advantage of their superiority in rank, relationship, etc. If the shipowner causes harassment on board, violating article 25-3, he or she shall be subject to an administrative fine not exceeding 10 million Korean won (article 179, section 1).

According to section 1 of article 25-4, anyone who becomes aware of the occurrence of harassment on board may report it to the shipowner. Upon receipt of the report, (1) the shipowner shall conduct an objective investigation on the relevant parties, etc, to verify the fact without delay (section 2), (2) the shipowner shall take appropriate measures including the change of the working place of the relevant damaged seafarer, etc, or the issuance of an order to take a paid leave of absence (section 3), (3) the shipowner shall not dismiss seafarers who report the occurrence of harassment on board, damaged seafarers, etc, or treat them unfavourably (section 6) and (4) a person who investigates the occurrence of harassment on board, receives a report on the investigation or participates in any other investigation process shall not divulge confidential information that he or she becomes aware of in the course of investigation to any other persons against the will of the damaged seafarers (section 7). In particular, if a shipowner violates 'treat them unfavourably' under the amendments, he or she shall be punished by imprisonment with labour for not more than three years or by a fine not exceeding 30 million Korean won (section 1 of article 168). A shipowner shall prepare the rules of employment (eg, the determination of seafarers'

payment, matters concerning hours of work, personnel management, education and training, and service on a ship, etc) and report the rules to the competent maritime affairs and port authorities (section 1 of article 119). The Korean government has amended the Seafarers Act to regulate and control harassment on board.

Law stated - 13 May 2024



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UPDATE AND TRENDS

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

In principle, title in the ship passes from the shipbuilder to the shipowner when the shipowner takes possession of the ship and the parties agree that the title shall pass. The parties can agree on the exact time when the title shall pass. However, to defend against a good faith third party, according to the laws in Taiwan, the transfer of title in the ship shall be done in writing and conformity with the following conditions:

- where the transfer takes place in Taiwan, an application to the local shipping administrative authority for their certification and seal; and
- where the transfer takes place in a foreign country, an application to the consular or representative office of Taiwan or any other equivalent institute empowered by the Taiwan government located in that country for their certification and seal.

Law stated - 29 April 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

In principle, the formalities to be complied with for the refund guarantee are subject to the agreements between the parties. However, if the guarantee is provided in the form of a bank letter, the bank, in addition to the parties, may have its own requirements on the formality.

Law stated - 29 April 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

The shipowner may file a claim with the court to compel the delivery of the vessel. If the shipowner wins and obtains a final and binding judgment, he or she may enforce the judgment and compel delivery of the vessel. In addition, before the judgment becomes final and binding, the shipowner may also apply for the provisional measure (preliminary injunction) for the delivery of the vessel, if the relevant requirements can be met.

Law stated - 29 April 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Where the vessel is defective and damage results, the shipowner may bring a claim against the shipbuilder on the grounds of breach of contract between the shipowner and the shipbuilder. However, a purchaser from the original shipowner or a third party may not have a claim under the shipbuilding contract due to the principle of privity of contract.

Nevertheless, article 191-1(1) of the Civil Code provides that:

The manufacturer is liable for the injury to another arising from the common use or consumption of his merchandise, unless there is no defectiveness in the production, manufacture, process, or design of the merchandise, or the injury is not caused by the defectiveness, or the manufacturer has exercised reasonable care to prevent the injury.

Therefore, the purchaser and the third party may be able to have a claim under product liability against the shipbuilder in accordance with article 191-1(1) of the Civil Code on a case-by-case basis.

Law stated - 29 April 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

If a vessel wishes to be registered under the flag of Taiwan, it has to meet the definition of 'ship' ruled under the Law of the Ships. Pursuant to article 3 of the Law of the Ships, a ship is a water vehicle that carries people or cargo on the surface or in the water, including a passenger ship, cargo ship, fishing boat, vessel of special purpose, yacht and small ship. Usually the 'a vessel under the construction' will not be considered the 'ship' under the Law of the Ships.

It is not practical to register a vessel under construction under the flag of Taiwan; however, it is possible to register a mortgage on vessels under construction.

Law stated - 29 April 2024

- 6 | Who may apply to register a ship in your jurisdiction?

Pursuant to article 5(2) of the Law of Ships, a ship may apply for registration as a Taiwanese-flagged ship under one of the following conditions:

- the ship is owned by the Taiwanese government;
- the ship is owned by a Taiwanese national;
- the ship is owned by a company established in accordance with the law of Taiwan with a principal office within the territory of Taiwan, and meets one of the following requirements:
 - an unlimited company, of which all shareholders are nationals of Taiwan; or
 - a limited company, of which at least half of the capital is owned by nationals of Taiwan, and the director authorised to represent such company is a national of Taiwan; or
 - a joint company, of which all shareholders with unlimited liabilities are nationals of Taiwan; or
 - a company limited by shares, of which the chairman of the board and at least half of the directors are nationals of Taiwan, and at least half of the capital is owned by nationals of Taiwan; or
- the ship is owned by a juristic entity, which is established in accordance with the law of Taiwan with its main office within the territory of Taiwan, and at least two-thirds of its members and its statutory representative are nationals of Taiwan.

Law stated - 29 April 2024

Documentary requirements

7 | What are the documentary requirements for registration?

Pursuant to article 11 of the Ship Registration Law, the following are required for ship registration:

- application form (if there is any special agreement attached to the cause of registration, it shall be clearly described in the application form);
- documents evidencing the cause of registration (if there is no document or such document is unavailable for submission, the reason why shall be stated in the application form with attachments of a letter of guarantee);
- certificate of former registration, if any;
- if a third party is involved for the cause of registration, the documentary proof thereof; and
- documents evidencing the registration of the obligor.

The last two items are not required if the cause of registration is based on an enforceable judgment.

Law stated - 29 April 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

In principle, dual registration and flagging out are not allowed in Taiwan.

Law stated - 29 April 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The Maritime and Port Bureau (MPB) of the Ministry of Transportation and Communications maintains the register of ship mortgages.

The information in the register of ship mortgages includes, among others:

- the basic particulars of the ship;
- the basic information of the mortgagee and the mortgagor (eg, name and contact details); and
- the amount of the debt, date of repayment, interest, payment date of interest, ranking of the mortgage and the former registered mortgage.

Law stated - 29 April 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Taiwan is not a party to the Convention on Limitation of Liability for Maritime Claims 1976, and thus the limitation of liability is governed by the Maritime Act of Taiwan (Maritime Act).

Shipowner's limitation (applicable for the registered owner, charterer, manager and operator of the ship)

Pursuant to article 21(1) of the Maritime Act, the liability of a shipowner is, in principle, limited to an amount equal to the value of the ship, the freight and other accessories of the particular voyage (if the shipowner wants to avail him or herself of the above liability limitation, it shall prove the value of the ship on that particular voyage) for the following claims:

1. claims in respect of the loss of life, personal injury or loss of or damage to property, occurring on board or which directly resulted from the operation of the ship or salvage operations;
2. claims in respect of damage resulting from the infringement of interests or rights caused by the operation of the ship or salvage operations; provided, however, that any damage resulting from a contractual relationship should be excluded;
3. claims in respect of the removal or destruction of a sunken ship or property lost overboard; provided, however, that a reward or payment made under a contract should be excluded; and
4. claims in respect to the obligations incurred for taking measures to avert or minimise the liabilities set out in above items (2) and (3).

Package limitation

Pursuant to article 70(1) and article 70(2) of the Maritime Act, where the nature or value of the cargo is fraudulently declared by the shipper at the time of shipment, neither the carrier nor the shipowner shall be liable for any damage to, or loss of, the cargo. Unless the nature and value of the cargo have been declared by the shipper before shipment and stipulated on the bill of lading, neither the carrier nor the shipowner shall be liable for any damage to or loss of the cargo in an amount exceeding 666.67 special drawing rights (SDR) per package or 2 SDR per kilogram, whichever is the higher.

Law stated - 29 April 2024

Procedure

11 | What is the procedure for establishing limitation?

In Taiwan, it is not necessary to provide a cash deposit or set up a limitation fund for asserting the limitation of liability. The shipowner or carrier only needs to raise the limitation defence in the court if any case arises.

Law stated - 29 April 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

In Taiwan, there is no mechanism to establish the limitation fund, and thus there are no issues regarding what happens to the fund if the limitation is broken. Nevertheless, the shipowner's limitation and the package limitation may not be applicable under certain situations.

Shipowner's limitation

Pursuant to article 22 of the Maritime Act, the shipowner's limitation of liability does not apply for the following claims:

- claims arising out of an intentional act or negligence of the shipowner;
- claims arising from the contract of employment with the shipmaster, seafarers or any other personnel serving on board the ship;
- claims for salvage reward or general average contribution;
- claims arising from the carriage of toxic chemical substances or oil pollution;
- claims arising out of nuclear incidents caused by nuclear substances or nuclear waste carried by ships; and
- claims arising out of nuclear damages caused by nuclear ships.

Package limitation

According to article 70(4) of the Maritime Act, neither the carrier nor the shipowner shall be entitled to the benefit of the package limitation if the damage or loss resulted from an intentional act or gross negligence of the carrier or the shipowner.

In practice, however, there are few cases where the plaintiff can successfully prove the intentional act or gross negligence of the carrier or the shipowner and then break the limitation. There are not many cases in which the parties dispute over whether the value of cargo has been stipulated on the bill of lading or what the 'per package' is.

Law stated - 29 April 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Taiwan is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. However, pursuant to article 81 of the Maritime Act, the carrier shall take out accident insurance for transporting passengers in the specific navigation routes and areas (the specific navigation routes and areas and the amount insured are decided by the Ministry of Transportation and Communication); the insured amount shall state in the passenger ticket and constitute part of the contract; the insurance premium shall be included in the ticket fare; and the insured amount shall be deemed as the maximum amount for the damage compensation.

Law stated - 29 April 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The Maritime Port Bureau (MPB) is authorised under the Commercial Port Law and the Laws of the Ships to conduct the examination of ship certificate, security, equipment, crew quotas and other matters towards the entrance and departure of foreign merchant ships.

Law stated - 29 April 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The shipping administration authority may impose a fine or order certain performance on the owner or master of a ship. For example, pursuant to article 92 of the Law of Ships, in the event of a violation of certain inspection provisions under the Law of Ships, the shipping administration authority may impose a fine on the owner or master of a ship, prohibit the ship from sailing and order to make corrections within a fixed period. The ship may be released for sailing only after the correction is made.

In addition, pursuant to article 32 of the Law of Ships, for a non-Taiwanese flagged ship that departs from a Taiwanese international port, the master of the ship shall submit the inspection document or proof of passing inspection to the shipping administration authority of the port for examination. Failing which the shipping administration authority of the port may order the master of the ship to make corrections within a fixed period, and the ship may not depart from the port before the fulfilment of the order.

Law stated - 29 April 2024

Appeal

16 | What is the appeal process against detention orders or fines?

Unless otherwise provided by law, detention orders or fines may be appealed in accordance with the Administrative Appeal Act, and if the decision of the administration appeal is not satisfactory, the interested party may further file an administrative litigation with the administrative court.

Law stated - 29 April 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The CR Classification Society is the approved classification society in Taiwan.

Law stated - 29 April 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

A classification society may be held liable for breach of contract with its clients or for the violation of its duties (eg, survey or inspection) commissioned by the government authorities.

Law stated - 29 April 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Yes. If a ship is stranded, sinks or malfunctions and drifts outside the commercial port area due to beaching or other accidents, the competent authority may order wreck removal at the expense of the shipowner. If the sunken ships, objects, flotsam, pollutants and rafts within the fishing port area endanger or could endanger the voyage and anchoring of vessels entering or departing the port, or contaminate or could contaminate the fishing port area, the competent authority may also order wreck removal at the expense of the shipowner.

In addition, if a ship suffers a maritime disaster or other accident that causes marine pollution or concern of pollution, the shipmaster and shipowner shall promptly take measures to prevent, eliminate or mitigate such pollution and shall promptly notify the local navigation and aviation competent authority, port management authority and local competent authority. For the above circumstance, the competent authority may order the adoption of necessary measures and, when necessary, the competent authority may directly take the measures at the expense of the shipowner, such measures including wreck removal.

Law stated - 29 April 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Taiwan is not a party to any international convention or protocol in respect of collision, wreck removal, salvage and pollution. Nevertheless, where there is a lack of applicable provisions under Taiwanese laws, as a standard practice, the government authorities and

courts often refer to the relevant international conventions or protocols. For example, where matters related to the installation of shipboard pollution prevention equipment, the determination of the concern of pollution of the marine environment by ship may be handled in accordance with international conventions and customary practice (article 19 of Marine Pollution Control Act Enforcement Rules).

Law stated - 29 April 2024

Salvage

- 21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement in Taiwan. The parties may negotiate and agree on their own terms and conditions. Therefore, the parties are free to use Lloyd's standard form of salvage agreement and it is commonly used in practice. Although there are no legal restrictions on who may carry out salvage operations in Taiwan, in practice, most of the salvage works are done by companies that have the expertise and reputation in the market.

Law stated - 29 April 2024

SHIP ARREST

International conventions

- 22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Taiwan is neither a party to the International Convention Relating to the Arrest of Sea-Going Ships 1952 nor a party to the International Convention on the Arrest of Ships 1999. Nevertheless, where there is a lack of applicable provisions under Taiwanese laws, as a standard practice, Taiwanese courts often refer to the relevant international conventions.

Law stated - 29 April 2024

Claims

- 23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

There is no restriction on the nature of the claims for the arrest of a vessel provided always that the debtor of the claim is the shipowner. A shipowner's creditor may arrest the shipowner's vessel if such creditor has obtained a writ of execution against the shipowner. However, there is no action in rem under the jurisdiction in Taiwan. Creditors whose claims

are secured by maritime liens or mortgages against the vessel would have to obtain a writ of execution against the vessel first to apply for the ship's arrest.

In principle, associated ships may not be arrested.

A bareboat (demise) chartered vessel, in principle, cannot be arrested for the claim against the bareboat charterer because the bareboat charterer is not the owner of the vessel. The same also applies to the claim against a time charterer. However, if the shipowner and the bareboat charterer or time charterer are co-debtors, it is possible to arrest the vessel subject to the court's discretion.

Law stated - 29 April 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Taiwan recognises the concept of maritime liens. Pursuant to article 24 of the Maritime Act, the following claims are secured by maritime liens and entitled to a preferential right of compensation:

- claims of the shipmaster, seafarer and other members of the ship's complement arising from their contracts of employment;
- claims against the shipowner in respect of loss of life or personal injury directly arising from the operation of the vessel;
- claims for salvage rewards, wreck removal expenses and general average contributions;
- claims against the shipowner, based on tort in respect of damage to or loss of property occurring, whether on land or on water, in direct connection with the operation of the vessel; and
- harbour charges, canal and other waterway dues and pilotage dues.

However, damages arising out of carrying toxic chemical substances or oil pollution, damages arising out of nuclear incidents caused by nuclear substances or nuclear waste being carried on ships and claims for nuclear damages caused by nuclear ships shall not apply to the maritime liens (article 26 of the Maritime Act).

Law stated - 29 April 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

If an arresting party intentionally or negligently applies for the arrest of the ship of an irrelevant third party, such a third party may have a claim in tort against the arresting party for damages on a case-by-case basis.

Law stated - 29 April 2024

Bunker suppliers

- 26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Essentially, only creditors of the shipowner can arrest the ship. Therefore, the bunker supplier may apply for the arrest of the vessel if the charterer is considered as the agent of the shipowner for the purchase of the bunker.

Law stated - 29 April 2024

Security

- 27 | Will the arresting party have to provide security and in what form and amount?

Yes. In the event of a provisional attachment (ship arrest), subject to the discretion of the competent court, the arresting party usually would be ordered to provide cash, a letter of undertaking or guarantee issued by an appropriate bank or insurance company in the amount equivalent of one-third to 100 per cent of the monetary value of the claim as security.

Law stated - 29 April 2024

- 28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The competent court would usually order the arrested party to provide the full monetary value of the claim as counter security and the amount of the counter security in principle cannot exceed the value of the arrested ship. The arrested party may request a review on the amount of the counter security if it has justifiable reasons. Subject to the discretion of the competent court, the counter security usually may be provided in the form of cash, a letter of undertaking or guarantee issued by an appropriate bank or insurance company.

Law stated - 29 April 2024

Formalities

- 29 |

What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

An original power of attorney (POA) is required for the appointment of a lawyer to file the arrest application. Taiwan is not a party to the Apostille Convention. In principle, if the POA is issued by a foreign entity, the POA must be notarised and legalised. If the POA is made in a language other than Chinese, a translation is required, but the translation is usually not required to be made by a sworn public translator. The POA and other documents for arrest cannot be filed electronically. In practice, due to the time pressure, the arresting party might be allowed to submit a POA without notarisation and legalisation first and supplement the duly notarised and legalised POA at a later stage. Nevertheless, all the above are still subject to the discretion of the competent court.

Law stated - 29 April 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

In practice, the court may appoint the shipping government authority, the shipmaster or other appropriate person to maintain the vessel while under arrest. The court may also order the creditor to pay for the maintenance costs in advance.

Law stated - 29 April 2024

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

In the event of a provisional attachment, the court would, upon the motion of the arrested party, order the arresting party to pursue the claim on its merits within a specified period (the period shall be decided by the court on a case-by-case basis). In principle, the claim on its merits should be pursued in Taiwan unless there is an arbitration agreement.

Law stated - 29 April 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

In practice, provisional attachment is the most common form adopted to obtain security for a monetary claim. If the arresting party's claim is non-monetary, he or she may apply for

provisional measure (preliminary injunction) to prohibit the behaviour of the shipowner or ask for the specific action of the shipowner. To obtain a preliminary injunction, the creditor should demonstrate the impossibility or extreme difficulty to satisfy the claim by future compulsory execution should there be any change in the status quo.

Law stated - 29 April 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Yes. If it is likely that the evidence would be destroyed or its use in court would be difficult, or with the consent of the opposing party, a party may move the court for perpetuation of such evidence; where necessary, the party who has legal interests in ascertaining the status quo of a matter or an object may move for expert testimony, inspection or perpetuation of documentary evidence. A motion for the perpetuation of evidence may be made before or after initiating a lawsuit.

Law stated - 29 April 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

If the bunkers belong to the shipowner, the bunkers may be arrested by the creditors of the shipowner through the provisional attachment or compulsory execution after the final judgment.

Law stated - 29 April 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

In general, creditors who have obtained writs of execution (eg, final and binding judgments and arbitral awards, however, provisional attachments and injunction orders are not writs of execution here mentioned) may apply for the judicial sale of an arrested vessel.

Law stated - 29 April 2024

Procedure

36 |

What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The court would ask shipyards, shipping government authorities, the master mariners' association or other appropriate bodies to evaluate the value of the ship and determine the basic auction price. The court would then publicise the information on the auction of the ship and inform the relevant parties of the auction. The auction is usually carried out through a bidding process.

It might take several months for the judicial sale to be concluded following an application for sale. If a second (or even third) auction is necessary, it will take longer to conclude the sale. The judicial sale is a part of the compulsory execution procedure. The fee for applying for compulsory execution is 0.8 per cent of the claim or the value of the ship, depending on the nature of the claim, and there will probably be other fees incurred in relation to the judicial sale (eg, fees of evaluation and maintenance). In principle, the applicant will be requested to pay such fees in advance.

Law stated - 29 April 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The proceeds of sale are first used to pay for the fees in relation to the compulsory execution. The remainder of the proceeds will then be paid in the following order: debts secured by maritime liens (the maritime lien attaching to the latter voyage has priority over those attaching to the previous voyage), debts secured by retention (in respect of claims in relation to building or repairing the ship), debts secured by ship mortgages and then debts without any security.

Law stated - 29 April 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

In principle, the judicial sale of a vessel will extinguish all prior liens and encumbrances on such vessel, including maritime liens.

Law stated - 29 April 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Although, there is some discussion among scholars on the issue that if the judicial sale of a vessel in a foreign jurisdiction is not recognised internationally, whether it may cause repeated sales of the vessel or other uncertain legal problems, Taiwanese law is still not clear on this issue. Nevertheless, we believe that most Taiwanese courts would consider the principle of reciprocity as long as it does not violate public policy or morals in Taiwan.

Law stated - 29 April 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Law stated - 29 April 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Taiwan is not a party to the Hague Rules, Hague-Visby Rules, Hamburg Rules or the Rotterdam Rules. Nevertheless, the Maritime Act is partly based on or modelled on these Rules and Taiwanese courts often refer to these Rules in their judgments.

In principle, carriage at sea begins when the carrier loads the cargo and ends after the carrier discharges the cargo.

Law stated - 29 April 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Taiwan is not a party to the international conventions in respect of road, rail or air transport. In terms of domestic law, there is no provision specifically regulating combined transport and multimodal bill of lading. Nevertheless, article 75 of the Maritime Act provides that:

Where there is a consecutive carriage of cargo involving carriage by sea and other modes of carriage, the leg of the journey involving carriage by sea shall be governed by the Maritime Act. If the time of the loss of or damage to the cargo occurred could not be ascertained, it shall be presumed as occurring during the carriage by sea.

Law stated - 29 April 2024

Title to sue

43 | Who has title to sue on a bill of lading?

In principle, the holder of the bill of lading or the assignee of the holder of the bill of lading has the title to sue for the disputes arising from the bill of lading. Generally speaking, according to article 627 of the Civil Code, the legal relationship of carriage as between the carrier and the holder of the bill of lading will be determined based on the content of the bill of lading.

Law stated - 29 April 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Even if the bill of lading explicitly prescribes the incorporation of the terms in a charter party (including the jurisdiction or arbitration clause), many Taiwanese courts would still consider that such terms in a charter party do not bind a third-party holder or endorsee of the bill unless there is clear evidence indicating that such third party or endorsee has knowledge of the terms and still accepts them.

Law stated - 29 April 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

Taiwanese law is not very clear on the demise clause or the identity of carrier clause. In determining who should be liable as a carrier, Taiwanese courts basically would look, among other factors, at who issued the bill of lading and who gave the authority for the issuance. In practice, if the identity of the carrier cannot be determined, some courts would assume that the shipowner is the carrier. Even under the time charter party, some courts assumed that the shipowner is the carrier if the bill of lading itself is unclear regarding who is the carrier or indicated the bill of lading was issued on behalf of the Master.

Law stated - 29 April 2024

Shipowner liability and defences

- 46** | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

If it is clear from the bill of lading that the shipowner did not issue or authorise others for the issuance of the bill of lading, the shipowner might be able to avoid the liability for cargo damage. However, if the identity of the carrier cannot be determined, some Taiwanese courts did consider the shipowner as the carrier. Under such circumstances, the shipowner may rely on the terms of the bill of lading provided always that the court has the discretion on the validity of such terms.

Law stated - 29 April 2024

Deviation from route

- 47** | What is the effect of deviation from a vessel's route on contractual defences?

Deviation usually results in a breach of contract under the carriage. However, pursuant to article 71 of the Maritime Act, deviation for the purpose of saving or attempting to save life or property at sea or for other reasonable cause shall not be deemed a breach of the contract of carriage, and neither the carrier nor the shipowner shall be liable for the damage or loss resulting therefrom.

Law stated - 29 April 2024

Liens

- 48** | What liens can be exercised?

According to article 27 of the Maritime Act, maritime liens can be exercised on the following objects:

- the ship, all her equipment and appurtenances, and any other residual materials;
- the freight to be earned for the voyage where the maritime lien occurred;
- compensation due to the shipowner for the damage sustained by the ship or loss of freight during that particular voyage;
- compensation due to the shipowner in respect of general average; and
- remuneration due to the shipowner for salvage rendered at any time before the end of the voyage.

Carriers may exercise liens on cargo to secure payment of freights and other fees. In addition, shipyards may exercise liens on the vessel to secure payment in relation to the building or repairing of the ships. Moreover, the carrier or shipmaster may detain the cargo against their owner who has not paid a contribution to the general average based on article 122 of the Maritime Act.

Law stated - 29 April 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

If a carrier delivers cargo without one or all bills of lading being surrendered (depending on whether the delivery is made at the port of destination or not), it will probably be liable for delivery of the same cargo or damage compensation to the holder of the bill of lading. Since delivery of cargo without production of the bill of lading is likely to constitute gross negligence, the carrier is unlikely to limit such liability.

Law stated - 29 April 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

Pursuant to article 55 of the Maritime Act, the shipper shall guarantee to the carrier the accuracy of the title, quantity, the kind of packing, and the number of packages of the cargo to be delivered, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars.

In addition, based on article 57 of the Maritime Act, if the loss sustained by the carrier was caused by the fault of the shipper or his or her agents or servants, then the shipper shall be responsible for the loss. Furthermore, if the nature or value of the cargo has been fraudulently declared by the shipper at the time of shipment then neither the carrier nor shipowner shall be liable for the damage to or loss of the cargo (article 70).

Law stated - 29 April 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Yes. The emission control areas in Taiwan include the ports of Keelung, Taichung, Kaohsiung, Hualien, Taipei Suao, Anping and Mailiao. Besides, the ships may be required

to attach oil change records and bunker delivery notes while entering the above ports to confirm whether they meet the requirements of the oil change procedure regulated in the Inspection Procedure for Vessels Using Low-Sulfur Fuel, which was established on 25 October 2018.

Law stated - 29 April 2024

Sulphur cap

- 52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The Ministry of Transportation and Communications issued guidance on the adoption of article 14.1.3 and article 4 of Annex VI Regulations for Prevention of Air Pollution from Ships under the International Convention for the Prevention of Pollution from Ships (MARPOL) and such guidance has become effective since 1 January 2019. According to the guidance, foreign vessels and flagships sailing in international routes shall utilise low sulphur fuel oil (sulphur-bearing not more than 0.5 per cent by weight), or equipment or alternative fuels that achieve the equivalent effect of emission reduction when entering an international commercial port area under the jurisdiction of Taiwan.

The inspector of the flag state or the port state control would use the current selection rule to appoint the target vessels and conduct the inspection on board. Where the vessel fails to comply with the above guidance, a fine ranging from NT\$100,000 to NT\$500,000 can be issued by the commercial port authorities.

Law stated - 29 April 2024

SHIP RECYCLING

Regulation and facilities

- 53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

The Commercial Port Law and the regulations thereunder apply to ship scrapping and recycling in Taiwan. Ship scrapping and recycling require approval from the port authorities and should be carried out in the areas designated by the port authorities. Usually, the port authority will take reference from the international ship recycling regulations; however, it is difficult to predict which international ship recycling regulations will apply as Taiwan is not a signatory to any international convention. There might be ship scrapping and recycling facilities in some shipyards in Taiwan, but there are fewer and fewer ship scrapping and recycling businesses in Taiwan owing to environmental protection and labour difficulties.

Law stated - 29 April 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

There is no court specially set up for the review of maritime disputes. Maritime disputes may be submitted to any court in Taiwan that has jurisdiction over the dispute under the Code of Civil Procedure or Maritime Act. Nevertheless, a few courts in Taiwan have internal maritime divisions designated to handle maritime disputes.

Law stated - 29 April 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Pursuant to article 145(1) of the Code of Civil Procedure, where service is to be made in a foreign country, it shall be effectuated by the competent authorities of such country, or the relevant ambassador, minister envoy or consul of Taiwan or other authorised institutes or organisations in such country to make the service. In practice, the court would request the Ministry of Foreign Affairs to further request that the relevant ambassador, minister envoy or consul of Taiwan, or other authorised institutes or organisations in that country make the service.

Law stated - 29 April 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The domestic arbitral institution in Taiwan is the Chinese Arbitration Association (CAA), however, there is no specific panel of maritime arbitrators in the CAA. Nevertheless, there are some arbitrators specialising in maritime disputes in the list of arbitrators of the CAA.

In principle, if there is an arbitration clause between the parties, most parties would choose to conduct the arbitration in London. Also, if there is no arbitration clause, the parties would most likely submit the disputes to the competent court instead of referring to the CAA.

Law stated - 29 April 2024

Foreign judgments and arbitral awards

57 |

What rules govern recognition and enforcement of foreign judgments and arbitral awards?

A final and binding judgment rendered by a foreign court may be enforced in Taiwan provided that such foreign judgment is recognised by a Taiwanese court. In principle, a foreign judgment may be recognised except where:

- the foreign court lacks jurisdiction pursuant to the law of Taiwan;
- a default judgment is rendered against the losing defendant unless the notice or summons of the initiation of action had been legally served within a reasonable time in the foreign country or had been served through judicial assistance provided under the law of Taiwan;
- the performance ordered by such judgment or the proceeding of the lawsuit is contrary to the public policy or morals of Taiwan; or
- there is no mutual recognition between the foreign country and Taiwan (in practice, as long as there is no precedent in the foreign country that rejects the recognition of a judgment rendered by a Taiwanese court, the Taiwanese courts tend to consider that this does not apply).

Similarly, a foreign arbitral award is enforceable if it is recognised by a Taiwanese court. In principle, a foreign arbitral award may be recognised except where:

- the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan; or
- the dispute is not arbitrable under Taiwanese laws.

Furthermore, the court may dismiss an application for recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern the arbitral award does not recognise arbitral awards of Taiwan.

Law stated - 29 April 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Taiwanese courts' position on this issue has not been very clear to date. Nevertheless, asymmetric jurisdiction and arbitration agreements are likely to be valid and enforceable in Taiwan if the court would consider there is the mutual consent of parties except where the applicable law provides for exclusive jurisdictions.

Law stated - 29 April 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

If a Taiwanese court has exclusive jurisdiction over a dispute but the claimant issued proceedings in a foreign country, the defendant might not be able to apply for an injunction to force the claimant to submit the case to the Taiwanese court. Nevertheless, if the claimant obtains a foreign judgment in its favour and applies for the enforcement of the foreign judgment (or arbitral award) in Taiwan, the defendant may argue the lack of jurisdiction of the foreign forum and request the Taiwanese court to reject the claimant's application for recognition or enforcement.

Law stated - 29 April 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant may object and request the court to dismiss the case. However, in practice, some Taiwanese courts would still review the case regardless of a jurisdiction's clause providing for a foreign forum.

If the arbitration shall be conducted in a foreign country, the court will order the claimant to apply for the arbitration within a certain period. If the claimant fails to do so accordingly, the court will dismiss the domestic court proceeding. If the claimant applies for arbitration within the prescribed period, the court will suspend the proceeding pending the result of the arbitration.

Law stated - 29 April 2024

LIMITATION PERIODS FOR LIABILITY**Time limits****61** | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The applicable time limits differ in accordance with the different nature of the claims as follows:

- claims arising out of general average shall be extinguished if not duly exercised within one year commencing from the date on which the adjustment is concluded;
- claim for the maritime liens shall be extinguished upon the lapse of one year from the time when the claim has arisen;
- claims for compensation for loss, damage or delay in the transportation of cargo are extinguished by prescription if not exercised within one year from the date of completion of transport, or from the date when completion of the transport ought to have taken place;
- claims for salvage rewards shall be extinguished if not duly exercised within two years commencing from the date of the completion of the salvage operation; and

- claims arising out of a collision are extinguished if not duly exercised within two years commencing from the date of the collision.

The time limits may not be extended or reduced by mutual agreement. In addition, time limits may not be waived in advance either.

Law stated - 29 April 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

No.

Law stated - 29 April 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Taiwan is not a party to the Maritime Labour Convention.

Law stated - 29 April 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Yes. Pursuant to article 227-2(1) of the Civil Code:

Where there is a change of circumstances after the constitution of the contract, which is unforeseeable when signing the contract and the performance of the original obligation becomes obviously unfair to a party, such party may apply to the court for the change or adjustment of the original obligation or effect.

Law stated - 29 April 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Although Taiwan is not a party to most international conventions, the maritime legislation in Taiwan is deeply influenced by them. In addition, where there is a lack of applicable provisions in Taiwanese laws, the courts may use the relevant international conventions for reference.

Due to the rising need for clean and renewable energy, Taiwan has devoted itself to protecting the marine environment and developing offshore wind projects in recent years as well as to promulgate the relevant regulations. For example, according to article 9-1 and 21 of the Regulations on Port Services at Commercial Ports, if the vessel has leakage or an accident with dangerous substances contained in the ship, which may impact the safety of the port area, such as marine and environmental pollution, personal injury, cargo explosion, fire, etc, the owner or captain must notify the port management enterprise, maritime and port authority or its designated institution and must prioritise the necessary disposal measures on board before entering the port. Furthermore, any matter causing pollution or mess at the port area during its operation shall be prohibited. Pursuant to article 12-1 of the Regulations for Administrating Vessel Carriers, vessel carriers that operate passenger or cargo transportation for offshore wind farms shall submit their detailed transportation plans (such as water areas where an offshore wind farm is implemented, period of the plan, and so on) and entrusted contracts to the shipping administration before executing the transportation. Such development seems to bring a different impact on marine environment protection and maritime transport regarding offshore wind farms in the future. In addition, Taiwan's Greater Changhua 1 and 2a offshore wind farms began operations on 25 April 2024, and they have the largest total capacity in Asia, which shows a new milestone for increasing offshore wind capacity in Taiwan. Moreover, Taiwan's Ocean Conservation Administration also signed the MOU on Marine Tourism and Conservation with Tourism Administration on 26 April 2024, and committed to promoting cooperation in marine tourism and marine conservation.

In summary, the environment, transportation, repairment, maintenance, safety, fishing, labour and crew benefit, noise, nature, electricity need, pollution and conflict of interests may engender new interaction and bring in new ideas as well as new output. Therefore, it may be worthwhile keeping an eye on relevant development.

Law stated - 29 April 2024

UPDATE AND TRENDS**Key developments of the past year****66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The traditional views of the Taiwanese courts are that the clauses on the back of the bill of lading are only unilateral presentations, rather than mutual agreement between the carrier and the B/L holder and, therefore, are not binding on the cargo owner. However, the

Supreme Court took a new position in July 2020 and ruled that the governing law clause on the back of the bill of lading is binding on the shipper, carrier and the B/L holder. It also implies that all the clauses on the bill of lading shall be binding unless they lessen or discharge the carrier's statutory liability under the Taiwan Maritime Law. Nonetheless, given the drastic change in the court's legal view, it is uncertain whether the courts will follow this new legal view to recognise the effect of all clauses of the B/L in the future.

In addition, in recent years Taiwan has devoted itself to improving the air quality and protecting the marine environment of the ports. The Ministry of Transportation and Communications requires that ships entering the ports of Keelung, Taichung, Kaohsiung, Hualien, Taipei Suao, Anping and Mailiao shall use low-sulphur fuel with a sulphur content of 0.5 per cent or alternative fuel with equivalent abatement effects, which is regulated based on MARPOL (International Convention for the Prevention of Pollution from Ships). We believe Taiwan will continue to dedicate itself to controlling marine pollution and maintaining marine ecology.

In recent years, the Maritime and Port Bureau (MPB) of the Ministry of Transportation and Communications has also made great efforts in maritime security, digital development and crew training. Although Taiwan is not a member of the International Maritime Organization (IMO), the country has vigorously implemented practices and principles that align with those of all IMO member states and is devoted to maritime safety and environmental protection. Taiwan has completed the international maritime audit work, and the final audit report was sent to the IMO in March 2023.

The MPB has also devoted itself to promoting the Trans-SMART Plan (Transform Sustainable, Modern and Advanced ports with Revolutionary Technology), which includes improving the construction of intelligent auxiliary systems for vessel navigation, maritime weather real-time systems, intelligent monitoring and management systems, etc, and also continuously promoting the transformation and upgrading of ports, combining big data analysis, artificial intelligence, unmanned vehicles and other technological applications, to accelerate the development of intelligent transformation of Taiwan's ports.

In response to the advancement of technology and the popularisation of electronic documents, many scholars in Taiwan believe that the current provisions of the Maritime Act should be revised. Therefore, since 2023, academic institutions have held academic seminars to discuss amending Taiwan's Maritime Act.

Law stated - 29 April 2024



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Tunisia

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UPDATE AND TRENDS

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Pursuant to articles 15 and 23 of the [Maritime Trade Code](#), unless otherwise agreed title in the ship only passes from the shipbuilder to the shipowner on the date of delivery of the ship. The parties may agree that title will pass during the course of construction, before delivery or after delivery. This agreement should be registered on the national register of ships.

Law stated - 3 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

As with shipbuilding contracts, there are no specific formalities to be complied with for the refund guarantee to be valid. The only requirement is that the refund guarantee must be made in writing and properly executed by the parties thereto.

Law stated - 3 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

The seller is under an obligation to deliver the ship to the purchaser. Pursuant to the provisions of the Civil Code, if the shipyard, being solely responsible for the delay, fails to deliver the vessel, the purchaser may elect either to rescind the contract or request the delivery of the vessel (which may cause practical issues at the time of enforcement). In any case, the shipyard may be liable for damages.

Law stated - 3 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

There are no specific provisions provided by the Maritime Trade Code for this purpose. Pursuant to the provisions of the Civil Code, the shipbuilder is liable for latent defects of the

ship, even if the ship was accepted without reservation by the customer at the time of sale. The owner can take action against both the shipbuilder and the shipbuilder's sub-supplier if the latter was responsible for supplying or installing the defective machinery or equipment. Normally, the owner must commence proceedings within 30 days of the discovery of the latent defect (Civil Code, provision 672). Any lawsuit, including summary proceedings, will stall the limitation period. However, the parties may extend or reduce this period by mutual agreement.

The aforesaid provisions apply in the case of a ship repair contract. The shipbuilding contract may contain specific provisions concerning the shipbuilder's warranty regarding latent or apparent defects, in particular,

extending its duration. In addition, if the ship does not comply with the contract specifications, the purchaser has a claim in damages against the seller (provided that the non-compliance was not apparent at the time of delivery or the parties had agreed that non-compliance that was apparent upon inspection did not preclude the purchaser from seeking damages).

The effects of an agreement for the sale and purchase of a ship are governed by the provisions of the Civil Code. An action resulting from latent defects must be brought by the buyer normally within a period of 30 days following the discovery of the latent defect. If the vessel is defective and loss or damage results from such defect, a direct claim in tort by any person (including third parties) incurring loss or damage would lie in product liability against the shipbuilder. However, according to provision 673 of the Civil Code, a shipbuilder acting in bad faith cannot rely on this limitation period.

Law stated - 3 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

According to article 39 of the Maritime Trade Code, these registries are held in the principal town of each maritime district. There are two types of registries, one for the registration of ships eligible for mortgage (more than 10 GRT) and the other for the registration of ships not subject to mortgage (less than 10 GRT).

Under article 23 of the Maritime Trade Code, any ship sailing under the Tunisian flag must be registered in the principal town of the maritime area that became her home port. The owner shall register the ship fully built upon delivery or purchase as soon as he acquires its property. If a foreign ship is acquired abroad, the buyer must submit a written request for registration within seven days of the date of its entry into a Tunisian port. The registration formalities must be completed within a period not exceeding 60 days from that date.

It is possible to register ships under construction (article 25 of the Maritime Trade Code).

Law stated - 3 May 2024

6 | Who may apply to register a ship in your jurisdiction?

Individuals and companies may apply to register a ship in Tunisia. A shipowner must comply with certain conditions to obtain registration of a vessel. These conditions vary depending on whether the shipowner is an individual (a citizen or a foreign national) or a company. In all cases, however, such conditions apply both to new ships and to second-hand ships.

Law stated - 3 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

According to article 24 of the Maritime Trade Code, for vessels built in Tunisia the owner or his or her agent should provide the maritime authority of the home port of the vessel with the tonnage certificate and an original copy of the deed of sale.

For vessels built or acquired abroad, the owner or the agent should provide the maritime authority of the home port of the vessel with a written statement, in addition to the tonnage certificate and the original copy of the ownership title of the ship.

The maritime authority shall require the applicant to register all documents supporting his or her statement.

Law stated - 3 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration by way of suspending the underlying registration is possible.

Law stated - 3 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

Maritime mortgages are registered on a special register maintained by the registry of ship mortgages at the local customs authorities of the home port of the vessel.

As the registry of ship mortgages is a public registry, anyone may gather information regarding, inter alia, the name of the vessel, the date of the registration of the mortgage, the identity of the creditors, the debtor and the secured amount.

Law stated - 3 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Regarding international conventions, the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the protocol of 1996, is not in force in Tunisia. The provisions concerning the limitation of liability for maritime claims are governed by articles 131 to 160 of the Maritime Trade Code. These provisions are applicable to vessels of 300 tons or more.

Pursuant to article 132 et seq of the Maritime Trade Code, the shipowner (meaning the owner, manager, charterer, operator or supervisor of a seagoing ship) and the maritime carrier (under a bill of lading) are entitled to limit their responsibilities for maritime claims.

Law stated - 3 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Under Tunisian maritime law, it is not compulsory to set up a fund. However, in practice, it is common to provide a limitation fund. To establish limitation, an expert request must be made before the president of the commercial court with territorial jurisdiction. Once the fund is set up (to be deposited at the Fund for Deposits and Consignments), the judge will record its constitution, which creditors may then dispute. Once all issues are resolved, the distribution of the fund takes place.

Pursuant to article 141 of the Maritime Trade Code, the limitation fund consists of the amount at which the shipowner intends to limit its liability plus legal interest from the date of the event until the date of payment to the fund for deposits and consignments, and the charges adjudicated by the judge.

According to the Tunisian Maritime Trade Code, the limitation of liability of the shipowner is set inclusively:

- with regard to the claims of repairing material damages to a total of 150 dinars by gross registered tonnage; and
- with regard to the claims of compensation for bodily injury, a total of 250 dinars by gross registered tonnage.

The limited amount of liability of carriers for loss, general average or damage is fixed at 400 dinars per package or usual unit of cargo freight.

Factors used to calculate the fund include, among others, the nature of the damage, the relevant regime and the tonnage of the ship.

Notwithstanding the above, under Tunisian maritime law there is no separate right to plead limitation without setting up a fund.

Law stated - 3 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

Under Tunisian maritime law, the limit can be broken if it is proved that the loss resulted from an inexcusable fault. Tunisian courts assess *in abstracto* the concept of such fault and assess the fault against the concept of professional conduct. For instance, any breach of the fundamental obligation of seaworthiness is an inexcusable fault.

Law stated - 3 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Passenger claims generally involve personal injury or death, but may also involve claims for lost or damaged luggage. Internationally, these claims are regulated by the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, but Tunisia is not a signatory to this Convention. Passenger claims are, therefore, governed by the general maritime law of Tunisia (provisions 150 to 157 and 219 to 225 of the Maritime Trade Code).

The carrier owes passengers a duty to exercise reasonable care under the circumstances. In order for a passenger to succeed in a negligence action, he or she must prove that the carrier breached a duty owed to the passenger, that the actions of the shipowner or one of his or her employees were the proximate cause of the injury, and the existence of actual injuries and damages.

The carrier may only be exonerated wholly or partly from liability for non-performance, defective performance or late performance of its obligations if it provides evidence that it had done its best to prevent the damage, or in cases of force majeure or fault of the passenger. Any contrary clause is void.

In addition to the limitation of liability of the shipowner as set out above, the carrier's liability may not exceed 8,000 dinars per passenger (article 152 of Maritime Trade Code).

Law stated - 3 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

Tunisian maritime and commercial ports are managed by the Office of the Merchant Navy and Ports (OMMP), a state establishment endowed with financial autonomy and legal status. The OMMP provides merchant navy services, more specifically the administration of ships, seamen and maritime navigation security.

Port state control is operated by the Safety Inspectorate, under the OMMP (which operates under the Ministry of Transport).

Law stated - 3 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

All Tunisian maritime ports are in conformity with the International Ship and Port Facility Security Code provisions:

- safety assessments and plans approved since 28 June 2004, reviewed yearly;
- port facility safety officers responsible for all areas of all ports;
- personnel with specific safety duties have received training in coordination with the International Maritime Organization; and
- simulations and safety training in ports.

In compliance with the Tunisian maritime regulations, during these inspections, inspectors may order the detention of a foreign vessel to request the rectification of all deficiencies detected that are clearly hazardous to safety. Under such circumstances, the inspector may also prohibit the ship from continuing a hazardous operation due to established deficiencies. In the case of deficiencies that are clearly hazardous to safety, health or the environment, the competent authority of the port where the ship is being inspected shall ensure that the ship is detained or the operation in the course of which the deficiencies are revealed is stopped.

Law stated - 3 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

The Navigation Code, the appeal procedure provides that any appeal against a decision of an inspector shall be presented by the shipowner, operator of the ship or its representative, or captain whose departure clearance was denied, before the Chief of the Centre of Ship Safety. The appeal shall be made by the shipowner, operator of the ship or its

representative, or captain whose departure clearance was denied within 15 days of being notified of the decision of the inspector.

Law stated - 3 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

In Tunisia, among the authorised classification societies are Bureau Veritas, DNV (Det Norske Veritas) and Nippon Kaiji Kyokai (ClassNK), which are all members of the International Association of Classification Societies.

Law stated - 3 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

The liability of a classification society may arise under contract law. Tunisian courts acknowledge the validity of non-liability clauses inserted in contracts entered into between shipowners and classification societies. Provisions limiting the liability of classification societies are also valid under Tunisian law. However, the application of such clauses is excluded in the event of gross negligence on the part of the classification society.

A classification society may also incur liability in tort and be criminally liable.

Law stated - 3 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

The state or a local authority can order wreck removal. The law provides extensive powers to the relevant administration to remove wrecks, in particular when they present a danger to navigation and the environment or if the owner of the wreck is anonymous. Notably, under the circumstances described in article 6 of Special Law No. 89-21 of 22 February 1989 on Wreck and Wreck Removal, either the state or the port authority may act on their own initiative at the shipowner's expense and risk.

Law stated - 3 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Regarding collision, Tunisia is not a member of the International Convention for the Unification of Certain Rules of Law with Respect to Collision between Vessels adopted in Brussels on 23 September 1910. However, Tunisia is a member of the Convention on the International Regulations for Preventing Collisions at Sea 1972, as amended.

Regarding salvage, the International Convention on Salvage 1989 is applicable in Tunisia (Law No. 98-36 of 25 May 1998). The International Convention on Maritime Search and Rescue 1979, adopted in Hamburg on 27 April 1979, is also applicable in Tunisia (Law No. 98-35 of 25 May 1998).

The key international provisions in force in Tunisia relating to pollution are as follows:

- The International Convention for the Prevention of Pollution from Ships (MARPOL) 1973, together with its 1978 and 1997 protocols;
- The International Convention on Civil Liability for Oil Pollution Damage 1992, establishing the principle of strict liability for tanker owners for damage caused by spills of persistent oil from laden tankers and creating a system of compulsory liability insurance;
- The Fund Convention 1992 and the Supplementary Fund Protocol 2003;
- The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001;
- The International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, as amended;
- The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969;
- The Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973, as amended;
- The International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, as amended; and
- The International Convention on the Control of Harmful Anti-fouling Systems on Ships 2001.

Law stated - 3 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement. The Lloyd's standard form of salvage agreement is acceptable.

There are no specific restrictions on who may carry out salvage operations. They are usually carried out by specialised companies.

Law stated - 3 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Tunisia is neither a party to the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships signed in Brussels on 10 May 1952, nor to the International Convention on the Arrest of Ships signed in Geneva on 12 March 1999.

Law stated - 3 May 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Under Tunisian maritime law and according to article 100 of the Maritime Trade Code, a ship may be arrested pursuant to an ex parte request for an order of conservatory arrest for any claim, as long as the claim appears to be well founded in theory.

Under article 100 of the Maritime Trade Code, a vessel can be arrested in respect of a maritime claim. According to article 100 of the same code, are considered maritime claim any pretention with a right or a claim having one of the following causes:

- damage caused by any ship either in collision or otherwise;
- loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
- assistance and salvage;
- agreement relating to the use or hire of any ship whether by a charter party or otherwise;
- agreement relating to the carriage of goods in any ship whether by a charter party or otherwise;
- loss of or damage to goods, including baggage carried in any ship;
- general average;
- towage;
- pilotage;

- goods or materials wherever supplied to a ship for her operation or maintenance;
- construction, repair or equipment of any ship or dock charges and dues;
- wages of masters, officers or crew;
- master's disbursements, including disbursements made by ship pers, charterers or agents on behalf of a ship or her owner;
- disputes as to the ownership or co-ownership of any ship;
- disputes as to the exploitation or earnings of that ship;
- the mortgage or hypothecation of any ship and, generally, any claim that has its source in one of the causes that allow the appli cation of limitation of responsibility of the owners or ship owners.

Regarding the arrest of associated ships, pursuant to article 103 of the Maritime Trade Code, in the case of a charter vessel whose nautical man agement has been replaced and where the charterer alone is responsible for a maritime claim relating to that ship, the claimant may arrest such ship or any other belonging to the charterer. No other ship belonging to the shipowner can be arrested under such a claim.

These provisions shall also apply to all cases where a person other than the owner holds a maritime claim.

Law stated - 3 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Tunisia is a party to the International Convention on Maritime Liens and Mortgages 1993, adopted in Geneva on 6 May 1993 (ratified by Law No. 94-45 of 9 May 1994).

Article 71 of the Maritime Trade Code provides a list of the order of priority of maritime liens:

- judicial costs incurred in relation to the sale of the ship and the distri bution of the proceeds of the sale;
- costs incurred in the last port of call;
- crew fees;
- salvage and general average contribution;
- claims arising out of collisions, accidents at sea and damage to port structures and cargo; and
- costs incurred by the captain outside the home port of the vessel for the preservation of the ship or the continuation of the journey.

These are followed by:

- mortgages;

- other secured claims; and
- all other unsecured claims.

Law stated - 3 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

Wrongful arrest would lie in the abuse of the right to arrest a vessel; absence of legitimacy, malice or the inappropriateness of the measure may constitute an abuse. In the event of such an abuse, the judge may award damages to the arrestee.

Law stated - 3 May 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Yes. The creditor of a charterer may arrest the vessel as long as he or she benefits from a maritime lien.

Under Tunisian maritime law and pursuant to article 71 of the Maritime Trade Code, the bunker supplier will have a maritime lien if it entered into a contact with the captain of the vessel in relation to the supply of bunkers ordered outside the vessel's home port.

Law stated - 3 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

Article 104 of the Maritime Trade Code provides that: 'providing a guarantor is compulsory if the applicant does not have, on the day of the arrest, his domicile in Tunisia. The guarantor shall provide a valid guarantee within the meaning of the same article.' 'Valid guarantee' means a good and sufficient guarantee.

This requirement is not applicable before all Tunisian courts. Before some local courts, the arresting party has to provide guarantor. This guarantor will then provide a guaranty or security. This guaranty varies from 20,000 to 100,000 Tunisian dinar depending the vessel particulars and port duties along with claim details. This security shall be provided in a commitment form by a Tunisian entity or a local bank.

The debtor can obtain the release of the arrest if it can provide a satisfactory guarantee to the arresting party by a local bank or depositing the amount at the Fund for Deposits and Consignments as a guarantee.

Law stated - 3 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

It is not the court that will make the calculation of the amount of security.

An approximative calculation of the amount of security is made on the basis of the vessel particulars and port duties along with claim details. In most cases, the arresting party provides a guarantee (by a local guarantor) varying from 40,000 Tunisian dinar to 100,000 dinar even before filing the arrest application without referring to the court so that it can arrest the vessel very soon. If the arrested party finds this guarantee insufficient, then it may ask for a judicial review subsequently.

This security shall be provided in a commitment form by a Tunisian entity or a local bank.

No. The amount of security can't exceed the value of the ship. If the arrested party finds the guarantee insufficient, then it may ask for a judicial review subsequently.

Finally, the arrested party, if it considers the arrest abusive, may request release from the President of the Court who, if the security appears serious and if the appearances of the basis of the claim, which are within his or her discretion, appear insufficient to justify the arrest, shall be able to deem it appropriate to lift the arrest.

In the event that the shipowner or charterer suffers a loss due to the arrest of the ship, such parties may apply for an emergency proceeding to request the release of the ship from arrest. Under the terms of article 105 of the Maritime Trade Code, at the request of the shipowner on a subsidiary basis, the judge may authorise the release of the ship subject to the issuance of a guarantee or security.

Pursuant to article 105 of the Maritime Trade Code, the judge will decide as to the nature, extent and conditions of the guarantee if the parties do not agree. The guarantee or security will be deposited at the Fund for Deposits and Consignments. However, at the request of one of the parties it may also be deposited in the hands of a third party appointed for that purpose (in practice, often a bank). The judge who consents to such a request will state in his or her decision the conditions of such deposit. In the event that the third party refuses to accept such deposit, the sum will be deposited, without any new decision in this respect, in the Fund for Deposits and Consignments. Where the value of the guarantee cannot be determined immediately, the judge will invite the parties to appear before him with any evidence at a given date.

Law stated - 3 May 2024

Formalities

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- 29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

The appointment of a lawyer shall be by a power of attorney. The PoA shall be bilingual (English/French) or (English/Arabic). Tunisia is already a signatory to the Apostille Convention. However, there is no need of notarisation or legalisation or authentication. A simply signed PoA (signature and stamp) suffices. There is no need for the original (hard copy), a high-quality scanned copy suffices.

As for the form of the other documents to be provided to the court, high-quality scanned copies suffice. There is no need for notarisation or legalisation or authentication.

An official Arabic or French translation is required. It must be from a local sworn public translator.

If there is insufficient time available before filing the arrest application to comply with all the required formalities, unfortunately, it isn't possible to set the arrest procedure in motion while undertaking to the court to complete the formalities as soon as practicable.

The relevant documents cannot be filed electronically.

On average, at least three days' notice is required to prepare an arrest application.

Law stated - 3 May 2024

Ship maintenance

- 30 | Who is responsible for the maintenance of the vessel while under arrest?

The bailiff in charge of the arrest of a ship will designate a person responsible for the surveillance of the vessel while under arrest. However, the shipowner and the OMMP are also responsible for the maintenance of the arrested vessel (article 21 of the Maritime Trade Code).

Law stated - 3 May 2024

Proceedings on the merits

- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Pursuant to article 104 of the Maritime Trade Code, the arresting party must pursue the claim on its merits in the Tunisian courts that have jurisdiction to decide within 30 days of the arrest order. Otherwise, the arrest will be considered null and void.

Law stated - 3 May 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

According to the Maritime Trade Code, the arrest of a ship is subject to a specific legal regime, as a ship represents a specific type of property. Pursuant to article 71 of the Maritime Trade Code, apart from ship arrest, a creditor can benefit from a maritime lien that can be executed on the freight, if the claim has become due during the transport and if its value is still in the hands of the captain or the owner's agent. In addition, the creditor can seek the arrest of the debtor's receivables.

Law stated - 3 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

No, not in their conventional form. Pursuant to the Maritime Trade Code, the arrest of a ship is subject to a specific legal regime, as a ship represents a specific type of property. According to article 105 of the Maritime Trade Code, the judge may either allow the operation of the arrested ship by the shipowner if he or she provided adequate guarantees, or adjust the management of the ship in a manner that he or she deems most useful for the duration of the arrest.

Law stated - 3 May 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Yes. The arrest of a ship's bunkers is subject to the same legal regime as the arrest of the ship itself.

Law stated - 3 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Creditors of the shipowner may apply for judicial sale of the vessel. These creditors must have a maritime lien, mortgage or debt (article 101 of the Maritime Trade Code).

Law stated - 3 May 2024

Procedure

- 36** | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The procedure for initiating and conducting judicial sale of a vessel is provided by articles 108 et seq of the Maritime Trade Code.

The initial step in such a procedure involves a bailiff notifying the shipowner of a judgment evidencing that payment is due or, in certain cases, a notarised deed. If payment is not made, the bailiff will then issue attachment minutes (from arrest to distraint), which will be notified to the relevant port authorities. In relation to the second phase of the procedure, summons to appear will be served in order to carry out the auction of the ship and the attachment minutes will be filed with the relevant ship and mortgage registry. The arrest will then be notified to the creditors.

The court will determine the conditions regarding the auction sale of the vessel.

The timing of the procedure will depend on a number of factors, such as whether the ship is registered under the Tunisian or a foreign flag. However, article 133 of the Maritime Trade Code provides that the time period must not exceed three months. The court costs in connection with the sale will be determined by the judgment given by the court, and will usually reflect the fees incurred in relation to the ship's detention and the expenses incurred in the course of court proceedings.

Law stated - 3 May 2024

Claim priority

- 37** | What is the order of priority of claims against the proceeds of sale?

According to article 71 of the Maritime Trade Code provides a list of the order of priority of maritime liens:

- judicial costs incurred in relation to the sale of the ship and the distribution of the proceeds of the sale;
- costs incurred in the last port of call;
- crew fees;
- salvage and general average contribution;
- claims arising out of collisions, accidents at sea and damage to port structures and cargo; and
-

costs incurred by the captain outside the home port of the vessel for the preservation of the ship or the continuation of the journey.

These are followed by:

- mortgages;
- other secured claims; and
- all other unsecured claims.

Law stated - 3 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The judicial sale of a vessel will serve to extinguish prior liens and encumbrances including maritime liens and all other claims (purifying effect).

Law stated - 3 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

The judicial sale of a vessel in a foreign jurisdiction is not recognised in Tunisia (articles 8 and 11 of the Tunisian Code of International Private Law (CIPL)).

Law stated - 3 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Tunisia is already a party to the International Convention on Maritime Liens and Mortgages 1993, adopted in Geneva on 6 May 1993 (ratified by Law No. 94-45 of 9 May 1994).

Law stated - 3 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state

ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Tunisia is not a signatory of the Hague Rules 1924 or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules). However, the Hamburg Rules are applicable in Tunisia (ratified on 15 September 1980 and entered into force on 1 November 1992).

For the purpose of the application of such rules, carriage at sea begins when the goods are loaded on to the vessel and ends when they are discharged from the vessel.

Law stated - 3 May 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Internationally, there aren't any applicable multimodal transport conventions.

The applicable international transport convention:

- for road transport, the Convention on the Contract for the International Carriage of Goods by Road 1956 and the Protocol of 1978;
- for rail transport, the Convention Concerning the International Carriage of Goods by Rail 1980 as amended by the Protocol of 3 June 1999; and
- for air transport, the Convention for the Unification of Certain Rules for International Carriage by Air 1999 is also applicable in Tunisia (ratified on 27 February 2018).

Law stated - 3 May 2024

Title to sue

43 | Who has title to sue on a bill of lading?

Through the application of the maritime trade law, the consignee has title to sue on a bill of lading. Consignors may have title to sue on a bill of lading if they suffered loss or damage. The real consignee may also have title to sue on a bill of lading.

Law stated - 3 May 2024

Charter parties

44 |

To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

In principle, clauses of the charter party that are not incorporated in the bill of lading and that have not been accepted by the holder of the bill of lading are not binding. A reference in the bill of lading to a clause in the charter party will not be binding.

However, if the clause of the charter party is entirely reproduced in the bill of lading, and if the holder or endorsee of the bill of lading has accepted such clause, it will be binding.

The above principle appears to be tempered by the jurisprudence in respect of arbitration clauses.

Law stated - 3 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

The 'demise' and identity of carrier clauses are not prohibited under Tunisian maritime law, but are not considered binding by the Tunisian courts.

Law stated - 3 May 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

In a large number of charterers' bills of lading, the name of the carrier is not provided. Where such a bill of lading is kept by the charterer, the contractual relations are governed by the charter agreement. However, issues arise when this type of bill of lading is passed on to a consignee who is a third party to the charter agreement. In the event of loss of or damage to cargo, the holder may only rely on the charterer's bill of lading, which does not provide information on the carrier. In this respect, the Tunisian courts have held that, when the bill of lading mentions neither the shipowner nor the charterer's name and when the charter party that it refers to is not reproduced in or attached to the bill of lading, the recipient and its insurers are entitled to bring an action against the apparent carrier, namely, the shipowner. This entitlement exists regardless of the existence of information regarding the identity of the charterer, which may have resulted from elements external to the bill of lading that were revealed after delivery thereof. There is no distinction between the carrier and the shipowner.

Law stated - 3 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Under the Maritime Trade Code, loss or damage resulting from a vessel's deviation in order either to save or attempt to save lives or property at sea or any reasonable deviation will not be considered as a breach of the contract of carriage, and the carrier will not be liable for any subsequent loss or damage. However, the carrier may be held liable for any loss or damage resulting from an unreasonable deviation, such as a voluntary deviation towards a manifestly unsuitable port.

Law stated - 3 May 2024

Liens

48 | What liens can be exercised?

Pursuant to article 193 of the Maritime Trade Code, the carrier does not have a lien on the cargo for payment of its freight. However, according to article 71-5 of the Maritime Trade Code, a lien can be exercised on the ship in relation to claims for loss of or damage to cargo.

Law stated - 3 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Delivery without production of the bill of lading may render the carrier liable. In practice, it is common for the consignee or his or her representative not to be in possession of the bill of lading at the discharge port. The carrier will accept to deliver the cargo without production of the bill of lading provided that an autonomous guarantee is issued. The Tunisian courts have held that delivery of cargo by the carrier without the delivery of such guarantee as requested by the consignor is a breach of contract.

Law stated - 3 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

In addition to the duty to present the goods properly packed and marked at the time and place determined in the bill of lading, the shipper has a duty of sincerity regarding the nature and value of the goods, in particular regarding dangerous goods. The shipper is also

responsible for paying for the freight, unless otherwise agreed by the parties. A paid-freight note is usually affixed to the bill of lading.

Pursuant to the Maritime Trade Code, the shipper is liable for any damage to the ship or other goods caused by its fault or the inherent defect of its goods. If the shipper breached the duty of sincerity regarding the nature of the goods, the carrier will not be liable for the loss of those goods.

Law stated - 3 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Yes. In accordance with the International Convention for the Prevention of Pollution from Ships (MARPOL) (annex VI in force as of 19 May 2005 and modified in 2008) there is an ECA in force in Tunisian territorial waters.

Law stated - 3 May 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The applicable cap on the sulphur content of fuel oil depends on the geo graphic area in which the ship is navigating.

According to annex VI of the MARPOL Convention, under the general requirements, the sulphur content of any fuel oil used on board ships shall not exceed the following limits: sulphur content of 0.50 per cent outside ECAs and 0.10 per cent inside ECAs.

Unfortunately, local authorities don't enforce seriously the regulatory requirements relating to low-sulphur fuel.

Law stated - 3 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

There isn't any specific domestic or international ship recycling regulations in Tunisia.

There aren't any ship recycling facilities in Tunisia.

Law stated - 3 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The Tunisian commercial courts will usually have jurisdiction regarding maritime disputes. However, it is important to note the use of arbitration in settling international maritime disputes. A large number of contracts, such as shipbuilding contracts, contracts in respect of salvage operations and charter agreements, provide an arbitration clause.

The Tunisian Commercial Maritime Court will exercise jurisdiction over maritime disputes regarding, among other things, offences committed by professionals of the maritime industry, the captain of a ship or the crew.

Law stated - 3 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

In addition to the bilateral conventions between Tunisia and other states on the service of judicial and extrajudicial documents in civil or commercial matters, the main rules in Tunisia that govern the service of court proceedings on a defendant located out of the jurisdiction are set out in the Tunisian Code of Civil Procedure.

According to article 9 of the Tunisian Code of Civil Procedure, if the defendant is not resident in Tunisia and has a known domicile abroad, a copy of the act must be served to him or her by registered letter.

Law stated - 3 May 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

No.

Law stated - 3 May 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The Code of International Private Law regulates the recognition and enforcement of foreign judgments. A claim for recognition and enforcement of a foreign judgment shall be initiated before the Court of First Instance and, once litigation has ended, the foreign judgment will be recognised and enforceable, or both.

The courts will not review the scope or content of a foreign judgment; however, they will determine the compatibility of the judgment with the related provisions of the CIPL. Therefore, litigation within this area is usually faster than general litigation at the commercial courts. In compliance with provision 11 of the CIPL, recognition or enforcement, or both, shall not be granted for foreign court decisions if:

- the subject of the litigation comes under the sole competence of the Tunisian courts;
- the Tunisian courts have already made a decision not to admit an appeal via the ordinary channels, on the same subject, between the same parties and for the same cause;
- the foreign decision is against public policy according to the CIPL, or based on procedures that have failed to preserve defence rights;
- the foreign decision was cancelled, its enforcement was suspended in accordance with the legislation of the country where it was issued, or it is not enforceable in the country where it was issued; and
- the state where the judgment or decision was delivered does not comply with the rule of reciprocity.

Law stated - 3 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Yes. Asymmetric jurisdiction and arbitration agreements are valid and enforceable in Tunisian jurisdiction.

Law stated - 3 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

In principle, Tunisian courts do not issue anti-suit injunctions. Under Tunisian law, if the claimant, in breach of a jurisdiction clause, issues proceedings elsewhere in Tunisia, the party who wishes to raise the plea of lack of jurisdiction, under penalty of inadmissibility, must do so before the court at which the matter is brought and explain which jurisdiction it believes the matter should be brought before (article 18 of the Code of Civil Procedure).

Law stated - 3 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant can raise a plea of lack of jurisdiction before the court.

In the presence of an arbitration clause, the clause applies. Where a dispute that is referred to an arbitration tribunal pursuant to an arbitration agreement or arbitration clause is brought before a court of law of the state, the latter must decline jurisdiction unless the matter has not yet been brought before an arbitration tribunal and the arbitration agreement is manifestly null and void.

Law stated - 3 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Time limits vary depending on the nature of the claim. A two-year time limit applies to claims arising under a contract of carriage and a voyage or time-charter agreement governed by Tunisian law. The time limit can be extended by agreement.

In relation to liability in tort a longer time limit applies, which will usually be three years.

Law stated - 3 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

No.

Law stated - 3 May 2024

MISCELLANEOUS

Maritime Labour Convention

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- 63** | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Yes. The Maritime Labour Convention 2006 applies in Tunisia and to vessels flying the Tunisian flag.

Tunisia ratified the Maritime Labour Convention 2006 on 5 April 2017.

Law stated - 3 May 2024

Relief from contractual obligations

- 64** | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

In the absence of a contractual hardship clause, it would be very difficult to obtain relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract. Article 242 of the Tunisian Civil Code incorporates the principle of *pacta sunt servanda* (ie, the terms of a contract are generally binding as between the parties thereto and a judge is not entitled to modify the agreement or order its non-performance, even where economic circumstances have rendered the contract particularly onerous for one of the parties). The only statutory exception to this rule is when an event that constitutes *force majeure* has occurred; however, under Tunisian law, *force majeure* will only be deemed to have occurred when the event in question is irresistible (not simply an event that makes performance more difficult), unforeseeable (which may not necessarily be the case even for dramatic natural events, such as hurricanes, or human events, such as war), external (which would not necessarily be the case if a party's performance is hindered by acts of its own subcontractors) and does not imply fault on the part of the party wishing to excuse its non-performance.

Contractual hardship clauses, which oblige the parties to negotiate in good faith modifications to the contract in the event of the occurrence of circumstances that upset the original economic equilibrium of the contract, are valid under Tunisian law but, in practice, their application is difficult, as the courts are wary of ordering modifications in the event that the parties, despite negotiating in good faith, are unable to agree on the necessary modifications. In any event, the courts will also scrutinise closely whether the events in question actually fall within the scope of the events referred to by the parties in the contract as triggering application of the hardship clause.

Law stated - 3 May 2024

Other noteworthy points

- 65** | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Law stated - 3 May 2024

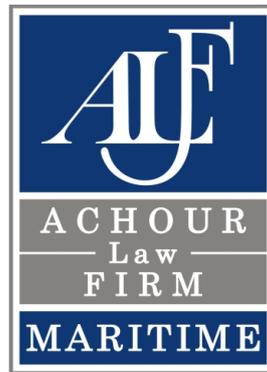
UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

Not at present.

Law stated - 3 May 2024



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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

This would depend on whether the new build is registered at the shipping registry. The title of a new build that is not registered at the shipping registry shall pass through the transfer of possession from the shipbuilder to the shipowner, after the physical delivery and the signing of the protocol of delivery and acceptance. However, for registered vessels, the title shall pass to the shipowner at the shipping registry through an official transaction of the registrar, who shall transfer the ownership and record such change at the registry. Under Turkish law, the parties may decide in the shipbuilding contract whether the shipyard or the contractor will be the registered owner. The Turkish Commercial Code allows foreign contractors to be registered owners of new builds.

Law stated - 2 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

Although the Code of Obligations does not specifically regulate the refund guarantee, the refund guarantee is a special form of the guarantee contract, whereas the rules of the Code of Obligations regulating 'third-party performance liability undertaking' shall apply by comparison to the guarantees. There is no formal requirement for 'third-party performance liability undertaking', and neither this nor the guarantee contract depend on the principal contract. The Code of Obligations requires specific formalities for the sureties. Article 583 of the Code of Obligations refers to the fact that surety contracts should be drawn up on paper and the maximum quantum for the liability, the date of the surety and the type (eg, joint and several liability) of liability should be stated in writing by the person providing the surety. Article 584 also requires a spouse's consent if the person providing the surety is not a member of the board of directors or a shareholder of the debtor company. Although these legal validity requirements govern the surety contract, article 603 of the Code of Obligations states that the same validity rules shall apply to any personal guarantee or undertaking given by natural persons. If the refund guarantee in a shipbuilding contract is given by a natural person, the form of the guarantee should comply with the specific requirements for the sureties set out by articles 583 and 584 of the Code of Obligations, otherwise the personal guarantee or undertaking shall be deemed null and void. However, in Turkey, bank refund guarantees are common practice for shipbuilding contracts and the foregoing requirements shall not apply to bank guarantees issued by a bank as a legal commercial entity. In almost all cases, Turkish banks apply Turkish law and local jurisdiction and state that, if the contract is disputed, the refund guarantee shall only be liquidated in accordance with the final arbitration award or the final judgment of the courts.

Law stated - 2 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

It is possible to apply to the courts and request a precautionary injunction order to deliver the vessel when the yard refuses to deliver it. The court, while granting such an order, would request that the claimant lodge sufficient counter-security in consideration of the potential losses or damages to the opponents if the claimant's request was found to be wrongful.

The claimant should also proceed with the main claim action before the relevant jurisdiction within two weeks for the sake of the precautionary injunction order.

Law stated - 2 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

The liability of the shipyard against the original shipowner would be based on contractual liability. If the vessel is sold, the original shipowner shall be held liable to the purchaser in accordance with the provisions of the sale contract.

However, third parties, or a purchaser from the original shipowner whose rights are prejudiced from the defects arising from the fault of the shipbuilder, may bring a tort action against the shipbuilder in accordance with the stipulations of the Code of Obligations.

Law stated - 2 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Commercial vessels owned by Turkish companies or Turkish natural persons, pleasure yachts and vessels used for scientific, sporting or educational purposes can be registered in the Turkish shipping registry. Vessels under construction for Turkish and foreign entities and natural persons may be registered at the registry for vessels under construction.

Turkish commercial vessels exceeding 18 gross tonnage must be registered at the shipping registry.

Law stated - 2 May 2024

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6 | Who may apply to register a ship in your jurisdiction?

Natural persons holding Turkish nationality and companies established in Turkey where most directors are Turkish nationals and majority of the votes representing shares are held by Turkish shareholders, may apply to register a ship. For joint-stock companies, in addition to the foregoing requirements, the shares should be registered and share transfers to foreign entities or natural persons subject to the approval of the board of directors.

Law stated - 2 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

The applicant should submit the following documents:

- corporate authorisation of the Turkish company;
- notarised original resolutions of the board of directors of the company for the approval of the purchase and registration in the Turkish shipping registry;
- the notarised original power of attorney giving the necessary power to the applicant if different from the authorised signatory;
- a notarised original circular signatory showing the list of authorised persons empowered to act for and on behalf of the company;
- a certificate of good standing from the Turkish Maritime Chamber of Commerce;
- original or notarised copies of the articles of incorporation along with the amendments;
- an original deletion certificate (if the second-hand vessel is purchased from a foreign seller);
- a non-encumbrance certificate from the previous foreign registry;
- an invoice;
- a notarised and apostilled bill of sale signed by the foreign seller;
- protocols of delivery and acceptance along with their official Turkish translations;
- customs entry document of the vessel; and
- a tonnage certificate duly issued by the Turkish authorities.

If the vessel is to be owned by a Turkish natural person, he or she should provide his or her identity card instead of the corporate documents.

For a foreign new build, the applicant should also submit the shipbuilder's certificate.

Law stated - 2 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration is not permitted under Turkish law. However, if a Turkish vessel is managed and operated by a foreign entity for a minimum of one year, the vessel, with the formal consent of the Ministry of Transport and Infrastructure, shall fly the foreign flag during the management period. Owners should also provide the Turkish authorities with proof of the formal consent of the flagging-in state for the temporary entry of the vessel into their (bareboat) registry.

If a foreign vessel is managed and operated by Turkish entities for a minimum period of one year, the vessel, with the consent of the Ministry of Transport and Infrastructure, shall fly the Turkish flag during the management period. The applicant should also submit the official consent of the foreign owner along with the regulation of the foreign country enabling the temporary change of flag. In this case, the vessel shall be registered at the bareboat registry. Suppose the majority of the votes representing the shares are not granted to Turkish citizens in that (Turkish) management or operating (or bareboat charterer) company. In that case, the shares are not registered and the share transfer to foreign entities or natural persons does not require the approval of the board of directors, the vessel is still allowed to fly the Turkish flag but would not benefit from cabotage rights.

Law stated - 2 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

Mortgages are registered in the vessel's registry records at the shipping registry. The registrar should record the name of the mortgagee, the amount, the interest rate and type of the mortgage, the degree of the mortgage, the notary certificate showing the number and date of the mortgage agreement executed before the notary public, and further information related to the principal claim for which the mortgage has been created as a security.

Law stated - 2 May 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Turkey adopts the regime of the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 and its 1996 Protocol shall be applied to all vessels irrespective of their flag.

The claims mentioned in article 2 of the LLMC are subject to a limitation of liability except for claims under article 2(1)(d) and (e) as Turkey reserves the right to exclude the application of the above-mentioned claims. Turkey also reserves the right to exclude the claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, or of any amendment or protocol related thereto.

All persons under article 1 of the LLMC including the persons who are defined under the first paragraph of article 15 of the LLMC can limit their liabilities.

Law stated - 2 May 2024

Procedure

11 | What is the procedure for establishing limitation?

Setting up a limitation fund occurs through a court action before the competent court as mentioned in article 1348 of the Turkish Commercial Code (TCC). The fund shall be calculated based on the tonnage of the vessel and established for the maximum liability. This amount (converted to Turkish lira from special drawing rights (SDR)) shall be deposited in an interest-bearing account. The deposit can be in the form of a bank letter of guarantee; however, in that case, the bank should undertake to also pay the interests accrued until the distribution of the fund is completed.

According to article 1335 of the TCC, limitation of liability is also a defence that can be brought by any person without establishing the fund. A shipowner or other entitled person may apply to request the constitution of a limitation fund via the competent court as mentioned in article 1348 of the TCC before the legal proceedings have been initiated and before it has needed to respond to a claim that has already been commenced.

Law stated - 2 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

In line with the provisions of article 4 of the LLMC, liability shall not be limited if the loss or damage is the result of the intention to cause such loss or damage, or of reckless actions performed in the knowledge that such loss would probably result. There has been no case in which limitation was broken. Pursuant to article 1334 of the TCC, the fund will be allocated between the creditors considering their priority without prejudice to their further rights if limitation is broken.

Law stated - 2 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

The TCC has adopted the important stipulations of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 2002, which is also ratified by Turkey and applicable since September 2019. Therefore, the limitation regime under this Convention is applicable.

Law stated - 2 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The port state control that includes marine transport is making progress with international standards determined in the international conventions to which Turkey is a party, and national regulations administered by the Ministry of Transport and Infrastructure within the scope of the Mediterranean Memorandum of Understanding agreed in 1997 and the Black Sea Memorandum of Understanding agreed in 2006.

Port state control is operated through Boards of Ship Surveys in the Harbour Master offices under the authority of the Ministry of Transport and Infrastructure.

Law stated - 2 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The port state inspector must detect the 'detention circumstance' criteria stated in section 3 of the Regulation on Port State Control, under the relevant clauses of the Mediterranean Memorandum of Understanding (MoU) and Black Sea MoU (to which Turkey is a party) and the port state control procedure clauses that are included in the International Maritime Organization's general assembly resolution A.1052(27).

When the port state inspector decides whether there is a need to detain a vessel that has deficiencies, he or she evaluates whether the vessel has good and valuable documents and whether it is equipped with a suitable crew according to the minimum safe manning certificate.

During the inspection, the port state inspector evaluates whether the vessel and its crew for the specific voyage can do the following:

- navigate safely;
- exercise due care in the matter of safely loading, discharging and controlling safely;

- work the equipment and machines in the engine room;
- carry out suitable handling and steering;
- effectively fight any fire on board, if necessary;
- abandon ship quickly and safely and, if necessary, perform rescue and salvage operations; prevent pollution;
- maintain sufficient balance;
- maintain water tightness;
- communicate throughout the entire voyage in an emergency situation, if necessary; and
- maintain health and safety, living and working conditions on board throughout the whole voyage; and collect the maximum information if an accident occurs.

If the detected deficiencies cannot be improved in a short time at the port of detention, the port state inspector may let the vessel sail to the nearest convenient port (nominated by the inspector) where the vessel can remove the deficiencies within as short a time as possible, and in all cases, within 30 days.

Punitive sanctions can be imposed, as set out under article 20 of Law No. 4922 on the Safety of Life at Sea.

Law stated - 2 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

It is possible to object to the administrative body of the port authority within one month of the date of detention of the vessel or sanction by a vessel's owner, manager or agent to a detention order, an order prohibiting entry into the harbour imposed by the port state inspector. However, the objection does not have a suspensive effect.

Monetary fines and administrative decisions may be challenged before the administrative courts.

Law stated - 2 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The list of classification societies approved in Turkey is as follows:

- American Bureau of Shipping;

- Bureau Veritas SA
- DNV AS;
- Korean Register of Shipping
- Lloyd's Register of Shipping;
- Nippon Kaiji Kyokai;
- RINA Services SpA; and
- Turkish Lloyd.

Law stated - 2 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

There are no direct rules regulating the liabilities of classification societies. Therefore, general rules and terms of agreements shall be considered in evaluating whether liability is attributable to a classification society.

In consideration of the contractual relationship between classification societies and owners, classification societies may be held liable in the event of a breach of contractual terms. However, under the principle of trust and of contract with protective effect towards third parties, classification societies may be faced with non-contractual liability because of their tortious acts. Pursuant to recent cases, agreements to which the classifications societies are party are interpreted as attorney (agency) agreements and such type of agreements confer a particular and more diligent obligation on the contractual parties when fulfilling their obligations. In this respect, if classification societies breach such obligation, third parties may be entitled to claim damages under the principle of trust as well as the principle of contract with protective effect towards third parties.

Law stated - 2 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

The state authorities can order wreck removal. Shipowners, masters and agents shall be obliged to remove the wreck and properties within the time frame granted by the harbour master if the position of the wreck prevents safe and secure navigation in the port area. The interested parties shall be notified for the granted period either by notification or an announcement in a newspaper.

In addition, the harbour master is entitled to take any preventive actions needed, including removal of the wreck, if the position of the wreck prevents free navigation in ports, straits or

other waterways or in the case of a risk of environmental pollution and the harbour master may sell the wreck emergency basis. In this regard, the authorities and harbour masters can take the necessary action to remove wrecks without the need to comply with the rules and procedures.

Law stated - 2 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

- the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, 1910;
- the Convention on the International Regulations for Preventing Collisions at Sea, 1972;
- the amendments made to the International Regulations for Preventing Collisions at Sea;
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (London);
- the Protocol concerning Cooperation in Preventing Pollution from Ships and, in cases of Emergency, Combating Pollution of the Mediterranean Sea;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990;
- the 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean; International Convention on Salvage, 1989;
- the International Convention for the Prevention of Pollution from Ships, approved by Turkey in 1990, and its 1997 Protocol;
- the Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000;
- the International Convention on Maritime Search and Rescue, and its amendments;
- MARPOL, Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form;
- the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001; and
- the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004.

Law stated - 2 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement. The Directorate General of Coastal Safety, which is a state-owned organisation, has monopoly rights in the Turkish Straits, Marmara Sea and in some adjacent areas for salvage operations where they offer a salvage agreement called the Turkish Salvage Agreement (Turks) 2015.

Apart from the aforementioned areas, salvage operations may be undertaken by any Turkish person or entity. Except for monopoly areas granted to The Directorate General of Coastal Safety, private salvage companies may offer or accept Lloyd's standard form of salvage agreement or other salvage agreements.

Law stated - 2 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Turkey has ratified the International Convention on Arrest of Ships 1999 and it came into effect on 3 May 2019. Nevertheless, the Turkish Commercial Code (TCC), which came into effect on 1 July 2012, already incorporated most of the rules of the International Convention on the Arrest of Ships 1999.

Law stated - 2 May 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

A vessel, irrespective of its flag or the law governing the claim, may be arrested for maritime claims under article 1352 of the TCC same as they are defined under article 1 of the International Convention on the Arrest of Ships, 1999.

An arrest can be made under the circumstances described in article 3 of the same Convention. The arrest of associated ships under the same management is not allowed.

The arrest of a ship for a maritime claim can only be possible if:

- the person who owned the ship at the time when the maritime claim arose is liable for the claim and is the owner of the ship when the arrest is effected;

- the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is the demise charterer or owner of the ship when the arrest is effected;
- the claim is based upon a mortgage, a hypothec or a charge of the same nature on the ship;
- the claim relates to the ownership or possession of the ship; or
- the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien that is granted or arises under the law of the state where the arrest is applied for.

Arrest is also permissible of any other ship or ships that, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:

- the owner of the ship in respect of which the maritime claim arose; or
- the demise charterer, time charterer or voyage charterer of that ship.

Law stated - 2 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Yes. Article 1320 of the TCC regulates the types of claims providing a right to the maritime lien with the creditor. The following claims arising against the owner, demise charterer, manager or operator of the vessel grant a claim right on the vessel to their creditors:

- claims for wages and other sums due to seamen in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
- claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
- the salvage cost;
- duties to be paid for port, canal, other waterway and pilotage;
- claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel; and
- the general average contribution credit claims.

Law stated - 2 May 2024

Wrongful arrest

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25 | What is the test for wrongful arrest?

If the claim for which the arrest was granted is found not to exist or is in any other way unjustified, the arrested party is entitled to claim damages. Thus, the test for wrongful arrest is the ultimate failure of the claim.

Law stated - 2 May 2024

Bunker suppliers**26** | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Yes. The answer will depend on the current ownership or charter situation of the vessel at the time of the arrest and at the time the maritime claim arises, if this provides the creditor with a maritime claim.

Law stated - 2 May 2024

Security**27** | Will the arresting party have to provide security and in what form and amount?

Yes, the arresting party must provide a fixed quantum security corresponding to 10,000 special drawing rights (SDR). However, claims for seamen wages are exempted from providing the security. The security shall be either in cash or in a definite letter of guarantee unlimited in time issued by a Turkish bank.

The arrested party may always ask the court to increase the amount of security.

Law stated - 2 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The shipowner or debtor may demand that the court lift the arrest in return for sufficient security corresponding to the maritime claim amount plus interest and expenses, provided that this amount does not exceed the value of the vessel. The security shall be either in cash or in a definite letter of guarantee unlimited in time issued by a Turkish bank, and the suitability of the wording shall be at the sole discretion of the court. In addition, the parties may always freely agree upon the form and amount of security. The security amount to be lodged by the debtor or the owner may not exceed the value of the ship.

Law stated - 2 May 2024

Formalities

- 29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

Under Turkish law, the lawyer should be empowered by the power of attorney that is to be notarised by the notary public. The notarisation can be done either abroad or in Turkey if the representative of the corporation or the master is in Turkey. If the notarisation is effected abroad then the document should be apostilled if the issuing country is a party to the Apostille Convention; if not, the document should be legalised by the Turkish Embassy or Consulate. Having said this, Turkey is a signatory to the Apostille Convention. If the power of attorney is issued, notarised and apostilled abroad, it should be translated into Turkish by a sworn public translator and notarised again by the Turkish notary. If it is not possible to issue the power of attorney, then an extension can be requested from the court for submitting the same. The copy of the power of attorney can be submitted to the court electronically but the lawyer must keep the original in its office. Accordingly, it is crucial to have all the documentation and the power of attorney a few days before applying to the court for the arrest to have sufficient time for translation of the supporting documents for the arrest and for the power of attorney.

Law stated - 2 May 2024

Ship maintenance

- 30 | Who is responsible for the maintenance of the vessel while under arrest?

The enforcement office that executes arrest orders shall take all necessary measures for the operation, management, maintenance and protection of the vessel. Accordingly, the enforcement offices may order the arresting party to deposit additional counter security for costs the vessel may incur during the period of arrest.

Law stated - 2 May 2024

Proceedings on the merits

- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

It is possible to make an arrest simply to obtain security and then pursue proceedings on the merits before the relevant jurisdiction, therefore an arrest in Turkey does not seize jurisdiction for principal legal action that must be commenced in one month from the arrest to maintain the arrest.

Law stated - 2 May 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

No, as article 1353 of the TCC clearly stipulates that a vessel may only be arrested in respect of a maritime claim.

Law stated - 2 May 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

The parties to a dispute are under the obligation to provide all documents that they rely on. If the court opines that the presentation of a document is inevitable for evidentiary purposes of the arguments pertaining to the claim, the court may grant the concerned party a fixed period in which to procure the document. If the requested party fails to provide such a document without any justified reason, the court may give precedence to the counter-evidence provided by the opposing party.

A third party may be invited by the court to present a document that a party to the dispute asserts that the third party possesses. The third party shall, accordingly, be obliged to procure such document or to submit justified reasons in the event of failure to fulfil the order. If the court is not satisfied with the explanation, the third party may be invited to give testimony.

However, an ex parte application may be made to the court for the collection of evidence. While evaluating such a request, the court shall consider whether the applying party has a legal interest in the collection of evidence and whether there is a risk that the evidence may vanish if it is not collected.

Law stated - 2 May 2024

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

The law does not describe a direct remedy for bunker arrest. However, under the principle and interpretation of precautionary injunction orders, arresting bunkers is possible.

Law stated - 2 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Any creditor who has an enforceable legal title against the owner of the vessel, irrespective of whether it is the arresting party, may apply for the judicial sale of an arrested vessel.

Law stated - 2 May 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The procedure for initiating and conducting the judicial sale of a vessel consists of the following steps:

- service of the payment order to be issued by the enforcement office to the debtor;
- the proceedings becoming conclusive, either by a failure of the debtor to oppose the proceedings within the time frame defined by law, or by obtaining a favourable judgment in the event of the objection of the debtor being challenged before the court;
- the physical seizure of the vessel;
- valuation of the vessel to be conducted by the enforcement courts and service of the same on interested parties; the request of the auction sale of the vessel;
- publication of the auction sale and information concerning the flag state of the vessel being auctioned and service of the same on interested parties;
- sale of the vessel;
- issuance of a list of creditors if the sale amount does not suffice to cover all claims of the creditors who duly informed the enforcement office of their participation in the auction sale;
- actions brought by the creditors who, according to the list of creditors, do not appear to benefit from the sale amount and, therefore, allege that the ranks of priority are not valid or that the claims that affect the rank of priority are falsified or exaggerated;
- finalisation of the foregoing claims including appellate; and
- distribution of the sale amount to the creditors.

The period needed for the finalisation of the application for sale depends on various factors, such as whether the list of creditors is challenged by the creditors before the courts, whether service of the payment order needs to be made abroad through diplomatic channels and whether the debtor challenges the enforcement proceeding before the courts. The process normally takes between six months and three years.

The following costs are associated with the judicial sale of a vessel:

- fees for the initiation of the enforcement proceeding, which amount to roughly 5 per cent of the claimed amount, whereas a fixed quantum is applicable with regard to execution proceedings by way of foreclosure of a mortgage;
- costs and fees related to the translation and certification of the supporting documents;
- fees for the physical seizure of the vessel;
- fees and expert costs for the valuation of the vessel;
- fees for the publication of the auction sale;
- the service of summons;
- VAT, which amounts to 18 per cent of the sale price;
- brokerage, which amounts to 0.1 per cent of the sale price;
- stamp tax, which amounts to 0.569 per cent of the sale price;
- prison fund, which amounts to 2 per cent of the sale price; and
- a collection fee, which amounts to 11.38 per cent of the sale price.

Law stated - 2 May 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The order of priority of claims against the proceeds of sale is as follows:

- cost of the forced sale, custody and maintenance of the vessel, and the wages and other receivables of the master and crew, for the period from the arrest of the vessel until signing off;
- cost of removal or salvage, or both, of a wrecked, stranded or sunken vessel by public authorities to ensure safe navigation or to protect the environment;
- claims granting maritime lien rights;
- shipyard claims if the vessel is subject to a forced sale while in the possession of that shipyard;
- customs taxes and duties, and other taxes levied on the vessel;
- ship mortgages or other statutory liens;
- maritime claims that do not take priority over the specific claims above; and
- other ordinary claims against the owner.

Law stated - 2 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The successful buyer shall obtain a clean title on the vessel, free of all liens and encumbrances. The auction publication shall include the notice that the vessel will be sold free from any in rem or in personam rights or encumbrances unless the buyer consents to undertake such encumbrances.

Law stated - 2 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Yes, the judicial sale of a Turkish-flagged vessel in a foreign jurisdiction shall be recognised. Accordingly, all encumbrances pertaining to the vessel shall be deleted from the ship registry provided that, at least 30 days before the auction takes place, the authority conducting the judicial sale of the vessel informs the Turkish ship registry, the owners and the concerned parties who appear to hold a right on the vessel according to the ship registry records about the auction, and also provided that the auction is published in a national newspaper with a circulation above 50,000.

Law stated - 2 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Turkey is a signatory to the International Convention on Maritime Liens and Mortgages 1993 and ratification procedures of the Convention are ongoing. However, the TCC incorporates most of the rules of the International Convention on Maritime Liens and Mortgages 1993.

Law stated - 2 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Turkey has been party to the Hague Rules since they were approved in 1955 and entered into force on 4 January 1956. Turkey has not approved the Hague–Visby Rules, the Hamburg or the Rotterdam Rules, but the Turkish Commercial Code incorporates a set of rules that purport to adapt the Hamburg Rules and Hague–Visby Rules. In this respect, the period when carriage at sea begins and ends is stipulated under article 1178 of the Turkish Commercial Code, which appears to be a translation of article 4, subparagraph 2 of the Hamburg Rules.

Law stated - 2 May 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

The conventions and domestic laws in force in respect of road, rail and air transport are as follows.

Road

- The Convention on the Contract for the International Carriage of Goods by Road 1956 (Geneva), amended by the 1978 Protocol, duly entered into force 1993;
- the Road Transportation Code No. 4925, duly entered into force in 2003; and
- Regulation No. 27225 on Road Transportation, duly entered into force in 2009.

Rail

- The Contract of International Carriage of Goods by Rail duly entered into force in 1930; and
- the Convention concerning International Carriage by Rail and its Protocol.

Air

- The Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air (1929);
- the Hague Protocol to Amend the Warsaw Convention(1955); and
- the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal), duly entered into force in 2010.

Law stated - 2 May 2024

Title to sue

43 | Who has title to sue on a bill of lading?

In principle, the shipper, consignee, carrier and third-party endorsee have title to sue on a bill of lading.

Law stated - 2 May 2024

Charter parties

- 44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Charter-party terms can be incorporated into a bill of lading provided that the bill of lading includes such an incorporation clause with clear reference (such as the date of the charter party).

Charter party terms, including jurisdiction or arbitration clauses that are validly incorporated into a bill of lading, are binding on a third-party lawful holder of the bill, provided that a copy of the charter party is presented.

Law stated - 2 May 2024

Demise and identity of carrier clauses

- 45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

The 'demise' clause or identity of carrier clause may be recognised to the extent that TCC compulsorily provides that the contractual the actual carriers are severally liable.

Law stated - 2 May 2024

Shipowner liability and defences

- 46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several. If an action is brought against the shipowners, the same defences and limits of liability may be relied on as those conferred on the contracting carrier. Shipowners may, therefore, rely on the terms of the bill of lading.

Law stated - 2 May 2024

Deviation from route

- 47 | What is the effect of deviation from a vessel's route on contractual defences?

If the deviation is inevitable as a consequence of justified reasons, the parties' rights and obligations shall not be affected and the shipowners shall not be held liable for the losses that might be incurred as a result.

Law stated - 2 May 2024

Liens

48 | What liens can be exercised?

The following lien rights can be exercised:

- the lien right on movables and valuable papers of the charterer for ensuring the recovery of freight and other receivables prescribed in the charter agreement;
- the lien right on movables and valuable papers of the charterer for ensuring the recovery of hire and other receivables prescribed in the time charter agreement;
- the lien right on cargo for ensuring the recovery of all receivables the carrier is entitled to for the voyage under the charter agreement;
- the lien right on passengers' luggage for ensuring the recovery of all receivables the carrier is entitled to under the passenger contract; and
- the lien right on the vessel, cargo and freight to ensure the recovery of general average distribution shares.

Law stated - 2 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

If the bill of lading is issued to the order, the master must deliver the cargo upon presentation of all copies of the bill of lading. Otherwise, responsibility towards the rightful owner shall remain. If the bill of lading is not issued to the order and the shipper and the consignee give the relevant consent, the cargo may be redelivered or delivered without the production of any copies of the bill of lading. However, the carrier may ask for certain guarantees to be provided. As this is mandatory, any clause restricting or removing such obligations shall be interpreted as null and void. Liability shall not, therefore, be limited by way of a letter of indemnity.

Law stated - 2 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper must provide a precise and accurate description of the cargo; otherwise, they shall remain responsible to the carrier for damages incurred as a result of false declaration. The shipper shall also be held responsible for loading dangerous or contraband cargo or cargo that is forbidden from being imported or exported. The responsibility cannot be avoided even if it is proved that illegitimate acts were carried out with the consent of the master.

The shipper must present to the carrier all documents needed for the carriage of the cargo. The shipper shall remain responsible to the carrier and parties with interest in the cargo for any losses sustained because the documents were falsified.

The shipper shall be liable to owners for damages if it is caused by its personal negligence.

Law stated - 2 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Although the declaration of the Marmara Region as an ECA is on the agenda, there is no ECA in any Turkish domestic territorial waters.

Law stated - 2 May 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The cap on sulphur content is set at 0.5 per cent as per MARPOL Annex VI. Additionally pursuant to the regulation published by the Ministry of Environment, the cap on grade 1 marine diesel oil is 0.1 per cent by mass, and the same cap is applicable for fuel intended to be loaded on marine vehicles sailing in inland waters and on vessels at dock. Any contradictory act may risk the arrest of the vessel and the imposition of an administrative fine. However, it is currently not established how, or, by which state authority, the fines for non-compliance with Annex VI will be imposed.

Law stated - 2 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

The Regulation of Ship Recycling and the Regulation on Importation Wrecks and Recycling Ships are the domestic regulations, and the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships are the international regulations that apply in the Turkish jurisdiction.

There are many ship recycling facilities located in Alia a, Izmir.

Law stated - 2 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

There are designated courts for maritime disputes. In Istanbul, the 17th Commercial Court and in Izmir, the fifth Commercial Court shall hear disputes in the capacity of commercial courts specialising in maritime disputes. In other jurisdictions, the first Commercial Court of the place oversees the maritime disputes unless the Supreme Council of Judges and Public Prosecutors nominate one or more commercial courts to deal solely with maritime disputes. If no commercial court is situated in the concerned jurisdiction area, general civil courts of first instance shall hear disputes in the capacity of commercial courts.

Law stated - 2 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

International treaties, bilateral agreements, international legal assistance rules and the Code of Notification No. 7201 describe the rules governing service of court proceedings. Turkey has entered into various bilateral agreements with regard to the service of judicial documents and is also a party to the Convention on Civil Procedure 1954 and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965.

Law stated - 2 May 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

No. There are arbitral institutions but there is not a specialist maritime arbitration institution.

Law stated - 2 May 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The rules governing recognition and enforcement of foreign judgments and awards are stipulated in articles 50 to 63 of the International Private and Procedure Law. In this respect, while considering whether the foreign judgment is enforceable in Turkey, the judge shall consider the following conditions:

- whether there is an agreement, provision of law or de facto reciprocity between Turkey and the country where the award is rendered enabling the judgment to be enforced;
- whether the judgment is rendered by a court that was not entitled to conduct the judgment based on the grounds of lack of connection with respect to the matter in dispute or parties to the dispute, provided that an objection is raised by the defendant;
- whether the judgment is explicitly contrary to public policy; and
- whether the party against whom enforcement action has been started in Turkey has objected to the enforcement request on the grounds of at least one of the following issues:
 - the party was duly summoned to the court or duly presented before the court that rendered the foreign judgment, in accordance with the procedural rules of the foreign country law; or
 - the judgment was rendered in the absence of the party, contrary to the concerned procedural rules.

Law stated - 2 May 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

For an arbitration clause or agreement to be valid under Turkish law, it shall be in writing by means of letter, telegraph, telex, fax or other means of communication and it shall demonstrate the clear intention of the parties to settle their disputes via arbitration for a dispute arising at present or in the future from an existing legal relationship. The arbitration agreement may be signed for settling part of the dispute. The law has not been established for asymmetric arbitration clauses where the Court of Appeal thinks that the validity of each asymmetric arbitration clause shall be interpreted in accordance with the particularities of each case.

Law stated - 2 May 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

There are no domestic remedies for this situation if proceedings are initiated elsewhere in breach of a jurisdiction clause that refers to Turkish courts. However, if proceedings are initiated in Turkey in breach of a jurisdiction clause that refers to another jurisdiction, then the defendant may object to jurisdiction within the time frame designated under the Code of Civil Procedure, requesting that the claim be dismissed on the grounds of a lack of jurisdiction. If the jurisdiction of Turkish courts is defined as a requirement of public policy and not only in contractual terms, the judge may, *ex officio*, dismiss the claim on the grounds of a lack of jurisdiction, where such an objection may be argued until the judgment is rendered.

Law stated - 2 May 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

Pursuant to the Code of International Private and Civil Procedure and the Code of International Arbitration, if any objection has been made by the defendant to stop domestic proceedings that breach a clause providing an arbitral tribunal to have jurisdiction, the domestic court makes a *prima facie* evaluation on the enforceability of the arbitration agreement. If the arbitration agreement is deemed valid by the domestic court, the court would render a decision on lack of competence. Similarly, if the defendant's objection is in accordance with the jurisdiction of a foreign court, the domestic court renders a decision of lack of competence.

Law stated - 2 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

These are as follows:

- two years for claims arising out of salvage or wreck removal;
- one year for claims granting creditors maritime lien rights;
- 10 years for compensation for loss of life or passenger injury;
- two years for claims arising out of passenger contracts and damage or loss of luggage;

- one year for claims arising out of charter parties, contracts of carriage or bills of lading; and
- one year (statutory time bar) for claims arising out of damage, loss or late delivery of cargo.

The action of recourse against the party liable may be started after the lapse of this period. However, the right to start an action of recourse shall be statute-barred within 90 days if the party entitled to start a claim of recourse does not exercise this right, starting from the date the entitled party paid the indemnity or from the date of the claim petition with regard to the indemnity claim as served on the entitled party. The period for claims arising out of damage, loss or late delivery of cargo shall be extended by mutual agreement, to be made after the occurrence of the grounds for action:

- one year for general average contribution; and
- two years for claims arising from a collision.

Turkey also suspended all limitations between 13 March 2020 and 15 June 2020. Any suspended time is added to a limitation period.

If the incident concerns criminal liability the time limit can be longer.

Law stated - 2 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Neither courts nor arbitral tribunals may extend the time limit. However, if the liable party acts maliciously to prevent the entitled party from bringing an action within the time limits, the liable party cannot rely on such an objection and the time limit shall be deemed to be started from the date the entitled party acknowledges the incident.

Law stated - 2 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Turkey is a party to the Maritime Labour Convention but has not fully completed the necessary ratification procedures and, therefore, in principle, the rules of the convention do not apply directly to disputes heard by Turkish courts. However, in practice as the contracts of employment incorporate Maritime Labour Convention 2006, the courts do apply the terms to the disputes. However, legislative procedures have been commenced for the ratification of the convention and remain ongoing.

Law stated - 2 May 2024

Relief from contractual obligations

- 64** | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Pursuant to article 138 of the Code of Obligations, and under the interpretation of the theory of unpredictability, a party to a shipping contract may ask the court to modify the contract to meet new conditions or to renege on the contract if adaptation is not possible, provided that the following conditions are met:

- the occurrence of an extraordinary event that was unpredictable or could not have reasonably been predicted by the parties when the contract was signed;
- the occurrence of the event shall not result from the acts of the debtor;
- the unpredicted circumstances shall have made the performance of the obligations of the debtor excessively onerous, to the extent that their performance contradicts the principle of good faith; and
- the debtor shall not have fulfilled its obligations or shall have fulfilled its obligations notwithstanding the rights arisen therefrom.

Law stated - 2 May 2024

Other noteworthy points

- 65** | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Under the provisions stipulated with regard to arrest in Turkey, the vessel must be in a Turkish port or at anchor without a transit regime or its transit passage should be broken for another reason for the arrest to be sought. An arrest order is not granted by courts when a vessel is on her way to port or anchorage.

Law stated - 2 May 2024

UPDATE AND TRENDS

Key developments of the past year

- 66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The most noteworthy development to affect shipping business in Turkey continues to be the war in Ukraine. Turkish marine industries are having problems placing war risks insurance

in the areas affected by the war. From 1 December 2022, the Turkish Ministry of Transport and Infrastructure has been requesting additional cover letters from the protection and indemnity insurers (P&I Clubs) for tankers passing through Turkish straits, confirming that the P&I policy is valid. Disagreements on the wording of such letters initially led to massive delays in the straits, where extensive queues were observed in the anchorage areas. However, subsequently a sensible solution was found and agreed wording was issued. In addition, Turkey has published a new Regulation on Ship Registries that modernises the establishment and the use of registries. Pollution fines continue to be an issue for all in the business and insurers have started to charge extra premiums for or excluded the Turkish pollution fine covers.

Law stated - 2 May 2024

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Pursuant to article 10 of Federal Maritime Law No. 43 of 2023 (the Maritime Law), ownership of the vessel remains with the shipbuilder and may not be transferred to the shipowner until trials are concluded and delivery is accepted by the shipowner unless otherwise agreed. Where there is an agreement to transfer title to the shipowner while the vessel is under construction, the shipbuilder retains the right to retain possession of the vessel until the entire purchase price is paid.

A shipbuilding contract that is not in writing is void. Any variation to the shipbuilding contract must also be in writing.

Law stated - 17 June 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

The guarantee by the shipbuilder is in respect of latent defects and is applicable notwithstanding disclaimers or delivery of the vessel. A refund guarantee ordinarily forms part of the shipbuilding contract. The Maritime Law does not refer to a refund guarantee or set out formalities, other than the fact that claims for latent defects must be made within one year from the discovery of the defect or two years from the delivery of the vessel, whichever occurs later.

Law stated - 17 June 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Injunctive relief is generally not available in the onshore courts of the United Arab Emirates. Article 102 of Federal Law No. 50 of 2022 (the Commercial Code) provides that where (in the context of a commercial sale) the seller fails to deliver the specific item sold, the purchaser, after having granted the seller adequate time for performance, may petition the court for an order for specific performance. In practice, the onshore courts rarely grant orders for specific performance, and damages are the most common remedy.

Law stated - 17 June 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

By law, the shipbuilder will be liable for a latent defect provided that a claim for latent defects has been made within one year of the discovery of the defect or within two years of the delivery of the vessel, whichever occurs later. Claims for defects and damages may also lie in the contract.

Law stated - 17 June 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Pursuant to article 13 of the Maritime Law, the following conditions must be met for registration:

- the vessel shall be ordinarily designated for navigation in the UAE (the state) waters, coastal navigation between the state's ports, or navigation on the high seas;
- the majority of the shares in the vessel shall be owned by physical persons or juristic persons holding the nationality of the state or the nationality of one of the Gulf Cooperation Council countries. Alternatively, ownership may belong to physical persons or juristic persons with a domicile, head office, or ship management office in the state;
- the vessel shall not exceed 20 years in age from the date its construction is completed as per the shipbuilding contract. Passenger vessels may not exceed 10 years;
- the vessel's drawings and specifications shall be approved by the UAE Ministry of Energy and Infrastructure (the Ministry) or its authorised representative following an inspection of the vessel; and
- the vessel shall possess valid international certificates, attesting to its suitability for maritime navigation, issued by one of the classification bodies licensed by the Ministry or whose certificates receive approval from the Ministry.

Shipbuilding contracts are registered in a 'Register of ships under construction' to be maintained separately by the Ministry. It is the shipbuilder's responsibility to register shipbuilding contracts in this register.

Law stated - 17 June 2024

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6 | Who may apply to register a ship in your jurisdiction?

Ordinarily, a vessel may be registered in the United Arab Emirates only by the owner or the owner's representatives. The Maritime Law has liberalised the ownership regime to include juristic persons with a domicile, head office or ship management office in the state – see article 13(b) of the Maritime Law.

Law stated - 17 June 2024

Documentary requirements

7 | What are the documentary requirements for registration?

The application for registration is expected to be set out in the Implementing Regulations, which are yet to be promulgated.

Law stated - 17 June 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration is not permitted in the UAE. However, the Ministry retains the right to grant a licence to the owner of a ship registered with the Ministry to fly the flag of another country if the owner intends to lease it unequipped to a charterer who seeks its registration abroad. An application is required to be made to the Ministry together with the bareboat charter and a letter issued by a foreign registry, confirming the approval of the charterer's country for the registration of the ship and the authorisation to fly its flag.

Law stated - 17 June 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

These details are expected to be set out in the Implementing Regulations.

Law stated - 17 June 2024

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Articles 80 to 86 of the Maritime Law provide for a limitation regime that allows an owner, charterer or operator to limit liability based on the tonnage of the vessel.

The United Arab Emirates is also a signatory to the Convention on Limitation of Liability for Maritime Claims 1976, which was ratified in 1997 without reservations. Pursuant to the Convention, shipowners and salvors may limit their liability. In 2020, the United Arab Emirates ratified the 1996 Protocol, which amended the limits of liability.

Law stated - 17 June 2024

Procedure

11 | What is the procedure for establishing limitation?

Although the United Arab Emirates has ratified the Convention on Limitation of Liability for Maritime Claims 1976, there has been no instance in which a limitation fund has been constituted. However, the new Maritime Law contains provisions similar to the 1976 Convention, including the categories of limitable claims, excepted claims, conduct barring limitation, and the constitution of the fund. It is important to note that there are some key differences (for example, claims arising from wrecks and abandoned vessels are accepted claims under the Maritime Law). The Maritime Law is widely to facilitate a limitation fund being constituted.

Article 85 of the Maritime Law sets out the procedure for establishing a fund, which commences with a request to the court to be submitted in accordance with the requirements specified in the Implementing Regulations. Importantly, the request requires the provision of a guarantee and will result in the UAE courts being vested with exclusive jurisdiction.

Law stated - 17 June 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

Operators (defined to mean owners, charterers, corporate managers, or any person using the vessel for navigation and commercial purposes) may not limit liability for personal error, or a deliberate act of omission or a serious error. Masters and seafarers may limit liability of personal error, but may not limit liability where the damages arise as a result of a deliberate act or omission, whether done recklessly or with the intent of causing harm, where the individual was aware that damage could potentially occur.

Law stated - 17 June 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

The United Arab Emirates is not a party to the Athens Convention. Articles 206 to 220 of the Maritime Law cover contracts of carriage of passengers.

Article 216 of the Maritime Law provides that a carrier's liability for a passenger's death or physical or psychological injury is limited to 250,000 Special Drawing Rights unless the damage arises from certain circumstances (such as international and civil laws, natural disasters etc), in which case the maximum compensation is 400,000 Special Drawing Rights.

A carrier's liability for the loss or damage of registered personal effects is limited to 3,375 Special Drawing Rights and limited to 2,250 Special Drawing Rights for the loss of unregistered personal effects.

This may be in addition to 'blood money' payments defined by Sharia law (usually 200,000 UAE dirhams per adult). The passenger may agree to limit the carrier's liability, but such limitation will not be applicable if it is established that the damage resulted from acts or omissions of the carrier (or its servants/agents) which were reckless or done to cause harm.

Law stated - 17 June 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The Maritime Inspection Department can carry out inspections of both national and foreign vessels in any UAE port.

Law stated - 17 June 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The Maritime Inspection Department may:

- refuse to grant a navigation licence or a certificate of safety;
- prohibit a ship from sailing; and
- impose imprisonment or fines.

Law stated - 17 June 2024

Appeal

16 | What is the appeal process against detention orders or fines?

An appeal may be filed to the minister in charge of the Federal Transport Authority within 10 days from the date of communication of the Maritime Inspection Department's decision. The minister must provide a decision within 10 days, failing which the appeal is deemed to be allowed.

Law stated - 17 June 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The approved classification societies are:

- the American Bureau of Shipping;
- Bureau Veritas;
- the China Classification Society;
- DNV;
- Germanischer Lloyd;
- Lloyd's Register of Shipping;
- the Russian Maritime Register of Shipping;
- the Korean Register of Shipping;
- Emirates Classification Society (TASNEEF);
- Hellenic Register of Shipping LLC;
- Indian Register of Shipping;
- Oilfield Inspection Services Middle East LLC;
- Nippon Kaiji Kyokai; and
- RINA.

Law stated - 17 June 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

There have been no instances of a classification society being held liable.

Law stated - 17 June 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION**Wreck removal orders****19** | Can the state or local authority order wreck removal?

The relevant maritime authority may order that a wreck be seized as security for the cost associated with removing it. The authority may conduct an administrative sale of the vessel by public auction and recover its debt out of the proceeds, in preference to the other creditors.

Law stated - 17 June 2024

International conventions**20** | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?**Collision**

The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 has not been ratified by the United Arab Emirates. The United Arab Emirates has ratified the Convention on the International Regulations for Preventing Collisions at Sea 1972.

Salvage

The United Arab Emirates ratified the International Convention on Salvage 1989 in 1993.

Pollution

The United Arab Emirates is a signatory to:

- the International Convention for the Prevention of Pollution from Ships 1973 (as amended by the 1978 protocol);
- the International Convention on Civil Liability for Oil Pollution Damage 1992; and
- the Fund Convention 1992.

Wreck removal

The United Arab Emirates has not ratified the Nairobi International Convention on the Removal of Wrecks 2007.

Law stated - 17 June 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement.

Law stated - 17 June 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Collision

The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 has not been ratified by the United Arab Emirates. However, the Maritime Law provisions relating to collisions are largely based on the Convention. Articles 1 to 6 and article 8 of the Convention are mirrored in articles 318 to 326 of the Maritime Law. The collision provisions of the Maritime Law apply to all collisions between seagoing vessels. The United Arab Emirates has ratified the Convention on the International Regulations for Preventing Collisions at Sea 1972.

Salvage

The United Arab Emirates ratified the International Convention on Salvage 1989 in 1993.

Pollution

The United Arab Emirates is a signatory to:

- the International Convention for the Prevention of Pollution from Ships 1973 (as amended by the 1978 protocol);
- the International Convention on Civil Liability for Oil Pollution Damage 1992;
- the protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships (MARPOL)73/78;
- the Annex (VI) of the Convention on the Regulations of Prevention of Air Pollution from Ships;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001; and
- the Fund Convention 1992.

Wreck removal

The United Arab Emirates has not ratified the Nairobi International Convention on the Removal of Wrecks 2007.

Law stated - 17 June 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

A vessel can be arrested as security for a maritime claim. A 'maritime debt' is defined in the Maritime Law as being a claim arising out of:

- loss or damage resulting from the operation of a vessel;
- loss of life or personal injury occasioned by the vessel and arising out of the use thereof;
- salvage operations or agreements including where the vessel or its cargo causes imminent damage to the environment;
- damage caused by the vessel to the environment or the coastal strip or the interests in connection thereto, and any costs or expenses arising from avoiding, mitigating or eliminating such damages;
- costs arising from salvaging a sunken, wrecked, stranded or abandoned vessel and the costs arising from its transportation, recovery, preventing its harmful effect or the destruction thereof;
- any contract relating to the use of a vessel under a charter party or other document;
- any contract relating to the carriage of goods or passengers onboard the vessel under a charter party, bill of lading, travel ticket or other document;

- loss or damage to goods or luggage transported by a vessel;
- general average;
- towing;
- piloting;
- supply of goods, materials, fuel, tools or containers and services necessary for the operation of the vessel, its management, preservation or maintenance;
- building, rebuilding, repairing, converting or equipping the vessel;
- port, canal, harbour and other waterway charges;
- wages and any other amounts due to the master and crew members on account of their work onboard the vessel, including their repatriation expenses and payable social insurance contributions;
- amounts paid on behalf of the owner of the vessel or its operator;
- insurance premiums of the vessel and its Takaful insurance contributions that are payable by the owner of the vessel, its charterer or their representative;
- any commissions, brokerage, or agency expenses payable by the owner of the vessel, charterer, or their representative;
- any dispute over ownership of the vessel or possession thereof;
- any dispute between joint owners of the vessel relating to its use and distribution of the profits thereof;
- maritime mortgage or any other real estate insurance over the vessel; and
- any dispute arising from a contract for the sale of a vessel.

Article 53 of the Maritime Law specifically provides that an order for provisional arrest of a vessel may only be made to settle a maritime debt.

Under the provisions of article 54 of the Maritime Law, a claimant may arrest not only the vessel to which the claim relates but also any other vessel owned by the defendant at the time of applying for a provisional arrest. The UAE courts are not generally inclined to lift the veil of corporate personality, therefore, sister ships owned by the subsidiaries of the defendant cannot be arrested.

However, there is no right to arrest other vessels owned by a defendant in the following circumstances (see articles 54 and 55):

- in a dispute regarding ownership or possession of a vessel;
- any dispute between joint owners of the vessel relating to its use and distribution of the profits thereof in a dispute between joint owners of the vessel, or relating to the use or the right to profits arising out of the use thereof;
- in a claim arising from a maritime mortgage or any other real estate insurance over the vessel;
- in a dispute arising from a contract for sale of a vessel; or
- where the vessel was chartered by the demise.

When a claim against a vessel is not created by the owner but solely by a demise-charterer (bareboat), the claimant may arrest either the chartered vessel or any other vessel owned by the demise-charterer. However, the claimant may not arrest any other vessel owned by the owner of the chartered vessel.

Law stated - 17 June 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

The concept of the maritime lien (as understood in a common law jurisdiction) is not recognised in the United Arab Emirates. However, the Maritime Law identifies certain debts that follow the vessel in the hands of different owners. These debts are classified as priority debts and include:

- judicial costs incurred in the protection and sale of the vessel (including port charges);
- debts arising out of a contract for the employment of the master, crew and any other person employed by a contract of maritime employment on board the vessel;
- monies due for assistance and salvage;
- compensation due for collisions; and
- debts arising out of a contract made by the master and the ship agent on behalf of the owner.

Law stated - 17 June 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

An arrest will generally be regarded as wrongful if it is subsequently held by the court that the plaintiff obtained the arrest order maliciously, in bad faith and with the intention to cause damage to the defendant. The burden of proof in relation to these matters rests on the defendant who claims damages for wrongful arrest. The court may also use its discretion to compensate the defendant in the event that it determines that the arrest was wrongful.

Law stated - 17 June 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

The supply of bunkers may be considered a maritime debt since it relates to supplies necessary for the use or maintenance of a vessel. There has been at least one case in which a UAE court upheld the right of a bunker supplier to arrest a vessel for a claim for the supply of bunkers to the vessel, even though the supplier's contract was with the charterer.

Law stated - 17 June 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

Under the Maritime Law, there is a requirement for a financial guarantee to be provided by the arresting party. The arrest order cannot be obtained unless the court accepts the financial guarantee in order to ensure the safety and security of the vessel and its crew during the arrest period. Any amounts used from the guarantee will be considered as 'judicial expenses' upon distribution of the proceeds of execution on the vessel. A protection and indemnity letter of undertaking may be accepted.

Law stated - 17 June 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The amount of security is determined at the court's discretion. The court will usually order that the arrest be vacated if security or other surety is offered and is sufficient to meet the claim. However, a vessel will not be automatically released from arrest if the arrest has been affected in connection with a dispute as to the ownership of the vessel, the co-ownership, possession or use of the vessel, or the right to the profits arising out of its use.

In such cases, the court may permit the person in possession of the vessel to use it if they provide sufficient security and use their discretion to charge a person with the management of the vessel during the period of the arrest.

An application for the release of a vessel under the foregoing provisions will not be construed as an admission or acknowledgement of the claim.

Law stated - 17 June 2024

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

An arrest application can only be filed before onshore UAE Courts. Therefore, lawyers who are licensed to practise in the UAE courts must be retained to institute proceedings in court

and a notarised power of attorney is required in all UAE jurisdictions. If the power of attorney is executed outside the United Arab Emirates, it must be legalised and consularised at the UAE consulate in the country of execution. The power of attorney must then be legalised through the UAE Ministry of Justice.

Arabic is the official language of the United Arab Emirates and its courts. All proceedings are conducted in Arabic and all documents filed must be translated into Arabic by a translator licensed by the Ministry of Justice. Consequently, all underlying documents supporting the arrest must be translated into Arabic. Actions cannot be filed without a power of attorney and the translated supporting documents, which may be filed electronically.

Law stated - 17 June 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

The claimant must provide an undertaking that it will maintain the vessel while under arrest. This undertaking includes the payment of port fees.

Law stated - 17 June 2024

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

It is possible to arrest a vessel in the UAE and pursue the merits elsewhere, depending on the circumstances.

Under article 250 of the Civil Procedure Code (CPC), if a substantive suit is not filed within eight days of a provisional order being granted, the provisional order is cancelled. Until relatively recently, the practice of the UAE courts was to follow the provisions of the CPC with respect to the arrest of vessels, notwithstanding that a specific procedure is set out under the Maritime Law. Consequently, as a matter of practice and out of an abundance of caution, applications for arrest are now commonly made with reference to both the provisions of the CPC and the Maritime Law.

Nonetheless, the Maritime Law provides that a substantive suit must be filed within five days by the successful applicants. In circumstances where the underlying contract contains an arbitration clause, evidence that arbitration proceedings in relation to the substantive dispute have been commenced within eight days by the successful applicants is often produced notwithstanding that it is not strictly required following the enactment of the Federal Arbitration Law No. 6 of 2018.

Law stated - 17 June 2024

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Attachment orders may be issued at the court's discretion pursuant to Article 247 of the CPC. Article 247 of the CPC provides that a court may issue an attachment order in the following circumstances:

- the debtor has no permanent residence in the United Arab Emirates;
- the creditor fears that the debtor will escape or conceal its assets; or
- the creditor holds a formal or informal unconditional deed of debt.

Additionally, the Federal Arbitration Law (which applies to UAE-seated arbitrations, except for the DIFC and ADGM Financial Free Zones) provides that the Chief Justice of the Court of Appeal may, upon application of a party or an arbitral tribunal, order such interim or conservatory measures as he may consider necessary in respect of existing or potential arbitration proceedings before or after the commencement of an arbitration. The Federal Arbitration Law also empowers an arbitral tribunal to grant the following interim or conservatory measures:

- an order to preserve the evidence that may be relevant to the dispute;
- take necessary measures to preserve goods that constitute part of the subject matter of the dispute;
- preserving assets and funds out of which a subsequent award may be satisfied;
- maintaining the status quo; or
- an order to take action that would prevent or refrain from taking action that is likely to cause harm.

Law stated - 17 June 2024

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

While article 35 of the Evidence Law provides for the disclosure of documents and evidence, in practice, we have yet to see a UAE court issue orders on the disclosure of documents or evidence.

Law stated - 17 June 2024

Bunker arrest and attachment

34 |

Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

The Maritime Law defines the term 'vessel' to mean any seagoing watercraft operating or intended to be operated for maritime navigational purposes, even if it does not aim to make a profit. All accessories of the ship shall be deemed part of the ship.

A 'watercraft' is defined as any seagoing or marine craft operating or intended to be operated in the territorial waters and water streams in the Emirate, whether for personal, commercial, sports or tourism purposes, and of whatever type or form.

A vessel that is not self-propelled may not be considered a 'vessel'. Therefore, petroleum installations may not be viewed as vessels and may not be arrested.

However, an attachment over bunkers may be sought under the Civil Procedure Code.

Law stated - 17 June 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

The claimant may apply for an order for a judicial sale of an arrested vessel. An order for the sale of a vessel is made when a final judgment has been rendered against the vessel and an order for the arrest of that vessel has been confirmed. The order stipulates the price at which the vessel will be sold, as well as the date on which the sale will take place.

Law stated - 17 June 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

The court will appoint an expert to value the vessel. This value will constitute the reserve price in an auction for the sale of the vessel.

If the court orders a vessel to be sold, it will provide:

- the price of the vessel;
- the conditions of sale; and
- the date on which the public auction will take place.

The sale is advertised in one of the widely circulated local newspapers – usually an Arabic daily. The notice of sale is also served on the Registrar of Ships and at any other place specified by the court.

The notice of sale must specify:

- the name and domicile of the person arresting the vessel;
- the legal instrument in accordance with which the implementation of the arrest order will be carried out;
- the amount of the claim for which the arrest was made;
- an address for service of the arresting party within the area of the court in which the vessel lies;
- the name and domicile of the owner of the vessel;
- the name and domicile of the defendant against which the arrest order was affected;
- a description of the vessel and its port of registration;
- the name of the master;
- the place in which the vessel is located;
- the basic price and the conditions of sale; and
- the day, place and time at which the sale will take place.

Law stated - 17 June 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

Articles 29 and 40 of the Maritime Law broadly stipulate the priorities according to which sale proceeds must be distributed. The order is as follows:

- the statutory dues, court expenses and expenses relating to the sale of the vessel;
- crew wages;
- general average claims;
- marine casualties and physical injuries sustained by the passengers and crew, other than compensation due for loss or damage sustained by the goods and luggage;
- debts arising from the contracts concluded by the ship agent on behalf of the owner or concluded by the captain outside the ship's port of registration within the limits of its legal authorities;
- debts arising from loading, unloading, pilotage and towing operations;
- mortgages;
- malfunction and damage that require compensation for the ship's charterers; and
- insurance premiums.

The court usually determines the priority rights of claimants. In cases involving complicated accounts, Dubai courts often appoint an expert to determine the order of priority in which the sale proceeds are to be distributed. The expert may be a person who is not qualified in law.

Law stated - 17 June 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

All priority rights are extinguished on the sale of a vessel consequent to a judicial sale.

Law stated - 17 June 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

The judicial sale of a vessel and subsequent change of ownership in a foreign jurisdiction will be recognized in the United Arab Emirates.

Law stated - 17 June 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Law stated - 17 June 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hague Rules, Hague-Visby Rules, Hamburg Rules and the Rotterdam Rules have not been ratified by the United Arab Emirates.

Although the United Arab Emirates is not a signatory to the Hague-Visby Rules, the relevant provisions of the Maritime Law are largely based on these rules.

Under the Maritime Law, carriage of goods at sea begins when the carrier of goods (or its representative) takes delivery of the goods and ends at the time that the goods are delivered.

Law stated - 17 June 2024

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Articles 188 to 198 of the Maritime Law make provisions with respect to multi-modal transport contracts, as do articles 280 to 320 of the Commercial Code. They set out, among others, the rights, obligations and responsibilities of the carrier.

Law stated - 17 June 2024

Title to sue

43 | Who has title to sue on a bill of lading?

The following have the right to sue on a bill of lading:

- the party named in the bill of lading;
- the party that takes lawful delivery of the goods; and
- a party that has had the bill of lading endorsed or assigned.

Law stated - 17 June 2024

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The charter party may be expressly incorporated into the bill of lading.

A jurisdiction clause or arbitration clause in a charter party will ordinarily be considered to be binding on a third-party holder or endorsee of the bill. A third-party holder or endorsee will be considered to have agreed to the terms incorporated.

The Arbitration Law provides that an arbitration agreement should be in writing and may be contained in a document signed by parties or in exchange of correspondence or referenced in any document containing an arbitration clause. The practice of the court has been to require a clear identification of the arbitration clause when a reference is made.

Law stated - 17 June 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

There is no express provision in the law recognising or prohibiting the demise clause. UAE law recognises freedom of contract. Therefore, if the parties have agreed to the demise clause, it would usually be recognised and binding on the parties.

Law stated - 17 June 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Shipowners are not liable under UAE law for cargo damage if they are not the contractual carrier unless such damage is due to a fault in the vessel. However, it is not unknown for vessels to be arrested even in situations where the shipowner is not the contractual owner.

Law stated - 17 June 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Where there is an unjustifiable deviation, the shipowner will be liable to the charterer for the losses, unless the navigational management of the vessel is transferred to the charterer.

Law stated - 17 June 2024

Liens

48 | What liens can be exercised?

Articles 19 to 40 of the Maritime Law recognise the concept of 'privileged debts', which follow the vessel in the hands of different owners. Eight categories of privileged debts are

recognised in the Maritime Law, including expenses incurred for the preservation and sale of the ship, loading charges, port fees and claims arising out of employment on a vessel.

Law stated - 17 June 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Article 166 of the Maritime Law requires the carrier to deliver the cargo to the person entitled to receive the cargo, or her representative, on the production of the bill of lading. The delivery of cargo without the production of the bill of lading may result in the carrier being liable for the value of the cargo.

Law stated - 17 June 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

The shipper is required to:

- make timely delivery of the goods to the carrier at the agreed time and location specified in the Bill of Lading or as required by prevailing custom at the shipping port in the absence of a specific agreement;
- prepare the goods in a manner suitable for sea carriage, ensuring they do not pose a threat to persons or property providing accurate information on the goods to be shipped and placed in the bill of lading;
- assume liability for any damage incurred by the vessel, the goods being transported or third parties, arising from his or her actions, the actions of his or her representative, or defects in the goods providing the carrier with the characteristics, quantity and weight of the goods; and
- pay the agreed freight.

Law stated - 17 June 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

No.

Law stated - 17 June 2024

Sulphur cap

- 52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The UAE ratified the MARPOL protocol (Annex VI) on 20 February 2019 (effect on 20 May 2019) and, therefore, the provisions of the MARPOL protocol (Annex VI) will apply to the sulphur content of fuel oil.

Law stated - 17 June 2024

SHIP RECYCLING

Regulation and facilities

- 53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

There are no domestic or international ship recycling regulations that apply in the United Arab Emirates. However, there are a number of ship recycling companies in the territory.

Law stated - 17 June 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

- 54 | Which courts exercise jurisdiction over maritime disputes?

There are no specialised maritime courts in the United Arab Emirates. Therefore, the civil courts exercise jurisdiction over maritime matters. Action is first initiated before the court of first instance and appeals are permitted to the court of appeal and thereafter to the court of cassation on a matter of law and subject to financial thresholds being met.

Law stated - 17 June 2024

Service of proceedings

- 55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Service on parties domiciled abroad may, on occasion, be effected through email or facsimile and if service cannot be so effected, process will be served through diplomatic channels. Service is deemed to be effected on the date of sending the email or facsimile

message and on the date on which a voice or video call was made. Only process served by facsimile is deemed to have been served on the date of receipt.

Law stated - 17 June 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

Until 20 September 2021, Dubai had a domestic arbitration institute (the Emirates Maritime Arbitration Centre (EMAC)) that specialised in maritime arbitrations. However, by Dubai Decree No. 34 of 2021, with effect from 20 September 2021, EMAC was abolished and all its assets and liabilities were transferred to the Dubai International Arbitration Centre.

Law stated - 17 June 2024

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The United Arab Emirates is a party to the New York Convention and has ratified the convention without reservation. Therefore, a foreign arbitral award rendered in a member country will be recognised and enforced in the United Arab Emirates, subject to the terms of the Convention.

Foreign judgments will be enforced in the United Arab Emirates on the basis of reciprocity. Therefore, a party attempting to enforce a foreign judgment must provide evidence that a UAE judgment has been enforced in that jurisdiction. Reciprocity is usually evidenced by the existence of a bilateral treaty for the enforcement and recognition of judgments.

Law stated - 17 June 2024

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

In theory, asymmetric jurisdiction and arbitration agreements are valid and enforceable in the United Arab Emirates and are frequently incorporated in agreements, particularly by banks. The Arbitration Law is silent on the application of asymmetric jurisdiction and arbitration agreements. However, there are no reported cases of the UAE courts having recognised the validity or enforceability of such clauses.

Law stated - 17 June 2024

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

If the parties have agreed to arbitration, a UAE court will refuse to hear the case provided that the defendant has objected to the court hearing the dispute before it submitted its defence on the merits of the case.

If the parties have agreed to a foreign court having jurisdiction to hear the dispute, unless the parties agree otherwise, a UAE court will disregard such an agreement and proceed to hear the case if it is satisfied that it has jurisdiction under the law. Under UAE law, a court is permitted to assume jurisdiction in the following circumstances:

- the defendant is registered or domiciled in the United Arab Emirates;
- the claim relates to an asset which is located in the United Arab Emirates;
- the claim relates to a contract that was executed or performed (even partially) in the United Arab Emirates; or
- the claim relates to payments that were made from or to the United Arab Emirates.

Law stated - 17 June 2024

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

If the contract contains an arbitration agreement and court proceedings are initiated, the court will refuse to hear the dispute if the defendant objects to the court hearing the dispute before it submitted its defence on the merits.

In the event of a foreign jurisdiction clause, there are no remedies available in the United Arab Emirates. A defendant may attempt to obtain an anti-suit injunction from a foreign court that has jurisdiction. However, the enforcement of such an injunction may not be possible in the United Arab Emirates, on the grounds that it will be contrary to public policy.

Law stated - 17 June 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The following limitation periods apply to maritime claims:

- three years for claims in tort;
- one year for charter party and cargo claims and 90 days for third-party recourse actions;

- two years for salvage and collision claims;
- two years for marine insurance claims;
- two years for passenger claims relating to death or personal injury;
- one year for claims for the carriage of luggage;
- two years for compensation claims arising out of collisions; and
- one year for rights of recourse of a defendant ship against another ship for settled claims for death or personal injury.

Law stated - 17 June 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

No. Time limits set by law cannot be extended by agreement, the courts or the tribunals.

Law stated - 17 June 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention is not ratified in the United Arab Emirates. However, the convention is unofficially recognised in the Emirates and many of its provisions are adopted and integrated into the UAE legislative and regulatory systems – for example, in recognition of the ship owners' liability towards seafarers, the Federal Transport Authority issued Circular No. (6) of 2018 pertaining to compulsory insurance requirements of the ship owners' liabilities towards the seafarers and is widely based on MLC 2006 Regulation 2.5, Standard A2.5.2 and guidelines B2.5.

Law stated - 17 June 2024

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Article 249 of the Civil Code provides that in the event of an 'exceptional event of a public nature', the courts may excuse the performance of an obligation or reduce the onerous obligations to a reasonable level. Therefore, in theory, if the economic conditions can be

considered an exceptional event of a public nature, a party may use article 249 to seek relief from the strict enforcement of a shipping contract.

That being said, the Dubai courts have held that the 2011 global financial crisis and the 2020 covid-19 pandemic did not constitute an 'exceptional event of a public nature' and refused to apply article 249 of the Civil Code.

Law stated - 17 June 2024

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Law stated - 17 June 2024

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Implementing Regulations are expected to have a significant impact on the understanding and operation of the Maritime Law.

Law stated - 17 June 2024

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NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Title in the vessel typically passes when the shipbuilder delivers the ship and the shipowner accepts delivery, depending on the terms of the contract and the law of the state where the vessel is being constructed. Construction contracts are state law contracts. The parties can negotiate when title transfers to the buyer, and contracts may reflect title in a partially constructed vessel passing to the buyer based on construction milestones. In some jurisdictions, title insurance may also be obtained based on construction milestones.

Law stated - 15 May 2024

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

Shipbuilding contracts are not maritime contracts and are governed by state law. Refund guarantees are, similarly, state law contracts and typically issued by the builder's bank, the parent or some other guarantor. Formalities will vary according to state law and are a matter of contract and state law.

We note that banks in the United States are generally prohibited from guaranteeing performance by other parties. As such, shipbuilding contracts in the United States will sometimes include alternatives to bank refund guarantees, such as parent company performance guarantees.

Law stated - 15 May 2024

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

As shipbuilding contracts are not maritime contracts and are subject to state law (including the Uniform Commercial Code (UCC)), remedies would depend on the contract's choice of law provision or the law of the state where the contract is performed. A buyer may have a right to seek the equitable relief of specific performance of the contract if the vessel is unique or has been identified to the contract under the UCC.

A shipbuilding contract may also provide a contractual right for a buyer to take delivery of an unfinished vessel following a shipyard default and complete construction at an alternate shipyard.

Law stated - 15 May 2024

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Claims for defects in vessel construction are typically state law claims brought under the UCC or the construction contract's warranty provisions, or both. Product liability claims arise when injury is caused to a third party by a defective product placed into the stream of commerce, and are largely irrelevant to warranty claims.

Law stated - 15 May 2024

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

As defined in section 3 of Title 1 of the US Code, the word 'vessel' includes 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water'. Recent interpretations of that expression by the United States Supreme Court have injected an element of uncertainty into what legal practitioners once thought was a well-settled area of law, but the prevailing view is that, for these purposes, the definition includes offshore drilling rigs and mobile offshore drilling units.

Any vessel of at least five net tons not documented under the laws of a foreign country is eligible for registration with the National Vessel Documentation Center (NVDC), provided it is owned by a citizen of the United States. Federal documentation of a vessel allows the vessel to fly the US flag and makes it eligible to become subject to a 'preferred mortgage', which is generally considered to entitle the mortgagee to superior treatment compared with state-titled vessels.

One can apply for documentation while a vessel is under construction to pre-obtain the official number, but a permanent, full-term certificate of documentation cannot be issued until completion.

Law stated - 15 May 2024

- 6 | Who may apply to register a ship in your jurisdiction?

A US-flagged vessel must be owned by a US citizen to be documented with the NVDC. However, there are different levels of citizenship with respect to certain entities and for certain trades (eg, a corporation seeking to register a vessel must be formed under the

laws of the United States or a state thereof, its chief executive officer must be a US citizen, no more of its directors may be non-citizens than a minority of the number needed to constitute a quorum of the board, but the shareholders need not be US citizens). If the vessel is intended to be used in the US coastwise trade (or the American fisheries trade), the corporation must be at least 75 per cent owned by US citizens. The complete rules and procedures for determining when an entity (as opposed to an individual) is a US citizen are voluminous and the foregoing is a mere example. A full analysis is beyond the scope of this summary and each case must be looked at thoroughly and independently.

Law stated - 15 May 2024

Documentary requirements

7 | What are the documentary requirements for registration?

Evidence of US citizenship, title, build, tonnage and dimensions, and a designated managing owner, vessel name and hailing port must be filed with the NVDC, together with the required fees.

Law stated - 15 May 2024

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Dual registration is not permitted. Flagging out is possible but may require governmental approval. Most US-based owners register their vessels with various open registries rather than under the US flag.

Law stated - 15 May 2024

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The register of ship mortgages is maintained by the NVDC. Abstracts of title obtained from the NVDC will show the builder, previous owners, mortgages, notices of lien claims and judicial sales.

Law stated - 15 May 2024

LIMITATION OF LIABILITY

Regime

|

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The Limitation of Liability Act was passed in 1851 to encourage investment in shipping. Under this Act, vessel owners (including demise charterers) may limit liability to the value of the vessel and pending freight in certain circumstances where the loss occurred without the privity or knowledge of the owner.

The act provides for limitation to apply in a wide variety of claims, but there are limits to limitation in cases of personal injury and death, pollution liabilities, wage claims and others. Limitation may apply to claims brought by the US government. Limitation is generally not favoured by the courts. The United States is not a party to the Convention on Limitation of Liability for Maritime Claims 1976.

In December 2022, the US passed legislation that prevented 'covered small passenger vessels' from benefiting from the Limitation Act. The new legislation also extends the minimum limitations period for giving notice of or filing claims for personal injury or death for covered small passenger vessels from six months to two years.

Law stated - 15 May 2024

Procedure

11 | What is the procedure for establishing limitation?

A limitation proceeding is commenced under Rule F of the Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the Supplemental Rules) and creates not only a limitation proceeding, but also a concursus of claims where all claims are marshalled into one proceeding. The limitation proceeding must be commenced within six months of the owner being given adequate written notice of a claim, whether or not a claimant has initiated a legal proceeding. The limitation proceeding may be commenced prior to the owner being given notice of a claim. The loss must have occurred without the privity or knowledge of the owner to successfully limit liability. To commence the proceeding, the owner must deposit with the court a sum equal to the value of the owner's interest in the vessel and its pending freight (or security therefor), together with such sums as the court may deem necessary to carry out the provisions of the act.

Law stated - 15 May 2024

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

Limitation is generally not favoured by the courts and can be broken if the loss is deemed to have occurred with the privity or knowledge of the owner. With today's communications, where owners and their vessels are in near-constant contact and managerial oversight it is

not difficult for a court to find that privity or knowledge existed at the time of the loss. With respect to certain seagoing vessels, privity based on the knowledge of its superintendent or managing agent at or before the beginning of the voyage is imputed to the owner in cases of personal injury and death (46 USC section 30506(e)). With respect to such vessels, US\$420 per gross ton is set aside for such claims, even in the event the vessel is a total loss.

Notwithstanding denial of limitation, the court may in certain circumstances proceed to judgment on the claimants' claims. While there is a dearth of authority on the point, if limitation is denied, an established limitation fund would likely be returned to the owner unless otherwise attached.

Law stated - 15 May 2024

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Under the Limitation Act, claims against a ship or its owner for cargo loss, personal injury and death that are subject to limitation:

[Are] those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel [...] any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

Moreover, under the Limitation Act, a shipowner may not limit liability for negligence to passengers.

The US has not acceded to or ratified the Athens Convention on the Carriage of Passengers and their Luggage by Sea.

Law stated - 15 May 2024

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

The US Coast Guard is responsible for port state control and vigorously implements port state control initiatives on vessels trading in US ports.

Law stated - 15 May 2024

Sanctions

15 | What sanctions may the port state control inspector impose?

The Coast Guard is authorised to conduct examinations and enforce compliance with laws and regulations within its jurisdiction and to detain vessels or deny entry to US territorial waters for vessels operating outside of acceptable standards. Vessels may be required to post a bond or letter of undertaking covering the amount of the penalty to gain entry to a US port or obtain clearance to depart, or as security for possible fines.

The Coast Guard may issue civil penalties for deficiencies, and it also may conduct criminal investigations separately or in coordination with other federal agencies such as the Department of Justice and the Environmental Protection Agency. These bodies may issue fines and other sanctions, including in some circumstances criminal prosecution, for violations of security and environmental regulations. Sanctions are frequently issued in the environmental area and are common in 'magic pipe' and other cases that the government pursues.

Law stated - 15 May 2024

Appeal

16 | What is the appeal process against detention orders or fines?

Port state control actions may be challenged in writing or at a hearing, and an appeal can be lodged with the appropriate US district court. This is a common occurrence.

Law stated - 15 May 2024

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

Full members of the International Association of Classification Societies or other classification societies approved by the Coast Guard may survey or certify the construction, repair or alteration of a vessel in the United States. The authorisations issued by the Coast Guard for each of the following classification societies can be found on the [US Coast Guard's website](#):

- American Bureau of Shipping (ABS);
- ClassNK (NKK);
- Det Norske Veritas (DNV);
- Germanischer Lloyd (GL);



- Lloyd's Register (LR);
- DNV GL;
- Bureau Veritas (BV); and
- RINA.

In addition, the Coast Guard has entered into agreements with certain classification societies that are approved under its Alternate Compliance Program to delegate certain inspection functions to the classification society. Information about the [Alternate Compliance Program](#) is available on the Coast Guard's website.

Law stated - 15 May 2024

Liability

18 | In what circumstances can a classification society be held liable, if at all?

A classification society is not liable to a shipowner for negligently performing its classification services. Third parties, such as vessel purchasers, may sue a classification society for negligent misrepresentation, but such claims rarely succeed.

Law stated - 15 May 2024

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

The owner, lessee or operator of a wrecked vessel located in navigable waters has strict duties under federal law to mark and then promptly remove the wreck. Civil and criminal liability can result from failure to do so. Failure to do so in a timely manner may also result in the abandonment of the wreck, in which case the US government would assume responsibility for marking and removal and may then seek reimbursement from the owner, lessee or operator under the federal Wreck Removal Act.

Law stated - 15 May 2024

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The United States has not adopted the 1910 Collision Convention or the Nairobi International Convention on the Removal of Wrecks 2007, although the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS), International

Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Salvage, and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL) have been adopted in whole or in part by the US. The US is a signatory but not a contracting party to the International Convention on Civil Liability for Oil Pollution Damage. Ballast water management in the US is subject to federal and state regulation and the US is not a signatory or contracting party to the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004. Coordination between US regulation and implementation of the Ballast Water Convention, which entered into force in September 2017, is thus an unsettled area. Vessels are required to comply with federal regulations concerning the discharge of ballast water into the waters of the United States.

Law stated - 15 May 2024

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory form of salvage agreement. The standard Lloyd's Open Form is often used and local salvors may have their own forms containing local or foreign arbitration clauses. US courts will not enforce arbitration provisions in salvage agreements providing for foreign arbitration (such as the Lloyd's standard form) for purely domestic salvage. The Society of Maritime Arbitrators Inc has promulgated a salvage form (US Open Form Salvage Agreement or MARSALV) that provides for arbitration in the US and is frequently used with respect to salvage of recreational vessels in the US. Salvage operations may be carried out by any person or company and salvage awards may be issued depending on the order of salvage. Salvors have possessory liens on salvaged vessels.

Law stated - 15 May 2024

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

The US is not a signatory to international conventions with respect to ship arrest. In the United States, actions involving ship arrests are governed under substantive federal law and the Federal Rules of Civil Procedure.

Law stated - 15 May 2024

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested?

| for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Maritime lien creditors and those with statutory rights may enforce their rights in rem against a vessel. Such arrested vessels are governed by Rule C of the Supplemental Rules, which provides that a vessel may be arrested to enforce any maritime lien or where a statute provides for in rem proceedings. There is no associated or sister ship arrest regime in the US. However, property of the defendant may be attached under Rule B of the Supplemental Rules and, where the defendant owns a vessel and if the requirements of Rule B are met, that vessel may be seized. Under the US statutory regime governing maritime liens, officers or agents appointed by a bareboat or time charterer are presumed to have authority to procure necessities for a vessel, such that a maritime lien for necessities may arise against the vessel and render it subject to arrest to enforce the lien.

Law stated - 15 May 2024

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Federal law recognises maritime liens. Maritime liens may arise from damage arising out of maritime tort, stevedore's wages and seamen's compensation claims, general average, salvage and the supply of necessities.

Law stated - 15 May 2024

Wrongful arrest

25 | What is the test for wrongful arrest?

An arrest can be held to be wrongful if made in bad faith, with malice or with gross negligence.

Law stated - 15 May 2024

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

A bunker supplier's claim is the classic maritime lien for necessities. A supplier of necessities must provide them on the order of the owner or a person authorised by the owner and the supplier must rely on the credit of the vessel (reliance is presumed) and will be entitled to a maritime lien unless it has actual notice of a 'no lien' clause in the charter.

Vessels are routinely arrested to enforce bunker suppliers' maritime liens and many ship mortgage foreclosures are commenced by such suppliers rather than mortgagee banks. There has been considerable litigation in the US, in particular arising out of the collapse of the OW Bunkers complex of entities, concerning competing maritime lien claims between contract suppliers of bunkers and physical suppliers.

Law stated - 15 May 2024

Security

27 | Will the arresting party have to provide security and in what form and amount?

Initially, security is not required for a vessel arrest. The US Marshals Service, however, will require a deposit of sufficient funds to cover anticipated custodial costs before arresting a vessel, which vary based on the characteristics of the vessel and other circumstances. In addition, under Rule E of the Supplemental Rules, the court may require security in the form of a sufficient amount to pay all costs and expenses that may be awarded against a party. If the vessel owner asserts a counterclaim, the court will require that counter-security be provided under Rule E(7). Rule E mandates that security be in the form of a bond or other suitable security.

Law stated - 15 May 2024

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

Security may be posted to release the vessel from arrest. It is common for the parties to agree upon the amount and the form, which is frequently a protection and indemnity club letter of undertaking, sometimes posted by agreement in advance to avoid arrest altogether. Rule E governs the process. In distressed situations, as numerous claimants intervene, the posting of security can become problematic and unlikely. The security shall provide for the payment of the principal sum plus interest at 6 per cent per year. The court may reduce or increase the amount of security as required.

When a ship is arrested or attached, the only way to release that ship with respect to the specific charge that gave rise to the arrest is through a special bond. The amount of security posted in a specific bond may not exceed the value of the ship. The special bond requires the shipowner (or anyone else who may have an interest in the ship) to post a security that is either agreed upon by the parties or, if no agreement could be reached, established by the court. Rule E provides that the principal sum of the bond or stipulation will be set at an amount high enough to cover the amount of the plaintiff's claim together with accrued interest and costs, but not to exceed the lower of twice the amount of the plaintiff's claim or the value of the arrested property on 'due appraisal'. Therefore, the security should not exceed the value of the ship.

A general bond is used to prevent a future arrest or attachment of a ship. For the bond to prevent a future arrest or attachment, the bond must be twice the aggregate value of the plaintiff's claim.

Law stated - 15 May 2024

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

No power of attorney or other such formal documents need be provided to the court in the event of a ship arrest in the United States. Court papers to be filed in a ship arrest action include a verified complaint against the ship in rem (and usually against its owner in personam as well), a summons to be issued by the court, a warrant of maritime arrest and a memorandum of law setting forth the reasons why the warrant should be issued by the court. The only formality is that the complaint must be verified (ie, sworn to). It is the best practice to have the client, which is often a company located overseas, review and verify the complaint before a notary public. However, with the exigencies of ship arrest, frequently there is no time to accomplish this before the arrest. Accordingly, local counsel will often verify the complaint, stating that the verification is made by an attorney because the plaintiff is a corporation located overseas. Scanned and copied documents will suffice to support the complaint; originals are not required, at least in the first instance. In many federal courts in the United States at this time, court papers can be filed electronically. However, not all districts permit the electronic filing of the initial papers commencing an action (eg, the complaint). Although not recommended, arrest papers are frequently drafted and filed within the space of a single day. More advance notice, obviously, makes the arrest attorneys' jobs easier. The US is a signatory to the Apostille Convention.

Law stated - 15 May 2024

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

An arrest of a vessel is performed by the US Marshals Service, but the marshal rarely tends to the vessel much beyond the initial arrest. An order approving a substitute custodian is usually obtained at the same time as the arrest. The substitute custodian (or the marshal, if no substitute is appointed) will care for the vessel while in custody and its expenses will be given the highest priority in the rank and priority of lien claims.

Law stated - 15 May 2024

Proceedings on the merits

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- 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Attachment of property in aid of a foreign proceeding may be obtained under Rule B.

Law stated - 15 May 2024

Injunctions and other forms of attachment

- 32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Maritime attachment is available under Rule B where a plaintiff has a maritime claim (not necessarily a lien claim) and such a plaintiff can bring an action to attach property of the defendant, provided the defendant is not found within the federal judicial district where the property is located for jurisdictional and service of process purposes. Rule D can be used by an owner to repossess a vessel. Freezing or *Mareva*-type injunctions are not available in the United States. State courts will also have pre-judgment attachment regimes, including some specifically in support of arbitration or international arbitration.

Law stated - 15 May 2024

Delivery up and preservation orders

- 33 | Are orders for delivery up or preservation of evidence or property available?

These are injunctive remedies that are not generally available in the United States. Parties to litigation will be required to preserve evidence under common law and procedural rules. The seized vessel or assets will be preserved pursuant to order while the litigation is pending.

Law stated - 15 May 2024

Bunker arrest and attachment

- 34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Bunkers and other assets may be attached or arrested under Rules B and C. Under Rule B, bunkers or any other property of the defendant can be attached to secure a maritime claim when a defendant is not present in the federal district where the bunkers are found. The defendant must have title to the bunkers or other property in order for the bunkers to be subject to attachment.

Law stated - 15 May 2024

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

Any party to the action, the Marshal or the custodian may apply for the sale of the vessel. As a practical matter, it is usually the mortgagee bank or the single largest creditor that moves to have the vessel sold.

Law stated - 15 May 2024

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

A party usually makes a motion for interlocutory sale of the vessel near the commencement of the action because the vessel is a wasting asset. Notice of the action and arrest of the vessel, as well as notice of the motion for interlocutory sale, is given pursuant to statutory authority. Although a broker may be involved pursuant to court order, the vessel sale is conducted by the US marshal, usually in the courthouse lobby. The court will later confirm the sale, at which point the vessel is delivered to the buyer free and clear of liens.

Although the length of time required to conduct a motion for interlocutory sale varies from jurisdiction to jurisdiction within the US, on average the time from making the motion through to the sale of the vessel is about two months. The marshal will charge poundage in the amount of 3 per cent of the first US\$1,000 of proceeds and 1.5 per cent of proceeds above that amount, and brokerage commission may also be involved if a broker is utilised. The proceeds of the sale of the vessel are paid into the registry of the court and distributed according to the rank and priority of liens subsequent to the confirmation of the sale of the vessel.

Law stated - 15 May 2024

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

While rank and priority of liens varies from jurisdiction to jurisdiction, the general order of priority is as follows:

- expenses, fees and costs allowed by the court, including those incurred while the vessel is in custody;
- wages of vessel crew;

- maritime liens arising before a preferred mortgage was filed;
- salvage and general average claims;
- maritime tort liens;
- preferred mortgage liens on US-flagged vessels;
- liens for necessities;
- preferred mortgage liens on foreign-flagged vessels;
- general maritime contract liens;
- claims on non-maritime liens; and
- non-lien maritime claims.

Where liens accrue at different times, the general rule is that liens that arrive last in time take precedence. In practice, in distressed situations, any claimant coming after the mortgagee is unlikely to recover.

Law stated - 15 May 2024

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

An admiralty sale of a vessel is an *in rem* proceeding that completely extinguishes all prior liens and encumbrances on the vessel.

Law stated - 15 May 2024

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

US admiralty courts will recognise foreign admiralty sales of vessels provided the court conducting the sale had jurisdiction over the vessel and due process occurred.

Law stated - 15 May 2024

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No, the US is not a signatory to the International Convention on Maritime Liens and Mortgages 1993.

Law stated - 15 May 2024

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

- 41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The United States applies a version of the Hague Rules through the Carriage of Goods by Sea Act (COGSA) as well as the Harter Act. The US also signed the Rotterdam Rules, which are not yet ratified. COGSA has been in place for generations and provides a reasonable and predictable cargo loss and damage liability regime. COGSA applies 'tackle to tackle' but the period it covers is frequently extended by clauses in bills of lading.

Law stated - 15 May 2024

Multimodal carriage

- 42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

The US Supreme Court has held that a through bill of lading is a maritime contract even for those portions (in that case, the rail portion) of the transportation services that take place on land. There are other cargo liability regimes covering rail and truck transportation that, at times, conflict with COGSA and that may affect the carrier's liability for the times the cargo is not aboard a vessel.

Law stated - 15 May 2024

Title to sue

- 43 | Who has title to sue on a bill of lading?

A real party in interest may bring a suit under a bill of lading, and cargo claims are frequently brought by shippers and their subrogated insurers under bills of lading.

Law stated - 15 May 2024

Charter parties

- 44 |

To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The terms of a charter party can be incorporated into a bill of lading, provided it is clearly done on the face of the bill of lading.

Foreign forum selection clauses and foreign arbitration clauses found in incorporated charter parties are enforced if the charter party is properly incorporated in the bill of lading. To enforce an arbitration clause against a third-party holder, a bill of lading should specifically identify the charter party and clearly incorporate the arbitration clause. A party seeking to avoid enforcement of a foreign arbitration or forum selection clause has the burden of proving a likelihood that 'the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees'.

Law stated - 15 May 2024

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

COGSA states that any bill of lading clause will be 'null and void' if it relieves the carrier or the ship from liability for loss of, or damage to or in connection with, the goods. There is conflicting authority in this area; agency principles are sometimes applied to resolve the issue and commentators have stated that clauses in a charter party that identify the carrier or that apportion the losses incurred to third parties should not control the ability of the third party to recover, but there is no reason why they should not be given effect as between the charterer and the owner.

Law stated - 15 May 2024

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

The shipowner may not be liable under COGSA if it is not the contractual carrier. However, the ship itself will be liable in rem for having carried the cargo and ratified the terms of the bill of lading.

Law stated - 15 May 2024

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?



COGSA provides that carriers are not liable for losses resulting from reasonable deviations, and although the decisions are inconsistent, some courts have held that unreasonable deviations deprive the carrier of the right to assert certain COGSA defences, such as the package limitation.

Law stated - 15 May 2024

Liens

48 | What liens can be exercised?

Characteristic maritime liens recognised under US law include:

- wages of a ship's master and crew;
- salvage;
- general average;
- breach of charter party;
- ship mortgages, both US and foreign flag;
- contract liens, such as contracts for repairs, supplies, towage, pilotage and a wide variety of necessaries;
- maritime tort liens for personal injury, death and collision;
- claims for cargo loss or damage;
- claims for unpaid freight and demurrage; and
- pollution claims.

Law stated - 15 May 2024

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

A carrier that delivers the cargo without presenting an original, negotiable bill of lading can be liable to the holder of the original bill of lading. In most circumstances, the owner will demand a letter of indemnity in cases where the original bills are not presented.

Law stated - 15 May 2024

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

Under COGSA, the shipper is responsible for proper marks, number, quantity and weight of the cargo, and must indemnify the carrier 'against all loss, damages and expenses arising or resulting from inaccuracies in such particulars'.

Law stated - 15 May 2024

SHIPPING EMISSIONS

Emission control areas

51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

ECAs exist along [certain areas of the US coast and other waters](#), in general up to 200 nautical miles from the coast.

Law stated - 15 May 2024

Sulphur cap

52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

A global cap of a global 0.5 per cent m/m of sulfur content was instituted by the International Maritime Organization and went into effect on 1 January 2020. Ships operating in ECAs (which include certain US waters) must meet a stricter standard of 0.1 per cent fuel sulphur. There are some limited opportunities for waivers and exemptions, the use of which is strictly scrutinised. Violation of these requirements can result in civil or criminal penalties and fines.

Discharge of wastewater from scrubbers is regulated by individual US states, some of which have discharge prohibitions or ban scrubbers entirely.

Law stated - 15 May 2024

SHIP RECYCLING

Regulation and facilities

53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

There are no regulations specific to ship recycling. Instead, federal and other regulations apply to the various processes in ship recycling, such as removal of asbestos, polychlorinated biphenyls (PCBs), bilge and ballast water, paint, scrap metal and oil. The US Environmental Protection Agency publication *A Guide for Ship Scrappers: Tips for Regulatory Compliance* (2000) is a frequently referenced summary. There are several ship recycling facilities in the United States.

Law stated - 15 May 2024

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

US federal courts possess subject matter jurisdiction over maritime matters. The state and federal courts have concurrent jurisdiction over many matters not specifically in admiralty, and personal injury claims are often brought in state court. However, certain claims are only cognisable in admiralty and must be brought in federal courts (eg, ship mortgage foreclosures, vessel arrests and Rule B attachments).

Law stated - 15 May 2024

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The United States is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Also, federal procedural rules and state court rules will set forth how personal service may be accomplished in a jurisdiction outside of where the matter is proceeding. Frequently, this will involve service in one state pursuant to the rules of the forum state. There are also substituted service rules that permit service, for instance, upon a state's secretary of state in certain circumstances. The rules vary from state to state.

Law stated - 15 May 2024

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The relevant arbitral body is the Society of Maritime Arbitrators (SMA) in New York. Houston and Miami also are looking to become centres of maritime arbitration. Many charters specifying arbitration in New York are ad hoc and do not require that arbitrators be members of any specific arbitral body.

The SMA provides only limited administration of arbitrations, which generally proceed autonomously under rules promulgated by the SMA. The SMA is very active in promoting maritime arbitration in the US, maintaining its roster of arbitrators and publishing panel awards, which are available on the LEXIS and Westlaw services.

Law stated - 15 May 2024



Foreign judgments and arbitral awards

- 57** | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Many states have laws allowing the courts to enforce foreign money judgments through the adoption of the Uniform Foreign-Country Money Judgments Recognition Act. In addition, foreign maritime arbitration awards are frequently enforced under the New York Convention, which is codified as part of the Federal Arbitration Act.

Law stated - 15 May 2024

Asymmetric agreements

- 58** | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Asymmetric arbitration agreements are not per se invalid but may be subject to judicial scrutiny for unconscionability, particularly arbitration agreements in consumer and employment relationships. Generally, in the absence of unconscionability, of which asymmetry is a consideration, such agreements are enforceable.

Law stated - 15 May 2024

Breach of jurisdiction clause

- 59** | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Under the laws of the United States, jurisdictional clauses are enforced unless unreasonable. In appropriate circumstances, a US court may issue an anti-suit injunction, binding on the parties before it, to restrain a foreign proceeding.

Law stated - 15 May 2024

- 60** | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

A defendant may bring a motion to stay or dismiss an action brought in violation of a clause specifying that a foreign court or arbitral tribunal should have jurisdiction or venue of the matter. In particular, the US Federal Arbitration Act provides a well-developed body of law for the enforcement of domestic and foreign agreements to arbitrate.

Law stated - 15 May 2024

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Under general maritime law, there are generally no strict statutes of limitation and the doctrine of laches applies. However, courts will also generally look to analogous state statutes of limitation in the district where the action is brought to see if the claim should be barred by laches. Under a laches analysis, the defendant generally must have suffered some prejudice by the failure of the plaintiff to timely make its claim. In addition, there are maritime statutory rules for bringing claims. The Carriage of Goods by Sea Act contains a one-year limitations period, there is a two-year period for salvage claims, and personal injury claims generally must be brought within three years. In addition, with respect to passenger claims, carriers by sea may impose a contractual limitation period of no less than one year to file suit from the date of injury or death. Recent amendments to the Limitation Act also extended the limitation period to give notice of or file claims for personal injury or death in response to a shipowner's suit seeking exoneration from or limitation of liability from six months to two years for 'covered small passenger vessels'.

Law stated - 15 May 2024

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

In some cases, limitations periods can be extended, for example, by agreement of the parties or by application of the doctrines of equitable tolling or estoppel if the facts and circumstances warrant. With respect to requests to toll a particular statute of limitations, however, courts typically apply such doctrines sparingly.

Law stated - 15 May 2024

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The US has not ratified the Maritime Labour Convention (MLC). However, because US-flagged vessels that are unable to demonstrate compliance with the MLC may be subject to port state control actions when engaged on international voyages to countries that have ratified the MLC, the US Coast Guard has established a voluntary inspection programme for vessel-owners and operators who wish to document compliance with the MLC, with particular focus on US-flagged vessels that operate on international routes to ports of countries that are parties to the MLC.

Law stated - 15 May 2024

Relief from contractual obligations

- 64** | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

In general, maritime contract claims, as with other contract claims, are not construed such that one party, in the absence of an applicable force majeure or an 'impossibility' clause, can claim that it is relieved of its obligations under that contract due to a change of economic circumstances. In fact, the majority of arbitration awards and court cases reflect the commercial reality that arbitrators and courts disfavour contract parties who seek to avoid their obligations due to market conditions. Force majeure provisions, in addition, are strictly construed and frustration claims must go to the root of the contract before a judge or a panel of arbitrators will consider relieving a party of its obligations under the contract.

Law stated - 15 May 2024

Other noteworthy points

- 65** | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Recently there has been an upturn in the number of bankruptcy proceedings brought by shipping companies in the United States and often bankruptcy law and maritime law come into conflict. Maritime lien claimants, whether by virtue of possessory contract liens or ship mortgages, will be secured creditors in maritime bankruptcies and the rank and priority of liens should ultimately reflect maritime law, even in bankruptcy court. However, it is very important to know both areas of law and have advice in both areas before making a claim in a bankruptcy proceeding. In addition, although bankruptcy courts may sell vessels 'free and clear of liens', it is still not fully established whether foreign admiralty courts will recognise US bankruptcy court sales as admiralty sales fully cleansing the vessels of liens.

Law stated - 15 May 2024

UPDATE AND TRENDS

Key developments of the past year

- 66** | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

In 2024, as the USA enters a pivotal Presidential election year, headlines are dominated by geopolitical instability and national security issues. The ongoing war in Ukraine persists,



while the Israel-Hamas conflict and disruptions in the Red Sea have altered trade routes, putting pressure on fuel costs and freight rates.

We continue to see companies seeking advice with respect to international sanctions, especially concerning Russia and other countries such as Iran, China and Venezuela. The United States has aggressively adopted, implemented, and enforced US sanctions, including establishing entirely new sanctions programmes, expanding and reinvigorating existing sanctions programmes, and resolving novel and significant enforcement actions. For the shipping industry, this notably includes the December 2023 tightening of the price cap policy, implemented by a coalition of countries to prohibit a variety of services related to the maritime transport of Russian Federation-origin crude oil and petroleum products, unless those products are purchased and sold in compliance with the relevant price cap and market participants adhere to a recordkeeping and attestation process to obtain the benefit of a safe harbour. Tensions with China are also impacting investment regulations, potentially affecting cross-border investments in the shipping industry.

Within the United States, offshore wind investments are beginning to gain traction, including with the development of large-scale offshore wind farms and tax incentives available under the Inflation Reduction Act of 2022.

More generally, there is a related focus on corporate transparency in 2024. For example, US reporting companies covered by the Corporate Transparency Act (CTA) must comply with new beneficial ownership reporting requirements effective from 1 January 2024. Those falling under the CTA's scope before this date have until 1 January 2025 to file their first annual report with FinCEN.

Law stated - 15 May 2024

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