

GETTING THE
DEAL THROUGH 

Shipping 2019

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MFB Solicitors

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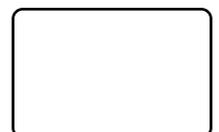


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Preface

Shipping 2019

Eleventh edition

Getting the Deal Through is delighted to publish the eleventh edition of *Shipping*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Marshall Islands and Mexico.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Kevin Cooper, of MFB Solicitors, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
June 2018

Global overview

Kevin Cooper, Vaughan Wise-Dolpire and Freddie Courtney

MFB Solicitors

Global sanctions

The impact of international sanctions on the global maritime industry has remained a hot topic, particularly following the lifting of certain sanctions against Iran in January 2016 and the US Trump administration's recent decision to withdraw from that agreement, the recent thawing of relations between North Korea and the international community and Brexit. Indeed, the blockade of Qatar in 2017 by Bahrain, Saudi Arabia and the UAE, among other countries, in what was said to be a response to Qatar's support of terrorism, is a comparatively recent example of how economic and political measures can have a significant impact on the shipping industry.

In broad terms, the primary global sanctions regimes are as follows.

Iran

On 16 January 2016, Implementation Day, the European Union and the United Nations lifted a number of sanctions against Iran in accordance with the Joint Comprehensive Plan of Action (JCPOA). The JCPOA was signed by the EU3+3 (France, Germany and the United Kingdom and China, the Russian Federation and the United States), following Iran's agreement not to seek, develop or acquire any nuclear weapons. 'Snap back' provisions within the JCPOA allowed for the reintroduction of sanctions if Iran breached the commitments it has made. The 'snap back' provisions would not apply with retroactive effect to contracts executed in accordance with the JCPOA during the period of sanctions relief.

The EU adopted several legal actions that implement the JCPOA through UN Security Council Resolution 2231 (2015). These amended the main EU legislation dealing with nuclear-related activities in relation to Iran, namely Council Decision 2010/413/CFSP and Regulation (EU) No. 267/2012. These amendments lifted restrictions against Iran in the following sectors:

- financial, banking and insurance;
- oil, gas and petrochemicals;
- shipping, shipbuilding and transport; and
- precious metals and currency.

Once the restrictions had been lifted, EU entities began legal trading to Iran, including with Iranian entities. That said, some restrictive EU measures remain in place (but these relate largely to military goods: weapons and items that might be used for internal repression) and some entities and individuals remain listed. This has meant a need for all trades related to Iran to be checked to ensure that they comply with the remaining sanctions.

While this is a positive step for EU entities looking to trade or work with Iran, it is important to be alert to the fact that the US only lifted extraterritorial, or 'secondary sanctions'. Then, on 8 May 2018, President Trump announced the US's withdrawal from the JCPOA as a result of which, after a wind-down period, the US would reimpose sanctions that were lifted when the JCPOA was implemented. At the time of writing, the effect of this is yet to be felt, but it is likely to largely impact non-US businesses, as it is re-imposing 'secondary' sanctions on persons and companies outside the US dealing with Iranian entities. Indeed, as a result of the US administration's decision, larger container lines have announced their intention to wind down their operations in Iran and, in the shipping sector, the US's withdrawal from the JCPOA is likely to have a particular effect on insurance, those involved in the carriage and trade of petroleum products and shipbuilders.

Syria

The EU has maintained restrictive measures against Syria. These restrictions include a number of export and import bans, such as a ban on the import, purchase and transport of crude oil and petroleum products from Syria. There are also restrictions on investment, including a ban on investment in the Syrian oil industry. Restrictions affecting the transport sector include an obligation for EU member states to inspect vessels and aircraft if there are reasonable grounds to believe they carry arms, related material or equipment that might be used for internal repression. The US also has sanctions in place against Syria that affect dealings by US persons or those within the jurisdiction of the US.

Russia/Ukraine

In July 2014, EU Regulation 833/2014 came into force, imposing economic sanctions on Russia. These were enforced as a consequence of Russia's failure to comply with EU demands regarding the annexation of Crimea and Sevastopol. This regulation targeted the military, oil and financial services industries and was further amended by EU Regulation 960/2014 in September 2014 and EU Regulation 1290/2014 in December 2014.

The regulation prohibits the following:

- making available, directly or indirectly, a wide range of technologies (primarily used in energy projects) originating inside or outside the EU, to anybody in Russia or to anyone outside Russia for use in Russia, without prior authorisation;
- providing, directly or indirectly, associated services necessary for certain categories of exploration and production projects in Russia (including its exclusive economic zone and continental shelf); and
- to directly or indirectly purchase, sell, provide investment services or assistance in the issuance of, or otherwise deal with, transferable securities and money-market instruments with certain maturities in relation to certain entities that have been designated as subject to sectoral sanctions.

In addition to the above, an EU-wide asset freeze and travel ban was also imposed in March 2014 on those undermining the territorial sovereignty or security of Ukraine and those supporting or doing business with them under Regulation (EU) No. 269/2014, and in relation to those responsible for misappropriating state funds pursuant to Regulation (EU) No. 208/2014. These targeted asset freezes and travel bans on Russia/Ukraine were subsequently extended and were not due to expire until 15 September 2018.

Similarly to the EU, the US has also imposed sanctions on certain sectors in Russia, in addition to sanctions against certain individuals and entities.

Crimea/Sevastopol

Pursuant to UN General Assembly Resolution 68/262 of 27 March 2014, Crimea and Sevastopol continue to be considered part of Ukraine. EU authorities have continued to condemn what is considered to be the illegal annexation of Crimea and Sevastopol, with restrictions having been introduced in response to this annexation, which try to restrict trade and assistance to the region, including assistance to the energy industry in the territory.

Various legislation has been imposed by the EU in relation to Crimea/Sevastopol. In December 2014, the latest EU Regulation on

Crimea/Sevastopol came into effect (Regulation (EU) No. 1351/2014). The restrictions contained in this regulation have replaced a number of the earlier restrictions, and are more extensive in scope.

Pursuant to the current restrictions, it is prohibited to import goods into the EU that have originated in Crimea/Sevastopol, and to provide direct or indirect financing or financial assistance, insurance and reinsurance related to such import.

It is also prohibited to sell, supply, transfer or export certain goods and technology to any natural or legal person, entity or body in Crimea/Sevastopol or for use in Crimea/Sevastopol that relate to the following industry sectors:

- transport;
- telecommunications;
- energy; and
- the prospecting, exploration and production of oil, gas and mineral resources.

In addition, it is prohibited to provide technical assistance, or brokering, construction or engineering services directly relating to infrastructure in Crimea/Sevastopol and to provide services directly related to tourism activities in Crimea or Sevastopol. There are also a number of restrictions that curtail investment in Crimea/Sevastopol, including restrictions on real estate in the region, ownership or control of entities in Crimea/Sevastopol and the creation of any joint venture.

Korea

The EU, UN and US have all imposed sanctions against the Democratic People's Republic of Korea (North Korea).

The EU restrictions are wide-ranging and include, among others:

- requirements for cargo inspections on all cargo going to or from North Korea by sea or air, or which has been brokered or facilitated by North Korea or its nationals, or which is being transported on North Korean flagged aircraft or maritime vessels;
- a prohibition on North Korea and its nationals from chartering aircraft or maritime vessels, a prohibition on member states or their nationals from providing crew services to North Korea;
- a restriction on providing helicopters and vessels to North Korea;
- a prohibition on the import of petroleum products from North Korea;
- prohibitions on the transfer of funds to and from North Korea unless the funds are for a specific purpose listed in the Regulation;
- a prohibition on the transfer of funds to or from North Korea unless they fall within a specific exception;
- a prohibition on investment in certain commercial activities and financing and financial assistance for trade with North Korea; and
- a prohibition on services incidental to mining or manufacturing in the chemical, mining and refining industry.

There are various other prohibitions and restrictions and anyone considering doing business with a North Korean connection should review the legislation carefully. At the time of writing, the recent thawing in relations between North and South Korea, and the intervention of the US Trump administration, may result in an easing of sanctions over time.

EU sanctions post-Brexit

The UK's departure from the EU is likely to have an impact on the sanctions landscape. While nothing is likely to change in the immediate future (as with other areas of EU law, the UK will continue to implement EU regulations after the UK has officially notified the EU of its wish to leave the EU), going forwards, the UK is likely to be able to decide its own economic sanctions but will be unable to influence the decisions of the EU. This may well add an additional layer of complexity.

While it is not clear what path the UK will take in relation to sanctions post-Brexit, it is probable that the UK will continue to favour the use of economic sanctions as a tool of foreign policy. Indeed, it was announced in June 2017 that a new international sanctions bill would form part of the UK's post-Brexit legislative programme. Further, without the need to achieve agreement between all the EU member states, the UK will be free to impose whatever restrictions it considers to be appropriate, and will be able to act quickly.

Whatever happens in the UK/EU discussions, it is clear that the sanctions landscape will remain a complex one. Compliance officers,

particularly those working in companies affected by UK jurisdiction, will now have to contend with potentially differing US, EU and UK sanction regimes.

Environmental measures

The global shipping industry continues to promote a range of initiatives aimed at minimising damage to the environment from shipping.

The Ballast Water Management Convention 2004 came into force on 8 September 2017. The convention requires ships to manage their ballast water to remove, render harmless, or avoid the uptake or discharge of aquatic organisms and pathogens within ballast water and sediments. The aim is to halt the spread of invasive aquatic species that can have an adverse effect on local ecosystems and affect biodiversity.

The International Maritime Organization's (IMO) International Code for Ships Operating in Polar Waters (the Polar Code) entered into force on 1 January 2017. The IMO has stated that the Polar Code is intended to cover the full range of shipping-related matters relating to navigation in waters surrounding the two poles:

- ship design, construction and equipment;
- operational and training concerns;
- search and rescue; and
- the protection of the unique environment and eco-systems of the polar regions.

In October 2016, the IMO Marine Environment Protection Committee agreed that IMO member states should develop a road map to reduce CO₂ emissions from the international shipping sector in line with the Paris Agreement adopted by the parties to the UN Framework Convention on Climate Change. The aim was to agree and adopt a strategy to reduce greenhouse gas emissions from ships, with a revised strategy expected to be adopted in 2023. The IMO met in London in 2018 and the agreement reached represented a significant change in climate ambition for a sector that represents 2–3 per cent of global carbon dioxide emissions. It set an emission pathway of 'at least' 50 per cent of 2008 levels by 2050, with the ambition of increasing the cut towards 100 per cent after 2050 if possible. It signals to the industry the clear need for a move away from reliance on fossil fuels: from the 2030s we can expect new oceangoing vessels to be powered by zero-carbon renewable fuels. Also in October 2016, the IMO adopted a global CO₂ data-collection system for ships, which came into force on 1 March 2018, requiring the fuel consumption of all major vessels to be reported and totalled, intended to provide the IMO with far more accurate fuel consumption data.

Ship recycling

Ship recycling is also on the rise, partly owing to overcapacity in the market, but also due to regulatory pressures. However, ship recycling raises environmental concerns. According to the European Maritime Safety Agency, most ship recycling takes place in South Asia, often on tidal beaches and in dangerous conditions that lead to health risks and extensive pollution of coastal areas. Furthermore, old ships contain many hazardous materials, including asbestos, PCBs and large quantities of oil and oil sludge. As a result, there have been a number of international regulatory initiatives designed to ensure that ship recycling is done in an environmentally sound manner.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention) is an international treaty that came into force in 1992. It aims to reduce hazardous waste generation and promote environmentally sound management of hazardous wastes, wherever the place of disposal. It also aims to restrict the transboundary movements of hazardous wastes, except where this is perceived to be in accordance with the principles of environmentally sound management. The exact regulatory requirements are, however, dependent on the national law of each contracting state party. The Basel Convention also permits party states to impose additional requirements to those laid down by the Basel Convention, in order to better protect human health and the environment.

In addition, The Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships (the Hong Kong Convention), an IMO convention, was adopted on 15 May 2009 but is not yet in force. It will enter into force 24 months after ratification by 15 states representing 40 per cent of the world's merchant shipping by

gross tonnage, provided that those states' combined maximum annual ship recycling volume is not less than 3 per cent of their combined tonnage. Nonetheless, the IMO has issued several guidelines to assist member states with the early implementation of the convention. The Hong Kong Convention focuses on environmentally sound recycling. Among the main requirements are:

- the performance of an initial survey to verify and produce the inventory of hazardous materials;
- a ship-specific recycling plan; and
- the recycling must take place at an authorised ship recycling facility.

In the EU, on 30 December 2013, the Ship Recycling Regulation (EU) No. 1257/2013 entered into force, with the aim of reducing the negative impact linked to the recycling of EU-flagged ships. The regulation was based on the Hong Kong Convention and was designed to implement the convention quickly, without waiting for its ratification and entry into force. In addition, on 19 December 2016, the European Commission issued Decision (EU) No. 2016/2323 establishing the European list of ship-recycling facilities pursuant to the Ship Recycling Regulation. The regulation provides, among other things, that ships flying the flag of an EU member state can only be recycled at one of the facilities included in the list. In order for a facility to be approved and included in the list, it must comply with the requirements set out in the regulation. The first edition of the list, published in December 2016, included 18 European recycling yards considered to be safe for workers and environmentally sound in accordance with the regulation's requirements. However, the European Community Shipowners' Association argued for ship recycling facilities in non-EU countries to get EU recognition in order to raise standards worldwide. On 7 May 2018, the European Commission published a new list containing 21 facilities within the EU but, so far, all applications from non-EU facilities are still being considered.

Cybersecurity measures

The extensive ransomware attack that hit almost 100 countries in May 2017 is only one of many incidents that have highlighted the increased global cyber threat in recent years. Indeed, that attack was soon followed by the Petya cyber-attack in June 2017 that affected a number of large companies around the world, including the Danish transport and logistics group AP Moller-Maersk. The cyber-attack was reported to have resulted in the shutdown of the group's IT systems in multiple offices around the world.

In 2017, the IMO Maritime Safety Committee approved various measures intended to enhance maritime security, including adopting a resolution that cyber risk management form part of ships' safety management systems going forward. This was followed by BIMCO's revised cybersecurity guidelines. Among other things, the second edition includes guidance on:

- the need to ensure appropriate insurances are in place to deal with any losses arising from a cyber incident;
- how to ensure an effective response to such an incident, including having a team of personnel or external experts in place to take the appropriate action; and
- how to effectively segregate networks on board.

The Trump administration has also made it clear that cybersecurity is one of its top priorities.

The General Data Protection Regulation

Owing to the recent wealth of 'resubscribe' emails, companies and individuals even outside the EU will be aware of the introduction, on 25 May 2018, of the EU's General Data Protection Regulation, which governs the control and processing of personal data. It applies to processing carried out both by organisations operating within the EU and those outside the EU that offer goods or services to individuals in the EU, and is intended to harmonise data privacy laws across Europe, as well as to give greater protection and rights to individuals. Breaches can result in large fines and it has been reported that the purchase of cyber insurance has been boosted by companies' concerns about cyber-attacks leading to breaches.

Australia

Geoffrey Farnsworth and Nathan Cecil
Holding Redlich

Newbuilding contracts

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

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

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.

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.

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.

Ship registration and mortgages

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.

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.

7 What are the documentary requirements for registration?

The documents required for registration are as follows:

- application for registration (Australian Maritime Safety Authority (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;
- demise charter party: if applicable;
- tonnage certificate: if applicable;
- call sign licence: if applicable;
- evidence of marking of ship; and
- registration fee.

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.

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

Since 30 January 2012, the Personal Property Securities Register (PPSR) (www.ppsr.gov.au) has been the single national register of security interests in personal property.

Limitation of liability

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 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 in relation to a ship that belongs to the naval, military or air forces of a foreign country.

11 What is the procedure for establishing limitation?

Pursuant to section 25 of the 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 convention. 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 convention.

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.

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

None. 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.

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

AMSA is the agency responsible for port state control. AMSA operates under the Australian Maritime Safety Authority Act 1990 (Cth).

15 What sanctions may the port state control inspector impose?

Under the Navigation Act 2012 (Cth), AMSA has the power to detain a vessel or bring it to another appropriate place if AMSA reasonably suspects that the vessel or a seafarer or person on board the vessel 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 the detention of the vessel.

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

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.

If 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 as a result of the detention.

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.

Classification societies**17 Which are the approved classification societies?**

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.

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 Department of Harbours and Marine requirements.

Collision, salvage, wreck removal and pollution**19 Can the state or local authority order wreck removal?**

AMSA may order removal of any wreck of an Australian or foreign vessel or remove the wreck if necessary for the purposes of saving human life, securing the safe navigation of vessels or protecting the marine environment.

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 has signed but not ratified the Nairobi International Convention on the Removal of Wrecks 2007. The Navigation Act 2012 (Cth) regulates wrecks and addresses the same points as the 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 signed but not ratified 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.

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 must obtain permission from the owner of the salvable property and local authorities to carry out salvage operations.

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

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

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 injunctioned 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.

For a short period following the decision in *Reiter Petroleum Inc v The Ship 'Sam Hawk'* [2015] FCA 1005, it was thought that in some circumstances, foreign maritime liens outside the above list may be enforceable in Australia. However, the Full Court of the Federal Court overturned this decision in September 2016. It appears that Australia will continue to follow 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 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 which provide 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.

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.

For a short period following the decision in *Reiter Petroleum Inc v The Ship 'Sam Hawk'* [2015] FCA 1005, it was thought that in some circumstances, foreign maritime liens outside the above list may be enforceable in Australia. However, the Full Court of the Federal Court overturned this decision in September 2016. It appears that Australia will continue to follow the UK position, whereby a maritime lien will only be enforceable if it corresponds to a local Australian maritime lien.

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 a consent required for the release from arrest of a ship or other property.

This section has not been subject to a judgment in Australia. However, 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.

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 must be the person who would be liable in personam, and the owner of the ship.

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

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. In addition, the marshal can, and usually will, require payment on account of costs, which will vary depending on the length of the arrest.

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. Once the arresting party has been offered adequate security it will generally consent to the release from arrest. Note that a failure to consent to release when offered adequate security may render the continued arrest wrongful.

The alternative to negotiated security is bail bond under Part VII of the 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.

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.

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.

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.

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.

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

Yes, see question 32.

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.

Judicial sale of vessels

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.

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

The marshal will usually prepare an estimate of costs of marshal's expenses in relation to 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 with 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.

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.

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.

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.

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

No.

Carriage of goods by sea and bills of lading

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 on the Hague-Visby Rules (called '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.

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.

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 in accordance with the order (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)).

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 which 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 not be adequate 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 in order 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.

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.

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.

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 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 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.

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.

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.

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.

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.

Shipping emissions

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

No.

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?

Annex VI of the International Convention for the Prevention of Pollution from Ships is given effect in the Protection of the Sea (Prevention of Pollution from Ships Act) 1983 (Cth) and Marine Order 97, marine pollution prevention, air pollution.

The maximum sulphur content of fuel oil for ships operating in domestic territorial waters is 3.5 per cent. From 1 January 2020 sulphur content of fuel oil must not exceed 0.5 per cent.

The maximum penalty for a reckless or negligent breach of the provisions is A\$360,000. A strict liability penalty may be up to A\$90,000. AMSA may also detain vessels that pose a risk to the environment.

Ship recycling

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.

There are no commercial ship recycling facilities in this jurisdiction.

Jurisdiction and dispute resolution

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.

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 1988 (Cth) 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, 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 (the Hague Convention). Leave of the court is not required for originating processes to be served in accordance with 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 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.

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

The Australian Maritime and Transport Arbitration Commission 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.

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 final and conclusive.

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

Judgments not covered by the FJA 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 money sum and is final and conclusive (but the judgment may be 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).

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

Yes.

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

Subject to contractual interpretation, Australian courts have 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.

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

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?

See question 59.

Limitation periods for liability

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 (with the exception of 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 reasonable opportunity to arrest the vessel.

Under the Admiralty Act 1988 (Cth), a proceeding may be brought on a maritime claim, or on a claim on a maritime lien or other 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.

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, or 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.

Miscellaneous

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 was implemented in Australia by Schedule 13 of Marine Order 11 under the Navigation Act 2012 (Cth) and associated delegated legislation. The

Convention will apply to Australian vessels and foreign-flagged vessels in Australian ports.

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.

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

As discussed in question 23, in order to effect a surrogate arrest in Australia, one must establish that the 'relevant person' was, when the cause of action arose, the owner or charterer of, or in possession or control of the first-mentioned ship; and that the person was, when the proceedings are commenced, the owner of the second-mentioned ship.

The decision in *Euroceanica (UK) Ltd v The Ship 'Gem of Safaga'* [2009] FCA 1467 examined the issue of 'control' in the first limb and concluded that the term must be interpreted in the 'practical, business sense'. In that case, the court gave meaning to the word by considering whether the relevant person provided instructions to the masters, decided the ports of call and the cargoes to be carried and the nature of the correspondence issued on behalf of the vessel.

This is the first Australian judgment to give an alternative meaning to the word 'control' and it has widened the potential application of section 19 of the Admiralty Act.



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Newbuilding contracts

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. However, 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 registry with the Admiralty Court.

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

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, approved on all the equipment tests, and pass all ocean navigation trials required by the manufacturer of the equipment and the Brazilian maritime authorities.

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 evidencing 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 in limine decision before the competent civil court, in order to obtain the immediate possession of the vessel and move it out of the shipyard. The Brazilian Procedural Code allows the offended party to request a precautionary measure if the plaintiff can demonstrate the periculum in mora (imminent risks of delay) and the *fumus boni iuris* (the legal grounds of the request and its reasonableness).

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 scholars argue that the provisions of the Brazilian Consumer Act also apply to such contracts under a service-and-suppliers' relationship, and the time-bar period in this case is also five years. A potential third-party claim – by a purchaser from

the original shipowner against the shipyard – would be barred by the absence of direct relationship and would fail under the *res inter alios acta* principle.

Ship registration and mortgages

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 tons (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, 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 and the Naval Ministry 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, in order 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.

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

Individuals resident in the country or Brazilian companies may apply to register a ship in Brazil.

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 2003);
- 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;
- copy of the shipowner's certificate;
- authorisation from the Ministry of Agriculture, Livestock and Supply (for fishing boats);
- copy of vessel's safety certificate;

- copy of tonnage certificate or tonnage records;
- copy of freeboard certificate;
- copy of shipbuilding licence or permit:
 - record of technical activities or the responsible engineer's log;
 - the vessel's specifications;
 - general plans;
 - half-breadth plan;
 - hydrostatic curves and cross curves or tables;
 - safety plan;
 - arrangement plan of the navigation lights;
 - capacity plan;
 - sheer plan;
 - heeling test report; and
 - 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, or 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 vessel's acquisition and full and general release;
- engine: copy of invoice or receipt of release or private instrument containing engine details, price, buyer, seller, and with seller's and buyer's signatures duly certified and acknowledged by a notary;
- hull: copy of the invoice and receipt of release, or private instrument, containing the vessel's details, the purchase price and the details of the seller and buyer with their respective signatures duly acknowledged and certified by a notary;
- proof of residence;
- 15 x 21 centimetre photo of the vessel, coloured, dated and taken abeam;
- copy of the compulsory insurance certificate (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, owner or their legal representative's email address.

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 in view of the lack of legal provision and also due to a violation of the public interest.

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-flag vessels must be constituted through a public deed and registered with the Admiralty Court. To create a mortgage on a Brazilian-registered vessel, a public deed is required. 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.

Limitation of liability

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 does not provide for a limitation of civil liability and establishes that anyone who causes damage to the other party must fully compensate the damages caused.

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

Regarding the amounts of indemnity, it is important to point out that 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. However, indirect damages or consequential losses are expressly excluded, unless otherwise agreed by the parties. It is also important to advise that direct damages include both material and moral damages.

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:

- 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.

11 What is the procedure for establishing limitation?

Unfortunately, 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 an adhesion contract (eg, a standard bill of lading imposed by the carrier), the clauses that exclude or limit liability of one of the parties, might be considered null and void by Brazilian courts.

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

Not applicable (see question 11).

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

Brazil is not a signatory to the Athens Convention or its protocols.

Brazilian and foreign passengers, while being transported or on cruise trips, have their rights supported by the Brazilian Civil Code and the Consumers Act, which establish the right to full reparation of the passenger or consumer.

Port state control

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

All foreign vessels entering Brazilian ports are subject to port state control. Port state control in Brazil is performed by qualified naval inspectors accredited by the Department of Ports and Coasts (DPC), as per regulations set forth in the NORMAM-04 Ordinance (the Ordinance). The DPC has, inter alia, 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, 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 in 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, platform or support installations thereof;
- define maritime and interior areas for the construction of temporary refuges where vessels can anchor or beach for 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.

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.

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

Detention orders and fines can be challenged by an administrative defence 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 against the maritime authority in order to revoke the detention or fine.

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:

- the American Bureau of Shipping;
- Bureau Veritas Sociedade Classificadora e Certificadora Ltda;
- Bureau Colombo Ltda;
- Det Norske Veritas Ltd;
- Germanischer Lloyd do Brasil Ltda;
- Lloyd's Register do Brasil;
- Nippon Kaiji Kinkai do Brasil;
- Registro Italiano Navale;
- Registro Brasileiro de Navios e Aeronaves;
- Record Certificação Naval Ltda;
- Autoship Prestação de Serviços de Entidade Certificadora de Embarcações Ltda; and
- ABS Group Services do Brasil.

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.

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 DPC under the 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 to the government. However, if an affected party is able to 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.

Collision, salvage, wreck removal and pollution

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 to the environment. Navy Ordinance NORMAM-10 also establishes the requirements and procedures for obtaining a permit for a wreck removal.

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 of the following conventions:

- 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.

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. The traditional international salvage companies are usually engaged in such operations. The Lloyd's standard form of 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.

Ship arrest

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 has been ratified.

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, according to article 1 of the 1926 Brussels Convention. If the arrest is in personam, the claimant shall demonstrate the *fumus boni iuris* by the presentation of a clear and indisputable debt, while the *periculum in mora* may be proven by evidence that the debtor might leave Brazilian territorial waters without having other assets in the country, or that the debtor might dispose of its assets.

In other words, for the judge to issue a preventive measure there must be a potential exposure of the claimant to losses that would be difficult to repair due to the normal time frame of an ordinary lawsuit and the final decision on merit.

There are no provisions dealing with arrest of sister ships in Brazilian law. If the claim is based on privileged creditors 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*, it is possible for a Brazilian judge to 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 as a third party harmed by the arrest measure to try to lift the arrest of its vessel.

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.

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, after the continuance of the proceedings the injunction is overturned or the claim is dismissed, the Civil Procedural Code allows the defendant to seek an indemnity for the losses suffered with the wrongful arrest and this indemnity can be assessed and liquidated in the same legal proceedings.

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 the Brazilian Commercial Code and the 1926 Brussels Convention (international convention for the unification of certain rules of law relating to maritime liens and mortgages), credits arising out of ship suppliers out of the port of registry, included 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.

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

A guarantee may be required by the court from claimants that present an arrest request, in order 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 having no assets within the Brazilian territory. In this

case, the judge may demand security of between 10 and 20 per cent in order to guarantee the legal costs and opponent lawyer's fees.

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

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 a 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 and it can be presented in the same form as described in question 27.

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 (POA), issued by a representative of the company, duly empowered as per the by-laws or certificates. Such documents must be signed, notarised and legalised at a Brazilian embassy abroad, in order to be presented to the courts in Brazil. In the case of urgency measures, such as an arrest, the Brazilian Code of Civil Procedures allows the party 15 days to present the POA to the records, following the presentation of the claim. This deadline can be extended for an additional 15 days.

Preparing an arrest application should not take longer than one business day, including the draft of the claim and the payment of the court costs. However, the challenge is to gather all the supporting documents and meet the formal requirements for presentation of those at court, which, depending on the quantity of documents, may take some additional days.

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 for the analysis of the arrest request, he may postpone the decision on the matter 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 avoiding time and costs with legalisation and consularisation procedures.

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

Usually the debtor or owner of the arrested vessel will be responsible for keeping the vessel duly crewed, maintained and in class.

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 impeding the security in Brazil of a judicial claim or arbitration to be submitted to the jurisdiction of another country.

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. After the enforcement of an arrest order over a vessel, the arresting party is bound to file a main lawsuit before the Brazilian courts, otherwise the arrest claim will be dismissed and the claimant may suffer penalties with the release of the vessel, payment of court costs and fees, and liability for wrongful arrest (see question 25).

Therefore, the arrest of a vessel in Brazil will depend on the merits of the case (namely, the main lawsuit) being judged in Brazil or being ratified by the Superior Court of Justice, in the case of a foreign decision or award.

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 monies.

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, inter alia, the urgent production of evidence, disclosure of documents and preservation of evidence or assets.

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 is not a common practice within the Brazilian jurisdiction 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 is able to demonstrate both the liquidity of its credits (unpaid bills or a promissory note) and a risk that the debtor and its assets may disappear in the near future (in the instance of an insolvency or similar situations).

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

The arrest of bunkers may involve logistic and costs difficulties for the arresting party as the claimant will be obliged to nominate a fiduciary agent to be responsible for the bunker and arrange a licensed facility to unload and receive the bunker eventually arrested.

Judicial sale of vessels

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.

The creditor or arresting party may apply for the judicial sale of an arrested vessel if the debt is not paid.

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.

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.

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 for the transfer of ownership of the vessel within 15 days of the effective acquisition.

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

First, all foreign decisions and awards concerning vessels registered in Brazil must be previously ratified by the Superior Court of Justice in order to become valid and effective in Brazil.

Further to the above, the title over a vessel is only consolidated and effective in Brazil once that title is registered with the Admiralty Court, maritime court registry office or the competent port captaincy in the case of vessels not subject to registry with the Admiralty Court. This registry has the purpose of establishing the nationality, validity and making public the ownership of the vessel.

Therefore, 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 should be recognised by Brazilian courts if duly registered at the flag state registry.

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.

Carriage of goods by sea and bills of lading

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?

As mentioned in question 20, Brazil is not a signatory of the main international conventions that exclude or minimise the responsibility of carriers, including 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 UN, but has not yet signed the Rules. The concept adopted by the Rotterdam Rules is already in force under the 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.

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.

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 are entitled to 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 are also entitled to a recovery action against the carrier under the bill of lading.

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 as an evidence of the contract of carriage includes 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 as much information, terms and conditions of the 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 in the case of conflict the bill of lading will prevail.

However, the shipowners usually have standard bills of lading, it being 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. Jurisdiction or arbitration clauses are valid and binding in adhesion contracts if the contracting parties expressly agree on this specific clause, stating that same is accepted. This requirement being observed, the arbitration clause shall be binding on any third party holding the bill of lading.

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 issuer or carrier to any third party, including the owner, are considered not written, that is, null and void.

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 importer or exporter (for example, owing to 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, as mentioned above, 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, reserving the right of redress action against carrier.

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 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.

48 What liens can be exercised?

The liens that can be exercised against the vessel are as set out in question 37, which include some relevant liens in the context of a discussion of carriage of goods by sea and bills 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?

As mentioned above, 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 the related bill of lading, the carrier will be subject to liability for not delivering the cargo to the consignee (if the cargo is delivered to the wrong person) and also for delivering damaged cargo, if the bill of lading does not expressly state the condition of the cargo shipped.

The carrier will be liable for all direct material and moral damages, including the value of the cargo, without limitation, unless otherwise provided in the bill of lading or in an agreement between the carrier and owner of the cargo.

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 error on the cargo or consignee particulars or information.

Shipping emissions

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

There are no emission control areas in force in Brazilian territorial waters.

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 3.5 per cent m/m, as per provided by the National Oil, Natural Gas and Biofuels Agency (ANP), ABNT Technical Norms and Annex VI of MARPOL.

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 to be 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.

Ship recycling

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 (IBAMA).

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.

So far there are no specialised ship recycling facilities in Brazil.

Jurisdiction and dispute resolution

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 their 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, it is also important to point out that 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.

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 said

Update and trends

In November 2017, the Superior Court of Justice, as reported by Justice Salomão, recognised the validity of foreign maritime mortgages in Brazil, by means of a judgment rendered in Special Appeal No. 1.705.222/SP. The case relates to a dispute among investors over the priority of their credits against the foreign-flagged floating production storage and offloading (FPSO) unit OSX-3.

The appellate decision relating to the case was published on 1 February 2018, and reaffirms important concepts of international law, particularly with respect to the incorporation of international treaties into the Brazilian legal framework and the respect for acts of sovereignty of the states.

The Superior Court of Justice reaffirmed the conclusion of the Federal Supreme Court in the judgment in the leading case ADI 1.480 MC/DF that: 'the international treaties or conventions once regularly incorporated into internal law, are, in the Brazilian legal framework, at the same level of validity, efficacy and authority in which the ordinary laws are positioned, consequently, there is among these and the acts of public international law a mere relationship of parity.'

Asserting that the FPSO should be considered a ship, Justice Salomão points out in his opinion that the UN Convention on the Law of the Sea determines that ships have the nationality of the state of their flag, and that this state 'exercises its jurisdiction and its control in administrative, technical and social matters on ships flying its flag'.

'The mortgage registry is a sovereign act of the state of the nationality of the vessel, being under its jurisdiction in respect of administrative matters. Therefore, the act has extraterritorial effects, reaching the national internal ambit', stated Justice Salomão.

Restating that to allow ship mortgages is a national and international tradition, notwithstanding their carrying the legal nature

of movable assets, the Superior Court of Justice mentioned provisions of the Bustamante Code and of the 1926 Brussels Convention for the Unification of Certain Rules Relative to Principles and Maritime Mortgages to conclude that the maritime mortgage established according to the law of the flag has extraterritorial effects, 'including in countries whose legislation is not aware of or does not regulate' the matter.

Moreover, the decision highlights that it is not incumbent upon the Brazilian Admiralty Court to register the mortgage of a vessel flying the flag of another country, even for lack of legal provision, the registration being a sovereign act of the state of the vessel's nationality.

'The instability and the maritime risk resulting from the constant displacement [of vessels] is compensated with the stability of the registries at ports of origin', said Justice Salomão.

Thus, demonstrating concern with the legal certainty towards owners and rights holders of ships, as well as with the correct application of international conventions, the Fourth Panel of the Superior Court of Justice overturned the decision rendered by the lower courts, recognising the validity, within the national scenario, of the foreign maritime mortgage registered within the state of the flag.

In the words of the reporting Justice Salomão, 'by denying efficacy to the mortgage, with all due respect, the local court fails to observe several international conventions and causes legal uncertainty with possible restrictions and increased costs for the charter of vessels used in Brazil. Therefore, overturning such decision is mandatory'.

By means of this decision, the Superior Court of Justice has established a landmark towards the validity of maritime mortgages registered within the flag state over foreign flag vessels.

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 are to be served.

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

Yes, there are domestic arbitral institutions with arbitrators specialised in maritime matters such as the Brazilian Center of Mediation and Arbitration (CBMA), the Brazilian Maritime Law Association (ABDM), the Brazilian Center of Maritime Arbitration and the Mediation and Arbitration Chamber of the Getúlio Vargas Foundation. The CBMA, for instance, has a specialised commission to deal with maritime and port-related disputes, counting with competent and qualified practitioners and arbitrators with expertise to attend the growing number of disputes in this sector. This method of conflict resolution is an increasing practice in Brazil, following the arbitration law (Law No. 9,307/96), the ratification of the New York Convention in 2002, the ratification of the CISG 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 prior to judicial disputes.

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.

The exequatur being 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.

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.

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. 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.

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 (see question 56).

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.

It is also notable that this type of clause, when inserted in contracts that can be construed as being contracts of adhesion, that is contracts with very little room for negotiating 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. In other words, the commitment clause or the election of a foreign jurisdiction will be effective only if the adhering party expressly accepts it.

Limitation periods for liability

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, the Federal Decree No. 116/1967 provides a one-year time

bar as of the date of discharge, similarly 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.

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 in 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.

Miscellaneous

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

Brazil has not ratified the Maritime Labour Convention.

The Brazilian Ministry of Labour and Employment established a Tripartite Commission of the Maritime Labour Convention to study the various norms that make up the Rules and the Code annexed to the Convention, as well as the compatibility between the international norm and Brazilian law. Although the Tripartite Commission has placed unanimously in favour of ratification by Brazil of the Maritime Labour Convention, so far the Brazilian government has not sent the Convention to the National Congress for approval.

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

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.

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 ANTAQ. 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, and 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.



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Newbuilding contracts

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 Chilean maritime law, there are no specific regulations or compulsory requirements. Accordingly, title in the ship will pass subject to the parties' stipulations. Otherwise, this is a matter to be analysed under the general sales of goods rules contained in both the Chilean Civil and Commercial Codes.

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

As noted in question 1, under Chilean maritime law there are no specific regulations or compulsory requirements. Accordingly, such formalities would mostly depend on what the parties have agreed.

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

Generally speaking, the owner may sue the yard to compel delivery of the vessel or claim damages based on the general rules applicable to all contracts contained in the Chilean Civil Code and the general obligation relating to sellers for delivering at the agreed place and time.

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?

Generally speaking, under the Chilean rules relating to the sale of goods, once a contract is consummated the buyer must bear the risk of loss or wear and tear unless otherwise agreed, or if such loss or impairment is caused by the seller's fraud or negligence or by inherent vice. A third party that has sustained damage may consider suing in tort.

Ship registration and mortgages

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 Chile any type of vessel, whether constructed or under construction, or naval devices can be registered at the following registries kept by the General Administration of the Maritime Territory and Merchant Marine (the Maritime Authority):

- the Large Vessels Registry;
- the Minor Vessels Registry;
- the Vessels in Construction Registry;
- the Naval Devices Registry; and
- the Mortgage, Liens and Prohibitions Registry.

The rules relevant to the organisation and operation of the registries as well as the procedures, formalities and requirements of registration are contained in the respective regulations. In this respect, it is important to note that the practice of registering vessels chartered on a bareboat basis does not occur in Chile.

In accordance with article 15 of the Navigation Law, all large vessels (ie, those over 50 gross tonnes (GT)), must be registered in the Large Vessels Registry, which is kept by the Maritime Authority. Minor vessels (ie, those of 50 GT or less), are registered in the Minor Vessels Registries that are kept by the harbour masters.

In addition, the Navigation Law distinguishes between merchant and special vessels. The former is defined as those that are used for carriage purposes, whether on a local or international basis. Unless there is a cargo reservation in place, foreign merchant vessels have no restrictions on performing international carriage of goods by sea. However, cabotage is restricted, in principle, to Chilean merchant vessels. On the other hand, special vessels are those used for specific purposes and with particular features relating to their functions (eg, tugs, fishing vessels, dredgers) and may therefore be subject to further regulations.

Regarding vessels under construction, the proprietor must submit to the Maritime Authority the titles that justify his or her rights over the vessel, the technical specifications and other requirements established by the respective regulations.

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

Regarding merchant vessels, they can be registered by Chilean nationals or citizens. If the owner is a corporation, it must meet the following requirements to be deemed Chilean:

- having its registered offices and true and effective headquarters in Chile;
- having a Chilean president, manager and majority of directors or administrators, as the case may be; and
- the majority of the equity capital is owned by Chilean individuals or bodies corporate.

Regarding special vessels, they can be registered in Chile by foreign natural persons as long as they are domiciled in the country and their main place of business is located locally (this rule does not apply to fishing vessels).

7 What are the documentary requirements for registration?

The registration of a merchant vessel in Chile involves aspects of domicile and nationality of her owners (see question 6). To this must be added the Chilean nationality of the crew when the vessel, if already Chilean, wishes to fly the Chilean flag.

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

Although not regulated in depth, according to the Chilean Navigation Law dual registration of national merchant vessels would be acceptable when, for reasons of obvious convenience to domestic interests, the President of Chile authorises the bareboat charter of national vessels for a certain period. In such cases, the vessel must fly a foreign flag, although her Chilean registration will continue in effect.

Regarding flagging out, the owner is free to do so. In such a case, the corresponding vessel or naval devices acquired or constructed abroad for registry in Chile and those that are built in Chile for sale abroad or registry in the country may navigate under the national flag without any document other than a 'safe conduct', namely, a document that, in the case of Chile, corresponds to the credentials issued by the

consul of Chile or the Chilean Maritime Authority, as the case may be, that legitimises the journey of the vessel to or from a Chilean port (temporary document).

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

See question 5.

Limitation of liability

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

The Chilean regulations that refer to tonnage limitation matters (ie, articles 889 to 904 of the Commercial Code) are inspired by both the international conventions signed in Brussels in 1957 (the 1957 Convention) and in London in 1976 (the 1976 Convention). With respect to the tonnage limitation figures, the Commercial Code follows the lines of the 1976 Convention. In addition, it is important to note that the Commercial Code establishes a specific set of procedural provisions in connection to the constitution and distribution of the corresponding limitation fund (see question 11).

The claims subject to limitation are as follows:

- (i) death or personal injury and damage to property on board;
- (ii) death or personal injuries caused by any person for whom the owner is responsible, whether on board or ashore (in the latter case, his or her actions must be related to the ship's operation or to the loading, discharging or carriage of the relevant goods);
- (iii) loss of or damage to other goods, including the cargo, caused by the same person or people, grounds, places and circumstances given in (ii) above; and
- (iv) resulting liability related to the damage caused by a vessel to harbour works, dry docks, basins and waterways.

The people entitled to limit their liability under this regime are as follows:

- (i) the shipowner as defined by Chilean regulations;
- (ii) the shipowner's staff;
- (iii) liability insurers;
- (iv) the operator, carrier, charterer and ship's proprietor, if a different person or entity than (i) above; and
- (v) individual employees of (iv) above, including the master and members of the crew, if sued.

Limitation in connection with civil liability for the damage resulting from the spillage of hydrocarbons and other hazardous substances is regulated as follows:

- spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo is subject to the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969, as renewed in 1992 (CLC 1992); and
- spillage of hydrocarbons from vessels not carrying oil in bulk as cargo or spillage of other hazardous substances is subject to the terms of the CLC 1969 and supplementary norms set forth by the Chilean Navigation Law (among others, it extends the limitation benefit to the owner, proprietor and operator).

Regarding limitation in connection with contracts of carriage of goods by sea, Chilean law draws a distinction between lost or damaged goods and delayed goods. In the former case, the carrier's liability is limited to an amount equal to 835 special drawing rights (SDR) per package or other shipping unit, or 2.5 SDR per kilogram of gross weight, if the latter is higher. In the case of delayed goods, the carrier's liability is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed, but not exceeding the total sum of the freight payable under the respective contract of carriage by sea. It is worth noting that the above rules do not comprise either the interests arising from the value of the damaged goods or the judicial costs.

11 What is the procedure for establishing limitation?

The procedure for establishing a limitation fund in connection to general civil liability or carriage of goods by sea contracts is regulated in the Commercial Code (article 1,210 et seq). Its main features are as follows.

Persons entitled to commence limitation proceedings

Any of the persons listed in question 10 who consider themselves entitled to limit liability under the Chilean general limitation regime or a carrier under the Chilean adoption of the Hamburg Rules may come before any of the courts mentioned below and ask that a procedure be initiated, aimed at constituting the fund and verifying and settling credits and distribution in accordance with the priorities provided by law.

Competent courts

It will be up to an appropriate court to investigate all the matters referred to in the previous subheading and any that are an accessory or of consequence to them:

- (i) when the limitation of liability refers to a vessel registered in Chile, it will be the civil court that lies within the jurisdiction of the port of registration of the vessel;
- (ii) if dealing with a foreign vessel, the appropriate Chilean civil court of the port where the accident occurred or the first Chilean port of call after the accident or, failing either of these, whatever court has jurisdiction in the place where the vessel was first retained or where a guarantee for the vessel had first been granted; and
- (iii) when such a procedure has still not been brought in any of the courts mentioned previously and the limitation of liability is filed in a plea, the same court before which it is being pleaded will be able to hear the case on limitation so long as it is an ordinary one. If dealing with a court of arbitration, copies of the pertinent background information will be sent to the court that is able to hear the case in accordance with the preceding points so that, before this court, the action aimed at constituting and distributing the limitation of liability fund can be brought.

In these cases, the plea for limitation of liability by constituting the fund may only be made when answering the lawsuit action.

Term for exercising limitation of liability by constituting a fund

Except in the case of (iii) above, limitation of liability by constituting a fund may be exercised up to the moment in which the deadline expires for filing defences within foreclosure proceedings or within the deadline of the summons referred to in article 233 of the Civil Procedure Code in court-ordered enforcement proceedings.

Resolution declaring commencement of proceedings

The court, after examining whether the applicant's calculations of the amount of the fund fall into line with the pertinent provisions, will issue a rule in which it will declare that proceedings have begun. At the same time, it will rule on the options offered for the constitution of the fund, ordering them to be complied with, if it approves them. In the same resolution, it will mention the sum that the petitioner shall place at the disposal of the court to cover all costs of proceedings and it will appoint a receiver plus a deputy to conduct and carry out all the acts and operations that he or she is entrusted with in this section. These appointments shall fall upon persons who are on the list of receivers mentioned in the Chilean Bankruptcy Law and it will not be necessary for their appointment to be ratified at a later date by the board of creditors.

Rules regarding cash and guarantees

When money is handed over for the constitution of the fund, the court will deposit it in a bank, with the knowledge of the receiver and the interested parties. Any readjustments and interest obtained therefrom will be added to the fund to the benefit of the creditors. If the fund has been constituted by means of a guarantee, its amount will accrue current interest wherever the court sits and it will be left on record in the document establishing the guarantee.

Limitation of civil liability for damage from spillage of hydrocarbons and other hazardous substances

- Spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo is subject to the CLC 1992; and
- spillage of hydrocarbons from vessels not carrying oil in bulk as cargo or spillage of other hazardous substances is subject to the terms of the CLC 1969 and supplementary norms set forth by the Chilean Navigation Law, including those for fund constitution and distribution.

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

Tonnage limitation

Under Chilean law, there is no single express test for breaking limitation, such as that contained in article 4 of the 1976 Convention, and the alternatives have to be concluded from different provisions contained in the Commercial Code, which are explained below.

First, according to article 885 of the Commercial Code, the liability of the owner for his or her personal acts is subject to the general liability rules contained in the Chilean Civil Code.

Second, article 891 of the Commercial Code establishes that:

The limitation of liability of the shipowner may be petitioned by his or her staff in such cases and for the causes contemplated by law, unless it is proved that the loss resulted from their act or omission, [1] committed with the intent to cause such loss, or [2] recklessly and with knowledge that such loss would probably result.

In addition, article 903 of the Commercial Code (based on article 6.3 of the 1957 Convention) states that:

When actions are brought against the master or against members of the crew such persons may limit their liability even if the occurrence which gives rise to the claims resulted from their own fault, unless it is proved that the loss resulted from their act or omission, [1] committed with the intent to cause such loss, or [2] recklessly and with knowledge that such loss would probably result. If, however, the master or member of the crew is at the same time the proprietor, co-proprietor, carrier, owner or operator of the ship, the limitation shall only apply to him or her where his or her fault is committed in his or her capacity as master or as member of the crew of the ship.

Note, however, that in connection with the general test for breaking limitation, we are of the view that the general test would be the test contained in article 891.

Limitation of civil liability for damage from spillage of hydrocarbons and other hazardous substances

Spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo

Limitation of liability in this scenario follows the test set forth under the CLC 1992.

Spillage of hydrocarbons from vessels not carrying oil in bulk as cargo or spillage of other hazardous substances

The benefit is lost if the damage has been caused by fault or neglect on the part of the proprietor, owner or operator of the vessel.

Limitation in connection to contracts of carriage of goods by sea

The carrier forfeits his or her right to limit liability if it is proven that the loss, damage or delay in delivery arose from:

- intentional damage by the carrier (act or omission), his or her staff or agents; or
- an action or failure of the carrier, his or her servants or agents, done recklessly and with knowledge that such loss, damage or delay would probably occur.

The right to limit liability is also forfeited if the goods have been carried on deck in breach of an agreement to carry them below deck. We are currently unaware of cases where limitation has been broken under any of the above-mentioned scenarios.

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

Chile has not ratified the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. However, the fundamental regulations applicable to passenger and luggage claims are found in Book III, Title V, paragraph 5 of the Chilean Commercial Code 'About passage contracts' (article 1,044 et seq) and are loosely based on the principles set forth under the Athens Convention.

Port state control

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

Such responsibility falls on the Maritime Authority in accordance with the Navigation Law and complementary regulations, as well as applicable international conventions.

15 What sanctions may the port state control inspector impose?

As a general rule, a vessel cannot sail unless otherwise authorised by the Maritime Authority. If a foreign vessel sails without the authorisation of the corresponding port state control officer appointed by the Maritime Authority, her captain, owner or ship agent may be jointly and severally liable for up to 1 million Chilean pesos.

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

Depending on the specific officer that granted the detention order or fine, the appeal process is to the next most senior officer, up to the head of the Maritime Authority.

Classification societies

17 Which are the approved classification societies?

According to resolution 12600/150 issued by the Maritime Authority, the current approved classification societies are as follows:

- American Bureau of Shipping;
- Bureau Veritas;
- DNV GL;
- Lloyd's Register of Shipping; and
- Nippon Kaiji Kyokai.

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

The main source of the obligation of a classification society is found in its contract with the shipowner or shipbuilder, as the case may be. If such contract is subject to Chilean law, failure to comply with the corresponding obligations will imply liability.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Yes. The associated costs are to be borne by the vessel's owner, proprietor or operator, as the case may be.

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

Collision

Article 1116 et seq of the Commercial Code set out the main regulations applicable to collisions. The Chilean Navigation Law and the Collision Rules (1972) also apply.

Salvage

Salvage is regulated by Book 3, Title 6, paragraph 5 of the Commercial Code, denominated 'Services rendered to a vessel or other property in damage' (article 1,128 et seq of the code). These rules are based on the Comité Maritime International's draft International Convention (Montreal 1981) and the London International Convention on Salvage 1989.

Pollution

Spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo is regulated by the CLC 1992.

Spillage of hydrocarbons from vessels not carrying oil in bulk as cargo and spillage of other hazardous substances is subject to the terms of the CLC 1969 and supplementary norms set forth by the Chilean Navigation Law.

Wreck removal

Chile is not a party to the Nairobi International Convention on the Removal of Wrecks 2007. Wreck removal is regulated by Title VIII, paragraph 4 of the Chilean Navigation Law.

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 Chilean salvage regulations listed in question 20 apply to all salvage operations unless the relevant contract expressly or implicitly stipulates otherwise. There are two exceptions: aid rendered to warships or other public vessels that are being used, at the time of salvage operations, exclusively in official non-commercial trade; and the removal of shipwrecked remains. The regulations also apply if the assisted vessel and the salvager belong to the same owner or are subject to the same administration.

However, there is no mandatory form of salvage agreement and these are subject to the principle of freedom of contract.

As to who may carry out salvage operations, there are no specific restrictions. In this respect, the salvor must: perform salvage operations with due care, making best efforts to salvage the vessel and property contained thereon and to impede or reduce damage to the environment; and if reasonably required by circumstances, request the aid of other available salvors and accept the intervention of other salvors when requested to do so by the owner or master. However, in such an event, the salvor's payment is not affected if it is shown that such intervention was unnecessary.

Ship arrest

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

Chile has not ratified any international convention regarding the arrest of ships. However, the fundamental regulations applicable to ship arrest that are found in Book III, Title VIII, paragraph 5 of the Commercial Code 'About the Procedure to Arrest Vessels and its Release' (article 1,231 et seq) are loosely based on the principles set forth under the International Convention Relating to the Arrest of Seagoing Ships (Brussels, 10 May 1952).

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 Chilean law, a vessel may be arrested if the requesting party has a credit that entitles it to do so. These credits may be of two types, namely:

- privileged credits as set forth by articles 844, 845 and 846 of the Chilean Commercial Code; or
- credits other than those mentioned in the first point above.

Under Chilean law, there is no statutory definition for privileged credits. However, they may be defined as those that give rise to a maritime lien and allow for requesting an arrest as per the special rules set forth by Book III, Title VIII, paragraph 5 of the Commercial Code, 'About the Procedure to Arrest Vessels and its Release' (article 1,231 et seq). Articles 844, 845 and 846 of the Commercial Code establish and distinguish the following groups of privileged credits.

Credits of article 844 of the Commercial Code

- Legal costs and other disbursements caused by reason of a suit, in the common interest of the creditors, for the preservation of the vessel or for its forced alienation and distribution of the yield;
- the remuneration and other benefits arising from the contracts of embarkation of the vessel's crew, in accordance with labour regulations and civil law that regulate the concurrence of these credits, together with the emoluments paid to the pilots at the service of the vessel. This privilege applies to the indemnities that are due for death or bodily injuries of the surviving employees ashore, on board or in the water, and always provided that they stem from accidents related directly to the trading of the vessel;
- the charges and rates of ports, channels and navigable waters, together with fiscal charges in respect of signalling and pilotage;
- the expenses and remunerations due in respect of assistance rendered at sea and general average contribution. This privilege applies to the reimbursement of expenses and sacrifices incurred by the authority or third parties, in order to prevent or minimise

pollution damages or hydrocarbon spills or other contaminating substances to the environment or third-party property, when the fund of limitation of liability has not been constituted as established in Title IX of the Chilean Law of Navigation; and

- the indemnities for damages or losses caused to other vessels, to port works, piers or navigable waters or to cargo or luggage, as a consequence of the collision or other accidents during navigation, when the respective action is not susceptible to be founded upon a contract, and the damages in respect of bodily injury to the passengers and crew of these other vessels.

Credits of article 845 of the Commercial Code

Mortgage credits on large vessels (ie, vessels over 50 GT) and secured credits on minor vessels (ie, vessels up to 50 GT).

Credits of article 846 of the Commercial Code

- Credits in respect of the sale price, construction, repair and equipping of the vessel;
- credits in respect of supply of products or materials that are indispensable for the trading or conservation of the vessel;
- credits arising from contracts of passage money, affreightment or carriage of goods, including the indemnities for damages, lack and short deliveries in cargo and luggage, and the credits deriving from damages in respect of contamination or the spilling of hydrocarbons or other contaminating substances;
- credits in respect of disbursements incurred by the master, agents or third parties, for account of the owner, for the purpose of trading the vessel, including agency service; and
- credits in respect of insurance premiums concerning the vessel, be they hull, machinery or third-party liability.

The privileged credits of article 844 enjoy privilege over the vessel in the order enumerated in 'Credits of article 844 of the Commercial Code', above, with preference over mortgage credits and the privileged credits of article 846. Mortgage credits are preferred to those of article 846, which in turn follow the rank indicated under 'Credits of article 846 of the Commercial Code' above.

In this respect, it is worth noting that the privileged credits established by the aforementioned provisions have preference and exclude all other general or specific privileges regulated by other legal bodies, when referring to the same goods and rights. However, the rules regarding priorities and privileges in matters of pollution or for avoiding damages from spills of hazardous substances, which are established in international treaties in force in Chile and in the Navigation Law, have preference over the provisions of Book III, Title III of the Commercial Code ('About Privileges and Naval Mortgage') in the specific matters to which they refer.

The lien on the ship granted by a privileged credit can be exercised not only against the actual ship to which the privileged credit relates, but also against a ship in the same ownership or a ship in the same administration or operated by the same person. In this respect, according to article 882 of the Chilean Commercial Code, the shipowner or *armador* is the 'person or corporation, whether or not the proprietor of the vessel, who trades or dispatches it under his name'. The same article defines the operator as 'the person who is not the owner but who executes transport and other vessel exploitation contracts according to a power of attorney granted by the former, assuming liability therefrom'. On the other hand, as regards ship administration or management, these concepts are not expressly defined in the Commercial Code.

Under Chilean law a bareboat charterer has the status of the shipowner with same rights and obligations. Accordingly, a bareboat-chartered vessel can be arrested for a claim against the bareboat charterer. As to whether a time-chartered vessel can be arrested for a claim against a time-charterer, there are no express provisions.

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

See question 23 in connection with privileged credits.

25 What is the test for wrongful arrest?

First, under Chilean regulations an arrest based on privileged credits is subject to the following conditions:

- the arresting party must invoke one or more of the privileged credits enumerated in question 23. In this respect, it is important to note that, except for the regulations related to pollution or for avoiding damages from spills of hazardous substances, the maritime privileges preclude any other general or special privilege regulated by other laws in connection with the same goods. The maritime privileges also confer upon the creditor the right to pursue the vessel in whosoever's possession she may be;
- the arresting party must attach antecedents that constitute presumption of the right being claimed; and
- if, in its discretion, the court considers that the antecedents attached are not sufficient or the petitioner states they are not yet available to him or her, the court may require that counter-security be provided for the eventual damages that may be caused if, subsequently, it is found that the petition lacked basis.

Second, when an arrest has been decreed as a prejudicial precautionary measure (ie, a measure to secure the outcome of a subsequent substantive action), the petitioner is obliged to file his or her complaint requesting that the decreed arrest remain in force within a time period that, in principle, is 10 days, but that may be extended for up to a total of 30 days, provided there is a sound basis to do so. The non-fulfilment of this obligation means the cancellation of the arrest and liability for the damages that may have been caused, on the irrefutable presumption that the proceedings for the arrest were fraudulent. In addition, if the arrest was wrongful, fraudulent or lacked basis, the defendant may claim damages in separate ordinary proceedings subject to the general rules set forth by the Code of Civil Procedure.

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, an arrest can be made provided the claimant has a credit entitling him or her to do so (see question 23). Such credit will be considered as a privileged credit in accordance with article 846(2) of the Commercial Code.

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

If the court requires that security is provided as per question 25, there are no specific rules for establishing its form or amount.

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 usually established by the court based on the petition of the arresting party. Such amount cannot exceed the value of the arrested vessel and can be reviewed subsequently through incidental proceedings. Regarding the form of security, there are no specific rules and it will depend on the court's resolution, but the guarantee usually requested and granted is a bank guarantee issued at the order of the court. As regards protection and indemnity insurance (P&I) club letters of undertaking, for a long time, P&I club letters of undertaking were accepted only if agreed by the arrest petitioner, mainly because the Chilean courts were not accustomed to them. However, in a recent arrest following a pollution case, the court hearing the arrest accepted a letter of undertaking with no prior approval from the arrest petitioner.

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 Chilean law the general rule is that either individuals or corporations are required to be represented by a counsel, which means granting a power of attorney (POA) with judicial faculties. The POA has to follow Chilean law and practice and the quickest way to produce it is via the ship agent assisting the vessel at the pertinent Chilean port (they are entitled to do so on behalf of the owner). Depending on the circumstances, a POA is not necessarily required at the first presentation but security may be needed to be provided.

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

There are no specific provisions as to this matter. However, the owner is in principle responsible for the associated costs, notwithstanding its right to claim damages if it appears that the arrest was wrongful.

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?

Chilean procedural regulations are silent on this matter. However, when an arrest is decreed as a prejudicial precautionary measure (ie, a measure to secure the outcome of a subsequent substantive action), it would be possible to arrest to obtain security and then pursue proceedings on the merits elsewhere. Note that the procedural obligations established must be met, namely, filing the petitioner's complaint requesting that the decreed arrest remains in force for a period that, in principle, is 10 days but may be extended for up to a total of 30 days provided there is sound basis to do so (see question 25).

However, this is an option that has to be further tested in Chilean courts.

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

An arrest requested by invoking a credit other than privileged ones, namely, a credit not covered under articles 844, 845 and 846 of the Chilean Commercial Code (see question 23), is subject to the general rules set forth by the Chilean Code of Procedure (CCP) regarding prejudicial and precautionary measures.

If the arrest is requested as a pre-judicial precautionary measure, in other words, a measure to secure the results of the exercise of the forthcoming action against the debtor, then the measure to be petitioned is the 'prohibition from sailing', which is subject to the following conditions:

- existence of qualified and serious grounds for requesting the measure;
- the value of the vessel upon which the precautionary measure falls must be determined; and
- security deemed as satisfactory by the court to cover the damages that may come up or fines that may be levied must be granted.

The prohibition from sailing may be also requested as a precautionary measure, together with filing the principal action itself. In this case, to obtain the measure it is necessary that either the defendant's wealth does not provide sufficient guarantee or that there are grounds to consider that he or she will try to conceal his or her assets. In addition, the claimant must provide supporting documentation to evidence at least a serious presumption of the right being claimed and counter-security if requested by the court. In this respect, it is worth noting that, when dealing with serious and urgent cases, the court may grant the measure without the required supporting documentation, for a term not longer than 10 days, until such documentation is submitted. In such a case, the court must necessarily require counter security.

Having said the above, under Chilean practice it is unusual to petition an arrest in accordance with the general rules of the CCP, as it faces more technicalities than an arrest based on the special system established by the Commercial Code for privileged credits.

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

In Chile, the closest concept is the use of precautionary prejudicial measures, which includes the following:

- deposit in court of a specific asset at stake that has led to a dispute between the parties;
- placing property under the authority of a court-appointed administrator;
- prohibition on concluding acts or contracts over some specific asset or real estate (prohibition). This measure is aimed at preventing the sale or transference of the asset or real estate; and
- sequestration of monies, assets or credits (sequestration).

In addition, in shipping matters there are special provisions contained in the Commercial Code for the verification of facts and the production of evidence before a trial.

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

In Chile bunkers can be subject to the general rules set forth by the CCP regarding pre-judicial and precautionary measures (see question 33).

Judicial sale of vessels

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

In the context of a ship arrest, the petitioner that requested it.

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?

According to the Commercial Code, the judicial sale of a vessel, whether voluntary or forced, must observe the rules and formalities set forth by the Code of Civil Procedure for the judicial sale of real estate. The procedure may take from a couple of months up to one or two years, subject to the debtor's behaviour towards the proceedings. Court costs are usually minor, but other costs might be generated, such as those relating to the administration of the attached property (incumbent on a depositary who has to render an account of his or her administration before the pertinent court).

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

It will depend on the ranking of the lawful and recognised privileged creditors (see question 23).

In respect of mortgage creditors, if a mortgage creditor of a lower grade seeks a mortgaged vessel against the personal debtor who owns it, the creditors of a preferred grade are entitled either to require the payment of their credits over the price of the auction according to their respective grades or to keep their mortgages over the auctioned vessel, provided their credits are not due. Saying nothing, during the challenge term, shall be understood as opting in favour of being paid at the price of the auction.

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

Privileged credits are extinguished either by the judicial sale registration at the pertinent registry or after 30 consecutive days, counted from the auction's date, whichever is the shortest period.

As to mortgage credits, the mortgage is extinguished if the auction is done with acknowledgement of the preferred mortgage creditors, if applicable.

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

Yes, but only as far as the sale concerns a foreign-flagged vessel.

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

No.

Carriage of goods by sea and bills of lading

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?

In 1982, Chile ratified the United Nations Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules), which were in force internationally as of 1 November 1992. Additionally, the Chilean legislature

included them in the Commercial Code in 1988 (Book III, Title V, paragraph 3), with minimal changes (the Chilean Rules).

Chile has not considered the ratification, acceptance or approval of the Rotterdam Rules. As explained above, Chile ratified the Hamburg Rules in 1982 and any departure from these Rules is very unlikely for the time being.

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 main rules regarding multimodal transport can be found in article 1041 et seq of the Chilean Commercial Code. Thus, article 1041 defines the main concepts applicable to multimodal transport: multimodal transport, contract of multimodal transport and operator of multimodal transport.

Furthermore, article 1043 sets out the regime of liability applicable in multimodal transport. The relevance of this article is that under Chilean law the liability of all those involved in any part or parts of the multimodal transport is joint.

Likewise, the Hamburg Rules must be taken into consideration when dealing with multimodal transport, especially in connection with the limitation of responsibility set out by the Hamburg Rules, of which Chile is a signatory country.

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

The shipper, consignee or third-party holder or endorsee, as the case may be.

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?

Under the Chilean Rules, any party may be subject to the provisions of our rules regarding carriage of goods by sea, which are applicable if:

- the port of loading or discharge as provided for in the contract of carriage by sea is located in Chile;
- the bill of lading or other document evidencing the contract of carriage by sea (such as the sea waybill, through bill of lading, short form bill of lading, etc) stipulates that the contract will be governed by Chilean law (such as through a clause paramount); or
- one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in Chile.

Chilean regulations are compulsorily applicable regardless of the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person. In this respect, it is important to note that clauses paramount have been held as unwritten by the Chilean Supreme Court (*AJ Broom v Exportadora*, Supreme Court of Chile, Case No. 683-98) as they would be contrary to public policy.

The Chilean Rules are applicable to all contracts of carriage by sea and it is not a condition that they are necessarily evidenced in a bill of lading or other documents of title such as sea waybills or short-sea notes. In respect to combined transport bills or through bills of lading, the Rules are applicable only to the corresponding sea leg carriage. The Rules do not apply to charter parties. Nonetheless, a bill of lading issued in compliance with a charter party is under the Rules if it governs the relation between the carrier and the holder of the bill of lading other than the charterer.

In the case of contracts providing for future carriage of goods in a series of shipments during an agreed period (eg, tonnage or volume contracts used for cargo projects), the Rules apply to each shipment. However, where a shipment is made under a charter party, the Rules do not operate, with the exception explained in the preceding paragraph.

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

Chilean law recognises a basic distinction between the 'carrier' (also known as the 'contractual carrier') and the 'actual carrier'. The former is defined as 'any person by whom or in whose name a contract

of carriage of goods by sea has been concluded with a shipper' (article 975, No. 1 of the Commercial Code) and the latter as 'any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted' (article 975, No. 2 of the Commercial Code).

The above distinction has very much simplified the identity of the carrier problem, as anyone who issues a bill of lading as a principal may be treated as a contractual carrier. This applies even to freight forwarders if they issue their own 'house' bill of lading and, as a matter of Chilean practice, many cargo claims are normally based on these documents alone. In this regard, it is important to note that under Chilean practice 'demise' or identity of carrier clauses have no effect.

In this respect, where the performance of the carriage or part thereof has been entrusted to an actual carrier, the carrier nevertheless remains responsible for the entire carriage. The carrier is jointly and severally responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his or her staff and agents acting within the scope of their employment. Additionally, all the provisions governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him or her.

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 Chilean Rules the main principle is that the liability of the carrier is based on presumed fault or neglect. Accordingly, the carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place while the goods were in the carrier's charge. If the shipowner is deemed an actual carrier (as opposed to the 'carrier' definition explained in question 44) and damage occurs during his or her custody period, such shipowner would be liable. However, in Chile a carrier may avoid liability if he or she discharges the burden of proving that he, his or her staff or his or her agents adopted all measures that could reasonably be required to avoid the cause of loss or damage, and consequences thereof.

The above is notwithstanding the carrier's right to limit liability as per the regimes explained in question 10, if applicable.

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

Under the Chilean Rules, there are no specific provisions dealing with deviation. If he or she is the cause of the loss or damage, the carrier is subject to the general test of proving that he or she took all measures that could reasonably be required to avoid the cause of loss or damage, and consequences thereof. However, the carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

48 What liens can be exercised?

According to Chilean law, privileges on a vessel are attached to credits arising from the following cases:

- legal cost and other disbursements caused by reason of a suit, in the common interest of the creditors, for the preservation of the vessel or for its forced alienation and distribution of the yield;
- the remuneration and other benefits arising from the contracts of embarkation of the vessel's crew, in accordance with labour regulations and civil law that regulate the concurrence of these credits, together with the emoluments paid to the pilots at the service of the vessel. This privilege applies to the indemnities that are due for death or bodily injuries of the servants who survive ashore, on board or in the water, and always provided that they stem from accidents related directly with the trading of the vessel;
- the charges and rates of ports, channels and navigable waters, together with fiscal charges in respect of signalling and pilotage;
- the expenses and remunerations due in respect of assistance rendered at sea and general average contribution. This privilege applies to the reimbursement of expenses and sacrifices incurred

by the authority or third parties, in order to prevent or minimise pollution damages or hydrocarbon spills or other contaminating substances to the environment or third-party property, when the fund of limitation of liability has not been constituted as established in Title IX of the Chilean Law of Navigation; and

- the indemnities for damages or losses caused to other vessels, to port works, piers or navigable waters or to cargo or luggage, as a consequence of the collision or other accidents during navigation, when the respective action is not susceptible to be founded upon a contract, and the damages in respect of bodily injury to the passengers and crew of these other vessels.

There is also a privilege attached to mortgage credit over major and minor vessels; however, the credits mentioned above will prefer any mortgage.

Last, privileges on a vessel are attached to the following credits, which will be preferred over the credits mentioned in the paragraphs above, namely:

- credits in respect of the sale price, construction, repair and equipping of the vessel;
- credits in respect of supply of products or materials, which are indispensable for the trading or conservation of the vessel;
- credits arising from contracts of passage money, affreightment or carriage of goods, including the indemnities for damages, lack and short deliveries in cargo and luggage, and the credits deriving from damages in respect of contamination or the spilling of hydrocarbons or other contaminating substances;
- credits in respect of disbursements incurred by the master, agents or third parties, for account of the owner, for the purpose of trading the vessel, including agency service; and
- credits in respect of insurance premiums concerning the vessel, be they hull, machinery or third-party liability.

Likewise, privileges on cargo are attached to credits arising from the following cases:

- legal and other disbursements caused by a lawsuit aimed at the preservation of the goods or the forced alienation and distribution of the yield, which is in the common interest of the creditors of the owner of the goods;
- reimbursement of expenditure and remuneration related to salvage operations and to which cargo interests contribute, as well as general average contributions;
- removal of shipwrecked goods; and
- freight and accessory charges, including loading, discharging and warehousing costs when applicable.

In this respect, in Chile, shipowners or carriers are not entitled to retain cargo on board at the port of discharge in order to secure the freight payment. Instead, they may file an application before the competent judge at the port of discharge to deposit the goods with a third party in order to sell them at auction. This application is normally handled quickly. Charterers or consignees are able to release the goods if they provide enough security for the outstanding payment; the judge decides whether the security offered is adequate.

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

The main regulations applicable to cargo delivery procedures are the Hamburg Rules, which have been incorporated without major changes into the Commercial Code (article 974 et seq) (see question 41). In addition, the Customs Ordinance, the Compendium of Customs Regulations, the Coastal Shipping Regulations and Customs resolutions regarding free trade zones are also applicable.

Although article 977 of the Commercial Code defines a 'bill of lading' as a document that obliges the carrier to deliver the goods upon presentation of the bill of lading to the carrier, under old customs regulations in place until 2005, this verification often could not take place. Customs Resolution No. 2250/05 overcame the problem of cargo delivery at Chilean ports without surrender of the original bill of lading – the problem arises as a result of the conflict between local shipping regulations and customs regulations. The resolution was issued after lengthy negotiations with the Customs Authority in the context of its internet

Update and trends

Recognition of salvors' rights to limit liability

In the context of a salvage and towage operation performed by a Chilean tugboat close to the Strait of Magellan, the tugboat's owners constituted a limitation fund in Chile in order to respond to the damage suffered by the different parties in connection with the subsequent sinking of the towed vessel. The owners based their request on being the owners and proprietors of the tugboat.

The plaintiffs opposed the fund's constitution, arguing – among other things – that, under Chilean law, salvors are not entitled to limit their liability.

Tonnage limitation of liability

The Chilean tonnage limitation regulations (ie, articles 889 to 904 of the Commercial Code) are inspired by the Brussels Convention 1957 and the Convention on the Limitation of Liability of Shipowners 1976.

With respect to tonnage limitation figures, the Commercial Code follows the 1976 convention. Under article 889 of the Commercial Code, the shipowner can limit its liability in the following cases:

- death or personal injury and damage to property on board;
- death or personal injury caused by any person for whom the owner is responsible, whether on board or ashore (in the latter case, the acts must relate to the ship's operation or the loading, discharging or carriage of relevant goods);
- loss of or damage to other goods, including cargo, caused by the above person or people, grounds, places and circumstances; and
- resulting liability concerning the damage caused by a vessel to harbour works, dry docks, basins and waterways.

Besides the shipowner, other people entitled to limit their liability under the Chilean tonnage regime include:

- the shipowner's staff;
- liability insurers;
- the operator, carrier, charterer and ship's proprietor, if different from the shipowner's staff; and
- individual employees in the previous bullet point, including the master and crew members, if sued.

Procedure for establishing limitation

The procedure for establishing a limitation fund in connection to general civil liability is regulated by article 1,210 et seq of the Commercial Code and is mainly based on articles 11 to 13 of Chapter III of the 1976 Convention.

Case study

Facts of the case

On 16 January 2009, during a voyage from Punta Loyola, Argentina to Punta Arenas, Chile, the captain of a fishing vessel transporting approximately 9,500 kilograms of gold bullion reported steering problems while navigating in adverse weather conditions and sought rescue assistance. The crew was evacuated successfully by an Argentine navy helicopter leaving the boat afloat and steaming ahead. Despite attempts by a Chilean tugboat to rescue the fishing vessel, the latter sank. The tugboat owners filed a request to constitute a limitation fund before the Valparaiso Second Civil Court for the potential liability associated with the sinking of the fishing vessel. The request was based on the company's capacity as shipowner of the tugboat.

Two opposition claims were filed against the constitution of the limitation fund. In this respect, one of the grounds argued by the plaintiffs was that the owners had acted as assistant or salvor and that this capacity – in their view – did not warrant the benefit of being able to limit their liability.

Decision

The Valparaiso Second Civil Court rejected the different opposition grounds alleged by the plaintiffs and upheld the limitation fund. As regards the specific allegation that in Chile salvors would not be entitled to limit liability, the court held that article 889 of the Commercial Code expressly provides that a shipowner can limit its liability without excluding its faculty for being, simultaneously, salvor of another vessel.

According to the Valparaiso Second Civil Court, the correct manner of interpreting the laws applicable to this case involves affirming that the salvor or assistant, which is also the proprietor and shipowner of the rescuing vessel, can limit its liability. Further, the conclusion is even broader: if the salvor holds any of the capacities in respect of which the right to limit liability exists, said salvor can do so.

Subsequently, both the Valparaiso Court of Appeals and the Supreme Court upheld the Valparaiso Second Civil Court judgment.

Comment

The decision examined above is one of the most relevant substantive decisions confirmed by the Supreme Court and should provide future certainty in safeguarding salvors' rights to limit their liability.

systems integration project for the development of customs operations. As a result of the resolution, ocean carriers in Chile are now directly involved in cargo delivery procedures, both in practice and from a legal point of view, for the first time. Accordingly, under the new regulations, if carriers proceed to deliver cargo without production of the bill of lading, they can face both contractual and tort liability.

Regarding limitation, it would operate exclusively under the circumstances explained in question 10.

50 What are the responsibilities and liabilities of the shipper?

The shipper is subject to a general rule that he or she is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his or her staff or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his or her part. In addition, the shipper is subject to further special rules on dangerous goods.

Shipping emissions

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

No.

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 used in our domestic territorial waters is that established in the MARPOL Convention.

The enforcement of these requirements is carried out by the local representative of the vessel's flag state authority and the sulphur content is verified according to the bunker delivery note certificates for the bunker's supply.

Ship recycling

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

Chile has not signed the Hong Kong Convention; however, the IMO Guidelines on Ship Recycling (2003) are applicable.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

Article 1203 of the Commercial Code establishes the general principle that the resolution of any maritime dispute, including those relating to marine insurance, is subject to mandatory arbitration. In short, all maritime disputes must be resolved by an arbitrator. However, in certain cases set forth by the same article, the ordinary civil courts may hear maritime disputes, including if the parties mutually agree to this and in the instance of claims relating to oil pollution regulated by the Navigation Law.

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

A party who wants to sue a foreign entity from Chile must do so by way of a letter rogatory (ie, a formal request from a local court to a foreign court). The party must submit the complaint to the relevant foreign civil or criminal court, and request that the court notify the respondent

through the appropriate channels. The foreign court will forward the complaint to the Chilean Supreme Court. Once the Chilean Supreme Court reviews the complaint and finds it appropriate for service, it will transfer the complaint to the Ministry of Foreign Relations. The Ministry will proceed to fulfil the request in accordance with the relevant mutual legal assistance treaty. The Ministry may also be guided by a specific bilateral treaty, or in the event that there is no formal bilateral arrangement, it may work directly with the foreign ministry of the country where the entity is legally domiciled.

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

Chile has a couple of well-known arbitration centres with a panel of maritime arbitrators specialising in maritime arbitration, namely the Santiago Arbitration and Mediation Centre of the Santiago Chamber of Commerce, and the Arbitration and Mediation Centre of Valparaíso of the Fifth Region Chamber of Commerce and Production.

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

Foreign judgments and arbitral awards are enforced through exequatur. This process is contemplated in the Civil Procedure Code under which judgments issued in a foreign country shall have in Chile the force granted to them in existing treaties; for their enforcement, the procedures set out by Chilean law shall be followed unless they have been modified by such treaties. If there are no treaties related to this matter, Chile shall grant to the judgment the same force granted to Chilean judgments by the jurisdiction originating the judgment. If the judgment comes from a jurisdiction that does not enforce Chilean judgments, it shall not be enforced in Chile. If none of the previous rules may be applied, foreign judgments shall be enforced in Chile provided that:

- they contain nothing contrary to the laws of the republic, except that procedural rules to which the case would have been subject in Chile shall not be considered;
- they are not contrary to national jurisdiction;
- the party against whom enforcement is sought was duly served with process, except that such party may still be able to allege that for other reasons it was prevented from making a defence; and
- they are not subject to appeals or further review in the country of origin.

A duly legalised copy of the judgment, officially translated into Spanish, if necessary, must be presented to the Chilean Supreme Court in order to begin the exequatur process. In the case of arbitral awards, its authenticity must also be certified by attestation of a High Court of the originating jurisdiction.

Notice of the enforcement request must be served on the party against whom it is sought. Such party shall have a period of 15 days, extended depending on where it is domiciled, to respond. An opinion from an independent court official is also requested by the Supreme Court.

The Supreme Court entertains the matter in a hearing at which the parties may make oral statements.

After enforcement is allowed, the judgment must be presented to the competent civil court to commence an executive proceeding (under which the defendant's assets can be foreclosed, if applicable).

In respect of foreign arbitral awards, a law on international commercial arbitration, based entirely on the UNCITRAL Model Law, was recently passed. Article 35 of that law regulates the recognition and enforcement of foreign arbitral awards. Article 36 lists the defences that can be asserted against enforcement and regulates orders of stay. Chile is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In this respect, Chilean courts have enforced all foreign arbitral awards that comply with the rules set out in the law for enforcement.

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

See question 54. As regard jurisdiction agreements, generally they are valid and enforceable with few exceptions, such as when dealing with claims under the Chilean adoption of the Hamburg Rules.

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

In Chile, there are no remedies available for bringing the case back to the country, but the defendant, notwithstanding the remedies he or she may have abroad, may contest the enforcement of the foreign judgment or award in Chile in accordance with the rules explained in question 57.

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?

Except for cases of compulsory jurisdiction, such as those relating to contracts of carriage of goods by sea, as explained in question 44, the defendant has a formal defence based on lack of competence.

Limitation periods for liability

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

Under Chilean maritime law the general principle is that any action relating to maritime disputes is time-barred after two years. Actions relating to passage contracts, freight, general average and contributions are time-barred within six months. In addition, in the case of collision actions, the two-year period is extended to three years if the responsible vessel was not arrested or detained while in Chilean jurisdictional waters, provided that the vessel abandoned them without calling at a Chilean port after the collision.

As to time extensions, under Chilean maritime law the running of the corresponding limitation period can be interrupted by a declaration in writing to the claimant by the person to whom the limitation period



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applies. This can be done successively but the corresponding period shall run again as of the date of the last declaration.

62 May courts or arbitral tribunals extend the time limits?

Not unless otherwise agreed by the parties.

Miscellaneous

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

Chile has not ratified the Maritime Labour Convention.

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 speaking, Chile applies the principle of the immutability of the contracts (mainly based on article 1545 of the Chilean Civil Code). In this respect, there are no express regulations that allow modification of the terms of a shipping contract, where economic conditions have made contractual obligations more onerous to perform. Nevertheless, and although not within the shipping industry, in recent years there have been a few cases accepting this criterion, which is based on the 'unforeseen event' theory supported by some local scholars.

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

No.

China

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Newbuilding contracts

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, the parties can agree the time of title transfer in the shipbuilding contract, but in any event the transfer of the ship's title shall be registered with the competent ship registration authorities, otherwise the transfer of title shall not be valid against a third party.

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

China (PRC) is still implementing a foreign currency control policy. As such, if a refund guarantee is issued by a bank or other financial institution in China for the benefit of a foreign legal person, the refund guarantee shall be subject to prior approval of the State Administration of Foreign Exchange of the PRC, otherwise the refund guarantee will be considered void under Chinese law.

If a refund guarantee is considered void, the statutory provisions governing the consequences of a void contract shall apply and the party at fault shall compensate the innocent party.

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

Yes, in theory the shipowner is entitled to apply to the competent maritime court to issue a maritime compulsory order in accordance with the Special Maritime Procedural Law to press the shipyard to deliver the vessel, but generally the shipowner will be demanded to provide counter-security when applying to the court to issue the order, and the sum of the counter-security will be up to the ship's value.

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?

As guided by the doctrine of privity of contract, unless otherwise provided, the shipbuilding contract will only prevail between the contractual parties. As such, except for the original shipowner who concluded the shipbuilding contract with the shipyard who can make a claim in contract, the other parties who sustained damage because of a defective vessel can only claim against the shipyard under the tort law.

It is still controversial on whether the Product Liability Law can apply in the shipbuilding industry.

Ship registration and mortgages

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 Regulations on the Registration of Ships of 1994 (amended in 2014), the following vessels are eligible for registration under the flag of China:

- vessels owned by Chinese citizens whose residence or principal place of business is in China;

- vessels owned by corporate legal persons that have been established in accordance with Chinese law and have their principal place of business in China, provided that, where the registered capital of the legal person has foreign investment, the share of investment of the Chinese investors shall not be less than 50 per cent;
- vessels for the public services of China; and
- other vessels that the China Maritime Safety Administration (MSA) deems to be registered.

The registration of military vessels, fishing vessels and sport vessels in China is governed by other regulations.

A foreign vessel demised-chartered by a Chinese corporate legal person can be registered under the PRC flag provisionally, but the original registration port or country shall also be listed in the registration certificate.

A vessel under construction in China may be registered under the PRC flag and granted with a certificate of temporary Chinese nationality after registration.

In addition, according to Measures on the Registration of Ships 2016, a vessel owned by corporate legal persons incorporated in China only for the internal use, or a vessel owned or demise-chartered by corporate legal persons incorporated in the pilot free trade zone of China that engages only in the international trade, can be registered under the PRC flag even if the share of investment of the foreign investors exceeds 50 per cent.

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

All individual persons, legal corporates or legal entities with residence or principal place of business in China may apply to register a ship in accordance with the law and rules.

7 What are the documentary requirements for registration?

Generally, the documents evidencing the legal status of the ship shall be submitted when applying for registration. Accordingly, the documentary requirements for registration may vary depending on how the title of the ship is acquired.

For example, for the registration of ownership of a purchased ship the documents shall include:

- a bill of sale or the sales contract, and the document of delivery and acceptance of the ship;
- a document issued by the ship registry at its original port of registry certifying the deletion of the registration of ownership; and
- a document evidencing that the ship is not under a mortgage or that the mortgagees have agreed to the transfer of the mortgaged ship to the other person.

For the registration of ownership of a newly built ship the documents shall include the shipbuilding contract and the document of delivery and acceptance of ship, or the shipbuilding contract only if the ship is still under construction.

For the registration of ownership of a ship procured through inheritance, bestowal, auction under legal process or court judgment, a document with appropriate legal effect evidencing the transfer of the ship's ownership shall be submitted.

In addition, the valid technical documents of the ship issued by an authorised organisation for the survey of ships shall be further

submitted if applying for registration of the Chinese nationality of the ship, which may include:

- international tonnage measurement certificate;
- international loadline certificate;
- cargo ship safety construction certificate;
- cargo ship safety equipment certificate;
- passenger quota certificate;
- passenger ship safety certificate;
- cargo ship safety radiotelegraphy certificate;
- international oil pollution prevention certificate;
- ship safety navigation certificate; and
- other relevant technical certificates.

If a shipowner applies for the registration of Chinese nationality of a ship purchased overseas with foreign nationality, then a certificate issued by the original foreign ship registry authorities to the effect that the ship's original nationality has been deleted or will be immediately deleted upon the new registration is made, will be also required.

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

Dual registration and flagging of a ship is not permitted under Chinese law. The Chinese authorities will not grant Chinese nationality to a ship before it is confirmed that its original nationality registration is deleted or suspended.

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

For normal merchant ships, the Maritime Safety Administration (MSA) is the competent authority for ship registration including registration of ship mortgages. The following information regarding registration of ship mortgage will be recorded:

- the name and address of the mortgagee and the mortgagor of a ship;
- the name and nationality of the mortgaged ship and the authority that issued the certificate of ownership and the certificate number thereof; and
- the amount of debt secured, the interest rate and the period for repayment of the debt.

For the military vessels, fishing vessels and sport vessels, ship registration is governed by other regulations in China.

Limitation of liability

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

The limitation regime applicable to maritime claims is mainly established by way of domestic legislation in China, and the parties who can limit their liability are the shipowner (including the charterer and the operator of a ship) and salvor, the servants or agents of the shipowner or salvor, and the insurer of liability of the shipowner or salvor, whichever is applicable.

The main content of the maritime limitation regime in China is summarised as follows.

Limitation of liability of the carrier in international carriage of goods

China is not party to the Hague-Visby Rules, but a carrier's liability for the loss of or damage to the goods is the same as that provided for in the Hague-Visby Rules as amended by their 1979 special drawing rights (SDR) Protocol, which is provided in Chapter IV of the Maritime Code of the PRC.

More specific, a carrier's liability shall be limited to an amount equivalent to 666.67 SDR per package or other shipping unit, or two SDR per kilogram of the gross weight of the goods lost or damaged, whichever is the higher. The liability of the carrier for the economic losses resulting from delay in delivery of the goods when the carrier fails to deliver the goods within the time frame expressly agreed between the carrier and the shipper, shall be limited to an amount equivalent to the freight payable for the goods so delayed. A higher limit of liability may be agreed between the carrier and the shipper in writing.

Limitation of liability for maritime claims for ships with gross tonnage in excess of 300 tonnes engaging in international trade

The Convention on Limitation of Liability for Maritime Claims 1976 (LLMC Convention 1976) is only applicable in the Hong Kong Special Administration Region of PRC, but not applicable in mainland China.

The new limits as provided for in its 1996 protocol will not apply in the PRC (including Hong Kong).

However, the main contents as provided in the LLMC Convention 1976 have been adopted in Chapter XI of the Maritime Code. More specifically, it is provided that the following maritime claims are subject to limitation of liability:

- (i) claims in respect of loss of life or personal injury, or loss 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, as well as consequential damages resulting therefrom;
- (ii) claims in respect of loss resulting from delay in delivery in the carriage of goods by sea or from delay in the arrival of passengers or their luggage;
- (iii) 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
- (iv) 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, and further loss caused by such measures.

With respect to the remuneration set out in (iv) above for which a person liable pays as agreed upon in the contract, the person liable cannot limit liability in relation to the obligation for payment.

The amount of limitation of liability for maritime claims of a vessel engaged in international trade with a gross tonnage in excess of 300 gross tonnes (GT) shall be calculated as follows.

In respect of claims for loss of life or personal injury

- (i) An amount of 333,000 SDR for a ship of between 300 and 500 GT; and
- (ii) for a ship in excess of 500 GT, the limitation under (i) shall be applicable to the first 500 GT, and the following amounts in addition to that set out under (i) shall be applicable to the gross tonnage in excess of 500 GT:
 - for each ton from 501 to 3,000 GT: 500 SDR;
 - for each ton from 3,001 to 30,000 GT: 333 SDR;
 - for each ton from 30,001 to 70,000 GT: 250 SDR; and
 - for each ton in excess of 70,000 GT: 167 SDR.

In respect of claims other than those for loss of life or personal injury

- (i) An amount of 167,000 SDR for a ship with a gross tonnage ranging from 300 to 500 GT; and
- (ii) for a ship with a gross tonnage in excess of 500 GT, the limitation under (i) shall be applicable to the first 500 GT, and the following amounts in addition to that under (i) shall be applicable to the part in excess of 500 GT:
 - for each ton from 501 to 30,000 GT: 167 SDR;
 - for each ton from 30,001 to 70,000 GT: 125 SDR; and
 - for each ton in excess of 70,000 GT: 83 SDR.

Limitation of liability of any salvor not operating from any ship or operating solely on the ship to, or in respect of which, he or she is rendering salvage services, shall be calculated according to a GT of 1,500 tonnes.

Limitation of liability for maritime claims for ships with gross tonnage not exceeding 300 tonnes and those engaged in coastal transport services as well as those for other coastal operations

In respect of claims for loss of life or personal injury

- An amount of 54,000 SDR for a ship with a gross tonnage in excess of 20 GT and less than 21 GT; and
- for a ship with a GT in excess of 21, 1,000 SDR shall be added for each gross ton in excess of 21 GT.

In respect of claims other than those for loss of life or personal injury

- An amount of 27,500 SDR for a ship with a gross tonnage in excess of 20 GT and less than 21 GT; and

- for a ship with a GT in excess of 21 GT, 500 SDR shall be added for each GT in excess of 21 GT.

Limitation of liability for maritime claims for ships engaging in transport service between ports of China or coastal operations in China shall be calculated on the basis of 50 per cent of the limitation of liability provided for ships engaging in international trade.

Limitation of liability for oil pollution damage

Limitation of liability for oil pollution damage within the scope of application of the International Convention on Civil Liability for Oil Pollution Damage of 1992 (CLC 1992), to which China is a party, shall be determined in accordance with the convention.

If oil pollution damage falls outside the scope of application of the CLC 1992, then the limitation of liability shall be determined in accordance with (2) or (3) above.

11 What is the procedure for establishing limitation?

The procedure for establishing a limitation fund is provided for in Chapter IV of the Special Maritime Procedure Law. After the occurrence of a maritime accident, the shipowner or other person who is entitled to limit liability may apply to a maritime court with jurisdiction for the establishment of a limitation fund for the maritime claims subject to limitation.

The limitation fund can be established either by way of cash deposit or by way of security satisfied with the competent maritime court.

The limitation fund shall be established in yuan and shall be calculated according to the conversion rate of yuan against SDR of the day when the award issued by the court allowing the establishment of a limitation fund becomes effective.

If following the maritime accident there is only one claimant, then the shipowner may invoke the liability limitation as defence during the hearing, without applying for the constitution of the limitation fund.

The establishment of a limitation fund may be applied for either before legal proceedings have been initiated or during the legal proceedings that a claim has been commenced, but in any event the application for establishment of a limitation fund shall be made before the delivery of first-instance judgment.

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

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 act or omission done with the intent to cause such loss, or recklessly and knowing that such loss would probably result.

In practice it is very difficult to prove a shipowner's wilfulness or recklessness to cause the loss. As such, although there have been some precedent cases wherein the shipowners' right of limitation is broken, it is a very rare scenario.

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

China is party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 1974 as amended by its 1976 SDR Protocol. Chapter V of the Maritime Code has the same provisions as those contained in the Athens Convention, except for the limits of liability of carriers in the carriage of passengers between Chinese ports. Details are as follows.

Limitation of liability of the carrier in international carriage of passengers by sea

The carrier's liability is the same as that provided for in the Athens Convention of 1974 as amended by its 1976 SDR Protocol and shall be limited to the following:

- for the death or personal injury of the passenger: 46,666 SDR per passenger per carriage;
- for loss or damage to the passengers' cabin luggage: 833 SDR per passenger per carriage;
- for loss or damage to the passengers' vehicles, including the luggage carried therein: 3,333 SDR per vehicle; and
- for loss or damage to other luggage: 1,200 SDR per passenger per carriage.

A higher limit of liability may be agreed between the carrier and the passenger in writing.

The total amount of limitation of liability of the shipowner for loss of life or personal injury to passengers shall be an amount of 46,666 SDR multiplied by the number of passengers the ship is authorised to carry according to the ship's relevant certificate, but the maximum amount of compensation shall not exceed 25 million SDR.

Limitation of liability of the carrier in carriage of passengers by sea between the ports of China

The carrier's liability shall be limited to the following:

- for death or personal injury to the passenger: 40,000 yuan per passenger per carriage;
- for loss or damage to the passengers' cabin luggage: 800 yuan per passenger per carriage;
- for loss or damage to the passengers' vehicles, including the luggage carried therein: 3,200 yuan per vehicle; and
- for loss or damage to the passengers' other luggage: 20 yuan per kilogram of the luggage.

A higher limit of liability may be agreed between the carrier and the passenger in writing. The total amount of limitation of liability of the shipowner for loss of life or personal injury to passengers shall be 40,000 yuan multiplied by the number of passengers that the ship is authorised to carry according to the ship's relevant certificate, but the maximum amount of compensation shall not exceed 21 million yuan.

Port state control

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

As empowered by the Maritime Traffic Safety Law of the PRC and the Rules on the Supervision and Administration of the Ship's Safety in the PRC, the MSA acts as the port state control agency in China.

15 What sanctions may the port state control inspector impose?

A ship safety inspector from MSA may put forward one or some of the following proposals if a foreign vessel is determined to have a defect or defects found during a safety inspection:

- warning;
- correction of defects before the vessel sails;
- correction of defects within a certain time limit after the vessel sails;
- detention of the vessel;
- prohibition on the vessel from entering a port;
- restriction of operation of the vessel;
- ordering the vessel to sail to a designated zone; and
- deporting the vessel from a port.

Where a vessel that violates the law refuses to allow a safety inspection or obstructs the inspector conducting a safety inspection, or where a vessel does not correct its defect, the MSA shall have the right to impose a fine on the vessel, its owner, operator or manager up to 30,000 yuan.

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

The interests of the ship against which the detention order is imposed shall have the right to make a statement and contention of the sanctions made by the MSA inspectors. The MSA inspectors shall also inform the appeal procedure to the ship interests.

The ship interests may also consider commencing administrative proceedings against the MSA requesting for revoking the detention order, but the process will be very lengthy.

Classification societies

17 Which are the approved classification societies?

The classification society approved by the Chinese government to conduct statutory surveys of vessels flying or planning to fly the Chinese flag is the China Classification Society.

Subject to the approval by the Ministry of Transport of the PRC, foreign classification societies can establish representative offices in China to conduct survey on foreign vessels (and on Chinese vessels in certain scenarios). As far as we are aware there are the following

ship survey institutions established in China by foreign classification societies:

- Lloyd's Register Classification Society (China);
- Bureau Veritas Marine China;
- DNV GL (China);
- Nippon Kaiji Kyokai (China);
- Korean Register of Shipping (China);
- Registro Italiano Navale (China);
- Dalian Jack Maritime Technology Consultants;
- Isthmus Bureau of Shipping Dalian;
- Panama Maritime Documentation Services (Beijing);
- Russian Maritime Register of Shipping (Tianjin);
- Indian Register of Shipping (Qingdao);
- ABS Greater China (Headquarters Shanghai);
- Union Bureau of Shipping (Dalian); and
- Universal Maritime Bureau (Yantai).

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

According to the relevant laws and rules, the classification society or the surveyors might be held to assume administrative liability should there be faults in the surveys.

In theory the classification society or the surveyors could also be held to assume civil liability if the causation between their faults and the damage to other parties can be justified, but in practice we have not seen any precedent cases to this effect in China.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Article 40 of the Maritime Traffic Safety Law of 1983 amended in 2016 authorises the MSA to take necessary and compulsory measures where a vessel is involved in an accident that jeopardises or may jeopardise traffic safety. It is provided that, with respect to a sunken or drifting vessel or other object that affects the safety of navigation, the dredging of waterways or constitutes a threat of explosion, the owner or operator shall lift or remove such a ship or object within a deadline set by the MSA; otherwise, the MSA may take compulsory measures to lift or remove the ship or object at the expense of the owner or operator of the ship or object.

Where a vessel is involved in an accident occurred in inland waterways, the Regulations on the Traffic Safety in Rivers of 2002 amended in 2017 shall apply; article 42 of the regulations has the same effect as the Maritime Traffic Safety Law of 1983.

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

The following international conventions and protocols in relation to collision, wreck removal, salvage and pollution are in force in China:

- International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910;
- Convention on the International Regulations for Preventing Collisions at Sea 1972 and its protocols;
- International Convention on Maritime Search and Rescue 1979;
- International Convention on Salvage 1989;
- International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 and other protocols;
- International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969;
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972;
- Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973;
- International Convention on Oil Pollution Preparedness, Response and Cooperation 1990;
- International Convention on Civil Liability for Oil Pollution Damage 1992;
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (applicable in Hong Kong Special Administrative Region only);
- International Convention on Civil Liability for Bunker Oil Pollution Damage 2001; and

- Nairobi International Convention on the Removal of Wrecks 2007, but only applied in the Exclusive Economic Zone, not applicable in territorial waters.

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 China. What is recommended by the China Maritime Arbitration Commission is the Standard Form of Salvage Contract Form of 1994. In other words, the parties can agree to apply Lloyd's standard form of salvage agreement.

The main companies that carry out salvage operations in China are the Yantai Salvage Bureau, the Shanghai Salvage Bureau and the Guangzhou Salvage Bureau, which are all under the direction of the Ministry of Transport.

There are also many private salvage companies which can carry out salvage operations in China. Usually all these salvage companies have close connection with MSA.

Ship arrest

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

China is a party to the International Convention Relating to the Arrest of Seagoing Ships 1952, but this convention is applicable only in Hong Kong. China is not a party to the International Convention on the Arrest of Ships 1999.

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?

According to article 21 of the Special Maritime Procedure Law of PRC, an application may be made for the arrest of a vessel with respect to the following maritime claims:

- loss of or damage to property caused by vessel operation;
- loss of life or personal injury in direct connection with vessel operation;
- salvage at sea;
- damage or threat of damage caused by a vessel to environment, coast or relevant interested persons:
 - measures taken to prevent, diminish or eliminate such damage;
 - compensation paid for such damage;
 - costs for reasonable measures taken or to be taken for reinstatement of the environment;
 - losses caused or likely to be caused by such damage to a third party; and
 - damage, costs or losses of a similar nature;
- expenses related to the refloating, removal, reclamation or destruction of a sunken vessel, wreck, run-afloat vessel or abandoned vessel, or expenses related to making them harmless, including those relating to refloating, removal, reclamation or destruction of the things that have remained or no longer remain on board the vessel, or to making them harmless, and expenses related to the maintenance of an abandoned vessel and its crew;
- any agreement in respect of the employment or chartering of a vessel;
- any agreement in respect of the carriage of goods or passengers;
- loss of or damage to, or in connection with, goods carried on board a vessel (including luggage);
- general average;
- towage;
- pilotage;
- goods supplied or services rendered to a vessel for its operation, management, maintenance or repair;
- construction, reconstruction, repair, refurbishment or equipment of a vessel;
- dues and charges of port, canal, dock, harbour and other waterways;
- crew's wages and other monies, including the costs of repatriation and social insurance contributions payable for the crew;
- expenses paid for a vessel or a shipowner;

- insurance premiums (including mutual insurance calls) for a vessel, payable by or paid for a shipowner or bareboat charterer;
- any commissions, brokerages or agency fees in respect of a vessel, payable by or paid for a shipowner or bareboat charterer;
- any dispute over ownership or possession of a vessel;
- any dispute between joint owners of a vessel over the employment or earnings of the vessel;
- a ship mortgage or rights of a similar nature; and
- any dispute arising out of a contract of sale of vessel.

The arrest of a vessel cannot be applied for based upon claims other than the above-listed maritime claims, unless for the enforcement of an effective court judgment, arbitration award or other legal document.

The maritime court may arrest other vessel that, when the arrest is attached the vessel is owned by the owner, bareboat charterer, time-charterer or voyage charterer of the offending vessel who is liable for the maritime claim giving rise to the arrest, but this rule shall not apply if the claim is in relation with ownership or possession of a vessel.

According to article 23 of the Special Maritime Procedure Law, a demise-chartered vessel can be arrested for a claim against the demise-charterer, provided that when the ship arrest is attached the vessel is still owned or demised-chartered by the party who is liable for the claim.

A vessel under time-charter cannot be arrested for a claim against the time-charterer.

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

According to article 22 of the Maritime Code, the following maritime claims shall be entitled to maritime liens:

- payment claim for wages, other remuneration, crew repatriation and social insurance costs made by the master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts;
- claims in respect of loss of life or personal injury occurring in the operation of the ship;
- payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges;
- payment claims for salvage payment; and
- compensation claims for loss of or damage to property resulting from tortious acts in the course of the operation of the ship.

Compensation claims for oil pollution damage caused by a ship carrying more than 2,000 tonnes of oil in bulk as cargo that has a valid certificate attesting that the ship has oil pollution liability insurance coverage or other appropriate financial security are now within the scope of sub-paragraph (v) of the preceding paragraph.

The maritime claims set out in (i) to (v) shall be satisfied in the order in which they are listed. Any of the maritime claims set out in (iv) arising later than those under (i) to (iii), however, shall have priority over those under (i) to (iii). Where there are more than two maritime claims under (i), (ii), (iii) or (v), they shall be satisfied at the same time, regardless of their respective occurrences; where they cannot be paid in full, they shall be paid in proportion. Should there be more than two maritime claims under (iv), those arising later shall be satisfied first.

25 What is the test for wrongful arrest?

While article 20 of the Special Maritime Procedure Law has explicit provision to the effect that a maritime claimant who has wrongfully applied for preservation of a maritime claim shall indemnify the person against whom the claim is made or the interested person for the losses thus incurred, which suggests China has the mechanism of wrongful arrest, so far there has not been any clear legislation defining what kind of ship arrest action shall be deemed as wrongful arrest.

It is generally considered that, so far as the claimants can establish a prima facie claim against the owner or bareboat charterer of the ship, the ultimate failure of the claim is not sufficient to substantiate wrongful arrest. We tend to the view that bad faith will be an important element taken into account by the Chinese judge when deciding the dispute of wrongful arrest, but in practice we very rarely see precedents wherein the claimant is adjudged to assume indemnity liability on account of wrongful arrest.

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?

China does not have the regime of suit in rem, and therefore a bunker supplier will have difficulties in applying for a ship arrest order based on a bunker supply contract with the charterers.

As an exception, if the charterers mentioned above refer to bareboat charterers, then the ship arrest order might be granted by the maritime court provided that when the ship arrest is attached the vessel is still owned or demised chartered by the party who is liable for the bunker price.

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

According to the Special Maritime Procedure Law and the Supreme Court's guidance, the maritime court shall enjoin the arresting party to provide counter-security. In practice, an application for ship arrest may not be allowed if the maritime claimant fails to provide a counter-security as required by the maritime court.

According to the Supreme Court's guidance, if the arresting party is a crew member involved in the employment dispute, or a claimant suffered personal injury at sea or other navigable waters, and in the meantime the related facts and the rights and obligations are clear, the maritime court can refrain from demanding a counter-security from the arresting party.

The counter-security to be provided by the arresting party could be cash deposit or other security such as a letter of security issued by a Chinese commercial bank or a Chinese insurance company or the China Shipowners Mutual Assurance Association (China Protection and Indemnity (P&I) Club). A letter of security issued by a foreign entity is normally not acceptable to a maritime court.

In respect of the amount of a counter-security, article 76 of the Special Maritime Procedure Law provides that it shall be equal to the amount of loss that may be suffered by the arrested party as a result of the arrest and its specific amount shall be decided by the pertaining maritime court. The Supreme Court's guidance further provides that the amount of a counter-security shall cover the vessel's maintenance costs and expenses occurring during the period of arrest, loss of use caused by the arrest and the cost that the respondent may incur in procuring the security for the release of the vessel from the arrest. If after ship arrest it is revealed that the counter-security provided by the applicant has become insufficient to cover the possible loss suffered by the respondent, the maritime court shall order the applicant to provide supplementary counter-security.

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?

According to article 76 of the Special Maritime Procedure Law, the amount of security shall be equal to the amount of the claim but shall not exceed the value of the vessel arrested. In practice a reasonable uplift will be allowed when deciding the security amount.

The arrested party may apply to review the amount of security ordered by the maritime court, but the court's order is not subject to appeal. In addition, according to article 77 of the Special Maritime Procedure Law, even after the arrested party or other person has provided the security, they may apply to the maritime court for reduction, alteration or withdrawal of the security if they have justifiable reasons to make such request.

The security to be provided by the arrested party could be cash deposit or other security acceptable to the maritime court, such as a letter of security issued by a Chinese commercial bank or a Chinese insurance company or the China P&I Club. A letter of security issued by a foreign commercial bank or insurance company is normally not acceptable to the maritime court, unless agreed by the arresting party.

If the parties have disputes on the forms and amount of the security to be provided (including the wording of the letter of guaranty), the maritime court shall make a ruling.

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?

Strictly speaking, when a party appoints a lawyer to make the arrest application, the lawyer shall submit an original power of attorney (POA), proof of incorporation of the arresting party and certificate of identity of legal representative of the arresting party in addition to other application documents proving that the arresting party has a maritime claim that may give rise to the arrest of the vessel to be arrested, together with the exact information of movement or whereabouts of the ship to be arrested.

If the arresting party is registered outside China, the POA and all other application documents shall be notarised by a local notary public in the country where the arresting party is registered and legalised by the Chinese embassy or consulate in that country. The Apostille Convention is applicable in Hong Kong and Macao, but not in mainland China.

If there is insufficient time available to comply with all the required formalities, it is up to the maritime court to decide whether to set the arrest procedure in motion while the arresting party or its lawyer undertakes to the court to complete the formalities within a time limit.

If the POA or other application documents are not in Chinese, a Chinese translation is needed. It varies in different courts as to the translation formalities (ie, some courts may require translation made by a sworn public translator).

Usually the application documents shall be filed in original, which shall be executed by the arresting party. If all the maritime court's requirements on the documentation can be satisfied, then on average the ship arrest order can be granted within 48 hours.

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

Normally a ship shall be managed by the shipowner or the bareboat charterer (or the ship management company it is entrusted to) during the period of arrest. If the shipowner or the bareboat charterer does not perform the duties for the ship management, then the maritime court may entrust a third person or the maritime claimant to manage the ship on behalf thereof; relevant costs arising therefrom shall be borne by the shipowner or the bareboat charterer, or may be paid preferentially out of the proceeds from auction of the ship.

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 the relevant Chinese law, the arresting party shall pursue the claim on its merits by bringing an action with the maritime court that effected the arrest of the vessel or other maritime courts which shall have jurisdiction over the disputes, within 30 days of the date of the arrest of the vessel, otherwise the maritime court will order the release of the vessel under arrest or return the security that has been provided to release the vessel.

It is also provided that if the parties to a ship arrest action have jurisdiction or arbitration agreement, then in principle such agreement shall be respected. That said, theoretically speaking it is possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere pursuant to the jurisdiction or arbitration agreement, but in any event the proceedings must be commenced within 30 days of the date of arrest of the vessel.

For completeness, if the parties to a ship arrest action wish to have a longer amicable negotiation period and do not wish to commence the proceedings within 30 days after the ship arrest, the parties may reach an agreement to the effect that the reliable security is provided by the arrested party to the claimants directly (rather than providing the security to the maritime court) and following which the claimants shall file an application to the maritime court for releasing the ship. In that event the maritime court will not intervene with the dispute resolution and the 30-day time limit will not apply.

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

In theory, for obtaining security to secure a claim, all the property owned by the party who shall be liable for a claim can be subject to preservation by the competent court as provided in the Civil Procedural law of the PRC, and the procedure of property preservation is generally similar with the procedure of ship arrest.

In addition, if the ship to be arrested flies the PRC flag, it could also be subject to 'living arrest' by the Chinese maritime court, which means that after a court order for arrest of the vessel is issued, the vessel can still be allowed to engage in trading as agreed to by the maritime claimant, but the disposal of the vessel or mortgage on the vessel is restricted or prohibited.

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

The Special Maritime Procedural Law of the PRC has provision for a maritime compulsory order, and orders for delivery up of property (usually the cargo) fall within this category.

The Special Maritime Procedural Law also has provisions for preservation of evidence and preservation of property. In addition to the ship arrest, the other property subject to preservation as explicitly provided in the Special Maritime Procedural Law may include cargo carried by ship, bunkers and materials on board of ship, etc.

To apply to the competent maritime court to grant orders for delivery up or preservation of evidence or property, the applicant shall prove that it is a party to a maritime claim while the respondent is a party liable for or relevant to the claim. The applicant shall also prove the emergency to take such actions and provide counter-security to the maritime court as demanded.

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 to apply to the competent maritime court to take arrest actions on bunkers, given that the bunkers are owned by the party against whom the claim is made.

However, in practice it is not easy to persuade the maritime court to grant an attachment order for bunkers only. The reason behind this is that if the liable party refuse to arrange security in consideration of the lift of the attachment order, the maritime court would have to consider pumping the bunkers out from the ship to other place (to avoid the unreasonable detention to the ship) for further disposal, while such actions would most likely need the other authorities' assistance (eg, the MSA, which will be in charge of oil-pollution prevention during the bunker pumping action, customs, which will be in charge of taxation of the bonded bunker, etc) which is beyond the control of the maritime courts.

Accordingly, unless pre-coordination among the relevant authorities for pumping the bunkers can be sorted out, the chance of obtaining an arrest order over the bunkers would be remote in China.

Judicial sale of vessels

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

Generally, any party who applied to the maritime court for arresting the vessel can apply for judicial sale of the vessel arrested, if the demand of security is not satisfied within prescribed time limit (ie, 30 days after the ship is arrested) and in the meantime it is not appropriate to keep the ship under arrest.

If the arresting party does not apply for judicial sale of the vessel after filing a lawsuit or commencing arbitration, the person against whom the claim is made, namely, the owner or bareboat charterer of the vessel, may also apply to the maritime court for judicial sale of the vessel. In this scenario the proceeds acquired through the judicial sale will be kept by the maritime court.

In practice we have not seen any precedent case fall within the latter circumstance.

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?

In brief, the procedures for judicial sale of an arrested ship are as follows:

- The arresting party files an application for judicial sale of the vessel under arrest.
- The maritime court shall examine the application and make an order to allow or disallow judicial sale. The order is subject to argument, but the maritime court shall have the right to make the decision.
- The maritime court that orders judicial sale of a vessel shall issue an announcement in newspapers or other news media, within a period of not less than 30 days. The registration authority of the ship as well as the maritime lien holder, mortgagee and shipowner known to the maritime court shall be served with the notice of judicial sale.
- The creditors who wish to make claim against the ship interests shall within the prescribed period apply in writing for the registration of their respective rights with relevant evidence. The maritime court shall examine the documents and adjudge to accept or reject the registration.
- The maritime court shall organise a committee of judicial sale, and the committee shall arrange for the assessment and evaluation of the vessel.
- The committee of judicial sale shall display the vessel for judicial sale, make the vessel available for inspection and provide information about the vessel.
- The bidders shall register with the committee of judicial sale within a prescribed time limit and pay a certain amount of bidding deposit for purchase of the vessel.
- The judicial sale shall be made in public.
- If the vessel is successfully sold in the judicial sale, the vessel shall be delivered to the purchaser after the total price is paid into an escrow account as designated by the maritime court. The maritime court shall issue an announcement stating that the vessel has been sold in a judicial sale and delivered to the purchaser and serve notice to the related ship registration authorities.
- If the judicial sale fails at first instance, the maritime court may consider organising another sale in accordance with the Auction Law of the PRC.

The whole process of a judicial sale may take two to three months. The maritime court will charge costs covering inspection, evaluation of the vessel, announcement of judicial sale, distribution of the proceeds of sale, other expenses for the common benefits of the creditors and other court fees in relation to the judicial sale.

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

If the creditors cannot reach an agreement on the distribution of the proceeds of sale, the maritime court shall decide the order of priority of claims against the proceeds of sale according to the order of priority established by the Maritime Code as follows:

- the court costs for the litigation, the expenses incurred for the preservation and sale of the vessel, distribution of the proceeds of sale and other expenses for the common benefits of the creditors;
- the maritime claims as secured by maritime lien (see question 24);
- the shipbuilder's claim for shipbuilding expenses or ship repairer's claim for ship repair expenses that are secured by possessory lien on the vessel constructed or repaired, if any;
- the claim secured by ship mortgage; and
- the other ordinary claims.

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

Yes, the judicial sale will serve to extinguish all prior liens and encumbrances on the vessel including any maritime lien, mortgage of the vessel and possessory lien on the vessel.

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

It would appear that the related Chinese law does not have provisions regarding the validity of judicial sale of a vessel in other jurisdictions, nor any international convention or bilateral treaty that China has entered in dealing with this issue. As such, we view it is still an undecided issue on whether the judicial sale of a vessel in a foreign jurisdiction will be recognised in China.

So far we have not seen any precedent cases tried by the Chinese maritime courts regarding a dispute of the validity of the judicial sale in other jurisdictions; as such we view the judicial sale of a vessel in a foreign jurisdiction to be recognised in China in general.

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

China is a signatory to the International Convention on Maritime Liens and Mortgages 1993, but has not ratified this convention.

Carriage of goods by sea and bills of lading

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 ratified or acceded to the Hague Rules, Hague-Visby Rules or Hamburg Rules. However, the related provisions of the Hague-Visby Rules regarding the carrier's responsibilities, exemptions and limitation of liability, and those of the Hamburg Rules regarding, inter alia, the shipper's responsibilities and actual carrier and transport documents, are adopted in the Maritime Code.

China has not ratified or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules).

Under the Maritime Code, the responsibilities of the carrier with regard to the containerised goods start from the time the goods are taken over at the port of loading and end when the goods have been delivered at the port of discharge. The responsibility of the carrier with respect to non-containerised goods starts from the time of loading the goods onto the ship and ends when the goods are discharged. In respect of non-containerised goods, the carrier and the shipper are free to reach agreement on the responsibility and liability of the carrier for the goods before loading and after discharge.

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 network liability system is adopted by Chinese law in respect of multimodal transport by two or more different transport modes. The multimodal transport operator may enter into separate contracts with the carriers of the different modes but shall remain responsible for the entire transport.

If loss of or damage to the goods has occurred in an ascertained stage of transport, the provisions of the relevant applicable international treaty or law governing that specific stage of the multimodal transport shall be applicable to matters concerning the liability of the multimodal transport operator and the limitation thereof. If the stage of transport in which the loss of or damage to the goods occurred cannot be ascertained, the multimodal transport operator can by far invoke the liability exemption and limitation as provided in the Maritime Code, if sea carriage mode is involved in the entire transportation.

It is noted that China is not a party to the Convention on the Contract for the International Carriage of Goods by Road. Road transport is subject to the Contract Law, which does not have any carrier's liability limitation.

China is a party to the Agreement Concerning International Carriage of Goods by Rail, and rail cargo transport is also subject to the Railroad Law of China. However, it is generally believed that the carrier's liability limitation as provided in these rules will only be applicable if the claims were directly against the Chinese national carriers

(ie, China Rail or its subsidiaries). In other words, the freight forwarder might have difficulties to limit its liability for any damage occurring during the rail cargo transportation.

China is a party to the Unification of Certain Rules for the International Air Transport Convention and the Hague Protocol. Air transport is also subject to the Civil Aviation Law of China. In the case of any conflicts between an international treaty and domestic law, the international treaty shall prevail.

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

The party who lawfully holds a bill of lading is entitled to sue the carrier, whether it is a named bill of lading, an order bill of lading or a bearer bill of lading.

The person by whom or in whose name or on whose behalf the goods are delivered to the carrier is also defined as the shipper in the Maritime Code. As such, so far as a party can prove that it holds the bill of lading lawfully (because of the delivery of the goods to the carriers), it will have the title to sue even if its name is not specified in the bill of lading.

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?

While article 95 of the Maritime Code in principle confirms that the terms in a charter party explicitly incorporated in the bill of lading shall bind a third-party holder or endorsee of the bill, and in the meantime there are still many cases wherein the carriers argued before the Chinese courts that the jurisdiction or arbitration clause in a charter party have been validly incorporated into the bill of lading, in reality the Chinese courts tend to negate the validity of the incorporation for various reasons.

That said, carriers cannot expect to successfully challenge the Chinese maritime court's jurisdiction relying on the jurisdiction or arbitration clause provided in a charter party and incorporated into the bill of lading.

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

The demise clause or identity of carrier clause contradicts the definition of the carrier as provided in the Maritime Code and therefore is null and void in China. The maritime courts usually negate the validity of the 'demise' clause because it goes against article 44 of the Maritime Code, which provides that the carrier shall not alleviate its obligation as provided by in the law.

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 shipowners were not the contractual carrier but were accused of liability for cargo damage, the shipowners will usually invoke the provisions in the Maritime Code in defence.

In practice shipowners have difficulties in relying on the terms of the bill of lading in defending claims. The reasons are that the shipowners are not a party to the bill of lading and, according to article 44 of the Maritime Code, any provisions carried in a bill of lading that derogate from the provision of carriers' liability as provided in the Maritime Code, shall be null and void.

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

According to article 49 of the Maritime Code, unless the carriers have some justified reasons (eg, for saving or attempting to save life or property at sea), the goods shall be transported to the discharge port on the agreed or customary or geographically direct route. However, the law does not clarify the remedies allowed to the cargo interests if unreasonable deviation happens.

Under the Contract Law of the PRC, the innocent contractual party can claim for damage caused by the other party's default conduct. That

said, the carriers shall undertake the indemnity liability if the causation between the deviation and the damage to the cargo interests can be justified.

It will be a controversial issue on whether the carriers can invoke the liability defence as provided in the Maritime Code if the claim is made relying on the unreasonable deviation. Generally, if the unreasonable deviation constitutes an act or omission of the carrier or actual carrier performed with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result, the liability limitation defence shall be unavailable. The burden of proof shall rest upon those with the cargo interests.

48 What liens can be exercised?

The following possessory liens are provided for in the Maritime Code:

- (i) under a contract of international carriage of goods by sea, if the freight, contribution in general average, demurrage to be paid to the carrier by the shipper or the consignee and other necessary charges paid by the carrier on behalf of the owner of the goods, as well as other charges to be paid to the carrier have not been paid in full, nor has appropriate security been given, the carrier may have a lien, to a reasonable extent, on the goods belonging to the debtor;
- (ii) under a time-charter party, if the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the owner shall have a lien on the charterer's goods or other property on board or the earnings from a sub-charter;
- (iii) under a towage contract, where the towed party fails to pay the towage price or other reasonable expenses as agreed, the tug owner shall have a lien on the object towed; and
- (iv) under a shipbuilding or ship repair contract, the shipbuilder or ship repairer shall have a lien on the vessel constructed or repaired where the other party fails to pay the shipbuilding or repair price.

As a matter of Chinese law only the cargo owned by the debtors are subject to lien by the carriers. In other words, in scenarios (i) and (ii), although the carriers are in theory entitled to exercise lien over the cargo for the unpaid costs, if the ownership of the cargo has already been transferred to an innocent party who (as determined by the maritime court) is not personally liable for the payment of the costs, then the carriers cannot exercise lien over the cargo.

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

Where a carrier delivers goods without the original bill of lading, the lawful holder of the original bill of lading may require the carrier to bear contractual or tort liability for the loss calculated on the basis of the value of the goods at the time of shipment plus freight and insurance (ie, the cost, insurance and freight price of the goods). The carrier cannot invoke limitation of liability for such loss.

The possible defence available to the carrier might be that it has no faults in releasing the cargo without production of the original bill of lading. For instance, the carrier had to deliver the goods to the customs or port authority as required by the law in the port of discharge.

50 What are the responsibilities and liabilities of the shipper?

The Maritime Code has specific provision on the responsibilities and liabilities of the shipper in articles 66 to 70, as follows:

- the shipper shall have the goods properly packed and shall guarantee the accuracy of the description, mark, number of packages or pieces, and weight or quantity of the goods at the time of shipment, and shall indemnify the carrier against any loss resulting from the inadequacy of packing or inaccuracies in the above information;
- the shipper shall perform all necessary procedures at the port, customs, quarantine, inspection or other competent authorities with respect to the shipment of the goods and shall furnish to the carrier all relevant documents concerning the procedures the shipper has gone through. The shipper shall be liable for any damage to the interest of the carrier resulting from the inadequacy, inaccuracy or delay in delivery of such documents;
- at the time of shipment of dangerous goods, the shipper shall, in compliance with the regulations governing the carriage of such goods, have them properly packed, and distinctly marked and labelled, and shall notify the carrier in writing of their proper

Update and trends

The Maritime Code is now being reviewed and might be amended in future. However, there is no specific time frame on this matter.

description, nature and the precautions to be taken. Where the shipper fails to notify the carrier, or notified him or her inaccurately, the shipper shall be liable to the carrier for any loss, damage or expense resulting from such shipment; and

- the shipper shall pay the freight to the carrier as agreed, unless the shipper and the carrier have reached an agreement that the freight shall be paid by the consignee and such an agreement has been noted in the transport documents.

Shipping emissions

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

The Ministry of Transport has published the Implementation Plan on Domestic Emission Control Areas in Waters of Pearl River Delta, the Yangtze River Delta and Bohai Rim, with which three emission control areas have been established within Chinese territorial waters (ie, the Pearl River Delta, the Yangtze River Delta and the Bohai Rim (Beijing, Tianjin and Hebei)).

The main ports in the ECA of the Pearl River Delta are Shenzhen, Guangzhou and Zhuhai. The main ports in the ECA of the Yangtze River Delta are Shanghai, Ningbo-Zhoushan, Suzhou and Nantong. The main ports in the ECA of the Bohai Rim are Tianjin, Qinhuangdao, Tangshan and Huanghua.

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?

According to amended Annex VI of MARPOL 73/78, which China has ratified, the sulphur content of fuel oil used on board ships in China shall in any event not exceed 3.5 per cent m/m.

From 1 January 2018, the sulphur content of any fuel oil used on board vessels berthing at all the ports of ECA shall not exceed 0.5 per cent m/m (excluding the first hour after arrival and the last hour before departure). From 31 December 2019, China may consider requiring that the sulphur content of any fuel oil used on board vessels entering the ECA shall not exceed 0.1 per cent m/m.

The local traffic committee and the MSA are the competent authorities to enforce the regulatory requirements relating to low-sulphur fuel and monitor the emission of vessels entering Chinese territorial waters. The MSA may impose fines or other administrative sanctions on the vessel, its owner, operator or manager.

Ship recycling

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

China has domestic regulations promulgated by the Ministry of Transport dealing with the recycling of old ships flying the PRC flag. Generally, a seagoing ship more than 30 years old (varying from 30 to 34 years depending on the type of vessel) shall be compulsorily dismantled as scrap.

The recycling facilities in China are shipyards that are capable of dismantling scrap ships. If a Chinese ship is dismantled in a licensed shipyard earlier than the compulsory scrap ages, the shipowner may have a chance to apply for subsidies from government authorities.

According to a recent Chinese government announcement, from 31 December 2018 foreign scrap ships will not be allowed to be dismantled in China.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

The maritime courts exercise jurisdiction over maritime disputes at first instance. The High People's Court in the province or municipality

where a maritime court is located exercises jurisdiction over maritime disputes at second instance. The second instance is the final instance except for special situations in which an application for retrial may be made to the Supreme People's Court.

There are 10 maritime courts in China, located in Dalian, Tianjin, Qingdao, Wuhan, Shanghai, Ningbo, Xiamen, Guangzhou, Haikou and Beihai. Each maritime court has its own geographical jurisdiction.

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

The relevant provision can be found in the Civil Procedural Law and the Special Maritime Procedural Law of the PRC, as follows:

- direct service on the defendant or its legal representative located within the territory of China;
- service through the defendant's representative agency or branch or business agent located within the territory of China that is empowered to receive service;
- service through its agent ad litem who is empowered to receive service;
- service by the method specified in the Convention on the Service abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention) or other treaties concluded or acceded to by both China and the country where the defendant resides;
- service through diplomatic channels;
- service by post if the law of the country where the defendant resides so permits;
- service by public notice in public newspapers if the above means of service cannot be adopted;
- service by fax or email, etc, by which service on the defendant can be confirmed; or
- other appropriate means by which receipt of the document by the defendant can be confirmed.

The legal documents concerning the arrest of a ship may also be served on the master of the ship arrested in China.

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

The China Maritime Arbitration Commission, which is in Beijing and has a branch in Shanghai, is an arbitral institution specialising in maritime arbitration. The Shanghai Arbitration Court of International Shipping subordinate to the Shanghai Arbitration Commission is also an arbitral institution specialising in maritime arbitration.

Other local arbitration commissions are also qualified for maritime arbitration, since many maritime experts are also in the arbitrator list of these local arbitration commissions.

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

The Civil Procedural Law has provisions dealing with the recognition and enforcement of foreign judgments and arbitral awards.

The application shall be filed with the competent intermediate courts (including maritime courts) of the PRC, and the Chinese courts may deal with the application according to an international treaty concluded or acceded to by China, a bilateral treaty concluded by China, or based on the principle of reciprocity.

So far China only has bilateral treaties with very few countries (eg, Russia) and regions (eg, Hong Kong) in respect of the recognition and enforcement of judgments. Nevertheless, if the Chinese court considers that such a judgment or ruling does not contradict the basic principles of the law of China or violate the national, social and public interest of China, theoretically speaking the court may honour the judgement rendered in other jurisdiction and assist during enforcement proceedings. However, in practice it is very rare that a foreign judgment is recognised and enforced in China.

China is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. An arbitral award delivered in another state party to the New York Convention will have a good chance of being recognised and enforced in China.

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

Chinese law does not explicitly exclude the validity of asymmetric jurisdiction and arbitration agreements, and in theory the parties to a contract are free to reach an agreement in respect of dispute resolution method (jurisdiction and arbitration issues).

However, if a party to the contract raise jurisdiction dissention claiming that the asymmetric jurisdiction and arbitration agreements provided is unfair and should be revoked, the possibility that such clause is determined invalid cannot be ruled out. In other words, the validity of the asymmetric jurisdiction and arbitration agreements will be dealt with case by case in China.

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

If a claimant commences proceedings in another Chinese court in breach of a valid jurisdiction clause or agreement, the defendant may raise an objection to challenge the jurisdiction of the court hearing the case. The court that has heard the case shall deliver a civil ruling in response to the objection, and the civil ruling is subject to appeal.

If the claimant commenced the proceeding or arbitration out of China in breach of a jurisdiction clause, and afterwards the claimant sought recognition and enforcement of the foreign judgment or arbitration award in China, the defendant can file a defence and request the relevant Chinese court to not honour the foreign judgment or arbitration award.

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 within the time limit prescribed by the court file a jurisdiction objection substantiated with related evidence. The Chinese court that has heard the case shall deliver a civil ruling in response to the objection, and the civil ruling is subject to appeal.

Limitation periods for liability**61 What time limits apply to claims? Is it possible to extend the time limit by agreement?**

Unless otherwise provided in other law, the General Rules of Civil Law provide a three-year time limit for claims including breach of contract and liability in tort, counting from when the claimants know or should have known that the rights were infringed.

The Maritime Code has shorter limitation periods for many kinds of maritime claims, for instance the time limit for a contract of carriage of goods by sea is one year, the time limit for a claim arising out of a charter party is two years and the time limit for a dispute arising out of a passenger carriage contract, salvage contract, towage contract, marine insurance contract and ship collision accident is two years.

The time limits are considered as a matter of substantial law in China, and therefore cannot be extended by way of private agreement.

62 May courts or arbitral tribunals extend the time limits?

Article 137 of the General Principles of Civil Law provides that the people's courts may extend the time limits under special circumstances, and a similar provision is also provided in article 188 of the General Rules of Civil Law enacted on 1 October 2017, but it is not yet clear what those special circumstances are.

In summary, it is very rare that the limitation period is extended by the courts or arbitral tribunals in China.

Miscellaneous**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 entered into force in China on 12 November 2016. According to the Announcement of Performing the Maritime Labour Convention published by the Ministry of Transport and the Ministry of Human Resources and Social Security, the Maritime Labour Convention 2016 applies to Chinese vessels engaged in international voyages and coastal voyages and all crew members on board such vessels, excluding military vessels, official vessels, fishing vessels, sports vessels and other vessels navigating or operating merely within a port area, inland rivers and sheltered waters.

The categories of the social insurance applied to China are endowment insurance, medical insurance, employment injury insurance, unemployment insurance and maternity insurance.

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?

Chinese law does not have this kind of mechanism. Unless otherwise provided in the contract, the parties to a contract must fully perform their obligations under the contract, and any change in economic conditions will not be a good reason to seek relief from enforcement of the contract.

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

According to the Convention on Limitation of Liability for Maritime Claims 1976, a shipowner is entitled to limit its liability for claims in respect of raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned.

In China a claim of this kind is not subject to liability limitation and the owners of the sunken ship shall pay the wreck removal costs in full.



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Newbuilding contracts

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 are no specific rules in Colombia for shipbuilding contracts. However, article 1438 paragraph 2 of the Commercial Code (CC) states that the contract, despite its commercial nature, will be ruled by the Civil Code.

In any case, according to article 1427 of the CC, title will pass from one party to another by means of registration of the deed in the respective harbour master's office, accompanied by the material delivery of the vessel. These rules are not supposed to be changed by the parties since they are mandatory in nature.

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

There is no specific provision in this particular regard at the national level.

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

As mentioned above, article 1438 paragraph 2 of the CC states that the contract, despite its commercial nature, will be ruled by the Civil Code. Thus general rules of the Civil Code will be applicable in order to compel delivery of the vessel.

From a general perspective, whenever there is a clear, express and enforceable obligation (eg, to deliver on a particular date), an action that could be attempted by the affected person in said cases would be an 'executive action', which is supposed to be faster than an ordinary action (and additionally precautionary measures could be requested).

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?

As a general rule, this type of claim would lie in contract since the relation between the shipyard and the shipowner would usually be considered a commercial one.

However it is worth mentioning that, in Colombia, there is a definition of 'consumer': the natural or legal person who acquires or uses a given product to satisfy a personal, private or domestic need or, in relation to a business, when the natural or legal person acquires or uses something not intrinsically linked to its economic activity (article 5 No. 3 Law 1480/11). Thus a defective product claim could be initiated under Law 1480 whenever the owner could be considered a 'consumer' under the description in the above law (eg, recreational boats).

Ship registration and mortgages

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 a general principle, any type of vessel is eligible for registration under the Colombian flag. If a given vessel was previously registered

in another jurisdiction, then proof of cancellation at the foreign registry will be required.

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

There used to be a restriction in this regard in article 1458 CC, stating that only Colombian nationals were allowed to own a vessel registered in Colombia. However, the Council of State has considered this article to be inapplicable, since it was deemed to be contrary to the Colombian Constitution.

7 What are the documentary requirements for registration?

Pursuant to Law 730/01, in order to register a vessel in Colombia there are two different procedures: provisional registration and definitive registration. This registration scheme was originally aimed at cargo and fishing vessels. However, as from 2012, this law is to be applicable to any type of vessel (and even a naval artefact) regardless of its type of service (with the only exception of sports ships of any size, which are specifically excluded).

To obtain provisional registration the interested party must submit, among others, the following basic documents:

- seaworthiness and security certificates of the vessel (and certificates provided in this respect by the national maritime authority - DIMAR);
- certificate of cancellation of the previous registration;
- proof of material delivery of the ship or naval artefact;
- copy of the deed of purchase (if applicable);
- pollution guarantee;
- certification of initiation of proceedings to obtain the certificate of lack of reports for narcotics traffic;
- certification of initiation of proceedings for the issuance of the licence for access to the frequency bands allocated to the maritime mobile service (Law 730 article 8).

To obtain a definitive registration the requirements are basically the same, but proper certificates of lack of reports for narcotics traffic and licence for the access to the frequency bands allocated to the maritime mobile service must be submitted to DIMAR.

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

Dual registration is not possible under Colombian law.

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

As per article 1441 of the CC, the registration book is kept by the different harbour masters offices across the country. Basic data regarding the mortgage is included in the registry.

Limitation of liability

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

Colombia is not a party to the Convention on Limitation of Liability for Maritime Claims 1976. However, as per article 1481 CC the shipowner is able to limit its liability up to the value of the vessel (its accessories and freight) in respect of claims arising out of certain situations such as:

- compensation due to third parties owing to damage or loss suffered during navigation or within the harbour as a consequence of the fault of the master, crew members, or both;
- compensation due to cargo owners for damage or loss of cargo on board;
- any obligations arising out of bills of lading or charter parties; and
- payments to be made to salvors.

11 What is the procedure for establishing limitation?

There is no specific provisions at a local level dealing with this procedure. In practice, the shipowner will be able to invoke the limit in procedures initiated against him or her so far as the basis of the claim is one of the events listed in article 1481 CC.

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

As per article 1482 CC the limitation of liability provided for in article 1481 CC would not be available:

- regarding obligations arising out of personal act or fault of the shipowner;
- in relation to obligations entered into by the ship's agent on behalf of the shipowner whenever said obligations were ratified or utilised by the shipowner; and
- regarding obligations emerging from labour agreements with the master, crew and other persons at the service of the vessel.

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

Colombia is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Article 1596 CC states in relation to loss of or damage to luggage that the maritime carrier will be liable to the passenger for the value that the passenger has declared and that, if no such declaration is made, the carrier will be liable up to 10 grams of pure gold per kilo, unless the carrier is able to prove that the event causing the damage or loss has occurred owing to force majeure.

Port state control

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

DIMAR is the national maritime authority exercising port state control in Colombian waters. It does so as per the Viña del Mar Agreement to which Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Panama, Peru, Uruguay and Venezuela are parties.

15 What sanctions may the port state control inspector impose?

Warnings could be levied against the ship and restrictions to set sail could be imposed. An investigation for violation of merchant marine rules could be also initiated by the respective harbour master.

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

If there is a sanction imposed by a harbour master for a violation of merchant marine rules, then this sanction could be appealed before DIMAR (central level).

Classification societies

17 Which are the approved classification societies?

The approved classification societies in Colombia are:

- Overseas Marine Certification Services (OMCS CLASS);
- OIC-Class;
- Sociedad Andina de Certificación (SAC Register);
- Lloyd's Register Central And South America Limited;
- American Bureau of Shipping (ABS); and
- Isthmus Bureau of Shipping (IBS).

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

It is worth noting that DIMAR's Resolution 576/13 sets out the criteria for the delegation of functions in classification societies within the country. This resolution also contains some special obligations

that classification societies have when operating within Colombian territory.

As per article 11 of Resolution 576/13, breach of these special obligations amounts to a violation of merchant marine rules, and sanctions could be imposed by DIMAR (including suspension or cancellation of permits and fines).

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Under article 5 of Resolution 071/97 it was clear that local authorities could have ordered a wreck to be removed and also that the costs of said operation could be transferred to the shipowner involved. However, Resolution 850/17 has repealed Resolution 071/97 and it does not contain a similar provision covering that situation.

In any case, article 33 of Decision 487/00 establishes that in the case of a judicial sale made by a maritime authority of a stranded or sunken ship (in the interest of protecting the marine environment or the safety of navigation), costs incurred as a consequence are to be paid in first place with the product of the sale.

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

Neither the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 nor the Nairobi International Convention on the Removal of Wrecks 2007 are in force at the national level. However, COLREG/72 is in force in Colombia.

On the other hand, regarding accidental pollution coming from ships, both the CLC and FUND Conventions (1992) are in force at the domestic level.

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. Thus a Lloyd's standard form of salvage agreement should be acceptable.

As per article 30 of Resolution 850/17 of the Ministry of Transport, DIMAR could order tugboats to assist and to render services to any vessels whenever they deem it necessary in order to preserve security of navigation and to prevent environmental damage.

Ship arrest

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 are in force in Colombia. However, there is a regional instrument in the Andean Community, namely, Decision 487/00, which is inspired by (and very similar to) the 1999 Convention.

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 Decision 487/00 a vessel could be arrested whenever there is a 'maritime credit' (ie, a 'maritime claim' as expressed by article 1 of the 1999 Convention) and the situations that can give rise to a maritime credit are basically the same as those expressed in article 1 of the 1999 Convention.

Article 42 of Decision 487/00 (in the same manner as article 3.2 of the 1999 Convention) states that an arrest could proceed against any other vessel or vessels that, at the moment the arrest is effected, belong to the person that is personally obliged in virtue of a maritime credit and that, at the moment in which the credit arose, he or she was either the owner of the vessel with respect to which the maritime credit arose, or demise-charterer, time-charterer or voyage-charterer of that ship (but the provision clarifies that it does not apply to credits relating to the ownership or possession of a vessel).

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

Article 21 of Decision 487/00 makes specific reference to 'maritime privileges'. Accordingly, Decision 487/00 states that these privileges place a special burden on the ship without the need for public registration, and making clear that they will follow the vessel even in the case of change of ownership, registry or flag (but not in case of forced execution of the ship).

Certain credits are considered to be guaranteed by a 'maritime privilege' by article 22 of Decision 487/00. Among these credits are:

- crew wages, including repatriation costs and social security payments;
- compensation payable owing to death or bodily injury wherever occurring in direct relation with the exploitation of the vessel;
- salvage reward;
- credits for port, channel or other navigational waters duties and pilots; and
- credits related to tort claims arising out of the exploitation of the ship (different from damage or loss suffered by cargo, containers or luggage on board).

Certain exceptions to these privileges are provided in article 23 of Decision 487/00.

25 What is the test for wrongful arrest?

There is no specific test in this regard in Colombia. However, as per article 51 of Decision 487/00, the tribunals of the country in which the arrest has been effected would be competent to determine the liability of the creditor for damage or loss caused with the arrest, whenever it has been (ie, illegal or unjustified), or in cases in which the security requested and provided has been excessive. In order to determine said liability the decision points to the application of the respective local law, so that the assessment is to be made in application of general parameters of civil and commercial liability.

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 41 of Decision 487/00, in our view the arrest could not proceed in this situation in Colombia since the credit will not be one of the registered owner or the demise-charterer.

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

As per article 50 of Decision 487/00, the local tribunal could order the party requesting the arrest (or once effected, in order to be maintained) to provide security of the type, amount and conditions that the tribunal deems necessary in order to secure payment for damage or loss that could result, in particular (but not exclusively) from the fact that the arrest is either illegal or unjustified, or whenever the security requested or submitted is excessive.

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 order to get the arrest order removed, article 44 of Decision 487/00 states that the arrested party needs to provide sufficient security in a satisfactory manner. In any case, the same article clarifies that the person providing security could request at any moment its reduction, modification or cancellation.

Article 47 of Decision 487/00 further explains that, if no agreement is reached between the parties regarding the sufficiency and form of the security, the tribunal will determine its nature and quantity, but it will not exceed the value of the ship involved.

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 order to arrest a vessel a power of attorney is usually required. Additionally, a certificate of incorporation of the company that is pursuing the arrest is also required, as well as any other documents supporting the existence of the maritime credit that could be available. Those documents should be fully translated into Spanish by a certified translator. In this respect, note that Colombia is party to the Apostille Convention.

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

Usually the crew will be allowed to remain on board the vessel while the arrest is in place. Article 44 of Decision 487/00 sets out that the tribunal could allow the person in possession of the ship to remain exploiting it once security has been provided, or to resolve in any other manner the situation of the operation of the ship while the arrest is in place.

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?

Article 52 of Decision 487/00 makes clear that the tribunals of the country in which the arrest is effected will be competent to decide the claim on its merits unless the parties agree (or have agreed) to submit such claim to the tribunals of a different country or to arbitral proceedings. Thus it is possible that the proceedings on the merits are carried out in a different jurisdiction.

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

The traditional method of obtaining security for maritime claims, as in many other jurisdictions, is through a ship arrest. However, in cases of maritime accidents (eg, collisions, groundings, etc) the respective harbour master will initiate an investigation procedure in which, as per article 72 of Decree 2324/84, security could be requested by the harbour master on the part of the ship or ships involved in order to be authorised to set sail. This security is supposed to be requested for different purposes, namely to secure damages, fines and the expenses of the investigation so initiated.

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

As per article 32 of Law 1563 of 2012, a precautionary measure could be requested in any type of judicial procedures in order to secure evidence that could be relevant during proceedings.

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

There is no specific provision in Decision 487/00 dealing with arrest of bunkers or similar.

Judicial sale of vessels

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

Article 1454 CC sets out that the judicial sale of a ship would take place following the general rules of the procedural code (for judicial sales), but that it will be announced via posters located in visible places of the ship and of the harbour master's office where the ship is located. Accordingly, those persons who fulfil the general requirements of the local procedural rules would be able to apply for a judicial sale of the ship (ie, once there is already a judicial decision on the merits granting the right of payment to the creditor).

On the other hand, it should be mentioned that article 10 of Decision 487/00 makes clear that creditors guaranteed with maritime mortgages would have their right to request the judicial sale of the ship even if the vessel has change ownership to a third party acting in good faith.

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?

It is not very common to have this type of judicial sales (of ships) in Colombia. In any case, such a judicial sale will follow the general rules for this type of sale as provided for in the General Procedural Code (as per article 1454 CC).

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

As per article 32 of Decision 487/00, expenses arising from the arrest or in the subsequent execution will be paid in the first place with the product of the sale. Said costs are deemed to include expenses incurred for the conservation of the vessel, wages and other related costs.

As per article 24 of Decision 487/00, maritime privileged credits are to take priority over mortgages and other maritime credits.

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

Article 31 of Decision 487/00 sets out that as a consequence of the judicial execution of the ship, all mortgages or encumbrances registered, as well as all other maritime privileges levied on the ship, will be of no effect whenever by the moment of the execution the vessel is located within the jurisdiction of the member country, and the execution has operated following the parameters brought by Decision 487/00.

Furthermore, as per article 21 of Decision 487/00, maritime privileges will follow the ship even if the owner changes, but not in case of judicial sale.

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

A judicial sale effected in a different country should be recognised in Colombia in application of the general rules of the recognition of foreign judicial decisions.

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

Colombia has not ratified this convention. However, Decision 487/00 suggests that the Andean countries proceed with the ratification of this instrument.

Carriage of goods by sea and bills of lading

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?

Colombia has not yet ratified any of the existing conventions on the subject. The CC has nonetheless incorporated the basic provisions of the Hague Rules and the Hague-Visby Rules. However, with regard to some key provisions of the rules, the local provisions do not follow the international regime or have been construed in a different manner (ie, regarding liability limits, in respect of which the Supreme Court of Justice, in its decision of 8 September 2011 (LJ William Namén) took the view that any sort of agreement should be treated as valid under domestic law so far as it is not a derisory one).

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?

Both the CC and Decision 399/97 have incorporated imperative schemes that could be applicable to multimodal international transport under certain circumstances. Each regime contains provisions on the liability of the carrier, exemption clauses, liability limits and time bars.

On the other hand, the Andean Community also has in place Decision 331 as modified by Decision 393. Decision 331 originally followed – to a certain extent – the parameters brought by the UCNTAD/ICC Rules of 1992 to deal with the liability of the multimodal operator. This regime (as contained in Decision 331/393) is to be applicable (article 2) whether multimodal carriage is undertaken from one of the Andean countries to a third country or vice versa (thus not being necessary for the application of the decision that both the point of origin and the point of destination are located in territory of member countries). This view was adopted by the Supreme Court of Justice in its decision of 3 September 2015 (LJ Ariel Salazar).

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

Under local law the bill of lading is a *titulo valor*, meaning a negotiable document of title and is evidence of the contract of carriage. Thus any third party that has entered in possession of such document acting in good faith has title to sue the carrier.

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?

There is no provision in the local regime dealing with whether (or to what extent) the terms in a charter party could or could not be incorporated into the bill of lading.

In our view, from a general perspective, a jurisdiction or arbitration clause in a charter party whose terms are incorporated in a bill of lading should be binding by reference to a third party holder of the bill. A problem could arise, however, if said third-party holder is deemed to be a ‘consumer’ for the purpose of Law 1480 of 2012.

45 Is the ‘demise’ clause or identity of carrier clause recognised and binding?

There is no specific provision or case law in this regard.

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 Colombia, the contractual carrier will be held responsible for the operation despite the fact that it is admissible to subcontract (all or part of) the carriage. In this respect, the maritime carrier (ie, the contractual one) would have the defences provided by the law (which are very similar to those contained in article 4.2 of the Hague-Visby Rules).

Colombian law also contains provisions regarding non-vessel operating common carriers (NVOCCs). In our view, NVOCCs are to be treated as carriers (despite not being the performing carriers) whenever they have offered their services (and contracted) in their capacity as carriers.

In any case, if the shipowner is not the contractual carrier, there could still be a possibility of finding him or her liable (if local law is applicable) via article 991 CC, which makes the carrier jointly and severally liable with the owner of the vehicle for the contract of carriage if the carrier does not have the control of the vehicle in which the service is rendered.

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

There is no clear answer to this question at the domestic level. All that the CC states is that reasonable changes in route (such as the one effected to save life or goods at sea, or to attempt to do so) would not constitute infraction of the obligations of the carrier and, in this case, the carrier would not be liable regarding any damage so caused.

48 What liens can be exercised?

As mentioned in question 24, ‘maritime privileges’ will follow the vessel in the manner already explained. These specific situations are mentioned in article 21 of Decision 487/00.

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 production of a bill of lading, the likelihood is that the carrier could be later required by the legitimate holder of the bill of lading to deliver the cargo or to pay the appropriate compensation if cargo was misdelivered.

50 What are the responsibilities and liabilities of the shipper?

According to article 1623 CC the shipper would only be liable for damage or loss suffered by the carrier whenever there has been fault on its part or on the part of its agents.

Shipping emissions

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

There is no ECA for maritime transport in force in Colombia.

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?

Law 1205/08 requires any means of transport (thus including seagoing vessels) using diesel to use less than 50ppm of sulphur. Sanctions for not complying with this provision are contained in Resolution 180689 of 2010 of the Ministry of Mining and Energy.

According to DIMAR, the current limit of sulphur content in fuel oil for ships is 3.50 per cent m/m.

Ship recycling

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

There is no provision specifically dealing with ship recycling as such in Colombia at the moment. However, the law refers to the possibility of scrapping vessels for recycling purposes. Parameters for carrying out the scrapping procedure in the country are dealt with in DIMAR's Resolution 509/16.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

Tort claims (ie, collision claims) are usually dealt by harbour masters in application of the procedure contained in Decree 2324 of 1984. As per the decree, the harbour master of the respective zone will initiate investigation procedures aiming to establish the cause of the damage or loss suffered (and its amount) and the party responsible for it.

Contractual disputes are usually dealt with by regular courts and, exceptionally, arbitrators.

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

As per article 291 No. 3 of the General Procedural Code, when judicial proceedings are initiated in Colombia and the party to be notified of said proceedings is located abroad, the interested party should send a communication by authorised postal service and the person will have 30 days to respond.

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

Although there is no domestic arbitral institution with a panel of maritime arbitrators as such, some chambers of commerce around the country have different arbitration centres with recognised maritime or transport lawyers on their lists.

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

Regarding foreign judgments, articles 605 et seq of the General Procedural Code deal with exequatur procedures in Colombia.

In addition, Colombia is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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

It is unclear whether this type of agreement would be valid in Colombia, specifically regarding commercial arbitration.

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

There is no specific provision at the local level dealing with this situation. However, in our view, a breach of a jurisdiction clause could entitle the affected party to seek damages as a consequence.

In any case, if proceedings are initiated in Colombia in breach of a jurisdiction clause, then said procedure should, in our view, be closed since there will be a lack of jurisdiction on the part of the Colombian courts.

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 could argue lack of jurisdiction of the local court in order to stop proceedings at the domestic level (article 100 No. 1 of the General Procedural Code). In particular, the defendant could make specific reference to the 'arbitration clause' exception (article 100 No. 2 of the General Procedural Code).



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Colombia

Limitation periods for liability

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

As a general rule, if there is a clear, express and enforceable obligation to pay, or to make or not to make something, then the time limit will be five years. If no such clear, express and enforceable obligation is in place, but the judge requires to rule on the existence of the right of the claimant, then the general rule is that the time limit will be 10 years.

The usual understanding is that the time limits provided in law are of public order and are not to be extended by either the parties or the judge.

62 May courts or arbitral tribunals extend the time limits?

See question 61.

Miscellaneous

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 in force in Colombia.

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 Colombian law there is room for seeking relief from the strict enforcement of the legal rights and liabilities of a given contract under the *teoría de la imprevisión* (unpredictability doctrine). Thus, as per article 868 CC, when extraordinary and unforeseeable circumstances occur after the conclusion of a contract of successive, periodic or deferred execution, and they alter or aggravate the future performance by one of the parties, to such an extent that it is excessively burdensome, in this case the affected party could seek judicial relief.

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

Colombia could be seen as an evolving jurisdiction for maritime issues. However, one of its main problems is that legislation is dispersed and somehow old-fashioned in many cases. A process of consolidation and renovation is nowadays much desired.

Croatia

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Newbuilding contracts

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 Croatian law, the transfer of ownership of ships and yachts requires a document of title and registration in the Croatian Ship Register, Yacht Register, or Register of Ships or Yachts Under Construction. Unregistered transfer deeds have some significance and they create certain legal effects, but full transfer of title happens only at the time when the title is registered with the Ship or Yacht Register.

The parties are free to choose the time the title will pass from the shipbuilder to the shipowner. The document of title is usually handed to the shipowner at the delivery of the vessel. In some cases, usually in order to accommodate some financing problems, the title in the newbuilding passes from the shipbuilder to the shipowner while the ship is still under construction.

When a newbuilding is ordered by a foreign company, the parties to the shipbuilding contract usually choose English law to govern the contract, and therefore the provisions of Croatian law are of only secondary importance. Nevertheless, if the newbuilding is registered in the Croatian Register of Ships under Construction, Croatian law will govern the real-right aspects of the case.

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

According to Croatian law, all guarantees, including a refund guarantee, must be made in written form. No other formalities are required. If the case of state guarantees, in order for the Ministry of Finance to issue such a guarantee, it should be approved by the government.

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

This depends on the precise set of circumstances in which this happens, as well as the dispute resolution mechanisms envisaged in the shipbuilding contract (which is often governed by English law). Provided that the shipowner's right to demand delivery of the ship has been duly determined by the competent body (be it a court or arbitral body), the shipowner may request that this right be judicially enforced in accordance with the rules of judicial enforcement of non-pecuniary claims.

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 special rules on liability for a defective product as part of the sale-and-purchase contract apply only between the shipowner and the buyer.

Croatian product liability law is mostly concerned with personal products. According to the general rules on liability in tort, a claim would lie at the suit of any party suffering damage.

Ship registration and mortgages

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?

Seagoing ships, defined as vessels intended for seagoing navigation, exceeding 12 metres in length and with a gross tonnage greater than 15 gross tonnes (GT), or authorised to carry more than 12 passengers, may be registered in one of the following registers:

- the Register of Merchant Ships;
- the Register of Fishing Ships;
- the Register of Ships in Public Service; and
- the Register of Ships Under Construction.

The following ships qualify for registration in the Croatian Register of Ships:

- a ship wholly or partially owned by a Croatian citizen or a legal entity with its headquarters in Croatia;
- a ship wholly or partially owned by an EU citizen or a legal entity with its headquarters in the EU, if the ship is managed or operated by a Croatian company, and provided the owners approve the registration;
- a ship wholly or partially owned by an EU citizen or a legal entity with its headquarters in the EU, provided that the ship is managed from a branch office in Croatia;
- a ship owned by a foreign citizen residing outside Croatia or the EU, if the ship is managed or operated by a Croatian company, and provided that the owner approves the registration;
- a ship owned by a foreign company with its headquarters outside Croatia or the EU, if the ship is managed or operated by a company headquartered in an EU country, and having a branch office in Croatia, and provided the owners approve the registration; and
- a ship owned by a foreign company with its headquarters outside Croatia, the EU and the European Economic Area, if such foreign company depends on a company with its headquarters in Croatia subject to tonnage tax, provided the owners approve the registration.

It is possible to register vessels under construction. As mentioned above, there are separate registers used only for ships under construction. Croatia is party to the International Convention Relating to the registration of Rights in Respect of Vessels under Construction, 1967. Registration in the Croatian Register of Ships under Construction is compulsory with regard to each ship under construction wholly owned by a Croatian citizen domiciled in Croatia or a Croatian legal person. On the other hand, registration is optional for a ship owned by a foreign physical or legal person that is under construction in a Croatian shipyard.

Yachts, defined as vessels intended for sport and leisure, used for private purposes or business activity, of more than 12 metres in length, intended for longer stays at sea and authorised to carry no more than 12 passengers (in addition to the crew), may be registered in the Register of Yachts or, as the case may be, in the Register of Yachts under Construction.

The following yachts qualify for registration in the Croatian Register of Yachts:

- a yacht wholly or partially owned by a Croatian citizen or a legal entity with its headquarters in Croatia; and
- a yacht owned by a foreign citizen or a foreign company, if it spends most of the time in Croatia.

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

Although there are no specific rules as to who may apply to register a ship, the answer to this question follows from the criteria providing which ships qualify for registration, because those criteria are connected to the identity (nationality) of the owner, manager or operator (see question 5). The identity of the person formally submitting an application is irrelevant as long as they can prove that they have a legitimate interest in seeking a particular inscription in the register.

7 What are the documentary requirements for registration?

The documents required for permanent registration of a vessel are as follows:

- proof of ownership of the ship (bill of sale);
- documents proving fulfilment of the nationality requirements;
- decision on the ship's name and home port, issued by the Ministry of Maritime Affairs;
- technical specification certificate issued by an approved organisation, with the confirmation that the ship is technically eligible for registration in the Croatian Register of Shipping;
- call sign certificate;
- documents detailing other particulars of the ship;
- deletion certificate issued by a foreign register (where applicable); and
- the owner's written statement assigning the responsibility for the ship's management to the relevant company in the sense of the ISM Code.

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

Dual registration and flagging out are not allowed.

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

All records concerning a ship (including encumbrances) are kept in one place, the Register of Ships, maintained by the Harbour Master's Office. 'Section C' or 'sheet C' of the main book of the Register of Ships contains entries regarding real rights encumbering a ship (such as a mortgage), demise charter, time charter, the right of pre-emption or any restrictions to the ownership.

Limitation of liability

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

Croatia is party to the 1976 Limitation Convention as well as its 1996 Protocol, which applies by way of a tacit acceptance procedure. The new limits already took effect and the Croatian Maritime Code was amended in this respect. The text of the convention is reproduced almost verbatim in the Croatian Maritime Code, with slight deviations. The persons entitled to limit their liability as well as the claims subject to the limitation are the same as the ones listed in the 1976 Limitation Convention.

Special limitation regimes also apply in the fields of carriage of goods by sea (Croatia is party to the Hague-Visby Rules), carriage of passengers (Croatia is party to the 1974 Athens Convention with its 1976, 1990 and 2002 Protocols), civil liability for the pollution by hydrocarbons carried as cargo (Croatia is party to the CLC 1992 and Fund Convention 1992/2003) and civil liability of the operators of nuclear ships (Croatia has not ratified the 1971 Nuclear Convention but the Maritime Code contains similar provisions).

11 What is the procedure for establishing limitation?

The Croatian Maritime Code expressly provides that a person wishing to limit their liability should set up a fund. It then continues to regulate the situations in which limitation is invoked but the fund has not been set up, which is somewhat confusing. The prevailing view in the jurisprudence is that the setting-up of the fund is compulsory.

The limitation fund may be set up by lodging a cash deposit or a guarantee. The calculation of the limitation amount is as per the 1996 Limitation Convention Protocol.

The limitation of liability procedure is administered by the commercial courts. The application to limit liability may be submitted by any person entitled by law to limit their liability. The application must include a description of the occurrence with regard to which limitation is sought, a list of known claimants and their respective claims, as well as a declaration of whether the applicant wishes to constitute a limitation fund and how.

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. If that is done, the claimants will not be able to commence enforcement or arrest proceedings in order to enforce or secure the claims with regard to which the fund has been constituted.

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

Pursuant to the Croatian Maritime Code, a person shall not be entitled to limit his or her liability 'if it is proved that the loss resulted from his act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that the loss would probably result'. The cited provision differs from the corresponding provision of the 1976 Limitation Convention (article 4) in that it omits the word 'personal' in front of the words 'act or omission'. According to the authors' best knowledge, this standard has not been broken in Croatia.

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

The limitation regime that applies to passenger and luggage claims is provided in the Athens Convention, as amended by the protocols of 1976, 1990 and 2002.

Port state control

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

The port state control agency in Croatia is the Harbour Master's Office, which is supervised by the Ministry of Maritime Affairs, Transport and Infrastructure. Croatia is party to the Paris Memorandum of Understanding on Port State Control.

15 What sanctions may the port state control inspector impose?

The inspector may order the detention of the vessel, discontinuation of the cargo operations, or both, and may impose fines. In addition, if the shipowner has not removed the deficiencies as ordered by the inspector and the vessel poses a threat to the ports, or the navigable routes, or the environment, the harbour master shall order that the vessel be removed from her present location, or shall directly arrange for her removal at the owner's risk and expense.

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

The party against whom a fine or detention has been imposed may lodge an appeal to the Appeal Commission of the Ministry of Maritime Affairs, Transport and Infrastructure. The appeal shall not withhold execution of the first instance decision. In the case of dissatisfaction with the decision of the ministry, the affected party may challenge it before the Administrative Court.

Classification societies

17 Which are the approved classification societies?

The only approved classification society is the Croatian Register of Shipping.

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

Croatian law does not contain any specific provisions on liability of classification societies. In principle, a classification society may be held liable for the damage suffered as the consequence of an intentional or negligent act or omission in the performance of the society's duties,

just as any other legal entity. There are no court cases reported on this issue.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

As a matter of principle, any damaged, stranded or sunken vessel obstructing or endangering navigation or presenting a danger of pollution shall, by order of the Ministry of Maritime Affairs, Transport and Infrastructure (its organisational unit), be removed from the navigable waterway at the owner's cost.

It is to be noted that, as of 1 June 2009, a registered owner of a Croatian-flagged ship engaged in international trade and of 300 GT or greater, is required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the costs of locating, marking and removing of wrecks.

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

Croatia is party to a number of international treaties dealing directly or indirectly with collision, salvage and prevention of marine pollution. These are:

- the 1910 Collision Convention;
- the 1952 International Convention for the Unification of Certain Rules concerning Civil Jurisdiction in Matters of Collision;
- the 1952 International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation;
- the 1974 SOLAS Convention;
- the 1989 Salvage Convention;
- the 1969/73 Intervention Convention;
- the 1973/78 MARPOL Convention;
- the 1992 CLC, the 1992/2003 Fund Convention;
- the 2001 Bunker Convention;
- the 1972 London Dumping Convention;
- the 1976/95 Barcelona Convention, including the 1976/95 Dumping Protocol;
- the 2002 Cooperation Protocol;
- the 1980 Land-Based Sources Pollution Protocol and the 2001 Special Areas Protocol;
- the 1982 UNCLOS Convention;
- the 1990 OPRC Convention;
- the 1992 Rio de Janeiro Convention; and
- the Nairobi International Convention on the Removal of Wrecks 2007.

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. There are no restrictions as to who may carry out salvage operations.

Ship arrest

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

The 1952 Arrest Convention is in force in Croatia.

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 list of maritime claims in the Croatian Maritime Code is very similar, although not completely identical, to the list of maritime claims of the 1952 Arrest Convention. It does not contain bottomry and the claims relating to disputes concerning ownership and between co-owners. On the other hand, the crew's claim (article 1, paragraph 1, subparagraph (m) of the Convention) covers not only the wages but also all other rights arising out of the crew's employment. In addition, the list of claims in the Maritime Code includes claims relating to commissions, brokerages and agency fees.

A ship flying the flag of a member state to the 1952 Arrest Convention can only be arrested if the claim falls within the list of maritime claims provided in the convention. Croatia exercised a reservation not to apply the convention to the arrest of a ship for claims in connection with title or ownership of a ship, but to apply domestic law instead.

If the ship's flag state is not party to the 1952 Arrest Convention, the Croatian court should examine the reciprocity between Croatia and the country of the ship's flag. If reciprocity exists, the right to arrest shall be limited to claims listed in the Croatian Maritime Code. If there is no reciprocity, the vessel may be arrested for any type of claim. Croatian courts are not inclined to examine the existence of reciprocity (partially because the urgent nature of arrest matters does not allow extensive research) and therefore, in cases involving ships flying flags of non-member states, the courts usually allow arrest for any type of claim.

In addition to any of the 'maritime claims' as defined in the 1952 Arrest Convention and the Maritime Code (depending on the vessel's flag), a vessel can be arrested to enforce a ship mortgage or a maritime lien over the vessel.

Where arrest of a Croatian-flagged vessel is sought within Croatian jurisdiction by a person who has his or her habitual residence or principal place of business in Croatia, the provisions of the Croatian Maritime Code shall apply.

The court usually does not engage in identifying the law applicable to the merits and the motion will usually be considered in the light of Croatian law.

The concept of sister-ship arrest applies. The applicant may arrest any ship owned by the person against whom the claim is directed. Nevertheless, no ship other than the particular ship in respect of which the claim arose may be arrested in respect of claims regarding the ownership, lien or mortgage of a ship.

A bareboat chartered vessel cannot be arrested for a claim against the bareboat charterer. A time-chartered vessel cannot be arrested for a claim against a time-charterer.

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

Croatia recognises the concept of maritime liens. The claims giving rise to maritime liens are:

- claims for wages and other sums due to the master, officers and other members of the crew 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;
- 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 the loss of damage to cargo, containers and passengers' effects carried on the vessel.

25 What is the test for wrongful arrest?

Should it occur (on appeal) that the arrest was unjustified, or should the applicant fail to commence proceedings on the merits within the given time following the arrest, the respondent will have the right to claim compensation for any damage suffered as the consequence of such arrest.

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 should not be possible because the arrest can be sought only if the ship is owned by the person liable for the claim.

Nevertheless, the Croatian courts have, from time to time, accepted arrest motions for claims related to the bunker supply although the supply had been ordered by charterers. The basis for such arrest was found in the fact that the receipt of the bunker on board was confirmed by the vessel's official and stamped with the vessel's stamp, which led the courts to the conclusion that the claim was against the owner of the vessel.

Another possibility is where the claim relating to bunker supply is secured by a maritime lien in the law of the vessel's flag state and the Croatian court decides to apply that law.

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

If the circumstances are justified, the respondent may seek that the applicant for the arrest motion be ordered to lodge security for any damage that may be caused by the arrest. This is a very rare occurrence. The amount of security depends on the court's discretion and on the circumstances of the case. The amount will be calculated taking into account the types and extent of the damage that the respondent may suffer as a consequence of the arrest.

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 should be equal to the amount for which the arrest has been ordered. The value of the ship is of no relevance in this respect. Providing a security in a lower amount would be possible only upon agreement with the arresting party. The security must be provided by way of a cash deposit in the court account or in the form of a bank guarantee. Protection and indemnity (P&I) club letters of undertaking, as well as any other forms of security, are accepted only if those are accepted by the arresting party.

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?

For a lawyer to be able to make the arrest application, he or she needs to be provided with a power of attorney, duly signed and stamped. Apart from the power of attorney having to be submitted in original, no other formalities are required in this respect. Alternatively, when it comes to the supporting documents, scanned copies shall suffice as long as the translation, made by a court sworn interpreter, is provided in original.

Croatia is a state party to the Apostille Convention. However, when it comes to the arrest procedure, there is no need for legalisation, notarisation, etc.

In urgent cases, it usually takes one day to prepare the arrest application. For the time being, it may not be filed electronically.

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

The shipowner or ship operator remains responsible for maintenance of the vessel and her crew while under arrest. Nevertheless, if the owner's resources prove insufficient to maintain the crew, the court shall order the applicant to advance the necessary funds.

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 simply to obtain security and then pursue proceedings on the merits elsewhere. At the same time, the fact that the vessel has been arrested in Croatia will regularly give the claimant a possibility to pursue the proceedings on the merits in Croatia.

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

Under the general rules on civil procedure (contained in the Forced Execution Act, which applies in the shipping matters to the extent that certain issues have not been regulated in the Maritime Code), parties may seek various interlocutory measures aimed at securing future satisfaction of their claims. There is an open-ended list of those measures, which includes:

- prohibition on the respondent from selling or disposing of its assets;
- prohibition on the respondent's debtor from voluntarily fulfilling its obligation to the respondent; and
- prohibition on the respondent's financial institution from effecting payments from the respondent's account.

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

The court may order a party to deliver a document relied on by the opposing party. The court may also order a third person to deliver a document relied on by any party, if the third party is compelled by law to produce such a document.

Upon proving a risk that any piece of evidence will be impossible or very difficult to obtain at a later stage, an interested party may apply to the court to carry out the securing of evidence. This measure can be sought before or after commencement of the litigation procedure.

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

There is a theoretical possibility to do so, but in practice it occurs very rarely. The applicant has to prove that the bunkers are owned by the respondent, which is usually difficult to do.

Judicial sale of vessels

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

Whoever has an 'enforceable document'. This term includes documents such as:

- final judgment of the Croatian court;
- award of a Croatian arbitration or final judgment of a foreign court or a foreign arbitral award, which has been recognised by the Croatian court; or
- a court settlement or special agreement concluded before a notary public, containing the debtor's express agreement that in the case of default the creditor may settle its claim directly by way of forced execution.

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?

Judicial sales of ships in Croatia are administered by the commercial courts and observe the following general pattern:

- issuance of a 'writ of execution' (the sale order);
- evaluation of the ship and determination of the conditions of sale;
- sale by way of public auction or direct deal; and
- distribution of the proceeds of sale.

Auction is not the only method of judicial sale of vessels. As an alternative, a vessel may be sold by way of a 'direct bargain'. This is possible only if the parties to the judicial sale (ie, the creditor as applicant and the shipowner as the respondent), mortgages, liens and beneficiaries of personal servitudes that expire upon the sale of a ship agree prior to the sale of the ship by way of public auction that the ship will be sold by direct deal through an authorised ship broker, court official, notary public or by other means. In such case, a ship sale and purchase agreement will be entered into between the person authorised by the court to sell the ship (the broker, etc) and the buyer. The said method of sale is still under the control of the court and retains the status of a judicial sale.

The duration of the judicial sale proceedings depends on various factors, such as the procedural position taken by the shipowner (appealing against various court decisions will significantly extend the proceedings) and the market situation (if the ship is not sold at the first auction, the next one can only be summoned some time later). The procedure is not structured so as to guarantee swift completion.

The court costs consist of various items, such as court fees (calculated on the basis of the value of the underlying claim, but not exceeding 10,000 kune); evaluation costs (charged differently by various evaluators, but usually not exceeding 10,000 kune); and advertisement costs (the amount of which depends on where the advertisement is published).

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

The system of priorities under Croatian law is a distinctive combination of procedural and substantive provisions. On the one hand, the priority

among different categories of claims, and the non-proprietary rights, is a question of procedure, and is governed by the *lex fori*. On the other hand, the priority of proprietary rights on the vessel (ie, maritime liens and mortgages) is considered a matter of substance and governed by the law of the vessel's flag state (which, for Croatian-flagged vessels, is governed by the relevant provisions of the Maritime Code dealing with maritime liens and mortgages). The Maritime Code's general order of priority may be summarised as follows:

- costs associated with the sale;
- claims of the Republic of Croatia related to removal of standard vessels, locating, marking and removal of wrecks and sunken objects;
- maritime liens;
- possessory liens;
- ship mortgages;
- other claims; and
- the residue of the proceeds, if any, is paid to the owner.

Claims belonging to one category are given access to the proceeds of sale only after all claims from the preceding category have been paid in full. If the proceeds of sale are insufficient to fully satisfy all the claims in the same category, the priority among them is determined by special rules that vary according to the category in question.

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

Judicial sale is a valid legal basis to acquire ownership in a vessel. It will extinguish the previous ownership and grant the purchaser a clean title over the vessel. On the basis of a special order issued by the court after the adjudication decree has become final and the purchaser has paid the full price, the purchaser will be registered in the Ship Register as the owner of the vessel.

Judicial sale will extinguish all mortgages, liens, charges or encumbrances attached to the ship before the sale, except those that the purchaser agreed to assume with the consent of their holders.

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

Judicial sale of a vessel in a foreign jurisdiction will not be recognised without the completion of the recognition procedure. Croatia is not party to the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. On the other hand, Croatia is bound by the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). Outside the scope of Brussels I, the Croatian national rules provide a number of formal requirements and substantial (mostly negative) criteria for the recognition of foreign court decisions. The most significant negative criteria are:

- if the defendant has been prevented from participation in the foreign proceedings due to procedural error;
- if the case falls within the exclusive jurisdiction of the Croatian courts;
- if the Croatian court has already rendered a final decision in the same matter;
- if recognition would be against public policy; or
- if there is no reciprocity.

If the document produced by the foreign court is not a court decision but a certificate or notice or some similar official form issued by the court clerk, such document would be considered a 'foreign public document', and would have to be legalised in Croatia. Croatia is party to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. If the foreign public document originates from a state that is party to the Convention, an apostille would eliminate the need for legalisation.

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

Croatia is not party to this convention.

Carriage of goods by sea and bills of lading

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 1924, as amended by two protocols (the Visby Protocol 1968 and the SDR Protocol 1979), are part of Croatian maritime law: all three documents have been ratified in Croatia and its provisions have also been reproduced in the text of the Croatian Maritime Code.

The Rotterdam Rules are still under consideration in Croatia and no position has yet been taken.

The transport period begins at the moment of receipt of cargo and ends on its delivery. The relevant moments (receipt and delivery) may be freely stipulated by the parties. Nevertheless, unless the contract or the customs of the port provide otherwise, the carrier is considered to have taken over the cargo from the shipper and delivered the cargo to the receiver under ship's tackle.

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?

Croatia is not party to the UN Multimodal Convention. There are special laws applying to each mode of transport, and they would apply to the relevant stages of transportation. In 2009, Croatia passed the Combined Transport Act in conformity with the requirements of the Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between EU member states. The Combined Transport Act contains provisions defining basic terminology, distances in combined transport, measures to stimulate combined transport, combined transport documents and collecting of statistical data. It does not deal with private law issues.

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

The title to sue belongs to a lawful holder of a bill of lading (the indicated consignee in the 'straight' bill of lading; the party holding a bearer bill of lading; the endorsee of an order bill of lading). In addition, title to sue belongs to a party subrogated into the rights of such lawful holder of a bill of lading.

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 written terms of the charter party and general terms and conditions of the carrier are binding on the lawful holder of the bill of lading (who is not a consignee or a shipper) only if the bill of lading contains an explicit reference to such charter party or general terms and conditions.

Oral covenants of the charter party that are not entered in the bill of lading are not binding on the lawful holder of the bill of lading (who is not a consignee or a shipper) even if the bill of lading contains an explicit reference to such oral covenants.

If the bill of lading contains only a general reference to the charter party and general terms and conditions of the carrier, the lawful holder of the bill of lading shall not be bound by the provisions of the charter party or general terms and conditions which are more onerous than the terms usually used for this kind of transport.

The arbitration agreement is valid if the bill of lading contains an explicit reference to the arbitration clause contained in the charter party. Such clause would be binding on an endorsee.

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

The 'demise' clause or identity of carrier clause would not be recognised or considered binding.

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 will not face contractual liability for cargo damage. The shipowner may be sued in tort by the party affected by cargo damage, provided that the prerequisites of tortious behaviour have been fulfilled. The shipowner who is not the contractual carrier may rely on the terms of the bill of lading only in the sense of proving that he or she did not act as contractual carrier.

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

In the case of deviation, the carrier's liability for the claims arising therefrom and the extent thereof will be determined by the Hague-Visby Rules, if applicable. In cases falling outside the scope of the Hague-Visby Rules and subject to Croatian national law, the carrier shall not be liable for cargo damage if he or she proves that the said damage was a consequence of a reasonable deviation (including, without limitation, saving or attempting to save life or property at sea). In spite of the carrier's proof of such an exculpatory reason, he or she shall be held liable if the consignee proves that the damage was caused by the personal fault of the carrier or the fault of his or her agents or servants, not relating to navigation.

48 What liens can be exercised?

The Croatian Maritime Code has adopted a civil law approach towards maritime liens. According to that approach, a maritime lien is a substantive right over maritime property that entitles the claimant to subject that property to a judicial sale, and have the claim satisfied out of the proceeds in priority to non-lien creditors. Maritime liens are considered substantive rights, as opposed to mere procedural remedies.

The list of claims giving rise to maritime liens on the vessel, contained in the Maritime Code, reproduces almost verbatim the text of article 4 of the 1993 Convention on Maritime Liens and Mortgages (although Croatia is not a member state).

In addition, a shipbuilder or a ship-repairer holding a ship in the shipyard or repair yard may detain the ship until their claims relating to the shipbuilding or ship-repair contract are paid. This is not a maritime lien, but a 'right of retention' (similar to possessory lien in common law).

The Maritime Code also provides for maritime liens on cargo. The claims giving rise to a lien on cargo are those relating to:

- the legal costs associated with the storage or judicial sale of the cargo, or both;
- salvage and general average; and
- the contract of carriage.

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 has acted as per the charterer's instructions although all counterparts of the bill of lading have not been returned, the carrier shall compensate the lawful holder of the bill of lading for the damage suffered as the consequence. The limit of such compensation shall not exceed the amount payable by the carrier if there is total loss of the cargo. This is about the closest that the Maritime Code comes to the situation of cargo delivery without production of the bill of lading.

50 What are the responsibilities and liabilities of the shipper?

The shipper is responsible for:

- identifying the place of loading in the loading port;
- obeying the master's instructions on safe stowage of the cargo;
- issuing instructions on manipulation with special cargo;
- notifying the master on the dangerous nature of the cargo and required measures; and
- the timely handing of customs and other cargo documents to the master.

The shipper shall be liable for damages owing to the loading of cargo without the carrier's knowledge. The charterer is liable for damages

owing to defective packing; the nature and condition of the cargo if unknown to the carrier; inaccurate information on the cargo; and carriage of clandestine cargo if unknown to the carrier.

Shipping emissions

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

No.

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 of fuel oil is 1.5 per cent m/m. Each shipment of fuel oil should be accompanied by a declaration of compliance. If in doubt whether the fuel oil does comply with the regulatory requirements, the inspectors are authorised to order sampling and a new chemical analysis, as provided in greater detail in the Commission Implementing Decision (EU) 2015/253 of 16 February 2015, laying down the rules concerning the sampling and reporting under Council Directive 1999/32/EC as regards the sulphur content of marine fuels (Official Journal of the European Union, L41, 17 February 2015.). If the fuel oil does exceed the maximum sulphur content, the safety inspectors (Harbour Master's Offices) will prohibit further use of such fuel oil.

Ship recycling

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

Croatia is not party to the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships. On the other hand, as a member of the EU, Croatia is directly bound by a number of relevant EU laws, including notably Regulation (EU) No. 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and the amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC.

To our knowledge, there are no ship recycling facilities in Croatia.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

Maritime disputes are heard in the first instance by commercial courts (except disputes relating to contracts for the carriage of passengers which are heard by the municipal courts). The High Commercial Court of the Republic of Croatia acts as the court of appeal. A third-stage appeal to the Supreme Court of the Republic of Croatia is permitted only exceptionally.

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

Service of court proceedings is made pursuant to the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, when applicable. Croatia is also party to Regulation (EC) No. 1393/2007 of the European Parliament and of the Council on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents).

In cases falling outside the scope of the 1965 Convention or the regulation, service of court proceedings is made through diplomatic channels. The procedure is rather slow and sometimes also quite expensive because all the documents need to be translated into the language of the recipient.

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

There is one well-established arbitration institution in Croatia, the Permanent Arbitration Court at the Croatian Chamber of Economy (with its seat in Croatia's capital, Zagreb), which resolves both domestic and international disputes. There is no special panel of arbitrators specialising in maritime matters, but the list of arbitrators contains a number of persons who are known experts in maritime matters.

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

Croatia is bound by 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 (recast) (Brussels I bis). Croatia is also party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Otherwise, the provisions of Croatian procedural law will apply. They are based on similar principles to Brussels I bis and the 1958 New York Convention.

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

Brussels I bis seems to allow asymmetric jurisdiction agreements, so those should be valid and enforceable in Croatia. Also, we have identified no obstacles in the Croatian Arbitration Act to making asymmetric arbitration agreements. Nevertheless, we are not aware of any Croatian court or arbitral decisions to that effect.

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

The Croatian courts cannot intervene in a foreign forum and anti-suit injunctions are alien to Croatian law. It remains for the court before which the proceedings have been started to decide on its jurisdiction.

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 request the court or tribunal to dismiss the case due to lack of jurisdiction. In spite of that, it is the court's duty to examine whether it has international jurisdiction. If, however, the action has been brought in the domestic court in breach of an arbitration agreement, the court shall not dismiss the proceedings without the defendant's express objection, to be submitted at the first hearing.

Limitation periods for liability

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

The specific limitation periods provided in the Maritime Code are as follows:

- carriage of goods: one year;
- general average: one year;
- carriage of passengers and luggage: two years;
- collisions: two years;
- salvage: two years;
- CLC claims: three years;
- nuclear ship operator liability: three years; and
- marine insurance: five years.

In other cases, general rules would apply, as contained in the Obligations Act. The general time limitation period applicable to commercial contracts is three years. The limitation period for claims in tort is three years from the time the damage and the person liable to restore it becomes known, but in any event, it is five years from the occurrence of damage.

Extension is not allowed (by agreement or otherwise) unless specifically provided for by the law (eg, the Hague-Visby Rules and provisions of Maritime Code reproducing the Hague-Visby Rules).

62 May courts or arbitral tribunals extend the time limits?

See question 61.

Miscellaneous

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

Croatia is party to the Maritime Labour Convention (MLC). Croatia applies the convention to all the vessels in Croatian territorial waters and to Croatian vessels abroad. The provisions of the MLC have been incorporated in various pieces of Croatian legislation, from the Maritime Code through to the rules on watchkeeping and on medical examination of seafarers, as well as the collective agreements supported by the Croatian Seafarers' Union.

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 the concept of *rebus sic stantibus*, a contractual party may seek that the contract be amended or terminated if, due to extraordinary and unforeseeable circumstances that have occurred after the parties have entered into a contract, the performance of the contract has become overly onerous or would cause too high a loss. No such relief can be sought if the party affected should have considered such circumstances at the time of entering into the contract. When deciding on this point, the court will be guided by the principles of fairness, taking into account the purpose of the contract, the distribution of risk ensuing from the contract or the law, the duration of the changed circumstances, and the interests of both parties.

Consequently, the changed economic conditions will lead to such a relief only if the court finds that the actual nature or extent of such a change in the economic conditions could not have been foreseen at the time of entering into the contract.

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

The Croatian government has recently accepted the bill of a new Ship and Port Facility Security Act, creating a framework for the direct implementation of Regulation (EC) No. 725/2004 of the European Parliament and the Council, and causing Directive 2005/65/EC on enhancing port security to be introduced into Croatian legislation.

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Newbuilding contracts

- 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 moveable 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.

- 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 become effective in the first place.

- 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 to him. Specific performance is, however, a discretionary power of the court and is applied in cases where an alternative remedy is not possible.

- 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 his or her 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 or similar.

Ship registration and mortgages

- 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.

- 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 (EEA), 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.

- 7 What are the documentary requirements for registration?**

A Cypriot company is formed by the registration of the memorandum and articles of association with the Registrar of Companies, and the filing of the requisite company forms registering the appointment of directors, secretary and registered office.

- 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 the shipowner to the charterer, and on the condition that the respective laws of the underlying registry and of the bareboat registry, to explicitly permit dual registration, and to contain preventive covenants that matters relating to ownership, and to mortgages over the ship, shall be exclusively governed by the laws of the ships' underlying register. The bareboat charterer must also undertake to maintain the same safety standards to the ship, even though the chosen bareboat register applies safety standards that are lower than those applied by the ships' underlying register.

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

The Register Book is entrusted by 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.

Limitation of liability

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 2012 Protocol, adopted on 19 April 2012, and the amendments therein in relation to the limitation periods prescribed in the Convention, scheduled to have entered into force on 15 June 2015, will not become effective in Cyprus in the absence of a fresh ratification law ratifying the 2012 Protocol.

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:

- (i) 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;
- (ii) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- (iii) 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;
- (iv) 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;
- (v) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship; and
- (vi) 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 this convention, and further loss caused by such measures.

The claims set out under (iv), (v) and (vi) are not subject to 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.

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 (see questions 42 to 49).

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.

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

The Athens Convention limitation regime applies.

Port state control

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

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

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 detention of ships.

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

Orders made or fines imposed under port state control (PSC) 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.

Classification societies

17 Which are the approved classification societies?

All members of the IACS class societies are recognised by Cyprus.

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.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Yes.

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); 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 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 and the Port Reception Facilities for Ship-generated Waste and Cargo Residues Regulations, 2003;
- 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.

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.

Ship arrest

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.

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.

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.

25 What is the test for wrongful arrest?

The test for wrongful arrest is 'bad faith'.

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 his or her claim falls within one of the sections in question 23 (subsection (m) in particular).

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

Yes, in the form of a local bank guarantee.

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.

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 will have to engage a local lawyer who will agree to undertake the case. The documents supporting the claim may be photocopies and have to be in a language that is understood by the court, otherwise 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 in a matter of two to three days.

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.

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.

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*.

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.

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.

Judicial sale of vessels

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.

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 appraisal (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 appraisal) and they then form part of the admiralty marshal's expenses (see question 37). An approximate figure would be around €10,000.

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.

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.

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.

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

Yes, Cyprus is a signatory.

Carriage of goods by sea and bills of lading

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).

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.

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.

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).

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

Yes, it is recognised and binding.

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.

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

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.

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.

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).

50 What are the responsibilities and liabilities of the shipper?

The principles of English law are to be followed.

Shipping emissions

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.

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 has to 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 changeover, specific entries must be entered in the official engine log of a ship. Enforcement is performed through 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.

Ship recycling

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

The EU regulations apply in Cyprus as regards recycling of ships. There are no recycling facilities locally.

Jurisdiction and dispute resolution

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.

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 effected. Otherwise, depending on the country in which the defendant resides, there are numerous bilateral treaties and international conventions that Cyprus has ratified.

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.

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.

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.

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 very reluctant to entertain such an action and would prefer to leave the matter to the foreign court to decide.

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.

Limitation periods for liability

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.

62 May courts or arbitral tribunals extend the time limits?

Yes, they have discretion to do so, provided they satisfy themselves of certain requirements.

Miscellaneous**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 Department of Merchant Shipping is the responsible body to ensure application on all Cypriot ships.

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.

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

No.



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Newbuilding contracts

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 shipbuilding contract will contain detailed provisions dealing with when title in the ship will pass. The parties are, in principle, free to agree whatever they like. However, title normally passes on delivery. In most shipbuilding contracts payment is by instalments and payment of the final instalment and delivery are simultaneous. This is often marked by a formal closing meeting.

It sometimes happens that, for whatever reason, the shipbuilder is not able to provide a refund guarantee (to secure the return of any pre-delivery instalments in the event of non-delivery). In such cases the contract might provide for the progressive transfer of title as the construction progresses.

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

Under section 4 of the Statute of Frauds 1677, a contract of guarantee is unenforceable unless it is made in writing, or is evidenced in a written note or memorandum and requires that it be signed by the guarantor or by its agent. The note or memorandum must acknowledge the existence of the agreement and include the material terms of that agreement. There have been some interesting decisions on the validity of guarantees in the English courts. In one case, the Court of Appeal held that a guarantee could be found in a chain of emails for the purposes of the Statute of Frauds, even though no hard copy of the final form of guarantee had been signed. The Court of Appeal also held that an email salutation by a broker authorised to act on behalf of the guarantor was sufficient to constitute a signature for the purposes of the Statute of Frauds, irrespective of the intention with which the broker signed, and it was irrelevant whether or not the broker thought he or she was signing a guarantee. In another case, the Commercial Court considered the validity of a guarantee issued and sent by SWIFT (a secure international messaging service used by financial institutions). The guarantor bank's name appeared in the header that was automatically inserted into the SWIFT message and the court's conclusion was that this constituted sufficient signature for the purposes of the Statute of Frauds.

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 of a contract is a discretionary remedy. Such an order is not normally granted if compliance with it would require detailed judicial supervision. Thus, an order for specific performance of a shipbuilding contract compelling the builder to complete and deliver the vessel is unlikely to be granted. The situation may be different where the vessel is complete, it is possible for the yard to deliver it and damages are not an adequate remedy.

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 Consumer Protection Act 1987 (CPA) imposes a measure of strict liability for damage caused by a defective product. The person liable is the 'producer' of the product and, since the definition of a product in the CPA expressly includes 'ship', the possibility arises, in theory at any rate, of anyone being able to make a claim against the shipbuilder under the CPA. However, damage to the product itself is expressly excluded under the CPA. Similarly, so far as concerns loss of or damage to property, the CPA only applies in respect of damage to property ordinarily intended for the private use or consumption of the person who suffers the damage. In short, therefore, the CPA is unlikely to apply to loss of or damage to commercial property, for example to cargo on the ship or to other vessels, although there is a possible exception where the vessel is used privately. Where the CPA does not apply, any remedy will depend upon the application of the usual principles of contract and tort.

Where the vessel is defective because of defects in workmanship or materials, the purchaser's right to reject the vessel will depend on the terms of the contract and also on whether the defects are material and whether the shipbuilder is in repudiatory breach of contract. In practice, if the shipbuilder can, and is willing to, rectify the defects within the agreed delivery time, there will be no repudiatory breach of contract. Where the defects are minor and do not deprive the purchaser of substantially the whole benefit of the contract, there will be no right of rejection and the purchaser will be limited to a claim in damages. More usually, the purchaser will require the shipbuilder to remedy the defects at its own cost. Once the vessel has been accepted for delivery after sea trials, it is usually provided in the contract that such acceptance is final and binding such that the builder is not liable for pre-delivery defects. Contracts will, however, often also contain contractual warranties whereby the builder agrees to remedy defects discovered after delivery, subject to specific time limits within which claims can be made. They may also contain terms seeking to limit or exclude liability on grounds other than time. For example, statutory implied terms as to compliance with description, satisfactory quality and fitness for purpose are often excluded, as is liability for consequential losses. However, in England and Wales there are statutory provisions in place that, where applicable, affect a contracting party's freedom. Where the Unfair Contract Terms Act 1977 applies, liability for death or personal injury cannot be excluded. Those who enter into shipbuilding contracts as consumers, rather than businesses, have further statutory rights and protections under the Consumer Rights Act 2015, most of which cannot be contracted out of.

It may be that a purchaser from the original shipowner or other third party will be able to rely upon the Contracts (Rights of Third Parties) Act 1999 to bring a claim against the shipbuilder. Commercial contracts usually, however, contain an express clause excluding the operation of that Act. Purchasers from the original shipowner may take an assignment of any guarantee in the shipbuilding contract and this may well be enforceable through the original buyer, even if there is a prohibition against assignment in the shipbuilding contract.

Nevertheless, a claim will lie at the suit of a third party if he or she can demonstrate a negligent breach by the shipbuilder of a duty of care under the principles established in *Donoghue v Stevenson* [1932] AC 562.

Ship registration and mortgages

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?

For a vessel to be registered as a British ship under the Merchant Shipping Act 1995 (MSA 1995) it must be 'a vessel used in navigation' and it must be owned by persons qualified to own a British ship. Vessels eligible for registration in the Register of British Ships mirror the four parts of the register:

- Part I: British ships that are not fishing vessels or small ships (ie, merchant or pleasure vessels that are over 24 metres in length, are owned by a company or are (or will be) subject to a mortgage);
- Part II: fishing vessels;
- Part III: small ships under 24 metres in length; and
- Part IV: bareboat charter ships (ships that are registered in another jurisdiction but are bareboat chartered to persons qualified to own British ships).

A ship cannot be registered on more than one part of the register simultaneously.

Vessels operated by the Royal Navy are not able to register on the British Ship Register, but Royal Fleet Auxiliary vessels are.

The Merchant Shipping (Registration of Ships) 1993 provides, to be a British ship, the legal and beneficial owners of every share of a 'majority interest' (ie, 33 per cent of the shares) in the vessel must be companies or subjects of the UK, or a British territory, or citizens of an European Economic Area (EEA) state. Each of the shares to be counted in the majority interest must be wholly owned by such qualified people. In the MSA 1995, 'ship' is defined as any vessel used in navigation, but this is likely to be interpreted more widely to include units capable of movement at sea, whether self-propelled or not. The Department of Trade has indicated that it considers submersibles and jack-up rigs to be ships capable of being registered under the MSA 1995. The Registrar of Shipping and Seamen should be consulted if eligibility for registration is not clear.

It is not possible to register vessels under construction under the UK flag.

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

The following are eligible to be owners of ships entered on the UK register:

- British citizens;
- British Dependent Territories citizens;
- British Overseas citizens;
- companies incorporated in an EEA state;
- citizens of EU member states exercising their rights under articles 48 or 52 of the EU Treaty in the UK;
- companies incorporated in British overseas possessions, so long as their principal place of business is either in the UK or in those possessions; and
- European economic interest groupings.

If none of the above criteria can be met, a representative may be appointed. The representative must be either an individual resident in the UK or a company incorporated in an EEA state that has a place of business in the UK.

A maximum of five persons or companies may be registered as owners of a British ship.

All applications for registration are to be made to the Registrar at the Registry of Shipping and Seamen. This can be done in person or by post and must be supported by a declaration of eligibility in the approved form, which is to include a declaration of British connection, a declaration of ownership by every owner setting out their qualification to own a British ship and a statement of the number of shares in the ship and their ownership.

7 What are the documentary requirements for registration?

The following documents will generally need to be submitted in order to register:

- application to register;
- declaration of eligibility;
- bill of sale (for an existing vessel);
- copy of certificate of incorporation (if the owner is a company);
- certificate of survey for tonnage and measurement;
- international tonnage certificate (for vessels greater than 500 GT);
- builder's certificate (for a new-build vessel);
- deletion certificate or transcript from current register or an undertaking to provide one within six weeks;
- copy of ship's current continuous synopsis record (for vessels greater than 500 GT); and
- mortgage registration forms (if appropriate).

The above list is a minimum and further documents and information may be required in relation to, for example, safe manning, certificates of equivalent competency, maritime security (ISPS Code), radio communications, ISM Code, seafarer employment agreements, accommodation, Maritime Labour Crew Convention (MLCC), survey, stability and civil liability certification.

Once the documentation is received, a Carving and Marking Note will be issued to the attending surveyor. Once signed and returned, the Certificate of Registry can be issued.

Often, a limited company is incorporated in Britain for the purpose of being the registered owner of a vessel on the Register. The basic requirements to incorporate a company under the Companies Act 2006 (CA 2006) are as follows:

- memorandum of association: the memorandum simply states that the subscribers:
 - wish to form a company under the CA 2006;
 - have agreed to become members (subscribers) of the company; and
 - where the company is to have share capital, have agreed to take at least one share each (or one share for a single subscriber);
- articles of association: the internal arrangements of a company are governed by its articles of association. A company may adopt its own articles or adopt one of the model articles of association prescribed for companies by the CA 2006, either with or without modification. The relevant model articles applicable to the type of company in question will apply by default to newly incorporated companies unless they choose to vary or exclude those articles;
- shareholders: whether the incorporated company is a public limited company or a private limited company limited by shares, only one shareholder is required, irrespective of that shareholder's nationality or place of residence;
- directors: a private limited company may have only one director, if permitted in its articles, while a public limited company must have at least two directors. At least one director must be a natural person, but a director's nationality or place of residence is irrelevant for legal purposes;
- company secretary: a private limited company does not need to have a company secretary, unless required to do so by its articles of association; a public limited company must have a formally qualified secretary; and
- filing: the memorandum of association and articles of association (if not adopting the relevant model articles), together with the payment of the requisite fee, must be filed at Companies House with form IN01 (application for registration), which discloses certain details to Companies House, including the proposed registered address and accounting reference date of the company and details of its proposed directors.

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

The dual registry system allows a charterer, leasing a ship registered in one country, to benefit from the advantages offered by another registry. It also allows the shipowner to maintain the original registration, which is merely suspended during the dual registration but regains its effectiveness upon termination of the charter.

The UK only expressly allows dual charter registration under a bareboat charter and only when vessels are bareboat chartering into the UK.

Neither the MSA 1995 nor its associated regulations contain any specific provisions allowing bareboat chartering out of a vessel flying the UK flag, although it is not expressly prohibited. Ships can be bareboat chartered into the UK register from any other registry provided that the eligibility requirements for both vessel and charterer are met. As with owned ships, a representative person or managing charterer must be appointed. Once the initial paperwork is submitted, the chosen name and port will be confirmed and an official number issued. Once these details have been marked on the ship, the certificate of registry will be issued and will last for five years or the duration of the bareboat charter agreement, whichever is the shorter.

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

The Registrar General of Shipping and Seamen maintains the mortgage register of a merchant ship or fishing vessel on the British register. The register contains:

- type of mortgage;
- date of creation;
- date and time of registration;
- name and address of the mortgagee;
- number of shares mortgaged; and
- where relevant, original principal amount secured.

English law does not permit mortgages in favour of a bearer, so the mortgagee must be named. The amount is secured and the repayments are not recorded. If the mortgage is discharged, this is endorsed on the reverse side of the mortgage, and registered.

Limitation of liability

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

The UK is party to the 1976 Convention on Limitation of Liability for Maritime Claims (the 1976 Convention) as amended by the 1996 Protocol. Amendments to the 1996 Protocol were announced by the International Maritime Organization (IMO) in April 2012, introducing new liability limits that came into force on 8 June 2015 and that resulted in a 51 per cent increase on the previous limits. These limits came into force in the UK on 30 November 2016.

Under the 1976 Convention, the persons entitled to limit their liability include shipowners, charterers (including slot charterers, according to a decision of the English High Court), 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 English courts have held that the 1976 Convention also entitles the charterers to limit for claims brought against them by shipowners although, in those circumstances, charterers can only limit their liability for claims in respect of which limitation is available under article 2 of the 1976 Convention. By way of example, charterers can limit their liability in respect of an indemnity claim for any cargo claims brought against the shipowners, but they cannot limit their liability in respect of a claim for an indemnity for salvage costs or in respect of general average.

The 1976 Convention applies to seagoing ships, but the implementing legislation in the MSA 1995 extends the right to limit to non-seagoing ships, as well as to hovercraft. The UK maintains a reservation in respect of article 2(1)(d) of the 1976 Convention with the result that liability for the cost of wreck removal is unlimited. That said, there are arguments that it is still possible to limit liability in respect of the recourse claims relating to wreck removal expenses.

Section 191 of the MSA 1995 also extends the right of limitation to harbour authorities, conservancy authorities and owners of docks and canals. The claims that can be limited are set out in the 1976 Convention. It should be noted that the UK excludes claims for 'loss of life or personal injury' suffered by passengers on seagoing ships from the list of claims subject to limitation. All such claims are subject to the Athens Convention 1974 and its 2002 Protocol, which entered into force on 23 April 2014. Since 31 December 2012, the key provisions of the Athens Convention 1974 and the 2002 Protocol have been implemented in the EU and the EEA by the EU Passenger Liability Regulation, Regulation 392/2009 (PLR).

Under section 22 of the Pilotage Act 1987, pilots and pilotage authorities may limit their liability to £1,000 plus the pilotage fee for

individual liability of the pilot and to £1,000 multiplied by the number of pilots employed by the pilotage authority in cases where the latter is liable for the acts of its pilots.

11 What is the procedure for establishing limitation?

Rule 61.11 of the Civil Procedure Rules stipulates that a limitation action must be started in the Admiralty Court by issuing a claim form. At least one defendant must be named in the claim form, but other defendants may be described generically. If the action is successful and a limitation decree granted, the limiting party will be entitled to limit liability against any and all claims. It is possible to invoke limitation of liability without setting up a fund when commencing an action. However, in some circumstances there may be advantages in so doing, for example to protect against later increases in the fund or to make use of the rights contained in article 13 of the 1976 Convention; principally, freedom from ship arrest in states party to the Convention. The prior initiation of legal proceedings under the 1976 Convention is not a condition precedent for an application to constitute a limitation fund.

One issue that has come before the English courts is whether a limitation fund can be set up by way of a protection and indemnity (P&I) club letter of undertaking. The English Court of Appeal has clarified that it is possible (subject to certain requirements) to constitute a tonnage limitation fund in England with a guarantee, including a P&I club letter of undertaking.

Limitation may also be pleaded by way of defence. Success with that defence, however, will only establish the right to limit liability to the claimant in that particular action, and not liability to any other claimants. It is not necessary to set up a limitation fund where limitation is pleaded by way of defence.

The limits are calculated on the basis of the vessel's limitation tonnage.

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

Article 4 of the 1976 Convention provides that 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 knowledge that such loss would probably result. The cases demonstrate that it is extremely difficult to break this limit.

In what has been described as a landmark judgment in the English Admiralty Court in 2016, in *Kairos Shipping v ENKA & COLLIC (Atlantic Confidence)* [2016] EWHC 2412 (Admlty), however, cargo interests successfully broke limitation in the UK for the first time since the 1976 Convention came into force.

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

The Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 (Athens Convention), has been in force in the UK, by virtue of section 183 of the MSA 1995, since June 1996.

The Protocol to the Athens Convention was adopted in 2002 and came into force on 23 April 2014 and, as at May 2018, is in force in 28 states: Albania, Belgium, Belize, Bulgaria, Croatia, Denmark, Finland, Greece, Ireland, Latvia, Lithuania, Malta, Marshall Islands, Montenegro, the Netherlands, Norway, Palau, Panama, Portugal, Romania, Saint Kitts & Nevis, Serbia, the Slovak Republic, Slovenia, Spain, Sweden, Syrian Arab Republic and the UK.

The 2002 Protocol has replaced fault-based liability with strict liability. The carrier is liable unless it can show that the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible nature or, alternatively, that the incident was wholly caused by an act or omission of a third party with intent to cause the incident.

The 2002 Protocol raises the limits of liability for death of, or personal injury to, a passenger, from 46,666 SDR to 250,000 SDR (approximately US\$358,000). Where losses exceed this new limit, and are caused by fault or neglect on the part of the carrier, there is an overall increased limit of liability of 400,000 SDR (approximately US\$573,000) per passenger. Carriers cannot limit liability where they acted with intent to cause such damage or recklessly and in the knowledge that their actions would probably cause damage. Under the protocol, member states have an opt-out provision, allowing them to retain

or introduce higher limits of liability, or indeed unlimited liability, for personal injury and death claims under their national law.

For loss of or damage to luggage, the limit varies:

- the liability of the carrier for the loss of, or damage to, cabin luggage is limited to 2,250 SDR (approximately US\$3,220) per passenger, per carriage;
- the liability of the carrier for the loss of, or damage to, vehicles including all luggage carried in or on the vehicle, is limited to 12,700 SDR (approximately US\$18,180) per vehicle, per carriage; and
- the liability of the carrier for the loss of, or damage to, other luggage is limited to 3,375 SDR (approximately US\$4,831) per passenger, per carriage.

The 2002 Protocol also states that compulsory insurance is required to cover passengers on ships. Third-party claimants are now entitled to bring a direct claim resulting from a shipping-related incident against the liability insurer, up to the strict liability limit of 250,000 SDR (approximately US\$358,000) per passenger for each distinct occasion.

The 2002 Protocol applies to all international carriage where a ship is registered in the UK, the contract of carriage has been made in the UK, or the place of departure or destination is in the UK. The 2002 Protocol does not, however, apply to vessels registered to carry no more than 12 passengers. As stated in the answer to question 10 above, the key provisions of the Athens Convention 1974 and the 2002 Protocol have been implemented in the EU by the PLR since 31 December 2012.

Port state control

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

Modern port state control in the UK derives from the voluntary commitment of EU member states to the memorandum of understanding agreed in Paris in 1982 (the Paris MoU). This was given a legal framework by EU Council Directive 95/21/EC on port state control of shipping, which was implemented in the UK by the Merchant Shipping (Port State Control) Regulations 1995, Statutory Instrument 1995 No. 3128, as subsequently amended.

Directive 2009/16/EC on Port State Control (the PSC Directive) replaced Directive 95/21/EC and was implemented into UK legislation by the Merchant Shipping (Port State Control) Regulations 2011, which came into force on 24 November 2011. In July 2013, a legislative resolution proposing a new directive to align the PSC Directive with the requirements of the Maritime Labour Convention 2006 (MLC) was passed in the European Parliament. Among other things, the amendments dealt with how the requirements under the MLC are to be monitored as part of a member state's port state control duties. The European Council adopted the new Directive 2013/38/EU on 22 July 2013 and it came into force on 20 August 2013, the date of entry into force of the MLC.

The Port State Control agency in the UK is the Maritime and Coastguard Agency, which is an executive agency of the Department of Transport. It was established in 1998 as a result of the Port State Control (Amendment) Regulations, Statutory Instrument 1998 No. 1433, and the merger of the Marine Safety Agency and the Coastguard Agency.

15 What sanctions may the port state control inspector impose?

The PSC Directive imposes a risk-based system of targeting ships for inspection. Provisions of the directive that apply to shipowners, operators, agents, masters, crew, pilots and port authorities are incorporated into English law by the Merchant Shipping (Port State Control) Regulations 2011 (MSR 2011). Each ship in the database is allocated a risk profile out of the three possible risk profiles: high risk, standard risk or low risk. When determining a ship's risk profile, the following criteria are considered:

- type of ship;
- age of ship;
- flag of registry;
- performance of the relevant 'recognised organisation' (an organisation, usually a classification society, which is authorised by a member state to carry out surveys and issue certificates on its behalf: see question 17);

- the ship's ISM company performance; and
- number of deficiencies and number of detentions within the previous 36 months.

Calculators for ship risk profiles and company performance based on information entered by the user are provided on the Paris MoU website.

Company performance is a new criterion and is based on the company's performance in the Paris MoU region with respect to the number of deficiencies per inspection and number of detentions in the preceding three-year period.

The frequency of periodic inspection will depend on the risk profile of the ship. Ships with a high, standard or low-risk profile will be inspected 6, 12 or 36 months, respectively, after the previous inspection in the Paris MoU region. Ships with 'overriding factors', as described in Annex I part II 2A of the PSC Directive, will be inspected regardless of the period since the last inspection. Inspections may take place before they are due at the discretion of inspectors 5, 10 or 24 months after the previous inspection for a ship with a high, standard or low-risk profile, respectively. A ship with 'unexpected factors', as described in Annex I part II 2B, may be inspected according to the professional judgement of the inspector. The interval until the next inspection restarts after each inspection. Ships other than those described above will not, generally, be selected for inspection.

Usually inspections are unannounced. All inspections begin with an initial inspection. The port state control officer (PSCO) will, as a minimum, check relevant certificates and documents listed in Annex IV, confirm that deficiencies outstanding from the previous inspection in the Paris MoU region have been rectified, and look at the overall condition of the ship, including the engine room, accommodation and conditions of hygiene on board. Where there are 'clear grounds' for believing that the condition of a ship or its equipment or crew does not meet requirements, more detailed inspection may be undertaken.

The following sanctions may be imposed:

- a prohibition notice, which requires that a particular activity cease;
- a detention notice, whereby the vessel is prevented from leaving port until the PSCO is satisfied that the deficiencies have been properly rectified and the detention notice has been lifted. The vessel is only permitted to be moved from the place of detention if repairs cannot be made at that place, or if there are overriding reasons of safety. Unauthorised departure from the port of detention may incur liability to a fine or imprisonment; or
- an access refusal notice, which is applicable to all ship types registered with a black or grey-listed flag on the Paris MoU white, grey and black lists (where the individual flag state administrations are ranked according to how their ships have performed in relation to port state control within a period of three years: the 'black list' shows the flag states that have significantly more detentions than the average number within the Paris MoU countries; the 'grey list' shows the flag states that have a number of detentions corresponding to the average and the 'white list' represents high-quality flags with a consistently low detention record). Banning is based on the number of detentions a ship has had within a specified period. A ship that flies a black-listed flag will be banned if it has been detained more than twice in the preceding 36 months. A grey-listed flag ship will be banned if it has been detained more than twice in the preceding 24 months. Minimum ban times are applicable as follows: three months for the first ban and 12 months for the second ban. A detention occurring after the second ban may lead to permanent exclusion from EU ports and anchorages.

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

Regulations 14 to 16 of the Merchant Shipping (Port State Control) Regulations 2011 provide owners and masters with rights of appeal and compensation in respect of a detention notice or access refusal notice. An independent arbitrator, appointed by agreement between the parties, decides the appeal. The notice of reference form must be sent to the PSCO within 21 days of receipt of the detention or access refusal notice. A notice of appeal should also be sent to the Maritime and Coastguard Agency office that issued the order.

Detention will not be suspended by issuing a notice of reference. The burden of satisfying the arbitrator that there were no reasonable grounds for the detention lies with the shipowner. If the arbitrator decides that there was no valid basis for the detention, he or she must

cancel the detention. Alternatively, the arbitrator may confirm the detention or issue a modified detention order. The arbitrator may also order that the owner be compensated for any loss suffered as a result of the detention, including lost freight, port expenses and legal costs.

Appeal against the arbitrator's decision is only possible on a question of law or serious irregularity. In the only case for a century dealing with the legality of detention of a vessel under the UK merchant shipping legislation, the disponent owners of a cruise ship sought to challenge the validity of two notices of detention issued by the Maritime and Coastguard Agency, but did not appeal the notices within the 21-day period stipulated by the relevant Regulations. The court, asked to decide a number of preliminary issues, held that some technical defects in the two notices of detention that had been issued did not invalidate them.

Classification societies

17 Which are the approved classification societies?

The UK Ship Register has agreements with six classification societies to act as 'recognised organisations' authorised to conduct statutory surveys and certification on UK Registered Ships:

- ABS Europe Ltd;
- Bureau Veritas;
- Class NK;
- DNV GL AS;
- Lloyd's Register Marine; and
- RINA UK Ltd.

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

Classification societies usually exclude their liability by contract. However, it is theoretically possible for a classification society to incur liability in tort if the claimant can establish that the classification society owed a duty of care, that that duty of care was breached and that such breach resulted in loss or damage to the claimant. Although the landmark decision of the House of Lords (as it then was) in *Marc Rich & Co v Bishop Rock Marine (The Nicholas H)* [1995] 2 Lloyd's Rep. 299 established that classification societies do not owe a duty of care towards third parties in respect of their classification and certification duties, international developments concerning the liability of classification societies may lead the UK Supreme Court to decide differently should a new case come before it.

The International Association of Classification Societies, which has 12 full members, has introduced a level of self-regulation among its members, including the formation of uniform standards for technical safety rules. In addition, the Erika III package of maritime safety and anti-pollution reforms came into force on 17 June 2009 and includes a regulation and a directive on common rules and standards for ship inspection within the EU and survey organisations authorised to operate on behalf of member states. The directive has been enacted by means of Amendment 3 to MSN 1672 (M+F). The regulation is binding in its entirety and directly applicable in all member states. In summary, these enactments provide for classification societies to achieve the status of 'recognised organisations' on behalf of member states in certain circumstances, whereupon they will be subject to the uniform rules and standards and minimum criteria laid down for such recognised organisations. The directive also contains provisions concerning the financial liability of recognised organisations in the case of a wilful act or omission, or gross negligence.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Under the MSA 1995 a harbour or conservancy authority has the power to remove, destroy, take possession of or mark a wreck where, in the opinion of the authority, the wreck is an obstruction or danger. The authority may sell the removed vessel and reimburse their expenses from the proceeds. The authority may contract with a third party for the removal or salvage of a wreck. Liability for the costs of wreck removal lies with the owner (as mentioned in question 10, such liability is unlimited), notwithstanding that a third party may be ultimately liable, for example where there has been a collision as a result of the negligence of another vessel.

Where there is no harbour or conservancy authority with the power to remove a wreck, the General Lighthouse Authority has the same powers to remove a wreck in its area.

Under the MSA 1995, as modified by the Wreck Removal Convention Act 2011, the Secretary of State, after determining that a wreck poses a hazard, may issue a wreck removal notice to an owner, stating:

- a reasonable deadline by which the wreck must be removed and that evidence of insurance or other security must be provided;
- that, if the deadline is not complied with, the wreck may be removed by the state at the owner's expense; and
- that the state may intervene in the removal if the hazard becomes particularly severe. Failure to comply with such a notice may result in a fine.

The Nairobi International Convention on the Removal of Wrecks 2007 (the Wreck Removal Convention) entered into force on 14 April 2015 following the deposit, on 14 April 2014, of an instrument of ratification by the 10th ratifying state, with the IMO. As at May 2018, the Wreck Removal Convention is in force in 41 countries. In the UK, the Wreck Removal Convention has been implemented by the Wreck Removal Convention Act 2011, which modified the wording of the MSA 1995. The UK's 'Convention Area' covers both its territorial waters and its Exclusive Economic Zone.

The convention sets out uniform international rules that aim to ensure that wrecks are removed promptly and effectively. An order can be given if the wreck is likely to be a hazard to navigation or a threat to the environment. It also places a positive obligation on the master of a wrecked vessel to report it to the concerned state.

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

The Collision Convention 1910 was implemented into national legislation by the Maritime Conventions Act 1911, which was repealed and replaced by the MSA 1995. The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (as amended) are in force by virtue of the MSA 1995 and apply to all British ships wherever they may be, and to all foreign ships within UK waters.

The International Convention on Salvage 1989 applies in the UK.

The International Convention for the Prevention of Pollution from Ships 1973 as amended by the 1978 Protocol (MARPOL 73/78) and subsequently amended by the 1997 Protocol is also in force. The International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 1992), the Fund Convention 1992 and the Supplementary Fund Protocol 2003 apply in the UK.

The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, which entered into force on 21 November 2008, applies in this jurisdiction. This aims to ensure that adequate, prompt and effective compensation is available to persons who suffer damage caused by spills of oil when carried as fuel in vessels' bunker tanks.

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. Lloyd's Open Form (LOF) is acceptable and indeed that is the most common form of salvage agreement in the world. However, the LOF does not have to be used and parties can agree their own terms and conditions. Usually, salvage operations are undertaken by professional salvage contractors, but anyone can carry out salvage operations and then bring a claim for contractual or common law salvage.

Given the wide usage of the LOF form worldwide, Lloyd's publish updated versions at appropriate intervals. The most recent edition of the LOF was published in 2011. A revised edition of the accompanying Lloyd's Standard Salvage and Arbitration Clauses (LSSA Clauses) was also published and was subsequently updated in 2014. In summary, there have been two major changes to the LOF itself: the details of LOF awards are now made available, although by subscription only; and Lloyd's now requires that all agreements to use the LOF be reported to Lloyd's. There have also been some changes to the LSSA Clauses, the principal ones being as follows: an arbitrator is now entitled to demand security for the fees incurred or reasonably anticipated to be incurred;

and notice of the salvage operation can now be provided to the insurers of the property rather than the owners themselves. This change was aimed at reducing the number of notices that needed to be sent out because one insurer may act for a number of owners. The 2014 revision introduced three further changes: the fees for arbitrators are now available on the Salvage Arbitration Branch website; the clause dealing with the ability to serve notice on the security provider has been made clearer and, most importantly, if agreement is reached between the salvors and cargo owners who own at least 75 per cent of the value of the cargo, these settlements are no longer binding on the owners of the rest of the cargo, but the arbitrator can take into account such settlement offers and give them such weight as appropriate.

Ship arrest

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

The UK is a party to the Convention Relating to the Arrest of Seagoing Ships, Brussels, 1952 (Arrest Convention 1952).

The UK has not, as yet, ratified the International Convention on the Arrest of Ships 1999 (Arrest Convention 1999). The Convention entered into force on 14 September 2011 among its 10 acceding states and, as of May 2018, had 11 state parties. Other states, for example, Russia and Colombia, have incorporated elements of the Arrest Convention 1999 into domestic law. Among the changes that the Arrest Convention 1999 introduced to the Arrest Convention 1952 regime is the addition of new categories of maritime claims, including:

- environmental claims;
- wreck removal claims;
- claims for insurance premiums and P&I club calls;
- claims for commissions, brokerages and agency fees; and
- claims arising out of sale contract disputes and claims for special compensation under article 14 of the Salvage Convention 1989.

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?

Section 20(2) of the Senior Courts Act 1981 lists 19 types of maritime claim within the admiralty jurisdiction of the High Court and in respect of which a vessel may be arrested. These include:

- claims relating to the possession or ownership of, or mortgage on a ship;
- claims for damage done by or to a ship;
- claims for loss of life or personal injury due to a defect in a ship;
- claims for loss of or damage to goods carried on a ship;
- other claims relating to the carriage of goods on a ship;
- claims relating to the use or hire of a ship;
- claims for salvage, towage and pilotage;
- claims for goods and materials supplied to a ship;
- claims in respect of the construction or repair of a ship;
- claims by the master or crew for wages;
- claims arising out of a general average act; and
- claims arising out of bottomry and collisions.

Notable exceptions to this list, where arrest is not possible, include claims for insurance premiums and for legal costs.

English law treats both English and foreign-flagged vessels equally and it does not distinguish between 'convention' and 'non-convention' vessels.

It is possible to arrest sister ships, but not associated ships. Sister ships are vessels that at the time when action is brought are owned by the same person who was the legal owner or demise charterer of the ship in connection with which the claim arose, at the time when the cause of action arose.

A bareboat (demise) chartered vessel can be arrested for a claim against the bareboat charterer but a time chartered vessel can only be arrested for a claim against a time charterer for a claim that has given rise to a maritime lien.

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

Yes. The claims that give rise to maritime liens are:

- damage done by ships;
- salvage;
- crew's wages and emoluments;
- master's wages and disbursements;
- fees and expenses incurred by a receiver of wreck; and
- bottomry and respondentia.

25 What is the test for wrongful arrest?

A claim for wrongful arrest usually requires demonstration of bad faith or gross negligence.

While not strictly speaking cases of wrongful arrest, there is English court precedent where Senegalese cargo underwriters, through the Senegalese receivers, attempted to hold shipowners and their P&I club 'to ransom' by arresting vessels in Senegal and insisting on a Senegalese law and jurisdiction clause in the bank letter of guarantee to govern the substantive cargo claims, in circumstances where the bills of lading incorporated an English law and London arbitration agreement. The court held that the owners were entitled to damages from the time when the vessel could and should have been released with adequate security in place.

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 English law, a bunker supplier can only proceed against the party with whom that supplier has contracted and cannot arrest a vessel if it did not contract directly with the owner or demise charterer. Furthermore, even if the bunker supply contract with the charterer contains an express term giving the supplier a lien on the vessel under the law governing that contract, this would have no effect under English law because the owners are not party to that contract. The majority decision of the Privy Council in *The Halcyon Isle* [1980] 2 LLR 325 held that the *lex fori* alone governs the recognition and ranking of foreign maritime liens under English law and this majority view has subsequently had considerable persuasive effect in cases decided in a number of jurisdictions. The bunker supplier may have a claim against the shipowner for conversion of the bunkers (and thereby be entitled to arrest the vessel) where the bunker supply contract contains a retention of title clause, provided that the property in the bunkers does not pass from the supplier until payment for them has been made (see *The Saetta* [1993] 2 Lloyd's Rep. 268). However, in those circumstances, the shipowner may be able to rely on section 25(1) of the Sale of Goods Act 1979 (SGA) as a buyer of the bunkers from the charterer in good faith and without notice of any adverse right of the bunker supplier (see *The Fesco Angara* [2010] EWHC 619). Where the requirements of section 25(1) of the SGA are met, the owner will acquire clean title to the goods.

In 2016, the English Supreme Court ruled in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd and another (Res Cogitans)* that bunker suppliers who were unable to transfer property in bunkers supplied to a ship were nonetheless entitled to the price of the bunkers from the shipowners. The bunker supply contract in question provided for a credit period and incorporated a retention of title clause. The Supreme Court concluded that it was not a contract of sale within the scope of the SGA. Therefore, the implied term under section 12(1) of the SGA, which provides that it is an implied condition of a contract for the sale of goods that the seller has the right to sell the goods or will have such right at the time when property is to pass, did not apply. Section 49(1) of the SGA, which requires that property in the goods has passed to the buyer if the seller is to maintain a claim for the price, also did not apply. As a result, when the intermediate bunker supplier went bankrupt, the shipowners were liable to the physical bunker supplier for the agreed price of the bunkers, which was held to be a straightforward claim in debt. This decision had important consequences for those entering regularly into bunker supply contracts, who have had to consider whether standard bunker industry forms needed to be amended in order to protect the position of those purchasing bunkers from bunker traders in the future.

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

It is not necessary under English law for the arresting party to provide counter-security. However, a personal undertaking is required from the arresting party to the Admiralty Marshal to pay all costs of arrest, care and custody, upon the demand of the Admiralty Marshal.

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 to be provided must be reasonable but the assessment may be based on an approximation. 'Reasonable' in this context will generally mean the claimant's best arguable case, plus interest and costs. Clearly there is scope for negotiation as to what the claimant's best arguable case is. Only if such negotiations are unsuccessful will the court determine the amount and form of the security to be provided. The Arrest Convention 1952 does not limit the value of the security to the value of the ship, instead stating that security should be 'sufficient' (article 5), and this should be interpreted as sufficient to cover the arresting party's best arguable case including interest and costs. In practice, the court is likely to limit the security to either the value of the ship or to the statutory limit of liability with interest and costs. By contrast, the Arrest Convention 1999 explicitly states in article 4(2) that: 'in the absence of agreement otherwise between the parties, total security cannot exceed the value of the ship' although, as noted above, the UK is not a signatory.

As to the form of security, this is not prescribed and is a matter for negotiation between the parties. If the court is forced to intervene, then it will look to the financial standing of any guarantor being proposed (whether that guarantor is the shipowner, its P&I club or another entity). It is not necessarily the case that the security must be provided by an independent financial institution in order for it to be considered adequate.

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 formalities required for appointing a lawyer to make the arrest application to the Admiralty Court: a power of attorney is not required. In order to arrest a ship, documents in support of the claim should be filed with the claim form, together with details of the ship's location and port of registration. All original court documents (warrant of arrest and claim form) must be filed with the court before the arrest. A declaration must also be provided regarding the ownership of the ship, the level of security sought and providing confirmation that the claim has not been satisfied. This declaration must be verified by a statement of truth.

The documents do not need to be notarised or apostilled, even though the UK is a signatory to the Apostille Convention. However, where documents are in need of translation, translations must be certified by a notary. Where possible, original documentation should be provided, although the court may order an arrest even though some original documentation is not available. Documents can be filed electronically and the procedure for organising an arrest is in most cases straightforward and can be completed in a matter of hours. Before the ship is arrested, the arresting party must check to ensure that no caution (caveat) against arrest has been lodged with the court. Furthermore, the arresting party's solicitor must undertake to pay the Admiralty Marshal's fees and any expenses incurred by him in respect of the arrest of the ship, the care and custody of it while under arrest and eventual release from arrest.

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

The costs of arrest, care and custody are reimbursed to the Admiralty Marshal by the arresting party, but the arresting party is likely to be able to recover the costs from the defendant when the ship is sold because the Admiralty Marshal's costs and expenses rank first in priority of claims against the proceeds of sale of the vessel.

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?

Article 7 of the 1952 Arrest Convention, to which the UK is a party, specifies the circumstances in which the arresting court has jurisdiction to hear the claim on the merits. In England, the right to arrest is co-extensive with a right to hear the claim on its merits. This jurisdiction is not exclusive and, at least in theory, the claimant could arrest in England for security only and then pursue his or her claim in a different jurisdiction. More typically, however, the claimant will both arrest the vessel in England and seek to pursue the claim here and the defendant may seek to stay the English court proceedings in reliance on a foreign jurisdiction clause or by asserting *forum non conveniens*. If the English court grants a stay in favour of proceedings elsewhere, it has jurisdiction to maintain the security pending the outcome of the foreign proceedings.

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

The main English law interim remedy is the freezing injunction (formerly known as a *Mareva* injunction). A freezing injunction is an interim order prohibiting the respondent from dealing with or disposing of its assets. It is used to preserve those assets with a view to enforcing a judgment against them. It is important to note that such an injunction is not, of itself, a form of security. It does not grant any kind of priority over the assets, for example, but it does oblige the enjoined party to either comply with the terms of the order or to be held in contempt of court. The injunction normally obliges the enjoined party to disclose details of their assets and, where the injunction includes assets held by a third party on behalf of the enjoined party, for example a bank, the injunction will be served on that third party, who will also be required to comply with the terms of the injunction. A breach of the injunction may amount to a contempt of court, which is punishable by a fine, imprisonment or seizure of assets. The threat of the injunction (or its effect once obtained) may, however, be sufficient to persuade the target party to provide security voluntarily.

A freezing order will generally be capped at the amount of the claim, but it is possible to obtain orders that do not have a cap or that relate to a specific asset or assets. In circumstances where some or all of the respondent's assets are outside the jurisdiction, the court may grant a worldwide freezing order.

There are six general conditions for the granting of a freezing injunction:

- the applicant must have an underlying cause of action;
- the English court must have jurisdiction (this may be its jurisdiction in support of foreign proceedings);
- the applicant must have a good arguable case;
- there must be evidence that the respondent has assets against which a judgment could be executed;
- there must be a risk that any judgment would not otherwise be satisfied; and
- the applicant must provide an undertaking in damages.

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

Orders for the delivery up of property are available under the Torts (Interference with Goods) Act 1977 (the Act), but not more generally. Among other things, the Act provides remedies for the wrongful interference with goods, such as the torts of trespass to goods and conversion. The availability of an order for delivery up as an interim remedy may result in a claim being brought in tort, even if a claim would also lie in contract. An example of a claim for conversion in respect of which an order for delivery up under the Act might be sought is a claim for wrongful retention of cargo.

In a wider context, interim orders are available for the detention, custody, preservation or inspection of relevant property. In particular cases, the court may also make orders allowing samples to be taken or experiments to be conducted on relevant property. The court may also, in certain circumstances, order the sale of goods (generally perishable goods).

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

Arresting bunkers is not possible under English law, although bunkers could still be the subject of a freezing injunction (see question 32).

Judicial sale of vessels

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

The arresting party can apply for judicial sale of the vessel where it has not received security for its claim from the defendant shipowner.

In addition, the defendant shipowner can also apply for appraisal and sale *pendente lite*, for example, where a private sale being negotiated by the shipowner falls through.

If the arresting party obtains an order for judicial sale but then receives adequate security for his or her claim then, in normal circumstances, the arresting party would consent to the vessel's release from arrest and would also consent to the order for sale being vacated. However, if other maritime claimants have filed caveats against the vessel's release from arrest, then they would be notified and would be given a short window of opportunity to arrest the vessel themselves and restore the order for the vessel's sale.

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 normally takes place under the supervision and control of the court. The Admiralty Marshal is responsible for administering the formalities of the judicial sale, in accordance with the order of the Admiralty Court. There is a standard Admiralty Court order for sale of a ship, which can be varied as necessary. The usual order made either on judgment or *pendente lite* is that the property be appraised and sold by the Admiralty Marshal. An order for sale can usually be obtained within about a month of the arrest. The court will usually make such an order based on the grounds that the vessel is a wasting asset. The vessel will then be appraised, advertised for sale and sold by sealed tender. In order to maximise the sale price, the vessel will be advertised worldwide in appropriate shipping publications and prospective buyers are given a reasonable opportunity to inspect and submit tenders.

A sale will normally take place about four or five weeks after the order for sale is made. Unless the net proceeds of sale are sufficient to meet all the claims against the vessel, or all the parties reach agreement as to the distribution of the fund, it will be necessary for the court to determine how the fund is to be divided among the various claimants, and whether any particular claimant is to be afforded priority over any other claimant. Any party that has obtained or obtains judgment against the vessel or the proceeds of sale of the vessel may then apply to the court for the determination of the order of priorities of the various claims against the proceeds of sale of the vessel. The determination of priorities may only be made by the Admiralty Judge unless otherwise ordered by him or her.

It normally takes between three and five months for the whole process to be completed, namely: arresting the vessel, obtaining an order for sale, completing the sale, determining the priorities and making payment.

The court costs for judicial sale amount to 1 per cent on the first £100,000 and 0.5 per cent on the balance of the sale proceeds.

As an alternative to sale by public auction, the vessel may, in appropriate cases, be sold by private treaty. In such a case, the Admiralty Court exercises its discretion to order that the vessel be sold to a named buyer at a specified price. This has become known as the 'fast track', or the 'private court sale', procedure. Such orders are normally made if the court is satisfied that the specified price is unlikely to be bettered using the traditional public tender procedure and that the interests of other claimants against the vessel are not prejudiced. In order to satisfy the court of this, the claimant seeking a fast-track sale (usually a bank with a mortgage over the vessel) is usually required to present three independent ship valuations to the court and details of the proposed sale. The proposed buyer will be expected to pay a price reflecting the highest valuation. On completion of the sale, the gross proceeds of sale are paid into court. An Admiralty Court decision in 2013, however, cast doubt on this practice. In that case, the Admiralty Court held that, as a

general principle, such an order should not be made, notwithstanding that the proposed price appears to be at or about the market value of the vessel because there remains a risk that the vessel would not be sold at the best possible price. In the judge's view, the traditional method of sale, whereby the Admiralty Marshal advertises the sale and invites offers to buy the vessel, is designed to enable the vessel to be sold at the best possible price.

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

The order of priority of claims against an arrested vessel or the proceeds of sale depends on the category of the claim. In brief:

- maritime liens (concerning damage done by ships; salvage; crew wages and emoluments; master's wages and disbursements; fees and expenses incurred by a receiver of a wreck; bottomry and respondentia) rank first in priority. There are rules governing the priority of the various maritime liens among themselves and the respective dates on which the competing claims arose may be relevant;
- mortgages and similar charges rank second. Registered mortgages rank in order of registration and ahead of unregistered mortgages; and
- all other claims in rem rank *pari passu*, such as claims for necessities, claims arising under charter parties and bills of lading and claims for ship repairs.

However, there are various other claims that must be paid out of the fund before it is divided among maritime claimants. These include the costs and expenses of arrest, custody and sale; court commission on the sale price and sums due to other parties who at the time the sale order was made, had a common law possessory lien over, or a statutory right to detain the vessel (eg, for port charges).

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

The judicial sale of a vessel gives the purchaser clean title free of all maritime liens and other charges or encumbrances. After the sale, all claims or demands against the vessel can only be enforced against the proceeds of sale.

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

Where a foreign court has ordered the sale of a vessel, the English court will recognise that sale unless it can be shown to be a sham.

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

No.

Carriage of goods by sea and bills of lading

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 (HVR) were enacted into domestic legislation by the Carriage of Goods by Sea Act 1971, to which the rules are attached in full as a schedule and, by section 1(2), are given the force of law. Under article I(e) of the HVR, carriage by sea covers the period from the time when the goods are loaded on board the ship to the time they are discharged from the ship. However, as confirmed by the decision in *Pyrene v Scindia Navigation* [1954] 2 QB 402, the parties are free to agree on the role each is to play in the loading and the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.

The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) will enter into force one year after 20 states have ratified the Rotterdam Rules. As of May 2018, there were 25 signatories to the Rotterdam Rules but only

four ratifications (Spain, Togo, Congo and Cameroon). At present, it is not clear if and when the UK will ratify the Rotterdam Rules. However, a formal consultation process, including an impact assessment, will take place before the UK government takes a decision.

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?

Road

The Convention on the International Carriage of Goods by Road 1956 (CMR) has been implemented into English law by the Carriage of Goods by Road Act 1965. The provisions of the CMR apply to the international road leg of a carriage that comes before or after another mode of transport, including transport by sea.

Air

The Convention for the Unification of Certain Rules for International Carriage by Air 1999 (the Montreal Convention), which replaces the Warsaw Convention in respect of international carriage by air, has been implemented into English law by the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002. Article 38 of the Montreal Convention provides that in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of the convention shall only apply to the carriage by air.

Rail

The UK is also a signatory to the Convention Concerning the International Carriage of Goods by Rail 1980 (COTIF) and to the Protocol of Vilnius (Protocol of 3 June 1999) for the modification of the convention, which is given force in English law by virtue of the Railways and Transport Safety Act 2003 and the Railways (Convention on International Carriage by Rail) Regulations 2005. COTIF 1980, as modified by the Protocol of 1999, applies to passengers, their luggage and goods under international transport documents made out for a journey over the territories of at least two member states, provided that carriage takes place exclusively over railway lines registered under the convention.

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

Anyone who is a 'lawful holder' of a bill of lading has rights of suit under the contract of carriage as if they had been an original party to that contract. The 'lawful holder' is identified in the Carriage of Goods by Sea Act 1992, section 5(2) as:

- (i) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
- (ii) a person with possession of the bill as a result of the completion, by delivery of the bill, of any endorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill; or
- (iii) a person with possession of the bill as a result of any transaction by virtue of which he or she would have become a holder falling within (i) or (ii) above had the transaction not been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates.

Once it is established that a person is the 'lawful holder', the next requirement for acquisition of rights is that the person must be regarded as having become the lawful holder in 'good faith'. However, the concept of good faith is not defined in the 1992 Act.

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 extent to which the terms of a particular charter party will be incorporated into a bill of lading depends upon the proper construction of the bill of lading incorporation clause.

Where the words used in the clause refer by name or number to a specific clause or clauses in the charter party then those will be

incorporated. Where the words in the bill of lading incorporation clause are general, for example, 'all terms, conditions and exceptions of the charter party', then only such terms as are appropriate to the carriage and delivery of the goods will be incorporated, and not terms collateral to those matters.

A charter party jurisdiction or arbitration clause is a collateral clause and will not be incorporated into a bill of lading unless it is specifically referred to in the incorporation clause, for example, 'all terms, conditions and exceptions, including the arbitration clause in the charter party'.

A jurisdiction or arbitration clause in a charter party that is validly incorporated into a bill of lading is binding on a third party 'lawful holder' of the bill.

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

Normally the bill of lading will be signed by or on behalf of the master and a bill so signed is prima facie an 'owners' bill', imposing on the shipowner responsibility for performing the contract of carriage. This will be the case even though the bill might be issued on the charterers' (or sub-charterers') form but is signed by the master.

An 'identity of carrier' clause in a bill of lading is a clause that provides that the contract contained in or evidenced by the bill is to be between the shipper and the shipowner. 'Demise clauses' are in principle valid and effective, but they are not conclusive and may be overridden if the bill of lading has been signed in such a way, and contains terms and conditions that indicate that it is a charterers' bill rather than an owners' bill and the responsibility for the carriage lies with the charterer. The bill of lading as a whole will be considered and the relevant question is how the bill is likely to be regarded by a reasonable person acquainted with the shipping trade.

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 the bill of lading is a charterer's bill but the carrier in fact is the shipowner, he or she may be liable in tort for damage to the cargo. However, this can raise complex questions relating to the ownership of the cargo at the time of the loss or damage, and whether the shipowner, as the actual carrier, can rely on the bill of lading terms, particularly the Hague or the Hague-Visby Rules. The general principle is that the actual carrier can do so only in exceptional circumstances, such as where there is a Himalaya clause that extends the protections in the bill to third parties. There is also authority that, in appropriate circumstances, a 'bailment on terms' arises such that when the shipowner (the actual carrier) takes physical possession of the cargo they do so on the terms of the bill of lading.

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

Deviation has been defined as an intentional and unreasonable change in the geographical route of the voyage as contracted. The key words are 'as contracted': there is a right at common law to depart from the normal route in order to avoid danger to the ship or cargo or to save human life. Similarly, article IV (4) of the Hague or Hague-Visby Rules specifically provides that any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, should not be considered to be a breach of the rules or of the contract of carriage. Departure from the normal route in these circumstances will not be a deviation. Also, there may be an express 'liberty clause' in the contract of carriage.

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 loss arises while the vessel is deviating, the carrier will only escape liability if it can prove that the loss would have happened anyway. Furthermore, a deviating carrier may lose the benefit of clauses in the contract of carriage that are to its advantage and so be disentitled from relying on clauses exempting it from liability. This latter rule is harsh and arguably anomalous, and doubts have been expressed as to whether its full rigours would now be applied by the courts.

The issue of justifiable deviation has been much discussed in the context of piracy, namely whether a master or shipowner is justified in deviating from the vessel's route in order to avoid capture of the ship. There is also much debate over specific deviation clauses in charter parties and whether they excuse the payment of hire in the event the vessel departs from the agreed route owing to the risk of being hijacked. This debate has led to the formulation of specific piracy clauses, including by the Baltic and International Maritime Council and the International Association of Independent Tanker Owners, with the intention of providing protection to shipowners. In addition, the marine insurance industry has developed loss of hire cover that can be purchased as a separate insurance or as an extension to the kidnap and ransom policy.

48 What liens can be exercised?

In the context of a discussion of carriage of goods by sea and bills of lading, relevant liens include:

- the shipowner's lien on the cargo: in respect of freight (this type of lien arises at common law) and, depending upon its terms, other amounts payable to the shipowner under the contract of carriage (this type of lien is a contractual lien). A lien on the cargo will normally be exercised either by refusing to discharge the cargo or warehousing it ashore pending payment of sums due. They are 'possessory' liens, which means that they are entirely dependent upon possession and will be lost if possession is relinquished;
- the shipowner's lien on sub-freight or sub-hire: this type of lien will only arise if the contract of carriage is subject to the terms of a validly incorporated charter party containing a relevant lien clause. It can therefore only arise as a matter of contract. The property that is subject to the lien is the charterer's right to be paid sub-freight or sub-hire under a sub-charter of the vessel, and the lien is exercised by the shipowner effectively intercepting the sub-freight or sub-hire and directing that it be paid to him or her instead of to the charterers. The English Commercial Court has clarified the nature of charter party liens and has held that a lien on sub-freight or sub-hire creates an assignment by way of a charge. A significant consequence of this decision is that, as a security interest, an equitable charge may require registration in certain jurisdictions; and
- liens on the ship: this type of lien is not dependent upon possession and is exercisable by an action in rem commenced by arresting the vessel. A small number of claims within the admiralty jurisdiction (principally, those involving damage done by ships, salvage and in relation to seamen's and master's wages) will give rise to a maritime lien. Such a lien operates effectively as a charge on the ship that will follow the ship, notwithstanding a change of ownership other than by judicial sale. Other types of maritime claim (identified in question 23), while they do not give rise to a maritime lien, are enforceable by an action in rem and arrest of the vessel and are commonly referred to as giving rise to statutory liens. The right to arrest in respect of such claims is lost if there is a change of ownership of the vessel but the right will be protected if court proceedings are commenced prior to the change of ownership.

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

In the absence of an express term in the bill of lading, delivery of cargo without production of the original negotiable bill of lading is a breach of contract that will render the carrier liable for the value of the cargo to the 'lawful holder' of the bill entitled to immediate possession of the cargo. The position regarding non-negotiable bills of lading is not so clear, especially where the person seeking delivery of the goods is the consignee named on the bill of lading. There is no decision directly on the point, but the view has been expressed that goods should not be surrendered without presentation of the original bill.

Notwithstanding the above it is, in practice, not always possible for the original bills to reach a receiver prior to arrival of the vessel at the discharge port. Accordingly, it is common for charter parties to include a clause requiring delivery against a letter of indemnity (LOI) or bank guarantee. Delivery against such a document will enable liability to be passed on to the indemnifier or guarantor. However, great care must be taken when drafting the LOI or bank guarantee so as to stipulate the party to whom delivery should be made. In one case, where owners delivered the cargo to someone other than the receiver named in the

LOI without production of the bills of lading, the charterers' undertaking in the LOI to provide security was held not to be engaged.

In 2012, the English Court of Appeal confirmed previous case law that the provisions of an LOI issued by receivers to voyage charterers requesting delivery of the cargo without the presentation of bills of lading may extend to owners in their capacity as charterers' agents for the purpose of delivering the cargo, such that owners were entitled to enforce the LOI in their own name pursuant to section 1(1) of the Contracts (Rights of Third Parties) Act 1999 where the LOI provided an indemnity in favour of charterers' 'servants and agents'.

It remains unclear whether the one-year time limit under article III(6) of the Hague-Visby Rules applies to claims for loss or damage brought pursuant to an LOI issued to allow delivery of cargo without presentation of original bills of lading.

50 What are the responsibilities and liabilities of the shipper?

Under article III(5) of the Hague-Visby Rules, the shipper is deemed to have guaranteed to the carrier the accuracy at the time of shipment of the information furnished by him or her as to the marks, number, quantity and weight of the cargo, and is obliged to indemnify the carrier for loss, damage or expenses resulting from any inaccuracies. Similarly, articles IV(2)(n) and (o) exempt the carrier from liability for loss of or damage to the cargo arising or resulting from insufficiency of packing and insufficiency or inadequacy of marks.

Other than its obvious duties in the light of the above provisions to ensure that the cargo is properly identified and packed, the only positive obligation on the shipper is the duty, which arises at common law, not to ship 'dangerous' goods without the consent of the carrier. This can include not only goods that are likely to cause physical loss of or harm to the ship, but also goods that might lead to the detention of the ship.

This duty is amplified and extended in article IV(6) of the Hague-Visby Rules and has been interpreted extremely widely to include just about 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. One interesting decision considered the issue of whether the presence of rats in a cargo of soya bean meal pellets rendered the cargo dangerous. In that case, it was held that a cargo 'loaded with a rat' was not a dangerous cargo.

Shipping emissions

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

Yes. The North Sea (and English Channel) ECA, which has been in effect since 22 November 2007 pursuant to Annex VI of the IMO's MARPOL, which came into force in May 2005. It has been implemented into UK domestic law by the Merchant Shipping (Prevention of Air Pollution from Ships) Regulations 2008. Annex VI to MARPOL provided that the sulphur content in fuel oil in ECAs should not exceed 1.5 per cent by mass. Annex VI was subsequently revised (see question 52). It is important to note that ECAs differ in terms of what they limit; the North Sea ECA limits sulphur oxide, as opposed to nitrogen oxides and particulate matter.

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 revised Annex VI to MARPOL (and the associated NOx Technical Code 2008) came into force on 1 July 2010 and imposed more stringent limits on sulphur content in fuel. In particular, the revisions provided for a reduction in the sulphur content of any fuel oil used on board ships outside the ECAs (the global sulphur cap) to 3.5 per cent (from the previous 4.5 per cent) from 1 January 2012, followed by a further reduction to 0.5 per cent from 1 January 2020. The sulphur limits applicable in ECAs were reduced to 1 per cent as of 1 July 2010 (from the previous 1.5 per cent), with a further reduction to 0.1 per cent from 1 January 2015. It is left to member states to ensure compliance with these requirements and to impose the appropriate penalties. In the UK, the authorities may detain or fine a vessel, irrespective of flag, for non-compliance.

In order to bring sulphur limits applicable within the EU in line with IMO-imposed levels, EU Directive 2005/32/EC came into force

on 1 January 2010. The Directive applies to all vessels, irrespective of flag, ship type, age or tonnage, and requires EU member states to take all necessary steps to ensure that ships berthed or anchored within their ports for longer than two hours do not consume marine fuel with a sulphur content exceeding 0.1 per cent by mass. The Directive was implemented into domestic law by the Merchant Shipping (Prevention of Air Pollution from Ships) (Amendment) Regulations 2010 and the UK has been enforcing the Directive since 20 April 2010. Article 12 of the Directive states that it is left to member states to determine the applicable penalties for breach, subject to the requirement that these must be effective, proportionate and dissuasive. In the UK, the authorities may detain a vessel, impose a fine, or both, in the event of non-compliance with the Directive.

In relation to climate change, in June 2013, the European Commission adopted a Communication setting out a strategy for progressively including greenhouse gas emissions (GHG) from maritime transport in the EU's policy for reducing its overall GHG emissions. The first step was the proposal of a Regulation to establish an EU-wide system for the monitoring, reporting and verification of carbon dioxide emissions from large ships. This Regulation, EU MRV Regulation 2015/757, entered into force on 1 July 2015 in the EU and became fully effective on 1 January 2018. This is a regulation on the monitoring, reporting and verification of CO₂ emissions from all vessels over 5,000 GT trading in EU ports (regardless of their flag, port of registry or home port, but excluding certain types of vessels such as warships and other government vessels, fishing vessels and historical vessels) and is part of the EU's overall strategy to reduce greenhouse gas emissions by 2050. Among other things, the regulation introduces certain monitoring requirements that applied from 31 August 2017. The data collected from the monitoring plan requires verification by an authorised third party and, once the verification process is successfully completed, the vessel is issued with a document of compliance that must be kept on board for inspection. Data collection takes place on an annual, as well as a per voyage basis, except if all of the ship's voyages start or end in ports located in the EU and if the ship performs more than 300 voyages during a reporting period, according to its schedule. There are penalties available for failing to carry a document of compliance, including vessel detention and the issuance of an expulsion order that prohibits entry into EU ports.

Ship recycling

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

International standards as to ship recycling are addressed in the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the HKC). Although the HKC is not yet in force, the EU incorporated elements of the HKC regime into EU law through Regulation (EU) No 1257/2013 (the 2013 Regulation) on 30 December 2013.

The 2013 Regulation sets out requirements for European ships and European shipowners, as well as ship recycling facilities willing to recycle ships, and the relevant competent authorities or administrations. In 2016, the European Commission provided an official list of ship recycling facilities, which was later updated on 4 May 2018. The list, to apply from 31 December 2018, ensures that all large commercial seagoing vessels sailing under an EU member state flag use an approved ship recycling facility. Currently, the UK has three listed ship recycling facilities, which are:

- Able UK Limited at Cleveland;
- Harland and Wolff Heavy Industries Limited at Belfast; and
- Swansea Drydock Ltd at Swansea.

Vessels flying the flag of a third country calling at EU ports or anchorages will need to provide an updated inventory of hazardous materials on board and the installation and use of certain hazardous materials will be prohibited or restricted in port or at anchorage in an EU state. A vessel that does not comply will be subject to penalties, possible detention or both.

While the 2013 Regulation has direct effect in EU member states, the UK has yet to implement domestic legislation to support it. Since consultation on implementation ended on 15 September 2017, no further updates have been provided by the UK government.

Ship recycling is also regulated under the international standards set by Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal, 1989 (the BC). The EU implemented the BC's provisions through the Waste Shipment Regulation (EC) No 1013/2006 (the WSR). While the WSR does not specifically refer to ships as being waste, end-of-life vessels may fall within the definition of waste, as they likely contain a range of hazardous materials and substances including asbestos, heavy metals and oil residues. The WSR has direct effect in the UK via the Transfrontier Shipment of Waste Regulations 2007 (as amended). To avoid any overlap or confusion, ships covered by the regulation are excluded from the scope of the WSR.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

If the amount involved is more than £100,000, the claim can be brought in the High Court in London. Smaller claims are decided by the County Courts. The majority of maritime disputes are heard by the Commercial Court or Admiralty Court, which are specialist divisions of the High Court.

The following proceedings must be started in the Admiralty Court:

- proceedings in rem commenced in order to arrest a vessel (see question 23);
- collision claims;
- limitation actions; and
- salvage claims.

Any other Admiralty claim, as defined in section 20 of the Senior Courts Act 1981, can be started in the Admiralty Court.

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

The rules governing service of court proceedings outside the jurisdiction are set out in Part 6 of the Civil Procedure Rules. Broadly, a claim form may be served on a defendant outside the jurisdiction without permission of the court where the defendant is domiciled in:

- Scotland or Northern Ireland;
- a state that is a party to the Brussels Convention or Brussels Regulation (1215/2012/EU) (EU member states); or
- a state that is a party to the Lugano Convention 2007 (Iceland, Norway and Switzerland).

Also, and regardless of the defendant's domicile, a claim may be served on a defendant outside the jurisdiction where the defendant is a party to an agreement conferring jurisdiction on the courts of England and Wales.

Otherwise, the permission of the court is required. The claimant needs to establish that the claim has a reasonable prospect of success and that England and Wales is a proper place in which to bring the claim. There are a number of grounds listed in the practice direction to Part 6 that may qualify the claim as being suitable for service out of the jurisdiction. These include, but are not limited to, the following:

- a contractual claim where the contract was made within the jurisdiction, is governed by English law or contains an English jurisdiction agreement;
- a claim for salvage services performed within the jurisdiction;
- the person out of the jurisdiction to be served is a necessary and proper party to the proceedings; and
- a claim in tort where the damage was sustained within the jurisdiction or the damages sustained resulted from an act committed within the jurisdiction.

The methods of service on a defendant out of the jurisdiction are service in accordance with:

- the Brussels Regulation;
- service through foreign governments, judicial authorities and British consular authorities; and
- service by any method permitted by a Civil Procedure Convention or by any other method permitted by the law of the country in which the claim or other document is to be served.

Specific rules apply to service on a foreign state. However, no person is authorised or required to do something that is contrary to the law of the country where the claim or other document is to be served.

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

The London Maritime Arbitrators Association (LMAA) specialises in maritime dispute resolution. As of May 2018, It has a panel of 32 full members. There are also supporting members who are available to accept appointments as arbitrators. The LMAA has four sets of rules:

- for small claims;
- fast and low-cost arbitration;
- intermediate claims and larger cases; and
- mediation terms.

The most recent set of LMAA rules (known as ‘Terms’) came into effect on 1 May 2017.

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

A foreign judgment is not automatically enforceable in England and Wales. There are a number of regimes for the recognition and enforcement of foreign judgments depending, in broad terms, on whether they are judgments of courts in Europe (broadly speaking, for the purposes of this response, member states of the EU and the European Free Trade Association), in Commonwealth countries or elsewhere in the world.

Europe

The Brussels Convention/Brussels I Regulation (recast in 2012) and the Lugano Convention govern the recognition and enforcement of judgments from the member states of the EU, Iceland, Norway and Switzerland. The Civil Jurisdiction and Judgments Act 1982 was originally passed to implement the Brussels Convention into English law. This act was subsequently amended by the Civil Jurisdiction and Judgments Act 1991 to implement the Lugano Convention 1988 into English law. Thereafter, the Civil Jurisdiction and Judgments Order 2001 gave the English courts jurisdiction under the recast Brussels Regulation. The recast Brussels Regulation largely supersedes the Brussels Convention. The Civil Jurisdiction and Judgments Regulations 2009 implemented the Lugano Convention 2007 into national law.

Enforcement of a foreign judgment under the Brussels Regime or Lugano Convention is straightforward and does not require the English courts to reassess the merits of the claim. The main examples of when the English courts will refuse to enforce such a judgment are if the judgment is contrary to English public policy or the judgment is irreconcilable with an earlier judgment given in England or Wales and involves the same cause of action and is between the same parties.

Furthermore, a European enforcement order (EEO) is available to a judgment creditor who wishes to enforce a judgment obtained in an uncontested claim within the EU. An uncontested claim is where the debtor has not objected to the claim in the course of court proceedings or has not appeared in court or has admitted that the claim exists and is justified in the course of court proceedings. The EEO does not require registration or judicial approval in England and Wales before it can be enforced. Rather, a judgment that has been certified as an EEO by the member state court of origin is, for enforcement purposes, treated as though it had been given by the courts of England and Wales.

The Commonwealth and other statutory regimes

The Administration of Justice Act 1920 governs the recognition and enforcement of judgments from Commonwealth and other countries and the Foreign Judgments (Reciprocal Enforcement) Act 1933 governs the recognition and enforcement of judgments from a further 11 countries. Broadly, under these acts, a foreign judgment may be registered for enforcement in England and Wales. The procedure for registration is relatively straightforward. The requirements for registration to take place include the following: the judgment must not have been obtained by fraud or be contrary to English public policy and the court that issued the judgment must have had jurisdiction. Once registered, the judgment takes effect as if it were an English judgment.

Elsewhere

Recognition and enforcement of judgments from the courts of countries that do not come within the statutory regimes is subject to common law rules. In very brief terms, these require the commencement of a new action on the judgment. The underlying claim will not be examined on the merits and, provided that the original court had jurisdiction according to English conflict of law rules, that the judgment is for a debt or a definite sum of money (not being a tax, fine or penalty), is final and conclusive and its enforcement would not be contrary to public policy, then the person seeking enforcement will be entitled to judgment in England for the amount due under the foreign judgment.

Arbitration awards

As of May 2018, the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) has 159 contracting states. The majority of arbitration awards can, therefore, be enforced under the New York Convention, to which the UK is a party. Provisions for the enforcement of arbitral awards are set out in section 66 of the Arbitration Act 1996. Enforcement of non-New York Convention awards will be governed by section 66 of the Arbitration Act and by common law, the requirements are that the arbitration agreement must be valid under its governing law and the award must be final. The award will not be enforced if the arbitrators had no jurisdiction, the award was obtained by fraud, the proceedings were contrary to natural justice or where its enforcement would be contrary to public policy.

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

Asymmetric jurisdiction clauses, which allow one party to sue in any jurisdiction while restricting the other party to only one jurisdiction, have been common in commercial contracts, and especially financial agreements, since the 1960s. In 2012, however, the validity of such clauses under EU law was called into question when the French Cour de Cassation appeared to hold that they were ineffective under the Brussels I Regulation (the Recast Regulation).

In *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc and another* [2017] EWHC 161 (Comm), the English High Court considered the validity of asymmetric jurisdiction clauses for the first time, holding that the jurisdiction clause was, in that case, effective and conferred exclusive jurisdiction on the English courts. In so finding, the judge considered Recital 22 of the Recast Regulation, which notes that one of the aims of the regulation was to ‘enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics’. He concluded that such aims would only be achieved if asymmetric jurisdiction clauses were treated as exclusive for the purposes of the regulation. The above said, the question of whether such clauses are exclusive jurisdiction clauses for the purposes of the Recast Regulation ultimately lies with the Court of Justice of the European Union.

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

The English court may issue an anti-suit injunction restraining a party from commencing or continuing proceedings in a foreign court in breach of an exclusive jurisdiction clause or an arbitration agreement. Breach of the injunction will be a contempt of court and any judgment obtained will not be recognised or enforced in England.

In 2009, the European Court of Justice (ECJ) held, however, that the courts of the countries in which the Brussels Convention or Brussels Regulation and Lugano Convention apply could not issue anti-suit injunctions to restrain proceedings in another state where the particular Convention applies. Pursuant to these Conventions, where proceedings are commenced in more than one member state and those proceedings relate to the same cause of action between the same parties, the member state court to which the dispute is later referred must stay its proceedings in favour of the other court. It is for the court to which the dispute was first referred to decide whether it has jurisdiction.

Furthermore, while the Brussels Regulation was expressly stated not to apply to arbitration, the ECJ held that courts of an EU member state could not issue anti-suit injunctions to restrain court proceedings in another EU member state where proceedings have been commenced in breach of an arbitration agreement. The ECJ found that court proceedings and judgments relating to arbitration, including

whether the arbitration agreement is valid, fall within the scope of the Brussels Regulation.

Anti-suit injunctions continue to be available in England to restrain breaches of English jurisdiction and clauses subjecting disputes to arbitration in England and Wales where court proceedings have been commenced outside the EU. The English Commercial Court has also ruled that an English arbitral tribunal can award damages or an indemnity for breach of a contractual obligation to arbitrate, including where that breach is by way of commencement of proceedings in another EU member state court pursuant to the Brussels Regulation. Furthermore, the ECJ has held that it is not incompatible with the Brussels Regulation for a member state court to recognise an arbitration award that contains an anti-suit injunction. The Regulation does not prevent a court in an EU member state from recognising and enforcing (or from refusing to recognise and enforce) such an award, either pursuant to its national law or the New York Convention.

The European Court's interference with arbitration (especially as arbitration is expressly excluded from the Brussels Regulation) led to calls for reform of the Brussels Regulation. As a result, revisions to the Brussels Regulation came into force in member states on 10 January 2015. The UK chose to opt into the 'recast' regulation. Among other things, the recast regulation provides that, where parties have conferred exclusive jurisdiction in their agreement on a member state court, any other member state court shall stay proceedings brought before it until the court provided for in the jurisdiction agreement rules on its own jurisdiction. This is so irrespective of in which court proceedings are commenced first. The recast regulation also clarifies the scope of the arbitration exception and confirms that the New York Convention takes precedence over the Brussels Regulation and, therefore, member state courts are permitted to recognise and enforce an arbitral award even if it is inconsistent with another member state court's judgment. The recast regulation further confirms that a member state court can decide on the validity of an arbitration agreement even where the matter has been referred to another member state court first and also that the regulation does not apply to any court proceedings relating to or in support of arbitration. The recast regulation does not, however, expressly deal with the legitimacy of court-ordered anti-suit injunctions within the EU.

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 English courts have powers to stay proceedings started in England on the grounds that there is an exclusive jurisdiction or arbitration clause or on the grounds of *forum non conveniens*, that is: if the defendant demonstrates that there is a more appropriate forum for trial of the action. The court will take into account such factors as any foreign proceedings currently under way, rules as to costs of proceedings in the foreign forum or if the alternative forum has little experience of handling complex commercial disputes. The court cannot stay proceedings on the grounds of *forum non conveniens* if the proceedings fall within the Brussels Regulation, Brussels Convention or Lugano Convention.

Limitation periods for liability

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

Under the Limitation Act 1980, the ordinary time limit for actions founded on tort or contract, except for personal injury claims, is six years from the date on which the cause of action accrued. Where the loss or damage is latent and was not known about prior to the expiry of the limitation period, the claimant has three years from either the date of knowledge of loss or the date when it ought reasonably to have known of the loss. This applies to claims in both contract and tort but, except in actions involving personal injury, there is an overriding time limit of 15 years.

Where the claim is for death or personal injury the limitation period will expire three years from the date of the act or omission that caused the death or personal injury, or knowledge if later.

Where the action is 'upon a speciality', which would be the case in relation to a contract made by deed, the period is 12 years.

Various international conventions prescribe limitation periods for certain specific claims. For example:

Update and trends

Brexit

On 23 June 2016, the United Kingdom voted to leave the European Union. On 29 March 2017, the Prime Minister triggered article 50 of the Lisbon Treaty, thereby starting a minimum two-year countdown leading to the UK's exit from the EU (Brexit). As at May 2018, the UK and the remaining 27 EU member states were in negotiations to agree the terms for the exit and those discussions were proving to be both complex and protracted, with the UK scheduled to leave the EU by the end of March 2019 (although there will be a 21-month 'transition period' after that date, to allow everyone better to prepare for Brexit). As of May 2018, it is not yet clear how the UK's trading relationship with the EU will change.

On 29 November 2016, the UK Chamber of Shipping published a document, 'Blueprint for Growth', that outlined the policies it recommended the UK government should adopt in its Brexit negotiations. This document closely followed the position paper issued earlier that month by Maritime UK, a body representing various UK shipping interests, including ports, marine industries and professional business services. The recommendations include, among other things:

- maintaining reciprocal rights for those working abroad in the maritime industry;
- ensuring that the industry has the people and skills it needs;
- avoiding disruption to UK trade with the EU and third countries;
- maintaining a favourable trading relationship with the EU comparable to the single market; and
- ensuring minimum disruption to the flow of goods and people at UK borders.

- one year for cargo claims under the Hague or Hague-Visby Rules;
- two years for collision claims under the Maritime Conventions Act; and
- two years for salvage claims under the Salvage Convention 1989 (incorporated into English law by the Merchant Shipping (Salvage and Pollution) Act 1994).

Time limits can be extended by agreement. In practice, agreement must be reached before the time limit has expired. It should also be noted that if, by virtue of the application of English conflict of laws principles, a foreign law applies to the claim, then the applicable time limit may be that of the foreign law, not English law, and the ability or otherwise to extend that time limit by agreement will be a matter for that foreign law.

62 May courts or arbitral tribunals extend the time limits?

The expiry of a limitation period under the Limitation Act 1980 or any other Act of Parliament usually provides the defendant with a complete defence to the claim made against him, as it is contrary to public policy for potential defendants to be indefinitely exposed to litigation. Under section 33 of the Limitation Act 1980, the court has a discretionary power to extend a time limit in certain circumstances, but only in respect of actions for personal injuries or death.

The court has the power to extend most procedural time limits, for example by granting the claimant an extension of time to serve proceedings on the defendant in certain circumstances.

English arbitral tribunals have the power to extend time limits for commencing arbitral proceedings. Once any available arbitral process for extending time to begin arbitration proceedings has been exhausted, the court has the power under section 12 of the Arbitration Act 1996 to extend the time limit for commencement of arbitral proceedings in restricted circumstances.

Miscellaneous

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) entered into force internationally on 20 August 2013. As of May 2018, 86 countries, including the UK, had ratified it. Each country that ratifies the MLC is under an obligation to apply its standards in its domestic law. Four 'red ensign' states have ratified the MLC and the rest are expected to follow suit.

Red ensign states are UK Crown Dependencies (Isle of Man (ratified), Guernsey and Jersey) and UK Overseas Territories (Anguilla, Bermuda (ratified), British Virgin Islands, Cayman Islands (ratified), Falkland Islands, Gibraltar (ratified), Montserrat, St Helena and the Turks and Caicos Islands).

The MLC came into force in the UK on 7 August 2014. Shipowners must ensure that vessels flying the UK flag comply with its requirements. Subject to certain exceptions, the MLC applies to vessels of all tonnages, whether publicly or privately owned, that are ordinarily engaged in commercial activities. As a general rule, vessels of 500 GT or over must obtain certification from the Maritime and Coastguard Agency (UK flag state control), which the vessel must carry on board. The certification documents are known as the Declaration of Maritime Labour Compliance and the Maritime Labour Certificate, and are evidence that the vessel is prima facie compliant for the purposes of port state control in other state parties. Carrying the certification should avoid the need for port state control to carry out a physical inspection of the vessel.

UK port state control will inspect vessels for MLC compliance when they call at a UK port. In the case of a vessel flying the flag of a state party, the vessel should be able to present certificates issued by the relevant flag state authority or appointed recognised organisation evidencing that the vessel is compliant. The principle of 'no more favourable treatment' contained in the MLC will additionally require UK port state control to inspect vessels flying flags of non-ratifying countries for compliance with the MLC. In that case, a physical inspection of the vessel will need to be carried out by port state control to verify that the vessel complies with the MLC's 14 minimum requirements regarding seafarers' working and living conditions. This may be a slower process than the submission of certification by vessels whose flag state is a party to the MLC. If the vessel does not comply with those minimum conditions, it may be subject to delays in port, and possibly detention.

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 English courts robustly enforce the provisions of freely negotiated commercial contracts between parties of similar bargaining power. The exception to this is legislation aimed at protecting consumers. Attempts to argue that a contract has been frustrated, for example because economic conditions have made it more onerous to perform, are usually unsuccessful. Furthermore, there is no concept of force majeure in English common law similar to the civil law concept. Force majeure will therefore only apply to English law contracts where the parties have expressly incorporated a force majeure clause. Commercial parties who wish to protect themselves from extreme economic and financial movements should therefore consider incorporating suitable provisions into their contracts, such as price escalation clauses, material adverse change clauses and force majeure clauses.

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

It should be noted that international conventions have the force of law in the UK only if and to the extent that they have been incorporated into domestic law by a statute. If there is any difference between such a statute and the text of the convention, then the statute will take precedence.



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Newbuilding contracts

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

For title in the ship to pass from the shipbuilder to the shipowner, a notarised agreement between the shipbuilder and the shipowner is required and a corresponding entry shall be made in the Register of Ships. The title in the ship passes only after the entry is made, so the exact time when the title passes is not for the parties to decide. Another aspect of such a transaction is the passing of risk of accidental loss of or damage to the ship being sold; as a rule, the risk passes to the shipowner upon delivery of the ship, even when the title itself has yet not passed. The parties can change when the risk passes.

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

The guarantor must be a person engaged in an economic or professional activity. A guarantee issued by a consumer (a natural person who performs a transaction not related to an independent economic or professional activity) is not valid. In practice, the guarantee document is made in writing.

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 file an action ordering the performance of an obligation to deliver the vessel with the Estonian courts, when the vessel has been completed and the yard groundlessly refuses to deliver her despite the buyer having fulfilled all of his or her relevant obligations under the shipbuilding contract. On the basis of an enforcement instrument (court judgment) the bailiff should grant a term of up to three months to the debtor for the voluntary compliance with the enforcement instrument. Upon failure to voluntarily comply with the instrument, the bailiff should release the vessel from the possession of the debtor and grant its possession to the claimant. There is, however, no case law on the subject.

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 shipowner's claim against the shipbuilder would in such circumstances arise from the shipbuilding contract or from the principles of unlawful causing of damage (tort). The purchaser's claim against the shipbuilder could arise from the principles of unlawful causing of damage.

Product liability regulation in Estonia is primarily aimed at protecting the interests of consumers. Pursuant to the section of the Estonian Law of Obligations Act concerning product liability (based on the EC Council Directive No. 85/374/EEC), the producer shall be liable for causing the death of a person and for causing bodily injury to or damage to the health of a person if this is caused by a defective product. If a defective product causes the destruction of or damage to a thing, the producer shall be liable for damage caused thereby only if:

- this type of product in question is normally used outside economic or professional activities;
- the victim mainly used the product outside the economic or professional activities of the victim; and
- the extent of the damage exceeds an amount equal to €500.

Ship registration and mortgages

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 types of vessels registered in the Estonian Register of Ships are:

- seagoing vessels of at least 12 metres in length;
- inland vessels of at least 12 metres in length; and
- sailing yachts and launches shall be entered in the register of ships if the overall length of the sailing yacht or launch is at least 24 metres.

It is possible to register vessels under construction in the Estonian Register of Ships under Construction.

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

A ship shall be registered if the owner of the ship submits a notarially authenticated petition for registration of the ship.

The owner of a ship registered in Estonia can be:

- an Estonian citizen resident in Estonia;
- a general and limited partnership that is located in Estonia and in which Estonian partners have a majority of votes; and
- another legal person in private law that is located in Estonia and in the management boards or equivalent bodies of which Estonian citizens form the majority.

A citizen of a member state of the European Union and a company or other legal person in private law founded pursuant to the law of a member state of the European Union whose seat and business establishment is in a member state of the European Union shall, upon request, be equal to the 'owner' specified above, provided that the person has:

- a residence or a permanent business establishment in Estonia, and the ship itself is not deemed to be a business establishment; or
- a permanent representative whose residence or seat is in Estonia and who is responsible for compliance with the technical, social and administrative requirements established with regard to seagoing vessels in Estonia and who directly controls and monitors the use of the ship.

7 What are the documentary requirements for registration?

In order to register a seagoing vessel, the following documents or documents that contain the following information shall be submitted:

- the name, number or other mark of identification of the ship;
- the type of main engines of the ship, the type of the ship according to its purpose, and the main material of the hull;
- the home port;
- the place and year of build and the name of the builder;
- the ship's call sign;
- the International Maritime Organization (IMO) number, the results of official measurement and the output of the engines;

- the owner, the co-owners and the percentage of each owner's share of the common ownership, and in the case of the owner having a local representative, information regarding the representative (his or her authority, compliance with the requirements established for the operators of ships in Estonia and consent for being a representative);
- the legal basis for acquiring ownership;
- proof of the right to fly the national flag of the Republic of Estonia;
- documents that certify that the ship complies with the safety requirements for ships established in the Republic of Estonia;
- the provisional certificate of nationality, if issued; and
- a receipt for payment of the state fee.

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

Estonia allows dual charter registration under a bareboat charter both out of and into Estonia.

Flagging out

If a seagoing vessel that is required to fly the national flag of the Republic of Estonia is transferred to a person for use in the person's own name for at least one year on the basis of a bareboat charter, and if the person is not a citizen of the Republic of Estonia resident in Estonia and does not have the right to fly the national flag of the Republic of Estonia on the person's ships, the Minister of Economic Affairs and Communications may permit the ship to be entered in the register of another state at the request of the owner, if this is permitted by the laws of the corresponding state. The maximum duration of such permit is two years. At the request of the owner the permit may be extended for one year at a time.

Upon application for a permit to fly the national flag of another state, the shipowner shall submit the following documents in Estonian or together with a notarially authenticated Estonian translation:

- a notarially authenticated petition of the shipowner;
- the written charter contract of the ship;
- the consent of the foreign register of ships for dual registration; and
- the certificate of seagoing vessel, and the certificate of nationality, if issued.

Flagging in

A seagoing vessel of at least 12 metres in length may fly the national flag of the Republic of Estonia on the basis of a provisional certificate of nationality issued by the Estonian Maritime Administration at the request of the charterer if:

- the charterer of the ship belongs to the set of persons specified above (see paragraph 1, question 6);
- the ship has been bareboat chartered for use in the charterer's own name;
- the shipowner consents to the change of flag; and
- the law that had applied with regard to the ship does not prohibit flying the national flag of the Republic of Estonia.

The maximum duration of a provisional certificate of nationality issued by the Estonian Maritime Administration shall be two years. At the request of the charterer, a permit may be extended one year at a time.

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

There is no separate register of mortgages in Estonia. Mortgages are entered in the register of ships, which is maintained by the registration departments of the county courts. The registry departments maintain information about the mortgagee (name and registry code), date of entry, the monetary amount of the mortgage (the sum of the mortgage), amendments to entries and deletion.

Limitation of liability

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

The liability limitation regime for Estonian shipowners and salvors is based on the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) (in force in Estonia from 1 February 2003), as amended by the 1996 Protocol, which entered into force in Estonia from 14 June 2011. In addition to this convention, the limitation of liability is

regulated by the respective articles of the Merchant Shipping Act (MSA), which establishes some exceptions or difference to LLMC regimes. The limitation can be applied to the same claims and to the same extent as established by LLMC except for:

- the limit of liability for a ship with a gross tonnage (GT) of up to 250 shall be one-half of the limits of liability for a ship with a GT of up to 500, pursuant to paragraph 1(b) of article 6 of LLMC (MSA p71); and
- application of LLMC limitation pursuant to its paragraph 1(b) of article 6 (limitations in paragraphs 2 and 3 of article 6 of LLMC are not applied) to claims for reimbursement of the costs of lifting, removal, destruction of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board the ship, unless it is dangerous to the environment; this limit of liability applies to claims which have arisen from the same event against the same group of persons within the meaning of paragraph 1(a),(b) or (c) of article 9 of LLMC (MSA paragraph 72); this exception has been established on the basis of paragraph 1 of article 18 of LLMC.

The MSA provides priority to the claims arising from damage to port facilities, basins, waterway and navigation facilities with respect to claims specified in paragraph 1(b) of article 6 of LLMC as permitted by the Convention.

Shipowners and salvors (as defined in LLMC) can limit their liability as stipulated in LLMC and in addition to these, pilots can benefit from LLMC limitation regime as specified in paragraph 1(a) and (b) of article 6 of LLMC (MSA paragraph 74).

New liability limitations established by 2012 amendments need formal procedure to make these applicable in Estonian jurisdiction.

11 What is the procedure for establishing limitation?

In order to establish a fund and later distribute the funds, proceedings should be commenced in the court of law, where the claim against the person entitled to establish the fund is filed (MSA paragraph 78(1)). A person entitled to limit the liability should file the respective application to the court and provide requested information regarding the incident, certain date about the applicant, the ship and number of passengers (if any) (MSA paragraph 80). The court will determine on the basis of the Convention the amount of the fund, which should be deposited on an account prescribed by the court (MSA paragraph 83). The cash deposit may be replaced by other security, which the court can determine at their discretion (MSA paragraph 84).

An application to establish limitation fund assumes some claim filed in court against a shipowner or other person entitled to limit its liability and the limitation fund can be established with the same court where the claim is filed. The limitation fund is calculated on the basis of the GT of the vessel concerned.

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

The same circumstances as stipulated in the convention.

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

The liability limitation regime in respect of passenger and luggage claims for shipowners or carriers is based on the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, as amended by the 1976 Protocol, which Estonia ratified on 5 June 2002 and entered into force on 1 October 2002.

In relation to the Athens Convention, the 2002 protocol has also been introduced, but Estonia has not ratified it. However, it has been implemented by Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents (the PLR Regulation), which has been directly applicable to Estonia and other EU member states since 31 December 2012. The PLR Regulation ensures a single set of rules governing the rights of carriers and passengers in the event of an accident across the EU.

MSA paragraph 61(1) contains a reference to the PLR Regulation in respect of maximum limitations of carriers' liability. However, MSA paragraph 61(2) establishes an exception for regular passenger lines that increased liability over that stipulated by the PLR Regulation shall apply if prescribed by the laws of the state from which a vessel has departed or that is the destination of a voyage.

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

Port state control is executed by the Estonian Maritime Administration, a governmental agency that operates within the area of government of the Ministry of Economic Affairs and Communications.

15 What sanctions may the port state control inspector impose?

The Estonian Maritime Administration may:

- prohibit a ship from leaving a port (detention);
- prohibit the use of a ship's compartments, shipboard installations or work equipment if the condition thereof endangers the life or health of crew members or passengers;
- issue precepts for the elimination of deficiencies and a term for the elimination of deficiencies;
- impose a fine of up to €3,200 (up to €1,000 for natural persons), if a person fails to observe the precept;
- allow the ship, with the approval of the maritime administration of the flag state and if the seaworthiness of the ship allows this, to proceed to the nearest appropriate repair yard available where the ship can be repaired;
- suspend a regular service or prohibit commencement of a regular service of a ro-ro passenger ship or a high-speed passenger craft; and
- prohibit ships flying a foreign flag from entering Estonian ports or anchorage.

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

A challenge may be submitted to the head of the Maritime Safety Service of the Maritime Administration within 30 days of the date of detention, prohibition on entry, suspension of a regular service or prohibition on the commencement of a regular service.

If a decision of the Maritime Administration does not satisfy a shipowner or the representative thereof, the shipowner or a representative thereof has the right to file a complaint to an administrative court.

Classification societies**17 Which are the approved classification societies?**

- Lloyd's Register;
- Bureau Veritas;
- DNV GL AS;
- the American Bureau of Shipping;
- Registro Italiano Navale; and
- Russian Maritime Register of Shipping.

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

A classification society may be held liable following general legal principles (on the basis of breach of contract or in tort, depending on the case). However, no such case has yet been tested in the Estonian courts.

Collision, salvage, wreck removal and pollution**19 Can the state or local authority order wreck removal?**

If sunken property obstructs vessel traffic; maritime trade or hydro-technical work; endangers human life or health; threatens to pollute the environment; is washed ashore; or extends above water, then the Maritime Administration specifies a period within which the owner of the property is required to raise the property.

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

In Estonia, the following conventions or protocols are in force in relation to collision, salvage and pollution:

- the International Convention on Salvage 1989, which entered into force in Estonia on 31 July 2002;
- the Convention on the International Regulations for Preventing Collisions at Sea (COLREG) 1972, which entered into force in Estonia on 16 December 1991;

- the International Convention for the Prevention of Pollution from Ships (MARPOL) 1973/1978, which parts and amendments entered into force in Estonia on different dates 1992, 2003 and 2005;
- the IMO Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage 1969, which entered into force in Estonia on 6 August 2005;
- the IMO Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, which entered into force in Estonia on 6 August 2005, and the Supplementary Fund Protocol 2003, which entered into force in Estonia on 14 January 2009; and
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, which entered into force in Estonia on 21 November 2008.

Estonia has signed Nairobi International Convention on the Removal of Wrecks in 2007. However the convention has not been ratified yet and it is not in force in Estonia.

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 is acceptable. There are no restrictions as to who can carry out salvage operations.

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

Estonia is party to the International Convention on the Arrest of Ships 1999.

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 Estonia a ship, irrespective of her flag or law governing the claim, may only be arrested in respect of maritime claims as per article 1(1) of the International Convention on the Arrest of Ships 1999 (incorporated into the Estonian Law of Maritime Property Act) and maritime liens as per article 4(1) of the International Convention on Maritime Liens and Mortgages 1993 (incorporated into the Estonian Law of Maritime Property Act).

Arrest of associated ships is permissible as per article 3(2) of the International Convention on the Arrest of Ships 1999. Bareboat chartered vessels can be arrested for a claim against the bareboat charterer on basis of article 3(1)(b) of the International Convention on the Arrest of Ships 1999 and paragraph 782(2) section 2) of the Estonian Law of Maritime Property Act if the bareboat charterer of the vessel at the time when the maritime claim arose is liable for the claim and is bareboat charterer or owner of the vessel when the arrest is effected. Time-chartered vessels can be arrested for a claim related to this vessel, which is secured by maritime lien.

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

Estonia recognises maritime liens stipulated in article 4(1) of the International Convention on the Maritime Liens and Mortgages 1993, which are stipulated in paragraph 74(1) of the Estonian Law of Maritime Property Act.

25 What is the test for wrongful arrest?

In practice, no specific test has been elaborated for wrongful arrest. In a recent case, an arrested party was in financial difficulties and could not defend the claim for wrongful arrest. The court made its judgment without participation of arrested party against it and ruled out paying full damages. In principle, the party who applied for securing an action (ie, arresting a ship) shall compensate the damage caused to the other party by the securing of the action, if:

- a court judgment for refusal to satisfy or hear the secured action enters into force, or the proceeding in the matter is terminated on any other grounds except approval of the compromise of parties;
- it becomes evident that no claim for securing a claim or no cause for securing the action existed at the time of securing the action; or
- a ruling on securing the action, which was made before the action was filed, has been revoked due to the fact that the action was not filed on time.

Claims could also arise from unlawfully caused damage on the basis of fault (carelessness, gross negligence or intent) by the tortfeasor.

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?

Arrest is permissible of a ship in respect of which the bunker claim is asserted if the demise charterer of the ship at the time when the claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected.

However, there was a case where the court arrested a ship for a bunker claim against the time charterer. In our opinion this position is erroneous, although the question has not been reviewed in the Supreme Court.

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

Yes. In the case of monetary claims the court shall make the securing of an action or continuation of securing of an action dependent on the provision of security in order to compensate for possible damage caused to the opposing party. The security must be lodged by the due date set by the court. If the security is not lodged by the due date, the court shall refuse to secure the action or cancel the measures for securing the action.

The amount of security must be at least 5 per cent of the claim, but in any case, not less than €32. Estonian courts have discretion to determine a security amount based on the potential size of losses and expenses the shipowner may incur. However, security of between 5 and 15 per cent of the claim amount has often been sufficient. At the request of the defendant, the amount of security to be provided by the arresting party may be increased.

Security shall be lodged by depositing money or securities on the deposit account of the court, or by submitting an irrevocable and unconditional guarantee document issued by a credit institution from the Republic of Estonia or another member state of the European Union for an unspecified term for the benefit of the other party.

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 nature of the claim and supporting documents filed by the arresting party together with the arrest application, the court shall determine the sum of money upon payment of which to the court's determined bank account or upon the provision of a bank guarantee to the extent of which the execution of the ship arrest will be terminated. In such case, the court shall cancel, based on the defendant's application, the arrest and substitute it for the deposited sum of money or a bank guarantee. The sum is usually equal to the claim amount stipulated in the ship arrest application. As to whether such sum is subject to review, there is no practice as yet. Substitute security to release an arrested ship can be a cash deposit to be paid to a specified account of the Estonian Ministry of Finance or an irrevocable and unconditional guarantee document issued by a credit institution of the Republic of Estonia or another member state of the European Union for an unspecified term for the benefit of the arresting party. Parties may agree other substitute security, inter alia, a protection and indemnity (P&I) guarantee or cash deposit with a public notary account with special agreement. However, in reality, the practice of ship release for substitute security is awaiting court approval. There is no court precedent in Estonia regarding the security amount exceeding the value of an arrested ship. However, in principle, Estonian courts shall follow international conventions, which Estonia has ratified. Estonian courts should follow article 4 paragraph

2 of 1999 Arrest Convention, which stipulates that the security amount shall not exceed the value of the arrested ship.

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 Estonian lawyer can be appointed by a power of attorney or the appointment may be included into legal service contract or other relevant agreement or document. A document that confirms the appointment of the lawyer by a client should be provided to the court. The power of attorney or other document of authorisation can be provided in copy at the initial stage of the arrest proceedings. However, the original is to be available on request as soon as possible.

Translation of basic claim documents or these relevant parts can be required, but these can usually be provided later after commencement of the arrest procedures. Documents in the English and Russian languages are generally acceptable in Estonian courts and need not be translated into Estonian unless the other party requests such translation. The translation issues usually remain to the next stages of court procedures if and when the arrested party objects the ship arrest. It is possible to commence an arrest procedure with limited documents and provide additional documents during the procedure. However, the basic documents supporting the claim should be provided at the filing of the arrest application. Limited supporting documents or an unclear or complicated claim may result in a higher level of counter-security requested by the court from the arresting party. On some occasions, the court may request the payment of counter-security in a court deposit before issuing a decree for ship arrest. The arrest application and relevant documents can be filed electronically in Estonia. It takes on average two days to prepare a good arrest application, although, this depends on the documents available to support the claim that is the basis for the ship arrest.

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

The owner shall remain responsible for the vessel under arrest. However, the arresting party may be requested to fund the ship's stay under the arrest until its sale if the owner abandon's the ship or cannot maintain it. Usually it is assumed that ship's captain shall maintain the responsibility for the ship in, which case the captain should sign respective consent before the bailiff. In case the captain does not take responsibility for the ship then the bailiff or arresting party can apply to the court to appoint a holder of the ship. This is very rare practice because usually shipowners and crew of the arrested ship want to keep custody of the ship.

A bailiff may demand that the arresting party make an advance payment for particularly high enforcement costs, such as costs related to the transport, storage, guarding, meeting ship bunker costs and other similar costs.

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 ship in Estonia simply by obtaining a security to the maritime claim and then pursuing the claim on the merits elsewhere.

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

For locally registered ships, the establishment of a judicial mortgage on a ship or seizure of a ship, including a prohibition on selling the seized ship.

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

Yes.

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

In principle, yes. However, as there is no case law, various legal complications may arise when attempting to arrest bunkers.

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

A bailiff shall conduct enforcement proceedings (including judicial sale of an arrested vessel) on the basis of an application of a claimant (arresting party) and an enforcement instrument (court judgment). The claimant and shipowner can apply both independent of each other the sale of the arrested ship if the ship cannot be maintained properly or ship's value is reducing significantly (eg, if winter approaches and there are no funds for its maintenance, heating, etc). Such application shall be resolved by court and the bailiff shall deposit the sale proceeds on the court account.

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?

Two types of forced sales regarding arrested ships can be distinguished.

First, based on an application by the arresting party or shipowner (as debtor), the court may order the sale of an arrested ship before rendering the judgment if the value of the ship is likely to decrease significantly or maintenance of the ship would involve unreasonable costs (see question 35).

Second, the ship may be sold in the execution proceedings of court judgment. In that case the claimant submits an application for enforcement and the judgment to a bailiff, who commences enforcement proceedings (ie, starts preparing public auction).

The bailiff will give notice of the public auction to:

- the register of ships in which the ship is registered;
- all known mortgagees of the ship;
- the known owners of claims secured by a maritime lien; and
- the shipowner.

The enforcement proceedings should be finished and the ship sold by way of compulsory auction within six to 12 months from the date of application to the bailiff.

There are no court costs involved in the enforcement proceedings, only enforcement costs, which shall eventually be borne by the shipowner (covered by the proceeds from the ship sale). There is no way to know the definitive amount of the enforcement costs, except for the bailiff's fee, which is calculated as a percentage of the claim (eg, for a claim of €2 million the bailiff's fee is €30,133, which can be increased by a maximum of €5,000 in complicated forced sale cases).

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

The money received from the sale shall be distributed in the following order of priority:

- the expenses connected with the forced sale and arrest of the ship, and expenses that the state incurs for removal of the ship from the waterways to secure safe navigation;
- claims secured by a maritime lien;
- claims secured by a ship mortgage; and
- other claims.

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

If a ship is sold by compulsory auction, the bailiff shall issue a certificate at the request of the purchaser that the ship is free of maritime liens, mortgages and other encumbrances.

If a ship is sold by compulsory auction, all encumbrances shall be deleted on the basis of a certificate issued by the bailiff provided that all entitled persons are notified of the compulsory auction as required. Encumbrances to which the purchaser agrees are not deleted.

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

Yes, provided that the judicial sale was carried out in accordance with the laws of that jurisdiction and the International Convention on Maritime Liens and Mortgages 1993.

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

Estonia has acceded to the convention.

Carriage of goods by sea and bills of lading**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?**

Estonia signed the International Convention for the Unification of Certain rules of Law Relating to Bills of Lading (Hague Rules) in 1924 but did not ratify it. Regardless of this, most Estonian shipping companies base their international contracts of carriage of goods by sea on the Hague Rules as amended by the 1976 Protocol (the Hague-Visby Rules). The Hamburg Rules have not been ratified by Estonia. However, many principles laid down in the Hamburg rules were implemented into the MSA, which is mandatory for Estonian cabotage carriage of goods by sea. The MSA stipulates that the carrier shall be liable for the loss of or any damage to the goods caused between the time the goods are accepted for carriage (by the carrier) and the time these are delivered (paragraph 25), which corresponds to the principles of the Hamburg Rules. The goods are deemed to have been delivered if the consignee or its representative (or third-party holder of the bill of lading) has acquired direct possession of the goods or in certain case the goods are stored or deposited at the port of destination in such a way that they are available to the consignee (or third-party holder of the bill of lading).

The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) are under consideration in Estonia and no decision in respect of this is expected soon.

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?

Estonia has ratified the Convention on the Contract for the International Carriage of Goods by Road (CMR) on 3 May 1993, the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929 Warsaw) on 16 March 1998, the Convention for the Unification of Certain Rules for International Carriage by Air (1999 Montreal) on 10 April 2003 and the Convention Concerning International Carriage by Rail on 20 August 2008.

Estonia has regulated domestic transport of passengers by the Public Transport Act adopted on 26 January 2000.

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

The consignee or third-party holder of the bill of lading has title to sue. The shipper has title to sue on the basis of bill of lading only in case if the shipper itself is consignee stipulated in the bill of lading (MSA paragraph 38(3)). The shipper can sue the carrier on the basis of the contract of carriage of goods.

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?

As a general rule the terms of the charter party can be incorporated into the bill of lading and these are binding to the third-party holder or endorsee of the bill (MSA paragraph 38(2)). However, the arbitration clause has specific requirements for its validity to the parties. Thus, third parties can easily object to the arbitration clause incorporated into the bill of lading with reference to the charter party. There is no case law on this subject matter yet.

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

The issues covered by the 'demise' clause and the identity of carrier clause are covered by the concept of 'actual carrier' introduced into

Estonian maritime laws in 2002. Based on this, the actual carrier is liable for loss of or damage or delay of the cargo jointly and severally with the contractual carrier if the damage is caused during the period when the goods are being carried by the actual carrier. An agreement between the contractual carrier and the shipper or consignee regarding non-application of the limits of liability specified in the Act or extension of the liability of the carrier applies to the actual carrier only if the actual carrier has agreed thereto in writing (MSA paragraph 34(1)). The actual carrier may present the same objections against a claim submitted against the actual carrier as may be presented by the contractual carrier (MSA paragraph 34(2)).

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 may be liable for cargo damage depending on the circumstances and the terms of the contract of carriage of goods and the charter party. A shipowner can rely on the terms of the bill of lading if it can be considered as the actual carrier of the damaged cargo.

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

The carrier shall not be liable for violation of the contract for the carriage of cargo, including any deviation from a vessel's route, if the violation was caused by taking necessary measures to rescue persons or salvage property at sea.

48 What liens can be exercised?

The carrier has a lien on cargo and cargo documents in order to secure its claims arising from: the contract for the carriage of cargo and claims arising from earlier contracts of carriage; forwarding contracts; and storage contracts entered into with the shipper according to the Merchant Shipping Act.

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 obliged to deliver the goods to the consignee (or third-party holder of the bill of sale) only if the bill of lading is returned to the carrier and the consignee (or third-party holder) provides a signature concerning the fact that delivery of goods has been taken place (MSA paragraph 45). If the carrier violates this obligation then the carrier can be liable for loss of goods before rightful consignee (or third-party holder). In such a case, the carrier cannot limit its liability on the basis of the liability limitation regimes established for the carriage of goods. If several holders of originals of the bill of lading claim delivery of the goods, the carrier is obliged to arrange to have the goods stored or deposited on the account of the rightful owner of the goods and shall inform the holders of the bill of lading claiming delivery of the goods thereof.

50 What are the responsibilities and liabilities of the shipper?

If the goods require special care upon loading, unloading or during carriage, the shipper is obliged to inform the carrier in good time and shall indicate the measures that may be needed (MSA paragraph 9). In the case of dangerous goods, the shipper is obliged to inform the carrier of the nature of the danger in good time in writing (MSA paragraph 8). Before the goods are delivered to the carrier, the shipper is obliged to place the documents and information that is necessary for the loading and unloading of the goods and for conducting other formalities related to carriage, in particular for customs clearance, at the disposal of the carrier (MSA paragraph 10). The carrier is entitled to demand from the shipper the information and documents necessary for the issue of a bill of lading (MSA paragraph 40(2)).

Shipping emissions

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

Estonia, as a country with coastline on the Baltic Sea, has a sulphur-content ECA in force. Estonia has ratified Annex VI of MARPOL, which became valid in Estonia on 18 October 2005.

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 limit of 0.1 per cent m/m of sulphur in a vessel's fuel oil has been established in Estonia. This is checked by inspectors of the Estonian Maritime Administration on the basis of a ship's documents (oil book, log, etc). In the case non-compliance is discovered, the inspectors of the Estonian Environmental Inspections will be informed, who have authority to take samples of fuel oil and make analyses thereof, which should prove non-compliance (if any). The inspectors of the Estonian Environmental Inspections have an independent right to check the fuel oil of vessels; however, their inspections of vessels is rare. The Estonian government has prepared an adoption of the EU sulphur directives (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/EEC and Directive 2012/33/EU of 21 November 2012 amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels) into Estonian law, which should establish sanctions for non-compliance.

Ship recycling

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

Ship recycling in Estonia can be performed in compliance with Regulation (EU) No. 1257/2013 of the European Parliament and of the Council on ship recycling dated 20 November 2013. BLRT Grupp AS has ship recycling facilities in Tallinn, Estonia and provides ship recycling services.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

There are no specialised courts dealing with maritime disputes. County courts have universal jurisdiction to hear all civil, criminal and misdemeanour matters as the court of first instance.

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

In Estonia, the Code of Civil Procedure governs service of procedural documents in foreign states.

The provisions of the Code of Civil Procedure apply to the service of procedural documents in another EU member state unless otherwise provided by Regulation 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters.

A procedural document may also be served in a foreign state pursuant to the convention on the service abroad of judicial and extra-judicial documents in civil and commercial matters, or another international agreement.

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

There is no such arbitral institution specialising in maritime disputes in Estonia. However, there are some permanent arbitral tribunals, where parties can, if so agreed, appoint maritime specialists of their choosing as their respective arbitrators.

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

Recognition and enforcement of foreign judgments and awards is governed by:

- the Code of Civil Procedure;
- the Code of Enforcement Procedure;
- European Parliament and Council Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and other EU legal instruments (eg, Regulations No. 805/2004, 1896/2005 and 861/2007);
- legal aid treaties with the Russian Federation and Ukraine; and
- the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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

There are no rules and precedent cases in Estonia regarding the validity and enforceability of asymmetric jurisdiction and arbitration clauses; however, the relevant clauses of the 2007 Lugano Convention and the European Parliament and Council Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I) should be taken into account. Estonian courts generally follow judgments of the Court of Justice of the European Union, whose judgments and resolutions can be considered relevant.

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

There is no precedent in Estonia concerning anti-suit injunctions, nor is there any legal basis to apply for such an injunction.

In the event that a non-EU court that made the decision did not have jurisdiction to make the decision in compliance with the provisions of Estonian law regulating international jurisdiction, then such a decision will not be recognised.

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 should itself refuse to hear a statement of claim if the parties have made an agreement on jurisdiction prescribing jurisdiction of a specific court, or if the parties have entered into an agreement for referral of the dispute to arbitration except in the case where the action contests the validity of the arbitral agreement.

If the court itself does not refuse to accept an action, a party can request the court to do so, referring to an agreement on jurisdiction or an arbitral agreement.

Limitation periods for liability**61 What time limits apply to claims? Is it possible to extend the time limit by agreement?**

The limitation period for a claim arising from a transaction is, as a rule, three years. In some exceptional cases, it may be as much as five or even 10 years.

The limitation period for claims arising from unlawfully caused damage (tort) is three years as of the moment when the entitled person became or should have become aware of the damage and of the person obliged to compensate for the damage, but in any case, not more than 10 years after performance of the act or occurrence of the event which caused the damage.

According to the General Part of the Civil Code Act the parties may agree upon shortening or extending the limitation period (the maximum limitation period extension is up to 10 years).

62 May courts or arbitral tribunals extend the time limits?

No.

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

Estonia ratified the Maritime Labour Convention (MLC) in May 2016 and it entered into force on 5 May 2017. Estonia has adopted a new Maritime Labour Law (MLL), which is based on the MLC. The MLL entered into force on 1 July 2014.

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, yes. There is an equivalent of the *clausula rebus sic stantibus* doctrine stipulated in the Estonian Law of Obligations Act, according to which, if the circumstances under which a contract is entered into change after the entry into the contract and this results in a material change in the balance of the obligations of the parties due to which, the costs of one party for the performance of an obligation increase significantly or the value of that which is to be received from the other party under the contract decreases significantly, the injured party may demand amendment of the contract from the other party in order to restore the original balance of the obligations.

Moreover, if the bases for amendment of a contract exist but, due to the circumstances, amendment of the contract is not possible or would not be reasonable with respect to the other party, the party aggrieved by alteration of the balance of the obligations may withdraw from the contract or, in the case of a long-term contract, cancel the contract.

The application of this principle is subject to fulfilment of a number of further conditions.

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

Shipowning companies do not pay any tonnage tax or annual corporate tax in Estonia. Only income tax is due on the distribution of dividends, which forms 21/79 of the dividends received. There is no age limit beyond which ships may not be registered in Estonian ship registries.



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Newbuilding contracts

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 L 5113-3 of the Transport Code, unless otherwise agreed, title in the ship passes from the shipbuilder to the shipowner only on the date of delivery of the ship after sea trials. The parties may agree that title will pass during the course of construction, before delivery.

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 requirements are that the refund guarantee must be made in writing and be properly executed by the parties thereto.

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 article 1610 of the Civil Code, if the yard, 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 yard may be liable for damages.

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?

Pursuant to article L 5113-4 of the Transport Code, the shipbuilder is liable for latent defects of the ship, even if the ship was accepted without reservation by the customer. The owner can take action against both the shipbuilder and the shipbuilder's sub-supplier, if the latter was responsible for supply or installation of the defective machinery or equipment. The owner must commence proceedings within one year of the discovery of the latent defect (Transport Code, article L 5113-5). Any lawsuit, including summary proceedings, stalls the limitation period.

According to article L 5113-6 of the Transport Code, the same 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 vessel does not comply with the contract specifications, the purchaser has a claim in damages against the seller (provided that the purchaser accepted delivery with reservation if the non-compliance was apparent on delivery, or the non-compliance was not apparent at the time of delivery).

The effects of an agreement for the sale and purchase of a ship are governed by the provisions of the Civil Code. Pursuant to article 1648 of the Civil Code, the action resulting from latent defects must be brought by the buyer within a period of two years 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 the loss or damage would lie in product liability against the shipbuilder, pursuant to articles 1245 et seq of the Civil Code. The damage to the defective vessel itself is not covered by these provisions. The vessel is defective if it does not provide the safety that a person is entitled to expect. This regime applies to all manufacturers, including shipbuilders. Such action for the recovery of loss or damage is time-barred after a period of three years from the date on which the claimant knew or should have known of the loss or damage, the defect and the identity of the manufacturer (Civil Code, article 1245-16).

Ship registration and mortgages

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 there are several registries in France, ships are registered with the local customs authorities of their home port.

One of the registries is the French International Register (RIF) created in 2005 (Law No. 2005-412 of 3 May 2005). Article L 5611-2 of the French Transport Code provides that the following vessels are eligible for registration with the RIF:

- vessels engaged in deep-sea trade or in international cabotage, except for passenger vessels sailing scheduled voyages between EU countries;
- commercially operated leisure vessels of over 15 metres in overall length, manned with a professional crew; and
- professional fishing vessels classified as the first category and navigating in areas defined by regulations.

Article L 5611-3 of the French Transport Code provides the following list of ships that are not eligible for registration under the RIF:

- passenger ships sailing scheduled intra-community lines or, in accordance with a list fixed by regulation, scheduled international lines;
- vessels operating exclusively in national domestic trade (domestic cabotage);
- port assistance vessels, in particular those assigned to towing at the port, maintenance dredging, boatage, piloting and buoyage; and
- professional fishing vessels not mentioned in 3° of article L 5611-2 of the French Transport Code and by regulatory measures taken for its application.

It is possible to register vessels under construction.

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

General registration

For general registration under the French flag RIF for vessels purchased in a non-EU country after all duties and taxes have been paid, or purchased in the European Union, and where the shipowner is an individual or group of individuals, the following conditions apply:

- single shipowners must come from a member state of the European Economic Area (EEA) (the European Union, Iceland, Liechtenstein or Norway);

- in the case of several shipowners, at least half of these individuals must be nationals of a EEA member state; and
- the shipowner (or the designated manager if there are several owners) must reside in France or elect domicile in France if he or she resides there for less than six months per year.

Where the shipowner is a legal entity or a group of companies, the following conditions apply:

- at least 50 per cent of the corporate shipowners must have their registered office or principal establishment in a EEA member state; and
- the ship must be managed and controlled by the registered office or a principal establishment in France or, failing that, by a permanent establishment of the vessel's owner company domiciled in France.

In respect of a lessee of a new or second-hand vessel intended to be acquired by a leasing agreement, the conditions described above for the shipowner will also apply.

Temporary registration

For temporary registration (special approval for vessels flying under a foreign flag) for vessels purchased in a non-EU country after all duties and taxes have been paid, or purchased in the European Union, and where the shipowner is an individual or group of individuals, the conditions described above apply.

Where the shipowner is a legal entity or a group of companies, the following conditions apply:

- at least 25 per cent of the corporate shipowners must have their registered office or principal establishment in a EEA member state; and
- the ship must be managed and controlled by the registered office or a principal establishment in France or, failing that, by a permanent establishment of the vessel's owner company domiciled in France.

In respect of bareboat chartered vessels (only if the laws of the state of the foreign flag allow suspension of their flag), the conditions regarding a bareboat charterer, whether a natural person or legal entity, are the same as for a shipowner under general registration under the French flag.

Suspension of registration

For suspension of registration under the French flag for vessels that are subject to a bareboat lease to a foreign company and that will fly a foreign flag for the entire lease period, and where the shipowner is a legal entity or a group of companies, the following conditions apply:

- the company cannot be established on EEA territory; and
- the ship must be managed and controlled by a permanent office (see conditions above) located outside French territory.

7 What are the documentary requirements for registration?

If the purchaser is entitled to register at the RIF (see question 5), it must follow a multi-stage process:

- reservation of the name;
- approval to sail under the French flag;
- registration; and
- declaration of the ship's complement.

More precisely, the shipowner must request three kinds of documents from the RIF to fully register the ship:

- a name reservation request through Cerfa form No. 12701*01;
- a request for a transfer of ownership through the Cerfa form No. 12702*01, and in the case of second-hand vessels, for the change of flag or deletion of foreign flag; and
- an application for permission to fly the French flag and the registration through Cerfa form No. 12704*01. This application must be accompanied by various documents. The list of these documents varies depending on whether the ship is a new build or secondhand.

Documentary requirements regarding new vessels or vessels under construction

The application for permission to sail under the French flag and the registration must be accompanied by the following documents:

- the articles of association and a trade register extract for the purchaser;
- the shipbuilding contract and (if relevant) any addenda thereto;
- evidence of the signatories' authority;
- any documents relating to the financing of the ship (for example, any lease contract);
- in the event that the ship is to be owned by an economic interest grouping:
 - the bareboat charter to the end user; and
- the articles of association and trade registry extract pertaining to the charterer;
- the protocol of delivery and acceptance;
- any relevant co-ownership agreement;
- the minutes of the board of directors in which the purchase of the vessel was decided;
- a certificate of cancellation of the foreign flag if the ship has been under such a flag during the construction;
- the certificate of non-mortgage registration; and
- the international tonnage certificate of the previous flag state (if tonnage has been determined).

Documentary requirements regarding second-hand vessels

The list of documents regarding a second-hand ship is as follows:

- the articles of association and a trade register extract of the purchaser;
- deed of ownership or copy of the contract of sale if there has been a change of owner;
- evidence of signatories' authority;
- any documents relating to the financing of the ship (for example, any lease contract);
- any relevant co-ownership agreement;
- international tonnage certificate of the previous flag;
- a cancellation certificate of the foreign flag;
- the certificate of non-mortgage registration; and
- the protocol of delivery and acceptance.

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

Dual registration by way of suspending a flag is possible in respect of ships that are bareboat chartered to a foreign company. Those ships will fly the foreign flag throughout the bareboat charter.

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, one 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.

Limitation of liability

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 1976) as amended by the protocol of 1996 is in force in France. Amendments in relation to the increase of the limits of liability in the 1996 LLMC Protocol entered into force on 8 June 2015 under the tacit acceptance procedure according to article 8 7°) of the 1996 LLMC Protocol. It appears that these amendments have not yet been implemented domestically.

Under French law, articles L 5121-1 et seq of the French Transport Code apply.

The limitation regime applies to both contractual and non-contractual claims. Article L 5121-4 provides a list of claims that cannot be limited, such as claims arising from salvage and assistance operations and general average contribution. The parties who can limit their liability pursuant to article L 5121-2 of the Transport Code are the charterer, the shipowner, the manager, the captain or their employees.

11 What is the procedure for establishing limitation?

Under French law, it is not compulsory to set up a fund. In practice, however, it is common to provide a limitation fund. To establish limitation, an ex parte request must be made before a commercial court having territorial jurisdiction. Once the fund is set up (constituted either by a bank deposit or guarantee), the judge will record the constitution of the limitation fund. Creditors may then have the possibility of disputing the constitution of the fund; however, no specific maritime provisions are provided in that respect. Once all issues are resolved, the distribution of the fund takes place.

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 French law, there is a separate right to plead limitation without setting up a fund.

According to the French Supreme Court, a shipowner may constitute a limitation fund before legal proceedings have been initiated (Cass Com 9 July 2013, No. 12-18,504) and before it has been required to respond to a claim that has already been commenced.

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

Pursuant to article 4 of LLMC 1976, '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.'

Under French law, the limit will be broken if it is proved that the loss resulted from an inexcusable fault. French courts assess notably 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.

By way of example, a dangerous reckless behaviour, an unworthy behaviour or contrary to the rules of professional conduct may constitute cases of inexcusable faults and notably:

- conduct barring limitation is likely to have occurred when the owner has not made proper arrangements for the testing of a crane prior to the discharge from his ship of a heavy piece of machinery. The discharge of a heavy crane without ensuring that the upper revolving part be safely blocked entails the presumption that the carrier has acted recklessly and with knowledge that a damage would probably occur (Court of Appeal of Montpellier (2e chambre section B) 7 December 1999, *Jumbo Navigation NV v Mague Equipamentos de Movimentação and Others*, affirmed by the Court of Cassation on 3 April 2002, No. 00-11,344); and
- the passenger carrier that does not prevent and warn a passenger not to stay on the front bridge when the vessel navigates through rough seas, cannot rely on the limitation of its liability. The injury the passenger suffered was the consequence of a failure to perform safety duties. The failure to perform such duties, which implied objectively the conscious of the probability of the damage and its reckless acceptance, constitutes an inexcusable fault (Court of Cassation: Civ. 1ère 18 June 2014, No. 13-11,898 (*le Cristal*)).

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

The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the Protocol of 2002, is applicable for EU member states as the European Union has ratified the Athens Convention. Article 1 of 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 provides that the regulation lays down the community regime relating to liability and insurance for the carriage of passengers by sea, as set out in the relevant provisions of, notably, the Athens Convention. The regulation declares the Athens Convention applicable where the ship is flying the flag of, or is registered in, a member state, the contract of carriage has been made in a member state, or the place of departure or destination according to the contract of carriage is in a member state.

The French Law No. 2016-700 dated 30 May 2016 authorises the accession of France to the Protocol of 2002 to the Athens Convention.

Port state control

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

France is a party to the Paris Memorandum of Understanding on Port State Control of 1982 (the Paris MoU). Pursuant to the Paris MoU, each contracting party shall maintain an effective system of port state control with a view to ensuring that, without discrimination as to flag, foreign merchant ships calling at a port of its state, or anchored off such a port, comply with certain international standards as provided in international conventions listed under section 2 of the Paris MoU.

At its 50th meeting in May 2017, the Paris MoU committee has adopted new performance lists for flags and recognised organisations. The French flag is ranked second on the white list.

Directive No. 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port state control (the 2009 Directive on Port State Control) takes into account the provisions of the Paris MoU.

On a national scale, port state control is operated by an office of port state control that is part of the Directorate of Maritime Affairs, under the authority of the Directorate-General of Infrastructure, Transport and Sea, which is part of the French Ministry of Ecology, Sustainable Development and Energy.

On a regional scale, inspections are carried out by highly skilled and trained inspectors of Interregional Directorates of the Sea, and officials of the French Ministry of Ecology, Sustainable Development and Energy.

15 What sanctions may the port state control inspector impose?

In compliance with the Paris MoU, 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. These provisions are also provided by the 2009 Directive on Port State Control, which states that in the case of deficiencies that are clearly hazardous to safety, health or the environment, the competent authority of the port state 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.

Article L 5334-4, 1 of the Transport Code provides, in particular, that access to a port is denied to any ship that receives a formal prohibition order from a state acting in accordance with the provisions of the Paris MoU. New articles 41-8 et seq of Decree No. 84-810 dated 30 August 1984 (created by Decree No. 2012-161 dated 30 January 2012 and modified by Decree No 2016-1693 dated 9 December 2016) also describes the measures of the detention of a vessel and prohibition of vessels from accessing a port.

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

Article 41-12 of Decree No. 84-810 dated 30 August 1984 (created by Decree No. 2012-161 dated 30 January 2012) and modified by article 31 of the Decree 2014-28 (dated 1 December 2014) and by Decree No. 2017-422 (dated 28 March 2017) sets out the appeal procedure.

The appeal procedure provides that any appeal against a decision of an inspector shall be presented by the shipowner, operator of the ship, charterer for any maritime labour certification or its representative before the chief of the centre of ship safety. Any appeal against the decision rendered by the aforementioned chief shall be presented before the minister of maritime affairs.

The appeal shall be made by the shipowner, operator of the ship or its representative within 15 days of being notified of the decision of the inspector.

Classification societies

17 Which are the approved classification societies?

In France, the authorised classification societies are Bureau Veritas Marine & Offshore SAS, DNV-GL AS Rina Services SpA, Lloyd's Register EMEA and the Korean Register of Shipping, which are all members of the International Association of Classification Societies, founded in 1968.

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. French 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 French 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 may be criminally liable.

Collision, salvage, wreck removal and pollution

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. Notably, under the circumstances described in article L 5242-18 of the Transport Code, the state or the port authority, as relevant, may act on their own initiative at the shipowner's cost and risk.

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

Regarding collisions, the International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels, 23 September 1910), the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation, the International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision (both adopted in Brussels on 10 May 1952) and the International Regulations for Preventing Collisions at sea dated 20 October 1972 are in force in France.

Regarding salvage, the International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea (Brussels, 23 September 1910) and the International Convention on Salvage (London, 28 April 1989) are in force in France.

Regarding pollution, the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) as modified by the protocol of 1978, the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC) as replaced by the protocol of 1992, and the 1992 protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund 1992) are in force in France.

Regarding wreck removal, the French Law No. 2015-820 (dated 7 July 2015) authorises the ratification of the Nairobi International Convention on the Removal of Wrecks adopted on 18 May 2007, and Decree No. 2016-615 (dated 18 May 2016) relates to the publication of the said Convention under French law.

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. Another form of salvage agreement commonly known as the 'Formule Villeneau' may also be used.

There are no specific restrictions on who may carry out salvage operations. Usually, these are carried out by specialised companies.

Ship arrest

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

The International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, Brussels, 10 May 1952 (the 1952 Convention), is in force in France. However, France is not a party to the International Convention on the Arrest of Ships signed in Geneva on 12 March 1999.

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 France, the applicable source of law will be either the 1952 Convention or Decree No. 67-967 and the Transport Code.

Under French law and according to article L 5114-22 of the Transport 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 the 1952 Convention, a vessel can be arrested in respect of a maritime claim as defined and listed by article 1 of the 1952 Convention. The 1952 Convention will apply to any vessel flying the flag of a contracting party in the jurisdiction of any contracting party to the 1952 Convention.

If the vessel is flying the flag of a non-contracting party to the 1952 Convention, the vessel may be arrested in the jurisdiction of any contracting state in respect of any of the maritime claims enumerated in article 1 of the 1952 Convention, or of any other claim for which the law of the contracting state permits arrest.

In relation to associated ships, in the 1990s the French courts developed the 'theory of the community of interests' enabling the creditors of company X, shipowner of vessel A, to arrest vessel B, owned by company Y, if such creditors are able to provide evidence of some confusion of assets between X and Y. Such evidence was, at that time, easily provided.

Following the development of the theory, the French courts were quickly overwhelmed by the number of arrests in France by creditors from around the world and had to tighten the criteria. Since then, in a series of decisions of the French Supreme Court, it was held that creditors must demonstrate that the companies are fictitious, which in practice is extremely difficult to evidence.

Under French law the creditors can only arrest a vessel that is owned by a debtor. By exception, there are two situations in which a creditor can arrest a vessel based on a claim held against a time-charterer or a bareboat charterer:

- if a creditor legitimately believes he or she has entered into a contract with a shipowner; or
- if a claim benefits from a maritime lien based on article L 5114-8 of the Transport Code (CA, Pau, 6 December 1984, *Navire Spartan*).

The possibility of arresting a ship for a claim held against a charterer is expressly addressed in the 1952 Convention:

- in the case of a claim held against a bareboat charterer, article 3(4) paragraph 1 of the convention expressly states that it is possible to arrest a chartered vessel in the case of a charter with demise (CA, Montpellier, 1 December 2003); and
- in the case of a claim held against a time-charterer, French courts apply article 3(4) paragraph 2 of the convention, which allows arresting cases where a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship (T Com Marseille, 4 June 2003).

The 1952 Convention lays down certain conditions relating to the quality of the claim. It must be a 'maritime claim' (as defined and listed by article 1 of the 1952 Convention), and such maritime claim must directly relate to the ship.

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

French law recognises the concept of maritime liens. The creation of such maritime lien is automatic, requiring no formality on the part of the creditor.

Claims giving rise to maritime liens are set in an exhaustive list in order of priority in article L 5114-8 of the Transport Code:

- legal costs incurred in relation to the sale of the ship and the distribution of the proceeds of the sale;
- tonnage taxes or port taxes and other taxes of the same kind, pilotage fees and costs associated with the custody and preservation of the vessel since the vessel entered the last port;
- crew costs;

- salvage and assistance of the vessel and contribution to general average;
- compensation for collisions or accidents at sea, compensation for damage caused to port or inland-waterway structures, compensation for personal injury to passengers and crews, and compensation for loss or damage to cargo and/or luggage; and
- costs incurred by a captain outside the home port of the vessel for the preservation of the ship or the continuation of the journey.

According to article L 5114-17 of the Transport code, maritime liens expire after a period of one year, except for costs incurred by a captain (mentioned above), for which the period is reduced to six months.

25 What is the test for wrongful arrest?

A wrongful arrest would lie in the abuse of the right to arrest a vessel. An 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.

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 is possible for a bunker supplier to 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 creditor of a charterer may arrest the vessel as long as the creditor benefits from a maritime lien.

Under French law and pursuant to article L 5114-8, 6 of the Transport Code, the bunker supplier will have a maritime lien if it entered into a contract with the captain of the vessel in relation to the supply of bunkers ordered outside the vessel's home port.

In addition, under international law and pursuant to the 1952 Convention, the claimant is entitled to arrest a ship in respect of a maritime claim arising out of goods or material wherever supplied to a ship for its operation or maintenance.

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

The arresting party does not have to provide security. The debtor can obtain the release of the arrest if it can provide a satisfactory guarantee to the arresting party.

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, form and terms of the guarantee are usually agreed between the parties. The release is given, in this case, without the intervention of a judge. If there is no agreement between the parties as to the amount of the guarantee, the judge ruling by way of summary proceedings is competent to appreciate the sufficiency of the amount of the guarantee.

The release of the arrest of the vessel is granted or ordered after the constitution of a guarantee, which can take the following forms:

- bank guarantee, as explicitly provided by article L 512-1 of the Code of Execution of Civil Procedures;
- guarantee issued by an insurer and notably a protection and indemnity club;
- deposit with the relevant registry or a receiver designated by the parties; and
- limitation fund constituted in accordance with the Convention on Limitation of Liability for Maritime Claims 1976 and the 1996 Protocol.

The amount of the guarantee would be limited to the value of the ship. This position seems to be prevalent under French law and can be found notably under article 4.2 of the International Convention on Arrest of Ships 1999, which states that 'In the absence of agreement between the parties as to the sufficiency and form of the security, the court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship.'

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 relation to ship arrest under French law, powers of attorney are not required for the appointment of a lawyer to make an arrest application.

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. The French Supreme Court held in a decision dated 3 March 1998 (Cass Com 3 March 1998, 95-20.692) that the shipowner is responsible for the maintenance of the arrested vessel.

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?

Whether pursuant to the 1952 Convention or under French law, a French court's examination of the merits of the claim to decide the arrest of a ship will be limited to the allegation of the claim. The parties must then pursue the claim on its merits in the courts that have jurisdiction to decide.

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

Pursuant to article 531 of the Civil Code, the attachment of a ship is subject to a specific legal regime, as a ship represents a specific type of property. Pursuant to the Transport Code, apart from the 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 (L 5114-8 to L 5114-9). In addition, the creditor can seek the arrest of the debtor's receivables.

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

Orders for delivery up or preservation of evidence or property are not available in their conventional form in French maritime law. Pursuant to article 531 of the Civil Code, the attachment of a ship is subject to a specific legal regime, as a ship represents a specific type of property. Therefore, procedural measures envisaged by the Transport Code are applicable to ships. Article L 5114-21 of the Transport Code provides that a judge may issue an order pursuant to which a ship that has been placed under arrest obtains a right to leave the port for one or several journeys upon the deposit of adequate security and on condition that the ship returns to the port within the term specified by the judge. In the event that the ship does not return to port within the specified time period, the security is awarded to the creditors.

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

Yes, it is possible to arrest bunkers of the ship. The arrest of the ship's bunkers is subject to the same legal regime as the arrest of the ship itself.

Judicial sale of vessels

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

Creditors of the shipowner may apply for judicial sale of the vessel.

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 R 5114-29 et seq and L 5114-23 et seq of the Transport Code.

The initial step in such procedure is the notification by a bailiff to the shipowner of an order to pay (article L 5114-23 of the Transport

Code). The creditor must be in possession of an executory title, namely, either a judgment evidencing that the payment is due or, in certain cases, a notarised deed. If payment is not made, the bailiff will then issue attachment minutes, 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, for example, whether the ship is registered under the French flag or a foreign flag. The court costs in connection with the sale will be determined by the judgment given by the court. The costs will usually reflect the fees incurred in relation to the ship's detention and the expenses incurred in the course of court proceedings.

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 may be set out as follows:

- maritime liens, article L 5114-8 of the Transport Code, provides the following list of maritime liens:
 - legal costs incurred in relation to the sale of the ship and the distribution of the proceeds of the sale;
 - tonnage taxes or port taxes and other taxes, pilotage fees and fees associated with the conservation of the vessel since the entry of the vessel at the costs incurred in the last port of call;
 - crew costs;
 - 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;
- mortgages over the ship;
- other secured claims; and
- all other unsecured claims.

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 as provided by article L 5114-19, 2 of the Transport Code.

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

The judicial sale of a vessel in a foreign jurisdiction will be recognised in France. It was held in a decision dated 4 October 2005 (No. 02-18.201) by the French Supreme Court that a decision of a foreign court regarding a judicial sale has legal effects in France.

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

France is not a party to the International Convention on Maritime Liens and Mortgages 1993.

Carriage of goods by sea and bills of lading

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 1924 entered into force on 2 June 1931 and France ratified these rules on 9 April 1936;
- the Hague-Visby Rules 1968 entered into force on 23 June 1977 and France ratified these rules on 10 July 1977;
- the SDR Protocol 1979 entered into force on 14 February 1984 and France ratified this protocol on 18 November 1986;

- the Hamburg Rules entered into force on 1 November 1992 but they have not been ratified by France; and
- the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) has not been ratified by France.

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.

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 following conventions regarding road, rail and air transport that apply to stages of the transport other than by sea are in force in France:

- the Convention on the Contract for the International Carriage of Goods by Road 1956 and the Protocol of 1978;
- the Convention Concerning the International Carriage of Goods by Rail 1980 as amended by the Protocol of 3 June 1999; and
- the Convention for the Unification of Certain Rules for International Carriage by Air 1999.

Regarding domestic law, the French Transport Code, applicable since 1 December 2010, is in force.

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

In principle, the consignee has title to sue on a bill of lading (Cass Com 24 November 1975, No. 74-12.782).

The French Supreme Court has recognised that the consignor may have title to sue on a bill of lading if the consignor suffered loss or damage. The real consignee may also have title to sue on a bill of lading.

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.

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

The 'demise' and identity of carrier clauses are not prohibited under French law. However, such clauses are not considered to be binding by the French courts.

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 charterer's bills of lading, the name of the carrier is not provided. Where such bill of lading is kept by the charterer, the contractual relations are governed by the charter agreement. However, issues arise where 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 or damage to cargo the third-party holder may only rely on the charterer's bill of lading, which does not provide information on the carrier. In this respect, the French Supreme Court has held that when the bill of lading mentions neither the shipowner's 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 and which were revealed after delivery thereof (Cass Com 21 July 1987, 86-10195, Bull 1987 IV No. 211 p156).

It is interesting to note that article 37 of the Rotterdam Rules states that if the carrier is not identified in the contract particulars, but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier. However, the shipowner will not be held liable if he or she proves that the ship was under a bareboat charter at the time of the carriage, identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address (Cass Com, 6 October 2016, No. 15/01504, *X et a v Allianz Global*). The bareboat charterer may also rebut the presumption of being the carrier in the same manner.

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

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 as provided by the Hague Rules and article L 5422-12 of the Transport Code.

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.

48 What liens can be exercised?

Pursuant to article L 5422-8 of the Transport Code, the carrier has a lien on the cargo for payment of its freight.

Article L 5114-8, 5 of the Transport Code provides for, among other things, a lien on the ship in relation to claims for loss or damage to cargo.

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

A 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 French courts have held that delivery of cargo by the carrier without the delivery of such guarantee requested by the consignor is a breach of contract.

Under the Rotterdam Rules, the limitation of liability not only covers loss or damage to the cargo but also covers breaches of the carrier's obligations. The Rotterdam Rules also provide specific provisions regarding delivery of cargo in the absence of a negotiable transport document.

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 fixed on the bill of lading.

Pursuant to article L 5422-10 of the Transport 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 did not respect his or her duty of sincerity regarding the nature of the goods, the carrier will not be liable for the loss of these goods.

Article L 5422-11 of the Transport Code provides a one-year time limit on claims against the shipper.

Shipping emissions

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

Yes. France is a member state of the International Maritime Organization and it is through this organisation that the International Convention for the Prevention of Pollution from Ships (MARPOL) was adopted in 1973. In 1997, an amendment was adopted and a new Annex VI was added. Annex VI entered into force on 19 May 2005 and was modified in 2008 and new guidelines were added notably in 2013.

This annex sets emission limits for ship exhausts such as sulphur oxides, nitrogen oxides, suspended particles, volatile organic compounds and banned substances that weaken the ozone layer. In Europe, the Baltic Sea became the first fully implemented sulphur oxides emission control area (SECA) in August 2006. One year later, in August 2007 the North Sea and the English Channel became the second SECA.

Annex VI is integrated into EU law by Directive No. 2016/802/EU of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuel. This directive applies to all ships whatever their flag state. Therefore, any ship that is located in the territorial waters or exclusive economic zone of a EU member state must comply with the requirements of the directive.

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?

According to Directive No. 2016/802/EU, the applicable cap on the sulphur content of fuel oil depends on the geographic area in which the ship is navigating:

- within an emission control area: the sulphur content of any fuel oil used by any ship navigating in this area must not exceed 1 per cent m/m. Since 1 January 2015, this threshold has decreased to 0.1 per cent; and
- outside an emission control area: the sulphur content of any fuel oil used by any ship must not exceed 4.5 per cent m/m. Since 18 June 2014, this threshold has decreased to 3.5 per cent and from 1 January 2020, the authorised percentage will be 0.5 per cent.

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:

- 4.5 per cent m/m prior to 1 January 2012;
- 3.5 per cent m/m on and after 1 January 2012; and
- 0.5 per cent m/m on and after 1 January 2020.

Within an emission control area, the sulphur content of fuel oil used on board ships shall not exceed the following limits:

- 1.5 per cent m/m prior to 1 July 2010;
- 1 per cent m/m on and after 1 July 2010; and
- 0.1 per cent m/m on and after 1 January 2015.

In France, the control procedure is provided in a ministerial order dated 23 November 1987 relating to ships' security. In accordance with article 213-6.18 of this order, the details of the fuel oil used by a vessel must be recorded in a bunker delivery note, accompanied by a sealed sample. This sample should be signed by the supplier and the ship's representatives. It should also be retained on board for a period of at least 12 months and in an accessible place since an inspection can occur at 'any reasonable time'.

Article L 218-15 of the French Environmental Code provides that a master of a ship who is found guilty of violating the MARPOL Convention and, in particular, Rule 14 (regarding sulphur emissions), will be punished with a €200,000 fine and imprisonment for up to one year.

Once Directive No. 2016/802/EU is implemented, its provisions relating to controls and sanctions will therefore be applied. In this regard, the directive is quite clear but not particularly innovative. Concerning the controls, the member states shall take all necessary measures to check by sampling that the accepted sulphur threshold is complied with. Moreover, according to the Commission, the sanctions imposed by the member states shall be effective, proportionate and dissuasive.

Ship recycling

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

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention 2009) was signed by France on 19 November 2009 and ratified on 2 July 2014. However, the Hong Kong Convention 2009 will only enter into force two years after 15 states, representing 40 per cent of the world's merchant shipping by gross tonnage, and on average 3 per cent of recycling tonnage for the previous 10 years, have either signed it without reservation as to ratification, acceptance or approval, or have deposited instruments of ratification, acceptance, approval or accession with the Secretary General. None of these conditions has currently been met.

To anticipate the implementation of the Hong Kong Convention 2009, the European Parliament and the Council of the European Union adopted the Ship Recycling Regulation on 20 November 2013 (Regulation (EU) No 1257/2013). This regulation has been embodied in French law by Decree No. 2015-1827 dated 30 December 2015 and articles D 543-271 et seq of the French Environmental Code.

An European List of ship recycling facilities is prepared in accordance with article 14 of the EU regulation, based on permission or authorisation granted by member states. In France, there are currently three ship recycling facilities:

- Gardet & De Bezenac Recycling/Groupe Baudelet Environnement – GIE MUG;
- Grand Port Maritime de Bordeaux; and
- Les Recycleurs Bretons.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

The French 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 French 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.

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

In addition to Council Regulation (EC) No. 1393/2007 of 13 November 2007 on the service in member states of judicial and extrajudicial documents in civil or commercial matters (service of documents), the main rules in France that govern service of court proceedings on a defendant located out of the jurisdiction are set out in the French Code of Civil Procedure.

Furthermore, articles 14 and 15 of the Civil Code set out the rule known as 'privileged jurisdiction'. Article 14 states that: 'an alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in France with a French person; he or she may be called before the courts of France for obligations contracted by him in a foreign country towards French persons' and article 15 states that: 'a French national may be called before a French court with respect to obligations he or she has borne abroad, even towards an alien.'

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

The Paris Maritime Arbitration Chamber (CAMP) is the French arbitral institution specialising in settling maritime disputes in a fast and economical way. The CAMP is made up of institutional members, which are legal entities and professionals of the maritime sector.

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

Regarding the recognition and enforcement of foreign judgments, the European Union rules are laid down in Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012

Update and trends

The aforementioned reform of the French Civil Code on contract law and the general regime and proof of obligations affects maritime matters, notably in relation to unequal clauses. Pursuant to the new article 1171, in standard-form agreements imposed by one party on another (*contrat d'adhésion*), contractual clauses (other than those dealing with the principal object of the contract or the price of the service provided) that create a significant imbalance between the rights and obligations of the parties to the contract can be set aside by the judge at the request of the detrimentally affected contracting party. General terms and conditions of insurance policies or bills of lading also enter in the scope of this article. To identify the existence of such significant imbalance clauses, careful attention must be paid to all the provisions of the contract.

on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. The provisions of the Code of Civil Procedure will also apply.

Regarding the enforcement of foreign arbitral awards, France is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Pursuant to this convention, each of the contracting states shall recognise the arbitral awards as binding and enforce them in accordance with the procedural rules of the territory where the award is relied upon.

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

The validity of asymmetric jurisdiction and arbitration clauses remain unsettled under French law, due to recent controversial decisions of the French Supreme Court.

In the *Rothschild* case (Cass Civ 1 26 September 2012, 11-26.022), the court held that an agreement providing an option for one party to choose between an indefinite choice of jurisdiction is void.

This rejection of asymmetric jurisdiction clauses was later justified by the French Supreme Court in the *Danne Holding v Crédit Suisse* case (Cass Civ 1, 25 March 2015, 13-27.264) on the basis that such clause was drafted without an objective criteria setting out the basis for any alternative jurisdiction, and thus was contrary to the Lugano Convention's principles, which requires foreseeability and legal certainty.

However, in its latest decision (Cass Civ 1, 7 October 2015, 14-16.898, *Société eBizcuss.com v Apple Sales International, Apple Inc and Apple Retail France*), the Supreme Court gave effect to a clause providing a limited choice to the beneficiary of the option. In light of this decision, it is considered that asymmetric clauses are valid under French law, provided that the choice offered to the beneficiary is objectively limited and foreseeable.

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

In principle, French courts do not issue anti-suit injunctions.

Under French law, if the claimant, in breach of a jurisdiction clause, issues proceedings elsewhere in France, 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 75 of the Code of Civil Procedure).

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 jurisdiction before the court.

In the presence of an arbitration clause, the '*compétence-compétence*' principle applies. Where a dispute, which 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 (article 1448 of the Code of Civil Procedure).

Limitation periods for liability**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.

In respect of contractual claims, a one-year time limit applies to claims arising under a contract of carriage governed by French law as well as claims arising under a voyage or time charter agreement governed by French law. The one-year time limit also applies to cargo claims under the Hague Rules 1924. The time limit can be extended by agreement.

In relation to liability in tort a longer time limit applies, which will usually be of five years for commercial disputes. However, in respect of claims against the carrier, whether the claims are grounded in contract or in tort, the one-year limit applies.

62 May courts or arbitral tribunals extend the time limits?

Courts and arbitral tribunals may not extend the time limits.

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

The Maritime Labour Convention applies to its full extent in France and to vessels flying the French flag. Indeed, the French Law No. 2012-1320 dated 29 November 2012 authorises the ratification of the Maritime Labour Convention. The convention entered into force on 20 August 2013, and has been in force in France since 28 February 2014.

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 has traditionally been very difficult to obtain relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract. However, pursuant to the ministerial order dated 10 February 2016 reforming the French Civil Code, which came into force on 1 October 2016 with respect to contracts concluded on and after that date, new article 1195

of the French Civil Code provides that if a change in circumstances that was unforeseeable at the time a contract was entered into renders performance thereof excessively onerous for a party who had not agreed to assume the risk thereof, such party may request the other contracting party to renegotiate the contract, provided the requesting party continues to perform its own obligations during such negotiation. In the event that the other contracting party refuses such negotiation or in the event that such negotiations are unsuccessful, the parties may agree to terminate the contract, on the date and pursuant to such conditions as they may determine, or may request the judge to adapt the contract. In the event of failure to agree within a reasonable period, the judge may, at the request of a party, revise the contract or terminate it, on such date and pursuant to such conditions as are fixed by the judge.

Separately, new article 1218 of the French Civil Code, also added by the aforementioned ministerial order, codifies previous case law to the effect that the occurrence of an event that constitutes force majeure (ie, an event that is beyond the control of the obligor, which could not have been reasonably foreseen at the time of the entry into of the contract and the effects of which cannot be avoided by appropriate measures and which prevents performance of its obligation by the obligor) may affect performance of the contract. Under article 1218, a distinction is drawn between the effects of the force majeure: on the one hand, if the effects are temporary, performance of the obligation is suspended unless the delay resulting therefrom justifies termination of the contract. On the other hand, if the effects are definitive, the contract is automatically terminated and the parties are discharged of their obligations. However, the defaulting contractor will not be free from his or her contractual duties if he or she has either accepted to undertake the impossibility of execution, or if he or she has been given notice to execute his or her contractual duties before the impossibility occurred (articles 1351, 1351-1 of the French Civil Code).

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

France adopted Law No. 2011-13 of 5 January 2011 regarding Anti-Piracy and State Police Powers at Sea, amending Law No. 94-589 of 15 July 1994. This law enhances preventive and repressive measures, in particular on the high seas, to provide a more efficient anti-piracy regime.



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Newbuilding contracts

- 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, the builder of a vessel needs to provide physical possession of the vessel to the shipowner, and both parties have to agree that ownership of the vessel is transferred. The exact date and time of transfer of title is usually documented by the execution of a protocol of delivery and acceptance by both the builder and the shipowner. Simultaneously, a builder hands over to the shipowner a bill of sale. This is the usual procedure for a vessel which is completed in compliance with the underlying shipbuilding contract and accepted by the shipowner as such. The shipbuilding contract usually provides for the relevant procedure of delivery of the vessel by the builder to the shipowner.

However, the builder of a vessel and the buyer under the relevant shipbuilding contract may agree on a transfer of ownership of the vessel when it is still under construction. In such a case, the ship is recorded in the registry for ships under construction. A German particularity is that a vessel under construction may only be recorded if at the same time a mortgage is recorded against the vessel. However, in most cases, the vessel under construction is recorded in the name of the shipbuilder and a mortgage is recorded in favour of the yard's bank financing the construction phase (and such bank often provides refund guarantees).

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

A guarantee granted under German law needs to be granted in writing. There are no other formalities to be satisfied. There is nothing comparable to a SAFE registration of a refund guarantee issued by a Chinese bank, for example.

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

Yes. If the customer has a valid claim against the yard to deliver the vessel, but the yard refuses to do so, this claim can be pursued in court (or by arbitration, as the case may be). But gaining a final and binding judgment will take several months at least, and if the yard files an appeal it may even take several years. On the other hand, there might be a substantial financial risk for the yard not to deliver the vessel to the shipowner, as in the current market the final instalment under a shipbuilding contract is usually the highest. If the yard ultimately loses the proceedings, the shipowner may not only be entitled to have the vessel delivered, but may also be entitled to compensation for any loss.

It might be possible to obtain a preliminary injunction to compel delivery of the vessel before the final judgment. But the courts' requirements would be very high, as delivery of the vessel to the shipowner would create a factual situation with serious impact. It would require, generally, very good prospects of winning the regular proceedings; for example, a situation in which the yard has no obvious reason not to deliver the vessel.

- 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 shipbuilding contract would usually provide for certain claims for deficiencies of the vessel after delivery by the builder to the shipowner within a guarantee period of 12 months. Thereafter, the shipowner may still raise a claim against the builder if any deficiencies become apparent, but usually the obligations to prove a claim would then be much higher for the shipowner. Damage resulting from such deficiencies may also be claimed under the shipbuilding contract. If the initial buyer of a vessel intends to sell the vessel on to a third party, this final buyer may only raise any contractual claim against the builder in an instance where the rights under the shipbuilding contract have been assigned.

Generally, the German Civil Code may provide for a claim in delict for damage or personal injury as well as for product liability under the Product Liability Act (in addition to the rights under the shipbuilding contract).

Ship registration and mortgages

- 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?**

Germany provides three different types of register to record a vessel, all three held and administered by the local courts:

- for seagoing vessels;
- for inland waterway vessels; and
- for vessels under construction.

A German owner of a vessel of 15 metres in length or more is obliged to record its vessel in the German registry. In addition, if the owner is majority-based within the EU, the vessel may be recorded in the German registry.

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

Any German citizen or entities with their place of registration in Germany and with the majority of voting rights held by Germans must record a vessel in Germany. Individuals or entities having their residence in the EU may apply to register their ship in Germany. Owners that are recorded outside an EU jurisdiction may, under certain circumstances, apply for a German flag if they appoint a person in Germany who takes responsibility for satisfying all the technical, social and administrative obligations applicable to a vessel pursuant to German law. It is also possible for a German bareboat charterer of a foreign registered vessel to obtain permission to fly the German flag (although in such a case it would not be a typical dual registration as is known from other bareboat registries).

- 7 What are the documentary requirements for registration?**

A shipowner needs to provide the German registry with the following documents:

- in preparation for the registration:
 - an application with the required details of the vessel (eg, name, type, home port, place and year of build, IMO number, name of owner, legal basis for obtaining title);

- the identity card of the owner, or, more likely, if the owner is a company, an excerpt from the relevant commercial register; and
- a tonnage certificate on measurement of the vessel;
- upon actual delivery of the vessel to the shipowners:
 - the bill of sale and protocol of delivery and acceptance as proof of ownership; and
 - the deletion certificate from the previous registry or, in the case of a newly built vessel, non-registration evidence by a certificate signed by the builder, confirmation by a local authority, or a legal opinion by a local lawyer (to have confirmation of no double registration).

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

Flagging out by way of dual registration is a structure often used by German shipowners. Such flagging out needs to be based on a bareboat charter agreement between the owners of the vessel and a certain entity acting as bareboat charterer. The bareboat charterer is usually a special-purpose company belonging to the same group of companies as the owners.

A vessel would be registered in the underlying German registry (upon satisfaction of the above-mentioned requirements), and the shipowners can apply to the German Federal Maritime and Hydrographic Agency (BSH) for permission to fly a foreign flag for a maximum of two years.

German shipowners use such dual registration, in particular, to fly the flag of Antigua and Barbuda, Cyprus, Gibraltar, Liberia, Malta or the Marshall Islands.

While working on the requirements to be fulfilled towards the underlying German registry and the BSH to obtain the relevant flagging out permission, a shipowner needs to apply to the flag state for dual registration. Once the BSH grants its permission, the right to fly the German flag is withdrawn for the relevant period.

As said above, in the other direction (ie, from an underlying foreign registration towards Germany) it is possible for a German bareboat charterer to obtain permission to fly the German flag (but without any registration in a German bareboat registry).

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

Mortgages recorded against a vessel are registered in the same registry as the relevant vessel. This may be any of the three types of registry for vessels (including for those under construction), as noted above. The ship registries are maintained at the local courts (which are also in charge of the commercial registry and the real estate registry). The competent court is usually the court at the home port of the ship.

Mortgages are recorded in section III of the registry, setting out the amount of the mortgage, the details of the mortgagee, the details of notarial acceptance by the shipowner and the date of the mortgage's registration.

Limitation of liability

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

Germany is a signatory to the Convention on Limitation of Liability for Maritime Claims 1976 as amended by the Protocol of 1996 (LLMC). However, Germany ceased to be a signatory to the original convention of 1976 (effective date of denunciation, 13 May 2004). Therefore, the convention does not apply in respect of those states that were party to the original convention but not to the amendment.

Germany made a reservation pursuant to article 18 LLMC regarding claims in respect of wreck removal (article 1 (d) and (e)). These claims are regulated by section 612 of the German Commercial Code (HGB). As a consequence, an additional fund has to be established for these claims. The rules for this fund again follow the rules of the LLMC (eg, for the limit). Furthermore, claims in connection with the Bunkers Convention 2001 are also covered by the limitation.

The new limits of the LLMC, which were introduced by a further amendment to the convention in 2012, have been applicable in Germany since June 2015. The claims that can be limited are listed in article 2 LLMC; the persons who can limit their liability are set out in article 1.

Limitation for claims in connection with oil pollution damages resulting from maritime casualties involving oil-carrying vessels is regulated by the International Convention on Civil Liability for Oil Pollution Damage (CLC).

11 What is the procedure for establishing limitation?

In order to establish limitation in accordance with article 11 LLMC, a fund must be set up at a German court serving for all relevant claims caused by the incident. Upon application, the competent court may order that instead of a cash deposit, security must be provided for the relevant amount.

An application to constitute a limitation fund is only possible after legal proceedings in Germany have been initiated. The fund is calculated pursuant to article 6 LLMC and for oil pollution damages pursuant to article V CLC.

There is a separate right to plead limitation as a defence in proceedings according to article 10 LLMC without setting up a fund. However, this option is not available in respect of claims for oil pollution damages.

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

In accordance with article 4 LLMC, a party shall not be entitled to benefit from limitation of liability if it is proven that this party acted either with the intention to cause a loss or recklessly and with knowledge that such loss would probably result. For oil pollution damages article V.2 CLC contains a comparable rule.

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

Germany is not a party to the Athens Convention. However, the European Union has enacted the Athens Regulation (Regulation (EC) No. 392/2009) whereby the Athens Convention was basically introduced as EU law. Therefore, the rules of the Athens Convention are in fact applicable in Germany. Being an EU Regulation, its terms take precedence over German law dealing with such claims.

Port state control

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

The Ship Safety Division of the BG Verkehr is in charge of port state control (PSC) in German ports, monitoring adherence to the relevant port state regulations. It performs its tasks on behalf of the German federal government. In any event, and as in any other jurisdiction, vessels entering German territory must adhere to relevant environmental and criminal laws alongside port-specific provisions.

15 What sanctions may the port state control inspector impose?

If the PSC inspector reveals a deficiency, this will be discussed with the vessel's master and will set a time frame for rectification of the deficiency. Rectification may be required before the vessel's departure from the port or prior to arrival in the next port (in which case the work may be undertaken by the crew on the voyage).

If, however, a major deficiency is revealed and the vessel is deemed unfit to proceed to sea, or the deficiency poses an unreasonable risk to the vessel, crew or environment, the PSC inspector may inform the vessel's flag state or classification society to request an audit, and the PSC may impose a detention. The detention of the vessel would be maintained until the relevant deficiencies have been rectified and approved by the PSC in a further inspection.

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

An appeal may be made within one month of the date of notification and should be submitted in writing to the PSC. This appeal does not, however, suspend the detention if immediate enforcement is ordered (which will usually be the case). In order to reinstate the suspensory effect of the first appeal (which will then suspend the detention order), another appeal to the administrative court is necessary.

Classification societies

17 Which are the approved classification societies?

The classification societies for German-flagged ships approved pursuant to an agreement with the German Ministry of Transport are:

- American Bureau of Shipping (ABS);
- Bureau Veritas (BV);
- DNV GL;
- Lloyd's Register of Shipping (LR);
- Nippon Kaiji Kyokai (Class NK);
- Korean Register (KR);
- Registro Italiano Navale (RINA); and
- Russian Maritime Register of Shipping (RS).

All societies are authorised to represent the German flag state in matters of ship safety and the marine environment (ie, the International Convention for the Prevention of Pollution from Ships 1973, the International Convention for the Safety of Life at Sea 1974 (SOLAS), the International Safety Management Code and Load Line).

However, not all societies may represent the German flag state in all relevant areas. For example, BV and KR are excluded from representation on maritime labour law issues. KR, NK and RS must not represent on navigational and radio equipment issues, and RS may not represent on ship and port security aspects.

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

Given that only very few cases have been decided by German courts, it is not certain whether or to what extent classification societies may be held liable. Usually a classification society limits or excludes its contractual liabilities towards their contractual counterparts. If such agreement is being upheld, a shipowner may only raise a claim in delict against its classification society. A third party without a contractual link to the classification society may also raise a claim in delict (eg, if this third party may be considered as a beneficiary under other parties' contract or in the case of tort generally).

However, in the case of a third party the classification society might be able to defend a claim by stating that it has exercised reasonable care when selecting the inspection officer. In this case the liability in delict would not apply.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

If the wreck poses a danger to the environment, the public in general, or to the safety and efficiency of maritime traffic, the relevant German authorities (in particular the Central Command for Maritime Emergencies and the Waterways and Shipping Department) may instruct the owner or anyone exercising control of the vessel (eg, as demise owner) to remove the wreck.

The authorities are also entitled to remove the wreck themselves, which is usually done by instructing a specialised salvage company, particularly if the owner is not taking care of removal (eg, if the owner has abandoned the vessel).

The German authorities will raise a claim against the owner for reimbursement of (reasonable) costs and expenses for the removal, but the owner may be entitled to limitation of liability (see question 10) or other defences. The German authorities may apply for an arrest of the vessel, particularly where no sufficient security has been put up.

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

In this context, the terms of the following conventions are applicable in Germany:

- in respect of collisions: the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (incorporated into the German Commercial Code in 1913); the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision 1952; and the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions or other Incidents of Navigation 1952;

- in respect of wreck removal: the Nairobi International Convention on the Removal of Wrecks 2007;
- in respect of salvage: the International Convention on Salvage 1989; and
- in respect of pollution: the CLC and the International Convention on Civil Liability for Bunker Oil Pollution Damage.

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; therefore, Lloyd's standard form of salvage agreement is acceptable and often used. There is no restriction with regard to the party who may carry out salvage operations. Usually these tasks are carried out by specialised salvage companies.

Ship arrest

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

Germany is a signatory to the International Convention Relating to the Arrest of Sea-Going Ships 1952. It is not, however, a signatory to the International Convention on the Arrest of Ships 1999. It may be worth noting that German law may give rise to further possibilities to arrest, for example, a vessel, bunkers or cargo.

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 8(4) of the Arrest Convention 1952, the rules set out in the convention do not alter the rules of arrest of a German ship. This leads to a minor difference in respect of what claims can lead to an arrest. While for German-flagged ships domestic law provides that any claim for payment against the owner of a vessel is sufficient, for ships flying the flag of another member state the list in article 1 applies. The law governing the claim, not its nature, changes the situation in respect of arresting a ship.

Arresting a sister ship is possible as long as 'sister ship' means another ship of the same owner. However, if the owner is an SPV owning just this one ship, it will not be possible to arrest a ship that is merely associated with the vessel in connection with which the claim arose (ie, where both SPVs belong to the same group of companies).

According to section 597 of the German Commercial Code, a bareboat chartered vessel may be arrested if the claim against the bareboat (demise) charterer gives rise to a maritime lien. The same applies for a time-chartered vessel.

If other property of charterers is concerned (ie, accessories, section 598 of the German Commercial Code), for example, bunkers, that property may also be arrested.

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

Under German Maritime Trade Law the applicant may have to consider maritime liens and mortgages. Germany has ratified neither the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1967 nor the International Convention on Maritime Liens and Mortgages 1993, but the 1967 Convention is partly transformed into section 596 et seq of the Commercial Code.

As per section 596 of the Commercial Code the following claims are to be secured by maritime liens: crew wages, port charges and pilotage dues, claims for personal injury and death or damage to property, claims for salvage, wreck removal and contribution in general average and (as a German particularity) claims of the social security authorities.

As per section 602 of the Commercial Code, the maritime liens prevail over all other liens (including ship mortgages).

25 What is the test for wrongful arrest?

German law provides for strict liability in the case of wrongful arrest. Irrespective of any 'bad faith' or 'fault' on the part of the claimant, he or she would be obliged to provide compensation for proven loss caused

by a wrongful arrest (including, but not limited to, any compensation for damage caused in relation to security which has been put up). The arresting party may be liable for unlimited compensation.

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?

As only a claim against the owner of the vessel is required to arrest it, such a claim against the charterer of the vessel would generally not be sufficient to arrest the vessel. The arrest of a ship for a claim against a bareboat charterer (ie, a demise owner of the vessel) is only possible if the relevant claim is based on a maritime lien. A rather theoretical basis for an arrest of a vessel by a bunker supplier would be a claim of the charterer against the owner in delict (as there would usually be no contractual link).

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

There is, so far, no consistent and clear jurisdiction on the requirement for the arresting party to put up security. As the intention in the recent reform of the relevant legislation was rather to lower the barrier for ship arrests, this would be an argument against the requirement to put up security.

Therefore, some legal writers argue that courts are no longer allowed to order the arresting party to provide security. On the other hand, section 921 of the German Code of Civil Procedure still clearly states that it is at the discretion of the court to order the need for security.

The form of security will be determined by the court. Usually, the competent court determines the form of security, either by paying a deposit to the court in an amount as ordered or by providing a bank guarantee from a bank acceptable to the court.

The amount of security (determined by the court) is not related to the amount of the claim but rather to the possible compensation that the arresting party may have to pay if the arrest ultimately turns out to be wrongful. As this is at the discretion of the court, guidance for the judge may be the charter rate that the owner could lose if the ship is off hire.

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?

With reference to question 27, the competent court has the discretion to determine the form and amount of security. Paying the amount to the court or providing a bank guarantee will usually be preferred. Theoretically, the amount can exceed the value of the ship, depending on the circumstances of the claim for which the arrest is made, any additional interest and costs, and potential compensation.

The court may review the amount and form of the security at any time. If the amount is deemed to be too high the court's decision might be appealable. Additionally, both parties may agree on different security (insofar as form and amount are concerned).

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?

Usually no power of attorney is required for an attorney to commence the arrest proceedings at the competent court. The court will usually rely on the lawyer's statement that he or she has been properly instructed to act on behalf of the arresting party.

However, if the authorisation of the acting lawyer is contested by the other party (even if just for tactical reasons), the lawyer should be prepared to present a power of attorney to the competent court. Therefore, we recommend either presenting the power of attorney to the court right away or to at least be prepared to present such power of attorney in case the other party contests proper authorisation. If such power of attorney is granted by a party outside Germany, it might be recommendable to have it notarised and apostilled (if the state of execution and notarisation is party to the Hague Convention) for the sake of completeness. An apostille would be acceptable in Germany, as Germany is a party to the relevant convention.

As to the claim for which the arrest is made, the arresting party will have to provide prima facie evidence in respect of the facts and circumstances of the claim. Any documents supporting the arresting party's position, such as charter parties, survey reports or correspondence, need to be presented to the court. An affidavit of the creditor (or the competent manager) stating that all facts and documents presented to the court are true will suffice.

Generally, no other formalities (legalisation or apostille) are required. While the arrest application itself must be filed in the German language (as the court language is German), most courts will probably accept any other documents supporting the claim in English. The preparation and proceedings in court may take only a few days.

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

The court bailiff will take possession of the vessel, and he or she will prevent the ship from departing. The bailiff is also responsible for guarding and safekeeping the vessel while the arrest is in place. If necessary, the bailiff or the court will hire professional companies to maintain the vessel. The arresting party will have to provide the bailiff with advance payments to bear the costs of the vessel's maintenance.

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 obligation to pursue proceedings on the merits in Germany just because the vessel has been arrested in Germany. But when the vessel has been arrested in Germany this can constitute jurisdiction by German courts. If the vessel has been arrested without proceedings on the merits having started (in Germany or elsewhere), the court will, upon application of the shipowner, order that legal actions on the merits must be commenced within a reasonable time. The court will set a time limit (often about one month). If the claimant does not comply within this time period, the arrest will be lifted upon application of the shipowner.

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

No, there are no other forms of attachment orders or injunction available.

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

German law does not provide discovery procedures such as, for example, those under US law. Instead, every party must provide proof of the facts or circumstances stated to the benefit of itself.

However, this may lead to unfair situations, particularly if the opponent is in possession of all the necessary documents that are relevant to prove certain aspects in the proceedings. In such cases the court may decide that the burden of proof lies rather with the opposing side to attract this party's cooperation.

Surveys or other statements by experts appointed just by a party are not considered as evidence by a court. They are instead considered as a statement by a party, but the surveyors may be appointed and heard as witnesses in the proceedings. Only the findings of a court-appointed surveyor may be considered as evidence.

In order to preserve evidence German procedural law provides for separate proceedings (for example to determine the cause of a fire in a ship's engine room before the damage is repaired and any evidence is lost). In these proceedings experts may be appointed by the court and the findings will later on be admissible in the proceedings on the merits.

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

Theoretically, this would be possible because an arrest can be made pursuant to German law in respect of any asset or property of a debtor. However, as indicated in the answers to questions 23 and 26, the owner of the bunker must be the debtor of the relevant claim. If the claim exists against the shipowner, but the bunker belongs to another person (eg, the bareboat or time charterer), an arrest of the bunker would not be possible. Additionally, arresting bunkers (or basically any assets other than

the vessel) is more difficult because a good reason for the arrest must be proven to the court. Such a reason may exist where any delay would result in serious difficulties in enforcing a judgment.

Judicial sale of vessels

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

In order to apply for the judicial sale of a ship, the creditor will need to obtain an enforceable title. This could be a final and binding judgment (or, as the case may be, an arbitration award) or an enforceable notarial deed. The arrest of the ship is not a precondition to a judicial sale. Any creditor with the aforementioned title may apply for judicial sale.

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?

An application by a creditor is required for the commencement of sale proceedings. The court will set a date for the auction to be carried out. It will also inform the involved parties and publish the date in maritime publications. The highest bidder wins the auction and must pay the proceeds to the court. The duration of the whole process depends on various factors, but it can take months until the proceeds are distributed. The court costs depend on the value of the vessel.

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

All costs associated with the procedure of the judicial sale will be settled first. Second, the maritime liens (if any) are settled, to be followed, third, by the mortgagee's claim. Thereafter, the remainder of the funds will be for the applicant or creditor, but one needs to consider other 'ordinary' claimants at the same rank seeking settlement of their claim.

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

The result of a judicial sale will be that the purchaser receives the vessel sold free from any encumbrances (including maritime liens).

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

The judicial sale of a vessel outside Germany would be recognised in Germany similarly to the recognition of a foreign judgment (ie, it depends on the place of the court decision).

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

Germany signed the convention in 1994. The convention entered into force in 2004 internationally, but it was never ratified by Germany and therefore it is still not in force in Germany.

Carriage of goods by sea and bills of lading

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?

Only the Hague Rules are in force in Germany. However, the rules of the Visby amendment have mainly been incorporated into the German Commercial Code in 1986. Although Germany was host to the conference in Hamburg, it never did ratify the relevant convention (ie, the Hamburg Rules do not apply in Germany).

Given that Germany completely overhauled its codification of maritime law in 2013, it seems unlikely that Germany will ratify the convention for the Rotterdam Rules in the near future.

Carriage at sea begins as soon as the carrier obtains possession of the goods for the purpose of transportation; it ends upon delivery of the goods to the recipient. With the reform of the German Maritime Trade Law and the implementation of the institution of the performing carrier

in section 509 of the Commercial Code, it seems to be possible that a terminal operator is liable as carrier, which could lead to the extension of the term 'carriage at sea'.

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 German Commercial Code provides general rules for combined (multimodal) transportation.

International rules that may take precedence and that can also apply in such cases are:

- air transportation: the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal Convention), which replaced the Warsaw Convention;
- road transportation: the Convention on the International Carriage of Goods by Road 1956;
- rail transportation: the Convention Concerning the International Carriage of Goods by Rail 1999; and
- inland vessels: the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway.

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

While the details under German law vary depending on the type of bill of lading, generally, the lawful holder of the bill of lading or the party otherwise entitled under a bill of lading is authorised to raise a claim. Possession of the bill of lading might be relevant for the answer to this question.

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 order to effectively incorporate the terms of the charter party into the bill of lading, the charter party agreement should be attached to the bill of lading (or at least the main content of the relevant clauses should be repeated in the bill of lading). A mere reference in the bill of lading to the charter party may not be sufficient (in the case that the charter party is not attached). If the terms of the charter party have been duly incorporated, this includes jurisdiction and arbitration clauses.

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

After certain arguments about the question of whether or not the identity of carrier clause is binding under German law, the Federal Court of Justice ruled in the 1990s on two cases and denied the clause's validity. Therefore, the identity of carrier clause cannot be regarded as binding under German law.

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 a bill of lading does not identify the contractual carrier or if it identifies a person as the contractual carrier who is in fact not the carrier, the shipowner has rights and duties under the bill of lading. This includes the liability for any damage to cargo. Where a contractual link is missing, German law may provide for liability of the actual carrier of the goods. The actual carrier may, however, derive defences from the law and from the contract entered into by the contractual carrier and the shipper.

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

The carrier will not be liable if the decision to deviate is made in order to save human life or undertake salvage at sea. However, the carrier may be held liable for any cargo damage that is caused by a deviation not justified due to any of the aforementioned reasons. In the case where damage to the cargo results from unjustified deviation, the carrier may not benefit from a limitation of liability.

48 What liens can be exercised?

The following liens can be exercised:

- maritime liens: wages of the ship's crew, public charges, claims to compensation for damages in respect of loss of life or injury (except for those claims that are based on a contract), salvage claims, wreck removal costs, claims of the social security authorities;
- by operation of law: the carrier has a lien on the goods that have been delivered to him to cover all claims under the contract for carriage of the cargo. The owner of the vessel has a lien on the property of the time charterer on board the ship (including fuel) in order to secure the amounts receivable under the time charter contract; and
- contractual liens: the parties are free to agree on liens on a contractual basis (subject to the granting party having possession or a lien).

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 without production of the bill of lading, he or she will be obligated to pay to the relevant holder of the bill of lading the damages just as if the cargo had been lost (as the primary obligation to deliver the same cargo again might be impossible to satisfy). In the case of gross negligence, the carrier may not be entitled to the limited liability.

50 What are the responsibilities and liabilities of the shipper?

A shipper must pay the freight costs as agreed. Additionally, the shipper must provide specific information about the cargo in general (eg, measurements, numbers, weight), exact details about the danger and any precautions in case of dangerous goods. This has become even more important for container weight verification due to the amendment to SOLAS insofar as container vessels are concerned.

Furthermore, the shipper must provide for sufficient packaging of the cargo in order to protect it against loss or physical damage. The shipper must also provide such documents and such information as are necessary for official processing (especially customs clearance).

The shipper will be liable for all damage that is caused by not complying with the aforementioned responsibilities.

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

Yes, sulphur emission control areas (SECAs) were established for the North Sea and the Baltic Sea. Therefore, all domestic territorial waters of Germany are part of emission control areas.

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 the aforementioned SECAs, the sulphur content of the fuel used by ships must not exceed a maximum of 0.1 per cent. The authorities in charge conduct, on a regular basis and without notice, inspections of the vessel's records and (if deemed necessary) of the fuel used by that vessel. If proceedings against the owner, manager or master of the vessel reveal non-compliance with the rules for low-sulphur fuel, fines of up to €50,000 may be ordered.

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

In Germany, Regulation (EU) No. 1257/2013 on ship recycling, amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC (Regulation (EU) No 1257/2013) is applicable. On the basis of article 16 of Regulation (EU) No 1257/2013 a European list of ship recycling facilities shall be published. According to said list, as currently published and dated 4 May 2018, there is currently no ship recycling facility in terms of the aforesaid regulation in Germany.

Complementary rules to Regulation (EU) No 1257/2013 are included in section 4a of the German SeeUmwVerhV (ordinance on maritime environmental performance).

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009, which has internationally not yet entered into force, is as of now not ratified by Germany.

Jurisdiction and dispute resolution**54 Which courts exercise jurisdiction over maritime disputes?**

Although Germany does not have specialised courts dealing only with shipping-related matters (such as admiralty courts in other jurisdictions), the district courts would regularly be competent in the first instance. The location of such a district court may follow for a dispute over contractual rights and obligation from the jurisdiction clause (if any) in the relevant contract. Other ways to determine the place of jurisdiction depend (for example) on the port where the vessel is or the location of the defendant's office. In a number of cases, the chambers for commercial matters at the district courts are in charge of maritime disputes. A professional judge is supported by lay judges (in such chambers these are usually commercially experienced individuals).

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

The relevant rules are mainly the Council Regulation (EC) No. 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters, as well as the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In addition, the German Procedural Code contains rules for service outside of the jurisdiction.

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

The parties to a contract may agree on arbitration under the terms of the German Maritime Arbitration Association (GMAA). The GMAA has around 200 members, who may be appointed as arbitrators or mediators experienced in maritime law matters pursuant to German or English law.

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

Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters deals with judgments from courts within the EU. Essentially, every member state has to recognise any judgment from the courts of other member states. In addition, the German Code of Civil Procedure provides rules for cases in which the aforementioned regulation is not applicable and no special bilateral agreements are in place. Germany has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and there are certain bilateral treaties between Germany and other states.

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

Asymmetric dispute settlement agreements (ie, asymmetric jurisdiction and arbitration agreements) are generally allowed in commercial transactions (B2B) under German law. Whether they are valid and enforceable varies from case to case.

In the national context, the parties are allowed to choose their jurisdiction provided that 'the parties to the agreement be merchants', (section 38 of the German Civil Procedure Act). Owing to the legal nature of a dispute settlement agreement as an 'agreement', the jurisdiction agreement is subject to abuse control according to sections 134 and 138 of the German Civil Code, and as far as they are included in general terms and conditions the jurisdiction agreement is subject to a test of reasonableness of its contents according to sections 307 et seq of the Civil Code. As a result a jurisdiction agreement in standard business terms is ineffective if, contrary to the requirement of good faith, it unreasonably disadvantages the other party to the contract with the user.

In an international context, article 25 of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation (EU) No. 1215/2012)

applies. Whether the above-mentioned abuse control is allowed in the scope of application of Regulation (EU) No. 1215/2012 is arguable.

According to section 1029 of the German Civil Procedure Act, parties are allowed to conclude arbitration agreements.

The validity and enforceability of an asymmetric jurisdiction and arbitration agreement are subject to the above-mentioned legal tests. In national context an individually agreed term is invalid (eg, if the economically stronger party misuses its position to take advantage of the economically weaker party or if the agreed asymmetric jurisdiction and arbitration clause results in a factual loss of legal protection). With regard to asymmetric jurisdiction and arbitration agreements integrated as general terms and conditions, sections 307 et seq of the Civil Code apply.

In an international context it should be mentioned that the French Cour de Cassation regarded asymmetric jurisdiction agreements as invalid. Whether this influences prospective decisions of the European Court of Justice and as a consequence thereof prospective decisions of German courts remains open.

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

A defendant should raise in the foreign court non-compliance with the relevant jurisdiction clause as a (formal) defence given that such proceedings would be not legitimate. If the court still decides in favour of the applicant, the defendant needs to go against the enforcement of the foreign judgment, as a court decision (if the requirements are satisfied) will be recognised and enforceable in Germany. Whether or not the defendant can later challenge the recognition of the foreign judgment in Germany depends on the specifics of the case.

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 sued in Germany despite there being a valid jurisdiction clause in place, the defendant may then raise this issue as a defence within the German court proceedings. The court would have to dismiss the case on the grounds that it is not competent to hear the case. If this argument is not heard and a judgment follows, one needs to consider actions against enforcement comparable to what has been said above.

Limitation periods for liability

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

Under German law various limitation periods apply depending on the nature of the claim. The regular limitation period (especially relevant for claims based in tort) is three years and will start at the end of the year in which the claim arose.

However, particularly in the maritime context, other codified periods may apply. For example, a two-year period is applicable to claims for damages:

- for the death of or personal injury to a passenger;

- for the loss of, physical damage to or delayed re-delivery of luggage;
- for claims for wreck removal;
- for claims to a salvage reward; and
- for claims resulting from ship collision.

Only a one-year limitation period applies to claims under charter contracts, claims to contribution in general average or claims under a contract for the carriage of goods by sea under a bill of lading.

The beginning of the period until the time bar needs to be examined carefully in any particular case, as this may start on the date of the incident or at some time at the end of the year in which the incident has occurred.

It is important to note that it is always possible to extend these limits by agreement between the relevant parties.

62 May courts or arbitral tribunals extend the time limits?

Time limits (for limitation periods for liability) may only be suspended by certain means, but not formally extended.

Miscellaneous

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

Germany incorporated the Maritime Labour Convention 2006 into the new Maritime Labour Act (SeeArbG) in 2013, which applies to all merchant vessels that fly the German flag. In addition, shipowners and masters of any ship flying a foreign flag have to ensure that the working and living conditions of the crew members on board meet the requirements of the articles and regulations in conjunction with part A of the Code of the Maritime Labour Convention (pursuant to section 137 SeeArbG). Compliance with these rules will be checked by the PSC.

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?

Although German law clearly provides that contracts must be fulfilled, there may be circumstances in which parties can seek relief from their obligations. The German Civil Code provides a two-tier system. If the parties concluded an agreement on the basis of certain facts which later prove to be wrong or if these facts have seriously changed and the relevant contract would not have been entered into if the changed facts had been known, the court may alter the content of the corresponding rights and obligations under a contract. If such a change is not possible in a reasonable manner given the relevant agreement and the relevant circumstances, the contract may even be terminated. Termination is also possible if there is a compelling reason and the terminating party can no longer be expected to fulfil the contract. However, the barriers for the aforesaid remedies (in particular the burden of proof) are quite high. The mere fact that the contract turns out to be economically disadvantageous will not suffice to meet the requirements.

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

The current market conditions in the German shipping market have had and still have a huge impact on commercial agreements. What was previously known as the KG model, with issuing houses setting up closed-end funds with hundreds of various private individuals to attract the equity portion for the acquisition of a ship, no longer works.

Various new structures are being set up in the form of joint ventures between German shipowners and investors from abroad, where the shipowners contribute vessels and ship management services and the investors contribute funds. German shipowners also enter into joint ventures with each other to increase efficiency. There have been a number of restructurings and warehouse solutions to cope with the current market. Insolvency administrators have also become constant participants in the shipping market.

All these developments require a variety of complex legal structures. The German government has reacted with certain support measures to provide assistance to the industry.

Ghana

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Newbuilding contracts

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 any 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; or
- where shipbuilding contracts are financed in instalments, the parties may also agree that the shipbuilder will retain title until a substantial portion or the final instalment of the purchase price is paid (in this case, final payment and delivery are simultaneous).

However, where there is no express provision stipulating when title will pass, title passes from the shipbuilder to the shipowner when the ship is delivered to the shipowner.

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

First and foremost, every contract of guarantee must be in writing and signed by the guarantor in order to be valid. Second, it is important for the buyer to ensure that the refund guarantee is properly signed by the authorised representative of the bank. In this regard, due consideration must be given to the restrictions and approvals of financial exposure of banks provided for under the Banks and Specialised Deposit Taking Institutions Act 2016 (Act 930) as well as the regulations of the bank itself. Last, for the purposes of enforcement, it is crucial to clearly state all the terms of guarantee, especially the calling-up procedure. This is because the interest of the buyer and the ship builder are not aligned. On the one hand, it is in the interest of the buyer for the refund guarantee to be called up on demand. On the other hand, it is in the interest of the shipbuilder to impose certain preconditions such as the builder's admission of liability or a finding of the builder's liability by an arbitral tribunal or a court.

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 also order specific performance of the contract without giving the builder the option of retaining the ship on the payment of damages to the buyer.

It is, however, important to note that the order of specific performance is an equitable remedy that is granted at the discretion of the court. So, it is possible for the court to order specific performance where an award of damages will not be an adequate remedy. But, it is unlikely to obtain a decree of specific performance to compel a shipbuilder to build and deliver a ship.

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 contract, the shipowner may sue the shipbuilder under the Sale of Goods Act 1962 (Act 137) (Sale of Goods Act) 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 in respect of defects, which 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'.

In respect of third party rights, a purchaser from the original shipowner, or other third party, will be able to rely upon the third-party provisions in the Contracts Act 1960 (Act 25) (Contracts Act) in order to bring a claim against the shipbuilder. Similarly, a third party may also bring a claim against the shipbuilder under the general common law tort of negligence.

Ship registration and mortgages

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) (Ghana Shipping Act). Ships that are eligible to fly the Ghanaian flag are ships that are either registered with, or licensed by, the Ghana Maritime Authority (GMA).

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 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. It is mandatory for all Ghanaian ships to 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, or that have a gross tonnage of 150, or that, irrespective of length or weight, trade or operate solely within the inland waters, are compulsorily 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 crafts 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 execution of a contract for 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.

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 in order 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 is divided into only 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.

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;
- a declaration of ownership;
- the builder's certificate;
- a notice of the name proposed for the Ghanaian ship;
- the allotment of signal letters; and
- a 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 including other incorporation documents determined 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 paid, before a certificate of registry will be issued to the applicant.

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. Therefore, 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.

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;
- particulars of the transfer of mortgage and the transfer instrument, where interest in the mortgage is transmitted by death, bankruptcy or some other lawful means; and
- particulars of a notice revoking the mortgage.

Limitation of liability

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:

- (i) 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;
- (ii) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- (iii) 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;
- (iv) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board the ship;
- (v) claims in respect of the removal, destruction or the rendering harmless of the cargo of a ship; and
- (vi) 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 (iv), (v) and (vi) 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.

11 What is the procedure for establishing limitation?

The procedure for establishing limitation is to initiate limitation proceedings. A party that anticipates that a liability claim is likely to be made against it may apply to the High Court for a determination of 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 arises on a distinct occasion is calculated as follows:

- in respect of claims for loss of life or personal injury, 333,000 units of account for a ship with a tonnage not exceeding 500 tonnes; for a ship with a tonnage exceeding 500 tonnes, the following amounts in addition to the 333,000 units of account:
 - for each tonne from 501 to 3,000 tonnes: 500 units of account;
 - for each tonne from 3,001 tonnes, to 30,000 tonnes: 333 units of account;
 - for each tonne from 30,001 to 70,000 tonnes: 255 units of account; and
 - for each tonne in excess of 70,000 tonnes: 167 units of account;
- any other claim, 167,000 units of account for a ship with a tonnage not exceeding 500 tonnes; for a ship with a tonnage exceeding 500 tonnes the following amount in addition to the 167,000 units of account:
 - for each tonne from 501 to 30,000 tonnes: 167 units of account;
 - for each tonne from 30,001 to 70,000 tonnes: 125 units of account; and
 - for each tonne in excess of 70,000 tonnes: 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 tonne 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. It is not necessary to provide a cash deposit.

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 personal act or omission with the intent to cause the loss, or from that person's recklessness and with knowledge that the loss would probably be the result. There is however no reported court decision on this limit being broken in practice.

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 which are covered by a contract for the carriage of goods.

Port state control

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

The port state control agency in Ghana is the GMA. The GMA 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.

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.

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

Where the Director-General of the GMA is satisfied that a ship is unseaworthy, 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 (the Court) comprises a High Court judge and two assessors. The judge and each assessor may survey the ship and go on board the ship for inspection.

The Court may also 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 for the detention of 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.

Classification societies

17 Which are the approved classification societies?

The GMA 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.

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 from that breach of duty by the classification society.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Yes. Where a vessel is wrecked in a port, harbour, lake, river, waterway or water course in the country under the control of a public authority in a manner which, in the opinion of the authority, is likely to be an obstruction or danger to navigation or to life boats engaged in life boat 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 and 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 fit the vessel or the part raised or removed, and also any other property recovered, and out of the proceeds of the sale reimburse itself for the expenses incurred, and hold the remainder in trust for the persons entitled to it.

The remainder of the proceeds of the sale shall be paid to the relevant authority unless it is claimed by a person entitled to it within one year of the sale.

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 (OPRC) 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).

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, and 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 salvage operations that are performed within the coastal and inland waters of Ghana must be performed by Ghanaian vessels.

Ship arrest

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.

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, necessities, 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;
- a claim for salvage for services rendered to a ship;
- a claim in the nature of towage;
- a claim for necessities supplied to a foreign ship and a claim for necessities supplied to a ship elsewhere than in the port to which the ship belongs;
- a claim by a seaman or ship master 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 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 against the bareboat charterer. But a time-chartered vessel cannot be arrested for a claim against a time-charterer.

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

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:

- 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 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.

25 What is the test for wrongful arrest?

An arrest is wrongful if the warrant for arrest was issued against a ship with respect to which a caveat against arrest is in force and the person procuring the arrest did 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.

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 necessities supplied to a foreign ship or a claim for necessities 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.

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.

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 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.

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.

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:

- the Ghana Armed Forces;
- the Customs Excise and Preventive Service; or
- the GMA.

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.

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

Generally, the High Court has the jurisdiction to give such reliefs that are just and equitable in the circumstances. Such just and equitable reliefs may include injunctions ordered by the court. Therefore, an arresting party in respect of an action in personam may apply for a *Mareva* injunction against a defendant, seeking the orders of the court to prevent the defendant from taking the ship out of Ghana.

It is noteworthy that in order to succeed in such an application, the applicant will generally have to 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 in the process of execution in satisfaction of the judgment debt.

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, in order to ensure that justice is done between the parties.

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

Yes. Parties to a maritime action may apply for an arrest warrant to be issued against any property 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.

Judicial sale of vessels**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, in order 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.

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, in order 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 make 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.

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 ship. The balance shall be distributed with first priority to persons who hold a maritime lien under the Ghana Shipping Act. After that, the holders of preferential rights with relation to shipbuilding and ship repairing come next. Last, the holders of the mortgages and any other preferential rights registered under the Ghana Shipping Act.

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.

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

Yes. A valid judicial sale of a vessel in a foreign jurisdiction is likely to be recognised in Ghana.

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

No. 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 GMA 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.

Carriage of goods by sea and bills of lading**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 in 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 (incorporating 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.'

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) ('Ghana Civil Aviation Act'), there is no comprehensive domestic legislation on multimodal transport. The Ghana Civil Aviation Act incorporates the Montreal and Warsaw Conventions.

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.

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 which expressly incorporates specific terms of a charter party. 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.

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' clause or identity of carrier clause under Ghanaian law. But it is unlikely that the 'demise' clause or identity clause will be recognised and enforced in Ghana for two main 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' clause or identity of carrier clause 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 in fact 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.

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.

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

Generally, a deviation from a vessel's route as agreed by the parties will be a breach of the contract and the carrier will be liable for the resulting losses or damage. However, the Hague Rules (incorporated in the Bills of Lading Act) permits any deviation in saving or attempting to save life or property at sea or any reasonable deviation. A deviation in such circumstances will not be deemed to be an infringement or breach of the contract of carriage, and the carrier will not be liable for any loss or damage resulting from the deviation.

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 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.

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.

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).

Shipping emissions

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

No. There is no emission control area in force in Ghana's domestic territorial waters.

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 3.5 per cent m/m. This is in accordance with the specifications of the International Maritime Organization, under Regulation 14 of MARPOL, as revised in 2010. The Maritime Pollution Act 2016 (Act 932) incorporates the provisions of MARPOL and its amendments, and does not establish a regime for enforcement of MARPOL specifications.

Ship recycling

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. The general international ship recycling regulations that apply in Ghana are MARPOL 73/78 (International Convention on Prevention of Pollution from Ships), 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 not extensive. The Ghana Shipping Act provides that a written permission of a receiver is required for the breaking up of a vessel prior to its removal from Ghana. The Environmental Protection Act 1994 (Act 490) regulates the protection of the environment from various forms of pollution, and the Hazardous and Electronic Waste Control and Management Act 2016 (Act 917) regulates the control, management and disposal of hazardous waste, electrical and electronic waste.

There is no ship recycling facility in Ghana. However, 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.

Jurisdiction and dispute resolution

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, that party has a right to 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.

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 enter appearance.

Service of notice of a writ of summons and other court proceedings may be effected by either the government of the country in which the defendant resides, the judicial authorities of that country or through 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.

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

The domestic arbitral institution is called the Ghana Arbitration Centre, and has a list of arbitrators with varying specialisations. However, there are no recognisable arbitrators who specialise in maritime arbitration.

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 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 present the party's case;
- a party, lacking legal capacity, was not properly represented;
- the award does not deal with the issues submitted to arbitration; or
- the award contains a decision beyond the scope of the matters submitted for arbitration.

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 other penalty.

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

In Ghana, arbitration agreements are generally subject to the agreement of the parties involved. Choice of forum is generally subject to the agreement of the parties, but where they are unable to agree on a common forum, the arbitral tribunal determines the forum for the parties.

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

A party may bring an application under common law to issue an anti-suit injunction. Considering the nature of the rules of Court on injunctions generally, an anti-suit injunction has to be based on an existing claim. For instance, breach of contract.

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. In considering the application for stay of proceedings, the Court may consider issues such as the jurisdiction that has the closest connection to the dispute.

Limitation periods for liability

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 period of 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 after the act, neglect or default complained of occurred, or where the injury or damage continues, within 12 months after it ceases.

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 a number of 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 of 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 a 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.

Miscellaneous

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 MLC 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 MLC must obtain certification from the GMA. The certification is referred to as the Maritime Labour Certificate. The Maritime Labour Certificate is prima facie evidence that the ship complies with the MLC.

Further, under the Regulations, no ship owner can operate a ship in Ghana unless the ship has been issued with a valid declaration of MLC.

The ship owner is required to keep the MLC and Maritime Labour Certificate in a conspicuous place at all times on board the ship.

Also, an authorised officer of the GMA has the authority to inspect a Ghanaian ship and a foreign ship when it arrives at a Ghanaian port to ensure that the ship complies with the MLC. The Regulations also provide rules for seafarer compensation, for loss or foundering of ship, manning levels, conditions of employment, accommodation, health protection, medical care and security protection of seafarers.

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 on the basis of 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.

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.

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

Although Ghana has ratified many international conventions relating to shipping, few have been incorporated into domestic law. Unless an international convention is incorporated into domestic law, it does not have the force of law in Ghana.

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Hong Kong

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Newbuilding contracts

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 Hong Kong law, the Sale of Goods Ordinance (SGO) applies to a contract for the construction of a ship. Normally, under the SGO, title passes upon delivery and acceptance. This may be varied by the provisions of the sale contract. In other words, the parties are, in principle, free to agree whatever they like. Normally, the title in the ship passes from the shipbuilder to the shipowner on delivery, which will be provided in the shipbuilding contract. While under most circumstances, payment by the buyer is by instalment, often the final instalment and delivery are simultaneous.

As the instalments are prepayments of the sale price and the shipowner has no title, he or she will usually protect him or herself by requiring that a refund guarantee be issued on behalf of the shipbuilder in return for payment of each instalment. When the shipbuilder is not able to provide a refund guarantee (to secure the return of any pre-delivery instalments in the event of non-delivery), the shipbuilding contract may provide for the progressive transfer of the title of the ship as the construction progresses. When contractual provisions specify that the ship is completed after it has passed sea trials, it signifies that title passes only upon successful completion of such trials.

If there is no provision in the shipbuilding contract as to title, the parties must rely on the position implied by law. The implied position in relation to the transfer of title on a newbuilding contract is specified in section 20(1), rule 5 of the SGO, 'where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract... the property in the goods thereupon passes to the buyer'. Under section 2 of the SGO, goods are in a 'deliverable state' when they are 'in such a state that the buyer would under the contract be bound to take delivery of them'. Therefore, the title would normally pass upon delivery and acceptance.

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

A refund guarantee is a contract of guarantee. Accordingly, it must be supported by consideration unless it is made as a deed. The position under English law is that a guarantee must be in writing or evidenced in writing. The position under Hong Kong law is different. There is no requirement that a guarantee must be in writing. A guarantee may be proved in the same way as any other contract.

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

If a vessel has been completed, it may be possible to apply for and obtain an order for specific performance to compel the shipyard to deliver the vessel. That said, it is important to note that specific performance is a discretionary remedy under Hong Kong law. Therefore, there is a risk that the Hong Kong court may not grant an order for specific performance. Such an order is not usually granted if compliance with it would require detailed judicial supervision. Accordingly, if a vessel is not complete, such an order may not be granted to compel the builder to complete and deliver the vessel.

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 a vessel is defective and damage results, the way that the claim is brought will depend on the party bringing the claim. A shipowner, a purchaser from the original shipowner and a third party that has sustained damage all have potential causes of action against the shipbuilder.

If a shipowner brings the claim, the shipowner's claim will usually be for breach of the contract with the shipbuilder. A shipbuilding contract usually contains an express term as to quality. Even if the shipbuilding contract does not expressly contain such a term, the shipowner may rely on the implied condition under section 16(2) of the SGO that the vessel shall be of merchantable quality. The shipowner may also rely on section 16(3) of the SGO that where the buyer makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose.

A purchaser from the original shipowner would usually not be able to claim against the shipbuilder as they are not a contractual party to the shipbuilding contract. As a result, the purchaser will normally only be able to claim in contract against the original shipowner under the sale and purchase contract. To get around this legal impediment, it may be a condition of the sale that the warranty in the shipbuilding contract is transferred from the original shipowner to the purchaser.

A third party who has suffered damage may be able to bring a claim in the tort of negligence against the shipbuilder for failing to exercise reasonable care in building the vessel. The third party must show that the shipbuilder owed him a duty of care under the principles established in the case of *Donoghue v Stevenson* [1932] AC 562 1932 SC (HL) 31.

Ship registration and mortgages

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 can be registered on the Hong Kong Shipping Register if the following conditions are satisfied:

- the majority interest (ie, more than half of the shares) in the vessel is owned by one or more qualified persons, or the vessel is operated under a demise charter by a body corporate being a qualified person; and
- a representative person is appointed in relation to the vessel.

A 'qualified person' must be:

- an individual holding a valid Hong Kong identity card and who is ordinarily resident in Hong Kong;
- a body corporate incorporated in Hong Kong; or
- a registered non-Hong Kong company under section 2(1) of the Companies Ordinance.

In Hong Kong, as long as all documents necessary for the ship's registration are provided to the Hong Kong Shipping Register, in theory a ship can be registered even if the ship is still under construction. In

practice, it is usually impossible to meet the registration requirements as the shipyard usually will not release the builder's certificate while the vessel is still under construction and the original builder's certificate is required for registration.

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

For a ship that is owned by one or more qualified persons, an application for registration shall be made by the person or persons applying to be registered as owner, or by an individual or individuals authorised to act on such person or persons' behalf.

For a ship that is operated under a demise charter by a body corporate being a qualified person, an application for registration shall be made by both the demise charterer and the owner, or by an individual or individuals authorised to act on its or their behalf.

7 What are the documentary requirements for registration?

There are three types of registration:

- full registration;
- provisional registration; and
- demise charter (bareboat charter) registration.

The following documents (which must be original, unless otherwise specified) are required to be submitted for full registration:

- application form for ship registration;
- form of authority for making and signing applications and declarations, where necessary;
- declaration of entitlement to own a ship registered in Hong Kong (where a ship has more than one owner, a separate declaration of entitlement must be made by each owner);
- title documents (ie, a builder's certificate for a new ship, a duly executed bill of sale for a ship purchased by the owner, a court order for an auctioned ship or a certificate of ownership (issued by the current registry of the ship) for reflagging a ship without change of ownership);
- a copy of certificate of ownership showing no registered encumbrance for the ship (not applicable to a new ship or where the ship is being reflagged without a change of ownership);
- original or copy of certificate or evidence of deletion from previous registry if it is not a new ship;
- certified true copy of certificate of incorporation or registration in Hong Kong of the owner or Hong Kong identity card of the owner, as appropriate;
- certified true copy of certificate of incorporation and memorandum of association of the representative person appointed in relation to the ship, where applicable;
- original or copy of certificate of survey giving the principal particulars of the ship, international tonnage, etc; and
- original or copy of certificate or declaration of marking of ship completed by the master of the ship or an authorised surveyor.

For provisional registration, photocopies or certified true copies are acceptable for stipulated documents.

For full or provisional registration of a vessel on demise charter, the following additional documents are required to be submitted:

- form of authority for making and signing applications and declarations by the demise charterer, where necessary;
- certified true copy of certificate of incorporation or registration in Hong Kong of the demise charterer; and
- declaration of entitlement to register a ship in Hong Kong by the demise charterer, together with a true and complete copy of the demise charter party made between the owner and the demise charterer with consent to register the ship in Hong Kong.

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

Dual registration and flagging out are not possible in Hong Kong.

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

The Hong Kong Shipping Registry and the Hong Kong Companies Registry maintain the register of mortgages.

Information contained on the Shipping Register includes:

- the name and address of each mortgagor;
- the official number and name of the ship;
- the name and address (or, in the case of a body corporate, place of incorporation) of the mortgagee; and
- particulars of any documents or transactions, the obligations whereunder are secured by the mortgage.

Information regarding the mortgage contained on the Companies Registry includes:

- name of the mortgagor;
- description of the instrument creating or evidencing the mortgage together with a certified true copy of the instrument; and
- name and address of the mortgagee.

Limitation of liability

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 as amended by the 1996 Protocol (the Limitation Convention) has the force of law in Hong Kong (per section 12 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (MSLO)). The application of the provisions of the Limitation Convention is qualified by sections 13 to 23 of the MSLO.

Increase of tonnage limits, as introduced by the International Maritime Organization in June 2015, came into force on 4 December 2017 as incorporated into the MSLO.

The persons entitled to limit their liability under the convention include shipowners, charterers, managers, operators, salvors and any person for whose act, neglect or default the previous parties are responsible, as well as the insurers of the liability of those parties. The claims that can be limited are set out in article 2 of the Limitation Convention.

Under section 13 of the MSLO, the word 'ship' includes any air-cushioned vehicle designed to operate in or over water while so operating; and any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship. Under section 14 of the MSLO, the right to limit liability under this ordinance applies in relation to any ship, whether seagoing or not.

11 What is the procedure for establishing limitation?

Limitation actions must be commenced in the Admiralty list of the Court of First Instance. The writ must name at least one of the defendants that has a claim against the limiting party and must then be served on at least one of the defendants referred to by name. As long as the requirements of Order 75 rule 4 of the Rules of the High Court (RHC) have been fulfilled, it is possible to serve the writ out of the jurisdiction.

A party can invoke limitation of liability before constituting a limitation fund. However, there may be advantages to setting up a limitation fund, for example, making use of the rights contained in article 13 of the Limitation Convention.

It is not possible under Hong Kong law to constitute a limitation fund before legal proceedings have been initiated.

According to article 11 of the Limitation Convention, a fund may be constituted, either by depositing the sum or by producing a guarantee acceptable under the legislation of the state party to the convention where the fund is constituted and considered to be adequate by the court or other competent authority. In Hong Kong, those who want to constitute a limitation fund do so by paying into court a sum of money calculated in accordance with articles 6 and 7 of the Limitation Convention.

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

Article 4 of the Limitation Convention provides that a party shall not be entitled to limit its liability if it is proved that the loss resulted from its personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Cases demonstrate that it is extremely difficult to break this limit. As at the date of writing, there is no reported Hong Kong case in which limitation has been broken.

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

The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (Athens Convention) is in force in Hong Kong by virtue of section 3 of the MSLO.

Pursuant to article 7 of the Athens Convention, the liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 46,666 units of account per carriage. If a carrier's principal place of business is in Hong Kong, the Chief Executive may by order specify a limit in substitution for, but not lower than, the limit specified above.

In relation to a carrier's liability for the loss of or damage to cabin luggage, this shall in no case exceed 833 units of account per passenger, per carriage. The liability of the carrier for the loss of or damage to vehicles including all luggage carried in or on the vehicle shall in no case exceed 3,333 units of account per vehicle, per carriage. The liability of the carrier for the loss of or damage to luggage other than that mentioned above shall in no case exceed 1,200 units of account per passenger, per carriage.

The carrier and the passenger may agree that the liability of the carrier should be subject to a deductible, which is to be deducted from the loss or damage. Deductibles cannot exceed 117 units of account in the case of damage to a vehicle and cannot exceed 13 units of account per passenger in the case of loss of or damage to other luggage.

Port state control

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

The Marine Department of the Hong Kong Special Administrative Region is the port state control (PSC) agency. The Marine Department is authorised to perform this function by the Director of Marine.

The Marine Department carries out inspections in accordance with the provisions of IMO Resolution A.1052(27) and the Tokyo Memorandum of Understanding Port State Control Manual.

15 What sanctions may the port state control inspector impose?

If serious deficiencies are noticed, the ship will be detained under the PSC regime, and the ship's agent or owner, classification society and flag state will be notified of the detention as well as the requirement for rectification. Serious deficiencies affecting the seaworthiness of the vessel or the safety of the crew or causing damage to the marine environment must be rectified before the ship departs. Inspection visits for establishing that deficiencies have been rectified are charged at an hourly rate on work done.

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

Under section 66 of the Shipping and Port Control Ordinance, if any person is aggrieved by a direction, decision or act of the Director of Marine, or any other person, performing or exercising any function, duty or power under that Ordinance, he or she may, within 14 days after the date on which the direction, decision or act was given, made or done, or the date on which he was notified of the direction, decision or act, appeal to the Chief Executive against the direction, decision or act by lodging the grounds of the appeal in writing with the Chief Secretary for Administration.

Classification societies

17 Which are the approved classification societies?

The Hong Kong government has authorised the following classification societies to conduct statutory surveys and certification for cargo ships registered in Hong Kong:

- American Bureau of Shipping;
- Bureau Veritas;
- China Classification Society;
- DNV GL;
- Lloyd's Register;
- Nippon Kaiji Kyokai;
- Korean Register of Shipping;
- Rina Services SpA; and
- Russian Maritime Register of Shipping.

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

Usually, classification societies exclude their liability under contract.

A classification society may be liable under the tort of negligence if the claimant establishes that the classification society owed a duty of care and the duty of care was breached. However, in England, the landmark case, *Marc Rich & Co v Bishop Rock Marine (the Nicholas H)* [1995] 2 Lloyd's Rep. 299, established that classification societies do not owe a duty of care towards third parties in respect of their classification and certification duties. This was a decision of the House of Lords in 1995 and it is not strictly binding (but may be followed) in Hong Kong. On the other hand, recent international developments on this issue may lead the Court of Final Appeal of Hong Kong to decide differently should a new case come to its attention.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Under section 21(1) of the Shipping and Port Control Ordinance, the Director of Marine has the power to give to an owner or master of, or other person who claims or appears to the Director to exercise control over a vessel that has sunk in the waters of Hong Kong, such directions as he or she thinks fit in respect of the removal, movement, anchoring, mooring, securing, raising or destruction of the said vessel.

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

Hong Kong is party to the Brussels Collision Convention 1910. Under section 9 of the Merchant Shipping (Collision Damage Liability and Salvage) Ordinance, the provisions of the International Convention on Salvage 1989 have the force of law in Hong Kong.

With regard to pollution, the following international agreements apply in Hong Kong:

- Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage 1969, signed on 27 November 1992, as amended in 2000;
- International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 29 November 1969, its Protocol signed on 2 November 1973 and as amended in 1991, 1996, 2002 and 2007;
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, and 1978 amendments to Annexes I and II concerning incineration at sea, and as amended in 1980, 1989 and 1993;
- Protocol of 1996 to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 7 November 1996, as amended in 2006;
- International Convention for the Prevention of Pollution from Ships, 2 November 1973, as modified by the Protocol signed on 17 February 1978, and Annexes III and V to the convention and amendments in 1984, 1985, 1987, 1989, 1990, 1991, 1992, 1994, 1995, 1996, 1997, 1999, 2000, 2001, 2003, 2004, 2006, 2007, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016, and the Protocol of 1997 as amended in 2005, 2008, 2010, 2011, 2012, 2014 and 2016;
- Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, signed on 27 November 1992, as amended in 2000; and
- International Convention on Oil Pollution Preparedness, Response and Cooperation, 30 November 1990, as amended in 2000.

The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 is implemented in Hong Kong by the Bunker Oil Pollution (Liability and Compensation) Ordinance.

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?

In Hong Kong, there is no mandatory local form of salvage agreement and Lloyd's open form is acceptable in Hong Kong. However, parties can agree on their own terms and conditions. There are no restrictions on who may perform salvage services in Hong Kong.

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

Hong Kong is a signatory to the International Convention Relating to the Arrest of Seagoing Ships, Brussels, 10 May 1952.

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 plaintiff may arrest a vessel for claims pursuant to maritime liens or for claims falling within the following categories:

- any claim to the possession or ownership of a ship or to the ownership of any share therein;
- any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- any claim in respect of a mortgage of or charge on a ship or any share therein; or
- any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

For the types of claims listed below, in certain circumstances it is also possible to arrest sister ships:

- any claim for damage done by a ship;
- any claim for loss of life or personal injury sustained in consequence of any defect:
 - in a ship; or
 - in its apparel or equipment; or
 - in consequence of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship;
 - or the master or crew of a ship; or
 - any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible; being an act, neglect or default in the navigation or management of a ship, in the loading, carriage or discharge of goods on, in or from the ship; or
 - in the embarkation, carriage or disembarkation of persons on, in or from the ship;
- any claim for loss of or damage to goods carried in a ship;
- any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- any claim in the nature of salvage;
- any claim in the nature of towage in respect of a ship or an aircraft;
- any claim in the nature of pilotage in respect of a ship or an aircraft;
- any claim in respect of goods or materials supplied to a ship for its operation or maintenance (note: this claim is in respect of what are commonly described as 'necessaries', namely bunker fuel, repairs, spare parts, paints and the like);
- any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;
- any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
- any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- any claim arising out of an act which is or is claimed to be a general average act; or
- any claim arising out of bottomry.

A demise-chartered vessel may therefore be arrested for a statutory claim against the demise-charterer if he or she is still the demise-charterer when the writ is issued. A vessel on time-charter when the action is brought cannot be arrested for a statutory claim against the time-charterer, but sister vessels wholly and beneficially owned by the time-charterer at that time can be arrested.

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

Hong Kong courts recognise the concept of maritime liens. Claims that give rise to maritime liens are those arising from damage caused by a ship, salvage, crew's wages, master's wages and disbursements, and (now obsolete) bottomry and respondentia.

25 What is the test for wrongful arrest?

The arrested party must prove bad faith or malice or gross negligence on the part of the arresting party.

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 only arrest a vessel if it shows that it contracted directly with the vessel's owner or bareboat charterer. Even if the bunker supply contract with the charterer provides that the supplier has a lien on the vessel under the law governing that contract, this would have no effect because the owners are not party to that contract.

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

Under Hong Kong law, it is not necessary for the arresting party to provide counter-security. That said, the arresting party usually has to provide an undertaking (usually a solicitor's undertaking) to pay the bailiff's expenses of the arrest (maintaining the ship under arrest, including watchman's fees, launch hire, provision of crew, victualling, bunkers, etc).

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 the security is subject to the court's discretion. Usually, the amount of security must be reasonable, which means the claimant's reasonably arguable best case, plus interest and costs. The amount of the security cannot exceed the value of the ship.

Normally, an agreed form of contractual security is provided without an application to court. Usually, a protection and indemnity insurance (P&I) club letter of undertaking serves this purpose. Alternatively, a bail bond can be provided to the court as security.

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 is not required to appoint a lawyer to make the arrest application. Solicitors representing the plaintiff will usually require written instructions before proceeding with the arrest. No notarisation of documents is required for the arrest application. Documents required to make an arrest application include an in rem writ with acknowledgement of service, a warrant of arrest, an affidavit in support of the arrest, a praecipe of warrant of arrest, a praecipe for service of the writ by a bailiff and an undertaking to pay the bailiff's expenses.

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

The costs of the arrest, care and custody of the vessel are usually paid by the arresting party and the arresting party is required to reimburse the expenses of arrest to the bailiff. Nevertheless, as the bailiff's expenses rank first in priority of claims against the proceeds of the sale of the vessel, it is likely that the arresting party is able to recover the bailiff's expenses from the defendant when the vessel is sold. Although, as a condition of the release, the party that has been arrested may be required to pay these maintenance expenses.

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 does not need to pursue the claim on its merits in the courts of Hong Kong. It is possible to arrest the vessel so as to obtain security and then pursue proceedings on the merits elsewhere.

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

The main remedy and method available to obtain security is by way of obtaining a *Mareva* injunction in Hong Kong. A *Mareva* injunction is an injunction order of the court restraining the debtor from disposing of, or dissipating, its assets in Hong Kong (including its bank accounts).

In order for the Hong Kong court to grant a *Mareva* injunction, the creditor must show, among other things, that it has a good arguable case against the debtor, that the balance of convenience is in favour of granting the injunction order, that there are assets within Hong Kong and that there is a real risk of dissipation of assets, or removal of assets from Hong Kong, which would render the creditor's judgment of no effect. Where there is no direct evidence on the risk of dissipation, some kind of dishonest conduct on the part of the debtor may be required for the court to infer risk of dissipation.

Further, it is usually necessary for the creditor to provide an undertaking (or if requested by the court, a payment of security into court) to pay damages to the debtor if the court later decides that the *Mareva* injunction was wrongfully granted.

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

Under section 35 of the Arbitration Ordinance, the arbitral tribunal has power to make orders to preserve evidence that may be relevant and material to the resolution of the dispute and/or to preserve assets out of which a subsequent award may be satisfied. Under section 56 of the Arbitration Ordinance, orders may include, for example, directing the inspection, photographing, preservation, custody, detention or sale of the relevant property by the arbitral tribunal, a party to the arbitral proceedings or an expert; or directing samples to be taken from, observations to be made of, or experiments to be conducted on the relevant property.

For Hong Kong court proceedings, a party to these proceedings may apply for an order for detention, custody or preservation and inspection of any property which is the subject matter of the proceedings. Additionally, for the purpose of enabling any order, the court may, by the order, authorise any person to enter upon any land or building in the possession of any party to the cause or matter. The application is made in accordance with Order 29 rule 2 of the RHC.

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 bunkers in Hong Kong. However, many practical issues arise, such as where to store the bunkers that have been arrested.

Judicial sale of vessels

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

Usually, the arresting party applies for judicial sale of an arrested vessel.

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?

Under Order 75 rule 12 (3) of the RHC, the application for an order for sale should be made by summons or motion in the action in which the property is under arrest. The application should be supported by affidavit evidence.

Under Order 75 rule 23 of the RHC, once the court orders the sale of the ship, the party applying for the sale and appraisal shall file a praecipe and execute an undertaking in writing satisfactory to the bailiff to pay the fees and expenses of the bailiff on demand before a

commission for appraisal and sale will be executed. An appraisal will be carried out by an independent surveyor appointed by the bailiff.

The sale will usually be conducted by way of public tender by the bailiff. The bailiff will advertise the sale for two consecutive days. All tenders are confidential and have to be accompanied by a cheque for payment of 10 per cent of the tender amount. The court normally orders an appraisal of the vessel to ascertain its minimum value as it is a function to ensure a vessel is sold at the best possible price. The public sale is made known to the maritime world. The vessel will not be sold at a price less than the appraised value of the vessel without the order of the court. Once the vessel is sold, the bailiff will make the sale known by publishing a notice of sale for one day announcing that the vessel has been sold free of all liens and encumbrances.

On average, a judicial sale is usually completed within three months from the date of an application for sale.

The following costs usually arise from a judicial sale:

- auction and broker's fees: variable;
- advertisement fees for the invitation to tender: variable;
- advertisement fee of the notice of sale of the vessel after the vessel has been sold: variable;
- the bailiff's legal costs: variable; and
- court fees: calculated in accordance with item 20 of High Court Fees Rules schedule 1 at HK\$15 per HK\$1,500 or part thereof of the sale price.

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:

- the bailiff's costs and expenses;
- legal costs of arrest and sale up to the date for order of appraisal and sale;
- possessory liens predating the maritime liens (if any);
- salvage (maritime lien);
- damage or collision (maritime lien);
- master or crew wages and master's disbursements (maritime liens);
- mortgages (with registered mortgages ahead of unregistered mortgages); and
- statutory rights of action in rem, such as necessaries claims, agent's claims, cargo claims, charterer's claims, towage claims, etc.

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

After judicial sale of the vessel, all prior liens and encumbrances on the vessel, including maritime liens, will be extinguished. This gives the purchaser clean title to the vessel. All claims and demands against the vessel can only be settled against the proceeds of the sale (*The Acrux* [1962] 1 Lloyd's Rep. 405).

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

Hong Kong courts recognise a judicial sale of a vessel in a foreign jurisdiction provided that the sale has been ordered by a foreign court which has competent jurisdiction in the matter.

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

Hong Kong is not a signatory to the International Convention on Maritime Liens and Mortgages 1993.

Carriage of goods by sea and bills of lading

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 apply in Hong Kong. Pursuant to the Hague-Visby Rules, carriage at sea begins when the goods are loaded onto

the ship and ends upon discharge. Hong Kong has not ratified the Rotterdam Rules.

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?

For international carriage of goods by air

The Carriage by Air Ordinance (CAO) gives effect to the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) (as amended at The Hague, 1955), 12 October 1929 and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), 28 May 1999. They are set out in schedule 1 and schedule 1A of the CAO respectively. When the carrier who actually performs the carriage is not the carrier concluding the carriage of goods by air, the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, signed in Guadalajara on 18 September 1961 (Guadalajara Convention 1961), will apply to govern the rights and obligations of the carriers.

For non-international carriage of goods by air

In this situation, a modified form of the Montreal Convention is set out in schedule 3 of the CAO.

For carriage by road and rail

Two main conventions for carriage by road and rail are the Convention on the Contract for the International Carriage of Goods by Road and the Convention concerning International Carriage by Rail. However, Hong Kong is not a party to either of the aforesaid conventions.

The Kowloon-Canton Railway Corporation Ordinance governs the Kowloon-Canton Railway Corporation.

Parties can choose to incorporate the UNCTAD/ICC Rules for Multimodal Transport Documents (1992) into their contracts.

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

Anyone who is a 'lawful holder' of a bill of lading has title to sue under the contract of carriage as if he had been an original party to that contract. Under section 2(2) of the Bills of Lading and Analogous Shipping Documents Ordinance, a 'lawful holder' is identified as:

- (i) *a person with possession of the bill who by virtue of being the person identified in the bill is the consignee of the goods to which the bill relates;*
- (ii) *a person with possession of the bill as a result of the completion, by delivery of the bill, of any endorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill; or*
- (iii) *a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within (i) or (ii) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;*

and a person shall be regarded for the purposes of this Ordinance as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

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 extent to which the terms in a charter party be incorporated into the bill of lading depends on the proper construction of the incorporation clause in the bill of lading.

Usually, if the words used in the bill of lading incorporation clause are referred by name (for example, there is specific reference to the arbitration clause in the charter party) or number of a specific clause in the charter party, then those clauses will be incorporated. However, when the words in the bill of lading incorporation clause are general,

for example, 'all terms, conditions and exceptions of the charter party', then only such terms as are appropriate to the carriage and delivery of the goods will be incorporated, and not terms collateral to those matters. Since the jurisdiction or arbitration clause is a collateral clause, it will not be incorporated into a bill of lading unless it is specifically referred to in the incorporation clause.

When a jurisdiction clause is validly incorporated into a bill of lading, it is binding on a third-party holder or endorsee of the bill.

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

A 'demise' clause in a bill of lading states that if the vessel is not owned by or demise-chartered to the company that issued it, then the contract evidenced by the bill of lading is with the vessel owner or the demise-charterer as the case may be, and that the party (usually the charterer) issuing the bill of lading merely acts as agent for the vessel owner or demise-charterer and has no liability in respect of the contract.

The identity of carrier clause in a bill of lading states that the contract contained in is made between the shipper and the shipowner and not the person the shipper regarded as the carrier.

Such clauses restrict the rights of suit of the shipper or consignee and permit them to sue only the person identified in the contract evidenced by the bill of lading, even though it is the charterers who concluded the contract of carriage and performed the duties of a 'carrier' under the Hague or Hague-Visby Rules.

Whether the 'demise' clause or identity of carrier clause is binding or not depends on how the bill of lading was signed. If the way the bill of lading has been signed indicates that it is a charterer's bill rather than an owner's bill and there are terms and conditions indicating that the responsibility for the carriage is on the charterers rather than the owners, the charterers will be liable.

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 bill of lading is a charterer's bill and the carrier is the shipowner, the shipowner may be liable in tort for damage to the cargo. As for whether the shipowner as the actual carrier can rely on the bill of lading terms, it depends on whether there is a *Himalaya* clause in the bill of lading. The *Himalaya* clause extends the protections in the bill to third parties.

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

Deviation is a departure from the 'agreed route' or the usual route. It has been defined as an intentional and unreasonable change in the geographical route of the voyage as contracted. Under article IV(4) of the Hague or Hague-Visby Rules, any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, should not be considered as a breach of the rules or contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

When there is a deviation, this will be a breach of contract rendering the carrier liable for losses caused by the deviation. A deviating carrier may lose the benefit of clauses in the contract of carriage that are to his advantage and so be disentitled from relying on clauses limiting his or her liability.

48 What liens can be exercised?

In the context of a discussion on carriage of goods by sea and bills of lading, there are three types of liens (ie, lien on cargo, lien against a vessel and lien on sub-freights).

A lien on cargo is a right to retain possession of the cargo pending payment of sums owed to the carrier, typically freight. This might arise at common law or under contract (ie, under the terms of the bill of lading or the charter party). Usually, the lien should be exercised when the vessel is at or anchored off the discharge port, or ashore if the cargo can be discharged and stored in a warehouse under the shipowner's control. The lien will be lost once the cargo is delivered to the receivers or if possession is lost by the shipowner.

A lien against a vessel (other than a ship-repairer's lien) is exercisable by an action in rem commenced by arresting the vessel. Some claims give rise to a maritime lien which is a privileged claim upon sea-connected property, such as a vessel, for services rendered to, or the injuries caused by that property. This operates as a charge on the ship which will follow the ship notwithstanding a change of ownership. Such claims principally arise in cases involving damage done by ships, salvage and in relation to seamen's and master's wages.

A lien on sub-freights only arises pursuant to contract and does not exist at common law. Many time charters include a lien over sub-freights payable to the charterer by the cargo interests to secure the payment of the hire due to the owner from the charterer. Pursuant to such a lien the owner can demand payment of freight by the sub-charterer directly to him instead of to the time charterer.

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 usually a breach of contract if the cargo is delivered without production of the original negotiable bill of lading, unless there is an express term allowing for delivery without production of the original bill of lading. This carrier will be liable for the value of the cargo to the 'lawful holder' of the bill of lading. In the case of a non-negotiable bill of lading, the position is not clear-cut, especially where the person seeking delivery of the cargo is the consignee named on the bill of lading. Nevertheless, it is common practice to have a clause requiring or permitting delivery against a letter of indemnity or bank guarantee. In that case, the liability due to the delivery of cargo without production of the bill of lading would pass on to the indemnifier or guarantor.

50 What are the responsibilities and liabilities of the shipper?

Pursuant to article III(5) of 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, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars'.

Under article IV(6) of the Hague-Visby Rules as well as the common law position, without the consent of the carrier, it is the duty of the shipper not to ship 'dangerous' cargo onto the vessel. Pursuant to article IV(6) of the Hague-Visby Rules:

goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of 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 shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

Shipping emissions

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

There is currently no ECA in force in Hong Kong. However, Hong Kong is looking to collaborate with the relevant mainland Chinese authorities to put an ECA in place after the mainland's Ministry of Transport drew up three ECAs in December 2015: the Pearl River Delta, the Yangtze River Delta and the Bohai Rim Area. The ECAs are scheduled to take effect in January 2019.

As of 1 July 2015, the Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation came into force. Essentially, the Regulation requires oceangoing vessels to switch to clean marine fuel with sulphur content not exceeding 0.5 per cent by weight while at berth.

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?

Pursuant to the Air Pollution Control (Ocean Going Vessel) (Fuel at Berth) Regulation, there is a cap of 0.5 per cent by weight on the sulphur content of fuel oil used by oceangoing vessels while they are at berth. Discussion to extend the standard to all marine vessels operating

in Hong Kong waters (ie, not just at berth) from 1 January 2019 to align with the national standard is currently under way in the legislature.

The Environmental Protection Department conducts surprise inspections to oceangoing vessels berthed and may initiate prosecution for non-compliance. According to section 4(3) of the regulation, a person who commits an offence is liable on conviction to a fine of HK\$200,000 and to imprisonment for six months.

Ship recycling

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

Hong Kong is party to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal 1989 (Basel Convention). The Basel Convention governs the disposal of hazardous waste and prohibits the export of waste from developed to less developed country, which may have an impact on ship recycling. Hong Kong has not ratified the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009. There is currently no domestic ship recycling regulation in place.

There are no ship recycling facilities in Hong Kong.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

Most of the maritime disputes are heard at the Commercial Court. Nevertheless, the following claims must be started in the Admiralty Court:

- claims in rem so as to arrest a vessel, for example, damage done by a ship, concerning the ownership of a ship, for loss of life or personal injury, by a master or a member of a crew for wages, towage or pilotage;
- collision claims;
- limitation claims; or
- salvage claims.

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

Order 11 of the Rules of High Court governs service of court proceedings on a defendant located out of the jurisdiction. Generally, it is necessary to apply for permission of the court to serve out of the jurisdiction, supported by an affidavit stating:

- the grounds on which the application is made;
- that in the deponent's belief the plaintiff has a good cause of action;
- in what place the defendant is, or probably may be found; and
- where the application is made under rule 1(1)(c) (namely, the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the court to try.

The method of service includes any method permitted by the law of the country in which the writ is to be served. However, service of an in rem writ on a vessel in Hong Kong waters is sufficient.

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

The Hong Kong International Arbitration Centre (HKIAC) is the domestic arbitral institution in Hong Kong. The panel in the HKIAC includes arbitrators who specialise in maritime arbitration. In February 2000, the Hong Kong Maritime Arbitration Group (HKMAG) was formed as a division of the HKIAC. The HKMAG maintains a list of arbitrators (and mediators) with shipping experience willing to hear maritime disputes.

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

The Foreign Judgments (Reciprocal Enforcement) Ordinance governs the enforcement of foreign judgments in Hong Kong.

Part 10 of the Arbitration Ordinance contains the provisions that deal with the recognition and enforcement of arbitration awards.

Update and trends

Since 2016, the Hong Kong Monetary Authority (HKMA), the central bank of Hong Kong, has been exploring the potential applications of distributed ledger technology (DLT) to banking and financial services. The results of the proof-of-concept work commissioned by the HKMA in relation to DLT application in trade finance were published in the white paper dated 11 November 2016, followed by a second white paper dated 25 October 2017. The reports identified several challenges including governance, data security concerns and the lack of cross-jurisdiction legal framework before the proof-of-concept work could move on to the commercial pilot stage.

In November 2017, the HKMA entered into a memorandum of understanding with the Monetary Authority of Singapore to jointly develop the Global Trade Connectivity Network (GTCN), a cross-border interface between the Hong Kong and Singapore trade platforms based on DLT. The GTCN is expected to digitalise trade and trade finance between the two cities, with the aim of expanding the network in the region and globally. The platform is expected to be rolled out in early 2019.

There are four types of foreign arbitration awards:

- convention awards, which means awards that are made in a state or territory of a state (with the exception of China) that are a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention);
- awards made in China by a recognised tribunal authority in accordance with the Arbitration Law of the People's Republic of China;
- other foreign awards, which means any other foreign awards that do not fall into the above two categories (eg, awards made in Taiwan); and
- awards made in Macao in accordance with the arbitration law of Macao.

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

The Hong Kong position is unclear, as the validity of asymmetric jurisdiction and arbitration agreements has not been considered by Hong Kong courts yet. Some guidance may be derived from English case law, which is highly persuasive in the Hong Kong courts. The English position is that asymmetric clauses are generally enforceable so as to give effect to the parties' intention. Asymmetric jurisdiction clauses have recently been upheld by the High Court of England in *Barclays Bank plc v Ente Nazionale di Previdenza Ed Assistenza dei Medici e Degli Odontoiatri* [2015] EWHC 2857 (Comm) and *Commerzbank AG v Pauline Shipping Limited Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm).

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

Upon application, the Hong Kong court may issue an anti-suit injunction to restrain a party from commencing or continuing proceedings elsewhere in breach of a jurisdiction or arbitration clause. Any breach of the injunction will be a contempt of court and the Hong Kong court will not recognise or enforce any judgment or award obtained in breach of such order.

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 for a stay of proceedings in favour of the foreign jurisdiction on the grounds that there is an exclusive jurisdiction clause, an arbitration clause, or on the grounds of forum non conveniens.

Limitation periods for liability

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

Under the Limitation Ordinance, for breach of simple contract and claim under tort, the time limit is six years from the date on which the cause of action accrued. For negligence claims involving latent damage other than an action for personal injuries, the time limit is either six

years from the date on which the cause of action accrued, or three years from the date the claimant knew or ought reasonably to have known the damage (whichever is later). For personal injury or death claims, the time limit is three years from the date on which the cause of action occurred (for example, the date of death) or the date of the claimant's knowledge (whichever is later).

Section 26(1) of the Limitation Ordinance provides that, in the case of fraud, concealment or mistake, either:

- (a) *the action is based upon the fraud of the defendant;*
- (b) *any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
- (c) *the action is for relief from the consequences of a mistake;*

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

Some international conventions provide limitation periods for certain claims. For example, one year for cargo claims under the Hague or Hague-Visby Rules, two years for collision claims under the Brussels Collision Convention 1910 and two years for salvage claims under the International Convention on Salvage 1989, which were incorporated into Hong Kong law by virtue of the Merchant Shipping (Collision Damage Liability And Salvage) Ordinance.

Time limits can be extended by agreement.

62 May courts or arbitral tribunals extend the time limits?

An application can be made to the court to extend the time limit for bringing proceedings. However, the court's powers are limited.

Under section 30 of the Limitation Ordinance, the court has over-riding power to extend time if it is fair and just in the circumstances in respect of fatal accidents and personal injuries.

The court has power to extend procedural time limits, for example by granting a time extension to a claimant to file a statement of claim or by granting a time extension to a defendant to file a defence, etc.

Arbitral tribunals have the power to extend time limits to commence arbitral proceedings and most procedural time limits during the arbitration proceedings.

Miscellaneous

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), 2006 entered into force internationally on 20 August 2013 and it applies to those countries that ratified it on or before 20 August 2012. For those countries that ratified the MLC after 20 August 2012, the entry into force date will be 12 months after the date the ratification is registered. Ships calling at the port of a country that has ratified the MLC may be inspected by PSC for compliance with the MLC requirements.

Hong Kong has yet not ratified the MLC and thus the MLC does not yet apply in Hong Kong. It is advised that the owners of Hong Kong registered ships should apply for the issuance of the 'Statement of Compliance' to show that they are in compliance with the provisions of MLC from recognised organisations to avoid PSC intervention in ratifying countries.

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 Hong Kong court will enforce the provisions of negotiated commercial contracts strictly and according to the provisions of legal rights and liabilities of the parties between the parties of similar bargaining power. Usually, parties cannot argue that the contract is frustrated due to economic conditions making the contractual obligations more onerous to perform. Therefore, commercial parties that wish to protect themselves from onerous economic and financial movements should incorporate suitable provisions into the contracts, for example, price escalation clauses, material adverse change clauses and force majeure clauses.

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

Immigration arrangement for non-local oceangoing seafarers

Non-local seafarers entering Hong Kong on a ship are permitted to remain on board for however long the ship is in Hong Kong, whereas those joining an oceangoing ship in Hong Kong are not allowed to remain in Hong Kong after the departure of specified ship or later than 14 days after the date of landing, whichever is earlier. The '14-day rule' used to put shipowners and managers in a rough spot when a vessel was stranded in Hong Kong owing to unforeseeable circumstances. Therefore, the Immigration Department modified the rule in December 2017. Where a vessel is stranded in Hong Kong owing to ship arrest by the Hong Kong court, PSC detention by the Marine Department, or urgent ship repair, non-local seafarers who have arrived in Hong Kong to join the vessel may apply to the Immigration Department to work on board under the sponsorship of the ship operator or the local agent, and subsequently depart with it. Other non-local seafarers may apply for employment visa or entry permit to Hong Kong for the same purpose. The seafarers may be permitted to stay in or enter Hong Kong on employment condition for 90 days or in accordance with the duration of the employment contracts, whichever is shorter, subject to further extensions.

Block exemption to liner shipping vessel sharing agreements

The Competition Ordinance, which prohibits businesses from making or giving effect to an agreement whose object or effect is to harm competition in Hong Kong, came into effect on 14 December 2015. On 17 December 2015, the Hong Kong Liner Shipping Association applied for exemption of vessel sharing agreements (VSAs) and voluntary discussion agreements (VDAs) from the First Conduct Rule under the ordinance. VSAs are agreements between liners on operational arrangements, including consortia, slot exchange agreements, joint service agreements and alliances. VDAs allow liners to discuss and exchange market information relating to specific shipping routes.

In consideration of the economic efficiencies VSAs bring, the Competition Commission of Hong Kong ordered a five-year block exemption for VSAs between liner shipping companies on 8 August 2017 on the following conditions:

- parties to the VSA do not exceed a market share limit of 40 per cent in aggregate;
- the VSA does not authorise or require shipping lines to engage in cartel conduct; and
- shipping lines are allowed to withdraw from the VSA without incurring a penalty upon giving a reasonable period of notice.

The block exemption order will be reviewed in four years from its commencement.

The Competition Commission of Hong Kong refused to exempt VDAs as there was insufficient evidence to establish the economic efficiencies of VDAs. VDAs are not necessarily illegal, but the unavailability of exemption may expose carriers to the risks of anti-competition complaints.

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Newbuilding contracts

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 are essentially three ways by which the title in the ship passes from the shipbuilder to the shipowner:

- an agreement for sale entered into by the parties;
- the consideration for the ship or vessel is paid; and
- the bill of lading (B/L) is issued.

Pursuant to the issuance of the B/L in favour of the shipowner, the title in the ship passes from the shipbuilder to the shipowner. Last, the said transfer of title of the ship is entered in the registry.

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

There are no set formalities or forms prescribed for a refund guarantee to be valid. The terms of the 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.

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 vessels could be compelled to be made by the local courts by way of a lawsuit on the grounds of breach of contract and by seeking specific performance of the said contract.

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 lawsuit could be filed against the shipbuilder on the grounds of breach of contract at the instance of a shipowner. However, a purchaser from the original shipowner shall not have any remedy available since the liability of the shipbuilder shall be towards the original shipowner. As for a claim by a third party sustaining damages, a claim for damages would lie on the basis of tort.

Ship registration and mortgages

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 India flag as per the procedures and requirements enlisted in Part V of the Merchant Shipping Act 1958.

Only completed vessels can be registered under the Indian flag.

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

The following persons are eligible to register a ship in India:

- a citizen of India;

- a company or a body established by or under 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.

7 What are the documentary requirements for registration?

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 statutory declaration of ownership;
- forms: application to register a ship, declaration of ownership and nationality; and
- 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 (required only in case of second-hand ships).

All the said documents and supplementary documents should be in the format as prescribed under the Part V of the Merchant Shipping Act 1958.

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

Neither dual registration nor flagging is permitted in India.

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

The Mercantile Marine Department maintains the register of mortgages. The register of ship mortgages includes the following information, among others:

- the basic information of the ship (eg, name);
- 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, former registered mortgage, etc.

Limitation of liability

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

- 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).

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.

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

The limitation cannot be broken for any damage except for damage caused by pollution or when the damage is 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 the limitation of liability, does not incorporate the principles of article 4 of the Limitation of Liability for Maritime Claims Act 1976.

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

The following regimes apply in respect of passenger and luggage claims in India:

- Limitation of Liability for Maritime Claims Act 1976;
- Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims Act of 19 November 1976;
- Merchant Shipping Act 1958 (Part X-A); and
- in cases of oil pollution the International Convention on Civil Liability for Oil Pollution Damage would apply.

The Athens Convention is not applicable in India.

Port state control

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.

15 What sanctions may the port state control inspector impose?

The port state control inspector may impose any permissible sanctions in accordance with the Safety of Life at Sea Convention.

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

An aggrieved party shall have to file a writ petition appealing against the detention orders or fines.

Classification societies

17 Which are the approved classification societies?

The International Association of Classification Societies and the Indian Register of Shipping.

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.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Yes.

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 2007 and the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC Convention) (as amended by the CLC Protocol of 1992) are applicable in India. However, India is only a signatory to the CLC Convention but has not yet statutorily incorporated it.

The Merchant Shipping Act 1958 is the statute governing the issues related to collision, wreck removal, salvage and pollution.

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.

Ship arrest

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 applicable in India. Both are no longer applicable in light of the enactment of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017. With any inconsistency the statute will prevail over the conventions.

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 claims are defined under section 4 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017. These are the only classes of maritime claims for which vessels can be arrested. Associate ship arrest is not permissible in India. A bareboat chartered vessel cannot be arrested unless there is a maritime claim against the ship or the shipowner. For a claim against a charterer, the ship of the owner cannot be arrested. Also, 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.

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

Yes, India recognises maritime liens. 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.

25 What is the test for wrongful arrest?

The arrest of the vessel has to be declared as wrongful by the Admiralty Court or any appellate court. Further, the shipowner has to prove the losses suffered by him or her on account of the arrest. The court has the power to grant a reasonable amount of legal expenses.

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?

There are contrary views taken by various High Courts in India. As per the judgments of the Bombay High Court, a bunker 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. However, the same is adjudicated in the affirmative by the Gujarat High Court.

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

Only an undertaking is required to be provided on an affidavit by the party arresting the ship. However, in any given case, the court may order the party to furnish counter-security.

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 will prima facie test whether a claim is justified at the time of arresting the ship. Subsequently, each claim has to be proved by filing of the respective lawsuit. It can receive security that is predominantly in the form of B/L or cash deposits. It can exceed the value of the ship. However, the shipowner may limit his or her liability.

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 *vakalatnama* (note of appearance) is required to be executed in favour of the lawyer. A power of attorney 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 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 cannot be filed electronically. Once all documents are made available, the arrest application can be made within 24 hours.

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.

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?

Arrest can be made in the High Court. However, if there is an arbitration clause and if the defendant provides security, the dispute may be referred to arbitration. However, if the defendant does not provide security, the matter shall be prosecuted in court.

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 such as attachment before judgment. However, the shipowner or defendant must be within the jurisdiction of the court. Such a claim is a claim in personam.

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

Inspection by a court commissioner or surveyor are the different modes available for the same.

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

No. Unless there is no claim against a vessel, bunkers cannot be independently arrested.

Judicial sale of vessels

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.

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. Thereafter, the price of the vessel is determined and fixed. Further, an advertisement for sale is published. The vessel is then sold by a bidding process. The expenses incurred by the sheriff (ie, costs incurred by a court) are calculated and settled from the amount obtained from the sale of the vessel.

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

Liens, mortgage, maritime claims.

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

A vessel is sold free from all encumbrances including liens and mortgages.

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

Yes, judicial sale of a vessel in foreign jurisdiction is recognised in India.

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

Yes, India is a signatory to the International Convention on Maritime Liens and Mortgages 1993.

Carriage of goods by sea and bills of lading

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?

Indian Admiralty courts follow the Hague Rules and the Hague-Visby Rules. However, they are yet not statutorily incorporated or ratified.

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 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) are the laws applicable to the different modes of transport other than sea.

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

For a person to sue on the bill of lading (B/L), the title and property should be passed a per section (1) of the Bills of Lading Act 1955. Normally, the consignee or the holder of a B/L duly endorsed is entitled to sue on a B/L.

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 B/L, including the arbitration clause to the extent that the reading of the same does not lead to an absurd and unworkable situation. But the reference to an arbitration clause has to be a specific reference. If it is specific then the arbitration clause can be incorporated.

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

Yes, subject to the contract.

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 contract between the shipper and shipowner is under the master B/L. However, a B/L 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.

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 content of the contract.

48 What liens can be exercised?

Liens can be exercised on cargo and freight.

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

The shipowner is liable for damages for the loss in delivery and in some cases the entire cost of the assignment.

50 What are the responsibilities and liabilities of the shipper?

It depends on the nature of the contracts (cost, insurance and freight or free on board).

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

No.

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 current global limit set by the International Maritime Organization (of which India is a member state) for sulphur content of ships' fuel oil is 3.5 per cent mass by mass, which is followed by India.

Ship recycling**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 has its own Ship Recycling Regulations 2015, issued by the Gujarat Maritime Board.

Jurisdiction and dispute resolution**54 Which courts exercise jurisdiction over maritime disputes?**

The High Courts of Bombay, Kolkata, Orissa, Kerala, Andhra Pradesh and Madras exercise jurisdiction over maritime disputes in India.

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 vessel or its owner, service is by warrant of arrest being effected on a vessel. In personam claims are governed by the Civil Procedure Code.

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

Yes, the Indian Council of Arbitration.

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

The Arbitration and Conciliation Act 1996 (as amended in 2015). The New York and Geneva Conventions are also applicable.

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

Yes. However, in a situation where both parties are Indian, they cannot opt out of Indian laws. Also, if the award is going to be enforced in India then the test in sections 47 and 48 of the Arbitration and Conciliation Act 1996 has to be satisfied.

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

An application to stay the proceeding and file proceedings before the appropriate courts having jurisdiction.

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 to stay the proceeding and file proceedings before the appropriate courts having jurisdiction.

Limitation periods for liability**61 What time limits apply to claims? Is it possible to extend the time limit by agreement?**

- Breach of contract – three years;
- inward cargo – three years; and
- outward cargo – one year.

Liability in tort

- Collision – three years;
- malicious prosecution – one year; and
- cargo damage – one year.

62 May courts or arbitral tribunals extend the time limits?

No.



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Miscellaneous

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 is applicable in India.

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 specific performance.

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

The enactment of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017.

Indonesia

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Newbuilding contracts

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 shall pass from the shipbuilder to the shipowner when the ship has been delivered and registered in the register of Indonesian ships and the deed of registration of the vessel is made and issued. The parties can agree to change the time when title will pass.

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

Basically, the holder of the guarantee shall issue a document stating that such guarantee shall be refunded.

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 local courts could consider compelling such delivery upon examining a lawsuit on the grounds of breach of contract or tort.

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?

Article 19 of Law No. 8 of 1999 concerning Consumer Protection provides that entrepreneurs shall be obliged to pay compensation for the damages, contamination or services suffered by the consumer as a result of consuming or using the goods, services, or both produced or traded. In this regulation 'entrepreneurs' means an Indonesian legal entity or non-legal entity that performs its activities within Indonesia.

The lawsuit could be filed against the shipbuilder on the grounds of breach of contract. A purchaser from the original shipowner will not have legal standing to claim any liability against the shipbuilder, as it only has legal ties with the original shipowner. As for a third party that has sustained damage, however, a claim would lie on the basis of tort.

Ship registration and mortgages

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?

Based on article 158 of Law No. 17 of 2008 concerning Shipping (the Shipping Act) and article 5 of Regulation of the Ministry of Transportation No. 13 of 2012 concerning Vessel Registration and Nationality (Regulation No. 13/2012), the following are the requirements for vessels to be eligible to register under the Indonesian flag:

- the vessels have been measured and have obtained the measurement certificate;
- the vessels have a minimum tonnage of 7 GT;
- the vessel is owned by an Indonesian individual or individuals or a legal entity established under Indonesian law and domiciled in the Indonesian jurisdiction; and
- the vessel is owned by an Indonesian joint venture legal entity whose majority shareholder is Indonesian.

It is possible to register vessels under construction under the Indonesian flag. Article 14 of Regulation No. 13/2012 provides that a ship under construction, whether in Indonesia or overseas, can be registered temporarily in Indonesia with the authorised ship registry office. A temporary registration certificate will be issued on the condition that the vessel construction has physically reached, at least, the completion stage of the hull, main deck and the entire superstructure.

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

The following may apply for vessel registration:

- an Indonesian citizen;
- a legal entity established under Indonesian law and domiciled in Indonesian jurisdiction; and
- an Indonesian joint venture legal entity whose majority shareholder is Indonesian.

See also question 5.

7 What are the documentary requirements for registration?

The documentary requirements for vessel registration are as follows:

- (i) evidence of title over the vessel;
- (ii) identity of the owner;
- (iii) taxpayer's registration number;
- (iv) measurement certificate; and
- (v) evidence of payment for the transfer of ownership duty, in accordance with the prevailing laws and regulations.

The evidence of title as indicated in (i) above is:

- for a new vessel constructed by a shipyard:
 - shipbuilding contract;
 - protocol of delivery and acceptance; and
 - shipbuilder's certificate;
- for a new vessel constructed by a traditional shipbuilder:
 - builder's certificate acknowledged by a local head of district; or
 - builder's certificate accompanied by a written statement issued by a local head of district explaining the title of the vessel;
- for a vessel previously registered in other jurisdiction:
 - bill of sale, signed before and attested by a notary or authorised government official of the original flag country; and
 - protocol of delivery and acceptance;
- sale and purchase agreement or deed made before a notary;
- notarial deed of grant;
- court stipulation of an inheritance;
- court order of a district court or a final and binding court judgment; or
- minutes of auction.

The evidence of the identity of the owner as indicated in point (ii) above is:

- an identity card in the case of an individual owner; or
- a deed of establishment or a deed of amendment of a company's articles of association made before a notary, showing the latest composition of directors, shareholders, or both, which has obtained approval from the Ministry of Law and Human Rights.

Registration of a vessel previously registered in other jurisdiction must be accompanied by a written statement from the original ship registry evidencing the deletion of the vessel from that registry.

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

In accordance with articles 160 and 167 of the Shipping Act, dual registration and flagging out are not allowed.

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

Based on article 60 of the Shipping Act, the person responsible for maintaining the register of mortgages is the registrar and recorder for the registration and transfer of ownership of ships at the place where the ship is registered. Subsequently, information in respect of a vessel's registration, including mortgage (or hypothec) of the vessels, shall be recorded in the Main Register of Ship Registration, which is maintained at the Directorate General of Sea Communications at the Ministry of Transportation.

Information contained in the register of mortgages includes, inter alia, the name of the vessel, the owner of the vessel, the name of the mortgagor and mortgagee, the value of mortgage, etc.

Limitation of liability

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

Under Indonesian law, the following regimes apply with regard to limitation of liability as governed under the Indonesian Commercial Code: package and tonnage limitation of liability. Claims that can be limited are cargo claims and claims on damage of vessel caused by collision. Carriers, operators, or both, as well as owners of a vessel, can limit their liability. Indonesia is not a state party to the Convention on Limitation of Liability for Maritime Claims 1976.

11 What is the procedure for establishing limitation?

Pursuant to article 316a of RV (the old Dutch Civil Procedural Law applied for Europeans, which is still used for guidance by Indonesian judges), it is necessary to provide a cash deposit to the registrar of the court. However, to the best of our knowledge, there has never been any precedent of the court applying this procedure. The law is silent on the issue on whether a shipowner or any person invoking limitation of liability can constitute the fund before any legal proceedings are initiated and before it has been required to respond to a claim that has been already commenced.

The limitation fund is calculated as stipulated in article 474 of Indonesian Commercial Code regarding tonnage liability in relation to cargo damage, which provides that if the carrier is the operator of the ship, the liability for loss or damage to the goods carried by the ship shall be limited to 50 rupiahs per cubic metre of the net tonnage of the vessel, increased, in the case of a mechanically propelled vessel, by what was deducted to determine that tonnage, from the gross tonnage for the space occupied by the means of propulsion. The original text of the provision in the Indonesian Commercial Code reads '50 guilders'; however, this is widely interpreted as 50 rupiahs.

The same calculation as described above is also applicable with regard to the application of article 541 of the Indonesian Commercial Code, which provides the tonnage limitation in the case of collision.

We are not aware of any precedent concerning the application of these terms.

A separate right to plead limitation without setting up a fund could be agreed upon by the parties concerned.

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

The limit can be broken if it is proven that: there is serious negligence on the part of the master or crew; because of an act of God or force majeure; or because of the fault of a shipper who has not properly informed the carrier of the nature of the goods.

In 2014, there was a first-level court decision that held that a carrier as a defendant could not invoke a limitation of liability clause under the Bill of Lading. Hence, based on this decision, somehow the limit had

been broken. The plaintiff acted as an insurer of a shipper whose cargo was lost when the ship was sinking. The first defendant was a carrier and the second defendant was the protection and indemnity insurer of the first defendant who insured the first defendant against third-party liability risk.

The plaintiff argued that the sinking was due to unseaworthiness of the ship and the master's failure to apply good seamanship. On the other hand, the first defendant invoked force majeure defence and limitation of liability clause under the bill of lading. The court rejected the force majeure defence by the first defendant. Further, the court held that the first defendant could not invoke limitation of liability.

However, although the court was faced with the issue of whether or not the first defendant could invoke limitation of liability, it did not consider the issue of whether there was negligence on the part of the master or crew, nor was it convinced by the defendant's force majeure defence. The court's reasoning was rather based on its view that limitation of liability was a term that was unilaterally made by the first defendant as a carrier and hence did not reflect the parties' equality. We are unaware whether this decision was appealed or not.

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

Indonesia is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Obligations of ship operators carrying passengers (or water transportation companies, as they are described in the Shipping Act) and the rights of passengers are briefly set out in the Shipping Act and some of its implementing regulations. In line with Government Regulation No. 20 of 2010, as amended by Government Regulation No. 22 of 2011 (GR No. 20 of 2010 as amended), carriers are obliged to insure their liability in relation to death or injury to passengers and delays in transportation. Further, based on article 181(5) of GR No. 20 of 2010 as amended, the limit for insurance liability arising out of delays in transportation of passengers will be based on contractual arrangements between the operators and passengers, evidenced by the terms and conditions on the tickets.

Port state control

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

The port state control agency is the harbour master. Such agency operates under the authority of the Directorate General of Sea Communications.

15 What sanctions may the port state control inspector impose?

The sanction that may be imposed by the port state control inspectors (harbour masters) is that they will not issue port clearance for vessels entering or leaving the port.

The ship can be detained with the approval or under the order of the court.

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

The appeal process against detention orders or fines is to file an objection or rebuttal to the district court that issued the orders.

Classification societies

17 Which are the approved classification societies?

The Regulation of the Ministry of Communications No. PM 7 of 2013 regarding the Obligation of Indonesian Flagged Vessels to be Classified under Classification Bureau (Decree No. 7/2013) obliges every Indonesian-flagged ship being 20 metres LBP or more, of 100 GT or more, or having a main engine of 250 HP or more, to be classified under the rule of PT Biro Klasifikasi Indonesia, an Indonesian classification society. Alternatively, such vessels may also be dually classified under foreign classification societies acknowledged by the Indonesian government. These classification societies are members of the International Association of Classification Society, comprising:

- American Bureau of Shipping;
- Bureau Veritas;
- China Classification Society;
- Croatian Register of Shipping;
- DNV GL;

- Indian Register of Shipping;
- Korean Register of Shipping;
- Lloyd's Register of Shipping;
- Nippon Kaiji Kyokai;
- Polish Register of Shipping;
- Registro Italiano Navale; and
- Russian Maritime Register of Shipping.

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

There is no regulation pertaining to the liability of a classification society.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

The state authority, in this case the Directorate General of Sea Communications, may order wreck removal under article 203 paragraph (1) of the Shipping Act, while local authorities cannot do so.

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

As regards the conventions or protocols in relation to collision, by Presidential Decree No. 50 of 1979 Indonesia ratified the Convention on the International Regulation for Preventing Collisions at Sea 1972.

For the conventions and protocols in relation to pollution, by Presidential Decision No. 18 of 1978 Indonesia has ratified the International Convention on Civil Liability for Oil Pollution Damage 1969. The protocol of 1992 to amend that Convention has also been ratified by Presidential Decision No. 52 of 1999. In addition, by Presidential Decision No. 46 of 1986, Indonesia has ratified the Marine Pollution Conventions of 1973 and 1978.

Indonesia has not yet ratified any conventions or protocols in relation to 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. Salvage operations may be carried out by companies with permits from the Directorate General of Sea Communications for such operations.

Ship arrest

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

Indonesia has not yet ratified any of the conventions regarding arrest of ships.

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 paragraphs (1) and (2) of the Shipping Act, an arrest of a vessel can only be conducted against the vessel concerned by a written order from the court based on the existence of a maritime claim. An order from the court for the arrest of vessel in respect of a maritime claim will be issued without the process of submitting a civil claim or lawsuit.

With respect to the arrest, the vessel's flag will not make a difference in respect of claims for arresting the vessel.

The Shipping Act is silent on whether associated ships can be arrested. However, the wording 'against the ships concerned' suggests that the arrest of associated ships cannot be undertaken, at least not under the framework of the Shipping Act.

Despite the above, note that, under Indonesian law, it is also possible to arrest ships based on the existence of a civil claim, by way of conservatory attachment (locally known as *sita jaminan*). A plaintiff filing a civil claim against a defendant may apply for conservatory attachment over the defendant's assets to prevent the defendant from dissipating its assets to secure the enforcement of the court decision against such

defendant. In the context of civil claim against a shipowner, a plaintiff may apply for conservatory attachment against the shipowner's assets, including all ships owned by such shipowner. If this is the case, then it is possible to attach not only the ships concerned with the maritime claim (in the framework of article 222 of the Shipping Act), but also other ships (or associated ships) owned by the shipowner's concerned.

Note, however, that the attachment of the associated ships as elaborated in the foregoing paragraph will fall under the regime of conservatory attachment, which would mean that an attachment of vessels can also be performed by an interlocutory decision in the form of an attachment order from the court during the course of a civil case. Such attachment can affect any assets of the defendant and not only the vessel.

As mentioned earlier, in line with article 222 paragraphs (1) and (2) of the Shipping Act, an arrest of a vessel can be conducted against the ships concerned by a written order from the court based on the existence of a maritime claim. Elucidation to article 223 (1) of the Shipping Act lists several types of maritime claims, among others, fees related to the use or the operation or the charter of ships as set out in charter parties. Based on these provisions, it can be interpreted as follows:

- the wording 'against the ships concerned' seems to suggest that the arrests of ships can be undertaken against such ships as long as it can be established that the maritime claim relates to such ships, irrespective of who the registered owners of such ships are; and
- assuming that the claims against the bareboat charterer or the time-charterer arise from the charter parties, these claims fall within the scope of maritime claim as set out under the Elucidation to article 223 (1) of the Shipping Act.

Against such background, it can be interpreted that a bareboat (demise) chartered vessel or a time-chartered vessel can be arrested for the claims against the bareboat charterer or the time-charterer if the claims are classified as maritime claims under the Shipping Act, among others, claims that arise out of charter parties. Nevertheless, note that since the implementing regulation on ship arrest has not been issued to date, our interpretation above cannot be confirmed in practice.

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

No. Indonesian law does not recognise the concept of maritime liens.

25 What is the test for wrongful arrest?

Wrongful arrest can be challenged in court based on error with respect to the status of ownership of the arrested ship or the legal procedure of the arrest.

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. A bunker 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. A bunker supplier has the contractual relationship with the charterer, not with the vessel owner. Since the charterer does not own the vessel, the bunker supplier cannot arrest the vessel that is owned by a third party (ie, the vessel owner).

A bunker supplier cannot arrest the vessel since the vessel is not an asset of the charterer with whom a bunker supplier has a contractual relationship.

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

Under Indonesian law, it is not necessary for the arresting party to provide security.

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?

Under Indonesian law, there are no stipulations requesting the arrested party to provide security.

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?

Since there is no specific regulation on vessel arrest, in practice a claimant must lodge an arrest application by filing a civil lawsuit (locally known as *gugatan*) against a defendant. In terms of appointment of a lawyer to file a civil lawsuit, a power of attorney (POA) granted by a client (or a claimant in this case) to a lawyer is required. Such POA must specifically mention representation of the claimant by such lawyer in the civil lawsuit concerned. The POA must be notarised and legalised by the diplomatic representative of the Republic of Indonesia in the country where it is executed.

All evidence in writing must be in their original form. Since court proceedings before an Indonesian court are conducted in Indonesian, any documents in a foreign language must be accompanied by its official Indonesian translation. This is to say that the POA should be made in Indonesian or at least in bilingual form (Indonesian and another foreign language, as necessary). All submissions of the documents to the court are conducted manually. If the vessel arrest application is granted by the court, it will issue a court order (locally known as *penetapan pengadilan*) ordering the arrest.

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

As regards the maintenance of the arrested vessel, in practice, the owner or operator of the vessel shall be responsible.

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 practice, arrest of a vessel is similar to imposing a conservatory attachment on the property of a party that has failed to fulfil its obligations.

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

Yes. The claiming party may request that the court order a conservatory attachment. A conservatory attachment is affected by means of an interlocutory decision of the court in the form of attachment order during the course of a civil case. Such attachment can affect any assets of the defendant, whether moveable or immovable. Note that to seek an order for conservatory attachment, a claim on the merits will have to be submitted beforehand.

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

No. Such orders are not recognised under Indonesian law.

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

No. Arrest or attachment over bunkers cannot be performed in Indonesia. Bunkers cannot be separated from the vessel. Thus, an arrest or attachment must be sought over the vessel.

Judicial sale of vessels

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

The plaintiff in a civil claim may apply for judicial sale of an arrested vessel.

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 a vessel is recognised as a form of execution or enforcement of a court decision and may only be performed after obtaining a final and binding decision from the court.

Following such decision from the court, the winning party should submit a petition for execution to the court. Furthermore, the court

shall issue a warning twice to the losing party to obey the court's decision. Failure to obey such warning will result in the court issuing an execution order to the court bailiff and the State Receivables and Auction Office to perform such judicial sale in the form of an auction. Prior to the auction, the Auction Office will also announce the auction twice. The whole process, in practice, will take quite a considerable time.

The court costs for the judicial sale vary depending on the stipulation issued by the head of each district court. Additionally, there are also the costs of the Auction Office, taxes and the cost for the change of ownership.

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

Pursuant to article 316 of the Indonesian Commercial Code, the following claims are prioritised against the proceeds of sale:

- costs of execution;
- debts due to the master and the crew arising under the seafarer's agreements relating to the period during which they have served aboard the ship;
- remuneration due for salvage, pilotage dues, canal and harbour dues and other shipping dues; and
- debts arising from collisions.

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

In Indonesia, the judicial sale can be deemed as an execution sale through the process of public auction conducted under court order. The legal effect would be a change of ownership over the vessel. Should the vessel be subject to encumbrances or liens, the holder of the said security rights may lodge rebuttal against the process of the judicial sale, as a vessel that is encumbered with a lien or maritime liens cannot be the subject of a judicial sale.

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

Yes, insofar as the judicial sale of the vessel is performed in accordance with the prevailing laws and regulations in that jurisdiction.

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

Yes. By Presidential Decree No. 44 of 2005, Indonesia has ratified the International Convention on Maritime Liens and Mortgages 1993. However, at the time of writing, the implementing regulation of the Presidential Decree is not yet available.

Carriage of goods by sea and bills of lading

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 Hague-Visby Rules have not been ratified by Indonesia, but in practice the parties may refer to any of the provisions of those rules in the bill of lading.

The Hamburg Rules have been ratified by Indonesia, but in practice they are not implemented.

As to the Rotterdam Rules, up to this point there has not been any proposal from Indonesia to ratify, accept, approve or accede to the rules.

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 relation to multimodal transport, there are Government Regulations No. 8 of 2011 concerning Multimodal Transport and Regulation of the Ministry of Transportation No. 8 of 2013 concerning Implementation and Commercial Operation of Multimodal Transport. Nevertheless, these regulations do not specifically address 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.

Indonesia is also a signatory to the ASEAN Framework Agreement on Multimodal Transport, 17 November 2005.

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

The shipper, consignee or notified party has title to sue on a bill of lading.

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?

Any relevant terms in the charter party can be included in the bill of lading. A jurisdiction or arbitration clause in a bill of lading would be binding on a third-party holder or endorsee of such bill of lading.

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

Such clauses are unknown in Indonesian shipping practice and are therefore not applicable.

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 unless there is provision in the contract relating to the shipowner. The defence that the shipowner can raise is that it has no legal relationship at all, since it is not a party to the contract of carriage. However, the shipowner can rely on the terms of the bill of lading to defend itself, even though it is not a contractual carrier, as long as the rights and obligations of the shipowner are also stipulated therein. Alternatively, the shipowner may also use the terms of the bill to point out that they have no obligations whatsoever with regard to the contract of carriage.

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 content of the contract.

48 What liens can be exercised?

Based on article 316 of the Indonesian Commercial Code, the following are the privileged rights (comparable to liens):

- costs of execution;
- debts due to the master and the crew arising under the seafarer's agreements relating to the period during which they have served aboard the ship;
- remuneration due for salvage, pilotage dues, canal and harbour dues and other shipping dues; and
- debts arising from collisions.

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 production of the bill of lading may take place against certain guarantees provided by the consignee.

By the parties' agreement, carriers are not prohibited from limiting the liability of the carrier.

50 What are the responsibilities and liabilities of the shipper?

Based on articles 468, 504, 517p, 519u, 520i and 520j of the Indonesian Commercial Code, the shipper shall be liable for damages and late delivery of the goods or cargo occurring due to its own fault. Accordingly, the shipper is obliged to provide goods or cargo in good condition and on time, as well as proper information relating to the nature of the goods or cargo. Furthermore, the shipper shall be liable to pay damages resulting from the shipper's request to discharge and rearrange the goods or cargo at his or her own initiative.

Shipping emissions

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

There is no emission control area in force in Indonesia.

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?

There are no regulations capping the sulphur content of fuel oil used in Indonesian territorial waters.

Ship recycling

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

Indonesia is not a party to Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships. A few general provisions pertaining to ship recycling are scattered under domestic legislation, such as the Shipping Act. Note that the term 'ship scrapping' instead of 'ship recycling' is used in Indonesian domestic regulations.

The Elucidation to article 241 of the Shipping Act defines 'ship scrapping' as the activities of cutting and destroying ships that are no longer used in a safe and environmentally sound manner. In line with article 241 paragraph 1 of the Shipping Act, ship scrapping must be done in compliance with the requirements on marine environment protection.

There are several private recycling facilities that are run traditionally in Indonesia.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

Any district court (the court of first instance) exercises jurisdiction over maritime disputes in Indonesia. The relevant court should be the court in the domicile of the defendants or the location of the vessel.

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

The rules that govern service of court proceedings are contained in the Indonesian Civil Procedural Laws (HIR, RBG and RV). Service of court proceedings must be performed by a court bailiff from the district court having jurisdiction over the domicile of the defendant.

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

The domestic arbitral institution is called the BANI Arbitration Centre, whose head office is located in Jakarta. Branch offices are located in Batam, Bandung, Denpasar, Medan, Surabaya, Palembang and Pontianak. The BANI Arbitration Centre has arbitrators who are expert in maritime law and business.

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

A foreign judgment cannot be enforced in Indonesia. Foreign judgments must be relitigated and the previous judgment shall be treated as evidence in the new case filed in Indonesia.

Recognition and enforcement of arbitration awards is governed by Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution (Indonesian Arbitration Act), which refers to the rules of the 1958 New York Convention with respect to international arbitration awards.

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

Assuming that asymmetric jurisdiction clauses typically require one party to an agreement to sue in the courts of a specified jurisdiction, while allowing the other party to sue in any court with jurisdiction, note that Indonesian law is silent on this issue. Nevertheless, the general principle is that parties have the autonomy or freedom to choose to

refer their dispute to a particular forum for dispute resolution, including any court.

Further, assuming that what is meant by asymmetric arbitration agreements are clauses which allow one party (typically the claimant) to choose whether to sue in the courts of a specified jurisdiction or to refer the disputes to particular arbitration, note that the Indonesian Arbitration Act is also silent on this issue. However, the general principle is that the court shall decline jurisdiction over the disputes of the parties that have been bound by an arbitration agreement.

To date, we are not aware of any court decisions dealing with the issues of asymmetric jurisdiction and arbitration agreements.

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

A defendant could submit an objection or demurrer challenging jurisdiction in their submission.

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 file an objection or demurrer regarding the competency of the forum, as stipulated in the relevant contract in their submission.

Limitation periods for liability

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

In general, as regards time limits for breach of contract and tort, article 1967 of the Indonesian Civil Code imposes a 30-year time limit.

However, the Indonesian Civil Code and Commercial Code also stipulate the time limits for particular claims, including those related to maritime claims. Such time limits could be extended or reduced by agreement of both parties.

62 May courts or arbitral tribunals extend the time limits?

In practice, the courts or arbitral tribunals have full discretion on this. Therefore, they may extend the time limits.

Miscellaneous

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

Indonesia has not yet ratified the Maritime Labour Convention and therefore it is not applicable in this jurisdiction.

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 conditions will not prevent parties from seeking the strict enforcement of their legal rights and liabilities under a shipping contract against another party. Should economic conditions impede the performance of a shipping contract, parties should attempt an amicable negotiation.

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

One of the key provisions of the Shipping Act, which was passed in April 2008, are the cabotage rules, which limit domestic carriage (coastal or inter-island trade) to Indonesian national flag-carrying vessels. In addition, the vessels are required to be crewed by Indonesian citizens. The Cabotage Law was effectively implemented on 7 May 2011.

To implement the Cabotage Law, the Ministry of Transportation has issued the implementing regulation concerning the restriction of the operation of foreign vessels in Indonesia, which is amended by Ministry of Transportation Regulation No. 100/2016. Pursuant to Ministry of Transportation Regulation No. 100/2016, under certain restrictions and requirements, foreign vessels can only be operated in Indonesia for the following activities:

- oil and gas exploration;
- offshore drilling;
- offshore construction;
- offshore support activity;
- dredging works; and
- salvage and underwater works.



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Newbuilding contracts

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 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).

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.

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 or seizure, or both.

In order 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 up to the applicant to request provisional enforceability and present arguments concerning the prejudice that a delay would cause.

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.

Ship registration and mortgages

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 title in construction.

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.

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.

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 (see question 5), 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.

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.

Limitation of liability

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

According to article 7 of the Code of Navigation, shipowners' liability is ruled by the law of the ship's flag. Therefore, the limitation regime in respect of claims arising from the operation of the vessel to be applied by the Italian courts depends on the national law or international conventions ratified by the country of the ship's flag.

Italy has not ratified the Convention on Limitation of Liability for Maritime Claims (LLMC).

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 of more than 300 GT, limits of liability identical to those provided for under Chapter II of the LLMC Convention, as amended by the protocol of 1996. The decree was not amended in order to enact in Italy the new limits that took effect from June 2015.

The decree has given rise to a number of 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; and
- the absence of any provisions regarding cases where a shipowner may lose title to the limitation.

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.

11 What is the procedure for establishing limitation?

Pursuant to the rules of the Code of Navigation, a shipowner who intends to avail him 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.

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.

As of May 2018, there is no case law in Italy on limitation being broken.

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 (IMO) guidelines for implementation of the Athens Convention).

Port state control

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 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.

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.

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.

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.

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 decision has been overruled by the Court of Appeal of Genoa (though for reasons related to the merits of the case and not to 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.

Collision, salvage, wreck removal and pollution

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.

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 arrest has been effected of the defendant ship or of any other ship belonging to the defendant that can be lawfully arrested, or where 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 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.

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 also 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 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 in force in 2015.

Finally, it must be noted that 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 but is not yet applicable.

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.

Ship arrest

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.

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 with 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 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. The trend of the Italian courts is more favourable to claimants, and arrests are usually granted even in the absence of a lien on the vessel.

However, 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.

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.

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.

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 the debtor is a person other than 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. The trend of the Italian courts is more favourable to claimants and arrest are often granted even in the absence of a lien on the vessel.

However, according to some recent precedents of the Italian courts, article 3.4 of the Brussels Convention authorises the arrest of the supplied vessel only when the debtor (other than the shipowner) has control over the vessel, like the charterer, but in no other cases.

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 in case the arrest is eventually found to be wrongful.

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 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 case the owner can apply to the court, giving evidence of the value of the ship, to reduce the amount of the arrest.

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 order 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 him or herself.

Translation may be required from time to time by the judge.

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 case of emergency a scanned copy might be accepted upon condition of filing the original 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 from 8am to 1pm).

This does not take into consideration that drafting and preparing an arrest application will generally require at least a couple of days.

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.

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.

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.

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.

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.

Judicial sale of vessels

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.

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. In order to do so, the creditor must be in possession of 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 in order 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 by means of 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.

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.

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.

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, in order to obtain deletion from the registry.

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

Italy is party to the 1926 Convention on Maritime Liens and Mortgages, but not the 1993 Convention.

Carriage of goods by sea and bills of lading

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.

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).

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.

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... in..., including the arbitration or jurisdiction clause apply.'

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

Certain judgments of Italian courts have stated that 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 are recent.

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?

According to articles 2043 to 2049 of the Civil Code and article 274 of the Code of Navigation, shipowners could be held responsible in tort if they are not the contractual carrier.

A judgment of the Supreme Court also stated that shipowners could only be held liable under contract. In such a case, the court stated that the concept of 'transporteur' in the 1924 Brussels Convention also includes the ship (ie, shipowners who are not contractual carriers). Therefore, according to this decision, the Convention also applies to shipowners who are not contractual carriers.

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.

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 in order 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.

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;
- for duties of anchorage, lighthouse, port and other duties and taxes of the same type;
- for pilotage, custody and maintenance of the ship after arrival in the last port;
- for 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 general average;
- credits arising from the contract of carriage, including discharging expenses and storage costs; and
- for the master's obligations on the cargo in the case that he or she needs to collect money for the prosecution of the voyage.

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.

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.

Shipping emissions

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.

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?

Italy is implementing 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 3.5 per cent from 18 June 2014, and 0.5 per cent from 20 January 2020.

Enforcement of the regulatory requirements relating to low-sulphur fuel follows Legislative Decree No. 202/2007, which provides sanctions for the violation of the MARPOL Convention, according to which the master, crew and shipowner will be punished with a fine of between €10,000 and €80,000 and imprisonment for between six months and three years.

Ship recycling

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 but applies only from 31 December 2018. The updated European list of ship recycling facilities was issued in May 2018 and does not yet include Italian facilities.

The main ship recycling facility in Italy is San Giorgio del Porto (SGdP), which 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.

Jurisdiction and dispute resolution

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 recently 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. By a recent judgment the Court of Cassation also affirmed the validity of a jurisdiction clause included in a multimodal document of transport.

In the event that proceedings are commenced before an Italian court with no jurisdiction, this must be challenged by the defendants in their first pleadings.

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 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, Regulation No. 1393/2007 applies.

Update and trends

On 13 February 2018, Legislative Decree No. 229 of 2017, updating the Italian Recreational Craft Code (Codice della Nautica da Diporto) entered into force.

The decree aims to simplify the administrative procedures involving recreational craft and to promote more competitiveness, aligning national legislation with other European countries.

In particular, the decree introduces specific provisions related to commercial yachts and historical yachts, also establishing updated procedure for registration and cancellation of vessels from the public registry.

One of the most important changes is the abolition of any reference to paper records in view of the adoption of the Central Online Archive of Recreational Craft for the registration and ownership of recreational craft, and the Leisure Boaters' Online Desk for all administrative formalities, such as the issue and update of the navigation licence, the safety certificate, the new temporary licence, the certificate of charter suitability and the authorisation for temporary

navigation. Furthermore, registration and cancellation of the bareboat charter in the public registry can now be requested alternatively by the owner or the charterer.

The decree also introduced of the 'shipowner's declaration', to be made by those who undertake pleasure craft operation, with the provision of a limit of liability of the owner of pleasure craft of less than 300 tonnes for 'the obligations contracted at the time and for the needs of the voyage and for the obligations arising from facts or actions made during the same trip' (with the exception of those arising from wilful misconduct or gross negligence) equal to the value of the vessel and the amount of the charters and other proceeds of the voyage.

Last, the reform established a system of preventive checks that, following a favourable assessment by the public authority of the correctness of the on-board documentation, safety equipment and qualifications of the captain of the pleasure craft, will avoid, during the summer season, the reiteration of such checks (issue of a 'blue sticker').

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 articles 806 et seq of the Italian Code of Civil Procedure and it can be 'ritual' (*arbitrato rituale*) or 'informal' (*arbitrato irrituale*). 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.

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 EC Regulation 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 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 are very similar to those described above.

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

The Italian Supreme Court held in Judgments No. 9314/2008 and No. 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.

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.

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?

See question 58.

Limitation periods for liability

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.

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.

Miscellaneous**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.

However, the regulations of the convention must be implemented with some amendments to national legislation, which are currently being examined by Parliament.

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.

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

No.

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Newbuilding contracts

- 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 such 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.

- 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. 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 obligation, the bank or the surety can be entitled to request the buyer to claim against the shipbuilder and attach the shipbuilder's assets first, if they exist (Civil Code, articles 452 and 453).

- 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 refuses 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.

- 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 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.

Ship registration and mortgages

- 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).

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

Article 1 of the Ship Law provides that owners of Japanese ships, as detailed in question 5, may apply to register a ship.

- 7 What are the documentary requirements for registration?**

For registration, applicants must present the ship's certificate of tonnage and certificate of shipbuilding.

- 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 (the Ship Law, article 14).

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

The registry office maintains the register of mortgages. The mortgage registration contains:

- 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;
- the name and the address of the debtor;
- the credit amount; and
- the interest rate or penalty, if any.

Limitation of liability

- 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 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, a passenger's claims in respect of loss of life or personal injury shall be excepted from the limitation process.

Shipowners and salvors may limit their liability. 'Shipowner' means the owner or charterer, including a bareboat charterer. A non-vessel operating common carrier shall not limit its liability in the limitation proceedings.

11 What is the procedure for establishing limitation?

Shipowners or salvors 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 (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 prima facie prove that the total claim may exceed the limitation amount.

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 knowledge that such loss would probably result (LLS, article 3, paragraph 3).

There was no precedent case in which the limitation was broken.

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 or luggage claims provided in any law or regulation 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 Athens Convention.

Port state control

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.

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.

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.

Classification societies

17 Which are the approved classification societies?

- Nippon Kaiji Kyokai;
- Lloyd's Register;
- Det Norske Veritas; and
- American Bureau of Shipping.

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.

Collision, salvage, wreck removal and pollution

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 pollution to 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).

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

Japan ratified the Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels 1910, and the International Convention on Civil Liability for Oil Pollution Damage but has not ratified the Nairobi International Convention on the Removal of Wrecks 2007 or the International Convention of Salvage 1989.

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 quite popular in Japan. Nippon Salvage Co Ltd and Fukada Salvage & Marine Works Co Ltd are popular salvage companies in Japan.

Ship arrest

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.

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 (see question 48). The claim against a bareboat charterer may have the lien over the ship. Japan will amend the Commercial Code. Under the amended Commercial Code, the claim against the time charterer may have the lien over the ship.

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:

- (i) expenses relating to the sale of the ship and its appurtenances by court auction and the expenses of preservation after commencement of the proceedings for the sale by court auction;
- (ii) expenses of preservation of the ship and its appurtenances at the last port;
- (iii) all public dues levied on the ship in respect of the voyage;
- (iv) pilotage dues and towage dues;
- (v) salvage remuneration and the ship's contribution to general average;
- (vi) claims that have arisen from the necessity for the continuance of the voyage;
- (vii) claims of the master and other mariners that have arisen from the employment contract;
- (viii) claims that have arisen from the sale or construction and the equipment of the ship, if the ship has not made any voyage after her sale or construction; and
- (ix) claims in respect of the equipment and food and fuel of the ship for her most recent voyage.

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 (iv) to (vi) above, a claim arising later shall take precedence over an earlier one (Commercial Code, article 844).

The claims subject to the limitation of liability of shipowners shall have the lien over the ship (LLS, article 95 (see question 10)). The priority of claims as preferential right shall be below item (viii) above. Therefore, a cargo claim or collision claim shall have the lien over the ship.

If the bill of lading is issued by the charterer who chartered the ship directly from the shipowner, the claimants are entitled to exercise the lien over the ship (Japan's International Carriage of Goods by Sea Act (JCOGSA), article 19). The priority rank is the same as the claims subject to the limitation of liability of shipowner.

The lien shall be valid for one year from when the claim has arisen (Commercial Code, article 847). No extension is allowed. The claimants should arrest the ship within one year. The lien of (viii) of the above shall be extinguished by the departure of the ship.

A maritime lien has priority over the ship's mortgage (Commercial Code, article 849).

25 What is the test for wrongful arrest?

If the claimant is negligent, the claimant shall be liable in tort for the owner's loss.

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 or the bareboat charterers but not with the time charterer or the voyage charterer.

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.

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 security amount is about one-fifth to one-third of the claim amount but the ship's value will be taken into account. The security amount shall not exceed the value of the ship. The security amount will not be changed subsequently.

In the case of a lien, no security is required.

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 and registered so by the company registrar. 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 the urgent case, 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 usually four to five days will be required for safety reasons. However, this all depends on the case merit and the available evidence.

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 insurance premium is paid by the arresting party.

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.

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.

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.

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 control of the owner.

Judicial sale of vessels

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 against the shipowners in favour of the claimants.

- 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 be concluded, but may be prolonged 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.

- 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. Next, claims without any priority shall be eligible. The order among the maritime liens is explained in question 48.

- 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).

- 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.

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

No, Japan is not a signatory of the convention.

Carriage of goods by sea and bills of lading

- 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 JCOGSA is basically the same as the Hague-Visby Rules.

The JCOGSA shall apply to sea carriage from port to port but a special clause beneficial to the carrier may be valid before loading or after discharge.

Japan has not yet decided to ratify the Rotterdam Rules.

- 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. Limitation set out in 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 19 SDR per kilogram. The time limit is two years.

- 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.

- 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, such jurisdiction or arbitration agreement shall be considered valid as long as the place or the country is clearly identified in the bill of lading.

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

The Supreme Court of Japan held on 27 March 1998 that the demise clause shall be 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.

- 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).

- 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 knowledge that damage would probably result (JCOGSA, article 13-2).

- 48 What liens can be exercised?**

The Commercial Code, article 753, provides the master may exercise lien over the cargo, if the freight, extra charge, disbursement, port charge, general average contribution or salvage charge is not paid.

- 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 the cargo caused by the delivery without the bill of lading. However, the carriers shall be entitled to rely on the package or weight limitation unless it is proved that loss or damage resulted from an act or omission of the carrier done with intent

to cause damage or recklessly and with knowledge that cargo loss or damage would probably result.

The carrier shall be entitled to rely on the one-year time limit.

50 What are the responsibilities and liabilities of the shipper?

The shipper shall declare the dangerous cargo to the carrier. 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).

Shipping emissions

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

No ECA exists in Japan.

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 cap on sulphur content is applicable. No sanction is available for non-compliance.

Ship recycling

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. A 'scrap and build' policy applies to domestic ships in Japan.

Jurisdiction and dispute resolution

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); and
- 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).

The court where the ship is salvaged or first arrives after the salvage has the jurisdiction over the salvage claim.

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).

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).

Update and trends

The Commercial Code (Transport and Maritime Law) has been amended. The new Commercial Code is expected to be in effect within the next year.

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 (CPL, 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.

In order 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.

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. They may be considered invalid if they are regarded to be against public policy.

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 a Japanese jurisdiction clause, a Japanese court or Japanese law does not have any remedies for the defendant. Anti-suit injunctions do not exist in Japan.

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 argue the jurisdiction and to request the court to dismiss the proceedings. Proceedings shall be dismissed, not stayed, if the exclusive jurisdiction clause is considered valid.

Limitation periods for liability

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

Type of claim	Time limit
Breach of commercial contract	Five years (Commercial Code, article 522)
Liability in tort	Three years (Civil Code, article 724)
Shipowner's claim against charterer, shipper or consignee	One year (Commercial Code, article 765)
Claim based on bill of lading	One year (JCOGSA, article 14)
Claim based on collision	One year (Commercial Code, article 798) Will be amended to two years under new Commercial Code
Claim based on collision (Convention applicable)	Two years (Collision Convention, article 7)
Insurance claim based on policy	Three years (Insurance Law, article 95)

It is possible to extend the Hague-Visby time limit (JCOGSA, article 14, paragraph 2).

The agreement of the extension of the time limit shall not be allowed in Japan, but it is possible to waive the benefit of elapsed time.

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.

Miscellaneous

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.

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.

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.

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Newbuilding contracts

- 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).

- 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 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.

- 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.

- 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).

On the other hand, 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.

Ship registration and mortgages

- 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).

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

As explained in question 5, owners of Korean ships may apply to register a ship under the Korean flag.

- 7 What are the documentary requirements for registration?**

In order 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).

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

Dual registration is not possible, but flagging out is possible.

- 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.

Limitation of liability

- 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 KCA adopted most provisions in the 1976 LLMC. There is also the Korean Act on the Procedure for Limitation of Liability of the Shipowners, etc, which provides 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, which have occurred in direct connection with the operation of the ship; and
- claims in respect of measures taken in order 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.

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 (P&I) 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.

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 knowledge that such loss would probably result.

The limitation has not been broken in Korea. On the other hand, 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 (see question 49).

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 as follows.

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 tonnes;
- 167,000 SDR for a ship with a tonnage not below 300 tonnes but not exceeding 500 tonnes;
- for a ship with a tonnage in excess of 500 tonnes, 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.

Port state control

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.

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.

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 departure of a vessel until the vessel's deficiencies have been rectified.

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.

Classification societies

17 Which are the approved classification societies?

The Korean Register of Shipping (KR) is the approved classification society.

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.

Collision, salvage, wreck removal and pollution

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 navigation of a vessel or where there is such a risk of obstruction (article 26 of the Korean Public Order in Open Ports Act).

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 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.

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.

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

Korea has ratified neither the International Convention Relating to the Arrest of Sea-Going Ships 1952, nor the International Convention on the Arrest of Ships 1999.

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 (or prejudgment attachment) and the second is the maritime lien arrest.

Provisional arrest (or prejudgment attachment) 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 prejudgment attachment, 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.

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. For a vessel flying the Korean flag, see question 47 setting out the list of claims giving rise to maritime liens.

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.

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

See question 23 for more detail.

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.

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 effect 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.

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

See question 23.

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 P&I 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.

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 (CoI) 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 CoI is needed when receiving a refund of the counter-security from the court.

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.

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.

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.

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

Upon the claimant's application, an order for delivery up or preservation of evidence or property and an order for production of documents can be issued by the court.

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.

Judicial sale of vessels**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 (as explained in question 23 above) or mortgage over the ship or the final and conclusive judgment against the shipowners in favour of the claimant.

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 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.

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.

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.

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.

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.

Carriage of goods by sea and bills of lading

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 KCA.

The carriage of goods by sea begins from 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.

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. On the other hand, 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.

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

A holder of the original bill of lading has title to sue on a bill of lading.

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.

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 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 right bottom 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).

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.

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 existence of a liberty clause.

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).

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 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 itself (representative director or managerial level officers in case of a corporation) done with intent to cause damage or recklessly with knowledge that cargo loss or damage would probably result.

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 receives the cargo.

Shipping emissions

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.

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 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).

Ship recycling

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 tonnes 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.

Jurisdiction and dispute resolution

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.

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.

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

The Korean Commercial Arbitration Board and the Seoul International Dispute Resolution Centre (established in 2013) have a panel of maritime arbitrators specialising in maritime arbitration.

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.

In order 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.

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 decided case 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.

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 injunction does 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.

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.

Limitation periods for liability

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 KCA), extendable by parties' agreement;
- claim under the charter party: two years (articles 840, 846 and 851 of the KCA), extendable by parties' agreement; and

- claim for collision: two years (article 881 of the KCA), extendable by the parties' agreement.

62 May courts or arbitral tribunals extend the time limits?

No, neither courts nor arbitral tribunals can extend the time limits.

Miscellaneous

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.

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.

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

No.



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Latvia

Gints Vilgerts

Vilgerts

Newbuilding contracts

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 article 28(1) of the Maritime Code of Latvia (in force from 1 August 2003) a ship under construction shall be deleted from the Ship Register on the basis of a submission of the builder or acquirer. In order to re-register a ship that has been registered as a ship under construction in another Ship Register Book, it must be operational and meet the requirements of the Maritime Code.

The parties may agree to change that, but would not normally be binding towards third parties and the acquirer would only have the rights of an owner when the ship has been registered in the Ship Register.

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

The Maritime Code does not explicitly provide the formalities that concern the refund of a guarantee, but nevertheless, the guarantee can be issued in accordance with the general rules of the Civil Law and the Commercial Law that concern legal transactions as such.

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

A party may submit a claim to the court of a general jurisdiction to adjudge and declare the delivery of the vessel and also a claim for the compensation of damages if a party has incurred damages due to unlawful refusal to perform contractual obligations. Additional contractual remedies may be available.

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 may be based on an agreement, but also in certain cases the provisions of the Law on the Safety of Goods and Services or other legal acts may be applicable. Normally such claim may be brought within the contractual relationships between parties.

Ship registration and mortgages

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 8 of the Maritime Code ships shall be registered in the Ship Register:

- cargo ships, passenger ships, pleasure ships (ships carrying fewer than 12 passengers), special-purpose ships (barges, cable-laying vessels, dredgers, floating cranes, icebreakers, tugs, pilot ships, rescue ships, research ships, support vessels and training ships, etc) and state service ships (eg, accident prevention, border patrol, environmental protection, etc);
- ships under construction;
- recreational craft: sailing yachts with the maximum length over 2.5 metres, motor yachts with the maximum length 12 metres or more,

as well as motor yachts with the length less than 12 metres, if they are used for commercial activities; and

- fishing vessels and fishing boards, which are used in industrial fishing in territorial waters and exclusive economic zone waters.

Also covered in the Road Traffic Safety Directorate Register are:

- floating craft with maximum length less than 12 metres, except those used for economic activity at sea and in ports;
- the following recreational craft: craft intended for water sports and pleasure (also jet skis), the maximum length of which is less than 12 metres, except for yachts.

In accordance with article 27(1) of the Maritime Code a ship under construction may be registered in the Ship Register on the basis of the shipbuilding contract. Registration of a ship under construction in the Ship Register shall protect the rights of the acquirer from the time of commencement of building of the ship. A notification by a shipbuilder of a decision to build a ship on his or her own account within the meaning of this section shall be considered as equivalent to a shipbuilding contract for the funds of the acquirer.

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

The Maritime Code does not explicitly limit the registration of a ship to nationality or the place of incorporation. A person must have a general legal capacity to act and assume rights and obligations. In this manner, general rules of Civil Law and Commercial Law governing legal capacity of persons are applicable.

7 What are the documentary requirements for registration?

Article 11 of the Maritime Code provides the procedure for registering a ship in the Ship Register and for issuing ship certificates. Consequently, the aforementioned article provides that a ship shall be registered in the Ship Register on the basis of:

- documents, which are the basis for acquiring the ownership rights of the ship (eg, contract for the sale of a vessel);
- a bareboat charter agreement; and
- a statement issued by a state institution, which certifies that the ship is in the balance sheet of a relevant state authority.

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

Latvian law does not explicitly permit dual registration and flagging.

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

Ship mortgages are registered in the Ship Registry that is maintained by the Maritime Administration of Latvia. The mentioned registry contains information on all encumbrances of ships registered regarding them.

Limitation of liability

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

Latvia is a party to the Convention on Limitation of Liability for Maritime Claims 1976. Latvian law contains the same limitation

regime, categories of claims and parties who can limit their liability as provided in this convention, its protocol of 1996 and amendments to the protocol of 1996.

11 What is the procedure for establishing limitation?

A person shall submit the application to the court for establishing a fund as provided in the Convention on Limitation of Liability for Maritime Claims 1976. A fund may be constituted both by depositing the sum or by producing a guarantee. The decision on establishment of a fund, its size and security to be provided is made by the court.

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

Latvian Law provides the same conduct barring limitation as in article 4 of the Convention on Limitation of Liability for Maritime Claims 1976. To our best knowledge no court practice is available.

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

Article 240(1) of the Maritime Code provides that a carrier is liable for loss which has arisen due to the loss of life of a passenger or harm caused to his or her health, as well as for loss occasioned to a passenger in relation to the loss or damage of his or her luggage if the accident which has caused loss occurred during the carriage and the loss has been caused due to the fault of the carrier, his or her employees or representatives in the performance of their work duties.

A carrier may be released from liability fully, if the carrier proves that the loss of life of a passenger or harm caused to his or her health, or loss to his or her luggage was caused due to the fault of the passenger, or partly, if these were facilitated by the fault of the passenger.

The liability of a carrier for harm caused to the health of a passenger shall be determined in accordance with the provisions of the Maritime Code. The liability of a carrier for lost or damaged passenger luggage shall not exceed:

- 2,250 units of account for loss in connection with cabin luggage;
- 12,700 units of account for a vehicle, including the whole luggage located in or on the vehicle;
- 3,375 units of account for loss in connection with such luggage which is not referred to in the above-mentioned points.

The amounts referred to above shall be applied to each voyage. The liability of a carrier may also be applied to interest and legal expenses. The carrier and passengers may agree in writing regarding higher limitations of liability.

Port state control

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

The state port control agency in Latvia is the Maritime Administration, which operates under the control of the Ministry of Transportation of Latvia.

15 What sanctions may the port state control inspector impose?

The Maritime Administration can impose fines or other administrative penalties provided with the Latvian Administrative Violations (in force from 1 July 1985).

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

The parties on whom the Maritime Administration has imposed a fine or other administrative penalty can submit a complaint to the Ministry of Transportation of Latvia and afterwards, if the decision is not in favour of the applicant, appeal it to the court of general jurisdiction. The decision of the first instance court may be appealed once again to the Court of Appeals.

Classification societies

17 Which are the approved classification societies?

- American Bureau of Shipping;
- DNV GL AS (DNV-GL);
- Bureau Veritas;

- Korean Register;
- Lloyd's Register Group Limited;
- RINA Services SpA; and
- Russian Maritime Register of Shipping.

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

A classification may be held liable for breaches of obligations according to the general rules of the Civil Law insofar as the society has legal capacity to act and assume rights and obligations. Maritime Administration and Marine Safety Law Classification societies (recognised organisations) may limit the maximum amount, which they pay out to the Maritime Administration of Latvia in accordance with a court or arbitration court decision that has come into effect, but this amount may not be less than:

- €4 million in claims, which are associated with injuries to persons or death; and
- €2 million in claims, which are associated with the loss of property or damage done thereof.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

The State Coast Guard under article 7 of the Maritime Administration and Marine Safety Law, in conformity with its competence, shall control compliance with laws and regulations and norms of international law, which determine the procedures for using Latvian waters. For this purpose, the Coast Guard shall eliminate the consequences of ship accidents and disasters, consequences of the spillage of oil, dangerous and hazardous substances into the sea and coordinate the work related to the elimination of such consequences in Latvian waters in compliance with the National Contingency Plan in respect of cases of pollution by oil, dangerous or harmful substances in the sea approved by the ministry and the emergency action plans.

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

Latvia is a party to the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910, which entered into force in Latvia on 4 April 2002. Latvia is not yet a party to the Nairobi Convention of 2007. Latvia has ratified the International Convention on Civil Liability for Oil Pollution Damage. Latvia is a party to the International Convention on Salvage of 1989.

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?

Not applicable. In practice, English law and practice are followed.

Ship arrest

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

Latvia has been a party to the International Convention on the Arrest of Ships of 1999 since 7 December 2001.

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 a parties' legal interest is infringed, for instance, a person has suffered damages or the other party has not fulfilled its contractual obligations in relation to a marine claim of which object is the ship in question, the party who has suffered from the wrongful act may request the court to decide upon vessel arrest as an injunctive measure under the Civil Procedure Law (in force from 1 March 1999). The claim has to be of a pecuniary nature. Such a measure can be applied when there are reasonable grounds to conclude the enforcement of the final judgment of the court could become impossible or difficult.

Under article 48 of the Maritime Code, a maritime claim is a claim, which is brought in relation to:

- loss or damage caused by the operation of the ship;
- loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- damage or threat of damage caused by the ship to the environment (including coastline) or related interests; such reasonable and justified measures taken to minimise or prevent such damage; compensation for such damage; costs of such measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, loss or costs of a similar nature to those identified in this clause;
- costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
- any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;
- any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
- loss of or damage to or in connection with goods (including luggage) carried on board the ship;
- general average;
- towage;
- pilotage;
- goods, materials, provisions, bunkers; equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
- construction, repair, reconstruction, converting or equipping of the ship;
- dues and charges for the use of port, canal, dock and other waterways;
- remunerations and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
- disbursements incurred on behalf of the ship or its owners;
- insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
- any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
- any dispute as to ownership or possession of the ship;
- any dispute between co-owners of the ship as to the employment or earnings of the ship;
- a mortgage or a charge of the same nature on the ship; and
- any dispute arising out of a contract for the sale of the ship.

If the claim is brought against a bareboat charterer, the bareboat (demise) chartered vessel may be arrested if the claim is a maritime claim under article 48 of the Maritime Code and the respective bareboat charterer is still the bareboat charterer (or owner) at the time of the arrest, or the claim is secured by maritime lien. However, the time-chartered vessel may be arrested only if the claim is brought against a time-charterer as an operator of the vessel and the claim is secured by maritime lien.

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

The concept of maritime liens is recognised in Latvia. Under article 33(1) of the Maritime Code maritime liens secure the following claims against the owner of the vessel, bareboat charterer or operator of 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 of 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.

The aforementioned article 33 of the Maritime Code reflects article 4 of the International Convention on Maritime Liens and Mortgages (1993) with the exceptions provided therein.

25 What is the test for wrongful arrest?

Arrest as such is wrongful if the court decides that the claimant's claim is unfounded or the vessel in question does not belong to the respondent or there are grounds according to article 143 of the Civil Procedure Law to claim damages in cases an injunctive relief has been applied. The respondent may also claim compensation for damages that he or she has suffered due to the wrongful ship arrest if the claim following an injunction has not been brought at all, the claimant has no rights of claim, or the claimant waives the claim.

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 article 48(1)(12) of the Maritime Code, such a claim may be deemed a maritime claim under Latvian law. This means that the court may rule that the respective vessel may be arrested according to article 50(1)(2) if the contract is concluded with the bareboat charterer, who is liable for the claim and who is the bareboat charterer (or the owner) of the respective vessel at the time of arrest.

Under article 50(2) of the Maritime Code any other ship or ships may also be arrested that at the time of arrest are owned by such persons as are liable regarding a maritime claim and who at the time the claim arose were:

- the owner of the ship in relation to which the maritime claim arose; and
- the bareboat, time or voyage charterer of such ship.

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

Under article 140(2) of the Civil Procedure Law in satisfying and application for an injunction (eg, ship arrest), a court or judge may require the claimant to secure losses which the respondent may suffer because of the claim enforcement, by assigning a certain sum of money to be deposited into the bailiff's deposit account. Under article 51(2) of the Maritime Code if the parties cannot agree on the injunctive measure or amount, then the court applies the measure, not exceeding the arrested ship's value.

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 security is applied in order to preclude suffering of damages for the respondent. The respondent submits an application for security in the amount of the alleged damages which may incur due to the injunctive measure, based on supporting evidence. Under article 51(2) of the Maritime Code if the parties cannot agree on the injunctive measure or amount then the court applies the measure, not exceeding the arrested ship's value.

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?

General rules on representation of natural and legal persons in the court apply. Natural persons are to be represented on basis of a notarised power of attorney. The representation of legal person does not require notarisation of the power of attorney, but does require the original of the power of attorney if the claimant is within the EU. Outside the EU it may require an apostille attached to the power of attorney.

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

Under general rules of the Maritime Law the owner of the vessel under arrest is still responsible for the maintenance of the vessel, regardless of the fact that the injunctive measure has been applied. The obligation does not cease to exist as long as the party is the owner who has registered his ownership rights within the Ship Register. In practice, the court bailiff and the master of the port require the operator to maintain the arrested ship and this obligation of duty and care is subject to civil liability.

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 party can submit an application for the arrest of a ship before the claimant has submitted a statement of a claim. Nevertheless, only national courts have the jurisdiction to conclude that the said injunctive measure is applicable.

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

Under article 35(1) of the Maritime Code, any natural or legal person shall have the right of retention in accordance with the Civil Law, if the ship is in the possession of the relevant person.

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

The Civil Procedure Law does not explicitly provide such procedural instruments. However, the Civil Procedure Law does provide a right of a party to the proceedings or a party in proceedings yet to be initiated to request to obtain and therefore ensure that the evidence would be available later if there is a risk that the particular evidence that is necessary for the case may not be available later or it would be burdensome to collect the evidence later. The requirements and the procedure thereof are described in section 16 of Civil Procedure Law.

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

Ship arrest does not apply to bunkers. However, a separate injunction may be used in respect of bunkers.

Judicial sale of vessels

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

All creditors may apply for the judicial sale of an arrested vessel.

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 (auction) of a vessel is initiated by the party awarded by the court by submitting an execution writ to a court bailiff in line with the Civil Procedure Law. The judicial sale of a vessel is conducted by a court bailiff in accordance with the Maritime Code and provisions of the Civil Procedure Law. The price of the vessel is evaluated by an expert who is summoned by a court bailiff. Further, prior to the auction of a vessel in question, a court bailiff shall prepare a notice regarding the action to the Ship Registrar, the holders of all the vessels mortgages and the owner of the vessel. Such a notice shall be sent 30 days prior to the date of the auction. The information regarding the auction shall be published in the official newspaper of Latvia. The actual sale depends on the activity of the bidders in the auction, therefore there are no precise implications as to the time frame during which a vessel could be sold in an auction. The expenses for the execution of court's judgments depends on the sum levied by the court, taking into account all the relevant costs of the execution process. Furthermore, all the court fees and expenses incurred in relation to the execution process shall be covered from the sale of the vessel.

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

Under article 56(1) of the Maritime Code, in the instance of a forced sale (auction) of a ship, all mortgages and other encumbrances on the ship, except those that with the consent of the holders of such rights have been assumed by the purchaser, as well as all maritime liens and other claims shall be deleted if:

- during the time of the auction the ship is located in territory within the jurisdiction of Latvia; or
- the auction has taken place in accordance with laws and regulations, including the provisions of article 55 of the Maritime Code.

Claims shall be satisfied from the income from the forced sale (auction) of a ship, in the following order:

- claims regarding expenditures that are associated with the arrest of the ship and the auction, including the costs of the maintenance of the ship and the ship's crew, remunerations and other costs referred to in article 33 of the Maritime Code;
- claims regarding expenditures that have arisen for a competent institution in the raising of a sunk ship or relocating of a ship damaged due to an accident, in order to ensure safety of navigation or to protect the sea environment;
- claims associated with payments of taxes and fees debts;
- claims associated with ship salvage, observing the provisions of article 34 of the Maritime Code;
- claims secured by maritime liens, except for claims associated with ship salvage;
- the claims of shipbuilders and ship repairers if they have used their rights of retention prior to the forced sale (auction) of the ship;
- claims associated with pledges, mortgages and other registered encumbrances;
- other maritime claims;
- other claims.

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

Under article 56(3) of the Maritime Code in case of a forced sale (auction) of a ship, the court shall approve a statement of auction and take a decision to register the ownership rights to the sold ship in the name of the buyer, as well as regarding deletion of ship mortgages, encumbrances, other claims registered in the Ship Register and maritime liens, except for those assumed by the buyer. On the basis of the court decision, the Ship Registrar shall delete all ship mortgages, encumbrances and other claims registered in the Ship Register, as well as register the ownership rights of the buyer to the ship or issue a certificate of deletion of the ship.

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

It could be recognised if the mandatory rules governing such a sale are met under the applicable law and the formalities of the country where the ship has been registered are fulfilled.

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

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

Carriage of goods by sea and bills of lading

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?

Latvia is party to Hague Rules and Hague-Visby Rules. Latvia is not a party to the Hamburg Rules and UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Use of Incoterms is market practice and start and end of liability of the carrier is different from case to case.

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 Convention on the Contract for the International Carriage of Goods by Road 1956 is applied most in relation to combined transport or multimodal bill of lading, which has been implemented in the legislation of Latvia. Latvia is also party to the Convention Concerning International Carriage by Rail (COTIF). In practice multimodal transport documentation is used as well by freight forwarders.

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

The person who is the holder of the bill of lading under the applicable mandatory rules of law.

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?

For the terms to be binding upon a third party, an explicit or implicit acceptance of such terms would have to be expressed. That would be based on the ex-post evaluation of the factual circumstances exercised by the court. In case the rights are transferred to another party, the jurisdiction or arbitration clause would normally be treated as a separate agreement and therefore not transferred unless expressly provided otherwise.

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

It can be contractually agreed upon and therefore have a binding effect inter partes. The Maritime Code does not exclude such an option.

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 carriers under normal circumstances can be held liable for the damages that may incur due to damaged cargo. Both parties can agree upon a different model of liability and its exclusion as long as it is not contrary to the mandatory rules of carrier's liability during a shipment by sea.

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

If it is not explicitly agreed upon, there are no regulations that may specifically address the impact of the deviation from a vessel's route (if it is not expressly set by the agreement) on contractual defences.

48 What liens can be exercised?

Generally, similar rights in addition to mortgages and other types of pledges (based on an agreement) are provided by the law and can be contractually modified; however, it is not common that they are in a way that would permit more rights than already provided by the law. Also, one may argue that such rights may not be widely used as a person that has an obligation to render performance with the object or property cannot subject to a non-consensual lien as well as other restrictions that may be applicable according to articles 399 and 400 of the Commercial Law.

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 would generally be liable for any damage caused thereof. However, at least to some extent it would be possible to contractually limit the liability insofar as the damage has not been caused by gross negligence or wilful misconduct.

50 What are the responsibilities and liabilities of the shipper?

Under article 14 of the Maritime Administration and Marine Safety Law the owner and the master of a ship have a duty to maintain the hull, mechanisms, machinery and equipment of the ship to ensure that

the cargo loading, stowage, securing on board and ballast operations are performed in compliance with safety requirements. A shipowner will be held liable in accordance with the law for non-compliance with the safety requirements.

Shipping emissions

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

Yes. Latvia is also a party to the 1997 Protocol amending the International Convention for the Prevention of Pollution from Ships 1973, as modified by the 1978 Protocol (Annex VI of MARPOL 73/78).

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?

It is prohibited to use fuel oil if the content of sulphur exceeds 1 per cent by mass. The operator shall ensure that at least twice a year the analysis of the samples of the fuel oil used is made by an accredited laboratory and results shall be submitted to the relevant Regional Environmental Board of the State Environmental Service, which is the regulatory institution. A fine may be applicable as a sanction for non-compliance.

Ship recycling

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

The main legal act is Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No. 1013/2006 and Directive 2009/16/EC. According to this regulation the recycling may only take place at facilities listed on the EU List of Facilities. They may be located both within or outside the EU. In any case they must comply with a series of requirements related to workers' safety and environmental protection. There is one Latvian company on the List of Facilities, joint-stock company Tosmares kuģubūvētava.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

Civil maritime disputes are resolved in courts of a general jurisdiction. Latvia has not dissolved other legal bodies that exercise jurisdiction over maritime disputes.

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

The Civil Procedure Law governs court proceedings of a defendant located out of the jurisdiction in line with the applicable international treaties of which Latvia is a party and applicable EU legislative acts.

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

No, there are no such institutions in Latvia, but the parties may refer the dispute resolution to an ad hoc arbitral tribunal comprising a panel of experts in the field of maritime disputes. If the parties have not signed an arbitration agreement, all disputes are resolved by courts of general jurisdiction under the provisions of Civil Procedure Law.

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

Recognition and enforcement of foreign judgments is governed by the Civil Procedure Law and international treaties governing such recognition (eg, the Lugano Convention 2007) and EU regulations. As to the recognition of foreign arbitral awards, the Civil Procedure Law governs the recognition of such awards in addition to the rules set out by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention 1958).

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

Asymmetric jurisdiction and arbitration agreements are valid and enforceable as far as they do not contradict general exceptions in Latvian law that prohibit the adjudication of certain disputes in arbitration court. For example, individual labour disputes shall be adjudicated only in national court.

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

Generally, the defendant could appear before the court or submit an application to terminate the proceedings submitting proof that there is an agreement on jurisdiction and therefore the court in question has no jurisdiction fully or in part.

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 request the court to terminate an ongoing litigation before the national court in case of a breach of clause providing for a foreign court or arbitral tribunal to have jurisdiction over the concerning dispute. Also, the defendant may request not to initiate court proceedings in a situation when the court has refused to accept the claimant's claim and the claimant has appealed the decision as the initiation of the proceedings is decided in ex parte proceedings and the defendant would learn about such a step by the claimant only after the decision of the court on that has been passed.

Limitation periods for liability

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

Under article 327 of the Maritime Code, the prescriptive period for claims regarding loss arising due to collision of ships is two years, counting from the day when the collision took place. The prescriptive period for recourse claims regarding compensation which is referred to in the aforementioned article is one year, taking into account that for a claim regarding compensation in a case of occasioning of bodily injury, the prescriptive period shall be calculated from the day on which the claim for compensation of loss is allowed.

Under article 328 of the Maritime Code, the prescriptive period for claims regarding compensation for loss in the case of pollution in accordance with this code or compensation in accordance with the Fund Convention is three years, counting from the time when the damage or loss arose, or the payments were made. An action cannot be brought if from the moment of the accident six years have passed. If the damage, loss or payments arise in a series of several accidents that have one cause, the six-year period shall be counted from the time when the first accident occurred.

The prescriptive period for claims regarding loss, arising in a case of loss or damage of cargo or in connection therewith, or in relation to incorrect or incomplete statements in a bill of lading is one year, counting from the day when the cargo should have been delivered or it was delivered (if the cargo is subsequently delivered).

The prescriptive period for claims regarding loss which has arisen through failing to present a bill of lading during delivery of the cargo or delivering the cargo to another person is one year, counting from the day when the cargo should have been delivered or it was delivered (if the cargo is subsequently delivered).

The prescriptive period for recourse claims regarding compensation in respect to cargo is one year, counting from the day when the claim was satisfied.

The prescriptive period for claims regarding loss arising due to the loss of the life of a passenger or harm caused to his or her health, as well as regarding loss occasioned to a passenger in regard to the loss or damage of his or her luggage, is two years.

The commencement of the prescriptive period shall be calculated as follows:

- if harm to health is caused: from the moment the passenger disembarked ashore;
- if the passenger loses his or her life during the carriage: from the day when the passenger should have disembarked ashore;
- if harm to health is caused during carriage and after disembarkation ashore the passenger dies as a result of such harm to health: from the moment the passenger dies; or
- if luggage has been lost or damaged: from the day when the passenger disembarks or should have disembarked ashore, taking into account the last incident.

An action may not be brought after a period of three years has expired from the time the passenger has disembarked or should have disembarked ashore, taking into account the last incident.

The prescriptive period may be extended if the carrier provides an appropriate notice and both parties agree on extension. Such notice or agreement shall be made in writing.

The prescriptive period for a claim regarding payment of general average, as well as compensation for damage and loss obtained in general average is one year, counting from the day when the ship reached port after the general average.

The prescription period for a claim regarding payment of general average compensation is one year, counting from the time of calculation of expenditures of the general average.

The prescriptive period for a claim regarding salvage reward or special compensation is two years, counting from the day when the salvage measures (operations) are completed.

The prescriptive period for a claim by the Maritime Administration of Latvia regarding compensation for loss from the owner of a wreck is three years, counting from the day when assessment of the hazardousness of the wreck is completed, but not more than six years, counting from the day when the ship became a wreck.

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62 May courts or arbitral tribunals extend the time limits?

Time limits as part of substantive law cannot be extended. Nevertheless, a party may interrupt it and it can be suspended for a certain period of time in exceptional cases. A time limit (period of limitation) for initiating court proceedings is not to be confused with procedural terms that can be extended and reset by the court in case there are appropriate grounds for that.

Miscellaneous

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

The Maritime Labour Convention in Latvia has been in force since 12 August 2011. In accordance with Standard A4.5 (2) and (10), the Latvian government has specified the following branches of social security:

- sickness benefit;
- unemployment benefit;
- old-age benefit;
- employment injury benefit;
- family benefit;
- maternity benefit;
- invalidity benefit; and
- survivors' benefit.

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?

Latvian law does not provide a general hardship clause that could be applied in the situation described.

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

Not applicable.

Liberia

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Newbuilding contracts

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

Liberia does not have any shipyards that construct vessels for international ocean shipping. As a result, there are few, if any, laws, cases or previous contracts on point.

Liberian law does permit the registration of a vessel under construction. See section 51(8) of Title 21 of the Liberian Code of Laws of 1956, as amended (the Maritime Act). In order for this to occur, the relevant shipbuilding contract will need to provide that title to the vessel passes from the shipbuilder to the owner.

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

For the reason stated above this is not applicable. In the absence of a domestic shipbuilding capacity one is not likely to address questions involving the applicability of Liberian law to refund guarantees.

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

Not applicable.

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?

Not applicable.

Ship registration and mortgages

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?

Chapter 2 of the Maritime Act controls vessel documentation for internationally trading vessels and vessels under construction.

In particular, this chapter provides the minimum registration requirements under the act. For example, seagoing vessels of more than 500 net tons engaged in foreign trade, private yachts of 24 metres or more, offshore drilling rigs and mobile offshore drilling units are eligible for registration. Additionally, the maximum age limit for registered vessels is 20 years (section 51), although that may be waived in appropriate circumstances.

While the Maritime Act does not define 'vessel', section 30 adopts the general maritime law of the United States to the extent that it does not conflict with Liberian law. Therefore, US definitions of 'vessel' are persuasive law, but not binding.

For vessels under construction, section 51(8) states that the Commissioner or Deputy Commissioner may temporarily waive the registration requirements that the vessel is unable to comply with, by virtue of being under construction.

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

A citizen or national of the Republic of Liberia or a foreign maritime entity qualified in Liberia may register a vessel under the Maritime Act. Entities formed under the Associations Law (including the Business Corporation Act) are considered nationals for purposes of the Maritime Act irrespective of the domicile or citizenship of the holders of the equity interests thereof. Moreover, a business entity not organised under Liberian law may qualify as a foreign maritime entity under Chapter 13 of the Business Corporation Act. This designation allows foreign businesses, which may own and operate ships in other jurisdictions, to also register and document Liberian-flagged vessels.

7 What are the documentary requirements for registration?

To receive a permanent Certificate of Registry from the Commissioner or Deputy Commissioner, the vessel owner must provide the following information to the issuing officer:

- satisfactory proof as to the ownership of the vessel;
- evidence that any foreign marine document for the vessel has been surrendered with the consent of the government that had issued it, or has been legally cancelled or otherwise terminated;
- evidence that the vessel is in a seaworthy condition;
- evidence that the owner has paid the prescribed initial registration fee and the authorised agent's fee;
- the markings of the name, official number, home port and draft have actually been made; and
- a certificate of tonnage measurement has been issued.

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

Section 92 of the Maritime Act provides that the Commissioner or Deputy Commissioner may issue a certificate of permission for a Liberian vessel to obtain a bareboat charter registration in a foreign state. Conversely, it is also possible to register a vessel in Liberia under a bareboat registration scheme. To do so, in addition to the customary application for registration, the party seeking such registration should also submit a copy of the bareboat charter, a certificate from the state of underlying registration setting forth the ownership of the vessel and any encumbrances thereon, written consents of the owner and any mortgagee to the bareboat registration in Liberia and satisfactory evidence that the right to fly the flag of the underlying registration state is suspended.

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

Pursuant to section 100 of the Maritime Act, the central office of the Commissioner or Deputy Commissioner of Maritime Affairs records and maintains all instruments of 'sale, conveyance, hypothecation, mortgage or assignment of mortgage of any vessel'.

Limitation of liability

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

Shipowners and salvors may limit their liability for maritime claims in accordance with Chapter 4 of the Maritime Act. 'Shipowner' is defined as 'owner, charterer, manager and operator of a seagoing ship' as well

as the ship itself. 'Salvor' is defined as 'any person rendering services in direct connection with salvage operations'. The types of claims that can be limited are enumerated in section 161, which include claims in respect of loss of life or personal injury, loss or damage to property, loss resulting from delay in the carriage by sea of cargo, passengers or their luggage, etc.

It is also worth noting that Liberia is a signatory to the Convention on Limitation of Liability for Maritime Claims 1976. Under this treaty, shipowners and salvors may limit their liability pursuant to article 2. The treaty also shares similar definitions of 'shipowner' and 'salvor' with the Maritime Act. To a large degree, Chapter 4 of the Maritime Act can be viewed as a domestic implementation of the Convention.

Liberia has not yet acted in respect of the new limits.

11 What is the procedure for establishing limitation?

Liberia has not adopted any independent special procedural requirements to invoke the limitation as it is considered a defence to a claim.

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

Under section 163 of the Maritime Act, a person or entity is not entitled to a limitation on liability, if the claimant can prove that the loss resulted from a personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. There have been no cases to date within the Liberian court system where this question has arisen.

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

Chapter 4, Sub-Chapter II of the Maritime Act governs Carriage of Passengers and Luggage.

Port state control

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

There are three agencies that provide vessel inspection and certification:

- Port State Control, which inspects foreign vessels that are more than 500 gross tons;
- Facilitation, which conducts routine inspections for vessels calling on ports in Liberia; and
- Small Water Crafts, which has jurisdiction over commercial fishing vessels in territorial waters.

15 What sanctions may the port state control inspector impose?

Port State Control authorities may detain a vessel for various regulatory deficiencies. Common deficiencies include incomplete vessel documentation, lack of maintenance, faulty safety equipment and general cleanliness.

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

Liberian domestic legislation does not specifically address the appeals process for an appeal from a Port State Control order or fine as distinct from any other governmental administrative assessment. A challenge would need to be brought in court locally in Monrovia.

Classification societies

17 Which are the approved classification societies?

All vessels must be classed by a full member of the International Association of Classification Societies, which include:

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

- Polski Rejestr Statków; and
- Russian Maritime Register of Shipping.

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

There is no applicable precedent for claims of this nature in Liberia. As Liberia is likely to follow US laws on this subject, a classification society is not likely to be liable to a shipowner for negligently performing its classification services. Third parties, such as vessel purchasers, may sue a classification society for negligent misrepresentation.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

As a party to the Nairobi International Convention on the Removal of Wrecks 2007, Liberian officials may order the removal of a wreck in accordance with article 9 (www.gov.uk/government/uploads/system/uploads/attachment_data/file/228988/8243.pdf).

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 2007 applies to the territorial water of the Republic of Liberia (www.shipownersclub.com/media/2015/12/The-Nairobi-International-Convention-on-the-removal-of-wrecks-Update-December-20151.pdf). In addition, Liberia has adopted the International Convention on Civil Liability for Oil Pollution Damage ([www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-civil-liability-for-oil-pollution-damage-\(clc\).aspx](http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-civil-liability-for-oil-pollution-damage-(clc).aspx)). Liberia is also a signatory to the International Convention on Salvage 1989 (<http://treaties.fco.gov.uk/docs/pdf/1996/TS0093.pdf>).

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?

Article 9, section 4 of the Nairobi International Convention on the Removal of Wrecks 2007 states that the registered owner may contract with any salvor or other person to remove the wreck that constitutes a hazard, subject to conditions set forth by Liberian officials. However, Liberian officials may only enact regulations to the extent necessary to ensure that the removal proceeds in a manner that is consistent with safety considerations and the protection of the marine environment.

Ship arrest

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

Liberia is a party to the International Convention on the Arrest of Ships 1999 (http://unctad.org/en/PublicationsLibrary/aconf188d6_en.pdf).

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 following claims give rise to a right to arrest a vessel:

- liens for damages arising out of tort;
- liens for 'unpaid annual taxes, fees, penalties and other charges, arising under section 83 of the Maritime Act;
- crew wages;
- general average;
- salvage, including contract salvage;
- 'expenses and fees allowed and costs taxed by the court'; and
- liens for necessities.

A creditor may not arrest associated ships to satisfy a claim against another associated ship. However, a vessel may be arrested in respect of a maritime lien claim incurred by a bareboat charterer or a time-charterer.

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

Yes, the claims giving rise to maritime liens are noted in question 23.

25 What is the test for wrongful arrest?

As there are no major ports in Liberia where arrests are common, there have been no judicially articulated bases for establishing a claim of wrongful arrest. Liberian courts are likely to follow American jurisprudence in this regard. Section 30 of the Maritime Act provides that:

[i]nsofar as it does not conflict with any other provisions of [the Maritime Act], the non-statutory General Maritime Law of the United States of America is hereby declared to be and is hereby adopted as the General Maritime Law of the Republic of Liberia.

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.

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

This is subject to the discretion of the court.

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?

This is subject to the discretion of the court.

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 is needed for an attorney at law to act. However, if the arresting party is required to execute any documents it may do so by a power of attorney that, for these purposes, should be notarised and legalised. Liberia is a party to the Hague Convention on Legalisation of Documents. English is the official language of the Republic of Liberia. Electronic filing of documents is not currently permitted. As noted above, there is little precedent for arrests in Liberia, making it difficult to provide specific answers to the remaining questions.

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

An arresting party will have to advance the costs of maintaining the ship while it is under arrest, including food for the crew, fuel, oil and similar items. These items are considered custodia legis and are recovered as part of an award of costs for seizing the vessel.

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?

No separate claim on the merits is required. Once a vessel has been arrested the court will accept jurisdiction over the substantive claim.

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

Not applicable.

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

Not applicable.

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

There is no applicable precedent for this form of arrest.

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

It is highly unlikely that a Liberian-flagged vessel or any foreign vessel under the jurisdiction of the Liberian courts would be arrested (or for that matter call) in Liberia, but any claimant with a valid maritime lien claim (including a mortgagee) may apply for judicial sale of a vessel following a valid court-sanctioned arrest.

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?

Section 112 of the Maritime Act states that the libellant must provide notice by publication and actual notice to the master, another ranking officer, or caretaker of the vessel. The libellant must also provide notice to any person who has recorded a notice of claim of an undischarged lien upon the vessel, unless after a search by the libellant satisfactory to the court such person is not found within Liberia. There is insufficient local precedent to answer the remaining questions.

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

A creditor who holds a properly drafted and recorded mortgage enjoys a high priority. Furthermore, the mortgagee claim is superior over all claims against the vessel in rem except for:

- liens arising before the mortgage recordation;
- expenses and fees allowed and taxed by the court sitting in foreclosure;
- tonnage taxes and other fees owing to Liberia; and
- the maritime liens arising from tort, for crew wages or for salvage.

Additionally, furnishers of repairs, supplies, towage, use of dry dock or marine railway, or other necessities may attach a maritime lien to a vessel. Complicating matters is that 'other necessities' is broadly defined under US case law, which the Maritime Act incorporates through section 30.

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

Section 113 of the Maritime Act states that upon the sale of a vessel, pursuant to an in rem action, all pre-existing claims in the vessel, including any possessory common law lien, terminate and attach in accordance with their respective priorities to the proceeds of sale.

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

There is little, if any, jurisprudence on the subject. Assuming that the proceedings did not violate public policy, however, it is believed that the courts of the Republic of Liberia would respect such a ruling.

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

Yes – see www.jus.uio.no/lm/un.imo.maritime.liens.and.mortgages.convention.1993/doc.html.

Carriage of goods by sea and bills of lading**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?**

Liberia is not a party to these treaties (www.gard.no/web/updates/content/52583/hague-hague-visby-and-hamburg-rules-package-limitation-values). Rather, Sub-Chapter I of Chapter 4 of the Maritime Act provides the framework for the Carriage of Goods under Liberian law. Under section 120(e) of the Maritime Act, 'Carriage of Goods' is defined as 'the period of time when the goods are loaded on to when

they are discharged from the ship'. Under section 112(4) the bill of lading is prima facie evidence of the receipt of goods by the carrier. Furthermore, removal of the goods is prima facie evidence of the delivery by the carrier, according to section 122(6). The recipient of the goods must give notice and a description of any loss or damage in writing at the port of discharge before removal. If the loss or damage is not apparent, then notice must be given within three days of delivery.

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?

Not applicable.

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

This will very much depend on the laws under which the relevant cargo is shipped. As with the laws of most jurisdictions, the carrier will issue the bill of lading to the shipper. Ordinarily, to the extent the shipper negotiates it to a cargo consignee, that consignee will have the requisite title to commence any appropriate action.

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?

Nothing in Sub-Chapter I of Chapter 4 of the Maritime Act prevents the insertion of lawful provisions regarding general average in a bill of lading, according to section 125.

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

There is insufficient precedent in this area to unequivocally answer this question.

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?

Chapter 4 of the Maritime Act provides defences for the ship and, by extension, the shipowner. For example, section 123(4)(h) states that the ship is not responsible for the loss or damage to, or in connection with, goods if the nature or value was knowingly misstated by the shipper in the bill of lading. In addition, section 123(2) enumerates 17 instances in which the ship is not responsible for loss or damage to goods, including acts of war, insufficiency of packing, or saving or attempting to save life or property at sea.

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

Section 123(4) of the Maritime Act provides that any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, is not an infringement or breach of contract of carriage, and the carrier is not liable for any resulting loss or damage; provided that the deviation is prima facie unreasonable if it was for the loading or unloading of cargo or passengers.

48 What liens can be exercised?

Liens for damage to, or loss of, cargo may be asserted against the vessel or, to the extent provided for by contract, freights or sub-freights.

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

According to section 126 of the Maritime Act, under certain circumstances, carriers, shippers and their respective agents may enter into agreements as to the responsibilities and liabilities of the carrier. No bill of lading is required for these agreements, but the terms must be embodied on the receipt, in the form of a non-negotiable document.

The parties may negotiate and stipulate as to the seaworthiness of a vessel (so long as the provisions are not contrary to public policy) as well as the care or diligence of the carrier's servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea.

50 What are the responsibilities and liabilities of the shipper?

Under section 123(5) of the Maritime Act, at the time of shipment, the shipper is deemed to have guaranteed to the carrier the accuracy of the marks, number, quantity and weight. In addition, the shipper indemnifies the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars.

In addition, the shipper must provide notice and a description of the loss or damage to the goods either at the port of discharge or within three days if the damage is not apparent, under section 123(6).

Furthermore, the shipper is not responsible for loss or damage sustained by the carrier or the ship that arises or results without the act, fault or neglect of the shipper, his or her agents, or his or her servants.

Shipping emissions

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

Liberia is a contracting state to the International Convention for the Safety of Life at Sea 1974, the International Regulations for Preventing Collisions at Sea 1972, the Convention on the International Maritime Satellite Organization 1976, the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) and other regulations for the operations of vessels. Liberia is also an International Maritime Organization member and has adopted the International Safety Management Code, the Life-Saving Appliances Code and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 international codes. The Republic of Liberia is also a signatory to the International Convention on Civil Liability for Oil Pollution Damage, which requires tank ships that transport more than 2,000 tonnes of oil to be certified and file paperwork with the Office of the Deputy Commissioner of Maritime Affairs (www.liscr.com/liscr/Maritime/MaritimeFAQ/MarinePollutionRequirementCompliance/tabid/122/Default.aspx).

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 Republic of Liberia is a party to the Revised Annex IV of MARPOL, which provides limits for a vessel's sulphur emissions and other pollutants. Vessels in the territorial waters of Liberia are subject to inspections by the Port State Control officers when there are clear grounds for believing a master or crew is unfamiliar with the pollution-reduction requirements (https://www.liscr.com/liscr/Portals/o/POL-009_Rev%2006-14.pdf). Deficiencies of a serious nature may result in detainment ([www.imo.org/blast/blastDataHelper.asp?data_id=15732&filename=129\(53\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15732&filename=129(53).pdf)).

Ship recycling

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

Liberia has not yet adopted the IMO 2009 Hong Kong Convention on the Safe Recycling of Ships, nor has such convention gone into force internationally. Nor has Liberia adopted any domestic legislation on this subject.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

The Circuit Courts of the Republic of Liberia, sitting in Admiralty, have jurisdiction over causes of action that arise under the Maritime Act. Although, section 33 of the Maritime Act states that other courts, whether in Liberia or elsewhere, are not deprived of jurisdiction to enforce provisions of the Maritime Act, except as otherwise stated.

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

See question 35.

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

No.

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

Provided that the defendant appeared in the action or proceeding in person or by a duly authorised representative, a judgment for a definite sum obtained by a court of another jurisdiction whose proceedings do not offend public policy would, when duly authenticated, be admissible as evidence in a proceeding brought to enforce the same action in a Liberian court.

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

There have been no Liberian cases on this subject to date.

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

A Liberian court is not likely to enjoin a foreign court of competent jurisdiction; the party alleging improper venue will need to raise the claim in which the action is maintained in violation of a jurisdiction clause.

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 relevant party can seek dismissal of an action brought in violation of a forum selection clause. Absent public policy considerations, a Liberian court is likely to dismiss the wrongly maintained action.

Limitation periods for liability

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

This will very much depend on the type of claim asserted. For example, the statute of limitations for written contracts is seven years, while the statute of limitations for damage to cargo against a vessel and its owner is one year. In each case these time periods can be extended by the agreement of the parties.

62 May courts or arbitral tribunals extend the time limits?

Not unless by the agreement of the parties to the arbitration.

Miscellaneous

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 adopted in Liberia. Where Liberian law and regulations are not as specific as the requirements in the Maritime Labour Convention, Liberian Marine Notices provide guidance on compliance (see Marine Notice MLC-001, revised January 2014).

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 a general matter, no.

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

No.

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Newbuilding contracts

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

Property in goods pass when parties intend it to pass. The parties' intention may be ascertained from the terms of the contract. In shipbuilding contracts, the terms of the contract usually state that title will pass upon execution of the protocol of delivery and acceptance.

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

There is no prescribed form or wording required for a refund guarantee to be valid. However, there must be valid consideration for the guarantee to be enforceable. The terms of the refund guarantee are subject to the agreement of parties.

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

An application may be made to court for an order for specific performance. Specific performance is a discretionary remedy which may be granted in relation to certain types of contracts which the Specific Relief Act 1950 prescribes as being specifically enforceable. It may be granted in situations where, among others, the plaintiff has done substantial acts or suffered losses, or where damages are not an adequate remedy.

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 damages due to a defective vessel can be founded on breach of contract, including breach of implied conditions under the Sale of Goods Act 1957, such as conditions as to quality and fitness, or in tort by a non-contracting party for negligence.

Ship registration and mortgages

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?

Vessels may be registered with the Malaysian Ship Register (MSR) or with the Malaysian International Ship Register (MISR), provided the conditions under the Merchant Shipping Ordinance 1952 (MSO 1952) are satisfied. Vessels under construction may only be provisionally registered, and such provisional registration may be for a minimum period of six months but not more than 12 months.

Currently, vessels which meet the ownership requirement can be registered under the Malaysian flag. For registrations with the MISR, only the following vessels may be registered:

- vessels fitted with mechanical means of propulsion;
- not less than 1,600 gross tonnage (GT); and
- not more than 15 years of age for tankers or bulk carriers, or not more than 20 years for other vessels.

The Malaysian Shipping (Amendment) Act 2017 (MSAA 2017) introduced several amendments to the MSO 1952 in relation to, among others, requirements for registration of ships. The MSAA 2017 was gazetted on 1 December 2017, but has not come into force to date. Under MSAA 2017, the age and tonnage criteria for registration under MISR will be prescribed in regulations to be issued in due course.

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

Currently, for MSR registration, section 11 of MSO 1952 provides that to register a ship as a Malaysian ship:

- the owners of the ship must be Malaysian citizens; or
- if the ship is owned by a company:
 - the company must be incorporated in Malaysia;
 - the company must have a principal office in Malaysia;
 - the management of the company is carried out mainly in Malaysia;
 - the majority of the shareholding must be held by Malaysian citizens; and
 - the majority of the board of directors must be Malaysian citizens.

Further, currently under section 66B and 66D of MSO 1952, registration with the MISR may be done by a company:

- incorporated in Malaysia;
- with an office in Malaysia;
- with a majority of shareholding, including voting shares, held by non-Malaysian citizens; and
- with paid-up capital of at least 10 per cent of the value of the ship or 1 million ringgit, whichever is higher (only applicable to the first ship registered by the company).

Under the MSAA 2017:

- A person is qualified to own a Malaysian ship to be registered under the MSR if the person is a Malaysian citizen or, to the extent as may be determined by the Minister (usually by regulations to be issued in due course), a body corporate incorporated in Malaysia.
- Any person or entity, regardless of citizenship or place of incorporation, may register a ship as a Malaysian ship with MISR. A non-Malaysian citizen or a body corporate incorporated outside Malaysia applying to register a ship as a Malaysian ship under MISR is required to appoint a representative person so long as the said ship remains registered. The representative person must be a Malaysian citizen who has his or her permanent residence in Malaysia or a body corporate incorporated in Malaysia that has its principal place of business in Malaysia.
- A charterer of a ship under bareboat charter terms may also register a ship in the MSR or MISR.

7 What are the documentary requirements for registration?

Currently, the main documents required for registration under the domestic registry or MISR include:

- forms: application to register a ship, application for allotment of an international call sign, declaration of ownership and nationality, appointment, cancellation or change of ship manager;
- statutory declaration of ownership containing the details set out in section 16 of MSO 1952;
- identity card or citizenship certificate (in the case of individuals) or article and memorandum of association (now known as

- constitution), certificate of incorporation and certificate of registry of business (in the case of bodies corporate);
- letter of authorisation appointing an officer to make declaration on behalf of the owner;
 - certification from the customs department that import duty has been paid (if applicable);
 - builder's certificate or deletion certificate;
 - certificate of approved name;
 - certificate of survey;
 - bill of sale;
 - memorandum as to the registration of the managing owners; and
 - certification under the common seal of the corporation to the effect that the majority of shareholding, including voting shares, is held by Malaysian citizens.

There may be changes to the documentary requirements once the MSAA 2017 comes into force.

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

Neither dual registration nor flagging out is permitted in Malaysia.

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

The register of mortgages is maintained by the domestic ship registry, which has offices in Port Kelang, Penang, Kuching and Kota Kinabalu; and the MISR, which is based in Labuan. The register of mortgages contains information such as the name of the vessel, the date and type of mortgage registered.

Limitation of liability

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

Malaysia applies three main limitation regimes, which are tonnage limitation, limitation under the Hague Rules and limitation for oil pollution liability.

For tonnage limitation, Peninsular Malaysia and Labuan apply the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976), as amended by the 1996 Protocol. Sabah and Sarawak apply the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (1957 Convention).

The LLMC 1976 is set out in the 16th Schedule of the MSO 1952 and to date, there have been no legislative amendments to adopt the new limits announced by the International Maritime Organization in April 2012. Under the LLMC 1976, insurers of liability for claims, shipowners, salvors and any person whose act, neglect or default the shipowner or salvor is responsible for are entitled to limit their liability. A shipowner includes a charterer, manager and operator of a ship. The claims which are subject to limitation of liability include:

- claims in respect of loss of life or personal injury or loss or damage to property, occurring on board, or in direct connection with the operation of a ship, and consequential losses arising; and
- claims in respect of loss caused by delay in the carriage of cargo or passengers.

Liability is limited based on the gross tonnage of the ship and the value of special drawing rights (SDR) (articles 6, 7 and 8, Part 1, of the Schedule).

The Hague Rules are compulsorily applicable in Malaysia through the Carriage of Goods by Sea Act 1950 (COGSA) in relation to and in connection with the carriage of goods by sea in vessels carrying goods from any port in Malaysia to any other port whether in or outside Malaysia. The Hague Rules provide for a package limitation where carriers may limit their liability for loss or damage to the gold value of £100 (which is determined in Malaysia by reference to the UK Coinage Act 1870) per package or unit, unless the nature and value of such goods have been declared by the shipper before shipment and have been inserted in the bill of lading.

Limitation for oil pollution liability is provided under the Merchant Shipping (Liability and Compensation for Oil and Bunker Oil Pollution) Act 1994 (1994 Act). The limits are different for oil pollution and bunker oil pollution. In respect of the former, the registered owner of a ship

is entitled to limit his liability in respect of any one incident to an aggregate amount of 4.5 million SDR for a ship not exceeding 5,000 units of tonnage and, for ships exceeding this tonnage, 4.5 million SDR plus an additional 631 SDR for each additional unit of tonnage; with a maximum aggregate amount of 89,770,000 SDR. For bunker oil pollution, the registered owner, bareboat charterer, or manager or operator of a ship may limit its liability in accordance with the LLMC 1976 set out in the 16th Schedule of MSO 1952.

11 What is the procedure for establishing limitation?

A limitation action is usually commenced where there are several claims made or anticipated, whose total exceeds the limitation value. In the case of only one claimant, limitation can be raised as a defence. A limitation action can be commenced without admission of liability but liability must be established or admitted before a decree limiting liability can be granted.

Order 70, Rules 35 to 38 of the Rules of Court 2012 provide for the procedure to be followed in relation to limitation actions. The person seeking limitation relief (ie, the plaintiff in the limitation action) must be named in the writ by his name. The plaintiff must make one or more persons with claims against him the defendants in the writ, with at least one of the defendants named in the writ by his name. Service of the writ is only required on named defendants. The defendant(s) must then enter appearance and after seven days of entry of appearance or seven days after the time limit for entry of appearance has expired, the plaintiff may apply for a decree limiting his liability or for directions as to further proceedings. Where the only defendants in a limitation action are those named in the writ and all of them have either been served with the writ or entered appearance, the decree need not be advertised. Otherwise, it must be advertised, giving persons with claims a time limit to enter appearance and file their claims. Claimants should proceed to file their claims and serve a copy of their respective claims on every party pursuant to Order 70, Rules 39 to 41 of the Rules of Court 2012.

The plaintiff may constitute a limitation fund by paying into court the Malaysian ringgit equivalent of the number of SDR or gold francs to which he or she claims to be entitled to limit his or her liability, together with interest, from the date of the incident giving rise to his or her liability to the date of payment into court. Upon making such payment into court, the plaintiff must give notice in writing to every defendant.

For oil liability pollution, section 7 of the 1994 Act provides that after the court has determined liability and directed payment or deposit of a bank guarantee or security into court, the court will determine the amounts that would, apart from the limit, be due in respect of liability to the persons making the claims and then direct the proportionate distribution of the funds among the relevant persons.

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

Limitation under the LLMC 1976 and for oil pollution liability can be broken where the person seeking to break limitation proves 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. Limitation has been broken in Malaysia in cases involving the 1957 Convention, which applies in Sabah and Sarawak.

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

The LLMC 1976 applies in respect of passenger and luggage claims and the limits are set out in articles 6 and 7 of the LLMC 1976.

Port state control

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

Malaysia is a member of the Memorandum of Understanding on Port State Control in the Asia-Pacific Region. The Ship Accreditation Unit of the Marine Department of Malaysia conducts port state control inspections. The Marine Department derives its authority from Malaysia's merchant shipping legislation.

15 What sanctions may the port state control inspector impose?

The Minister of Transport or detaining officer (ie, port officer or surveyor-general of ships) may order the provisional detention of an unsafe vessel, that is, a vessel which is unfit to proceed to sea or within port limits of any port without serious danger to human life by reason of the defective condition of her hull, equipment or machinery, or under-manning or overloading or improper loading. If after a survey is conducted the vessel is still found to be unsafe, the Minister of Transport can order a final detention of the vessel.

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

Before a final detention order is made, the owner or master of the vessel which has been provisionally detained may make an appeal to the Court of Survey within seven days' receipt of the surveyor's report. The Court of Survey consists of a judge sitting with two assessors who have nautical, engineering or other special skills or experience (section 343 of MSO 1952).

Classification societies**17 Which are the approved classification societies?**

The following classification societies are recognised by the Malaysian Marine Department:

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

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

A classification society may be liable for breach of contract to the party that engaged it. However, while there have been no reported cases in Malaysia on tortious liability, it is anticipated that similar to the English courts, the Malaysian court will be slow to find classification societies liable in negligence for losses suffered by third parties.

Collision, salvage, wreck removal and pollution**19 Can the state or local authority order wreck removal?**

Yes, the Director of Marine in Malaysia may order the shipowner to locate, mark and remove a wreck and take measures to prevent pollution from the wreck, if in the opinion of the Director of Marine, the wreck is or is likely to become a hazard to navigation or a public nuisance, or causes or is likely to cause inconvenience or harmful consequences to the marine environment.

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

Malaysia has adopted the following international conventions and protocols:

- the Nairobi Wreck Removal Convention 2007 (not in force in East Malaysia);
- the International Convention for the Prevention of Pollution from Ships 1973 and 1978 (MARPOL);
- the International Regulations for Preventing Collision at Sea 1972 (COLREGS);
- the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC);
- the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC), Protocol of 1992;
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992; and
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

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 the Lloyd's standard form is acceptable. The MSO 1952 does not impose restrictions on persons who may carry out salvage operations.

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

Although Malaysia is not a party to either convention, the Malaysian High Court is vested with the same jurisdiction as the English High Court by virtue of section 24 of the Courts of Judicature Act 1964. Malaysia therefore applies the English Senior Courts Act 1981 (SCA 1981), which gives effect to the International Convention Relating to the Arrest of Sea-Going Ships 1952.

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 in Malaysian territorial waters for claims set out in section 20(2) of the SCA 1981, irrespective of the vessel's flag or law governing the claim. The categories of claims where the vessel with which the claim arises can be arrested are as follows:

- any claim to the possession or ownership of a ship or to the ownership of any share therein;
- any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- any claim in respect of a mortgage of or charge on a ship or any share therein; and
- any claim for the forfeiture or condemnation of a ship or of goods that are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

The categories of claims where the vessel with which the claim arises, or a sister ship (Category B), can be arrested are as follows (section 20(2)(e)-(r), SCA 1981):

- any claim for damage done by a ship;
- any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of:
 - the owners, charterers or persons in possession or control of a ship; or
 - the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
- any claim for loss of or damage to goods carried in a ship;
- any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- any claim in the nature of salvage;
- any claim in the nature of towage in respect of a ship or an aircraft;
- any claim in the nature of pilotage in respect of a ship or an aircraft;
- any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
- any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
- any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- any claim arising out of an act which is or is claimed to be a general average act; and
- any claim arising out of bottomry.

For claims under Category B, an arrest of the vessel or a sister ship is only permissible provided the following criteria in section 21(4) of the SCA 1981 are met:

- the claim arises in connection with a ship;
- the person who would be liable on the claim in an action 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; and
- at the time when the action is brought, the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a bareboat charter (for arrest of the vessel), or the relevant person is the beneficial owner as respects all the shares in a sister ship (for arrest of a sister ship).

A time-chartered ship cannot be arrested for claims against its time-charterer, but where a time-charterer owns other ships, any other ship owned by the time-charterer may be arrested in relation to a claim against the time-charterer, provided the claim falls within section 20(2) (e)-(r) of SCA 1981, and the requirements in section 21(4) of the SCA 1981 are met.

Arrests of associated ships are not permitted in Malaysia.

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

Yes. Claims that give rise to maritime liens are claims for damage done by a ship, master's disbursements, master and crew wages, bottomry and salvage.

25 What is the test for wrongful arrest?

To claim damages for wrongful arrest, the aggrieved party must show mala fide or gross negligence which implies malice by the arresting party. An action for wrongful arrest has been successful where the vessel has been arrested for a completely unmeritorious claim.

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, vessels may only be arrested pursuant to the admiralty jurisdiction of the High Court in Malaysia if the ownership requirement in section 21(4) of the Senior Courts Act 1981 are met (ie, that the person who would be liable in personam for the claim must be, at the time the action is brought, the beneficial owner or bareboat charterer of the vessel). Based on this, it would not be possible for a charterer to arrest a vessel for a claim for bunkers arising out of a contract between the charterer and the bunker supplier. However, if the charterer had the actual or apparent authority of the owner and the bunker supplier intended to contract with the owner, then the bunker supplier may be able to invoke the admiralty jurisdiction of the High Court.

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

No, but an undertaking must be made to the court by the arresting party to pay on demand the fees and expenses incurred by the Admiralty Sheriff in relation to the arrest. A sum of 15,000.00 ringgit is also required to be deposited in court prior to arrest.

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 party wishes to provide security to secure the release of the vessel, the security may be provided in the form of bail, letters of undertaking or bank guarantees. Parties are free to negotiate the quantum of security, usually the value of the claim and expected interest and cost, which should not exceed the value of the vessel. If the sum requested by the arresting party is excessive, an application may be made to court to moderate the amount. The court will usually moderate the amount to the claim amount with interest and costs on the basis of the arresting party's best arguable case.

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 document is required as proof of appointment when a lawyer appears in court and states that he is instructed. However, if this authority is challenged, the lawyer should furnish the court with a warrant to act or a board resolution appointing him to make the arrest application.

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

The sheriff. However, the arresting party will be responsible to first expend the amounts necessary for the maintenance and preservation of the vessel, which are eventually recoverable from the proceeds of sale of the vessel.

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 vessel cannot be arrested for the purpose of obtaining security for court proceedings outside Malaysia and the arresting party must pursue the claim on its merits in the Malaysian court. However, where the court stays or dismisses an action in rem on the ground that the dispute in question should be submitted to the determination of courts outside Malaysia, the court may order that any vessel that has been arrested be retained as security for the satisfaction of the foreign judgment. Arrests of vessels in Malaysia are permissible to secure the amount in dispute in respect of a foreign arbitration (section 11 of the Arbitration Act 2005). Further, where admiralty proceedings are mandatorily stayed in favour of a foreign arbitration, the court may order that the vessel that has been arrested be retained as security for the satisfaction of any award or order that the stay of those proceedings be conditional on the provision of equivalent security (section 10 of the Arbitration Act 2005).

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

A *Mareva* or freezing injunction, either domestic or worldwide, may be obtained where there is a real risk of dissipation of assets prior to judgment. Some of the other factors the court will consider in granting a freezing injunction is whether there is a good arguable case and whether the balance of convenience lies in favour of granting the freezing injunction to freeze assets up to the value of the claim.

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

Yes. The court has the discretion to grant an order:

- for detention, custody or preservation, or inspection of any property in a party's possession, which is the subject matter of the cause, or as to which any questions may arise; and
- to authorise any samples of property be taken or any observation or experiment made on such property to obtain full evidence in any matter.

For inspection by assessors, any party or witness of a ship or other property to obtain full information or evidence on any issue.

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

It is not possible to arrest bunkers under the Malaysian admiralty jurisdiction but freezing injunctions may be obtained in respect of bunkers.

Judicial sale of vessels

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

The arresting party, the owner of the vessel or any party with a recognised in rem claim can apply for judicial sale of an arrested vessel. However, the application must be made in the action in which the vessel is arrested.

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?

An order for appraisal and sale must be obtained, after which a commission for appraisal and sale must be filed in court. Once the vessel is valued by a court-appointed valuer, the vessel will be sold either by private treaty or public auction (rarely used). The private treaty exercise involves advertising the sale of the vessel and inviting sealed bids which are submitted to the Admiralty Sheriff. If after several rounds of tender the bids do not reach the appraised value, an application may be made to court to authorise sale below appraised value. Once the proceeds of sale are paid into court, the hearing to determine the priorities hearing will be held after 90 days of payment of proceeds into court (or such other period as the court orders) and the proceeds of sale will then be paid out in accordance with the order of priorities. Depending on the number of rounds of tender needed, a judicial sale may be concluded within approximately six to 12 months following an application for sale.

The main costs associated with judicial sale are filing costs (set out in the rules of court), costs of valuation of vessel and costs of advertisements (incurred by the arresting party with the approval of the sheriff and recoverable from the proceeds of sale as sheriff's costs and expenses). The court's commission on sale is 5 per cent on the first 1,000 ringgit and 2.5 per cent on subsequent amounts.

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

The ranking of claims in order of priority is generally as follows:

- statutory claimants, namely through powers conferred by the port legislation of Malaysia on harbour and port authorities to detain and sell ships for unpaid dues;
- court's commission upon judicial sale;
- sheriff's expenses and costs;
- costs of the producer of the fund (usually arresting party's legal costs);
- maritime liens (except for possessory liens which accrue before the maritime liens);
- possessory liens;
- mortgages; and
- statutory liens, ranking *pari passu*.

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

A judicial sale in Malaysia extinguishes all claims, liens, maritime or otherwise, and encumbrances on the vessels and provides the purchaser with clean title.

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

There are no decided cases on this point but Malaysia is likely to follow the English position which recognises the extinction of liens and encumbrances on vessels sold by a foreign court pursuant to a judgment in rem.

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

No.

Carriage of goods by sea and bills of lading

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?

Malaysia has not signed or ratified the Hague-Visby, Hamburg or Rotterdam Rules. The Hague Rules are compulsorily applicable in Malaysia in relation to and in connection with the carriage of goods by

sea in vessels carrying goods from any port in Malaysia to any other port whether in or outside Malaysia. The Hague Rules apply only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea. Carriage at sea covers the period from the time when the goods are loaded on the vessel to the time they are discharged from the vessel (article I(e) of the Hague Rules).

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?

Malaysia is not party to a combined transport or multimodal bill of lading convention, but is party to the following main road and air transport conventions:

- the Convention on Road Traffic 1949;
- the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 (Warsaw Convention); and
- the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal Convention).

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

Malaysia applies the provisions of the English Bill of Lading Act 1855. A shipper has title to sue on a bill of lading. Further, every consignee 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 or her all rights of suit, and be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself or herself.

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 position under English law will be persuasive in Malaysia. Generally, clauses that are directly germane to the subject matter of the bill of lading can be incorporated by general reference and non-germane clauses, including arbitration and exclusive jurisdiction clauses would require clear and specific words for incorporation. The charter party clauses must also make sense in the context of the bill of lading and not be inconsistent with its terms.

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

The Malaysian courts are likely to adopt the position under English law. Whether a demise clause or identity of carrier clause is binding on the owner will depend on the facts of the case. If the bill of lading contains a demise or identity of carrier clause stating that the shipowner is the carrier, the shipowner will not be considered the carrier if the face of the bill of lading contains wording identifying the charterer as carrier and the bill of lading is signed by agent for charterer (*The Starsin* [2003] 1 Lloyd's Rep. 571).

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 the shipowner is not the contractual carrier, the shipowner is not entitled to rely on, and is not subject to, the rights, immunities, responsibilities and liabilities set out in the Hague Rules. However, the shipowner may be liable in negligence and may rely on defences such as contributory negligence.

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

The English position will be persuasive in Malaysia. Unjustified deviation would amount to a breach of contract which will entitle the innocent party to discharge the contract. In those circumstances, the carrier cannot rely on the contractual defences.

48 What liens can be exercised?

The liens that may be exercised are as follows:

- maritime liens: only for claims for damage done by a ship, master's disbursements, master and crew wages, bottomry or salvage. Maritime liens created under foreign law would not be recognised unless the underlying claim falls within the recognised categories;
- contractual liens: agreed in contract between parties; and
- common law liens: created by operation of law and exercisable by shipowners, warehousemen, shipbuilders or repairers, and port authorities for unpaid sums.

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

Carriers can be found liable for breach of contract, conversion or breach of the duty as bailees. They cannot avail themselves of the limitation of liability under the Hague Rules.

50 What are the responsibilities and liabilities of the shipper?

The responsibilities of the shipper include providing accurate details of the marks, number, quantity and weight of the goods at the time of shipment, and paying freight of the goods. The shipper is also liable for all damages and expenses directly and indirectly arising out of or resulting from the shipment of dangerous goods the shipment where the carrier has not consented with knowledge of the character of the goods.

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

There is no ECA in force in Malaysian territorial waters.

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?

Malaysia has ratified annex VI of MARPOL. Based on MARPOL, as at 1 January 2012, the maximum sulphur content of any fuel oil used on board Malaysian and foreign vessels in Malaysian territorial waters is 3.5 per cent m/m.

There is currently no penalty provided under Malaysian law for non-compliance.

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

There are ship-breaking facilities in Malaysia. However, Malaysia has not ratified the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, and there are no ship recycling regulations that are applicable in Malaysia.

Jurisdiction and dispute resolution**54 Which courts exercise jurisdiction over maritime disputes?**

All high courts in Malaysia have jurisdiction over maritime disputes. Since 2010, an admiralty court based in Kuala Lumpur has been established to deal specifically with maritime-related disputes.

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

Service of notice of writ on a defendant outside the jurisdiction is permitted with leave of court in relation to certain categories of claims and where the court has jurisdiction to determine the dispute (see Order 11 and Order 70, Rule 3 of the Rules of Court 2012). It is not permissible for in rem actions.

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

Yes. The Asian International Arbitration Centre (formerly known as the Kuala Lumpur Regional Centre for Arbitration) has a panel of arbitrators who specialise in diverse areas, including maritime arbitration.

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

The Reciprocal Enforcement of Judgments Act 1958 provides for the reciprocal enforcement in Malaysia of judgments of superior courts in Brunei Darussalam, Hong Kong, New Zealand, Singapore, Sri Lanka, the United Kingdom and specific districts in India. The judgments must be final and conclusive as between parties, be for monetary payment not in the nature of taxes or fines, and not be given on appeal from a court that is not a superior court. An application must be made within six years from the date of judgment (or last judgment, in case of appeal) to the Malaysian High Court for the judgment to be registered in the High Court. For judgments of other countries, fresh proceedings have to be initiated in Malaysia to obtain a judgment.

For arbitration awards, Malaysia is party to the New York Convention 1958. An award made in respect of an arbitration where the seat of arbitration is in Malaysia or from a country that is party to the New York Convention shall be recognised as binding and be enforced by entry as a judgment in terms of the award on an application in writing to the High Court. Recognition or enforcement of an award may be refused in limited circumstances set out in section 39 of the Arbitration Act 2005, such as where the arbitration agreement is not valid under the law to which the parties have subjected it, the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia or the award is in conflict with the public policy of Malaysia.

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

Yes. In the case of *Majlis Perbandaran Seremban v Maraputra Sdn Bhd* [2004] 5 MLJ 469, the High Court recognised that asymmetric arbitration clauses allowing only one party the right to refer matters to arbitration are valid and binding.

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

An application may be made to the court for an anti-suit injunction. The injunction may be granted to restrain the institution or prosecution of a foreign suit where this would result in multiplicity of proceedings. The court will not grant an injunction if it will unjustly deprive the claimant of advantages in a foreign forum.

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 to court for a stay of proceedings where proceedings have been commenced in breach of a clause providing for a foreign court to have jurisdiction. However, the presence of a foreign jurisdiction clause does not automatically oust the jurisdiction of the Malaysian courts. The Malaysian court will consider whether it has jurisdiction to determine the dispute, and if so, whether Malaysia is the appropriate forum to determine the dispute.

In relation to clauses providing for jurisdiction to a foreign arbitral tribunal, section 10 of the Arbitration Act 2005 provides for a mandatory stay of proceedings where a party makes an application before taking any other steps in the proceedings, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Limitation periods for liability**61 What time limits apply to claims? Is it possible to extend the time limit by agreement?**

Section 517 of MSO 1952 provides for a time limit of two years for any action to enforce a claim or lien against a vessel or its owners for any damage or loss caused by the whole or partial fault of the vessel to

another vessel or its cargo, freight or other property on board, or damages for loss of life or personal injuries suffered by any person on board. The time limit of two years also applies to claims in respect of salvage services rendered. Further, an action under MSO 1952 to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries must be commenced within one year from the date of payment.

The time limit for claims founded on breach of contract and tort is six years from the date on which the cause of action accrued, but does not apply to any cause of action within the Admiralty jurisdiction of the High Court that is enforceable in rem other than an action to recover the wages of seamen (section 6 of the Limitation Act 1953). For claims falling within the scope of the Carriage of Goods by Sea Act 1950, which incorporates the Hague Rules, the time bar is one year after delivery of the goods or the date when the goods should have been delivered.

It is possible to extend the time limits by mutual agreement.

62 May courts or arbitral tribunals extend the time limits?

The courts may extend the time periods provided under section 517 of MSO 1952, if it is satisfied that during such period there has not been any reasonable opportunity to arrest the defendant's vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business. In relation to arbitration, section 45 of the Arbitration Act 2005 allows the High Court to extend time limits for commencement of arbitration specified in the arbitration agreement, if it is of the opinion that undue hardship would otherwise be caused.

Miscellaneous

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

Malaysia ratified the Maritime Labour Convention 2006 (MLC 2006) on 20 August 2013 and MSO 1952 was subsequently amended, effective 1 March 2017, to give effect to the provisions of MLC 2006. The bulk of the amendments apply to Malaysian ships, while a number apply to both Malaysian and foreign ships. The exempted categories of ships include government or state-owned ships, fishing vessels, pleasure yachts, Malaysian ships trading or operating exclusively within Malaysian ports, floating, production, storage, and offloading vessels, and floating, storage and offloading vessels.

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.

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

The MSAA 2017 will bring about changes to the merchant shipping regime in Malaysia when it comes into force. The key changes pertain to registration of ships under the MSR and MISR, registration of bareboat chartered-out ships, rights of mortgagees, licensing of ships, increase in penalties and the establishment of a Malaysia Shipping Development Fund.

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Newbuilding contracts

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, a standard form contract in international use will be adopted as the basis of the shipbuilding contract, with the parties making the 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 had 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, 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 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.

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).

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).

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 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 in 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.

Ship registration and mortgages

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.

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

In order 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 or of the European Economic Area (EEA) or of Switzerland 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 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 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).

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 would 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 a confirmation from an approved classification society.

In order 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 in order 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 international tonnage certificate issued under the authority of Malta as well as a duly endorsed carving and marking note.

Depending on the age of the vessel, a satisfactory flag state inspection may be required as a condition for registration of the vessel under the Maltese flag.

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 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 (see question 6).

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 register from the underlying registry and the consent of the underlying registry and of any registered mortgagee. Within a period of 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.

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).

Limitation of liability

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 limitation 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 in order 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) have been amended to reflect the new limits of liability which have effect in Malta as from 8 June 2015.

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 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 person has been required to respond to a claim that has already been commenced.

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.

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.

Port state control

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).

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 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 of time and where a refusal of access has been issued by a state signatory to the Paris Memorandum of Understanding (Paris MoU).

A ship runs the risk of being permanently refused access to any port and anchorage within Paris MoU territories in case of a subsequent detention in a port or anchorage within those territories after the third refusal of access.

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 Court of Appeal (Inferior Jurisdiction). 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.

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 recognised classification societies by the Malta Transport Authority:

- American Bureau of Shipping;
- Bureau Veritas;
- China Classification Society;
- Class NK;
- Croatian Register of Shipping;
- DNV-GL;
- Indian Register of Shipping;

- Korean Register of Shipping;
- Lloyd's Register of Shipping;
- Polish Register of Shipping;
- Registro Italiano Navale; and
- Russian Maritime Register of Shipping.

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 a *bonus 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 is recognised by the Maltese administration 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.

Collision, salvage, wreck removal and pollution

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 in order 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 MSA).

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 to 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 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 are required to comply with anti-fouling legislation in terms of EU law.

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. Neither is there any requirement for a contract to be entered into in order 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.

Ship arrest

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

Malta is not a signatory to either of the 1952 and 1999 Arrest Conventions. 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.

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 (i) to (xxv) 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:

- (i) claims to possession, ownership or title to a ship;
- (ii) questions arising between co-owners as to the ownership, possession, employment or earnings of a ship;
- (iii) claims in respect of a mortgage or hypothec or charge on a ship;
- (iv) claims arising out of a contract of sale;
- (v) claims for damages received by a ship;
- (vi) claims for damage caused by a ship;
- (vii) claims for loss of life or personal injury caused by a ship;
- (viii) claims for loss or damage to goods carried in a ship;
- (ix) claims arising out of an agreement for the carriage of goods or use or hire of a ship;
- (x) claims for salvage;
- (xi) claims for damage to environment by a ship;
- (xii) claims relating to wrecks;
- (xiii) claims for towage;
- (xiv) claims for pilotage;
- (xv) claims for supplies or services rendered to a ship;
- (xvi) claims for construction, repair, conversion or equipping of a ship;
- (xvii) claims for port, dock or harbour dues;
- (xviii) claims by crew for wages or repatriation;
- (xix) claims for disbursements made;
- (xx) claims for commissions, brokerage or agency fees;
- (xxi) claims arising out of an act of general average;
- (xxii) claims arising out of bottomry;

- (xxiii) claims for forfeiture of a ship;
- (xxiv) claims for insurance premiums; and
- (xxv) 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 arrest is possible in security of foreign process (see question 30), 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 (i), (ii) and (iii) 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 (iv) to (xxv), an action *in rem* may be brought against that ship, where the person who would be liable on the claim for an 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 MSA, which survive the voluntary sale of the vessel by up to one year.

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 a number of 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 ranking of creditors.

Maltese law also confers a possessory lien over the ship in favour of any ship repairer, shipbuilder or other 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:

- (i) judicial costs incurred in respect of the sale of the ship and the distribution of the proceeds thereof;
- (ii) fees and other charges due to the registrar of Maltese ships arising under the MSA;
- (iii) tonnage dues;
- (iv) wages and expenses for assistance, recovery of salvage, and for pilotage;
- (v) 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;
- (vi) rent of the warehouses in which the ship's tackle and apparel are stored;
- (vii) 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;
- (viii) 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;

- (ix) damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman;
- (x) 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;
- (xi) 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 (i) to (ix) above, although in any case for a sum in the aggregate not exceeding 4,000 units;
- (xii) 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;
- (xiii) monies due to creditors for provisions, victuals, outfit 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;
- (xiv) 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;
- (xv) damages and interest due to another vessel or to her cargo in cases of collision of vessels; and
- (xvi) the debt specified in article 2009(d) of the Civil Code for the balance of the price from the sale of a ship.

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 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.

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.

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 local bank guarantee.

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 would have to deposit the amount of the claim as security. Such 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.

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, would require to 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 needs to be executed by an authorised representative of the arresting party but otherwise, 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 at a later stage 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.

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.

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 security of maritime in rem claims (see question 23), as well as in 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.

It is to be noted here that ship mortgages constitute executive titles under Maltese law, so that 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 the filing of 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 in which 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.

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 in nature and is not to be confused with a warrant of arrest. Such order 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.

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.

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 in the event that a reservation of ownership clause is included in the bunkers supply agreement. In appropriate cases, such warrant of seizure of bunkers could possibly be coupled with an arrest of the vessel.

Judicial sale of vessels

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

Any creditor being in possession of an executive title, namely final judgment (*res judicata*) creditors and creditors enjoying any other executive title (see question 31) 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 which 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.

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 in possession of 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.

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

The order of priority of claims is as follows:

- (i) judicial costs incurred in respect of the sale of the ship and the distribution of the proceeds thereof;
- (ii) fees and other charges due to the registrar of Maltese ships arising under the MSA;
- (iii) any debt secured by a possessory lien or privilege (according to article 54 of the MSA) over a ship, provided that such debt arose prior to the debts of the creditors enjoying any one of the special privileges listed in (iv) to (xi) hereunder; in the event that 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 (iv) to (xi) hereunder, then such debt as secured by a possessory lien or privilege would rank immediately after such special privilege;
- (iv) tonnage dues;
- (v) wages and expenses for assistance, recovery of salvage, and for pilotage;
- (vi) 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;
- (vii) rent of the warehouses in which the ship's tackle and apparel are stored;
- (viii) 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;
- (ix) 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;
- (x) damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman;
- (xi) 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;
- (xii) 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 (i), (ii), (iv), (v), (vi), (vii), (viii), (ix) and (x) above, although in any case for a sum in the aggregate not exceeding 4,000 units;
- (xiii) debts secured by a registered mortgage;
- (xiv) 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;
- (xv) monies due to creditors for provisions, victuals, outfit 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;
- (xvi) 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;
- (xvii) damages and interest due to another vessel or to her cargo in cases of collision of vessels; and
- (xviii) 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 (iii) are the debts due to any ship repairer, shipbuilder or other creditor into whose care and authority a ship has been placed for the execution of works or other purposes.

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.

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.

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, as outlined in question 24, 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.

Carriage of goods by sea and bills of lading**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 purpose of 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.

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.

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.

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 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 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.

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 the 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.

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.

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.

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 MSA 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.

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 unless against 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.

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; 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.

Shipping emissions

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.

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, the placing on the market of 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 in order 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 423.29 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 by means of 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.

Ship recycling

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. There are no ship recycling facilities in Malta.

Jurisdiction and dispute resolution

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 €11,646.87. 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.

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 resident in an EU member state or not. If resident in an EU member state, then service is effected through the Office of the

Update and trends

Following the conclusion of the European Commission's investigation into Malta's tonnage tax regime in December 2017, Malta has published new tonnage tax regulations in line with the European Commission's decision. The new tonnage tax regulations provide a sound basis for the Maltese flag to grow further.

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 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.

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.

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

With regard to foreign judgments, once again 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.

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 opportunity to pronounce themselves 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 of *pacta sunt servanda*.

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.

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 which it deems fit.

Limitation periods for liability

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 a number of 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 for 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 the filing of a judicial act, unless the prescriptive period concerned be a peremptory one, as is the case for instance with regard to 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, it is possible for the arrested party to 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 records of the warrant.

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.

Miscellaneous

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 which 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.

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.

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 which is free from all privileges and encumbrances.



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Newbuilding contracts

- 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 passes from the shipbuilder to the shipowner under the terms and conditions of the shipbuilding contract and under the rules and regulations of the applicable law as agreed in the shipbuilding contract. Within the scope of the construction of commercial vessels and private pleasure yachts it can practically be excluded that a shipbuilding contract will be governed by the laws of the Marshall Islands.

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

Marshall Islands law would be relevant only in cases where the refund guarantee would be governed by the laws of the Marshall Islands. This can practically be excluded within the scope of the construction of commercial vessels and private pleasure yachts.

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

Yes, provided that the local courts in the Marshall Islands have subject-matter and personal jurisdiction over the point in question. In the case of an entity incorporated under the laws of the Marshall Islands and acting as the buyer under a shipbuilding contract (which, in all likelihood, will not be governed by the laws of the Marshall Islands and will contain an agreed legal venue outside of the Marshall Islands), the Marshall Islands courts will neither have subject-matter nor personal jurisdiction over questions related to the delivery of the vessel under the shipbuilding contract.

- 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 damage claim as result of a defective vessel would primarily be governed by the underlying contract (eg, the shipbuilding contract). Product liability would be relevant only in the context of the shipbuilding contract and will not be specifically considered if the shipbuilding contract contains a warranty clause covering the shipbuilder's liability for deficiencies of the vessel. A purchaser would primarily be entitled to damages against the seller of the vessel under the purchase contract, and not against the builder of the vessel, unless the purchaser can prove that the builder had the intention to damage the purchaser. It should be emphasised that this is relevant in very exceptional cases only. Under normal circumstances, building contracts as well as purchase contracts of second-hand vessels will not be governed by the laws of the Marshall Islands.

Ship registration and mortgages

- 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 Marshall Islands has one register for domestic vessels, that is, vessels operated exclusively within Marshall Islands territorial waters. A further register records internationally trading vessels. The latter is widely considered to be an open registry (ie, the shareholders or officers of the entities documented as owners or bareboat charterers are not subject to any nationality requirements).

The vessels eligible for registration need to fulfil certain minimum requirements: a seagoing vessel engaged in foreign trade, commercial fishing vessels of at least 24 metres in length, commercial yachts of at least 24 metres and private yachts of at least 12 metres are eligible for documentation. Further, the age of a vessel shall not exceed 20 years. The age limit may be waived under certain conditions, including, without limitation, a preregistration inspection. Further, vessels under construction are eligible for documentation, provided that the applicant holds legal title to the vessel under construction and there is no restriction against such registration in the jurisdiction where the vessel is being built.

The Marshall Islands rules do not contain a specific definition of the term 'vessel'. Beside documenting the swimming objects being recognised as ships beyond any doubt, the register has also documented all sorts of mobile offshore units and mobile offshore drilling units as vessels.

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

A ship will be documented if it is owned by a citizen or national of the Marshall Islands or by a foreign maritime entity qualified in the Marshall Islands. Entities formed under the Associations Law (including the Business Corporations Act) are considered nationals for this purpose. A registered foreign maritime entity is an entity that has been incorporated under the laws of a jurisdiction other than the Marshall Islands and has been accredited by the Marshall Islands as a foreign maritime entity. For this purpose, the applicant is required to provide information on the nature and powers of the entity, its legal representatives, its address its principal place of business, its management and its valid incorporation and existence. This enables entities that have been incorporated under a jurisdiction other than the Marshall Islands to apply, register and then document Marshall Islands-flagged vessels.

- 7 What are the documentary requirements for registration?**

The Maritime Act does not suggest a list of specific documents, but describes the functional contents of the documents required for the registration. The documents should cover the following issues to the satisfaction of the register:

- Applicant's ownership of the vessel: this will normally be a bill of sale transferring title to the vessel onto the applicant. It also covers the corporate issues of the registration: the applicant needs to submit all corporate documents to the registrar evidencing that it is validly incorporated and existing, that the requirements of the applicant's articles or by-laws with respect to directors' and shareholders' resolutions have been met and that the persons being

authorised to act on behalf of the applicant have actually acted and were properly authorised to do so.

- Any foreign marine document for the vessel has been surrendered with the consent of the government that had issued it, or has been legally cancelled or otherwise terminated: this item covers the discharge of the vessel from its previous registration. Usually the Marshall Islands requires a certificate of deletion from the previous registration or – in case of a newbuilding – satisfactory evidence that the vessel has not been registered anywhere else previously.
- Seaworthiness of the vessel: the seaworthiness is usually evidenced by a class certificate to be submitted to the register. In addition, the register may and in most cases will require a pre-registration inspection, which is mandatory for vessel of 15 years of age or more. These inspections are conducted by the register's own staff.
- Payment of all fees to the Maritime Administrator: that is, initial registration fee, tonnage tax, as well as documentation fees for the vessel, the registration of the mortgage, etc.
- Markings of name, official number, home port and draft: these must be applied.
- Issuance of a certificate of measurement: the Marshall Islands accepts measurement certificates issued under the 1969 London Tonnage Convention.

The submission of some other organisational documents is required, without limitation satisfactory evidence that the vessel is insured against protection and indemnity risks or evidence that the applicant, the vessel's manager, or both hold all relevant safety and security management certificates.

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

Registration of a vessel as a bareboat under the Marshall Islands flag as well as the registration of a Marshall Islands-documented vessel as a bareboat under the flag of another jurisdiction are permitted.

Bareboat registration in the Marshall Islands' ship register requires that the vessel is bareboat-chartered to an entity being eligible for vessel documentation in the Marshall Islands register. Further, the jurisdiction of the vessel's underlying registration needs to permit the bareboat-flagging out of vessels and to withdraw the right to fly its flag for the duration of the Marshall Islands bareboat registration. The legal owner of the vessel as it appears from the underlying registration needs to consent to the Marshall Islands bareboat registration. In case the vessel is encumbered with a mortgage, hypothecation or similar charge (registered in the underlying register), the holder of such right also needs to consent to the bareboat registration in the Marshall Islands.

The bareboat registration of a Marshall Islands-documented vessel in a jurisdiction other than the Marshall Islands requires an application of the vessel's registered owner and the permission of the Maritime Administrator of the Marshall Islands. In case the vessel is subject to a preferred ship mortgage, the consent of the holder of such rights is required. During the currency of the foreign bareboat registration the vessel's right to fly the Marshall Islands flag is withdrawn and a restricted certificate of registry will be issued.

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

A sale, conveyance, hypothecation, mortgage or assignment of mortgage as well as leasing contracts or bareboat-charter contracts can be recorded and maintained in the central office of the Marshall Islands Maritime Administrator in the US or its duly authorised agent elsewhere. The central storage of the hard copies of all recorded documents and the electronic storage device are situated in the US. The Marshall Islands operates a worldwide database system enabling various deputy commissioners in numerous offices covering all major time zones in Asia, Europe, North America and South America to collect the instruments to be recorded, procure the valid recordation of the instruments and issue certificates confirming the valid recordation. These certificates usually contain: the vessel's main particulars; a recital with a short description of the recorded right together with the exact time and place of recordation; and the exact time of the issuance of the certificate.

Limitation of liability

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

With effect from 1 March 1995 the Marshall Islands has been a member state of the 1976 Convention on Limitation of Liability for Maritime Claims 1976 (LLMC). The limitation regime as set out in the LMCC applies and is enacted in the Limitation of Liability for Maritime Claims Act (section 501 et seq of the Marshall Islands Maritime Act). The same limits as agreed in the 1996 Protocol to the LLMC have been introduced in section 510 of the Marshall Islands Maritime Act.

11 What is the procedure for establishing limitation?

Questions of procedure are resolved in accordance with the *lex fori*. It is improbable that a liability claim will be governed by Marshall Islands law or pursued in a court in the Marshall Islands because liability cases would occur outside of the Marshall Islands territory.

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

The limitation of liability is barred if the entitled person proves that the loss resulted from the liable person's personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

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

The Marshall Islands has acceded to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea on 29 November 1994. Claims arising for loss of life or personal injury to passengers of a ship are limited to 175,000 special drawing rights (SDR) multiplied by the number of passengers that the ship is authorised to carry according to its certification. Loss or damage of cabin luggage is limited to 833 SDR, loss or damage of vehicles to 3,333 SDR and loss or damage of other luggage to 1,200 SDR.

Port state control

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

As a general observation, questions about the local port state control regime will be relevant for only very few vessels trading internationally. Most of these vessels will never call at a port in the Marshall Islands during their entire lifetime.

Pursuant to the Marshall Islands Ports of Entry Act (latest version 2013 – PEA), vessels calling at Marshall Islands ports are subject to port state control inspections under the authority of the Minister of Transportation and Communications or its secretary. This task has been delegated to the Marshall Islands Port Authority. The ports of entry to which the local port state control regime applies (seaports and airports) are Kwajalein Anchorage, Kwajalein Airstrip, Ebeye Anchorage, Majuro, Darrit Anchorage, Majuro International Airport, Jaluit Anchorage, Jabor Island and the Jaluit Atoll.

15 What sanctions may the port state control inspector impose?

Pursuant to the PEA, the Marshall Islands Port Authority has the power to identify and make note of any deficiencies in the condition of a vessel, its equipment, or its crew and to apply appropriate control action and corrective measures as necessary.

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

The appeal process is governed by the process laid down in the Tokyo Memorandum of Understanding, which is geographically applicable to the Marshall Islands. When a vessel is detained by the Marshall Islands Port Authority in national waters on the grounds that the vessel is unsafe to proceed to sea, poses an unreasonable risk to personnel or the marine environment, and/or fails to comply with applicable national or international requirements, the owner, international safety management (ISM) operator or flag state of the vessel may, if believing that the vessel has been unduly detained, appeal to the Secretary of Transportation and Communications for a review of the detention. The shipowner, ISM operator or flag state may request a detention to

be reviewed by submitting such request along with a statement and supporting documentation of the reasons why the owner, ISM operator or flag state believes that the vessel has been or was detained in error. Such request shall be made in writing within 30 days of the date the notification of the detention was served.

Classification societies

17 Which are the approved classification societies?

The Maritime Administrator of the Marshall Islands cooperates with all members of the International Association of Classification Societies.

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

In general a classification society can be held liable owing to a default under the contract between the shipowner and the classification society or under tort. In relation to the laws of the Marshall Islands this would either require that the contract with the classification society is governed by Marshall Islands law, or that the damage caused by the classification society otherwise establishes subject-matter and personal jurisdiction in the Marshall Islands. Both scenarios are extremely unlikely because the contract with the classification society will almost never be governed by Marshall Islands law and the establishment of the subject-matter jurisdiction of tort claims against the classification society would require that the damage has occurred in the territorial waters of the Marshall Islands or that the classification society has committed a criminal offence against the damaged party.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Not relevant, as most vessels trading internationally will not enter Marshall Islands territorial waters during their lifetime.

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

The Marshall Islands is not a member state of the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910. Further, the Marshall Islands has acceded to the following conventions: Nairobi International Convention on the Removal of Wrecks 2007 on 27 October, 2014; International Convention on Civil Liability for Oil Pollution Damage 1976 on 24 January 1994; and International Convention on Salvage 1989 on 16 October 1995.

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 are no mandatory local forms of salvage agreements. Salvage operations may be carried out by all salvage companies. Owing to the sensitive environment in the territorial waters of the Marshall Islands specific local rules for the environmental protection of the islands need to be maintained for all activity within the Marshall Islands territorial waters, including salvage operations.

The Maritime Act includes the Wrecks and Salvage Act, which, however, contains provisions for Marshall Islands-flagged vessels stricken outside of territorial waters of the Marshall Islands.

Ship arrest

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

The Marshall Islands is neither a member state of the International Convention Relating to the Arrest of Sea-Going Ships 1952 nor to the International Convention on the Arrest of Ships 1999.

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 Marshall Islands is a small nation comprising thousands of small islands. Very few internationally trading significant carriers trade there. As a consequence, there is no history of vessel arrests on which to

draw, and the Maritime Act itself does not contain provisions regarding the arrest of vessels within the territorial waters of the Marshall Islands.

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

The Marshall Islands Maritime Act mentions the following liens:

- liens for damages arising out of tort;
- liens for unpaid tonnage taxes, fees, penalties and other charges arising under the Maritime Act or its implementing regulations;
- liens for crew wages;
- liens for general average;
- salvage liens (including contractual claims for salvage); and
- liens for expenses and fees allowed and costs taxed by the court.

25 What is the test for wrongful arrest?

See question 23.

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?

See question 23.

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

See question 23.

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?

See question 23.

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 following applies to all correspondence with Marshall Islands courts. The formal requirements for evidencing proper authorisation of a party to litigation are fairly uncomplicated and widely determined by the requirements and applications of the parties. All correspondence must be in English or – if not in English – accompanied by a certified translation into English. The courts accept electronic submission of documents. A litigation can be held entirely on the basis of electronic documents (usually PDF copies) against a printout prepayment fee to the court of US\$250. It is not necessary to submit originals.

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

See question 23.

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?

See question 23.

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

See question 23.

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

See question 23.

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

See question 23.

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

To our knowledge there is no precedence for a judicial sale of a vessel within the Marshall Islands. Ships engaged in international trade very rarely call at a Marshall Islands seaport.

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?

See question 35.

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

See question 35.

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

See question 35.

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

The judicial sale of a Marshall Islands-documented vessel outside the Marshall Islands will have the effect that the registrar will cancel the vessel from the Marshall Islands register, provided that (presumably) the buyer of the vessel in the judicial sale has notified the registrar of such sale, upon which the registrar will inform the registered mortgagees of such notification and its intention to strike the vessel and its right to fly the Marshall Islands flag from the register. Not less than 60 days following the mailing of such notification to the mortgagees, the registrar, as a result of receipt by it of satisfactory evidence that the vessel has been transferred to another registry following the sale by order of a foreign admiralty court in a civil action in rem, will strike the vessel and its right to fly the Marshall Islands flag from the registry. Section 304 paragraph 2 of the Maritime Act explicitly states that such action shall not impair or affect the lien or the status of any preferred mortgage recorded against the vessel, nor shall it terminate the interest of a mortgagee in the vessel. It can be concluded from the above that evidence about the judicial sale in a foreign jurisdiction will be recognised by the Marshall Islands ship register if it is sufficiently evidenced to the registrar that a judicial sale has validly been effected.

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

The Marshall Islands is not a member state to the International Convention on Maritime Liens and Mortgages 1993.

Carriage of goods by sea and bills of lading

Note: we believe that contracts for the carriage of goods, charter contracts and bills of lading will in almost no circumstances be governed by the laws of the Marshall Islands. Nor will tort claims in connection with the carriage of goods be governed by the laws of the Marshall Islands. Therefore, answers to questions 41 to 50 will not be of relevance to the reader. Chapter 4, Part I of the Marshall Islands Maritime Act refers to the carriage of goods by sea only.

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?

Not applicable – see above note.

Update and trends

Every shipping jurisdiction – including the Marshall Islands – is substantially influenced by and dependent on the work of international bodies, primarily the IMO. Being aware of the responsibility towards shipowners in respect of the contents of the rules and regulations released by – inter alia – the IMO, the Marshall Islands takes an outstandingly active part in the work of the IMO. The Marshall Islands has appointed at all times no fewer than three active IMO delegates, who take part in all IMO activities. The negotiating strategies are closely linked to the interests of the shipowners and the status of the negotiations is frequently reported to their shipowners.

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?

Not applicable – see above note.

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

Not applicable – see above note.

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?

Not applicable – see above note.

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

Not applicable – see above note.

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?

Not applicable – see above note.

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

Not applicable – see above note.

48 What liens can be exercised?

Not applicable – see above note.

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

Not applicable – see above note.

50 What are the responsibilities and liabilities of the shipper?

Not applicable – see above note.

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

No.

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 Maritime Organization (IMO) regulations apply (reduction to 0.5 per cent sulphur in the emitted exhaust gas starting from 1 January 2020).

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

There are no ship recycling facilities on the territory of the Marshall Islands. Therefore, the applicability of international ship recycling regulations is redundant.

Jurisdiction and dispute resolution**54 Which courts exercise jurisdiction over maritime disputes?**

The High Court in Majuro will hear all disputes to which the High Court's jurisdiction applies. There are no specific maritime sections within the High Court.

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

The rules governing service of court proceedings on a defendant located outside of the Marshall Islands are specified in the Marshall Islands Rules of Civil Procedure (MIRCP). Rule 4(f) MIRCP states that service shall be effected in accordance with the rules of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the Hague Convention). If the Hague Convention is not applicable, service shall either be effected in compliance with the rules for service applicable at the place of service, or (unless prohibited by the rules of that state) by delivering a copy of the summons and of the complaint to the individual personally, or by using any form of mail that the Marshall Islands court clerk addresses and sends to the individual and that requires a signed receipt.

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

There is no local arbitral institution with maritime arbitrators in the Marshall Islands.

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

Foreign judgments and arbitral awards will be recognised provided that they do not violate basic legal principles applicable in the Marshall Islands. A further condition is that either the defendant was personally present and heard in the foreign proceedings or, in the case of a default judgment, that the defendant was properly notified and given the possibility to defend his or her position, but has omitted to do so.

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

Yes.

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

The defendant must claim the lack of subject-matter or personal jurisdiction of the court outside the Marshall Islands that will decide on the basis of the civil procedures rules applicable there whether the claim shall be dismissed owing to lack of jurisdiction.

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 has the possibility in the domestic proceedings to claim that the High Court in Majuro lacks subject-matter or personal jurisdiction for these proceedings. The court will decide on the basis of the MIRCP and a substantial number of precedents by the Supreme Court as well as US courts, mainly Delaware courts.

Limitation periods for liability

Note: not relevant because contracts will in all likelihood not be governed by Marshall Islands law.

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

Not applicable – see above note.

62 May courts or arbitral tribunals extend the time limits?

Not applicable – see above note.

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

The Marshall Island has been a member state of the Maritime Labour Convention since the 25 September 2007. Pursuant to section 155 of the Maritime Act, all vessels documented in the Marshall Islands and engaged in foreign trade shall comply with the international conventions and agreements to which the Marshall Islands is a state party, including the Maritime Labour Convention.

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?

To apply, the shipping contracts need to be governed by Marshall Islands law. This is so unlikely that any answer would not be relevant for the reader.

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

At present we are not aware of any further noteworthy points related to shipping in the Marshall Islands jurisdiction.

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Newbuilding contracts

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

Article 82 of the Mexican Navigation Law (the Navigation Law) establishes two options for the transfer of ownership under shipbuilding contracts:

- purchase agreement of a future item, in which case the shipbuilder shall provide at its own cost the materials for the construction of the ship and the ownership will be transferred to the shipowner once the construction process is finished; and
- works agreement, in which case the shipowner will provide for the materials of construction and therefore the ship will be its property since the beginning of the works.

It is more common to agree on a purchase agreement of a future item. A ship construction agreement will typically provide for transfer of ownership at the very end and upon delivery of the ship by the shipbuilder to the shipowner, once the complete purchase price is paid.

Parties may agree to change when title will pass, as a shipbuilding contract is a commercial contract in which the intent and will of the parties prevail.

A ship is considered a movable good and as such is regulated under the Navigation Law and the Federal Civil Code. A ship comprises its hull and machinery, its equipment and fixed or movable accessories that are destined permanently for navigation and ornament, constituting a universal fact (*corpora ex consentibus*) (article 78 of the Navigation Law).

The document showing ownership of a ship, a change in ownership or the creation of a lien upon it must be in the form of a public instrument granted by a Mexican notary public or public broker. If the document is executed in a foreign state, Mexican law requires legalisation at a Mexican consulate or an apostille (article 79 of the Navigation Law).

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

Under Mexican maritime law, there are no specific regulations on the matter: the parties are free to agree on the terms of the refund of the guarantees in the construction agreement or in the refund guarantee itself.

To provide more legal certainty most agreements are formalised before a notary public in order to constitute full proof and uncontested evidence in court.

The wording of the refund guarantee must be clear as to the procedure for making a claim and to collect, otherwise parties may face challenges when enforcing their rights in court.

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

If one of the parties breaches its obligation under an agreement, the other party is entitled to request a court for specific performance of its obligations, and in any case payment for lost profits and damage that the delay of performance may cause. Therefore, if a shipyard unlawfully refuses to deliver the vessel, the buyer can claim specific performance of the agreement.

According to article 96 of the Navigation Law, the shipyard has the right to retain a newly constructed vessel until the client pays all amounts due for its construction.

As a precautionary measure, a shipowner may seek a court order resolving the seizure of the newly constructed ship during the main proceedings in the dispute arising from ownership and construction contracts (articles 268 and 269 of the Navigation Law).

Self-help remedies are not available in Mexico.

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?

Liability of the shipbuilder for hidden defects of the ship will be time-barred after two years from the date these defects are discovered by the shipowner, purchaser or third party suffering the damage, but in any event cannot exceed four years as from the date of delivery under the shipbuilding contract (article 79 of the Navigation Law).

Under the Federal Civil Code, liability for hidden defects is also regulated. The general rule is that the transferor is obliged to indemnify the transferee for hidden defects of the transferred goods that make the goods inadequate for their use, and that if the transferee would have known the defects, it would have refused to purchase the goods or would have paid less for its purchase. This will apply to a purchaser from the original shipowner or a third party that has sustained damage.

The right to claim indemnity for hidden defects under the provisions of the Federal Civil Code will be time-barred after six months as from the date of the transfer or delivery of the goods (including the ship). This provision would not be applicable to hidden-defects claims between shipbuilder and shipowner, as there is a special provision in article 79 of the Navigation Law, as explained above.

Ship registration and mortgages

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?

Mexican shipowners or operators (shipping companies) may flag and register vessels in Mexico. Article 10 of the Navigation Law classifies vessels that are eligible for registration as follows:

- by use: passenger transport, transport of cargo, fishing, sports and recreation;
- of extraordinary specialisation by reason of technology and the nature of the services rendered: construction vessels, offshore supply, oil tankers, production of hydrocarbons and related services of the industry;
- mixed use: passenger and cargo transport;
- dredging; and
- by size: major vessels (500 tonnes or above) and minor vessels (below 500 tonnes or below 15 metres in length when the tonnage units are not available).

Major vessels cannot exceed 20 years of age from date of construction, but a technical authorisation from the Mexican Maritime Authority

(the Maritime Authority) may be obtained as an exception (article 36 of the Regulations of the Navigation Law).

Vessels under construction cannot obtain the Mexican flag until construction and class are completed, but if the future owner intends to flag and register the vessel in Mexico, the construction project may be submitted for approval by the Maritime Authority (article 289 of the Regulations of the Navigation Law).

Construction agreements are registered before the Maritime Registry if the construction is in Mexico or overseas if the vessel is intended to be flagged as Mexican (article 17(iv) of the Navigation Law).

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

Mexican law requirements for the flagging and registration of vessels are very strict. Only Mexican individuals and entities may register and flag vessels with a Mexican flag, provided that the vessel is owned by such party or is under its possession pursuant to a financial lease (article 11 of the Navigation Law). Vessels cannot be registered and flagged in Mexico under a bareboat charter agreement.

Pursuant to the Mexican Foreign Investment Law, the participation of foreign investment in the capital stock of Mexican shipping companies that are engaged in the business of operating vessels in interior and cabotage navigation is restricted to 49 per cent of such capital stock.

A Mexican shipping company may operate a foreign flag vessel in Mexico, provided that a navigation permit has been previously obtained. Navigation permits are effective for a term of three months and may be renewed for additional three-month periods, provided that no navigation permit may be renewed for more than seven times, except if the relevant vessel is qualified by the Ministry of Communications and Transport (SCT) as a vessel with extraordinary specialised technical characteristics, in which case such permits may be extended at the discretion of the SCT. No other exemptions are available.

7 What are the documentary requirements for registration?

A written application request must be filed with the Maritime Authority, together with the following documents, pursuant to articles 37 and 39 of the Regulations of the Navigation Law):

- power of attorney;
- articles of incorporation and by-laws;
- document evidencing ownership of the ship, which can be in the form of a shipbuilding agreement, purchase and sale agreement, bill of sale or invoice; in Mexico, the bill of sale is most commonly used;
- in the event that the flagging and registration is not made on the 'ownership' form, but rather on the 'possession or use' form, an original of the financial lease agreement will be required, duly formalised in a public deed (meeting all requirements under Mexican law);
- statutory certificates of the ship (under current foreign flag);
- copy of the blueprints of the vessel's deck and hull;
- copy of the blueprints of the vessel's control and machine room (if applicable);
- original and apostilled or legalised deletion certificate of previous flag and any other document showing deletion of the ship in the previous ship registry of the foreign state; this requirement is usually the last to be completed; and
- payment of fees.

Note that a vessel cannot sail without a flag. Once the deletion certificate of the flag is filed with the Maritime Authority, a safe-conduct permit will be issued for a term of 25 business days, until the flagging and registration procedure is concluded, during which time the vessel may navigate. The safe-conduct may be considered as a provisional Mexican flag.

As a result of the flagging and registration filings, the Maritime Authority will order and coordinate the inspections of the ship, to confirm safety and seaworthiness. At the conclusion of the inspection process, Mexican law statutory certificates for the ship will be issued.

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

Dual registration and flagging is not permitted under Mexican law. Vessels that are located in Mexican waters must be flagged and registered in a single state, in accordance with the United Nations

Convention on the Law of the Sea. Ships must sail under the flag of one state only (article 10, final paragraph of the Navigation Law).

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

The register of ship mortgages is maintained by the National Maritime Public Registry, as a special registry for maritime matters at the SCT.

In addition, ship mortgages may also be recorded at the Sole Registry of Guarantees over Movable Assets, which is part of the Ministry of Economy.

Upon registration of the mortgage in the National Maritime Public Registry, this will provide priority against other liens (including tax credits), unsecured creditors and shall produce legal effects in relation to third parties (articles 18, 101 and 102 of the Navigation Law).

In order for a ship mortgage to be recorded at the National Maritime Public Registry, the corresponding vessel must be flagged with the Mexican flag and have a Mexican registration number or the vessel must be navigating in Mexican waters under a safe-conduct (articles 15 and 17 of the Navigation Law).

The National Maritime Public Registry contains the following information (article 17 of the Navigation Law):

- Mexican shipping companies, shipping agents and operators;
- purchase agreements, transfer, assignments, guaranties, ownership, mortgages and other encumbrances over Mexican vessels;
- bareboat charters of Mexican vessels;
- shipbuilding agreements performed within Mexico or abroad when the vessels will be flagged in Mexico;
- court orders and other administrative resolutions; and
- other contracts or documents related to vessels, maritime commerce and port activities, when the law provides for this registration formality.

Limitation of liability

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

Mexico has ratified the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976) and the 1992 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage (CLC PROT 1992), but has not ratified the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 1996 (HNS 1996) nor LLMC PROT 1996.

The persons entitled to limit liability and the claims subject to limitation are those provided in articles 1 and 2 of LLMC 1976, respectively.

Claims for oil pollution are handled according to CLC PROT 1992 and the Fund Convention 1971 and Fund PROT 1992.

The Navigation Law (articles 177 and 305) provides that all claims deriving from maritime accidents or casualties and limitation of liability will be subject to the LLMC and the CLC PROT 1992. The law also provides a special chapter regulating the limitation of liability proceedings before the federal courts.

11 What is the procedure for establishing limitation?

A claim to limit liability will commence with the submission of a brief making the request to the federal court with jurisdiction in the port in which the event occurred. If the event occurred offshore, then the competent court will be that of the jurisdiction in the next port of arrival. If the ship is prevented from arriving into port owing to the event that originates the limitation claim, then the competent court will be that with jurisdiction in the port of exit of the last voyage, or the port of destination, at the election of the plaintiff.

The statute of limitations to file a claim to limit liability is one year either from when the owner, operator or legitimate party is notified of the first claim from third parties in connection with the claim subject matter of the limitation, or the occurrence of the event that will result in the limitation claim, even when there is no claim from third parties.

Mexican law does not entitle a shipowner or salvor to plead limitation without setting up a fund. Thus article 10 of the LLMC is not applicable.

To benefit from the limitation, the fund must be constituted or guaranteed. Forms of guarantee normally accepted by Mexican courts are bonds, deposits and letters of credit.

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

The limitation can be broken when it is proved that the shipowner or salvor acted with negligence, bad faith or wilful misconduct when causing the marine event that is the subject matter of the limitation claim. This principle is not only embedded in article 4 of the LLMC, but also in Mexican law regulating strict liability (Federal Civil Code).

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

Mexico is not party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL 74).

The Navigation Law expressly regulates passenger transport contracts (articles 138 to 147). Generally, these provisions are inspired by PAL 74.

The liability of the carrier will be limited as follows:

- 16,000 special drawing rights (SDR) for the death of or personal injury to a passenger;
- 400 SDR for the loss of or damage to cabin luggage;
- 1400 SDR for the loss of or damage to vehicles including all luggage carried in or on the vehicle; and
- 600 SDR for the loss of or damage to luggage other than that mentioned above.

Port state control

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

The Ministry of Navy (SEMAR), through local offices of a harbour master in each Mexican port.

15 What sanctions may the port state control inspector impose?

There are many sanctions that the SEMAR may impose on shipowners and operators who breach the provisions of the Navigation Law (articles 323 to 328). These sanctions may vary depending on the materiality and recurrence of the breach. Penalty fines (monetary) are set on the basis of unit values (UVs). One UV is approximately US\$4.

Some examples are as follows:

- 50 to 1,000 UVs for:
 - Mexican shipping companies that are not incorporated as Mexican companies;
 - masters and owners that do not carry on board ship the original certificate of registration; or
 - general breaches to the Navigation Law and international maritime conventions;
- 1,000 to 10,000 UVs for:
 - masters that breach specific provisions applicable to general average;
 - shipowners and operators that fail to maintain safety and good order on board; or
 - masters and shipowners that fail to fly the flag; and
- 10,000 to 50,000 UVs for:
 - shipowners and operators that fail to have valid protection and indemnity (P&I) insurance;
 - persons that commit fraudulent acts to obtain navigation permits; or
 - ship agents or operators that fail to register with the Mexican Maritime Registry.

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

These fines and penalties can be challenged in federal administrative Courts. An *amparo* proceeding, which is a special constitutional proceeding (habeas corpus), is also available.

Classification societies

17 Which are the approved classification societies?

Classification societies approved by the Maritime Authority are those that are members of the International Association of Classification Societies.

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

Classification societies will be held liable under general rules of liability for damage caused for the acts and omissions that they may incur in the performance of their services. This liability regime will be governed by contract and by the contract rules of the Federal Civil Code.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

The SEMAR may order wreck removal when a vessel, aircraft, naval artefact, cargo or any other object is adrift and may be a risk or danger to navigation and other marine activities, the navigation communication channels and the environment (article 167 of the Navigation Law).

A shipowner or operator has the obligation to perform wreck removal within six months as of the date of the event (article 168 of the Navigation Law).

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

Mexico is a party to the following conventions:

- Convention for the Unification of Certain Rules of Law with Respect to Collision;
- International Convention on Civil Liability for Oil Pollution Damage; and
- International Convention on Salvage 1989.

Mexico is not a party to the Nairobi International Convention on the Removal of Wrecks 2007.

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?

Parties to a salvage operation are entitled to enter into salvage agreements in any form, including international industry standard forms such as the Lloyd's salvage agreement. The only limitation to the freedom of contract is not to breach the 1989 Salvage Convention.

Ship arrest

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

Mexico is not a party to the International Convention Relating to the Arrest of Sea-Going Ships 1952 or the International Convention on the Arrest of Ships 1999.

Ship arrests are regulated under the Navigation Law (articles 268 to 274).

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?

Ship arrest is available for the following claims (article 269 of the Navigation Law):

- loss or damage caused as a result of the use of the ship;
- loss of life or personal injury caused by direct operation of a ship;
- salvage;
- environmental;
- wreck removal, refloating and recovery of a ship, including costs of maintenance of crew;
- charter parties, including bareboat charters and time-charters;
- contracts of transport of goods and passengers, bills of lading;
- loss and damage to cargo and luggage;
- general average;
- towage;
- pilotage;
- goods, materials, supplies, bunker, equipment, containers supplied to the ship or services supplied to the ship;
- construction and repair;
- fees for the use of ports, canals, docks and other facilities or navigation channels;
- wages of masters, officers, or crew;

- master's disbursements, including disbursements made by ship-
pers, charterers or agent on behalf of a ship or its owner;
- insurance premiums;
- ship agent fees;
- disputes of ownership and possession of a ship;
- disputes between co-owners of any ship as to the ownership,
possession, employment or earnings of that ship;
- mortgages and pledges; and
- purchase and sale of ships.

The arrest measure must have a direct claim over the ship or its cargo, despite the owner, charterer or affiliate company. In other words, the claim, subject matter of the arrest, must be directly related to the ship or cargo. For this reason, associated ships may not be arrested.

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

Mexico recognises the concept of maritime liens or privileges (articles 91, 92, 95 and 98 of the Navigation Law).

The following claims give rise to maritime liens:

- wages and other debts owed to the vessel's crew, including repa-
triation costs and health and housing contributions;
- indemnities derived from death or injuries resulting from the
exploitation of the vessel;
- rewards for rescue or salvage of the vessel;
- credits for the usage of port premises, maritime signage, naviga-
tion lanes and navigation;
- indemnities derived from damage caused by pollution result-
ing from the spill of hydrocarbons, radioactive substances, toxic,
explosive or other hazardous materials of nuclear fuel or radio-
active products or waste;
- indemnities derived from civil liability resulting from loss or mate-
rial damage caused by the exploitation of the vessel, different from
loss or damage caused by carriage, containers and personal prop-
erty of the passengers on board the vessel;
- maritime privileges derived from the most recent voyage shall be
preferred to those derived from previous voyages;
- construction and repair claims, which are extinguished when the
vessel is delivered; and
- liens over cargo for claims deriving from carriage, offload and stor-
age, wreck, salvage and general average.

The statute of limitations for maritime liens or privileges is one year from when these may be claimed.

25 What is the test for wrongful arrest?

A claim for wrongful arrest will generally be sustained when bad faith or gross negligence is demonstrated in court. A plaintiff that arrests a ship may ultimately fail to sustain its principal claim, thus the ship arrest will be released and the court will award damages to the defendant (arrestee). The test for wrongful arrest will be reviewed by the court in the final judgment.

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. Under Mexican law, a bunker supplier may 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 269 XII of the Navigation Law). A bunker supplier will have a credit right against the contracting party of the bunker service, either the shipowner or charterer.

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

The plaintiff will be required to post a bond to guarantee damages to a defendant if the defendant can prove that the arrest was wrongful (eg, it was made in bad faith without any rights to arrest the ship). The amount of the bond is set at the discretion of the court. Later, the defendant will have the opportunity to post a counter-bond once the arrest has been carried out in order to have the ship released. Note

that all procedures before the arrest is ordered and carried out are ex parte and the defendant is not party to such procedures. A defendant's rights against a wrongful arrest are guaranteed by the bond placed by the plaintiff.

Letters of undertaking from P&I clubs may also be available, subject to the fact that such issuers are recognised and approved by the Maritime Authority.

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 claim amount and value of the vessel will be considered by the judge to determine the amount of the bond. Generally, however, the amount of the bond should correlate with the amount of the potential damage that the defendant may suffer if the arrest is wrongful.

The amount of the security may range at the court's discretion but will not exceed the total value of the ship.

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?

Mexican law is very formalistic, especially referring to representation and submission of evidence. Representation is in the form of a power of attorney. Foreign plaintiffs must comply with certain formalities when granting powers of attorney to be exercised in Mexico, such as specific legal language formulae, translation into Spanish, notarialisation in the country of origin, apostille or legalisation (depending on the state) and further formalisation of the power of attorney document with a Mexican notary public.

Mexico is a party to the Apostille Convention. In addition, legalisation of documents through a Mexican embassy may be undertaken.

All legal proceedings must be in writing and all documents and evidence must be submitted as original or certified true copies by a Mexican notary public. Under Mexican law all documents should be filed in Spanish or be accompanied by a Spanish translation made by a Mexican court-approved translator (a sworn public translator). Further formalities may be required when reviewing documents on a case-by-case basis.

As mentioned above, Mexican law is very formalistic, especially with regard to civil or commercial rules of procedure. When filing the arrest application all the required formalities must be satisfied. It is not possible to set the arrest procedure in motion and then complete the formalities at a later stage. The risk of doing so is to have the court dismiss the claim. No electronic filings are permitted under Mexican law.

On average, five business days are required to prepare an arrest application.

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

Once the arrest is granted, the court will communicate with the Ministry of Marine, the SCT and the chief of port to request their assistance in securing the ship. The arrest will be evidenced by a court document describing the condition and specifics of the arrest, including the location where the ship will stay and the person who will have custody of the ship. The plaintiff will have the right to appoint a person to take custody of the ship.

A depositary will be appointed by the plaintiff. Generally the depositary will be the shipowner or ship operator (defendant), who will have strict duties of care.

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?

Ship arrest may be requested to the Mexican court before or after litigation is commenced on the merits of the principal claim. Litigation proceedings of the principal claims may occur in Mexico or abroad.

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

Yes. The rules of procedure in civil or commercial disputes provide other forms of interim measures and injunctions to obtain security (article 1168 of the Code of Commerce), such as attachment of assets when there is justified reasons to believe that the assets to secure or guaranty payment will be hidden, fraudulently transferred, damaged or that may be insufficient to guaranty a claim. These interim measures will be granted if the plaintiff can prove to the court the test of urgency, need and of having the right to request such measure.

In addition, executive proceedings, which are special proceedings that allow a plaintiff to seize assets of the defendant at the commencement of litigation (immediately after filing a claim) may be available when the documents that are the subject matter of the claim are invested with legal formalities of executive legal actions, such as a final judgment (*res judicata*), promissory note or an acknowledgement of debt agreement duly formalised with a Mexican notary public.

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

Yes. Under the Federal Code of Civil Procedure (articles 379 to 399) orders for delivery up or preservation of evidence or property are available. These interim measures will be granted if the plaintiff can prove to the court the test of urgency, need and of having the right to request such measure.

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

Yes. Arrest, attachment order or injunction in respect of bunkers are available.

Judicial sale of vessels

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

Creditors, mortgagees and beneficiaries under guarantee trusts, whose credits are secured with the vessel.

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?

Creditors under ship arrests, other than mortgagees and beneficiaries under guarantee trusts, which have a special procedure for judicial sale, will have the right to commence the judicial sale proceedings as a result of a final judgment. The rules governing judicial sales are provided in the Code of Commerce (articles 1408 to 1413 for executive proceedings).

The value of the judicial sale will be based on appraisal made by an independent third party authorised by the court. Each plaintiff and defendant will have the right to submit their appraisals for consideration of the court.

The judicial sale will be announced to the public by means of a court edict published in important newspapers and official gazettes. Judicial sales will be in the form of public auction. In each successive auction, a 10 per cent discount price will be fixed. Any surplus will be delivered to the debtor. The plaintiff is entitled to request the court that ownership of the ship be transferred to the plaintiff.

As to the enforcement of ship mortgages, the Navigation Law provides for a special chapter (article 275). The judicial sale will follow the rules of procedure established in the Code of Civil Procedure of Mexico City applicable to foreclosure of mortgage special proceedings. The judicial foreclosure procedure shall take place through a public bid; provided that the initial price of the vessel shall be that agreed by the mortgagor and the mortgagee or, in the absence of agreement, the price resulting from the appraisal submitted by the parties or by a third-party appraiser appointed by both parties or the court. Before the foreclosure procedure begins, the court shall require the issuance of an encumbrance certificate issued by the Maritime Registry and, as the case may be, the registered creditors shall be called upon so that they may exercise their rights. Once the foreclosure procedure has concluded, the vessel shall be delivered to its buyer free of any lien, subject to the

payment of the offered price, and the court shall order the formalisation of the sale in a public deed granted before a notary public or commercial broker; the Maritime Registry shall be ordered to make the relevant registrations on the vessel's maritime folio and, if the buyer is a foreign entity or individual, to proceed with the deletion of the Mexican flag and cancellation of the registration (article 275 of the Navigation Law).

Under normal circumstances the special mortgage proceeding may take anywhere from four months to one year; however, such proceeding may be extended if the debtor appeals and initiates a constitutional law suit (*amparo*), in which case such proceeding may take more than one year.

Under Mexican law there are no self-help remedies such as repossession or taking over the property upon default, therefore the mortgagee must wait until it obtains a final judgment to proceed with the sale of the vessel under a foreclosure sale in a public auction.

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

Maritime liens or privileges (as described in question 24) will have priority against the proceeds of a sale.

Ship mortgages shall rank subsequent to maritime privileges established under article 102 of the Navigation Law.

Mortgagees are privileged in the category of creditors in bankruptcy procedures only after certain constitutional labour obligations with the employees and the expenses of litigation (articles 217, 219 and 224 of the Insolvency Law of Mexico).

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

Once claims under maritime lien or privilege are time-barred (one year), the judicial sale will have full effect, extinguishing all prior liens and encumbrances on the vessel, including maritime liens, and thereby giving the purchaser clean title.

To prevent the rights of creditors under a maritime lien being affected, prior to the commencement of judicial sale the court shall order the issuance of an encumbrance certificate issued by the Maritime Registry and the registered creditors shall be called upon so that they may exercise their rights in terms of the rules of priority for creditors.

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

In Mexico a judicial sale of a vessel ordered in a foreign jurisdiction will be recognised. The foreign judgment or award ordering the judicial sale would need to be enforced in Mexico in the event that the vessel is located in Mexican territory, irrespective of the flag state. There are formal rules of procedure governing the recognition and enforcement of foreign judgments and arbitral awards (articles 1347A and 1461 of the Code of Commerce).

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

Mexico is not a party to the International Convention on Maritime Liens and Mortgages 1993.

Carriage of goods by sea and bills of lading

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?

Mexico is party only to the Hague-Visby Rules, which are incorporated by reference to the Navigation Law (article 134).

In addition, the Navigation Law (article 133) regulates contracts of carriage of goods by sea and bills of lading when:

- the loading or offloading port described in the bill of lading is in Mexico;
- the bill of lading includes Mexican law as governing law; and
- that an alternative port of offloading is located in Mexico.

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?

Mexico is party to the following international conventions:

- United Nations Convention on International Multimodal Transport of Goods (Geneva 1980), which is not yet in force;
- Convention on International Civil Aviation (Chicago Convention 1944); and
- Convention for Unification of Certain Rules of International Air Transport and Protocol (Warsaw 1929).

Rail, road, air combined and multimodal transport is regulated at a federal level by the following laws:

- Civil Aviation Law and its Regulations;
- Federal Autotransport Law and its Regulations;
- Rail Service Law and its Regulations; and
- Regulation for International Multimodal Transport.

Each of these laws regulates bills of lading. The Code of Commerce also regulates bills of lading.

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

Any of the parties to the bill of lading: shipper, carrier, consignee and endorsee or any holder of the bill of lading.

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 can be incorporated by reference, including the arbitration clause. It is advisable to have express language in this regard in the bill of lading document or endorsement document.

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

It is likely that a 'demise' clause or identity of carrier clause may not be found valid by a Mexican court. The reason lies in article III rule 8 of the Hague/Visby Rules, which appears to outlaw non-responsibility clauses. However, under Mexican law, parties can freely regulate their liability in contract.

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 21 of the Navigation Law establishes that a shipowner is presumed to be the ship operator, unless proven otherwise. Ship operators must make a written representation (and record it with the Maritime Registry) assuming such liability for the operation of the ship in order to release shipowner from such liability. If such representation is not made then the shipowner and the ship operator will be jointly liable for all obligations deriving from the operation of the ship.

When held liable under a claim for breach of a carriage contract or bill of lading, the shipowner would have to prove to the court that the breach was caused by the true operator or carrier and that shipowner is unrelated to the claim. However, bills of lading may include shipowners as carriers. The definition of 'carrier' under the Hague-Visby Rules (which are applicable in Mexico) includes the owner or charterer of the vessel. Shipowners may rely on the terms of the bill of lading even though they are not contractual carriers.

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

Deviation is considered to be lawful when saving human life and when protecting the cargo and the ship. This principle is embedded in the Hague-Visby Rules (which are applicable in Mexico).

Unjustified deviation will most certainly cause a contract breach, and may also create adverse effects in insurance, such as loss of insurance coverage (articles 198(iv) and 201 of the Navigation Law).

48 What liens can be exercised?

Creditors with a maritime lien will be entitled to foreclose, up to the value of their credits, over the vessel, cargo, freights and sub-freights (article 100 of the Navigation Law).

Creditors will have a maritime lien over goods transported by sea for claims arising from (article 98 of the Navigation Law):

- freight and accessories, including costs of loading, offloading and storage;
- removal of wreck cargo;
- rewards for salvage; and
- general average contribution.

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 responsible towards the shipper for any possible wrongful delivery. Thus the importance for the carrier to obtain a written acknowledgment and receipt of delivery of goods, signed by the 'apparent' consignee. Liability may be limited by contract.

Under article VI of the Hague-Visby Rules special agreements may be justified without the issuance of a bill of lading, subject to all terms, conditions and liabilities of the carrier being set forth in the agreement.

50 What are the responsibilities and liabilities of the shipper?

The shipper shall indemnify the carrier for losses, damage and costs arising from any error or inaccuracy of the information delivered by shipper to the carrier necessary to identify the goods (article 132 of the Navigation Law and article III 5 of the Hague-Visby Rules).

The shipper shall be liable for damage and expenses resulting from goods of an inflammable, explosive or dangerous nature when the carrier has not consented with knowledge of their nature (article 132 of the Navigation Law and article IV 6 of the Hague-Visby Rules).

Shipping emissions

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

Mexico has been actively exploring international action to reduce air pollution from large commercial marine ships in Mexican waters. Currently Mexico is in advanced negotiations with the United States and Canada to establish an ECA covering most of the territorial waters of the three countries, but to date there is no existing ECA in force.

Mexico is not party to Annex VI of the MARPOL, which regulates atmospheric pollution prevention caused by ships, including shipboard incineration, and the emissions of volatile organic compounds from tankers.

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?

According to the NOM-016-CRE-2016 the cap of sulphur content of fuel oil used by vessels (maritime diesel) in Mexican territory is 500mg/kg.

To comply with the requirements for all fuels within Mexican territory, the producer, importer, transporter, distributor and retailer shall present an annual report prepared by an expert third party to the Maritime Authority that proves that the product complies with the regulatory requirements. In the case of a breach of the obligations the authority may impose a fine between US\$67,000 and US\$680,000 (this amount may vary according to the exchange rate).

Ship recycling

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

Mexico is not part of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships of 2009, but Resolution A.962(23) Guidelines on Ship Recycling are applicable on the matter; this resolution is referred to in article 681 of the Regulations of the Navigation Law.

There are only about 60 shipyards in Mexico and only a few offer ship recycling services.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

The Federal Courts.

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

Service of process of court proceedings in a maritime dispute will be made by letter rogatory when the defendant has its domicile outside Mexican territory. Also, process service may be performed through the ship agent of the defendant located and authorised in Mexico (article 265 of the Navigation Law).

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

No, in Mexico there is no institution specialising in maritime arbitration.

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

Mexican law specifically regulates recognition and enforcement of foreign judgments and arbitral awards. These provisions may be found in the Code of Commerce.

A foreign judgment would be recognised and enforced by the courts in Mexico without retrial or examination of the merits of the case, provided that:

- compliance with international conventions on letters rogatory;
- such judgment was not rendered as an action for a thing or action in rem;
- the court issuing the judgment is considered competent under the rules internationally accepted that are compatible with Mexican procedural laws;
- process service was made personally on the defendant;
- the judgment is a final judgment according to the laws of the foreign state;
- that the action that originated the court proceedings is not the subject matter of pending litigation in Mexico between the same parties;
- Mexican courts do not determine that the obligation to which enforcement is sought violates Mexican law or public policy; and
- the judgment fulfils the necessary requirements to be considered authentic.

As to foreign arbitral awards, Mexico is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Commerce Code incorporates the most relevant provisions of the convention together with the UNCITRAL Model Law on Arbitration.

To enforce an award, an original or certified copy of the award must be filed with the Mexican courts, along with the original document that contains the arbitral agreement. If it is not originally in Spanish, a translation from an expert witness certified by the Mexican courts must be filed as well.

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

Mexican law provides for an exclusive 'mutual' jurisdiction approach rather than 'asymmetric' jurisdiction. The choice of jurisdiction must be expressly agreed and must be a mutual choice between the contracting parties. Mexican law does permit plural or multiple jurisdiction clauses, whereby different forums may be mutually agreed and the plaintiff may choose freely from these multiple jurisdiction where to initiate a claim.

Mexican courts are unlikely to uphold asymmetric jurisdiction clauses. The same approach applies to arbitration agreements.

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

A defendant would have to file a defence or exception based on the non-competence of the court. This action is called 'inhibitory action' or

Update and trends

Cabotage navigation is a hot topic. Currently the operation of vessels in cabotage navigation is restricted to Mexican shipping companies.

The Mexican maritime industry has historically been protective of the national fleet and Mexican operators. Fair competition is crucial between Mexican nationals and foreign companies. Abusive, simulated or fraudulent conduct must be prevented.

Industry trends are moving to a more open market where strategic alliances between Mexican and foreign shipping companies are coming into play. Pemex contracts continue to be the most desired to employ vessels, but opportunities are growing in the private and spot markets.

The industry is slowly moving to globalisation and the legal regime is starting to be left behind.

The Mexico energy reform of offshore deep and shallow water operations is increasing demand for foreign operators and foreign flag vessels. This is the greatest challenge for the Mexican fleet industry: renovation.

'improper venue'. This motion will be filed with the competent court to request the non-competent court to decline jurisdiction.

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 would have to file a defence or exception based on the non-competence of the court. This action is called 'inhibitory action' or 'improper venue'. This motion will be filed with the same non-competent court to request it to decline jurisdiction.

Limitation periods for liability

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

The general statute of limitations in commercial contracts is 10 years as from the moment the obligation is due. For obligations that are not subject to a term, the specific performance of the obligation may be claimed as from the date that the creditor formally requests the debtor to pay the obligation, through a notary public, two witness or court proceedings.

The statute of limitations for strict liability (similar concept to torts) is two years as from the date of occurrence of the illicit act (article 1161(v) of the Federal Civil Code).

There are special statute of limitations provisions for different particular subject matters. In maritime law, the following special statutes of limitation shall apply:

- maritime liens or privileges: one year;
- hidden defects of the shipbuilder: two to four years;
- mortgage claims: three years;
- charter parties: one year;
- bills of lading: one year;
- passenger claims: one year;
- towage: six months;
- collision: two years;
- general average: one year; and
- insurance: two years.

62 May courts or arbitral tribunals extend the time limits?

No. Statutes of limitation may not be extended by a court or arbitral tribunal. Time limits may be interrupted in certain cases such as an express acknowledgment of debt by a debtor or a partial payment. The filing of a claim or lawsuit with a court also interrupts time limits.

Miscellaneous

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

Mexico is party to the Maritime Labour Convention and its provisions are incorporated into the Mexican Federal Labour Law in articles 187 to 214 related to seafarers.

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 commercial contracts, parties may not generally seek relief in court based on release of obligations or early termination of contract, for changes of economic conditions or circumstances that make obligations more onerous to perform. In other words, the principle of *pacta sunt servanda* prevails.

However, if the parties expressly agree in the contract to a 'change of circumstances' clause, such as change in law or economic conditions, allowing them to be released from performance or to be entitled to renegotiate conditions, then such an agreement will be valid and upheld in court.

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

In June 2017, as a result of certain amendments to the Navigation Law, the regulating government authority in shipping matters is now shared between the SCT and the SEMAR.

The main purpose of the amendment is to vest the SEMAR with authority not previously held by it to regulate certain matters in the maritime industry, with a specific mandate to have full control of all of Mexico's harbour masters.

The effects of the reform have been positive, as both authorities have made regulation of the marine industry more efficient:

- the SEMAR is now considered as the main national maritime authority, but the SCT remains responsible of certain aspects of commercial navigation;
- harbour masters will retain substantially their current functions and authority, but they are controlled by the SEMAR and not by the SCT;
- the SEMAR is now responsible for the flagging and registration of vessels (including naval artifacts – eg, towed vessels and rigs), as well as for all matters pertaining to safety inspections and certification of Mexican and foreign vessels (both formerly responsibility of the SCT);
- authorisations and permits, such as temporary navigation permits, will remain with the SCT; and
- the National Maritime Public Registry remains under the SCT's control.

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Newbuilding contracts

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 it owned the raw materials, components and equipment. However, if the shipbuilder does not already own all the chattels it uses to build the vessel, it nevertheless becomes the owner of the vessel constructed by it, unless the costs of the value added by it are so modest as not to justify this result. If the shipowner owns the raw materials, components and equipment with which the shipbuilder is constructing a vessel, then the shipowner 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 pass. The parties are free to contract that 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 ships register is the laying of the keel of the vessel or reaching a similar milestone in construction. Title will pass immediately to the buyer. Title 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. Upon its completion, the vessel can be deleted from the Dutch Ship Register to register it abroad provided the mortgagee, if any, consents to this.

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 his or her 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.

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), 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 do so. The test applied here will be the reasonableness and fairness of the yard's standpoint taking into account all circumstances.

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 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. Claims made by a purchaser from the original shipowner can only be made if the original shipowner has transferred any residual rights for warranty it may have had under the building contract to the purchaser. Without such a transfer of rights a purchaser can only claim in tort, provided the defect in the vessel was of such a serious nature that a court would consider it to be a tort to the general public at the time the product was put into circulation. Product liability is limited to 'damage', namely 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 of 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 differences 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).

Ship registration and mortgages

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 in order to be included in the Ship 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 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:

- (i) the barge is operated from the Netherlands, irrespective of the nationality of its owner;
- (ii) the barge is owned by a Dutch individual or the individual has domicile in the Netherlands; or
- (iii) 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 have to comply with either (ii) or (iii).

Further to the definition of a vessel, a vessel under construction is constructed to float on water, but neither floats nor has been afloat. In order 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 Ship Register is possible. However, registration of a vessel under construction in the Dutch Ship Register 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 Ship Register as a vessel, 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).

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 Ship 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 are 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 domicile in the Netherlands, for example, at the office of a Dutch lawyer.

7 What are the documentary requirements for registration?

Before applying for registration of the vessel in the Dutch Ship Register, the following documents are required in order 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 which includes details on the motor of the vessel (ie, a machinery certificate or an air pollution prevention certificate).

After obtaining the certificate of nationality and the provisional certificate of registry, the Dutch Ship 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 Ship Register).

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:

- (i) the vessel has been let under a bareboat charter to one or more:
 - (a) individuals who have the nationality of a member state of the EU, EEA or Switzerland or who are equated with EU citizens;
 - (b) companies that are incorporated in accordance with the law of an EU or EEA member state or Switzerland; or
 - (c) individuals, companies or legal entities, other than those mentioned under (a) who can invoke the freedom of establishment

- rules by virtue of an agreement between the European Union and a third state;
- (ii) the bareboat charterer has its main office or branch office in the Netherlands;
 - (iii) 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;
 - (iv) one or more individuals as mentioned under (iii) or, in the case of absence, if a deputy is permanently available and has the powers to act without delay if so required;
 - (v) 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;
 - (vi) the bareboat charterer accepts the responsibility for the vessel and those on board, which arises from status of a Dutch flag vessel; and
 - (vii) 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 Ship 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 Ship Register. After having received such authorisation from the court, the Dutch Ship 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.

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 are made in public registers kept for that purpose at the Dutch Land Register Office. 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 organisation of the registers, the manner of registration and the consultation procedure. Registers are maintained in Rotterdam, Amsterdam and Groningen, but the Dutch Ship 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 principle 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: in the event that the deeds presented for registration have been executed on different days, in order of the day the deeds were presented; and in the event that 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).

Limitation of liability

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) applies with the following reservations:

- exclusion of articles 2(i)(d) and (e), which apply to the LLMC to claims in respect of raising, removal, destruction or rendering

harmless of vessel or cargo that is sunk, wrecked, stranded or abandoned;

- application of national law of limitation to vessels intended for navigation on internal waterways, including provision that the limitation of liability for claims for loss of life or personal injury (other than those claims in respect of passengers of a vessel) on any distinct occasion shall in no case be less than 200,000 units of account;
- the limitation of liability for claims in respect of loss of life or personal injury on inland navigation vessels will (in general) be 60,000 units of account multiplied by the number of passengers the vessel is authorised to carry; but in any case, it will be less than 720,000 units of account. Maximum limits of liability are also stated as three million units of account for a vessel with a maximum capacity of 100 passengers, six million units for 180 passengers, and 12 million units for vessels carrying more than 180 passengers; and
- the limit for passenger vessels under 300 tons for other than claims for loss of life or personal injury is 100,000 special drawing rights (SDR). The 1996 Protocol, which entered into force on 13 May 2004, has been accepted.

The LLMC shall apply in cases described in article 15 of the LLMC. Claims subject to limitation are:

- loss of life or personal injury, or loss 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 vessel 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 vessel or salvage operations;
- claims in respect of the raising, removal, destruction or the rendering harmless of a seagoing vessel or an inland navigation vessel that is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such vessel;
- claims in respect of the removal, destruction or the rendering harmless of the cargo of the vessel; and
- claims of a person 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 title 7, book 8 of the Dutch Civil Code, and further loss caused by such measures, but with exception of such claims of the person liable.

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. The limit of liability for claims for loss of life or personal injury on ships not exceeding 2,000 gross tonnage (GT) is 3.02 million SDR (up from 2 million SDR) and the limit of liability for property claims for ships not exceeding 2,000 GT is 1.51 million SDR (up from 1 million SDR). In both cases additional amounts are claimable on larger ships.

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. In November 2012, the Netherlands signed CLNI 2012. To date Belgium, France, Germany, Luxembourg, Poland and Serbia have also signed CLNI 2012, with Luxembourg and Serbia ratifying it. CLNI 2012 will, in time, replace the current CLNI, but it has not yet entered into force. 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.

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 has 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 pre-trial 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 order 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. The limits of liability for other claims than those mentioned in article 7 of the LLMC (carriage of passengers) must be calculated as follows.

In respect of claims for loss of life or personal injury:

- 2 million SDR for a vessel with a tonnage not exceeding 2,000 tons;
- for a vessel with a tonnage exceeding 2,000 tons the number of SDR to be added to the basic 2 million SDR:
 - 2,001 to 30,000 tons: 1,208 SDR;
 - 30,001 to 70,000 tons: 906 SDR; and
 - 70,000 tons upwards: 604 SDR.

In respect of all other claims:

- 1.51 million SDR for a vessel with a tonnage not exceeding 2,000 tons;
- for a vessel with a tonnage exceeding 2,000 tons the amount of 1.51 million SDR will be increased as follows:
 - 2,001 to 30,000 tons: 604 SDR;
 - 30,001 to 70,000 tons: 453 SDR; and
 - 70,000 tons upwards: 302 SDR.

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 the *Wisdom* had limited liability by establishing both a property and a wreck fund. The Dutch state initially ordered the wreck's removal. 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 the *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'.

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 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 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 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 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).

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. In the event of death, the minimum advance payment is €21,000. Additionally, article 7 stipulates that carriers shall ensure that passengers are provided with appropriate and comprehensive 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 is applicable to the claim.

The Athens Convention 2002 system entails a two-tier liability system:

- strict liability in respect of claims for loss of life or personal injury up to 250,000 SDR, unless the incident was intentionally caused by a third party, or resulted from an act of war, hostilities, civil war, insurrection or force majeure; and
- in respect of claims above this limit, there is a further limit of 400,000 SDR, unless the incident occurred without the fault or neglect of the carrier.

With regard to luggage the following limits apply:

- cabin luggage claims are limited to 2,250 SDR per passenger;
- vehicle claims including all luggage carried in or on the vehicle are limited to 12,700 SDR per vehicle; and
- other luggage claims are limited to 3,375 SDR per passenger.

Thus the Athens Convention 2002 limits the liability with regard to individual claims, whereas the LLMC offers possibilities to limit the liability for a particular incident.

Port state control

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. Compliance with the International Ship and Port Facility Security Code is also verified by this body. 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 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 last 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. 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.

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*.

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 after 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).

Classification societies

17 Which are the approved classification societies?

The Dutch Ministry of Infrastructure and Water Management has authorised a number of classification societies (recognised organisations) to act on behalf of the Human Environment and Transport Inspectorate, who 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). Seven authorised, recognised organisations carry out surveys of vessels applying to transfer to the Dutch Ship Register and issue the certificates required. The six authorised organisations are:

- American Bureau of Shipping represented by ABS Europe Ltd, Rotterdam;
- Bureau Veritas represented by Bureau Veritas, Rotterdam;
- DNV GL, Barendrecht;
- Lloyd's Register represented by Lloyd's Register Group, Rotterdam;
- Nippon Kaiji Kyokai represented by Nippon Kaiji Kyokai (Netherlands) BV, Barendrecht; and
- Registro Italiano Navale represented by RINA Netherlands BV, Rotterdam.

Register Holland, a foundation with its office in Enkhuizen, the Netherlands, is a national classification society recognised by the Human Environment and Transport Inspectorate. Register Holland was founded in 1984 as an independent and highly specialised organisation, mainly focused on surveying sailing passenger vessels. As of April 2011, Register Holland also received a designation by the Human Environment and Transport Inspectorate allowing it to classify all kinds of inland vessels, such as tugs, barges and passenger vessels for non-convention and non-European legislation. Its knowledge of both traditional and modern rigging is quite unique and surveys for Dutch certificates are conducted by Register Holland in accordance with their own classification rules. There are special rules for:

- seagoing sailing vessels with up to 36 passengers and a maximum of 500 GT and seagoing motor vessels with a power greater than or equal to 750kW and a maximum of 12 passengers (the White Rules);
- inland navigation sailing vessels with more than 12 passengers (the Yellow Rules);

- inland navigation sailing vessels with up to 12 passengers (the Red Rules);
- non-commercial seagoing sailing vessels (the Green Rules); and
- seagoing sailing vessels taken into service prior to 1996 (the Blue Rules).

In respect of inland cargo vessels, the respective surveyors are:

- EFM Onderlinge Schepenverzekering UA and EFM Expertise BV (Meppel);
- VOF Expertise- en Taxatiebureau A Middelkoop (Nieuwendijk);
- Stichting Nederlands Bureau Keuringen Binnenvaart (Rotterdam); and
- Noord Nederland Maritiem Expertisebureau Heerenveen BV (Heerenveen).

In respect of sailing vessels, the surveyors are:

- EFM Onderlinge Schepenverzekering UA and EFM Expertise BV (Meppel);
- Dutch Certification Institute (Joure); and
- Stichting Register Holland (Enkhuizen).

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 connection 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 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 particular 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 a classed and class maintained vessel 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 a 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 as 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, 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 a 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 public delegated task does not run any real risk of becoming liable. The injured party will have to overcome a considerable number of hurdles in order 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 denial of a claim for damages.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Yes, pursuant to article 1 of the Dutch Wrecks Act 1934, the Dutch state and the operator of waterways are entitled to remove or have removed any vessel or its remains wrecked or beached in public national and territorial waters, without being liable to the parties with interest in such vessels for the damage caused by such removal. It has been held by the Dutch Supreme Court that even for international waters the Dutch state shall have the power to have vessels, cargo or their remains removed at the expense of the party liable, provided the wreck's location is in the approach to one of the main Dutch ports.

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.

In 2008, the Netherlands signed the Nairobi International Convention on the Removal of Wrecks 2007. This convention entered into force on 14 April 2015. The Nairobi Convention 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 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 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, inter alia, 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 which came into force in the Netherlands on 2 October 1983.

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 2000 or LOF 2011) is frequently agreed upon in the Netherlands. In case parties do not agree upon salvage under applicability of LOF 2000 or LOF 2011, 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.

Ship arrest

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.

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:

- (i) under the law which applies to the claim; and
- (ii) under the law of the flag of the vessel.

As for (i), 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 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, the vessel arrest was allowed in the Netherlands.

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 10:136 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.

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. 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 vexatious and therefor wrongful.

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, the vessel arrest was allowed in the Netherlands.

The bunker supplier may as an alternative wish to proceed to attach the bunkers on board of 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. Debunkering is not always allowed since bunkers may be considered as waste under the European Waste Regulation (1013/2006).

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 a wording for a bank guarantee regularly used and accepted in the Netherlands (in case both the arresting party and the debtor are of Dutch nationality, the NVB form is a wording for a bank guarantee to be issued).

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. 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 a wording for a bank guarantee to be issued).

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 need to be notarised, legalised and authenticated.

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 in enforcement of 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 arrest. Any amounts spent in that connection will usually be recoverable under the mortgage, ranking above other claims.

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 this 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.

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 may be a more attractive option, provided that there are assets.

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. However, it has been debated in case law and literature whether under Dutch law attachment to preserve evidence is allowed except for evidence in intellectual property law cases. Dutch law contains a specific regime for the seizure of evidence in intellectual property law cases. However, until September 2013 it was uncertain whether seizure in other civil proceedings was possible. The Dutch Supreme Court decided in September 2013 that under specific conditions it is possible to seize evidence in all civil cases. The Dutch Supreme Court clarified this issue by considering that seizure of evidence is also possible in non-IP cases, provided that such seizure occurs only after the court has given permission not to inspect the evidence.

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. Debunkering 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, recently 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 reutilisation (*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).

Judicial sale of vessels

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
- a EU European Enforcement Order (pursuant to EU Regulation (EC) No. 805/2004 of 21 April 2004).

One of the above-mentioned 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).

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?

In order 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 alternatively 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 Ship 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 with the intention of offering 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 €350. 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, publications, etc, will be added.

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).

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 in enforcement of 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 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.

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.

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.

Carriage of goods by sea and bills of lading

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 on to the time they 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 four countries: Spain on 19 January 2011; Togo on 17 July 2012; the Republic of the Congo on 28 January 2014; and by Cameroon on 11 October 2017. The Netherlands has signed the Rotterdam Rules.

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.

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.

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.

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 carrier, in addition to the persons mentioned in the first sentence. Much will depend on the actual wording of such 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 clearly 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.

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 which 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.

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.

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 is entitled to 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.

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 act pertaining to gross negligence or wilful misconduct could give rise to unlimited liability of the carrier.

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 which 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 for 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 known

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.

Shipping emissions

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.

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 is reduced initially to 3,5 per cent (from the current 4,5 per cent), effective from 1 January 2012; then progressively to 0,5 per cent, effective from 1 January 2020. The limits applicable in the ECAs for sulphur dioxide and particulate matter were reduced to 1 per cent, beginning on 1 July 2010 (from the original 1,5 per cent); being further reduced to 0,1 per cent, effective from 1 January 2015.

In line with the international conventions, the Dutch authorities prescribe that the sulphur concentration of the fuel may not exceed 3,5 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, beginning from 1 January 2010. 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 berthing of the ship. The time of changeover 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 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 which shows that they comply with the requirements of SOLAS, when the ships are at sea and to ships which 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 moment is €800,000.

Ship recycling

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. In 2018, no specific ship recycling regulations apply other than the general waste disposal provisions from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 and Regulation (EC) No. 1013/2006 on shipments of waste. As of 31 December 2018, Regulation (EU) No. 1257/2013 on ship recycling comes into force. This regulation is applicable 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 GT do not fall under the new regulation. The Netherlands has signed the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009, though the convention has not been ratified yet by the Dutch parliament and has not (yet) entered into force.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

The Dutch judicial system can be divided into the general system and the administrative law system. For the past 200 years, the territory of the Netherlands was divided into 19 districts. The 19 district courts are the general courts of first instance, whereas there are 62 sub-district courts dealing with petty offences and cases with a monetary value not exceeding €25,000, together with agency disputes, leasehold cases and employment matters. On 12 July 2012, the Dutch government adopted the Act for the Revision of the Judicial Map. Pursuant to this Act, as of 1 January 2013, the territory of the Netherlands is divided into 11 districts.

As a result of new legislation, which entered into force on 1 January 2017, 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.

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.

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 (TAMARA) institute has offered a platform for conducting professional arbitration in the areas of shipping, shipbuilding, transport, storage, logistics and international trade. The TAMARA Institute is organised in the form of a foundation with the major Dutch shipping firms as founding members.

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 Dutch concepts 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).

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 a 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 a 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

Update and trends

The Netherlands recently issued a legislative proposal that aims to abolish the wreck fund and introduced unlimited liability for wreck and cargo removal claims. The idea behind the new Netherlands legislative proposal appears to be that the Dutch state will no longer be confronted with limitation of liability in the case of claims for wreck or cargo removal operations. However, the recent Dutch Supreme Court judgment of 2 February 2018 (see question 11) shows that the wreck fund is also available for recourse claims from the other parties involved, offering the possibility to resolve and settle disputes quickly. Abolishing the wreck fund may have an impact on the approach taken by parties, including owners and underwriters, following an incident and could lead to a less favourable position for the Dutch shipping industry. At the time when the Netherlands made the reservation under Article 18 of the LLMC and the wreck fund was introduced, this was considered a decisive argument. It remains to be seen whether, failing a

special regime for wreck and cargo removal claims, such claims will still be classified in the same manner or regarded as property claims, with the result that more claims will have to share in a single fund.

The Dutch special regime for limitation of liability for wreck and cargo removal claims offers parties an efficient way to settle their claims. It provides for multiple funds, meaning that property and wreck and cargo removal claims are paid out of separate funds even if instituted through a recourse claim and independent of the claim's legal basis. From a maritime industry point of view, this regime is to be preferred over unlimited liability. This should also be preferable from a government point of view, as unlimited liability may lead to more insecurity in respect of recourse possibilities, especially since some countries have not implemented the reservation under article 18 of the LLMC.

may only refuse to enforce an award on grounds that are exhaustively enumerated in the Arbitration Act.

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

Generally speaking, 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.

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.

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.

Limitation periods for liability

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

The time limits applying to claims 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.

It should be noted that claims for breach of contract and for 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 became 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 agreement should be concluded after the event giving rise to the claim.

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.

Miscellaneous

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, 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.

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 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 on the basis of 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 which presumptions the parties based the contract on. Again, this possibility must be limitedly applied.

Finally, article 6:94 of the Dutch Civil Code provides the possibility for the court to reduce contractual penalties, should the principle of fairness require such reduction.

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

The Rotterdam District Court found Dutch reefer operator Seatrade and two of its directors criminally liable for illegally selling vessels for demolition in South Asian yards in breach of the EU Waste Shipment Regulation in its judgment dated 15 March 2018. The decision appears to be the first time an EU shipowner has been held criminally liable for the illegal export of vessels for demolition to South Asian yards. The Dutch public prosecutor brought the cases against Seatrade over historic sales

of vessels for demolition in India, Bangladesh and Turkey in 2012. The sales of the vessels took place via cash buyers. All vessels departed from Rotterdam and Hamburg on their final voyage to the South Asian yards. Seatrade and its directors were fined up to €750,000 and the directors have been banned from working in the shipping industry for a year. The public prosecutor also sought prison sentences for the directors, but the court did not impose these. The decision sets a precedent in the Netherlands. It makes it clear that shipowners who sell vessels for demolition in South Asian scrap yards in breach of the EU Waste Shipment Regulation risk facing criminal liability. It is the first successful prosecution of a shipowner for non-compliance with the EU Waste Shipment Regulation, which prohibits the export of hazardous waste to non-OECD countries, and bans the export of waste for disposal.

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Newbuilding contracts

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, conduct of the parties and circumstances of the case). Typically, title will pass on delivery.

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.)

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 is a discretionary remedy and will only be given where an award of damages is inadequate.

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. However, a shipbuilding contract will often contain provisions seeking to limit or exclude liability in respect of defective workmanship or materials.

Ship registration and mortgages

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 (SRA) 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 SRA).

The Fisheries Act 1996 separately established a Fishing Vessel Register for fishing vessels operating in New Zealand fisheries waters.

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).

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, 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.

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

As noted in question 5, the SRA provides that vessels on demise charter to New Zealand-based operators may register in Part A.

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

Maritime New Zealand (MNZ), 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.

Limitation of liability

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

Limitation of liability is governed either by contract 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 (MTA)) and the CCLA (Part 5) govern limitation of liability relating to carriage of goods.

In October 2013, following the *MV RENA* grounding, New Zealand amended the MTA 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 MTA 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 MTA states that articles 2, 3 and 9 of the LLMC Convention do not limit or effect claims related to the removal of wrecks by either a regional council or the Director of MNZ, the removal of hazards to navigation, or personal injury. In those cases, the provisions of the MTA or the Accident Compensation Act 2001 (ACA) will take precedence. New Zealand adopted the new 2015 LLMC liability limits on 8 June 2015.

11 What is the procedure for establishing limitation?

Pursuant to the Admiralty Act 1973 (AA), 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 (HCR) relates to the High Court's admiralty jurisdiction. The HCR do 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, as noted above, have 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 HCR. However, the HCR 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 which apply are calculated on the basis of the vessel's tonnage as prescribed by the LLMC.

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

Article 4 of the LLMC applies: limit can only be broken if loss resulted from 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.

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 Carriage of Goods Act 1979 (CGA) applies to domestic carriage and will cover damage to luggage. Under the CGA a carrier will be strictly liable for loss or damage up to a limit of NZ\$2,000 per piece. A carrier is not liable for loss of or damage to hand luggage unless caused by the negligence or wilful default of the carrier.

The ACA 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 ACA).

Port state control

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

Port state control is governed by the MTA and is carried out in accordance with the Tokyo MoU. The regulatory body is MNZ and the MTA gives the Director of MNZ certain powers of inspection, investigation, detention and rectification.

15 What sanctions may the port state control inspector impose?

Under section 55 of the MTA, the Director of MNZ has powers to 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.

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

It is possible to appeal to the New Zealand District Court.

Classification societies

17 Which are the approved classification societies?

MNZ keeps a list of recognised classification societies. These are:

- American Bureau of Shipping;
- Bureau Veritas;
- DNV GL;
- Nippon Kaiji Kyokai; and
- Lloyd's Register.

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 in circumstances where class certificates are issued in

a statutory capacity: see *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Where a 'wreck' will be hazardous to navigation, the Director of MNZ 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 (RMA).

Similarly, regional councils have power to remove a wreck under Part 3A of the MTA. Under those provisions, a regional council may take steps in accordance with the MTA 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.

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 Regulation for Prevention of 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 for the Unification of Certain Rules concerning Civil Jurisdiction in the Matters of Collision 1952 (although the AA nonetheless reflects its provisions).

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 will be undertaken by professional salvage operators.

Ship arrest**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 AA and Part 25 of the HCR.

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 AA, 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 AA 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 (t) of the AA (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.

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

Claims that give rise to maritime liens in New Zealand law are those for:

- damage done by a ship;
- salvage;
- seafarers' wages;
- master's wages and disbursements; and
- bottomry and respondentia.

If there is a maritime lien against a vessel, an action in rem may be brought against that particular vessel, together with an application for such vessel's arrest.

25 What is the test for wrongful arrest?

There may be two types of cases, either bad faith or gross negligence on the part of the arresting party, giving rise to a claim for damages for the wrongful arrest. The test for bad faith is where, on a subjective assessment, the arresting party has no honest belief in its entitlement to arrest. An arresting party will be guilty of gross negligence where, on an objective assessment, the basis for arrest is so inadequate that the court can infer that the party did not believe in his or her entitlement to arrest the vessel, or acted without any serious regard to whether there were adequate grounds to arrest.

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 if, at the time an in rem claim is brought (together with an application for arrest) the vessel is on charter by demise to the particular charterer at fault.

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

Counter security is not required, although as part of the court papers to be filed on an application for an arrest warrant, the arresting party must provide 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 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 then request additional security to cover fees, expenses and harbour dues as the original payment is exhausted.

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. The arresting party is normally entitled to an amount paid into court reflecting its reasonably arguable best case, together with interest and costs. However, the court may release the vessel on the provision of undertakings or guarantees as security.

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, or in circumstances otherwise provided for in the Oaths and Declarations Act 1957. 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.

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 affidavit(s), 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 memoranda of counsel) will the court accept 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. Note, however, there may be issues such as a vessel at anchorage refusing to allow the bailiffs access (that particular arrest took two to three days to arrange).

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. But if the vessel is sold, the arresting party may be able to recover such costs, because highest priority with respect to the proceeds is accorded to the Registrar's costs and expenses.

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 New Zealand, the arresting party has the right to pursue a claim on its merits. At the same time as (or before) the arrest papers, a notice of proceeding must be filed. The HCR require statements of claim and notices of proceeding to be served as soon as practicable after they are filed (and if service is not affected within a year, the proceeding will be treated as discontinued).

There is nothing in theory to prevent a party from arresting, seeking to stay the New Zealand proceeding, and pursuing proceedings on the merits elsewhere. What is more usual is that the arresting party will pursue its substantive claim in New Zealand and the defendant may then seek a stay on the basis of *forum non conveniens*. If the defendant prevails, the New Zealand court may nevertheless maintain security pending resolution of the foreign proceeding.

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 also needs to 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 as opposed to arresting 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.

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 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.

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, in obiter, 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.

Judicial sale of vessels

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

Any party to the proceeding (including interveners) may request a commission for the appraisalment and sale.

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 appraisalment 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 appraisalment 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 actually paid by the Registrar.

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 Registrar;
- costs and expenses of the producer of the fund (generally the arresting party);
- maritime liens;
- possessory liens;
- mortgages; and
- statutory claims under section 4(1) of the Admiralty Act 1973.

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). However, New Zealand courts cannot guarantee courts of another country will take a similar approach.

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

Yes, where the foreign court has competent jurisdiction.

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

No.

Carriage of goods by sea and bills of lading

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?

As noted above, the Hague-Visby Rules (HVR) have force of law in New Zealand by virtue of section 209 of the MTA. The HVR are appended to Schedule 5 of the MTA. Under article 1(e) of the HVR, carriage by sea covers the period from the time when the goods are loaded on 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.

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 CCLA (Part 5) governs domestic carriage of goods by land, water or air or by more than one of those modes.

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 (B/L):

- the lawful holder of the B/L;
- 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.

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 B/L incorporation clause, a charter party jurisdiction or arbitration clause will not be incorporated into the B/L. However, a validly incorporated jurisdiction or arbitration clause will be binding on a third party lawful holder of the B/L.

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

Yes, so long as it is clearly set out in the B/L.

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 CGA a shipowner as actual carrier may be liable to the contractual carrier, who may seek compensation from the shipowner as 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 actual carrier in tort or bailment.

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

What amounts to a deviation will depend on the definition contained in 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 HVR.

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 arising from the deviation.

48 What liens can be exercised?

- Shipowner's lien on the cargo in respect of freight: this is based on common law, contract and the MLA; and
- shipowner's lien on sub-freight or sub-hire: this will arise from contract, if the contract of carriage is subject to the terms of a validly incorporated charter party clause containing the relevant lien provisions.

Liens on the vessel: see comments at questions 23 and 24 above and section 4(1) of the AA.

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 B/L will potentially expose the carrier to a claim for misdelivery by the lawful B/L holder. Liability cannot be limited.

50 What are the responsibilities and liabilities of the shipper?

Under the HVR 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 HVR 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.

Shipping emissions

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.

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 not a party to Annex VI of the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) relating to air pollution. New Zealand does not have any domestic legislation relating to sulphur in fuel and discharge in the coastal marine area is permitted under the RMA. The New Zealand government is currently considering whether to join Annex VI, but a decision has not been announced at the time of writing.

Ship recycling

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.

Jurisdiction and dispute resolution

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 in the High Court. In personam claims of NZ\$350,000 and less may be determined by the District Court.

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 HCR. But Part 6 does not apply to initiating documents which 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 affected 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).

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

There are two main domestic arbitral institutions: the Arbitrators' and Mediators' Institute of New Zealand; and the Resolution Institute. Neither has 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 arbitrators.

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 (SCA) 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 SCA 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, in certain cases foreign judgments both in personam or in rem may be enforceable at common law.

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.

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. Note, however, that section 210 of the MTA provides that the New Zealand courts will have jurisdiction in respect of a B/L or similar document relating to the sea carriage of goods from or to any place in New Zealand.

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, 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.

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*.

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 in the alternative stay) the proceeding on the basis it has no jurisdiction. In the case described, the defendant's argument would be founded on *forum non conveniens* (ie, that New Zealand is not the appropriate forum for the action). A contractual submission to a foreign court or arbitral tribunal will be relevant to such argument but is not conclusive. That said, a plaintiff opposing a stay or dismissal will carry the burden of convincing the New Zealand court there is a strong case for not granting a stay (or dismissal).

Limitation periods for liability

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

Under the Limitation Act 2010 (LA), New Zealand has a generally applicable limitation period of six years after the date of the act or omission which is the basis of the claim. However, there are several exceptions, including:

- a late knowledge date whereby the claimant has gained knowledge of all the relevant facts as specified by section 14(1) of the LA;
- a one-year limit under the HVR for claims in respect of loss or damage to goods under a contract of carriage governed by the HVR;

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- under the CGA, there is a one-year time limit for claims and the contracting carrier must be notified of any partial loss or damage within 30 days;
- under section 361 of the MTA, no action may be brought in respect of discharge or escape of oil from a CLC ship, or in respect of discharge or escape of bunker oil from a bunker oil convention ship, unless the proceedings have been commenced no later than three years after the date on which the claim arose, nor later than six years after the event by reason of which liability was incurred;
- a general one-year time limit for MTA defences, which does not run while a person who is charged with an offence is beyond the territorial sea; and a six-month time limit for offences under the RMA;
- under section 97 of the MTA, there is a two-year time limit placed on claims for damage caused by a ship. However, the plaintiff can apply for an extension;
- salvage claims are subject to a two-year time limit under article 23 of the Salvage Convention; and
- 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 LA by analogy with reference to the LA provisions.

The LA applies equally to arbitral and civil proceedings.

62 May courts or arbitral tribunals extend the time limits?

The LA 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. As noted above, the LA applies equally to courts and arbitral tribunals.

Miscellaneous

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.

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.

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

No.

Nigeria

Funke Agbor and Chisa Uba

Adepetun Caxton-Martins Agbor & Segun (ACAS-Law)

Newbuilding contracts

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

As a shipbuilding contract is basically an agreement to sell future goods, title generally passes from the shipbuilder to the shipowner upon delivery and the vessel's acceptance by the buyer. This is, however, subject to the express agreement of the parties. The parties can agree to change when title will pass.

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

In order to be valid:

- the refund guarantee must be in writing;
- it should be by deed unless the buyer has furnished consideration for it; and
- the extent of the refund guarantee should be clearly stated.

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

Delivery of the vessel is an express duty of the yard under the contract. Failure to perform this duty will amount to a breach of contract for which the buyer can seek redress in court. The buyer can bring an action in court to compel the yard to deliver the ship in specific performance of the contract.

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's claim can lie in breach of contract if the defect is a result of the shipbuilder's failure to comply strictly with the agreed specifications and general arrangement plan.

The shipowner's claim may also lie under product liability where the defect is as a result of negligent workmanship by the shipbuilder, notwithstanding full compliance with agreed specifications and general arrangement plan.

The claim of a purchaser from the original shipowner against the shipbuilder would lie under product liability.

The claim of a third party who has suffered damage as a result of the defective vessel against the shipbuilder would lie in product liability.

Ship registration and mortgages

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 vessels eligible for registration under the Nigerian flag are as follows:

- merchant ships;
- fishing vessels;
- ships under construction;

- ships on bareboat charter to Nigerians or to a Nigerian company beneficially owned in all its shares by Nigerians;
- licensed ships of less than 15 tonnes gross tonnage (GT); and
- floating production storage and offloading and floating production storage units.

Separate registers are maintained for the different categories of vessels listed above.

It is possible to register vessels under construction under the Nigerian flag.

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

The persons who may register a vessel in Nigeria are:

- Nigerian citizens;
- corporate bodies and partnerships established under and subject to Nigerian law, with their principal place of business in Nigeria; and
- such other persons as the Minister of Transport may prescribe.

There has been no prescription by the Minister pursuant to this last category and thus only Nigerian citizens and Nigerian corporate bodies or partnerships are entitled to register vessels in Nigeria.

7 What are the documentary requirements for registration?

The Merchant Shipping Act 2007 (MSA) and the Nigerian Maritime Administration and Safety Agency (NIMASA) guidelines provide that the documents required for registration of vessels are as follows:

- a formal application by owners or their agents with a letter of authority to act on behalf of the owners;
- certified copies of the company's incorporation documents;
- a copy of the company's current tax clearance certificate;
- a copy of the company's bank statement or a bank reference letter;
- a completed declaration of ownership form, issued by the Nigerian Ship Registration Office (NSRO);
- tonnage certificate issued by the surveyor commissioned to survey the vessel to ascertain the tonnage before registration;
- the vessel documents evidencing:
 - the name of the vessel;
 - the time and place of purchase of the vessel;
 - the name of the master of the vessel;
 - the year of build of the vessel;
 - the description of the vessel; and
 - the carving or marking of the vessel;
- the bill of sale or the builder's certificate (evidence of title);
- deletion certificate issued by the original registry (this is required if the vessel is flagging in from a foreign flag registry);
- evidence of protection and indemnity (P&I) insurance cover of the vessel;
- certificate of an approved plan for a newly built vessel in Nigeria, issued by NIMASA or approved by a classification society on behalf of NIMASA;
- copies of the vessel's certificates;
- copies of the receipts issued by NIMASA evidencing payment of registration fees;
- the requisite forms to be obtained from the registry for completion;
- documents showing the name and address of the ship managers;
- the ship's log, to be inspected by the registrar of ships; and

- evidence of the ability or experience of the owners to operate and maintain the vessel.

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

Dual registration is prohibited under Nigerian law.

However, the registration in Nigeria of foreign vessels bareboat chartered-in by Nigerian citizens for cabotage purposes is permitted. Under that arrangement foreign vessels bareboat chartered-in by Nigerian citizens for use within the coastal area are required to be registered with the Registry and to fly the Nigerian flag for the period of the charter. The original registry of the vessel will be suspended for that period except with regard to private law considerations relating to the title, transfer, transmission and mortgage of the vessel.

Flagging out is not prohibited under Nigerian law as the MSA allows the registration of Nigerian-owned vessels outside Nigeria. To deregister the vessel from the Nigerian Ship Register for the purpose of flagging out, written consent of all registered holders of mortgages on the ship must be obtained.

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

Mortgages are registered in the Nigerian Ships Register, which is maintained by the registrar of ships in the Nigerian Ships Registration Office and will contain the particulars of the mortgagee and details of the mortgage debt.

Copies of the following will be placed in the vessel's file:

- the mortgage deed;
- the certificate of mortgage; and
- the 'mortgage to secure account current' form.

Where the mortgagor is a corporate body, the mortgage is also registered at the Nigerian companies' registry known as the Corporate Affairs Commission (CAC). The information contained in the CAC register is as follows:

- a description and date of creation of the instrument creating the mortgage;
- the amount secured under the mortgage;
- particulars of the mortgagee;
- short particulars of the vessel mortgaged; and
- the date of acquisition of the vessel mortgaged.

Limitation of liability

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

The limitation regime that applies is the Convention on Limitation of Liability for Maritime Claims, 1976 and the 1996 Protocol, which was made applicable by the MSA.

Claims subject to limitation of liability are:

- 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 removal, destruction or rendering harmless of the cargo of the ship;
- 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 MSA, and further loss caused by such measures;
- claims in respect of floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof; and
- claims in respect of raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship.

Claims falling under (iv) to (vi) above are not to be subject to limitation to the extent that they relate to remuneration under a contract with the person liable.

The parties who can limit their liability are the shipowner and salvors. 'Shipowner' includes the owner, charterer, manager and operator of a ship.

Nigeria is a state party to the Convention on Limitation of Liability for Maritime Claims 1976 and the 1996 Protocol. As the Convention and Protocol were made applicable in Nigeria by section 335 of the MSA, the new limits under the 1996 Protocol could have become applicable in Nigeria from 8 June 2015, when they took effect, but because section 356 of the MSA expressly lists the old limits under the 1996 Protocol as the limits applicable in Nigeria, the old limits will remain applicable until that provision of the MSA is amended by the National Assembly.

11 What is the procedure for establishing limitation?

Limitation is established by way of limitation proceedings at the Federal High Court. A party who apprehends that claims under any law, including the Merchant Shipping Act that gives effect to a liability convention, are likely to be made against him by any party, may apply to the courts for a determination of whether or not its liability can be limited under law.

The proceedings to establish limitation would be commenced by originating summons, which is to be served on persons who have or may have maritime claims against the applicant in respect of matters for which limitation is sought to be established. The originating summons may also be served on one person as the representative of a class. Where the court establishes that the applicant is entitled to limit his or her liability, it may:

- determine the limit of liability;
- order the constitution of a limitation fund for the payment of claims in respect of which the applicant is entitled to limit his or her liability; and
- make such orders as are just for the administration and distribution of the fund.

Where all persons identified as having or likely to have maritime claims against the applicant were not served with the summons, the court may order advertisement of the order determining liability and give all such parties a period of at least one month to bring such a claim or apply for the limit of liability to be set aside or varied. Any application to set aside or vary the limit of liability must be served on all other persons named as respondents in the summons commencing the proceedings. Where no such application is made within the stipulated period, the limit as determined shall be binding on all. Where the order determining the limit is not advertised, it shall be binding only on the parties served with the summons.

It is not necessary to provide a cash deposit.

If the court orders the constitution of a limitation fund, such order will specify the method of calculation.

The Admiralty Jurisdiction Act 1991 empowers the Federal High Court to entertain a defence of limitation of liability notwithstanding non-commencement of limitation proceedings from which a fund is set up, so there exists a separate right to plead limitation without setting up a fund.

A shipowner or other entitled person may commence proceedings for limitation of liability and 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.

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

The limit will be broken where it is proved that the loss or damage was due to the act or omission of the person liable or due to the act or omission of his or her agent or servant while acting within the scope of their employment and with the intent to cause such loss or damage, or recklessly with the knowledge that such damage would result.

The limitation was broken in Nigeria in the case of *Shipcare Nigeria Ltd v Owners of the MV 'Fortunato' and another* (2011) 7 NWLR (Pt 1246) 205 where the incident for which the shipowners sought to limit their liability happened while the vessel was in a compulsory pilotage district and there was no evidence that a licensed pilot was on board the vessel

at the time, the court held that the shipowners were not entitled to limit their liability. The failure to have a pilot on board in a compulsory pilotage district was viewed as an act or omission of the ship, which was held as making the ship unseaworthy.

The limit was broken in this case notwithstanding that all required conditions for breaking the limit were not present, that is, there was no evidence of intent to cause the loss or damage by the shipowners, their agent or servants. There was also no evidence that the shipowners, their servants or agents acted recklessly with knowledge that such damage would result.

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

The limitation regime that applies is the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 and its Protocol of 1990, which is made applicable by virtue of the MSA. The Convention on Limitation of Liability for Maritime Claims 1976 and the 1996 Protocol (see question 10) also applies to claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage.

Port state control

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

The port state control agency is NIMASA, which is also the maritime regulatory authority in Nigeria.

It operates on the authority of the NIMASA Act 2007 and the MSA.

15 What sanctions may the port state control inspector impose?

The sanctions are detention of the offending ship, imprisonment upon conviction for a maximum period of six months or a fine to be determined by NIMASA for the owner or the demise charterer or manager who is in operation of the vessel.

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

Where a ship is detained as unsafe, the detaining officer is required to immediately report the detention to the Minister of Transportation (the Minister). The master or owner of the ship can appeal to the Minister, who may appoint a surveyor to survey the ship in determination of whether or not it is unsafe. Depending on the result of the survey, the Minister may order the vessel to be released or endorse the detention. The shipowner or master can appeal against the survey report to a board of survey.

Generally, the shipowner or master can commence action at the Federal High Court to contest the detention order or fine if the appeal fails.

Classification societies

17 Which are the approved classification societies?

The classification societies currently approved by the maritime regulatory authority are:

- American Bureau of Shipping;
- International Register of Shipping;
- Lloyd's Register;
- Bureau Veritas;
- Registro Italiano Navale;
- International Naval Survey Bureau;
- DNV GL;
- China Classification Society;
- Croatian Register of Ships;
- Indian Register of Ships;
- Korean Register of Ships;
- Nippon Kaiji Kyokai;
- Polish Register of Ships; and
- Russian Register of Ships.

The list is not exhaustive and may change from time to time.

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

Though this is not a common occurrence in Nigeria, generally a classification society should be held liable under the rules of contract if it breaches a term of its agreement with the shipowner.

It may also be held liable in tort to a third party who relies on its assertions in a class certificate to act to its detriment.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Yes, NIMASA is empowered by the MSA and NIMASA Act to order wreck removal.

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

The International Regulations for Preventing of Collisions at Sea 1972 are in force in Nigeria.

There are no international conventions or protocols presently in force in Nigeria in relation to wreck removal.

The pollution conventions in force in Nigeria by virtue of section 335, MSA are:

- the International Convention for the Prevention of Pollution from Ships 1973/1978 and the annexes thereto;
- the Convention Relating to Intervention on the High Seas in cases of Threatened Oil Pollution Casualties 1969;
- the International Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990;
- the International Convention on Civil Liability for Oil Pollution Damage 1992;
- the Convention on Limitation of Liability for Maritime Claims, 1976 and the 1996 protocol thereto;
- the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 and its protocol of 1992; and
- the Basel Convention on the Control of Transboundary Movement of Wastes and their Disposal 1989.

The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 is not applicable in Nigeria.

The Nairobi International Convention on the Removal of Wrecks 2007 is not in force in Nigeria. The convention has been ratified by Nigeria but as it has not been enacted by the Nigerian National Assembly as required by the Constitution, it is not yet law in Nigeria. Wreck removal on Nigerian territorial waters is governed by the Merchant Shipping Act 2007 and the Merchant Shipping (Wrecks and Salvage) Regulations 2010 made thereunder.

The International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992 is in force by virtue of section 335 of the MSA.

The International Convention on Salvage 1989 is in force in Nigeria by virtue of section 387 of the MSA.

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.

Salvage operations may be carried out by any vessel; however, by virtue of the Coastal and Inland Shipping (Cabotage) Act 2003, where the salvage operation is within the coastal and inland waters of Nigeria, only a Nigerian-built vessel, wholly owned and manned by Nigerian citizens, can carry out the salvage operations except in cases of emergency or upon a determination by the Minister of Transportation that the salvage operation is beyond the capacity of Nigerian-owned and operated salvage vessels and companies.

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

There is no international convention on the arrest of ships in force in Nigeria.

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 in respect of claims classified as maritime claims by the Admiralty Jurisdiction Act 1991, which is the main legislation governing the arrest of ships in Nigeria. Maritime claims include claims arising from title to or ownership of a ship, possession of a ship, ship mortgage, mortgage of ship's freight, salvage, damage done by or to a ship, wages of the master and crew, master's disbursements, carriage of goods or passengers by ship, use or hire of a ship, supply of goods or services to a ship, port dues and so on.

The action for the claim would be commenced as an Admiralty action in rem against the vessel sought to be arrested.

Associated ships cannot be arrested in Nigeria.

A sister ship may be arrested where all the following circumstances exist:

- the claim must have arisen in connection with a ship;
- the person who would be liable for the claim in an action in personam must have been the owner or charterer or in possession or control of the ship when the cause of action arose; and
- at the time when the claim is brought the person who would be liable in an action in personam must be the beneficial owner of all the shares in the (sister) ship against which the claim is brought.

A bareboat (demise) chartered vessel can be arrested for a maritime claim against the bareboat charterer where all the following circumstances exist:

- the claim arose in connection with that vessel;
- the bareboat charterer would be liable for the claim in an action in personam;
- the vessel was on charter to the bareboat charterer as at the time the cause of action arose; and
- the bareboat charter is still subsisting as at the date the action is commenced.

A time-chartered vessel cannot be arrested for a claim against the time-charterer.

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. The claims that give rise to maritime liens in Nigeria are as follows:

- 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;
- disbursements of the master on account of the ship;
- 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 ship;
- claims for damage done by a ship;
- claims for salvage, wreck removal and contribution in general average; and
- claims for ports, canals and other waterways, dues and pilotage dues.

25 What is the test for wrongful arrest?

The test for wrongful arrest under the Admiralty Jurisdiction Act is obtaining the arrest of a ship or other property unreasonably and without good cause.

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?

If the charter is a demise charter and the charterer was in possession and control of the vessel at the time the cause of action arose and at the time action is brought, then the vessel can be arrested for the claim; otherwise, the vessel cannot be arrested for the claim.

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

The arresting party generally does not have to provide security before the vessel can be arrested.

In certain circumstances the arresting party may on the application of the defendants be ordered to provide security for costs, failing which the vessel will be released. The circumstances include where the claim is more than 5 million naira, or its equivalent in any currency, or where the court is satisfied that the arresting party has no assets in Nigeria.

The security for costs can be in the form of a deposit of the sum in court or a guarantee to be provided by a bank, insurance company or a P&I club.

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 Admiralty Jurisdiction Procedure Rules 2011 (AJPR) provide for security to be supplied by the arrested party in the amount claimed or the value of the ship or property under arrest. In practice the security is, very often, based on the claims of the arresting party and as requested in the application for arrest. There is no provision for revision of the security amount.

The AJPR provides for payment of cash into court or a bail bond in the same value to be filed in court. In practice, the form of security is usually according to the application of the arresting party, which is, most of the time, a bank guarantee from a Nigerian bank.

The amount of security cannot exceed the value of the ship. The AJPR provides for payment of cash or a bail bond for the amount claimed or the value of the ship, whichever is less.

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 an arrest application.

An Admiralty action in rem must be commenced in Nigeria against the vessel for the substantive claim before an application for arrest can be made. On average between 24 and 48 hours are required to prepare the originating processes for the suit and the arrest application. The length of time depends on factors such as the availability and volume of documents relevant to the transaction from which the substantive claim arose; the complexity of the transaction; and the lawyer's experience, expertise, speed and so on.

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

The Admiralty Marshal, who is the chief registrar of the Federal High Court, is responsible for the maintenance of a vessel under arrest; all expenses of the Admiralty Marshal are required to be paid by the arresting party. The court, upon the grant of an arrest order, would generally order the arresting party to pay an amount not less than 100,000 naira and no more than 500,000 naira towards the Admiralty Marshal's expenses. The Admiralty Marshal may make further demands fortnightly for payment on account of those expenses while the ship remains under arrest.

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 suit by way of an action in rem must be commenced for the claim in the Nigerian Federal High Court and the vessel will be arrested in the suit. It is not possible to commence a suit simply to obtain security through the arrest of the vessel and then pursue proceedings elsewhere.

In certain circumstances, where there is an arbitration agreement, the court may, on application of an interested party who is party to the arbitration agreement, stay proceedings in the suit in Nigeria and order that the claims be referred to arbitration in accordance with the agreement. In such a situation, the vessel arrested or the bank guarantee furnished as security for release of the same will be retained by the court as security for the arbitration award.

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

A claimant may also apply to the court for an order of interim attachment of property, otherwise known as a *Mareva* injunction. This is where it is anticipated that the defendant intends to dispose of his or her property or any part thereof or to remove any such property from jurisdiction. The claimant will apply to the court either at the time of the institution of the suit or at any time thereafter for such defendant to furnish sufficient security to fulfil any decree that may be made against him or her in the suit.

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

Generally, orders of injunction are available to restrain the performance of an act or to preserve evidence or property that is or is likely to become the subject of a dispute. The rules of court also allow for interim attachment of property.

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 and to obtain injunctions or attachment orders in respect of bunkers.

Judicial sale of vessels

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

The arrestor or any other party interested in the ship can apply for sale of the vessel where the owners fail to provide bail to secure its release for a period of more than six months from the date of arrest.

The court can also, on its own initiative, but with notice to the parties and subject to valuation, order a sale of the vessel where it is deteriorating in value.

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?

Judicial sale of vessels is conducted by the Admiralty Marshal and, unless the court otherwise directs, will be by public auction. The Admiralty Marshal, upon receipt of the order to sell the vessel, will advertise the impending sale in two national newspapers for 21 days and at the expiration of that period the vessel will be sold by public auction. The court is not precluded from ordering a sale by private agreement where the parties agree to this.

Section 73 of the MSA requires that written notice of the date, time and venue of the sale be given to:

- holders of mortgages and other preferential rights that have not been issued to the bearer;
- holders of mortgages and preferential rights that have been issued to the bearer; and
- holders of maritime liens specified under section 66 of the MSA whose claims have been notified to the officers and the registrar of ships at least 30 days before the sale.

After the sale the Admiralty Marshal shall, as soon as possible, file a return of the sale, pay the proceeds into court and file an account of sale and the vouchers of the account.

On average, it can take about two months to conclude the sale from the date of the order.

The costs associated with judicial sale are mainly the expenses of the Admiralty Marshal.

The Admiralty Jurisdiction Procedure Rules 2011 provide that the Admiralty Marshal's expenses shall be 2 per cent of the proceeds of sale.

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

Section 75 of the MSA provides that the costs awarded by the court and costs of the arrest and sale shall first be deducted from the proceeds of sale and thereafter the balance shall be distributed among holders of:

- maritime liens under section 66 of the MSA; these include the master's and seamen's wages, master's disbursements, claims in respect of loss of life or personal injury, salvage and wreck removal claims, and port and pilotage dues. These maritime liens shall, however, be extinguished after one year from the time the claims secured by such liens arise;
- preferential rights under section 69 of the MSA, which includes a shipbuilder's or ship repairer's lien or right of retention; and
- mortgages and other preferential rights registered under the MSA.

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

By virtue of section 74 of the MSA, upon the judicial sale of a vessel all liens and encumbrances on the vessel will cease to exist, except those assumed by the purchaser with the consent of the holders. No charter party or contract for the use of the ship shall be deemed a lien or encumbrance for this purpose.

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

Yes, judicial sale in a foreign jurisdiction will be recognised.

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

No.

Carriage of goods by sea and bills of lading

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?

International conventions come into force in Nigeria when they have been enacted into law by the National Assembly. The Hague Rules were enacted into law in 1926 without variation by the Carriage of Goods by Sea Act and more recently the Hamburg Rules were also enacted into law without variation by the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act 2005.

Nigeria has ratified the Rotterdam Rules, but they do not yet have the force of law.

For the purpose of application of the rules, carriage of goods commences when the carrier receives the goods for carriage and ends when he or she delivers to the receiver in accordance with the contract of carriage or the law of the discharge port.

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 only other means of carriage under a combined transport or multimodal bill of lading regulated by domestic legislation and international convention is air transport, which is governed by the Civil Aviation Act and the Warsaw Convention.

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

The carrier, shipper, consignee and endorsee of the bill of lading.

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 wholly incorporated into the bill of lading as express terms of the same. All the terms of the incorporated charter party being express terms of the bill of lading shall be binding on a third-party holder or endorsee of the bill. Where, however, the bill of lading is issued pursuant to the charter party without an express incorporation of the terms, the arbitration clause will not be enforceable against a third-party holder who has acquired the bill in good faith, unless an annotation is inserted in the bill of lading to the effect that the arbitration clause is so binding.

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

The demise clause or identity of carrier clause is no longer recognised or binding in Nigeria in view of the provisions of the Hamburg Rules, which are in force in Nigeria.

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 for cargo damage where they are not the contractual carriers.

Generally, only parties to a contract can rely on the terms of the contract and thus the shipowner cannot rely on the terms of the bill of lading if he or she is not a contracting party. Where, however, the shipowner acts as an agent of the contractual carrier and acted pursuant to the agency employment, the shipowner could be entitled to rely on the terms of the bill of lading if the bill provides that agents may do so.

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

Where the deviation is not for a justifiable reason such as to save life or property, the carrier shall be liable for losses or damage that result from such deviation. The deviation should, however, not affect defences for loss or damage that occur independently of the deviation.

The carrier may lose its right to limit its liability if it is shown that the deviation was reckless and with knowledge that loss or damage would occur as a result.

48 What liens can be exercised?

The liens that can be exercised include a carrier's possessory lien on cargo for unpaid freight; and statutory liens prescribed in the Admiralty Jurisdiction 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 action is brought, the owner or demise charterer in possession and control of the vessel. In the absence of the particular vessel, the lien can be exercised on any other vessel beneficially owned by the liable party at the time action is brought.

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

Where the carrier delivers the cargo without production of the bill of lading, he or she will be liable for any loss or damage that results and such liability cannot be limited.

50 What are the responsibilities and liabilities of the shipper?

The shipper is liable for loss suffered by the carrier, the actual carrier or damage sustained by the ship if the loss or damage was caused by the fault or neglect of the shipper or his or her servants or agents.

The shipper has the responsibility to suitably label dangerous goods as such and to inform the carrier of the dangerous nature of the goods and the precautions it may be necessary to take.

If the shipper fails to properly label dangerous goods or to inform the carrier about them, the shipper shall be liable to the carrier and any actual carrier for loss resulting from the shipment of such goods.

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

The International Convention for the Prevention of Pollution from Ships 1973 has been domesticated and thus has the force of law in Nigeria. However, regulations designating emission control areas are yet to be issued.

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 level of sulphur content in fuel used in Nigerian domestic waters is 0.5 per cent m/m. The Department of Petroleum Resources (DPR) is the regulator of petroleum products in Nigeria and they inspect all cargoes that enter or leave the shores of Nigeria. Where fuel does not conform with the above standard, the DPR will not grant entry or permit discharge of that cargo in Nigeria.

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

Ship recycling in Nigeria is presently regulated by the Nigerian Merchant Shipping Act (MSA) with guidelines drawn up by the NIMASA.

There are ship recycling facilities in Nigeria.

Jurisdiction and dispute resolution**54 Which courts exercise jurisdiction over maritime disputes?**

The Federal High Court is the Admiralty court in Nigeria.

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

The rules governing service of court proceedings on a defendant outside the jurisdiction are the Federal High Court (Civil Procedure) Rules 2009, the Admiralty Jurisdiction Procedure Rules 2011 and the Sheriffs and Civil Process Act.

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

Yes, the Maritime Arbitrators Association of Nigeria is mainly made up of arbitrators and lawyers specialising in maritime arbitration. The Chartered Institute of Arbitrators, Nigeria Branch, can also constitute a panel of specialist maritime arbitrators.

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

Recognition and enforcement of foreign judgments and awards are governed by the Foreign Judgments (Reciprocal Enforcement) Act and the Reciprocal Enforcement of Judgments Act.

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

Generally, parties are bound by their contracts in the absence of vitiating factors such as coercion or duress, mistake, misrepresentation, undue influence, fraud and illegality. Thus, unless any of the vitiating elements exist in a particular circumstance, asymmetric arbitration agreements are likely to be held valid and enforceable.

With respect to asymmetric jurisdiction agreements, section 20 of the Admiralty Jurisdiction Act makes any agreement which seeks to oust the jurisdiction of the Nigerian Federal High Court in an Admiralty matter null and void in any of the following circumstances:

- the place of performance, execution, delivery, act or default is or takes place in Nigeria; or
- any of the parties resides or has resided in Nigeria; or

- the payment under the agreement (implied or express) is made or is to be made in Nigeria; or
- in any Admiralty action or in the case of a maritime lien, the plaintiff submits to the jurisdiction of the court and makes a declaration to that effect or the rem is within Nigerian jurisdiction; or
- it is a case in which the federal government or the government of a state of the federation is involved and the federal government or government of the state submits to the jurisdiction of the court; or
- there is a financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matter under the Admiralty jurisdiction of the court; or
- under any convention, for the time being in force to which Nigeria is a party, the national court of a contracting state is either mandated or has a discretion to assume jurisdiction; or
- in the opinion of the court, the cause, matter or action should be adjudicated upon in Nigeria.

Thus, where the asymmetric jurisdiction agreement has the effect of depriving the Nigerian Federal High Court of jurisdiction under any of the above circumstances, the agreement will not be valid or enforceable in Nigeria.

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

Under section 20 of the Admiralty Jurisdiction Act 1991, a foreign jurisdiction clause is null and void in Nigeria. A Nigerian claimant can litigate his or her claims in Nigeria even where the agreement provides that only a foreign court can exercise jurisdiction; this provision is particularly applicable in the case of the bill of lading, which is usually a standard form contract, the terms of which the Nigerian consignee is generally obliged to accept. The claimant will have to show among other things that the claim is more closely connected to Nigeria than elsewhere.

A foreign arbitration clause is enforceable in Nigeria.

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 there is a foreign arbitration clause, the defendant upon entering appearance and before filing a statement of defence can apply to the court for a stay of the Nigerian proceedings pending reference to arbitration in accordance with the agreement. The court may stay proceedings after considering certain factors, including the justice of referring the matter to arbitration, particularly with reference to the effect on the claimant and the readiness and willingness of the defendant or applicant to do everything necessary for the proper conduct of the arbitration.

A foreign court jurisdiction clause will be considered null and void if any of the circumstances listed in section 20 Admiralty Jurisdiction Act exist.

Limitation periods for liability

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

The time limit for maritime claims brought under the Admiralty Jurisdiction Act is three years except where a different time limit has been stipulated under other laws. For instance, the Nigerian enactment of the Hamburg Rules stipulates a two-year time limit for claims under a bill of lading. Parties are at liberty to extend the time limit by agreement, but it is not usual and the court is not bound to uphold such agreement.

62 May courts or arbitral tribunals extend the time limits?

An arbitral tribunal is likely to extend time limits if the parties so agree. The courts may not extend the time limit.

Miscellaneous

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

Nigeria has ratified the Maritime Labour Convention (MLC) but the Convention has not been incorporated into Nigerian municipal laws and is, therefore, not yet in force in Nigeria.

NIMASA currently implements some provisions of the MLC in Nigeria through existing provisions of the MSA which are similar in effect to the MLC.

Based on regulatory powers conferred on it by the MSA and NIMASA Act, NIMASA issues maritime labour certificates to all vessels flying the Nigerian flag, which the vessels are required to carry at all times along with a declaration of maritime labour compliance (DMLC) countersigned and stamped by Director Maritime Labour Department NIMASA. NIMASA would in signing and stamping the DMLC state any equivalencies or exemptions granted or both.

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?

Ordinarily, the court will always give effect to the intentions of the parties to a contract. It is possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where it can be established or proven that the contract has become impossible to perform by reason of forces beyond the control of the parties thereto (force majeure) or in view of any other vitiating elements of the contract. Unfavourable economic conditions are, however, not a factor for which relief from strict enforcement of the rights and liabilities of the parties in a shipping contract can be granted. The position of the law is that the courts do not rewrite contracts for parties where the terms are clear. In the absence of, inter alia, fraud, duress, undue influence and misrepresentation the parties are bound by their contract.

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

A noteworthy point relating to shipping in Nigeria not covered by the above is the cabotage regime introduced by the Coastal and Inland Shipping (Cabotage) Act 2003. Under this act, only Nigerian-built vessels wholly owned and manned by Nigerian citizens are allowed to operate within Nigerian waters. The Cabotage Act, however, acknowledges that there may be a dearth of vessels to provide the required capacity for domestic trade and so provides for a system of waivers from the three requirements (ownership, manning and building). These waivers are granted by the Minister for Transportation through NIMASA upon an application where he or she is satisfied that there is no Nigerian-built vessel wholly owned and manned by Nigerians available to perform the particular service described in the application.

The Cabotage Act also provides for the establishment of the Cabotage Vessel Financing Fund. Any vessel in Nigeria that is engaged in the coastal trade is mandated to pay a surcharge of 2 per cent of the contract sum performed into the Fund. Also of note is the recent introduction of 12 new regulations mainly introducing levies relating to the management of the marine environment, intended to ensure the safety, cleanliness and general protection from pollution of the Nigerian territorial waters. The regulations were made pursuant to powers conferred on the Minister by the Merchant Shipping Act 2007.

Norway

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Newbuilding contracts

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

Unless otherwise agreed, ownership and title will pass from the shipbuilder to the shipowner upon delivery of the ship according to the Sale of Goods Act 1988. Legal title and transfer of the same will in general be evidenced by a builder's certificate, a bill of sale or both, and supported by a protocol of delivery and acceptance. Transfer of title upon delivery of acceptance is the arrangement normally agreed in Norwegian shipbuilding contracts, and is also the system adopted in article XI of the Norwegian Standard Form Shipbuilding Contract 2000 (SHIP 2000).

The parties are free to agree on when title shall pass to the shipowner and title may pass during construction, either progressively or in stages. Transfer of title during construction is a practical alternative form of security if the shipbuilder is unable to provide a refund guarantee to secure repayment of the shipowner's pre-delivery instalments, and is commonly agreed in Norwegian offshore construction contracts. Title to the ship under construction, including identifiable materials at the yard, may be secured by registration in the Norwegian Shipbuilding Register.

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

A refund guarantee issued by a Norwegian bank to the shipowner under Norwegian law is not subject to specific formalities in order to be valid. There are in principle no legal requirements as to the format of the guarantee, but to be accepted as a guarantee and enforceable as such, the guarantee wording must be clear both in respect of the promise to guarantee and under what conditions it becomes due. As to the latter, the wording of the guarantee is critical for ascertaining whether it is an on-demand guarantee (demand bond) or an ancillary guarantee. The Supreme Court judgment of 22 August 2012 (*Norsk Tillitsmann ASA v Silvercoin Industries AS*) and Court of Appeal case of 6 June 2016 (*Bergen Group ASA v Eastern European Investment Management Sp Zoo*) set out the principles that will be applied when considering whether a guarantee is to be considered an on-demand guarantee. The general principles of Norwegian non-statutory contract law and guarantee law apply to the refund guarantee.

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 authority to enforce physical delivery of the vessel, but in general only on the basis of an enforceable judgment or arbitration award ordering such performance. Sanctions may be daily fines. It is in principle possible to file a petition with the local courts for a preliminary order to compel delivery of the vessel; however, there would have to be very particular circumstances present in order for such an order to be rendered.

The alternative for the shipowner will be a claim for damages, which may be secured by an arrest of the vessel, and, when the enforceable judgment or award is ready, to move for an enforcement lien and subsequent judicial sale of the vessel.

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 from the shipowner will in general be subject to the provisions of the shipbuilding contract, under which the shipbuilder's liability for damage caused after delivery by defects in the vessel will invariably be limited to the period and scope of the guarantee. Article X of SHIP 2000 provides that, if the defect itself is remedied within a reasonable time, the shipbuilder shall have no other liability for damage or loss caused as a consequence of the defect, except for repair or renewal of the vessel's part or 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.

A purchaser of the vessel from the original shipowner, who has not taken an assignment of the shipbuilding contract, will in principle be in the same position as a third party, but may under certain conditions make direct claims against the shipbuilder on the basis of general principles of Norwegian contract law.

A claim against the shipbuilder from a third party that has sustained damage would lie either in product liability, in general negligence-based tort law or, based on a narrow line of older court cases, in quasi-tort or strict liability for products with inherent special risks that may be called product liability in a wider sense. The enacted product liability in Norway is based on EC Council Directive 85/374/EEA and is thus limited to personal injury and death and to damage to property ordinarily intended and used for private use; namely, it is essentially a consumer protection.

Ship registration and mortgages

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 traditional Norwegian ship register is called the Norwegian Ordinary Ship Register (NOR). All Norwegian vessels of 15 metres overall length or more must be registered here, unless they are entered in the registry of another country or in the Norwegian International Ship Register (NIS). Voluntary registration applies more broadly.

The NIS was established in 1987 and is open also to foreign shipping companies. Vessels registered in the NIS fly the Norwegian flag, but their trading areas are restricted. This includes restrictions related to carrying cargo or passengers between Norwegian ports or to engage in regular scheduled passenger transport between Norwegian and foreign ports. Last year the Ministry of Trade, Industry and Fisheries lifted some of the restrictions in trading area for NIS-registered vessels.

Vessels under construction at Norwegian shipyards with a minimum length of 10 metres may be registered in the Norwegian Shipbuilding Register (BYGG), which is administered as a division of NOR. The shipowner may also register in the BYGG his or her conditional rights under the shipbuilding contract, irrespective of how the title has been arranged.

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

The owner of a NOR-registered vessel must comply with the ownership requirements set out in the section 1 of the Maritime Code (1994), which state, in brief, that companies should have their head office in Norway, that 60 per cent of the shares and their voting rights must be held by Norwegian nationals and that the majority of the directors, including the chairman, must be Norwegian nationals who are resident in Norway and have remained so for the past two years. Companies and nationals within the European Economic Area (EEA) receive, however, equal treatment to Norwegian companies and nationals with regard to the place of their head office, nationality and residency, provided that the vessel is a part of the owner's economic activities established in Norway and that the vessel is operated from Norway. The Ministry may grant dispensations. If the owner does not have its main office in Norway, a Norwegian representative must be appointed.

The NIS is open for foreign shipping companies, but if the shipowner does not comply with the requirements set out in section 1 of the Maritime Code (1994), it is a requirement that the vessel must be operated (either technically or commercially) by a Norwegian shipping company with its head office in Norway and a Norwegian representative must be appointed.

Registration in the Shipbuilding Register is open to buyers of all nationalities.

7 What are the documentary requirements for registration?

The main documentary requirements for new registration in the NIS are:

- notification form for registration in NIS;
- application for a certificate of name;
- tonnage certificate: issued by an approved classification society for vessels over 500 gross tonnage (GT) and by the Norwegian Maritime Authority for vessels under 500 GT;
- SOLAS-confirmation or confirmation of survey: issued as for the tonnage certificate;
- builder's certificate, bill of sale or other title document: overseas title documents must be notarised and legalised;
- if applicable, declaration of nationality form and/or appointment of Norwegian process agent and/or management agreement
- company documentation for foreign owners
- ISM/CSR
- certificate of deletion or non-registration from previous register: duly legalised; and
- guarantee for wages and repatriation of crew (not covered by Norwegian or EEA social security schemes) in the event of bankruptcy.

For a vessel not previously registered, succession of title back to the shipbuilder must be documented. If the vessel is transferred from another register, succession of title back to the last registered owner in the former register must be documented. If the vessel is a new build, the builder's certificate and protocol of delivery and acceptance must be submitted.

The documentary requirements for new mandatory registrations in NOR are, in general, as for registration in the NIS, apart from: notification form for the NOR and declaration of nationality.

The requirements as to the format of the documents to be submitted for registration in the NOR, may vary somewhat from the requirements relating to the documents to be submitted for registration in the NIS.

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

No, Norwegian law does not provide for any form of dual registration or for registration of bareboat or other charters. If the vessel is entered in a foreign ship register, it loses its right to be registered in any of the Norwegian ship registers and to fly the Norwegian flag. The Norwegian government has, however, in consultation paper dated 5 December 2017 proposed to open up for bareboat registration in and out of the Norwegian ship registers.

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

Ship mortgages are registered as encumbrances on the relevant vessels in the ship registers (NOR, NIS or BYGG). The ship registers contain details of the vessel's ownership, ship mortgages and other encumbrances (such as enforcement liens) and their respective priorities. Ship mortgages may contain restrictions on further mortgaging of the vessel without the mortgagee's written consent, which will be noted in the register and observed by the registrar.

In January 2012, the ship registers came under the administrative control of the Norwegian Maritime Authority, but have maintained their separate offices in Bergen.

Limitation of liability

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

Norway is a signatory to the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC), and the amendments in the 1996 Protocol. The rules of the convention are incorporated into the Norwegian Maritime Code, but the limitation amounts have later been increased by the Act of 12 May 2015 implementing the amendments to the 1996 Protocol adopted by the International Maritime Organization (IMO) on 19 April 2012. The new limitations amounts will apply from 8 June 2015.

The right to limitation is available to the shipowner, the ultimate owner (in relation to ships on bareboat), charterers and operators as well as any person offering services in direct connection with salvage and wreck removal. Furthermore, the right to limitation is available to any person whose act, neglect or default the shipowner is responsible for. Finally, the Maritime Code specifies that the limitations shall also be available to the liability insurers of the insured.

The type of vessels that may limit their claims will follow the common Norwegian definition of ships. Floating cranes, floating docks, dredgers and Norwegian-owned hovercraft fall outside this definition.

According to the Maritime Code, sections 172 and 172(a), the right to limitation shall, regardless of the basis for the claim, be available for the following losses and damages:

- loss of life or personal injury, or loss or damage to property arising on board or in direct connection with the use of the vessel or salvage;
- damage resulting from delay in the carriage by sea of goods, passengers or their luggage;
- other damage of non-contractual nature that arises in direct connection with the use of the vessel or with salvage;
- measures taken to avoid or reduce the above costs or damages; and
- certain claims in connection with clean-up efforts relating to maritime accidents, etc.

Claims that are excepted from limitation are listed in section 173:

- salvage claims, including a salvor's special compensation provided by the law in situations where the operation entailed a risk of environmental damage, contributions in general average and contractual claims for wreck removal and agreed remuneration for measures taken to avoid or reduce costs or damages as set out in sections 172 and 172(a);
- claims relating to oil spills, as this is regulated elsewhere;
- claims relating to nuclear vessels or activity;
- damages or injury caused to employees engaged in relation to the operation of the ship or salvage; and
- claims for interest or legal costs.

Special limitation rules apply to liability for oil pollution, and special limitation rules will apply to liability for HNS-Convention claims when the provisions concerning implementation of the convention come into force (Act of 12 May 2015).

11 What is the procedure for establishing limitation?

The right to limit follows from the law, and does not require the establishment of a fund. Claims may be dealt with directly and informally between the debtor and creditors. However, should new creditors come forward after such a process, the debtor will remain liable. A fund can only be established in response to an arrest or commencement of

legal action for a claim and then the fund must be established by paying in the amount or providing other security (eg, protection and indemnity (P&I) club undertaking) at the court where such action or arrest is pursued. Once the fund is established there will be a deadline for notification of claims. It is not possible to apply to constitute a limitation fund before legal proceedings have been initiated.

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

The Norwegian Maritime Code reflects the rules of the Convention in this regard, so that there is no right to limit if the responsible party caused the loss or damage with intent or gross misconduct and with an understanding that such loss was likely to occur.

The principle has been tested in a Finnish Supreme Court case where a ship capsized and lost the deck cargo. The court held that the accident was a result of gross negligence with respect to making the vessel seaworthy prior to departure, but maintained the right to limit on the grounds that the responsible party had not understood that such loss was likely to occur (ND 1993,57 FH). There are no court cases in Norway in which the limitation of the convention has been broken.

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

The limitation regime in Norway relating to the carriage of passengers and their luggage by sea is based on the Athens Convention (as amended by the 2002 Protocol), which was ratified by Norway in 2013, and EU Regulation 392/2009. The convention was ratified with the IMO 2006 Reservation, allowing limitation of liability in respect of claims relating to war or terrorism. The convention was implemented into Norwegian law by amending the Norwegian Maritime Code with effect from 1 April 2014.

Port state control

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, which is an executive agency under the Ministry of Trade, Industry and Fisheries. The Norwegian regulation of port state control is based on the Paris Memorandum of Understanding on Joint Port State Control and the EU Council Directive on Port State Control (95/21/EC) with amendments.

Norway has adopted, with effect from January 2011 (as part of the EEA Agreement), and implemented in Norwegian law, the European Parliament Directive on Port State Control (2009/16/EC) as amended by Directive 2013/38/EU. Vessels calling at Norwegian ports are now required to submit reports using the national reporting system SafeSeaNet.

15 What sanctions may the port state control inspector impose?

The following sanctions may be imposed:

- an order that the shipowner remedy non-compliance with a relevant regulation within a certain period of time;
- in the event of non-compliance with such an order, relevant certificates may be withdrawn;
- a fine, a penalty fee, or both may be imposed on the shipowner for intentionally or negligently infringing relevant regulations. A penalty fee may also be imposed on other persons who on behalf of the shipowner intentionally or negligently infringe relevant regulations;
- a vessel may be detained, ordered to proceed to a certain harbour, denied access to Norwegian territorial waters or given other orders. These orders may be enforced with necessary force within the limitations set out in international law. When there is reason to believe that a vessel has infringed certain regulations, such force may also be exercised in order to investigate the matters; and
- the public prosecutor may indict the shipowner or other persons who have acted on behalf of the shipowner and who have intentionally or negligently infringed certain regulations and the court may give judgment on imprisonment or impose a fine.

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

Sanctions can be appealed to the Maritime Authority within three weeks from the time of which the decision has been delivered to the complainant. The Authority may reverse its decision or forward the appeal to the relevant appeal authority (which is the Ministry of Trade, Industry and Fisheries or the Ministry of Environment, depending on the area of law). A decision made by the appeal authority is final, and may only be challenged through legal proceedings. Criminal proceedings can be appealed to the Court of Appeal.

Classification societies

17 Which are the approved classification societies?

The Maritime Authority has appointed several classification societies as recognised organisations (RO) to which it has delegated tasks such as pre-registration surveys. The authority delegated is set out in individual agreements with the respective RO. The classification societies appointed as ROs are:

- American Bureau of Shipping;
- Bureau Veritas;
- DNV GL;
- Lloyd's Register of Shipping;
- Nippon Kaiji Kyokai; and
- RINA SpA.

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

The classification society can operate both as provider of services, ensuring compliance with class rules, and as agent for the government ensuring compliance with public statutory legislation. The classification society may be held liable by the government or by the shipbuilder or shipowner under the contract entered for the services provided. As for a possible contractual claim by a shipbuilder or shipowner, the classification society will generally have excluded or limited its liability in the contract. Such exclusion will not be effective for wilful misconduct and gross negligence. Beyond that, there is authority in Norwegian law for the courts to set aside, in whole or in part, contract terms that are deemed unreasonable or contrary to good business practice to enforce.

The buyer or other affected third parties may, in principle, hold the classification society liable in tort of negligence. Whether such a right exists depends on the specific circumstances present, inter alia, the type of claim made and the basis on which the classification society has performed its services. Traditionally, Norwegian legal scholars have been reluctant to accept that classification societies can be held liable by third parties, not least in respect of defects. However, in more recent legal theory it has been argued that there is no reason for adopting a *sui generis* approach to third-party claims against classification societies and that the question of liability should be resolved in accordance with general contract and tort law. In particular, the Supreme Court has in three landmark decisions in 2015 and 2016 confirmed the concept of information liability and provided important guidance and clarifications as to the conditions for liability. The conditions for information liability were summarised in *Information Liability Judgment No. II*, and was reiterated and confirmed in *Information Liability Judgment No. III* and *Information Liability Judgment No. IV*, as follows:

- there must be misleading information caused by the negligence of the information provider in a professional context;
- the aggrieved party must have had reasonable and justifiable reason to rely on and act according to the information; and
- the information must have been meant for the aggrieved party or at least for a limited group to which the aggrieved party belong.

There is limited Norwegian case law regarding claims against classification societies in particular, both in respect to contractually based claims and legal action in tort. Notwithstanding the fact that the limited case law available indicates that it is, in principle, possible for both the builder and the buyer to hold a classification society liable for negligence, it may be difficult in practice to succeed in claims against classification societies (eg, the Court of Appeal judgment of 4 November 1997 in *Swire Southern Limited v DNV*).

Collision, salvage, wreck removal and pollution**19 Can the state or local authority order wreck removal?**

The government (represented by the Norwegian Coastal Administration) or the local authority may order wreck removal in accordance with the Harbours and Naval Fairways Act of 2009 or the Pollution Control Act of 1981. An order for wreck removal pursuant to the Harbours and Naval Fairways Act can be directed to the person registered as owner at the time the vessel became a wreck or at the time the order is given. An order under the Pollution Control Act can be directed at the 'responsible' party, a term which may also cover entities other than the registered owner. If the wreck is not removed within a given time limit, the government or local authority can remove the wreck. In such a case, the shipowner is liable for the removal costs and related compensatory damage. The shipowner may limit incurred liability in accordance with LLMC 1996. However, in accordance with article 18 of the LLMC 1996, the Norwegian Maritime Code imposes increased economic liability for wreck removal on the shipowner.

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

The Norwegian Maritime Code incorporates:

- the Collision Convention 1910;
- the International Convention on Salvage 1989;
- the International Convention on Civil Liability for Oil Pollution Damage and the Fund Convention 1992 and the Supplemental Fund Protocol 2003; and
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

Furthermore, the Ship Safety and Security Act incorporates the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).

The Nairobi International Convention on the Removal of Wrecks 2007 has not yet been ratified by Norway, but the Convention will affect any vessel flying the flag of one of the state parties or any vessel which is bound for the Convention area. The question of ratification is currently under consideration by the Norwegian Ministry of Transportation.

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 incorporates the International Convention on Salvage 1989. There is no mandatory form of salvage agreement. Lloyd's standard form of salvage is commonly used, but the parties are free to agree their own terms.

Any person or entity can in principle carry out salvage operations. However, a shipowner or a master may on a reasonable basis expressly prohibit a person from carrying out a salvage operation. The fact that the salvor is a professional will be taken into account when calculating the award.

Ship arrest**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 Seagoing Ships 1952, which has been incorporated into the Maritime Code and is thus in force in Norway. The 1999 Arrest Convention has also been signed by Norway, but has so far not been ratified.

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 of a seagoing ship can only be obtained as security for maritime claims as provided for in section 92 of the Norwegian Maritime Code. The list of maritime claims contained therein reflects the definition of maritime claims in the Arrest Convention 1952, with the exception that claims arising out of wreck removals are also included.

The vessel's flag or the law governing the claim does not matter, provided the vessel can serve as an object for enforcement of the claim according to the general provisions of the Norwegian Enforcement of Claims Act.

Under Norwegian law, the debtor must be the owner of the vessel that is being arrested. Claims against time or bareboat charterers do not give a right to arrest a ship. The right of sister ship arrest is recognised in the sense that if the owner of the ship to which the maritime claim relates is liable as an entity or a person for the claim, the arrest may be directed at other ships owned by that legal entity or person at the time the claim arose. The right to arrest other ships belonging to the owners does not apply to disputes as to ownership of a ship, or to a dispute between co-owners of a ship as to the ownership, possession, employment or earnings of that ship, where the arrest can only be effected against the ship to which the claim relates.

The claimant must also prove on the balance of probability that he or she has sufficient cause for arresting the ship, namely, that the debtor's conduct gives reasons to assume that enforcement of the claim will either be impossible or significantly more burdensome if the arrest is not granted, or that enforcement will otherwise have to be made abroad. Norwegian law consequently adds another requirement that is not found in the Arrest Convention. The requirement of sufficient cause does not apply to claims secured by a mortgage or lien on the vessel.

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

Norway is not a signatory to the 1967 Maritime Lien Convention; however, the list of maritime liens contained in the Norwegian Maritime Code section 51 corresponds substantively with the list contained in the 1967 Maritime Lien Convention. The maritime liens recognised 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 ship;
- damages in respect of loss of or damage to property, occurring in direct connection with the operation of the ship, 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 if the claim is against the owner, charterer, manager or any person to whom the shipowner has delegated his or her functions.

25 What is the test for wrongful arrest?

If the claim ultimately fails, Norwegian law provides for strict liability for wrongful arrest.

Bad faith or negligence by the claimant in regard to the asserted cause for arresting the ship may also form the basis for liability for wrongful arrest.

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 may not arrest the vessel unless the bunker compensation claim is against the owner of the vessel. The bunker supplier may have the option to arrest the bunkers (see question 34).

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

The court may order that the arresting party, as a condition for the arrest, shall put up security for port dues during the arrest period, counter-security for wrongful arrest, or both. Counter-security for wrongful arrest is ordered at the courts' discretion in a fixed amount covering probable costs relating to a wrongful arrest, and is in general calculated on the basis of loss of hire over a stipulated number of days. In practice, the courts normally do not order counter-security to be put up. Security for port dues must be put up for a minimum of 14 days, failing which the arrest may be lifted upon the request of the port authorities.

The form of the security must be either a cash deposit in a Norwegian bank with appropriate declaration by the bank to the enforcement authority or a bank guarantee from a Norwegian bank or other financial institution to the enforcement authority, with no time bar. A security may be replaced by another security in acceptable form.

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 (the arrested party) can always avoid effectuation of the ship arrest by establishing with the court adequate security for the arresting party's claim. In the same manner, the arrested party can have a ship arrest lifted. The amount of the security shall correspond to the amount for which the court has granted the arrest, without regard to the value of the ship. The form of the security shall be the same as for security provided by the arresting party (see question 27).

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?

It is not necessary for the arresting party to issue any formal power of attorney when instructing legal counsel in Norway in connection with the arrest application. The arrest application can be filed on the same day as the instructions are received, provided that the necessary documents are available and in order. The application can be sent by email or facsimile to the court, in addition to the original hard copy. Some courts have started to use the courts' web-based portal, which allows for the application to be filed online.

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

The shipowner is generally responsible for the maintenance of the vessel while under arrest. The arresting party is by statute made responsible for payment of port dues that may accrue during the arrest.

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 for security only and to pursue proceedings on the merits elsewhere.

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

It is possible to obtain attachment (in the law called arrest) in most types of assets owned by the debtor, as security for monetary claims. An injunction order, for interim security measures, may be obtained for non-monetary claims. In all these cases a sufficient cause for the arrest or other security measure must be shown. Note that the measures are discretionary and may be denied by the court.

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

Orders for securing and getting access to evidence are available pursuant to the Dispute Act Chapter 28. It is also possible, pursuant to the conditions of Chapter 34 of the Dispute Act, to obtain an interim measure in the form of an order for delivery of property.

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 provided that the claim is against the owner of the bunkers. A sufficient cause for the arrest must be shown. Since arrest is a discretionary measure it may be denied by the court due to practical difficulties and inconvenience caused to the ship or other third parties.

Judicial sale of vessels

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

In order to be entitled to apply for judicial sale of a vessel arrested in Norway, one must be the beneficiary under a registered mortgage or other registered lien in the vessel and one's claim must be 'qualified' for enforcement under the Enforcement Act 1992 and due for payment. The claims that are qualified for enforcement under the Enforcement Act are, in addition to registered mortgages, inter alia, final and binding judgments and arbitration awards.

The normal procedure in enforcing a judgment or arbitration award through to judicial sale of the vessel is first to petition for an enforcement lien on the basis of the judgment or award, and by that to obtain priority for the claim in the subsequent sale. Foreign judgments are subject to recognition and enforceability according to a treaty or convention (see question 57). For foreign arbitral awards, the Norwegian Arbitration Act 2004 accepts recognition and enforcement on much the same terms as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

If the judgment or award orders that the vessel be sold, a judicial sale may be petitioned for directly, without the need first to obtain an enforcement lien.

If the vessel arrested in Norway is a foreign-flagged vessel, the Norwegian court and execution officer must involve the registrar of the flag state in the process, which may cause extra procedural steps and delay.

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 sales process, after the registered lien is in place, consists of two stages. At the first stage the claimant files a petition for judicial sale of the vessel. The court will then give the owner an opportunity to present its case whereafter it will grant or reject the petition for judicial sale. The second stage consists of the sales process, which will be either by auction or by ordinary (judicial) sale through a court-appointed administrator (normally a ship broker). The claimant decides whether the final offer is to be petitioned and affirmed by the court, upon which the court will affirm or refuse the bid. Finally, the court will distribute the sales proceeds.

The time needed for the judicial sale process depends on several factors, most importantly the court's workload, appeal of court decisions and the vessel's market. A fair general assessment suggests that the first stage should be completed in a period of between one and three months and the second stage between two and six months.

The court fees for 2018 are:

- arrest petition: 2,825 kroner;
- enforcement petition (judicial sale): 2,373 kroner;
- fee if the court decides to carry out the judicial sale: 10,170 kroner;
- appeal to the district court: 1,130 kroner; and
- appeal to the appeal court: 6,780 kroner.

Furthermore, proceedings in court trigger a daily fee and a judicial sale may also incur harbour fees and administrator's (normally ship broker's) remuneration.

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

First, the court will not affirm a bid for the vessel that does not cover all encumbrances in the vessel with higher-ranking priority than the claimant's security.

The proceeds of the sale shall be distributed in accordance with the following order, from highest to lowest priority:

- court fees and the court-appointed administrator's remuneration;
- maritime liens (in order of priority as listed in section 51 of the Maritime Code);
- mortgages and similar registered encumbrances based in contract; and
- unsecured debt.

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

A judicial sale in Norway extinguishes all prior liens and encumbrances on the vessel including maritime liens and thereby gives the purchaser a clean title. Exception applies for non-pecuniary rights registered in the vessel, which as a main rule follow the vessel. However, non-pecuniary rights with the same priority as the claimant or behind may be discharged by the court if necessary for the sale of the vessel.

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

A judicial sale in a foreign jurisdiction will be recognised provided the vessel is within the jurisdiction at the time of sale and that the judicial sale is performed in accordance with the national law of that jurisdiction and the provisions of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967.

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

Yes, but the 1993 Convention has not been ratified and is not in force in Norway.

Carriage of goods by sea and bills of lading**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, which are incorporated into the Maritime Code, with certain modifications.

The Hamburg Rules were signed but not ratified by Norway. Instead, the Maritime Code has been given certain elements from the Hamburg Rules that are considered compatible with Norway's obligations under the Hague-Visby Rules.

From the outset Norway varied the rules so that the rights were more favourable for the cargo owner than the Hague-Visby rules stipulated, unless expressly waived by the cargo owner. This continues to relate particularly to the following two categories:

- the tackle-to-tackle principle of the Hague-Visby Rules was replaced with a general rule that the owner shall be responsible for the goods from such time and place as he or she is placed in charge of the goods; and
- livestock and deck cargo are made subject to special liability provisions that cannot be contracted out of.

Norway is a signatory to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (widely known as the Rotterdam Rules), but has not yet ratified the convention so as to make it applicable. The Norwegian Maritime Law Commission recommends that ratification should take place when the United States or the larger EU states ratify the convention.

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 is a party to 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 a protocol of 1999)) and the Convention for the Unification of Certain Rules for International Carriage by Air 1999, all of which are incorporated into national legislation by special acts on each of these areas.

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

The Norwegian Disputes Act provides any person with a legal claim based in law, contract or tort, with access to sue a person with an adequate relation to the dispute, provided a resolution by the courts is deemed to be reasonably required. The lawful holder of the bill of

lading will normally be entitled to bring a claim against the owner. This may be the shipper, the consignee or the endorsee depending on the circumstances of the case.

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 incorporated into the bill of lading by reference. Such a provision will generally be applicable with regard to a shipper who is also the charterer. If the bill of lading is issued or transferred to a third party, the legislation becomes prescriptive so that the rights of the lawful holder of the bill of lading under the Maritime Code may not be waived by contract.

The Maritime Code severely restricts the enforceability of jurisdiction clauses in the bill of lading. Section 310 stipulates that any provision on jurisdiction shall be void to the extent that it limits the cargo owner's right to bring a claim in either of the following jurisdictions:

- the principal place of business or dwelling of the party being sued;
- the place where the transport agreement is entered into insofar as the party being sued has a place of business or an agent through whom the agreement has been reached;
- the agreed place of loading; or
- the agreed place of discharge, or the actual place of discharge.

The above restrictions do not apply if neither the agreed place of delivery nor the agreed or actual place of loading is in Norway, Denmark, Finland or Sweden or if something else follows from the Lugano Convention of 2007.

Arbitration provisions will similarly only be applicable to the extent that they do not limit the cargo owner's right to bring a claim in any of the aforementioned places.

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

The starting point in the Maritime Code is that the carrier and subcontractor are jointly and severally liable. If, however, it is made clear that a part of the transport will be executed by a named carrier then the first carrier has the right to limit his or her liability for the carriage executed by the named carrier. In the event that there subsequently is a dispute over which carrier was responsible for the loss or damage or delay, then the principal carrier shall have the burden of proof.

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 Norwegian law the shipowner and named carrier are jointly and severally liable towards the cargo owner for loss or damage or delay caused during the carriage of the goods. There is very limited possibility to vary these principles, as described above.

Both parties may rely on the defences in the Maritime Code, or incorporated into the bill of lading, unless the bill of lading terms reduce the rights of the cargo owner.

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

The Maritime Code has intentionally softened the provisions relating to deviation. Previously, the provision was negatively constructed; deviations could only be made in order to save lives or salvage vessels or goods or other reasonable grounds. All other deviations were unlawful. The new provisions now expressly state that deviations to save lives or to salvage vessels or goods are lawful deviations.

While the change at first glance may appear to be minor, it confirms more affirmatively that the shipowner will not be liable for loss or damage or delay caused by the deviation.

48 What liens can be exercised?

Pursuant to the Maritime Code, the carrier has the right to retain the goods as security for:

- freight due;
- the cargo owner's contribution to general average and salvage claim;
- any costs incurred to protect the goods where this is founded in legislation; and
- any other claims for which it is agreed that the carrier may detain the cargo as security.

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

Where the carrier delivers the goods without the presentation of the bill of lading, and there subsequently comes forward a lawful holder of the bill of lading, the carrier will be liable to the holder of the bill of lading. Under Norwegian law there will in such circumstances be no defences available to the carrier.

In the event that the carrier secured a letter of indemnity from the party that received the goods, the carrier will be able to bring a claim for indemnity under the letter of indemnity.

50 What are the responsibilities and liabilities of the shipper?

The Maritime Code contains several provisions describing the liability of the shipper. First, the shipper is responsible for delivering the goods to the carrier within the time period agreed with the carrier, and the goods need to then be delivered in a state and in such a manner as to allow for safe and easy loading, stowage, transport and discharge. The shipper also has a responsibility to ensure that the goods are adequately packed, and cannot cause damage to other goods. The general provision stipulates that it is the responsibility of the shipper to ensure no dangerous goods are shipped.

In the event that the shipper cancels the shipment prior to loading, he or she shall be liable for freight loss and other losses. If the transport agreement is cancelled after loading and delivery is to be made at a place other than the agreed discharge port, the shipper shall similarly be liable for freight loss and other losses.

And, naturally, unless something else is agreed, the shipper will be liable to pay freight, which falls due upon delivery of the goods.

Shipping emissions

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

Annex VI of MARPOL is incorporated into Norwegian law and applies as a regulation. The North Sea is defined as an ECA.

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 caps contained in Annex VI of MARPOL are generally applicable:

- fuel oil used in the EEA must have a sulphur content below 3.5 per cent m/m (to be adjusted to 0.5 per cent from 2020);
- fuel oil used in the North Sea Sulphur Emission Control Area must have a sulphur content below 0.1 per cent; and
- marine gas oil is subject to an overall limit of sulphur content of 0.1 per cent.

In addition to this, particular EU requirements in respect of sulphur contents are applicable, namely:

- for ships at port or port area, the limit is 0.1 per cent m/m; and
- for passenger ships sailing routes within, or to or from, the EEA, there is a limit of 1.5 per cent m/m.

Norway operates an additional sulphur dioxide tax for all mineral oils with more than 0.05 per cent sulphur content.

The provisions relating to compliance, enforcement and sanctions are set out in the Ships Security Act of 2007 and the Regulation Concerning Environmental Security for Ships and Other Moveable Installations of 2012 into which Annex VI of MARPOL is incorporated. The possible sanctions include, inter alia, penalties, withdrawal of certificates, detention of the vessel and for substantial breaches, fines or incarceration.

Ship recycling

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

Ship recycling in Norway is subject to a number of Norwegian regulations covering the handling of waste, as well as health, safety and environmental issues associated with recycling. There are, however, only a few ship recycling facilities in Norway, and Norwegian owners will usually scrap or recycle their vessels at facilities abroad.

Norway has ratified the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal 22 March 1989, and has implemented Regulation (EC) No. 103/2006 of the European Parliament and the Council of 14 June 2006 on shipments of waste. The latter has been implemented as Chapter 13 of the Norwegian Regulation on recycling and treatment of waste.

Further, the Norwegian government has played an active role in international regulatory work related to ship recycling, and was one of the first states to ratify the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, which is yet to come into force. Norway is also in the process of implementing Regulation (EU) No. 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling (amending Regulation (EC) No. 1013/2006 and Directive 2009/16/EC).

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

Unless otherwise agreed between the parties, maritime disputes fall under the jurisdiction of the ordinary courts, namely, the district courts in the first instance and on appeal the regional courts of appeal. On certain conditions a judgment may be further appealed to the Supreme Court, but the Supreme Court's Appeals Selection Committee will often deny such further appeal to be heard.

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

Norway is a party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965. The Ministry of Justice is the central authority in Norway.

Service on Norwegian citizens abroad may be made through Norwegian consular authorities.

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

There is no arbitral institution in Norway with a panel of maritime arbitrators. The Oslo Chamber of Commerce offers arbitration services for commercial disputes in general, but arbitrations in maritime disputes are, in general, established ad hoc by the parties or their counsel, based on provisions of contract and the Norwegian Arbitration Act 2004. Trained maritime arbitrators are found among scholars, judges and practising lawyers. The Scandinavian Institute of Maritime Law in Oslo has greatly contributed to the quality of the maritime law community and to the traditions of Norwegian maritime arbitrations, which are well respected and widely used. An initiative by the Norwegian Maritime Law Association to establish a centre for Nordic Maritime and Offshore Arbitration is currently planned.

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

Norwegian recognition and enforcement of foreign judgments requires convention or treaty. The most important convention is the Lugano Convention 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters entered into between the member states of the European Union and Norway, which replaced the Lugano Convention 1993 and entered into force on 1 January 2010.

Norway is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. In addition, the Norwegian Arbitration Act 2004, which is based on the UNCITRAL Model Law, provides in sections 45 and 46 that an arbitral award shall be recognised and enforceable pursuant to the requirements of the act, irrespective of the country in which the award was made. The

requirements are fairly similar to those of the 1958 Convention and apply, accordingly, also to awards made in non-convention countries.

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

Asymmetric jurisdiction and arbitration agreements are in general valid and enforceable in Norway. In theory, it is possible that an agreement can be deemed to be in breach of the European Human Rights Convention article 6, inter alia, if, in effect, it prevents one of the parties from commencing legal action or refers the dispute to a biased venue. The agreement may also, in theory, be set aside by the Agreement Act section 36 concerning unfair terms. Norwegian courts show great reserve in applying the Agreement Act section 36 on agreements between professional parties.

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

Such proceedings will not make the case *lis pendens* and prohibit the Norwegian courts from accepting jurisdiction in Norway for the same dispute. A foreign judgment rendered in breach of a jurisdiction clause under circumstances where Norway has not, by convention or treaty, accepted the foreign jurisdiction, may be challenged as not being enforceable in Norway. If proceedings are brought in breach of a jurisdiction clause before the courts of an EU or EEA member state, the issue is partly regulated by the Lugano Convention 2007; if the other court is seized before the Norwegian court, the Norwegian court is bound to stay its proceedings until the court first seized has decided whether it has jurisdiction.

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 jurisdiction of the domestic court may be challenged before the court at the initial stages. Any decision by the domestic court to seize jurisdiction may be subject to appeal to the courts of appeals and, ultimately, to the Supreme Court.

Limitation periods for liability

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

The general limitation period for claims, as enacted in the Limitation Period for Claims Act 1979, is three years. For contractual claims, the period commences at the due date for satisfaction of the claim or from the date of a breach. For tort claims, the period commences on the date on which the injured party obtained, or should have obtained, the necessary knowledge of the damage and the person responsible. Under this Act, certain claims are subject to a longer limitation period and certain hindrances trigger supplementary periods.

For international sales of goods, the New York Convention of 14 June 1974 applies, where the general limitation period is four years.

Special legislation may contain shorter limitation periods than three years. The Maritime Code contains shorter limitation periods, inter alia, for maritime liens, one year; for various passenger claims, two years; for claims for damages for loss of or damage to cargo or for incorrect or incomplete statements in a bill of lading, one year; and for claims for damages for loss suffered by cargo being delivered without presentation of a bill of lading or to the wrong person, one year.

The debtor may extend the time limit by an acknowledgement of the debt or by a specific extension not exceeding three years and addressed to the creditor after the debt has arisen.

62 May courts or arbitral tribunals extend the time limits?

No, but the normal way of interrupting the limitation period is to file suit or to commence arbitration proceedings.

Miscellaneous

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

The Ships Employment Act 2013, which came into effect on 20 August 2013, implements the provisions of the Maritime Labour Convention (MLC). The Ships Employment Act applies to seamen working on board Norwegian vessels.

The Norwegian Maritime Authority (NMA) issues DMLC part I upon the shipowner's application. After the shipowner has issued the DMLC Part II, he or she may ask the NMA, or one of the ROs (see question 17), for an MLC inspection. The MLC certificate is issued either by the NMA or an RO.

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 section 36 of the Contracts Act it is in principle possible for the courts to set aside, in whole or in part, contract terms that the court deems to be unreasonable or contrary to good business practice to enforce. However, there would in general have to be extraordinary circumstances present in order for the courts to apply section 36 to a commercial contract between professional parties.

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

Norway is not a member of the European Union, but as a member of the EEA, much EU commercial legislation has been adopted. As a traditional shipping nation, Norway is also a party to the leading international conventions that relate to shipping.

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Newbuilding contracts

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, risks and responsibilities associated with ownership passes between a shipbuilder and shipowner as agreed to in the contract. With respect to third parties and authorities, ownership title only passes when the sales contract is recorded in the Panama Public Registry.

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

Under Panamanian law, the contract would need to be in writing and specifically provide the events that would trigger the obligation to refund the guarantee.

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

This is not relevant in Panama as there are no building yards in Panama; but if there were, such a remedy would be available under Panamanian law.

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 shipowner, original purchaser and a third party would have a claim in either contract or tort against the yard. Such remedy, however, could be limited by the terms of the building contract.

Ship registration and mortgages

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 are eligible to be registered in Panama regardless of the nationality of the owners or shareholders of the owning company. Vessels must meet the technical and safety demands of the Panama Maritime Authority (PMA), the entity responsible for the registration of vessels in Panama. A vessel under construction can be registered in Panama and an ownership title and mortgage can also be recorded on such a vessel.

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

Persons or companies of any nationality may register a ship in Panama and the companies or persons can be based in any country.

7 What are the documentary requirements for registration?

The shipowner will have to provide the vessel's particulars and a power of attorney to an attorney in Panama who will apply for a provisional registration, which is valid for six months. In addition, the shipowner will have to present a bill of sale, deletion certificate and closing continuous synopsis records from the vessel's previous registry. The

shipowner may also be required to present technical certificates of the vessel in order to permanently register the vessel in Panama.

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

Yes, it is possible to have dual registration and to flag out of Panama. If Panama is the primary (mother) flag, the PMA will grant a consent authorising the vessel to flag in another country for up to two years, which is renewable. If Panama is the secondary flag, the PMA will require consent from the primary flag authority, technical documents of the vessel and the bareboat charter party. The owners of the vessel must grant their consent.

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

The register of mortgages and ownership titles has recently been transferred to the Ship and Mortgage Public Registry Directorate of the Panama Maritime Authority. The directorate contains the following information:

- name and domicile of mortgagee and mortgagor;
- maximum amount guaranteed by the mortgage;
- interest rate or how it is calculated, if an interest rate is applicable. It is possible to register a mortgage that does not provide for payment of interest;
- payment dates or how such dates are established; and
- particulars of the ship.

It is also possible to register a mortgage for obligations other than a loan, such as a mortgage to guarantee performance of a future obligation. Ownership titles and mortgages can be recorded preliminarily through any Panama Merchant Marine Consulate.

Limitation of liability

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

While Panama is not a signatory to the Limitation Convention 1976, its text was largely incorporated in the Panamanian Code of Maritime Procedure. The articles are compiled under a special title, 'Substantive provisions that regulate the limitation of liability of the vessel owner'. Therefore, from the outset, it is clear that the intention of the legislature was to include 'substantive' law in the Code of Maritime Procedure. The articles in this title provide rights and remedies to the plaintiff in the limitation procedure and thus the courts would have to apply these provisions as the substantive law.

A peculiarity of Panama's Limitation of Liability Law (which was borrowed from US law) is that the person seeking to limit liability must do so within six months of receiving a written claim.

One difference between the Panamanian Limitation of Liability Provisions and the 1976 Convention is that the Panamanian limitation provisions changed the word 'including' to 'excluding' when referring to limitation of liability for damages to 'harbour works'. The term 'harbour works' was translated into Spanish as *obras portuarias*, which means 'port works' and seems to be intended to be broad in its application. We opine that this may have been done because all the ports at the time were operated by the government and the intention could

have been to protect government property and interests, especially the Panama Canal.

Salvors and the owners, charterers, managers and operators of oceangoing vessels may limit their liability arising from claims in respect of:

- loss of life or personal injury or loss of or damage to property (excluding damage to harbour works, waterways, bridges, canals, aids to navigation and installations of the Panama Canal);
- loss resulting from delay in the carriage of cargo, passengers or their luggage by sea;
- other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the vessel or salvage operations;
- the raising, removal, destruction or the rendering harmless of a vessel that has sunk or been wrecked, stranded or abandoned, including anything that is or has been on board such vessel;
- the removal, destruction or the rendering harmless of the cargo of the vessel; and
- 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 present law, and further loss caused by such measures.

11 What is the procedure for establishing limitation?

The action for limitation must be filed within six months of the receipt of a claim (a letter from someone claiming damages). Nothing in the law prohibits the entitled person from constituting the limitation fund prior to receiving a claim or being required to respond to a claim. However, after receiving a written claim the shipowner or entitled person must file the limitation action within six months thereafter. The limitation request must be filed in writing before the Maritime Court. Such requests must contain the exoneration from liability and the amount of limitation in case the court finds liability. The motion or complaint must contain:

- a description of the voyage giving rise to the claim, including the date and place of its termination;
- the amounts of all claims filed, including pending claims, whether or not they arise from a contract; and
- a statement as to whether the vessel has been damaged, lost or abandoned and, if so, where and when.

The motion or complaint must be accompanied by the following documents:

- the deposit of the total amount that constitutes the limitation fund;
- the title of ownership of the vessel;
- a copy of the admeasurements certificate;
- a list of the known creditors and their claimed amounts; and
- designation of the evidence that shall be offered in due course.

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

The person liable 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 the intent to cause damage, or recklessly or with knowledge that such loss would probably result.

Limitation has not been broken in our jurisdiction.

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

Panama has incorporated into law the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 2002.

Port state control

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

Port state control functions are carried out by the PMA, which is responsible for regulating Panama-flagged vessels around the world as well as foreign-flagged vessels in Panamanian waters. The Panama Canal Authority (PCA) is also empowered to verify the seaworthiness of and compliance with safety regulations of vessels transiting the Panama Canal.

15 What sanctions may the port state control inspector impose?

The PMA inspectors can detain or prohibit the movement of any vessel in Panamanian waters found to have serious deficiencies. The PMA can remove from the registry or impose monetary fines up to US\$10,000 on any Panama-flagged vessel that is found by foreign port state control units to have safety deficiencies or to have violated international law.

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

Any detention order or fine imposed by the PMA can be appealed to the administrator of the PMA and thereafter to the board of directors of the PMA. Additionally, the decision of the board of directors can be appealed to the Supreme Court of Panama.

Classification societies

17 Which are the approved classification societies?

The PMA has approved numerous classification societies as recognised organisations and recognised security organisations that can issue documents on behalf of the PMA. All classification societies that are members of the International Association of Classifications Societies (www.iacs.org.uk) have been approved by the PMA. Additionally, the PMA has approved other companies to act as recognised organisations. A full list can be seen under the circular at www.segumar.com.

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

There are no decisions from Panama's maritime courts on this issue of law but, in general terms, Panamanian law establishes the obligation of any party that through negligence or fault causes damages to another to indemnify such person. The issue of privity of contract may not be a bar to action for damages by a third party against the classification society.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Both the PMA and the PCA can order wreck removal.

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;
- the International Convention on Civil Liability for Oil Pollution Damage;
- the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage 1969;
- the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage; and
- the Nairobi International Convention on the Removal of Wrecks 2007 (note: the PCA has its own regulations, under which PCA could require a vessel owner to remove a wreck in canal operating waters).

Most provisions of the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 have been adopted as part of Panama's internal laws.

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 for salvage. The parties are free to contract the terms and salvage award, including the Lloyd's standard form. However, a party to the salvage agreement may move the court to void the contract and the court may do so if, under the circumstances, it considers the agreement to be inequitable.

The judge would set the salvage compensation based on:

- the circumstances of the salvage: the results, efforts, risk posed by the assisted vessel, passengers, crew and cargo, risk taken by salvors, time, expenses and the like; and
- the value of the salvaged property.

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

Panama is not a signatory to any arrest conventions.

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 purposes of founding jurisdiction or obtaining security in any claim brought in personam against its owner. This extends to all vessels under the same ownership, which can be arrested as property of the defendant.

Actions in rem may be filed when the applicable substantive law provides for a maritime lien, privileged maritime credit or statutory right in rem. In general terms, the law applicable to a controversy is as follows:

- crew injury: law of the flag;
- stevedore injury: law of the country where the accident occurred;
- contract of affreightment: as agreed or place of shipment;
- charter party: as agreed or law of the flag; and
- supplies: as agreed or place where services rendered.

There is no sister ship arrest under Panamanian law. However, the Code of Maritime Procedure states that if the substantive law applicable to the dispute allows for arrest of a sister ship, such action can be brought in Panama.

There is no provision in Panamanian law for the arrest of a vessel as if it were the property of the bareboat charterer. The Code of Maritime Commerce defines an owner as: 'A person with real property rights over a vessel, who is therefore entitled to sell, use and enjoy the vessel, as well as to possess it peacefully and continuously'. The bareboat charterer does not meet the definition since it cannot sell the vessel and thus the claim would fail under Panamanian law. If the applicable substantive law to the controversy allows the arrest of the bareboat chartered vessel for claims against the bareboat charterer, Panamanian courts would entertain the complaint.

A time-chartered vessel cannot be arrested for claims against the time-charterer. The bunkers would be subject to such arrest.

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

Under the Maritime Code of Commerce, the following give rise to maritime liens, if Panamanian substantive law applies:

- judicial and arrest expenses incurred to the benefit of maritime claimants;
- expenses, salaries and compensation for assistance or salvage rendered during the last voyage;
- crew wages;
- naval mortgage;
- registration fees and taxes;
- wages of stevedores or port workers for services rendered in connection with loading or unloading operations;
- compensation for tort claims;
- general average;
- supplies or necessities;
- bottomry and insurance premiums for the last six months;
- expenses in connection with piloting or watchkeeping of the vessel, its maintenance or custody;
- compensation to shippers or passengers for non-delivery of cargo or damage to the same during the last voyage; and
- unpaid purchase price of the vessel's last acquisition and interests.

25 What is the test for wrongful arrest?

Arrest of a vessel can be challenged:

- if it was executed against a vessel not belonging to the defendant;
- if the maritime lien is extinguished or non-existent under applicable law; or
- if there is a written agreement between the parties not to arrest the vessel.

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 vessel can be arrested provided that the applicable law confers a lien or an in rem action against the vessel on the bunker supplier.

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

If the arrest is petitioned to enforce a maritime lien (in rem) against the vessel or for purposes of founding jurisdiction over a foreign defendant not domiciled in Panama or over a case arising outside the jurisdiction of local courts, security required is US\$1,000. If the court has jurisdiction and the arrest is for the sole purpose of obtaining security, the counter-security required for the arrest to be ordered shall be between 20 and 30 per cent of the amount of the complaint.

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 the court will order the arrested party to post is equal to the amount of the claim, plus the court-calculated attorney's fees, plus arrest expenses, plus three years of interest (between 6 and 10 per cent depending on the type of claim: civil, tort or commercial). The bond to be posted must be either in the form of cash, a surety bond, a bank guarantee, or whatever is agreed by the parties. The maximum amount of security required to be posted is the value of the property arrested.

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 lawyer may act without a power of attorney (POA) for a period of two months by posting a bond with the court. The bond depends on the amount of the complaint, but the maximum required bond is US\$4,500. A POA must be submitted within the period of two months. The bond is returned when the POA is submitted. The POA must be notarised and the notary public's signature authenticated by a Panamanian consul or via apostille. Original documents are required and they must be translated into Spanish by a local authorised translator. Normally, one day's notice is sufficient to prepare and file a complaint and arrest application.

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

The marshal of the court is in charge of maintenance of the vessel, but the arresting party shall cover expenses incurred while the vessel remains under arrest. These expenses are recoverable if the arresting party prevails in trial.

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 procedure specifically aimed at arrest in order to obtain security; however, the defendant can petition the court to decline jurisdiction in favour of a previously agreed tribunal or arbitration panel, or the parties can jointly petition the court to do so.

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

A plaintiff may file for injunctions to stop the sale of a vessel or the recording of mortgages, but this is not considered an arrest to obtain security. The court may require posting of bonds of up to US\$50,000 to guarantee against damages.

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

A plaintiff may move the court to secure evidence or information before filing a lawsuit. The court may require posting of bonds of up to US\$50,000 to guarantee against damages.

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

Yes. Bunkers may be arrested through in personam actions against the owner of the bunkers.

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

After the vessel has remained under arrest for more than 30 days the arresting party may apply for judicial sale of the arrested vessel. The defendant or owner may also make such an application at any time after the arrest. The court or the marshal of the court can proceed with the sale at any time if the asset is in danger of suffering substantial damages or deterioration.

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?

Following the petition or if the vessel has been abandoned or severely neglected by its owners, to the point where it represents a physical or financial risk for the marshal or the court, a judicial sale is ordered. The court then appoints a surveyor or expert appraiser, who will inspect the vessel and determine its market value, either as a ship or as scrap, and a notice shall be published in a local newspaper in Panama announcing the date of the sale, value of the vessel and particulars. The arresting party shall pay for the above expenses, which are recoverable from the proceeds of the sale.

The sale takes place in three rounds of bidding; the first only admits bids for 75 per cent of the appraisal value, and if the vessel is not sold owing to lack of bidders, then a second round is set for one week later. At the second round, valid bids are for a minimum of 50 per cent of the appraisal value. If the vessel, cargo or asset is not sold, then third and successive rounds will take place in which any bid is admitted. To qualify as a valid bidder, a deposit of 5 per cent of the appraisal value shall be made, and it is credited towards the amount of the winning bid, or reimbursed immediately if the bid is unsuccessful.

If there is more than one bid, then upon reception of the last bid, an opportunity will be given to the bidders to increase their offers until a final bidder prevails.

The whole process, between the arrest and the first round of the judicial sale, can take about three months.

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

In rem claims get paid first ahead of in personam claims, with the order of priority as follows:

- judicial and arrest expenses incurred to the benefit of maritime claimants;
- expenses, salaries and compensation for assistance or salvage rendered during the last voyage;
- crew wages for the last voyage;
- naval mortgage;
- registration fees and taxes;
- wages of stevedores or port workers for services rendered in connection with loading or unloading operations done during the vessel's last arrival;
- compensation for tort claims;
- general average;
- supplies or necessities;
- bottomry and insurance premiums for the last six months;
- expenses in connection with piloting or watchkeeping of the vessel, its maintenance or custody after the last voyage and its entry into port;

- compensation to shippers or passengers for non-delivery of cargo or damage to the same during the last voyage; and
- unpaid purchase price of the vessel's last acquisition and interests for the past two years.

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

The judicial sale clears and extinguishes all previous liens and grants the buyer clear title over the vessel.

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

Yes, as long as the buyer in a foreign judicial sale has previously registered his or her title at the appropriate ship registry of the vessel's flag at the time it is arrested in Panama or at the time of the facts in dispute in a judicial proceeding.

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

No.

Carriage of goods by sea and bills of lading**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?**

Panama is not a party to the Hague Rules, Hague-Visby Rules or Hamburg Rules; however, many principles and provisions of the Hague-Visby Rules have been adopted through internal legislation, including exemptions, liabilities and package limitation.

Carriage of goods by sea and multimodal transport are regulated by separate chapters of Law No. 55 of 2008. The former is deemed to commence at the port of loading, from the time the master received the cargo, and ends upon delivery at port of discharge.

Panama is not a signatory to the Rotterdam Rules.

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?

Domestic carriage of goods by sea or land is governed by the Code of Commerce, and provides for a time frame of six months instead of one year for international carriage.

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

It depends on the type of bill of lading; if it is to order, the holder of the bill has title to sue; and if the bill is nominative, the person named as consignee will have title to sue.

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 or as per a charter party can incorporate the terms and conditions of the charter party, provided that it is expressly mentioned in the bills of lading, and that reference is made to the proper identification of the charter party, for example, using the date or other form of reference.

As the bill of lading is negotiated and endorsed by third parties, so are the terms and provisions of the charter party mentioned therein.

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

Demise clauses are usually recognised for purposes of identifying the contractual carrier, but they do not limit the potential in personam liability of actual or effective carriers and the in rem liability of vessels involved in the carriage.

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?

Panamanian law distinguishes between the contractual carrier and the effective carrier, meaning by the latter the person that actually performs the carriage or part of it, including owners or disponent owners that make use of a ship for such purposes.

The actual or effective carrier has the same duty of care and obligations as the contractual carrier and can benefit from any exceptions of defences granted by Panamanian law to the contractual carrier.

When the contract provides for an effective carrier different from the contractual carrier, and the shipper is aware of such identities, it can be agreed that the contractual carrier is not responsible for damages arising during the custody or performance of the carriage by the effective or actual carrier.

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

Deviation is not allowed, except for justified causes such as assisting other vessels or persons. The law, however, allows for 'reasonable' deviations without defining what is to be understood or considered by that, therefore it is usually referred to common causes such as avoiding bad weather or perils of the sea. Carriers and vessels are responsible for damages arising from unjustified deviation.

48 What liens can be exercised?

Possessory or maritime liens can be exercised against the vessel, cargo or freight, provided that they arise by virtue of the applicable substantive law.

Maritime liens against vessels, cargo or freight are provided for by Panamanian Commercial Law, which does not allow for contractual liens agreed between the parties.

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 the production of the bill of lading does so at his or her own risk and therefore liability cannot be limited. Usually carriers in Panama only accept such cargo in exchange for a letter of indemnity from the consignee or other form of guarantee acceptable to them.

50 What are the responsibilities and liabilities of the shipper?

The shipper is under obligation to pack the goods adequately and guarantees the accuracy of their description, markings, number of packages or pieces, the weight and quantity of the cargo and shall compensate the carrier for any loss or damage resulting as a consequence of failure to comply with the above.

The shipper shall also carry out all the procedures required by the port, customs, quarantine, inspection and other competent authorities in connection with the loading of cargo, and shall provide the carrier with all relevant documentation required by him or her. The shipper shall be liable for any damage caused to the carrier arising from the inadequate, inaccurate or delayed delivery of such documents.

When dangerous goods are being loaded, the shipper shall pack, mark and label them accordingly in order to distinguish them, and the shipper shall give the carrier a correct description of them, and shall notify the carrier of the dangerous nature of the goods and of any precautions to be taken. If the shipper fails to notify the carrier or does not notify him or her properly, the shipper shall be liable to the carrier for any damage sustained by the carrier, the vessel or the cargo shipped on board.

Shipping emissions

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

There is no emission control area in force in Panamanian waters.

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?

There is no cap on the sulphur content of fuel in force in Panamanian waters.

Ship recycling

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

In 2015, the PMA issued a resolution regulating the activity of ship recycling. In 2016 Panama acceded to the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships of 2009.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

There are two maritime courts in Panama with jurisdiction over all the country's territory. These two courts are of equal rank and alternate the issuance of arrest motions and distribute the number of cases filed in Panama. Although a special Court of Appeals was created by law in 2009, it has not yet been established and appeals are currently heard by the civil bench of the Supreme Court.

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

When an arrest is petitioned for and ordered by the court, the Code of Maritime Procedure provides that service on a foreign defendant is effective upon the seizure of the vessel or other asset belonging to him by the marshal of the court. In cases where there is no arrest, service is made through service of the complaint and attachments made by an attorney admitted to practise at the place where the defendant is domiciled.

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

The Panama Maritime Law Association and Panama's Chamber of Shipping have now established a centre specialising in maritime arbitration. Rules are mostly based on London Maritime Arbitration Association rules.

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

The Code of Civil Procedure and the Code of Maritime Procedure.

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

The Maritime Courts of Panama have accepted the application of asymmetric jurisdiction clauses and arbitration agreements as valid and enforceable.

Arbitration clauses in contracts of adhesion (eg, bills of lading) are not enforceable.

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

If there is a jurisdiction clause providing for Panamanian courts, and the claimant brings proceedings abroad, then local courts would stay proceedings initiated in Panama if these were commenced after the proceedings at a foreign court. Local courts cannot challenge the validity of proceedings brought elsewhere.

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 claimant commences legal proceedings in Panama in breach of an arbitration or jurisdiction clause, the defendant can move the court to decline its jurisdiction in favour of the agreed forum or arbitration panel. Any security posted before Panamanian courts (eg, to lift an

arrest) will remain, pending the outcome of the proceedings brought at the agreed forum.

The jurisdiction or arbitration clause has to be contained in a contract negotiated and agreed between the parties; therefore, clauses contained in pro forma contracts such as bills of lading are not considered valid agreements by local courts.

Limitation periods for liability

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

The statute of limitations for claims arising from the following is one year:

- contracts for the international carriage of goods by sea or land, including charter parties;
- marine or cargo insurance;
- services rendered to vessels such as repairs, discharge of cargo, surveys, etc;
- supplies, bunkers or other necessities given to vessels;
- wages;
- compensation arising from tort, such as personal injury cases, for example;
- collision; and
- contribution to general average.

Panamanian law does not recognise extensions agreed by the parties as valid.

62 May courts or arbitral tribunals extend the time limits?

Time limits are provided for in substantive laws that are matters of public policy and therefore cannot be extended by courts, arbitral tribunals or by agreement of the parties. Depending on the type of claim, there are different mechanisms to interrupt the statute of limitations (eg, by commencing proceedings and publishing in a local newspaper a certificate of filing) as issued by the clerk of the court).

Miscellaneous

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 signed by Panama and entered into force in August 2013.

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 party affected by the non-fulfilment of a contract can either petition the court for the enforcement and fulfilment of the same by the party in breach, or for the termination of the contract on the grounds of a substantial change in the economic conditions, but this has to be proven and declared by the judge.

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

Owing to a mistake when amending the Code of Maritime Procedure, the National Congress eliminated surety bonds and bank guarantees as valid means to unilaterally lift and arrest. Therefore, since the end of 2011, local courts were only accepting cash as security to release a vessel from arrest. Letters of undertaking issued by protection and indemnity clubs have to be agreed and accepted by the claimant. This mistake has since been amended and now other means detailed in question 28 are accepted.

The Panama Administration for Aquatic Resources requires merchant ships registered in Panama and engaged in fishing support activities (carrying of frozen fish, fuel and bunkers for fishing fleets, etc) to have a special licence issued for such purpose, even if occupying such business in international waters. Failing to have this licence can result in severe fines and the inclusion of the vessel on blacklists.



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Newbuilding contracts

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 vessel's title passes from the shipbuilder to the shipowner according to custom, unless the law provides otherwise. However, this is a matter to be analysed under both the Peruvian Commercial and Civil Codes.

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

Under Peruvian law there are no specific regulations or compulsory requirements. However, if the parties have agreed for a guarantee to be provided by the shipbuilder, same will be returned when the vessel is delivered to the shipowner's satisfaction, as per the corresponding contract.

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

Yes, Peruvian general regulations will apply.

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 title to suit is derived from the contract, where provisions to this effect will be agreed upon, in cases where the vessel turns out to be defective and damage results.

This is not the only source, but common regulations also apply. The time bar is five years pursuant to civil rules.

Ship registration and mortgages

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 the vessels are eligible for registration under the Peruvian flag provided that administrative proceedings are completed.

Yes, it is possible to register vessels under construction under the Peruvian flag in the National Public Registry.

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

Peruvian nationals or Peruvian companies and foreign companies with restrictions may apply to register a vessel.

7 What are the documentary requirements for registration?

The relevant documents for the organisation and operation of the registries as well as the proceedings, formalities and requirements of registration are contained in the respective regulations. In accordance with Resolution No. 22-2012-SUNARP/SA the requirements for registration are as follows:

- title of acquisition when the vessel has been acquired abroad;

- the factory declaration of when the vessel was constructed in Peru; and
- a legalised copy of the registrations certificate.

If the vessel requires inscription according to Law No. 28583, it also needs to present the following documents:

- a legalised copy of the technical certificate characteristics;
- a legalised copy of the operating licence granted to the Peruvian shipping company;
- a sworn declaration, indicating the vessel's scope of operation; and
- if the vessel was imported, it is compulsory to present the cancellation of the original flag's registration.

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

Peruvian maritime law does not contemplate the dual registration of Peruvian-flagged vessels in general terms. Dual registration is only allowed by way of authority given by the original register in respect of vessels that are leased or bareboat chartered or both, both with compulsory purchase order, by a Peruvian shipping company.

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

Maritime mortgages are registered in a Peruvian public registry, the Encumbrances Register, maintained by the Public Registry of Vessel Mortgages.

Because the register of vessels' mortgages is a public registry, any person 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.

Limitation of liability

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

The Peruvian Civil Code does not provide for a limitation of civil liability and establishes that anyone who causes damage to the other party must fully compensate for the damages caused, unless the said damages are not attributable to him or her.

In addition, the Code of Commerce, which was published in 1902, does not contain any stipulation regarding limitation of liability. Nonetheless, the shipowner can exonerate him or herself of liabilities by abandoning the vessel, its appurtenances and the freights earned during the corresponding voyage.

Regarding limits of liability, in Peru we can only invoke that contained in the Hague Rules.

Peru is a signatory party to the International Convention for the Unification of Certain Rules related to Bills of Lading of 1924 (the Hague Rules), signed in Brussels on 25 August 1924, which was incorporated by Peru into its domestic legislation by means of the Supreme Resolution No. 687 of 16 October 1964.

The only claims that can be limited are cargo claims. As to the third question, shipowners and disponent owners can limit their liability.

Peru is not a party to the London International Convention for the Limitation of Liabilities on Maritime Claims 1976.

11 What is the procedure for establishing limitation?

There is no established procedure in Peru for obtaining limitation. Parties can limit their liabilities towards each other under a contract. Nevertheless, if the contract is considered an adhesion contract like the bill of lading (B/L) regarded to be imposed by the carrier, the clauses that exclude or limit liability of one of the parties that wrote the clauses, might be considered null and void by Peruvian courts.

A shipowner or other entitled person can constitute a limitation fund if it has been agreed between the parties to the contract. As Peru is not a party to the Convention on Civil Liability, it is not mandatory to constitute a limitation fund.

When a claim is submitted against a vessel, it is usual in Peru to request a club letter of guarantee before the vessel sails from Peruvian waters. This is to avoid the threat of embargo or arrest of the vessel. See also question 20.

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

Not applicable (see question above).

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

Peru is not a signatory to the Athens Convention or its protocols.

The Peruvian Code of Commerce governs the contract of carriage of passengers and their luggage. Also, the Law of Promotion of the National Merchant Fleet contains some stipulations on this topic.

Regarding liabilities of the carrier, the rules of the Peruvian Civil Code should be applied since the previous ones do not contain any stipulation in this respect.

Two matters should be proved in order for the carrier to be liable: that the incident that caused the damage occurred in the course of the carriage; and that it was caused by the fault or neglect of the carrier.

There are no limitations of liabilities regarding passenger claims to the passenger nor to his or her luggage.

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

According to section 1 of the Regulations on the Law of Control and Surveillance of Maritime, Rivers and Lakes Activities, the National Maritime Authority is exerted through the General Directorate of Captaincies (DICAPI), which in turn acts through:

- the General Director, at national level;
- chiefs of captaincy districts, at regional level; and
- port captaincies, as per its scope of jurisdiction.

15 What sanctions may the port state control inspector impose?

There are no inspectors as such in Peru. The Maritime Authority establishes fines which are classified in terms of minor, major or severe sanctions. They are imposed as follows:

- warning: which is manifested in writing;
- fine: pecuniary sanction between 0.5 UIT (tax unit) and 1,000 UITs (1 UIT: US\$1,280.86 approximately) for 2018. This UIT amount changes every year;
- temporary suspension of rights, licences, permissions, authorisations, among others granted by the Maritime Authority;
- cancellation of rights: definite suspension of rights, licences, permissions, authorisations, among others, granted by the Maritime Authority; and
- the port state control may impede vessels from sailing and arrest them as per captaincy regulations. It should be noted, however, that only a competent judge can arrest (embargo) a vessel.

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

If a detention order or fine is imposed by any port captaincy, the appeal process may be initiated both before the corresponding port captaincy or DICAPI. After the final resolution is issued by the latter, the administrative instance is concluded and the sanctioned party has three months to file a contentious administrative proceeding before a civil court in order to seek the annulment of the DICAPI resolution.

Classification societies**17 Which are the approved classification societies?**

In Peru treatment concerning classification societies depends on the origin of the flag vessel. In this sense, for Peruvian flag vessels whose performance is attributable in cabotage, within Peruvian territory, the classification societies must be registered before the International Association of Classification Societies. On the other hand, in the case of foreign-flagged vessels, the classification societies must adapt their activity to the regulations of the country of origin.

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

The liability of the classification societies is regulated by Supreme Decree No. 015-2014-DE, as with any other Peruvians societies, the same that performs maritime activities. In general, Peruvian maritime law has no specific regulations on the responsibility between the parties or third parties. If there is an affected party it is possible to file a claim under the Peruvian Civil Code.

Collision, salvage, wreck removal and pollution**19 Can the state or local authority order wreck removal?**

Yes, they can. In this respect, pursuant of section 256 of the Regulations on the Law of Control and Surveillance of Maritime, Rivers and Lakes Activities, anyone who provides services of removal activities will need an authorisation from the Maritime Authority.

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

There are no international conventions in force in relation to collision, wreck removal and salvage.

With regard to pollution, Peru is a party to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) and its annexes. Further, Peru is also a party to the International Convention on Civil Liability for Oil Pollution Damage (CLC 69) and its protocols.

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 and it is subject to the principle of freedom of contract. In this regard, section 240 of the Regulations on the Law of Control and Surveillance of Maritime, Rivers and Lakes Activities states that there is salvage for vessel goods in danger and provided that it is proved that one of the two following cases has happened:

- when there is a contract of salvage; or
- when the master of the vessel does not manifest their reasonable opposition to the voluntary action for salvage.

Lloyd's standard form of salvage agreement is acceptable.

As to who may carry out salvage operations, there are no specific restrictions in this respect. Anyone who attempts and succeeds in salvaging a vessel in distress will be named as salvor by the Captaincy Authority.

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

By Legislative Resolution No. 30566, issued on 23 May 2017, Peru approved the International Convention on the Arrest of Ships 1999 (Geneva). Also, Decision No. 487 applies, which the Andean Community Commission issued on 7 December 2000, incorporating the provisions of both the International Convention on Maritime Liens and Naval Mortgages of 1993 and the International Convention on the Arrests of Ships of 1999. It also added a few sections, namely its own legislation on the matter.

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?

Yes, a bareboat chartered vessel be arrested for a claim against the bareboat charterer, and a time-chartered vessel be arrested for a claim against a time-charterer. Although the arrest should be valid, Peruvian courts have not yet decided on the matter. Under Peruvian law, a vessel may be arrested if the requesting party has a maritime credit that entitles him or her to do so. In this sense, as in the International Convention on the Arrest of Ships 1999, section 1 of Decision No. 487 from the Andean Community classifies the Maritime Credit according to its cause:

- loss or damage caused by the operation of the vessel;
- death or personal injury occurring on land or on water, in direct connection with the operation of the vessel;
- assistance or salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations or assistance with respect to a vessel which by itself or its cargo threatened damage to the environment;
- damage or threat of damage caused by the ship to the environment, coastline or related interests;
- costs and expenses relating to the launching, removal, recovery, destruction or rendering harmless of a sunken ship, wrecked, abandoned, including anything that is or has been on board a ship, and costs and expenditures related to the preservation of an abandoned ship and maintenance of its crew;
- any contract relating to the use or hire of the ship in a charter party or otherwise;
- a contract for the carriage of goods or passengers on board the ship in a charter party or otherwise;
- loss or damage to the goods (including luggage) carried on board the ship;
- the general average;
- the trailer;
- pilotage;
- goods, materials, supplies, bunkers, equipment (including containers) supplied or services rendered to the vessel for its operation, management, preservation or maintenance;
- construction, repair, conversion or equipping of the vessel;
- the rights and duties of ports, canals, docks, harbours and other waterways;
- disbursements made on behalf of the ship or its owners;
- insurance premiums;
- commissions, brokerages or agency fees payable by the shipowner or bareboat charterer, or on their own, in connection with the vessel;
- any dispute concerning the ownership or possession of the ship;
- any dispute between co-owners of the vessel regarding its use or the proceeds of their exploitation;
- a registered mortgage or encumbrance of the same nature on the ship; and
- any dispute arising from a contract of sale of the ship.

Associated ships (sister ships) may also be arrested.

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

Yes, refer to question 23.

25 What is the test for wrongful arrest?

A precautionary arrest demands a main lawsuit, which must be filed within 10 days of enforcement of the 'in limine' decision. This suit will discuss whether the debt really exists and its value. If it is adjudged that the debt did not exist, then there was a wrongful arrest. Therefore, as a consequence of a decision on merit considering the main lawsuit groundless, the party that requested the arrest may be held liable for wrongful arrest and ordered to pay all losses sustained by the defendants, including lawyers' fees and expenses as per the Peruvian Civil Procedural Code.

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. In pursuance of section 1.12 of the Decision 487 of the Andean Community and section 1(l) of the International Convention on the Arrest of Ships 1999, any claim related to the bunker provided to the vessel is qualified as a maritime credit. Therefore, a vessel can be arrested.

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

The court will require a counter-guarantee in order to compensate eventual losses sustained by a vessel's interests in case of a 'wrongful arrest'. However, the form and the amount of the counter-guarantee will be at the judge's discretion, in the light of the evidence of the credit and the legal grounds of the claim submitted by plaintiffs as per the Peruvian Civil Procedural Code.

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 will be determined by the judge taking into consideration the supporting evidence submitted and the amount requested by the claimant.

In principle, the arrested vessel may be released on the offering of a bank guarantee in the amount for which the arrest is applied by claimants. This procedure can take one week. The most practical way to release a vessel from arrest is to pay the total claimed amount in the form of a cash deposit. This procedure to release the vessel can take between two and five days.

The amount of security cannot exceed the value of the ship.

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 relation to the appointment of a lawyer to make the arrest application, a power of attorney must be provided to the court. The said document must be authenticated and apostilled by the Peruvian consulate and duly translated into the Spanish language (sworn translation). Peru is signatory to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention). If the power of attorney comes from a non-party to the above-mentioned convention, legalisation by the Peruvian consul will suffice and his or her signature will have to be validated by the Minister of Foreign Affairs of Peru.

Also, in order to make the arrest, all supporting documents should be submitted before the court in their original form or certified copy by a public notary and, if they are in any language that is not Spanish, they must be duly translated into Spanish (sworn translation).

On the other hand, if there is insufficient time available before filing the arrest application to comply with all the required formalities, it is possible to begin (not to execute) the arrest procedure, while the arresting party completes the formalities or the relevant documents as soon as possible.

The relevant documents cannot be filed electronically.

Finally, the arresting party will require approximately 15 days' notice to prepare an arrest application.

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

In accordance with article 21.2 of the Regulations on the Law of Control and Surveillance of Maritime, Rivers and Lakes Activities, the Maritime Authority has the responsibility of supervising the vessel while it is under arrest. Nonetheless, they are responsible in solidum with the arresting party for the custody of the vessel and its contents.

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?

Yes, it is possible to pursue proceedings on the merits elsewhere. Peru, as with some other countries of the Andean region, is a party to the Andean Pact, and as such ought to abide by the Decisions or Resolutions issued by the relevant authority (the Andean Community Commission).

In particular, it is applicable for the arrest of vessels, the International Convention on the Arrest of Ships 1999 and Decision No. 487 issued on 7 December 2000, by which the Andean Community Commission incorporated the provisions of both the International Convention on Maritime Liens and Naval Mortgages of 1993 and the International Convention on the Arrests of Ships of 1999. It has also added a few sections, namely its own legislation on the matter.

According to section 37, paragraph 2 of the above decision, applicants seeking for the preliminary arrest of a vessel are entitled to ask Peruvian courts for the arrest of a vessel only in respect of maritime credits, the same that are listed in question 23. Article 2 of the International Convention on the Arrest of Ships 1999 also states the possibility of pursuing proceedings on the merits elsewhere.

Consequently, plaintiffs would have title to ask the Peruvian courts for the preliminary arrest of a vessel, provided that the person who was the owner of the vessel at the time when the maritime credit arose and who is bound under the said credit is the owner of the carrying vessel at the time of the attachment of a preliminary arrest, in pursuance of section 41 of the said Decision.

Also, under section 42, sub-section (c) of the above decision, plaintiffs would be entitled to ask for a preliminary arrest of any other vessel or vessels, that is to say, sister ships, provided that at the time of the arrest, the vessels belong to the person who is personally bound under the relevant maritime credit, and that at the time when the credit arose, was the owner of the vessel in respect of which the maritime credit had arisen.

To perform this right of preliminary arrest, applicants should file their applications together with the relevant supporting evidence set out by sections 608, 610 and 613 of the Peruvian Civil Procedure Code, which includes the putting up of counter guarantee. The arrest shall be served upon owners only after the carrying out of the attachment, as set out in section 636 of the code.

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

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

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

Yes. The Peruvian Civil Procedural Code provides for the possibility of precautionary measures and injunctions to allow, inter alia, the urgent production of evidence, disclosure of documents and preservation of evidence or assets.

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

Yes, it is possible but not a usual practice in Peru. This arrest is subject to the same legal regime as the arrest of vessels.

Judicial sale of vessels

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

The creditor after a definite sentence or arresting party may apply for the judicial sale of an arrested vessel if the debt is not paid.

Mortgages on ships are executed by way of judicial actions through a forced sale at public auction.

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?

According to the Peruvian Commercial Code, the judicial sale of a vessel, whether voluntary or forced, must observe the rules and formalities set forth by the Code of Civil Procedure for the judicial sale. The procedure may take from a couple of months up to one or two years, subject to the debtor's behaviour towards the proceedings. Court costs are usually minor but other costs, duly supported but previously accepted by the court, might be generated, such as those relating to the administration of the attached property (incumbent on a depositary who has to render an account of his or her administration before the pertinent court).

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

The order of priority, based on the harmonious application of the rules of the Peruvian Commercial Code and Decision No. 487 of the Andean Community is the following, from highest to lowest:

- 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;
- privileged maritime credits;
- 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, and maintenance expenses at the port of sale;
- short delivery and cargo losses;
- debts arising out of the construction of the vessel;
- expenses incurred by the captain for repairs of the vessel and her appurtenances, provided it arises from a court order; and
- the outstanding price of the vessel due to the last vendor.

38 What are the legal effects or consequences of judicial sale of a vessel?

All credits are extinguished by the judicial sale registration at the corresponding registry, as per the Peruvian Code of Commerce.

39 Will judicial sale of a vessel in a foreign jurisdiction be recognised?

All foreign decisions and awards must be previously ratified by the Superior Court of Justice in order to become valid and effective in Peru, in accordance with section 2111 of the Peruvian Civil Code.

40 Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No, Peru is not a signatory party to the convention. However, most of their rules are contained in Decision No. 487 of the Andean Community together with most of the rules of the International Convention on the Preliminary Arrests of Vessels of 1999.

Carriage of goods by sea and bills of lading

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?

Peru is only a signatory party to the International Convention for the Unification of Certain Rules related to Bills of Lading of 1924 (the Hague Rules), signed in Brussels on 25 August 1924, which was incorporated by Peru into its domestic legislation by means of the Supreme Resolution No. 687 of 16 October 1964.

Peru is not a party to the Rotterdam Rules.

Subject to other agreement between the parties, the carriage of goods at sea begins when cargo is received at the port of loading and ends at the port of discharge.

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 respect of air transport, Peru is a party to the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention). Also applicable is the Peruvian Law of Civil Aeronautics Act No. 27261 published on 8 May 2000.

There are no specific rules for rail, road and multimodal transport. Some rules are found in the Code of Commerce and Decisions 331, 393 and 399 of the Andean Community.

43 Who has title to sue on a bill of lading?

The consignee, shipper or third-party holder of the B/L or endorsee, as the case may be.

Regarding the collection of freight, if the charterers and sub-charterers are the actual carrier provided, they are the issuer of the B/L.

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?

Peruvian judges have no uniform criteria in respect of the B/L terms since many of them consider its clauses as 'non-negotiable' imposed terms, amounting to a contract of adhesion.

Nevertheless, it is possible to incorporate the terms of the charter party on the B/L as long as its provisions do not establish, in favour of the party who drafted them, any release or limitation of liability, pursuant to section 1398 of the Peruvian Civil Code; outside those provided by the Hague Rules.

Likewise, the jurisdiction or arbitration clause will be binding under Peruvian law provided that the charter party is duly filled in and signed by the consignee or, query, the consignee has been properly informed of its contents.

45 Is the 'demise' clause or identity of carrier clause recognised and binding?

The demise or identity of carrier clause has no effect under Peruvian law. There is no distinction between contractual carrier and actual carrier. Any stipulation, including the demise clause, printed in the back of the B/L will be dismissed.

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?

Section 600, as construed by Peruvian judges, expressly declares that both the shipowner and the contractual carrier shall be liable for the acts of the master in relation to the goods loaded on board the vessel. Hence, claimants are entitled to act against any of them. We disagree with this interpretation.

The above does not mean that in the proper forum the contractual carrier cannot act against the shipowner afterwards.

As mentioned in question 44, many courts in Peru consider the clauses of the B/L as being a contract of adhesion. Therefore, shipowners could not rely on the reverse side of the B/L.

47 What is the effect of deviation from a vessel's route on contractual defences?

It is acceptable to deviate a vessel from a contractual route only in accordance with section 4.4 of the Hague-Rules 1924. Therefore any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of the contract of carriage. As to domestic law, there are no specific regulations dealing with deviation.

48 What liens can be exercised?

The arrest (embargo) of a vessel in order to obtain a guarantee provided that the matter is considered as a maritime credit.

The corresponding port captaincy can also impede the sailing of the vessel in some cases under investigation, such as pollution, death of persons and others.

With regard to liens on cargo, sections 678, 679 and 680 of the Commercial Code state that the carrier cannot retain the cargo in case of lack of payment of freight or other expenses. Nevertheless, the carrier is entitled to proceed with the embargo of the cargo and later sell it at public auction to recover the amount due and the costs and fees incurred.

49 What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The value of the cargo plus the damages. Carriers cannot limit such liability.

50 What are the responsibilities and liabilities of the shipper?

According to the Law of Securities Exchange, the main responsibilities and liabilities of the shipper are established in the contract of carriage.

As to the Hague Rules 1924, the shipper is obliged to provide an accurate description of the cargo embarked such as its weight, quantity, nature and value. Also, the shipper is responsible before the carrier for damaged goods, in particular dangerous goods and missing information, provided all of them occur prior to the delivery at the port of loading.

The shipper is also responsible for paying the freight, unless otherwise agreed by the parties.

Shipping emissions

51 Is there an emission control area (ECA) in force in your domestic territorial waters?

There is no emission control area in Peru.

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 domestic territorial waters, we apply Regulation 14 of the MARPOL Convention, by which the sulphur content of any fuel oil used on board vessels shall not exceed 4.5 per cent m/m. Peru has not yet implemented any regulation regarding cap of the sulphur content of fuel oil.

Ship recycling

53 What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

There are none.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

Civil courts in general and commercial courts in Lima, exercise jurisdiction over maritime disputes.

55 In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

A defendant located out of the jurisdiction will be correctly notified (in Peru) at the vessel's local port agent domicile. In that sense, the deadlines to make a formal appearance and to plead preliminary pleas and points of defence are the same as for a defendant located in the Peruvian jurisdiction.

56 Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

Yes, there are two main domestic arbitral institutions with a panel of maritime arbitrators specialising in maritime arbitration, namely the Lima Chamber of Commerce and the American Chamber of Commerce of Peru.

57 What rules govern recognition and enforcement of foreign judgments and arbitral awards?

With regard to recognition and enforcement of foreign judgments:

- the exequatur is a legal proceeding whereby a foreign judgment is recognised and enforced in our judicial system. This proceeding, which in Peru is a 'non-contentious' one, does not involve the review of the contents of said judgment; and
- the exequatur procedure must be initiated considering the effectiveness of international rules (treaties, conventions) binding on Peru and the state in which the court issued the respective judgment.

If a treaty exists on the matter, the process is followed according to the terms thereof.

In the absence of a treaty the judge will verify the reciprocity that exists in the country where the judgment was issued with regard to the application of Peruvian judgments in that country.

Requirements of the exequatur (section 2104 of the Peruvian Civil Code)

- It does not solve matters of Peruvian competence;
- a foreign court must have been competent to take cognisance of the subject, in accordance with the rules of private international law and to the general principles of international procedural competence;
- the defendant must have been notified according to the law of the place where the proceeding takes place; reasonable term to appear must have been granted; and procedural guarantees must have been granted to exercise his or her defence;
- the judgment has the authority of res judicata in the concept of the laws of the place where the proceeding takes place;
- there is no pending trial in Peru between the same parties and on the same matter that must have been initiated prior to the filing of the claim that gave rise to the judgment;
- it is compatible with other judgment that complies with the requirements of recognition and execution required under this title and that has been previously issued; and
- the reciprocity must have been proven.

Once the exequatur has been achieved, the interested party has free access to the title in order to request the enforcement of the judicial decision with the same characteristics and procedures for enforcing the national judgments.

With regard to recognition and enforcement of arbitral awards: for arbitration awards, provisions of Executive Decree No. 1071, the General Arbitration Law, shall be applicable as per the provisions of section 2111 of the Peruvian Civil Code.

According to the said law, the foreign arbitration awards would be recognised and executed, taking into consideration:

- the Convention on Recognition and Enforcement of Foreign Arbitration Awards, approved in New York on 10 June 1958;
- the Inter-American Convention on International Commercial Arbitration, approved in Panama on 30 January 1975; or

- any other treaty on recognition and enforcement of arbitration awards to which Peru is a party.

The timescale should be between six and nine months.

Afterwards, the execution of the foreign arbitration awards, solely recognised by a Peruvian tribunal, should be followed through the courts of justice.

58 Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

There is no jurisprudence as to asymmetric jurisdiction. We believe Peruvian judges would not accept it, although it is arguable. As to arbitration agreements, they are fully accepted as a valid alternative to a court's jurisdiction.

59 What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

The defendant, within the period granted for reply, may file a plea of jurisdiction alleging the lack of jurisdiction of the court due to the existence of a jurisdiction clause. In the event of a foreign jurisdiction having been elected, the lawsuit filed in Peru will be extinguished should the said clause be considered valid. If the selected jurisdiction is in Peru, the records of the proceedings will be forwarded to the competent court.

According to Peruvian law, Peruvian courts are totally competent to know about matters that should be executed in Peru (eg, consignees in maritime matters can validly appear before the court).

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 is able to submit a plea of jurisdiction, arguing that claimants have filed a lawsuit before a non-competent Peruvian court when, according to the contract of maritime carriage, the parties have agreed that any claim or dispute shall be solved by another foreign court. The legal basis governing the plea of jurisdiction is stipulated in the Peruvian Civil Procedural Code.

Therefore, if the incompetent court upheld the defendants' plea of jurisdiction, the legal proceedings will be suspended for all defendants and the entire file will be sent to the correspondent court in order to continue the legal proceedings, in accordance with the provisions of section 451, paragraph 6 of the Peruvian Civil Procedural Code.

Limitation periods for liability

61 What time limits apply to claims? Is it possible to extend the time limit by agreement?

Time limit for cargo claims resulting from ocean carriage

The Peruvian Code of Commerce provides a one-year time bar as of the date of discharge.

For contractual liabilities, the time bar is 10 years and for actions in tort two years, according to the Peruvian Civil Code.

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 time-bar interruption through a court proceedings notification. Once interrupted, the time bar is renewed for an equal period. Strikes by court employees will suspend the time bar.

62 May courts or arbitral tribunals extend the time limits?

No. The time limit is a question of public policy that cannot be changed and cannot be extended by the parties, not even by the courts or arbitral tribunals.

Nevertheless, it is usual practice in Peru to grant a time extension to claimants but its validity would be subjected to the person granting the extension, since legally it has no effect.

Miscellaneous

63 How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Peru has not ratified the Maritime Labour Convention.

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?

It is impossible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract. In this respect, Peru applies the principle of the immutability of the contracts according to the Peruvian Civil Code *pacta sunt servanda*. In this way, there are no express regulations that allow modification of the terms of a shipping contract, where economic conditions have made contractual obligations more onerous.

65 Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

In 2009, a new law for the development of the Peruvian merchant navy, sailing Peruvian flag vessels for the coastal trade, was enacted. The law provides that only Peruvian corporations, namely with 51 per cent of investors being of Peruvian nationality and owning vessels under the Peruvian flag, are to participate in coastal trade. It also provides that

the master needs to be of Peruvian nationality and up to 85 per cent of the crew must also be Peruvian. Nonetheless, should there be no Peruvian-flagged vessels for a specific coastal trade, the law states that the time charter of foreign vessels is possible but limited to six months only.

After several years of successfully rebuilding a Peruvian merchant navy for coastal trade, with heavy investment, there are at present, among others, several proposals before Parliament to change the law, in particular, that foreign shipping companies (liners) should be permitted to discharge and load cargo in coastal trade and also to allow Peruvian shipping companies to time-charter vessels for three to five years. This breaks the original purpose of the law, but it would allow foreign-flagged vessels to be part of the success, without risking foreign investment and other requirements of the law.

On the other hand, Peru ratified Annex VI of MARPOL 73/78 by Supreme Decree No. 029-2013-RE, dated 25 June 2013. The supreme decree includes the use of a bunker delivery note, a document that evidences the delivery and quality of fuel to the ship by the supplier of bunkers in Peru.

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Newbuilding contracts

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.

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.

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.

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'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 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.

Ship registration and mortgages

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.

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 which 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.

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 legalised by the Singapore Consulate;
- the builder's power of attorney duly notarised and 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
- the company registry profile on the applicant (where the applicant is a company).

In the event 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 second-hand vessel

The applicant must submit copies of:

- the bill of sale of the vessel duly notarised and legalised by the Singapore Consulate;
- the seller's power of attorney duly notarised and legalised by the Singapore Consulate (in the event the bill of sale is signed by the seller's attorney) and the free-from-encumbrance certificate from the vessel's existing registry;
- 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; and
- the company's registry profile on the applicant (in the event that the applicant is a company).

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 builder's certificate;
- the notarised and legalised 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;
- ISM declarations and ISM certificates; and
- CSR (for which the applicant will have to apply to the MPA).

Final registration of second-hand vessel

The applicant must submit the following within the time limit specified by the MPA:

- the original notarised and legalised bill of sale;
- the notarised and legalised 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).

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.

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.

Limitation of liability

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 (1996 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 (2001 edition) and the Carriage By Air (Montreal Convention, 1999) Act.

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.

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 other 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 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 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 GT:

- 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 Maritime and Port Authority of Singapore for a particular day.

Limitation of liability

Limitation of liability may be invoked even though a limitation fund has not been constituted. Claims and counter claims 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.

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 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 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.

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. The limitation regime applicable in respect of air carriage has already been discussed in question 10. 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.

Port state control

14 Which body is the port state control agency? Under what authority does it operate?

The Maritime and Port Authority of Singapore 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. 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.

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 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.

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.

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.

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.

Collision, salvage, wreck removal and pollution**19 Can the state or local authority order wreck removal?**

Under Part IX of the Maritime and Port Authority of Singapore Act, the MPA is empowered to require the owner or agent of any vessel, aircraft or other 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 has powers to 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.

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 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 not 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.

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 Maritime and Port Authority of Singapore 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.

Ship arrest**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.

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.

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.

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.

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, it is worth adding here that 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.

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.

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.

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 (\$\$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.

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 his 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 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.

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 give an undertaking to indemnify the Sheriff in respect of the costs and disbursements in effecting and maintaining the arrest.

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 pp549–550.

[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, it is highly likely that the Singapore court would adopt the approach as that in the International Arbitration Act, *mutatis mutandis*.

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.

33 Are orders for delivery up or preservation of evidence or property available?

On an application by a party to the proceedings under Order 29 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.

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 bunkers owner 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.

Judicial sale of vessels

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.

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?

Sale may be ordered upon judgment, or *pendente lite*. 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.

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
- other 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.

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.

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 writ of *fieri facias*).

40 Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Carriage of goods by sea and bills of lading

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 (1998 edition) 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 on, and ends with their discharge from, the carrying ship.

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.

On the other hand, a carrier in a contract governed by Singaporean law with the goods owner 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.

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 such 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.

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.

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)).

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 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.

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 waiver of the breach does not mean 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.

48 What liens can be exercised?

The types of lien, within the context of contract of affreightment, are as follows.

Liens for freight under 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 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 (see question 23).

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.

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.

Shipping emissions

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.

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 2005, 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 3.5 per cent m/m.

A surveyor inspects ships in Singapore waters to verify that they possess a valid IAPP 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.

Ship recycling

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.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

The High Court of Singapore exercises admiralty jurisdiction over maritime claims enumerated above (question 23) 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.

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 11, 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.

56 Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The Singapore Chamber of Maritime Arbitration provides the international maritime community with an independent, efficient and reliable institution for dispute resolution. Its address is: 32 Maxwell Road, Nos. 02-14 Maxwell Chambers, Singapore 069115. Phone: +65 63240552. Fax: +65 63241565. Web: www.scma.org.sg.

57 What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Order 67 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 application by a judgment creditor in Singapore for registration of the foreign judgment (ie, procedural) and, conversely, also application 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).

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 11 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.

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.

59 What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

The legal position regarding a breach of a Singapore jurisdiction clause would be the inverse of that laid out in question 58. 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.

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.

Limitation periods for liability

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.

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.

Miscellaneous**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 GT and above which are engaged in international voyages must carry and maintain a maritime labour certificate and a declaration of maritime labour compliance. But ships below 500 GT need not be so certified, though they may at the request of their owners attain the Maritime Labour Convention certification.

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 which 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 which 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, still more 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

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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.

65 Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Spain

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Newbuilding contracts

1 When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Article 110 of the Law of Maritime Navigation (LMN) 14/2014, stipulates that title will pass on delivery, unless the parties agree to postpone passing of title to a later moment in time.

2 What formalities need to be complied with for the refund guarantee to be valid?

There is no specific regulation of refund guarantees and the parties are free to negotiate. The shipbuilder should offer a first-class bank guarantee in sufficient sum and with a cut-off date to cover potential delays. The parties must agree in clear and unequivocal terms under what circumstances the guarantee can be called upon. Where the buyer finances the purchase through a loan, the guarantee must also allow for assignment of the benefit to the financier.

3 Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

According to article 112 of the LMN, the shipyard must deliver the ship at the place and on the date agreed. Unreasonable delay beyond 30 days owing to negligence gives rise to a right to compensation and delay over 180 days will allow the contract to be terminated.

A Spanish court will not compel delivery prior to hearing full arguments. Consequently, the buyer must await the provisional enforcement of the judgment at first instance to be able to compel the shipyard to deliver the vessel. In the meantime, prior to publication of the judgment, the buyer can apply to the court to arrest the vessel as security.

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 buyer will have a claim for breach of contract against the shipyard. According to article 115 of the LMN, the time limit to pursue such a claim is three years from the date of delivery of the vessel.

Otherwise, article 113 of the LMN stipulates that the shipbuilder must rectify the defects in the vessel that were not otherwise manifest or could not have reasonably been appreciated at the time of the delivery, so long as the buyer protests such defects within a period of one year from the date of delivery. Article 113(3) stipulates that the shipbuilder will be liable for damages and loss, except where the parties have expressly agreed otherwise in the shipbuilding contract.

A third party purchasing the vessel from the original buyer will have a claim for breach of contract against the original buyer and a claim in tort against the shipyard.

A third party who is not a purchaser of the vessel has a claim in tort.

The General Law of Consumers and Users (Royal Legislative Decree 1/2007) governing product liability applies exclusively to protect consumers and could extend to the purchase of vessels by consumers.

Ship registration and mortgages

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 vessel, boat or naval artefact (as defined by articles 56 to 58 of the LMN), irrespective of origin, tonnage or activity is eligible for registration.

There are two distinct registries: the administrative register, commonly known as the Maritime Register, and the commercial Register of Movable Property (Section for Vessels). The Maritime Register grants the licence for the vessel, flagging rights and is intended to maintain the identification and administrative control of Spanish vessels and boats. The Register of Movable Property records all acts and contracts relating to ownership and other proprietary rights in the vessel.

The Maritime Register is subdivided into the Ordinary Register and the Special Register of Vessels of the Canary Islands (REBECA). REBECA offers more competitive labour and fiscal conditions. The Ordinary Register is universal for all national vessels irrespective of origin, tonnage or activity. REBECA only applies to merchant vessels (not fishing vessels) of 100 gross tonnage (GT) or more.

In accordance with article 69 of the LMN, all vessels, boats and naval artefacts flagged in Spain must be registered in the Section for Vessels of the Register of Movable Property. Otherwise, at this time, inscription in this register is optional for state-owned vessels, boats (including pleasure and racing yachts) and naval artefacts.

Vessels under construction can be registered in the Maritime Registry and the Register of Movable Property (Section for Vessels). According to the LMN, if a vessel has a mortgage it must also be entered in a special book in the Register of Movable Property (Section for Vessels) relating exclusively to vessels under construction. Once construction is completed, the registration is transferred to the Book of Newbuildings.

6 Who may apply to register a ship in your jurisdiction?

Natural persons resident in Spain or legal entities duly domiciled in Spain and in the European Economic Area (EEA), as long as a representative is appointed in Spain.

For the registration of vessels in REBECA, the owning company must also be entered in the register, and for this purpose they must operate the vessel from the Canary Islands. Where they operate from another place in Spain or abroad, they must have a permanent representative in the Canary Islands.

The party registering the vessel must be the owner or bareboat charterer of the vessel.

Only the owners can enter the vessel on the Register of Movable Property (Section for Vessels).

7 What are the documentary requirements for registration?

The documents required will depend on whether the vessel is constructed in Spain or imported. For vessels built in Spain, the first step is the building authorisation followed by the registration of the vessel as a vessel under construction.

For imported vessels, the application must be made and accompanied by proof of ownership or bareboat charter, the certificate

of deletion from the register of origin, proof of payment of customs duties and proof of the name of the vessel.

For imported vessels being registered in REBECA, proof that the vessel complies with national and international safety regulations is also required.

There is a specific procedure for the flagging and registration of yachts that are 24 metres or less in length, imported or mass produced.

The application for registration for vessels under construction can be made by presenting a copy of the vessel licence issued by the Naval Command in the province of the place where the vessel is licensed or by any of the documents listed in article 73 of the LMN (public deed or policy issued by a notary public or by a Spanish Consul abroad). In this respect, the owner will file an application, accompanied by a certificate issued by the shipyard providing information on the present situation of construction of the vessel, the length of the keel and other dimensions and the materials to be used in her construction, cost of the hull and ship plan.

8 Is dual registration and flagging out possible and what is the procedure?

Article 91 of the LMN prohibits dual registration and dual nationality.

In accordance with article 94 of the LMN, where a Spanish vessel has been chartered by a non-Spanish resident, authorisation can be obtained for it to be temporarily flagged in the place of residence of the charterer for the duration of the charter (the same is true in reverse for Spanish residents chartering foreign vessels) and for any other type of chartering contract that temporarily transfers possession of the vessel. The temporary flagging out must comply with the requirements of article 96 of the LMN (among other things, the permission of the relevant creditors must be obtained and duly noted on the Maritime Register and the corresponding certificates relating to mortgages from the foreign register of origin must be presented).

9 Who maintains the register of mortgages and what information does it contain?

Article 65 of the LMN provides that all mortgages, charges and encumbrances must be entered in the Register of Movable Property (Section for Vessels).

Article 68 states that the Register of Movable Property is maintained by the Ministry of Justice. The Register contains information relating to ownership and all charges and encumbrances, as well as information on debts (including details on the mortgagor and mortgagee, date of constitution, amount and duration).

The LMN brings an end to the duplication of information on the registers, although coordination and exchange of information between the registries continues.

Limitation of liability

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 applies, as amended by the 1996 Protocol and the recent Revised Protocol increasing the limits as from June 2015. Article 1 of the 1976 Convention lists the parties that can limit their liability. Article 2(1) lists the maritime claims that can be limited in the amounts set out in the 1996 Protocol as updated by the Revised Protocol. On ratifying the 1996 Protocol, Spain reserved her right to exclude from the right to limit any claims relating to shipwreck and cargo removal.

The right to limit exists irrespective of whether the claims are contractual or in tort (article 396(2) of the LMN), and irrespective of the applicable jurisdiction (whether civil, criminal, labour courts or administrative: article 393 of the LMN).

In accordance with Spain's reservation to the 1996 Protocol, for vessels of less than 300 GT separate limits will apply (article 399(2) of the LMN).

11 What is the procedure for establishing limitation?

In order to exercise the right to limit, the corresponding limitation fund must be constituted in the amounts stipulated by the 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims (as updated by the Revised Protocol, including legal interest accrued as from the date of the casualty giving rise to liability (article 403(1) of the

LMN). The limitation fund is constituted by depositing the corresponding sum at court or providing a bank guarantee granted by a financial entity authorised to operate in Spain (article 490(a) of the LMN).

The right to constitute the limitation fund expires two years from the date on which the first claim is filed at court (article 405(2) of the LMN). Each party that purports to rely on a right to limit must constitute the fund within a maximum of 10 days from the initiation of the proceedings (article 488 of the LMN).

The application for the constitution of the fund must be filed in writing by the lawyer and the procurator before the competent commercial court (article 487 of the LMN). The application must identify the facts relevant to the right to limitation and attach the following supporting documents (article 490 of the LMN):

- documentation proving a deposit in the court bank account of a sum equal to the maximum amount of the indemnity, or the provision of a bank guarantee issued by a financial entity authorised in Spain and granted in favour of the court;
- authenticated copy of the tonnage certificate;
- list of crew on board at the time of the casualty;
- where the limitation refers to claims for death or personal injury of passengers, a certificate confirming the number of passengers the vessel was authorised to carry;
- authenticated copy of the certificate of seaworthiness;
- certificate from the monetary organisation in relation to the conversion of SDRs into euros at the moment of constitution of the fund;
- document setting out the calculation of the limit; and
- list of creditors subject to limitation, stating their domicile, if known, the debt being pursued and the estimated quantum.

Once the application has been filed along with the corresponding documents, the judge will issue an order admitting the application and will declare the constitution of the fund without prejudice to the rights of the parties to challenge. If any of the criteria mentioned above are not met, the judge will grant a period of five days to rectify the application. The same right and time limit of five days is given where the calculation of the limit is incorrect.

A shipowner or other entitled person cannot apply to constitute a limitation fund before legal proceedings have been initiated and before they have been required to respond to a claim that has already been commenced.

12 In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

In accordance with the Convention on Limitation of Liability for Maritime Claims 1976, the limit can be broken where it is proven that the loss resulted from a personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Limitation has not yet been broken in Spain.

13 What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Since 31 December 2012, Spain has applied Regulation (EC) 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 harmonised the regime of liability and insurance for the carriage of passengers by sea 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 and the International Maritime Organization guidelines for implementation of the Athens Convention adopted in 2006.

The regulation not only applies to international carriage, but also to carriage by sea within a single member state on board ships of classes A and B pursuant to Council Directive No. 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships.

Spain is also a party to the Athens Convention.

Port state control

14 Which body is the port state control agency? Under what authority does it operate?

The Ministry of Public Works and Transport, specifically the Directorate General of the Merchant Marine, to which the corresponding Harbour

Masters' offices belong, and carry out port state control functions through their teams of accredited inspectors.

15 What sanctions may the port state control inspector impose?

Where the inspection of a vessel reveals deficiencies in breach of Royal Legislative Decree No. 2/2011 of the State Ports and the Merchant Marine, the harbour master will open an administrative sanction file against the owner and the master (and in specific cases against the insurers).

An administrative sanction file is divided into two stages: the investigation of the facts, including allegations and taking of evidence; and the resolution. The first stage is conducted by the investigating officer of the Harbour Master's Office, who then passes the completed investigation to the Directorate General of the Merchant Marine for resolution and imposition, where appropriate, of the corresponding sanction.

The potential sanction depends on the seriousness of the breach. Royal Legislative Decree No. 2/2011 of the State Ports and the Merchant Marine distinguishes between the following groups of sanctions:

- minor sanction up to €60,000;
- serious sanctions up to €602,000; and
- very serious offences up to €3,005,000.

To obtain security for any potential sanction, the Harbour Master's Office can detain the vessel until such time as the corresponding cash or bank guarantee is provided.

The Harbour Master's Office will not authorise the departure of the vessel until such time as the deficiencies have been remedied. If certain repairs cannot be completed in the port, the Harbour Master's Office can allow the vessel to sail to be repaired in another port or for scrapping.

16 What is the appeal process against detention orders or fines?

An appeal against the detention of the vessel can be lodged at the Directorate General of the Merchant Marine within a period of 30 working days.

Any sanction imposed by the Directorate General of the Merchant Marine can be appealed to the Ministry of Public Works and Transport within one month. Thereafter, the decision of the Ministry can be appealed to the administrative courts.

Classification societies

17 Which are the approved classification societies?

Article 101(2) of the LMN stipulates that the maritime authorities can authorise recognised organisations to carry out inspections and, where appropriate, issue or renew the corresponding certificates, in accordance with the regulations.

Pursuant to Royal Decree No. 877/2011 of 24 June 2011 and at this time only six classification societies are authorised in the name of the Spanish state to carry out the functions of inspection, survey and certification of vessels flying the Spanish flag, namely:

- Bureau Veritas;
- China Classification Society;
- DNV-LG;
- Korean Register of Shipping;
- Lloyd's Register; and
- Registro Italiano Navale.

18 In what circumstances can a classification society be held liable, if at all?

Article 106(2) of the LMN stipulates that classification societies will be liable for damages and losses caused by breach of contract arising from a lack of due diligence in the inspection of the ship and issue of the certificate. Whether the classification society can rely on any standard terms exonerating or limiting liability will depend on the incorporation of those terms into the contract.

Article 106(3) of the LMN stipulates that the liability of classification societies to third parties will be determined by the general law, understood to be article 1902 of the Spanish Civil Code, which in turn provides that a party who, as a result of an action or omission, causes damage to another by his or her fault or negligence shall be obliged to repair the damage caused. Such claims against classification societies have generally been very difficult to prove.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Yes. The port authority can order wreck removal in ports. In Spanish sovereign waters or jurisdiction, the harbour master will order wreck removal.

Where a party fails to obey an order to remove a wreck, the relevant Spanish authority can undertake the wreck removal and will pass the costs of doing so on to the registered owner and operator, as well as their underwriters.

In accordance with Spain's ratification of the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims 1976, there is no right to limit liability for wreck removal.

The relevant Spanish authority has a maritime lien and, where necessary, can sell the vessel to cover the costs of all expenses incurred.

20 Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Spain is a party to the following international conventions:

Collision

- The International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910;
- the International Convention for the Unification of Certain Rules concerning Civil Jurisdiction in Matters of Collision 1952;
- the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision and other incidents of Navigation 1952; and
- the Convention on the International Regulations for Preventing Collisions at Sea 1972.

Salvage

- The International Convention on Salvage 1989.

Pollution liability

- The International Convention on Civil Liability for Oil Pollution Damage 1992;
- the International Oil Pollution Compensation Fund 1992;
- the Oil Pollution Supplementary Fund Protocol 2003; and
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

Others

- The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 and the 1973 Protocol;
- the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and the 1996 Protocol;
- the International Convention for the Prevention of Pollution from Ships Convention 1973/78 (MARPOL) and annexes I to VI;
- the Convention for the Prevention of Marine Pollution from Land-Based Sources 1974 and the 1986 Protocol;
- the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean 1976 and its Protocols;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 and the 2000 Protocol; and
- the Convention for the Protection of the Marine Environment of the North-East Atlantic 1992.

Spain has not ratified the Nairobi International Convention on the Removal of Wrecks 2007. The LMN regulates wreck removal (articles 369 to 383).

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 is acceptable.

In those cases where assistance has been provided to the vessel without first having agreed the remuneration, the LMN offers the parties the possibility to take any dispute to the Council of Maritime Arbitration and the auditors of maritime arbitrations, both operating under the Ministry of Defence. The commercial courts have

jurisdiction over disputes arising from remuneration for salvage in those cases where the parties do not agree to submit their dispute to the Council of Maritime Arbitration.

Salvage operations can be undertaken by any person or entity with the resources to carry out the operations at sea (such as tugs, auxiliary vessels and booms) and from the coast.

Ship arrest

22 Which international convention regarding the arrest of ships is in force in your jurisdiction?

Spain has ratified the International Convention on the Arrest of Ships 1999. In accordance with article 473(3) of the LMN, the rules of the convention apply irrespective of the flag.

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?

Foreign vessels flying a flag belonging to a contracting state of the International Convention on the Arrest of Ships 1999 can only be arrested for those claims listed in the convention.

Spanish vessels can be arrested not only for those claims of the 1999 Convention, but also for other additional claims or rights not listed in that convention where the claims or rights have been caused by the owner of the vessel and the claimant is a person habitually resident in Spain, or the right of action has been acquired through an assignment of rights or subrogation. In addition, Spanish vessels can be arrested by the Spanish administration pursuant to the corresponding administrative law rules.

Vessels belonging to a state that is not a party to the 1999 Convention can be arrested for any type of claim.

It is possible to arrest an associated ship in accordance with article 3(2) of the 1999 Convention.

In accordance with the 1999 Convention, article 3, a bareboat chartered vessel can be arrested where:

- the bareboat (demise) charterer of the ship at the time when the maritime claim arose is liable for the claim and is bareboat (demise) charterer or owner of the ship when the arrest is effected; or
- the claim is based upon a mortgage or a hypothec or a charge of the same nature on the ship; or
- the claim relates to the ownership or possession of the ship; or
- the claim is a maritime lien

A time-chartered vessel can be arrested for a claim against a time-charterer only where the maritime claim is also a maritime lien as a matter of Spanish law.

24 Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Yes. Spain is a party to the 1993 International Convention on Maritime Liens and Mortgages. Article 4 of that convention lists the following maritime liens:

- 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 of 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.

In accordance with the LMN, article 124, Spanish law also admits maritime liens of the flag state, but these additional maritime liens rank below those of the registered liens and mortgages listed in the 1993 Convention.

25 What is the test for wrongful arrest?

An arrest will be deemed wrongful and set aside if it is not in accordance with the International Convention on the Arrest of Ships 1999, the underlying substantive action fails on the merits, or the underlying substantive action is not commenced within the time limit fixed by the Spanish court in the arrest order.

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, but only where the law of the flag of the vessel recognises as a lien a right to arrest bunkers and the strict requirements of the International Convention on Maritime Liens and Mortgages 1993, article 6 are complied with.

27 Will the arresting party have to provide security and in what form and amount?

Yes. The security can be provided in any form permitted by law (eg, cash, bank guarantee, insurance bond).

The amount of the security must cover the likely damages and losses as well as the costs that could arise from the arrest. The amount of the security is at the discretion of the judge, but article 472(2) of the LMN provides that security cannot be ordered for less than 15 per cent of the amount claimed. The security must be lodged at court and only then will the court serve the arrest warrant.

The amount of security can subsequently be varied ex officio by the court or at the request of either party, based on the freights and size of the vessel, the expenses incurred as a result of its detention in port, the daily market rate, whether it is part of liner traffic, whether or not it is loaded with cargo and contractual obligations.

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 will be ordered to provide security of the principal sum pleaded in the writ of arrest. The arresting party can also request an increase of 30 per cent to cover interest and the costs of arrest. The arrested party can request a review of the sum of security ordered. The security must be provided by way of cash, Spanish bank guarantee or insurance bond. Protection and indemnity club letters of undertaking can be accepted but only with the express agreement by the arresting party.

Article 4.2 of the International Convention on the Arrest of Ships 1999 states that the amount of security cannot exceed the value of the ship.

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?

Spanish lawyers act in the courts through procurators; therefore, a power of attorney appointing procurators before the corresponding local court is needed for filing the arrest application. The power of attorney must be sworn by the client before a notary public. Foreign powers of attorney must be duly apostilled or otherwise legalised in the country of origin.

Most Spanish judges will not insist that an original power of attorney be submitted with the arrest application, but will accept a copy of the power of attorney duly apostilled or otherwise legalised. The original must thereafter be submitted to the court or the court will set aside the arrest.

According to the International Convention on the Arrest of Ships 1999, a mere allegation of a maritime claim listed in its article 1 is enough to proceed with the arrest; therefore, it is only compulsory to submit supporting documentation with the arrest when the application is not for a claim listed in that Convention.

All foreign language documents need to be translated into Spanish.

The court will accept uncertified translations and copies of all relevant documents, but they can be challenged by opponents.

An arrest in Spain can be carried out in a morning (the court and port close at 14.00) so long as the arresting party can provide a copy of the apostilled power of attorney and lodge the security that same morning. The court will not normally accept any undertakings to rectify any deficiency in the documents exhibited for the arrest. If the documentation does not prima facie prove title to sue or a valid right to arrest, then the arrest will not be granted. All documents are forwarded to the procurator at the court electronically, but must be presented in hard copy by the procurator to the court.

30 Who is responsible for the maintenance of the vessel while under arrest?

The owner of the vessel.

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 Spanish courts have jurisdiction over the underlying substantive proceedings, unless the parties have agreed otherwise.

In any event, the arresting party must ratify the arrest by submitting proof to the Spanish court that proceedings on the underlying substantive action have been commenced in the competent jurisdiction within the time limit fixed at the discretion of the Spanish judge, but usually within a period of 30 days up to a maximum of 90 days. If the arresting party fails to meet this deadline, the Spanish court, at the request of the arrested party, will release the vessel or return any security and declare the arrest wrongful.

32 Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Yes. The Law of Civil Procedure 1/2000 allows the adoption of precautionary measures, whether by way of arrest or injunction, to 'ensure the effective judicial protection that could be given for a favourable judgment'. This law would apply to any attempt at pre-judgment arrest, whether of property, cargo or bank accounts, among other things. The application can be made prior to filing the writ of claim, subject to proving urgency.

However, there are two strict prerequisites:

- *fumus bonus iuris*: the claimant must demonstrate, prima facie, a legitimate claim; and
- *periculum in mora*: the claimant must demonstrate that there is a serious risk that, if such action is not taken before the judgment, the ultimate enforcement of the judgment will be rendered impossible or ineffective. In practice, this is a heavy burden to prove.

In extreme circumstances, it is possible to make an *ex parte* application, otherwise the court will serve notice on the defendant before taking a decision.

The judge will usually seek security from the applicant of an amount at the discretion of the court, taking into consideration the particular facts of the case.

33 Are orders for delivery up or preservation of evidence or property available?

Orders for the preservation of evidence are available. The Law of Civil Procedure 1/2000 provides a special system to safeguard evidence prior to and during litigation, at the request of one of the parties and always under the control of the court. However, as stated in question 3, the courts will not force delivery of property in dispute before rendering judgment.

In addition, there are rules in relation to deposits and the recognition and judicial sale of goods, as well as for the delivery of cargo and the recovery of freight by way of legal proceedings for collection.

34 Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

There is no specific procedure for the arrest of bunkers, and such an arrest would be conducted in accordance with the precautionary measures established in the Law of Civil Procedure 1/2000 (see question 32).

Judicial sale of vessels

35 Who can apply for judicial sale of an arrested vessel?

The mortgagee bank as well as any other persons who hold a favourable judgment or arbitration award confirming the existence of a valid and enforceable maritime lien or a claim against the owner of the vessel.

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 governed by the International Convention on Maritime Liens and Mortgages 1993, the Law of Maritime Navigation 14/2014 and, in default of these two regulations, by Civil Procedure 1/2000 for the auction of movable goods subject to public registration.

The procedure starts with an application by a creditor to the corresponding commercial court for the enforcement of the judgment or right against the vessel. The court will appoint an expert to value the vessel and request from the flag state a copy of the registration in order to identify all mortgages and other encumbrances.

Before proceeding to the judicial sale of the vessel, the court will serve written notice of the sale, with at least 30 days' warning, on the following persons or entities:

- the competent authority in charge of the registration of the vessel;
- the owner of the vessel;
- holders of registered mortgages and charges; and
- holders of maritime liens recognised by the International Convention on Maritime Liens and Mortgages 1993, article 4, so long as the judge has been duly notified of the existence of these liens and mortgages.

The holders of maritime liens and mortgages can appear in the enforcement proceedings and pursue claims of better entitlement.

Following compliance with the corresponding formalities, the vessel is auctioned to the highest bidder. Where there are disputes between creditors at the time of the sale, the funds raised in the sale are held in a court bank account pending judicial resolution of the dispute. Only the sum that is required to cover the dispute is retained by the court, such that any excess is paid to the creditor who instigated the sale proceedings.

It can take up to eight months to complete a judicial sale of a vessel. Disputes between creditors will result in delays pending judicial resolution.

The expenses recoverable in the judicial sale are:

- the legal fees of the lawyers and procurators for the enforcement;
- the fees of the judicial expert retained to value the vessel; and
- the costs and expenses incurred in the arrest proceedings and the subsequent judicial sale.

The amount of costs will depend on the circumstances of each case, as well as the value of the enforcement and whether or not there are claims of better entitlement, among others.

37 What is the order of priority of claims against the proceeds of sale?

The order of priority is as follows:

- costs and expenses incurred in the arrest proceedings and the judicial sale, which include, inter alia, the expenses of conservation of the vessel and maintenance of the crew, as well as wages and other sums, and the expenses referred to in the International Convention on Maritime Liens and Mortgages 1993, article 4(1)(a), incurred from the moment of the arrest or from the commencement of the enforcement;
- expenses incurred by the state in removing the vessel;
- maritime liens as listed in the International Convention on Maritime Liens and Mortgages 1993;
- liens for builders and repairers of the vessel who have a right of retention;
- registered mortgages and encumbrances; and
- liens as provided by domestic law, so long as they are in accordance with and comply with the formalities of the 1993 Convention.

38 What are the legal effects or consequences of judicial sale of a vessel?

As long as the judicial sale has complied with the formalities of the International Convention on Maritime Liens and Mortgages 1993, all the registered mortgages, charges, liens and encumbrances of whatever kind (save for those that the buyer has voluntarily accepted) will be removed from the vessel.

39 Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Yes, as long as the International Convention on Maritime Liens and Mortgages 1993 has been complied with.

40 Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Yes.

Carriage of goods by sea and bills of lading**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?**

Article 277(2) of the LMN provides that, in respect of contracts for the carriage of goods by sea, whether domestic or international, the rights under the bill of lading and the liability of the carrier will be governed by the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, the protocols that modify these rules to which Spain is a party, and by the LMN. In this respect, Spain did not ratify the 1968 Hague-Visby Rules, but they were indirectly endorsed through Spain's ratification of the 1979 Protocol.

Spain is the only EU state to have ratified the Rotterdam Rules. The Rotterdam Rules do not contain any specific regulation on when sea carriage begins and ends, but article 26 implies that carriage begins once the cargo is loaded on board the vessel and ends when it is discharged ashore. Article 14 states that the sea carrier, prima facie, assumes the obligations of, among others, loading and stowage.

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?**Domestic carriage**

- By road: Law 15/2009 of the Contract of Carriage of Goods by Land limits liability for the year 2016 at €5.97 per kilogram of cargo damaged or lost;
- by rail: (same as by road, above);
- by air: Law 48/1960 on Air Transport, as updated in accordance with Royal Decree 37/2001, provides limits of liability of 17 SDR per kilogram of cargo damaged or lost; and
- multimodal: article 209 of the LMN stipulates that, where the contract of carriage consists of stages of transport other than by sea, those stages will be regulated by any specific rules of mandatory application to that form of carriage. Therefore, the 'network' system is applied, as occurs with liability under Law 15/2009 on the Contract of Carriage of Goods by Land.

International carriage

- By road: the Convention on the Contract for the International Carriage of Goods by Road 1956;
- by rail: Appendix B of the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail of the Convention Concerning the International Carriage by Rail 1980;
- by air: the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 signed in Warsaw as amended by the Hague Protocol 1955 and Montreal Protocols 1, 2 and 4; and the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal); and

- multimodal: article 209 of the LMN applies the 'network' liability regime to international multimodal carriage.

43 Who has title to sue on a bill of lading?

- The named consignee or his or her assigns by way of endorsement;
- the endorsee of a 'to-order bill'; and
- the holder of a bearer bill of lading (rare).

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, the charter-party terms can be incorporated into the bill of lading through a clear and unequivocal incorporation clause, the validity of which will depend on the scope of said clause as well as compatibility with the terms of the bill of lading.

In general, and in accordance with articles 251 and 468 of the LMN, for a choice of jurisdiction or arbitration clause to be considered binding on a third-party holder of a bill of lading, it must have been accepted by the third party in an 'individual and separate' manner.

45 Is the 'demise' clause or identity of carrier clause recognised and binding?

No, in accordance with the LMN, the issuer of the bill of lading will always and in all circumstances, be considered to be the contractual carrier.

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 278 of the LMN states that the shipowning carrier will be considered as the actual carrier and, therefore, will be liable for all damage and loss to the cargo during carriage.

The carrier's liability regime under the LMN applies to all rights of action for damage, loss or delays during the sea carriage and will also apply to the shipowning carrier.

47 What is the effect of deviation from a vessel's route on contractual defences?

The carrier will be liable for the damage and losses that occur as a result of any deviation from the agreed route, deviation from the most appropriate route in accordance with the circumstances, save where such deviation is carried out to save human life or for any other reasonable and justified cause, so long as it is unconnected with the seaworthiness of the vessel.

48 What liens can be exercised?**Against the vessel**

- The liens listed in the International Convention on Maritime Liens and Mortgages 1993;
- the liens exercised by the Spanish authorities in relation to wreck removal;
- the right of the salvor to retain the vessel under its control pending provision in their favour of sufficient security to cover the reward claimed; and
- the right to retain the vessel of the holders of maritime liens relating to the construction, repair or reconstruction of the vessel.

Against the cargo

The LMN permits the following liens against the cargo:

- the right of the salvor to retain cargo salvaged and under their control, save in situations where sufficient security has been granted in favour of the salvor for the sum of the reward claimed;
- the right of the owner of the salvaged vessel to retain the cargo pending provision of sufficient security by the cargo interests to cover any award due;
- the right of the owner to retain the cargo carried until such time as those interested in the voyage have provided a guarantee to contribute to the general average;

- the right of the port handling operator to retain the cargo in its possession pending payment of the price due for the services provided;
- the right of the carrier to retain the cargo in its possession pending receipt of the freight, demurrage or other expenses incurred during the voyage;
- the right of the time charterer to retain the cargo pending payment of the freight, demurrage and other expenses incurred during the voyage; and
- the right of retention of luggage by the carrier pending payment for the voyage.

49 What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

In accordance with article 252(2) of the LMN, the carrier has unlimited liability towards the rightful holder of the bill of lading for the value of the cargo at the port of destination.

50 What are the responsibilities and liabilities of the shipper?

The LMN provides that the shipper is liable in the following circumstances:

- where the goods shipped are different from those contracted and the carrier has not been notified, the shipper will be liable for all damage and loss incurred as a result to the carrier and any other cargo interests;
- where the goods shipped are dangerous and the prior consent of the carrier has not been obtained, or where not declared and labelled in accordance with applicable rules, the shipper will be liable for any resulting damage towards the carrier and all other cargo interests; and
- in general terms, article 260 of the LMN grants the carrier a right of action to demand compensation for damage and losses arising from any inaccuracy in the remarks or declarations relating to the cargo presented for carriage or the condition of that cargo.

Shipping emissions

51 Is there an emission control area (ECA) in force in your domestic territorial waters?

No.

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 Spanish territorial waters, its exclusive economic zone and its sulphur emissions control area is 1.5 per cent m/m. For vessels in Spanish ports, the maximum permitted sulphur content of fuel oil is 0.1 per cent m/m.

The Spanish harbour master enforces the regulatory requirements through port state control inspections of the engine room log, fuel oil log and fuel delivery notes.

Sanctions for non-compliance will depend on the sulphur level found, but can result in administrative sanction proceedings and even criminal proceedings in more serious cases.

Ship recycling

53 What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

Ship recycling activities in Spain are governed by the following rules:

- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 was adopted on 22 March 1989; and
- EU Regulation 1257/2013 on ship recycling.

Recycling facilities:

In Spain there are various ship recycling facilities, although the only facility included in the list of installations authorised by the EU in accordance with EU Regulation 1257/2013 is that of DDR Vessels XXI SL of Gijón (Asturias).

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

The commercial courts have jurisdiction over civil claims arising from the application of transport and shipping regulations.

Further, the LMN provides for the intervention of Spanish notary publics in the handling of the following files (voluntary jurisdiction):

- sea protest;
- general average;
- deposit and sale of cargo and luggage;
- loss, removal or destruction of the bill of lading; and
- transfer of commercial effects that have been altered or damaged.

55 In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Service of court proceedings are carried out by a Spanish court. The claimant must provide details in the writ of claim in relation to the domicile of the defendant for the purpose of service.

If the defendant is domiciled in the European Union, Council Regulation (EC) No. 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters will apply.

If the defendant is domiciled elsewhere then it will be necessary to identify whether the defendant's country of domicile is party to any international conventions to which Spain is also a party. Spain is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965.

In the absence of any relevant international conventions, service is conducted in accordance with the Law of Civil Procedure 1/2000, whereby the claimant requests the Spanish civil court to send the writ of claim and supporting documents (with a translation if necessary) to the Spanish Ministry of Justice, which in turn will send the documents to the corresponding public agency in the defendant's country of domicile.

56 Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

No.

57 What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Judgments

For judgments rendered in the European Union, Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters will apply.

Otherwise it will be necessary to determine whether the judgment was rendered in a state party to the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1988, to which Spain is a contracting state.

If neither of the above applies, then it will be necessary to determine whether any specific bilateral convention exists between Spain and the state in which the judgment was rendered.

If there is no bilateral agreement with Spain, then the 1881 Law of Civil Procedure will apply, which stipulates a single process for the authorisation of the foreign judgment to have legal effect in Spain, without distinguishing between recognition and enforcement. Otherwise, the recognition of the judgment will be subject to reciprocity or compliance with a list of both substantive requirements and formalities.

Arbitral awards

In the absence of an international convention to which Spain is a party that sets out a more favourable regime for the recognition and enforcement of arbitral awards, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 will apply.

Spain is a party to the European Convention on International Commercial Arbitration 1961.

58 Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Asymmetric jurisdiction and arbitration agreements are relatively new in Spain, but the few cases where these have been considered by the courts and academics, the trend appears to admit such clauses if they

otherwise comply with the general rules regarding submission and acceptance.

59 What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

No remedies are available in Spain. The defendant must appear before the foreign court to challenge the jurisdiction in accordance with the relevant procedural rules and time limits of that court.

If the defendant ignores the foreign proceedings, and a judgment is rendered in default against the defendant, then the defendant may be unable to oppose subsequent recognition and enforcement in Spain based on the lack of jurisdiction of the foreign court that rendered that judgment in default.

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 can challenge the jurisdiction of the Spanish court by filing a motion to contest jurisdiction within a period of 10 days from the date of service of the writ of claim on the defendant. The motion suspends the 20-day time limit for filing a defence on the substantive claim. Pending resolution of the motion, a defendant must take no steps at court that could imply submission to the jurisdiction.

If the defendant successfully challenges the jurisdiction of the Spanish court, the claimant has a right of appeal to the Appeal Court. In the meantime, the proceedings on the substantive claim remain stayed pending a ruling by the Appeal Court.

If the defendant fails in the challenge to the jurisdiction, then the stay of proceedings is lifted and the defendant has a minimum period of 10 days in which to file a defence against the substantive claim. There is no right of appeal on the issue of jurisdiction until the court of first instance has rendered judgment.

Limitation periods for liability

61 What time limits apply to claims? Is it possible to extend the time limit by agreement?

Contract

Where the contract or Spanish law does not stipulate otherwise for the specific contract type, the time limit is now five years.

Tort

For damage and personal injury, the time limit is one year from the date of the damage or, in the case of personal injury, one year from the date of full recovery or stabilisation of the injury.

The general time limit for both contract and tort can be extended for further periods on an annual basis by correspondence with all potential defendants, so long as there is proof of delivery or receipt of said correspondence by the defendants.

The parties are also free to agree extensions.

However, where the law stipulates a time limit, then such time limit prevails over the general rules referred to above.

Examples of time limits for different claims

- Right of action arising from a breach of a shipbuilding contract: three years from the date of delivery;
- right of action arising from a failure to pay the purchase price for a newbuilding: three years from the date provided in the contract or, in the absence of such a date, from the date of delivery (these time limits for shipbuilding contracts can also be applied to ship repair contracts or naval remodelling);
- right of action arising from a mortgage: three years from the date on which the right could be exercised;
- right of action arising from the charter of a vessel: one year from the date of termination of the charter party or the return of the vessel;
- right of action arising from a charter party or under a bill of lading: one year;
- right of action arising from a contract to carry passengers: two years;
- right of action from a towage contract: one year;
- right of action arising from the charter of a yacht: one year from the date of the termination of the contract or disembarkation of the charterer and crew, if later;
- right to recover by the contractual carrier against the actual carrier: one year;
- right of action arising from handling of cargo at port: two years;
- right of action arising from a collision: two years; and
- right to demand a contribution to general average: one year from the termination of the voyage in which the relevant casualty occurred.

While the parties are free to agree extensions in relation to the above-listed claims, not all these claims can be extended by proof of correspondence and may need to be protected by litigation or arbitration in the competent jurisdiction.

62 May courts or arbitral tribunals extend the time limits?

No. Only the parties can extend time limits.

The filing of proceedings at the competent court or commencement of arbitration proceedings in the appropriate jurisdiction will protect the time limit.

There are a number of specific situations in which the legal rules allow the claimants to apply for a conciliation hearing, which has the effect of extending the time limit.

There is no conciliation procedure for arbitration.

Miscellaneous

63 How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

On 22 January 2013, Spain ratified the 2006 Maritime Labour Convention, which entered into force on 20 August 2013. Article 104 of the LMN stipulates that the maritime authorities will ensure compliance with the Maritime Labour Convention. The competent

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authority in Spain is the Directorate General of the Merchant Marine. The port state control inspectors will ensure compliance with the Convention in relation to visiting foreign vessels.

In relation to the application of the Maritime Labour Convention 2006 to vessels flying the Spanish flag, on 18 April 2013 the Directorate General of the Merchant Marine clarified the categories of persons who are not to be considered 'seafarers' for the purpose of the Convention (including port workers, stevedores, pilots, vessel surveyors and shipbuilders) and also the types of vessels not to be included in the Convention (including fishing vessels, certain categories of recreational craft, artisanal or traditional craft, and state vessels), as well as listing the vessels that are prima facie exempt (including tugs, bunker supply vessels, dredgers, pontoons, port-cleaning vessels and supply vessels) where those vessels do not operate outside the port zones.

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, in extreme cases the Spanish Supreme Court can apply the rebus sic stantibus rule whereby the court will try to re-establish the contractual balance in cases where there are proven extraordinary and disproportionate prevailing circumstances.

65 Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Switzerland

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Newbuilding contracts

1 When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Swiss law does not provide a specific shipbuilding contract.

A shipbuilding contract is considered as an innominate contract, including elements of a sale contract (article 187 et seq of the Swiss Code of Obligations (CO)) and a work contract (article 363 et seq of the CO).

Generally, ownership only passes if there is a valid legal act transferring the ownership (article 714 of the Swiss Civil Code (CC)). In other words, without other agreement among the parties, title will pass on delivery.

Once the vessel has been registered in the Swiss Register of Ships, ownership will only pass upon registration (article 31 of the Federal Law on Vessel Registry (the Registry Law), and 37.1 of the Federal Law on Shipping Under the Swiss Flag (the Navigation Act)).

2 What formalities need to be complied with for the refund guarantee to be valid?

Under Swiss law, there are no specific formalities to be complied with for a refund guarantee to be valid.

It is, however, always important for the parties to properly draft the refund guarantee to ascertain its significance. Particular concern shall be given to differentiating a non-accessory, abstract guarantee from an accessory surety bond.

3 Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

The shipyard has a contractual obligation to transfer the ownership upon the agreed date of delivery. If the yard fails to comply with this obligation, the purchaser can either claim delivery of the vessel or rescind the contract.

The shipyard is liable for any damage resulting from a delay in the delivery of the vessel.

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 shipbuilder will be contractually liable against the first owner for any damage resulting from defects in the vessel.

If the vessel is sold to a third party, the original shipowner can be held liable for any defect according to the contract.

Third parties may have grounds for an action in tort based on article 41 CO or based on the Swiss Product Liability Act (which is consistent with EC Directive 85/374).

Ship registration and mortgages

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 17 of the Navigation Act, seagoing vessels may be entered into the Swiss Register of Ships only if they are used for or intended for the commercial conveyance of persons or goods or for other commercial activity at sea. Yachts can also be entered in the Swiss register.

It is not possible to register vessels under construction under the Swiss flag.

In some cases, ships used for philanthropic, humanitarian, scientific or cultural purposes can also be entered into the Swiss Register. This requires approval from the Federal Department of Foreign Affairs.

6 Who may apply to register a ship in your jurisdiction?

To be entered into the Swiss Register of Ships, a seagoing vessel must fulfil the requirements of the Navigation Act and of the Navigation Ordinance.

Residence and domicile

The following persons must be domiciled or resident in Switzerland:

- the owner of a sole proprietorship;
- three-quarters of the partners or other members of a general or limited partnership or of a limited liability company, who must also hold more than three-quarters of the invested capital or shares of the registered capital;
- the shareholders of a stock corporation holding the majority of the share capital as well as two-thirds of the voting rights; and
- two-thirds of the members of a cooperative, who must also hold two-thirds of the cooperative capital on the basis of participation certificates.

Nationality and control

The above-mentioned natural persons must be Swiss nationals.

Entities that participate in the business of the Swiss shipowner in the capacity of partners, limited partners, shareholders, cooperative members and management, must also be Swiss nationals.

Administration and management

Two-thirds of the members of the board and management of a stock corporation, a limited partnership, a limited liability company or a cooperative society must be Swiss nationals. The majority must be Swiss residents.

Financial resources

The shipowner must finance at least 20 per cent of the book value of the ships registered under his or her name. The shipowner must disclose the origin of the funds. Borrowed funds shall not have an adverse effect on the Swiss influence in the business and foreign creditors must accept immediate repayment of the debt at the request of the Swiss Maritime Navigation Office.

7 What are the documentary requirements for registration?

According to article 7 of the Navigation Ordinance, the following documents must be enclosed with the application:

- the certificate of conformity, the certificate of registration for maritime navigation and the approval of the name issued for the ship to be registered by the Swiss Maritime Navigation Office, as well as the certificate of ownership;
- evidence that the seagoing vessel, if it was already entered into the register of another country, has been deleted from this register or that this deletion will take place upon registration in the Swiss Register of Ships;
- a written declaration that the owner has not applied and will not apply for his or her ship to be entered in the register of another country; and
- evidence that there are no contractual liens on the seagoing vessel or if there are, that the lien holder consents to the entering of the lien in Swiss currency in the Swiss Register of Ships and to the claims being made subject to Swiss law and, if the lien holder is a foreign national, that this lien is permitted in accordance with article 5d, paragraph 4 of the Navigation Ordinance (the certificate of financing and obligation of repayment on request of the Swiss Maritime Navigation Office).

8 Is dual registration and flagging out possible and what is the procedure?

Dual registration is not possible in Switzerland.

9 Who maintains the register of mortgages and what information does it contain?

Mortgages are maintained by the Swiss Register of Ships.

The register contains principally information with regard to ownership, mortgages and usufruct (article 26 of the Registry Law). Additional information can be added (eg, bareboat charters and charter parties).

Limitation of liability

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) has been in force in Switzerland since 1 April 1988 (article 49 of the Navigation Act). The new limits adopted on 19 April 2013 apply since 8 June 2015. Under the convention, the parties entitled to limit their liability include owners, charterers, managers, operators and salvors (article 1 of the LLMC).

For damages relating to oil pollution, article 49 of the Navigation Act refers to the International Convention on Civil Liability for Oil Pollution Damage 1969.

In the event of loss or destruction of the goods, the liability of the carrier is limited to the value of the goods at the place of destination on the day the vessel should have discharged the cargo according to the freight contract (article 105.1 of the Navigation Act).

In cases of partial destruction, damage or delay, the carrier shall be required to pay only the amount of the reduction in value of the goods without further damages (but in no case more than in the event of total loss (article 105.1 of the Navigation Act)).

Except in cases of fault or gross negligence, the liability of the carrier shall in any case be limited to:

- 666.67 special drawing rights (SDR) for each item or each unit transported; or
- 2 SDR for each gross weight kilogram of goods (article 105.3 and 105a of the Navigation Act and article 44 of the Navigation Ordinance).

11 What is the procedure for establishing limitation?

According to article 45 et seq of the Navigation Ordinance, the liability of the shipowner can be limited by establishing a limitation fund.

The procedure can be summarised as follows:

- the shipowner shall apply to the court, indicating, among other things, the amount of the liability and the creditors in respect of whom he or she wishes to rely on the limitation of liability;
- provided that the prerequisites for liability limitation have been established prima facie, the court shall immediately order the

opening of the proceedings and appoint a trustee who shall inform all creditors;

- creditors can register their claims within 60 days and also apply to the court for increase of the liability fund; and
- finally, the funds are distributed to the creditors according to the collocation plan.

According to article 50 of the Navigation Ordinance, the shipowner has to deposit the amount of the fund with the cantonal deposit authority and the shipowner has to bear all costs of the proceedings including the costs of the trustee. Instead of the deposit, the court may require the provision of an irrevocable guarantee from a Swiss bank or from an insurance company in favour of the court. In such a case, the liability sum shall be increased by the amount of interest that would accrue if the fund were held on bank deposit. If the liability fund is stipulated in gold francs, in special units of account or in foreign currency, a conversion into Swiss francs shall be effected at the rate of exchange in effect on the day on which the liability fund was established. If, in accordance with the applicable foreign law, the liability of the operator is limited to the value of the vessel or if only the vessel itself is liable, then the value of the vessel shall be established for the proceedings in Switzerland and this amount is to be paid.

Article 49 of the Navigation Act regarding the limitation of the liability of the owner of seagoing vessels, shipper and carrier strictly refers to the dispositions of article 1 to 13 of the LLMC. Hence, Swiss law does not provide a separate right to plead limitation without setting up a fund. Also, in accordance with article 11 LLMC such a fund can only be set up once legal proceedings have been instituted in respect of claims subject to limitation.

12 In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The limitation does not apply if it is proven that the carrier or its employees have caused the damage by acting or neglecting to act with intent to cause the damage or recklessly, with the awareness that the damage would be likely to occur (articles 48 and 105a of the Navigation Act).

To date, there has not been a reported case where the limitation of liability was broken.

13 What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 was ratified by Switzerland in 1987 and entered into force in 1988.

Port state control

14 Which body is the port state control agency? Under what authority does it operate?

Switzerland does not have a centralised port state control agency and is not a party to the Paris Memorandum on Port State Control of 1982 (Paris MoU).

15 What sanctions may the port state control inspector impose?

As Switzerland does not have a centralised port state control agency, this question is not applicable to this jurisdiction (see question 14).

16 What is the appeal process against detention orders or fines?

As Switzerland does not have a centralised port state control agency, this question is not applicable to this jurisdiction (see question 14).

Classification societies

17 Which are the approved classification societies?

The classification societies currently approved by the Swiss Maritime Navigation Office are the following:

- American Bureau of Shipping;
- Bureau Veritas;
- Det Norske Veritas;
- Germanischer Lloyd;
- Lloyd's Register of Shipping; and
- Nippon Kaiji Kyokai.

18 In what circumstances can a classification society be held liable, if at all?

A classification society can be held liable under contract and in tort. It can also be criminally liable.

Collision, salvage, wreck removal and pollution**19 Can the state or local authority order wreck removal?**

The Swiss Maritime Navigation Office can order an owner to remove the wreck.

20 Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The following conventions are in force in Switzerland.

Collision

- The International Convention for the Unification of Certain Rules of Law Related to Collision Between Vessels 1910; and
- the Convention on the International Regulations for Preventing Collisions at Sea 1972.

Salvage

- The International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvages at Sea 1910; and
- the International Convention on Salvage 1989.

Pollution

- The International Convention for the Prevention of Pollution of the Sea by Oil 1954;
- the International Convention for the Prevention of Pollution from Ships 1973, as modified by the 1978 Protocol;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990;
- the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (with the 1976 Protocol);
- the International Convention on Civil Liability for Oil Pollution Damage 1969 and with the related Protocols of 1976 and 1992;
- the Fund Convention 1992; and
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

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. Lloyd's standard form is acceptable.

Ship arrest**22 Which international convention regarding the arrest of ships is in force in your jurisdiction?**

Switzerland is a party to the International Convention Relating to the Arrest of Seagoing Ships 1952.

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?

Based on Swiss national law, a vessel can be arrested for any claim.

An arrest based on the International Convention Relating to the Arrest of Seagoing Ships 1952 can be executed only with regard to maritime claims as defined in article 1 of the Convention.

In principle, a sister ship can only be arrested if the same person or entity owns it.

A vessel (be it bareboat chartered or time-chartered) can only be arrested for a claim against the owner.

24 Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

The only mention of maritime liens in Swiss law is the mention made in the 1952 Arrest of Seagoing Ships convention. Therefore Swiss law is not familiar with this concept.

25 What is the test for wrongful arrest?

An arrest is considered to be wrongful if no claim existed or if the conditions for an arrest were not met. The test is therefore purely objective depending only on the ultimate failure of the claim.

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 Swiss law, a bunker supplier can only proceed against the contractual party. In other words, a bunker supplier will only be allowed to arrest a vessel if it has a claim against the shipowner (article 271 of the Federal Law on Debt Collection and Bankruptcy (SchKG)).

27 Will the arresting party have to provide security and in what form and amount?

The arresting party may be obliged to provide a security for the arrest (article 273 of the SchKG). The amount is fixed by the judge based on the probability of the existence of the claim and the possible damages of a wrongful arrest.

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 the claim and the importance of the arrested goods (ie, the vessel) to the debtor are to be taken into consideration. Upon request, the judge may review the security during the arrest proceedings and adjust it to new circumstances. The security can be made as a deposit or as a security of equal value (ie, a security bond or bank guarantee).

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?

Copies of the power of attorney and all documentary evidence must be submitted with the application (the power of attorney can also be reserve in the application and handed in very shortly thereafter). The originals need only be presented if the court has, on its own will or based on an application of the opposite party, a reasonable doubt about the authenticity of a particular document.

As a rule, all documents must be handed in with translations into the court's language (which might be French, German or Italian, depending on where in Switzerland the arrest is requested). It is up to the court's discretion to accept documents in another language (or not) and if free translations of the relevant passages in the application itself may suffice. Many, but not all, courts, for example, accept documents in English, if notified of their presence beforehand and if time is of the essence.

Filings can be made by paper or electronically, although the latter is not necessarily reviewed faster by the judge. Many courts will accept advance by fax if the original application is filed on the same day. It is advisable to give the court an ex ante heads-up announcing the urgent application and to then deliver it by hand or courier service.

Where the file is complete, consists of only a few documents and the case is factually and legally straightforward, the application can be prepared within a couple of hours and filed the same day (or prepared overnight and filed first thing in the morning). In complicated cases, however, the preparation can take several days or even weeks.

30 Who is responsible for the maintenance of the vessel while under arrest?

According to article 57 of the Registry Law, if a vessel is arrested, the certificate of registration is to be deposited with the responsible debt

enforcement office, and the master has to follow its instructions. The debt enforcement office is responsible for maintenance of the vessel while it is under arrest.

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 may pursue the claim on its merits before a competent court outside Switzerland.

The arrest will remain in force only if the decision of the foreign court can be recognised in Switzerland.

32 Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

No.

33 Are orders for delivery up or preservation of evidence or property available?

The debtor is obliged to provide information regarding the objects covered by the arrest. There is no explicit order to deliver or preserve evidence or property available.

34 Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

Under Swiss law, it is not possible to arrest bunkers independently of the vessel.

Judicial sale of vessels

35 Who can apply for judicial sale of an arrested vessel?

Parties of debt enforcement proceedings under Swiss law can apply for judicial sale of the vessel.

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?

According to article 54 of the Registry Law, the enforcement proceedings for vessels follow the procedure for the enforcement proceedings for real estate set out in SchKG, mutatis mutandis. The request for realisation of the asset can be lodged with the debt enforcement office at the earliest one month after the seizure and at the latest one year after the seizure (article 58 of the Registry Law). According to article 133 et seq of the SchKG, the debt enforcement shall conclude the judicial sale within three months from the application for realisation. The costs for the judicial sale are 2 per cent of the vessel's value.

37 What is the order of priority of claims against the proceeds of sale?

Pursuant to article 38.1 of the Navigation Act, the order of priority is:

- maritime claims listed in the 1926 International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages;
- ship mortgages; and
- other claims.

38 What are the legal effects or consequences of judicial sale of a vessel?

Maritime liens (statutory liens) cease to exist upon the forced sale of a seagoing vessel (article 38.2 Navigation Act).

39 Will judicial sale of a vessel in a foreign jurisdiction be recognised?

The judicial sale of a vessel in a foreign jurisdiction will be recognised under the conditions of article 25 et seq of the Swiss Private International Law Statute (PILS).

40 Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No, Switzerland is not a party to the International Convention on Maritime Liens and Mortgages 1993.

Carriage of goods by sea and bills of lading

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?

Switzerland has ratified the Hague-Visby Rules but not the Hamburg Rules. The Rules are not directly applicable in Switzerland but have been included in the national legislation (Part 5, section 4 of the Navigation Act).

Switzerland did not ratify the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules).

According to article 208 of the Navigation Act, the carrier shall receive the goods at the port of loading under the hoisting device of the ship and deliver them to the consignee in the same manner at the port of unloading.

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 following conventions are in force in Switzerland:

- the Convention on the Contract for the International Carriage of Goods by Road 1956 and the Protocols of 1978 and 2008;
- the Convention concerning the International Carriage of Goods by Rail 1980 and the Protocols of 1990 and 1999; and
- the Convention for the Unification of Certain Rules for International Carriage by Air 1999.

43 Who has title to sue on a bill of lading?

The lawful holder of the bill of lading has title to sue.

Bills of lading are documents of title in terms of article 925 of the Swiss Civil Code (article 116 of the Navigation Act). The bill of lading is the decisive document with regard to the legal relationship between the carrier and the consignee of the goods.

Obviously, the charter party, not the bill of lading, is decisive with regard to the legal relationship between the carrier and the shipper. In this respect, the provisions of the bill of lading shall be deemed to be the contractual intent unless derogations are agreed upon in writing (article 115 of the Navigation Act).

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 extent to which the terms of the charter party can be incorporated into the bill of lading depend on the construction of the clause. It can generally be held that freedom of contract shall apply and terms in a charter party can be incorporated into the bill of lading as long as they do not violate compulsory statutory provisions (article 117 of the Navigation Act).

Whether a mere incorporation of a reference to the charter party in the bill of lading will be sufficient to render a jurisdiction or arbitration clause binding on a third-party holder will depend on the facts of the specific case. The Swiss Supreme Court has already given effect to an arbitration clause in a charter party, the terms of which were incorporated in the bill of lading. On the facts of the case, the court held that the parties were professional shipping companies and were supposed to know the content of the *Asbatankvoy* arbitration clause.

45 Is the 'demise' clause or identity of carrier clause recognised and binding?

Whether a demise clause or identity of carrier clause will be recognised as binding under Swiss Law is primarily a question of contractual interpretation of the terms of the bill of lading as a whole.

In this regard, the following points need to be considered:

- the name and domicile of the carrier must be included on the bill of lading (article 114.2.a of the Navigation Act); and
- a bill of lading signed by the master is primarily an owner's bill of lading. Unless the master states that he or she has issued the bill expressly in the name of the charterers, both owners and charterers may remain liable jointly and severally (article 96.2 and 3 of the Navigation Act).

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, only the carrier is liable under the bill of lading. The shipowner can be jointly and severally liable with the charterers (carrier) when the master did not expressly issue the bill of lading in the name of the charterers (article 96.2 and 3 of the Navigation Act).

In addition, according to article 48 of the Navigation Act, the shipowner shall be liable for any loss or damage caused to a third party by a crew member, a pilot or any other person working on board the seagoing vessel in the exercise of his or her duties, unless he or she demonstrates that such person was not at fault.

47 What is the effect of deviation from a vessel's route on contractual defences?

Article 104.2(l) of the Navigation Act incorporates both articles IV(2) (l) and IV(4) of the Hague Rules, and holds that the carrier shall not be liable for loss resulting from saving or attempting to save life or property at sea nor for loss resulting from other justified deviation.

48 What liens can be exercised?

The lien on cargo is possessory and will apply following the general conditions of article 895 et seq, CC.

A lien on freight or sub-freight could be exercised in accordance with the proceeding rules of the Federal Law on Debt Collection and Bankruptcy, namely, by seizure of claims.

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 production of the bills of lading is liable towards the authorised holder of the bill of lading for any damage that may result.

A limitation of the carrier's liability will be null and void (article 117.1 of the Navigation Act).

A properly drafted letter of indemnity by the consignee or the charterers will be requested by the carrier to allow discharge without presentation of bills of lading.

50 What are the responsibilities and liabilities of the shipper?

According to article 106.1 of the Navigation Act, which partly implements article III(5) of the Hague-Visby Rules, the shipper shall be deemed to have guaranteed to the carrier the accuracy of the dimensions; the number and weight; the markings required for the identification of the goods; and the nature and condition of the goods.

The shipper shall indemnify the carrier for any loss or damages resulting from inaccuracies as to the goods, even if he or she is not responsible for the loss or damage, and shall be liable to the other cargo owners if he or she is at fault with regard to the loss or damage.

Shipping emissions**51 Is there an emission control area (ECA) in force in your domestic territorial waters?**

No emission control areas are in force in Switzerland.

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?

There is no such cap applicable in Switzerland.

Ship recycling**53 What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?**

Switzerland is party to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal that was adopted on 22 March 1989, but it is not a party to the Hong Kong Convention.

There are no domestic laws issued regarding ship recycling.

There are no ship recycling facilities in Switzerland.

Jurisdiction and dispute resolution**54 Which courts exercise jurisdiction over maritime disputes?**

Basle is the competent place of jurisdiction for actions in rem with respect to a vessel entered in the Swiss Register of Ships.

With regard to Swiss vessels, Basle is also the subsidiary place of jurisdiction for actions in tort and for other civil claims (ie, if no other court in Switzerland has jurisdiction).

Basle is also the competent place of jurisdiction for actions in connection with proceedings to limit the liability.

55 In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The defendant must be formally served in compliance with all applicable rules, such as the Hague Conventions on the Service of Judicial Documents Abroad.

56 Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

Switzerland does not have an arbitral tribunal specialised in maritime arbitration. However, the Swiss Rules do not impose a panel of arbitrators, so that competent experts from Switzerland or abroad can be appointed. These can be lawyers or professionals from the shipping industry.

In recent years, the Alternative Dispute Resolution for Commodity Trading, Shipping and Trade finance was created in order to address the needs of the commodity industry and shipping industry. This new initiative has created an optional list of arbitrators and mediators composed of commodity traders, dispute resolution practitioners involved in the Geneva University Master in International Trading, Commodity Finance and Shipping.

57 What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The recognition and enforcement of foreign judgments and awards is governed either by the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 2007 or by the Swiss Private International Law Statute.

Switzerland is also party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

58 Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Yes, they are valid and enforceable. It is within the freedom of the parties to decide whether to go to arbitration or the court system or for both parties or only one of them to have the option to go for only one of these options.

59 What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

There is no remedy in respect of countries that are signatories of the Lugano Convention.

Judgments from countries that are not signatories of the Lugano Convention can only be recognised and enforced if the foreign court

had jurisdiction over the defendant pursuant to the rules set out in the PILS.

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 challenge the jurisdiction before the domestic court. If the defendant can present a valid agreement on a foreign place of jurisdiction or arbitration or if the legal provisions regarding the place of jurisdiction refer to another jurisdiction, the court will declare itself incompetent.

Limitation periods for liability

61 What time limits apply to claims? Is it possible to extend the time limit by agreement?

Time limits will depend on the nature of the claim.

Generally, claims for breach of contract are time-barred after a period of 10 years (article 127 of the CO).

According to article 87 of the Navigation Act, claims arising out of a bareboat charter, a charter party and a freight contract shall be time-barred one year after termination of the contract or one year after the date on which the goods were delivered or should have been delivered, respectively.

Claims resulting from general average shall be time-barred after a period of two years (article 124.1 of the Navigation Act).

Except where the Criminal Code provides a longer period, actions in tort are time-barred one year from the date of knowledge but, in any case, not later than 10 years from the date on which the cause of action occurred.

Except for the limitations pursuant to article 127 et seq of the CO, the limitation periods can be altered by contract.

62 May courts or arbitral tribunals extend the time limits?

No. Courts and arbitral tribunals do not have the competence to extend the time limits.

Miscellaneous

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 23 February 2006 was ratified by Switzerland on 21 February 2011 and entered into force on 20 August 2013. On 11 June 2014, the International Labour Conference approved several amendments of the MLC with regard to repatriation of seafarers, financial security and shipowners' liability. These amendments entered into force on 18 January 2017.

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, a change in economic circumstances cannot relieve a party from its contractual obligations.

65 Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Switzerland's only access to the sea is through the river Rhine. The most important seaports for Switzerland are Amsterdam, Antwerp, Hamburg and Rotterdam.

The Navigation Ordinance contains extensive provisions regarding employment law at sea.

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Newbuilding contracts

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 when the title shall pass. However, in order to defend against the good faith third party, transfer of title in the ship shall be done in writing and in conformity with the following conditions:

- where the transfer takes place in Taiwan, an application to 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 the Republic of China (Taiwan) or any other institute empowered by the Ministry of Foreign Affairs located in that country for their certification and seal.

2 What formalities need to be complied with for the refund guarantee to be valid?

In principle, no formalities need to be complied with for the refund guarantee as long as agreed by the parties. However, if the guarantee is in the form of a bank letter, the bank may have some requirements on the formality.

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 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. The shipowner may seek for the provisional measure (preliminary injunction) and after depositing the bond with the court, the shipowner may compel the delivery of the vessel provided that the strict requirements of provisional measure can be met.

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. Owing to privity of contract, the purchaser from the original shipowner and the third party who are not the parties to the shipbuilding contract may not have a claim in contract.

Under section 1, article 191-1 of the Civil Code:

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.

If the above-mentioned section 1, article 191-1 is met, the purchaser and the third party may have a claim under product liability against the shipbuilder.

Ship registration and mortgages

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?

Vessels that are defined under the Law of Ships are eligible for registration under the flag of the Republic of China (Taiwan). It is possible to register a mortgage on vessels under construction. It is not practical to register a vessel under construction under the flag of the Republic of China (Taiwan).

6 Who may apply to register a ship in your jurisdiction?

Under section 2, article 5 of the Law of Ships, a ship may be applied for registering as a Republic of China-flagged ship under any one of the following conditions, so anyone who meets the requirements stated in the following conditions may apply:

- the ship is owned by the Republic of China government;
- the ship is owned by a Republic of China national; or
- the ship is owned by a company that is established under the Republic of China laws with a principal office in the Republic of China and meets the following requirement (as the case may be):
 - where the company is an unlimited company, all shareholders of the company are Republic of China nationals;
 - where the company is a limited company, at least half of the company's capital is owned by Republic of China nationals, and the director authorised to represent the company is a Republic of China national;
 - where the company is a joint company, all shareholders with unlimited liabilities are Republic of China nationals; or
 - where the company is a company limited by shares, the chairman of the board and at least half of the directors are Republic of China nationals, and at least half of the capital is owned by Republic of China nationals; or
- the ship is owned by a juristic entity, which is established under the Republic of China laws, with its main office in the Republic of China and at least two-thirds of its members and its statutory representative are Republic of China nationals.

7 What are the documentary requirements for registration?

The following documents are required for registration:

- application form;
- documents evidencing the cause of registration;
- registration of certificate of former registration, if any;
- documentary proof, if the cause of registration involves any third person; and
- documentary proof of registration as to the right of the obligor.

The last two points may not be required if the application for registration is based on an enforceable judgment.

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.

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 mortgages of ships.

The information in the register of ship mortgages includes, among others:

- the basic information of the ship (eg, name);
- 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, former registered mortgage, etc.

Limitation of liability

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. Taiwan has its own maritime legislation (the Maritime Act (MA)), which has combined several international conventions.

Shipowner's limitation

Under article 21 of the MA, the liability of a shipowner is limited to an amount equal to the value of the ship, the freight and other accessories of the particular voyage in respect of the following claims:

- (i) 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;
- (ii) claims in respect of damage which is the result of 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;
- (iii) claims in respect of the removal of a sunken ship or property lost overboard; provided, however, that a reward or payment made under a contract should be excluded; and
- (iv) claims in respect of the obligations incurred for taking measures to avert or minimise the liabilities set out in above points (ii) and (iii).

However, if the sum of limitation of liability under the preceding paragraph is less than the following, the shipowner shall be liable for the deficit:

- (i) regarding property claims, an aggregate amount of 54 special drawing rights (SDR) as defined by the International Monetary Fund for each tonne of the ship's registered gross tonnage (GT);
- (ii) regarding loss of life or personal injury claims, an aggregate amount of 162 SDR for each GT;
- (iii) where the claims in above points (ii) and (iii) occur concurrently, an aggregate amount of 162 SDR for each GT, of which a first portion amounting to 108 SDR for each GT shall be exclusively appropriated to the payment of personal claims in respect of loss of life or personal injury, and of which a second portion amounting to 54 SDR for each GT shall be appropriated to the payment of property claims; provided, however, that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank, according to rate, with the property claims for payment against the second portion of the fund; and
- (iv) the GT of a ship weighing less than 300 tonnes shall be deemed to be 300 tonnes.

The owner, charterer, manager and operator of the ship may limit their liability as mentioned above.

Package limitation

Under article 70 of the MA, 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 inserted in 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 SDR per package or 2 SDR per kilogram, whichever is the higher.

11 What is the procedure for establishing limitation?

It is not necessary to provide a cash deposit or set up a limitation fund before asserting the limitation of liability in Taiwan.

12 In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

Shipowner's limitation

Under article 22 of the MA, the aforementioned limitation of liability does not apply to:

- obligations arising out of an intentional act or negligence of the shipowner;
- obligations arising from the contract of employment with the shipmaster, seafarers or any other personnel serving the ship;
- reward for salvage or contribution in general average;
- damage arising out of carrying toxic chemical substances or oil pollution;
- damage arising out of nuclear incidents caused by nuclear substances or nuclear waste being carried on ships; or
- claims for nuclear damage caused by nuclear ships.

Package limitation

Under article 70 of the MA, unless the nature and value of the cargo have been declared by the shipper before shipment and inserted in 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 SDR per package or 2 SDR per kilogram, whichever is the higher. However, under section 4, article 70 of the MA, neither the carrier nor the shipowner shall be entitled to the benefit of the limitation of liability provided in section 2, article 70 of the MA if the damage or loss has resulted from an intentional act or gross negligence of the carrier or the shipowner.

Theoretically, if the above article 22 MA or section 4 of article 70 MA is met, the limitation would be broken. But we seldom see the cases in which the plaintiff successfully proved the intentional act or gross negligence of the carrier or the shipowner and then broke the limitation. There have been more cases where the value of cargo has been inserted in the bill of lading and what is the so-called 'per package'.

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, under section 1, article 81 of the MA, accident insurance for transporting passengers in the specific navigation routes and area is required; the passenger ticket shall state the amount insured and constitute part of the contract; the insurance premium shall be included in the ticket fare; and the amount insured shall be deemed as the highest amount of the damages. The specific navigation routes and areas and the amount insured referred to above are decided by the Ministry of Communications and Transportation from time to time.

Port state control

14 Which body is the port state control agency? Under what authority does it operate?

The Maritime and Port Bureau of the Ministry of Transportation and Communications is the main port state control agency.

15 What sanctions may the port state control inspector impose?

Under article 92 of the Law of Ships, in the event of violation of certain inspection provisions under the Law of Ships, the shipping administration authority will impose a fine on the owner or master of a ship and order a prohibition of navigation and improvement to be made by a specified deadline. The ship may be released for sailing only after the improvement is made.

Under article 32 of the Law of Ships, for a non-Republic of China flagged ship that departs from a Republic of China 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. For a non-Republic of China flagged ship that fails to submit the inspection document or proof of passing inspection for examination or whose documents have expired, the shipping administration authority of the port may order improvement to be made by a specified deadline, and the ship shall not depart from the port before fulfilment of the order. The master of the ship who disagrees with the order for improvement or prohibition to depart from the port may appeal to the shipping administration authority of the port within five days.

16 What is the appeal process against detention orders or fines?

Unless otherwise provided by law, the person who is imposed with detention orders or fines may make an appeal in accordance with the Administrative Appeal Act, and if the person does not agree to the administration appeal decision, he or she may further file an administrative litigation to the administrative court.

Classification societies

17 Which are the approved classification societies?

CR Classification Society is the approved classification society in Taiwan.

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 with clients or violation of the regulations in respect of the duties (eg, survey, inspection) commissioned by the government authorities.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Yes. If a ship becomes 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 voyage and anchoring of vessels entering or departing the port, or contaminate or could contaminate the fishing port area, the competent authority may 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 adopt measures to prevent, eliminate or mitigate 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 adopt the measures at the expense of the shipowner, such measures including wreck removal.

20 Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Taiwan is not a party to international conventions or protocols in respect of collision, wreck removal, salvage and pollution. Nevertheless, where there is a lack of applicable provisions under Taiwanese laws, government authorities and courts often refer to the relevant international conventions or protocols as standard practice.

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 may agree to accept Lloyd's standard form of salvage agreement. 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.

Ship arrest

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, courts often refer to the relevant international conventions as standard practice.

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 specific restriction on which claims allow the arrest of a vessel provided always that the debtor of the claim is the shipowner. Shipowner's creditors may arrest the shipowner's vessel if the creditors have obtained a writ of execution against the shipowner. There is no action in rem in Taiwan. People who have a maritime lien or a mortgage against the vessel and have obtained a writ of execution against the vessel may arrest the vessel.

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. A time-chartered vessel, in principle, cannot be arrested for a claim against a time-charterer because the time-charterer is not the owner of the vessel. However, if the shipowner and the bareboat charterer or time-charterer are co-debtor, it is possible to arrest the vessel subject to the court's discretion.

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. Under article 24 of the Maritime Act, the claims listed hereunder may be secured by maritime liens and are entitled to a preferential right of compensation:

- claims of the shipmaster, seafarer and other members of the ship's complement that have arisen 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, expenses for wreck removal and ships' contribution on general average;
- 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.

25 What is the test for wrongful arrest?

If the arresting party intentionally or negligently arrests an irrelevant third party's ship, the third party may have a claim in tort against the arresting party for damages.

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?

If the claim against the charterer is a claim secured by maritime liens, or if the charterer is deemed an agent of the shipowner in respect of the contract, the bunker supplier may arrest the vessel.

27 Will the arresting party have to provide security and in what form and amount?

Yes. In the event of provisional attachment, the court would normally order the arresting party to provide cash, a letter of undertaking or guarantee issued by an appropriate bank or insurance company in the amount of one-third of the full monetary amount of the claim. But this is still subject to the discretion of the applicable court or government authorities.

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 event of provisional attachment, the court would normally order the arrested party to provide the full monetary amount of the claim in order to release the ship. The arrested party may request a review of the amount. Normally cash, a letter of undertaking or guarantee issued by an appropriate bank or insurance company may be acceptable, but this is still subject to the discretion of the applicable court or government authorities. In principle, the amount of security cannot exceed the value of the ship.

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 make the arrest application. In principle, if the POA is issued by a foreign entity, the POA needs to 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 from a sworn public translator. The POA and other documents for arrest cannot be filed electronically.

If there is insufficient time available before filing the arrest application, the arresting party might be allowed to submit a POA without notarisation and legalisation first, and submit an original of notarised and legalised POA later. If all required documents and security are in good order, the arrest usually can be completed in one or two business days. However, all the above is still subject to the discretion of the court or government authorities.

30 Who is responsible for the maintenance of the vessel while under arrest?

In practice, the court may appoint the shipping government authority, the master of the ship or other appropriate person to maintain the vessel while under arrest. The court may order the creditor to pay the costs of the maintenance in advance.

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 provisional attachment, the court should, upon the arrested party's motion, order the arresting party to pursue the claim on its merits within a specified period of time. In principle, the claim on its merits should be pursued in Taiwan, unless there is an arbitration contract.

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 of attachment in respect of ship arrest. If the arresting party's claim is non-monetary, he or she may apply for provisional measure (preliminary injunction). Generally, in order to obtain preliminary injunction, the creditor should show impossibility or extreme difficulty to satisfy the claim by compulsory execution in the future should there be a change in the status quo of the claimed object.

33 Are orders for delivery up or preservation of evidence or property available?

Yes. If it is likely that evidence could be destroyed or its use in court could be difficult, or with the consent of the opposing party, a party may move the court for perpetuation of such evidence; if 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 perpetuation of evidence may be made before or after initiating a lawsuit.

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 the final judgment.

Judicial sale of vessels

35 Who can apply for judicial sale of an arrested vessel?

Generally, creditors who have obtained certain kinds of writs of execution (eg, final and binding judgment, arbitral award, but not provisional attachment or injunction order) may apply for judicial sale of an arrested vessel.

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 in order to determine the basic auction price. The court would 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 the ship is not sold in the first auction and if a second (or even third) auction is necessary, it will take longer to conclude the judicial sale. The judicial sale is part of the procedure of compulsory execution. Generally, the application fee for initiating compulsory execution is 0.8 per cent of the claim or the value of the ship, depending on the nature of the claim. There will probably be other fees in relation to the judicial sale (eg, fees of evaluation and maintenance). Basically, the applicant will be requested to pay such fees in advance.

37 What is the order of priority of claims against the proceeds of sale?

The proceeds of sale are used to pay for the fees in relation to the compulsory execution first. Generally, the remainder of the proceeds will be paid for maritime liens, then to rights of retention (in respect of claims in relation to building or repairing the ship), then to ship mortgages, and then to other creditors whose claims are not secured.

38 What are the legal effects or consequences of judicial sale of a vessel?

In principle, the judicial sale will serve to extinguish all prior liens and encumbrances on the vessel, including maritime liens.

39 Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Taiwanese law is not clear on this issue; but we believe most Taiwanese courts would consider the similar requirements of reciprocity as to recognition of foreign judgments.

40 Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Carriage of goods by sea and bills of lading

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, but Taiwan's Maritime Act is partly based on these Rules, and some Taiwanese courts would refer to these Rules in their judgments as standard practice.

In principle, carriage at sea begins when the carrier loads the cargo and ends after the carrier discharges the cargo.

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 domestic law, there is no provision specifically regulating combined transport and multimodal bill of lading. Nevertheless, under article 75 of the MA:

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.

43 Who has title to sue on a bill of lading?

In principle, the holder of the bill of lading has title to sue on the bill of lading.

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 states incorporation of the terms in a charter party, many Taiwan courts still take the view that the terms in a charter party are not incorporated into the bill of lading, unless there is clear evidence indicating that the holder of the bill of lading has accepted the terms in the charter party.

45 Is the 'demise' clause or identity of carrier clause recognised and binding?

Taiwanese law is not very clear on the demise clause or identity of carrier clause. In determining who should be liable as a carrier, Taiwanese courts basically would look, among other factors, at who signed the bill of lading and who gave the authority to sign it. If it is difficult to determine the identity of the carrier, some courts would assume that the shipowner is the carrier.

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 sign or authorise others to sign it, the shipowner might be able to avoid the liability for cargo damage under the bill of lading. However, if the identity of the carrier cannot be clarified, some Taiwanese courts tend to believe that the shipowner is the carrier, in which case the shipowner may rely on the terms of the bill of lading provided always that the court may have discretion on the validity of the terms of it.

47 What is the effect of deviation from a vessel's route on contractual defences?

Deviation usually results in breach of contract of carriage. However, under article 71 of the MA, deviation in saving or attempting to save life or property at sea or for other reasonable cause shall not be deemed to be a breach of the contract of carriage, and neither the carrier nor the shipowner shall be liable for the damage or loss resulted therefrom.

48 What liens can be exercised?

Basically, 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 the maritime lien has occurred;
- compensation due to the shipowner for material damage sustained by the ship, or for 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 in order to secure payment of freights and other fees.

Shipyards may exercise liens on the vessel in order to secure payment of fees in relation to building or repairing ships provided that the cargo is the property of the debtor.

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), the carrier will probably be liable for delivery of the same cargo or liable for damages 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.

50 What are the responsibilities and liabilities of the shipper?

Under article 55 of the MA:

The shipper shall guarantee to the carrier the accuracy of the notifications of the name, 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. The carrier is not entitled to a defence against any holders of the bill of lading other than the shipper on account of his claim against the shipper as aforementioned.

Shipping emissions

51 Is there an emission control area (ECA) in force in your domestic territorial waters?

Not at present.

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?

Taiwanese law is not very clear on this issue. Nevertheless, as Taiwan is a participant in the international shipping industry, the standards set up in the relevant international rules on shipping emissions would generally be referred to and followed by the relevant entities in the shipping industry in Taiwan.

Ship recycling

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 harbour authorities and should be carried out in the areas designated by the harbour authorities. Usually the harbour authority will take reference from the international ship recycling regulations on a case-by-case basis, although the harbour authority has no obligation to follow them since Taiwan cannot sign the international convention, and thus it is difficult to predict which international ship recycling regulations will apply. It would need to be assessed on a case-by-case basis. 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.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

There is no maritime court in Taiwan. Maritime disputes may be submitted to any court in Taiwan that has jurisdiction over the dispute under the Code of Civil Procedure. A few courts in Taiwan have internal maritime divisions designated to handle maritime disputes.

55 In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Under section 1, article 145 of the Code of Civil Procedure, where service is to be made in a foreign country, it shall be effectuated by requesting the competent authorities of such country, or the relevant Republic of China ambassador, minister envoy or consul, or other authorised institutes or organisations in that country to make the service. In practice, the court would request the Ministry of Foreign Affairs to further make a request to the relevant Republic of China ambassador, minister envoy or consul, or other authorised institutes or organisations in that country to make the service.

56 Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

There are some arbitrators specialising in maritime arbitration in Taiwan. However, there is no specific panel of maritime arbitrators in Taiwan's arbitral institutions.

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 recognised in Taiwan. However, this is not the case under any of the following circumstances:

- (i) where the foreign court lacks jurisdiction pursuant to Republic of China laws;
- (ii) where a default judgment is rendered against the losing defendant, except in cases where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under Republic of China laws;
- (iii) where the performance ordered by such judgment or its litigation procedure is contrary to Republic of China public policy or morals; or
- (iv) where there exists no mutual recognition between the foreign country and the Republic of China.

Regarding obstacle (iv), since Taiwan is not currently a signatory of the New York Convention, a Taiwan court will tend to consider that obstacle (iv) will not exist if there is no court case in that foreign country in which the recognition of a Taiwan court judgment was rejected. A foreign judgment may be enforced in Taiwan if none of the foregoing circumstances exists and the enforcement rule of the foreign judgment is granted by a Republic of China court.

A foreign arbitral award is enforceable in Taiwan if recognised by a Republic of China court rule first. A Republic of China court will refuse to recognise the arbitral award under any of the following grounds:

- recognition or enforcement of the arbitration award violates the public order or good morals of the Republic of China;
- under Republic of China laws, the subject matter of the arbitration award lacks arbitrability;
- the arbitration agreement is invalid due to the parties' incapacity in accordance with applicable laws;
- the arbitration agreement is invalid in accordance with applicable laws agreed upon by the parties, or in the absence of agreed laws, in accordance with the laws of the place of arbitration;
- one of the parties was not served with a notice of appointment of arbitrators or with the arbitration procedures, or other matters giving rise to a lack of due process;
- the arbitration award is irrelevant to the subject matter of the arbitration agreement, or beyond the scope of the arbitration agreement, unless the offending portion can be severed from the remainder of the arbitration award without affecting the remainder;

- the composition of the arbitral tribunal or the arbitration procedures are contrary to the parties' agreement; or in the absence of an agreement, contrary to the law of the place of arbitration; and
- the arbitration award has no binding force upon the parties or the award has been set aside or suspended by a competent court.

58 Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Taiwan courts' position on this issue has not been very clear up to now. We believe that asymmetric jurisdiction and arbitration agreements are likely to be valid and enforceable in Taiwan if the agreements are signed by the parties, except in the scenario of exclusive jurisdictions stipulated by law. If it is only stated on the bills of lading, the Taiwan court usually will not consider it as mutual consent and thus will resort to the relevant laws.

59 What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

If only Taiwanese courts have jurisdiction over the dispute and the claimant issues proceedings in a foreign country, the defendant might not be able to apply for an injunction to force the claimant to submit to the jurisdiction of Taiwan. Nevertheless, if the claimant wins the case in that foreign forum and applies for enforcement of the foreign judgment (or arbitral award) in Taiwan, the defendant may argue lack of jurisdiction of the foreign forum and request the Taiwanese court to reject the claimant's application for enforcement.

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 make an objection and request the court to dismiss the case. But in practice, some Taiwanese courts would still adjudicate the case regardless of the clause providing for a foreign court to have jurisdiction. If the parties stipulated that the arbitration shall be held in a foreign country, the court will order the claimant to seek the arbitration within a period of time, and will dismiss the domestic court proceeding if no arbitration is taken within the period. If the claimant seeks the arbitration in the foreign country accordingly, the court will wait for the result of the arbitration.

Limitation periods for liability

61 What time limits apply to claims? Is it possible to extend the time limit by agreement?

Time limits depend on the nature of the claims:

- claims for damages 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 arising out of a collision are extinguished if not duly exercised within two years commencing from the date of the collision; and
- claims for salvage reward shall be extinguished if not duly exercised within two years commencing from the date of the completion of the salvage operation.

The time limits may not be extended or reduced by mutual agreement. Time limits may not be waived in advance either.

62 May courts or arbitral tribunals extend the time limits?

No.

Miscellaneous

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.

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. Under section 1, article 227-2 of the Civil Code:

If there is change of circumstances which is not predictable then after the constitution of the contract, and if the performance of the original obligation arising therefrom will become obviously unfair, the party may apply to the court for increasing or reducing his payment, or altering the original obligation.

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 international conventions. Where there is a lack of applicable provisions in Taiwanese laws, courts might refer to the relevant international conventions.



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Newbuilding contracts

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 Turkish law, this depends on whether the newbuild is registered at the shipping registry or not. The title of a newbuild 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 are free to decide in the shipbuilding contract whether the shipyard or the contractor will be the registered owner. The Turkish Commercial Code (TCC) allows foreign contractors to be registered owners of newbuilds, but this rule only applies to newbuilds.

2 What formalities need to be complied with for the refund guarantee to be valid?

Under Turkish law, although the refund guarantee is not specifically regulated by the Code of Obligations, leading scholars are of the opinion that 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 set out by the Code of Obligations 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 executed by the handwriting of the person providing the surety. Article 584 also requires spouse consent in the event that 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. In the event that 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.

3 Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

According to the articles of the Turkish Code of Civil Procedure, No. 6100, it is possible to apply to the courts and request a precautionary injunction order for the delivery of the vessel when the yard refuses to deliver it. The court, while granting such an order, would request that the claimant lodge sufficient security in consideration of the potential losses or damages to the opponents if such a request of the claimant were to be found wrongful.

A precautionary injunction for the delivery of a vessel is an effective remedy against shipyards refusing to deliver. 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.

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 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 sales 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.

Ship registration and mortgages

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 956 of the TCC, 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 shall be entitled to be registered at the registry for vessels under construction.

Turkish commercial vessels exceeding 18 gross tonnage (GT) are to be mandatorily registered at the shipping registry.

6 Who may apply to register a ship in your jurisdiction?

In accordance with article 940 of the TCC, natural persons holding Turkish nationality and companies established in Turkey where the majority of directors are Turkish nationals and the 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 should be subject to the approval of the board of directors.

7 What are the documentary requirements for registration?

According to the relevant regulations, 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;
 - notarised original power of attorney giving the necessary power to the applicant if different from the authorised signatory;
 - notarised original circular signatory showing the list of authorised persons empowered to act for and on behalf of the company; and
 - certificate of good standing from the Turkish Maritime Chamber of Commerce;
- original or notarised copies of the articles of incorporation along with the amendments;
- original deletion certificate (if the second-hand vessel is purchased from a foreign seller);
- non-encumbrance certificate from the previous foreign registry;
- invoice;
- 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
- 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 newbuild, the applicant should also submit the shipbuilder's certificate.

8 Is dual registration and flagging out possible and what is the procedure?

Dual registration is not permitted under Turkish law. However, according to articles 941 and 942 of the TCC, 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 Turkish Ministry of Transport, Maritime Affairs and Communication, 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 Turkish Ministry of Transport, Maritime Affairs and Communication, 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. In the event that the majority of the votes representing the shares are not granted to Turkish citizens in that (Turkish) management or operating (or bareboat charterer) company, and 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.

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, while registering the mortgage, 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.

Limitation of liability

10 What limitation regime applies? What claims can be limited? Which parties can limit their liability?

In accordance with the current stipulations of the TCC, which entered into force on 1 July 2012, Turkey has abandoned the previous in rem liability regime and adopted the system of the Convention on Limitation of

Liability for Maritime Claims (LLMC) 1976 and its 1996 Protocol. The regime of the LLMC shall apply to all vessels irrespective of their flag.

The claims mentioned in article 2 of the LLMC are subject to limitation of liability, but Turkey reserves the right to exclude the application of the claims in respect of the raising, removal, destruction or rendering harmless of a ship that is sunk, wrecked, stranded or abandoned (article 2, subparagraph 1(d)) and the claims in respect of the removal, destruction or rendering harmless of the cargo of the ship (article 2, subparagraph 1(e)). 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.

According to article 1 of the LLMC, limitation of liability is available to shipowners (owner, charterer, manager and operator of the seagoing ships), salvors, their employees and the liability insurers of the claims that are the subject of the LLMC.

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 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.

According to article 1335 of the Commercial Code, 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 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 been required to respond to a claim that has already been commenced.

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 in the event that the loss or damage is the result of the intention to cause such loss or damage, or of actions that were reckless and performed in the knowledge that such loss would probably result. Moreover, in accordance with article 1331 of the Turkish Commercial Code, it is regulated that the liability cannot be limited for the claims that arise out of subparagraphs (d) and (e) of the first paragraph of article 2 and article 3 of the LLMC. Since the Turkish Commercial Code has been recently adopted in 2012, to our knowledge there is not any practice where the limitation has been broken in our jurisdiction.

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. In summary, for losses suffered as a result of the death of or personal injury to a passenger caused by a shipping incident, the maximum liability of the carrier for each shipping incident is 250,000 SDR per passenger. For losses suffered as a result of the death of or personal injury to a passenger and that are not caused by a shipping incident, the maximum liability of the carrier is 400,000 SDR. In the event of negligence or faulty action of the carrier, the maximum liability amount shall not be applied. For vessels carrying more than 12 passengers, reference must be made to compulsory insurance in respect of the death of and personal injury to passengers, which shall not be less than 250,000 SDR per passenger in each incident.

Port state control

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, Maritime Affairs and Communications within the scope of the Mediterranean Memorandum of Understanding agreed in 1997 and the Black Sea Memorandum of Understanding agreed in 2006.

The Ministry of Transport, Maritime Affairs and Communications takes all measures in accordance with article 5 of Regulation No. 26120 on Port State Control in order to perform the obligations it sets forth, including providing qualified and sufficient numbers of staff and tools, equipment and documents to be used by the staff in order to carry out port state control services. Inspections are performed by the port state inspector nominated by the Ministry of Transport, Maritime Affairs and Communications.

Within the meaning of port state control, the principal aim is to ensure the safety of navigation, life, goods and the environment at sea through the provision of the maximum protection in terms of safety on board, in compliance with the international conventions to which Turkey is a party and national legislations, and to impose sanctions on vessels that violate such rules.

15 What sanctions may the port state control inspector impose?

The duty of the port state inspector is to detect the 'detention circumstance' criteria stated in section 5 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 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 are able to:

- 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 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;
- maintain health and safety, living and working conditions on board throughout the whole voyage; and
- collect the maximum information in the event that 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 period 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.

16 What is the appeal process against detention orders or fines?

According to article 29 of the Regulation on Port State Control, a vessel's owner, manager or agent has the right to make an objection to a detention order, an order prohibiting entry into the harbour imposed by the port state inspector, and a monetary fine imposed by Law No. 4922 on the Safety of Life at Sea.

According to article 22 of the Regulation on Port State Control, it is possible to make an objection to the administrative body of the port authority within one month as from the date of detention of the vessel or sanction. However, the objection does not have a suspensive effect.

Monetary fines may be challenged before the criminal court, whereas annulment of administrative decisions may be sought before the administrative courts.

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;
- China Classification Society;
- Croatian Register of Shipping;
- DNV GL;
- Hellenic Register of Shipping;
- Indian Register of Shipping;
- Korean Register of Shipping;
- Lloyd's Register of Shipping;
- Nippon Kaiji Kyokai;
- Polish Register of Shipping;
- Registri Italiano Navale;
- Registro International Navale SA;
- Russian Maritime Register of Shipping; and
- Turkish Lloyd.

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 taken into account 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 as a consequence of their tortious acts. Pursuant to recent cases, agreements to which the classifications societies are party are interpreted as attorney (agency) agreements and, under article 506 of the Code of Obligations, such type of agreements confer a particular and more diligent obligation on the contractual parties when fulfilling their obligations. In this respect, in the event that 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.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Pursuant to article 7 of the Code of Harbour Law No. 618, shipowners, masters and agents shall be obliged to remove the wreck and properties within the time frame granted by the harbour master in the event that the position of the wreck prevents safe and secure navigation in the port area. The interested parties shall be notified of the granted period either by notification via a notary public or an announcement in a newspaper.

In the meantime, local authorities shall take any preventive actions needed, including removal of the wreck, in the event that the position of the wreck prevents free navigation in ports, straits or other waterways. In this regard, the administrative authorities and harbour masters are authorised to immediately take the necessary action in order to remove wrecks without the need to comply with the rules and procedures.

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, duly entered into force in 1937;
- the Convention on the International Regulations for Preventing Collisions at Sea 1972, duly entered into force in 2014;
- the amendments made to the International Regulations for Preventing Collisions at Sea, which duly entered into force in 1984, are still in effect;
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (London), duly entered into force in 2001;
- the Protocol concerning Cooperation in Preventing Pollution from Ships and, in cases of Emergency, Combating Pollution of the Mediterranean Sea, duly entered into force in 2002;

- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, duly entered into force in 1937;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, duly approved by Turkey in 2003;
- the 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, duly entered into force in 2005;
- the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, duly entered into force in 2003;
- the International Convention on Salvage 1989, duly entered into force in 2013;
- the International Convention for the Prevention of Pollution from Ships, approved by Turkey in 1990, and its 1997 Protocol, duly entered into force in 2014;
- the Protocol on Preparedness, Response and Co-operation to pollution incidents by Hazardous and Noxious Substances 2000, duly entered into force in 2013;
- the International Convention on Maritime Search and Rescue, and its amendments, duly approved by Turkey in 2013;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, duly approved by Turkey in 2013; and
- the MARPOL, Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form, duly approved by Turkey in 2014.

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 standard form issued and published by the Directorate General of Coastal Safety, which has monopoly powers and rights in the Turkish Straits and Marmara Sea, is the most common salvage agreement. However, this form is not compulsorily binding upon the parties, who may agree their own terms.

Apart from in the aforementioned areas, salvage operations may be undertaken by any Turkish person or entity.

There is no law preventing the application of Lloyd's standard form of salvage agreement.

Ship arrest

22 Which international convention regarding the arrest of ships is in force in your jurisdiction?

Turkey is not party to international conventions regarding the arrest of ships. However, the TCC, which came into effect on 1 July 2012, incorporates most of the rules of the International Convention on the Arrest of Ships 1999.

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 in the event that the claim grants its creditor a maritime claim right under article 1352 of the TCC. The types of claim that constitute a maritime claim are the same as those defined in 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 International Convention on the Arrest of Ships 1999. The arrest of associated ships under the same management is not allowed.

In accordance with article 1369/2 of the TCC, the arrest of a ship for a maritime claim can only be possible if:

- the owner of the vessel at the time the maritime claim arises is also the one liable for the debt and still the owner of the vessel at the time the precautionary attachment is executed; or
- the lessee (bareboat or time-chartered) of the vessel at the time the maritime claim arises is also the one liable of the debt and still the owner of the vessel at the time the precautionary attachment is executed; or

- the maritime claim is guaranteed via maritime lien, maritime mortgage or a liability in rem of same kind on the vessel (article 1369/1/c of the TCC); or
- at the time the attachment is executed, the vessels are owned by a person liable for the maritime claim and this person is either the owner of the vessel over which the maritime claim has arisen or the lessee, assignee or charterer.

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 grants 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;
- 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
- general average contribution credit claims.

25 What is the test for wrongful arrest?

Article 1361 of the TCC states that the courts in which the arrest has been carried out would also be competent to deal with the lawsuit to be filed against the arresting party for recovering damages resulting from wrongful arrest. Therefore, if the claim for which the arrest was granted is found not to exist or is in any other way unjustified, the arrested party shall be entitled to claim damages. Thus, the test for wrongful arrest is the ultimate failure of the claim.

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, if the claim provides the creditor with a maritime lien. The answer will depend on the current ownership charter situation of the vessel at the time of the arrest and at the time the maritime claim arose, if this provides the creditor with a maritime claim. See question 23.

27 Will the arresting party have to provide security and in what form and amount?

Yes, pursuant to article 1363 of the TCC, the arresting party has to provide a fixed quantum security corresponding to 10,000 SDR. However, in accordance with article 1363(3), seamen 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. The court, while evaluating such a request, shall take into account various factors, such as the daily maintenance expenses of the vessel and the loss of profits incurred as a result of the arrest. In the event that the court decides to increase the amount of security, the arresting party shall be obliged to provide additional security within the time frame granted by the court. Failing that, the arrest shall be automatically lifted.

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?

Under article 1371 of the TCC, the shipowner or debtor may demand that the court lift the arrest in return for a 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 pursuant to article 1372 of the TCC.

The security amount to be lodged by the debtor or the owner cannot exceed the value of the ship.

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 which 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 captain is within Turkey. If the notarisation is effected abroad then the document should be apostilled if the issuing country is 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 and 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 a time extension can be requested from the court for submitting the same. The copy of the power of attorney can be submitted to the court but the lawyer is under obligation to 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 in order to have sufficient time for translation of the supporting documents for the arrest and for the power of attorney.

30 Who is responsible for the maintenance of the vessel while under arrest?

Pursuant to article 1368(2) of the TCC, the enforcement offices through which arrest proceedings are implemented shall take all necessary measures for the operation, management, maintenance and protection of the vessel.

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 simply to obtain security and then pursue proceedings on the merits before the relevant jurisdiction within one month. In this regard, article 1359 of the TCC states that the courts that are competent to hear arrest requests are also competent to hear principal claims, unless there is a valid jurisdiction or arbitration clause.

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.

33 Are orders for delivery up or preservation of evidence or property available?

Under article 219 of the Code of Civil Procedure, the parties to a dispute are under the obligation to provide all documents that they rely on. In the event that 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 of time in which to procure the document. If the requested party fails to provide such 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.

On the other hand, an ex parte application may be made to the court for 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 in the event that it is not collected.

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.

Judicial sale of vessels

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, is entitled to apply for the judicial sale of an arrested vessel.

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 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 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;
- physical seizure of the vessel;
- valuation of the vessel to be conducted by the enforcement courts and service of the same on interested parties;
- 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 in the event that 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 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;
- costs for the publication of the auction sale;
- costs for service of summons;
- cost of VAT, which amounts to 18 per cent of the sale price;
- cost of brokerage, which amounts to 0.1 per cent of the sale price;
- cost of stamp tax, which amounts to 0.569 per cent of the sale price;
- cost of prison fund, which amounts to 2 per cent of the sale price; and
- cost of collection fee, which amounts to 11.38 per cent of the sale price.

37 What is the order of priority of claims against the proceeds of sale?

In accordance with articles 1390 to 1397 of the TCC, 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.

38 What are the legal effects or consequences of judicial sale of a vessel?

The successful buyer shall obtain clean title on the vessel, free of all liens and encumbrances, as pursuant to article 1385(2) of the TCC. 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.

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.

40 Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No. However, the TCC incorporates most of the rules of the International Convention on Maritime Liens and Mortgages 1993.

Carriage of goods by sea and bills of lading**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 on 17 February 1955. Turkey has not approved the Hague-Visby Rules, Hamburg or the Rotterdam Rules, but the TCC incorporates a set of rules that purport to adapt the Hamburg Rules. In this respect, the period when carriage at sea begins and ends is stipulated under article 1178 of the TCC, which appears to be a translation of article 4, subparagraph 2 of the Hamburg Rules.

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 Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal), duly entered into force in 2010.

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.

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).

A jurisdiction or arbitration clause in a charter party that is validly incorporated into a bill of lading is binding on a third-party lawful holder of the bill.

45 Is the 'demise' clause or identity of carrier clause recognised and binding?

The 'demise' clause or identity of carrier clause can be recognised and binding under Turkish law; however, under article 1192 of the TCC such clauses shall be deemed null and void if no court action can be taken against the actual carrier within the jurisdiction of Turkish courts.

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 article 1191 of the TCC, shipowners remain responsible for the entire carriage in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his or her servants and agents acting within the scope of their employment under the principle of joint and several liability. 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.

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 incur as a result.

48 What liens can be exercised?

The following lien rights can be exercised:

- lien right on movables and valuable papers of the charterer for ensuring the recovery of freight and other receivables prescribed in the charter agreement;
- 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;
- lien right on cargo for ensuring the recovery of all receivables the carrier is entitled to under the charter agreement;
- lien right on passengers' luggage for ensuring the recovery of all receivables the carrier is entitled to under the passenger contract; and
- lien right on the vessel, cargo and freight for ensuring the recovery of general average distribution shares.

Update and trends

Turkey ratified the 2010 Hazardous and Noxious Substances by Sea (HNS) Protocol on 23 April 2018. Turkey joined as one of the first three states, along with Canada and Norway, to deposit instruments of ratification to the protocol and lead the way towards entry into force of the 1996 HNS Convention.

Control of emission rates and the sulphur content of fuel oils is the emerging trend in Turkey, and it is considered that this trend could possibly affect shipping law and regulation in Turkey. However, there is no draft or government proposal regarding this trend.

49 What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Pursuant to article 1232 of the TCC, in the event that the bill of lading is issued to the order, the master is under the obligation to 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 production of any copies of the bill of lading. However, the carrier may ask for certain guarantees to be provided. As this article is mandatory, any clause restricting or removing such obligations shall be interpreted as null and void under article 1243 of the TCC. Liability shall not, therefore, be limited by way of a letter of indemnity.

50 What are the responsibilities and liabilities of the shipper?

Pursuant to article 1145 of the TCC, the shipper is obliged to provide a precise and accurate description of the cargo; otherwise, he or she 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.

Under article 1165 of the TCC, the shipper is under the obligation to present to the carrier all documents needed for carriage of the cargo. The shipper shall remain responsible to the carrier and parties with interest in the cargo for any losses sustained as a result of falsification of documents.

Shipping emissions

51 Is there an emission control area (ECA) in force in your domestic territorial waters?

Although the declaration of the Marmara Region as an emission control area is on the agenda, there is no ECA in any Turkish domestic territorial waters. In addition, Regulation No. 27449 on Decreasing the Sulphur Content of some types of Fuel Oil has been published by the Ministry of Environment.

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 3,5 per cent. Pursuant to the regulation published by the Ministry of Environment, the cap on grade 1 marine diesel oil is 0.1 per cent, and the same cap is applicable for fuel intended to be loaded on marine vehicles sailing in internal waters and on vessels at dock. Any contradictory act may risk the arrest of the vessel and imposition of an administrative fine.

Ship recycling

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 applying in the Turkish jurisdiction.

There are many ship recycling facilities (eg, Aliğa Denizcilik Geri Dönüşüm ve Gemi Söküm San Ve Tic Ltd Şti, Avşar Gemi Söküm Dış Tic Ve San Ltd Şti, İzmir Gemi Geri Dönüşüm Dem Çel San Ve Tic Ltd Şti) and there is an NGO called the Association of Ship Recycling Industries (Gemi Geri Dönüşüm Sanayicileri Derneği).

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

Under article 5 of the TCC, if there are more than one commercial court in one place of jurisdiction, the Supreme Council of Judges and Public Prosecutors may 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 involved in maritime disputes.

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 proceeding. 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.

Therefore, in principle the service of judicial documents requires diplomatic interference. However, according to a recently published letter by the General Directorate of International Law and Foreign Affairs of the Ministry of Justice, direct service by post is permissible to some countries.

56 Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

No. However, there is the Istanbul Arbitration Centre, which is an arbitral institution and where arbitrators may be appointed freely by the parties.

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 take into account 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.

With respect to the recognition and enforcement of foreign awards, Turkey is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

58 Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

In order 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. Accordingly, an asymmetric arbitration clause may be deemed valid in accordance with Turkish law. There are different approaches under Turkish law. Whereas some scholars deem the asymmetric arbitration agreements as valid generally, the asymmetric arbitration clause shall not be implemented as waiver of appeal rights, especially where one party is weaker than the other; some scholars and the Court of Cassation are of the opinion that the validity of each asymmetric arbitration clause shall be interpreted in accordance with the particularities of each case.

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 raise an objection of 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. In the event that 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.

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?

See question 59. Moreover, 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.

Limitation periods for liability

61 What time limits apply to claims? Is it possible to extend the time limit by agreement?

- Two years for claims arising out of salvage or wreck removal;
- one year for claims granting creditors maritime lien rights;
- two 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;
- 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 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 collision.

In the event that the incident concerns criminal liability the time limit may be longer, pursuant to article 72 of the Code of Obligations.

62 May courts or arbitral tribunals extend the time limits?

Neither courts nor arbitral tribunals have authority to extend the time limit. However, under article 1189 of the TCC, if the liable party acts maliciously in order to prevent the entitled party from bringing 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.

Miscellaneous

63 How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Turkey is not a party to the Maritime Labour Convention and therefore the rules of the convention do not apply directly to disputes heard by Turkish courts. However, administrative and bureaucratic studies of the ratification of the convention are ongoing, and common practice implicitly conforms to the convention's rules.

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 adapt the contract to the new conditions or to renege on the contract if adaption 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;

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- 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.

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, meaning that it should be at anchor for more than 48 hours or its transit passage should be broken for another reason in order for the arrest to be sought.

Ukraine

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Newbuilding contracts

1 When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Ukrainian law is applicable to the ship title when the ship is constructed on the territory of Ukraine or when the ship is registered under the Ukrainian flag.

Title passes from the shipbuilder to the shipowner at the moment of delivery, unless otherwise as stated in the contract. Parties conclude a specific agreement to verify that one party delivered and the other party accepted the ship in the agreed state and with its agreed equipment. The parties can determine other conditions on the ship title as it passes the preliminary arrangements.

2 What formalities need to be complied with for the refund guarantee to be valid?

Refund guarantees are used for shipbuilding contracts. A shipyard may issue a guarantee letter in respect of carrying out the shipbuilding contract. The guarantee letter does not prove the refund guarantee's validity. The refund guarantee is valid when the correct contract between the debtor, the creditor and the guarantor is concluded. The refund guarantee states the guarantor, which is usually the bank that will make a refund. The ship purchaser must be sure that the guarantor on the refund guarantee is a reputable entity that was officially nominated for the refund guarantee.

3 Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

The party can turn to the local court when the shipbuilding contract is drawn up in Ukraine or when the defendant is a resident of Ukraine.

The party can claim for the expenses incurred owing to the contract non-execution reimbursement. Also, the party can claim to oblige the other party to fulfil the contract in full.

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 Civil Code of Ukraine regulates contracts within Ukraine. The party may be liable under the regulations of the contract and the law.

The risk of accidental damage or destruction passes to the purchaser at the moment of delivery. The seller is obliged to deliver the ship in quality or equipment that is commensurate with the contract conditions. When the contract does not define the ship's quality, the ship's state shall be good enough for the contract's goal. The contract can define the warranty term.

The seller is liable for any damage that occurred before the delivery. When the seller and the shipbuilder are separate parties, the purchaser may claim to one of them or both for the damage that was caused before the delivery. The purchaser can claim for the defects for three years after delivery.

Ship registration and mortgages

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?

Ship registration in Ukraine is regulated by the Merchant Shipping Code and specific legislative acts. Vessels owned by Ukrainian citizens or entities can be registered under the Ukrainian flag. Ukrainian bareboat charterers can also register vessels under the Ukrainian flag.

Merchant shipping vessels, fishing boats, tugboats, tankers and passenger vessels may have the right to sail under the Ukrainian flag. Vessels under construction cannot be registered under the Ukrainian flag.

6 Who may apply to register a ship in your jurisdiction?

Physical or legal persons registered in Ukraine that own a vessel or act as a bareboat charterer may apply for vessel registration. Representative offices of the foreign companies in Ukraine, or partly foreign entities, may not register a vessel under the Ukrainian flag. We think this situation might change in the near future.

7 What are the documentary requirements for registration?

The party shall present an application for the registration. Application forms were approved by the Ministry of Transport and Communication (now known as the Ministry of Infrastructure) on 12 December 2006.

The applicant shall present:

- a State Shipping Registry questionnaire;
- a copy of the document confirming ownership;
- a copy of the tonnage certificate;
- a copy of the certificate of seaworthiness or the classification survey certificate;
- a copy of the passenger certificate (for passenger vessel);
- a copy of the manning certificate copy;
- a copy of the civil liability insurance policy (or other similar document) of the shipowner for damage from oil pollution under international treaties of which Ukraine is a signatory;
- a temporary certificate of the right to sail under the Ukrainian flag (if any);
- the document confirming the vessel's encumbrances or its absence;
- the identification document of the shipowner; and
- the document confirming cancellation of previous registration.

In addition, information on the ship's function, identification items and photos shall be presented. The bareboat charterer for temporary registry shall apply extra documents such as a copy of charter party, written shipowner's approval and mortgagee's approval (if applicable). The document copies must be certified by a notary or other authorised entity.

8 Is dual registration and flagging out possible and what is the procedure?

Ukraine does not recognise foreign registration if a vessel is already registered in Ukraine and the registration was not cancelled properly.

Dual registration is possible for a vessel that is registered for the validity of bareboat charter providing that the foreign jurisdiction allows dual registration for the vessel.

9 Who maintains the register of mortgages and what information does it contain?

According to Ukrainian law, a vessel is under the immovable property regime, but maritime mortgages are registered in the State Registry of Encumbrances of Movables.

The Ministry of Justice maintains the State Registry of Encumbrances of Movables according to the Order of State Registry of Encumbrances of Movables Maintenance, approved by the government on 5 July 2004. The registry contains the following information:

- the mortgagee's and mortgagor's identification information;
- the description of the mortgage's object, origin of the encumbrance and content;
- the limitation of the debtor's rights; and
- the register identification and date of registry.

Limitation of liability

10 What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Ukraine is not a party to the Convention for Liability for Maritime Claims 1976. However, Chapter 1 of section X of the Merchant Shipping Code stipulates limitation of the owner's liability. Remuneration to which a party may be entitled in relation to the death or injury of a third party (including passengers or crew) or damage to the property shall be limited by article 352 of the code.

In relation to claims arising from death or personal injury of third parties, the following remuneration is determined:

- for ships with a tonnage below 500 tonnes: 333,000 special drawing rights (SDR);
- for ships with a tonnage of more than 500 tonnes, in addition to the basic sum for each tonne:
 - from 501 tonnes to 3,000 tonnes: 500 SDR;
 - from 3,001 tonnes to 30,000 tonnes: 333 SDR;
 - from 30,001 tonnes to 70,000 tonnes: 250 SDR; and
 - more than 70,000 tonnes: 167 SDR.

In relation to claims arising from other grounds, remuneration shall be limited to the following:

- for ships with a tonnage below 500 tonnes: 16,700 SDR;
- for ships with a tonnage of more than 500 tonnes, in addition to the basic sum for each tonne:
 - from 501 tonnes to 30,000 tonnes: 167 SDR;
 - from 30,001 tonnes to 70,000 tonnes: 125 SDR; and
 - more than 70,000 tonnes: 83 SDR.

11 What is the procedure for establishing limitation?

Ukraine is not party to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

The Merchant Shipping Code stipulates funds such as the emergency pilotage fund, the emergency maritime navigation department fund and a fund for liability limitation provision. For claims arising from marine casualties caused by a pilot, the Code stipulates that such claims shall be covered by an emergency pilot's fund. Such a fund corresponds to 10 per cent of all pilot's charges received in the preceding year. However, for claims arising from the maritime navigation department's pilot's actions, remuneration shall be limited to the emergency maritime navigation department fund, according to article 114 of the Merchant Shipping Code.

The amount in the emergency maritime navigation department fund corresponds to 10 per cent of all charges received in the preceding year.

If there is nuclear damage, the liability of the nuclear vessel operator shall be limited by the fund for liability limitation provision: 99.75 million SDR, including court charges.

12 In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The liability limit cannot be broken because the law states the limit. The stated liability limit is not applicable in some cases.

The carrier's liability for cargo loss shall not be limited, when it was proven that the loss resulted from the carrier's negligence, oversight, recklessness, self-assurance and omission. The insurer shall pay above the insurance payment in case of general average. The liability

limitation of a nuclear vessel operator is not applicable when the vessel exploitation was not approved by the country of flag.

Article 351 of the Merchant Shipping Code stipulates the general rules when the limitation of liability is not applicable.

The limitation of liability is not applicable to:

- claims resulted from salvage and general average;
- crew members' claims and crews' next of kin claims;
- wreck removal or estrangement;
- oil pollution; or
- nuclear damage.

13 What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Ukraine has acceded to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Ukrainian law is applicable in such cases as:

- the carrier sailing under the Ukrainian flag;
- the passenger transportation agreement being conducted in Ukraine; and
- the specified port of departure or port of destination being located in Ukraine.

The carrier is liable for death or any injury of any passenger resulting from an action which happened during the carriage and was caused by the fault or negligence of the carrier or its employees. In cases of damaged or missing luggage, the carrier is entitled to prove its innocence in order not to be charged a remuneration payment. In respect of a passenger's death or an injury claim, remuneration payment shall be limited to 175,000 SDR. In respect of damaged or missing cabin luggage, the carrier's liability shall be limited to 1,800 SDR for one piece of passenger property. Article 194 of the Merchant Shipping Code also permits higher liability limitations to be determined in written form, signed by the carrier and the passenger.

Port state control

14 Which body is the port state control agency? Under what authority does it operate?

The State Service of Ukraine for Transport Safety provides state control for land, maritime and water transport and is subordinated to the Ministry of Infrastructure of Ukraine.

The State Service of Ukraine for Transport Safety acts on behalf of the State Service of Ukraine for Transport Safety Statute, approved by the government on 11 February 2015, providing port state control's functions on the basis of the rules on ship control for the safety of navigation provision approved by the Ministry of Transport of Ukraine on 17 July 2003.

15 What sanctions may the port state control inspector impose?

The port state control inspector has powers as follows:

- to prohibit a vessel from leaving port;
- to prohibit a vessel from executing harmful or illegal actions;
- an obligation to eliminate deficiencies; and
- to impose administrative sanctions (eg, fines, property expropriation).

16 What is the appeal process against detention orders or fines?

Sanctions imposed by the port state control may be appealed to the harbour master or to the local administrative court. Pleading to the harbour master is faster and more effective. The court trial has stated procedure terms and it takes time to execute the court's decision practically.

Classification societies

17 Which are the approved classification societies?

The government order 'On technical inspection of vessels that have the right to sail under the flag of Ukraine' that was enacted on 6 March 1996 approves the following classification societies:

- American Bureau of Shipping (US);
- Bureau Veritas (France);
- Det Norske Veritas Classification AS (Norway);
- Germanischer Lloyd (Germany); and
- Hellenic Register of Shipping (Greece).

The significant change is that the Russian Maritime Register of Shipping is not approved by the Shipping Register of Ukraine.

18 In what circumstances can a classification society be held liable, if at all?

The liability of classification societies is not stipulated by Ukrainian law. The classification society can be liable for criminal negligence, omission or fraud that caused significant damage in theory.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

The local authority is not authorised to remove a wreck that is defined as military property, culture or of architecture value.

The owner of the sunken property is obliged to apply to the local harbour master to approve the procedure for wreck removal. The harbour master states reasonable terms to remove the wreck. In the case of owner inaction within one year from the day of the sinking, the wreck becomes state property.

The owner of the sunken property is obliged to liaise with the harbour master immediately and remove the wreck if it presents an obstacle to merchant shipping, marine works, hydrotechnical or other works; or is a threat to human life, health or the environment. If the owner fails to remove the hazardous property, the Administration of Sea Ports is authorised to remove the wreck at the owner's cost.

20 Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Ukraine is a party to the International Convention on Civil Liability for Oil Pollution Damage from 4 July 2002. Specific methods of calculating damage caused by oil pollution were enacted. A new method of calculating oil pollution damage has not been produced yet.

On 22 March 2017, Ukraine became party to the International Convention on Salvage 1989.

Ukraine defined the right not to apply the International Convention on Salvage in cases:

- when the salvage operation passes through Ukrainian territorial waters and all the participants are Ukrainian vessels;
- when the salvage operation passes through Ukrainian territorial waters and no vessel is a participant;
- when all concerned parties are residents of Ukraine; or
- when the object of the salvage is of cultural, prehistoric, historic or archaeological value.

Ukraine is a party to the Agreement on Co-operation Regarding Maritime Search and Rescue Services Among Black Sea Coastal States 1998, which was ratified on the 28 November 2002. The agreement regulates the procedure of joint salvage operation execution.

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?

Ukrainian law does not stipulate a mandatory local form of salvage agreement. The Lloyd's standard form of salvage agreement is acceptable in Ukraine. In general, the Standard Form of Salvage Agreement approved by the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry is used in Ukraine.

According to the Law on the Sea Ports of Ukraine, only state enterprises shall execute emergent salvage procedures.

The Maritime Search and Rescue Service was established in order to fulfil Ukrainian obligations under international treaties in which Ukraine is a party, by Resolution of Cabinet of Ministers of Ukraine, 20 October 2011.

The stated goal of the Maritime Search and Rescue Service is to support the further development of a national system of maritime search and rescue within Ukraine's region and to coordinate and undertake air and sea search and rescue operations.

Ship arrest

22 Which international convention regarding the arrest of ships is in force in your jurisdiction?

Ukraine ratified the International Convention Relating to the Arrest of Sea-Going Ships 1952 (Brussels Convention), which came into effect in Ukraine on 16 May 2012.

However, the International Convention on the Arrest of Ships of 1999 does not apply to Ukrainian ship arrest procedures.

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?

Any vessel sailing under the Ukrainian flag or is located at a Ukrainian port can be arrested in respect of a maritime claim under the Brussels Convention and the Merchant Shipping Code.

Article 42 of the Merchant Shipping Code stipulates that a maritime claim is a claim connected to the vessel's ownership, building, managing, exploitation or commercial use, maritime lien, salvage, etc.

Associated ships may be arrested in Ukraine, when the owner of the vessel is liable for the maritime claim except for:

- disputes about the vessel's ownership;
- disputes between the vessel's co-owners on the vessel's exploitation; and
- mortgages.

The ship may be arrested in Ukraine exclusively by the court that is regulated by the Commercial Proceeding Code of Ukraine and the Civil Proceeding Code of Ukraine.

Requirements for an application for ship arrest in respect of a maritime claim are defined in part 3 of article 151 of the Civil Proceeding Code of Ukraine and part 3 of article 139 of the Commercial Proceeding Code of Ukraine.

The application for ship arrest in respect of a maritime claim must contain:

- the name of the court;
- full names, addresses and contacts of the claimant and defendant;
- the ground of the maritime claim; and
- the name of the ship to be arrested and other known information on the ship.

The court reserves the right to demand other documents to investigate the matter of the maritime claim.

The civil proceeding law of Ukraine and commercial proceeding law of Ukraine do not stipulate the status of the bareboat charterer or time-charterer.

Under the part 4 of article 3 of the International Convention Relating to the Arrest of Sea-Going Ships 1952, when in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of the convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

This article is applicable to the cases adjudicated in Ukraine. Under the process of the application for ship arrest in respect of a maritime claim the Ukrainian court shall define the necessity and the grounds of the arrest. Generally, it is possible to apply for an arrest in respect of the claim against a demise charterer or time-charterer, but there is a lack of court practice on such cases.

24 Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Ukraine recognises the concept of maritime liens.

The following claims give rise to maritime liens: payments in respect of crew members and claims arising out of the death or injury incurred in connection with the vessel's exploitation.

25 What is the test for wrongful arrest?

Article 6 of the Brussels Convention states that Ukrainian law is applicable to the wrongful arrest definition when the arrest procedure has been initiated in Ukraine.

The Ukrainian Proceeding Law defines ship arrest as a preventive measure to get security on the claim. In the case of a ship arrest cancellation or the claim refusal, the party that incurred the loss that resulted from the ship arrest may apply to the court for a reimbursement.

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 can initiate an arrest in Ukraine when:

- the existence of a maritime claim is proven;
- the owner of the ship is liable for a maritime claim; and
- the debtor's ship is berthed in Ukraine or sails under the Ukrainian flag.

When the charterer is liable for the maritime claim according to the charter party and at the moment of initiation of the ship arrest procedure the charterer still operates the vessel, such vessel shall be arrested.

27 Will the arresting party have to provide security and in what form and amount?

The court may request the arresting party to provide security in an amount sufficient to cover all expenses and losses resulted from the ship arrest. Security shall be provided in bank guarantee or monetary form. According to court practice, the arresting party does not provide security because it can be stated as a limitation of a right for trial.

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 debtor on the maritime claim can apply to court for a change in the measure to obtain security for a maritime claim when a ship is under arrest.

The amount of the security is defined by the court. Ukrainian courts are not obliged to use the principle of proportion with the ship value for maritime claims. The security can exceed the value of the ship when the claim exceeds it.

The party shall transfer the security to the court's bank account or present a sufficient bank guarantee. Ukrainian courts practically recognise bank guarantees as an appropriate form of security for a maritime claim. However, courts give priority to the bank guarantees issued by Ukrainian banks. In most instances, Ukrainian courts do not accept letters of undertaking issued by protection and indemnity clubs.

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 application for arrest in respect of a maritime claim must contain:

- the description of a proven maritime claim;
- grounds for the ship arrest;
- evidence that the ship is registered in Ukraine and/or planned to enter a Ukrainian port or berthed in a Ukrainian port; and
- evidence that the party responsible for the maritime claim owns or manages the ship.

The party must present to the court all documents that prove the facts stated in the application. In addition, documents that prove the powers of the lawyer must be presented. Power of attorney, attorney agreement and order of attorney prove the lawyer's powers in the proceeding.

All documental evidence and other attachments must be legalised, translated into Ukrainian and certified by a licensed translator or a notary.

Ukraine is a party to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents 1961. Sufficient apostille is enough for the foreign document legalisation. The document translation shall be made by the professional translator

and certified by the translator's bureau. The court may demand to present a translation certified by a notary.

All documents presented to the court shall be copies certified by an attorney or notary. The court may demand to present the original documents. Relevant documents can be filed electronically through the state's electronic court system.

The term of drafting the application depends on the time needed for the translation. An application for ship arrest can be prepared within two days.

30 Who is responsible for the maintenance of the vessel while under arrest?

The shipowner, or the party that operates the vessel, is responsible for the maintenance of the vessel under arrest.

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 shall present the claim for adjustment to the court, tribunal or arbitration, where the claim could or should be considered within 30 days of the ship arrest. The court shall cancel the ship arrest if the claim is not presented in time.

32 Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

The claimant may receive the security for the claim, such as property or seizure of finances, and the obligation for a person to stop or execute specific actions, etc.

Ship arrest is the only security measure stated specifically in respect of a maritime claim.

33 Are orders for delivery up or preservation of evidence or property available?

It is possible to preserve evidence or property in a Ukrainian court proceeding. The party shall apply to the court for evidence provision, when the party is unable to get access to the evidence.

Evidence can be provided in the following ways:

- witness cross-examination;
- expertise nomination; and
- evidence reclamation and investigation.

The application on the evidence preservation may be made to the court before the actual claim registration.

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 Ukraine. Theoretically, any property located in Ukraine may be arrested by the court.

Judicial sale of vessels**35 Who can apply for judicial sale of an arrested vessel?**

The following persons may apply for judicial sale of an arrested vessel:

- the claimant who suffered any damage or injury in direct connection with the operation of the vessel;
- the creditor;
- the crew member;
- local port authorities; and
- the salvor.

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 shall be public and accessible.

The initiator of the judicial sale must make a written notice to every concerned person within 30 days. The persons concerned with the judicial sale of a vessel are:

- the registered owner of the vessel;
- the local authority in the country of the vessel's registration; and

- all holders of the vessel's encumbrances issued to the bearer and that have not been issued to the bearer.

The written notice shall inform the person of the time and place of the judicial sale. When the list of concerned persons is uncertain, an announcement in the central state newspaper shall be made.

The court duty is 1 per cent of the amount of the claim.

37 What is the order of priority of claims against the proceeds of sale?

Article 358 of the Merchant Shipping Code stipulates the order of the privileged maritime claims satisfaction, as follows:

- claims arising from labour relations, damage resulting from injury, illness or death reimbursement, social payments;
- claims from nuclear damage and pollution;
- canal and port fees;
- claims arising from general average and salvage;
- claims arising from collision damage, private average or vessel exploitation;
- claims connected to the master's action aimed to save the vessel or cargo;
- claims arising from the damaged cargo or luggage; and
- claims connected to the freight payment.

38 What are the legal effects or consequences of judicial sale of a vessel?

After the judicial sale of a vessel, all encumbrances that were not received by the purchaser are invalid in the country of sale. Costs incurred in connection with the vessel arrest and judicial sale shall be reimbursed out of the vessel's value. The purchaser receives the title to the vessel.

39 Will judicial sale of a vessel in a foreign jurisdiction be recognised?

The judicial sale of a vessel in a foreign jurisdiction shall be recognised in Ukraine when the judicial sale's order and effects do not violate the public order and interests of Ukraine.

40 Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Ukraine ratified the International Convention on Maritime Liens and Mortgages 1993 on 22 November 2002.

Carriage of goods by sea and bills of lading

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?

Ukraine has not ratified the Hague Rules, Hague-Visby Rules or Hamburg Rules. Ukraine is not a party to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Carriage at sea begins from the moment of loading and ends with the cargo being discharged.

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 laws specifically regulating combined transport or multimodal bill of lading. The Transport Act is the main law regulating Ukrainian transport in general.

43 Who has title to sue on a bill of lading?

The following persons have the right to sue on a bill of lading:

- the consignee;
- the consignor;
- the bearer of the bill of lading;
- the party that was assigned to sue; and
- the shipper.

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 may be incorporated into the bill of lading when the bill of lading includes a note on it.

45 Is the 'demise' clause or identity of carrier clause recognised and binding?

The demise clause and identity-of-carrier clause are not recognised or binding.

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?

When the shipowner is not a contractual carrier, he or she is not liable for cargo damage. The shipowner is liable when it is proven that his or her malicious action or inaction resulted in the cargo damage.

47 What is the effect of deviation from a vessel's route on contractual defences?

The carrier may change the vessel route in a reasonable way in the following cases:

- to save a human life;
- to save a vessel or its cargo;
- to prevent a collision; and
- other necessities.

If a vessel's route deviation resulted from wrongful action by the carrier or a crew member, it shall be considered as contract violation.

48 What liens can be exercised?

The carrier may execute the lien right at the port of arrival when the freight is not paid in time. The cargo shall be maintained by the carrier on the vessel or in the warehouse at the port of arrival. The carrier has the lien right as long as he or she possesses the cargo. The lien right is the natural right of the carrier and may not be stipulated in the charter party. The vessel, cargo or freight may be the lien when the lien is commensurate with the claim.

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 cargo value is not declared in the bill of lading, the carrier's liability for damaged or lost cargo shall be limited to 666,67 units of account or two units of account per kilogram of gross mass of the cargo, whichever sum is greater.

50 What are the responsibilities and liabilities of the shipper?

The shipper's responsibilities and liabilities may be stated by the law and by the contract. The Merchant Shipping Code defines the shipper's status.

The shipper has the following liabilities:

- cargo carriage according to the contract regulations provision;
- cargo marking and packing provision;
- cargo for carriage receipt;
- bill of lading issue;
- accurate information presentation;
- all relevant documentation issued;
- vessel seaworthiness provision;
- sufficient cargo loading and clamping provision; and
- carriage of cargo without losses, delays and deficiencies carriage.

Shipping emissions

51 Is there an emission control area (ECA) in force in your domestic territorial waters?

Maritime ecological inspectors control the emission's regime in Ukraine's domestic and territorial waters, contiguous zone and

Update and trends

On 17 January 2018 the government enacted a decree on the establishment of a maritime administration. An appropriate public entity will start work from 1 August 2018.

The Ministry of Infrastructure of Ukraine has initiated the procedure of ports concession. Traditionally all merchant shipping ports in Ukraine were recognised as state property. In March 2018, the Ministry of Infrastructure announced the start of pilot projects regarding the concession of the merchant shipping ports Olvia and Kherson.

The President of Ukraine authorised the Minister of Infrastructure to sign a memorandum of cooperation between Ukraine and the International Maritime Organization in May 2018.

exclusive economic zone. The control is aimed at preventing pollution from oil, noxious liquids and waste material.

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) 1973, as modified by the 1978 Protocol, came into force for Ukraine on 25 January 1994. Annex VI, Regulation 14 (1.2) of MARPOL stipulates that the content of sulphur in bunker fuel shall not exceed 3.5 per cent m/m.

Any vessel arriving in Ukrainian ports that violates the rules on sea pollution shall be detained and fined by the port state control authority.

Ship recycling

53 What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

Ukraine is not a party to the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships.

Ukrainian law does not contain specific acts aimed to regulate the procedure of ship recycling.

There are no Ukrainian enterprises specialising in ship recycling.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

There are no specialised maritime courts in Ukraine. The Ukrainian court system is divided into general, administrative, criminal and commercial branches. Maritime claims arising from labour and civil relations are heard in general courts. Maritime claims arising from commerce are heard in commercial courts. Claims arising from regulation violations and criminal law are heard in administrative and criminal courts. The Ukrainian legal system does not state a special procedure for maritime claims proceedings, but the procedure of the ship arrest in respect of the maritime claim is stipulated by the Civil Proceeding Code of Ukraine and Commercial Proceeding Code of Ukraine.

55 In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

If the defendant or other participant of the proceeding is a foreign entity or foreign person, the proceeding is defined as 'proceeding with a foreign participant'. According to the Commercial Proceeding Code of Ukraine and the Civil Proceeding Code of Ukraine, foreign defendants have the same rights and liabilities as Ukrainian residents.

The Ukrainian Act 'On the International Private Law', defines the applicable law in relations where one of the parties is a foreign entity or foreign person.

56 Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry (MAC) is a permanently functioning arbitral institution that settles maritime claims. MAC settles disputes arising from contractual and other civil law relationships in the area of

merchant shipping, irrespective of whether the parties to a relationship include both Ukrainian and foreign entities, or whether the parties are only Ukrainian entities or only foreign entities, in accordance with article 2 of the Statute on the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry.

57 What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Foreign judgments may be recognised and enforced in Ukraine according to international and national regulations. As a successor to the Union of Soviet Socialist Republics, Ukraine is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

Foreign judgments may be enforced according to Chapter VIII of the Civil Proceeding Code of Ukraine. Ukrainian general courts are competent to adjust an application on foreign judgment recognition and enforcement.

58 Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Ukrainian law does not stipulate the validity and status of asymmetric jurisdiction and arbitration agreements. According to its aim, asymmetric jurisdiction and arbitration agreements contradict to main principle of the Ukrainian proceeding law on the equality of parties.

Therefore, we do not recommend turning to a Ukrainian court to enforce an asymmetric jurisdictional or arbitration agreement.

59 What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

There are no remedies available if the claimant issues the proceeding elsewhere in breach of a jurisdiction clause. When the matter must be adjusted exclusively by the Ukrainian court according to the Ukrainian law regulations, the foreign judgment shall not be recognised or enforced in Ukraine.

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?

Ukraine is a party to the New York Convention. According to part 3, article 2 of the convention, when the court receives a claim in respect of which the parties made an arbitral agreement or jurisdiction clause, it shall, at the request of one of the parties, refer the parties to the defined arbitration, unless the court defines an arbitral agreement or jurisdiction clause as invalid.

Limitation periods for liability

61 What time limits apply to claims? Is it possible to extend the time limit by agreement?

The general limit applied to claims is three years. The time limit may be extended with the parties' written agreement. The claim limit stated by the law cannot be shortened by the written agreement.

62 May courts or arbitral tribunals extend the time limits?

The court or arbitral tribunal cannot extend the time limits. The party that missed the time limit may apply to the court for a time limit renovation. If the court considers the time limit was missed on reasonable grounds, such as severe illness or official assignment, it renovates the time limit.

Miscellaneous

63 How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Ukraine has not ratified the Maritime Labour Convention. The Ukrainian authorities are not ready to correspond with the convention's demands. However, in practice, many Ukrainian shipowners and seafarers try to meet the convention's regulations in order to work in the international market.

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 652 of the Civil Code of Ukraine stipulates that a significant change of a contract's circumstances are grounds for the contract change or termination.

The parties may agree to change the contract's conditions according to the new circumstances.

When the parties cannot agree about the contract's conditions, change or termination, one of the parties may execute a unilateral termination that considers the following conditions:

- at the time of the contract conclusion, the parties have not predicted the significant changes;
- neither party could prevent the change of significant circumstances;
- the contract execution would harm the parties' material interests; and
- the contract regulations and commercial customs do not constitute a liability risk for any party.

The court may change the contract's conditions when the significant change of the contract circumstances results in public interest a threat or severe material losses of the parties.

65 Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Ukrainian judges support the uniformity of court practice. To direct judges in unregulated matters, the Supreme Commercial Court of Ukraine and the Supreme Specialised Court of Ukraine enact letters of recommendation and explanation. Therefore, before initiating the ship arrest procedure, court practice shall be studied.

However, Ukraine does not accept precedents as a source of law. Court practice does not bind a judge. Claimants may use letters of recommendation and explanation issued by the Supreme Commercial Court of Ukraine and the Supreme Specialised Court of Ukraine references for their disputation.

The court may enact a decision that does not correlate with general court practice and use letters of recommendation and explanation when a specific case has significant differences from previous cases.



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Newbuilding contracts

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.

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, parent or some other guarantor. Formalities will vary according to state law, and are simply a matter of contract and state law.

3 Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Again, because shipbuilding contracts are not maritime contracts and are subject to state law (including the Uniform Commercial Code (UCC) applicable in all states except Louisiana), 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.

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.

Ship registration and mortgages

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 US (see question 6). 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 in order to pre-obtain the official number, but a permanent, full-term certificate of documentation cannot be issued until completion.

6 Who may apply to register a ship in your jurisdiction?

As noted above, 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 US 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). However, 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.

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.

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.

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 filed with the NVDC will show the builder, previous owners, mortgages, notices of lien claims and judicial sales.

Limitation of liability

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 US is not a party to the Convention on Limitation of Liability for Maritime Claims 1976.

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.

12 In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

As noted above, 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.

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 (claims 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.

Port state control

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.

15 What sanctions may the port state control inspector impose?

The Coast Guard of the Department of Justice and other federal agencies 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 environmental cases that the government pursues. The Coast Guard can also deny entry or expel ships from port. 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.

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.

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 US. The list of approved classification societies is posted on the Coast Guard's website at www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/Alternate%20Compliance%20Program/ClassSocietyAuths.pdf?ver=2017-10-18-091452-957. 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 at www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Commercial-Regulations-standards-CG-5PS/Office-of-Standards-Evaluation-and-Development/US-Coast-Guard-Regulatory-Development-Program-RDP-/Alternate-Compliance-Program/.

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.

Collision, salvage, wreck removal and pollution

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.

20 Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The US does not frequently adopt international conventions, and 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 and the International Convention on Salvage, and the International Convention for the Prevention of Pollution from Ships 1989 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 discharge of ballast water into the waters of the US.

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.

Ship arrest

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 US, actions involving ship arrests are governed under substantive federal law and the Federal Rules of Civil Procedure.

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.

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. Various claims giving rise to maritime liens are identified in question 48.

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.

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.

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.

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 (P&I) 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 appraisalment'. 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.

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 document need be provided to the court in the event of a ship arrest in the US. 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 US 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.

30 Who is responsible for the maintenance of the vessel while under arrest?

Arrest of a vessel is effected 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.

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.

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 US. State courts will also have pre-judgment attachment regimes, including some specifically in support of arbitration or international arbitration.

33 Are orders for delivery up or preservation of evidence or property available?

These are injunctive remedies that are not generally available in the US. 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.

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.

Judicial sale of vessels

35 Who can apply for judicial sale of an arrested vessel?

Any party to the action, the Marshal or the custodian may apply for 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.

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 be involved too, 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 sale of the vessel.

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;
- maritime tort liens;
- salvage and general average claims;
- 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.

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.

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.

40 Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Carriage of goods by sea and bills of lading

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 US 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.

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 United States 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.

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.

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

Update and trends

A notable trend in the maritime industry is the resort by shipowners to US bankruptcy courts, either by domestic bankruptcy proceedings (Chapter 11) and proceedings in aid of a foreign main proceeding (Chapter 15). Maritime lien cases arising from the collapse of OW Bunkers continue to wend their way through the US federal trial and appellate courts, and are clarifying the law with respect to bunker supply specifically and maritime liens for necessities more generally. Environmental issues, particularly related to ballast water discharge and 'magic pipe' discharge, can be expected to continue to develop.

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'.

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.

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.

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.

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 necessities;
- maritime tort liens for personal injury, death and collision;
- claims for cargo loss or damage;
- claims for unpaid freight and demurrage; and
- pollution claims.

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 presentation of 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.

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'.

Shipping emissions

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.

See www.epa.gov/regulations-emissions-vehicles-and-engines/designation-north-american-emission-control-area-marine.

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?

Ships may not use fuel oil with a sulphur content greater than 0.1 per cent fuel sulphur from 1 January 2015. 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.

Ship recycling

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, PCBs, bilge-water 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 US.

Jurisdiction and dispute resolution

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).

55 In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The US 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.

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 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.

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 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.

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. In the absence of unconscionability, of which asymmetry is a consideration, such agreements are enforceable.

59 What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Under the laws of the US, 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.

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 foreign arbitration or venue provision. In particular, the US Federal Arbitration Act provides a well-developed body of law for the enforcement of domestic and foreign agreements to arbitrate.

Limitation periods for liability

61 What time limits apply to claims? Is it possible to extend the time limit by agreement?

Under general maritime law, there are no strict statutes of limitation and the doctrine of laches applies. However, courts will 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, such as the one-year limitations period under COGSA, and personal injury claims generally must be brought within three years.

62 May courts or arbitral tribunals extend the time limits?

In some cases, limitations periods can be extended.

Miscellaneous

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.

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 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.

65 Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

While maritime creditors' rights are described above, recently there has been an upturn in the number of bankruptcy proceedings brought by shipping companies in the US and often bankruptcy law and maritime law come into conflict. Maritime lien claimants, whether by virtue of possession 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.

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