

Shipping 2022

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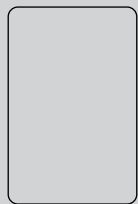
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Shipping

2022

Contributing editors**Kevin Cooper and Nico Saunders****MFB Solicitors**

Lexology Getting The Deal Through is delighted to publish the 14th edition of *Shipping*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 chapter on India.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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 editors, Kevin Cooper and Nico Saunders of MFB Solicitors, for their continued assistance with this volume.



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United States

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NEWBUILDING CONTRACTS

Transfer of title

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

Title in the vessel typically passes when the shipbuilder delivers the ship and the shipowner accepts delivery, depending on the terms of the contract and the law of the state where the vessel is being constructed. Construction contracts are state law contracts. The parties can negotiate when title transfers to the buyer, and contracts may reflect title in a partially constructed vessel passing to the buyer based on construction milestones. In some jurisdictions, title insurance may also be obtained based on construction milestones.

Refund guarantee

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

Shipbuilding contracts are not maritime contracts and are governed by state law. Refund guarantees are, similarly, state law contracts and typically issued by the builder's bank, the parent or some other guarantor. Formalities will vary according to state law and are a matter of contract and state law.

We note that banks in the United States are generally prohibited from guaranteeing performance by other parties. As such, shipbuilding contracts in the United States will sometimes include alternatives to bank refund guarantees, such as parent company performance guarantees.

Court-ordered delivery

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

Again, because shipbuilding contracts are not maritime contracts and are subject to state law (including the Uniform Commercial Code (UCC)), remedies would depend on the contract's choice of law provision or the law of the state where the contract is performed. A buyer may have a right to seek the equitable relief of specific performance of the contract if the vessel is unique or has been identified to the contract under the UCC.

A shipbuilding contract may also provide a contractual right for a buyer to take delivery of an unfinished vessel following a shipyard default and complete construction at an alternate shipyard.

Defects

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

Claims for defects in vessel construction are typically state law claims brought under the UCC or the construction contract's warranty provisions, or both. Product liability claims arise when injury is caused to a third party by a defective product placed into the stream of commerce, and are largely irrelevant to warranty claims.

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

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

As defined in section 3 of Title 1 of the US Code, the word 'vessel' includes 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water'. Recent interpretations of that expression by the United States Supreme Court have injected an element of uncertainty into what legal practitioners once thought was a well-settled area of law, but the prevailing view is that, for these purposes, the definition includes offshore drilling rigs and mobile offshore drilling units.

Any vessel of at least five net tons not documented under the laws of a foreign country is eligible for registration with the National Vessel Documentation Center (NVDC), provided it is owned by a citizen of the United States. Federal documentation of a vessel allows the vessel to fly the US flag and makes it eligible to become subject to a 'preferred mortgage', which is generally considered to entitle the mortgagee to superior treatment compared with state-titled vessels.

One can apply for documentation while a vessel is under construction 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?

A US-flagged vessel must be owned by a US citizen to be documented with the NVDC. However, there are different levels of citizenship with respect to certain entities and for certain trades (eg, a corporation seeking to register a vessel must be formed under the laws of the United States or a state thereof, its chief executive officer must be a US citizen, no more of its directors may be non-citizens than a minority of the number needed to constitute a quorum of the board, but the shareholders need not be US citizens). If the vessel is intended to be used in

the US coastwise trade (or the American fisheries trade), the corporation must be at least 75 per cent owned by US citizens. The complete rules and procedures for determining when an entity (as opposed to an individual) is a US citizen are voluminous and the foregoing is a mere example. A full analysis is beyond the scope of this summary and each case must be looked at thoroughly and independently.

Documentary requirements

7 | What are the documentary requirements for registration?

Evidence of US citizenship, title, build, tonnage and dimensions, and a designated managing owner, vessel name and hailing port must be filed with the NVDC, together with the required fees.

Dual registration

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

Dual registration is not permitted. Flagging out is possible but may require governmental approval. Most US-based owners register their vessels with various open registries rather than under the US flag.

Mortgage register

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

The register of ship mortgages is maintained by the NVDC. Abstracts of title obtained from the NVDC will show the builder, previous owners, mortgages, notices of lien claims and judicial sales.

LIMITATION OF LIABILITY

Regime

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

The Limitation of Liability Act was passed in 1851 to encourage investment in shipping. Under this Act, vessel owners (including demise charterers) may limit liability to the value of the vessel and pending freight in certain circumstances where the loss occurred without the privity or knowledge of the owner.

The act provides for limitation to apply in a wide variety of claims, but there are limits to limitation in cases of personal injury and death, pollution liabilities, wage claims and others. Limitation may apply to claims brought by the US government. Limitation is generally not favoured by the courts. The United States is not a party to the Convention on Limitation of Liability for Maritime Claims 1976.

Procedure

11 | What is the procedure for establishing limitation?

A limitation proceeding is commenced under Rule F of the Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the Supplemental Rules) and creates not only a limitation proceeding, but also a concursus of claims where all claims are marshalled into one proceeding. The limitation proceeding must be commenced within six months of the owner being given adequate written notice of a claim, whether or not a claimant has initiated a legal proceeding. The limitation proceeding may be commenced prior to the owner being given notice of a claim. The loss must have occurred without the privity or knowledge of the owner to successfully limit liability. To commence the proceeding, the owner must deposit with the court a sum equal to the value of the owner's

interest in the vessel and its pending freight (or security therefor), together with such sums as the court may deem necessary to carry out the provisions of the act.

Break of limitation

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

Limitation is generally not favoured by the courts and can be broken if the loss is deemed to have occurred with the privity or knowledge of the owner. With today's communications, where owners and their vessels are in near-constant contact and managerial oversight it is not difficult for a court to find that privity or knowledge existed at the time of the loss. With respect to certain seagoing vessels, privity based on the knowledge of its superintendent or managing agent at or before the beginning of the voyage is imputed to the owner in cases of personal injury and death (46 USC section 30506(e)). With respect to such vessels, US\$420 per gross ton is set aside for such claims, even in the event the vessel is a total loss.

Notwithstanding denial of limitation, the court may in certain circumstances proceed to judgment on the claimants' claims. While there is a dearth of authority on the point, if limitation is denied, an established limitation fund would likely be returned to the owner unless otherwise attached.

Passenger and luggage claims

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

Under the Limitation Act, claims against a ship or its owner for cargo loss, personal injury and death that are subject to limitation:

[Are] those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel [. . .] any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner).

Moreover, under the Limitation Act, a shipowner may not limit liability for negligence to passengers.

The US has not acceded to or ratified the Athens Convention on the Carriage of Passengers and their Luggage by Sea.

PORT STATE CONTROL

Authorities

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

The US Coast Guard is responsible for port state control and vigorously implements port state control initiatives on vessels trading in US ports.

Sanctions

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

The Coast Guard is authorised to conduct examinations and enforce compliance with laws and regulations within its jurisdiction and to detain vessels or deny entry to US territorial waters for vessels operating outside of acceptable standards. Vessels may be required to post a bond or letter of undertaking covering the amount of the penalty to gain entry to a US port or obtain clearance to depart, or as security for possible fines.

The Coast Guard may issue civil penalties for deficiencies, and it also may conduct criminal investigations separately or in coordination with other federal agencies such as the Department of Justice and the

Environmental Protection Agency. These bodies may issue fines and other sanctions, including in some circumstances criminal prosecution, for violations of security and environmental regulations. Sanctions are frequently issued in the environmental area and are common in 'magic pipe' and other cases that the government pursues.

Appeal

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

Port state control actions may be challenged in writing or at a hearing, and an appeal can be lodged with the appropriate US district court. This is a common occurrence.

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

Full members of the International Association of Classification Societies or other classification societies approved by the Coast Guard may survey or certify the construction, repair or alteration of a vessel in the United States. The authorisations issued by the Coast Guard for each of the following classification societies can be found on the US Coast Guard's website:

- American Bureau of Shipping (ABS);
- ClassNK (NKK);
- Det Norske Veritas (DNV);
- Germanischer Lloyd (GL);
- Lloyd's Register (LR);
- DNV GL;
- Bureau Veritas (BV); and
- RINA.

In addition, the Coast Guard has entered into agreements with certain classification societies that are approved under its Alternate Compliance Program to delegate certain inspection functions to the classification society. Information about the Alternate Compliance Program is available on the Coast Guard's website.

Liability

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

A classification society is not liable to a shipowner for negligently performing its classification services. Third parties, such as vessel purchasers, may sue a classification society for negligent misrepresentation, but such claims rarely succeed.

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

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

The owner, lessee or operator of a wrecked vessel located in navigable waters has strict duties under federal law to mark and then promptly remove the wreck. Civil and criminal liability can result from failure to do so. Failure to do so in a timely manner may also result in the abandonment of the wreck, in which case the US government would assume responsibility for marking and removal and may then seek reimbursement from the owner, lessee or operator under the federal Wreck Removal Act.

International conventions

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

The United States has not adopted the 1910 Collision Convention or the Nairobi International Convention on the Removal of Wrecks 2007, although the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS), International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Salvage, and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL) have been adopted in whole or in part by the US. The US is a signatory but not a contracting party to the International Convention on Civil Liability for Oil Pollution Damage. Ballast water management in the US is subject to federal and state regulation and the US is not a signatory or contracting party to the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004. Coordination between US regulation and implementation of the Ballast Water Convention, which entered into force in September 2017, is thus an unsettled area. Vessels are required to comply with federal regulations concerning the discharge of ballast water into the waters of the United States.

Salvage

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

There is no mandatory form of salvage agreement. The standard Lloyd's Open Form is often used and local salvors may have their own forms containing local or foreign arbitration clauses. US courts will not enforce arbitration provisions in salvage agreements providing for foreign arbitration (such as the Lloyd's standard form) for purely domestic salvage. The Society of Maritime Arbitrators Inc has promulgated a salvage form (US Open Form Salvage Agreement or MARSALV) that provides for arbitration in the US and is frequently used with respect to salvage of recreational vessels in the US. Salvage operations may be carried out by any person or company and salvage awards may be issued depending on the order of salvage. Salvors have possessory liens on salvaged vessels.

SHIP ARREST

International conventions

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

The US is not a signatory to international conventions with respect to ship arrest. In the United States, actions involving ship arrests are governed under substantive federal law and the Federal Rules of Civil Procedure.

Claims

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

Maritime lien creditors and those with statutory rights may enforce their rights in rem against a vessel. Such arrested vessels are governed by Rule C of the Supplemental Rules, which provides that a vessel may be arrested to enforce any maritime lien or where a statute provides for in rem proceedings. There is no associated or sister ship arrest regime in

the US. However, property of the defendant may be attached under Rule B of the Supplemental Rules and, where the defendant owns a vessel and if the requirements of Rule B are met, that vessel may be seized. Under the US statutory regime governing maritime liens, officers or agents appointed by a bareboat or time charterer are presumed to have authority to procure necessities for a vessel, such that a maritime lien for necessities may arise against the vessel and render it subject to arrest to enforce the lien.

Maritime liens

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

Federal law recognises maritime liens. Maritime liens may arise from damage arising out of maritime tort, stevedore's wages and seamen's compensation claims, general average, salvage and the supply of necessities.

Wrongful arrest

25 | What is the test for wrongful arrest?

An arrest can be held to be wrongful if made in bad faith, with malice or with gross negligence.

Bunker suppliers

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

A bunker supplier's claim is the classic maritime lien for necessities. A supplier of necessities must provide them on the order of the owner or a person authorised by the owner and the supplier must rely on the credit of the vessel (reliance is presumed) and will be entitled to a maritime lien unless it has actual notice of a 'no lien' clause in the charter. Vessels are routinely arrested to enforce bunker suppliers' maritime liens and many ship mortgage foreclosures are commenced by such suppliers rather than mortgagee banks. There has been considerable litigation in the US, in particular arising out of the collapse of the OW Bunkers complex of entities, concerning competing maritime lien claims between contract suppliers of bunkers and physical suppliers.

Security

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

Initially, security is not required for a vessel arrest. The US Marshals Service, however, will require a deposit of sufficient funds to cover anticipated custodial costs before arresting a vessel, which vary based on the characteristics of the vessel and other circumstances. In addition, under Rule E of the Supplemental Rules, the court may require security in the form of a sufficient amount to pay all costs and expenses that may be awarded against a party. If the vessel owner asserts a counterclaim, the court will require that counter-security be provided under Rule E(7). Rule E mandates that security be in the form of a bond or other suitable security.

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

Security may be posted to release the vessel from arrest. It is common for the parties to agree upon the amount and the form, which is frequently a protection and indemnity club letter of undertaking, sometimes posted by agreement in advance to avoid arrest altogether. Rule E governs the process. In distressed situations, as numerous claimants intervene, the posting of security can become problematic and unlikely. The security shall provide for the payment of the principal sum plus interest at 6 per cent per year. The court may reduce or increase the amount of security as required.

When a ship is arrested or attached, the only way to release that ship with respect to the specific charge that gave rise to the arrest is through a special bond. The amount of security posted in a specific bond may not exceed the value of the ship. The special bond requires the shipowner (or anyone else who may have an interest in the ship) to post a security that is either agreed upon by the parties or, if no agreement could be reached, established by the court. Rule E provides that the principal sum of the bond or stipulation will be set at an amount high enough to cover the amount of the plaintiff's claim together with accrued interest and costs, but not to exceed the lower of twice the amount of the plaintiff's claim or the value of the arrested property on 'due 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.

Formalities

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

No power of attorney or other such formal documents need be provided to the court in the event of a ship arrest in the United States. Court papers to be filed in a ship arrest action include a verified complaint against the ship in rem (and usually against its owner in personam as well), a summons to be issued by the court, a warrant of maritime arrest and a memorandum of law setting forth the reasons why the warrant should be issued by the court. The only formality is that the complaint must be verified (ie, sworn to). It is the best practice to have the client, which is often a company located overseas, review and verify the complaint before a notary public. However, with the exigencies of ship arrest, frequently there is no time to accomplish this before the arrest. Accordingly, local counsel will often verify the complaint, stating that the verification is made by an attorney because the plaintiff is a corporation located overseas. Scanned and copied documents will suffice to support the complaint; originals are not required, at least in the first instance. In many federal courts in the United States at this time, court papers can be filed electronically. However, not all districts permit the electronic filing of the initial papers commencing an action (eg, the complaint). Although not recommended, arrest papers are frequently drafted and filed within the space of a single day. More advance notice, obviously, makes the arrest attorneys' jobs easier. The US is a signatory to the Apostille Convention.

Ship maintenance

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

An arrest of a vessel is performed by the US Marshals Service, but the marshal rarely tends to the vessel much beyond the initial arrest. An order approving a substitute custodian is usually obtained at the same time as the arrest. The substitute custodian (or the marshal, if no substitute is appointed) will care for the vessel while in custody and its expenses will be given the highest priority in the rank and priority of lien claims.

Proceedings on the merits

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

Attachment of property in aid of a foreign proceeding may be obtained under Rule B.

Injunctions and other forms of attachment

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

Maritime attachment is available under Rule B where a plaintiff has a maritime claim (not necessarily a lien claim) and such a plaintiff can bring an action to attach property of the defendant, provided the defendant is not found within the federal judicial district where the property is located for jurisdictional and service of process purposes. Rule D can be used by an owner to repossess a vessel. Freezing or *Mareva*-type injunctions are not available in the United States. State courts will also have pre-judgment attachment regimes, including some specifically in support of arbitration or international arbitration.

Delivery up and preservation orders

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

These are injunctive remedies that are not generally available in the United States. Parties to litigation will be required to preserve evidence under common law and procedural rules. The seized vessel or assets will be preserved pursuant to order while the litigation is pending.

Bunker arrest and attachment

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

Bunkers and other assets may be attached or arrested under Rules B and C. Under Rule B, bunkers or any other property of the defendant can be attached to secure a maritime claim when a defendant is not present in the federal district where the bunkers are found. The defendant must have title to the bunkers or other property in order for the bunkers to be subject to attachment.

JUDICIAL SALE OF VESSELS

Eligible applicants

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

Any party to the action, the Marshal or the custodian may apply for the sale of the vessel. As a practical matter, it is usually the mortgagee bank or the single largest creditor that moves to have the vessel sold.

Procedure

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

A party usually makes a motion for interlocutory sale of the vessel near the commencement of the action because the vessel is a wasting asset. Notice of the action and arrest of the vessel, as well as notice of the motion for interlocutory sale, is given pursuant to statutory authority. Although a broker may be involved pursuant to court order, the vessel sale is conducted by the US marshal, usually in the courthouse lobby. The court will later confirm the sale, at which point the vessel is delivered to the buyer free and clear of liens.

Although the length of time required to conduct a motion for interlocutory sale varies from jurisdiction to jurisdiction within the US, on average the time from making the motion through to the sale of the vessel is about two months. The marshal will charge poundage in the amount of 3 per cent of the first US\$1,000 of proceeds and 1.5 per cent of proceeds above that amount, and brokerage commission may also be involved if a broker is utilised. The proceeds of the sale of the vessel are paid into the registry of the court and distributed according to the rank and priority of liens subsequent to the confirmation of the sale of the vessel.

Claim priority

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

While rank and priority of liens varies from jurisdiction to jurisdiction, the general order of priority is as follows:

- expenses, fees and costs allowed by the court, including those incurred while the vessel is in custody;
- wages of vessel crew;
- maritime liens arising before a preferred mortgage was filed;
- salvage and general average claims;
- maritime tort liens;
- preferred mortgage liens on US-flagged vessels;
- liens for necessities;
- preferred mortgage liens on foreign-flagged vessels;
- general maritime contract liens;
- claims on non-maritime liens; and
- non-lien maritime claims.

Where liens accrue at different times, the general rule is that liens that arrive last in time take precedence. In practice, in distressed situations, any claimant coming after the mortgagee is unlikely to recover.

Legal effects

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

An Admiralty sale of a vessel is an in rem proceeding that completely extinguishes all prior liens and encumbrances on the vessel.

Foreign sales

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

US Admiralty courts will recognise foreign Admiralty sales of vessels provided the court conducting the sale had jurisdiction over the vessel and due process occurred.

International conventions

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

International conventions

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

The United States applies a version of the Hague Rules through the Carriage of Goods by Sea Act (COGSA) as well as the Harter Act. The US also signed the Rotterdam Rules, which are not yet ratified. COGSA has been in place for generations and provides a reasonable and predictable cargo loss and damage liability regime. COGSA applies 'tackle to tackle' but the period it covers is frequently extended by clauses in bills of lading.

Multimodal carriage

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

The US Supreme Court has held that a through bill of lading is a maritime contract even for those portions (in that case, the rail portion) of the transportation services that take place on land. There are other cargo liability regimes covering rail and truck transportation that, at times, conflict with COGSA and that may affect the carrier's liability for the times the cargo is not aboard a vessel.

Title to sue

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

A real party in interest may bring a suit under a bill of lading, and cargo claims are frequently brought by shippers and their subrogated insurers under bills of lading.

Charter parties

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

The terms of a charter party can be incorporated into a bill of lading, provided it is clearly done on the face of the bill of lading.

Foreign forum selection clauses and foreign arbitration clauses found in incorporated charter parties are enforced if the charter party is properly incorporated in the bill of lading. To enforce an arbitration clause against a third-party holder, a bill of lading should specifically identify the charter party and clearly incorporate the arbitration clause. A party seeking to avoid enforcement of a foreign arbitration or forum selection clause has the burden of proving a likelihood that 'the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees'.

Demise and identity of carrier clauses

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

COGSA states that any bill of lading clause will be 'null and void' if it relieves the carrier or the ship from liability for loss of, or damage to or in connection with, the goods. There is conflicting authority in this area; agency principles are sometimes applied to resolve the issue and commentators have stated that clauses in a charter party that identify the carrier or that apportion the losses incurred to third parties should not control the ability of the third party to recover, but there is no reason why they should not be given effect as between the charterer and the owner.

Shipowner liability and defences

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

The shipowner may not be liable under COGSA if it is not the contractual carrier. However, the ship itself will be liable in rem for having carried the cargo and ratified the terms of the bill of lading.

Deviation from route

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

COGSA provides that carriers are not liable for losses resulting from reasonable deviations, and although the decisions are inconsistent, some courts have held that unreasonable deviations deprive the carrier of the right to assert certain COGSA defences, such as the package limitation.

Liens

48 | What liens can be exercised?

Characteristic maritime liens recognised under US law include:

- wages of a ship's master and crew;
- salvage;
- general average;
- breach of charter party;
- ship mortgages, both US and foreign flag;
- contract liens, such as contracts for repairs, supplies, towage, pilotage and a wide variety of 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.

Delivery without bill of lading

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

A carrier that delivers the cargo without presenting an original, negotiable bill of lading can be liable to the holder of the original bill of lading. In most circumstances, the owner will demand a letter of indemnity in cases where the original bills are not presented.

Shipper responsibilities and liabilities

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

Under COGSA, the shipper is responsible for proper marks, number, quantity and weight of the cargo, and must indemnify the carrier 'against all loss, damages and expenses arising or resulting from inaccuracies in such particulars'.

SHIPPING EMISSIONS

Emission control areas

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

ECAs exist along certain areas of the US coast and other waters, in general up to 200 nautical miles from the coast.

Sulphur cap

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

A global cap of a global 0.5 per cent m/m of sulfur content was instituted by the International Maritime Organization and went into effect on 1 January 2020. Ships operating in ECAs (which include certain US waters) must meet a stricter standard of 0.1 per cent fuel sulphur. There are some limited opportunities for waivers and exemptions, the use of which is strictly scrutinised. Violation of these requirements can result in civil or criminal penalties and fines.

Discharge of wastewater from scrubbers is regulated by individual US states, some of which have discharge prohibitions or ban scrubbers entirely.

SHIP RECYCLING

Regulation and facilities

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

There are no regulations specific to ship recycling. Instead, federal and other regulations apply to the various processes in ship recycling, such as removal of asbestos, polychlorinated biphenyls (PCBs), bilge and ballast water, paint, scrap metal and oil. The US Environmental Protection Agency publication *A Guide for Ship Scrappers: Tips for Regulatory Compliance (2000)* is a frequently referenced summary. There are several ship recycling facilities in the United States.

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

US federal courts possess subject matter jurisdiction over maritime matters. The state and federal courts have concurrent jurisdiction over many matters not specifically in admiralty, and personal injury claims are often brought in state court. However, certain claims are only cognisable in admiralty and must be brought in federal courts (eg, ship mortgage foreclosures, vessel arrests and Rule B attachments).

Service of proceedings

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

The United States is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Also, federal procedural rules and state court rules will set forth how personal service may be accomplished in a jurisdiction outside of where the matter is proceeding. Frequently, this will involve service in one state pursuant to the rules of the forum state. There are also substituted service rules that permit service, for instance, upon a state's secretary of state in certain circumstances. The rules vary from state to state.

Arbitration

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

The relevant arbitral body is the Society of Maritime Arbitrators (SMA) in New York. Houston and Miami also are looking to become centres of maritime arbitration. Many charters specifying arbitration in New York are ad hoc and do not require that arbitrators be members of any specific arbitral body.

The SMA provides only limited administration of arbitrations, which generally proceed autonomously under rules promulgated by the SMA. The SMA is very active in promoting maritime arbitration in the US, maintaining its roster of arbitrators and publishing panel awards, which are available on the LEXIS and Westlaw services.

Foreign judgments and arbitral awards

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

Many states have laws allowing the courts to enforce foreign money judgments through the adoption of the Uniform Foreign-Country Money Judgments Recognition Act. In addition, foreign maritime arbitration awards are frequently enforced under the New York Convention, which is codified as part of the Federal Arbitration Act.

Asymmetric agreements

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

Asymmetric arbitration agreements are not per se invalid but may be subject to judicial scrutiny for unconscionability, particularly arbitration agreements in consumer and employment relationships. Generally, in the absence of unconscionability, of which asymmetry is a consideration, such agreements are enforceable.

Breach of jurisdiction clause

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

Under the laws of the United States, jurisdictional clauses are enforced unless unreasonable. In appropriate circumstances, a US court may issue an anti-suit injunction, binding on the parties before it, to restrain a foreign proceeding.

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

A defendant may bring a motion to stay or dismiss an action brought in violation of a clause specifying that a foreign court or arbitral tribunal should have jurisdiction or venue of the matter. In particular, the US Federal Arbitration Act provides a well-developed body of law for the enforcement of domestic and foreign agreements to arbitrate.

LIMITATION PERIODS FOR LIABILITY

Time limits

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

Under general maritime law, there are 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. The Carriage of Goods by Sea Act contains a one-year limitations period, there is a two-year period for salvage claims, and personal injury claims generally must be brought within three years. In addition, with respect to passenger claims, carriers by sea may impose a contractual limitation period of no less than one year to file suit from the date of injury or death.

Court-ordered extension

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

In some cases, limitations periods can be extended.

MISCELLANEOUS

Maritime Labour Convention

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

The US has not ratified the Maritime Labour Convention (MLC). However, because US-flagged vessels that are unable to demonstrate compliance with the MLC may be subject to port state control actions when engaged on international voyages to countries that have ratified the MLC, the US Coast Guard has established a voluntary inspection programme for vessel-owners and operators who wish to document compliance with the MLC, with particular focus on US-flagged vessels that operate on international routes to ports of countries that are parties to the MLC.

Relief from contractual obligations

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

In general, maritime contract claims, as with other contract claims, are not construed such that one party, in the absence of an applicable force majeure or an 'impossibility' clause, can claim that it is relieved of its obligations under that contract due to a change of economic circumstances. In fact, the majority of arbitration awards and court cases reflect the commercial reality that arbitrators and courts disfavour contract parties who seek to avoid their obligations due to market conditions. Force majeure provisions, in addition, are strictly construed and

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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.

Other noteworthy points

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

Recently there has been an upturn in the number of bankruptcy proceedings brought by shipping companies in the United States and often bankruptcy law and maritime law come into conflict. Maritime lien claimants, whether by virtue of 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.

UPDATE AND TRENDS

Key developments of the past year

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

We have seen a distinct uptick in shipping companies seeking advice in the area of international sanctions, particularly with respect to Iran and Venezuela. This has been an active area of regulation and enforcement, and this focus is expected to continue. Environmental, social and governance (ESG) criteria have been an area of interest in the investing community, and many shipowners are making strategic decisions to meet the growing demands for ESG-compliant investment opportunities. Offshore wind farm projects represent another area of focus. The discontinuance of Libor remains on track for the end of 2021, albeit with a softened deadline. Libor's impending sunset will have a major impact on market participants reliant on Libor-based bank debt. Libor will likely be replaced with SOFR, and many legacy financial instruments will need to be amended, possibly including relevant ship mortgages.

Coronavirus

67 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In response to the coronavirus pandemic and to protect the public, cruise ship passengers, crews and other industry workers, the United States Centers for Disease Control and Prevention (CDC) imposed a no sail order on 14 March 2020, which was modified to a conditional sailing order on 30 October 2020. Most recently, on 2 April 2021, the CDC released a new phase of the Framework for Conditional Sailing Order for cruise ships operating or seeking to operate in US waters, along with the technical instructions for cruise ship operators and for local health authorities outlining this phase of the conditional sailing order. The Framework is expected to be further modified in light of industry feedback and changing pandemic conditions.

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