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Shipping

Contributing Editors
Yoav Harris and John Harris
Harris & Co Shipping & Maritime Law Office

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INTRODUCTION

Contributed by: *Yoav Harris and John Harris,* ***Harris & Co Shipping & Maritime Law Office***

The WHO Director General's opening remark on the mission briefing on COVID-19, on 12 March 2020, that "the global COVID-19 can now be described as a pandemic" was in fact a formal announcement reflecting a global health economic and political crisis, which is still pending, even after more than a year.

On that date, the reports of the Ministry of Health of the People's Republic of China reporting 7,711 confirmed and 12,167 suspected cases and the WHO's reports of "83 cases in 18 countries, of these only 7 had no history of travel in China" seems somewhat naïve, when currently the world is facing 4.7 million new cases a week and a cumulative total of 93 million reported cases, with over two million deaths globally since the start of the pandemic (WHO's weekly report on 19 January 2021).

One of the symbols of the outbreak of the pandemic was the quarantining of the cruise ship Diamond Princess on 4 February 2020 at the Port of Yokohama, Japan, after one of its passengers, who disembarked in Hong Kong on January 25th, was found six days later to have tested positive for COVID-19. When the vessel arrived in Japanese territorial waters a few days later, ten passengers were diagnosed with COVID-19. As of March 16th, 712 of the 3,711 passengers and crew were found to have tested positive with the virus. On May 16th, the Diamond Princess departed the Port of Yokohoma. On November 2nd, Carnival Corporation & Plc (the owners, through its subsidiary Princess Cruises, of the Diamond Princess) issued a formal notice of the extension of the pause of its North American operations and the cancellation of the remaining voyages which were scheduled to depart during December 2020.

The outbreak of the pandemic was also notable in the fall of demand for oil in the first months of 2020, which led both to a fall in the price of the oil and to a shortage of storage areas, with no empty space to store all of the oil which was produced, given no demand. The result was tankers turning into floating storage facilities.

According to the United Nations Conference on Trade and Development (UNCTAD), reports based on data provided by "Marine Traffic" (https://unctad.org/news-search) soon after the date of the WHO's characterisation of COVID-19 as a pandemic in mid-March 2020, container ships' arrival started to fall below 2019 levels. Recovery was recorded only towards the end of June 2020, corresponding with the easing of lockdowns in some countries.

One outcome of vessels navigating and calling at ports during a global pandemic, and with governmental restrictions on the entry, embarking and calling at their countries, was the crew-change crisis. According to the International Transport Workers' Federation's (ITF) statement of 17 July 2020, based on extrapolating the latest data from ITF-covered ships, the number of seafarers world-wide trapped working aboard ships due to governments' COVID-19 border and travel restrictions was estimated at 300,000 and an equal number of unemployed seafarers were waiting to replace them on those ships, which means that 600,000 seafarers were thus affected by the pandemic.

As can be evidenced for example by the wording of Article IV clauses 2 (d), (g) and (h) of the Hague-Visby Rules, an "Act of God", "Arrest or restraint of princes, rulers or people, or seizure under legal process" and "Quarantine restrictions" were not first introduced in the current COVID-19 pandemic crisis. These kinds of restrictions have been imposed upon shipping and vessels for ages. Carver's Carriage of Goods by Sea, by Thomas Gilbert Carver, presents the early example of Miller vs Law Accident Insurance [1903] when a discharge of diseased cattle was forbidden by the Buenos Aires authorities and, on the following day, the ministry issued a general order forbidding the discharge of any cattle arriving from the United Kingdom. The ship therefore left the dock at Buenos Aires with the cattle and they were trans-shipped outside the port and landed in Montevideo. It was held that the loss of the voyage to Buenos Aires was by "restraint of people".

In fact, as explained by Joe Schwarcz PhD (on www.mcgill.ca on 6 February 2020), the term "quarantine" derives from "*quaranta giorni*", meaning 40 days, and can be traced back to the 14th century when, as an act of protection against the spreading of the Great Plague (also referred as the Black Death) which at that time had devastated Europe, the city of Dubrovnik ordered that all ships and people had to be isolated for 40 days before entering the city.

The words "*force majeure*" appear in Article 1148 of the Code Napoleon, which provides: "There is no occasion for damages where, in consequence of *force majeure* or cas fortuit, the debtor has been prevented from conveying or doing that to which he was obliged or has done what he was debarred from doing". Accordingly, in the year 1934, when a French vendor who contracted to deliver wine "by the end of February" found on the last days of that month, when attempting to deliver the wine, that all the roads were impassable due to flooding, he received the French Court's protection which excused him from per-

Contributed by: *Yoav Harris and John Harris,* ***Harris & Co Shipping & Maritime Law Office***

formance of his obligation (Force Majeure and Frustration of Contract, page 7, by Ewan Mckendrick).

In contrast to the French concept of *force majeure*, it seems that the only possibility available under English law permitting the non-performance of contractual obligation is the concept of "frustration", applicable when the performance would render the obligation radically different from that for which it was originally contracted. The "frustration" relates more to occurrences which were not foreseeable at the time of conclusion of the contract, whilst *force majeure* circumstances are capable of being foreseen and allow the parties to suspend performance until the *force majeure* circumstances have passed; the English concept of frustration is more limited to the giving rise to an immediate termination of the contract.

English law recognises that, if the contracting parties have agreed that extraneous circumstances, not under the control of the parties, allow the suspension and even cancellation of the contract, such a contractual understanding should be enforced. It seems, therefore, that the English law "*force majeure*" is not a pure English law legal concept, but rather the giving of effect to contractual undertakings of the parties.

The foregoing can be illustrated, for example, in Arbitration 2/19, when a loading ship was required by the Mississippi Port authority to leave the terminal due to an approaching hurricane and to be anchored in an anchorage area. It was held that the ship was not compelled to leave the terminal because of the hurricane itself, but rather due to an anticipation of the hurricane and the need to "catch" an anchorage spot, with the result that the ship indeed "caught" the last anchorage. The matter was not recognised as a *force majeure* and, allegedly, the charterers would have had to pay demurrage for the delay in the loading operations. However, in that matter, due to an additional clause in the agreement, which stated that if the ship was delayed for any reason whatsoever not under the control of the charterers, the "lost time" would be on the account of the charterers, the owners' claim for demurrage was denied.

In another matter, also relating to the Mississippi river and a hurricane, a ship presented for loading a cargo of soya which was held in barges ready for loading was damaged by the storm and it took 15 days until the ship was righted. The cargo of soya was damaged, too, and the charterers could not provide an alternative cargo. The charterers contended that the inability to load the cargo was an "Act of God", entitling them to rely on *force majeure*. It was held that, in the agreement, the cargo was described as "soya beans" and was not further specified as being the specific cargo which was damaged. Therefore, the charterers were obliged to provide an alternative cargo (instead of the one which was damaged) and were not entitled to cancel the agreement. As the agreement was, accordingly, unlawfully cancelled by the charterers, it was held that they should pay the owners damages of hundreds of thousands of US dollars (Arbitration 3/19). In the matter of Classic Maritime Inc vs Limbungan Makmur Sdn Bhd and Others, it was held that the fact that a protecting dam protecting an iron mine had collapsed and the mine had ceased activities did not release the charterers from their liability to supply iron pallets as cargo. It was held that the matter was not a matter of an "Act of God" or "accident of the mine" which would have excused the charterers. This was because the real reason that the charterers did not supply the iron pallets was because of their commercial dispute with another mine which could have provided them with the required pallets. The court held that the charterers should pay owners compensation of USD19.8 million.

Returning to the case of the French vendor, it seems that if his matter had been decided under English law he would have been obliged to deliver some wine other than that which he could not deliver due to the flooded roads, not to mention that it was only during the last days of February that he decided to start to fulfil his obligation, which he could have done earlier that month. Thus, it might have well been that under English law the matter would not have been considered to be a case of *force majeure*.

Besides the diversity and differences between the French concept of *force majeure* and the attitude of English law, another element should also be considered, which is the foreseeability.

Could it really be contended that, when a formal announcement of a global pandemic has been declared in mid-March 2020 and governmental regulations and restrictions have been published, quarantines, restraints and other events relating to the pandemic are unforeseeable?

Obviously, the matter of a cruise vessel such as the Diamond Princess which was "caught" by the virus during its voyage, is different from that of a ship-owner's, charterer's or cargo interest who were contracting after mid-March 2020 and from that of ship-owners who had begun their vessel's voyage being aware, for example, of the crew-change crisis and, having that awareness, should "properly man, equip, and supply the ship" (Hague-Visby Rules, Article III, clause 1 (b)).

In relation to knowledge of facts existing before the beginning of a voyage, reference can be made to another example presented in Carver's Carriage of Goods by Sea: a ship proceeded from Mombasa, a plague-contaminated port, to Naples, where she loaded lemons for carriage to London. At Marseilles, the ship was disinfected with sulphur in accordance with a decree of the French Government requiring disinfection owing to her having come from a plague-contaminated port. The lemons were dam-

aged by the sulphurous fumes. It was held that the damage to the cargo was not caused by the exception of "restraint of princess" (Ciampa vs British India S.N. Co. [1915]).

It seems, therefore, that the COVID-19 pandemic will contribute, or in fact does contribute, its part to the development of the legal concepts of *force Majeure* and frustration. However, just as it influences almost every aspect of day-to-day life, it seems that this virus also touches many aspects of shipping.

It can be shipyards and building, managing, manning, chartering, container vessels or bulk carriers, ports and governmental regulations or passengers and cruises that are affected. Relevant and updated clauses are drafted and implemented in the relevant agreements. Some commercial activities are set aside or placed on hold, and others are still maintaining their routes in navigating through these times of uncertainty. It is all happening now, in these days, and it is probable that there will be more interesting developments to come in the future.

INTRODUCTION

*Contributed by: Yoav Harris and John Harris, **Harris & Co Shipping & Maritime Law Office***

Harris & Co Shipping & Maritime Law Office has two experienced lawyers at its head, acquiring precedents in court judgments, professional articles, lectures and conferences. It follows English law and judgments of other foreign jurisdictions and uses these to strengthen its arguments and/or to contend with local judgments. Harris & Co has deep and wide legal knowledge, and with the clarity and sharpness of its written and verbal pleadings, demonstrates the highest quality of cross-examination, acting promptly in obtaining arrest orders and liens, within very short timeframes, and resolves never to concede, if the legal position so warrants, in order to protect clients' rights. The firm has extended its involvement in Supreme Court and Haifa Maritime Court precedents, the variety of maritime matters it handles and of its academic presence, both in publishing articles, lecturing, and contributing to international shipping and maritime law publications.

Contributing Editors

Yoav Harris graduated in 1999 summa cum laude from the law faculty of Haifa University and has served as a litigator, and later as a partner, in several leading law firms. In August 2018, Yoav Harris joined his father, John Harris, in Harris & Co, acting as the managing partner, representing the accumulation of 70 years of experience in maritime law and commercial litigation. Yoav Harris has been a guest lecturer at the International Law Forum of the Faculty of Law of the Hebrew University and covered the topics of the arbitrations taking place between Iran and Israel in regard to the Eilat-Ashkelon pipeline enterprise, and of the authority of the Haifa Maritime Court to act as a Prize Court and order on the confiscation of vessels breaching the marine blockade imposed by the State of Israel on the navigating of vessels to Gaza Shore.

John Harris is the firm's founding partner and has more than 45 years of experience. He is widely recognised for his skills and expertise in the area of shipping and maritime law (transportation) in Israel.

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BELGIUM

Law and Practice

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1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

Main Legislation

- the Judicial Code;
- as from 1 September 2020: the New Belgian Maritime Code (NBMC);
- the Act on Carriage over the Interior Waterways, of 1936 (in the process of being changed and incorporated in an additional chapter of the NBMC).

Common Maritime and Shipping Claims

- cargo claims;
- ship arrests;
- salvage claims;
- stevedoring-related claims;
- ships' agency claims;
- customs and excise claims;
- marine insurance claims;
- claims for defended marine investigations by way of court-appointed and marine-dedicated surveyors.

1.2 Port State Control

Belgium is a party to the Paris MoU on PSC. This is an agreement between 27 Maritime Authorities. This system of port state control applies in Belgium.

For more information, see www.parismou.org

The authorities in Belgium within the FOD Mobility and Transport is the specialised service of the Federal Public Service of Mobility and Transport in Port State Control in Antwerp (PSC).

The PSC's authorities and powers of inspection and control include:

- examination of the documents (see Annex 10 of the Paris MOU Memorandum);
- verification of the overall condition of the ship, in order to determine whether it complies with various Conventions;
- controls on compliance with on-board operational requirements.

The PSC has sanction to:

- stop the ship;
- detain the ship;
- restrict operations of the ship;
- order the ship to move; and
- indicate measures to be taken by the ship to be released from PSC sanctions.

The PSC's relationship to marine casualties such as grounding, pollution or wreck removal does not include specific powers in respect of such incidents; nevertheless, a marine incident of any nature will result in a PSC inspection. Any such inspection may then result in the aforementioned sanctions.

Other authorities can also investigate such incidents, for instance, the investigative authorities of the Federal Bureau for the Investigation of Maritime Accidents (FEBIMA) as per the EU Directive 2009/18, O.J, of 28 May 2009 (as adapted), for the purposes of collecting evidence in order to advise on how to avoid similar incidents in the future.

The FEBIMA has authority for marine casualties and incidents whenever at least one of the following criteria is met:

- a Belgian-flagged vessel was involved; or
- the casualty occurred within the Belgian territorial sea or Belgian internal waters; or
- a substantial Belgian interest was involved.

FEBIMA investigations include the hearing of witnesses. Those investigations may not be hampered. The FEBIMA can detain ships. It can arrest any objects involved in an incident. It may also destroy objects for public health and safety reasons. Removing any object involved in an incident without the permission of the FEBIMA is prohibited.

The Public Prosecutor may also investigate these incidents, in order to determine if a criminal offence has been committed.

A court surveyor appointed by a court may also conduct an investigation for the purpose of determining the facts, causes and circumstances of an incident for use in court proceedings. Court surveying proceedings are defended actions. All parties to the proceedings will be invited and may be present and represented at every investigative step the court surveyor undertakes. A Belgian court will instruct a Belgian court surveyor if the facts to be determined can usefully be determined in Belgium. This is the rule, even if the case on the merits is to be held in another jurisdiction.

1.3 Domestic Legislation Applicable to Ship Registration

The governmental authority handling the domestic registration of vessels is the *Directoraat-Generaal Scheepvaart* – the Belgian Ship Registration - Federal Public Service of Mobility and Transport, in the department of Belgian Ship registry, in Antwerp.

The key piece of domestic legislation in your jurisdiction applicable to ship registration is the New Belgian Maritime Code, which has been applicable since 1 September 2020. It is of the utmost importance to realise the fundamental changes in statute law since this date.

1.4 Requirements for Ownership of Vessels

The registration of sea-going vessels is mandatory for sea-going ships under construction in Belgium, but optional for sea-going ships:

- which are operated from Belgium; or
- of which the owner or operator is either:
  - (a) a natural person who is a national of a member state of the European Economic Area; or
  - (b) a natural person who has his or her domicile or principal residence in Belgium; or
  - (c) a legal person that has its actual seat (that is, place of registered office, central administration or principal place of business) in one of the member states of the European Economic Area.

1.5 Temporary Registration of Vessels

Temporary Registration

A temporary registration is no more than a registration and a de-registration. It is possible to do this in Belgium.

Bareboat Registration

Bareboat registration is possible in Belgium. For the duration of the bareboat charter, the Belgian Flag cannot be used.

For a Belgian vessel in a foreign register, conditions precedent for receiving an authorisation include:

- contractual provisions in the bareboat-charter agreement;
- the authorisation of the holder of certain in rem rights;
- compatibility of the legislation of the receiving registry.

For a foreign vessel in the Belgian registry, conditions precedent for receiving an authorisation include the authorisation of the owner and of the receiving flag (which will check on the condition of the vessel).

1.6 Registration of Mortgages

The *Directoraat-Generaal Scheepvaart* – Belgian Ship Registration - the Federal Public Service of Mobility and Transport, in the department of Belgian Ship Registry, in Antwerp, maintains the registration of mortgages in Belgium.

Ships, ships under construction and ships undergoing conversion can be encumbered with a ship mortgage.

Prior to a ship being registered in the Ships Register, taxes must have been paid.

The formalities are minimal. A ship mortgage can be established by an authentic or a private deed. The Belgian Ships Register of Shipping mentions at the time of registration, and therefore requires, the following information:

- the date of the deed;
- the form of the instrument and, if it is an authentic instrument, the indication of the public official from whom or the court from which it emanates;
- the surname and first names of the parties, in addition to:
  - (a) for natural persons of Belgian nationality, their national register number;
  - (b) for natural persons of foreign nationality, their domicile;
  - (c) for legal persons under Belgian law, their company registration number; and
  - (d) for legal entities under foreign law, the address of their registered office;
- the nature and main elements of the transaction.

Also required, where appropriate, is:

- the amount and the due date of the interest, in addition to the deadline for repayment of the principal;
- the conditions to which the claim is subject;
- the stipulation of possession of the vessel; and
- the choice of domicile.

1.7 Ship Ownership and Mortgages Registry

The Ship Register is open to public inspection; it is held in the Belgian shipping register.

Certificates certifying the inscribed in rem and other rights can be obtained at minimal cost.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

The applicable international conventions and relevant laws that will impact upon liability of owners and interested parties in events of pollution and wreck removal are as follows.

Pollution

- the New Belgian Maritime Code, applicable as from 1 September 2020;

- the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 29 November 1969 and Protocol to the Convention, 2 November 1973 (the Intervention Convention);
- the International Convention for the Prevention of Pollution of the Sea by Oil, 12 May 1954 as amended (OILPOL);
- the International Convention for the Prevention of Pollution from Ships, 2 November 1973 and the Protocol to the Convention, 17 February 1978 (MARPOL 73/78);
- the 1982 United Nations Convention on the Law of the Sea, 10 December 1982 (the Montego Bay Convention, or UNCLAS);
- the 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 27 November 1992, as amended in 2000 (the CLC 1992);
- the 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 27 November 1992, as amended in 2000 (the 1992 Fund Convention);
- the International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 3 March 2001 (the 2001 Bunker Oil Convention);
- the 2003 Protocol Establishing a Supplementary Fund (The 2003 Supplementary Fund);
- EU Directive 2005/35, O.J. L255/11, 30 September 2005 as amended, which has been implemented into Belgian law by various Acts;
- the Belgian Statute of 20 January 1999 on the Protection of the Marine Environment in the sea areas under Belgian Jurisdiction, as amended (the Marine Protection Act). This Statute implements various International Treaties and EU Directives. It holds criminal liability provisions, reverses the Burden of Proof and authorises authorities to intervene in the case of incidents threatening the (marine or any other) environment. Substantial fines and possible incarceration are provided for;
- the New Belgian Maritime Code. This code also implements various International Treaties and EU Directives. It holds criminal liability provisions, reverses the Burden of Proof and authorises authorities to arrest vessels that are not in compliance. Substantial fines and possible incarceration are also provided for;
- various legal instruments, by the Federal State and the Regions, each within their authority in the implementation of Directive 2009/98 EC on Waste (the Waste Directive);
- the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (the Ballast Water Management Convention), which entered into force in Belgium on 8 September 2017.

This list is not exhaustive. Moreover, international legislation, from the International Maritime Organization (IMO) or the European Union, requires Belgium to enact new provisions, usually by amending the aforementioned provisions.

Wreck Removal

Wreck-removal of sea-going vessels

The 2007 Nairobi Convention on wreck-removal and the New Belgian Maritime Code (since 1 September 2020) are applicable.

The owner of the wreck (a definition that includes the owner, charterer or operator) must remove the wreck and its contents. This is a fundamental change in statute law since the applicability of the NBMC, as of 1 September 2020. Prior to the NBMC, the Belgian Supreme Court ruled that, once a wreck-removal fund is set up for a sea-going vessel, the authorities are no longer entitled to demand the owner, charterer or operator to remove the wreck at the owner's expense. That principle is now abandoned under the NBMC as far as sea-going vessels are concerned.

Wreck-removal of interior barges (and limitation of liability)

Case law on limitation of liability by interior barges for wreck-removal applies.

A Court of Appeal ruled that, at an interlocutory stage and provisionally only, the existence of an overall limitation set up for a sunken barge does not stop the authorities from ordering the owner to remove the wreck. The Supreme Court did not annul this decision. The non-annulment of that Court of Appeal decision may well have been due to the specificities of the particular case and, consequently, may not be standing law. This view is strengthened by a later decision of the same Supreme Court ruling, in a case on the merits, that the owner of a barge is entitled to limit liability for wreck-removal. In addition, in January 2017, the Supreme Court ruled that, once a wreck-removal fund is set up for a sea-going vessel, the authorities are no longer entitled to demand that the owner, charterer or operator remove the wreck at the owner's expense. It is likely that this case law now applies to interior barges.

2.2 International Conventions: Collision and Salvage

Collisions

It should be noted that the location of the incident, the type of vessels and the persons involved have an influence on the legislation that will apply. Sea-going vessels colliding on the high seas will be subject to different rules from those colliding on internal waterways. More complex still, there is different legislation for interior barges. Moreover, on rivers and canals, specific rules derogate from the COLREGS.

The following conventions and regulations apply in Belgium:

- the International Convention for the Unification of certain rules of Law with respect to Collision between vessels, Brussels, 23 September 1910 (The 1910 Collision Convention);
- the International Convention on certain rules concerning Civil Jurisdiction in Matters of Collision, Brussels, 11 May 1952 (The 1952 Brussels Civil Jurisdiction Convention);
- the International Convention for the unification of certain rules relating to Penal Jurisdiction in Matters of Collision, Brussels, 10th May 1952 (The 1952 Brussels Penal Jurisdiction Convention);
- the International Regulations for Preventing Collisions at Sea, 1972 as amended from time to time (The COLREGS);
- the International Convention for the Safety of Life at Sea, 1974 as amended (SOLAS) and its annexes;
- EU Regulation 864/2007, 11 July 2007 (Rome II);
- various local navigation regulations regarding the territorial sea, the ports, the rivers and canals (the Local Navigation Regulations).

Other provisions may also be relevant, such as:

- the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers, 1978;
- the International Safety Management Code (the ISM Code);
- the International Ship and Port Facility Security Code (the ISPS Code), etc.

If refuge is needed as per the EU Directive 2002/59 (as amended), the Maritime Salvage and Co-ordination Centre (MRCC) manages the incident for all authorities concerned.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Sea- going Vessels

Limitation of liability in Belgium is determined by the London Convention regime. For sea-going vessels, the legislation is the following:

- the Convention on Limitation of Liability for Maritime Claims, dated 19 November 1976 (the LLMC Convention);
- the Protocol of 1996 dated 2 May 1996 (The 1996 Protocol);
- the 2015 LEG.5(99) IMO Resolution raising the amounts (the IMO Resolution).

Domestic legislation (the New Belgian Maritime Code) essentially incorporates the 1976 LLMC Regime, as previously described, and extends it to other vessels.

Non-sea-going Vessels

For the limitation of liability for maritime claims against non-sea-going vessels, such as interior barges, different provisions apply.

2.4 Procedure and Requirements for Establishing a Limitation Fund

The answer to this question is in respect of limitation funds as per the 1976 LLMC. A limitation fund requires two court decisions. Both can be obtained within a few days.

First, a potentially liable person requests authorisation from the court to set up a fund. The request indicates the amount of security to be issued. The security proposed is to be either a cash payment or a guarantee to the court.

The court then orders the amounts to be paid or secured within a deadline. A fund administrator is also appointed.

Once the amount of the fund has been paid or secured, the fund administrator drafts a report, which is presented to the court. The court issues a second decision, confirming that a limitation fund was constituted.

A potentially liable person can set up the fund. The amount of limitation is calculated in accordance with the provisions of the 1976 LLMC regime as previously described. The security proposed is to be either a cash payment or a guarantee to the court. The guarantee is to be found acceptable by the court.

3. Cargo Claims

3.1 Bills of Lading

The Hague-Visby rules have been incorporated in the New Belgian Maritime Code. In addition to the applicability of the Hague-Visby Rules, they are also of mandatory application for all carriage to and from a Belgian port. Conflicting provisions in the terms of carriage are to be disregarded.

3.2 Title to Sue on a Bill of Lading

Under the New Belgian Maritime Code, both the receiver and the shipper have title to sue. However, it should be noted that the burden of proof of the damages suffered is different.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

The carriers' liability and limitation of liability for cargo damages is as per the principles of the Hague-Visby Rules (with the SDR protocol). Depending on how the bills of lading or other transport documents are issued, the liability rests with

the contractual carrier, the ship-owner or them both. This is always a factual matter.

3.4 Misdeclaration of Cargo

The carrier can claim against the shipper for misdeclared cargo. A misdeclaration is an error or omission and leads to liability. This is the normal application of the Hague-Visby Rules and its principles.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The time bar for filing a claim for damaged or lost cargo (either for breach of contract or liability in tort) in Belgium is one year from delivery, unless the protection given by the rules on carriage would not apply, in which case, it could be the contractual provisions in the terms of carriage which would be applicable.

Once the time bar runs out, it can be extended. Great care should be taken to ensure that the appropriate wording is used when applying for an extension to the time bar; the wrong wording can often result in a refusal to extend the time bar.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

The convention regarding the arrests of vessels that are applicable in Belgium is, for international arrests, the International Convention on Arrest of Ships, 1952 (the 1999 Arrest Convention).

For domestic ship arrests, the New Belgian Maritime Code applies.

4.2 Maritime Liens

In principle, Belgian jurisdiction will apply the rules of the flag in respect of liens and mortgages.

Foreign-registered in rem rights on a vessel will be respected if the relevant ships registry, containing a minimum of information, is publicly consultable and extracts can be obtained.

Belgian law provides different categories of in rem rights on a sea-going vessel. The NBMC provides these in the 'Ship Security Rights'. With the introduction of this chapter, a new type of in rem right was created, the so-called "Ship's Priority Rights", which has priority over the "Privileged Claims". Those two types of in rem rights take priority over the "*hypotheque*" (the alternative to the mortgage).

The first category, the "Ship's Priority Rights", regards various types of costs made by or on account of the vessel, from the last call in port up to the public sale. It includes the port costs, crewing costs, maintenance costs, etc.

The second category, the "Privileged Claims", are similar to those of the 1924 convention on liens and mortgages.

Under Belgian Law, there is a difference between maritime liens as in rem rights and maritime claims, which allows an arrest on a sea-going vessel.

The maritime claims for which a sea-going vessel can be arrested are those listed in Article 1.1 of the 1952 Ship Arrest Convention. A "Maritime Claim" means a claim arising out of one or more of the following:

- damage caused by any ship, either in a collision or otherwise;
- loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
- salvage;
- an agreement relating to the use or hire of any ship, whether by charterparty or otherwise;
- agreement relating to the carriage of goods in any ship, whether by charterparty or otherwise;
- loss of or damage to goods, including baggage carried in any ship;
- general average;
- bottomry;
- towage;
- pilotage;
- goods or materials, wherever supplied to a ship for her operation or maintenance;
- construction, repair or equipment of any ship or dock charges and dues;
- wages of Masters, officers, or crew;
- Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;
- disputes as to the title to or ownership of any ship;
- disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;
- the mortgage or hypothecation of any ship.

Interestingly, the NBMC, applicable since 1 September 2020, provides that, for vessels under the flag of a country which did not ratify the convention, an arrest for any type of claim is possible. There does not seem to be case law on this point yet.

4.3 Liability in Personam for Owners or Demise Charterers

The vessel in respect of which the maritime claim arose can always be arrested, even if the owner (or demise charterer) is not liable in personam.

4.4 Unpaid Bunkers

A bunker supplier can arrest a vessel in connection with unpaid bunkers supplied to a vessel. The Belgian Supreme Court ruled (in 2016) that, if an arrest is for deliveries (such as bunkers) made to the vessel, the claim must arise out of:

- a commitment entered into by the charterer or ship-owner; or
- an obligation which can be attributed to them under the doctrine of trust.

Case law since then seems generally to accept that, with deliveries (such as bunkers) to a vessel, there is an apparent authority from the owner or the charterer, so that unless the supplier explicitly indicates not to consider the owner or the charterer as the debtor, the order is attributable to that owner or charterer and the vessel can consequently be arrested.

4.5 Arresting a Vessel

An authorisation to arrest is requested of the Arrest Judge. This is done by way of an ex parte application filed by an attorney on behalf of a client. The judge usually (especially in Antwerp, Ghent and Bruges) gives a decision on the bench. A court bailiff thereafter serves the decision to the Master of the vessel and the vessel is then arrested.

No written power of attorney needs to be presented. In that application, all relevant information must be disclosed to the judge.

The court need not be provided with original documents; notarised and apostilled copies of the documents will suffice. Translation is needed only if the documents are in a language the judge does not understand. Documents in English do not need translation.

The statute law provides the possibility for the judge to impose a counter security. It is no longer customarily ordered unless the judge is of the opinion that the claim is doubtful and the arrestor is from a country where enforcement of a judgment on appeal for costs would be difficult.

4.6 Arresting Bunkers and Freight

It is possible to arrest bunkers (arrest of movables) and freight (third-party garnishment).

The conditions and principles that are to apply in order to arrest those types of assets are different from those of a ship's arrest.

For the arrest of a sea-going vessel, it suffices to allege a claim. That is usually not too difficult a test.

For the arrest of any other assets, such as movables (bunkers), freight, bank accounts, etc, the arrestor must establish that certain conditions are present.

First, conditions in respect of the quality of the claim.

An arrest is possible on condition that the claim is sufficiently:

- certain, and (this means it must be a prima facie good claim);
- due, and (this means it is payable immediately);
- quantifiable (this means the amount must be quantifiable).

Second, conditions in respect of the situation of the debtor (charterer); there must be urgency to secure the claim, and the debtor must be in financial difficulties.

4.7 Sister-Ship Arrest

The definition of a sister ship is that ships are "sisters" if they belong to the same physical or legal person. They can be arrested if one has a maritime claim against that person.

Beneficial ownership of ships alone is not a sufficient reason to allow a sister-ship arrest.

In "alter ego" situations (the arrest of the assets of one for claims against another), it is necessary either to pierce the corporate veil, to prove collusion or to establish fraud. Belgian case law has come to such findings by applying standards which are similar to the "alter ego" relationship findings in US case law.

4.8 Other Ways of Obtaining Attachment Orders

Apart from ship arrests, all other assets of the debtor can be arrested/attached. This includes movable assets (bunkers), freight, bank accounts, etc.

For the conditions necessary to be allowed to proceed with such an arrest or attachment, see **4.6 Arresting Bunkers and Freight**.

4.9 Releasing an Arrested Vessel

Once arrested, the vessel can only be released by agreement between the parties or by court order.

A court order ordering release usually means that the case was brought in court again, all parties to the conflict were heard and the judge ordered the release.

Arrest proceedings do not initiate the case on the merits itself. Separate proceedings in Belgium or elsewhere must be initiated to that effect.

The security in a proper wording must be issued by a first-class bank within the jurisdiction for the arrestor to be obliged to release the vessel from arrest. Parties may agree on an alternative. Any such alternative cannot be imposed on the arrestor.

The security is to guarantee the in personam claim. If that person is not the owner, the claim against that other person is to be secured. If the claim is against the charterer, the security is to guarantee that claim.

4.10 Procedure for the Judicial Sale of Arrested Ships

The procedure for the public sale of a vessel is a three-step judicial process:

- arrest of the vessel;
- first public auction with provisional adjudication;
- second public auction if there is a higher bid within 15 days of the provisional adjudication.

In some circumstances, the court can allow a sale without this public process.

Also, and if the loan agreement entitles the lender to take possession of the ship, specific proceedings can result in avoiding the public sale.

As regards maintenance and costs, as long as the vessel has not changed ownership the costs remain in principle for account of the previous owner. The arrestor or any other party who has an interest could ask the court (or the acting court bailiff) to make the costs of caretaking. Those costs would then be privileged on the price of adjudication.

The in rem rights will be determined as per the law of the flag. Foreign mortgages will be recognised if certain conditions in respect of publicity thereof are met.

For Belgian-flagged vessels, the hypotheque (Belgium does not know the concept of mortgages) comes after the ship's privileges.

4.11 Insolvency Laws Applied by Maritime Courts

In respect of insolvency, Belgium, in common with the rest of the EU, has to abide by the EU Insolvency regulation.

The conflict between maritime law and insolvency law is, as in many countries, still ongoing. Courts have up until now given priority to the obligations arising out of the 1952 Arrest Convention and, in doing so, have set the insolvency protection aside. This is still very much a debated issue.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

Courts are reluctant to condemn a party for wrongful arrest. A tort must have been committed. Losing the case on the merits or the arrest being lifted does not as such establish that a tort has been committed by the arrestor.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

EU Regulations and the Athens Convention, as amended by the 2002 Protocol to protect passengers, apply in Belgium. In addition, some Belgian legislation incorporates those provisions. Conflicting contractual agreements will be set aside.

The following apply:

- the New Belgian Maritime Code (Article 2.6.2.34 and following);
- the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (The Athens Convention, or PAL 1974) and the 2002 Protocol to PAL 1974 (the PAL Protocol 2002);
- Regulation (EU) No 392/2009, of 23 April 2009, on the liability of carriers of passengers by sea in the event of accidents. Note that this Regulation reinforces the PAL Protocol 2002, which was already applicable;
- Regulation (EU) No 1177/2010, of 24 November 2010, concerning rights when travelling by sea and inland waterways, amending Regulation (EC) 2006/2004;
- the Belgian Statute Law on Travel Contracts, of 21 November 2017 (the Travel Contracts Act).

In as far as the PAL regime applies, the time bar is two years.

The limitations and exonerations are as per the PAL regime. These provisions have also been incorporated in the NBMC.

In as far as the Travel Contracts Act applies the time bar, it is also two years. There is no limitation or exoneration of liability.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

The New Belgian Maritime code, applicable as of 1 September 2020, is of mandatory application. There is no known case law on this point, so far.

Courts are expected to extend the existing case law which denied the application of foreign jurisdiction or arbitration clauses whenever the claimant was a third-party holder of a negotiated bill of lading to all claims arising out of contracts of carriage irrespective of a bill of lading, a Seaway bill or another document of carriage having been issued. This is unless the carriage falls under the exceptions of the principles of the Hague-Visby Rules.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

The New Belgian Maritime code, applicable as of 1 September 2020, is of mandatory application. There is no known case law on this point so far.

Courts are expected to refuse to recognise a foreign jurisdiction or arbitration clauses whenever the claimant was a third-party holder of a negotiated bill of lading to all claims arising out of contracts of carriage, irrespective of a bill of lading, a Seaway bill or another document of carriage having been issued, again, and as with jurisdiction clauses, unless the carriage falls under the exceptions of the principles of the Hague-Visby Rules.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable in Belgium.

Domestic law has incorporated the rules on arbitration in the Judicial Code.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

If the claim that is subject to a foreign arbitration and/or jurisdiction allows an arrest of the vessel, the fact that the merits of the case is to be heard abroad is no hindrance. The arrest is a protective measure. If the applicable law or agreements between the parties refers the case to another jurisdiction, an arrest is still possible.

6.5 Domestic Arbitration Institutes

There is no arbitration institute that deals with maritime matters only.

Such matters can be arbitrated before the Belgian Centre for Arbitration and Mediation (CEPANI), which also deals with other, mostly commercial, matters. Within the CEPANI there are maritime arbitrators.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

The authority of the Belgian court is to be contested as a first defence on the basis of the foreign jurisdiction or arbitration clause. Unless the clause is invalid or not opposable to the claimant, the court will respect it and declare itself without authority.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

The Principles

Under Belgian Law, both the tonnage tax regime and the accelerated depreciation regime are available. They are alternatives and cannot be used together. Careful consideration must be made as to which one needs to be applied and when.

Additionally, reinvested capital gains can be exempt from taxes. In addition, a vessel that comes into Belgian possession for the first time can, again, under certain conditions, deduct 30% of the purchase price. Again, these are alternatives to the Tonnage Tax and cannot be used together with that Tonnage Tax.

Tonnage Tax - General

Within the EU, the guidelines to be respected by the individual Member States are set by the EU Commission in its "Guidelines on State Aid to Maritime Transport". In November 2017, the EU Commission approved, for another ten years, the Belgian support measures for maritime transport. A few changes to the already existing Belgian rules had to be made in order to comply with those guidelines.

Interestingly, dividends paid by Belgian tonnage tax companies comply with the subject-to-tax condition.

Tonnage Tax - for Ships

A tonnage tax can be applied to a shipping companies, core revenues from shipping activities and certain ancillary revenues that are closely connected to shipping activities (which are now capped at a maximum of 50% of a ship's operating revenues).

Tonnage Tax - for Towage and Dredging

On condition that 50% of revenues from towage or dredging comes from the high seas, the tonnage tax can be applied.

Tonnage Tax - for Operators/Ship Managers

If certain conditions and minimum thresholds are met, ship-management activities and operating services could qualify for the Belgian tonnage tax regime.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

COVID-19 Measures in General

COVID-19 measures are changing regularly. General measures, such as masking, social distancing, limiting contacts, hand hygiene, etc, need to be followed by all, and must also be followed on the terminals.

COVID-19 and Sea-going Vessels

As far as maritime traffic is concerned, the Joint Nautical Authority navigational area - Scheldt ports - Belgian coastal ports has made an announcement covering the Scheldt Shipping Area regarding coronavirus measures. They are subject to situational change.

At present, they include the following (Bass No 049-2020):

- All incoming ships must submit a Maritime Declaration of Health (MDH) 24 hours before entering port;
- the ship's Master declares whether there are any cases of illness or suspected cases on board. The declaration must also include a list of the last ten ports of call;
- all outgoing ships must submit an MDH if there has been any change in the health situation compared with the situation when entering port.

Further, the authorities can inspect and take appropriate measures once an outbreak on board is found.

8.2 Force Majeure and Frustration in Relation to COVID-19

Force majeure is an insurmountable obstacle to the fulfilment of commitments (Court of Cassation). The doctrine of unattributable impossibility implies that there are three conditions for the existence of *force majeure*; the performance of an obligation has become impossible, due to circumstances that are not due to a fault of the debtor and which were unforeseeable and insurmountable for him or her.

If an obligation has to be performed (eg, transport of goods), which is made impossible by an unforeseen COVID-19 measure, this could in some circumstances be considered as *force majeure*. It will depend on factual circumstances.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

The New Belgian Marine Code entered into force on 1 September 2020 and, for maritime issues, regards most Belgian relevant regulations, not only regarding arrest, privileges and mortgages, but also carriage and chartering. In addition, it focuses on the safety of shipping in accordance with the International Convention for the Safety of Life at Sea (SOLAS) regulations.

Kegels & Co is a niche law firm specialised in maritime, transport and logistics, as well as ITC (International Trade and Commodities) related matters. Other related matters include customs and excise, finance and insurance. Kegels & Co has its roots in centuries of this type of legal work.

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BRAZIL

Law and Practice

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

In Brazil, there is no general rule for maritime and shipping courts. The Brazilian legal system is a State Court system in which each state has the authority to organise and define the matters that will be dealt with in each of its courts. For example, in the State Court of Rio de Janeiro, there are seven first-instance courts that have jurisdiction over commercial matters such as insolvency, bankruptcy and maritime disputes, which sits apart from other civil matters. However, in most states there are no specialised courts and maritime matters are ruled by regular civil courts. In some circumstances, such as if a state-owned vessel or a federal interest is involved, Federal Courts will have jurisdiction.

In the above-mentioned judiciary system, the most common claims involve charter contract disputes, demurrage claims, cargo claims, arrest of vessels, indemnity claims for accidents involving vessels and others.

It should also be noted that Brazil has an Admiralty Court located in Rio de Janeiro. This court has nationwide jurisdiction to rule on maritime accidents and facts of navigation and its main goal is to find the causes of the incident and the parties responsible for it and to apply administrative penalties set forth in Law 2.180/54. However, this court is not part of the judiciary system, but an administrative tribunal subordinated to the Ministry of Defence/Navy Command.

The Admiralty Court adjudicates a wide variety of cases involving maritime accidents and facts of navigations, of which the most common cases involve personal injuries of crew members, machine failures, collisions and other accidents.

1.2 Port State Control

Brazil follows the resolutions of the International Maritime Organization (IMO) on Port State Control and is a signatory to the Latin American Ship Control Agreement by the State of Porto (Viña del Mar Agreement), committing itself to maintaining an effective system of inspections of foreign vessels and aiming at ensuring compliance with the international requirements applicable on board.

In this regard, 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 DPC has 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 of stations thereof;
- the formulation and enforcement of national policies relating to the sea;
- the implementation and inspection of laws and regulations at sea and inland waterways; and
- the qualification and certification of personnel for the merchant marine and related activities.

The DPC may also:

- prepare guidelines;
- 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 on board 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.

Port state control may, for example, stop vessels from sailing if there is any risk to navigation, life or the environment. It should also provide assistance to the Port Authority and Environmental Agencies in environmental matters.

In relation to wreck removal, it should be noted that it is regulated by Federal 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 for obtaining a permit for a wreck removal.

1.3 Domestic Legislation Applicable to Ship Registration

In Brazil, there are two types of registrations for vessels, the ownership registration and the Special Brazilian Registry (REB). The Brazilian Vessel Ownership Registry is a mandatory registry for all Brazilian vessels which have 100 or more gross tonnage employed in any kind of navigation. For vessels below this threshold of tonnage, the Ownership Registry is not handled by Admiralty Court but by the port captaincy with jurisdiction over the Vessel.

Law 7.652/88, together with the ordinances from Admiralty Court, is the main legislation applicable to ship registration in Brazil.

1.4 Requirements for Ownership of Vessels

The Brazilian registry is only available to Brazilian nationals and companies incorporated under Brazilian Laws. There is an exemption to this rule related to the registration of yacht and leisure vessels, which could be registered under Brazilian registry, even if not owned by Brazilian citizens or Brazilian companies.

Although it is not possible to register ownership over a hull, it is possible to register a vessel under construction at the Brazilian Special Registry (REB), which is used mostly to grant tax benefits to the hull's construction.

1.5 Temporary Registration of Vessels

Temporary registration is allowed to foreign-flagged vessels under bareboat charter to Brazilian shipping companies that hold necessary tonnage, with temporary suspension of the flag of origin.

The dual registration of Brazilian vessels are provided under Brazilian Law.

Thus, Brazilian law authorises to fly the Brazilian flag those vessels that are genuinely Brazilian and also foreign vessels when bareboat chartered into Brazil with suspension of the original flag.

1.6 Registration of Mortgages

The registration of the ship finance agreements is not mandatory in Brazil, but encumbrances over the vessels, such as mortgages, must be issued as a deed by a notary (maritime notary if available in that jurisdiction) and further registered before the Admiralty Court to be considered valid and in effect in Brazil.

In this sense, in order for a mortgage to be considered valid and in effect under the Brazilian law, all maritime mortgages over Brazilian-flag vessels must be constituted through a public deed and registered with the Admiralty Court. The necessary documents to register a mortgage through a public deed are:

- the amount of credit – an estimate or maximum amount thereof;
- the term established for repayment;
- the rate of interest, if applicable;
- the vessel's specifications, such as gross tonnage, deadweight tonnage and other identifying data; and
- the certificate of insurance of the vessel.

1.7 Ship Ownership and Mortgages Registry

Information related to ownership and encumbrances over vessels can be obtained by any third party through certificates issued by the Admiralty Court. Information related to financing documents and other types of guarantees are usually registered in the Titles and Deeds Registry; in this case, those would also be available through a request for certificates.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Brazil is not a signatory to the International Convention on the Removal of Wrecks, but has ratified the following maritime conventions related to pollution:

- the International Convention on Oil Pollution Preparedness, Response and Co-Operation, 1990 (OPRC/1990);
- the International Convention for the Prevention of Pollution from Ships (MARPOL) 73/78;
- the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC/69); and
- the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (CCAIMO).

Brazil has several domestic laws that regulate liability in the case of wreck removal and pollution.

2.2 International Conventions: Collision and Salvage

Brazil has signed the following international conventions regarding the liability of ship-owners and carriers, in relation to collisions and salvage:

- 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 Immunity of State-owned Vessels (Brussels 1928);
- the Convention for the Unification of Certain Rules related to Limitation of Liability of Owners of Sea-going Vessels (Brussels 1924);
- the International Convention for the Safety of Life at Sea (SOLAS 74);
- the SOLAS Protocol of 1978;
- the International Convention on Regulation for Preventing Collisions at Sea 1983;
- the International Regulations for Preventing Collisions at Sea;
- the United Nations Convention on Law of the Sea, 1982; and
- the International Convention on Salvage, 1989.

However, Brazil is not a signatory of the Hague Rules, the Hague-Visby Rules or the Hamburg Rules.

Brazil also has domestic regulations on salvage (Law No 7.203/1984) and related to liability in the case of accidents.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Brazil is party to the 1924 International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-going Vessels (the 1924 Brussels Convention) and to the International Convention on Civil Liability for Oil Pollution Damage (CLC-69). However, it is not a signatory to more recent and relevant conventions that exclude or minimise owner's liability, such as the Hague-Visby Rules, the Hamburg Rules, and the International Convention for the Limitation of Liabilities for Maritime Claims, London 1976.

The general rule in Brazil, set forth in the Brazilian Civil Law, is that anyone who causes damage to the other party shall fully compensate the damages caused. As Brazilian law does not provide for punitive damages, compensation is generally limited to the direct damages suffered by the party, including the actual losses and loss of profit. Indirect losses are generally excluded, unless otherwise agreed.

Moreover, the Brazilian Civil Code in its Article 750 establishes that the carrier's liability is limited to the value inserted in the bill of lading.

As a general rule, liability could be limited under a contract. There have been some cases where the limitation of liability was tested, and judges accepted the validity of that limitation. Nevertheless, if the contract is considered a "standard form contract", the limitation clause might be considered null and void by Brazilian courts.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Brazil is not a member of the International Oil Pollution Compensation Funds.

3. Cargo Claims

3.1 Bills of Lading

Brazil is not a signatory to the international conventions concerning bills of lading.

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

In addition, there are a number of domestic commercial laws dealing with sea transport and the bill of lading, such as the 1856 Commercial Code, the National Tax Code and, mainly, the 2002 Brazilian Civil Code, which is the most complete and important legislation in terms of private and commercial law in Brazil.

3.2 Title to Sue on a Bill of Lading

All parties to the contract of carriage represented by the bill of lading have title to sue, such as the consignee, the shipper or the carrier, who are entitled to file a claim in the case of a breach of the contractual obligations.

The subrogated underwriters of the cargo are also entitled to a recovery lawsuit against the carrier under the bill of lading.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

The general rule in Brazil, set forth in the Brazilian Civil Law, is that anyone who causes damage to the other party must fully compensate the damages caused. As Brazilian law does not provide for punitive damages, as a rule indemnity is limited to the

direct damages suffered by the party. Indirect losses are generally excluded, unless otherwise agreed.

Moreover, the Brazilian Civil Code in its Article 750 establishes that the carrier's liability is limited to the value inserted in the bill of lading.

Liability may also be limited by the parties under a contract. However, if the contract is considered a "standard form contract", the limitation clause might be considered null and void by Brazilian courts.

3.4 Misdeclaration of Cargo

While there is no specific rule regulating liability for the misdeclaration of cargo in Brazil, general liability rules would apply in such a situation. Thus, a carrier that suffers damages due to the misdeclaration of cargo by the shipper would, in principle, have a claim against the shipper.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

In general, a three-year time bar applies to indemnity and civil lawsuits related to unlawful acts, as prescribed by the Brazilian Civil Code. Specifically in relation to cargo claims resulting from sea carriage, the Federal Decree No 116/1967 provides a one-year time bar from the date of discharge, similarly to the Law on Multi-modal Transportation (Law No 9.611/98) and the Law for inland carriage (Law No 11.442/2007).

A time bar may be interrupted once at court, through a judicial notification. Once interrupted, the time bar is renewed for an equal period.

It is not possible to extend the time limit by an agreement between the parties, as this is a question of legal certainty that cannot be changed by the will of the parties.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Brazil has not ratified the International Convention to the Arrest of Sea-going Ships 1952 nor the International Convention on Arrest of Ships 1999.

However, Brazil is part of the Brussels International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages which, despite not providing rules for the arrest of ships, establishes additional credits that will be admitted in Brazilian Law to give rise to an arrest.

Usually, arrests are requested in Brazil following the rules prescribed by the Brazilian Civil Procedural Code, which sets out the possibility to request injunctions to seize assets, such as an arrest of a vessel. The Code determines some requirements to be met, such as to show the probability of the right and an urgency, for example that the vessel may attempt to leave Brazilian waters.

4.2 Maritime Liens

Maritime liens in Brazil are governed by the Commercial Code and the 1926 Brussels Convention on Maritime Liens and Mortgages. Based on a joint interpretation of both of these, the following claims can be considered to give rise to maritime liens:

- 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.

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 filed in personam, the claimant shall demonstrate the requirements previously mentioned that are applicable to injunction requests as determined by the Procedural Code.

4.3 Liability in Personam for Owners or Demise Charterers

Personal liability of an owner or demise charterer is not required for ship arrest, when attempting an arrest based on claims that attach to the vessel (in rem). However, the creditor must have the privileged credit properly constituted.

4.4 Unpaid Bunkers

According to the Brazilian Commercial Code and the 1926 Brussels Convention, credits arising out of ship suppliers out of the port of registry, including bunkers, are considered privileged. Therefore, due to the legal nature of those credits, they have in rem effects and will attach to the vessel, it therefore being possible to arrest the vessel even if the bunker supply contract was entered with the charterer and not with the owner.

4.5 Arresting a Vessel

In order to initiate an arrest claim in court, parties must be represented by lawyers, and a power of attorney (POA) is needed for the appointment of those lawyers. The POA must be signed by a representative of the company, duly empowered as per its by-laws or certificates. Such documents must also be duly notarised/legalised or apostilled (if the country in which the document is signed is a signatory of the Apostille Convention). In the case of urgency measures, such as an arrest, the Brazilian Civil Procedural Code grants the party 15 days to present the POA to the case records after the filing of the claim. This deadline can be extended for an additional 15 days.

All foreign documents that are relevant to the claim must be translated into Portuguese by a sworn translator. If it is not possible to translate them before the filing of the arrest application, it is possible to request the judge to grant an extension for the presentation of these documents. However, it is recommendable that all documents are presented upon the filing, as there is a risk of the judge understanding that the aforementioned documents were necessary for the analysis of the arrest request and the decision of the arrest would be delayed as a consequence.

In states where the courts have electronic proceedings, scanned copies of the documents may be sufficient.

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

4.6 Arresting Bunkers and Freight

The arrest of bunkers is not a common practice within the Brazilian jurisdiction and there is no specific legislation providing this possibility. However, it would be possible to request the arrest of bunkers based on the general rules set forth in the Civil Procedural Code.

The general rules provide that a party may request an arrest of assets or security in general if that party is able to demonstrate both the liquidity of its credits and a risk that the debtor and its assets may disappear in the near future.

It should be noted that the arrest of bunkers may involve logistic 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 receive the bunker when it is eventually arrested.

4.7 Sister-Ship Arrest

The Brazilian legal system does not provide a specific regulation regarding the arrest of sister ships.

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, in principle it may be possible to file a precautionary lawsuit against the ship-owner to arrest a sister ship and request security.

4.8 Other Ways of Obtaining Attachment Orders

The Brazilian Civil Procedural Code establishes other forms of measures and injunctions sought to obtain security and/or the compliance with a judicial order, the most common of which are the attachment of values, seizure and constrains of assets, either liquid or illiquid.

4.9 Releasing an Arrested Vessel

In order to release an arrested ship, the ship-owner will have to request the release from the Court and simultaneously provide a guarantee to replace the arrested vessel, plus the legal and attorneys' fees.

Normally, the most common type of guarantee is a judicial deposit 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 they are accepted by the opposing party and translated into Portuguese.

4.10 Procedure for the Judicial Sale of Arrested Ships

The judicial sale of vessels in Brazil follows the same general rules of asset bidding. The auctions are conducted by the public auctioneer in the course of a judicial proceeding, who will adopt all necessary formalities to conduct the auction and sell the vessel under a commission.

The public auctioneer will publish a Public Call announcing the auction for any interested party, which will contain a description of the object to be sold, the minimum price for the bid, the conditions of payment and the place where the auction will take place, among other details. The Public Call must be published

at least five days prior to the auction date. As a rule, the Public Call must be made available on a webpage to be determined by the judge. However, the judge may also determine the Public Call to be fixed on a local customary place and published in a newspaper of wide circulation.

Types of bonds required to/for:

- act ex officio – the Brazilian legal system does not oblige a bond constitution in order to sell a vessel extrajudicially;
- vessel arrest – a guarantee may be required by the judge from claimants requesting an arrest to compensate eventual losses sustained by the vessel's interest in the case of a wrongful arrest, while the Brazilian Civil Procedural Code also establishes that a guarantee must be presented by foreign claimants with no assets in Brazil in order to ensure payment of legal court costs and attorney fees;
- lift arrest – the Brazilian legal system does not provide a specific list of bonds to be presented; usually, the bond would be a judicial deposit in cash or a letter of credit by a first-line bank, while protection and indemnity insurance club letters of undertaking may be accepted, mainly depending on whether the other party accepts them;
- judicial sales – if the vessel holds a maritime lien, the Brazilian Commercial Code establishes that an amount sufficient to guarantee the payment of maritime lien creditors must remain deposited until it is time-barred or it is shown that it was paid, unless a guarantee is presented.

Furthermore, regarding the position of the mortgage in relation to other maritime claims, it should be noted that, based on the application of the Brazilian Commercial Code and the Brussels Convention, the level of priority of each credit is the following:

- federal taxes;
- legal costs and expenses;
- claims resulting from the employment of the 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.

4.11 Insolvency Laws Applied by Maritime Courts

The primary legislation governing insolvency and restructure proceedings in Brazil is the Federal Law 11.101/2005 (Brazilian Business Insolvency Act), which has been updated recently with new rules having taken effect on 25 January 2021. Among the main changes can be highlighted the incorporation of the UNCITRAL Model Law on Cross-Border Insolvency to assist states with cases where the insolvent debtor has assets in more than one country or where some of the creditors of the debtor are not from the country where the insolvency proceedings are taking place.

Regarding a possible order of arrest and judicial sale of a vessel before the competent bankruptcy court, it should be noted that, if the asset is considered essential for the preservation of the company's activity, it cannot be arrested. Furthermore, the decision of the essentiality of the asset is a matter only for the bankruptcy court. If the interest is in the sale of the vessel, this must be previously requested to the bankruptcy court, as determined by Article 66 of Law 11.101/2005.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

The Civil Procedural Code allows the defendant of a wrongful arrest to seek an indemnity and compensation for all the losses suffered by the wrongful arrest. That compensation can be assessed and liquidated in the same legal proceedings as the arrest.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger 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 both the Brazilian Civil Code and the Brazilian Consumers Code, which establish the right to full reparation of the passenger or consumer plus non-material damages.

The time bar to file a claim based on the Brazilian Consumers Act is five years.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

The Brazilian Procedural Code expressly recognises forum selection clauses as valid and binding and therefore a clause in this respect should be complied with.

Specifically in relation to bills of lading, there are some court decisions considering the bill of lading as an adhesion contract, when the issuer (ship-owner) establishes its clauses without negotiation with the other party and the other party is considered not to have expressly agreed. However, it will be very important to verify if the party adhering to the contract had or should have had knowledge of what it was accepting with the contract.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

In the same way as in **6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading**, if the contracting parties expressly agree on a specific arbitration clause, that clause shall be binding.

6.3 New York Convention on the Recognition and Enforcement of Foreign 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 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 Superior Court of Justice recognises foreign judgments and awards, provided they are not contrary to the Brazilian legal order, public policy, national sovereignty, and good moral conduct.

When the exequatur is granted, the award is forwarded to the federal judge of the state in which it will be enforced.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Brazil has not ratified the International Arrest Convention. According to domestic legislation, in order to request an arrest in Brazil, Brazilian courts must also have jurisdiction over the relevant claim. It is not permissible to file an arrest simply as a precautionary matter to secure a claim that will be attempted in another jurisdiction.

6.5 Domestic Arbitration Institutes

Brazil has domestic arbitral institutions with arbitrators specialised in maritime matters such as the Brazilian Centre of Mediation and Arbitration (CBMA), the Brazilian Centre 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, comprised of competent and qualified practitioners and arbitrators with the expertise to address the growing number of disputes in this sector.

Arbitration 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.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

The defendant should challenge the court's jurisdiction when presenting its defence by alleging that a foreign court or arbitral tribunal election clause should be observed.

Thus, if a lawsuit is filed in breach of an arbitration or foreign jurisdiction clause, the case can be extinguished in accordance with the Brazilian Procedural Code, as long as the defendant invokes that clause.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Brazilian tax legislation provides for a zero withholding income tax (WHT) rate reduction on the payment of charter hire abroad, unless the beneficiary is located in a "low-tax jurisdiction" which triggers WHT at 25%.

For charter hire payment, credit or remittances in the so-called "split contract structure" applied to oil and gas exploration and production (E&P) and regasification activities, there are maximum charter ratios vis-à-vis the total charter and service contract for purposes of qualification for the WHT zero rate reduction.

Hires exceeding these ratios will be subject to WHT at 15% or at 25% for beneficiaries located in "low tax jurisdictions" or subject to a "privileged tax regime".

As of 1 January 2018, the maximum charter rations were amended as follows:

- 70% for vessels with floating production, storage or discharge systems;
- 65% for rig vessels for drilling, completing and maintenance of wells; and
- 50% for other type of vessels.

The maximum charter ratios do not apply to vessels used in offshore support services.

Brazil has been adapting its accounting rules to the International Financial Reporting Standards (IFRS) standards and, as of 1 January 2019, Brazilian charterers are required to comply with the so-called "CPC 06" (IFRS 16) on operational leases.

Occasional changes will not affect the taxes to be paid in Brazil pursuant to the IRS Normative Ruling 1889/2019.

In Brazil, the shares have been nominative since the 1990s. There have been no recent changes in the corporate legislation concerning the matter.

There is no specific legislation in Brazil related to the liquidation of assets outside the country, nor relevant time requirements; the standard liquidation rules are to be followed.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

Since the beginning of the pandemic, Brazil has prioritised the operation of any and all services considered essential, which includes almost all maritime activity with the exception of passenger cruises.

Since March 2020, the National Agency for Ports and Navigation (ANTAQ) introduced several measures regulating the maintenance of the operation of vessels and port facilities, prohibiting any action that would restrict the movement of workers or the circulation of cargo, avoiding any effect on essential activities that could lead to shortage of necessary supplies. It also established restrictions on the embarkation of symptomatic crew and passengers and security measures to be adopted by port facilities and companies operating in waterway transportation.

The need to quarantine the crew was also widely discussed in Brazil. For instance, in March 2020, the Ministry of Infrastructure, through the National Commission of Port Authorities (CONAPORTOS), issued Resolution 2 with guidelines for ports, instructing ports to require cargo ships from abroad to dock without unloaded crew for up to 15 days from the last departure from a foreign port, except for landings that were essential for the operation. The resolution also suspended new shipments on cruise ships in Brazilian waters and imposed restrictions on the operation and disembarkation of individuals on cruise ships from abroad. In addition, further rules restricted the disembarkation of foreigners by inland waterway, with exceptions. More recently, additional precautions were adopted due to the variant of COVID-19 that started spreading from the UK, amongst which was the requirement to evidence COVID-19 testing prior to embarking.

Maritime authorities and the Admiralty Court, responsible for, among other functions, maintaining the register of naval goods, mortgages of Brazilian vessels and the Brazilian Special Registry, in addition to deciding on accidents and navigation facts, published a set of normative acts and ordinances on COVID-19. Although they recognised the need to guarantee security in the midst of the pandemic, their services were considered essential and, therefore, should continue, with the adoption of protective measures for users and workers.

8.2 Force Majeure and Frustration in Relation to COVID-19

It should be noted that, unlike most countries with a strong maritime tradition in which *force majeure* is only a contractual matter, Brazil also provides for *force majeure* in the Civil Law. In any case, commonly, the contracts signed between the parties in maritime areas also bring provisions related to *force majeure*, with definitions and cases where it could be claimed.

Brazilian law has several provisions that ensure the exclusion of liability and the possibility of alleging excessive burdens and contractual imbalance, should any contract be impacted by an unpredictable event that affects the obligations of the parties. The verification of whether the coronavirus pandemic would fit into this *force majeure* depends on a case-by-case analysis and what direct impacts it had on the performance of the obligations.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

There is no additional legal information that should be borne in mind in relation to legal aspects of maritime or shipping matters.

Kincaid | Mendes Vianna Advogados was established in 1932 and has a long tradition of providing legal advice on maritime law and international trade to worldwide companies. With offices in Rio de Janeiro, São Paulo, Brasília and Vitória, the firm provides legal services in all its areas of specialism, adding value services to the clients' businesses, meeting clients' specific needs, with unique solutions, based on solid legal expertise, significantly contributing to their business strategy and consequent business growth. The firm's multi-disciplinary practice was born out of its experience in international trade, which has expanded into various sectors and areas such as maritime, tax and customs, corporate, litigation and arbitration, insurance and reinsurance, ports and infrastructure, energy, oil and gas, environment, employment, aviation, compliance, railways and the public sector.

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CHINA

Law and Practice

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The following articles in the Special Maritime Procedure Law of the People's Republic of China (PRC) establish the authorities of the maritime courts and the appellate courts:

- Article 4 – the maritime courts shall entertain actions brought by the parties in respect of maritime tort, disputes over maritime contracts and other maritime disputes as provided for by law;
- Article 5 – in hearing and determining maritime cases, the maritime courts, the higher people's courts of the places where such maritime courts are located and the Supreme People's Court shall apply this Law.

There are 11 maritime courts in China. In practice, the maritime and shipping claims are generally categorised into claims of maritime tort, maritime contract, maritime lien, marine insurance, ship ownership/possessory lien/mortgage, salvage, general average and other maritime and shipping claims as stipulated by the law.

The appellate courts for the above claims are Higher People's Courts of the provinces where the maritime courts which entertained the claim are located. The Higher People's Courts can also entertain maritime and shipping claims as courts of first instance with an amount equal to or above RMB5 billion or which have a major impact in that area (though there is no clear standard for "major impact"). In that scenario, the Supreme People's Court will be the appellate court for those cases.

1.2 Port State Control

China is a member of the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region. The Maritime Safety Administration of the PRC and their branches (MSA) are the port state control authorities in China. The MSA is responsible for maritime safety supervision on vessels registered outside of the mainland of China.

Where the MSA notices serious deficiencies affecting the seaworthiness of the vessel or the safety of the crew or causing damages to the marine environment, they will detain the foreign ship and the ship may not be permitted to leave the port until the deficiencies are rectified.

In the case of marine casualties, such as grounding, pollution and wreck removal, the MSA is responsible for effecting emergency response and developing/implementing plans according to the circumstances.

When possible, the MSA will also attend on board to undertake investigations of the marine casualties and issue investigation reports in which the cause and liability of the marine casualties will be analysed and determined. The MSA will open their investigation reports to the public through their websites.

1.3 Domestic Legislation Applicable to Ship Registration

Domestic Legislation Applicable to Ship Registration

For registration of vessels other than fishing vessels, the Regulations of the PRC Governing the Registration of Ships shall apply.

For registration of fishing vessels, the Measures of the PRC on the Registration of Fishing Vessels shall apply.

Competent Authority of Ship Registration

The Ministry of Transport and the affiliated MSA handle the registration of vessels other than fishing vessels.

The Ministry of Agriculture and the affiliated fishery administration handle the registration of fishing vessels.

1.4 Requirements for Ownership of Vessels

As a general rule, the vessels owned by domestic individuals and/or enterprises can be registered at the ship registration authorities. If there are foreign capitals in an enterprise that is registering a vessel, it is required that the domestic capitals be no less than 50% of the whole.

As an exception, the authorities will accept those registrations of international trading vessels filed by those China-invested enterprises, Sino-foreign joint ventures or Sino-foreign co-operative joint ventures that are established in the free trade zone in accordance with PRC law, and those filed by the wholly foreign-owned enterprises and wholly Hong Kong-Macao-Taiwan-owned enterprises that are established in accordance with the regime of free trade zone specified by the State Council. The international trading vessels registered under this exceptional rule shall sail international routes and/or Hong Kong, Macao and Taiwan routes only.

For the ownership registration of fishing vessels, domestic ownership is required.

PRC law permits registration of vessels that are still under construction.

1.5 Temporary Registration of Vessels

PRC law permits the temporary registration of vessels.

For vessels other than fishing vessels, the temporary registration can be granted in the following circumstances:

- for a ship newly built which is to be sold overseas, the ship-owner may apply at the place of construction for a temporary certificate of ship's nationality;
- for a newly built ship purchased from overseas, the ship-owner may apply at the local embassy or consulate of the PRC for a temporary certificate of ship's nationality;
- for a ship built in a place within this country other than its intended port of registry, the ship-owner may apply at the place of ship-building for a temporary certificate of ship's nationality;
- for a ship built overseas, the ship-owner may apply at the local embassy or consulate of the PRC for a temporary certificate of ship's nationality;
- for a ship bareboat-chartered overseas, the bareboat charterer may apply for a temporary certificate of ship's nationality;
- for a second-hand ship bought from abroad, the ship-owner may apply at the place of its domicile or principal place of business for a temporary certificate of ship's nationality;
- for a change of port of registry due to the ship sale and purchase, the new ship-owner may apply at the new ship registration authority for a temporary certificate of ship's nationality;
- for a change of port of registry due to the change of the ship-owner's domicile or the ship's route, the ship-owner may apply at the original ship registration authority for a temporary certificate of ship's nationality.

For fishing vessels, usually the temporary registration of the ship's nationality will be granted by the ship registration authority if the fishing vessel is bareboat-chartered from abroad. If the ship's nationality certificate is lost or missing, temporary registration may also be granted.

Dual nationality of a vessel is banned under PRC law.

1.6 Registration of Mortgages

The mortgage of a ship shall be registered in the MSA where the port of registry is located.

The following documents are required for registering a mortgage:

- an application for mortgage registry in writing, executed by both parties;
- a ship mortgage contract and its master contract;
- a certificate of registry or ship-building contract;
- where a ship is owned by joint owners, the documents proving the agreement of mortgage of the ship by all the joint owners or the joint owners who have more than two thirds of the shares thereof;
- where a bareboat charter is registered, the documents proving the charterer's agreement of the mortgage.

In registering the mortgage of a ship under construction, except as provided for in the first four paragraphs above, an affidavit by the mortgagor shall be submitted, warranting that the ship is not registered for mortgage in other ship registration authorities nor that any law or regulation prohibits the ship from being mortgaged.

1.7 Ship Ownership and Mortgages Registry

The ship ownership and mortgages registry in China is available to the public.

Apart from the owners, the following entities and persons may apply to the competent authority to view the ship registration file:

- the obligee of a ship and its successor, recipient and legatee and their agents may each apply to the competent authority to view the ship registration file in their own name;
- the national department of administration and politics, the department of discipline inspection and supervision, the auditing department and the arbitration institution may apply to the competent authority to view the ship registration file directly related to their work;
- law firms may apply to the competent authority to view the ship registration file in relation to the cases they are handling which have been formally accepted by the court.

For the purpose of viewing the ship registration file, the following documents shall be submitted:

- an application for viewing the ship registration, indicating the name of the ship to be inquired about as well as the specific inquiry;
- a certificate of identity or qualification of the ship obligee, as well as proof of the mortgage;
- a certificate of identity or qualification of the successor, recipient or legatee, together with the materials proving the facts of the inheritance, gifting or legacy;
- a power of attorney specifying the specific matters to be inquired about, as well as the certificate of identity of the agent (for an agent inquiry);
- a certificate issued by the national department of administration and politics, the department of discipline inspection and supervision, the auditing department and the arbitration institution, specifying the cause of the inquiry and specific matters to be inquired about as well as the work certificate of the official who is responsible for the inquiry;
- a letter of introduction of the law firm, proof of case acceptance, and documents proving the inquiry is related to the cases they are handling, as well as the practising licence of the lawyer who is making the inquiry.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

The following are the applicable international conventions and relevant laws which have been ratified by the PRC and will impact upon the liability of owners and interested parties in events of pollution and wreck removal:

- the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997;
- the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 and the Protocol 1973;
- the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, and the 1996 London Protocol;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990;
- the International Convention on Civil Liability for Oil Pollution Damage, 1992;
- the Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001;
- the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001;
- the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Disputes over Compensation for Vessel-induced Oil Pollution Damage; and
- the Nairobi International Convention on the Removal of Wrecks.

2.2 International Conventions: Collision and Salvage

The following international conventions and relevant laws have been ratified by the PRC and will impact upon the liability of owners and interested parties in events of collision and salvage:

- the Convention on the International Regulations for Preventing Collisions at Sea, 1972;
- the International Convention for the Safety of Life at Sea, 1974;
- the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978;
- the Maritime Code of the PRC;
- the Provisions of the Supreme People's Court on Some Issues about the Trial of the Cases of Ship Collision Disputes;
- the Provisions of the Supreme People's Court on the Trial of the Cases of Property Damage Compensation arising from Ship Collision and Allision;
- the International Convention on Salvage, 1989.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The 1976 Convention on Limitation of Liability for Maritime Claims is not applicable in PRC jurisdiction. There is a domestic legislation, the Maritime Code of the PRC, that applies in this regard, and the specific provisions are set out as follows:

Article 207 states: "Except as provided otherwise in Article 208 and 209 of this Law, the person liable may limit his liability in accordance with the provisions of this Chapter, whatever the basis of liability may be, with respect to the following maritime claims:

(1) Claims in respect of loss of life or personal injury or loss of or damage to property, including damage to harbour works, basins and waterways and aids to navigation occurring on board or in direct connection with the operation of the ship or with salvage operations, as well as consequential damages resulting therefrom;
(2) 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;
(3) Claims in respect of other loss resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations;
(4) Claims 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 liability in accordance with the provisions of this Chapter, and further loss caused by such measures.

All the claims set out in the preceding paragraph, in whatever way they are lodged, may be entitled to limitation of liability. However, with respect to the remuneration set out in sub-paragraph (4) for which the person liable pays as agreed upon in the contract, in relation to the obligation for payment, the person liable may not invoke the provisions on limitation of liability of this Article."

Article 208 of the same law states:

"The provisions of this Chapter shall not be applicable to the following claims:

(1) Claims for salvage payment or contribution in general average;

(2) Claims for oil pollution damage under the International Convention on Civil Liability for Oil Pollution Damage to which the PRC is a party;
(3) Claims for nuclear damage under the International Convention on Limitation of Liability for Nuclear Damage to which the PRC is a party;
(4) Claims against the ship-owners of a nuclear ship for nuclear damage;
(5) Claims by the servants of the ship-owners or salvor, if under the law governing the contract of employment, the ship-owner or salvor is not entitled to limit his liability or if he is by such law only permitted to limit his liability to an amount greater than that provided for in this Chapter."

Articles 210 and 211 of the same law regulate the calculation of limitations of liability, which is generally identical to the limitation level regulated by the 1976 Convention on Limitation of Liability for Maritime Claims. The provisions are:

Article 210: "The limitation of liability for maritime claims, except as otherwise provided for in Article 211 of this Law, shall be calculated as follows:

(1) In respect of claims for loss of life or personal injury:
a) 333,000 Units of Account for a ship with a gross tonnage ranging from 300 to 500 tons;
b) For a ship with a gross tonnage in excess of 500 tons, the limitation under a) above shall be applicable to the first 500 tons and the following amounts in addition to that set out under a) shall be applicable to the gross tonnage in excess of 500 tons:
i) For each ton from 501 to 3,000 tons: 500 Units of Account;
ii) For each ton from 3,001 to 30,000 tons: 333 Units of Account;
iii) For each ton from 30,001 to 70,000 tons: 250 Units of Account;
iv) For each ton in excess of 70,000 tons: 167 Units of Account.
(2) In respect of claims other than that for loss of life or personal injury:
a) 167,000 Units of Account for a ship with a gross tonnage ranging from 300 to 500 tons;
b) For a ship with a gross tonnage in excess of 500 tons, the limitation under a) above shall be applicable to the first 500 tons, and the following amounts in addition to that under a) shall be applicable to the part in excess of 500 tons:
i) For each ton from 501 to 30,000 tons: 167 Units of Account;
ii) For each ton from 30,001 to 70,000 tons: 125 Units of Account;
iii) For each ton in excess of 70,000 tons: 83 Units of Account.
(3) Where the amount calculated in accordance with sub-paragraph (1) above is insufficient for payment of claims for loss of life or personal injury set out therein in full, the amount calculated in accordance with sub-paragraph (2) shall be available for payment of the unpaid balance of claims under sub-paragraph (1), and such unpaid balance shall rank pro rata with claims set out under sub-paragraph (2).
(4) However, without prejudice to the right of claims for loss of life or personal injury under sub-paragraph (3), claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have priority over other claims under sub-paragraph (2).
(5) The limitation of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of, which he is rendering salvage services, shall be calculated according to a gross tonnage of 1,500 tons.

The limitation of liability for ships with a gross tonnage not exceeding 300 tons and those engaging in transport services between the ports of the PRC as well as those for other coastal works shall be worked out by the competent authorities of transport and communications under the State Council and implemented after its being submitted to and approved by the State Council."

Article 211: "In respect of claims for loss of life or personal injury to passengers carried by sea, the limitation of liability of the ship-owner thereof shall be 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 relevant certificate, but the maximum amount of compensation shall not exceed 25,000,000 Units of Account.

The limitation of liability for claims for loss of life or personal injury to passengers carried by sea between the ports of PRC shall be worked out by the competent authorities of transport and communications under the State Council and implemented after its being submitted to and approved by the State Council."

China sets a relatively low standard for limitations of liability for ships with a gross tonnage ranging from 20 tons to 300 tons and those exceeding 300 tons but engaged in domestic transport services and other coastal works.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Application for the constitution of a limitation fund can be made before or during litigation proceedings, but no later than the issuance of the first-instance judgment.

The court will notify known interested parties and make an announcement to unknown interested parties via public media within seven days after the application.

Announcement of the constitution shall be produced in public media for three days consecutively; the announcing period is 30 days from the last announcement.

Notified parties can raise dissention against the constitution within seven days upon receipt of notice; parties not notified can raise dissention against the constitution within 30 days from the last announcement date.

The court's decision shall be made within 15 days upon receipt of dissention against the constitution. The time limit to appeal against the court's decision is seven days upon receipt. The Appeal Court's decision on dissention is 15 days upon receipt.

If no dissent is received, the court will permit the constitution within 30 days from the last announcement made on public media.

The creditor's registration period against the limitation fund is 60 days, beginning from when the last announcement is made.

The ship-owner, charter, operator, salvor and insurer may apply to the maritime court to constitute a limitation fund.

Cash or a guarantee shall be made available for the fund within three days after the court's decision to allow constitution, otherwise the application will be treated as withdrawn. A limitation fund is successfully constituted by a successful cash deposit or guarantee.

3. Cargo Claims

3.1 Bills of Lading

The laws and regulations applicable to the carriage of goods by sea and bills of lading in China are:

- the Maritime Code of the PRC; and
- the Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases of Delivery of Goods Without Original Bill of Lading ("Provisions of Delivery of Goods without B/L").

China (except Hong Kong) is not a party to the Hague Rules, the Hague-Visby Rules, the Hamburg Rules, or the Rotterdam Rules.

3.2 Title to Sue on a Bill of Lading

The shipper, the holder of the bill of lading (B/L), and the carrier have the title to sue.

The Shipper

In PRC law, "shipper" means both the contractual shipper who concludes the contract of carriage goods by sea with the carrier, and the actual shipper who actually delivers the goods to the carrier.

The contractual shipper as the contractual party has the title to sue the carrier directly under the contract of carriage of goods by sea. The bill of lading serves as evidence of the contract.

The actual shipper who holds the original "to order" B/L, even if his or her name is absent from the B/L, is still entitled to sue the carrier. The Supreme Court held that the actual shipper who holds the straight bill of lading also has the right to sue the carrier for the delivery of the goods without the original bill of lading in the case (2016) Supreme Court Min Shen No 2284.

The Holder of the Bill of Lading/Consignee

The legal holder of the bill of lading has the right to sue the carrier under the bill of lading.

The Carrier

The contractual and actual carriers have the title to sue the shipper under the contract of carriage of goods by sea and the bill of lading.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Ship-Owner's Liability

The ship-owner, regardless of whether he or she is a contractual carrier or an actual carrier, shall be liable for the loss of or damage to the goods during the period in which the carrier is in charge of the goods (with the exception stipulated in Article 51 of the Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases of Delivery of Goods Without Original Bill of Lading ("Provisions of Delivery of Goods without B/L")) and the loss caused by the delay in delivery within the time expressly agreed upon, if any; in general, the ship-owners (two types of carriers) should:

- exercise due diligence to make the ship seaworthy before and at the beginning of the voyage;
- perform his or her duty of care for cargo properly; and
- make no unreasonable deviation.

However, the actual carrier may not have the obligation to issue the bill of lading or deliver the cargo, subject to his or her charter party with charterers. In addition, the contractual carrier shall

be responsible for the entire carriage, while the actual carrier is only responsible for his or her segment. They can both seek recovery from each other under Article 65 of the Maritime Code of the PRC.

Limitation of Liabilities for Cargo Damages

Article 56 of the Maritime Code of the PRC states:

"The liability of the carrier for the loss resulting from loss of or damage to goods shall be limited to an amount equivalent to 666.67 Units of Account per package or other shipping unit, or 2 Units of Account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods had been declared by the shipper before shipment and inserted in the bill of lading, or where a higher amount than the amount of limitation of liability set out in this Article had been agreed upon between the carrier and the shipper.

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed to be the number of packages or shipping units. If not so enumerated, the goods in such article of transport shall be deemed to be one package or one shipping unit.

Where the article of transport is not owned or furnished by the carrier, such article of transport shall be deemed to be one package or one shipping unit."

According to Article 61 of the Maritime Code of the PRC, the above limitation of liability applies to both the contractual carrier and the actual carrier.

In addition, according to Articles 204 and 207 of the Maritime Code of the PRC, except for the unit limitation of limitation for the carrier, the ship-owner (including the charterer and the ship operator) and the salvor could be protected by the limitation of liability for maritime claims stipulated in Article 210 of the same law.

Article 210 (2) states "In respect of the claims other than that loss of life or personal injury:

a) 167,000 Units of Account for a ship with a gross tonnage ranging from 300 to 500 tons;
b) For a ship with a gross tonnage excess of 500 tons, the limitation under a) above shall be applicable to the first 500 tons, and the following amounts in addition to that under a) shall be applicable to the part in excess of 500 tons:
i) For each ton from 501 to 30,000 tons: 167 Units of Account;
ii) For each ton from 30,001 to 70,000 tons: 125 Units of Account;
iii) For each ton in excess of 70,000 tons: 83 Units of Account.

..."

However, the carrier or the person liable will not be entitled to the benefit of limitations of liabilities stipulated in Articles 56 and 207 if the loss, damage or delay in delivery of the goods resulted from an act or omission of the carrier or the person which was done with the intention to cause that loss, damage or delay, or recklessly and with the knowledge that such loss, damage or delay would probably result under Articles 59 and 209 of the Maritime Code of the PRC.

"A person liable" in Article 209 of refers to the person himself or herself and does not include his or her servant and agent. Therefore, the ship-owner is still entitled to benefit from the limitation of liability for a maritime claim if it is proved that the loss, damages or delay in delivery of goods resulted from the wilful or reckless acts of the Master, crews or agent rather than himself or herself.

3.4 Misdeclaration of Cargo

The shipper shall indemnify the carrier against any loss resulting from the misdeclaration of general and dangerous cargo.

In practice, for general cargo, in order to lodge a successful claim, the carrier needs to prove that damage was caused by the fault of the shipper or his or her servant or agent.

However, for dangerous goods, the court would normally apply the principle of strict liability. As per the case (2016) Supreme Court Min Shen No 1271, the Supreme Court held that for dangerous cargo, if:

- the shipper, including the actual shipper and Non-Vessel Operating Common Carrier, fails to notify or notifies the actual carrier inaccurately;
- the actual carrier has fulfilled its duty of care for the goods; and
- the loss or damage was caused by the dangerous cargo which was not properly declared, the shipper shall be liable for the loss or damage resulting from the misdeclaration of dangerous cargo.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

Time Bar

The time limit for bringing a claim against the carrier for damaged or lost cargo (either for breach of contract or in tort) is one year, counting from the day on which the goods were delivered

or should have been delivered by the carrier and within the limitation period or after the expiry thereof. If the person allegedly liable has brought a claim of recourse against a third party, that claim has a time limit of 90 days, counting from the day on which the person claiming for the recourse settled the claim, or was served with a copy of the claim documents by the court.

Extension, Suspension and Discontinuance of Time Limit

The time limit for actions for maritime disputes cannot be extended by agreement. It can be suspended or discontinued pursuant to the Maritime Code of the PRC.

Regarding suspension of time limit, Article 266 of the Maritime Code of the PRC states: "Within the last six months of the limitation period if, on account of *force majeure* or other causes, the claims could not be made, the limitation period shall be suspended. The counting of the limitation period shall be resumed when the cause of suspension no longer exists."

Regarding the discontinuance of time limit, Article 267 of the Maritime Code of the PRC states: "The limitation of time shall be discontinued as a result of the claimant bringing an action or submitting the case for arbitration or the admission to fulfil obligations by the person against whom the claim was brought. However, the limitation of time shall not be discontinued if the claimant withdraws his action or his submission for arbitration, or his action has been rejected by a decision of the court… The limitation period shall be counted anew from the time of discontinuance."

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

China has not participated in any international convention regarding the arrests of vessels. The domestic laws that cover vessel arrests in China are:

- the Maritime Code;
- the Special Maritime Procedure Law;
- the Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Law in the Arrest and Judicial Sale of Ships.

4.2 Maritime Liens

PRC law differentiates between maritime liens and maritime claims. The following maritime claims are entitled to maritime liens:

- crew wages, repatriation and social insurance costs, other remuneration;
- personal injury and casualty that occurred in ship operation;
- ship's tonnage dues, pilotage dues, harbour dues and other port charges;
- salvage;
- loss of or damage to property resulting from a tortious act in ship operation.

However, claims for oil pollution damage caused by a ship carrying more than 2,000 tons of oil that has a valid certificate attesting that the ship has oil pollution liability insurance coverage or other appropriate financial security are not within the scope of the above-mentioned maritime liens.

The following maritime claims are entitled to require the arrest of a ship:

- loss of or damage to the property occurred in the ship operation;
- personal injury and casualty directly related to the ship operation;
- salvage at sea;
- damage or threat of damage caused by the vessel to the environment, the coast or relevant interested parties; the measures taken for prevention, reduction and elimination of any such damage; payment for compensation of any such damage; the reasonable cost for potential or actual measures taken for restoring the environment; losses the third party suffered or will probably suffer due to that damage; the damages, fees or losses which are similar in nature to those specified in this point;
- expenses relating to the re-floating, removal, reclamation or destruction of a sunken ship, shipwreck, stranded ship, abandoned ship or to making them harmless, including expenses relating to the re-floating, removal, reclamation or destruction of the objects which have, or have no longer, remained on board the ship or to making them harmless, and expenses relating to the maintenance of the abandoned ship and her crew;
- agreement in respect of employment or chartering of a ship;
- agreement in respect of carriage of goods or passengers;
- goods (including luggage) on board or loss or damage related thereto;
- general average;
- towage;
- pilotage;
- providing supplies or rendering of services in respect of ship operation, management, maintenance or repair;
- construction, reconstruction, repair, refurbishment or equipment of a ship;
- dues or charges for ports, canals, wharves, harbours or other waterways;
- crew wages or other payments, including repatriation and social insurance premiums payable for the crew;

- expenses paid for a ship or ship-owner;
- a ship's insurance premium (including protection and indemnity calls) payable by or paid for by a ship-owner or bareboat charterer;
- a commission, brokerage or agency fee related to a vessel payable by or paid for by a ship-owner or bareboat charterer;
- disputes over the ownership or possession of a ship;
- disputes between co-owners of a ship over the employment or earnings of the ship;
- a ship mortgage or right of a similar nature;
- disputes arising from the sale and purchase of a ship.

4.3 Liability in Personam for Owners or Demise Charterers

A ship can be arrested regardless of its owners' or demise charterers' personal liability on the merits constituting a recognised maritime lien on the ship. Even if the ship's ownership has changed, the ship can be arrested within the time limit to exercise a maritime lien.

4.4 Unpaid Bunkers

A bunker supplier is entitled to arrest a vessel for unpaid bunkers, and there is no difference whether it is a contractual supplier or an actual supplier.

However, if the bunkers were supplied to a chartered vessel and the bunkers were ordered by the charterer and not by the owner, things will be different. A vessel operated or chartered by a time charterer or voyage charterer may not be arrested.

4.5 Arresting a Vessel

The following formalities are required to arrest a ship:

- a power of attorney and a certificate of identity of a legal Representative;
- a Certificate of Incorporation or Good Standing of the applicant.

The documents above shall be duly notarised and legalised.

- an application for arrest;
- supporting evidence and translation into the language of the PRC (if the original language is not that of the PRC). Originals or notarised copies of supporting evidence is required.

The court always requires the applicant to lodge a counter security in case of a wrongful arrest.

4.6 Arresting Bunkers and Freight

The applicant is entitled to arrest bunkers. However, it is very difficult to enforce such an arrest, due to complex customs formalities, safety, and storage requirements, etc.

The applicant is entitled to apply for a court order to preserve the freight for debts that are due.

4.7 Sister-Ship Arrest

The maritime court may arrest a sister vessel which is owned, at the time of arrest, by the ship-owner, the demise charterer, the time charterer or the voyage charterer who is liable for the maritime claim, except for claims related to the ownership or possession of the vessel.

4.8 Other Ways of Obtaining Attachment Orders

The applicant may apply for arrest of cargo, or property preservation against the respondent's real estate or other assets.

4.9 Releasing an Arrested Vessel

The owner or any interested party may lodge a satisfied security to release the vessel. The court only accepts security lodged in cash or a Letter of Undertaking (LOU) issued by a domestic bank or insurance company or any other entity they deem appropriate. Nonetheless, the ship-owner or the interested party has the liberty to negotiate the security with the applicant. In the event that the applicant agrees to accept a club LOU or a foreign bank's guarantee, the court may release the vessel.

4.10 Procedure for the Judicial Sale of Arrested Ships

A judicial sale of the arrested ship shall follow the steps set out below:

- set up an auction committee;
- appraise the ship value;
- issue the auction notice;
- display the ship;
- set the price;
- register the bidders;
- conduct the ship auction and bidding (online);
- make the auction confirmation and delivery;
- the court releases the ship and announces the auction result.

While the ship is under arrest, the ship-owner or bareboat charterer is liable for maintaining the ship until it has been sold by the court.

After being sold by auction, the payment sequence is:

- maritime claims with maritime liens;
- maritime claims secured by possessory liens;
- maritime claims secured by ship mortgages;
- other maritime claims in relation to the judicial sale and/or sell-off of the ship.

4.11 Insolvency Laws Applied by Maritime Courts

China has its Enterprise Bankruptcy Law, which provides that all the bankruptcy cases shall be submitted to the intermediate People's Court instead of the maritime court. According to the Interpretations to the Civil Procedure Law and the Interpretations to the Special Maritime Procedure Law, the intermediate People's Court may request the maritime court to assist in the arrest and/or auction of the vessel owned by owners that are under bankruptcy proceedings. But the enforcement of such a request or arrest is subject to the communication and co-ordination between the courts.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

The applicant shall indemnify the respondent for the wrongful arrest of a vessel. It is clear that the arrest is wrongful if the applicant loses in the substantive proceeding. In other scenarios, it is subject to the court's discretion.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

The Applicable Laws and Conventions to the Resolution of Passenger Claims in China

- the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974: its 1976 Protocol;
- the Maritime Code of the PRC;
- the Provisions on limitation of liability for carriage of passengers by sea between ports of the PRC.

Time Bar

Article 258 of the Maritime Code of the PRC states:

"The time limit for bringing a claim against the carrier with regard to the carriage of passengers by sea is two years, counting respectively as follows:

(1) Claims for personal injury: counting from the day on which the passengers disembarked or should have disembarked;
(2) Claims for death of passengers that occurred during the period of carriage: counting from the day on which the passenger should have disembarked; whereas those for the death of passengers that occurred after the disembarkation but resulted from an injury during the period of carriage by sea, counting from the day of the death of the passenger concerned, provided that this period does not exceed three years from the time of disembarkation.
(3) Claims for loss of or damage to the luggage: counting from the day of disembarkation or the day on which the passenger should have disembarked."

Limitation of Liabilities for a Ship-owner

Article 117 of the Maritime Code of the PRC states:

"Except the circumstances specified in paragraph 4 of this Article, the limitation of liability of the carrier under each carriage of passengers by sea shall be governed by the following:

(1) For death of or personal injury to the passenger: not exceeding 46,666 Units of Account per passenger;
(2) For loss of or damage to the passengers' cabin luggage: not exceeding 833 Units of Account per passenger;
(3) For loss of or damage to the passengers' vehicles including the luggage carried therein: not exceeding 3,333 Units of Account per vehicle;
(4) For loss of or damage to luggage other than that mentioned in subparagraphs (2) and (3) in this Article: not exceeding 1,200 Units of Account per passenger.

An agreement may be reached between the carrier and the passengers with respect to the deductibles applicable to the compensation for loss of or damage to the passengers' vehicles and luggage other than their vehicles. However, the deductible with respect to the loss of or damage to the passengers' vehicles shall not exceed 117 Units of Account per vehicle, whereas the deductible for the loss of or damage to the luggage other than the vehicle shall not exceed 13 Units of Account per piece of luggage per passenger. In calculating the amount of compensation for the loss of or damage to the passenger's vehicle or the luggage other than the vehicle, deduction shall be made of the agreed deductibles the carrier is entitled to.

A higher limitation of liability than that set out in sub-paragraph (1) above may be agreed upon between the carrier and the passenger in writing..."

In addition, according to Article 207, a ship-owner (including a charterer and an operator of a ship) or a salvor could enjoy the limitation of liability for maritime claims stipulated in Article 211 of the same law.

Article 211 states: "In respect of claims for loss of life or personal injury to passengers carried by sea, the limitation of liability of the ship-owner thereof shall be 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 relevant certificate, but the maximum amount of compensation shall not exceed 25,000,000 Units of Account..."

However, Articles 118 and 209 regulate that the carrier or a person liable shall not be entitled to limit his or her liability based on the above provisions, if it is proved that the loss resulted from his or her act or omission done with the intent to cause that loss

or damage or recklessly and with the knowledge that such loss would probably result.

Meanwhile "a person liable" in Article 209 refers to the carrier/owner himself or herself rather than the Master, crews or agent. This means the carrier/owner is still entitled to benefit from the limitation of liability for maritime claims if it is proved that the loss, damages or delay in delivery of goods resulted from the wilful or reckless acts of the Master or crews rather than the carrier/owner himself or herself.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

PRC courts rarely recognise the validity of the law or jurisdiction clauses stated in the Bills of Lading due to the lack of negotiation between the consignee, the receiver, the holder of the original Bills of Lading, the cargo underwriters and the carrier about such clauses.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

PRC courts rarely recognise the validity of the law and arbitration clauses incorporated into a bill of lading.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

China joined the 1958 New York Convention in 1986. Civil Procedure Law is the domestic law that governs the recognition and enforcement of foreign arbitral awards.

A foreign arbitral award needs to be notarised and legalised before being submitted to the PRC courts for recognition and enforcement.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

The applicant is entitled to apply to the PRC courts for the arrest of the vessel in dispute which is subject to foreign arbitration or jurisdiction. This application shall be made before the applicant commences the arbitration/litigation proceeding. Once the arrest is granted, the applicant shall commence the arbitration/litigation proceeding within 30 days.

6.5 Domestic Arbitration Institutes

The China Maritime Arbitration Commission (CMAC), the China International Economic and Trade Arbitration Commission (CIETAC) specialise in maritime claims.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

If the claimant commences proceedings before a PRC court in breach of foreign jurisdiction or arbitration clauses, the respondent is entitled to file a jurisdiction objection within the period of defence to challenge the court's jurisdiction. If the court sustains the objection, it will dismiss the claimant's action. In that case, the claimant shall bear the court fee, and there will be no further remedies available to the respondent/defendant.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

A ship-owner incorporated in the PRC is subject to corporate income tax on its worldwide income earned by its vessels, and is subject to relief for any tax paid on the same income elsewhere.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

After the outbreak of the COVID-19 pandemic, PRC ports took strict prevention and control measures. So far, PRC ports mainly take the following measures, as suggested by the Ministry of Transport of China:

Regulation and Improvement of Operational Procedures

- Before a ship enters the port, port enterprises will hold a pre-meeting to study the COVID-19 risks on board, declare specific prevention measures and matters to be noticed, and confirm the personnel in charge.
- Ships are urged to undergo disinfection and ventilation, duties are arranged and identity information of the personnel on and off the ships is recorded.
- An international trading ship is not allowed to load or discharge cargo at ports before she passes the sanitary quarantine and obtains the inspection and quarantine certificate.
- The strict prevention and control measures include non-direct contact between ship and shore personnel. The crew on board international trading ships are not allowed to disembark except for production and living requirements and emergencies.
- No crew change, ship supply, ship inspection or emergency rescue of injured crew is allowed without approval from the port competent authority.

Prevention and Protection Requirement for Port Staff

- The port staff shall be supplied with masks, gloves, goggles and other necessary protection supplies and be taught how to use them;
- the port staff shall be regularly tested of temperature and nucleic acid;
- the port staff shall not board on the ships or have direct contact with the crew unless there is a special reason;
- during cargo operation, warning signs and warning lines shall be set up to keep a safe distance;
- when unpacking imported refrigerated containers, personnel who have direct contact with the refrigerated goods shall be under closed-loop management;
- in-person gathering must be reduced by using mobile, webchat and video link.

Prevention and Protective Requirement for International Trading Ship Agent and Other Boarding Personnel

- They shall wear masks, gloves and goggles correctly and record body temperature and register information;
- they are prohibited from entering the crew's living area and having direct contact with the crew;
- they shall avoid eating, going to the toilet or resting on board. After completion of their works, they shall leave the ship without delay;
- they shall be disinfected after disembarkation. The prevention and protective equipment shall be disposed of according to the relevant regulations;
- those who have direct contact with imported bulk refrigerated goods shall be fixed and record body temperature regularly and get a nucleic acid test at least once a week and shall be kept under closed-loop management if necessary;
- the high-risk personnel such as port stevedores, pilots and shipping agents who have been vaccinated against COVID-19 should perform a regular nucleic acid test in accordance with the relevant regulations of the local health department.

Emergency Handling

- In the event that a crew member has a fever, cough or other abnormal symptoms, the boarding pilots must have their protective suit, goggles, high-level medical protective masks and gloves correctly equipped, the ships must be ventilated and disinfected thoroughly, and all crew members must wear high-level protective masks.
- In the event that a person with suspected symptoms of new coronary pneumonia vomits, the vomit shall be covered by a disposable absorbent material and a sufficient amount of disinfectant or a disinfectant towel. After removing the vomit, the surface shall also be disinfected.
- After the person who is suspected of being infected is quarantined, the temporary observation room where he or she stays shall be disinfected. In addition, the boats and vehicles carrying that person shall also be disinfected.

Crew Restrictions

- Where the crew is replaced at last port and within 14 days before arrival in China, the new boarding crew shall have a nucleic acid test within three days before boarding and can board the ship only with a negative test report. The test should be carried out in the institutions designated or recognised by PRC embassies and consulates overseas.
- When handling port entry formalities, a ship shall submit the duplicate of the negative nucleic acid test reports of newly boarded crew issued at last port or issued within 14 days before arrival.
- Where a member of the crew does not board with such a test report or boards with a fake report which causes the risk of the spread of COVID-19 in domestic China, he or she will be investigated for criminal liability.
- After a ship gets alongside, except for the normal duty shift of PRC crew and emergency rescue for the injured crew, the crew on board shall not be permitted to go ashore.
- After the formalities for the duty shift are completed, any crew with abnormal symptoms or a positive test result shall be taken into the care of the government. For crew without abnormal symptoms or a positive test result, they shall act in accordance with the local regulations and requirement.
- The crew shall take personal protection measures carefully during their duty shift and observe the quarantine requirements strictly during quarantine and report their daily health conditions to the shipping company or seafarer-manning agency.

8.2 Force Majeure and Frustration in Relation to COVID-19

PRC courts usually adopt the following rules to identify whether the COVID-19 pandemic constitutes a *force majeure* event.

- In respect of civil disputes directly caused by the pandemic, a party claiming partial- or whole-liability exemption by invoking *force majeure* shall bear the burden of proving that the cause is *force majeure*.
- A party that fails to perform a contract due to the pandemic shall, subject to the provisions on *force majeure*, be partially or wholly exempted from liability corresponding to the degree of impact. A party to whom failure to perform a contract or enlarged losses may be attributable shall bear corresponding liabilities. He or she will need to prove that timely notification has been provided.
- When a party has difficulty performing the contract due to the pandemic, the parties may renew negotiations. If the parties determine that the contract can be continued, the courts shall encourage the parties to resort to concilia-

tion. When a party intends to terminate the contract on the grounds that it is difficult to perform, the people's court will not support it. Where the continuance of the performance of the contract would be obviously unfair to one party and the party therefore requests to change the performance period, terms and price, the courts shall decide whether to support the request. If a party still requests partial or whole exemption from liability after the contract is thus modified, the court shall not support it. If the purpose of the contract cannot be realised due to the pandemic, the court will support the request for termination.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

PRC judicial practice is controversial with regard to certain seafarer-related disputes, for instance, the legal status of the manning company, the seafarer's maritime lien on their wages and the owners' liability to the injured seafarer, etc. The Supreme Court's regulations on the seafarer market are as follows.

- For a labour dispute between a seafarer and a ship-owner that is not relevant to the embarkation, employment on a ship, or disembarkation and repatriation of the seafarer, if either party brings an action directly in the maritime court, the maritime court shall notify the parties of the application of the Labour Dispute Mediation and Arbitration Law.
- For a dispute over a labour service contract between a seafarer and a ship-owner, the maritime court shall entertain the case if either party brings an action in the maritime court in the place of domicile of the claimant, the place where the contract was signed, the port of embarkation or disembarkation of the seafarer, or the place of domicile of the defendant.
- When a seafarer service-provider only performs relevant procedures on behalf of a seafarer, or only provides employment information for the seafarer, the court will support the seafarer service-provider's claim that it is only an intermediary rather than a staffing agency.
- When a ship-owner conducts operations externally in the name of an entity with which it is affiliated, without signing a written labour contract with each seafarer, if a seafarer employed by it is injured or dies at work and it is claimed that the entity with which it is affiliated is subject to the liability for work-related injury insurance, the claim shall be supported, unless there is a labour relationship between the ship-owner and the seafarer.
- When a labour dispute that is not relevant to the embarkation, employment on a ship, or disembarkation and repatriation of a seafarer is referred to a labour dispute arbitration committee, if the arbitration tribunal, upon application by the seafarer, awards prior execution with respect to the wages and other labour remuneration, medical expenses for work-related injury, or financial compensation or damages of the seafarer, a transfer shall be made to the local court for examination. If the seafarer applies for the arrest of a ship, the arbitration tribunal shall transfer the ship arrest application to the maritime court in the place where the ship's port of registry or where the ship is located for examination, or to a local court for appointing the maritime court in the place where the ship's port of registry or where the ship is located, to conduct an examination.
- For a maritime claim secured by a maritime lien, if the seafarer does not apply for the arrest of the ship that gave rise to that maritime lien, in line with Article 28 of the Maritime Code, but applies only for confirmation of his or her maritime lien on the ship within a certain period, the request shall be supported.
- For a maritime claim secured by a maritime lien, if the seafarer does not apply for restriction of operation of the ship but applies only for preservation, such as restriction of disposal or mortgage of the ship, the request shall be supported. However, the seafarer's contention that such preservation shall constitute the ship arrest under Article 28 of the Maritime Code will not be supported.
- The seafarer's claims for a maritime lien on the following wages and other labour remuneration arising from embarkation, employment on a ship or disembarkation and repatriation of a seafarer shall be supported:
  (a) remuneration or basic wages during normal working hours;
  (b) overtime wages for prolonged working hours, weekends and official holidays;
  (c) bonuses, allowances and subsidies during service on board, as well as wages paid under special circumstances;
  (d) interest on the delayed payment of the above amounts.
- Where the seafarer claims a maritime lien on the economic indemnity and compensation stipulated by the Labour Law and Labour Contract Law, the double pay payable due to failure of the conclusion of a written employment contract in accordance with Article 82 of the Labour Law, as well as the interest due on delayed payment of the amounts specified in this paragraph, the request shall not be supported.
- Where the wages, other labour remuneration, repatriation fee and social insurance arising from embarkation, employment on a ship or disembarkation and repatriation of a seafarer are not paid by the ship-owner but advanced by the third party in part or in whole, and the seafarer assigns the corresponding maritime claim to this third party, the third

party's request for confirmation of the maritime claim or exercising the maritime lien shall be supported.

- Where the seafarer requests the financial guarantor or manning agency to advance emergency expenses from the financial guarantee or manning reserve, because he or she has been abandoned or has encountered an emergency event when working overseas for which the ship-owner, financial guarantor and manning agency do not undertake liabilities, the request shall be supported.
- Regarding whether the overtime wages for working hours, weekends and official holidays arising from the embarkation, employment on a ship or disembarkation and repatriation of a seafarer shall be covered by the seafarer's wages, where a party requests to determine the wages in accordance with the prior agreement, if there is an agreement, the request shall be supported. However, if the agreed wages are lower than the statutory minimum wage, it shall not be supported.
- Under the standard working-hour system, where the seafarer claims overtime wages for weekends and this is rejected by the ship-owner on the grounds that they have evidence that the seafarer had an arrangement for compensated leave and therefore was not entitled to be paid for overtime wages, the ship-owner's argument shall be supported. Under the overall working-hour system, where the crew claims overtime wages based on the grounds that the overall working hours exceed the standard working hours, it shall be supported by the court. Where the crew claims overtime wages during statutory holidays and the ship-owner argues that the seafarer had an arrangement for compensated leave and therefore would not be paid for overtime wages during statutory holidays, the ship-owner's argument shall not be supported, unless it is agreed otherwise.
- Where the payment standard or manner of the seafarer's wages or other labour remuneration is not agreed or agreed ambiguously and a party claims that it shall be equivalent to the average level in the market, it shall be supported.
- In the event that the seafarer claims the wages and other labour remuneration arising from embarkation, employment on a ship or disembarkation and repatriation for conducting fishing operations illegally, into which they are deceived or forced, the seafarer's request shall be admissible. However, if the ship-owner can provide evidence that the seafarer is well aware of and has an intention to conduct those illegal operations, the seafarer's aforementioned request shall be inadmissible. Where the ship-owner or seafarer shall be subject to an administrative penalty or criminal investigation, it shall be handled in accordance with the relevant procedures.
- If the seafarer is injured while at work and the ship-owner can produce evidence that the seafarer is at fault for his or her injury and therefore requests the seafarer to accept liability and that he or she is at fault, the ship-owner's argument shall be supported.
- Where the seafarer sustains a work-related injury for which a third party is blamed, and the seafarer lodges an action against that third party, and the third party argues on the grounds that the seafarer's loss has been covered by work-related injury insurance, this argument by the third party shall be inadmissible. However, the seafarer's claim for medical costs shall not be supported if he or she has already acquired the medical costs.
- Where a foreign element is involved in the employment contract concluded between the seafarer and the ship-owner and if either party requests the court to determine the applicable law in accordance with Article 43 of the Law of the PRC on Choice of Law for Foreign-related Civil Relationships, the request shall be supported. If a party requests the application of law of the place where the labour is dispatched, the main business office of the ship-owner is located and the flag state, in case the applicable law is not chosen by either party for a work contract, it shall be supported. Where a party requests the application of the law which bears the closest relation to the agency agreement or brokerage contract concluded between the seafarer and the seafarer-manning agency, or between the seafarer-manning agency and the ship-owner, in case the applicable law is not chosen by either party with the ship-owner, the request shall be supported.
- The ship-owner specified herein includes the bareboat charterer, ship manager and ship operator.

Wang Jing & Co is one of the leading shipping law firms in China, with a team comprising 40 lawyers and marine consultants and offices in Guangzhou and Shanghai (dual heads), Beijing, Tianjin, Qingdao, Xiamen, Fuzhou and Shenzhen. The firm specialises in providing professional legal services in matters concerning collisions, pollution, salvage and wreck removal, cargo claims, piracy, charterparty, marine insurance, ship sale and purchase, shipping arbitration, etc. It has represented international clients, such as P&I Clubs, H&M Underwriters and ship-owners, in numerous complicated maritime issues, and is particularly adept at designing solutions, and providing efficient on-site assistance and considerate follow-up service. The team has participated in legislative discussions organised by the PRC Supreme Court and the China Maritime Safety Administration concerning mechanisms on limitation of liability for maritime claims, pollution damage compensation and the establishment of the oil pollution civil liability insurance system, with the aim of improving the maritime legal environment in China.

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COLOMBIA

Law and Practice

Contributed by:
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Contents

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1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The General Maritime Directorate (*Dirección General Marítima, DIMAR*) is the National Maritime Authority in Colombia. As such, the DIMAR was established originally under the name of the General Maritime and Ports Directorate (*Dirección General Marítima y Portuaria*) through Decree 2349 of 1971. The entity was later on reorganised through Decree 2324 of 1984 and it has maintained the basic structure provided by that regulation (which is still mainly in force) until today.

The DIMAR is, therefore, the local authority that exercises in practice the port state control and executes the policy of the maritime sector that is designed by the Colombian Government. As per Decree 2324 of 1984, the DIMAR is entitled also to investigate any maritime casualty occurring in Colombian waters. In fact, it was invested with specific jurisdictional functions regarding such accidents (ie, collisions, groundings, etc) and its powers entitle harbour masters of each respective jurisdiction in the first instance, and the Central Level, in the second instance, to determine the causes of the event and the liability of the vessels/persons involved.

It should be noted that there is no proper admiralty/maritime jurisdiction in Colombia. Thus, so-called wet shipping situations (collisions, groundings, etc) are dealt with by the DIMAR as previously described, whereas contractual claims (mainly bill of lading claims and/or charterparty-related claims) are to be handled, if required, by regular civil courts.

1.2 Port State Control

Colombia is a party to the so-called Viña del Mar Agreement. As per this international agreement, the DIMAR is to exercise in practice port state control following general parameters set out by the International Maritime Organization (IMO) for the purpose.

1.3 Domestic Legislation Applicable to Ship Registration

The procedure for registration of vessels at the domestic level is basically the one contained in Law 730 of 2001. Although originally created to apply only to certain types of vessels (in particular those dedicated to transportation and fishing activities), Law 730 of 2001 is today applicable to any type of vessel, irrespective of the use or type of employment for which she is envisaged. Law 730 of 2001 incorporates two types of registration, namely, provisory registration and definitive registration (provisory registration requirements are somehow less stringent than those requested for definitive registration).

1.4 Requirements for Ownership of Vessels

There are no specific requirements for ownership of vessels in Colombia. Despite the fact that Article 1458 of the Colombian Commercial Code originally established that only Colombian nationals were able to own commercial vessels registered under the Colombian flag, this provision was considered to be inapplicable by the Council of State. Local provisions do not specifically address the issue of whether vessels under construction could currently be registered. Thus, it seems debatable whether any such vessels could be entered into the Colombian flag register at some point.

1.5 Temporary Registration of Vessels

Temporary or "provisional" registration (as it is called in Colombia) is possible for up to six months and the requirements are somehow less stringent than those provided for definitive registration. As per Article 19 of Law 730 of 2001, dual registration is permitted (using the so-called provisional registration) only while procedures for cancellation of the original flag in a different State are carried out and the respective certificate of cancellation is provided.

1.6 Registration of Mortgages

Registration of mortgages on vessels are dealt with in Colombia by the DIMAR. As per Article 3 of Decision 487 of 2000 of the Andean Community of Nations, such a mortgage is to be created by means of a public deed and is to be registered in the respective ship registry in order to enable the effects contemplated in the referred international instrument. Article 5 of Decision 487 expressly provides details as to what the public deed should contain for this purpose (ie, the basic data of the creditor and the debtor, details about the amount of the debt that is to be guaranteed with the mortgage, etc).

1.7 Ship Ownership and Mortgages Registry

The DIMAR could issue a (previously requested) certificate of ownership (*certificado de tradición y libertad*) of any vessel entered in the Colombian flag register in which a mortgage that has been established on the vessel would be evidenced.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Colombia is a party to both the Convention on Civil Liability for Oil Pollution Damage (CLC) and the Oil Pollution Fund (FUND) Conventions in their 1992 amended versions. Thus, events of pollution arising out of accidents involving oil tankers transporting crude oil are to be dealt with mainly in the application of these international conventions. However, the coun-

try is also a party to the MARPOL convention and thus these parameters are to be usually available if there is an operational pollution occurring in Colombian waters.

Moreover, with regard to wreck removal, the country has not yet ratified the Nairobi Convention and there are no domestic provisions in force that specifically address the subject.

2.2 International Conventions: Collision and Salvage

As per Article 1473 of the Colombian Commercial Code, the *armador* is the person who, whether or not the registered owner of the vessel, is the one sending her to the sea at his or her own expense and under his or her own name and risk. Furthermore, Article 1478 establishes that the *armador* is to be held responsible (from a civil perspective) for the faults incurred by the captain, pilot and the crew.

However, Article 1481 of the Colombian Commercial Code clarifies that the *armador*, whether or not the owner of the vessel, could limit his or her liability – in most cases - to the value of the vessel, her accessories and freight.

Colombia is not a party to the Salvage Convention 1989. However, the Colombian Commercial Code in Articles 1545 - 1554 has incorporated certain provisions which follow the basic logic of the York Antwerp Rules.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Colombia has not ratified the 1976 LLMC Convention. As mentioned in **2.2 International Conventions: Collision and Salvage**, the Colombian Commercial Code provides only that in certain cases the *armador* could limit his or her liability to the value of the ship, her accessories and freight. Thus, currently, there are no further pieces of local legislations that follow the parameters of the 1976 LLMC Convention.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Apart from those provisions contained in the CLC and FUND schemes, there are no specific provisions for the constitution of such a fund in Colombian Law.

3. Cargo Claims

3.1 Bills of Lading

Colombia has not ratified any of the existing international set of rules on the subject. However, the Colombian Commercial Code has incorporated certain provisions that – to a certain extent – have purported to follow the general logic of the Hague/Hague-Visby Rules. Nevertheless, important differences can be found, in particular regarding the limitation of liability of the carrier.

3.2 Title to Sue on a Bill of Lading

Usually, it is understood that, if a proper bill of lading was provided, the legitimate holder of the bill of lading would be the one entitled to present any claim against the carrier.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Articles 1643 and 1644 of the Colombian Commercial Code deal with the carrier's limitation of liability. As per these Articles, if the value of the cargo has been declared to the carrier, that value will be used as a maximum limit of liability. If the value was not so declared by the shipper, the limit would be the price of the goods at the loading port. However, Article 1644 goes on to establish that parties could agree on a maximum limit of liability, thereby entitling parties to establish a different limitation. (See the Colombian Supreme Court of Justice, decision of 8 September 2011, L.J. William Namén).

The aforementioned provisions are to apply to the benefit of whomever is to be considered "the carrier", whether he or she is the registered ship-owner or not.

3.4 Misdeclaration of Cargo

Colombia is not a traditional maritime jurisdiction and thus there is not very much case law on the subject. However, it should be noticed that, as per Article 1615 of the Colombian Commercial Code, the shipper is to guarantee the precision of the information provided to the carrier regarding marks, numbers, quality, quantity, condition and weight of the goods. Thus, a breach of that obligation could open the door for the carrier to bring a claim against the shipper.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

There is no specific provision dealing with the time bar in the regulation of the contract for the carriage of goods. Thus, Article 993 of the Colombian Commercial Code, namely, a provision of the general set of rules for the carriage contract would be applicable. As per this provision, the time bar for filing a claim against the carrier would be two years. This period is to be counted from the moment the goods either have been delivered or should have been delivered to the consignee.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Colombia has not ratified any of the existing conventions on the subject. However, Decision 487 of 2000, namely, a regional instrument applicable in the Andean Countries (including Colombia), deals specifically with the subject of what is called "vessels' preventive embargo" (*embargo preventivo de buque*), ie, the "arrest" of vessels, as it is known, particularly in Anglo-Saxon jurisdictions.

4.2 Maritime Liens

Decision 487 of the Andean Community also deals with both maritime claims (or "credits", as the instrument call them) and maritime liens. Maritime claims/credits are defined in Article 1 of Decision 487, following the logic of Article 1 of the International Convention on Arrest of Ships, 1999. Thus, damages and/or losses caused by the exploitation of the ship (No 1), death or personal injury in direct relation to the exploitation of the ship (No 2), among others, would allow the "arrest" of the ship in Colombia.

However, despite the fact that the concept of a maritime lien itself also belongs to Anglo-Saxon jurisdictions, Decision 487 also deals obliquely with the concept by making reference to certain "maritime privileges" that will follow the vessel, even if there is a change of ownership or flag, except in cases of forced execution of the ship (Article 22). Among those "maritime privileges", claims could be found such as those pertaining to crew wages, including repatriation costs, death or personal injury compensation claims emerging directly from the exploitation of the ship, claims arising out of salvage rewards and claims arising out of port and navigation channel rights.

4.3 Liability in Personam for Owners or Demise Charterers

As per Article 37 of Decision 487, the logic of the instrument is to allow the "arrest" of a vessel whenever there is a maritime credit of the kinds described in Article 1. Moreover, Article 41 of Decision 487 essentially mirrors what is contemplated in Article 3.1 of the International Convention on Arrest of Ships, 1999, regarding requirements for the arrest to be permissible.

4.4 Unpaid Bunkers

As per Article 1 of Decision 487 of 2000, a "maritime credit", ie, a claim that could be used to "arrest" a vessel, would be a credit/claim that would have as its cause (No 12) bunkers supplied to the ship for the exploitation, management, conservation or maintenance of the vessel. Thus, it seems at least theoretically possible to arrest a vessel in Colombia as a consequence of such an event. However, the provision does not make any differentiation regarding who is to be the owner of the bunkers and/or the party that provided/ordered that service.

4.5 Arresting a Vessel

The specific set of documents that should be presented are to be determined on a case-by-case basis. However, the likelihood is that a power of attorney (POA) and a certificate of incorporation (or similar), duly apostilled, will be required if documents are coming from abroad. Other documents that could be provided to evidence the maritime claim/credit that is being alleged to promote the "arrest" should be also handed over to the court, so that the court can assess the claim properly.

Before the COVID-19 pandemic, it is likely that any such supporting documents would have been presented in their original form. However, today, due to the enactment of Decree 806/20 (a piece of legislation that was enacted as part of the measures adopted by the local government to deal with the pandemic in domestic courts) such documents should be provided in copy and/or sent by email to the respective court.

It is important to know that for the "arrest" order to be granted by the domestic court, security is to be provided by the arresting party, following the parameters contained in the General Procedural Code.

4.6 Arresting Bunkers and Freight

Decision 487 refers only to the "arrest" of the vessel (not to the bunkers and/or freight). However, it seems that it is theoretically possible to request a measure of this nature at some point, not under Decision 487 of 2000 (which only refers to the arrest of a "vessel") but under Colombian general procedural law if certain requirements are present. In fact, Article 590 lit. c of the Colombian General Procedural Code opens up the possibility of obtaining "any other measure" that the court could find reasonable to provide in order to protect the right that is being litigated and to avoid its infraction or to make sure that the effectiveness of the petition of the claimant is secured.

4.7 Sister-Ship Arrest

Decision 487 of 2000 expressly provides that sister-ship arrest is possible. For the purpose, this international regulation mirrors in Article 42 what is provided in 3.2 of the International Convention on Arrest of Ships, 1999.

4.8 Other Ways of Obtaining Attachment Orders

Article 72 of Decree 2324 establishes that any vessels involved in maritime accidents that are to be investigated by the DIMAR would need to provide security for any damages, fines and costs of the procedure before they are authorised to set sail by the respective harbour master. In practice, this is a different path that could be used to obtain security for maritime claims.

4.9 Releasing an Arrested Vessel

As per Article 44 of Decision 487 of 2000, any vessel that has been "arrested" could be freed whenever security has been provided in a satisfactory manner. Letters of Indemnity (LOIs) are accepted in arrest procedures whenever there is agreement by the parties for the purpose. If not, a bank guarantee or an insurance policy would be required.

4.10 Procedure for the Judicial Sale of Arrested Ships

There is no piece of local legislation which deals specifically with the judicial sale of ships in Colombia. Decision 487 of 2000 merely provides some provisions on the subject. Of more importance is Article 29 of Decision 487, which provides for a notification of the judicial sale to be effected to certain specific persons at least 30 days in advance. However, Article 1454 of the Colombian Commercial Code points out only that the judicial sale of a ship will follow the parameters set out in the General Procedural Code and that the sale will be announced with notices located in visible parts of the ship and in the respective harbour master's office.

4.11 Insolvency Laws Applied by Maritime Courts

Colombia has an analogous regulation to Chapter 11 of the United States Bankruptcy Code contained in Law 116 of 2006. From the perspective of such regulation, the debtor that is carrying out an insolvency procedure would not be able to provide warranties outside the insolvency procedure. Moreover, a different court (other than the one carrying out the insolvency procedure) would not be in a position to order the judicial sale of the vessel.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

There are no clear cases that can help to find an answer to this question. However, at least theoretically, compensation could be ordered under specific circumstances, since Article 51 of Decision 487 provides that the courts of the country in which the "arrest" has been effected would be competent to decide on the liability of the creditor regarding damages caused as a consequence, in particular, but not exclusively, by the arrest being held to be illicit or unjustified, or by requesting excessive security (thereby mirroring what is provided in Article 6.2 of the International Convention on Arrest of Ships, 1999).

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

Colombia has not ratified the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea and/or its protocol. There are only certain specific provisions in the Colombian Commercial Code which deal with the subject, in a very general way. In fact, Articles 1585 – 1596 provide some rules, dealing in particular with the liability of the carrier in cases of cancellation of the trip, or its delay or interruption due to *force majeure* causes. It should be noted, for instance, that Article 1592 establishes that, in the event of cancellation of the trip, a claim for compensation would proceed unless the carrier is able to prove the "extraneous cause" (ie, an institution similar to *force majeure*), in which case the carrier would only need to give back the amount received as the price paid by the passenger. Moreover, the provision goes on to state that if there is a justified motive for cancelling the trip, the carrier's compensation would not be in an amount in excess of double the price paid by the passenger.

Article 1596 also provides some guidance regarding the liability of the carrier regarding loss and/or damage of luggage, thereby providing that the carrier's liability would be up to the declared value of the luggage, and if there is no such declaration, up to 10 grams of pure gold per kilo, unless *force majeure* is actually proven. However, it clarifies that he or she would not be responsible for looting if the luggage had not been properly secured/closed.

The time bar for submission of any action against the carrier was not provided in this set of rules but, due to a remission contained in the Code, a provision from the general contract of carriage would be applicable. Thus, as per Article 993 of the Colombian Commercial Code, the time bar will be two years (from the moment the trip has concluded or should have ended).

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

The position of the local courts regarding this issue has not been univocal and there is room for academic debate on the subject.

In any case, from a general perspective, it could be said with regard jurisdiction clauses that such clauses have not usually been recognised by local courts due to local procedural law reasons. Regarding the choice of law clauses, it could be said that the trend is that Colombian courts have preferred to apply local law parameters (ie, those of the Colombian Commercial Code) as opposed to parameters contained in the terms of the bill of lading (B/L).

Notwithstanding the aforementioned, as previously stated, the situation is currently evolving. Thus, some recent case law/local

doctrine suggests that, depending on the specific clauses used and/or the specific context of the claim, there could be some room for recognising that such clauses should be given full validity and force under Colombian law.

The situation is somewhat different, in particular, if the matter is to be taken to arbitration, since Colombian law on the subject (Law 1563 of 2012) addresses the subject in that specific context and expressly recognises the validity of this type of clause.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

There is no sufficiently developed case law on this specific issue which can provide full guidance for future cases. However, the courts usually give effect to the situation in which the contract incorporates – at least in part - the content of a contract by using a remission to another contract/document. In any case, the points raised in **6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading** should be taken into account.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Colombia has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Thus, this convention has full effect in Colombia. Some additional provisions on the subject are provided in Law 1563 of 2012, specifically regarding the domestic procedure for the recognition and execution of foreign arbitral awards.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Article 38 of Decision 487 basically mirrors what is contained in Article 2.3. of the International Convention on Arrest of Ships, 1999. In that regard, it is clear that a vessel could be arrested in Colombia, despite the fact that, by virtue of a jurisdiction and/or arbitration clause contained in a different contract, the maritime credit/claim should be adjudicated and or established by a different jurisdiction, even if in application of a different law, and/or by an arbitral tribunal.

6.5 Domestic Arbitration Institutes

Currently there is no such institute. However, some recognised names in the field of maritime law are currently members of the lists of different arbitration centres established by several chambers of commerce across the country.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

This is something that should be assessed on a case-by-case basis. However, a lack of jurisdiction of the Colombian courts could be eventually alleged, as well as the existence of an arbitration clause, if so. In that regard, it should be noted that such situations are to be considered as "preliminary exceptions" within Colombian traditional civil procedure. Given their nature, those exceptions are to be given priority by the judge in respect to the decision that is to be provided on the merits of the claim.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

There is no such exemption in Colombian tax law.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

In the context of the COVID-19 pandemic, a number of special measures have been put in place in the country with regard to maritime activities. Originally, measures were quite restrictive; however, over time they have been moderated according to public policy on the subject as designed by the national government, the evolution of the virus, the occupation of hospital beds and other relevant factors. The DIMAR then issued Resolutions Nos 0113-2020, 156-2020, 275-2020 and 484-2020, restricting certain maritime activities and closing border crossings, among other measures.

Resolution No 0871-2020 is the one currently in force and includes some of the measures established in previous resolutions, such as a special procedure for the arrival and stay in port of international traffic vessels. It is also established that maritime activities are permitted as long as they are carried out under the control of the National Maritime Authority and are always in strict compliance with biosecurity protocols. Additionally, in places of high COVID-19 infection, harbour masters were given the possibility to restrict temporarily the exercise of maritime activities that involve the agglomeration of people and that could pose a threat to the safety or protection of the health of the inhabitants of the zone. Lastly, Presidential Decree No 039 of 2021 closed the land and river borders with Panama, Ecuador, Peru, Brazil and Venezuela, from 16 January 2021 to 1 March 2021, except for cargo transportation, and other specific activities.

8.2 Force Majeure and Frustration in Relation to COVID-19

Force majeure is a concept that is usually recognised by the courts, following the approach that civil law countries usually have regarding that legal institution. Thus, local courts usually

recognise that for an event to constitute a *force majeure* it should be an event that must consist of at least two conditions: to be unforeseeable and also to be unavoidable. It is doubtful whether the pandemic itself could at this point still be considered an event of "*force majeure*", since in the majority of cases it seems that the situation would not be seen as unforeseeable at this stage.

As Colombia is a civil law country, the concept of "frustration" is not familiar in Colombian law. However, Colombian law has an institution that could be deemed to have some similarities or points in common with that category of law. It is known as "*imprevisión*". That legal remedy is contemplated in Article 868 of the Colombian Commercial Code, which establishes that whenever unforeseen and extraordinary circumstances occurring after the conclusion of a contract (a contract of which the execution is to be projected in time) have altered the obligation of one of the parties, rendering it "excessively onerous", that party could request the revision of the contract.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

It is important to note that Colombian Law on maritime subjects has usually been dispersed and that in various subjects is very old-fashioned. In light of this, the national maritime authority, the DIMAR, has in recent years been working on preparing a Draft Maritime Code that is now in its sixth version.

Some key features of the Draft Maritime Code in its current version are:

- the Draft purports to reunite in just one body of law the majority of the regulations applicable to the so-called "maritime activities";
- a set of key "maritime law principles" are expressly contained therein;
- some provisions of the international conventions are replicated/incorporated in the text of the Draft (see below);
- offshore activities are to a certain extent regulated (including the liability of the operator of the platform);
- limitation of liability of the ship-owner follows the parameters of the LLMC Convention 1976 (adopting the 1996 protocol increased limits);
- the Draft adopts the fundamental logic of the Hague-Visby regime regarding the liability of the maritime carrier of goods;
- basic regulations applicable to procedure in cases of maritime accidents are clarified.

Franco & Abogados Asociados is a boutique law firm, with its headquarters located in Bogotá, Colombia. The firm specialises in maritime/ports/transportation/logistics-related issues and has ample experience representing and/or providing advice to several local and international clients (including ship-owners, carriers, freight-forwarders, P&I Clubs, fixed-premium insurance companies and reinsurers), in both contentious and non-contentious matters around the country. Franco & Abogados Asociados has developed a comprehensive legal portfolio within the ambit of the practice areas in which the firm deploys its operation, and always aims to provide its services in compliance with the highest standards of quality and reliability.

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The Supreme Court of Cyprus has exclusive jurisdiction to act as an Admiralty Court sitting as a court of first instance (original jurisdiction) and as a court of appeal (appellant jurisdiction). By virtue of sections 19(a) and 29(2)(a) of the Courts of Justice Law of 1960 (Law No 14/1960), the Admiralty Court is vested with and exercises the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its admiralty jurisdiction (as they existed immediately before the independence of Cyprus in 1960). Consequently, the English Administration of Justice Act of 1956, defines the admiralty jurisdiction of the Admiralty Court. Further, the Cyprus Admiralty Jurisdiction Order 1893 regulates the procedure before the Court.

Also, the District Courts have limited jurisdiction on maritime claims, but only on referral by the Supreme Court under certain circumstances. Judgments issued by District courts can be appealed to the Supreme Court.

Pursuant to Section 1(1) of the English Administration of Justice Act 1956, the Supreme Court has jurisdiction to hear and determine any claim:

- to the possession or ownership of a ship or to the ownership of any share therein;
- arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- in respect of a mortgage of or charge on a ship or any share therein;
- for damage done by a ship;
- for damage received by a ship;
- for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the Master or crew thereof or of 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;
- for loss of or damage to goods carried in a ship;
- arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- in the nature of salvage;
- in the nature of towage in respect of a ship;
- in the nature of pilotage in respect of a ship;
- in respect of goods or materials supplied to a ship for her operation or maintenance;
- in respect of the construction, repair or equipment of a ship or dock charges or dues;
- by a Master or member of the crew of a ship for wages;
- by a Master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- arising out of an act which is or is claimed to be a general average act;
- arising out of bottomry;
- for the forfeiture or condemnation of a ship or 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.

The jurisdiction may be invoked by:

- an action in rem against the vessel or property in question, if this is lying within the territorial jurisdiction of the court; such territorial jurisdiction extends to the territorial waters, but in practice the arrest of a vessel or the service upon her of a writ in rem is not possible unless the vessel calls at a Cyprus port; and
- an action in personam if the defendant has his or her residence or a place of business within Cyprus or if the cause of action arose in Cyprus or if an action arising out of the same incident or series of incidents is pending or has been determined in the Court.

1.2 Port State Control

In Cyprus, the system and powers of port state control are regulated by:

- the Merchant Shipping (Port State Control) Law of 2011 to 2015 (Law 95 (I)/2011) as amended for the purpose of harmonising the Law with the European Union directive titled "Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port state control" as amended;
- the Merchant Shipping (Port State Control) Notification 2015;
- the Merchant Shipping (Port State Control-Duration of Night) Order of 2011;
- the Merchant Shipping (Port State Control-Geographical Areas of Ports and Anchorages) Order of 2017;
- the Merchant Shipping (Community Vessel Traffic Monitoring and Information System) Law of 2004 (Law No 131(I)/2004) as amended; and
- the Relevant Circulars of the Shipping Deputy Ministry of Cyprus, issued from time to time.

Cyprus is also a signatory to the Paris Memorandum of Understanding and the Mediterranean Memorandum of Understanding on Port State Control.

The Shipping Deputy Ministry to the President of Cyprus (SDM) is the competent port state control authority in Cyprus. It carries out all inspections of foreign ships in Cypriot ports, verifying that crew, ship and equipment comply with the requirements of international conventions on safety, pollution prevention, operation, management and security, qualifications, living conditions and terms of employment. The Port State Control officers and officials have the authority to board vessels and inspect them if necessary, investigate and copy materials, interject and/or detain ships with insufficiencies following inspection or have hazardous materials that may create safety, health or environmental issues. Also, authorities in some cases may not allow entry to ships into Cyprus' ports if the ship Masters and operators do not abide with the law and do not provide information as requested by the competent authorities and, furthermore, may impose administrative fines.

Also, the Marine Accidents Investigation Committee (MAIC) and the SDM are the authorities responsible for the investigation of marine casualties in Cyprus.

When an accident occurs involving a ship flying the Cyprus flag anywhere in the world, or a ship flying a foreign flag within Cyprus's territorial and internal waters, the Master or the owner/manager or the agent of the ship must notify the MAIC, by virtue of the Marine Accidents and Incidents Investigation Law of 2012 (Law No 94 (I)/2012) (which transposed the EU Directive 2009/18/EC into Cyprus' legislation). The MAIC is responsible for the investigation of all types of marine accidents (casualties and incidents) and any marine accident notifications should be addressed to the MAIC.

The Marine Accidents and Incidents Investigation Law of 2012, gives the MAIC extensive powers, including access to any relevant area or casualty site and to any evidence or witnesses. However, according to the SDM Circular 17/2014, the SDM will continue to be responsible for investigating marine accidents for certain types of ships, ie: (a) ships not propelled by mechanical means, wooden ships of primitive build, pleasure yachts/crafts not engaged in trade, unless they are or will be crewed and carrying more than 12 passengers for commercial purposes, and (b) fishing vessels with a length of less than 15 metres.

1.3 Domestic Legislation Applicable to Ship Registration

The laws and regulations which govern matters relating to the registration of ships and related transactions in the Register of Cyprus Ships or in the Special Book of Parallel Registration are the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law of 1963 (the Law), as amended and the provisions of the Government Policy on the Registration of Ships under the Cyprus flag, which is established pursuant to the provisions of the Law.

Applications for the registration of ships and for the related transactions in the Register of Cyprus Ships or in the Special Book of Parallel Registration must be submitted to the Registrar of Cyprus Ships, who is stationed at the Head Office of the Shipping Deputy Ministry in Limassol (the Registrar). However, the provisional registration of ships and other transactions (other than the permanent and the bareboat-charter registration) may be effected abroad by a consular officer of the Republic of Cyprus upon instructions issued by the Registrar. In such cases, the transactions are recorded by the Registrar in the Register as from the date and time they have been effected by the consular officer.

1.4 Requirements for Ownership of Vessels

A ship may be registered under the Cyprus flag if either:

- more than half (50%) of the shares of the ship are owned by Cypriot citizens; or
- by citizens of other Member States of the European Union or the European Economic Area (EEA) (who, in the instance of not being permanent residents of the Republic of Cyprus, will have to appoint an authorised representative in the Republic of Cyprus); or
- all (100%) shares of the ship are owned by one or more corporations established and operating in accordance with the laws of the Republic of Cyprus or any other EU or EEA Member State which has its registered office, central administration or principal place of business within the EEA, or by corporations registered outside the European Union or the EEA, but controlled by Cypriot citizens or citizens of a Member State.

If the corporation is not incorporated and located in Cyprus, either it must appoint an authorised representative in Cyprus or the management of the ship must be entrusted in full to a Cypriot or EU ship-management company located in Cyprus.

Applications for the registration of ships must be made through a Cypriot lawyer and the ship must be surveyed by an approved classification society at the time of registration.

The corporation is deemed to be controlled by Cypriots or citizens of any other Member States when more than 50% of its shares are owned by Cypriots or citizens of any other Member States or when the majority of the directors of the corporation are Cypriot citizens or citizens of any other Member State.

An authorised representative may be a Cypriot citizen, or a citizen of any other Member State, who is resident in Cyprus or a partnership/corporation/branch established in accordance with the laws of Cyprus which has its place of business in Cyprus.

Also, vessels under construction are registrable in Cyprus.

1.5 Temporary Registration of Vessels

In Cyprus, the following three types of registration are allowed:

- provisional;
- permanent; and
- bareboat-charter registration (parallel).

Provisional registration of a ship may remain in force for six months. Thereafter, it may be renewed once, for a further three-month period.

Dual registration and flagging out are permissible in Cyprus. The basis of such types of registration is the bareboat-chartering of a ship by the ship-owner to the charterer on the condition that the respective laws of the underlying registry and of the bareboat registry (i) explicitly permit dual registration and (ii) contain preventive covenants whereby matters relating to ownership and to mortgages over the ship shall be exclusively governed by the laws of the ship's underlying register. In addition, the bareboat charterer must undertake to maintain the same safety standards to the ship, even if the chosen bareboat register applies safety standards that are lower than those applied by the ship's underlying register.

1.6 Registration of Mortgages

The Register of Mortgages is entrusted by the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law of 1963 (the Law) to the Registrar of Cyprus Ships and that Register contains a description of the vessel, the owner of the vessel, the particulars of the mortgages registered on the vessel and the registered mortgagees.

A Cyprus mortgage consists of a statutory mortgage and collateral deed of covenants (the Mortgage). The documentary requirements for registration of a Mortgage on a Cyprus Ship are:

- a written application by a local lawyer;
- resolutions of directors, on behalf of the ship-owners;
- a duly executed Power of Attorney, on behalf of the ship-owners;
- a duly executed Power of Attorney, on behalf of the Mortgagee;
- the duly executed Mortgage;
- a Certificate of Directors and Secretary (if the ship-owner is a Cyprus-registered Company) or a duly executed Incumbency Certificate (if the ship-owner is a foreign entity).

1.7 Ship Ownership and Mortgages Registry

Although the Cyprus Ships' Registry is open to the public, accessibility is limited to physical searches at the Ships' Registry itself upon payment of a search fee.

Further, a transcript of registration of a registered vessel can be ordered by the public (upon payment of the prescribed fee) evidencing, inter alia, the particulars of the vessel, the name and address of the legal owner of the vessel and the details of any registered mortgage (ie, the date and time of its registration and the details of the mortgagee).

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

In the event of pollution, the legal regime that the Republic of Cyprus will apply is the use of international conventions, EU Law and also national law. These, inter alia, are:

- the Merchant Shipping (Ship Source Pollution) Law of 2008 (Law 45(I)/2008), as amended;
- the International Convention on Civil Liability for Oil Pollution Damage of 1969 (CLC) and its Protocols of 1976 and 1992 and Amendments of 2000;
- the International Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) 1975 and its amendments;
- the International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971 and its Protocols of 1976 and 1992 and subsequent amendments;
- the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London Convention) 1972, as amended;
- the International Convention for the Prevention of Pollution from Ships (MARPOL) 1973 as amended by Protocol 1978 and its Amendments;
- the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) 1989;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) 2001; and
- the International Convention on Liability and Compensation for Damage in Connection with the Carriage of

Hazardous and Noxious substances by Sea (HNS) 1996 (Law No 21(III)/2004).

As regards wreck removal, the Nairobi International Convention on the Removal of Wrecks 2007 (Law No 12 (III)/2015) entered into force in Cyprus on 22 October 2015. Further, the Wrecks Law Cap 298 regulates wrecks in Cyprus.

Also, as regards both wreck removal and pollution, Cyprus is a signatory and a state party to the United Nations Convention on the Law of the Sea (UNCLOS) 1982.

2.2 International Conventions: Collision and Salvage

With regard to collision cases, the International Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels and Protocol of Signature, Brussels of 23 September 1910, was extended to Cyprus on 1 February 1913 when it was still a British colony and still continues in force until today. Also, the Maritime Convention Act of 1911, derived from the Law of the United Kingdom, applies to Cyprus by virtue of Articles 19(a) and 29(2)(a) of the Cyprus Courts of Justice Law of 1960, as amended.

Further, (i) the International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in Matters of Collision of 1952 (Law No 31(III)/1993), (ii) the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation 1952 (Law No 32(III)/1993) and (iii) the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs) (Law No 18/1980), as amended, have been ratified by Cyprus.

The legal regime in relation to salvage is (i) 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) and (ii) Part III of the Wrecks Law, Chapter 298.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The LLMC Convention (1976 Convention and its 1996 Protocol) was ratified by the Republic of Cyprus by virtue of 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 20(III)/2005).

2.4 Procedure and Requirements for Establishing a Limitation Fund

Pursuant to Article 11 of the LLMC Convention, any person alleged to be liable may constitute a fund with the court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 (which set the general limits and the limit for passenger claims, respectively) as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

The ratified Law 20(III)/2005 (see **2.3 1976 Convention on Limitation of Liability for Maritime Claims**), provides that a person wishing to set up a limitation fund, as provided for in Article 11 of the LLMC Convention, may set up such a fund in the Supreme Court of Cyprus, upon application made to the Supreme Court. In the case of a person wishing to set up a limitation fund by lodging a bank guarantee with the Supreme Court of Cyprus, the Supreme Court shall decide on the characteristics and conditions which such a guarantee must meet.

3. Cargo Claims

3.1 Bills of Lading

Cyprus has adopted, by way of succession, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (extended to Cyprus on 2 June 1931).

Further, the UK Bills of Lading Act of 1855 applies in Cyprus by means of Articles 19 and 29 of the Courts of Justice Law of 1960 (Law No 14/1960). Additionally, the Hague Rules are applicable in Cyprus through the Carriage of Goods by Sea Law, Chapter 263.

However, the Hamburg Rules and the Rotterdam Rules have not yet been ratified in Cyprus.

3.2 Title to Sue on a Bill of Lading

Cyprus has adopted the UK Bills of Lading Act 1855 to regulate the transfer of rights under a contract of carriage. Any party to a contract of carriage can sue for damages against the carrier, as well as consignees of goods named in a bill of lading and endorsees of a bill of lading, having acquired full proprietary rights upon or by reason of such consignment or endorsement. Ownership of the cargo will also depend on the way the parties deal with each other, and such dealings may or may not include the transfer of the bill of lading. Such a transfer may extinguish the rights of the original shipper or any intermediary, but, in respect of matters for which the shipper still remained at risk, may entitle him or her to sue.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Pursuant to the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC Convention), a ship-owner (as defined in the LLMC, a ship-owner shall mean the owner, charterer, manager and operator of a sea-going vessel) may limit his or her liability for the claims set out in Article 2 of the LLMC Convention, which includes claims for loss or damage to property.

The limitation amounts of each incidence are stated in Articles 6 and 7 of the LLMC Convention. However, 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 the intent that such loss would probably result.

The Merchant Shipping (Ship-owners' Insurance for Maritime Claims) Law of 2012 which transposed Directive 2009/20/EC on insurance against maritime claims (the Law) provides that an operator of a vessel (being the owner of a sea-going ship or any other person, such as the manager or the bareboat charterer, who has assumed responsibility for operating the ship from the ship-owner and who, on assuming such responsibility, has agreed to undertake all the duties, responsibilities and commitments that are imposed by that Law) shall be required to have insurance:

- covering that ship for maritime claims subject to limitation under the LLMC Convention for an amount, for each incident, equal to the relevant maximum amount for the limitation of liability as laid down in the LLMC Convention;
- the existence of which is to be proved by a valid certificate carried on board the ship issued by the relevant insurance provider.

Further, section 502 of the UK Merchant Shipping Act 1894 (which applies in the legal system of Cyprus pursuant to the Courts of Justice Law of 1960 - the Act), provides that a ship-owner of a sea-going vessel shall not be liable to make good to any extent whatever any loss or damage happening without his or her actual fault or privity where any goods, merchandise, or other things whatsoever taken in or put on board his or her ship are lost or damaged by reason of fire on board the ship. Also, section 503 of the Act provides that the liability of the owner of any ship for (inter alia) damage to any goods caused without actual fault or privity is limited to certain extents.

3.4 Misdeclaration of Cargo

Pursuant to Carriage of Goods by Sea Law, Cap. 263 and provided the contract of carriage is governed by the Hague Rules, the shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him or her. The shipper shall indemnify the carrier against all losses, damages and expenses arising or resulting from the inaccuracies in such particulars.

The shipper has also a common-law duty to notify the carrier of any dangerous cargo. If the shipper fails to declare dangerous cargo, then the carrier may also have a claim against the shipper for losses incurred as a direct consequent of the mis-declaration, eg, for damage to the vessel.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The Limitation of Actionable Rights Law No 66(I)/2012 (the "Limitation Law") is the general law prescribing time bars for all legal actions to be instigated in the Cyprus courts, including admiralty actions. Pursuant to the Limitation Law, the time bar period depends on the nature of the claim and indicatively the following time bars apply:

- in a claim of breach of contract, six years from the date on which the cause of action accrued;
- for civil wrongs (with certain exceptions including negligence, and breach of statutory duty), six years from the day of completion of the basis of the claim;
- in a claim in negligence, three years from the time the plaintiff sustained damage or where the negligence caused fresh damage continuing from day to day, from the time the damages cease to occur.

The period of limitation can be suspended, in (inter alia) the following circumstances:

- if, in the last six months of the applicable period of limitation, the claimant was prevented from commencing proceedings due to a moratorium or *force majeure*; and
- if, in the last six months of the applicable period of limitation, the defendant or any other person for whom the defendant is responsible prevented the claimant from instigating proceedings.

Further, the period of limitation can be reset in (inter alia) the following circumstances:

- if the obligor recognises in writing a right to an action against him or her;
- in the event of a monetary debt, if the obligor pays at least 50% of the aggregate owed sum, including any accrued interest;
- with the commencement of arbitration proceedings;
- if the court orders that the arbitration award is annulled or ceases to have effect.

As soon as the limitation period expires, the court no longer has jurisdiction unless a party with a legitimate interest submits an application and, as a result, the court may extend the prescribed limitation period up to two years on an equitable and reasonable basis.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Cyprus is not itself a party to the International Convention Relating to the Arrest of a Sea-Going Ship, 1952. However, the English Administration of Justice Act of 1956 ratifies this Convention and the Act applies to Cyprus by virtue of its Constitution and Articles 19 and 29 of the Courts of Justice Law of 1960 (Law No 14/60).

4.2 Maritime Liens

Cyprus law recognises the following maritime liens that give rise to an action in rem against and a right to arrest a vessel:

- lien for damage, which is 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 a collision);
- lien for salvage;
- bottomry;
- lien of the Master, officers and crew for wages and other emoluments; and
- reimbursement to the Master of disbursements made by him or her out of his or her own pocket on behalf of the owners.

The Supreme Court has jurisdiction to hear and determine all the claims of Section 1(1) of the English Administration of Justice Act 1956, which are all described as "maritime claims" (see **1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts**) and for which arrest of a vessel can be requested. Maritime liens enjoy certain advantages over certain other permitted actions in rem of Section 1(1) of this Act, in the time of creation of the lien, in priority and in the enforceability of the security.

4.3 Liability in Personam for Owners or Demise Charterers

A vessel may be arrested at any time, irrespective of who its owner is, in an action in rem in respect of a claim related to: her possession or ownership (section 1(1)(a) of the English Administration of Justice Act 1956 – the Act) or a claim by a co-owner as to possession, employment or earnings of that ship (section 1(1)(b) of the Act) or a claim under a registered mortgage (section 1(1)(c) of the Act) or a claim for her forfeiture or condemnation (section1(1)(s) of the Act) or a claim by a maritime lien holder or chargee of that vessel.

In all other claims of section 1(1) of the Act, an arrest can be made in an action in rem, where (a) the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of the vessel and (b) at the time when the action is brought, that the vessel is beneficially owned as respect all the shares therein by that person.

4.4 Unpaid Bunkers

A bunker supplier can arrest a vessel in an action in rem, provided that its claim falls within the permissible in rem action under the Administration of Justice Act 1956 (in particular section 1.1(m) – "any claim in respect of goods or materials supplied to a ship for her operation or maintenance").

Although the supply of bunkers may give rise to a maritime claim, that claim is not a claim whereby a vessel may be arrested irrespective of who its owner is (see **4.3 Liability in Personam for Owners or Demise Charterers**). Therefore, an arrest for unpaid bunkers can only be made in an action in rem, where (a) the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the vessel and (b) at the time when the action is brought, that the vessel is beneficially owned as respect all the shares therein by that person.

Thus, in the case of bunkers supplied by a bunker as an intermediary whereby the ship-owner/demise charterer has no contractual link and therefore no in personam liability, that bunker supplier may have no right to arrest. While some physical suppliers have argued that the contractual relationship is established by the bunker receipt, this, on its own, is unlikely to give rise to a contractual relationship without clear wording, a course of dealing or other evidence to establish an intended contractual relationship.

4.5 Arresting a Vessel

A warrant for the arrest of a vessel can only be applied for at the time of, or at any time after, the commencement of proceedings in rem against that vessel. Such proceedings are commenced by the issue of a writ of summons. The name, the place of residence, occupation of every claimant and defendant, and a concise statement of the claim made or the relief or remedy sought, should be included in the structure of the writ of summons.

In order to arrest a vessel, the plaintiff must file an ex parte application which must be supported by an affidavit. The affidavit must state the nature of the claim and the aid of the court is required, since the claim remains unsatisfied.

Practice has now been established that the plaintiff is required to make full and frank disclosure of all the material facts of the case which may influence the judgment of the court.

The claimant is best advised to engage the services of and be represented by a local lawyer. A power of attorney or other form of written authority is not required, either by the court or the local lawyer, in the case of a foreign litigant. A retainer in writing in the form provided by the Cyprus Civil Procedure Rules is required in the case of a local plaintiff.

The documents supporting the claim may not be notarised or apostilled; however, they must be in a language that is understood by the court, otherwise they have to be officially translated into Greek. Where possible, original documentation should be provided, although the court may order an arrest even though some original documentation is not available.

The court is following the practice of requiring the arresting party to put up security for the issue of warrant of arrest. The amount of security ordered varies and it usually depends on the particular judge dealing with the case, the nature of the claim made in the action in which the arrest is ordered and the extent of that claim.

4.6 Arresting Bunkers and Freight

It is not possible to arrest bunkers themselves in Cyprus and, where the bunker supplier asserts its claim on the basis of a retention of title, this does not give rise to arrest as it is not a maritime claim under section 1(1) of the English Administration of Justice Act 1956. However, retention of title clauses in contracts may be difficult to enforce and are unlikely to be enforced where the bunkers have already been used or have been mixed with others. Even if such a claim could be effective, it would require an injunction to detain the vessel until the bunkers were returned.

Also, it is not possible to arrest freight itself, except perhaps in the case of freight at risk, by arresting the cargo in respect of which the freight is due.

4.7 Sister-Ship Arrest

Cyprus law permits the arrest of a ship other than the one in respect of which the claim arose in certain circumstances.

Specifically, section 3(4) of the English Administration of Justice Act of 1956 applicable to Cyprus allows a claimant to invoke the admiralty jurisdiction of the Supreme Court by an action in rem and to obtain a warrant of arrest in respect of certain claims either:

- against the vessel in connection with which the claim arose, provided that the beneficial owner of that vessel at the time when the action is brought is the person who is personally liable to the claimant in respect of the claim, as owner or charterer of the vessel; or
- any other ship which is beneficially owned by that owner or charterer.

4.8 Other Ways of Obtaining Attachment Orders

Apart from a formal arrest, when it is not possible to file an admiralty action in rem against a vessel, Article 32 of the Courts of Justice Law, Law 14 of 1960, empowers the courts to make interim orders to protect assets that may be at risk or alienation or in order to preserve a particular status quo pending the final determination of an action, provided that the following conditions are all satisfied:

- a serious question arises to be tried at the hearing;
- there appears to be a "probability" that the plaintiff is entitled to relief; and
- unless an order is made it would be difficult or impossible to carry out complete justice at a later stage.

Interim measures include freezing orders with domestic or worldwide effect and "Chabra" type orders. Thus, a vessel may be effectually detained by the issue of a freezing order in the context of the main action in the civil courts instituted against the owner.

Further, Section 30 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law (Law 45/63), provides that the Supreme Court may, on the application of any interested person and if the Court thinks fit, make an order prohibiting for a time specified any dealing with the ship or any shares therein.

A vessel may also be detained by Cyprus competent authorities for breaches under various international maritime conventions or local laws (for ex. The Merchant Shipping (Port State Control) Laws of 2011 and 2015).

4.9 Releasing an Arrested Vessel

Pursuant to the Cyprus Admiralty Jurisdiction Order of 1893, the court may, by order and upon a written application, direct the release of the arrested vessel upon such terms as to security as to the court shall deem fit.

Therefore, the owner or interested party has to apply to the court for the release of the arrested vessel. The form of security which is usually requested by the court is a bank guarantee issued by a licensed financial institution in Cyprus. Unless the arresting party consents, it is unlikely that the court will accept a club Letter of Indemnity (LOI) or a foreign bank's bank guarantee.

4.10 Procedure for the Judicial Sale of Arrested Ships

Pursuant to Rule 74 of the Cyprus Admiralty Jurisdiction Order of 1893, the Supreme Court, either before judgment (pendente lite) or after final judgment, on the application of any party, by its order can appoint the Admiralty Marshal of the Court or any other person to appraise the arrested vessel or to sell that vessel, either with or without appraisement. The sale may be ordered to be either by public auction (the sale procedure adopted in most cases) or private treaty.

The sale is advertised in the local press and in appropriate shipping publications. The proceeds from the sale of a ship are paid into the court and, upon an application by any judgment creditor, will be distributed to all judgment creditors who claimed a share of the proceeds, in order of priority.

Whenever an arrest order is issued by the Supreme Court, the arrested vessel is placed under the safe custody and supervision of the Admiralty Marshal and/or the Deputy Admiralty Marshal(s) who are appointed pursuant to rule 5 of the Cyprus Admiralty Jurisdiction Order (1893) (in practice, the Court appoints the Admiralty Marshal in almost all cases). The Admiralty Marshal acts as the custodian/bailee of the arrested vessel, having the duty to ensure that the property and crew of the vessel are safe and in good condition or health at all times (and to comply with the relevant orders issued by the Court in the course of the legal proceedings from which the arrest order originates).

The ordinary order of priority of claims is as follows.

- Marshal expenses in connection with the arrest, custody and sale.
- Recoverable legal costs of:
  (a) the arresting party up to an including the arrest; and
  (b) the party who obtained the order for the appraisement and judicial sale.
- Possessory liens.
- Maritime liens.
- Claims of the Republic of Cyprus for fees, dues and tonnage taxes, in the case of a Cyprus-flag vessel.
- Claims under registered mortgages.
- Caims under foreign or unregistered mortgages.
- Administrative fines imposed by the Competent Authorities of Cyprus.
- Other maritime claims.

4.11 Insolvency Laws Applied by Maritime Courts

The Companies Law, Cap. 113 as amended (the Law), contains proactive self-help provisions afforded to companies, similar to the US Chapter 11 protection. It is a process whereby the protection of the court is obtained to assist the survival of the company and essentially allows a company to restructure with the approval of the court.

Specifically, in cases where the court considers that:

- a company is, or is likely to be, unable to pay its debts; and
- any resolution regarding the liquidation of the company has not been approved and published in the Official Gazette of the Republic; and
- no decree has been issued for the liquidation of the company,

may, upon a request submitted to it, appoint an examiner to the company for the purpose of examining the state of affairs of the company and the performance of such duties in relation to the company as may be imposed by or in accordance with the provisions of the Law.

The court shall issue an order only if it is satisfied that there is a reasonable prospect of survival of the company and of all or any part of that undertaking as an active entity (going concern). The court granting an order for the appointment of an examiner places the company under court protection for a certain period of time. The examiner formulates a scheme of arrangement, which requires the approval of at least one class of creditors before it can be brought before the court for approval.

The question as to whether an order on the arrest and judicial sale of a vessel owned by owners that are under the proceedings mentioned above can be granted has not yet been decided before the Supreme Court. However, the Law provides that for as long as a company is under the protection of the Court, the following (inter alia) provisions apply:

- no liquidation proceedings may be instituted against the company, nor may a resolution for liquidation be adopted in relation to that company, and any resolution thus adopted shall have no effect;
- no seizure in the hands of a third party, suretyship, seizure or execution shall take place in respect of the property or objects of the company, except with the consent of the examiner;
- in the event that any claim against the company is secured by a mortgage, lien, lien or other lien or pledge on or affecting all or any part of the company's property, objects or income, no action may be taken for the liquidation of all or any part of this security, except with the consent of the examiner;
- no measures may be taken to recover goods held by the company in accordance with any lease agreement, except with the consent of the examiner.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

Damages for "wrongful arrest" may be awarded in favour of the owner of the arrested vessel, if the arresting party has acted in bad faith or through gross negligence (relevant English law principles are followed).

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

The international conventions and domestic laws applicable to Cyprus for maritime passenger claims are mainly:

- the Limitation on Liability for Maritime Claims Convention 1976 as amended by its Protocol (LLMC Convention). Pursuant to Article 2.1(b) (and subject to certain exceptions mentioned in Articles 3 and 4 of the LLMC Convention), claims in respect of loss resulting from delay in the carriage be sea of cargo, passengers or their luggage, shall be subject to limitation of liability;
- the Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway;
- the Merchant Shipping (Liability of Carriers of Passengers by Sea in the Event of Accidents) Law No 5(I)/2014 (which transposed Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea in the event of accidents into national law; although Cyprus is not a contracting member of the Athens Convention, Law No 5(I)/2014 incorporates provisions of that Convention). It sets out limitation of liability for death, personal injury for loss and damage to luggage and vehicles;
- the Shipwrecked Passengers Law, Chapter 297. It sets out limitation to the amount recovered for expenses related to the harbouring and forwarding of shipwrecked passengers.

See **3.5 Time Bar for Filing Claims for Damaged or Lost Cargo** for the time bar for filing court claims in Cyprus for bringing a claim in breach of contract and in negligence.

In addition, pursuant to Article 16 of the Athens Convention, any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage shall be time-barred after a period of two years.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Cyprus Courts will generally recognise and enforce a jurisdiction clause stated in bills of lading. However, they may still consider whether there are adequate grounds for displacing the prima facie presumption of insisting on the parties honouring their bargain. This presumption may be rebutted on "good and sufficient reasons".

In relation to the jurisdiction clauses, the Cyprus Courts will take into consideration the following factors:

- in which country is the evidence on the matters in dispute situated or is readily available;
- the relevant benefits of each alternative jurisdiction in terms of facilitating a better trial at less cost;
- to what extent the foreign law applies to the matters in dispute and, if this is the case, to what extent it is substantially different from Cyprus law;
- the country to which each of the parties is linked and how close this connection is;
- whether the defendant sincerely wishes the issue in question to be tried somewhere else or whether he or she is just seeking a procedural advantage; and
- to what extent the plaintiffs will be prejudiced in the case of filing proceedings abroad.

As a general rule, an express choice of law by the contracting parties will be recognised and upheld by the Cyprus courts. On 20 April 2006, Cyprus ratified the Rome Convention by Law 15(III) of 2006 and, since 17 December 2009, Regulation (EC) No 593/2008 ("Rome I") has applied. In accordance with Article 5 of Rome I, in the absence of an express or implied choice of law, the proper law shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

General words in a bill of lading incorporating into it all the terms and conditions of another document, such as a charterparty, may not be sufficient to incorporate an arbitration clause contained in that document into the bill of lading in order to make its provisions applicable to disputes arising under the bill of lading. However, in the instance that a bill of lading contains specific words which attempt to incorporate an arbitration

clause of a charterparty, the Cyprus Courts may recognise and enforce the arbitration clause on the condition that the provisions in the charterparty are worded in such a manner which makes sense in the context of the bill of lading and they do not conflict with any express term contained in the bill of lading.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Cyprus has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Law No 84/1979) (the "New York Convention").

Upon accession of Cyprus to the New York Convention on 29/12/1980, Cyprus as a signatory has made a specific reservation of reciprocity: "The Republic of Cyprus will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State; furthermore it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law."

Domestic arbitration proceedings in Cyprus are governed by the Arbitration Law of 1944, Chapter 4 and international arbitration proceedings are governed by The International Arbitration in Commercial Matters Law 101/1987, which is almost identical to the UNCITRAL Model Law.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Although a foreign jurisdiction clause does not deprive the Cypriot courts of their jurisdiction, strong reasons must be presented as to why such a clause should be disregarded. The existence of an arbitration or a foreign jurisdiction clause must in any case be expressly disclosed when applying ex parte for the arrest; such information is considered as relevant for establishing the in rem jurisdiction of the Admiralty Court, hence necessary for the Court to reach the right conclusion regarding the arrest. Non-disclosure of such a clause may result in the discharge of the order and the release of the vessel.

6.5 Domestic Arbitration Institutes

There is no domestic arbitration institute in Cyprus specialising in maritime claims.

The most prominent arbitral institutions in Cyprus are:

- the Cyprus Arbitration and Mediation Centre;
- the Cyprus Branch of the Chartered Institute of Arbitrators; and
- the Cyprus Eurasia Dispute Resolution and Arbitration Centre.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

Proceedings that have commenced, notwithstanding the foreign jurisdiction clause or arbitration clause, can be challenged by the defendant by an application for stay.

Where the application for stay has been filed, a Cyprus court is not bound to grant a stay but rather it has a discretion whether to do so or not. In practice, however, a stay of proceedings will be granted by the court unless a strong cause for not doing so is shown and the burden of proving such a cause lies with the party requesting the stay. When exercising its discretion, the court should take into account all the circumstances of the case.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

On 29 April 2010, the Cyprus Parliament enacted the Merchant Shipping (Fees and Taxing Provisions) law of 2010 (which applied retroactively from 1 January 2010 for ten years). By a decision of the European Commission, this tonnage tax law has been extended for another ten years. On 15 April 2020, the Cyprus Parliament enacted the Merchant Shipping (Fees and Taxing Provisions) (as amended) Law of 2020, which applies from 1 January 2020 to 31 December 2029 (the Law). The tonnage tax law is fully compatible with the requirements of the EU acquis on State Aid to Maritime Transport.

The tonnage tax system (TTS) is based on the payment by the qualified persons of tonnage tax on the basis of the net tonnage of ships and provides full exemption from all income taxes that would normally be imposed under the Cyprus income and defence tax laws.

Pursuant to the Law, the TTS is available to qualifying ship-owners, charterers (bareboat, demise, time and voyage) and ship managers (providing technical and/or crewing services) who respectively own, charter or manage a qualifying ship engaged in a qualifying shipping activity and in ancillary activities to maritime transport.

The tax exemption for qualifying ship-owners covers:

- profits from the use of a qualifying vessel;
- profits from the disposal of a qualifying vessel and/or share and/or interest in it.

Profits from the disposal of shares in a ship-owning company;

- dividends paid out of the above profits at all levels of distribution;
- interest income relating to the financing/maintenance/use of a qualifying vessel and the working capital, excluding interest on capital used for investments.

Also, in the event that a qualifying owner earns income from a qualifying shipping activity and at the same time earns income from a non–qualifying activity, that income, that is not subject to TT, is subject to corporation tax at the normal rate of 12.5%. If mixed income is earned (TT and corporation tax), separate books must be kept.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

Cyprus Government was, and still is, actively supporting the recommendations from the IMO, the European Union, the International Labour Organization and the International Chamber of Shipping by adopting measures early enough to facilitate crew changes in Cyprus ports, loading and discharging operations, whilst ensuring the safety of public health.

Initially, the crew restrictions constituted of a complete ban of entry into Cyprus of all persons, with certain exceptions. Subsequently, the complete ban of entry was relaxed and pursuant to the Decree issued by the Ministry of Health of Cyprus titled "the Infectious Diseases (Determination of Measures against the Spread of COVID-19 Coronavirus Decree (No 30)) of 2020", crew changes are possible at Cyprus ports subject to certain conditions being satisfied and procedures followed. The ease in restrictions included the facilitation of crew changes of seafarers of any nationality who served on cargo vessels, crew members of oil platforms as well members of cruise ships in lay-up or leisure crafts. This facilitation of crew changes continues today.

The relevant decrees issued by the Ministry of Health of Cyprus permit the long-term stay in anchorage of vessels, including cruise ships (warm lay-up).

Also, the Minister of Transport, Communications and Works of Cyprus announced several restrictive measures for both the Cyprus Ports Authority and Contractors, Operators, and licensed agents for port services and port installations to implement. These relate to the disembarkation of passengers and crew, the crew of commercial vessels performing international voyages – who must return to Cyprus and strictly comply with the instructions of the Medical and Health Services – and the movement of members of the UNIFIL Command based onshore.

8.2 Force Majeure and Frustration in Relation to COVID-19

Cyprus law recognises the defence of *force majeure*. This is a contractual defence and in order for it to apply, it must be expressly provided for in the relevant contract which governs the relationship between the parties.

Further, the circumstances giving rise to the *force majeure* must be clearly mentioned in the contract and the relevant facts must fit into those circumstances. In order that a party may be able to invoke *force majeure* in respect of COVID-19, the relevant contract must clearly set out that the performance of that party's obligations thereunder may be postponed or excused in circumstances where the party is prevented from such a performance as a result of the COVID-19 pandemic or any other pandemic (even if COVID-19 is not specifically mentioned).

Further, the circumstances that are said to give rise to *force majeure* must not be induced by that party's own actions or omissions, ie, those circumstances must be beyond that party's control. If an appropriate *force majeure* clause has not been inserted in a contract, a party would be unable to rely on an event of *force majeure*, save where such an event leads to a frustration of the contract. The doctrine of frustration is a common-law principle which has been transplanted and codified into Cyprus Law under section 56 of the Cyprus Contract Law (Cap. 149) and states that a contract will be deemed automatically discharged where it becomes illegal or otherwise impossible to perform (by an event unforeseeable at the time of the contract). However, if performing the contract would be merely financially undesirable, a party will not be able to argue that the contract is frustrated and therefore terminated immediately.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

On 6 May 2019, the Council of Ministers announced the approval of a draft bill providing for the establishment of Admiralty and Commercial Courts of Cyprus. This new bill constitutes the fundamental basis of reforming the judicial system of Cyprus by providing fast and effective remedies for Commercial and Admiralty disputes. In particular, the new bill provides that (a) the Commercial Court will adjudicate specific commercial affairs disputes, namely those where the value of the claim exceeds EUR2 million, and these cases shall be subject to adju-

dication via fast-track procedures and (b) the Admiralty Court will adjudicate shipping and maritime matters which will also be subject to the fast-track procedure, regardless of the value of the claim.

On 16 December 2019, Cyprus successfully prolonged its Tonnage Tax and Seafarer Scheme for the next ten years (until 31 December 2029). The Scheme provides competitive advantages, including a wider list of eligible vessels and ancillary activities and discount rates for environmentally friendly vessels.

On 27 September 2019, the Merchant Shipping (Fees and Dues with respect to Ocean-Going Commercial Cyprus Ships) Regulations of 2019 (P.I. 322/2019), were entered into force whereby the Ocean-Going Commercial Ships' initial registration fees were abolished. Also, there is no cost for the issuance of the initial certificates of Ocean-Going Commercial Ships.

The Cyprus Shipping Deputy Ministry (SDM) has announced a new range of green incentives to reward vessels that demonstrate effective emissions reductions. From fiscal year 2021, annual tonnage tax will be reduced by up to 30% for each vessel that demonstrates proactive measures to reduce its environmental impact, ensuring ship-owners are rewarded for sustainable shipping efforts.

The Cyprus flag will provide a "discount" on its Tonnage Tax System by comparing what emissions reductions are required of a vessel, with what it actually achieves. For example:

EEDI - vessels that have achieved further reduction of their attained EEDI compared to the required Energy Efficiency Design Index (EEDI) (Regulation 20/MARPOL ANNEX VI) will obtain the respective annual tonnage tax rebate of between 5% to 25%.

IMO DCS - the environmental incentive relating to the IMO Data Collection System (DCS) applies to ships of 5,000 GT and above that comply with Regulation 22A of MARPOL ANNEX VI. Ships which demonstrate a reduction of the total fuel oil consumption in relation to the distance travelled, compared to the immediately previous reporting period, will obtain an annual tonnage tax rebate of between 10% to 20%.

Alternative fuels - vessels using an alternative fuel and achieving CO2 emissions reductions of at least 20% in comparison with traditional fuels will receive a rebate on annual tonnage tax of between 15% to 30%. This will be reviewed on a case-by-case basis, following review of documents submitted from a classification society.

Scordis Papapetrou & Co LLC is a leading and dynamic Cyprus law firm whose roots date from 1922. The firm and its associated entities comprise over 35 qualified lawyers and over 70 other professionals of various disciplines, working out of offices in Nicosia, Limassol, Athens, Moscow and Valletta. The firm offers, together with its affiliates and subsidiaries, in addition to other traditional services of a law firm, a wide range of services, such as international litigation, arbitration and dispute resolution, corporate and commercial, mergers and acquisitions, shipping, estate and tax planning and trusts, company/fund formation and administration, fiduciary and trustee services, accounting and tax advisory, and financial services. To date, the firm and its affiliated entities have acted in and advised on a multitude of multimillion corporate, shipping and commercial matters as well as major landmark court and arbitration cases.

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Trends and Developments

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Introduction

Shipping has been one of the most important pillars of the Cypriot economy for decades, with the sector contributing around EUR1.034 billion to the island's GDP per annum. With the 11th-largest ship registry in the world and the third in the EU, Cyprus has a large resident shipping industry, with over 220 shipping-related companies based in the country. The Cypriot maritime transport cluster represents around 7% of the GDP and employs around 9,000 persons (3% of the total gainfully employed population).

Cyprus, and more particularly Limassol, is considered to be the largest third-party ship management centre in the EU, and one of the top five in the world, providing ship management services to around 3,300 ships under various flags, with a net tonnage of 47 million. Over 20% of the world's third-party managed fleet and around 5% of the world fleet are managed from Cyprus.

Cyprus takes pride in its re-election to the International Maritime Organization Council for the two-year period 2020–21, ranking fourth in Category C, with a higher number of votes than ever before, strengthening its role in the European and international decision-making process. Additionally, in October 2020, Cyprus was elected for the first time to the Presidency of the Executive Committee of the Mediterranean Memorandum of Understanding on Port State Control, of which it is a member state.

The recent discovery of hydrocarbons in the Exclusive Economic Zone of the Republic of Cyprus widens the horizons of the Cypriot shipping industry, creating synergies and new prospects. Offshore exploration and production of oil and gas, as well as their transportation ashore, require specialised ships and equipment, and specialised supporting services. A new industry is emerging in Cyprus to meet the needs of the offshore activities. Many Cypriot-based shipping companies are very keen to be involved in the industry and some have taken this step by broadening their activities. It is also anticipated that additional shipping companies operating in non-EU jurisdictions will relocate their offices and operations to Cyprus to explore the benefits of the emerging Eastern Mediterranean offshore market. On the basis of the above, Cyprus can develop into an important energy centre in the Mediterranean region, with new shipping and energy projects, and the policy of its government includes Cyprus's future maritime transport needs for the exploitation of hydrocarbons.

The Establishment of the Shipping Deputy Ministry

The Shipping Deputy Ministry, which is responsible for maritime and shipping matters in Cyprus, was established on 1 March 2018, replacing the Department of Merchant Shipping. The day is marked as historic because the Shipping Deputy Ministry is an autonomous deputy ministry, dedicated entirely to Cyprus's maritime industry, with strategically located overseas maritime offices – in Piraeus, Brussels, Rotterdam, Hamburg, London and New York City – offering services to seafarers and Cypriot ships.

Its mission is based on the safeguarding and further development of Cypriot shipping as a safe, socially responsible and sustainable industry; the enhancement of the national economy; and the creation of jobs, specialisation and expertise in the sector. At the same time, the Shipping Deputy Ministry has been implementing a comprehensive "Blue Growth" strategy that not only includes enhancement and updating of the shipping regulatory framework and processes, but also focuses on digitalisation, the promotion of blue careers and shipping education, and a focus on maritime innovation and contribution to the development of responsible environmental policies and solutions.

The Shipping Deputy Ministry strongly encourages and supports research and innovation initiatives. Examples such as the Cyprus Marine and Maritime Institute (CMMI) and the Cyprus Foundation of the Sea promote technological innovation, bringing together the academic world with the public and private sector to develop innovative systems providing solutions to respond to the green and digital transformation of the sector. At the same time, the steady growth of the three maritime academies operating across the country, the introduction of a maritime direction in secondary education and the extension of the Shipping Deputy Ministry's grants and scholarships aim to ensure the continuous supply of high-calibre human talent into the Cypriot shipping market.

Safety Achievements of the Cyprus Flag

The International Chamber of Shipping published on 27 January 2021 its annual Flag State Performance Table for the year 2020–21, which provides an invaluable indicator of the performance of individual flag states worldwide. It analyses how the countries included delivering against a number of criteria, such as port state control records, ratification of international maritime conventions and attendance at IMO meetings.

The level of performance of many of the largest flag states – including Cyprus – continues to be very positive. More specifically, Cyprus maintains its reputation as a traditional large flag state with exceptionally high standards. As a party to all international maritime conventions on safety, security, pollution prevention, maritime labour, and health and safety, Cyprus gives full and complete effect to their provisions.

It is worth mentioning that 48 Cyprus-flagged vessels were detained worldwide in 2019, while in 2020, the number of such vessels was only 29.

Moreover, during the last quarter of 2019, the Shipping Deputy Ministry successfully passed European Maritime Safety Agency (EMSA) audits with no observations on safety and security, while Cyprus's case will be used by EMSA as an example of successful use of best practices and procedures on safety. It is of great importance that a network of local inspectors of Cypriot ships covers important ports worldwide to ensure efficient and effective control of Cypriot ships and to avoid detentions by port state control (PSC).

The Cyprus flag is classified in the White list of the 1982 Paris Memorandum of Understanding on Port State Control (the Paris MOU) and the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994 (the Tokyo MOU). It is a top-quality sovereign flag that adheres to all safety and security standards deriving from the Paris and Tokyo MOUs. Cyprus is also a signatory to the Mediterranean Memorandum of Understanding 1997 on Port State Control.

In addition, based on the outcome of the US government's 2019 Annual Report on Port State Control, Cyprus is no longer part of the Targeted Flag List of the United States Coastguard (USCG) in relation to the safety performance of flag administrations. The average detention ratio of Cyprus for 2017–19 was 0.96% compared to an average USCG ratio of 1.08%. In 2019, the detention ratio of Cypriot ships was reduced to 0.55%, down from 1.79% in 2018, while the USCG's 2019 ratio was 1.12%. This will lead to fewer inspections for Cypriot vessels at US ports and it adds to the flag's status as a high-quality flag that is consistently part of the White lists of the Paris and Tokyo MoUs.

New Cypriot Shipping Legislation

During 2019, 15 pieces of legislation were prepared by the Shipping Deputy Ministry. More specifically, five instruments were enacted and ten draft bills have been submitted to the office of the Attorney General for legal review.

The following are among the enacted instruments.

- Instruments relating to the designation of the safety zones in the Exclusive Economic Zone of Cyprus, under these safety zones regulations.
- Instruments referring to the simplification of the ship registration fees and dues to reflect the currency shipping needs that may be considered obsolete, resulting in lower registration fees. The Ocean-Going Commercial Ships initial registration fees were abolished in a bid to boost the Cypriot registry's competitiveness and attract more ship registrations. In addition, there is no cost for the issuance of the initial certificates of Ocean-Going Commercial Ships, nor mortgage fees. New regulations with respect to the applicable fees and dues for non-Ocean-Going Commercial Cyprus Ships will be adopted within the coming months.
- Furthermore, a model agreement has been drafted, governing the relations between the Cypriot government and the Recognised Organisations (classification societies) for statutory certification services. More specifically, in July 2019, a new agreement was signed between the Republic of Cyprus and the Recognised Organisations, which provides survey and certification services to ocean-going Cyprus flag ships on behalf of the Republic.

The conclusion of the new agreement with the 12 specialised and internationally acclaimed organisations was required as a result of legislative developments in shipping and to incorporate more flexible and technologically advanced procedures with the use of electronic services and certificates. In the new agreement the Croatian and Indian Registers of Shipping are included for the first time in the history of Cypriot shipping.

Among the ten draft bills prepared and submitted in 2019, the Shipping Deputy Ministry proceeded with the drafting of new legislation for the purposes of harmonisation with several EU directives. An integral part of this policy is the formulation of the national maritime spatial plan by March 2021, as required by the European Commission.

The directives deal with:

- the registration of persons sailing on board passenger ships operating to or from ports of the member states of the Community;
- the systems of inspections for the safe operation of roll-on/roll-off (ro-ro) passenger ships;
- high-speed passenger craft in regular service; and
- updated safety rules and standards for passenger ships.

The harmonising legislation referring to these directives is expected to be adopted in 2021.

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Recent Changes in Shipping Legislation

Amendments to the basic law concerning the registration of ships, sales and mortgages

In December 2020, the Cyprus flag enacted the Merchant Shipping (Registration of Ships, Sales and Mortgages) (Amendment) Law of 2020, which expressly provides for the deletion of a Cypriot ship from the Register of Cyprus Ships following the sale of the ship by court order, as well as a new mortgage procedure.

New government policy on the registration of vessels in the Register of Cyprus Ships

In May 2019, the Shipping Deputy Ministry introduced the new government policy on the registration of vessels in the Register of Cyprus Ships, in an effort to clarify discrepancies in the previous policy and to further develop the competitiveness of the Cyprus flag, simplifying the ship registration procedures.

New government policy on yachts

In the first quarter of 2021, the Shipping Deputy Ministry is expected to adopt a special regulation policy for yachts, introducing an attractive provision for the yachting industry. In December 2019, the Cypriot Tax Department introduced the Cyprus Yacht Leasing Scheme, which has been approved by the European Commission. More specifically, the lease agreement must relate to the supply of services and not to the supply of goods, as the CJEU set out in Mercedes-Benz Financial Services UK Ltd (case No C-164/16).

Electronic Services Provided by the Cyprus Flag

Online services provided in the Register of Cyprus Ships

The Shipping Deputy Ministry recently upgraded its services with digitalisation and automatisation, allowing the electronic submission of seafarers' applications, the electronic verification of certificates issued by the Cypriot registry and the management of the electronic Tonnage Tax System (TTS; an online tax calculator) through which beneficiaries (owners, charterers or ship managers of qualifying ships) can submit their applications. In addition, the Cyprus flag provides web services (eSAS) for Cypriot endorsements and seamen's books, the recognition of the seafarers' certificates of competency, the administration of the seafarers' e-learning platform and the "Seafarers Career Information System" (SCIS), a career database to facilitate the employment of seafarers, including an interactive platform that allows seafarers to share career information with companies using the system. Last but not least, the electronic ship registration process (online applications) in the Cypriot registry, the digitalisation of the archives of the Shipping Deputy Ministry and the PSC platform are under development and are expected to launch in the coming months.

Use of electronic certificates in the Register of Cyprus Ships

Since 2018, the Shipping Deputy Ministry has accepted, in electronic form, statutory certificates issued to Cyprus-flagged vessels by the Recognised Organisations, provided that they satisfy the requirements set out in the International Maritime Organization's (IMO's) Circular FAL.5/Circ.39/Rev.2, regarding the Guidelines for the use of electronic certificates. However, the existing practice of issuing hard-copy certificates remains acceptable.

Electronic deck logbooks on Cyprus-flagged vessels

In December 2020, the Shipping Deputy Ministry decided to accept the use of electronic deck logbooks as equivalent to the official deck logbooks that are published exclusively by the Cyprus flag, provided that the logbooks meet the requirements of IMO Resolution A.916(22), "Guidelines for the Recording of events related to Navigation".

Use of electronic record books (ERBs)

The Maritime Environment Protection Committee, in its 74th session in May 2019, adopted Resolutions MEPC.314 (74), MEPC.316 (74) and MEPC.317 (74), by which amendments to MARPOL Annexes I, II, V and VI and the Technical Code on Control of Emission of Nitrogen Oxides from Marine Diesel Engines (NOX Technical Code 2008) are entering into force, allowing the use of ERBs (oil, cargo, garbage and ozone-depleting substances record books, the record of fuel oil changeover and the record book of engine parameters) for the purposes of recording operations related to the above annexes. These amendments entered into force as of 1 October 2020.

The Cyprus flag accepts the use of ERBs as an alternative means to a hard-copy record book, at the discretion of the ship-owner/manager. Ships using an ERB do not need to keep a hard copy of the same record. However, it is advised to have on board the ship a hard copy of the relevant record book, for use in case of failure of the ERB, lack of power to the electronic equipment, or until crew familiarisation with the use of the equipment.

The Development of the Environmental Policy in Cyprus

Another trend is an increasingly green and environmental focus within the shipping industry. New regulatory requirements, internationally and nationally, push the industry towards a greener environment that is also impacting shipping market dynamics in most sectors.

The environmental policy in Cyprus has undergone significant change, owing to increasing alignment of national law with European policy (acquis communautaire), and this has created momentum towards environmental protection by making it a political priority. Furthermore, in recent years, the Shipping

Deputy Ministry has been promoting environmental protection as one of the major goals on its agenda.

Decarbonisation of Cyprus-flagged vessels

As a leading EU flag, Cyprus is committed to taking an environmentally sustainable path and supporting the industry in making progress towards its emissions reduction ambitions. In response to the latest IMO MEPC meeting from 16 to 20 November 2020, Cyprus welcomes the approval of the draft mandatory regulations to reduce carbon intensity of ships.

This is a step forward and a building block towards the implementation of the IMO's initial strategy for the decarbonisation of shipping. The draft amendments of MARPOL Annex VI, which are scheduled for formal adoption in June 2021, relate to mandatory goal-based technical and operational measures to reduce carbon intensity, including a review clause for the evaluation of the measures in the near future.

Cyprus encourages the examination of proposals put forward for the creation of R&D mechanisms. This will help to expedite innovation, and enable discussion of initiatives that support the development of low and zero-carbon technologies that the shipping industry can benefit from.

Financial incentives for environmental preservation

As a leading maritime nation, Cyprus recognises the need to encourage and reward those realising emissions reductions. To this extent, the Shipping Deputy Ministry has announced a new range of green incentives to reward vessels that demonstrate effective emissions reductions. The green incentives programme of the Shipping Deputy Ministry supports ship-owners in making sustainable choices and investing in new green technologies and cleaner operations.

State aid scheme for coastal vessels (de minimis)

Since September 2019, the Shipping Deputy Ministry has been implementing the state aid scheme for coastal vessels (de minimis), beneficiaries of which are the owners of coastal passenger vessels (registered under the Cyprus flag) engaged in the coastal passenger industry. The scheme will be valid for the period 2019–22 with a EUR3 million allocated budget (EUR1 million per year), provided that the minimum investment of the beneficiaries is at least EUR20,000. Among the scheme's aims are:

- the enhancement of the protection of the marine environment;
- the upgrading of coastal vessels;
- further improvement of health and safety conditions for crew and passengers; and
- the advancement of accessibility for people with disabilities.

Currently, 118 coastal passenger vessels of 7,671 gross tonnage (GT) are in the Register of Cyprus Ships.

Reduction of the Cyprus tonnage tax for environmentally friendly vessels

From fiscal year 2021, a reduction of up to 30% of the annual tonnage tax is possible in the case of a Cypriot ship or EU/EEA ship using mechanisms for the environmental preservation of the marine environment and the reduction of the effects of climate change. The Shipping Deputy Ministry gives particular importance to the environmental protection, internationally and locally, with the re-approval of the Cyprus tonnage tax, introducing discounted rates for environmentally friendly vessels.

The Cyprus flag will provide a "discount" on its TTS by comparing what emissions reductions are required of a vessel with what it achieves. For example:

- the Energy Efficiency Design Index (EEDI) – vessels that have achieved further reduction of their attained EEDI compared to the required EEDI (Regulation 20/MARPOL ANNEX VI) will obtain a respective annual tonnage tax rebate of between 5 and 25%;
- the IMO data collection system (DCS) – the environmental incentive relating to the IMO DCS applies to ships of 5,000 GT and above that comply with Regulation 22A of MARPOL ANNEX VI, and ships that demonstrate reduction of the total fuel oil consumption in relation to the distance travelled, compared to the immediately previous reporting period, will obtain an annual tonnage tax rebate of between 10 and 20%; and
- alternative fuels – vessels using an alternative fuel and achieving CO_2 emissions reductions of at least 20% in comparison with traditional fuels will receive a rebate on annual tonnage tax of between 15 and 30%, which will be reviewed on a case-by-case basis, following a review of the documents submitted from a class society.

However, any vessel detained for any reason during a PSC inspection – that violates any European Commission regulation related to environmental protection, or in laid-up condition (warm or cold) during the calendar year – will not be eligible for the incentive.

Implementation of new environmental legislation

Recent changes in shipping lean towards taking drastic measures to minimise air pollution by ships, such as reducing the sulphur content of the fuel to 0.5% from 3.5% five years ago, have created a number of legislative instruments or amended existing ones, such as the MARPOL 73/78 Convention. Cyprus has adopted all related legislation. This is the main challenge the

shipping sector is facing today and, to meet the targets, effort will be required across the industry for a number of years, for various reasons, including the availability of compliant fuels, the effects on ships' machinery and the training of crews on proper documentation.

In addition, a significant change to the environmental regulations in Cyprus is the effort of Cyprus-flagged ships to comply with the requirement of obtaining an Inventory of Hazardous Materials Certificate, requested by Regulation (EU) 1257/2013, which expired on 31 December 2020.

Moreover, it is worth mentioning that on 8 November 2018, Cyprus ratified the International Convention for the Control and Management of Ship's Ballast Water and Sediments (the Ballast Convention), to help prevent the spread of potentially harmful aquatic organisms and pathogens in ships' ballast water, and therefore Cyprus-flagged ships must carry on board an International Ballast Water Management Certificate issued by the Authorised Recognised Organisations.

Recent enforcement record

Cyprus performs random checks on ships arriving in its ports, under the PSC regime or specifically for pollution control purposes. For example, in the past 24 months there were about 180 checks on docked ships to check the compliance of the fuel they use with regard to the 0.1% sulphur content requirement, as provided by Directive (EU) 2016/802. The same practice is followed by other member states for Cyprus-flagged ships.

Recently, Cyprus checked five ships calling at Cypriot ports that had been reported as polluting the sea area under EU jurisdiction, which were detected by CleanSeaNet, a satellite monitoring system operated by EMSA.

The Action Plan of the Cyprus Flag during the COVID-19 Pandemic

Since February 2020, the Shipping Deputy Ministry has issued a plethora of circulars, taking urgent provisional measures for the operation of Cypriot ships and minimising risks to seafarers, passengers and others on board Cypriot ships during the COVID-19 outbreak. The Minister of Transport, Communications and Works, in exercising the powers vested in him by Article 14(1) of the Cyprus Ports Authority Legislation of 1973 to 2016, issued instructions for the implementation of restrictive measures at ports and port installations, as well as regarding crew-change protocol, to counter the pandemic.

In addition, the COVID-19 crisis has resulted in the rapid advancement of technology in the shipping sector. To that extent, the Shipping Deputy Ministry has made significant progress to simplify formalities and transform its services to a paperless environment, increasing the efficiency and attractiveness of the Cyprus registry and its relevant services. During the outbreak, the Shipping Deputy Ministry remained fully operational and continued to provide its services without any disruption, providing, at the same time, facilitations to shipping companies and owners of Cyprus-flagged vessels.

Among others, the Shipping Deputy Ministry adopted urgent provisional measures relating to the extension of the validity period of certain seafarers certificates, extended the annual/intermediate period or renewal surveys for all ships' statutory certificates and gave the possibility of remote audits, acknowledging that Cyprus-flagged vessels are encountering increasing difficulties in arranging surveys, audits, inspections, etc. Moreover, the Shipping Deputy Ministry introduced special measures as to the deferral of payment deadlines for tonnage tax and annual maintenance fees.

Cyprus was one of the first countries worldwide that recognised seafarers as essential workers and introduced practical measures for crew changes. Since May 2020, around 5,000 seafarers have been repatriated or have been able to return to work through Cyprus.

With regard to the vaccination of seafarers, which is a complex issue in terms of logistics, Cyprus is involved in all the deliberations at global and EU level, for a collective and co-ordinated approach. More specifically, the Shipping Deputy Minister has recently declared that "Cyprus believes that it should be a distinction and a different approach for short sea and deep sea shipping. For short sea shipping, national measures appear to offer a better fit and regional co-operation might be easier to achieve. On deep sea shipping, issues such as the country of origin of the seafarers, transport (air travel restrictions, etc) issues, availability of vaccines, the two-stage vaccination process and the subsequent time required for a seafarer to be considered inoculated are potentially a logistical nightmare. For this reason, Cyprus believes that vessels operating in long-distance intercontinental routes should be considered an isolated COVID-19 zone, a 'bubble', hence the focus should be on seafarers ashore. In this respect, Cyprus proposes a co-ordinated global approach to ensure that an adequate number of vaccines for seafarers are available to the country of origin of seafarers."

Brexit's Impact on Cypriot Shipping

The risks to Cypriot shipping from Brexit seem to be minimal. British companies are in the process of registering ships to the Cypriot registry and other companies have moved their headquarters to the island. On a broader level, Brexit will affect shipping companies' income and trade, but Cypriot shipping has not been affected negatively, for the time being.

Cypriot registry

From 1 January 2021, British vessels are no longer considered part of the EU fleet. In addition, British shipping companies are no longer considered European and therefore cannot fit into the TTS unless they make the necessary changes to be considered European. The Shipping Deputy Ministry, to prevent the deletion of vessels from its registry, contacted and informed the affected parties to make their own preparations for the UK's withdrawal from the EU, providing them with options. British nationals and companies that owned Cypriot-registered vessels, in order for them to continue to have their vessels registered under the Cyprus flag, had the following options:

- to transfer the ownership of their vessels to a person who, by virtue of Section 5 of the Cypriot Merchant Shipping Law, is qualified to own a Cypriot ship;
- to transfer the shares or change the directors of the registered owning company so that, by virtue of Section 5(4) of the Law, the registered owners will be deemed to be controlled by citizens of the EU or the EEA; and
- to transfer the registered office of the current registered owning company (re-domicilisation) to the Republic of Cyprus (by virtue of Sections 354A to 354H of the Companies Law, Chapter 113) or to any other EU or EEA member state.

The vast majority of British ship-owners transferred the ownership of their vessels to newly incorporated Cypriot legal entities. More specifically, the British owners proceeded with the establishment of Cypriot entities in the island, in order for them to remain eligible to own Cypriot-registered vessels. No vessel has been deleted from the Cypriot registry as a result of Brexit.

Seafarers

Since the Merchant Shipping Law does not impose any restrictions on the nationality of seafarers working on board Cypriot ships, the around 2,000 British seafarers working on Cyprus-flagged vessels will continue to do so with no effect and the Cyprus flag will continue to certify and recognise these seafarers.

The arrival of British shipping organisations in Cyprus

Brexit has resulted in an increased interest form British-based maritime organisations that see Cyprus as an attractive jurisdiction for an outpost or base due to fears of loss of access to the bloc's financial market.

The Steamship Mutual Underwriting Association (Europe) Limited, one of the largest shipping insurance companies in the international market, has operated in Limassol since February 2020, as a Brexit fall-back decision for the UK marine insurer following the uncertainty surrounding the UK's departure from the EU. The company's decision to choose Cyprus for its activities shows that companies of this calibre confer prestige and consolidates Cyprus as a quality complex of maritime activities of international range.

Another recent example is the British shipping firm P&O Ferries, which moved the registration of the six vessels in its English Channel operating fleet to Cyprus ahead of the UK's departure from the EU, in part to keep its tax arrangements inside the bloc. On the question of why the company chose the Cyprus flag, the spokesman of P&O declared that "the Cyprus flag is on the White list of both the Paris and Tokyo Memoranda of Understanding on Port State Control, resulting in fewer inspections and delays, and will result in significantly more favourable tonnage tax arrangements as the ships will be flagged in an EU member state."

Apart from the financial perspectives, Cyprus provides competitive advantages in terms of attracting UK-based shipping and shipping-related companies that seek to retain their access to the European market. Among others, Cyprus has a high availability of highly educated, multilingual, motivated individuals specialised in a variety of areas, including shipping, finance, insurance and law. Cyprus is a common law jurisdiction, based on English law, with national legislation according to the acquis communautaire. The majority of the population have tertiary education and speak excellent English. More than 150 dedicated maritime specialists at the Shipping Deputy Ministry offer tailored, 24/7 service from their offices in seven countries. Moreover, Cyprus is a party to all international maritime conventions on safety, security, pollution prevention, maritime labour, and health and safety, giving full effect to their provisions. Cyprus has also concluded 27 bilateral agreements on merchant shipping, through which Cypriot ships receive national or most favoured nation treatment in the ports of other states. Those agreements with labour-supplying countries provide for specific terms of employment that are beneficial to ship-owners and seafarers.

The Development of the Ports and Marinas in Cyprus

Following the redevelopment of the old port of Limassol that is now available for pleasure boats and the success of Limassol Marina, which opened in 2014, work has been under way to develop a number of new marina projects to bolster Cyprus's role as a yachting location in the Eastern Mediterranean. The Limassol Marina has already established itself as one of the most attractive and unique projects across Europe. Boasting a capacity of 650 berths, able to accommodate yachts between 8 and 115 metres, Limassol Marina is the first superyacht marina in Cyprus.

Two additional marinas, Paralimni and Ayia Napa, are under construction and are expected to be completed by the end of

2021. The two marinas will be a point of reference and a pole of attraction in the region, since they will contribute to the development of nautical tourism and, in general, the enrichment of the tourist product in the free city of Famagusta. Both marinas will be official ports of entry into the Republic of Cyprus, providing customs and immigration clearance 24 hours daily. Paralimni Marina will include 300 berths, while Ayia Napa Marina will host approximately 600 yachts in wet and dry storage.

Apart from the above marinas, in February 2020, the government of Cyprus signed an agreement with an Israeli consortium for the development of the Larnaca Port and Larnaca Marina, with an overall value of EUR1 billion, which will be the largest investment in Cyprus to date, according to the International Boat Industry. The signing of the concession agreement was completed in December 2020 and the "transition period" was activated in January 2021, which will last up to 12 months.

Construction work on the project is expected to start after the transition period – ie, at the beginning of 2022 – and is to be completed in four phases by 2037. The first phase will last five years and, among other things, aims to complete the new infrastructure works, so that citizens can use and enjoy the new spaces created.

The works include the expansion and reconstruction of the existing marina, so that it can accommodate 650 boats from 5 to 150 metres long and offer facilities such as boat repair and services. The upgraded marina will also have the possibility to accommodate "mega yachts" of up to 150 metres and approach a different clientele, which today seems reduced. The works also include the construction of the Marina Yacht Club. In addition, the upgraded Larnaca Port will be able to accommodate ships of up to 450 metres in length, such as luxury cruise ships, energy exploration vessels, military and other merchant ships.

Except for the above, following the completion of the privatisation process in February 2017, the Limassol Port's operations are now provided by three private concessionaires. The Limassol Port, as the main port of Cyprus, is a multipurpose port with modern facilities for handling passengers, containers, ro-ro, general cargo vessels and bulk carriers. It also provides support to offshore oil and gas operations.

Last but not least, developments have been seen in the small port at Vassilikos, on the south coast approximately midway between Limassol and Larnaca, near to the main oil terminal of the island. There are plans that the Port of Vassilikos will be constructed as a new industrial port that will operate as an oil and gas service centre, and it is expected to be ready by 2023. Its strategic location makes Vassilikos the first terminal of its kind in the Eastern Mediterranean, connecting Europe and the Black Sea with the Middle East and Asia.

The Development of the Fishing Industry in Cyprus

Cyprus has a long-standing fisheries tradition. Despite its limited contribution (around 0.8%) to GDP, the Cypriot fisheries sector holds significant socio-economic importance, particularly in coastal areas. Over 300 types of fish have been found in the sea around Cyprus, some of them immigrants from the Red Sea through the Suez Canal. The Cypriot fishing fleet comprised 858 vessels in 2019, with a combined GT of 3,811 and a total engine power of 40,801 kW. The fleet is classified into three categories: small-scale coastal fishing vessels, bottom trawlers and purse seiners. Since 2010, the compulsory use of vessel monitoring systems is applicable to all professional fishing vessels of less than 15 metres in length overall that hold an A and B Category licence.

Cyprus accepted the European directions with respect to Cypriot Chapter 8 – Fisheries Law and it was generally agreed that the policy, priorities, management and other measures applied by Cyprus in this sector are aligned to this. A Fishing Monitoring Centre has been established to enforce the European Common Fisheries Policy.

The authority responsible for fishery matters in Cyprus is the Department of Fishery and Marine Research (DFMR) of the Ministry of Agriculture, Natural Resources and Environment. The mission of the DFMR is the sustainable management and development of fisheries and aquaculture, and the protection and preservation of the marine environment through an integrated scientific approach. It is also responsible for the maintenance and upgrading of existing fishing shelters on the island, along with the construction of new ones, with the aim of providing safe harbouring of professional fishing vessels. There are 16 fishing shelters in Cyprus under the jurisdiction of the DFMR.

New policy on the registration of fishing vessels under the Cyprus flag

On 23 May 2019, the Shipping Deputy Ministry updated its policy on the eligibility of fishing vessels registered under the Cyprus flag, imposing strict age-related restrictions. More specifically, fishing vessels aged 25 years and above are not accepted for registration in the Register of Cyprus Ships and in the Book of Parallel Registration. In other words, any fishing vessel of up to 24 years is eligible to be registered under the Cyprus flag, provided that an entry inspection and an annual inspection are carried out.

Furthermore, the Registrar of Cyprus Ships will not consider applications for the registration of fishing vessels unless they are accompanied by an official communication from the Director

of the DFMR, informing the Registrar that the registration of the fishing vessel in question is allowed. Currently, 43 fishing vessels are registered in the Register of Cyprus Ships, with total GT of 2,507.

Recent issues in the Cypriot Registry

In May 2019, a fishing vessel that was above the age limit set by governmental policy was initially refused registration by the Registrar of Cyprus Ships based on the age limit requirements; however, successful registration of the vessel was achieved by this firm's shipping lawyer Mr Zacharias L. Kapsis, after proving that the fishing vessel had undergone a major conversion, ensuring the Registrar considered it as a new ship.

The redevelopment of the Liopetri fishing shelter

On 5 August 2020 the contract for the ambitious revamp of the Liopetri fishing shelter was signed. The EUR8.5 million project, one of the biggest involving a fishing shelter in Cyprus, includes the construction of a bridge over the Liopetri river, 100 berths for pleasure boats and another 35 for professional fishermen. In addition, there will be a training centre for canoes, coastal paths and facilities for fishermen, contributing significantly to sustainable fishing in Famagusta.

The project will boost not only the professional fishermen and tourism, but will also protect the marine environment. The project is co-financed by the European Maritime and Fisheries Fund (75%) and National Resources of the Republic of Cyprus (25%) and it is expected to be ready before the end of 2022. More specifically, the duration of the construction will last 30 months. The project has been on the cards for some years and was first intended to be launched in 2013 but was postponed because of the economic crisis that year.

Establishment of the Network of Scientists and Fishermen of Cyprus

On 23 September 2020 the Network of Scientists and Fishermen of Cyprus was created, which is co-financed by the European Maritime and Fisheries Fund. The Network is led by the Oceanographic Center at the University of Cyprus and is attended by the Pancyprian Association of Professional Coastal Fishermen, the Professional Fishermen of Multipurpose Boats, the Pancyprian Association of Professional Fishermen of the Small Fishing Boat and the Enalia Physis Environmental Research Center Ltd.

The main objectives of the Network are:

- the protection of fisheries;
- the safeguarding of the interests and rights of fishermen;
- the identification, promotion and resolution of problems related to fisheries; and
- the better and sustainable exploitation of fishery stocks.

Technological Innovation in Cyprus Shipping

Cyprus Centre for Land, Open Seas and Port Security

In September 2020, the Republic of Cyprus and the USA, in the framework of their bilateral co-operation in the security and defence realm, signed a memorandum of understanding to establish a training facility in Larnaca – the Cyprus Centre for Land, Open Seas and Port Security (CYCLOPS) – that will be Cypriot-owned and has already secured an initial funding sum from the US government for the purpose of establishing and operating. CYCLOPS will allow the USA to provide enhanced technical assistance related to safety and security, including border security, customs and export controls, port and maritime security, along with cybersecurity. Official construction began in February 2021.

Cyprus Marine and Maritime Institute

The CMMI is based in Larnaca and is an independent international scientific and business centre of excellence for marine and maritime activities that carries out research, technological development and innovation activities to provide practical solutions to the challenges that the marine and maritime industry, and society, faces or will face.

The proposal for the creation of the CMMI was submitted to the European Commission in November 2018 under the HORIZON 2020 "Spreading Excellence and Widening Participation" programme, and the project was awarded the grant. The Municipality of Larnaca is the co-ordinator of the project and the remaining partners are the Limassol Chamber of Commerce and Industry, the Maritime Institute of Eastern Mediterranean, Cypriot companies SignalGeneriX and GeoImaging, Irish research organisations Marine Institute and SmartBay Ireland, and the UK's Southampton Marine and Maritime Institute.

On 20 May 2020, the Shipping Deputy Ministry signed a memorandum of co-operation with the CMMI confirming the interest of both sides in the development and support of a joint strategic co-operation in the maritime sector with the aim of encouraging and developing maritime technology and innovation in Cyprus, promoting bilateral research co-operation in the blue economy.

Cyprus Foundation of the Sea

On 25 October 2017, the Council of Ministers of the Republic of Cyprus approved the establishment of the Cyprus Foundation of the Sea, the proposal of which was submitted by the Cyprus Shipping Chamber and MARINEM. The Foundation is supported by the Shipping Deputy Ministry and it will be the forum that, through R&D, will provide guidance as to the

type of research, education and training that is required in the marine and maritime fields to promote "Blue Growth".

Other Shipping-Related Developments in Cyprus

Re-establishment of the maritime passenger link between Cyprus and Greece

On 3 July 2020, the European Commission's Directorate-General for Competition approved a state subsidy for the operation of the sea passenger line between Cyprus and Greece. More precisely, EU's Directorate-General for Competition has decided that the maritime passenger route between Cyprus and Greece is considered a general economic interest service under the current EU rules and can thus be supported with state/government funds.

On the basis of the above, in December 2020, the Shipping Deputy Ministry launched European Open Tender Procedure No SDM 13/2020 for the Establishment of a Passenger Maritime Link between Cyprus and Greece, securing the EU's approval for a maximum state aid of EUR5 million annually for the 36-month contract, with the aim of reinstating the Cyprus–Greece ferry connection that was discontinued in 2000 after a sharp drop in the price of airline tickets, which made the line obsolete.

The ultimate aim of this project was to strengthen Cyprus's connectivity with mainland Europe, creating a new market for travellers to and from Cyprus and Europe, since the only means of transport currently available to and from Cyprus is by air.

The tender closed on 29 January 2021 and despite the initial interest shown by potential bidders to secure the documents of the Open European Tender for the Cyprus-Greece Maritime Connection, no bids were submitted.

The Shipping Deputy Ministry said the reason for ferry operators not submitting tenders could be attributed to the uncertainty and economically precarious conditions created by the COVID-19 pandemic, which has taken its toll on the shipping and travel sectors. Further, it said resuming the Cyprus–Greece passenger ferry link will be revisited once conditions allow for negotiations with the shipping industry.

The new regime of the prolonged Cyprus tonnage tax and seafarer scheme

Following the formal assessment of the Cyprus tonnage tax and seafarer scheme, the European Commission concluded, on 16 December 2019, that the assessed scheme of Cyprus is compatible with the internal market and in line with the EU Guidelines on State aid to maritime transport, prolonging the Cyprus tonnage tax and seafarer scheme for next ten years (till 31 December 2029). The scheme provides competitive advantages, including a wider list of eligible vessels and ancillary activities, discount rates for environmentally friendly vessels and, more importantly, the companies operating under the current TTS can continue to do so with no major changes.

The scheme was unanimously approved, on 15 April 2020, by the plenary of the House of Representatives of the Republic of Cyprus, securing the viability of the Cypriot registry and shipping industry.

Cyprus was the first open registry within the EU to have a comprehensive, transparent and approved TTS by the EU.

Cyprus's TTS applies to ship ownership, management and chartering activities. It is a system whereby beneficiary companies can choose to be taxed on the basis of their vessel's net tonnage (tonnage tax) rather than on their actual profits from maritime transport activities. The tonnage tax is considered as one of the key assets of the Cypriot shipping industry in its efforts to attract more ships and companies to the Cyprus maritime cluster.

The Cypriot scheme has been found to contribute to the global competitiveness of the EU maritime sector without unduly distorting competition and encourages ship registration in Europe while preserving Europe's high social, environmental and safety standards, and ensuring a level playing field.

Moreover, the Commission found that it complies with the rules limiting tonnage taxation to eligible activities and vessels. Furthermore, as regards taxation of dividends of shareholders, the Commission found that the Cypriot tonnage tax scheme ensures that shareholders in shipping companies are treated in the same way as shareholders in any other sector. As regards the seafarer scheme, the Commission found that Cyprus has agreed to apply the benefits of its respective scheme to all vessels flying the flag of any EU or EEA member state.

The attractive and transparent Cyprus TTS, among other things, provides exemptions to beneficiaries (owners of Cypriot ships, owners of foreign ships, charterers and ship managers) from income tax. Under the Cypriot corporate income tax law, every shipping company that is a tax resident in Cyprus and does not benefit from the tonnage tax scheme is subject to income tax in respect of its worldwide profits from its activities at the normal corporate tax rate (12.5%). As mentioned above, under the TTS, a special tax regime based on the amount of tonnage operated by eligible ship-owners, charterers and ship managers, applicable to eligible maritime transport activities, exempts the companies concerned from the general obligation to pay corporate income tax irrespective of the companies' profits or loss.

The tonnage tax for companies owning foreign vessels is payable by February 28th, while the tonnage tax for Cypriot vessels is payable by March 31st.

Before the establishment of the Shipping Deputy Ministry to the President of Cyprus in March 2018, 168 shipping-related companies were registered under the TTS, while 244 companies (45 ship managers, 42 charterers and 157 owners of foreign ships) are currently registered under it, with approximately 4,500 employees. Of those companies, 90% are controlled by EU interests.

There were more than 1,097 Cypriot qualifying vessels registered under the TTS as at January 2021.

The importance of the newly approved Cyprus tonnage tax and seafarer scheme
With the implementation of the new scheme, Cyprus intends to:

- boost the competitiveness of ship-owners and operators (charterers and ship managers);
- maintain and increase jobs and maritime expertise, to support the development of the maritime economy;
- encourage the employment of seafarers from EU/EEA member states and the registration of vessels in their ship registers; and
- contribute to linking up the maritime economies of member states whilst maintaining the overall competitiveness of the sector, as well as encouraging maritime-related research and innovation.

In particular, the Cyprus tonnage tax and seafarer scheme encourages the flagging or re-flagging of ships to EU/EEA member states' registers and promotes the maritime cluster, especially in terms of ship management services, thus helping to create a safe, efficient, secure and environmentally friendly maritime transport sector.

The maintenance and sustainability of a Cypriot-registered fleet is a national priority for the Republic of Cyprus, as well as the maintenance and attraction to Cyprus of companies engaging in shipping and shipping-related activities, with the aim of enhancing job creation and maritime expertise.

As regards the impact of the tonnage tax scheme, there has been a significant increase in the number of beneficiaries since 2010, mainly due to the relocation/establishment of additional companies in Cyprus as a result of the tonnage tax scheme as well as from the increase of the corporate tax rate in 2013. Based on data relating to the impact of the existing scheme, the Shipping Deputy Ministry estimates the forgone state revenue for 2020–29 at approximately EUR15 million per year.

As regards the financial impact of the seafarer scheme, the Shipping Deputy Ministry estimates the forgone state revenue for 2020–29 at approximately EUR400,000 per year.

Benefits for seafarers
There is no restriction on the nationality of the seafarers on board Cypriot ships, provided that they are holders of a valid Cyprus Seafarer's Identification and Sea Service Record Book issued by the Cyprus Maritime Administration. There are also no restrictions on officer nationality. No income tax is charged, levied or collected upon the salary or other related benefits from the employment of eligible seafarers (officers, crew members or masters) who are tax residents of Cyprus and are employed on board a Cypriot ship that is a qualifying ship engaged in maritime transport. More than 55,000 seafarers are employed on board Cypriot ships and 9,000 shipping personnel are employed onshore. The sector employs around 3% of Cyprus's workforce.

Reform of Cyprus's judicial system
On 6 May 2019, the Council of Ministers of the Republic of Cyprus announced the approval of a draft bill providing for the establishment of admiralty and commercial courts in Cyprus. This bill aims to constitute the fundamental basis of reforming the judicial system of Cyprus by providing fast and effective remedies for commercial and admiralty disputes. The ultimate aim is to strengthen the island's shipping industry and help to attract more investors.

Establishment of the Deputy Ministry of Tourism
In January 2019, the Deputy Ministry of Tourism was established, replacing the Cyprus Tourism Organisation. The Deputy Ministry of Tourism is responsible, amongst others, for the implementation of the Regulation of Marinas Laws of 1977 to 2002 and the Administration of Leisure Boats Docking Space Laws of 2007 to 2013. Larnaca Marina is also under the exclusive jurisdiction of the Deputy Ministry of Tourism.

Conclusion
Given the unique characteristics of the island, Cyprus will always have a prominent place in global maritime issues, playing a leading role and active contribution in the formulation of global and EU maritime policy, contributing to the IMO, International Labour Organization and EU discussions on forming regulation. However, despite the growth of the shipping industry in Cyprus, one of the major challenges that needs to be addressed is the Turkish embargo imposed on ships carrying the Cypriot flag and the relevant implications for the competitiveness of the Cypriot registry.

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A. Karitzis & Associates L.L.C. is a full-service, innovative and forward-thinking law firm headquartered in Limassol, the shipping and financial capital of Cyprus, with offices in Athens, Greece, as well. It is composed of an experienced, diligent and dedicated team of dynamic professional lawyers, who deal with most areas of common law-based Cypriot law in its adapted form after the accession of Cyprus to the EU in 2004. The professionals of A. Karitzis & Associates L.L.C. provide integrity, efficiency and trust to clients, offering a comprehensive range of legal and administrative services. The firm covers all major practice area disciplines and boasts a diverse portfolio of clients ranging from local to global businesses and corporations, non-profit organisations, SMEs, large groups of companies, and private individuals of all levels of wealth, including some HNWI and UHNWI. The Shipping Department of A. Karitzis & Associates L.L.C. – having experience and in-depth knowledge of shipping and maritime law, and advising banks, owners, managers, charterers, cargo-owners and their respective insurers domestically and internationally – is able to offer clients any kind of services related to the legal aspects of maritime affairs.

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Zacharias L. Kapsis is an advocate and legal consultant. He completed his master's degree in maritime law at the University of Southampton in 2018. His master's degree focused on the law of the marine environment, admiralty law, marine insurance law, carriage of goods by sea (charterparties and bills of lading), while his dissertation dealt with the seaworthiness of an unmanned/autonomous cargo ship. In December 2019, Zacharias graduated from the Adonis Business Academy, where he studied digital marketing and sales, a programme that enhanced his knowledge on modern marketing strategies and sales growth. Zacharias successfully completed his legal training in November 2015 and was admitted to the Cyprus Bar Association in 2018. Zacharias is a member of the Larnaca Bar Association and the secretary of the Shipping Committee of the Cyprus Bar Association. He is also a member of the Aviation Committee and the Committee on Environment, Energy Law, and Investment Programs of the Cyprus Bar Association. In addition, Zacharias is an affiliate member of both the Cyprus and Hellenic Marine Environment Protection Association. Zacharias joined A. Karitzis & Associates L.L.C. in January 2019 and has since been working in the Shipping Department, as a maritime law expert.

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The Danish Maritime Authority is a part of the Danish Ministry of Industry, Business and Financial Affairs, and is a government agency of Denmark that regulates maritime affairs.

Maritime and shipping-related disputes are heard by the Danish Maritime and Commercial Court. The authority of the Danish Maritime and Commercial Court is set out in the Danish Administration of Justice Act, which provides the Maritime and Commercial Court with authority over disputes concerning international trade relations as well as disputes concerning transport in a broad sense, including sea, land, air and rail.

The most common types of maritime and shipping-related claims brought before the Danish Maritime and Commercial Court are claims concerning carriage of goods, charterparties and bunker disputes.

1.2 Port State Control

The Danish Maritime Authority is operating as the port state control agency under the Danish Ministry of Industry, Business and Financial Affairs. The Danish Maritime Authority is the inspecting body for all vessels flying the Danish flag.

The Danish Maritime Authority has authorised several classification societies (Recognised Organisations) to perform various approval and certification tasks on board Danish ships. All vessels must be designed, constructed and maintained as per the standards of these classification societies.

There are no requirements for regular filings of any kind in Denmark. Ship-owners must ensure the validity of certificates and reapply for new certificates in the case of the expiry of such certificates.

Denmark strives to have regulation that ensures a competitive environment of a certain level for all ship-owners – both national and international – while ensuring that the shipping industry continues to become cleaner and safer. This is, inter alia, achieved through Denmark's membership of the IMO.

The Danish Maritime Authority may detain a ship if the ship's continued sailing constitutes a danger due to faults or deficiencies in the hull, machinery, safety equipment, location of ballast and cargo, manning or for other reasons associated with danger to the safety of occupants or danger of pollution.

In the event of a grounding in Danish territorial waters or in a Danish exclusive economic zone, the Master of the vessel must report the grounding to the Danish Maritime Authority. The registered owner of a vessel flying the Danish flag has a duty to ensure that the wreck is removed.

With regard to pollution, the Danish Maritime Authority co-operates with the Danish Environmental Agency. Thus, the Danish Maritime Authority performs port state control of adherence to, inter alia, regulation concerning sulphur emission. The Danish Maritime Authority's findings are reported to the Danish Environmental Agency for consideration. The Danish Environmental Agency will also decide whether to report a breach to the Danish police for further investigation and possibly criminal charges.

1.3 Domestic Legislation Applicable to Ship Registration

The Danish ship registers are handled by the Danish Maritime Authority and Chapter 2 and 2 (d) of the Danish Merchant Shipping Act contain the Danish rules on ship registration.

In Denmark, there are two different ship registries: a national registry for Danish-owned tonnage (DAS) and an international registry for ships engaged in foreign trade (DIS). Danish vessels with a gross tonnage of 20 GT or higher are obliged to register in the DAS or the DIS. Danish vessels with a tonnage of between 5 GT and 20 GT have a right to register in the DAS, but cannot be registered in the DIS. Furthermore, warships, fishing vessels, boulder fishing vessels and recreational craft, as well as ships carrying passengers engaged in regular services between Danish ports, cannot be admitted to the DIS. A vessel registered in the DAS or the DIS flies the Danish flag.

1.4 Requirements for Ownership of Vessels

In order to be registered in DIS or DAS, it is a requirement that economic activity in Denmark be carried out in one of three ways:

- the ship's technical or commercial operations are handled from Denmark;
- the unit responsible for the operation of the ship meets the requirements to be covered by the tonnage tax regime; or
- the shipping company, organisation or person who holds or has applied for the ship's compliance document in accordance with the Code of Compliance (Document of Compliance) is established in Denmark.

Furthermore, it is a requirement that the ship-owner appoint a Danish entity – either a natural or legal person – who can be contacted for inspection purposes and who can be sued on behalf of the ship-owner. For foreign ship-owners, the manag-

ing owner must also hold a Danish citizenship or be a Danish or European entity. Managing ship-owners from outside Europe are not eligible.

Both conditions must be fulfilled for the ship to remain registered in Denmark. The Danish Maritime Authority carries out random checks on whether ships are registered with a non-Danish owner and whether the ship and owner meet the registration conditions on an ongoing basis.

Pursuant to the Danish Maritime Act, a special section of the ship register has been established under the DAS register. This is called the ship-building register. Ships that are under construction in Denmark can be registered in the register. The precondition is that the ship can be reliably identified and that its tonnage is estimated to be at least 5 GT. There is no obligation to register and no requirements are made regarding the nationality of the owner. Request for registration is made by the owner and the notification information must be confirmed by the ship-builder. The detailed rules on registration in the ship-building register, registration of rights and deletion of the register are essentially the same as for the actual ship register.

Foreign-registered vessels can also be bareboat-registered in the DIS and Danish vessels can be bareboat-registered under certain foreign flags.

1.5 Temporary Registration of Vessels

The Maritime Act provides for the possibility of foreign ships being registered temporarily in the Danish ship registers under certain circumstances, and that Danish ships are correspondingly registered in foreign registers. The basic condition is that the ship is bareboat-chartered, and it is thus the charterer who requests the flag change. The purpose of these rules is to enable the parties to the charterparty to have the nationality of the ship changed temporarily, should there be any benefits associated with it.

The registration can take place in both the DIS and the DAS, and the ship can be admitted for a period of up to five years. However, this period may be extended by up to one year at a time at the written request of the charterer.

1.6 Registration of Mortgages

The Danish Maritime Authority is the authority responsible for the registration of mortgages.

Ship mortgages must be registered in the DAS or the DIS. The owner of the vessel must send the mortgage deed to the DIS or the DAS in original. The deed must be consecutive-page numbered and signed by the issuer of the mortgage. Passport or similar proof of identity is often required. The ship-owner can submit documents in both Danish and English.

1.7 Ship Ownership and Mortgages Registry

The Danish Maritime Authority offers public access to preliminary information about vessels, such as ownership and mortgages, registered in the DIS or the DAS. The information is not an official copy of the registers but a special database that the public has access to, and the information may therefore differ from the official registers. The database is updated approximately once a day.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Denmark is a party to the following international conventions on pollution:

- the 1992 International Convention on Civil Liability for Oil Pollution Damage;
- the 1992 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage;
- the 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Supplementary Fund);
- the 2003 International Convention on Civil Liability for Bunker Oil Pollution Damage;
- the 1973 International Convention on Prevention of Pollution of Ships;
- the 1978 Protocol relating to the International Convention on Prevention of Pollution of Ships;
- the 1997 Protocol to amend the International Convention on Prevention of Pollution of Ships;
- the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;
- the 2010 Protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

Denmark is a party to the following international conventions on wreck removal:

- the 2007 Nairobi International Convention on Removal of Wrecks.

2.2 International Conventions: Collision and Salvage

Denmark is a party to the 2010 International Convention for Unification of Certain Rules of Law with respect to Collision between Vessels. This convention is implemented in Chapter 8 in the Danish Merchant Shipping Act.

As for salvage, Denmark is a party to the 1989 International Convention on Salvage. Denmark has incorporated the 1974 York-Antwerp Rules in Chapter 17 in the Danish Merchant Shipping Act.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Denmark is a party to the 1976 Convention on Limitation of Liability for Maritime Claims and its Protocol from 1996. The convention has been implemented in the Danish Merchant Shipping Act.

2.4 Procedure and Requirements for Establishing a Limitation Fund

The Danish Merchant Shipping Act sections 177 to 180 and Chapter 12 set out the procedural rules for establishing a limitation fund.

According to these rules, a limitation fund may be constituted with the Danish Maritime and Commercial Court if arrest is applied for, an action is brought, or other legal proceedings are instituted in Denmark with respect to claims which according to their nature may be limited.

The fund is set up by paying the limitation amount to the court, or by providing security for the amount at the same time as an order is issued. The court will set a notification deadline once the fund has been established. Claims that have not been notified in time are disregarded.

The fund shall be deemed as constituted for all the persons who may invoke limitation of liability and to cover all the claims for which the limitation of liability applies. The fund shall only be available for payment of claims in respect of which limitation of liability may be invoked, including interest.

The court shall, by court order, stipulate the size of the fund amount as well as whether any security offered can be approved. The court order may stipulate that security shall also be provided for an additional amount to cover the costs of administering the fund, including costs awarded by the courts, as well as to cover any interest claims.

The limitation fund is calculated with reference to the size of the vessel and the nature of the claims.

The right to global limitation of liability exists, regardless of the basis of liability in respect of claims arising from:

- personal injury or damage to property occurring on board or in direct connection with the operation of the ship or with salvage operations;
- loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- loss resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations;
- 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 that ship;
- the removal, destruction or the rendering harmless of the cargo of the ship; and
- measures taken to avert or mitigate loss which is or would be subject to limitation of liability as well as loss caused by such measures.

The right to global limitation of liability does not apply to, inter alia:

- claims for reward for salvage or contribution in general average;
- claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage; and
- claims arising from nuclear damage caused by a nuclear-powered ship.

For claims resulting from the ship's own passengers dying or being injured, the liability limit is 400,000 SDR (Special Drawing Rights), multiplied by the number of passengers the ship is permitted to carry under its certificate.

For other claims in the event of death or personal injury, the liability limit is 3.02 million SDR for ships with a tonnage of 2,000 tons or less. For a ship with a larger tonnage, the liability limit is increased as follows:

- for each ton from 2,001 to 30,000 tons, an increase of 1,208 SDR;
- for each ton from 30,001 to 70,000 tons, an increase of 906 SDR; and
- for each ton over 70,000 tons, an increase of 604 SDR.

The limit of liability for claims relating to the location, marking and removal of a wreck is 2 million SDR for non-passenger ships operating exclusively on regular scheduled services. For such vessels with a tonnage of more than 1,000, the liability limit is increased as follows:

- for each ton from 1,001 to 2,000 with 2,000 SDR;
- for each ton from 2,001 to 10,000 with 5,000 SDR; and
- for every ton over 10,001 with 1,000 SDR.

The liability limit for all other claims, as well as any uncovered portion of claims relating the ship's own passengers' death or personal injury, is 1.51 million SDR for ships with a tonnage of 2,000 tons or less. For a ship with a larger tonnage, the liability limit is increased as follows:

- for each ton from 2,001 to 30,000 tons with 604 SDR;
- for each ton from 30,001 to 70,000 tons with 453 SDR; and
- for each ton over 70,000 tons with 302 SDR.

3. Cargo Claims

3.1 Bills of Lading

Denmark is a party to the 1968 Hague-Visby Rules and has incorporated the rules into the Danish Merchant Shipping Act.

In addition to incorporating the Hague-Visby Rules, Denmark has adopted the Rotterdam Rules and parts of the 1978 Hamburg Rules, even though Denmark is not a party to the Hamburg Rules.

3.2 Title to Sue on a Bill of Lading

Under Danish law, the rightful holder of a bill of lading has title to sue on the bill of lading. Rights under a bill of lading, including title to sue, are transferred when the bill of lading is validly transferred. To what extent a bill of lading can be transferred depends on the wording of the bill of lading. It can be issued to a specific person, to order or to a bearer. If it is issued to a specific person, it cannot be transferred and only that person has the right to sue. If it is issued to order, any person who by a consecutive series of transfers can prove that they are the rightful owner has title to sue on the bill of lading. If it is issued to the bearer, any person who has the bill of lading in their possession has the rights.

However, it must be noted that the carrier is responsible for the goods while the goods are in the custody of the carrier and anyone able to prove a legal interest related to the goods is under Danish law permitted to sue the carrier, irrespective of whether the plaintiff is the holder of a bill of lading.

The bill of lading is decisive for the legal relationship between the issuer of the bill of lading and the person who, with the bill of lading in hand, demands delivery of the cargo. Moreover, under Danish law a cargo interest may sue a carrier for damage due to loss or damage of cargo under the general rules on non-contractual liability.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

A carrier (whether the performing carrier or contractual carrier) is responsible for the goods, while the goods are in the custody of the carrier in the port of loading, during transport and in the port of discharge.

The carrier is liable for losses arising out of damage to or loss of goods as well as delay, while those goods are in the custody of the carrier, unless the carrier substantiates that the fault or neglect by the carrier or someone for whom the carrier is liable did not cause the loss.

The carrier is not liable for loss or damages caused by fault or neglect in navigation or the management of the ship. Similarly, the carrier is not liable for loss or damages caused by fire unless caused by the actual fault or privity of the carrier. Notwithstanding this, the carrier is liable for loss caused by unseaworthiness caused by want of due diligence on the part of the carrier to make the ship seaworthy.

The contracting carrier as well as the performing carrier and anyone for whom the carrier is liable may limit liability arising out of the carriage of goods by sea. Thus, the liability shall not exceed 667 SDR for each package or other shipping unit or 2 SDR per kilogram of gross weight of the goods lost, damaged or delayed, whichever is the higher.

A carrier may not limit liability arising out of the carriage of goods by sea, if it is proved that the loss resulted from an act or omission of the person done with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

3.4 Misdeclaration of Cargo

Dangerous goods shall, according to the Danish Merchant Shipping Act, be marked or labelled as dangerous in a suitable manner. The shipper shall inform the carrier and the sub-carrier to whom the goods are delivered in good time of the dangerous character of the goods and, if necessary, state the precautions to be taken.

In the event that the shipper otherwise is aware that the goods are of such a character that their carriage could cause danger or serious nuisance to persons, vessel or cargo, the shipper shall also provide information about this. If the goods are to be treated with special care, the shipper shall inform the carrier accordingly in good time and state the measures which may be necessary.

Where the shipper hands over dangerous goods to the carrier or a sub-carrier without informing him or her of the danger-

ous character of the goods and, if necessary, of the precautions to be taken and if the recipient of the goods does not otherwise have knowledge of the dangerous character, the shipper is liable towards the carrier and any sub-carrier for costs and any other loss resulting from the carriage of such goods. The carrier or sub-carrier may unload, render innocuous or destroy the goods, as the circumstances may require, without obligation to pay compensation.

In a Supreme Court case from 1999, the Danish Supreme Court found that batteries as well as battery waste should be regarded as dangerous goods. Prior to loading, the carrier noticed a liquid running out of the cargo of waste batteries. The shipper informed the carrier that the liquid could be neutralised. In reliance on this information the carrier loaded and transported the dangerous cargo of battery waste. During transport, the liquid from the battery waste caused significant damages to the ship. The Supreme Court held that the shipper was liable for the damages caused to the ship by the batteries.

Moreover, in a decision from the Danish Maritime and Commercial Court of 7 April 2012, it was established that the carrier must establish the cause of the damage. In that case, the shipper and recipient of scrap metal which contained flammable liquids were not considered liable to the ship-owner. During loading, a cargo of scrap metal caught fire on board the ship and caused significant damage. The cause of the fire could not, however, be determined with certainty and on this basis the Maritime and Commercial Court did not hold the shipper liable for damages.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The time bar for filing a claim for damaged or lost cargo is one year, as per the Danish Merchant Shipping Act section 501.

For recourse claims related to damages or lost cargo, the time bar is one year from the time where the claim was paid or legal proceedings concerning the claim commenced.

The time bar is suspended by the initiation of legal proceedings.

The time limit can be extended after the damage or loss occurred by agreement between the parties. Any agreement between the parties extending a time bar prior to the occurrence of a loss or damage is invalid.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Denmark is a party to the 1952 Arrest Convention, which has been implemented in Chapter 4 of the Danish Merchant Shipping Act. In addition, the Danish Administration of Justice Act which contains general rules on arrest applies, alongside the Danish Merchant Shipping Act.

4.2 Maritime Liens

According to the Danish Merchant Shipping Act, the maritime liens recognised in Denmark are:

- wages and other sums due to the Master and other members of the ship's complement in respect of their employment on board;
- public and private legal port dues, canal and other waterway dues, as well as pilotage dues;
- compensation for personal injury occurring in direct connection with the operation of the ship;
- compensation for damage to property in direct connection with the operation of the ship if the claim cannot be based on contract;
- rewards for salvage, removal of wrecks and contribution in general average.

In Denmark, a distinction is made between maritime liens and maritime claims. According to Danish law, arrest may only be carried out for security for a maritime claim. A claim secured by a maritime lien falls within the category for maritime claims, see further below. Maritime claims also include claims that are not secured by maritime liens.

According to the Danish Merchant Shipping Act, a maritime claim may arise out of one or more of the following:

- damage to property caused by a ship through collision or in some other way;
- personal injury caused by a ship or arising in connection with operation of a ship;
- salvage;
- agreements contained in a chartering agreement or otherwise for the use or hire of a ship;
- agreements contained in a chartering agreement or otherwise for the carriage of goods on board a ship;
- loss of or damage to goods, including luggage, which are carried on board a ship;
- general average;
- bottomry;
- towage;
- port, canal and other waterway dues and charges as well as pilotage;
- delivery of goods or materials to a ship, irrespective of the delivery location, for use in its operation or maintenance;
- construction and repair or delivery of equipment for a ship as well as costs and docking fees;

- wages for Masters and other members of the ship's complement;
- Masters' disbursements, including disbursements paid by shippers, charterers or agents on behalf of the ship or its owner.

In Denmark, arrest of a ship in accordance with the Danish Merchant Shipping Act can only be carried out as security for the above-mentioned maritime claims.

Arrest of a vessel where the owner is not the debtor can only be made if the claim is also secured by a maritime lien.

In addition to arrest in accordance with the Danish Merchant Shipping Act, arrest can be carried out as a security for non-maritime monetary claims in accordance with the Danish Administration of Justice Act if execution is not possible, if the possibility of payment will otherwise be significantly reduced and if the claimant does not wish to detain the vessel.

4.3 Liability in Personam for Owners or Demise Charterers

Denmark has implemented the 1952 Arrest Convention with a reservation, according to which making an arrest in Denmark presupposes that the claim can be levied against the ship-owner.

The general rule is that only the particular ship in respect of which the maritime claim arose may be arrested. However, sister ships owned by the ship-owner of the ship in respect of which the maritime claim arose may also be arrested, provided that the claim is not a dispute on property rights to a ship, dispute between co-owners of a ship on property rights, possession, use or revenues of the ship or mortgages on the original ship.

Arrest in associated ships is not possible.

According to Danish law, arrest can thus only take place without the owner being personally liable for the claim, if the claim is also secured by a maritime lien. This applies regardless of the creditor being domiciled in a country which has implemented the convention without a corresponding reservation.

4.4 Unpaid Bunkers

According to the Danish Merchant Shipping Act, an arrest requires that the owner of the ship can be held personally liable, unless the claim is secured by a maritime lien. Consequently, if bunkers were supplied to a chartered vessel and if the bunkers were ordered by the charterer and not by the owner, the claim cannot form the basis of an arrest, as the ship's owner is not liable and as bunker suppliers are not afforded a maritime lien under Danish law. If, however, the owner is liable towards the bunker supplier, the bunker supplier may apply for an arrest of the vessel.

A supplier may, irrespective of the above, apply for an arrest pursuant to the Danish Administration of Justice Act as previously mentioned.

4.5 Arresting a Vessel

An application for arrest must be submitted in writing to the bailiff's court. The application must contain an indication of the specific circumstances which, in the creditor's opinion, may prevent him or her from obtaining coverage of his or her claim. The documents that the creditor wishes to rely upon must also be attached. Copies are sufficient. If these requirements are not met, the bailiff's court may dismiss the case.

A power of attorney is not required to be submitted with the request for arrest. The arrest application must be drafted in Danish. Any supporting documentation is usually accepted in English but the opponent or the court may occasionally require a translation to Danish.

The arresting party will usually have to provide security for the damages and inconvenience that the arrest may cause the arrestee. The enforcement court specifies a sufficient amount which will normally not exceed an amount corresponding to five days' loss of hire.

Both parties may appeal the enforcement court's decision regarding the amount of security to the Danish High Court, which will review the decision. The Danish High Court's decision is final and cannot be appealed.

There are no rules regarding the form in which the arresting party has to provide security. Often, enforcement courts demand a bank guarantee but there is no statutory authority to such a demand. The court will usually also accept a letter of guarantee from a P&I (protection and indemnity) club.

4.6 Arresting Bunkers and Freight

Bunkers and freight may be subject to arrest in accordance with the Danish Administration of Justice Act.

In reality, there are several challenges concerning bunker arrest. For an example, it is – as previously mentioned – a requirement that the execution of the claim can be levied against the owner. This means that arrest can only be carried out with regard to a debtor's own assets and not assets owned by anyone else and, as bunker tanks are normally not emptied completely, it may be a challenge to determine which part of the bunker is owned by a specific debtor.

4.7 Sister-Ship Arrest

For certain maritime claims, it is possible to make an arrest of a sister ship. This requires that the sister ship is owned by the same legal entity which owns or owned the vessel with which the maritime claim is concerned at the time when the maritime claim arose.

4.8 Other Ways of Obtaining Attachment Orders

According to the Danish Merchant Shipping Act, apart from ship arrest, a ship-builder or a ship-repairer can exercise his or her right of retention over a ship to secure a claim in respect of the ship-building or repair.

Further, and as previously mentioned, arrest can be carried out as a security for non-maritime monetary claims in accordance with the Danish Administration of Justice Act if execution is not possible, if the possibility of payment will otherwise be significantly reduced and if the claimant does not wish to detain the vessel.

Moreover, the Danish Administration of Justice Act allows for obtaining attachments (levy execution) once a judgment or award has been obtained, a settlement entered into or a mortgage signed. Once execution is levied it gives the execution creditor a right to apply for a forced sale. To levy execution on a vessel, an enforceable judgment or court order, a settlement that expressly states that it is enforceable, an instrument of debt expressly stating enforceability or a mortgage is required.

Thus, this form of attachment can be used to secure payment of a right already established through a judgment, settlement agreement, debt instrument or mortgage.

The Brussels Regulation (recast) No 1215/2012 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters is in force in Denmark through Denmark's bilateral agreement with the EU. In accordance with the Regulation, judgments from within the EU are recognised and enforceable without any special proceedings. As Denmark is bound by the Lugano Convention, judgments rendered by a court within the European Free Trade Association (EFTA) are similarly recognised and enforceable in Denmark.

The Brussels Regulation also allows for provisional measures, including arrest. This means that a Danish court should allow arrest of a vessel situated outside Danish waters in accordance with the Danish Administration of Justice Act.

4.9 Releasing an Arrested Vessel

An arrest shall be lifted if security is provided which is deemed by the enforcement court as sufficient to cover the claimant's claim, including interest due and estimated future interest, as well as likely costs of the arrest procedure, the arrest action, and the action regarding the claim. Usually, an amount corresponding to the total claim plus 30% to 40% is regarded as sufficient.

A club LOI (letter of indemnity) is usually accepted and, similarly, a bank guarantee issued by an EU bank should be acceptable in Danish courts.

There is no formalised procedure and a petition to release the ship can simply be submitted to the court by email.

4.10 Procedure for the Judicial Sale of Arrested Ships

Judicial sales of arrested vessels are regulated by the general rules on judicial sales of goods which are laid down in the Danish Administration of Justice Act, chapters 49-50.

Arrest is only an interim remedy designed to secure the payment of debt where execution is not immediately available. A judicial sale of a vessel requires that execution is first levied on the vessel. Execution cannot be levied on the basis of a statutory maritime lien, but requires, eg, a judgment, an enforceable settlement or a mortgage.

Once execution is levied on the arrested vessel, usually on the basis of the judgment regarding the merits of the claim, the person with the claim can apply for judicial sale with the enforcement court.

The enforcement court will closely monitor a forced sale of vessels. The judicial sale of a vessel will be announced in the Official Danish Gazette as well as in local newspapers. The announcement must be made at least six weeks before the sale and at least twice. If the vessel is registered in the DAS or the DIS, the judicial sale will be registered therein.

Usually, the owner of the vessel will not be deprived of the right of disposal entirely and the owner will therefore still be responsible for the maintenance of the vessel. In addition, the owner is not allowed to dispose of the vessel in a way that can impair the arrestor's right.

Maritime liens on a ship take priority over other maritime claims and shall be paid in the order in which they are listed, and those mentioned under the same number shall rank equally.

However, rewards for salvage, removal of wrecks and contribution in general average, shall rank above other maritime liens which arose earlier and with regard to the relationship between the rights mentioned in **4.2 Maritime Liens**, the youngest rights shall rank before the oldest.

Maritime liens on a ship continue in the event that the property rights to the ship are transferred to another party or if the registration of the ship is changed.

Claims secured by registered mortgages and all other claims have priority after maritime liens in the order in which they have been established.

A vessel may be subject to several mortgages and there is no general rule requiring the consent from higher-recorded mortgagees. It is not uncommon to agree to and register negative-pledge agreements.

4.11 Insolvency Laws Applied by Maritime Courts

Rules on reorganisation analogous to Chapter 11 of the United States Bankruptcy Code are set out in Chapter 1 (a) of the Danish Bankruptcy Act. According to this act, arrest cannot be made during reorganisation proceedings. The rules imply that the debtor's creditors are barred from seeking satisfaction in the debtor's assets through individual prosecution when a reconstruction treatment has been initiated.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

Under Danish law, a person who has obtained an arrest on the basis of a claim which turns out not to exist must pay the debtor compensation for loss and tort. The same applies when the arrest lapses or is revoked due to subsequent circumstances, if it must be assumed that the claim did not exist.

The liability is strict, if the claim for which an arrest has been made turns out not to exist. If the arrest is otherwise found wrongful, the creditor is liable for loss and tort on a fault-based basis.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

The regulations on the carriers' liability for passengers and insurance obligation as well as the passengers' possibilities of being compensated and passenger rights are stipulated in four sets of regulations:

- the Athens Convention of 1974 on the carriage of passengers and their luggage by sea, as amended by the Protocol of 2002;
- the European Union Regulation No 392/2009;
- order No 9 of 10 January 2013 on certificates for confirming insurance or other guarantee for covering the liability to pay compensation in connection with accidents during the carriage of passengers by sea, as amended by order No 47 of 21 January 2014;
- chapter 15 of the Danish Merchant Shipping Act on the carriage of passengers and their luggage.

According to the Danish Merchant Shipping Act section 501, the period of limitation regarding delay of carriage of passengers or passengers' goods is two years after the day the passenger or the baggage was discharged.

The limitations on liabilities are as follows:

- loss caused by delay can be limited to SDR 4,150;
- loss caused by delay of luggage:
  (a) SDR 1,800 for hand luggage;
  (b) SDR 10,000 per vehicle;
  (c) SDR 2,700 for other luggage.

Liabilities cannot be limited if the loss is caused with intent or gross negligence.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Generally, Danish courts recognise and enforce law and jurisdiction clauses stated in bills of lading.

Any prior agreement which restricts the plaintiff's right to have disputes regarding carriage of goods decided by civil legal proceedings shall be void to the extent that it restricts the plaintiff's right, at his or her option, to institute an action with a court at one of the following places:

- the principal place of business, or in the absence thereof, the habitual residence of the defendant; or
- the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
- the port of loading agreed in the contract of carriage; or
- the agreed or actual port of discharge pursuant to the contract of carriage.

However, this does not prevent a party from instituting an action with a court at the place stated in the contract of carriage or prevent the parties from agreeing on how a dispute is to be settled once it has arisen.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

If a bill of lading has been completed pursuant to a chartering agreement, and that chartering agreement contains an arbitration clause, unless the bill of lading expressly states that such a clause is binding on the holder of the bill of lading, the carrier may not invoke the provisions against a holder of the bill of lading who has acquired it in good faith. Thus, an arbitration clause mentioned in the charterparty is only binding to the holder of a bill of lading if the bill of lading expressly refers to the clause.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Denmark is a party to the New York Convention of 10 June 1958 on the recognition and enforcement of arbitral awards.

The Danish Arbitration Act is based on the 1985 UNCITRAL Model Law and the 1958 New York Convention.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Under Danish law, arrest can be obtained if the requirements set out previously concerning arrest are met. The jurisdiction and applicable law of the underlying material claim is irrelevant and a Danish court will thus order an arrest of a vessel even if the relevant claim is subject to foreign arbitration or jurisdiction, due to an arbitration or law and jurisdiction clause in the relevant contract.

6.5 Domestic Arbitration Institutes

Denmark has a domestic arbitral institution, the Danish Institute of Arbitration. It does not specialise in maritime arbitration, but maritime disputes are occasionally arbitrated with the Danish Institute of Arbitration. In addition, maritime disputes can be arbitrated with the Nordic Offshore & Maritime Arbitration Association, facilitating international maritime and offshore arbitration in the Nordic Countries.

Denmark also has a well-established Mediation Institute, and maritime disputes can be mediated with the assistance of the Danish Mediation Institute, if the parties so agree prior to or once a dispute arises. During court cases, the courts also normally offer court mediation.

The procedure applicable to maritime arbitration and mediation depends on the parties' agreement and whether the rules of an arbitration or mediation institute have been specified by the parties.

In addition to these procedures, the Danish Maritime and Commercial Court uses lay judges with maritime expertise.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

The ordinary courts may refer a case to arbitration if, on the basis of a request from one of the parties, the court finds that the case has been commenced incorrectly and is in breach of an arbitration clause. However, this presupposes that the court does not declare the clause invalid or assesses that the subject matter cannot be admitted to arbitration.

In the event that arbitration proceedings have already been instituted, the courts may alone decide whether the subject is suitable for arbitration.

In that case, the pending arbitration proceedings may proceed irrespective of whether the proceedings are pending before the ordinary courts. If it turns out that the case is not suitable for arbitration, the arbitral tribunal will dismiss the case.

According to the Danish Arbitration Act section 16, a party's objection to the validity of an arbitration clause must be submitted no later than the submission of the defence.

If proceedings are commenced in breach of a foreign jurisdiction clause, the remedy depends on the nationality of the jurisdiction clause in question. If the jurisdiction clause breached specifies jurisdiction within the EU and if the Brussels I Regulation is applicable, a Danish court must decline jurisdiction if the court designated in the jurisdiction clause has already declared that it has jurisdiction; otherwise a Danish court must stay proceedings until the designated court declares whether it has jurisdiction.

If proceedings are commenced in breach of a foreign jurisdiction clause designating a court outside an EU Member State, a Danish court may choose to hear the matter if jurisdiction can also be established in Denmark.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Danish ship-owners are able to choose to be subject to the Danish tonnage tax scheme as an alternative to payment of regular, corporate tax. Under the Danish tonnage tax scheme, ship-owners' income is fixed on the basis of the net tonnage at their disposal. Ship-owners pay tonnage tax irrespective of actual income, profit and loss.

The participation of ship-owners in the tonnage tax scheme is voluntary, but the choice of opting in or out is binding for a period of ten years.

An amendment to the Danish tonnage tax scheme was agreed in the Danish parliament in 2015. The amendment means that special vessels such as supply, construction, offshore and ice-breaking vessels will be eligible for the tonnage tax scheme. The amendment was accepted by the EU Commission in 2018, but the amendment has not yet entered into force.

Merchant vessels or shipping companies that are permanently located in a Danish port or which sail a regular scheduled service between Danish ports can usually enter into payment agreements with the Danish ports and thereby obtain a discount on the fee.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

Persons residing in high-risk countries and who travel into Denmark with a recognisable purpose must be able to present a certificate of a negative COVID-19 test. The test must be taken a maximum of 72 hours before entry.

Seafarers from high-risk countries who enter Denmark with the recognisable purpose of crew changing are not obliged to show a negative COVID-19 test. The seafarer is in transit in Denmark to make the crew change and is therefore exempt from the rule of having to present a negative test.

The list of high-risk countries in the EU, Schengen and the United Kingdom is updated weekly by the Danish State Serum Institute.

8.2 Force Majeure and Frustration in Relation to COVID-19

In general, the Danish courts are very reluctant to rule on liability with reference to a *force majeure* consideration.

In order for *force majeure* to be invoked as a ground of discharge, there must be a qualified extraordinary circumstance such as war, import bans and natural disasters, ie, a circumstance of a completely unusual nature. It is unknown whether the coronavirus pandemic may constitute a ground for discharge. However, the Danish courts have not yet considered a pandemic case - such as the coronavirus pandemic - to be a *force majeure* event.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

The Brussels I Regulation which regulates jurisdiction is supplemented by the Danish Merchant Shipping Act, containing jurisdictional rules applicable to carriage of goods by sea. These rules take precedence over the general rules provided in the Brussels I Regulation.

The Danish Merchant Shipping Act provides that a jurisdiction clause cannot limit a plaintiff's right to commence proceedings:

- at the place where the defendant is domiciled;
- at the place where the agreement was entered into, if the defendant has a branch, or place of business or the like, there;
- at the place where the goods were loaded;
- at the place where the goods were or should have been discharged.

This means that the plaintiff can always commence proceedings in those jurisdictions even if an exclusive jurisdiction clause states differently.

As these places of jurisdiction are not identical to the places of jurisdiction laid out in the Brussels I Regulation, the Danish Merchant Shipping Act provides that the Brussels I Regulation takes precedence. As a result, the place of jurisdiction provided in s. 310(1) will no longer apply.

Subsequent to Brexit, the jurisdiction of a dispute concerning carriage of goods by sea between a party domiciled in Denmark and one domiciled in the UK will be regulated solely by the Danish Merchant Shipping Act if proceedings are initiated in Denmark.

The effects are inter alia that, due to Brexit, a plaintiff may choose to initiate proceedings in one of the jurisdictions provided by the Danish Merchant Shipping Act, irrespective of an exclusive jurisdiction clause.

This means that within the field of maritime litigation and especially with regard to disputes arising out of the carriage of goods by sea to or from Denmark, Brexit has increased the number of places in which proceedings may be initiated, irrespective of an exclusive jurisdiction clause agreed upon between the parties. When taking into consideration that one of the world's largest carriers is in fact Danish, this may actually entail changes in the current statistics and the UK's dominating market position concerning the provision of maritime services globally.

Bech-Bruun is a market-oriented law firm offering a wide range of specialist advisory services to large sections of the Danish corporate and public sectors, as well as to global enterprises. Counting more than 500 experienced and highly specialised employees, of whom 69 are partners, and with offices in Denmark, Shanghai and New York, Bech-Bruun is one of Denmark's leading full-service law firms. Bech-Bruun advises on all legal aspects of shipping, transport and logistics and co-operates with leading international transport lawyers and maintains an extensive international network to service its clients. Bech-Bruun is involved in more or less all major shipping deals in Denmark and is particularly known for maritime insolvency and issues related to the bunker industry.

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FRANCE

Law and Practice

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

French commercial courts, which rule on all matters involving commercial companies and commercial transactions, including in connection with maritime activities, are governed by Articles L721-1 et seq of the Commercial Code and by Articles L111-1 et seq of the Code of Judicial Organisation. Typically, claims related to the loss of, or damage to, goods carried by sea will be brought before commercial courts.

Maritime courts have been established by Order No 2012-1218, dated 2 November 2012, to rule on maritime misdemeanours and contraventions.

Specialised maritime courts, located in Brest, Le Havre, Marseille, Fort-de-France, Saint-Denis-de-la Réunion and Saint-Pierre-et-Miquelon, have been established by Law No 2001-380, dated 3 May 2001, for marine pollution offences committed in territorial waters, inland waters and waterways, the exclusive economic zone, ecological protection zone and on the continental shelf, whereas the judicial court of Paris has an exclusive jurisdiction for highly complex oil pollution claims and for matters relating to marine pollution offences committed outside maritime spaces under French jurisdiction.

1.2 Port State Control

France is a member of the Memorandum of Understanding on Port State Control (Paris MoU) of 1982. Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on Port State control, which was incorporated into domestic law by Order No 2011-635 dated 9 June 2011, uses the Paris MoU's procedures.

In France, inspection of foreign ships falls within the competence of the Directorate of Maritime Affairs, which has a dedicated team comprised of qualified inspectors to perform this inspection through the Ship Safety Centres.

Inspectors perform a broad inspection relating to the security and safety of ships. In the case of deficiency, inspectors may detain the ship.

Article L5334-4 of the Transports Code provides that access to the port is prohibited to any ship subject to a decision of denial of access, pursuant to the MoU.

Regarding marine casualties, the Directorate of Maritime Affairs is supported by Inter-regional Directorates of the Sea which have specialised services: Regional Operational Centres for Monitoring and Rescue (CROSS) and Ship Safety Centres (CSN).

1.3 Domestic Legislation Applicable to Ship Registration

Ship registration in France is governed by Articles L5112-1 et seq and Articles L5611-1 et seq of the Transports Code, and Articles 217 et seq of the Customs Code.

The domestic registration of ships with the first Register is handled by the customs administration and the Departmental Directorate of the Territories and the Sea in the region where the registration is made.

The domestic registration of ships with the French International Register (RIF) is handled by a single desk (*Guichet unique*) located in Marseille, composed of personnel from the customs administration and the maritime affairs administration.

1.4 Requirements for Ownership of Vessels

Ships registered in France must be at least 50% owned by nationals of an EU Member State or of a state that is part of the agreement concerning the European Economic Area, who, if they reside in French territory for less than six months per year, shall elect a domicile within French territory for all administrative or judicial matters relating to the property and the condition of the ship. If the ship is held in co-ownership, each of the managers must reside in France or, if they reside in France for less than six months per year, shall elect a domicile in France. Where the owners are legal entities, ships registered in France must be at least 50% owned by companies which have their registered office or principal place of business in France, or in another EU Member State, or in another state that is part of the agreement concerning the European Economic Area, under the condition in the two latter cases that the ship is managed and controlled by a permanent establishment located in France.

Ships registered in France must also have been built in an EU Member State or paid the import duties and taxes in an EU Member State.

It is possible to register a ship that is under construction.

1.5 Temporary Registration of Vessels

Temporary registration is permitted for bareboat-chartered ships, subject to the prior approval of the mortgage creditors and provided the laws of the dual flag State do not allow the registration of new mortgages.

1.6 Registration of Mortgages

Mortgages are registered with the customs collector in the district of registration of the ship or where the ship is under construction.

The following documents are required: either one of the originals of the mortgage deed, which remains deposited if it is a private deed, or an authentic copy, if there is a minute available. Together with one of these documents are submitted three slips signed by the applicant containing:

- the full names, professions and domiciles of the creditor and the debtor;
- the date and nature of the deed;
- the amount of the claim expressed in the deed;
- the agreements relating to interests and reimbursements;
- the name and designation of the mortgaged ship;
- the date of the French registration deed or of the declaration to begin construction;
- the election of domicile made by the applicant at the place of the registered office of the mortgage registry.

1.7 Ship Ownership and Mortgages Registry

The ship ownership and mortgages registries are available to the public. They are made public by way of entry in the registry by the customs administration.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Civil liability for oil pollution is governed by Articles L5122-25 et seq and Articles R5122-3 et seq of the Transports Code, Article 1240 of the Civil Code, Article L160-1 of the Environmental Code, EU Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, the 1992 Civil Liability Convention, the 1992 Fund Convention, the 2003 Supplementary Fund Protocol, the 2001 Bunker Convention and IMO-related resolutions.

Criminal liability for oil pollution is governed by:

- the International Convention for the Prevention of Pollution from Ships (MARPOL) 73/78;
- the International Convention for the Safety of Life at Sea (SOLAS) 1974;
- the 1982 Montego Bay Convention;
- the 1990 Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC);
- the Erika packages;
- EU Directive 2008/99/EC on the protection of the environment through criminal law;
- EU Directive 2005/35/EC as amended by EU Directive 2009/123/EC on ship-source pollution and on the introduction of penalties for infringements;
- EC Regulation 93/2007 amending EC Regulation 2099/2002 establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS);
- the Code of Transports;
- the Environmental Code; and
- the Criminal Code.

Wreck removals are governed by Articles L5142-1 et seq and Articles R5142-1 et seq of the Code of Transports and the Nairobi International Convention on the Removal of Wrecks of 18 May 2007.

2.2 International Conventions: Collision and Salvage

Collision is governed by the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Ships, which provisions are reproduced into French domestic law (Articles L5131-1 et seq and Article R5131-1 of the Transports Code), Article L5242-4 and Article L5263-1 of the Transports Code, and Article 223-1 of the Criminal Code.

Salvage is governed by the International Convention on Salvage dated 28 April 1989, which provisions are incorporated into the Transports Code (Articles L5132-1 et seq).

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The 1976 Convention on Limitation of Liability for Maritime Claims, as amended by the 1996 Protocol, is applicable in France and is reproduced in Articles L5121-1 et seq of the Transports Code.

2.4 Procedure and Requirements for Establishing a Limitation Fund

The constitution of a limitation fund is made through an application submitted to the president of the commercial court of the port of registry if the ship flies the French flag, or if it is a foreign ship of the French port where the incident occurred or of the first French port called at after the incident or, where there are no such ports, of the port where the ship has been arrested (Articles R5121-1 et seq of the Code of Transports). Orders are then issued to open the procedure of constitution and designate the liquidator and the method of constitution of the fund, then, after the funds are deposited or the equivalent guarantee provided, to acknowledge the constitution of the fund. Creditors are informed by way of a registered letter and publication

in the journal of legal notices. Once all claims are produced, a statement is drawn and the fund is distributed.

Any person entitled to limit and alleged to be liable may constitute a limitation fund. This right can be exercised before the court where proceedings are pending, or as per above, when occurring before the start of legal proceedings.

Limits are calculated in accordance with the provisions of 1976 Convention on Limitation of Liability for Maritime Claims, amended by the 1996 Protocol; however, the limits of liability concerning a ship with a tonnage that is lower than or equal to 300 are equal to half of those set by Article 6 of the 1976 Convention for ships with a tonnage lower than or equal to 2000.

It is not required to provide a deposit.

3. Cargo Claims

3.1 Bills of Lading

International carriage of goods by sea is governed by the Hague-Visby Rules, while domestic carriage is subject to Articles L5121-1 et seq, Articles L5422-1 et seq, Articles L5423-1 et seq, Articles R5422-6 et seq, Articles R5423-1 et seq, Articles D5422-1 et seq of the Transports Code, and Articles 3, 12, 32, 44 of the Decree No 66-1078 of 31 December 1966, of which the provisions are inspired by the Hague-Visby Rules.

3.2 Title to Sue on a Bill of Lading

Title to sue the carrier under a bill of lading is held by the consignee designated in the bill of lading, the legitimate bearer of a bill of lading to bearer and the endorsee of the bill of lading to order, as well as the shipper, the actual shipper and the actual consignee, when they prove they have suffered the damage.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

A ship-owner's liability can only be engaged for cargo damages if the ship-owner is deemed as the carrier. If engaged, the ship-owner's liability will be subject to the Hague-Visby Rules limits of liability, whether the ship-owner acted as the contractual carrier or as the actual carrier. In this latter case, the liability of the ship-owner will, however, be grounded in tort and the cargo claimant will thus need to bring evidence of a fault of the ship-owner and of a causal link between the fault and the incurred damage.

3.4 Misdeclaration of Cargo

Article L5422-4 of the Transports Code expressly provides that the shipper guarantees to the carrier the accuracy of the information concerning the cargo as reproduced in the bill of lading on the basis of the statements of the shipper. Thus, any misdeclaration of cargo engages the liability of the shipper towards the carrier.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

Any action against the carrier, whatever its nature, must be brought within one year from the date of delivery of the goods in the case of damage or partial loss, or from the date on which the goods should have been delivered in the case of total loss. This period may be extended by agreement concluded between the parties after the cause of action has arisen. It is interrupted by the recognition of the right of the claimant by the debtor, by service of a writ of summons or by enforcement of an act through bailiffs, and is suspended in the case that the claimant is unable to act as a result of any impediment resulting from law, an agreement or *force majeure*.

Any recourse action must be brought within three months from the date of exercise of the principal action or from the date of settlement.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Ships are arrested in France on the basis of the Brussels Convention relating to the Arrest of Sea-going Ships of 10 May 1952, the Transports Code (Articles L5114-20 et seq, Articles R5114-15 et seq) and the Code of Civil Procedures of Execution (Articles L111-1 et seq and Articles R112-1 et seq).

4.2 Maritime Liens

Maritime liens are governed by the Brussels Convention on Maritime Liens and Mortgages dated 10 April 1926, as incorporated into Articles L5114-7 et seq of the Transports Code.

Maritime liens, which are attached to the ship and the freight of the voyage during which the claim arose, are ranked as follows:

- court costs in connection with the sale of the ship;
- port, dock, harbour and other waterway dues and charges;
- crew wages;
- salvage fees and costs;
- damages related to collision, personal injuries, loss or damage to cargo or luggage;
- disbursements incurred by the Master of the ship or the shipping agent on behalf of the ship.

Maritime liens allow the arrest of the ship irrespective of the fact that the claim is not directed against its owner or demise charterer.

Maritime claims correspond to those listed in Article 1 of the 1952 Brussels Convention relating to the Arrest of Sea-going Ships of 10 May 1952 and allow the arrest of a ship owned by the debtor.

4.3 Liability in Personam for Owners or Demise Charterers

As a matter of principle, whether under French domestic law or under the 1952 Arrest Convention, it is required that the owners are personally liable for the alleged prima facie claim or maritime claim, as the case may be, on which basis the arrest is sought, except when the claim is secured by a maritime lien.

4.4 Unpaid Bunkers

Bunker suppliers, whether actual or contractual, can arrest a ship on the basis of the 1952 Arrest Convention or of French domestic law, as the case may be. Thus, the ship could be arrested twice for the same supply by both the actual and the contractual bunker suppliers.

If the bunkers were ordered by the charterer, the arrest of the ship is possible if it is established that the claim is secured by a maritime lien, ie, that the supply was ordered by the Master of the ship and occurred within six months before the arrest.

4.5 Arresting a Vessel

There is no need to provide a power of attorney. The petition must be substantiated with any document evidencing the existence and the cogency of the claim. When the petition is grounded on the 1952 Arrest Convention, the documents must also show the maritime nature of the claim. No original or notarised documents are required. The documents supporting the petition must be handed to the ruling judge. The documents should be translated. It is not common practice that French courts require a security deposit as a prerequisite for the arrest of a ship. However, judges have free discretion to decide otherwise.

4.6 Arresting Bunkers and Freight

Bunkers and freight can be arrested on the basis of the general regime applicable to arrest of movable tangible property (Articles L511-1, L521-1 R521-1 of the Code of Civil Procedures of Enforcement). The creditor must prove that they have a prima facie claim against the owner of the bunkers or freight and prove the existence of circumstances threatening the recovery of the claim.

4.7 Sister-Ship Arrest

Under French domestic law, any ship belonging to the debtor may be arrested even where the claim is not related directly to the ship. The 1952 Arrest Convention permits such an arrest provided the claim is not in connection with the title to or ownership of a particular ship or with disputes between co-owners or the mortgage or hypothecation of this ship.

If the ship belongs to a company of the same group of companies as the debtor, it must be established that the company owning the ship is fictitious, ie, has the same beneficial or associated ownership, want of employees, concurrency of assets and/or debts, unity of management, lack of participation to the profits and/or debts of the company, unequal distribution of the dividends, existence of a subordination bond between the existing entities, etc.

4.8 Other Ways of Obtaining Attachment Orders

Under French law, it is possible to obtain attachment orders under the regime framed by the Transports Code (Articles L5114-20 to L5114-29 and Articles R5114-15 to R5114-47) and the Code of Civil Procedures of execution (Articles L111-1 et seq and Articles R112-1 et seq).

As a matter of principle, a freezing injunction may be issued under the provisions of the Code of Civil Procedure, in the case of urgency whenever the claim is not seriously disputable, or otherwise when it aims to prevent an imminent damage or to stop a disturbance that is obviously unlawful. In practice, it is rarely ordered against a ship.

4.9 Releasing an Arrested Vessel

A ship may be released either by providing the appropriate guarantee or deposit as per the order of arrest or by serving upon the arrestor a writ of summons with a view to challenging the arrest.

As a matter of principle, any security that would be equivalent to the guarantee offered by the arrest of the ship for the recovery of the claim is acceptable. In practice, French judges accept bank guarantees, cash deposits and P&I letters of undertaking.

4.10 Procedure for the Judicial Sale of Arrested Ships

The judicial sale of the arrested ship is possible when the petitioner holds an enforceable deed or judgment. The procedure for the judicial sale of arrested ships is set out in Article R5114-20 et seq of the Transports Code. An order to pay must be served through bailiffs on the debtor 24 hours before initiating the procedure. The order expires ten days after the date of service, which means that the executory arrest must be carried out before the expiry of this period. Moreover, within three days of the penalty of being declared void, the petitioner must serve a copy of the minutes of the executory arrest on the debtor. This notice contains a summons to appear before the court. In addition, it is recommended to serve a copy of the minutes of the executory arrest on the harbour master and the consul of the State whose flag the ship flies. Within seven days from the date

of the minutes of the executory arrest, the executory arrest must be published in the mortgages registry in the case of a ship flying the French flag, otherwise in a special registry at the customs office of the place of arrest. The period of seven days is increased by 20 days if the place of arrest and the place where the registry is kept are not located in Metropolitan France.

The arrest must be served on the creditors who have a publicly registered claim on the ship, which contains a summons to appear before the court.

The Judicial Court fixes, by judgment, the reserved price, the conditions of the sale and the auction date. The tenderer must pay the price within 24 hours. Oppositions to the payment must be made within a month.

The owner of the arrested ship is responsible for its maintenance during the period of arrest. The arrestor may also be authorised to take maintenance measures during the period of arrest for the account of the owner in the case of failure of the latter.

Creditors with a maritime lien take precedence over creditors with a mortgage.

4.11 Insolvency Laws Applied by Maritime Courts

In France, a safeguard procedure would be close to Chapter 11 of the US Bankruptcy Code. The opening of insolvency proceedings in France prevents French courts from ordering the arrest and judicial sale of the ship in accordance with the principle of suspension of individual lawsuits.

In accordance with Article 5 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, the opening of insolvency proceedings in another EU Member State does not prevent French courts from ordering the arrest and judicial sale of the ship if the creditor has a right in rem, for instance when he or she holds a mortgage on the ship.

A decision issued in a non-EU member state relating to insolvency proceedings would have effects in France following enforcement proceedings.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

French judges are reluctant to accept a claim for compensatory damages for wrongful arrest, unless the bad faith or malice of the arrestor is clearly established.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

The EU Regulation No 392/2009 on the liability of carriers of passengers by sea in the event of accidents, dated 23 April 2009, which incorporates the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 and its protocol of 2002, governs international and domestic carriage of passengers by ship. The provisions of the Code of Transports (Articles L5421-2 et seq of the Transports Code), of the Law No 66-420 of 18 June 1966 on maritime affreightment and carriage contracts (Articles 47 to 49), and of the Tourism Code (Articles L211-1 et seq) only apply subsidiarily.

Actions against the carrier must be brought within two years from the date of disembarkation of the passenger in the case of personal injury. In the case of death occurring during carriage, actions against the carrier must be brought within two years from the date when the passenger should have disembarked. In the case of personal injury occurring during carriage and resulting in the death of the passenger after disembarkation, actions against the carrier must be brought within two years from the date of death, provided that this period shall not exceed three years from the date of disembarkation. In the case of loss of or damage to luggage, actions against the carrier must be brought within two years from the date of disembarkation or from the date when disembarkation should have taken place, whichever is later.

This time limit may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. It is interrupted by the recognition of the right of the claimant by the debtor, by service of a writ of summons or by enforcement of an act through bailiffs and is suspended in the case that the claimant is unable to act as a result of any impediment resulting from law, an agreement or *force majeure*.

No action can be brought after the expiry of a period of five years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later; or, if earlier, after the expiry of a period of three years from the date when the claimant knew or ought reasonably to have known of the injury, loss or damage caused by the incident.

The liability of the owner can be limited unless there is wilful misconduct.

Limitations provided for in the 1976 Convention on Limitation of Liability for Maritime Claims are applicable (Article 7).

Damage arising from delay is the subject of special provisions in the Transports Code (Articles L5421-2 and L5421-5).

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

French courts enforce jurisdiction clauses stated in bills of lading on the basis of Article 25 of Regulation (EU) No 1215/2012 of 12 December 2012, when the written consent of the parties is established, or when the shipper or consignee have regular shipments with the carrier, or when the business of the shipper or consignee suggests that they could not ignore the usage in maritime carriage, acknowledged by the courts, of the inclusion of a jurisdiction clause in a bill of lading referring to the courts of the place where the carrier is located.

The same control is made to appreciate the acceptance by the shipper or consignee of the choice of law clause found in the bills of lading.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

The courts in France recognise and enforce a law and arbitration clause of a charterparty incorporated into the relevant bill of lading on the same basis as outlined in **6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading**

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Foreign arbitral awards are enforced in France on the basis of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Articles 1514 et seq of the Code of Civil Procedure.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

The arrest procedure is governed by the law of the place of arrest. Therefore, if the ship is located in France at the time of arrest, French courts will order the arrest of the ship, irrespective of the law and jurisdiction clauses that may be found in the underlying contract.

6.5 Domestic Arbitration Institutes

Arbitration can be run by arbitrators freely designated by the parties or by a specialised body, such as the Chambre Arbitrale Maritime de Paris (CAMP), which is commonly designated in maritime contracts or following maritime disputes. The CAMP has its own rules and is seized on the basis of a simple request outlining the purpose of the arbitration and identifying the parties. Proceedings usually last for six months to one year.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

The defendant can raise the non-jurisdiction of the court and ask for compensation of the judicial costs. There is no such concept as anti-suit injunctions.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

France has a taxation system based on the tonnage of the ships. It applies to companies where at least 75% of the turnover comes from the use of commercial vessels (Article 209-0-B of the General Tax Code).

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

Before the embarkation of a seafarer on board a ship flying the French flag, the Ministry of Sea recommends that he or she complies with a period of isolation of at least seven days and a PCR test will be carried out.

Passengers on board ships engaged on scheduled lines must make a sworn statement on the lack of symptoms and contact with an infected patient, and must wear a mask in publicly accessible areas.

Ship cruises carrying fewer than 250 passengers and entering European ports only may navigate.

8.2 Force Majeure and Frustration in Relation to COVID-19

The mere existence of a pandemic is not sufficient to characterise a *force majeure*. It is necessary to consider whether the conditions provided for in Article 1218 of the Civil Code are met, ie, whether the pandemic represents an event beyond the control of the debtor, which could not have been reasonably foreseen at the time of conclusion of the contract and the consequences of which cannot be avoided by appropriate measures.

Furthermore, the contract may be renegotiated according to Article 1195 of the Civil Code if it is demonstrated that the change of circumstances was unforeseeable at the time of con-

clusion of the contract and that it causes the performance of the contract to be significantly costly for a party who did not accept to undertake the risk.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

Beyond the liability provided under the 1992 Civil Liability Convention, the discharge of oil into the sea is criminally punished under French law when the ship generating it flies the French flag or, with respect to foreign ships, when the pollution reaches the exclusive economic zone, the ecological protection zone or the French territorial and inland waters, as well as waterways up to the limits of maritime navigation.

The Master or responsible officer on board the ship is punished whenever the oil discharge is found to be intentional, but also when the oil discharge has been caused by negligence or disregard of laws and regulations or is consecutive to a marine casualty caused by negligence or disregard of laws and regulations or with failure to take the necessary measures against marine pollution.

French law also punishes the owner or manager of the ship, or their legal representative where legal entities are concerned, or any person other than the Master or responsible officer on board the ship exercising, de jure or de facto, a power of management or supervision in the management of the ship, when they are at the source of the oil discharge or when they did not take the necessary measures to avoid it.

Richemont Delviso is an international law firm, providing global legal assistance, covering advising, mediating and managing all judicial and arbitral disputes, drafting and reviewing contracts, as well as setting up and following up structures, projects and ventures of all kinds. Richemont Delviso is also involved in assisting clients in auditing and assessing risks that may arise from their business operations, including the impact of applicable legislation and regulation. Composed of 12 lawyers, and with offices in Paris, Marseilles and Ajaccio and a regional office in Douala (Cameroon), Richemont Delviso intervenes anywhere in metropolitan France and in French overseas departments and territories as well as in francophone African countries and has a wide international network of partners and correspondents, which allows the firm to provide rapid and efficient assistance throughout the world.

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GREECE

Law and Practice

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Hill Dickinson International see p.116

Contents

Contributed by: Jasel Chauhan, Maria Moisidou, Eleni Baxivanou and Io Papadimitriou, ***Hill Dickinson International***

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The Greek Code of Private Maritime Law is the main domestic law applied by the Greek shipping and maritime courts in marine disputes governed by Greek law. The most common maritime claims filed with the relevant Greek competent courts are claims for unpaid crew wages or repair/service costs, personal injury claims, marine insurance claims and maritime accidents. Mortgagee banks also use the Greek courts to enforce their rights under Greek or foreign mortgages. The aforementioned claims are usually secured through ship's arrest and applications for interim injunctions.

Article 51 of Law 2172/1993 provides for the establishment and operation of a special maritime division within the Court of First Instance of Piraeus and the Court of Appeal of Piraeus. The maritime division of the Court of Piraeus has exclusive jurisdiction in the Attica region and concurrent jurisdiction all over Greece.

1.2 Port State Control

The Directive 2009/16/EC of the European Parliament and of the Council applies in Greece in relation to the establishment of a harmonised inspection system for vessels entering Greek territory.

Greece is also a party to the Paris Memorandum of Understanding (MOU), pursuant to which the prime responsibility for compliance with the requirements laid down in the international maritime conventions lies with the ship-owner, while responsibility for ensuring that compliance remains with the Flag State.

In this regard, Port State Control in Greece is conducted by the competent department of the Hellenic Coastguard, which follows the rules and procedures established by the above Directive. The Port State Control authority must decide which ships are due to undergo mandatory inspection or are eligible for inspection (Article 12 of the Directive), the type of such inspection, ie, expanded or initial/more detailed (Articles 13 and 14 of the Directive) taking into consideration various parameters, which include the following:

- generic parameters: type and age of ship, Flag State performance, company performance;
- the ship's risk profile;
- overriding factors: ships suspended or withdrawn from class, subject to report or notification from another Member State, sailing in an unsafe manner, etc.

The Port State Control authority has been granted extended powers in relation to ships which have been involved in grounding or collision incidents (Clause II,2A, Annex A of the Directive). Although there are now specific provisions in relation to wreck removal, the enhanced authorities of the Port State Control will have an overriding effect in blocking cases.

1.3 Domestic Legislation Applicable to Ship Registration

Under Greek law, there are two available methods of registering a ship under the Greek flag:

- a ship can be registered under the Greek shipping register in accordance with the provisions of the Greek Civil Code of Public Maritime Law (Legislative Decree 187/1973). The legislation provides for numerous requirements in order to register a ship with the Greek flag; or
- a ship owned by a foreign shipping company may also be registered in Greece, pursuant to Legislative Decree 2687/1953. This provides that ships with a capacity of more than 1,500 gross registered tons (GRT), which are beneficially owned by Greek interests (which are more than 50%), may be registered with the Greek shipping register (as a foreign investment) following the issuance of a ministerial decision setting out the conditions applicable for the registration of the relevant ship.

1.4 Requirements for Ownership of Vessels

In order to register a vessel under the Greek flag, more than 50% of the shares in the vessel must be ultimately beneficially owned by either:

- Greek interests (being either Greek persons/legal entities or by foreign legal companies, provided that more than 50% of the shares in those non-Greek companies are owned by Greek persons or companies); or
- EU citizens/legal entities.

1.5 Temporary Registration of Vessels

Pursuant to Article 9 of the Greek Code of Public Maritime Law (GCPML), Greek Port or Consular authorities abroad have been granted the power to issue temporary trading certificates for vessels applying for registration under the Greek flag, with validity that cannot exceed six months. Immediately after the issuance of the temporary trading certificates, the Greek Ministry of Shipping and Insular Policy will take over the registration file, in order to proceed with the permanent registration of the subject vessel in accordance with the applicable legislative provisions.

There is no provision under the existing Greek legislation that provides for the dual or bareboat registration of vessels flying

the Greek flag and therefore, as the law currently stands, these forms of registration are not permitted.

1.6 Registration of Mortgages

In order for a Greek mortgage to be effective and enforceable against third parties, it should be registered with the competent Ship's Registry of the vessel's port of registration and become publicly recorded. A maritime mortgage under Greek law may be either simple or preferred. A simple mortgage is granted by a unilateral statement of the mortgagor, while a preferred mortgage may only be granted by deed. In that case, the mortgage must be in the form of a notarial deed and in the Greek language. If a mortgage is executed abroad, a certified Greek translation of the mortgage must be submitted together with the original document.

1.7 Ship Ownership and Mortgages Registry

Each port of the vessel's registration maintains two main registers in hard-copy (book) form:

- an ownership register (evidencing title of the vessel, details of the purchase deed, the vessel's particulars and encumbrances registered over the vessel); and
- a mortgage register (containing all the mortgage entries and the relevant information in relation to the registered mortgages, such as the details of the mortgagor, the notarial deed, the secured debt and the registration of any other encumbrances on the vessel, eg, arrest/prohibitory sailing order).

The Greek Ship Registry does not yet have a full online platform. However, documentation for the registration of a vessel under the Greek flag can be submitted electronically.

These two registers are available to the public through research and review of the relevant book registers by a lawyer or a notary public. However, in order for a third party to review any ancillary documentation (eg, the mortgage deeds, documents of title, etc), permission must be first granted in writing by a competent public authority, following proof of the existence of legal interest.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

The Greek state has ratified the following international conventions, which are in force as amended and applicable to owners and third parties in the event of a maritime pollution incident:

- the 1969 Convention of Civil Liability for Oil Pollution Damage (CLC), and the later 1992 CLCL;
- the 1992 Fund Convention;
- the 2003 Supplementary Fund Protocol;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage;
- the 1976 Barcelona Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean;
- the MARPOL 73/78 Convention; and
- the 1972 London Dumping Convention.

The Presidential Decree 55/1998 (as amended) in relation to the protection of the Marine Environment, as well as Article 914 of the Greek Civil Code regarding liability in tort, also applies.

Pursuant to Law No 2881/2001, wreck removal is the responsibility of the vessel's owner and therefore insurance against wreck removal is mandatory. The Greek state has also the authority to proceed with the removal of a wreck directly and subsequently to claim directly against the respective insurer, in the event that the ship-owner is unable to cover the cost. Despite the national regulation applicable for wreck removals, Greece has not yet ratified the Nairobi International Convention on the Removal of Wrecks.

2.2 International Conventions: Collision and Salvage

The Greek state has ratified the following international legislation, which is in force as amended and applicable in the case of a maritime collision incident:

- the International Regulations for Preventing Collisions at Sea 1972 (COLREGS);
- the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels.

These international regulations provide a framework for determination of the liability of the parties to a collision incident.

In circumstances where the international regulations do not apply, the provisions of Articles 235 to 245 of the Code of Private Maritime law and Article 914 of the Civil Code shall apply.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Greece is a party to both Convention for Limitation of Liability on Maritime Claims 1976 (LLMC 76) and its 1996 Protocol, which have been implemented at a national level through the enactment of Laws 1923/1991 and 3743/2009, respectively. Law 1923/1991 gives the force of national law to the provisions of

LLMC 76, while Law 3743/2009 gives effect to the amendments introduced by the 1996 Protocol.

In relation to the types of claim that may be subject to limitation of liability, Law 1923/1991 (as amended) is in line with Article No 2 of the LLMC, as to the following types:

- 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 directly connected with the exploitation 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 exploitation of the ship or salvage operations;
- claims in respect of the raising, removal, destruction or the rendering harmless of a ship which has sunk, or been wrecked, stranded or abandoned, including anything that is or was on board the ship;
- claims in respect of the removal, destruction or rendering harmless of the ship's cargo; and
- claims of a person, other than the person liable, in respect of measures taken in order to avert or minimise loss (the person liable may limit their liability in accordance with this Convention and further loss caused by such measures).

However, Article No 2 sub-paragraphs 1 (a) and (c) of Law 1923/1991 refer to "the exploitation of the ship" differing from the corresponding sub-paragraphs of LLMC 76, which use the phrase "the operation of the ship".

It has been decided by high authority (Piraeus Court of Appeal, decision number 228/2016, with recent Supreme Court approval, decision number 1470/2017) that the term "exploitation" adopted by the draftsmen of Law 1923/1991, does not do justice to the original text of LLMC 76. Accordingly, the phrase "exploitation of the ship" in Article No 2 of Law 1923/1991 should be read in line with the English text of LLMC 76 (ie, "operation of the ship") so as to include technical aspects and not only the commercial operation/exploitation of the ship.

In relation to the types of claim that may be excluded from liability, Law 1923/1991 (as amended) is in line with Article No 3 of the LLMC 76, as to the following types:

- claims for salvage, including, if applicable, any claim for special compensation under Article No 14 of the International Convention on Salvage 1989 (as amended), or contribution in general average;
- claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969, or of any amendment or protocol thereto that is in force;
- claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;
- claims against the owner of a nuclear ship for nuclear damage; and
- claims by servants of the ship-owner or salvor whose duties are connected with the ship or the salvage operations. These include claims by their heirs, dependants or other persons entitled to make such claims if, under the law governing the contract of service between the ship-owner or salvor and such servants, the ship-owner or salvor is not entitled to limit his or her liability in respect of such claims, or if they are by that law only permitted to limit their liability to an amount greater than that provided for in Article No 6.

In relation to the applicable limits, Article 16 of Law 4504/2017 ratified the increase of the LLMC limits according to the IMO "tacit amendment procedure". Therefore, liability may be limited as follows.

- For claims for loss of life or personal injury on:
  - (a) ships not exceeding 2,000 GRT, the limit is 3.02 million Special Drawing Rights (SDR); and
  - (b) larger ships, the following additional amounts are used in calculating the limitation amount:
    - (i) for each ton from 2,001 to 30,000 tonnes, SDR 1,208;
    - (ii) for each ton from 30,001 to 70,000 tonnes, SDR 906; and
    - (iii) for each ton in excess of 70,000 tonnes, SDR 604.
- For any other claims on:
  - (a) ships not exceeding 2,000 GRT, the limit is SDR 1.51 million; and
  - (b) larger ships, the following additional amounts are used in calculating the limitation amount:
    - (i) for each ton from 2,001 to 30,000 tonnes, SDR 604;
    - (ii) for each ton from 30,001 to 70,000 tonnes, SDR 453; and
    - (iii) for each ton in excess of 70,000 tonnes, SDR 302.

It must be noted that Greece is a member of the International Monetary Fund (IMF) and, therefore, the resulting SDR is given its euro value (depending on the establishment date of the limitation fund) by using the method of valuation applied by the IMF for its operations and transactions. The SDR value

is determined daily, based on the spot exchange rates observed around noon London time, and posted on the IMF website.

2.4 Procedure and Requirements for Establishing a Limitation Fund

The particulars for the establishment and operation of a Limitation Fund under LLMC 76 are set out at Law No 1923/1991, pursuant to which the LLMC 76 has been ratified and enacted to the Greek legislation.

Under Article 11 of Law No 1923/1991, a limited liability fund may be set by any person that could be considered liable under a maritime claim. The limitation fund is set by application of the relevant person at court or other competent authority. A party seeking to set up a limitation fund will need to post a Greek bank guarantee of a form and wording acceptable to the court.

It is a requirement for the establishment of the fund that the bank guarantee must be able to cover the totality of the amounts claimed in relation to the incident giving rise to the fund, together with relevant interest applicable from the date of the event. Calculations are made taking into account the "unit of account" referred to in Articles 6 and 7, which is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Articles 6 and 7 shall be converted into the national currency of Greece, according to the value of the currency at the date the limitation fund shall have been constituted, payment is made, or the guarantee is issued.

3. Cargo Claims

3.1 Bills of Lading

Greece has ratified the 1924 Hague Convention and the 1986 Visby Protocol, making the Hague-Visby Rules applicable to cargo claims subject to Greek jurisdiction, which have been given the force of national law through the enactment of Law 2107/1992. Greece has not ratified the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

In relation to domestic legislation, when the Hague-Visby Rules do not apply, Articles 107 to 148 of the Code of Private Maritime Law provide a regime similar to the Rules.

3.2 Title to Sue on a Bill of Lading

As a matter of principle under Greek law, when cargo is lost or damaged in the course of carriage, the party generally entitled to claim in its own name is the shipper that entered into the contract with the carrier. However, there are exceptions to this general rule, including the following.

- If the original bill of lading was issued to the order of the consignee (or has been endorsed by the shipper to the consignee) and the consignee is the holder of the original bill of lading, the consignee can claim in its own name.
- If the same applies to other legal holders of the bill of lading (eg, other parties that purchased the goods from the consignee), provided they can establish their rights as legal holders of the bill of lading with an unbroken chain of endorsements.
- If the insurer of a cargo indemnifies the legal holder of the bill of lading for its loss, the insurer becomes subrogated to the rights of the assured/holder of the bill of lading and is entitled to file a claim in its own name against the carrier.
- If a cargo pledgee and/or assignee of the consignee's rights has title to sue the carrier, provided it is the legal holder of the bill of lading.
- A shipper/charterer can sue the carrier if:
  (a) it is the legal holder of the bill of lading; or
  (b) it has endorsed the bill of lading to the consignee or a third party but retained risk to the goods (eg, a CIF [Cost, Insurance and Freight] sale); or
  (c) it has compensated the consignee/third party or legal holder of the bill of lading for its loss and has subrogated to the rights of the legal holder of the bill of lading.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

In accordance with the Hague-Visby Rules, the ship-owner/carrier is entitled to limit its liability either by unit (666.67 special drawing rights (SDRs) per unit) or by weight (2 SDRs per kilogram), whichever is higher. The limitation limits set out by the LLMC Protocol 1996 following the LLMC 76 and the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention) also apply.

However, the approach is different if the ship-owner is the actual carrier only and not the contractual carrier, having assumed the responsibility to carry the cargo and deliver it at the port of discharge. In this case, the Hague-Visby Rules are not interested in the actual carrier, for whose actions and omissions it is the contractual carrier who remains responsible. The contractual carrier has then a right of claim for damages in tort pursuant to Article 914 of the Civil Code and Article 106§2 of the Code of Private Maritime Law.

3.4 Misdeclaration of Cargo

Pursuant to Article III Rule 5 of the Hague-Visby Rules, the shipper guarantees the accuracy of the statement as to weight and quantity of the cargo, as well as the marks and number. In this regard, the carrier has the right to claim in damages against the shipper based on contract or tort for any liabilities due to claims of other cargo interests or due to damage caused to the

vessel, if they were caused due to misdeclaration of any of the aforementioned cargo particulars by the shipper.

In the specific case of loading dangerous cargo (inflammable, explosive or other dangerous goods) without the knowledge of the Master of the vessel, any such cargo may be discharged, rendered harmless or destroyed at the shipper's expense.

The national provision of Article 137 of the Code of Private Maritime Law follows the same approach, whereby the carrier will not be liable in the event of misdeclaration of the type, weight or value of the cargo. This approach has also been followed by the Greek courts, which recognise (inter alia) that a carrier will be discharged from liability to deliver a cargo in accordance with the respective bill of lading, if the shipper has made a false statement in that bill of lading (Decision No 438/1995 of the Piraeus Court of Appeal).

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The time bar for filing a claim for damaged or lost cargo in Greece is one year, with the time to be counted from the date of actual delivery or the date on which delivery should have taken place. These limits remain the same irrespective of whether the provisions of the Hague-Visby Rules (Article III Rule 5) or the Code of Private Maritime Law apply (Article 148). This one-year period may, however, be extended by agreement of the parties after the cause of action has arisen.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Greece is a party to the International Convention for the Unification of Certain Rules relating to Arrest of Sea-going Ships of 10th May 1952 (the 1952 Arrest Convention), which has been ratified and implemented in Greece by the Legislative Decree 4570/1966.

The 1952 Arrest Convention (together with the provisions of Articles 682, etc, and Articles 707, etc, of the Greek Code of Civil Procedure (the GCCP), which supplement the 1952 Arrest Convention) applies in cases where a vessel flies the flag of a signatory Member State and she is arrested in the jurisdiction of a signatory Member State, while the provisions of the GCCP are applicable to all other cases for the arrest of vessels in Greece.

4.2 Maritime Liens

Under Greek law, claims deriving from or relating to services provided on board the vessel and claims deriving from damages cause by a vessel are recognised as maritime liens.

More specifically, Article 205 of the Greek Code of Private Maritime Law (the GCPML) recognises the following claims as maritime liens:

- legal costs incurred for the common benefit of the creditors, dues and charges incurred by the ship, taxes relating to navigation, dues payable to the Seamen's Pension Fund, and fines imposed or to be imposed by the Bureau for the Provision of Marine Employment in favour of the Seamen's Fund for Sick and Unemployed Seamen;
- claims of the Master and crew arising from their employment contracts and the costs of guarding and maintaining the ship, from arrival at the port where the auction is to take place up to the auction;
- costs and expenses payable in respect of marine salvage and the removal of wrecks; and
- damages due to ships, passengers and cargoes as a result of collision.

A claim in relation to a foreign-flagged vessel is considered to be a maritime lien if both the law of the flag and Greek law recognise that claim as a maritime lien.

In cases where the 1952 Arrest Convention is applicable (ie, where a vessel flying the flag of another signatory Member State calls at a Greek port), that vessel may only be arrested for one of the following maritime claims, as defined in Article 1 of the 1952 Arrest Convention:

- damage caused by any ship either in collision or otherwise;
- loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
- salvage;
- agreement relating to the use or hire of any ship, whether by charterparty or otherwise;
- agreement relating to the carriage of goods in any ship, whether by charterparty or otherwise;
- loss of or damage to goods, including baggage carried in any ship;
- general average;
- bottomry;
- towage;
- pilotage;
- goods or materials wherever supplied to a ship for her operation or maintenance;
- construction, repair or equipment of any ship or dock charges and dues;
- wages of Masters, officers, or crew;
- Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;
- disputes as to the title to or ownership of any ship;

- disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship; and
- the mortgage or hypothecation of any ship.

If the claim is not one of a maritime nature, the creditor cannot arrest the vessel which relates to that claim.

For all the other cases where the 1952 Arrest Convention does not apply, the general provisions of Greek law apply. Under Greek law, a vessel may be arrested for any type of claim against the owner of the vessel.

4.3 Liability in Personam for Owners or Demise Charterers

Under Greek law, maritime claims are in personam claims. In contrast to other jurisdictions, Greek law does not provide for claims in rem against a vessel.

Any application for the arrest of a vessel must be filed against her registered owner – this applies even in cases of claims against third parties (ie, a demise charterer, vessel's operator or other party controlling the vessel).

Similarly, in cases of transfer of ownership of a vessel, arrest of that vessel may be effected against the new owner of the vessel for a debt of the previous ship-owner (even if that debt does not constitute a maritime lien as per Article 205 of the GCPML).

4.4 Unpaid Bunkers

Under Greek law, a bunker supplier can arrest a vessel in connection to unpaid bunkers supplied to a vessel, provided the owner of the vessel has undertaken a contractual obligation towards the bunker supplier. However, if the bunkers were ordered by the charterer for the supply of a chartered vessel, only the charterer, as the party that purchased the bunkers, would be held liable for the unpaid bunkers and the vessel would not be able to be arrested for debts of the charterer.

The second question relates to the most recent well-known OW Bunker cases brought before various courts around the world, including the Greek courts. The Greek courts have issued conflicting decisions on the liability of the owner to pay the physical supplier in relation to unpaid bunkers (in some cases, the owner has been held liable to pay the physical supplier while in other instances that liability has been dismissed).

4.5 Arresting a Vessel

In order to arrest a vessel, an application shall be filed by the creditor with the First Instance Court of the place where the vessel is moored, describing (and subsequently proving on a prima facie basis):

- a valid claim; and
- a risk that unless security (arrest) is granted, there is a likelihood that the creditor may not be able to enforce its right (ie, collect its claim).

Upon filing of the application, a hearing of the application is fixed within the next ten to 15 days.

Upon filing of the application, it is common practice for the creditors to apply for an ex parte provisional order with a view to prohibiting the vessel from sailing away and/or to effect any changes on her legal status (transfer of ownership, registration of mortgage, etc).

In relation to the application of arrest of a vessel, a proper hearing is held before the Court of the First Instance, witnesses are cross-examined on the merits of the case and upon completion of the hearing the judge determines a time-frame of two to three days, within which the parties have to file their written submissions and their supporting documentation.

Parties are not required to file original documents and therefore, usually, the parties file copies of the documents duly certified by a lawyer as true copies of the originals (together with official translations of those documents into the Greek language, if relevant).

Although the court has the discretion to order a security deposit on behalf of the arresting party, such a measure is quite rare in Greece.

4.6 Arresting Bunkers and Freight

Bunkers on board the vessel can be arrested in Greece, provided the arresting party has a valid claim; however, due to the difficulties encountered, the arrest of bunkers is not a common practice.

Under Greek law, an attachment can be exercised over freight owed to the charterer. However, a creditor exercising such an attachment has no right to collect the freight, but rather has a right to apply for the attachment of freight, even if that freight is held by a third party (arrest in the hands of a third party).

4.7 Sister-Ship Arrest

Under Greek law, the arrest of a sister ship may only be effected in limited circumstances and in practice this is rather unusual.

4.8 Other Ways of Obtaining Attachment Orders

Provided Greek courts have jurisdiction to hear applications for security measures in accordance with the provisions of the GCCP (ie, the defendant has its residence in Greece or the defendant has property in Greece, etc), a debtor can inter alia

apply for the attachment of bank accounts of the defendant and the registration of mortgage pre-notation over a property.

4.9 Releasing an Arrested Vessel

Under Greek law and following the application of any interested party, the court must amend the decision ordering the arrest of a vessel (and lift the arrest) and replace the security measure of the arrest with a security up to the amount of arrest ordered by the court.

The most common types of security permitted by Greek law are the following:

- payment of money with the Consignment Deposits and Loans Fund;
- a bank guarantee issued by a reputable/solvent bank and deposited with the court; and
- a letter of undertaking of a P&I Club (provided that such security is agreed by both parties).

It should be noted that a decision ordering the arrest of a vessel is not subject to any form of appeal. However, the Greek Code of Civil Procedure permits the revocation (or amendment) of such a decision under specific circumstances.

4.10 Procedure for the Judicial Sale of Arrested Ships

Procedure for Judicial Sale

Under Greek civil procedural law, auction proceedings in Greece generally take place without the involvement of a court. All public auctions are conducted exclusively through electronic (online) procedures (e-auctions) under the supervision of an appointed, accredited notary public (http://www.eauction.gr).

The public auction proceedings are initiated by any creditor who has an enforceable title (ie, a final and unappealable Greek court judgment or a foreign court judgment/arbitral award declared enforceable in Greece or a notarial deed (including a ship mortgage)/foreign ship mortgages to the extent that these have been declared enforceable by a Greek court decision, etc).

A copy of the enforceable title together with an exequatur (an official order addressed to all competent enforcement officers to execute the enforcement deed) attached thereto and a demand for payment are served on the debtor within a term of three business days by a court bailiff upon a creditor's instruction.

If the debtor fails to pay within three business days, the creditor may begin the main enforcement proceedings by officially instructing a court bailiff to proceed with the enforcement and arrest of the vessel. The court bailiff is instructed by the creditor to draft and issue a deed of arrest of the vessel, including:

- the vessel's precise description;
- the vessel's reserve price of first bid, which cannot be lower than two thirds of the commercial value of the vessel (which is determined on the basis of expert valuations);
- a description of the enforceable title (the basis of enforcement); and
- details of the auction date, location and the notary public conducting the auction proceedings (the notary public to be registered with the Notary Public Association and to be practising in the region where the vessel is moored).

The public auction of the vessel is scheduled on the first Wednesday (a business day) 40 days following her arrest.

The public auction is conducted by openly tendering online offers and is conducted on a real-time basis with successive online bids to the notary public via the specialised electronic bidding platform.

To take part in the auction procedure, prospective bidders must:

- register with the electronic platform two days prior to the auction date;
- declare their intention to participate in the specific public auction;
- provide a guarantee deposit in the amount of 30% of the first bid; and
- file a power of attorney online.

Liability for Maintaining the Vessel

The liability for maintaining the vessel from its arrest and until it is sold lies with the arresting party who is also obliged to place guards on board the vessel.

Under Greek law (Article No 975 of the Greek Code of Civil Procedure), the costs and expenses of the enforcement (including all costs incurred during the pre-auction phase, the arrest, the maintenance of the arrested vessel, etc) are deducted from the auction proceeds prior to its distribution to the ranking creditors.

Priority of Maritime Liens/Mortgages

The maritime liens of Article 205 of the GCPML take priority over a mortgage, except for a preferred ship mortgage on a Greek-flagged vessel registered as a foreign investment in the form of a notarial deed duly registered in the mortgage register in accordance with the provisions of LD 2687/1953, which ranks in priority over all maritime liens of Article 205 of the GCPML (except for those which are also recognised as liens in Article 2 of the Brussels Convention of 1926 in relation to liens and mortgages).

In the event of the auction of the vessel, the announced creditors with a claim protected by a maritime lien will be ranked in priority over the mortgagee creditors.

Article 205 of the GCPML provides for four classes of maritime liens and the claims of the first class are ranked in priority over the claims of the second class, etc. However, claims of the same class are ranked pari passu.

4.11 Insolvency Laws Applied by Maritime Courts

On 26 October 2020 a new integrated Insolvency Code (Law 4738/2020 on Debt Settlement and Second Chance Providence) was introduced and came into effect from 1 January 2021.

The new law has implemented in Greece the EU Directive 2019/1023 on preventive restructuring frameworks and second chance, and provides for preventive mechanisms, in and out-of-court restructuring procedures and updated liquidation proceedings.

One of the newly introduced mechanisms is the out-of-court settlement procedure which, inter alia, permits to debtors (both legal and natural persons) to make a request (on a confidential basis) for a settlement proposal of any debts by financial institutions and the Greek State.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

Article 703 of the GCCP provides that the arresting party shall pay damages in the event of wrongful arrest of a vessel if the following two conditions are met:

- the court has dismissed on the merits the main writ of action/claim in relation to which the security measure of the arrest of the vessel has been ordered; and
- the arresting party knew or did not know due to gross negligence that it did not have a valid claim.

The award of damages due to wrongful arrest is quite difficult and rare, except for cases where the arrest of the vessel was ordered on the basis of false or fraudulent evidence.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

Applicable International Conventions/Law

Greece has ratified both the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 13 December 1974 (the PAL) (Law 1922/1991) and its 2002 Protocol (Law 4195/2013). The PAL and the 2002 Protocol establish a framework under which passengers may claim compensation in the event of death/bodily injury/loss or damage of property.

On 23 April 2009, the Regulation (EC) No 392/2009 of the European Parliament and of the Council on the liability of carriers of passengers by sea in the event of accidents (the PLR) was adopted, implementing both the PAL and the 2002 Protocol in all the EU Member States with a view to creating a harmonised legal framework across the EU Member States in relation to the liability of carriers to passengers.

The PLR is applicable to all international voyages on passenger vessels where the vessel flies an EU Member State flag, the contract of carriage was concluded in an EU Member State or the place of departure/destination is an EU Member State.

The PLR also applies to domestic voyages carried out by Class A vessels since 31 December 2016, while since 31 December 2018 the PLR has also applied to domestic voyages carried out by Class B vessels.

Time Limit

Any claim for damages arising out of death/personal injury/loss or damage of luggage shall be time-barred after a period of two years.

The limitation period shall be calculated as follows:

- in the case of personal injury, from the date of disembarkation of the passenger;
- in the case of death occurring during carriage, from the date when the passenger should have disembarked, and in the case of personal injury occurring during carriage and resulting in the death of the passenger after disembarkation, from the date of death (provided that this period does not exceed three years from the date of disembarkation); and
- in the case of loss of/damage to luggage, from the date of disembarkation or from the date when disembarkation should have taken place, whichever is later.

Due to grounds for suspension/interruption, the limitation period can be extended up to:

- five years from the date of disembarkation of the passenger/date when the disembarkation should have taken place (whichever is the latter); or
- three years from the date when the claimant knew/ought reasonably to have known of the injury/loss/damage caused by the incident.

The period of limitation may also be extended, either by a written declaration of the carrier or by a written agreement of the parties, following the occurrence of the incident.

Limitation on Liability

Under the PLR, carriers are subject to a two-tier liability system for passenger claims involving personal injury and death arising out of a "shipping incident" (Annex I of PLR), while for all other cases which do not arise out of a "shipping incident" (as defined in the PLR), the liability of the carrier must be established.

Carriers are also liable for the loss of/damage to the luggage and vehicle of a passenger up to specific limits as they are defined in the PLR.

The carrier shall not be entitled to the benefit of the limits of liability prescribed in Articles 7 and 8 and Article 10(1) of the PLR, if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with the knowledge that such damage would probably result.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Under Greek law, jurisdiction clauses incorporated in charterparties reflect the written agreement of the parties and as a result such clauses are mainly considered valid.

However, the same does not apply to jurisdiction clauses incorporated in bills of lading, especially due to the fact that a bill of lading is directly issued by the carrier. As a result, different approaches on the validity and the binding nature of such jurisdiction clauses have been followed by the Greek courts, depending on whether such clauses refer to courts inside or outside of the European Union.

Following the decision 883/1994 of the Supreme Court, jurisdiction clauses referring to courts outside of the European Union are valid and bind the holder if such a clause has been confirmed in writing and both the carrier and the holder have signed the bill of lading.

However, Article 25 of the Regulation (EU) 1215/2012 applies to jurisdiction clauses relating to courts of another EU Member State.

Article No 25 of the Regulation grants exclusive jurisdiction to the courts of any Member State (as long as the parties are in agreement and regardless of where they are domiciled) "to settle any disputes which have arisen or which may arise in connection with the particular legal relationship". Article No 25 further provides that such an agreement conferring jurisdiction must be:

- in writing or evidenced in writing;
- in a form that accords with the practices the parties have established between themselves; or
- in the case of international trade or commerce, in a form that 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 contrast to jurisdiction clauses, parties can choose the applicable law governing their contract and that choice can be made expressly, orally or clearly demonstrated by the terms of the contract or the circumstances of the case (Regulation 593/2008 – Rome I).

The application of a choice of law may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

Under Greek law, the incorporation of an arbitration clause of a charterparty into the relevant bill of lading shall bind only bind the receiver/holder if this is appropriate to the relations of the carrier and the receiver/holder and if that clause has been incorporated into the bill of lading by an express and clear reference to the relevant arbitration clause of the charterparty.

A more lenient approach has been followed in relation to specific types of charterparty bills of lading, ie, CONGENBILL, where it is expressly stated these bills of lading are "to be used with charterparties". In such cases, the incorporation of the arbitration clause of the charterparty into the bill of lading has been accepted as valid and binding and there is a rebuttable presumption that the receiver can access the charterparty and has knowledge of or can review the content of that clause.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Greece is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which has been implemented in Greece by Legislative Decree 4220/1961.

The New York Convention is applicable provided (i) the dispute is one of a commercial nature and (ii) the arbitral award has been issued in another member state of the New York Convention.

However, if the arbitral award does not fall within the scope of application of the New York Convention, Articles 906, etc, of the Greek Code of Civil Procedure apply, which provide the requirements and the procedure following which a foreign arbitral award may be recognised as enforceable in Greece.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

The presence of a vessel within the Greek territorial waters and the subsequent call of that vessel at a Greek port would establish jurisdiction of the relevant Greek courts for purposes of arrest of that vessel (and this jurisdiction would continue to apply as long as the vessel remained berthed at a Greek port).

However, if the Greek courts do not have jurisdiction to decide on the merits of claim (due to a specific jurisdiction clause/arbitration agreement), the jurisdiction created by the presence of the vessel within the Greek territorial waters may be challenged.

If the 1952 Arrest Convention applies, the court in the jurisdiction of which the arrest has been effected (although that court does not have jurisdiction on the merits of the case), that court shall determine a timeframe within which the creditor must file a claim with the court which has jurisdiction.

If the parties have agreed to submit the dispute to the jurisdiction of a particular court other than that within the jurisdiction of which the arrest was made or to arbitration, the court or other appropriate judicial authority within the jurisdiction of which the arrest was made may fix the time within which the creditor shall commence main proceedings.

6.5 Domestic Arbitration Institutes

In Greece, there are two main arbitration bodies for maritime claims.

- The Hellenic Chamber of Shipping (the NEE). The NEE is a legal entity incorporated under Greek public law in 1936 and based in Piraeus. The arbitrators are appointed from a list of arbitrators of the NEE (consisting of lawyers, shipowners, charterers, etc).
- The Piraeus Association for Maritime Arbitration (the PAMA). The PAMA is a private non-profit association founded in 2005. Arbitrations are conducted in accordance with Law 2735/1999 adopting UNCITRAL's Model Law for International Commercial Arbitration and in accordance with the Rules for Maritime Arbitration adopted by the PAMA. An award issued by the PAMA is a final, binding and enforceable award pursuant to the provisions of the Greek Code of Civil Procedure (Articles 904, etc); however, this award is unappealable.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

A claim for damages could be brought before Greek courts in the event of initiating proceedings in breach of a foreign jurisdiction or arbitration clause; however, this is quite uncommon in Greece.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Tonnage tax in Greece is generally governed by Law 4110/2013, passed on 11 January 2013, imposing tonnage tax on foreign-flagged vessels.

Specifically, the following companies are subject to this tax system:

- ship-owning companies of non-Greek flagged vessels that are being managed by companies which have established an office in Greece under Article 25 of Law No 27/1975;
- the ship-managing companies are liable, together with the owning companies, for the payment of the tonnage tax;
- in the case of joint ship-management, all ship-management companies are jointly liable;
- if the management is changed within a fiscal year, each ship-managing company is liable for the period within which the ship remained under its management;
- in the case of transfer of ownership of a vessel subject to tonnage tax as per the points above, the buyer is liable, together with the seller, for any tonnage tax payable until the date of transfer, assuming the ship's management remains with a company which has established an office in Greece under Article 25 of Law No 27/75.

The tonnage tax is calculated as per the formula applying to vessels registered under the Greek flag pursuant to Article 13 of LD 2687/1953. The relevant formula in each circumstance will be the one in force during the year preceding the tax becoming payable. Any equivalent taxes or dues paid to the flag state are set off against the Greek tonnage tax.

Law 4110/2013 not only imposed tonnage tax on foreign-flagged vessels, it also clarified certain tax exemptions regard-

ing the distribution of dividends and the transfer of ownership of shares.

- The distribution of dividend of foreign ship-owning companies, which are subject to tonnage tax as above, is exempted from any taxes. This exemption applies also if the dividend distribution is effected through holding companies, irrespective of the number of companies intervening between the ship-owning entity and the beneficial shareholder.
- The transfer of ownership (sale or donation) of shares of Greek or foreign companies owning ships under a Greek or foreign flag is exempted from transfer tax.
- The inheritance of ships over 1.500 GRT under a Greek or foreign flag, or of shares of Greek or foreign companies owning such ships, is exempted from inheritance tax.

However, in 2019, the Greek government enacted the new Law 4670/2019, introducing a series of important amendments in the aforementioned taxation scheme, which can be summarised as follows:

- 10% tax is imposed on Greek tax residents on dividends distributed by Greek non-management shipping companies of Article 25 L 27/1975;
- a 10% tax (with further exhaustion from any other tax liability) is imposed on special payments and bonuses paid by Greek shipping companies of Article 25 L 27/1975 to members of their board of directors (BoD), managers, executives and employees on top of their regular salary;
- the special contribution of Article 43 Law No 4111/2013 that provided for the voluntary contributions of shipping companies for the period 2014–2017 has been extended for an indefinite period and is also imposed on the Greek non-management shipping companies of Article 25 Law No 27/1975;
- changes in the taxation of Category B vessels; and
- a tax duty on all Greek-flag fishing vessels and tugboats was imposed as of 1 January 2020.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

During the outbreak of COVID-19, the Hellenic Maritime Administration sought to maintain the smooth operation of the international maritime transport whilst securing high standards for the protection of public health. Domestically, the key objective has been to maintain essential maritime cabotage services to the Greek islands, which is largely restored, with the necessary adjustments to secure public health.

In this regard, various measures have been adopted throughout the last ten months, and are being re-considered regularly, depending on the changing circumstances of the pandemic, including the following:

- prior to the arrival in a Greek port, ship Masters must submit through the National Maritime Single Window (NMSW) the documents noted in the Convention on Facilitation of International Maritime Traffic (FAL) and Directive 2010/65/EU;
- crew members with symptoms or who suspect they are infected must follow regular quarantine or isolation routines established by the international and national Public Health Authorities;
- Port State Control inspections are carried out based on whether the conduct of the inspection would create a risk to the safety of the inspectors, the ship, its crew or the port and taking into consideration the relevant instructions from the Health Authorities.

Although there have been no further specific measures or restrictions, the Hellenic Coastguard is considering the COVID-19 pandemic on a case-by-case basis, depending on factors that include entering ships' last port of call, possible COVID-19 cases and the declarations made by the ship's Master before entering Greek ports.

8.2 Force Majeure and Frustration in Relation to COVID-19

The Greek courts have not yet decided on the issue of the recognition of the coronavirus pandemic as *force majeure* and/or frustration. Even in the few cases that COVID-19 has been claimed as a reason for non-payment under contracts relating to shipping services, the Greek courts have not yet considered the application of frustration or *force majeure* as a defence (Decision No 3012 of the Piraeus First Instance Court). It is likely that such cases will be considered in the future, with the high volume of cases brought before the Greek courts usually delaying hearing for nine to 12 months after the respective application has been filed.

However, the majority of shipping contracts remain subject to English law and arbitration. In this regard, when considering such shipping cases brought before them, Greek courts will need to consider the applicable law and the interpretation given under that law to the coronavirus pandemic within the concept of *force majeure* and frustration.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

Law 4646/2019 came into force on 12 December 2019, bringing a historical change to the ship registration procedures in Greece. Pursuant to paragraph 3 of Article 61, the key provisions of Article 1, Law 791/1978 have been amended to provide that any foreign company with an establishment and office in Greece acting as (inter alia) a bareboat charterer or ship lessee of vessels registered under the Greek flag will have its constitution and legal capacity governed by the governing laws of the country of its incorporation – irrespective of the place of actual management and operation.

The extension of the application of the original provisions of Law 791/1978 to bareboat charterers and ship lessees operates as indirect recognition of the concept of bareboat chartering and sale and leaseback structures as part of Greek legislation. Although this addition is a relatively minor amendment to the original legislation, it allows the Greek flag further scope with the introduction of these two internationally recognised schemes.

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Trends and Developments

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At the beginning of 2020, the Greek Minister of Shipping and Insular Policy, Mr Ioannis Plakiotakis voted 2020 as the year of change for Greek shipping. However, the outbreak of COVID-19 changed many timeframe expectations, with the pandemic emerging as a dominating factor for the implementation of new measures and changes to the Greek maritime and shipping industry. Nevertheless, legislative changes remained on the agenda and these include many of the following matters.

The 2020 Parliamentary Bill

In February 2020, a comprehensive draft bill was submitted to the Greek Parliament, covering all aspects relating to the shipping sector, including new shipping legislation, privatisation of ports and safety at sea.

A priority of the bill was the upgrading of the Piraeus port, aiming to attract new investors and to reinforce the port's position within the international market. It also provided for 1,500 new job positions to enable the port authorities and respective departments to operate quickly and efficiently. The bill also provided for the privatisation of ten Greek ports, including the one at Alexandroupolis, which has already attracted the interest of international investors from USA and China.

Another core issue dealt with by the bill was the modernisation of the Greek flag in order to become more competitive, by adopting improved practices and facilitating ship registration electronically. An innovating proposal to upgrade the flag registration system was the creation of an interface linking the Ministry with the tax authorities and the Ministry of Development.

The Greek Parliament voted in favour of the bill in March 2020, and the adoption of the measures and implementation of further actions is still under way.

IMO 2020

The 0.5% sulphur cap of IMO 2020 came into force on 1 January 2020, despite certain implementation concerns expressed worldwide, including those of the Minister of Greek Shipping and Insular Policy, as well as longstanding Greek ship-owners. Apart from Greek merchant marine, coastal shipping has also been affected by the enforcement of the new regulation and the rapid increase to the prices of very low sulphur fuel oil (VLSFO) from 1 January 2020. In an effort to address those increasing costs, the Greek government proceeded with an amendment to the then-existing regulatory framework, allowing coastal shipping operators to increase their fares if needed. However, in fear of price hikes being passed to the passengers, which could further damage coastal shipping/ferry companies, the Greek government adopted a temporary measure, by decreasing the VAT applicable to the coastal transportation fares, from 24% to 13% from 1 June 2020 to 31 October 2020. Although temporary, the measures provided a safety net for Greek shipping and tourism sectors significantly affected by the COVID-19 pandemic.

BWTS Implementation

The IMO Ballast Water Management Convention, which came into force in September 2019, requires ballast water treatment systems to be fitted on ships during docking surveys, between 2019 and 2024, in an effort to eliminate the transferring of organisms between marine ecosystems worldwide. As relevant deadlines approach, implementation of the system comes at a time when the Greek shipping industry is already struggling to bear increased fuel costs and bunker fuel quality issues, which reflect the dramatic changes brought about in view of the enforcement of IMO 2020 and the 0.5% sulphur cap on marine fuels from 1 January 2020 – in addition to the general impact of the COVID-19 pandemic.

Unsurprisingly, the pandemic has caused major disruption to the operation of the shipyards and the chains of supply for BWTS providers, which in turn creates unforeseen delay to the equipment installation schedules. As the installation of the BWTS system is labour-intensive, further delays are expected, with the majority of countries involved being under lockdown and several shipyards shutting down indefinitely.

COVID-19 Impact and Greek Seafarers

The outbreak of COVID-19 led to tremendous difficulties for crew changes and repatriations, impacting Greek seafarers as with all other seafarers all around the world – some of whom have been stuck at sea for over 20 months in some cases. Following the pandemic, most major ports worldwide (including Singapore, Fujairah and all Chinese ports) have, from time to time, either suspended crew-change operations or implemented extremely strict measures which rendered crew changes almost impossible. Thousands of Greek seafarers were stuck on board ships under unfamiliar circumstances, filled with uncertainty about their time of repatriation and the psychological pressure for them and their loved ones back at home.

As a result of the aforementioned restrictions placed on shipowners to disembark their crew, most of the seafarers' certificates applicable under International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 78 had expired or were due to expire, leading to a breach of the regulations of the respective flag states. In an effort to ensure the smooth operation of shipping, the Greek Ministry of Shipping and Insular Policy has been granting general extensions of validity until 31 December 2020 for expiring certificates and this could well continue if pandemic restrictions continue to make renewals impossible in the short term.

In relation to the trading and statutory certificates of vessels registered under the Greek flag and in relation to surveys, audits and inspections by the Hellenic Maritime Administration, additional special measures were also implemented. Appropriate regulatory provisions have been adopted in cases where surveyors, auditors and/or inspectors are not able to undertake such surveys, audits and inspections, due to restrictions imposed by COVID-19 countermeasures. The aim has been to grant reasonable time-extensions to compulsory surveys/audits and the validity of the expiring statutory certificates and documents for maritime safety and security, protection of the marine environment and maritime labour.

Further to more positive developments in relation to COVID-19 and the discovery of a vaccine, the Union of Greek Ship-owners issued a press release expressing the view that seafarers, as essential workers, should be given priority for COVID-19 vaccinations. According to its President, Mr Theodoros Veniamis, this would "facilitate crew changes and repatriations, which at the moment are seriously disrupted, and the protection of the uninterrupted international trade".

It remains to see how the international organisations and state authorities will respond to the urgent need for a substantial solution to the problem of crew changes.

Legal Developments: Bareboat Registrations (Law 4646/2019)

Paragraph 3 of Article 61, Law 4646/2019, brought a major change to Greek shipping and ship registrations in Greece, with the indirect recognition of the concept of bareboat chartering and sale and leaseback structures as part of Greek legislation. Article 61 supplements the key provisions of Article 1, Law 791/1978. Pursuant to Article 1, Law 791/1978, any foreign company with an establishment and office in Greece, acting (whether currently or historically) as a ship-owning, chartering or management company of vessels registered under the Greek flag, will have its constitution and legal capacity governed by the governing laws of the country of its incorporation – irrespective of the place of actual management and operation. The new law and provisions of Paragraph 3 of Article 61, Law 4646/2019 supplement Article 1, Law 791/1978 by adding a new definition of companies acting as bareboat charterers or ship lessees. Whilst a relatively minor amendment, this small change opens up an internationally recognised structure for the Greek flag – which has historically been strict and limited in the forms of registrations available.

Legal Developments: Ship Financing Valuation Provisions (Decision No 3561/2020)

An important decision in the context of ship financing in Greece has recently been handed down with Decision No 3561/2020 in the First Instance Court of Piraeus – recognising and determining the interpretation of "Value Ratio" (also known as a "loan-to-value" clause) in financing agreements. The recent decision relates to a dispute between a ship-owning company (acting as claimant, the Borrower) and: (i) a brokering company providing the valuation (the Broker), (ii) the physical person issuing/signing the valuation; and (iii) the financial institution acting (inter alia) as lender and security agent (the Lender).

The Borrower disputed the validity of a valuation which the Broker provided pursuant to the application of the "Value Ratio" clause. That valuation led to the occurrence of an event of default under the applicable provision and the service of a default notice from the Lender. The allegations of the Borrower were supported (inter alia) by the existence of a further/more recent valuation obtained unilaterally by the Borrower, which increased the ship value and therefore reduced the shortfall of the loan's value ratio. The Borrower refused to take the first valuation into consideration or to comply with the Lender's default notice or request for additional security, which then permitted the Lender to accelerate the loan and enforce its security by arresting the vessel. The Borrower also alleged that the loan and interest were being repaid in a timely manner and, as the market for ship valuations was rising, the Lender was adequately secured. However, the Greek court ruled against the Borrower, stating that the existence of an increased (unilateral) valuation did not automatically invalidate the notice of default served by the Lender. In addition, the Greek court ruled that, although the market was rising and therefore the vessel's value would provide sufficient security to the Lender, the Lender had, at the time of the arrest, acted in good faith and within the commercial terms agreed in the finance documents. The Greek court also acknowledged the recent decision of the English Court of Appeal for "Alkyon", which applied a strict interpretation of loan provisions, evidencing that both parties to a loan agreement should be well-advised of the meaning, application and interpretation of the provisions to which they agree and are contractually bound, together with the respective risks.

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A Historic Bill

On 8 January 2021, the Greek government proceeded with the historic motion of submitting a bill to parliament extending Greece's western limit of territorial waters in the Ionian Sea to 12 nautical miles. The bill is a result of fruitful negotiations between Greece, Italy and Albania, enhancing the country's strategy to promote security and prosperity in the region by mutual agreement. The bill was expected to be voted on by the Greek Parliament in January 2021.

Conclusion

While the implications of the COVID-19 pandemic worldwide have not yet been fully evaluated, Greece is struggling to protect its shipping and tourism sectors and avoid a further recession – following the Greek debt crisis in 2011. In this regard, Greek ship-owners have once again responded to the needs of Greek society and, together with the Greek State, have provided aid and support (through financial assistance and provision of medical supplies), remaining committed to the Greek values of solidarity and contribution. With 2021 now beginning in earnest, it remains likely that further legislative changes and improvements will be seen in the shipping sector in Greece.

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HONG KONG

Law and Practice

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The admiralty jurisdiction of the High Court of the Hong Kong Special Administrative Region of the People's Republic of China is chiefly to be found in the High Court Ordinance (Cap. 4). Section 12A of the statute lists the different types of maritime claim which give rise to the distinctive feature of admiralty jurisdiction, namely, the right to arrest a ship so as to obtain security for the claim.

In personam admiralty actions may also proceed in the District Court where the amount in dispute and the subject-matter are within the monetary limits and jurisdiction of the District Court Ordinance.

As with English law, Hong Kong law recognises the traditional maritime liens which are characterised by their ability to survive a private sale of the vessel or res:

- damage done by a ship;
- salvage;
- crew wages;
- Master's disbursements.

There are also what are commonly referred to as "statutory liens" – claims such as charterparty, bill of lading, vessel supplies, repair claims, etc – which enable arrest, provided that certain criteria as to the ownership and control of the vessel are met.

Lastly, there are claims which give rise to the right of ship arrest, irrespective of considerations of ownership:

- any claim to the possession or ownership of a ship;
- any question arising between the co-owners of a ship as to possession, employment or earnings of that ship; and
- any claim in respect of a mortgage of or charge on a ship or any share therein.

1.2 Port State Control

Pursuant to the Shipping & Port Control Ordinance and also the Merchant Shipping Ordinances, the Marine Department is responsible for all navigational matters in Hong Kong and the safety standards of all classes and types of vessels. The Marine Department has the responsibility to ensure that ships visiting Hong Kong comply with the requirements of the relevant international maritime conventions. In order to discharge this function, officers of the Department carry out PSC inspections on ships visiting Hong Kong in accordance with the provisions of IMO Resolution A.1138(31) and the Tokyo Memorandum of Understanding (MOU) Port State Control Manual.

In the event of casualties such as groundings, collisions and pollution, the Marine Department will conduct maritime accident investigations, following which reports are published concerning safety and security standards and recommended improvements.

1.3 Domestic Legislation Applicable to Ship Registration

Key Legislation and Regulations in Hong Kong

The key statutory provisions in Hong Kong applicable to ship registration are:

- Merchant Shipping (Registration) Ordinance (Cap. 415, Laws of Hong Kong) (MSRO);
- Merchant Shipping (Registration) (Fees and Charges) Regulations (Cap. 415A, Laws of Hong Kong);
- Merchant Shipping (Registration) (Ships' Names) Regulations (Cap. 415B, Laws of Hong Kong);
- Merchant Shipping (Registration) (Tonnage) Regulations (Cap 415C, Laws of Hong Kong); and
- Companies Ordinance (Cap. 622, Laws of Hong Kong) (CO).

The governmental authority which handles the registration of ships in Hong Kong is the Registrar of Shipping of the Hong Kong Shipping Registry, Marine Department.

1.4 Requirements for Ownership of Vessels

Ownership

The following categories of person are qualified to be owners of Hong Kong-registered ships (Section 11(4) of the MSRO):

- an individual who holds a valid Hong Kong Identity Card and is ordinarily resident in Hong Kong; or
- a company incorporated in Hong Kong; or
- a non-Hong Kong company registered with the Hong Kong Companies Registry under Part 16 of the CO as a non-Hong Kong company. Any overseas company wishing to be the owner of Hong Kong-registered ships can either incorporate a limited liability company in Hong Kong as a wholly owned subsidiary of the parent company, or register the overseas company in Hong Kong under Part 16 of the CO.

Each of the above categories of person is classified as a "qualified person".

In each case, a local representative person must also be appointed for each Hong Kong-registered ship (Section 68 MSRO), and that person must be:

- a qualified person and the owner or part owner of the ship; or
- a company incorporated in Hong Kong which is engaged in the business of managing, or acting as an agent for, ships.

Registrable Ships

A ship is registrable if:

- a majority interest in the ship is owned by one or more qualified persons (Section 11(1)(a) of the MSRO); or
- the ship is operated under a demise charter by a body corporate, being a qualified person (whether or not a majority interest in the ship is owned by one or more qualified persons) (Section 11(1)(b) of the MSRO), and a representative person is appointed in relation to the ship.

A "ship" includes every description of vessel capable of navigating in water not propelled by oars, and includes any ship, boat or craft and an air-cushion vehicle or similar craft used wholly or partly in navigation in water (Section 2 of the MSRO).

By virtue of the definition of "ship", a ship which is still under construction and is not capable of being used in navigation is therefore not registrable under the MSRO. There is also no provision under the MSRO which provides for registration of ships under construction.

1.5 Temporary Registration of Vessels

Provisional Registration

Ship registration in Hong Kong can be by way of full registration or provisional registration. Provisional registration of a ship in Hong Kong can be effected under Section 27 of the MSRO and is appropriate when the original title documents (eg, the builder's certificate, the bill of sale, etc) cannot be produced at the time of full registration. Provisional registration under the MSRO is optional and is not a prerequisite for full registration for a ship. It is a valid registration, but only for a period of one month, and may be extended for a further period of one month maximum upon application by the owner with acceptable justification.

Dual Registration

Dual registration is not permitted, either onto Hong Kong's register or from Hong Kong's register. Hence, a ship which, at the time of registration, remains registered in a place outside Hong Kong or subsequently becomes registered in a place outside Hong Kong will cease to be registrable under the MSRO.

However, section 11(1)(b) of the MSRO allows the registration of a demise or bareboat-chartered ship onto Hong Kong's register by a demise or bareboat charterer (being a body corporate and a qualified person), in which case, the application for registration must be accompanied by a statement in the required statutory declaration that the ship will not be registered elsewhere as long as it is registered in Hong Kong (Section 19(5)(b)(ii)(C) of the MSRO) or, if it is, that such registration will be deleted. The demise charter (bareboat charter) registration is valid for the period of the demise or bareboat charter.

A demise charter is defined under Section 2 of the MSRO as "a charterparty by which a ship is chartered or let by demise and under which the demise charterer has the possession of the ship and has control of all matters relating to the navigation and operation of the ship, including employment of the Master and crew".

1.6 Registration of Mortgages

Registration of Mortgages

A mortgage secured over a ship registered in Hong Kong should be registered in Hong Kong by the Registrar of Shipping at the Hong Kong Shipping Registry, Marine Department.

If the mortgage is granted by a Hong Kong-incorporated company or a non-Hong Kong company registered under Part 16 of the CO, the mortgage and any other document(s) containing a registrable charge in relation to the ship (eg, the deed of covenants) shall also be filed with the Hong Kong Companies Registry for registration within one month of the date of its creation (Sections 335 and 336 of the CO).

Documentary Requirements for Registration of a Mortgage

The following documents shall be submitted to the Registrar of Shipping for registration.

- One original form "Hong Kong Ship Mortgage" (Form No RS/M1) (Section 44(2) of the MSRO) – the prescribed mortgage form can be obtained from the Marine Department Homepage on the internet.
  - (a) It must be submitted in A3 size; and
  - (b) it must be executed either:
    - (i) under seal; or
    - (ii) by a lawful attorney-in-fact empowered by a power of attorney granted by the mortgagor (POA).
- If the mortgage is executed under seal:
  - (a) individual mortgagors should seal their mortgages in the presence of a witness who must attest the signature of the mortgagor by signing their name and stating their address and occupation legibly;
  - (b) corporate mortgagors should execute under common seal in accordance with their constitutional documents. If a corporate mortgagor does not possess a common seal, the mortgage should be executed under the hand and seal of a person purporting to be authorised by the mortgagor to execute on its behalf (ie, a director

or the secretary) and that person is required to make a declaration that the corporate mortgagor does not possess a common seal (Section 19(4) of the MSRO). If the declaration is made outside Hong Kong, the declaration should be made before a notary public practising in that jurisdiction. An original of that declaration shall be submitted to the Registrar;if the mortgage is executed by an attorney-in-fact, the POA must be executed under seal and witnessed by a named witness and one original POA (or a copy certified as true by a solicitor or a notary public) shall be produced to the Registrar. If the POA is executed outside Hong Kong, it must be certified by a notary public practising in the country in which the power is given.

- If the ship is provisionally registered, one original confirmation by the mortgagee dated the same day on which the mortgage is presented to the Registrar, and:
  (a) it should be executed by the mortgagee or its solicitor;
  (b) in a specified form "Confirmation by Mortgagee" obtained from the Marine Department Homepage on the internet; and
  (c) the purpose of the confirmation is to confirm that the mortgagee knows that the original title document will not be produced to the Registrar at the time of provisional registration and that the original title document is now held by the mortgagee or on its behalf.
- If there are already mortgages registered over the ship, original written consent(s) from all the holders of such mortgages.

The following documents shall be submitted to the Hong Kong Companies Registry for registration:

- a copy of each of the mortgage form No RS/M1 and any other security document containing a registrable charge, in each case certified as true by a director, the secretary or an authorised representative of the mortgagor or the mortgagee; and
- one original-form NM1 (Statement of Particulars of Charge), a form that can be obtained from the Hong Kong Companies Registry homepage on the internet, in respect of each registrable charge and signed by a director, the secretary or an authorised representative of the mortgagor or the mortgagee.

1.7 Ship Ownership and Mortgages Registry

The basic information (eg, ship name, official number, IMO number, gross tonnage, net tonnage, call sign, ship type and title registration status) regarding a Hong Kong-registered ship can be obtained by anyone via the Electronic Business System (eBS) services on the Marine Department Homepage on the internet.

To obtain fuller details (eg, the registered ship-owner's details and mortgage registration details) of a Hong Kong-registered ship, anyone can request a transcript of the register by completing a transcript request form, downloadable from the Marine Department Homepage on the internet and return it to the Marine Department or fax it to 2541-8842. The "Transcript of Register" will be issued to the applicant upon payment.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

The applicable international conventions are as follows:

- the 1973 International Convention for the Prevention of Pollution from Ships (known as the MARPOL Convention) and its 1978 Protocol and subsequent amendments are applied in Hong Kong by the Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413) and its associated Regulations;
- the International Convention on Civil Liability for Oil Pollution Damage, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 are applied in Hong Kong by the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap. 414) and its associated Regulations;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, is applied in Hong Kong by the Bunker Oil Pollution (Liability and Compensation) Ordinance (Cap. 605);
- the Nairobi International Convention on Removal of Wrecks has not yet been applied to Hong Kong. Statutory provisions governing the Marine Department's powers to direct the removal of wrecks and to impose penalties for non-compliance are to be found in the Shipping & Port Control Ordinance (Cap. 313).

2.2 International Conventions: Collision and Salvage

The Collision Regulations, formally known as the International Regulations for Preventing Collisions at Sea 1972 (as amended), are applied in Hong Kong pursuant to the Merchant Shipping (Safety) (Signals of Distress and Prevention of Collisions) Regulations (Cap. 369N).

Provisions of the Brussels Collision Convention 1910 as well as the International Convention on Salvage 1989 are enacted in Hong Kong by the Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap. 508).

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The London Convention, ie, the 1976 Convention on Limitation of Liability for Maritime Claims together with the 1996 Protocol (LLMC) is applied in Hong Kong by the Merchant Shipping (Limitation of Ship-owners Liability) Ordinance (Cap. 434).

2.4 Procedure and Requirements for Establishing a Limitation Fund

Limitation under the LLMC is available to salvors and "ship-owners" who are defined as the owner, charterer, manager or operator of the ship.

In order to establish a limitation fund and to obtain a decree limiting their liability, a plaintiff must commence a limitation action in the Admiralty list of the High Court by issuing and serving a writ on a named defendant, one of the persons with claims against the plaintiff in respect of the casualty.

Following the issue by the court of a decree, the plaintiff must constitute the fund by payment into court in accordance with the provisions in the schedule to Cap. 434 (as above) by reference to a fixed formula related to the tonnage of the ship and Special Drawing Rights (SDRs).

3. Cargo Claims

3.1 Bills of Lading

The Hague-Visby Rules are given statutory effect in Hong Kong by the Carriage of Goods by Sea Ordinance (Cap. 462). Neither the Hamburg nor the Rotterdam Rules have been applied to Hong Kong.

3.2 Title to Sue on a Bill of Lading

Title to sue vests in the lawful holder of the bill of lading (section 4 of the Bills of Lading and Analogous Shipping Documents Ordinance (Cap. 440)).

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

A carrier will not become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 SDRs per package or unit or two SDRs per kilogramme of gross weight of the goods lost or damaged, whichever is the higher (Article IV r.5 of the Hague-Visby Rules).

The Hague-Visby Rules can apply mandatorily under section 3 of Cap. 462 or voluntarily by virtue of incorporation of a clause paramount in the contract of carriage. A ship-owner sued as actual, as opposed to contractual, carrier would be expected to obtain the benefit of package limitation as a bailee on terms.

3.4 Misdeclaration of Cargo

The shipper is deemed to have guaranteed the accuracy of the information which they have supplied regarding the nature and details of their cargo. In the event of misdescription, the shipper is obliged to indemnify the carrier for loss or damage resulting from inaccuracies in the shipper's description of the goods. The relevant provision of the Hague-Visby Rules is Article III r.5.

A main source of Hong Kong law is the common law and rules of equity, as derived from the judgments of courts in Hong Kong and other common-law jurisdictions. Hong Kong's constitution, which is known as The Basic Law, provides at Article 84 that Hong Kong courts may refer to and apply case law precedents from other common-law jurisdictions. As a result, the Hong Kong courts will often refer to and apply English case law in disputes concerning bills of lading and other maritime matters.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

Where the Hague-Visby Rules apply, the carrier is discharged from all liability in respect of the goods, unless suit is brought within one year of their delivery or the date when they should have been delivered. This time limit may be extended by agreement of the parties.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Provisions of the 1952 Arrest Convention are applicable to Hong Kong by virtue of sections 12A-12E of the High Court Ordinance, which statute governs ship arrests in Hong Kong.

4.2 Maritime Liens

For details of the maritime and statutory liens recognised in Hong Kong, see **1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts**.

4.3 Liability in Personam for Owners or Demise Charterers

Where there is a "traditional" maritime (as opposed to purely statutory) lien on a ship for the amount claimed, an action in rem may be brought in the Court of First Instance against that ship. The maritime lien survives any private sale of the ship, and so can be enforced by way of arrest, even if the current owners or demise charterers of the ship have no in personam liability for the claim.

As regards the statutory liens for claims in respect of cargo, charterparty, repairs, supplies, etc (as described in section 12A(2)(e) to (q) of the High Court Ordinance), the right to arrest is subject to satisfying the criteria set out below.

- Where the claim arises in connection with a ship, and 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, an action in rem may be brought in the Court of First Instance against:
  (a) that ship, if at the time when the action is brought, the relevant person is either the beneficial owner of that ship in respect of all the shares in it or the charterer of it under a charter by demise; or
  (b) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner in respect of all the shares in it.
- A protective in rem writ may be issued, which preserves the statutory lien against any future private sale or change of ownership of the vessel. As a result, an innocent purchaser or demise charterer may find their vessel arrested in respect of earlier claims for which they have no in personam liability.

4.4 Unpaid Bunkers

Bunker suppliers can arrest a ship in respect of unpaid bunkers, provided that, at the time when they issue their in rem writ, the person liable to them in personam is either the owner of that ship or the charterer of it under a charter by demise. This means that a bunker supplier can only arrest a ship if it contracted with the ship-owner or bareboat charterer. As a result, if the only party liable for the unpaid bunkers is merely a time charterer of the vessel, the right of arrest does not arise.

4.5 Arresting a Vessel

There are few formalities required in order to arrest a vessel: there is no need for a power of attorney, nor notarised or apostilled documents, nor translations.

All the arresting party need do is file with the writ an affidavit setting out the basis of its right of arrest pursuant to the High Court Ordinance and exhibiting the supporting documents, together with an undertaking to pay the Bailiff's costs of arrest and preservation of the vessel. A search should also be made for any caveats against arrest which may have been filed at court.

Significantly, there is no need to provide a deposit or other counter-security in respect of any potential claim for wrongful arrest.

4.6 Arresting Bunkers and Freight

The maritime lien for salvage attaches not only to the ship but also to cargo, bunkers and freight, so that all the salvaged property may be arrested. Bunkers and freight may not otherwise be arrested, although they may be frozen by way of a Mareva injunction (see **4.8 Other Ways of Obtaining Attachment Orders**).

4.7 Sister-Ship Arrest

Sister-ship arrest is possible in Hong Kong, but not associated ship arrest. So, where the party liable in personam on the claim owns a number of ships, the claimant can decide which one of those ships to arrest. It should be noted that, whilst the claimant can name the entire fleet in its in rem writ, it is only permitted to arrest one of the vessels in respect of the claim.

4.8 Other Ways of Obtaining Attachment Orders

Security for a claim can also be obtained by way of the Mareva or freezing injunction, although this does not confer any priority over other creditors in respect of the asset. The main criteria to be satisfied by the plaintiff are:

- they have an arguable case;
- the court has jurisdiction in the matter;
- there is a real risk that the defendant will remove or dissipate the assets.

Another method of attaching the vessel is by way of a warrant of execution, which may be issued where there is a final judgment given by, or an arbitration award or foreign judgment registered at, the High Court.

4.9 Releasing an Arrested Vessel

Security for the release of an arrested vessel is usually given contractually by way of a Protection and Indemnity (P&I) Club letter of undertaking or a bank guarantee. The methods of security regulated by the Rules of the High Court are the bail bond and also the payment into court of money, although these are encountered relatively rarely in practice.

4.10 Procedure for the Judicial Sale of Arrested Ships

An application for the judicial sale of the vessel may be made on the basis that the vessel is a wasting asset because its value is being continually reduced by the costs and expenses of its arrest and maintenance, such that the judgment to be obtained may not be fully satisfied. In that regard, the plaintiff's solicitors must at the time of arrest provide to the court an undertaking to pay the bailiff's costs of arrest and maintenance of the vessel. The court's usual mode of sale is public invitation to tender: in other words, sealed bids.

Whilst the order of priority of claims is within the discretion of the court, the usual ranking and distribution of the court sale proceeds of the vessel is as follows:

- bailiff's costs of arrest and maintenance (including the bailiff's 1% commission on the sale price);
- recoverable legal costs of the arresting party;
- maritime liens;
- mortgages;
- statutory liens; and
- non-maritime debts.

4.11 Insolvency Laws Applied by Maritime Courts

Hong Kong has no statutory equivalent of the United States' Chapter 11 or the UK's Administration Order process for the restructuring of companies.

Foreign insolvency and restructuring proceedings do not, under Hong Kong law, result in an automatic stay of any Hong Kong action against the company in question. As a result, warrants for arrest and judicial orders for the sale of vessels may be granted by the Hong Kong Admiralty Court in respect of vessels which are owned by companies subject to overseas insolvency proceedings.

As regards Hong Kong insolvency law, the courts have jurisdiction to wind up not only companies which are registered in Hong Kong but also overseas-registered companies where there is, amongst other criteria, a sufficient connection to Hong Kong. The presence of the overseas-registered ship-owning company's vessel within Hong Kong waters would provide the basis for such jurisdiction.

When a winding-up order has been made or a provisional liquidator appointed, no action shall be proceeded with against the company except with leave of the court (section 186 of the Companies Ordinance, Cap. 32). The court will, however, grant leave to continue the proceedings to secured creditors, eg, mortgagees, maritime lienors, and statutory lienors whose in rem writ was issued prior to the date of the winding-up order.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

The ship-owner will only be able to recover its losses due to a wrongful arrest where it can prove that the arresting party or its solicitor acted in bad faith or was grossly negligent. This is a high threshold to cross.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

The 1974 Athens Convention concerning the Carriage of Passengers and their Luggage by Sea is given effect in Hong Kong by the Merchant Shipping (Limitation of Ship-owners Liability) Ordinance, Cap. 434. Any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage is time-barred after a period of two years. The Convention applies to international, not domestic Hong Kong, carriage.

The London Convention, ie, the 1976 Convention on Limitation of Liability for Maritime Claims together with the 1996 Protocol (LLMC) is applied in Hong Kong by the Merchant Shipping (Limitation of Ship-owners Liability) Ordinance (Cap. 434). The LLMC provides for limitation by reference to the vessel's tonnage, which may be relevant in the event of a serious casualty.

It should also be noted that the Control of Exemption Clauses Ordinance (Cap. 71) prohibits the carrier from excluding or restricting its liability for death or personal injury resulting from its negligence.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

For a bill of lading, as for any maritime commercial contract, the Hong Kong courts will uphold a choice of law clause.

Exclusive jurisdiction clauses will similarly be given effect unless there are strong reasons or exceptional circumstances for departing from them. A party who contests the appropriateness of the named forum has a heavy burden to prove that the interests of justice are such that the contractually agreed choice of jurisdiction should be overridden.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

For a charterparty arbitration clause to be incorporated into the relevant bill of lading, Hong Kong law requires that the bill of lading make specific reference to the arbitration clause to be incorporated. This requirement under Hong Kong law for specific words of incorporation also applies in the case of jurisdiction clauses.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Hong Kong is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Section 87 of the Arbitration Ordinance (Cap. 609) provides for the enforcement within Hong Kong of Convention arbitral awards.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

It is possible to arrest a ship in Hong Kong in respect of a claim which is subject to a foreign arbitration clause, although the in rem proceedings will be subject to a mandatory stay. Section 20(6) of the Arbitration Ordinance (Cap. 609) stipulates that the vessel, or the bail or security given for its release from arrest, shall be retained as security for the satisfaction of any award made in the arbitration.

Where a plaintiff sues in Hong Kong in respect of a contract which provides that all disputes are subject to the jurisdiction of a foreign court, the Hong Kong courts will usually exercise their discretion to stay the proceedings, unless strong reasons for not doing so are shown.

6.5 Domestic Arbitration Institutes

The Hong Kong Maritime Arbitration Group (HKMAG) has the specific aim of the promotion of maritime arbitration in Hong Kong. The majority of disputes are resolved by HKMAG member arbitrators on an ad hoc basis under the HKMAG Terms 2017, which are substantially based on the LMAA Terms 2017.

In some cases, the parties agree to have the resolution of their dispute administered by the arbitral organisation, especially if application to the Mainland Courts for interim measures is likely to be taken under the "Arrangement Concerning Mutual Assistance in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong SAR". HKMAG is a qualified arbitral institution under the Arrangement.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

Section 20 of the Arbitration Ordinance (Cap. 609) provides that, where court proceedings are brought in a matter which is the subject of an arbitration agreement, the court shall, where the defendant "so requests not later than submitting his first statement on the substance of the dispute" refer the parties to arbitration.

Similarly, a defendant may apply under Order 12 rule 8 of the Rules of the High Court to stay any proceedings brought in breach of a foreign jurisdiction clause, provided that any such application is made within the time limited for service of the Defence.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Fiscally, Hong Kong is regarded as tax-benign. Ship-owners operating ocean-going Hong Kong-flag vessels are exempted from paying tax on their shipping income. Withholding tax has been abolished. There is no tax payable on dividend income, nor are capital gains taxed. Stamp duty is restricted to land and stock transfers.

See **9.1 Other Jurisdiction-Specific Shipping and Maritime Issues** with regard to certain tax concessions for ship lessors and ship-leasing managers.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

Despite the relaxation of testing and other COVID-related restrictions in the beginning of the summer of 2020, the Hong Kong Government suspended crew change arrangements for all passenger vessels and cargo vessels without cargo operation with effect from 29 July 2020.

As of January 2021, all incoming crew members of cargo vessels coming to Hong Kong via air travel for cargo operation must obtain a negative COVID-19 test conducted at a recognised laboratory within 48 hours prior to boarding any flights to Hong Kong. Upon arrival, they must also undergo COVID-19 testing and wait until their test results are confirmed negative.

According to the HK Government, any crew members that arrive in Hong Kong without the following documentation will be subject to compulsory quarantine or refusal of entry into Hong Kong:

- a negative test report;
- a letter of certification declared by the shipping companies/agents (that the crew member concerned has tested negative for SARS-CoV-2 nucleic acid, conducted at a recognised laboratory with the specimen collected within 48 hours prior to boarding the flight to Hong Kong, with an emergency local contact phone number for prompt contact with the concerned crew under emergency situation); and
- an approval letter from the Marine Department.

Shipping companies/agents must arrange point-to-point transfer for the sea crew members and may not use public transport.

8.2 Force Majeure and Frustration in Relation to COVID-19

Hong Kong contract law does have the doctrine of frustration, but it does not have a free-standing principle of *force majeure*, the latter concept being dependent on there being an express provision in the contract.

If there is a *force majeure* clause in the contract, an affected party may rely on it by proving that specified circumstances beyond their control have prevented their performance of the contract. Typically, the clause would set out the consequences of the occurrence of the *force majeure* event, such as suspension or termination of the contract.

If the contract does not contain a *force majeure* clause, the affected party may consider whether the doctrine of "frustration" is applicable. Under Hong Kong law, a contract can be discharged by "frustration" when a supervening event (outside the parties' control and without the fault of either party) renders performance of the contract impossible or only possible in a radically different way from that originally contemplated.

Once a contract becomes frustrated, it will be treated as legally terminated, and the parties' obligations thereunder are then automatically discharged.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

On 19 June 2020, the Hong Kong government published the highly anticipated Inland Revenue (Amendment) (Ship Leasing Tax Concessions) Ordinance 2020, which contains profits tax concessions for qualifying ship lessors and ship-leasing managers.

In brief, profits derived from qualifying ship-leasing income are exempt from profits tax, whereas profits from qualifying ship-leasing management activities are either exempt from profits tax if the services are provided to affiliated companies, or taxed at the reduced profits tax rate of 8.25% if the services are provided to unaffiliated companies (the standard profits tax rate is 16.5%). The Ordinance, which incorporates anti-abuse provisions to safeguard the integrity of the tax system and comply with the latest international tax rules (the OECD's Base Erosion and Profit Shifting (BEPS) measures), came into effect from 1 April 2020.

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex legal needs, and widely recognised as a pre-eminent law firm for ship finance in Hong Kong, China and Singapore where the busiest ports in Asia are located. The firm's clientele spans the industry from ship finance banks, lessors and insurance companies to ship-owners, ship-builders, charterers, pool operators and ship managers. Complementing Mayer Brown's capability in ship finance, the shipping litigation team is a leading practice for ship mortgage enforcement as well as for charterparty disputes. When there has been a downturn in the shipping economic cycle, Mayer Brown has assisted and advised its ship finance clients in relation to their customers' defaults. The firm has acted for banks and leasing companies in numerous ship finance workouts and repossessions, involving many high-profile shipping company insolvencies. Mayer Brown's "one-firm" culture – seamless and integrated across all practices and regions – ensures that clients receive the best of its knowledge and experience.

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INDIA

Law and Practice

Contributed by:
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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The maritime authorities and shipping courts are established by the following pieces of domestic legislation.

- The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (the "Admiralty Act 2017") – notifies the High Courts of Calcutta, Bombay, Madras, Karnataka, Orissa, Kerala, Hyderabad for the State of Telangana and Andhra Pradesh as Admiralty Courts.
- The Merchant Shipping Act, 1958 (MSA) – establishes the following authorities.
  - (a) The Mercantile Marine Department – the main objectives are to administer the various merchant shipping laws and rules relating to the safety of ships and life at sea, the registration of ships, tonnage measurement, crew accommodation, surveys for load line, safety construction, the prevention of pollution, inquiries into shipping casualties and wrecks, surveys of passenger ships, radio equipment on board, inspection and approval of statutory equipment for life-saving and firefighting appliances, wireless telegraphy, the Global Maritime Distress and Safety System, navigational aids, pollution prevention equipment, supervision of repairs and construction of ships on behalf of state and central government organisations, port state control inspections, and examination and certification of various grades of certificates of competency under the MSA.
  - (b) The Directorate General of Shipping ("DG Shipping") – an attached office of the Ministry of Ports, Shipping and Waterways. DG Shipping deals with all executive matters relating to merchant shipping, the implementation of shipping policy and legislation towards ensuring safety of life and ships at sea, the prevention of marine pollution, the promotion of maritime education and training in co-ordination with the International Maritime Organization, the regulation of employment and welfare of seamen, the development of coastal shipping, the augmentation of shipping tonnage, the examination and certification of Merchant Navy officers, and the supervision and control of the allied departments and officers under its administrative jurisdiction.
  - (c) National Shipping Board – a statutory body established to advise the government of India on matters related to shipping, including the development thereof.
- The Major Port Trusts Act, 1963.
  - (a) The Tariff Authority of Major Ports (TAMP) – an independent authority that regulates all tariffs, both vessel related and cargo related, and rates for lease of properties in respect of major port trusts and the private operators located therein.

The common maritime and shipping claims that are filed in practice are:

- cargo claims;
- claims for unpaid bunkers supplied to the vessel;
- claims arising out of supply of goods and services to the vessel;
- claims towards wages and other sums due to the crew and Master;
- claims towards port, canal and other waterway dues and other statutory dues;
- claims arising out of any mortgage or charge of a similar nature on the vessel; and
- claims arising out of any agreement on use or hire of the vessel, whether contained in a charterparty or otherwise.

1.2 Port State Control

Port State Control in India

Port state control is ensured by adoption of the following international conventions in the MSA and the rules framed thereunder.

- the International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended;
- the International Convention on Load Lines, 1966 and its protocol;
- the International Convention for the Prevention of Pollution from Ships (MARPOL), 73/78;
- the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended from time to time;
- the International Regulations for Preventing Collisions at Sea (COLREG), 1972;
- the Maritime Labour Convention, 2006;
- the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001; and
- the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended from time to time.

Further, India is a member of the Memorandum of Understanding on Port State Control for the Indian Ocean Region.

Authorities and Their Powers in General and in Relation to Marine Casualties, such as Grounding, Pollution or Wreck Removal

Wreck removal

India has ratified the Nairobi International Convention on the Removal of Wrecks, 2007; however, the Convention has not been brought into effect yet by incorporation into local legis-

lation. Presently, the MSA deals with wrecks under Part XIII therein.

Relevant provisions regarding wrecks

The central government may, by notification in the Official Gazette, appoint a receiver of wreck to receive and take possession of the wreck and to perform duties connected therewith.

Under Part XIII, the receiver of wreck has the following powers:

- suppress any plundering, disorder or obstruction in the preservation of a shipwrecked vessel, or of the shipwrecked persons or of the cargo or equipment of the vessel;
- investigate certain matters in respect of vessels wrecked, such as name and description of the vessel, names of the Master and the owners, and occasion of the wrecking, stranding, or distress of the vessel;
- publish notification (in the manner as prescribed by the central government) containing a description of the wreck and the time at which, and the place where, it was found; and
- conduct immediate sale of the wreck in certain cases.

Pollution

If the central government is satisfied that oil or a noxious liquid substance is escaping or is likely to escape from a tanker, a ship other than a tanker or any offshore installation, causing or threatening to cause pollution of any part of coasts or coastal waters of India, the central government may take the following actions.

- Serve a notice upon the owner, agent, Master, charterer, or operator of a tanker, a ship other than a tanker, or a mobile offshore installation and require them to take appropriate action for:
  - (a) preventing the escape of oil or a noxious liquid substance from the tanker, a ship other than a tanker, a mobile offshore installation or offshore installation of any other type;
  - (b) removing oil or a noxious liquid substance from the tanker, a ship other than a tanker, a mobile offshore installation or offshore installation of any other type in such manner, if any, and to such place, if any, as may be specified in the notice;
  - (c) removal of the tanker, a ship other than a tanker, a mobile offshore installation or offshore installation of any other type to a place, if any, as may be specified in the notice;
  - (d) removal of the oil or noxious liquid substance slicks on the surface of the sea in such manner, if any, as may be specified in the notice; and
  - (e) dispersing the oil or noxious liquid substance slicks on the surface of the sea in such manner.
- Take steps to carry out the directives given by it in the aforesaid notice and contain the pollution already caused or prevent the pollution threatened to be caused, if any person on whom the notice is served fails to comply with the same in whole or in part.
- Give directions to the owner of any Indian ship, tug, barge or any other equipment to provide such services as required.

Other shipping casualties

The MSA provides for investigations and inquiries into various other shipping casualties:

- when on or near the Indian coast, any ship is lost, abandoned, stranded or materially damaged, any ship causes loss or material damage to any other ship, or there is a loss of life due to any casualty happening to or on board any ship, the Master, pilot, harbour master or other person in charge of the ship(s) must (on arriving in India) give immediate notice of the shipping casualty to the officer appointed by the central government; and
- when any of the aforesaid casualties has occurred to or on board an Indian ship, and any competent witness thereof is found in India, the Master of the ship must (on arriving in India) give immediate notice of the shipping casualty to the officer appointed by the central government.

The officer appointed by the central government will conduct a preliminary inquiry into the matter and provide a written report to the government, and may make an application to the relevant court for a formal investigation.

The central government may otherwise, through the court, instigate an inquiry into charges of misconduct/incompetency of the Master, mate, etc.

Key powers of the court:

- inquire into charges of misconduct/incompetency of the Master, mate, etc;
- summon the concerned individual to appear and make a defence;
- compel attendance and examination of witnesses;
- appoint assessors conversant with either maritime or mercantile affairs;
- issue a warrant to arrest a witness;
- cause a person who has committed an offence in India to be arrested, or hold him or her to bail to take his or her trial before a proper court; and
- remove the Master of any ship and appoint a new one.

Key powers of the central government:

- cancel or suspend the certificate of any Master, mate, etc granted by it in cases prescribed under Section 377 of the MSA;
- revoke or modify any order of cancellation or suspension made by itself/by a court in India; and
- grant, without examination, a new certificate of the same or lower grade in the event of any certificate being cancelled or suspended by itself or by the court.

1.3 Domestic Legislation Applicable to Ship Registration

The domestic pieces of legislation applicable to ship registration are as follows:

- the MSA and the rules framed thereunder;
- the Coasting Vessels Act, 1838; and
- the Inland Vessels Act, 1917.

The governmental authorities that handle the domestic registration of vessels are as follows:

- the Mercantile Marine Departments at various ports (for registration under the MSA);
- the Collector of Sea Customs (for registration under the Coasting Vessels Act, 1838, except for Mumbai, where the registration is handled by the Principal Officer at the Mercantile Marine Department, Mumbai); and
- the registering authorities appointed at certain places by the relevant state government by notification in the Official Gazette (for registration under the Inland Vessels Act, 1917).

1.4 Requirements for Ownership of Vessels

Under the MSA, an Indian ship must be owned wholly by:

- an Indian citizen; or
- a company or a body established by or under any central or state act, which has its principal place of business in India; or
- a co-operative society that is registered or deemed to be registered under the Co-operative Societies Act, 1912 (2 of 1912), or any other law relating to co-operative societies for the time being in force in any state.

Registration of foreign-owned ships is not permitted in India. Registration of a vessel under construction is not permitted in India.

1.5 Temporary Registration of Vessels

Temporary Registration and Pass

When a ship at any port outside India becomes entitled to be registered as an Indian ship, the Indian consular officer there may grant to her Master (on his application) a provisional certificate of registration containing such particulars as may be prescribed in relation to the ship.

Additionally, where the owner of a ship has applied to the registrar of a port for her registration but there is a delay in the issue of the certificate of registry or where the owner of a ship wants to proceed from a port in India where the ship has been built to the intended port of registry, the owner may apply to the registrar of the port for the grant of a temporary pass for plying the ship between the ports in India. The said pass shall, for the time and within the limits therein mentioned, have the same effect as a certificate of registry.

Dual Registration

River sea vessels (ie, cargo ships, dredgers and renewables service vessel tankers having prescribed specifications and gross tonnage) that are not passenger vessels, fishing vessels, or vessels carrying bulk chemical or gas (packaged or otherwise) carrying out prescribed operations can apply for dual registry under the MSA and Inland Vessel Act, 1917.

1.6 Registration of Mortgages

A mortgage on a ship/share under the MSA has to be registered with the Mercantile Marine Departments at various ports, and such mortgage is recorded in the register book at the concerned port of registry. The mortgage instrument is to be submitted to the Mercantile Marine Department.

1.7 Ship Ownership and Mortgages Registry

Information pertaining to ship ownership and the mortgages registry is available to the public.

The registrations can be viewed by someone other than the owners by making appropriate applications to the Mercantile Marine Department and by paying the prescribed fees, if required.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Pollution

India has acceded to 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.

Parts XB, XC and XIA of the MSA govern civil liability for oil pollution damage, contribution to the International Oil Pollution Compensation Fund and prevention and containment of pollution of the sea by oil.

Other relevant pieces of legislation include:

- the Merchant Shipping (Civil Liability for Oil Pollution Damage) Rules, 2008;
- the Merchant Shipping (International Fund for Compensation for Oil Pollution Damage) Rules, 2008;
- the Merchant Shipping (Prevention of Pollution by Garbage from Ships) Rules, 2009;
- the Merchant Shipping (Prevention of Pollution by Oil from Ships) Rules, 2010;
- the Merchant Shipping (Control of Pollution by Noxious Liquid Substances in Bulk) Rules, 2010;
- the Merchant Shipping (Prevention of Pollution by Sewage from Ships) Rules, 2010; and
- the Merchant Shipping (Prevention of Pollution by Harmful Substances Carried By Sea in Packaged Form) Rules, 2010.

Wreck Removal

India has acceded to the Nairobi International Convention on the Removal of Wrecks, 2007.

Part XIII of the MSA deals with wrecks. Other relevant pieces of legislation are the Merchant Shipping (Wrecks and Salvage) Rules, 1974 (amended in 1975) and the Indian Ports Act, 1908.

2.2 International Conventions: Collision and Salvage

Collision

India is a party to the Convention on the International Regulations for Preventing Collisions at Sea, 1972 and its annexures.

Part X of the MSA governs collisions. The Merchant Shipping (Prevention of Collisions at Sea) Regulations, 1975 adopt the Convention on the International Regulations for Preventing Collisions at Sea, 1972 and its annexures.

Salvage

India is a party to the International Convention on Salvage, 1989.

Part XIII of the MSA and the Merchant Shipping (Wrecks and Salvage) Rules, 1974 (amended in 1975) deal with salvage.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The 1976 Convention on Limitation of Liability for Maritime Claims is applicable in India, and has been adopted by Part XA of the MSA. Further, India has ratified the 1996 Protocol (without amendments to the MSA). It has been judicially upheld that the 1996 Protocol is part of the MSA and is in force in India.

Other relevant pieces of legislation are:

- the Merchant Shipping (Limitation of Liability for Maritime Claims) Rules, 2015; and
- the Merchant Shipping (Limitation of Liability for Maritime Claims) Amendment Rules, 2017.

2.4 Procedure and Requirements for Establishing a Limitation Fund

A person who is entitled to limit his liability under the MSA may apply to the High Court for setting up of a limitation fund if:

- an alleged liability has been incurred by such person in respect of any prescribed claims (under Part XA of the MSA); and
- legal proceedings have been instituted in respect of any prescribed claims (under Part XA of the MSA) against such person to limit liability.

A person may apply to the High Court for setting up a limitation fund for the total sum representing the amounts set out in the convention for the claims for which such person may be found liable, along with interest till constitution of the fund.

A limitation fund may be set up by the High Court to which the aforesaid application is made. On receipt of an application, the High Court may determine the amount of the owner's liability and require him to deposit/produce:

- such amount as is satisfactory in the opinion of the High Court;
- an acceptable guarantee for such amount; or
- a bank guarantee for such amount.

The amount so deposited or guarantee so produced shall constitute the limitation fund.

3. Cargo Claims

3.1 Bills of Lading

The Carriage of Goods by Sea Act, 1925 (COGSA) primarily deals with cargo claims in India. The Hague Rules, 1924 have been incorporated in the Schedule to COGSA. COGSA also incorporates certain provisions of the Hague–Visby Rules, in particular, the SDR Protocol.

The Bills of Lading Act, 1856 governs the law pertaining to bills of lading in India.

3.2 Title to Sue on a Bill of Lading

The title to sue on a bill of lading vests with the shipper and endorsee of the bill of lading to whom property in the goods has passed by virtue of the endorsement or consignment.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

A carrier's liability for loss/damage to cargo is similar to that contained in Articles III (1) and (2) and IV (1), (2), (3), (4) and (6) of the Hague Rules, 1924.

For any loss or damage to or in connection with goods, a carrier is entitled to limit liability to the amount equivalent to 666.67 special drawing rights (SDR) per package or unit, or SDR2 per kilogram of gross weight of the goods lost or damaged, whichever is higher. The package/weight limitation is available to the ship-owner provided the nature and value of goods have not been declared by the shipper before shipment and inserted in the bill of lading.

Parties may, by agreement, fix an alternate limit for cargo damage; such limit should not be less than that prescribed by COGSA.

The right to limitation is not available to the carrier in the event that it is proved that the cargo damage resulted from the carrier's act/omission done with an intent to cause damage or recklessly and with the knowledge that damage would probably result.

Under COGSA, there is no distinction carved between an actual and contractual carrier. However, the provisions of COGSA would be available to the contractual carrier; ie, a carrier who is a party to the contract of carriage.

3.4 Misdeclaration of Cargo

A carrier can establish a claim against the shipper for misdeclaration of cargo. COGSA provides that 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. The shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

COGSA is applicable to goods/cargo carried from any port in India to any port whether in or outside India. COGSA provides a one-year time limit (from the date of delivery of the goods or the date on which the goods should have been delivered), which can be extended by agreement between parties after the cause of action has arisen. Such action can also be brought within three months from the lapse of the one-year period, if allowed by the court.

In cases of claims arising out of cargo carried into India, the limitation period would be three years from the date of accrual of cause of action.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

India is not a signatory to the International Convention Relating to the Arrest of Sea-Going Ships, 1952 or the International Convention on Arrest of Ships, 1999. However, the Supreme Court, in the case M.V. Elisabeth & Ors v Harwan Investment and Trading Pvt Ltd (1993 AIR 1014) and Liverpool and London S.P. & I Association Ltd v MV. Sea Success I & Anr (2002 (2) BomCR 537), held that principles of the Arrest Conventions, 1952 and 1999 would be applicable in India till appropriate legislation is in place. In 2017, the legislature enacted the Admiralty Act 2017, for consolidating the laws relating, to inter alia, Admiralty jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other connected/incidental matters thereto.

The Admiralty Act 2017 governs ship arrests in India.

4.2 Maritime Liens

The following claims are recognised as maritime liens in India:

- 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 salvage services, including special compensation relating thereto;
- claims for port, canal and other waterway dues and pilotage dues and any other statutory dues related to the vessel; and
- claims based on tort arising out of loss or damage caused by the operation of the vessel, other than loss or damage to cargo and containers carried on the vessel.

India differentiates between maritime liens and claims. A maritime lien continues to exist on the vessel notwithstanding change of ownership or registration of a flag. A maritime claim ceases to exist on the vessel with the change of ownership.

The Admiralty Act 2017 enlists the maritime claims recognised in India, which are substantially similar to the maritime claims contained in the International Convention Relating to the Arrest of Sea-Going Ships, 1952 and the International Convention on Arrest of Ships, 1999.

4.3 Liability in Personam for Owners or Demise Charterers

For enforcement of a maritime claim, the personal liability of the owner or demise charterer towards the claim is required. However, in the case of a maritime lien, a vessel can be arrested regardless of the owner's personal liability.

4.4 Unpaid Bunkers

A bunker supplier can arrest a vessel in connection to unpaid bunkers supplied to a vessel. Section 4 (1) (l) of the Admiralty Act 2017 recognises claim for bunker supplies to a vessel as a maritime claim.

In Indian jurisprudence, there is no clear distinction carved out between the claimant being the contractual or actual supplier.

If bunkers for the vessel have been ordered by a charterer on its account and not on account of the owner, the offending vessel (ie, the chartered vessel that received the bunker) will not be liable for arrest. In the facts of a particular case, it is possible for a claimant at prima facie stage to arrest a vessel for bunkers ordered by the charterer.

4.5 Arresting a Vessel

The claimant would need to file an Admiralty Suit before the concerned High Court within whose territorial waters the vessel is present. For the purpose of filing the suit, the claimant would, inter alia, need to provide a notarised power of attorney legalised or apostilled by the Indian High Commission or a board resolution and an affidavit in support. Furthermore, the claimant would be required to pay the prescribed court fees.

If the documents in support of the claim are not in English, an English translated copy would have to be submitted in court.

At the time of filing the suit, the claimant will have to provide a written undertaking to pay such sums of money or kind of security as ordered by the court for any loss/damage that may be incurred or caused to the defendant or any other party as a result of the arrest of the ship and for which the claimant may be found liable.

4.6 Arresting Bunkers and Freight

Arrest of bunkers and freight is not possible in India.

4.7 Sister-Ship Arrest

Sister-ship arrest is allowed in India.

A claimant can arrest any other vessel in lieu of the vessel against which a maritime claim has been made ("offending vessel"), provided the vessel sought to be arrested:

- is owned by the person who is the owner of the offending vessel at the time the claim arose and is liable for the same; or
- is owned/demise chartered by the person who is the demise charterer of the offending vessel at the time the claim arose and is liable for the same.

4.8 Other Ways of Obtaining Attachment Orders

Apart from ship arrest, the claimant can approach the court seeking attachment before judgment (under Order XIII Rule 5 of the Code of Civil Procedure 1908), in order to secure its claim.

The test for obtaining an attachment before judgment is quite high. The claimant would have to establish that the defendant (with an intent to defeat the claim/execution of any decree) is about to dispose of his or her property (whole or part) or is about to remove the property (whole or part) from the jurisdiction of the court and prima facie establish that the claim is bona fide and valid.

As per the provisions of the Major Port Trust Act, 1963 a shipowner may request the port (at which the cargo is to be discharged) to exercise a lien over the cargo for outstanding freight and other charges.

In the event of arbitration (domestic or international), a party may apply to the concerned court for interim measures such as securing the amount in dispute/preservation or sale of goods that forms the subject matter of the arbitration/interim injunction/appointment of receiver, etc. A party may apply for such interim measures prior to the commencement of, or during, the arbitration proceedings, and before enforcement of the award. However, a party applying for interim relief prior to the commencement of arbitration is obliged to commence proceedings within 90 days from the date such relief is granted.

4.9 Releasing an Arrested Vessel

An owner or interested party can obtain release of the arrested vessel by depositing the monetary security ordered by the court. The security can be in the nature of a cash deposit or a bank guarantee issued by a Nationalised or Scheduled Indian Bank.

A P&I club letter of undertaking is acceptable only upon the claimant's consent. A foreign bank's bank guarantee is not acceptable.

4.10 Procedure for the Judicial Sale of Arrested Ships

The claimant may – at any time after service of a writ of summons, an arrest warrant or an arrest order upon the defendant – apply to the court by way of an interim application for an order of sale of the arrested ship by the Sheriff and payment of sale proceeds into the registry to the credit of the suit.

Furthermore, a court may, suo moto, order sale of the vessel if the owner (of the arrested vessel) abandons the vessel, within a period of 45 days from the date of the arrest or abandonment.

Thereafter, the court fixes a schedule for the following:

- issuance of a notice of judicial auction in newspapers/magazines, with all relevant details of the vessel, such as year built, gross register tonnage and deadweight tonnage;
- inspection and valuation of the arrested vessel by a court-appointed surveyor;
- inspection of the arrested vessel by the bidder;
- deposit of the earnest money;
- submission of bids in a sealed envelope; and
- date of the judicial sale.

On the date of the judicial sale, the sealed bids are opened and all the bidders are given a chance to better their bids in an open bidding before the court. The order of sale is passed in favour of the successful bidder with the maximum offer.

On the successful bidder depositing the requisite payment, the Judge passes an order confirming the sale of the vessel in favour of the successful bidder.

The ship-owner is obliged to maintain the vessel. If he fails to do so, upon the claimant's request, the court may permit the claimant to maintain the vessel. The maintenance costs incurred by the claimant, with the permission of the court, will constitute a first charge on the sale proceeds of the vessel and must be paid first.

Priority Ranking of the Claims

Maritime claims have the following priority ranking:

- a claim on the vessel where there is a maritime lien;
- registered mortgages and charges of same nature on the vessel; and
- all other claims.

In determining the priority of claims inter se, multiple claims in any single category of priority shall rank equally. Claims for various salvages shall rank in inverse order of time when the claims thereto accrue.

If the mortgage is not registered, then its priority will rank equally with other maritime claims.

4.11 Insolvency Laws Applied by Maritime Courts

The Insolvency and Bankruptcy Code, 2016 (IBC) provides for initiation of a corporate insolvency resolution process (CIRP) by the corporate debtor or by the creditors. The National Company Law Tribunal (NCLT) is the adjudicating authority for the same.

The corporate insolvency resolution process provides for the filing of a resolution plan that is geared towards reviving the corporate debtor and paying off its debts. The resolution plan has to be submitted to the NCLT within the prescribed time. Upon approval of the resolution plan by the NCLT, the same is binding on the corporate debtor, its employees, its members, its creditors, its guarantors and other stakeholders, as applicable. The NCLT shall order liquidation of the corporate debtor if it does not receive the resolution plan within the prescribed time or rejects the plan.

The Admiralty Court can order arrest of a vessel owned by an entity undergoing CIRP.

During CIRP, the court may order sale of the vessel, upon application by the:

- resolution professional; or
- a claimant in Admiralty proceedings (if the vessel is not being manned, equipped or maintained by the resolution professional during the moratorium, charges are not being paid or if the vessel becomes a navigation hazard). In all such cases of sale of the vessel, notice will be given to the owner (who may be represented by the resolution professional) before the vessel is sold.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

At the time of filing the suit, the claimant will have to provide a written undertaking to pay such sums of money or kind of security as ordered by the court for any loss/damage that may be incurred or caused to the defendant or any other party as a result of the arrest of the ship and for which the claimant may be found liable.

The arrest will be held wrongful if the same is not maintainable under the Admiralty Act 2017. In such cases, one may make

an application to the Admiralty Court concerned invoking the undertaking given by the claimant for paying the costs/damages incurred as a result of the wrongful arrest.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

India is a party to the Special Trade Passenger Ships Agreement, 1971 and the Protocol on Space Requirements for Special Trade Passenger Ships, 1973, which has been adopted by the MSA (Part VIII).

The Admiralty Act 2017 also recognises a claim arising out of an agreement relating to the carriage of passengers on board a vessel, whether contained in a charterparty or otherwise, as a maritime claim.

Time Limit for Filing such a Claim

There is no specific time limit for filing such a claim. Therefore, as per the Limitation Act, 1963, the limitation period would be three years from the date the right to sue accrued.

Limitations on Liabilities Available to the Owners with Respect to a Passenger's Claim

Owners are permitted to limit their liability for claims:

- arising out of loss resulting from delay in the carriage by sea of cargo and passengers or their luggage; and
- for loss of life or personal injury to passengers of a ship arising under the contract of passenger carriage. Owners are also permitted to limit their liability if a claim towards loss of life or personal injury is brought by a person who, with the consent of the carrier, is accompanying a vehicle for live animals that is covered by a contract for the carriage of goods.

The limits of liability for passenger claims will be determined in accordance with the provisions of the LLMC 1976 read with the 1996 Protocol. However, separate limits are applied for claims brought by passengers carried in and around the coast of India.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

For in personam proceedings against a party to a bill of lading, Indian courts recognise the law and jurisdiction clauses stated in the bill of lading.

If a suit is filed against a party under a bill of lading, such that the law and jurisdiction clause:

- confers jurisdiction to a foreign court, the suit filed in the Indian court would be dismissed due to lack of territorial jurisdiction; or
- sets forth adjudication of disputes by way of arbitration, the Indian court shall (on application made by a party to the arbitration agreement or any person claiming through or under him or her) refer the parties to arbitration, unless it finds that, prima facie, no valid arbitration agreement exists.

However, the existence of law and jurisdiction clauses in bills of lading does not bar an action in rem against the vessel.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

Courts in India recognise and enforce a law and arbitration clause of a charterparty incorporated into the relevant bill of lading. However, the law and arbitration clause would need to be specifically incorporated in the bill of lading.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable in India.

Part II (Chapter 1) of the Arbitration and Conciliation Act, 1996 addresses the enforcement of foreign awards on differences between parties:

- in pursuance of an agreement in writing for arbitration to which the New York Convention applies; and
- in one of such territories as the central government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the New York Convention applies.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

In India, courts permit arrest of a vessel even where the claim is subject to a foreign arbitration and/or jurisdiction due to an arbitration or law and jurisdiction clause in the relevant contract or bill of lading or charterparty.

Indian courts permit actions in rem to obtain and retain security in respect of disputes, the subject matter of which falls within the Admiralty jurisdiction of the court, even though the merits of the dispute are to be determined in the arbitration proceedings.

6.5 Domestic Arbitration Institutes

The Indian Council of Arbitration and International and Domestic Arbitration Centre India deal with maritime disputes with specialised rules for maritime arbitrations.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

For proceedings commenced in breach of a foreign jurisdiction clause, the defendant may prefer an application in the court (before which, such proceedings have been commenced) seeking an anti-suit injunction. The anti-suit injunction may be sought on the ground that the said court lacks territorial jurisdiction, owing to the specific agreement between the parties conferring jurisdiction on a foreign court.

For proceedings commenced in breach of a foreign arbitration clause, the defendant (being a party to the arbitration agreement or any other party claiming through or under him) may make an application to the court (before which the proceeding is filed) for referring the matter to arbitration. Such an application can be made for arbitrations governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Ship-owning companies in India have the option of availing of the tonnage scheme under the Income Tax Act, 1961.

The scheme is offered to a qualifying company; ie, an Indian company having its effective management in India, with its main objective as the carrying on of the business of operating ships and the said company owns at least one qualifying ship. A qualifying ship is a sea-going vessel (of 15 net tonnage or more) registered under the MSA or outside India (and which holds a prescribed licence issued by DG Shipping and a valid tonnage certificate).

Under the said scheme, a ship-owner is taxed on its notional annual income arising from the operation of its ships. The notional income is determined on the basis of the net tonnage of its fleet of ships. This ensures that the tax burden on the ship-owning company remains neutral, irrespective of the performance of the company.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

The Ministry of Shipping had declared transport service for carriage of goods by water and any service connected with loading, unloading, movement or storage of goods in any port as an essential service.

The present measures implemented in view of the coronavirus pandemic are as follows.

- Any crew member (who has not completed 14 days from last port of call; ie, China or the United Kingdom) shall be disembarked, subject to testing negative for COVID-19 through reverse transcription polymerase chain reaction (RT-PCR). The test shall be arranged by the shipping company/agent. The test shall be conducted after disembarkation.
- At least 72 hours prior to the arrival of the vessel at the port, the Master shall submit a Maritime Declaration of Health to the relevant port authorities disclosing the health of each person on board the vessel. If the voyage duration from the last port of call is less than 72 hours, then the Master shall submit the Maritime Declaration of Health to the relevant port authorities immediately upon departure from the last port of call.
- The pilot shall normally not be assigned to the vessel, unless pratique has been granted. Prior to boarding the vessel, the Master shall reconfirm to the pilot that all persons on board are healthy and there are no suspected cases of COVID-19 on board. All ship personnel who are likely to interact with the pilot should be wearing personal protective equipment (PPE).
- Controlled crew change – Indian seafarers.
  - (a) The relevant requirements for sign-on are as follows.
    - (i) The seafarer shall provide his or her travel and contact history for the past 28 days to the ship-owner/recruitment and processing services (RSP) in the prescribed format for submission to the concerned medical examiner (approved by DG Shipping) for certification of the seafarer's fitness to join the ship.
    - (ii) Upon the confirmation from the medical examiner for sign-on, the following process shall be completed by the ship-owner/RSP prior to sign-on: (i) details of the seafarer's vehicle and driver for travel to the sign-on site shall be uploaded on the DG Shipping website for generation of an e-pass (if applicable) for submission to the local authority (in the area of residence of the

seafarer) and issuance of a transit pass from the place of residence to the place of embarkation (the pass will be for a fixed route and specified validity), and (ii) at the city of embarkation, the seafarer shall undergo a COVID-19 test. The seafarer would be ready for sign-on if the COVID-19 test is negative.

(b) The requirements for sign-off are as follows.

(i) The Master shall submit the Maritime Declaration of Health to the relevant port authorities, along with any other information required by the port authorities. The port authorities shall grant pratique to the vessel prior to berthing.

(ii) The seafarer shall undergo a COVID-19 test. If the arrival is within 14 days from a foreign port, the seafarer shall be quarantined for 14 days from the date of departure at a port/state-approved facility. On completion of quarantine, the seafarer shall undergo a COVID-19 test.

(iii) If the seafarer tests positive, he shall be dealt with as per the procedure laid down by the Ministry of Health and Family Welfare. If the seafarer tests negative, the ship-owner/RSP shall upload the details of the seafarer, the vehicle and the driver for the proposed travel for generation of an e-pass (if applicable) for submission to the local authority (in the area of disembarkation) and issuance of a transit pass from the place of disembarkation to the place of residence (the pass will be for a fixed route and specified validity).

- Controlled crew change – foreign seafarers.

(a) The requirement set forth for sign-on of Indian seafarers shall be applicable to foreign seafarers.

(b) Sign-on at outer anchorage shall be allowed without any restriction only after obtaining prior clearance from the Foreigner Regional Registration Officer concerned. This is only a temporary measure while specific protocols on account of COVID-19 are in place. Once such protocols are removed, the sign-on procedure at outer anchorage should revert to the provisions as prescribed in Visa Manual, 2019.

(c) The sign-off requirements are as follows:

(i) The requirement set forth for sign-off of Indian seafarers shall be applicable to foreign seafarers.

(ii) Additionally, crew on board without a visa would be issued with a Temporary Landing Permit for one month on the basis of a valid passport and seaman's identity document for facilitating their sign-off and travel outside India.

(iii) If the validity of the Indian visa and/or passport is less than three months from the date of sign-off, then the ship-owner/RSP shall make all necessary efforts for renewal of the passport and/or visa through local embassies.

(iv) Sign-off at outer anchorage shall be allowed without any restriction only after obtaining prior clearance from the Foreigner Regional Registration Officer concerned. This is only a temporary measure while specific protocols on account of COVID-19 are in place. Once such protocols are removed, the sign-on procedure at outer anchorage should revert to the provisions as prescribed in Visa Manual, 2019.

8.2 Force Majeure and Frustration in Relation to COVID-19

Courts in India recognise the concept of force majeure as well as frustration. The concept of force majeure stems from the terms of the contract, whereas frustration is provided for under the Indian Contract Act, 1872.

Various High Courts in India have assessed COVID-19 as a force majeure event in the facts and circumstances of a given case. For instance, the High Courts of Delhi and Bombay have taken divergent views with respect to injunction on invocation/encashment of bank guarantees/letter of credit, depending upon the facts of the case.

The High Court of Delhi, in the case of Halliburton Offshore Services Inc v Vedanta Ltd & Anr, granted an ad interim injunction on invocation and encashment of a bank guarantee in the wake of the government-imposed lockdown due to the COVID-19 pandemic.

However, the Bombay High Court, in the case of Standard Retail Pvt Ltd v G.S. Global Corp and Ors, refused to grant an injunction on encashment of a letter of credit in the wake of the government-imposed lockdown due to the COVID-19 pandemic. In the facts of the case, the Court clarified that as lockdown was for a limited period, parties cannot use the same to resile from their contractual obligations of making payments.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

The apex court, in the case of The Chairman, Board of Trustees, Cochin Port Trust v M/s Arebee Star Maritime Agencies Pvt. Ltd. & Others (Civil Appeal No. 2525 of 2018), has addressed the long-standing issue relating to steamer agents and consignee's liability for port charges for uncleared cargo/contain-

ers lying in port premises. The judgment provides respite to the ship-owners and steamer agents who were saddled with liability towards ground rent levied by major ports for uncleared cargo. In a nutshell, the court held that:

- after the goods are discharged and the Port Trust takes charge of the same (by issuing a receipt), the demurrage/ storage charges accrued for the goods would be payable by the importer, consignee, owner of the goods;
- the steamer agent would be liable for dues in connection with services rendered by the Port Trust for the vessel, until landing of the goods and their removal to a storage place; and
- the Port Trust is obliged to destuff the goods and return the containers within a "short time" depending on the facts of each case, considering the activities of the port, the vessel traffic, etc. The Port Trust is not entitled to rely upon lack of storage space for the destuffed goods as a defence. In the event that the destuffed goods remain uncleared by the owner of the goods or any person entitled thereto within the prescribed time for their clearance and/or dues to the Port Trust remain unpaid, the Port Trust may sell such goods after expiry of the prescribed time periods. In this regard, the Port Trust must act reasonably and attempt to sell the goods within a reasonable period of time from the date on which it assumed custody of the goods.

Ganesh & Co. is a full-service law firm founded in 1982 that is based in Mumbai, in Fort and Chembur. The firm comprises a team of 15 lawyers. Ganesh & Co. has a wide range of practice, with a focus on maritime law. The firm routinely advises and assists domestic and international clients on charterparty disputes, ship arrest and release, cargo claims, maritime transactions and other maritime issues. Ganesh & Co. advised and represented container shipping lines in the landmark judgment passed by the Supreme Court in the case of The Chairman, Board of Trustees, Cochin Port Trust v M/s Arebee Star Maritime Agencies Pvt. Ltd. & Others (Civil Appeal No 2525 of 2018). The firm also deals with arbitrations, corporate and commercial laws, real estate laws, intellectual property laws, media and entertainment laws/regulations, and insolvency proceedings. Ganesh & Co. has a dedicated and handpicked group of correspondents that enable it to represent clients across various courts in India. It is committed to providing bespoke practical legal solutions to clients by employing innovative solutions. The firm's clientele includes domestic and international enterprises.

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INDONESIA

Trends and Developments

Contributed by:
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Last year saw a major overhaul of Indonesia's shipping law regime. In the middle of a pandemic, the government of Indonesia passed Law No 11 of 2020 on Job Creation (the "Omnibus Law"), which revises various provisions in laws across numerous sectors, including more than 60 articles in Law No 17 of 2008 regarding Shipping (the "Shipping Law").

The Minister of Transportation (MOT) also enacted regulations intended to attract more foreign investment to Indonesia's shipping industry, as further discussed below. This appears to be consistent with the agenda of the administration of President Joko Widodo to bolster investment and create jobs by streamlining regulations and removing barriers to doing business in Indonesia, especially for foreigners. In addition, the president has emphasised on numerous occasions, during both his previous as well as his current term, that he intends to transform Indonesia into a global maritime axis. Thus, the authors expect this trend will continue in 2021 with the enactment of new regulations aimed at increasing investment in the shipping sector.

Sea Transportation Strategic Plan

The MOT has enacted MOT Regulation No 80 of 2020 regarding the Strategic Plan of the MOT for 2020–2024 ("MOT Reg 80/2020"), which acts as a framework for the Ministry's agenda and policy goals for the next five years. With regard to sea transportation, MOT Reg 80/2020 stipulates that the government will focus on building nationwide maritime connectivity and simplifying various regulations and the bureaucracy in order to ease the implementation of sea transportation. This includes integrating the administration of various shipping and navigational affairs, such as vessel identification, the Shipping-Navigation Aid (*Sarana Bantu Pelayaran-Navigasi*) and the stipulation of sea routes into an electronic/digital platform. Note that as of this moment, it is unclear when this planned platform will be up and running.

Indonesia will also direct its focus to providing competitive infrastructure (ports), vessels and human resources (seafarers), taking into account the various national and international provisions on safety and environmental protections at sea. This includes upgrading seven ports in Indonesia and transforming them into an integrated port hub. The seven ports are:

- Kuala Tanjung (North Sumatra);
- Batam (Riau Islands);
- Tanjung Priok (Jakarta);
- Tanjung Perak (East Java);
- Makassar (South Sulawesi);
- Bitung (North Sulawesi); and
- Sorong (Papua).

A massive investment will be required to finance the development of Indonesia's maritime infrastructure. It is apparent from MOT Reg 80/2020 that a key policy goal for the sector is to simplify the bureaucracy to ease and attract foreign investment, which will be key to revitalising Indonesia's maritime sector.

Removal of Capital Requirement

One of the key regulatory changes in 2020 was the revocation of MOT Regulation PM 45 of 2015 regarding Capital Ownership Requirement of Business Entities in the Transportation Sector ("MOT Reg 45/2015").

Under MOT Reg 45/2015, shipping companies were subject to a minimum issued and paid-up capital requirement of:

- IDR12.5 billion for a sea transportation company;
- IDR25 billion if the sea transportation company intends to construct and operate a special terminal (*terminal khusus*) and for a dredging/reclamation company;
- IDR25 billion to IDR1 trillion for a port operator company (*badan usaha pelabuhan*) (depending on the size and function of the port);
- IDR750 million (for non-joint ventures) or IDR1.5 billion (for a joint venture) for a salvage and/or underwater works company; and
- IDR750 million for a ship manning agency. For completeness, MOT Reg 45/2015 also imposes a minimum capital requirement for land and air transportation companies.

The articles imposing a minimum capital requirement for sea transportation companies were revoked by MOT Regulation No PM 24 of 2017 regarding the Revocation of Capital Requirement for Business Entities Engaging in Sea Transportation, Ship Agency, Stevedoring, and Port Management ("MOT Reg

24/2017"). Further, with the issuance of MOT Regulation No 64 of 2020 regarding the Revocation of MOT Reg 45/2015, the entire regulation was effectively revoked as of 1 September 2020.

In the absence of these industry-specific capital requirements, the minimum capital required for shipping companies in Indonesia now follows the applicable requirement for companies in general. For companies with entirely domestic investment, there is no minimum issued and paid-up capital, provided that the issued and paid-up capital is at least 25% of the company's authorised capital (as provided under Law No 40 of 2007 regarding Limited Liability Company and Government Regulation No 29 of 2016 regarding Change of Capital in Limited Liability Company). For companies with foreign investment (*penanaman modal asing*), the minimum issued and paid-up capital is IDR2.5 billion and there is a minimum investment value of more than IDR10 billion (as provided under Capital Investment Coordination Board (BKPM) Regulation No 1 of 2020 regarding Guidelines for the Implementation of Electronically Integrated Business Licensing Service). In practice, "investment value" is supervised by the BKPM based on the authorised capital of the company.

The removal of the minimum capital requirements significantly lowers the barrier to investment in Indonesia's maritime sector, which should allow more small and medium-sized companies to enter the market.

Utilisation of Foreign Vessels in Indonesia

The Omnibus Law adds a provision to the Shipping Law that foreign-flagged vessels may be used to conduct special activities in Indonesian waters (aside from carrying passengers and/or goods) if Indonesian-flagged vessels are "unavailable", defined in the elucidation as when Indonesian-flagged vessels are not available or sufficient. Further provisions regarding the use of foreign-flagged vessels as well as other changes to the Shipping Law are to be governed under a government regulation (*peraturan pemerintah*) that has not been issued as of this writing, which may or may not affect the contents of this piece.

Prior to the Omnibus Law, the utilisation of foreign vessels for special activities in Indonesian waters was regulated by ministerial regulation, the most recent of which was MOT Regulation No PM 92 of 2018 regarding Procedures and Requirements for the Granting of Foreign Vessel Utilization Approval for Activities Other than Domestic Carriage of Passengers and/or Goods as lastly amended by the MOT Regulation No PM 46 of 2019 ("MOT Reg 92/2018").

The MOT very recently issued a new MOT regulation that revokes MOT Reg 92/2018; ie, MOT Regulation No PM 2 of 2021 regarding Procedures and Requirements for the Granting of Foreign Vessel Utilization Approval for Activities Other than Domestic Carriage of Passengers and/or Goods ("MOT Reg 2/2021"). One of the biggest changes introduced by this new MOT regulation is that unlike prior MOT regulations where utilisation of foreign vessels was allowed until a certain "deadline" (eg, MOT Reg 92/2018 allowed utilisation of foreign vessels until the end of December 2020), there is no longer a deadline under MOT Reg 2/2021. Similar to MOT Reg 92/2018, MOT Reg 2/2021 provides an exhaustive list of the types of activities for which foreign vessels may be used, namely:

- oil and gas survey;
- drilling;
- offshore construction;
- offshore operational support;
- dredging;
- salvage and underwater works;
- electricity activities (done by power plant vessels); and
- terminal construction.

However, in the recently enacted Government Regulation No 31 of 2021 regarding the Administration of Shipping Affairs (2 February 2021) ("GR 31/2021") (which is the implementing regulation of the Omnibus Law in relation to the shipping sector), there does not appear to be any provision on the utilisation of foreign vessels for the above-mentioned activities.

Appointment of a General Agent for Foreign Shipping Companies

Currently, under Government Regulation No 20 of 2010 regarding Transportation on Waters, as amended by Government Regulation No 22 of 2011 ("GR 20/2010"), a foreign shipping company conducting shipping activities at a port or special terminal that is open for international trade is required to appoint a national shipping company or special sea transportation company to act as its general agent. This provision specifically requires that the agent be a shipping company and not merely a shipping agent. As such, foreign shipping companies will be required to partner with an existing Indonesian shipping company or set up a new shipping company. Please be advised that a shipping company in Indonesia is required to own a vessel with at least 175 gross tonnage for companies with entirely domestic investment, and 5,000 gross tonnage for companies with foreign investment.

GR 31/2021 revokes the relevant provision in GR 20/2010 discussed above. Due to this revocation, a foreign shipping company will be able to conduct shipping activities in Indonesia without having to appoint a national shipping company as a general agent. If required, the foreign shipping company may simply appoint (or establish) a shipping agency company, which is not required to own its own vessel. This would greatly

reduce the barrier faced by foreign shipping companies seeking to do business in Indonesia because it adds more options for Indonesian companies to act as agents. In addition, this also benefits Indonesian shipping agents because they are now no longer required to be a shipping company (owning a vessel) to serve foreign clients.

Centralisation of Licensing and Certification

One of the most significant changes to the Shipping Law under the Omnibus Law is the centralisation of the licensing and certification authority with the central government. This change is in line with the existing push by the government of Indonesia to centralise business licensing through the Online Single Submission (OSS) system, pursuant to Government Regulation No 24 of 2018 regarding Electronically Integrated Business Licensing Service ("GR 24/2018"), as well as MOT Regulation No PM 89 of 2018 regarding Norms, Standards, Procedures and Criteria for Electronically Integrated Business Licensing Service in the Sea Transportation Sector ("MOT Reg 89/2018").

Previously, licences/approvals related to the carriage of goods and port activities were issued by the MOT, and vessels operating in Indonesia were required to obtain various certifications related to safety, security and seaworthiness from multiple institutions, including the Sub-Directorate of Vessel Pollution Prevention and Safety Management (under the Directorate of Sea Transportation at the MOT), local port authorities and a classification agency appointed by the MOT. Under the Omnibus Law, these licences and certifications are now issued by the central government (or an institution appointed by the central government for certain certifications). Based on GR 24/2018, vessel certifications are now already issued by the central government through the OSS system. These certifications are known as the "Commercial/Operational License".

The centralisation of licensing and certification may minimise licensing costs (eg, the time and money spent on applications, meeting with officials, facilitation/application fees, renewals or extensions), which would benefit investors. However, it may take some time for these processes to be fully integrated under the OSS system.

Public and Legal Concerns

One of the biggest concerns with the overhaul of the shipping legal regime is that these changes could heavily favour large investors, especially foreign investors. Indonesians have a deep sentimental connection with the country's waters, which are a symbol of unity connecting the sprawling archipelago (hence the term "*tanah air*", which means "land and water"). Indonesia's shipping and maritime sector is one of the most heavily regulated in the country. As such, it is no surprise that the overhaul of the shipping industry has been met with criticism and warnings that local businesses will be unable to survive the expected surge of foreign investors. Perhaps the government's most pressing concern will be to balance the interests of local business against the need to accelerate growth and development by attracting more foreign investment.

Assuming the government of Indonesia is going to focus fully on development and growth, the authors note that there are still legal barriers to investment that are yet to be addressed. For example, MOT Regulation No PM 93 of 2013 regarding Administration and Operation of Sea Transportation, as amended by MOT Regulation No PM 74 of 2016 and partially revoked and replaced by MOT Reg 24/2017 ("MOT Reg 93/2013"), still requires a company with foreign investment engaging in the sea transportation business to own (leasing does not suffice) at least one vessel with 5,000 gross tonnage. This clearly adds an obstacle for foreign investors who wish to establish a sea transportation business in Indonesia, as not all sea transportation business requires a vessel of such tonnage. This requirement has not been revoked or amended by recent regulations.

Indonesia also still lacks the necessary regulation regarding ship arrest. The Shipping Law provides that a vessel may be arrested by way of a written court order if the vessel is involved in a criminal or civil case. With regard to a civil case, there are several "civil claims" that are deemed prioritised under Indonesian law (a list of which is provided in the Indonesian Civil Code). In the case of maritime claims, a written court order for arrest may be issued without initiating civil court proceedings. For completeness, "maritime claims" (some of them provided under the Indonesian Commercial Code) is defined as:

- claims involving loss or damage due to the operation of a ship;
- loss of life or fatal injuries due to the operation of a ship;
- damage to the environment, ship or cargo due to salvage work;
- damage or potential damage to the environment, coastline or other interests caused by a ship;
- costs for lifting, removal, repair or rescue related to the ship;
- costs for the use or operation of freight;
- cargo loss or damage;
- general average;
- towage costs;
- pilotage costs;
- bunkering;
- costs of repair, reconstruction or recondition;
- port, canal, dock, harbour, shipping lane fees;
- crew wages;
- financing or disbursements incurred for the interest of the ship;

- maritime insurance premium (including "mutual insurance call"); and
- commission, broker or agency fees; and
- several maritime dispute costs.

Further provisions on the procedures for vessel arrest at Indonesian ports are supposed to be provided by MOT regulation, but no such regulation has been implemented to date. If Indonesia really wants to increase its maritime activity, it should put in place a robust system for ship arrest, as the increase in vessel activity in Indonesia will likely be accompanied by a rise in disputes or claims related to maritime activities.

Sailing Forward

There has been a very consistent development in the regulatory framework for the Indonesian shipping sector. Recent key regulations are meant to remove barriers to foreign investment, while further regulations may be required to provide further clarity on how the shipping industry will be regulated in the future.

SSEK Legal Consultants is a leading shipping firm. The practice covers the full spectrum, from advising companies in the natural resources sector on Indonesia's cabotage rules to advising foreign cruise lines on their operations in Indonesia. SSEK is active in advising clients on complex cabotage issues in Indonesia. The team has handled numerous major port projects and its lawyers have advised some of the biggest port operators in the world. SSEK is active in representing both lenders and buyers in ship and rig leases. Founding partner Dyah Soewito is acknowledged for her mastery of Indonesian law, which benefits her numerous shipping clients. Stephen Igor Warokka, a junior partner, is a rising star in the shipping practice. Igor was the senior associate for many of the shipping matters handled by SSEK. His more recent experience includes representation of various foreign shipping companies in the acquisition and sale of vessels.

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The Admiralty Court in Israel applies the admiralty law and jurisdiction adopted by the English High Court of Admiralty in 1890, and consequently the Admiralty Courts Acts of 1840 and 1861 (legislation left over from the time of the British Mandate). However, this jurisdiction is naturally subject to subsequent local legislation.

The most important local law affecting the Admiralty Court's jurisdiction is the Shipping (Vessels) Law - 1960. This Law deals, inter alia, with:

- the registration of vessels;
- their transfer and devolution;
- liens;
- mortgages;
- loss of qualification;
- striking off the register;
- the effect of the registration of rights, nationality and flag;
- the name of the vessel.

The provisions that affect the jurisdiction of the Admiralty Court are laid out in Section 40, which provides for debts to be secured by a first lien (on the vessel, freight and accessories), and in Section 41, which lists the type of debts that can be secured and the order of priority of the liens.

The Shipping (Vessels) Law does not expressly refer to the position under the Admiralty Courts Acts, although it does retain existing legislation concerning the creation or transfer of a mortgage or charge upon a vessel.

It is accepted that the creation of these statutory liens also confers complementary jurisdiction in rem on the Admiralty Court.

1.2 Port State Control

The Israel Ministry of Transport has established the Shipping and Ports Administration (SPA) to regulate all activities relating to Israel's maritime activities.

The SPA is responsible for the safety of Israeli shipping, including:

- testing and registering large vessels and small craft;
- licensing foreign vessels;
- training, testing, and licensing maritime personnel and overseeing shipboard discipline;
- ensuring that vessels observe international standards for minimum crew strengths;
- supervision of the mechanical condition and safety of merchant marine vessels;
- developing and licensing harbours;
- the operation and maintenance of lighthouses along the coast;
- preventing marine pollution; and
- providing economic consultancy services to all bodies in the sector with a focus on establishing favourable conditions for the Israeli merchant marine.

Additionally, the SPA is responsible for maritime traffic, moorings and ports.

Port Regulations provide very detailed regulations relating to the conduct of vessels, safety, and order in the Israel ports. The State of Israel implemented the Port State Control (PSC) inspection system in 1997, in accordance with International Maritime Organization (IMO) and International Labour Organization (ILO) resolutions.

PSC inspections are conducted to ensure that foreign vessels calling at Israeli ports comply with international regulations and conventions. The SPA is responsible for all PSC activities, and aims to inspect each and every tanker and passenger ship arriving at Israeli ports, as well as 25% of the container ships and general cargo, with an emphasis on bulk carriers.

Specific documents must be filed in respect of each of the activities governed by the SPA, referred to above.

The SPA does not require periodic filings except in respect of certification following special surveys.

1.3 Domestic Legislation Applicable to Ship Registration

The principal law governing the registration of vessels in Israel is the Shipping (Vessels) Law – 1960. Other relevant legislation includes the Shipping (Registration & Marks) Law – 1962, the Shipping (Regulations of Building & Measurements) Law – 1961 and the Vessels (Mortgage & Transfer) Ordinance – 1948.

Under Israeli law, all Israeli vessels must be registered, using the same process without distinction as to the size or purpose of the vessel concerned. Nonetheless, in practice, small boats, namely, vessels less than seven metres in length, are exempted from registration in the registry and the details of the boat are maintained in a separate small boats' registry. Vessels under construction in Israel or abroad may also be registered in certain circumstances. Separate registries are kept for each port.

In accordance with the policy followed by the Registrar, the following types of vessels will not be approved for registration or change of use:

- boats of up to seven metres in length designed for private use, which are more than five years old;
- vessels of between seven metres and 24 metres in length, designed for private use, which are more than ten years old;
- boats of up to seven metres in length designed for commercial use and which are over three years old;
- vessels designed for commercial use that are over eight years old.

An exceptions committee is authorised to approve a vessel that does not meet the above criteria, provided that the vessel has been maintained in particularly good condition.

As noted, Israel limits registration under its flag based on the age of the vessel applying for registration. The goal of the regulations is to maintain the proper level of safety of vessels in Israel and prevent the importation of obsolete and unsafe vessels.

In addition, the Shipping (Foreign Vessel Under Control by Israeli Interests) Law – 2005, provides that any vessel that is not eligible for registration in the Register in accordance with the conditions specified above, but is controlled by Israeli interests (as these terms are defined in this Law) must be registered in Israel in a registry book, which is customarily referred to as the Secondary Register (or the Grey Register), regardless of its ownership registration in a foreign registry. A vessel so registered shall be subject to the technical supervision of the Israeli Ministry of Transport and to the manning regulations with respect to the employment of Israeli crew members. Nonetheless, various exemptions are available in respect of Israeli vessels, set out in Section 6 of the Shipping (Seamen) (Manning of Ships and Tugs with Israeli Crew) – 2016, for example, in circumstances relating to the area of trade of the ship or the security situation relating to the voyage of the vessel, circumstances concerning the chartering of the vessel or unusual circumstances concerning the technical operation of the vessel, or the owner's ability to control the vessel, and more.

Israeli law does not provide for bareboat-charter registration of foreign ships under the Israeli flag nor does it provide for the bareboat-charter registration of Israeli flag ships under a foreign flag.

1.4 Requirements for Ownership of Vessels

A vessel owned by the State of Israel, an Israeli citizen or a company registered in Israel or owned by a foreign company, where more than 50% of the shares in the vessel are owned by an Israeli citizen, must be registered in the Israeli vessel registry. Israeli law allows the registration in Israel of a vessel, less than 50% of which is Israeli-owned, upon a special application to the Minister of Transport. Similarly, where more than 50% of a vessel is Israeli-owned, the owner may apply to the Minister of Transport for permission not to register the vessel.

A non-Israeli may register an interest in an Israeli vessel, provided that this registration does not preclude the vessel from being registered as an Israeli vessel and, as noted, a foreign vessel controlled by Israeli interests must be registered in Israel.

Vessels under construction in Israel or abroad may also be registered in certain circumstances.

1.5 Temporary Registration of Vessels

Temporary registration of vessels is permissible in accordance with Section 16 of the Shipping (Vessels) Law – 1960 in respect of vessels located in foreign ports. The temporary registration is effective for six months but may be extended for up to one year. In all cases, the temporary registration lapses within seven days of the vessel first reaching an Israeli port.

Dual registration is not permitted, except in the case of foreign vessels controlled by Israeli interests. See **1.3 Domestic Legislation Applicable to Ship Registration**.

1.6 Registration of Mortgages

The process for registration of a mortgage before the Registrar of Vessels is a simple commercial financing procedure. The agreement, setting out the degree of the mortgage and conditions for repayment, must be drafted in writing and one copy thereof delivered to the Registrar, and entered into the vessel's file.

After co-ordinating an appropriate meeting, the mortgagor and mortgagee appear before the Registrar, with the original agreement or a "faithful copy" thereof, as attested to by the signature of a lawyer or an accountant on the copy of the agreement. Both parties must appear personally before the Registrar at the same time, complete a mortgage deed and sign it before the Registrar. This is after the Registrar has assigned a suitable mortgage number, which is subsequently recognised as the mortgage on the vessel (this number will appear on the mortgage deed and all other deeds relating to this mortgage). A party may appoint a representative to act on their behalf pursuant to a notarised power of attorney. If the vessel-owner is a company or corporation, the company or its representatives must also provide the Registrar with the minutes of the corporate management meeting, stating explicitly that a legal quorum of members has resolved to register the lien or mortgage in the Mortgage Register. The minutes must be duly attested to by a lawyer or accountant.

When both parties have signed the mortgage deed before the Registrar, the Registrar approves the deed and registers it in the Register on the page corresponding to the vessel in question.

The same procedure is followed when the owner of the vessel wishes to "increase the mortgage amount", "transfer the mortgage", "change the terms of the mortgage", or "delete the mortgage" from the Register of Vessels.

If a lien is imposed on a vessel by virtue of a competent court decision, and a written order is produced to the Registrar, the Registrar will record the court's order in the Register of Vessels, without being under an obligation to notify the vessel-owner that such an entry has been made.

Finally, it should be noted that, if the grantor of the mortgage (the mortgagor) is a company, the mortgage must also be registered as a charge with the Registrar of Companies.

All documents submitted to the Registrar may be drawn up in English or Hebrew.

1.7 Ship Ownership and Mortgages Registry

According to Section 109 of the Shipping (Vessels) Law – 1960, the Vessels Registry and all documents filed with the Registrar in connection with the registration, cancellation of registration or other transaction in connection with a vessel shall be open for inspection by any person. Additionally, under the Freedom of Information Law – 1999, every Israeli citizen or resident has the right to obtain information from a public authority in accordance with the provisions of the law. The public authority is not under any obligation to provide information that is a commercial or professional secret or which has economic value, information on commercial or professional matters connected with a person's business or information which may infringe a person's privacy.

In practice, the Registrar will provide access to all entries (registrations, mortgages, charges, pledges); however, access will not be provided to the underlying documents. The Registrar will respond by email with details of the information required.

The fee for an application to the SPA to inspect or verify any entry in the Registry of Vessels currently stands at ILS476.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Israel is a party to the following International Conventions relating to pollution:

- the International Convention for the Prevention of Pollution from Ships, 1973 as modified by Protocol, 1978 (MARPOL 73/78);
- Protocol to the International Convention on Civil Liability for Oil Pollution Damage, (CLC PROT 1992);
- Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND PROT 92);
- International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 as amended (OPRC 1990);
- Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 1995.

Local legislation relating to pollution includes:

- Prevention of Sea-Water Pollution by Oil Ordinance [New Version] -1980;
- Regulations for the Prevention of Sea-Water Pollution by Oil (Guarantee for Fine Payments and Cleaning Expenses) – 1983;
- Regulations for the Prevention of Sea-Water Pollution by Oil (Marine Environment Protection Fee), 1983.

The Prevention of Sea-Water Pollution by Oil Ordinance applies to Israeli territorial waters and inland waters and its provisions may be applied to non-Israeli vessels outside Israeli territorial waters which threaten to pollute Israeli territorial waters. The Ordinance specifies actions to be taken in the case of oil discharges and creates a Fund for the Prevention of Sea-Water Pollution with the goal of creating financial resources for the fight against and prevention of pollution of sea water and the seashore and for their cleansing and inspection. In cases of discharge of oil into the sea, the Minister of Transport may, by notice, request the owner of the vessel to take specified measures aimed at preventing, stopping or reducing the discharge. A "marine environment protection fee" may be imposed on owners or operators of vessels, as well as on owners or operators of installations on land or at sea from which oil might be discharged or allowed to escape into the sea. The remainder of the Ordinance and regulations promulgated thereunder set out offences, fines and penalties as well as legal and procedural matters, and indeed in recent years there have been cases where the Ministry of the Environment has enforced the Prevention

of Sea-Water Pollution by Oil regulations by bringing criminal charges against infringing owners.

With regard to wrecks, the Ports Ordinance – 1971 provides that the Israel Ports Company may demand that owners remove a vessel which has been lost or abandoned in Israeli waters where that vessel poses a danger to navigation or docking.

Further, the Wrecks and Salvage Fees Ordinance – 1926 provides that where any services are rendered wholly or in part within the waters of Israel in saving life from any vessel, or in assisting any vessel that is wrecked, stranded or in distress, or saving the cargo or apparel of that vessel, or any part thereof, there shall be payable to the salvor, by the owner of the vessel, cargo, apparel or wreck, a reasonable amount of salvage, to be determined in the case of dispute.

The Ordinance provides for determination of salvage disputes by arbitration. Section 20(3) of the Ordinance provides that the decision of the arbitrators shall, for the purposes of execution, have the effect of a judgment of the Magistrate's Court.

At the same time, where salvage is performed outside the waters of Israel, the applicable legislation is Section 6 of the Admiralty Court Act 1840 which provides the Admiralty Court with jurisdiction to decide all claims and demands whatsoever "in the nature of salvage for services rendered to any ship… whether such ship may have been within the body of a country or upon the high seas at the time when the services were rendered… in respect of which the claim was made", as well as Section 6 of the Admiralty Court Act 1861 which grants the Admiralty Court similar jurisdiction in respect of life salvage.

It should be noted that Israeli law has still not resolved the question whether the Admiralty Court possesses jurisdiction in the event of the salvage of life without the accompanying salvage of property.

Finally, the order of priority of the maritime lien for salvage including life salvage is determined by Section 41 of the Shipping (Vessels) Law – 1960, although it has been argued that the Court has discretion to deviate from the order proscribed in the section on grounds of equity.

2.2 International Conventions: Collision and Salvage

With regard to matters of salvage, see **2.1 International Conventions: Pollution and Wreck Removal**.

In terms of collision, Israel has ratified the International Regulations for Preventing Collisions as Sea, 1972 (COLREG 72) and incorporated them into Israeli law via the Ports (Preventing Collisions at Sea) Regulations 1972.

Israel is not a party to the Salvage Convention 1989.

Section 41(7) of the Shipping (Vessels) Law – 1960 creates a statutory lien for damages resulting from collisions or damage caused by the vessel to port installations, buildings and dry docks, as well as loss or damage to cargo and to passengers' personal effects.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The Israeli Shipping Law (Limitation on a Ship-Owner's Liability) – 1965 adopts the International Convention relating to the liability of Owners of Sea-Going Ships (Brussels, 10 October 1957).

As Israel has not ratified the LLMC 1976, no limitation is available for those claims introduced by the LLMC 1976 and not found in the 1957 Convention.

Accordingly, the types of claims subject to limitation of liability are those set out in Articles 1(a), 1(b) and 1(c) of the 1957 Convention.

- Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship.
- Loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible. Provided, however, that in regard to the act, neglect or default of this last class of person, the owner shall only be entitled to limit their liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers.
- Any obligation or liability imposed by any law relating to the removal of a wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned (including anything which may be on board such a ship) and any obligation or liability arising out of damage caused to harbour works, basins and navigable waterways.

The claims which are not subject to limitation of liability are as set out in Article 1(4) of the 1957 Convention, namely:

- claims for salvage or claims for contribution in general average; and
- claims by the Master, by members of the crew, by any servants of the owner on board the ship or by servants of the owner whose duties are connected with the ship, including the claims of their heirs, personal representatives or dependants, if under the law governing the contract of service between the owner and such servants the owner is not entitled to limit their liability in respect of such claims.

The Israel Shipping (Limitation on a Ship-Owner's Liability) (Amendment) Law – 1987, amended the 1965 Law referred to above by adopting the 1979 Protocol and replacing Gold Francs with Special Drawing Rights (SDR). Pursuant to the 1979 Protocol, the limitations of liability applicable in Israel are SDR 66.67 per tonne for cargo claims and SDR 206.67 per tonne for personal claims.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Owners can apply to the Admiralty Court to establish a Limitation Fund, calculated as set out in **2.3 1976 Convention on Limitation of Liability for Maritime Claims**. The Court will give orders as to the ship-owner's deposit and the manner in which notices will be published to creditors.

It should be noted that the Israeli courts accept the deposit of funds in Israeli currency, in a sum determined by the court. However, parties will often agree on the provision of local bank guarantees and, in some cases, foreign bank guarantees. Further, as the Isra Admiralty Court has accepted letters of undertaking issued by P&I Clubs as security for the release of vessels from arrest (in essence, in a manner similar to the position taken in the English case Atlantik Confidence [2014] 1 Lloyd's Rep. 586), it seems likely that they would follow the same approach and accept letters of undertaking issued by P&I Clubs in lieu of limitation funds.

Once a fund is constituted, claims by local creditors must be filed within 30 days, whereas foreign creditors are given 60 days to file their claims.

According to Section 9(a) of the Law, constitution of a fund creates a bar to other actions.

Finally, Section 9(a) of the 1987 Law provides that: "where the applicant has constituted a limitation fund in accordance with an authorisation under Section 7, the Court shall, on his application, direct a stay of all operations for the execution of a judgment against him as to a claim subject to limitation of liability, and the Court may direct a stay of all hearings, of a claim as aforesaid on which judgment has not yet been given if it considers that such should be done in order to ensure the just distribution of the fund constituted as aforesaid. Where the Court has directed a stay of execution proceedings or a stay of hearings the claim shall be deemed to have been filed under Section 13."

Section 13 of the Law refers to the filing of a claim against the fund.

3. Cargo Claims

3.1 Bills of Lading

Israel has adopted the Hague-Visby Rules by virtue of the Carriage of Goods by Sea Ordinance – 1926 as amended in 1992.

By virtue of the above Ordinance as amended in 1992, the Hague-Visby Rules apply to any bill of lading in respect of carriage of goods by sea in any vessel:

- from a port in Israel to another port, whether in Israel or outside of Israel;
- from a port in a country which is party to the Hague Rules or the Hague-Visby Rules, or when the bill of lading was issued in a country that is party to the Rules;
- when they apply to the contract of carriage included in the bill of lading or the bill serves as proof of its existence, according to a term stipulated in a contract or under the laws of the country the laws of which apply to that contract; and
- to a port in Israel, when the laws of Israel apply to such carriage whether according to the contract of carriage, according to another agreement between the parties, or according to the determination of the Court.

3.2 Title to Sue on a Bill of Lading

As a rule, the lawful holder of the bill of lading may bring suit under the bill of lading. There may be cases, however, where a party who is a named consignee under a non-negotiable bill of lading may have a cause of action against the maritime carrier, for example, the buyer of the cargo under a sale contract, who has not received by way of transfer or endorsement a right to assert a claim under the bill of lading.

It should be noted that, according to Article 8 of the Ordinance (and without derogating from Article I(b) and Article III part 4 of the Hague-Visby Rules and any other provisions of law), the party to whom the cargo was consigned (the consignee) and the party to whom the bill of lading was duly endorsed (the endorsee) are considered, as applicable, as a party to the bill of

lading, and as such are entitled to all the rights arising from the transaction pursuant to which the bill was made, and subject to the obligations referring to that transaction in exercising their aforementioned rights.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

The limitation of liability regime available to carriers is as set out in the Hague-Visby Rules, as amended by the 1979 Protocol, and where appropriate the provisions of the Israeli Shipping (Limitation on a Ship-owner's Liability) Law – 1965, as amended in 1987. See also **2.3 1976 Convention on Limitation of Liability for Maritime Claims** and **9.1 Other Jurisdiction-Specific Shipping and Maritime Issues**.

3.4 Misdeclaration of Cargo

In accordance with the Hague-Visby Rules, Article III(5), the shipper is deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by them, and the shipper is required to indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to this indemnity in no way limits the latter's responsibility and liability under the contract of carriage to any person other than the shipper.

It should be noted that, as part of the effort to deal with safety problems at sea and on shore arising from incorrect declarations of weight of containers, Israel has taken steps through its Port Regulations to ensure the reliability of weights of containers by scrutinising SOLAS VGM (Verified Gross Mass) declarations issued by shippers, as well as the weighing of all trucks entering the port.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

Israel has adopted the Hague-Visby Rules by virtue of the Carriage of Goods by Sea Ordinance 1926 as amended in 1992. In accordance with these Rules, the limitation period for filing a claim against a maritime carrier for damage/shortage of cargo is one year from the date of arrival of the cargo at its destination or from the date the cargo was due to reach its destination. This limitation period also applies to subrogation claims brought by insurance companies.

As noted, Israel has incorporated the Hague-Visby Rules into its law. In accordance with Article III 6 of the Rules, subject to paragraph 6 bis, the carrier and the vessel shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. According to Israeli case law, the time bar is not merely a procedural matter but a substantive right and therefore the limitation period may only be extended if the parties agree to this voluntarily.

It will be recalled that Article 6 bis. provides that an action for indemnity against a third person may be brought even after the expiry of a year if brought within the time allowed by the law of the court seized of the case; however, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against themselves.

In the Supreme Court case ALA 9444/00 Bellina Maritime S.A. Monrovia v Menorah Insurance Co Ltd, the Court held that a subrogated insurer cannot benefit from the provisions of Article III 6A of the Rules (namely, the provision which forms an exception to the short prescription period of one year set out in Article III6).

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Israel is not a party to either the 1952 or the 1999 Arrest Conventions.

For historical reasons, the jurisdiction of the Israeli Admiralty Court is equivalent to that applied by the English High Court of Admiralty in 1890. Similarly, the admiralty practice is that set out in the Vice-Admiralty Rules of 1883. In Israel, the District Court of Haifa sits as the Admiralty Court in in rem cases, although other competent civil courts have jurisdiction over in personam or commercial or civil disputes in accordance with the amount claimed and rules regarding place of domicile. Currently, claims below ILS2.5 million fall within the purview of the Magistrate's Courts, and higher claims are heard by the District Court. In the event that the Admiralty Court considers that it does not have jurisdiction to hear a case, it may decide to transfer the matter to another competent (civil) court. Appeal from the District Courts and the Admiralty Court lies to the Supreme Court of Israel.

4.2 Maritime Liens

The Shipping (Vessels) Law – 1960, Section 40 deals inter alia with debts to be secured by a first lien (on the vessel, freight and accessories). Section 41 lists the type of debts which are capable of being secured as a maritime lien and the order of priority amongst the liens.

The Law does not expressly refer to the position under the Admiralty Courts Acts, although it does retain existing legislation concerning the creation or transfer of a mortgage or charge upon a vessel. It is accepted that the creation of these statutory

liens also confers complementary jurisdiction in rem on the Admiralty Court, but the Court has not yet dealt with the issue of the ranking of priorities in the event of a conflict between the provisions of Section 41 of the Shipping (Vessels) Law and accepted principles of general admiralty law. In any event, Section 41 sets out the debts in the following order of priorities: expenses of judicial sale, pilotage and port fees, expenses of guarding and maintaining the vessel, Master and crew wages, salvage, personal injury, collision, necessaries.

It should be noted that, according to Section 53 of the Shipping (Vessels) Law – 1960, debts accumulated by a charterer are dealt with in the same way as those accumulated by an owner. More precisely, the section states: "The provisions of this chapter shall apply also to a vessel operated by a charterer or some other person who is not the owner thereof, unless he obtained the vessel unlawfully and the fact was known to the creditor". Consequently, it is arguable, pursuant to Section 53, that debts created by a charterer during the period of a charterparty will vest a maritime lien, or at minimum a statutory action in rem, against the vessel. However, this matter has not yet been decided by the highest instance in Israel.

With regard to foreign maritime liens, it should be noted that the Israeli Admiralty Court will look at the proper law of the claim in order to determine the validity of a lien.

4.3 Liability in Personam for Owners or Demise Charterers

The Admiralty Court has concurrent jurisdiction in rem and in personam. While there is no statutory requirement that owners be personally liable in order for a right in rem to arise, recent case law suggests that the Admiralty Court will not enforce a maritime lien in the absence of personal liability on the part of the owner (ALA 851/99 M/V Ellen Hudig (2004)). Similarly, in C.F. 45897-02-12 M/V Emmanuel Tomasos (2014) the actual bunker supplier's claim was denied on the ground that only the contractual supplier who had contracted with the owners could be a creditor under the necessaries lien. Likewise, in AF 24399-05-15 M/V Nissos Rodos (2016) it was held that the local agent who had been nominated by the operator of the vessel, and paid the port dues for the numerous calls of the vessel at Haifa Port, was not entitled to enforce a maritime lien for "port dues of any kind… paid by a third party" on the ground that the agent had no agreement with the owners and that therefore the owner was not personally liable to pay the agent.

Equally, in AF 22358-02-14 M/V Captain Harry (2016), a supplier's claim was dismissed due to a lack of owner's liability; nonetheless, the Admiralty Court noted that there were different types of maritime liens and that, for example, the maritime lien for salvage existed even if the owners were not liable for the circumstances leading to the salvage event. On appeal, the Supreme Court held that the claim for unpaid bunkers could not be heard on the merits due to the principle of res judicata (C.A. 7138/16 M/V Captain Harry (2018)).

4.4 Unpaid Bunkers

It should be noted that bunker supplies are regarded as necessaries both under Section 41(8) of the Shipping (Vessels) Law – 1961 and under Section 5 of the Admiralty Court Act 1861, and accordingly a bunker supplier may arrest the vessel in the event of breach of contract to pay for the bunkers. Nonetheless, according to the judgment handed down in C.F. 45897-02-12 O.W. Bunker Malta Ltd. v M/V Emmanuel Tomasos (referred to in **4.3 Liability in Personam for Owners or Demise Charterers**), the lien, and consequently the right of arrest, is limited to the party which directly entered into the supply agreement with the vessel and does not follow into the hands of sub-contractors who supplied the fuel.

The rationale behind the distinction between the supplier of the goods and sub-contractors is that the supplier has collateral to secure the payment for the goods, namely the vessel itself. Under this construction, the vessel may proceed with its regular voyage, while the supplier need not wait for other collateral, thereby delaying and interfering with the operation of the vessel. By comparison, the sub-contractor (namely, the physical supplier) does not have a direct arrangement with the vessel, and will receive their payment from the party ordering the goods and not the vessel, its owners or crew. The grant of security over the vessel to a sub-contractor is not required in order to secure the mobility of the vessel. The court also noted that the recognition of the right of each one in the chain of sub-contractor suppliers to realise a maritime lien would probably lead to the situation whereby the vessel would be required to pay a number of entities for the same supplies, contrary to the vessel's expectation that it would have to pay one supplier the agreed consideration for these supplies.

4.5 Arresting a Vessel

A claimant seeking to arrest a vessel will usually file an ex parte application supported by an affidavit and supplement it with a claim in rem before the court, asking for the arrest of the vessel as security for their claim. The grounds for arrest must satisfy the provisions of the Admiralty Courts Acts. Once the court is persuaded that there is a cause of action and that the damage caused to the applicant by not granting the warrant of arrest would be greater than the damage caused to the defendant by the grant of the order, it will issue a warrant of arrest, which will be valid for six months. To become effective, the warrant of arrest is served on the Master, the Port Authority and the Border Police. Usually, service is effected by electronic means.

A ship-owner anticipating this process may file a caveat against arrest undertaking to provide security in lieu of arrest.

There is a court fee, equal to 2.5% of the amount being sought, for filing the claim. Of this, 1.25% is payable upon filing the claim in rem or the application for arrest, whichever is earlier, and 1.25% is payable seven days before the first evidentiary hearing.

Hearings in the Admiralty Court are conducted in accordance with the rules of procedure set out in the Vice-Admiralty Rules 1883 which relate inter alia to service, appearances, filing preliminary acts in collision cases, preliminary proceedings, caveats, the trial and execution of judgments and the duties of the Marshal; nonetheless, insofar as these Rules fail to deal with an issue, it is dealt with in accordance with the Israeli Rules of Civil Procedure. Parties exchange pleadings, discovery of documents and engage in evidentiary hearings in the usual way.

In accordance with rules of procedure and Supreme Court precedent, particularly C.A. 168/93 and ALA 201/93 Fullwood Marinated Inc v Lofobunker Co S.A. (The "Arctic Hunter") and, except in exceptional cases, claimants in admiralty proceedings seeking the arrest of a vessel will not be required to put up any security for the arrest. According to the aforementioned case, an exceptional circumstance might be if the application for a warrant of arrest is based on documents the veracity of which is doubtful. Nonetheless, the court will take into account the property rights of the ship-owner, if appropriate, in accordance with Section 3 of Basic Law: Human Dignity and Liberty and the need to balance these fundamental rights against the claimant's right to an ex parte order of arrest, and where necessary do so by ordering counter-security in favour of the ship-owner.

4.6 Arresting Bunkers and Freight

According to Section 10 of the Vice Admiralty Rules 1883, a writ in rem may be served upon cargo, freight or other property if the cargo or other property is on board a ship. Conceivably, an issue of title would arise in the event of an attempt to arrest unpaid bunkers.

4.7 Sister-Ship Arrest

Israel does not recognise the right of a plaintiff to arrest a vessel which is not directly connected with the cause of action, ie, claims against sister-ships or associated vessels (although any such vessels may be attached within the framework of in personam proceedings in the civil courts) as previously described.

This was confirmed in the AF 6731-02-17 M/V Huriye Ana (2017), where the Admiralty Court held that it had no jurisdiction to order a "sister-ship arrest".

Nonetheless, within the context of a civil suit against the ship-owner as opposed to admiralty proceedings, and subject to strong evidence, the court could order the "corporate veil" to be lifted and consequently the attachment of sister ships or vessels owned by affiliated companies; it should be noted that attachment orders in civil proceedings are comparable to arrest orders, except in so far as concerns collateral security.

4.8 Other Ways of Obtaining Attachment Orders

In contrast to the in rem proceedings described in **4.5 Arresting a Vessel**, a vessel or other asset may be attached in ordinary civil proceedings. In such cases, claimants are required to provide a Letter of Undertaking on their own behalf, as well as a Third-Party LOU to reimburse the defendant should the temporary application be set aside and/or the claim be dismissed on the merits, causing the defendant to incur a loss. The court may exempt the claimant from providing a Third-Party LOU if it deems it just and proper to do so.

4.9 Releasing an Arrested Vessel

An owner or interested party may produce a P&I Club LOU as acceptable security in lieu of arrest. Similarly, an Israeli bank guarantee is acceptable security, as is the deposit of the claimed amount in the court treasury.

4.10 Procedure for the Judicial Sale of Arrested Ships

Once a vessel has been arrested in accordance with the rules and judgment has been entered in rem against the vessel and/or ship-owner, the court, usually at the request of the claimant, will examine whether the ship-owner is able to pay the sum awarded. In the event that it concludes that they are incapable of paying this sum, the court will order the sale of the vessel.

It should be noted that there have been cases, particularly where the vessel is deteriorating in value, guarantees have not been produced in lieu of arrest, or crew and suppliers have not been paid, where the court at the request of a claimant will order the appointment of a receiver in order to preserve the vessel, her crew and cargo. Normally, this process will shortly afterwards be followed by an order of sale with or without judgment in favour of the claimant. In rare cases, the court has ordered that a vessel be sold by private contract. In all these cases, the sale proceeds will serve as substitute security for the claim, pending judgment on the claim in rem and subsequently subject to an order as to priorities in accordance with Section 41 of the Shipping (Vessels) Law – 1960.

All of the maritime liens set out in Section 41 (except "necessaries") rank higher in terms of priority than the statutory right in rem granted by a mortgage.

4.11 Insolvency Laws Applied by Maritime Courts

As a matter of Israeli practice, a ship-owning or other company must settle its business, file suits, etc, while it retains its legal personality. Usually, all business is taken care of prior to or during the process of dissolution of the company and not after it has ceased to exist.

In Israel, the principal law governing the rehabilitation of companies is the Insolvency and Rehabilitation Law – 2018. This law creates a mechanism known as "protective negotiations", allowing a company to initiate out-of-court protective negotiations with its creditors while allowing it to remain active and avoid the appointment of a trustee. During this period of protective negotiations, a complete stay does not apply, but at the same time creditors may not initiate insolvency proceedings nor may they call for the complete repayment of the debt.

The Admiralty Court in Israel has not yet had occasion to deal with the issue of arrest and judicial sale under the new law, which came into effect in September 2019; however, it is likely that if a stay of proceedings is ordered in liquidation proceedings the Admiralty Court will not order the sale of a vessel which forms part of the assets of an insolvent party.

The Law prescribes a designated track for the recognition of foreign insolvency proceedings, and presumably this will also apply to the Admiralty Court. Yet, despite the insolvency proceedings, the position may be different in respect of arrests initiated for the purpose of obtaining good security in connection with cargo damage claims while the ship is entered in a P&I Club.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

There is no decisive authority in the Admiralty Court regarding damages for wrongful arrest. A party seeking an interim remedy (such as an attachment) may potentially be liable in tort if they have acted unreasonably or maliciously (C.A. 732/80 Arens v Bait-El, where the Supreme Court discussed the applicant's duty to present the Court with the full factual basis).

Alternatively, if the Admiralty Court has required a guarantee to be put up at the time of arrest, that could be forfeit in the appropriate circumstances.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

Israel is not a party to the Athens Convention relating to Carriage of Passengers and their Luggage by Sea. Accordingly, it seems likely that in passenger claims brought in Israel the courts would apply Section 5 of the Prescription Law – 1958, which sets a limitation period of seven years for non-land disputes. It is possible to stipulate a limitation period in a contract, albeit such a stipulation would be open to scrutiny as a potentially unfair restrictive clause.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

The Israeli courts give full effect to choice of law clauses contained in any contract, including contracts of carriage and bills of lading. Where the case is conducted in Israel, foreign law is considered a matter of fact, which must be proved in the usual way, generally through expert testimony.

With regard to jurisdiction clauses, the Israeli Courts will give effect to exclusive jurisdiction clauses, even where the action sought to be stayed is in rem. In the case of C.A. 8205/16 M/V "Thor Horizon", the Supreme Court held that a foreign jurisdiction clause contained in a bill of lading issued by a sub-charterer could apply to a claim in rem against the vessel for damage to goods. The Supreme Court emphasised that seizure of the vessel in Israel alone, without further links to the country, would not be sufficient to determine that Israel is the convenient forum in the face of a foreign jurisdiction clause. Further, the fact that the damage to the goods was discovered upon the arrival of the vessel in Israel was not, on its own, sufficient to weigh against a stay of proceedings in Israel. Nonetheless, in that case, prescription in the foreign forum meant that in the particular circumstances, the convenient forum for hearing the case was in fact Israel.

In another case, ALA 1785/15 Cosco Container Lines Co Ltd v Alison Transport Inc, the Supreme Court upheld the District Court decision that a consideration against an argument that Israel was not a forum non conveniens was that suit was being brought against the carrier, shipper and other parties, and it was important for all the disputes to be heard in a single forum. In that case, the dispute would in any event have been heard in Israel against three of the parties, and it would not be appropriate for policy reasons to stay the action in respect of the fourth party. Other links between the suit and Israel included the facts that the damage was caused to an Israeli company, the destination of the cargo was Haifa port, and the contract signed in Israel was a principal element in the chain of events leading to the flawed carriage of goods. Moreover, the defendant international forwarder seeking a stay could or should have anticipated that it would be subject to a suit in the country of destination of the cargo which it had handled.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

In the event of a foreign arbitration clause, Section 6 of the Israeli Arbitration Law – 1968 provides that when an action is brought before a court in a dispute in which it had been agreed to refer to arbitration, and if an international convention to which Israel is a party applies to the arbitration and that convention lays down provisions for a stay of proceedings, the court will exercise its power under Section 5 in accordance with and subject to those provisions.

This is also true where the arbitration clause is in a charterparty incorporated into the relevant bill of lading, subject always to the true construction of the relevant arbitration clause (ALA 1917/19 M/V Chem Antares (2019)).

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Israel is a party to the 1958 New York Convention on the Enforcement and Ratification of Foreign Arbitral Awards which provides for the stay of judicial proceedings in the case of a foreign arbitration agreement, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Section 29 of the Israeli Arbitration Law – 1968 provides that matters regarding enforcement or cancellation of an arbitration award governed by an international convention to which Israel is a party will be dealt with according to the provisions of that convention. As a result, a court considering the ratification of a foreign arbitral award would give consideration to such matters as whether the subject-matter is capable of arbitration according to the laws of Israel and whether recognition and enforcement of the award is consistent with Israeli public policy.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

The Admiralty Court has jurisdiction to order the attachment of a vessel as security for foreign judicial or arbitral proceedings, upon provision of prima facie evidence that the ship-owner will not be in a position to satisfy a judgment or arbitral award. Moreover, interim relief in the form of ship arrest or temporary attachment may be obtained before the foreign arbitration proceedings have been initiated (C.A. 102/88 Silver Goose Delicatessen Ltd v Cent or S.A.R.L).

6.5 Domestic Arbitration Institutes

There are a number of expert maritime lawyers and retired judges who specialise in handling maritime arbitrations.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

A defendant facing proceedings in breach of an exclusive foreign jurisdiction or arbitration clause may ask for a stay of the proceedings until judgment is rendered by a competent foreign tribunal.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Israeli shipping companies are subject to the same corporate tax regimes as other companies in Israel, and are not subject to any special regulation or legislation. Incentives are, however, provided to shipping companies in terms of amortisation, and seafarers are provided with incentives in terms of income tax deductions.

Likewise, the accounting procedure used by Israeli shipping companies is the same as that used by companies engaged in all other business in Israel. Moreover, the Israeli Companies Law – 1999, which governs matters related to bearer and nominative shares, draws no distinction between shipping companies and any other company registered or operating in Israel.

In terms of reform, it should be noted that in 2018, the Income Tax (Taxation of Income from Vessel Activity by Tonnage) – 2018 was published.

This Government Bill proposed to establish provisions regarding the calculation of the taxable income of Israeli shipping companies engaged in the international carriage of goods, in accordance with the "tonnage tax" method, namely, the calculation of the company's taxable income according to the tonnage of the vessel being operated. The explanatory notes of the bill explain that this reform is vital to safeguard and encourage Israeli shipping companies and their international competitiveness. The tonnage tax benefit is designed to be applied to companies where at least 80% of their revenues are derived from eligible activity. Eligible activity is defined as either operating an eligible vessel or chartering an eligible vessel otherwise than under a bareboat charterparty. The eligible activity refers to carriage of goods port to port outside Israel, in view of the fact that the benefit is intended to encourage international shipping, and the desire not to create a preference for coastal shipping in Israel over transport of goods by land.

This Bill has not yet been enacted.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

From time to time, the Israeli Ministry of Health issues guidelines for crew members on cargo vessels visiting Israeli ports, in order to prevent the spread of the coronavirus. These regulations inter alia prevent crew from leaving the vessel; various medical data regarding crew must be provided by the captain of the vessel to the Marine Traffic Control Room and contact persons are assigned to liaise between the port and the vessel.

8.2 Force Majeure and Frustration in Relation to COVID-19

Both domestic and international contracts often include *force majeure* clauses, which in the current climate often specifically refer to the COVID-19 pandemic. Such clauses will be recognised by the Israeli courts and provide a good defence/exclusion to any breach of contract.

Nonetheless, contracts entered into after the breakout of the COVID-19 pandemic are unlikely to be viewed as frustrating events, unless the loss is the result of events which were not foreseen.

In the absence of an express *force majeure* clause, the courts will consider the application of Section 18 of the Israeli Contracts (Remedies for Breach of Contracts) Law – 1970, which provides that the performance of a contract is frustrated due to events which the breaching party did not foresee and could not have foreseen when entering into the contract, the circumstances could not have been prevented by the breaching party and performance is impossible or fundamentally different from that intended by the parties. In the event of frustration as aforesaid, the contract may be terminated by the non-breaching party; the contract will not be enforced but neither will damages be awarded to the non-breaching party. The Israeli court may order restitution as well as payment of reasonable expenses.

The Israeli courts have recognised events occurring abroad, for example flight restrictions following the events of 9/11, as capable of frustrating performance of an Israeli contract.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

In Israel, cabotage is regulated by the Coastal Shipping (Permit to Foreign Vessel) Law – 2005, and the regulations promulgated thereunder in 2012 regarding applications for permits.

Section 1 of the Law defines coastal shipping broadly and includes carriage of goods and passengers originating from and destined for a port, vessel, facility or structure located in coastal or internal waters of Israel, without calling on a foreign port, excluding the carriage of empty containers or empty tows used by the ship-owner to carry goods.

The law provides for permits to engage in cabotage, including the requirement for a permit to perform any other operation in such waters, excluding fishing, oil and natural gas drilling and production, placing of pipes for conducting oil or natural gas on or under the sea bed. In so far as concerns the contiguous zone, the placing of cables or pipes on or under the sea bed is also excluded.

The policy considerations guiding the grant of a permit are:

- promoting coastal shipping by Israeli vessels;
- maintaining proper levels of ship and crew safety and preventing marine pollution;
- ensuring Israel's compliance with international maritime treaties;
- ensuring payment of compensation by ship-owners for damage caused by coastal shipping, including third-party damage, environmental damage and damage as a result of sinking;
- preserving state security and ensuring public order.

The Coastal Shipping Regulations 2012 provide for the process of applying for a permit, technical preconditions, the number of crew members, crew qualifications and terms of the permit. According to Section 13 of the Regulations, where a foreign coastal vessel has received a cabotage permit, it must employ as a minimum two Israeli crew members and, where officers are employed on board the vessel, at least one must be an Israeli national.

It should be noted that, in practice, foreign vessels are permitted to operate in Israeli coastal waters under a 30-day temporary permit. The vessel will be subject to testing by the Chief Marine Engineer of the SPA prior to being given a full permit.

Finally, in order to resolve problems concerning the carriage of containers between Israeli ports, in December 2014 the Minister of Transportation and Infrastructure published the Coastal Shipping (Permit to Foreign Vessel) (Exemption from the Provisions of the Law) Regulations – 2014. The new Regulations provide that most of the provisions and requirements contained in the original 2012 Regulations shall be excluded and will not apply to a foreign container vessel carrying containers between Israeli ports on an exceptional basis (ie, where the vessel is not employed in a regular published liner service between Israeli ports).

While the Coastal Shipping Law does not expressly define the relevant coastal area, it seems likely that the regulations would apply to Israel's territorial waters (12 nautical miles), contiguous zone (24 nautical miles) and, arguably, the exclusive economic zone (200 nautical miles).

The fee currently due for a foreign vessel cabotage permit is ILS578 upon submitting the application and ILS3,384 for a ship or ILS2,075 for a vessel which is not a ship, payable upon submission of the technical documents to the Chief Marine Engineer of the SPA.

Finally, a recent important development in Israel concerns marine insurance. Thus, in ALA 8588/19 Haifa Port Co Ltd v Certasig Insurance and Reinsurance Co Ltd. (2020) the Supreme Court of Israel decided that Section 62 of the Insurance Contract Law – 1981 applies to marine insurers, whether foreign or Israeli (as opposed to foreign insurers in non-marine insurance cases) and accordingly they have the right of subrogation under that section. The Court further held that classification of a matter as a "peril of the sea", including within the framework of the aforementioned law, would be performed in accordance with the type of risks to be covered by the policy, without reference to local or international characteristics. In the case at hand, relating to collision between vessels, a marine risk was clearly involved and therefore the insurer, which was a foreign insurer, would be regarded as a "marine insurer" subject to the provisions of Section 62 of the Law and therefore entitled to bring a subrogation action in Israel. It should be noted that, prior to this judgment, it was thought that an "insurer" under the Law meant an insurer who was licensed under the Supervision of Financial Services (Insurance) Law – 1981, and therefore excluded a foreign insurer C.A. (8044/15 VIG v The Sharon Drainage Authority).

J.SPRINZAK Maritime Law Firm was founded in 2003 and is located in the centre of Tel Aviv, with offices in one of the most prestigious buildings in the city. The firm enjoys strong contacts throughout the shipping sector and has gained a strong international reputation in the specialised fields of shipping and maritime law, international transport, insurance, international trade and related matters. In particular, the firm deals with and has broad experience in the following areas: admiralty/in rem actions, cargo claims (recovery and defence), charterparty contracts and disputes, coastal shipping, contracts of affreightment, dangerous-goods transportation, general average, marine insurance and policy drafting, maritime liens, necessaries, pilotage, pollution, port operations, property damages and personal injury arising from commercial or small vessel operations, protection and indemnity risks, receivership, sale and purchase of vessels, salvage, ship arrest and detention, ship collisions, ship equipment and supplies, ship finance including mortgages, ship registration in Israel and abroad, ship repairs, ship-building, towage contracts and liabilities, notarial services in relation to all the above.

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Joseph Sprinzak founded the firm in 2003 and is a specialist in the fields of shipping, multi-modal transport, marine insurance and aviation law. Joseph has wide experience in both commercial and litigation aspects of those fields. He has wide experience litigating in all types of marine and shore-based disputes involving personal injury, charterparty disputes, insurance coverage issues, collisions, salvage, general average and cargo disputes, for a variety of corporations, ship-owners, time-charterers, port agents, freight-forwarders, ports, terminals, liability insurers, P&I clubs, cargo interests and their insurers, bunker suppliers, shipyards, etc. Joseph appears regularly before all courts countrywide and has been involved in some landmark decisions. He has participated in court litigation and arbitrations outside Israel in the United States, England, Greece and Italy and has accepted instructions from overseas clients on many occasions. Joseph's expertise covers most aspects of commercial shipping, with particular emphasis on sale and purchase, new-building contracts, ship finance and the evolving coastal shipping trade in Israel. He is a member of the Israeli Bar and the Israel Maritime Law Association.

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Trends and Developments

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The Haifa Maritime Court

Located at the strategic meeting point between Europe, Asia and Africa, and governing the ports of Haifa, Ashdod and Eilat, the Haifa Maritime Court is an honourable and efficient jurisdiction in order to effect maritime liens and litigate maritime in rem claims, and other marine matters.

The Court will decide on claims and arrest applications also filed by entities incorporated in countries which do not have formal full diplomatic relations with Israel. Bunker suppliers, for example, incorporated at one of the Persian Gulf countries can recover from a non-paying vessel being bunkered elsewhere in the world when calling at Haifa or any Israeli Port.

The Court's historical roots and traditions have resulted in two sets of rules governing its authority and made it one of the rare courts authorised to act as a prize court.

In the following, we will look at the Haifa Maritime Court's historical rules and modern-day powers, as well as its position on owners' liability in constituting a maritime lien.

Two sets of rules governing the Maritime Court's authority

Israeli Maritime Law is in fact a legacy of the British Mandate for Palestine, which was officially valid from 1923 to 1948. By a King's Order-in-Council dated 2 February 1937, the Supreme Court of Jerusalem was constituted as a Maritime Court under the Colonial Courts of Admiralty Act, 1890 (the Colonial Act). On the date the Colonial Act was enacted, the relevant acts of admiralty in force were the Admiralty Court Acts of 1840 and 1861. Accordingly, these continue to apply to the Israeli Haifa Maritime Court's jurisdiction to this day.

Following the termination of the British Mandate and the establishment of the State of Israel in 1948, Israel enacted the Admiralty Court Act in 1952. This is merely an administrative act transferring all the authorities of the Supreme Court of Jerusalem (to act as a Maritime Court) to the Haifa District Court, which has acted as a Maritime Court ever since.

The act also states that, when deciding on an appeal on judgments of the (now established) Haifa Maritime Court, the Supreme Court will have (in addition to its authority as an appeal court) all the authority of the Maritime Court. The act does not, however, deal with the jurisdiction and the authority of the court itself.

When enacting the Israeli Shipping Act of 1960, the Israeli legislature included specific chapters on mortgages and liens adopting the continental lien regime of the Brussels Convention of 1926, preferring this regime to that of English law.

The result was that the Israeli Maritime Court (which is the Haifa District Court) has two non-identical sets of rules related to maritime liens. To add to this ambiguity, there were relatively few cases dealt with by the Supreme Court (in appeals from the Maritime Court's judgments). Accordingly, besides a correspondingly low number of Supreme Court judgments relating to the basic principles, there were no Supreme Court precedents covering all aspects of maritime liens.

A maritime lien is a substantive right

In this regard, the main Supreme Court judgment relating to maritime liens is that rendered in the matter of MV Nadia S. The Court held that a maritime lien is a substantive right rather than a procedural right (and in this regard diverged from the majority opinion in the English judgment in the matter of the Halcyon Isle) attaching to the ship and following the res into the hands of third parties, and is determined according to the lex causae.

This judgment was rendered on 5 July 1990, after more than 28 years, during which time, and until recently, the Supreme Court has dealt with barely one or two matters relating to maritime liens.

Accordingly, Israeli maritime law has developed on an empirical basis in judgments rendered by the Maritime Court. These judgments have the status of District Court judgments and are considered to be persuasive, but do not constitute binding precedents.

Lately, however, given the fact that the Maritime Court has rendered judgments in matters not previously dealt with, and due to Supreme Court appeals, Israeli maritime law is heading towards greater certainty.

Only the contractual supplier is recognised as a necessary lien

The first in this line of judgments is the matter of MV Emmanuel Tomasus (2012), where it was held that only the contractual supplier was entitled to a maritime lien for the supply of necessaries, so the actual physical supplier was not entitled to recover its debt from the arrest and sale of the supplied vessel.

The claimants filed an appeal before the Supreme Court, but withdrew the appeal at the hearing after the Court advised that it did not intend to intervene in the Maritime Court's judgment.

Charges paid at foreign ports also constitute the lien for general port charges

In the matter of MV Mirage 1, the Haifa Maritime Court held that the lien for "general port charges" included port charges paid by the agent (for the vessel) at a foreign port.

Cargo claims and underwriters

Under the Order of Carriage of Goods In Sea, as amended in 1992, Israeli law has adopted the Hague-Visby Rules, which will apply to any Bill of Lading (B/L) which governs the sea carriage of cargo either from any Israeli port or from any port of a country which is a party to either the Hague or the Hague-Visby Rules.

In a Supreme Court judgment in the matter of civil appeal 7779/09 HDI vs Orl, it was held that the quantities stated in the B/L are prima facia evidence, not only towards the owner but also towards the underwriter insuring the cargo in marine insurance. In a Supreme Court's decision in civil appeal 7195/18 Fhya vs Millobar (2018) it was held that if a claim filed within one year after the discharge of the cargo was filed by a claimant which had no title to sue, the one-year time limit (of Article III (6) of the Hague-Visby Rules) will not be "cut" and a later amendment of the claim (after one year) by adding an additional claimant with title to sue will not be allowed (due to the time-bar).

In a Supreme Court's decision in Appeal No 8518/19, the Supreme Court affirmed the decision handed by the Haifa Maritime Judge, the honourable R. Sokol, in Civil Claim 35583-11-18 relating to the MV Chrysopigi, that a foreign marine insurer has title to sue under the insurer rights which have been subrogated to him or her, even if the foreign insurer is not listed in the Israeli Insurance Supervisor's list as an insurer active in Israel and subject to the Supervisor's supervision. Under this decision, the court has given effect to the Israeli legislator's wording and meaning when excluding the marine insurance from supervision and other liabilities according to the Insurance Agreement Act of 1982. In the matter of Civil Claim 31521-01-20, the Haifa District Court further ordered that the act of subrogation does not relate to the manner in which an insurer handles its insurance agreements and therefore the act of subrogation should not be subject to local regulations and supervisions on the local insurers. Therefore, also in this matter, it was decided that a foreign marine insurer can use its subrogation rights and file a claim for damages even if not registered as an Israeli or foreign insurer in Israel.

Sister-ship arrests

In the matter of MV Huriye Ana (2017), the Maritime Court held that Israeli law did not allow for a sister-ship arrest, as no such authority is mentioned either in the Admiralty Acts of 1840 and 1861 or in the Israeli Shipping Act of 1960. Furthermore, Israel is not a signatory party to any of the conventions allowing such an arrest (for example, the Brussels Convention 1952 and the Geneva Convention 1999). Until this judgment was rendered in May 2017, the Haifa Maritime Court did order sister-ship arrests, accepting an arrest application filed ex parte, and even ordered the arrest of MV Huriye Ana itself. Those matters were settled, however, and before the 2017 case no Maritime Court judgment was reached.

The requirement for owners' liability

The maritime lien "springs into existence the moment the circumstances give birth to it" and like an unseen demon "attaches itself to the res and subtracts from the Owner's property in the vessel". Owners and other creditors may assume it lies somewhere holding its quiet possession of the vessel, but they will not see it until it appears in a claim in rem carried into effect in a legal process.

The question of whether the maritime lien requires an owner's personal liability seems to be viewed differently by European civil admiralty law (rooted in Rhodian Sea Law, Roles (Rules) of Oleron, Consolato del Mare Laws of Visby and the Ordonnance de La Marine of 1861) and by English common law, which imported the concept of maritime lien through the Doctors' Commons.

It seems that, while under English law "a proper maritime lien must have its root in personal liability of the owner" (The Castlegate (1893)), no such requirement appears in the European maritime lien regime, at least according to the Brussels Convention of 1926, which was adopted by the Israeli legislature when enacting the Israeli Shipping Act of 1960.

In MV Ellen Hudig (2004), the Haifa Maritime Court denied a maritime lien for "indemnities for loss of or damage to the cargo or baggage". This was because alleged damages to the cargo (which were additional expenses related to its discharge from the arrested vessel in Haifa and additional freight paid to another vessel to complete its intended voyage to Singapore) resulted from the vessel's arrest due to a claim filed by the crew for unpaid wages and the owners' subsequent appearance before a Belgian court under bankruptcy proceedings within the following ten days, and therefore (according to the court's view) did not fall under the owners' personal liability.

Ever since, the Ellen Hudig matter has been cited by the Haifa Maritime Court as an authority establishing the need to show owners' liability in order to recognise a maritime lien.

Accordingly, in the matter of MV Nissos Rodos (2016) the Maritime Court cited MV Ellen Hudig, in so far as the local ship agent was not entitled to a maritime lien for port dues paid by the agent for the vessel. It was reasoned that the agent had no agreement with the owner, there was no personal liability on behalf of the owner to pay the agent and, due to the fact that a maritime lien requires personal liability on behalf of the owner, the agent had no maritime lien. The appeal filed by the agent before the Supreme Court was withdrawn after the court advised that it did not intend to intervene in the Haifa Maritime Court's judgment.

In the matter of MV Captain Hurry (2016), the Haifa Maritime Court dismissed a bunker supplier's claim due to res judicata. The owners had filed a declaratory claim before a German court, seeking a declaration that they were not liable to pay the supplier and that the supplier did not have a maritime lien, which was successful.

The supplier's arguments before the Haifa Maritime Court were that the proceedings concerned the enforcement of a maritime lien and, as such, did not require an owner's personal liability. The Haifa Maritime Court examined the German judgment and, after being convinced that the court held that no liability was imposed on the owners towards the bunker supplier and that all contractual relations took place between the bunker supplier and the charterer only, dismissed the claim.

In MV Captain Hurry, however, the Haifa Maritime Court also mentioned that the maritime liens differed from each other, whereby some were intended to secure voluntarily liabilities and others to secure liabilities under law. For example, the court added, it was obvious that a lien for salvage existed even if the owner was not liable for the circumstances that led the vessel to distress. How will these findings affect further court cases dealing with maritime liens and owners' liabilities? Answers will be provided in future judgments.

Registration

In the matter of M/V Badr (2020) the Haifa Maritime Court held, under a decision accepting an application for an immediate relief for an attachment at the Israeli registration, that a vessel registered under a foreign registration cannot be registered under the Israeli registration unless properly deleted from its former registration, even if a new ownership arises from a writ of ownership issued by an Authority. The matter itself is scheduled for trial where the owners of the vessel's claim for the deletion of the registration of the vessel, which was registered in Israel, at the request of a buyer of the vessel who argues he had bought it from its alleged new owners according to a "writ of ownership" issued in Bulgaria and which is contested before the Bulgarian courts.

Mortgage

In the matter of Vapi Kredi Banaksi vs M/V Hurriye Ana (2020), the Haifa Maritime Court denied a bank's claim to enforce a mortgage which was written in the vessel's registration. The Court held that the validity of the loan agreement was not proven and that no information was provided in relation to the payment schedule agreed with the debtor (which was not the owners) and what was the exact amount of debt that remained. The fact that a mortgage is written in the vessel's registration is not enough to have it enforced.

The Authority to Act as a Prize Court

In the matter of M/V Estelle (2013), Haifa Maritime Court held that it was authorised to act as a prize court and to order on a confiscation of vessels breached the Naval Blockade imposed on the coast of Gaza (which was found to be legal after having been examined by a tribunal nominated by the Security Council) In the specific matter of MV Estelle, due to the Israeli Navy's ten-month delay in the filing of proceedings after the capture of the vessel, the Court disallowed the confiscation of the vessel and ordered its release. Later, in the matters of MV Marianne (2016) and MV Zaytouna-Oliva (2019) (all small vessels related to the same owners of the MV Estelle who tried to breach the Naval Blockade imposed on Gaza Shore), the Maritime Court ordered the confiscation and judicial sale of the vessels and ordered that the amount received from the sale was to be transferred to the State of Israel.

The Capture of a Vessel under the "Marine Cold War"

Unlike the State of Israel, which bases the acts of its capture of blockade-running vessels on the traditional law and the Haifa Maritime Court authorities, what appeared to be a British-American co-operation took a different approach when capturing the Iranian tanker which at the time was named Grace 1, in July 2019. The justification for the capture of this tanker by British commandos off the shore of Gibraltar was its intended violation of Council Regulation (EU) No 36/2012 imposing sanctions against Syria, due to the continuing violation of civil rights by the Syrian government. The Grace 1 was carrying oil intended for the Baniyas Refinery Company which was listed in the 2014 extended sanctions as part of the Syrian Ministry of Petroleum, and its capture was upheld by the Court of Gibraltar. However, not being sufficiently aware of the fact that British and associated tankers have no choice but to navigate next to the "Lions' Den" and the Hormuz strait, soon after the Grace 1 incident, the British tanker Stena Impero was captured by the Iranian authorities while navigating to Saudi Arabia.

The capture itself was explained by the Iranian authorities as due to the tankers "crossing a route other than the shipping lane in the strait of Hormuz, switching off its transponders and not paying attention to Iran's warning when it was seized by the Revolutionary Guards' forces".

As a result, soon after, the Gibraltar Court was satisfied with an Iranian commitment that the Grace 1 would not deliver its fuel to the Syrian refinery and released the tanker (which soon after changed its name, switched off its tracking devices near Iskenderun, and probably delivered its USD140 million worth of cargo to the Syrian refinery). A few weeks later, the Stena was released from its Iranian detention.

Ever since the capture and release of the Stena "unexplained" explosions and other damages and detentions have taken place in relation to Iranian, Marshal Island, Panamanian tankers and vessels navigating the Saudi Arabian and Persian Gulfs. Recently, on 4 January 2021, the Iranian forces seized and captured the South Korean tanker "Hankuk Chemi", as a result of environmental pollution. This seizure was followed with an accusation of South Korea by Iran for holding USD7 billion in Iranian funds following US sanctions. Currently, the marine cold war in the Persian Gulf does not seem to be at an end.

The Abraham Accords

The Treaty of Peace, Diplomatic Relations and Full Normalisation Between the United Arab Emirates and the State of Israel, followed by normalisation agreements with Bahrain, strengthens the strategic location of Israel and the Israeli ports and an increase in more volume of trade and transport between Israel and the Gulf States is expected. The Haifa Maritime Court has exercised its rights in favour of either a bunker supplier located in Dubai (arresting the MV Huseyn Javid for unpaid bunkers) or a Libyan owner (in attaching the registration of the M/V BADR) and, of course, after the Abraham accords have been concluded, the Persian Gulf or other Middle East claimants and interest will find the Haifa Maritime Court and other Israeli courts to be a favourable jurisdiction.

Harris & Co Shipping & Maritime Law Office has two experienced lawyers at its head, acquiring precedents in court judgments, professional articles, lectures and conferences. It follows English law and judgments of other foreign jurisdictions and uses these to strengthen its arguments and/or to contend with local judgments. Harris & Co has deep and wide legal knowledge, and with the clarity and sharpness of its written and verbal pleadings, demonstrates the highest quality of cross-examination, acting promptly in obtaining arrest orders and liens, within very short timeframes, and resolves never to concede, if the legal position so warrants, in order to protect clients' rights. The firm has extended its involvement in Supreme Court and Haifa Maritime Court precedents, the variety of maritime matters it handles and of its academic presence, both in publishing articles, lecturing, and contributing to international shipping and maritime law publications.

Authors

Yoav Harris graduated in 1999 summa cum laude from the law faculty of Haifa University and has served as a litigator, and later as a partner, in several leading law firms. In August 2018, Yoav Harris joined his father, John Harris, in Harris & Co, acting as the managing partner, representing the accumulation of 70 years of experience in maritime law and commercial litigation. Yoav Harris has been a guest lecturer at the International Law Forum of the Faculty of Law of the Hebrew University and covered the topics of the arbitrations taking place between Iran and Israel in regard to the Eilat-Ashkelon pipeline enterprise, and of the authority of the Haifa Maritime Court to act as a Prize Court and order on the confiscation of vessels breaching the marine blockade imposed by the State of Israel on the navigating of vessels to Gaza Shore.

John Harris is the firm's founding partner and has more than 45 years of experience. He is widely recognised for his skills and expertise in the area of shipping and maritime law (transportation) in Israel.

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ITALY

Law and Practice

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Contents

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1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

In Italy, there are no maritime or shipping courts. Shipping disputes are submitted to and settled by civil courts. This is in line with Article 589 of the Italian Navigation Code, according to which disputes regarding maritime accidents are to be submitted to the territorially competent court. In any event, the courts of the main maritime districts usually have divisions specialised in shipping matters.

With regard to maritime labour disputes, recent judgment No 5739 of the Italian Supreme Court of 3 March 2020 has confirmed that the standard criteria for identification of the territorially competent court (under Article 413 of the Italian Code of Civil Procedure) do not apply, as reference must be made to the special criteria under Article 603 of the Italian Navigation Code, which provides for two territorially competent courts: (i) the court of the place in which the maritime labour relationship was established, performed or ceased, or (ii) the court competent for the district in which the vessel is registered. This is because it is now generally accepted that, in the hierarchy of Italian legal sources, maritime labour law is lex specialis (see Article 1 of the Italian Navigation Code), thus overriding provisions that are of a general nature (lex generalis). In light of this principle, not only is the material discipline of maritime labour law significantly different from ordinary labour law, but special procedural rules also apply in order to determine the territorial jurisdiction of the court in charge of maritime labour disputes.

1.2 Port State Control

Italy is a party to the Paris Memorandum of Understanding on Port State Control signed on 26 January 1982 (the Paris MoU). Pursuant to the Paris MoU, each contracting State must maintain an effective system of port state control to ensure that foreign merchant ships calling at or anchored off a port of its State comply with certain international standards. These provisions have been endorsed by Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009, which was transposed into the Italian law system by Legislative Decree No 53 of 24 March 2011.

Moreover, at a national level, the relevant Italian authorities in charge of port state control are local Harbour Masters. Such activities are also co-ordinated by the 6th Division of the Italian General Command of the Harbour Master Corps Office (*Comando Generale del Corpo delle Capitanerie di Porto*). Generally, the powers of these authorities in Italy include notification of deficiencies, verification for the rectification of deficiencies, inspections, and formal prohibitions to sail, as well as refusal of access and detentions. More specifically, according to Articles 578-584 of the Italian Navigation Code, Italian authorities responsible for Port State Control activities have the power to conduct administrative investigations aimed at determining the causes and liabilities arising out of any marine casualty.

Finally, pursuant to Article 73 of the Italian Navigation Code, if the wreck of a vessel is considered to be a danger or hindrance to navigation, the Italian Harbour Master concerned may order the owner to carry out the removal of the wreck, at his or her own expense, while fixing a deadline for the removal. However, if the owner fails to comply with such an order or if an urgent situation occurs, the Harbour Master may proceed autonomously with the wreck removal and the owner will still remain liable for the related costs.

1.3 Domestic Legislation Applicable to Ship Registration

The Italian Navigation Code regulates the registration of vessels and the Italian Ministry of Transport (MIT) authorises, on a case-by-case basis, vessel registration into both of the available registries, which are, respectively, the Domestic Register (or First Register) and the International Register (or Second Register). The Domestic Register is the main Italian register, in which all the major vessels are registered. The ship-owner interested in registering a vessel in the First Register must comply with specific nationality requirements as set out in the Italian Navigation Code. The International Register, regulated by Italian Law No 30/1998, was established in order to contrast the considerable flagging-out of Italian vessels and, conversely, to attract back to the Domestic Register the consistent tonnage registered in foreign registries, especially under "flags of convenience". The International Register is divided into three sections, in which merchant vessels employed in international trade can only be entered subject to the MIT's authorisation.

The registration of a vessel in the International Register is indeed subject to prior ministerial authorisation under Article 1 of Italian Law No 30/98. Once the required documentation is duly filed, the Harbour Master's Office of the relevant Maritime Administration will effect the registration of the vessel in the International Register. The registry is maintained and updated by the very same Maritime Administration.

1.4 Requirements for Ownership of Vessels

The only party allowed to apply to register a vessel in Italy is the owner, who can be either a private or public entity. In general terms, Article 143 of the Italian Navigation Code provides that a vessel shall be validly registered in Italy if, inter alia, it: (i) is at least 50% owned by an Italian or European person; or (ii) is owned by a non-EU person or entity that directly manages the vessel through a branch in Italy. Therefore, as previously clari-

fied, foreign ownership is permitted; registration of vessels in Italy is in fact allowed for all EU ship-owners.

However, currently, ship-owners from non-EU countries can register a vessel in Italy coming from a non-EU registry only if they have a permanent establishment in Italy. Alternatively, non-EU ship-owners can register a vessel in Italy by suspending the flag of the foreign underlying register and chartering it on a bareboat basis to an Italian or EU ship-owner. Moreover, vessels that are still under construction are registered in a separate Registry for Ships under Construction, according to Article 234 of the Italian Navigation Code. In this regard, it should be noted that registration is made in the name of the buyer or the builder, depending on who holds title in the construction of the vessel. Finally, for the sake of completeness, it must be clarified that both the declaration of commencement of construction and the related ship-building agreement must be registered.

1.5 Temporary Registration of Vessels

In principle, Italian law excludes temporary registration of vessels (ie, temporary registration of a vessel already registered with a non-Italian registry). However, dual registration is permitted in relation to vessels (i) registered in a non-Italian registry and (ii) suspended from that non-Italian registry following a bareboat charter in favour of Italian or European individuals or entities. In order to register a vessel with the so-called "Bareboat-in Registry", certain documents are required, including the bareboat charter agreement, a tonnage certificate issued by the Italian Ship Register, evidence that the charterer complies with the nationality requirements set out in Article 143 of the Italian Navigation Code and an application to the Bareboat-in Registry for a certificate of nationality. When employed in international traffic, bareboat-chartered ships under "temporary suspension of flag" can be registered with Section III of the Italian International Ship Registry established pursuant to Law No 30 of 27 February 1998 (the authorisation, granted by the Italian Ministry of Transport, is subject, inter alia, to a trade union agreement).

1.6 Registration of Mortgages

Mortgages over Italian-flagged vessels must be registered with the Italian Ship Registry held by the Harbour Master's office at the port of registration of the mortgaged vessel. For the purposes of registration, the deed of mortgage must be executed in the Italian language before a notary public and filed with the competent Harbour Master's office, together with an application for registration of the mortgage (which must be carefully drafted, since its inaccuracy may affect the enforceability of the mortgage or of certain obligations secured thereby). Multiple mortgages over the same vessel take priority according to the date and time of their registration with the relevant Italian Ship Registry.

It should be noted that, under Italian law, maritime liens over a vessel rank before the mortgages over that vessel, whereas mortgages rank before civil-law liens.

1.7 Ship Ownership and Mortgages Registry

Information relating to ownership of a vessel and any relevant mortgages is publicly available at the Italian Ship Register held by the Harbour Master's office at the port of registration of that vessel. An excerpt from the Italian Ship Register relating to a vessel can be requested and obtained by any interested individual or entity.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

With regard to pollution, Italy is a State party to the following International Conventions:

- the International Convention for the Prevention of Pollution from Ships (MARPOL Convention 1973/78) and 1997 Protocol;
- the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 and Intervention Protocol 1973;
- the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969 and Protocols 1976 and 1992;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention), 1990;
- the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) 1972 and the London Convention Protocol 1996;
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IFC Convention), 1971 and Supplementary Fund Protocol;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention), 2001.

Furthermore, in 2014, as a result of several amendments and supplements to the existing Environmental Code (Legislative Decree No 152/2006), Italy adapted its legislation by Legislative Decree No 112/2014 to comply with Directive 2012/33/EU. The Environmental Code imposes a general clean-up obligation on the party liable for pollution of the sea. If this obligation is not met, remediation or depollution is carried out by the public administration, which can claim the relevant costs from the liable party. Recently, Directive (EU) 2019/883 has established a framework against the negative effects from discharges of waste from ships by requiring Member States to provide adequate

waste-reception facilities in all ports, including recreational ports and marinas. Member States must bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 28 June 2021.

As for wreck removal, Italy has not ratified the Nairobi International Convention on the Removal of Wrecks 2007. Therefore, Article 73 of the Italian Navigation Code will apply in this matter, which gives broad discretion to Maritime Authorities to issue orders for wreck removal. Regulation (EU) No 1257/2013, which entered into force in 2013 and is applicable from 31 December 2018, sets out new rules on ship recycling by providing common evaluation standards in accordance with the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009, even if the latter has not yet entered into force in Italy.

2.2 International Conventions: Collision and Salvage

As far as collision is concerned, Italy is a State party to the following International Conventions:

- the Convention for the Unification of certain Rules of Law with respect to Collisions between vessels, 1910 (Brussels Collision Convention);
- the International Convention for the Unification of certain Rules relating to Penal Jurisdiction in matters of Collision or other Incidents of Navigation, 1952 (Collision/Penal Convention;
- the International Convention on certain Rules concerning Civil Jurisdiction in matters of Collision, 1952 (Collision/Civil Convention);
- the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs).

As far as domestic law is concerned, whenever the criteria provided for by the Collision/Civil Convention are not applicable, the provisions of the Italian Navigation Code shall apply.

As far as salvage is concerned, Italy ratified the 1989 London Convention on Salvage in 1996 and applies it as a general rule. Therefore, the provisions of the London Convention de facto prevail over the rules laid down in the Italian Navigation Code concerning salvage.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The Convention on Limitation of Liability for Maritime Claims is not formally applicable in this jurisdiction since Italy has not yet ratified it.

However, Italian Legislative Decree 28 June 2012 No 111, implementing Directive 2009/20/EC of 23 April 2009 on the insurance of ship-owners for maritime claims, has provided for a legal system of limitation of liability for ship-owners in accordance with the provisions of the above-mentioned Convention for vessels of 300 GT or more (as far as limits of liability are concerned). At the same time, the provisions of Article 275 of the Italian Navigation Code are applicable for vessels of 300 GT or less. As a general remark, it should be noted that, pursuant to Article 7 of the Italian Navigation Code, ship-owners' liability is ruled by the law of the ship's flag state.

2.4 Procedure and Requirements for Establishing a Limitation Fund

The procedure for establishing a limitation fund is provided for by Articles 620-642 of the Italian Navigation Code. The Italian Navigation Code provides that a limitation fund must be set by the competent court. The procedure is commenced by the ship-owner, who must apply to the court, providing the relevant documents as required by Article 621. Pursuant to Article 622 of the Italian Navigation Code, the amount of the limitation fund shall be calculated based on: (i) the value of the vessel declared at the beginning of the voyage; or (ii) in the case of an insured ship, the estimated value set out in the insurance policy. The court requires a cash deposit and sets a time limit for its submission (see Article 629 of the Italian Navigation Code).

3. Cargo Claims

3.1 Bills of Lading

Italy has ratified the Hague Rules relating to Bills of Lading of 25 August 1924 and the protocols of 1968 and 1979 thereto (the Hague-Visby Rules). The Hague-Visby Rules are a lex specialis overruling the Italian Navigation Code. Conversely, Italy has not ratified the Hamburg Rules and the Rotterdam Rules.

3.2 Title to Sue on a Bill of Lading

Under Italian law, only the legitimate holder of the original bill of lading is entitled to sue for loss or damage to the cargo.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Article 2049 of the Italian Civil Code and Article 274 of the Italian Navigation Code regulate the ship-owners' liability for the acts or omissions of the crew.

More generally, the liability regime of a carrier is based on the so-called "fault-based liability scheme", which means the carrier shall not be liable for loss or damage caused by any of the excepted perils provided for by Article IV of the Hague-Visby Rules.

The ship-owner is liable when acting as either a contractual carrier or an actual carrier. Whenever the ship-owner is the contractual carrier, he or she benefits from the terms and conditions of the bill of lading involving limitations of liability. However, the ship-owner acting as an actual carrier can likewise benefit from the terms and conditions of the bill of lading and, therefore, from the liability limitations provided therein, if the bill of lading contains a properly drafted Himalaya clause.

3.4 Misdeclaration of Cargo

According to Article III, paragraph 5, of the Hague-Visby Rules and Article 457 of the Italian Navigation Code, the shipper must provide a complete and accurate description of the cargo to the carrier. The shipper must indeed guarantee to the carrier the accuracy of the marks, number, quantity, and weight at the time of shipment, and shall indemnify the carrier against any loss, damage and expense arising or resulting from inaccuracies in such particulars.

The Court of Genoa has confirmed the foregoing, stating in particular that, when maritime transport occurs under FCL (Full Container Load) conditions, the shipper shall be liable for the cargo contained in the container.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

For maritime cargo claims, pursuant to Article 438 of the Italian Navigation Code, the limitation period is six months after delivery of the goods or, in the case of a total loss, the date on which the goods should have been delivered or, in the case of carriage of specific goods, the date provided for by Article 456 of the Italian Navigation Code. If either the port of loading or the port of discharge is located outside Europe or Mediterranean countries, the limitation period will be one year. However, whenever the matter is subject to the Hague-Visby Rules, the one-year time bar under Article 3.6 of those Rules shall apply.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Italy has ratified the International Convention Relating to the Arrest of Sea-Going Ships signed in Brussels on 10 May 1952 (the 1952 Arrest Convention), which is therefore applicable in this jurisdiction. Conversely, Italy is not a party to the International Convention on Arrest of Ships signed in Geneva on 12 March 1999. Security over a debtor's assets can also be obtained in accordance with the general rules set out in the Italian Navigation Code (Articles 682 et seq) and the Italian Code of Civil Procedure (Articles 669 bis et seq).

4.2 Maritime Liens

Maritime liens are recognised in Italy, with regard to both international and domestic legislation. As regards international legislation, Italy has ratified the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1926. In respect of domestic legislation, maritime liens are enumerated in Articles 552 (liens on the vessel and the charter) and 561 (liens on cargo) of the Italian Navigation Code. The provisions contained in the Italian Navigation Code apply only to vessels flying the Italian flag. The provisions contained in the aforementioned International Convention apply to vessels flying the flag of a State party to that convention. Pursuant to Article 552 of the Italian Navigation Code, the following liens are provided for on a vessel, on the freight for the voyage during which the claim arose, on the vessel's appurtenances and on the freight items earned after the commencement of the voyage:

- legal costs due to the State or incurred in the common interest of creditors in order to preserve the vessel or for enforcement proceedings, anchorage, lighthouse, port duties and other duties and taxes of the same type, pilotage costs, and costs for custody and maintenance of the vessel after its entry into the last port;
- claims arising from the employment contract of the Master and the other members of the crew;
- claims for sums advanced by transport and navigation or consular authorities for the maintenance and repatriation of crew members, claims for compulsory contributions due to social security and welfare institutions for seafarers and inland navigation personnel;
- indemnities and compensation for assistance and salvage and the sums due for the vessel's general average contribution;
- indemnities for collision or other shipping accidents and for damage to the works of ports, dry docks and navigable ways, indemnities for death or injury to passengers and crew and for loss or damage to cargo or luggage;
- claims arising out of contracts entered into or acts carried out by the Master, within the scope of his or her authority, even if he or she is the ship-owner, for the preservation of the vessel or the continuation of the voyage.

However, according to Article 561 of the Italian Navigation Code, the following liens are granted on the cargo:

- legal costs due to the State or made in the common interest of creditors for conservative acts on the goods or for enforcement proceedings;
- customs duties due on the goods at the place of unloading;
- indemnities and compensation for assistance and salvage and sums due as general average contribution;

- claims arising from the transportation agreement, including the cost of unloading and the rent of any warehouses in which the unloaded goods are deposited;
- any amount of capital and interest due for obligations incurred by the Master in relation to the cargo in the circumstances referred to in Article 307 of the Italian Navigation Code.

A vessel can be arrested with respect to the maritime claims set out in Article 1(1) of the 1952 Arrest Convention. If the vessel flies the flag of a State which is not a party to that Convention, it can be arrested in accordance with the general rules of the Italian Navigation Code and of the Italian Code of Civil Procedure (provided that the vessel is owned by the debtor).

4.3 Liability in Personam for Owners or Demise Charterers

A vessel can be arrested in Italy regardless of its owners' personal liability.

Italian Courts usually tend to grant the arrest of a vessel (in a case where a person other than the owner or the demise charterer is liable) if the relevant claim falls within the list of maritime claims set out in Article 1(1) of the 1952 Arrest Convention.

4.4 Unpaid Bunkers

A claim for unpaid bunkers supply falls within the definition of a maritime claim under Article 1(1), letter k, of the 1952 Arrest Convention. As a consequence, a bunker supplier can arrest a vessel in connection with unpaid bunkers. As per the 1952 Arrest Convention, the claimant is the person who alleges that a maritime claim exists in his or her favour. Therefore, the actual supplier can try to arrest the vessel, provided that it is in a position to prove its contractual relationship with one of the vessel's operators.

As clarified above, Italian courts also tend to grant the arrest of a vessel in a case where a person other than the owner is liable, provided that the relevant claim falls within the list of maritime claims set out in Article 1(1) of the 1952 Arrest Convention. As a consequence, the circumstance where the bunkers are supplied to a chartered vessel and the bunkers were ordered by the charterer (and not by the owner) could have no relevance from a practical standpoint in Italy.

However, it should be noted that this issue – concerning Article 3, paragraph 4, of the 1952 Arrest Convention – is a well-known controversial point of this Convention and there is lack of uniformity in Italian case law regarding the interpretation and application of the aforementioned provision.

4.5 Arresting a Vessel

In order to arrest a vessel, in the first place it is necessary to submit an arrest application to the judicial authority. To this end, a lawyer must be duly authorised by means of a certified power of attorney, to be produced and filed. For the purposes of authentication, a distinction must be made: (i) powers of attorney issued abroad must be authenticated by a notary public and legalised with an apostille (where necessary); (ii) powers of attorney issued in Italy must be authenticated by a notary public or, if signed before a lawyer, by that lawyer.

Thus, the wet-signed copy of the power of attorney must be attached to the arrest application upon its filing, although, in the case of urgency, a scanned copy may be filed as long as the original is filed promptly. Without prejudice to the foregoing, no further special formalities are required. The court may request a translation of documents written in a foreign language. As far as the security deposit on behalf of the arresting party is concerned, although the Italian Code of Civil Procedure states that courts have the discretion to order the claimant to provide counter security, this is normally not required.

4.6 Arresting Bunkers and Freight

It is possible to arrest bunkers and freight in Italy. Nonetheless, under common practice, arresting the bunker is not a frequent occurrence, since providing evidence on the actual ownership of the bunker, as well as actually carrying out the arrest, involves certain risks and practical issues. In this jurisdiction, it is also possible to proceed with the sale of the cargo pursuant to Articles 437 or 450 of the Italian Navigation Code.

4.7 Sister-Ship Arrest

Under Italian law, it is possible to arrest a sister ship. Indeed, according to prevailing Italian case law, pursuant to Article 3 of the 1952 Arrest Convention, a claimant may arrest not only the vessel in respect of which the claim is brought but also any other vessel which is owned by the ship-owner at the time the claim is brought (the so-called "sister ships"). The foregoing does not apply, however, where the arrest is sought in respect of any of the maritime claims referred to in Article 1, letters (o), (p) and/or (q) of that Convention and particularly in the case of disputes relating to title or ownership, disputes between co-owners and claims arising from mortgages or encumbrances. In such cases, only the vessel in respect of which the claim is made may be arrested.

4.8 Other Ways of Obtaining Attachment Orders

Pursuant to Article 646 of the Italian Navigation Code, the competent court (or the Harbour Master or the Judicial Police in the case of urgency) can issue an order aimed at preventing a particular vessel from leaving the port.

4.9 Releasing an Arrested Vessel

In order to obtain the release of an arrested vessel, it is necessary to challenge the grounds and legitimacy for the arrest order issued by the court to request its revocation. This can be requested, by the owner or any interested party, at a special hearing normally scheduled a few days after the date of the arrest. Under Italian law, in order to obtain the release of an arrested vessel, it is also possible to provide a security deposit for the full amount due in relation to the arrested vessel by (i) depositing such amount in a bank account opened in the name of the competent court and (ii) depositing at the competent court a bank guarantee, to be issued by a leading Italian bank. A Clubs Letter of Indemnity (LOI) or a foreign bank's bank guarantee could be accepted only subject to the case-by-case evaluations of the competent court.

4.10 Procedure for the Judicial Sale of Arrested Ships

The procedure for the judicial sale of an arrested vessel is set out in Articles 643 to 686 of the Italian Navigation Code as well as in Articles 483 to 542 of the Italian Code of Civil Procedure. This procedure is strictly supervised by the competent court (the court of the place where the vessel has been arrested). The procedure, aimed at the sale by public auction of the vessel, may be initiated by the plaintiff whenever the latter has an enforceable right, such as a final judgment or the acknowledgement of the debt contained in a notarial deed. However, should the creditor lack such a right, it may commence a proceeding in order to obtain it by securing the credit through the arrest of the vessel.

The maintenance of the arrested vessel falls under the responsibility of the ship-owner, who is the person in possession of the vessel and in charge of its maintenance and operation. Therefore, the ship-owner keeps on taking care of the vessel even during its arrest. However, in special circumstances, such as the abandonment of the vessel, pursuant to Article 676 of the Italian Code of Civil Procedure, the maintenance shall be entrusted to a custodian appointed by the court. The priority ranking of claims 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 intervening promptly in the proceedings;
- non-privileged or unsecured creditors not intervening promptly in the proceedings; and
- all other unsecured claims.

4.11 Insolvency Laws Applied by Maritime Courts

Under a general standpoint, Italian Bankruptcy Law states that, unless otherwise provided by law, as of the day of the bankruptcy declaration, no individual enforcement or precautionary action, including for claims accrued during the bankruptcy proceedings, may be commenced or continued on the assets included in the bankruptcy itself. Notwithstanding the foregoing, Italian case law, in deciding a recent case concerning a claim, supported by a lien, against the bareboat charterer of an arrested vessel, ordered anyway the arrest of the vessel concerned, even though the debtor was a bankrupt company.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

The plaintiff may be held liable for damages for wrongful arrest in cases where the claim on which the arrest is based does not exist and where the plaintiff has brought a reckless lawsuit, acting in bad faith.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

The resolution of maritime passenger claims is regulated by two pieces of legislation.

- Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea in the event of accidents, implementing the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) as further amended. Currently, this Regulation sets out key provisions for resolving maritime passenger claims. In this regard, the regime set out by the Italian Navigation Code now has a limited scope of application but still regulates the carriage of people by sea (see Articles from 396 to 418).
- Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterways, which has further enhanced the protection given to passengers and their belongings.

Article 16 of Regulation (EC) No 392/2009 provides that any action for damages arising out of death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be time-barred after a period of two years. However, this time limit may be suspended or interrupted for a maximum period of five years. According to Article 24 of Regulation (EU) No 1177/2010, any passenger covered by the Regulation can make a complaint to the carrier or terminal operator within two months from the date on which the service was performed or should have been performed.

Moreover, Article 25 of this Regulation also provides that, in the event of an alleged infringement of its provisions, any passenger may submit a complaint, in accordance with national law, to the competent body designated as responsible for the enforcement of the Regulation which, in Italy, is the Transport Regulation Authority. It is worth mentioning that Article 418 of the Italian Navigation Code also provides for a specific time-limit period which is, however, shorter than in the other cases (even if its scope of application is now limited to carriages effected on board certain classes of ships only). In fact, any action shall be time-barred after six months or one year if the carriage begins/ends outside the EU or the Mediterranean Sea.

Finally, Article 8 of Legislative Decree No 111 of 28 June 2012 provides that the limitation of liability of the owner of a passenger ship in relation to the death of or personal injury to a passenger is equal to 175,000 special drawing rights multiplied by the number of passengers that the vessel can carry.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Italian courts recognise and enforce law and jurisdiction clauses stated in bills of lading.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

Courts in Italy will recognise and enforce a law and arbitration clause of a charterparty incorporated into the relevant bill of lading, provided that the bill of lading contains a specific reference to the charterparty, so as to identify that charterparty precisely (for example, by mentioning the date and place of issue of that charterparty).

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Italy ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards through Law No 62/1968. It acceded to the convention on 31 January 1969 and the convention entered into force in Italy on 1 May 1969. Recognition and enforcement of foreign awards are governed by Articles 839 et seq of the Italian Code of Civil Procedure.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Any circumstance in which the relevant claim is subject to a foreign arbitration and/or jurisdiction has no relevance with respect to the arrest procedure in Italy.

6.5 Domestic Arbitration Institutes

There is no domestic arbitration institute that specialises in maritime claims which is active in Italy.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

Should the plaintiff act in breach of a foreign jurisdiction or arbitration clause and commence a proceeding before an Italian court, the defendant must raise the objection of lack of jurisdiction of that Italian court in its first defence brief. However, Italian courts cannot grant anti-suit injunctions to prohibit a party from commencing or continuing proceedings in another jurisdiction.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Italian Law No 30/1998 established the so-called "Italian International Register" for ships engaged in international trade. Ships registered within this Register and their operators are granted a corporate tax reduction and other benefits aimed at reducing the labour costs of the registered fleet and safeguarding employment of seafarers.

In doing this, Italy has achieved substantial parity in operating costs with other tax-advantaged jurisdictions typical of this sector.

In so far as it is relevant here, the Italian legislator has provided for the following.

- A reduction of the taxable amount, relevant for IRES (Italian Corporate Income Tax) purposes, of the income deriving from the use of vessels registered in the Italian International Register (See Article 4, paragraph 2 of Law No 30/ 1998). Moreover, Legislative Decree No 344/2003 has amended the Italian Consolidated Tax Act (TUIR), introducing an optional alternative regime, extremely widespread at international level, providing for a flat-rate scheme called "tonnage tax" calculated on the tonnage value of registered vessels (see Articles 155 to 161 of the TUIR).
- A tax credit corresponding to the IRPEF (the Italian Tax on Personal Income) that the employer has to pay on the wages of seafarers employed on ships registered in the Italian International Register (see Article 4, paragraph 1 of Law No 30/1998).
- Exemption from the payment of social security contributions and welfare contributions for seafarers on board ships registered in the Italian International Register. The relevant

payment shall be borne by the State (see Article 6, paragraph 1 of the Law No 30/1998).

By Decision C(2020) 3667, the European Commission has authorised, until the end of 2023, the State aid scheme, subject to some amendments to be made to the Italian national legislation by the end of February 2021.

Those amendments include, inter alia:

- the extension of the benefits of the scheme to all eligible vessels flying an EEA flag; if a shipping company wants to benefit from the Italian International Register regime, at least a large part of its fleet must fly the flag of an EU or EEA State;
- the application of the special corporate tax reduction for shipping companies to a shipping company's core revenues from shipping activities, such as cargo and passenger transport, certain ancillary revenues that are closely connected to shipping activities (capped at a maximum of 50% of a ship's operating revenues), revenues from towage and dredging, subject to certain conditions, and bareboat charter-out and time and/or voyage charter-in activities, subject to a number of conditions.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

Given the COVID-19 emergency, restrictions on maritime transport have been regulated overall by emergency decrees and specific protocols.

In particular, the several restrictions imposed during 2020 on maritime activities by the Italian Authorities in order to face the current epidemiological crisis can be divided into three different phases, as set out below:

- measures introducing a prohibition on the free movement of people that resulted in a general lockdown;
- measures introducing a regime in which the prohibition on movement was not absolute but limited, for example, to movement between individual regions, or imposing a curfew;
- measures essentially removing restrictions on the movement of citizens within the country, during which a lack of passengers was nonetheless recorded due to the restrictive measures adopted by countries that traditionally attract tourists to Italy, such as the United States and China, which – even during the summer – substantially prevented their citizens from travelling abroad.

As a consequence, all emergency measures enacted by the Italian Government by means of specific Decrees of the Italian Prime Minister have followed these phases. To conclude, crew change was the most crucial issue in Italy throughout the crisis but, undoubtedly, the suspension of all cruise services and the ban for foreign-flag cruise ships to call Italian ports were among the more relevant measures applied since the beginning of the crisis.

8.2 Force Majeure and Frustration in Relation to COVID-19

The Italian Civil Code does not provide a definition of *force majeure*. However, Italy recognises the concept and the coronavirus pandemic can be classified as an event of *force majeure* under Italian law. The Italian Civil Code provides for some institutions whose application presupposes the occurrence of events that can be linked to the concept of *force majeure*. For contracts subject to Italian law, without prejudice to the relevance of any contractual clauses, reference shall be made, in particular, to the following institutions:

- supervening impossibility of performance for reasons not attributable to the debtor (Articles 1218, 1256 and 1463 of the Italian Civil Code);
- supervening hardship in performance (Articles 1467 et seq of the Italian Civil Code).

In any event, a case-by-case evaluation is of course necessary in order to activate the most appropriate remedy as well as in the light of the relevant contractual text.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

The EU's Institutions are working to update a wide range of instruments and adopt new policies to promote the transition to a new economic system and energy and industrial transition. This transition may have a significant impact on the shipping industry, through three main pillars:

- the European Green Deal;
- the EU Emissions Trading System (ETS) and carbon pricing;
- a new industrial strategy moved by crucial investments in transport infrastructure and digitalisation.

Even if the COVID-19 pandemic has shaped the flow of 2020, generating uncertainty and instability worldwide, especially for maritime transport, by means of the Communication "Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak", the European Commission has provided Member States with a temporary framework to allow them to adopt special aid measures in the context of the COVID-19 pandemic.

The Italian "*Piano Nazionale di Ripresa e Resilienza*" (PNRR) falls within this framework and aims to achieve, inter alia, economic recovery after the COVID-19 crisis and the creation of an industrial platform suitable for achieving the climate targets that Europe has set itself (zero net emissions by 2050). It should be noted that the attention of the PNRR to the shipping industry further confirms the fact that the Italian Government intends to consider maritime transport and the motorways of the sea as an essential infrastructure of the country, evenly balanced with the railway and road networks.

Nevertheless, the European Green Deal is ongoing and plans to make the EU's economy "climate neutral" by 2050. To overcome these challenges, Europe needs a new growth strategy where: (i) there are no net emissions of greenhouse gases by 2050; (ii) economic growth is decoupled from resource use; (iii) no person and no place is left behind. Moreover, in such a context, the shipping industry could be included for the first time in the EU Emissions Trading System (ETS), which is an instrument to control pollutant and greenhouse gas emissions at international level through monetary quotation of emissions and trading of emission allowances between states. However, it should be noted that the unilateral introduction of the EU-ETS in the European shipping industry could represent an important obstacle to the renewal of the fleet of several European shipping companies, already weakened by the COVID-19 crisis.

Nctm Studio Legale is a leading independent Italian law firm in terms of dimensions, quantity and relevance of transactions covered, with more than 250 professionals, 65 partners and five offices, both in Italy and abroad (Milan, Rome, Brussels, London and Shanghai). Nctm's shipping department has become synonymous with being one of the most important "ports of call" in Italy for any port, marine, and/or shipping logistics-related legal issues. Today, in the maritime and logistics industry, operators of the great liners tend to integrate all their supply chains under the same control. Nctm's capacity to handle different legal issues in the different segments of the logistics business is the firm's significant point of strength with its clients. Nctm also regularly advises Italian and international companies, banks, and financial institutions on matters related to shipping and aviation finance, structured finance, lease or sale and leaseback, and contracts for the use of ships and aircrafts.

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JAPAN

Law and Practice

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Contents

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1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

Domestic Laws

Japan has ratified most of the major maritime conventions, such as the Hague-Visby Rules, the latest version of the Limitation of Liability for Maritime Claims (LLMC) Convention 1976 with its 1996 Protocol, the 1992 Civil Liability for Oil Pollution Damage (CLC) Convention and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund), and relevant rules and regulations. In maritime and shipping practice in Japan, both general civil and commercial law and specific shipping laws/legislation apply, and they are generally based on these conventions. Examples of the main domestic laws related to shipping matters are set out as follows:

- the Civil Code;
- the Commercial Code;
- the Act on International Carriage of Goods by Sea (JCOGSA) incorporating the Hague-Visby Rules;
- the Limitation of Liability Act incorporating the latest version of the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 with its 1996 Protocol;
- the Act on Liability for Oil Pollution Damage incorporating the 1992 CLC Convention and Fund Convention, the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker) 2001 and the Nairobi International Convention on the Removal of Wrecks 2007.

Common Maritime and Shipping Claims

One of the common maritime and shipping claims filed in the Japanese jurisdiction is related to cargo claims between carriers and shippers under carriage contracts and/or bills of lading. The claims are essentially classified into contractual claims and the shippers' claims are successful in the event that the carriers can be proven to be in breach of the carriage contract. The cargo claims for domestic sea carriage and international sea carriage are governed by the Commercial Code and the JCOGSA respectively.

Another key type of claim is a tort claim under the Civil Code, which can be broadly used in cases where the victims attempt to bring a claim for damages against the perpetrators. An example of this is where the owner of a vessel collided with another vessel and would be entitled to make tort claims for damages against the owner of the other vessel. It is worth noting that some general rules of the tort claim under the Civil Code are amended in line with the nature of maritime and shipping claims, such as the statute of limitations.

1.2 Port State Control

System of Port State Control

Japan has entered into a memorandum of understanding on port state control (PSC) in the Asia-Pacific region (the TOKYO MOU). The TOKYO MOU has been used to conduct concentrated inspection campaigns with the other PSC MOUs. Under the New Inspection Regime of the TOKYO MOU, vessels are categorised as either High-Risk Ships, Standard-Risk Ships or Low-Risk Ships, based on a consideration of the vessel type and age, flag, recognised organisation, and the number of deficiencies and detentions.

Vessels are detained by the PSC in the event that the condition of the vessel or its crew fails substantially to satisfy the requirements of the applicable conventions to ensure that the vessel can proceed to sea with no danger to the vessel or persons on board and no threat of harm to the marine environment. The Ministry of Land, Infrastructure, Transport and Tourism publishes a list of the vessels detained in Japan on its website.

Maritime Casualty Response

In the case where maritime casualties such as grounding or pollution occur in the Japanese jurisdiction, the Japan Coast Guard and Japan Transport Safety Board have powers to deal with the casualties separately. A coastguard officer may take necessary measures, such as control of a vessel's movement, in the event of maritime casualties. The Japan Transport Safety Board may conduct interviews with the parties involved in the maritime casualty, carry out an on-site survey and demand that the parties submit incident reports for the purpose of investigations into the maritime casualties.

1.3 Domestic Legislation Applicable to Ship Registration

Dual System of Registration

Registration procedures for Japan-flagged vessels are mainly regulated by the Ship Act (*Sempaku-ho*). For vessels registered in Japan, there are two ways of registration, each of which has a different purpose and competent authority. The former, commercial registration (*toki*), is under the control of the Legal Affairs Bureau and records ownership, mortgages, lease rights, ship administrators, etc. The latter, administrative registration (*toroku*), is under the control of the District Transport Bureau or Shipping Bureau, which are subordinated to the Ministry of Land, Infrastructure, Transport and Tourism and records the details of the hull, the owner, the port of registry, etc. The certificate of nationality is issued upon administrative registration.

Privileges of Japanese Ships

The privilege to fly a Japanese flag is granted only to Japanese vessels, and in turn there is an obligation always to show that

flag. Only Japanese-flagged vessels are able to call at closed ports or conduct coastal transportation of cargos and passengers.

1.4 Requirements for Ownership of Vessels

For a vessel to be eligible to fly a Japanese flag, its owner must fall within one of the following:

- a Japanese authority;
- a Japanese citizen;
- a company incorporated under the laws of Japan, with all its representatives and at least two thirds of its executive officers being Japanese nationals; or
- an entity other than a company as described in the preceding point, in which all the representatives are Japanese nationals.

As long as either of these last two requirements is met, the owner may own Japanese-flagged vessels even if its shares are held by a foreign individual or company.

The details of the hull, the mortgage and the identity of the owner upon delivery may be recorded on the commercial registration for vessels under construction.

1.5 Temporary Registration of Vessels

Provisional Certificate of Nationality

If the certificate of nationality of a vessel ceases to be valid while the vessel is anchored in a foreign port, or if a vessel is delivered to a place outside the jurisdictional district of the maritime authority that has jurisdiction over the registered port (including cases outside Japan), a provisional certificate of nationality may be issued. Any such certificate will expire in one year or less if the certificate is issued in a foreign country, and six months or less if it is issued in Japan. In any case, however, it will expire upon arrival of the vessel at the registered port.

Dual Registration

Dual Registration is not allowed for Japanese vessels (including in cases of both charter-out and charter-in). However, in Japan, a special system called "*maru-ship*" is permitted, and when a Japanese vessel is bareboat-chartered to a foreign company, and the bareboat-charterer leases back the vessel to the original Japanese owner in the form of a time charter, foreign seafarers are allowed to be on board.

1.6 Registration of Mortgages

Competent Authority for Registration of Mortgages

Mortgages on Japanese vessels are recorded in a commercial registration and maintained by the branch office of the Legal Affairs Bureau, which has power over the location of the registered port (in the case of the vessels under construction, and the location of the manufacturer).

Documentary Requirements for Registration of Mortgages

The registration of a mortgage shall be applied to be recorded in the commercial registration with the original or certified copy of the ship mortgage agreement. In Japan, there is no designated form of the agreement. The registration of a mortgage on a ship under construction shall also be recorded in the registration after the delivery of the vessel without any additional application. The maturity date is not required to be stated, but the amount or the maximum amount of the principal must be specified. The secured claim must be owed by the registered mortgagee itself, and an agent or trustee for the benefit of lenders may not be registered as the mortgagee. Mortgages on several vessels securing the same single claim are also permitted. A registration and licence tax of four thousandths of the amount of the secured claim will be imposed in order to register the mortgage.

1.7 Ship Ownership and Mortgages Registry

Certificate of Administratively Registered Matters and Registered Book

The certificate of administratively registered matters of a vessel can be obtained by anyone. Regardless of the location of the registered port, any District Transport Bureau or Shipping Bureau is available for inquiries. The certificate describes the status of ownership, but not the status of the mortgage.

Certificate of Commercially Registered Matters

The certificate of commercially registered matters can also be obtained by anyone. Not only the status of ownership but also the status of mortgages is described thereon. Such a request for issuance may be made only to the competent branch office of the Legal Affairs Bureau. However, only interested parties are allowed to inspect collateral documents such as mortgage agreements.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Japan has ratified major maritime conventions covering pollution, such as the 1992 CLC Convention and the Fund Convention, MARPOL 73/78 with its Annexes, SOLAS, the Bunker Pollution Convention 2001 and other relevant rules and regulations, as well as conventions covering wreck removal such as the Nairobi Convention. These conventions are incorporated into or codified by Japanese local laws and regulations.

In 2020, the Nairobi Convention and the Bunker Pollution Convention 2001 were ratified, resulting in amendments to the Act on Liability for Oil Pollution Damage and other related domestic laws, which came into force on 1 October 2020. The amend-

ments to the Act on Liability for Oil Pollution Damage mainly purport to bring such legislation into line with the conventions. The gist of the amendments lies in:

- expanding the scope of the vessels which are required to obtain compulsory insurance;
- admitting a direct claim against an insurer for compensation for loss and damage arising from bunker oil or wrecks;
- limiting the defence arguments which may be made by the insurer other than the defences which that owner may have been entitled to invoke against the claimant; and
- recognition and enforcement of judgments made by the state parties under the Bunker Pollution Convention 2001.

2.2 International Conventions: Collision and Salvage

Japan has ratified the 1910 Collision Convention and the Convention on the International Regulation for Preventing Collisions at Sea 1972, which have each been promulgated and enforced as domestic laws. Whilst there had been a major difference between the 1910 Collision Convention and the applicable domestic law (ie, the Commercial Code) with respect to the relevant limitations period, this anomaly has now been resolved by the reform of the Commercial Code enacted on 1 April 2019.

Japan has also ratified the 1910 Salvage Convention, but not the 1989 Salvage Convention. The Lloyd's Standard Form of Salvage Agreement (LOF) and the Japan Shipping Exchange (JSE) Form of Salvage Agreement are the two forms most widely accepted by salvage operations in Japan. In the absence of any such specific agreement between the parties, the Commercial Code 2019 applies and provides that:

- the basic principle is "no cure, no pay";
- the labour and costs incurred as a result of any necessary measures to prevent or reduce environmental pollution are taken into account in determining the amount of salvage reward (as special compensation); and
- the limitations period for making a claim for the salvage reward is two years from the time of salvage, etc.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Japan has ratified the LLMC Convention 1976 and the LLMC Protocol 1996, both of which have been implemented into the Limitation of Liability Act. The increase in the limits of liability brought about by the amendment of the Protocol of 1996 have been applied under the Act, which was amended in line with the amendment of the Protocol of 1996, and came into effect on 8 June 2015.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Under the Limitation of Liability Act, an applicant for limitation of liability must be classified as a "ship-owner, etc" or a "servant, etc". "Ship-owner, etc" is widely construed as including ship-owners, voyage charterers, time charterers and slot charterers. "Servant, etc" is defined as "the servant of a ship-owner or salvor, or any other such person whose actions the ship-owner or salvor is responsible for". The applicant must file an application to the local District Court to initiate limitation proceedings and, once the court has found its application appropriate, the court will order the establishment of a limitation fund by cash equivalent to the liability limit or by guarantee made by a bank, insurance company or Protection and indemnity insurance (P&I) Club.

Article 7 of the Limitation of Liability Act provides the information on how to calculate the limitation figure. A complex calculation is required to find the amount of the limitation funds, but the basic concept for the calculation is (i) the limitation figure is calculated based on the gross tonnage of the vessel and (ii) two types of limitation figures are set out; one is for claims arising out of only property damage and the other is for all other claims (including claims arising out of death and personal injury). No further funds (eg, a deposit) are required to be provided.

3. Cargo Claims

3.1 Bills of Lading

Contracts for international carriage of goods by sea under bills of lading are governed by the Act on International Carriage of Goods by Sea (JCOGSA), which incorporates the essence of the Hague-Visby Rules, though with some variations. For example, unlike the Hague-Visby Rules, the JCOGSA extends the period of the carrier's obligation for reasonable care of cargo from receipt by the carrier up to delivery to the receiver.

The JCOGSA has force of law for the carriage of goods by sea when either or both of the port of loading or the port of discharge is located outside Japan (ie, international carriage), regardless of whether a bill of lading is issued. In contrast, contracts for domestic carriage of goods by sea are subject to the Commercial Code.

3.2 Title to Sue on a Bill of Lading

Under Japanese law, the lawful holder of a bill of lading is entitled to sue the carrier for loss or damage to the cargo, based on the contract of carriage on that bill of lading. Even if a bill of lading is not issued, the consignee has the title to make claims against the carrier after the cargo reaches the port of discharge, since the consignee is supposed to take over the shipper's title at that time.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Ship-Owner's Liability for Cargo Damages

Under the Act on International Carriage of Goods by Sea (JCOGSA), two main duties are imposed on the carrier: (i) the duty to receive, load, stow, carry, custody, discharge and deliver cargo properly and carefully, and (ii) the duty to ensure the vessel is seaworthy in three respects, namely, the physical condition of the vessel, the efficiency of the crew and equipment, and the vessel's cargo-worthiness. In the event of damage to the cargo during a voyage, the carrier is liable for damages unless the carrier can successfully prove that exercise of due diligence on the aspects has been fulfilled by the carrier.

Calculation of and Limitation of Liability for Cargo Damages

The JCOGSA sets out the rules for calculation of cargo damages, which state that the amount shall be either the current market price or, if there is no available market, the normal value at the place and time at which the goods should have been discharged. The prevailing view is that determination of the value should be consistent with the cost, insurance and freight value. The JCOGSA also includes a package limitation that is identical to that set out in Article IV (5) of the Hague-Visby Rules.

3.4 Misdeclaration of Cargo

The shipper is obliged to notify the carrier of the nature of the cargo, together with other information necessary to carry it safely, if the cargo has a flammable, explosive or other dangerous nature. In the case of a breach of the shipper's duty to provide notice of the cargo (including a misdeclaration), the carrier is entitled to claim damages against the shipper.

On 12 December 2015, the Supreme Court affirmed a judgment by the Tokyo High Court in the "NYK Argus" case, in which it ruled that the shipper and the cargo manufacturers were liable for damage to the vessel and the cargo caused by a fire in the container of the cargo in question, on the basis of tort and product liability respectively.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The time limits and prescription periods set out in substantive laws vary, depending on the nature of the claim. Claims for carrier's liability for breach of contract for carriage of cargo (including a claim for damaged or lost cargo) are subject to one-year time limits from the date of delivery of the cargo, or the date when the cargo should have been delivered in the case of total loss of the cargo.

The shipper can agree with the carrier on an extension of time to sue the carrier in order to avoid unnecessary court proceedings, and this agreement on extension of time is commonly used in the practice of cargo claims.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Japan has not ratified the 1952 Arrest Convention, nor the 1999 Arrest Convention, thus, vessel arrest is carried out under the domestic laws of Japan. Under Japanese law, creditors may arrest vessels upon the following rights or orders:

- a lien;
- a mortgage; or
- a provisional attachment order.

An arrest by a lien or a mortgage is usually considered as the first option by creditors since it is the easiest way to arrest vessels.

4.2 Maritime Liens

Under Japanese law, which is basically civil law, maritime liens are not formally recognised in the same way as under common law, such as the laws of England and Wales.

There is also no distinction between maritime claims and non-maritime claims. However, the following claims are covered by statutory liens which enable the claimants to arrest the vessel more easily compared to other measures. Thus, these claims have a similar nature to maritime claims which are covered by maritime liens (for this reason, this type of lien will be referred to as a "maritime lien" in this chapter for ease of understanding):

- claims for death or personal injury;
- claims for salvage and general average;
- claims for pilotage, towage or voyage-related taxes such as port charges;
- claims for necessity for continuation of a voyage; and
- mariners' claims arising from their employment contracts.

In addition to the above, the following claims are also covered by a lien:

- claims subject to a limitation held in accordance with the Limitation of Liability Act; and
- claims for the damage caused by oil pollution resulting from a spill or discharge of oil from a tanker.

4.3 Liability in Personam for Owners or Demise Charterers

In order to arrest a vessel upon a maritime lien under Japanese law, the prevailing view is that owners, demise charterers or time

charterers of the vessel are required to be liable in personam (Articles 707 and 703(2) of the Commercial Code).

4.4 Unpaid Bunkers

Arrest for Unpaid Bunkers

Bunkers are one of the necessities for vessels to continue a voyage. Therefore, a bunker supplier's claim for the payment of unpaid bunkers against ship-owners, demise charterers or time charterers is covered by a maritime lien by which the bunker supplier is able to arrest the vessel.

Possibility of the Arrest by Physical Supplier

However, if the bunker supplier is an actual supplier and not a contractual supplier, it is unlikely to be granted the right to arrest the vessel since the claimant does not have a contractual claim against the ship-owners, demise charterers or time charterers of the vessel.

Issue of Conflict of Laws

It should be noted, however, that Japanese courts may also require that (i) the governing law of the bunker supply contract, and/or (ii) the law of the country where the bunker is supplied or the flag state of the vessel, recognise and grant that arrest, which is up to the interpretation of each court regarding the issue of conflict of laws.

4.5 Arresting a Vessel

In order to file an application for the arrest of a vessel, an original power of attorney and corporate certificates are required as a formality. Documents which prove the claimant's claims/liens and their supporting affidavit may also be required. All the documents must be attached with Japanese translations, but, generally, notarisation and apostille are not required.

4.6 Arresting Bunkers and Freight

Arresting Bunkers

Under Japanese law, it is extremely difficult or almost impossible to arrest a remaining bunker on board. This is due to the requirements of the Civil Execution Act and the difficulties lying in the practical process of arrest of a bunker which is in the tank of the vessel.

Arresting Freight

It may also not be granted the right to arrest the freight on board the vessel under Japanese law; however, claims for losses or damages of the freight may be covered by the lien which arises from the scheme of limitation of liability for marine claims.

4.7 Sister-Ship Arrest

It is not possible to arrest a sister vessel with a maritime lien. Conversely, such an order may be granted by a provisional attachment. However, the thresholds are high in terms of the requirement that the registered owner of the sister ship must be liable in personam, and after arresting the vessel, the claimant must commence normal litigation procedures to obtain title of debt against the registered owner.

4.8 Other Ways of Obtaining Attachment Orders

Apart from ship arrest, there is, in general, no other practical measure to obtain security for the claim in relation to the ship, but this still may depend on the factual background.

4.9 Releasing an Arrested Vessel

In the Case of Arrest by Maritime Lien or Mortgage

If a vessel is arrested by enforcement of a maritime lien or mortgage, then cash, bank guarantees, insurance bonds or a club's Letter of Indemnity (LOI) are accepted as security to release the vessel.

In the Case of Arrest by Provisional Attachment Order

If a vessel is arrested by a provisional attachment order, the courts will normally accept only cash as a security to release the vessel.

4.10 Procedure for the Judicial Sale of Arrested Ships

Procedure of the Judicial Sale of Arrested Ship

Arrest of a vessel as an enforcement of lien or mortgage is, from the beginning, a part of the judicial auction procedure. If the arrested vessel is not released with sufficient security, the court will proceed with the judicial sale procedures, which are, in brief:

- deciding on the end period upon which a person who has a claim may apply for distribution of proceeds;
- evaluating the vessel;
- having a judicial auction;
- deciding on the sale of the vessel; and
- distributing the proceeds to claimants.

If a vessel is arrested under a provisional attachment order, a judicial sale procedure will not be held until the arresting party obtains title of the debt by normal litigation procedures in the court.

During the procedures, the vessel is maintained by the ship-management agent, who is appointed by the court. It normally takes between six and 12 months from the commencement of the judicial sale until its completion (ie, the completion of distribution to each creditor).

Priority Ranking of the Claims

The basic priority ranking of claims is:

- claims for costs of the procedure for the judicial sale;
- claims secured by maritime liens;
- claims secured by mortgages; and
- unsecured (ordinary) claims.

Priority Ranking of the Claims Covered by Maritime Lien

Within the category of maritime liens, the ranking of covered claims is:

- claims for death or personal injury;
- claims for salvage and general average;
- claims for pilotage, towage or voyage-related taxes such as port charges;
- claims for necessity for continuation of a voyage;
- mariners' claims arising from their employment contracts;
- claims subject to a limitation held in accordance with the Limitation of Liability Act/claims for the damage caused by oil pollution resulting from the spill or discharge of oil from a tanker.

4.11 Insolvency Laws Applied by Maritime Courts

Under Japanese law, there are similar insolvency schemes to those under Chapter 11 of the United States Bankruptcy Code; namely, the schemes under the Civil Rehabilitation Law and the Corporate Reorganisation Law of Japan.

If the owner of the vessel goes bankrupt and an insolvency procedure commences, the bankruptcy court/trustee may order or obtain an arrest order to recover its control over the vessel; however, this is not unconditional and depends on the terms of the relevant charterparty and other legal circumstances.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

In relation to an arrest by maritime lien, the threshold for the argument of wrongful arrest may be lower than that for arrest by provisional attachment order. The main requirement for such an argument is negligence or wilful misconduct of the arresting party in the course of the filing and arresting the vessel. The reason for this is that, since the arrest of the vessel by maritime lien is easier than for another normal attachment order procedure, the arresting party is required to be more cautious and should carry out sufficient analysis, both factual and legal, to avoid damage being incurred by innocent or irrelevant parties such as the owner who is not liable in personam.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

Convention and Domestic Law

Japan has not ratified the Athens Convention on passengers' liability. The rights of the passenger to claim for damages against ocean carriers are governed by the passenger transportation agreement and the Commercial Code.

Carrier's Liability for Passengers

With regard to liability for death or personal injury of passengers, there is no legislative limitation in favour of the carrier. Further, any agreement which limits or releases a carrier's liability for death or personal injury of passengers is deemed to be null and void, except for the damage mainly due to delay, Act of God, or liability for passengers who may suffer damage from normal vibration or other similar causes, which is normal for ocean transportation.

Nature of Liability of the Carrier and Burden of Proof

The nature of a carrier's liability for passengers is not strict liability; however, the burden of proof on the exercising of due care by the carrier or its employees lies with the carrier (Article 590 of the Commercial Code).

Time Bar for Passenger Claims

The time bar for passenger claims for personal injury or death in relation to transportation is five years from the time when the passengers first become aware of the damage and the wrongdoers, or 20 years from the time when the damage occurs.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

If a bill of lading indicates a specific foreign law as a governing law, Japanese courts will respect and accept that foreign law. In the absence of a governing-law clause in a bill of lading, it would be extremely difficult to predict the decision on what laws should be applicable to and govern the bill of lading. In practice, almost all bill of lading forms issued by Japan-related carriers have a governing-law clause.

Japanese courts also are inclined, broadly, to admit and enforce an exclusive jurisdiction (and arbitration) clause on the reverse side of a bill of lading. This means that the courts will dismiss a claim brought to an undesignated jurisdiction under a contract of carriage covered by a bill of lading.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

Where a bill of lading has clear clauses or wording for incorporation of the terms set out in a specific charterparty, the incorporation of those terms (including the jurisdiction and dispute resolution clauses) into the bill of lading would be adopted by Japanese courts. However, it is still unclear what the courts require in detail for such incorporation, since there are only a few judgments by the courts on this issue.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Japan is a contracting state to the 1958 New York Convention. Arbitral awards rendered in signatory countries of the Convention are enforceable in Japan, as long as the requirements of the Convention have been fulfilled. Conversely, the enforceability of arbitral awards in non-party states is subject to the conditions set out in the Arbitration Act.

The Arbitration Act has very similar provisions to those provided in the 1958 New York Convention. For instance, in cases where the party to an arbitral award attempts to resist its enforcement, the main available grounds are set forth under the Arbitration Act, and are that:

- the arbitration agreement is not valid due to the limited capacity of a party, etc;
- the arbitration proceedings have serious defects such as a lack of proper notice or opportunity for defence;
- the arbitral award is not valid on the premise that it contains a decision on matters going beyond the scope of the arbitration agreement, or the arbitral award is not final and binding, or the arbitral award has been set aside or its effect has been suspended by a judicial body of that country, etc; or
- the content of the arbitral award is contrary to public policy in Japan.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

In Japan, it is considered that Japanese courts will issue an arrest order for a vessel if the courts find that the claim in question is secured by a maritime lien, regardless of whether or not the claim is subject to a foreign arbitration/jurisdiction clause under the relevant contract/bill of lading.

Where the creditors attempt to arrest a vessel by a provisional attachment order, the courts will not allow the creditors to arrest the vessel, unless there is a possibility that a claim which is subject to a foreign arbitration/jurisdiction clause, and will eventually be awarded or judged by foreign arbitration or courts, is legally enforced in Japan.

6.5 Domestic Arbitration Institutes

The Tokyo Maritime Arbitration Commission (TOMAC), which is located in the Japan Shipping Exchange (JSE), is the only arbitral tribunal in Japan for resolving shipping disputes. It has a long history and a prestigious reputation, in particular with regard to disputes relating to the NIPPONSALE contract. The TOMAC is recognised as being the most popular choice for dealing with shipping issues.

The TOMAC has drawn up three types of arbitration rules: Ordinary Rules, Simplified Rules (claims up to JPY20 million), and Small Claims Arbitration Procedure (SCAP) Rules (claims up to JPY5 million). These rules all have a basic concept that, the smaller the claim amount is, the lower the costs that will be borne by the arbitration and the quicker the arbitration proceedings are resolved. The average length of arbitration proceedings is about 13 months under the Ordinary Rules, three to five months under the Simplified Rules and five to ten weeks under the SCAP Rules.

An arbitral award has the same effect as a final and binding judgment and an appeal to the court to set aside the arbitral award is allowed only on narrow grounds (such as violation of the arbitration procedure or public policy). One of the advantages of arbitration by the TOMAC in comparison with court proceedings is that the successful party is entitled to recover legal costs from the losing party to a reasonable extent upon application for recovery of those costs.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

In the case that a claimant commences legal proceedings in a court or arbitral tribunal in Japan, despite the relevant contract having a foreign jurisdiction or arbitration clause, a defendant can simply seek to dismiss the claim in the court proceedings and to dismiss the petition for an arbitral award, based on the defence of lack of jurisdiction or lack of valid arbitration agreement, respectively. Moreover, the defendant may be able to rely on a provisional court order prohibiting the commencement of legal proceedings in Japan on the ground that the claimant ignores the foreign jurisdiction or arbitration clause, resulting in a breach of the contract.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

In Japan, owners or operators of Japanese-flagged ships, or owners or operators who run a business in Japan with other countries' flagged ships, may enjoy the tonnage tax scheme.

Moreover, ship-owners may enjoy accelerated depreciation, as is seen in many countries worldwide.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

As of January 2021, non-Japanese crews may enter Japan with the submission of a certificate of a negative test result for COVID-19 issued within the last 72 hours. Even under the declaration of a state of emergency, the Japanese government tentatively grants entry to non-Japanese crews, since they are engaged in necessary business for society, namely, worldwide ocean transportation.

As to the vessel, if there is a crew member who has COVID-19 symptoms, the Master has to follow the general rules in relation to the coronavirus pandemic, eg, report it to the authorities, require the crew member(s) to take a PCR test, wait for the result and undergo quarantine, depending on the result of the test, as well as other applicable orders given by the authorities, which may vary from time to time due to the change in the situation across the state.

8.2 Force Majeure and Frustration in Relation to COVID-19

If the parties agree that the coronavirus pandemic is an event for exception of liability or an event of *force majeure*, the courts will generally grant relief to a party from its liability to perform under the contract.

In the case where there is no such clause expressly agreed, a party may still argue *force majeure* as one of the principles of law, however, the threshold for such an argument is normally high, since Japanese law does not have a clear and express concept of *force majeure* or its requirements and effects. Especially considering the fact that the coronavirus pandemic was foreseeable for parties who entered into a contract after the spring of 2020, it is difficult for such parties to be successful in an argument that the coronavirus pandemic falls under a *force majeure* event and thus releases the parties from their liability to perform their obligations under the contract.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

Japan has recently been promoting and engaging in the reduction of greenhouse gas emissions globally, which has been reflected in the new adoption of the IMO Marine Environment Protection Committee (MEPC) to amend the MARPOL Convention, including the requirement for existing ships to achieve specific carbon intensity by meeting the criteria under the Energy Efficiency Existing Ship Index (EEXI). There are seemingly several options to achieve this EEXI, eg, limit the engine output, change the fuel or change the ship/engine herself. The effect of the non-achievement of this requirement is left up to the flag states or port authorities of the contracting states.

The Japanese government, among others, may adopt a relatively strict attitude for this in order to ensure the effectiveness of the overall regulation. This is not only a Japanese territorial matter but may have a global impact on any long-term charterparty, thus, the development of the discussion should be cautiously observed. New regulations are expected to be enforced in 2023 at the earliest.

TMI Associates provides full legal services with global practice through its 14 offices located throughout Japan and around the world. TMI has over 500 lawyers and its shipping team has ten key lawyers and is led by partner Jumpei Osada. The shipping team advises on every aspect of shipping through its lawyers, who have extensive experience and a wide array of knowledge in those fields to offer the firm's clients, eg, ship-owners, operators, shipyards, financiers, insurers, P&I Clubs, and energy, and oil and gas companies. The team's practice has significant experience in both ship finance and dry/wet shipping matters. On the contentious side, TMI acts for clients in litigation related to cargo claims, casualties, insurance claims, ship-building and charterparties. Another strength of TMI lies in its ability to provide clients with one-stop services for issues involving several different legal fields in the shipping industry, such as mergers and acquisitions, bankruptcies and antitrust matters.

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MALTA

Law and Practice

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The court system in Malta is regulated by virtue of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta (COCP). The COCP provides that the Courts of Justice of Civil Jurisdiction in Malta are either superior or inferior. The Superior Courts are the Civil Court, the Court of Appeal and the Constitutional Court, whilst the inferior Courts are the Court of Magistrates (Malta) and the Court of Magistrates (Gozo). Gozo is one of the three islands in the Maltese archipelago, which is comprised of Malta, Gozo and Comino.

Cases which are valued at EUR15,001 and over are heard by the Superior Courts, whilst cases under this figure are heard by the Courts of Magistrates.

There is no designated maritime or shipping court and all maritime and shipping cases are heard by the First Hall of the Civil Courts. In practice, cases with a maritime flavour are assigned to two judges who, over the years, have garnered a great deal of expertise in the subject.

The jurisdiction of the courts to hear cases in rem is regulated by Article 742(B) of the COCP. This article was introduced into the COCP in 2006; before that time, the jurisdiction in rem of the courts was still regulated by the Victorian Admiralty Court Acts of 1840 and 1861. This article lists all the maritime claims which can be heard by the Maltese courts against vessels in rem.

The grounds contained in Article 742(B) are based on Article 21 of the English Supreme Court Act, and the list of maritime claims in the Arrest of Ships Convention 1952 and the Arrest of Ships Convention 1999.

1.2 Port State Control

Transport Malta, through its Merchant Shipping Directorate, has the responsibility to monitor and ensure that its fleet as well as ships entering Maltese ports and anchorages are compliant with international standards regarding safety, pollution prevention and on-board living and working conditions. A memorandum of understanding for the Mediterranean region had been signed in Malta in 1997 and Transport Malta is also a member of the Paris Memorandum of Understanding on port State control since July 2006.

Should deficiencies be noted by Port State Control Officers in the course of an inspection, actions may vary, from recording a deficiency to be rectified within a certain period of time to issuing a detention order in the event that a deficiency poses a hazard to safety, health or the environment. The detention order may only be lifted if the detainable item has been rectified to the satisfaction of the authority. However, one of the key issues that fall within the remit of the Ports Directorate within Transport Malta is the prevention of pollution occurring in the waters within its jurisdiction. Through the assistance of the Pollution and Incidence Response Unit, the Ports Directorate is responsible to deal with any incidence of pollution occurring within its jurisdiction. The Directorate also participates in the Western Mediterranean Region Marine Oil and HNS Pollution Co-operation (West MoPoCo) project, which aims to provide assistance and share expertise to strengthen the co-operation of preparedness between participating countries for any response to marine pollution.

The Ports Directorate is, furthermore, responsible for the release of periodic Notices to Mariners which contain updated navigational information, including the location of any wrecks or groundings of vessels.

Malta ratified the Nairobi International Convention on the Removal of Wrecks 2007, which has been transposed into Maltese law by virtue of the Merchant Shipping (Wreck Removal Convention) Regulations (Subsidiary Legislation 234.53). The Regulations apply to all Maltese ships wherever they may be and to all other ships, regardless of flag, while located within the territorial waters of Malta. By means of the Regulations, if a wreck is located in Maltese waters and may pose a hazard, the Authority for Transport in Malta is given the power to issue a "wreck removal notice" informing the registered owner of the deadline within which the wreck is to be removed. Should the registered owner fail to remove the wreck, the Authority may do so itself at the registered owner's expense.

1.3 Domestic Legislation Applicable to Ship Registration

The Merchant Shipping Act, Chapter 234, Laws of Malta is the primary legislation governing ship registration. The Act is supplemented by several subsidiary regulations which handle all ship-registration matters.

The Authority responsible for the registration of vessels is the Merchant Shipping Directorate within the Authority for Transport in Malta, referred to as Transport Malta.

1.4 Requirements for Ownership of Vessels

The registered owner of a vessel registered under the Malta flag may be a Maltese or non-Maltese entity or an individual (provided that individual holds a valid EEA, EU, Swiss or UK passport). In the case of a non-Maltese entity or individual, that non-Maltese owner is required to appoint a resident agent in

Malta to act as a channel of communication between the Maltese authorities and the non-Maltese owner.

The Merchant Shipping Act also caters for the possibility of registering a vessel still under construction.

1.5 Temporary Registration of Vessels

Under Maltese law, a vessel is initially registered provisionally for a period of six months. Although this is referred to as provisional registration, it is nonetheless a definite one. Mortgages may in fact be registered securely while the vessel is provisionally registered. The provisional registration may be extended for additional periods up to a maximum of one year, during which time proof of ownership documentation, together with some technical documents, need to be filed with the ship registry for purposes of obtaining permanent registration.

The Merchant Shipping Act provides for various registration options: straight, bareboat-out, bareboat-in and dual registration. In the case of dual registration, the interests of the owner are registered with the Malta Ship Registry, while charterers also operate the vessel under the Malta flag. Charterers may apply to obtain vessel certificates in their name, provided that the owner and any registered mortgagees provide their written consent to such an arrangement, and charterers pay registration fees equal to those due by owners.

1.6 Registration of Mortgages

The Malta Ship Registry within Transport Malta is responsible for the registration of Maltese mortgages over Malta flagged vessels.

The registration of a mortgage over a Malta-flagged vessel takes place by means of a statutory mortgage instrument, which is produced to the Registrar of Ships for registration and is recorded in the register of the relevant vessel. This registration determines the exact date and time from when the mortgage becomes effective vis-à-vis third parties and consequently also determines its ranking. The mortgage instrument is generally executed locally by a local representative of the mortgagor acting pursuant to a power of attorney, which is also presented to the Registrar of Ships together with the mortgage instrument.

1.7 Ship Ownership and Mortgages Registry

The Maltese Ship Registry which is responsible for the registration of ships and mortgages is a public registry distinct from the Government Public Registry. It is accessible to the general public, who may physically attend the registry to carry out searches on any Malta-flagged vessels. A transcript of the register of any registered vessel may also be ordered from the Ship Registry, which will reflect the publicly available information.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Malta is a party to the following:

- the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;
- the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997;
- the 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage 1969 and the Protocol of 1992 to Amend the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation;
- the 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances;
- the 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships;
- the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments; and
- the 2009 Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships.

Malta is also party to the 2007 International Convention on the Removal of Wrecks.

Very recently, the Oil and Hazardous and Noxious Substances Pollution Preparedness, Response and Co-Operation Regulations, 2020 (Legal Notice 450/2020) came into force on 1 January 2021. The purpose of these regulations is primarily to:

- establish in accordance with the provisions of the OPRC convention and OPRC-HNS Protocol a regulatory framework for the applicability of the convention and protocol; and
- provide for the applicability of the national contingency plan and for the requirement to have in place a marine pollution response emergency plan for marine terminals, marine facilities and ports.

2.2 International Conventions: Collision and Salvage

Salvage

Malta is not a signatory to any of the Salvage Conventions.

The law relating to Salvage is contained in Articles 342 to 346 of the Merchant Shipping Act. These articles provide for the payment of a salvage award when services are rendered which save lives or property from any vessel in Maltese territorial waters or from any Maltese vessel, wherever it may be. The law also provides that the salvage payable must be limited to the value of the property salvaged.

The award is based on a number of criteria, including: the measure of success obtained, the efforts of the salvors, the danger run by the vessel saved, by her passengers, crew and cargo, the danger run by the salvor and the salvaging vessel, the time expended, the expenses incurred and the losses suffered, and the risks of liability and other risks run by the salvors, the value of the property exposed to such risks, having due regard to the special appropriation of any of the salvor's vessels for salvage purposes, and the value of the property saved.

The obligation to pay salvage is not only an obligation limited to the owner of the vessel but an obligation of the person whose property has been saved.

Collisions

The liability for damages arising out of a collision is established by reference to the general law of tort, as enunciated in Article 1031 of the Civil Code. The law of tort in Malta is founded on fault-based liability, with every person being liable for the damage that occurs as a result of his or her fault. A person is deemed to be at fault if, in his or her own acts, he or she does not use the prudence, diligence and attention of a "bonus paterfamilias" – the standard of the "reasonable man."

In determining fault, however, consideration will be given to the Collision Regulations which became part and parcel of the law of Malta by virtue of Legal Notice 87 of 1978 entitled "Merchant Shipping (Prevention of Collisions) Regulations, 1978", which effectively laid out the International Regulations for Preventing Collisions at Sea 1972 as a Schedule to that Legal Notice.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Malta is a signatory to the 1996 Protocol of the LLMC 76, which has been transposed into Maltese domestic legislation by means of the 2003 Limitation of Liability for Maritime Claims Regulations, subsidiary legislation 234.16 of the Laws of Malta (the Maltese Regulations). In fact, it was Malta's adoption of the Protocol as the tenth State Party which brought into force the 1996 Protocol.

2.4 Procedure and Requirements for Establishing a Limitation Fund

The establishment of a limitation fund is set out in Subsidiary Legislation 234.16 entitled "Limitation of Liability for Maritime Claims Regulations". The Regulations stipulate that limitation funds are to be constituted with the Civil Court, First Hall. A person who wishes to constitute a limitation fund may do so by paying into 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 Regulations, together with interest from the date of occurrence giving rise to that liability to the date of payment into court at the rate of 8%. The person may adjust this figure by topping up funds in court if these were not sufficient or by filing an application to request a refund if they have overpaid.

A person who has made such a payment shall give notice thereof in writing to every person making a claim against him or her, specifying the date of payment in, the amount paid in, the amount of interest included therein and the period to which it related.

Funds can be constituted by paying a deposit of money into court or by providing a bank guarantee issued by a local bank. It is to be noted that, to date and as far as is known, there have been no limitation funds set up in Malta.

3. Cargo Claims

3.1 Bills of Lading

Malta is not a signatory to either the Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules.

The Hague Rules, however, apply in limited circumstances because the text of these rules has been incorporated by virtue of the Carriage of Goods by Sea Act of 1954, by way of a Schedule to the Act. The Hague Rules have effect in relation to and in connection with the carriage of goods by sea in any vessel used for that purpose and carrying goods from Malta to any other port, but not if that vessel is carrying goods within the limits of Malta, transporting them from one island to another. Thus, the Hague Rules are not applicable as a matter of law in relation to cargo carried loaded on board a vessel in a foreign port and discharged in Malta.

In the case of disputes arising under a bill of lading related to goods discharged in Malta covered by a bill of lading containing a Clause Paramount, Maltese courts will apply the liability regime indicated in the Clause Paramount. Therefore, in practice the courts tend to apply the Hague, or the Hague-Visby Rules where indicated, which are the most commonly applicable

liability regimes. There is no known case in which the Maltese court has applied the Hamburg Rules. The Rotterdam Rules are not yet in force.

In the event that the bill of lading does not contain a Clause Paramount incorporating the Hague or the Hague-Visby Rules, the laws which govern the dispute would be the Maltese Civil Code and Commercial Code.

3.2 Title to Sue on a Bill of Lading

Maltese law on bills of lading is contained in Articles 321 to 327 of the Commercial Code. They are sections of the law that are quite archaic and merit being revised. Whilst they do not deal with title to sue directly, they imply that, by and large, the parties to the bill who would be entitled to sue on the bill would be the shipper, consignee and any subsequent endorsee who is a subsequent holder of the bill of lading.

Maltese law provides that the bill of lading may be drawn to order or to bearer or in favour of a specified named party, and thus any such holder of the bill of lading would have title to sue. It is important to note that parties to a dispute frequently refer to English case law on the matter. Although Maltese courts are not obliged to follow English case law, English jurisprudence has substantial persuasive value in this regard.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Where the bill of lading contains a Clause Paramount applying the Hague or the Hague-Visby Rules, the courts will apply the liability regime, including the limitation provisions found in those Rules. It is not known if the Maltese courts have ever had to consider applying the liability regime in the Hamburg or Rotterdam Rules. However, if there is no Clause Paramount indicating the liability regime to be applied, Maltese law itself does not provide the ship-owner with any rights to limit his or her liability for cargo damage along the lines found in the Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules. The only rights of limitation available would be those limits found under the 1996 Protocol to the 1976 Limitation Convention.

3.4 Misdeclaration of Cargo

Maltese law is silent on this particular issue and consequently a carrier's right to commence an action against the shipper for misdeclaration or misdescription would be governed by the general law of contract. Much would depend on the stage at which the carrier discovered the misdescription and what the carrier would be claiming.

If the misdeclaration is discovered at the beginning of the voyage and prior to the departure of the vessel, it would be pertinent to establish whether that misdescription was of sufficient gravity to give the carrier the right to rescind the contract; alternatively, if the misdescription is discovered during or at the end of the voyage, the carrier would have to establish that the misdescription actually caused damage to the carrier.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The courts would apply the time limits in terms of the liability regime indicated in the Clause Paramount. If there is no Clause Paramount, the position is less clear.

With regard to lost or undelivered cargo, Article 544 (e) of the Commercial Code, Chapter 13 of the laws of Malta, states that actions for the delivery of goods are time-barred by the lapse of one year from the arrival of the vessel.

With respect to damaged cargo, there is no particular provision and consequently if the claim is based in contract it would attract a five-year time limit and if the claim is based in tort it would attract a two-year time limit.

The extension of time bars is not a straightforward issue. Some time bars can be interrupted, allowing time to start to run again, and others cannot be interrupted even if the parties agree that these should be extended. The latter time bars are referred to as being "peremptory". An example of a peremptory time limit is the one referred to above relating to lost or undelivered cargo. Such a time limit may not be extended even if by mutual agreement of the parties.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Malta is not a party to the 1952 Arrest Convention, nor is it a signatory to the 1999 Arrest Convention. Ship arrests are governed solely by Maltese domestic law.

Up until 2005, the grounds upon which a creditor could arrest a ship in rem were the grounds upon which the courts in Malta could exercise jurisdiction in rem. These grounds were those found in the UK Admiralty Court Acts of 1840 and 1861, which applied in Malta. These grounds were, of course, insufficient to cater for the exigencies of shipping over the last 150 years.

In 2006, statutory amendments were enacted to revamp the grounds upon which the courts could exercise jurisdiction in rem and therefore arrest vessels as security in actions in rem. A new article was introduced into the Code of Organisation and Civil Procedure (the COCP) which exhaustively listed all the maritime claims, for which a creditor could seek to arrest

a ship in rem in Malta. This list, found in Article 742B of the COCP, is extremely comprehensive and is based on the English Supreme Court Act of 1981 and the Arrest of Ships Conventions of 1952 and 1999.

Under Maltese law, a creditor may seek to obtain either a precautionary or an executive arrest. In the case of the latter, the creditor must already hold a judgment or other similar enforceable title. Conversely, a precautionary arrest is issued when a creditor wishes to obtain security for a claim which has not yet been decided. An arresting party has a statutory time frame of 20 consecutive days from the date of the issuance of a precautionary arrest within which to commence or institute proceedings on the merits before a competent court or tribunal.

A creditor is also permitted to arrest a ship in Malta either to secure a claim in personam or alternatively a claim in rem. When a ship is arrested as security for a claim in personam, the vessel would be regarded as any other asset forming part of the debtor's estate. In such circumstances, the arresting party would need to ensure that the Maltese courts would be vested with jurisdiction over the debtor. The grounds for jurisdiction in relation to a claim in personam as enshrined in Article 742(1) of the COCP, all require a direct connection or proximity to the territory of Malta or Maltese persons.

However, where a creditor obtains arrest to secure a claim in rem, the vessel is considered as being separate and distinct from the rest of the debtor's patrimony. Nonetheless, the arresting party would still need to ensure that the Maltese courts are vested with jurisdiction in rem. The creditor's claim would need to be intrinsically of a maritime character, as it must fall under one of the headings of maritime claims listed in Article 742B of the COCP. Furthermore, unless the claim is a special maritime privilege, the creditor would generally also need to satisfy the "relevant person test" as prescribed in Article 742D of the COCP in order to arrest in rem.

4.2 Maritime Liens

The concept of maritime liens per se is alien to the Maltese legal system. The closest equivalent are those claims listed in Section 50 of the Merchant Shipping Act (MSA), which are referred to as special maritime privileges. In all, there are 16 listed special privileges which include, inter alia, any judicial costs incurred in respect of the sale of the ship, salvage costs, crew wages and remuneration, expenses incurred for the preservation of the ship after her last entry into port, as well as moneys due to creditors for provisions, victuals, outfit and apparel, incurred prior to the departure of the ship on her last voyage. Section 50 of the MSA also serves to help competing creditors establish the ranking of their respective claims, as the list is organised in a hierarchical order according to the priority of the nature of those claims.

There are two fundamental differences between ordinary maritime claims and special maritime privileges under Maltese law. First, special maritime privileges attach to a vessel and will survive any voluntary sale of a vessel for up to a year. Conversely, ordinary maritime claims do not follow the vessel and an arrest in rem would only be possible where such claims satisfy the "relevant person test". The second cardinal difference relates to ranking. All the special maritime privileges enjoy a higher ranking than ordinary maritime claims.

Maltese law recognises a plethora of ordinary maritime claims which could give an arresting party locus standi to arrest a vessel in rem. Article 742B of the COCP exhaustively lists all recognised maritime claims. This list is quite comprehensive and includes, inter alia, towage or salvage claims, claims arising out of a contract of sale of a ship, charterparty claims, claims for damages or injury caused by a ship and insurance premia claims when payable in respect of a vessel.

For the sake of thoroughness, it is also worth mentioning that Maltese law does recognise that certain creditors may retain a possessory lien over a vessel. Any ship-repairer, ship-builder or other creditor, into whose care and authority a ship has been placed for the execution of works or any other purpose, is entitled to retain possession over the ship until the debts for such work or repairs are settled. However, a possessory lien is extinguished upon the voluntary release of the ship from the custody of the creditor.

4.3 Liability in Personam for Owners or Demise Charterers

Generally, a vessel may not be arrested in rem unless the "relevant person test" has also been satisfied. Article 742D of the COCP dictates that an arrest in rem for a maritime claim is only possible where the party who would be liable for the claim in an action in personam ("the relevant person") was when the cause of action arose, an owner or charterer of, or in possession or in control of, the ship or vessel, and that same relevant person is either the owner, beneficial owner or bareboat charterer of the ship at the time of the arrest.

There are, however, several exceptions to this rule. As previously stated, where the claim is a special maritime privilege listed in Section 50 of the MSA, the creditor may arrest the ship irrespective of who incurred the debt. Likewise, there is no need to satisfy the relevant person test when the underlying claim relates to the possession, ownership or title of a ship, or to any issue arising between co-owners of a ship in so far as the ownership, possession, employment or earnings of that ship are

concerned, or to a claim in respect of a mortgage, hypothec or charge registered over the ship.

4.4 Unpaid Bunkers

Article 742B(o) of the COCP provides that a claim "in respect of goods, materials, provisions, bunkers, supplies and necessaries supplied or services rendered to a ship for her operation, management, preservation or maintenance" would be classified as a maritime claim. Accordingly, a bunker supplier would be able to arrest a ship in rem to secure a claim for unpaid bunkers. Maltese law does not differentiate between contractual suppliers and actual physical suppliers. Both may arrest a vessel in rem for unpaid bunkers.

However, any supplier seeking to secure an arrest for such a claim would also need to ensure that the relevant person test is satisfied. Accordingly, a contractual supplier or a physical supplier may only arrest the vessel where the owner or the bareboat charterer of the vessel is the party liable in personam for the unpaid debt.

Following the collapse of the OW Bunkers Group, the Maltese courts were inundated with ship arrests in connection with unpaid bunkers. Several local bunker suppliers have relied on stipulations in their bunker delivery notes, which incorporate their standard terms and conditions, in order to try and satisfy the relevant person test by holding the owners liable for the unpaid debt, even where the fuel products were ordered by a charterer or an intermediary bunker trader. Admittedly, Maltese jurisprudence has been largely inconsistent on the matter, however, the more recent judgments on the subject have taken the position that a supplier cannot rely on the wording of the bunker delivery note to arrest a ship where the owner or bareboat charterer was not the party who contracted to purchase the bunkers.

Notwithstanding the foregoing, there may be cases where a claim for unpaid bunker supplies would classify as a special maritime privilege and, as such, an arrest may be issued against the vessel, irrespective of who contracted to purchase the bunkers. Claims relating to bunkers furnished to a ship after the vessel's last entry into port, or prior to her departure on her last voyage, would classify as special maritime privileges. All other bunker supplies would, however, be classified as ordinary maritime claims.

4.5 Arresting a Vessel

Formalities

A creditor seeking to arrest a vessel in Malta would need to submit an arrest application, which must include all the relevant details about the parties, the vessel, and the nature of the claim, as well as the amount being claimed (which must be in excess of 7,000 euros).

Where the arresting party is not Maltese, it would need to provide a power of attorney empowering their appointed local legal counsel to file the arrest on their behalf. The power of attorney would need to be duly notarised and legalised (or apostilled). A scanned copy would suffice in order to be able to proceed with the filing of the arrest. However, it may be necessary to present the original copy in the court at a later stage.

Whilst there is no obligation to submit any supporting documentation with an arrest application, it is always advisable that the arresting creditor does present any documents which could substantiate its claim, such as copies of the relevant contract or invoices, or even a statement of facts.

Apart from Maltese, English is also an official language in Malta. Accordingly, where the power of attorney or supporting documents are in English, these may be presented in court without the need for any translations. Documentation in any other language would need to be translated into either English or Maltese.

The arrest procedure in Malta is extremely expeditious and once the arrest application is filed in court, the arrest is usually issued within a matter of hours. Moreover, it is also possible to arrest a ship outside of normal court hours.

Security for an Arrest

The Maltese courts will never require an arresting creditor to put up any security prior to the issuance of an arrest. That said, once a ship is arrested, the owner of the arrested vessel may file an application requesting the court to order the creditor to put up security pursuant to Article 838A of the COCP. Should the court accede to this request, and should the creditor fail to comply, the arrest would be immediately lifted.

The court will only order the arresting party to put up security if the owner of the vessel can prove there is a "good cause" for such a demand. The law does not define what constitutes a "good cause" but Maltese jurisprudence in this regard would suggest that the owner would need to show that it may have a legitimate claim for statutory penalties, interests and damages caused by the arrest.

4.6 Arresting Bunkers and Freight

Under Maltese law, it is possible for a creditor to arrest bunkers on board a ship. A creditor would need to issue a warrant of seizure over those bunkers, which must necessarily be the property of its debtor. That said, there are several practical difficulties related to the seizure of bunkers, which make this remedy less

attractive to creditors. First, the creditor would need to arrange and pay for the de-bunkering of the fuel product from on board the vessel. Second, the creditor would need to find available storage space in Malta where the bunkers must be kept until there is a definite outcome on the merits of the claim. Malta is a relatively small country with very limited tank facilities for the storage of fuel products. There is therefore a constant and competitive high market demand for available storage space. Third, the creditor would need to engage the storage facility operator holding the product as its legal cosignatory, as required by the law. The respective operator may not be willing to accept this role as it confers several obligations and responsibilities.

In this regard, it is pertinent to mention that Maltese law offers additional protections to bunker suppliers wishing to arrest those bunkers for which they have not yet been paid. Article 2009(d) of the Civil Code would afford the unpaid supplier with a privilege over the bunkers. Moreover, should the bunker supplier have included a retention of title clause in its terms of sale of the product, that would be deemed enforceable in Malta, pursuant to the relatively new provisions under Article 26H of the Commercial Code. Accordingly, a bunker supplier with a claim for unpaid bunkers may retain title and take back possession of the bunkers, which would still be considered to be its own property.

Maltese law does not specifically provide for the arrest of freight. Nonetheless, it would be possible, for instance, for a consignee with a claim against a ship-owner under a bill of lading to issue a garnishee order to seize freight due to that ship-owner. Under normal circumstances, a garnishee order is used in the context of seizing any funds belonging to a debtor in bank accounts held with local banks. The creditor names the banks as garnishees in his or her application and consequently the banks would be obliged to seize any of the debtor's funds in their possession. That said, the law allows a creditor to name any third party as a garnishee.

There is therefore nothing to stop a consignee from issuing a garnishee order against the ship-owner and to list the charterer as a garnishee. Once the charterer is served with the garnishee order, he or she would be legally obliged to deposit into court any monies belonging to the carrier which may be in its possession or which may come into its possession at a later date. Thus, whenever freight is due by the charterer to the owner, the former would be prohibited from paying it directly to the owner but instead would need to deposit the amount in court as security for the consignee's claim.

4.7 Sister-Ship Arrest

Maltese law permits sister-ship arrests under certain circumstances. Article 742D of the COCP provides that, where a creditor has a claim in rem (which is one of the maritime claims listed in Article 742B) in relation to a particular ship, it may arrest any other ship that is owned or beneficially owned by the party who is liable in personam for the claim.

4.8 Other Ways of Obtaining Attachment Orders

Apart from ship arrests, Maltese law also offers creditors the possibility of applying for a flag injunction, which is another pragmatic tool that can be used to obtain security for maritime claims. Section 37 of the MSA affords a creditor the right to request that the Maltese courts issue an injunction over any vessel flying the Malta flag, prohibiting it from being sold, transferred or deregistered from the Maltese Ship Registry. In addition, such an injunction would also prohibit the affected ship owner from registering any further mortgages over the ship in question.

A Section 37 injunction may, however, only be issued where the creditor has a "right in or over a ship or a part", which is defined under Section 37(10) of the MSA as being a claim based on either:

- a right of ownership; or
- secured by a mortgage; or
- secured by a registered encumbrance; or
- secured by a privilege or a lien over the ship arising by operation of Maltese law or the law applicable to the claim; or
- any other maritime claim which gives rise to a claim in rem under Maltese law. Furthermore, the flag injunction is a precautionary measure and accordingly, the creditor will also need to open an action on the merits before a competent court or tribunal.

Once the injunction is issued by the courts, it will be recorded in the ship's register at the Maltese Ship Registry where it will remain until it is removed by court order. Accordingly, if the debtor ship-owner were to try to sell the ship in, for instance, two years' time, it would be prohibited from doing so until the injunction is removed.

It is also worth noting that, whereas a ship arrest is only permissible when the vessel is physically located within Maltese territorial waters, a Section 37 injunction may be requested wherever the vessel may be situated. Moreover, unlike a ship arrest, a Section 37 injunction does not impede the vessel's ability to continue trading. As such, this remedy can be quite advantageous to creditors dealing with a debtor who may have liquidity issues. By allowing the vessel to operate commercially, the ship can continue to generate revenue and, hopefully, the debtor could eventually be able to pay its dues. Nonetheless, the creditor issuing the section 37 injunction will continue to maintain its security, as the ship cannot be sold or transferred.

A creditor may also resort to using other attachment mechanisms available under Maltese law, which are not exclusive to maritime claims. For instance, a creditor may file for a garnishee order (which is similar in nature to a freezing order) to seize any funds which the debtor may have in accounts held with Maltese banks. It is also possible to apply for a warrant of seizure of any other movables or immovables which a debtor may have in Malta.

4.9 Releasing an Arrested Vessel

For a ship-owner or any interested party to secure the immediate release of an arrested ship, they would need to put up adequate security in court to cover the alleged claim amount. Strictly speaking, Maltese procedural law only allows two forms of security: either the deposit of the money in court or alternatively the presentation of an original bank guarantee (which must be drawn by a Maltese bank) in court. That said, a Maltese court would generally allow a Club LOU to be granted as alternative security for a claim, provided that the arresting creditor does not object.

4.10 Procedure for the Judicial Sale of Arrested Ships

Judicial Sales of Ships

Under Maltese law, a creditor with a final and non-appealable enforceable title may apply to the Maltese courts to have an arrested ship sold judicially, either by means of a court auction or alternatively by means of a court-approved private sale. In both cases, the vessel is always transferred free and unencumbered to the new owner.

In the case of a judicial sale by auction, the creditor would need to present an application requesting the courts to schedule an auction date and to appoint an auctioneer to preside over the auction. The registration of bidders is normally carried out on the day of the auction itself. Bidders fill up a registration form and are required to present all the necessary bidding documentation shortly before the auction commences. The auction is carried out in public and the vessel is ultimately sold to the highest bidder, who must then deposit the purchase price in Court within seven running days from the auction date. There is no minimum reserve and thus a creditor cannot ascertain beforehand the sale price of the vessel.

Alternatively, a creditor may enforce its claim by applying for a court-approved private sale. This allows the creditor to take a more pro-active approach as it may actively source the market for potential buyers (usually using the services of ship brokers). Once the best offer is identified, the creditor would normally conclude a memorandum of agreement with that prospective buyer, which would always be conditional on the final approval of the court. The creditor would then file a court application to request that the presiding judge approve or sanction the private sale. The creditor is also required to submit two independent appraisals of the vessel. These need to be survey valuations rather than just "desktop" estimates.

The creditor must also adduce to the court evidence that the proposed private sale is indeed in the interest of all known creditors and that the price offered is reasonable in the circumstances of that particular case. The application would then be served on all interested parties and a hearing date is appointed for the judge to decide on whether or not to accept the sale. If the court approves the sale, the purchaser has seven running days from the date of the completion of the sale to deposit the purchase price in court.

Maintenance Expenses

Generally, it is the ship-owner who remains responsible for the maintenance of its vessel whilst under arrest. Nonetheless, Article 857(4) of the COCP states that any expenses necessary for the preservation of an arrested ship should be borne by the party issuing the arrest warrant. Thus, where an arrested ship is abandoned by its owners, the authorities may turn to the arresting creditor to ensure the preservation of the ship. That said, the law expressly provides the arresting party with the right to recover such expenses and costs together with its claim. Any expenses incurred for the preservation of the ship whilst she is under arrest would enjoy a relatively high ranking. To the best of the knowledge available, the only time a court ordered an arresting creditor to pay for such costs was in the Indian Empress case, where the presiding judge ordered the mortgagee bank to pay certain expenses to maintain the arrested superyacht.

Ranking

Following a judicial sale of a vessel, and once the purchase price is deposited in court, the competing creditors must participate in distribution proceedings in order to establish the ranking of their respective claims and for the funds to be paid out accordingly. Article 54A of our Merchant Shipping Act sets out the ranking of all maritime claims in an extremely clear and hierarchal order. Under Maltese law, a mortgagee would enjoy relatively high ranking. Only possessory liens and a very limited number of special maritime privileges would pre-rank a mortgage claim. All ordinary maritime claims under Article 742B would rank after a mortgagee's claim.

4.11 Insolvency Laws Applied by Maritime Courts

Under Maltese general corporate law, a company in financial distress may file for a company recovery procedure pursuant to the provisions of Article 329B of the Companies Act, Chapter 386 of the Laws of Malta. In a nutshell, this procedure seeks to give an insolvent or nearly insolvent debtor certain judicial protection, for a specific period of time, in order to be able to

attempt to revive the company's business. Once a company recovery order has been issued by the courts, as a rule, a creditor would not be permitted to seize any assets or enforce any judgment against the debtor company in Malta without first obtaining leave of the courts.

That said, shipping companies are not regulated by the Companies Act. Maltese ship companies are governed by the provisions of the Merchant Shipping (Shipping Organisations – Private Companies) Regulations, Subsidiary Legislation 234.42. These Regulations do not provide shipping companies with the possibility of applying for a company recovery order or any equivalent measure. Thus, Maltese shipping companies are not afforded any protections akin to those granted within the context of US Chapter 11 Bankruptcy proceedings, such as an automatic stay order. Consequently, there is nothing that a debtor owner can apply for in order to stop its creditors from arresting its ship(s) in Malta or from subsequently having it or them sold judicially.

In this respect, it is also prudent to note that a Maltese court will also not necessarily consider itself bound by any stay order issued by a foreign bankruptcy or insolvency court. This issue was touched upon in the MV B Ladybug case. After the arrest of the vessel, proceedings were commenced to have her sold judicially in Malta. The registered owners tried to interrupt the judicial sale proceedings on the basis that the beneficial owners of the vessel were subject to ongoing US Bankruptcy proceedings and a stay order had been given. The owners had argued that the Maltese courts were thus obliged to suspend the ongoing judicial sale proceedings. The presiding judge concluded, however, that the Maltese courts should not be bound by the extra-territorial effects of such a stay order and decreed that the judicial sale proceedings should continue to be heard.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

The grounds upon which an arrested party can legitimately claim damages and penalties from an arresting party due to a wrongful arrest are explicitly provided for in Article 836(8) of the COCP and are quite limited. Should a court set aside an arrest, the owner of the vessel would generally only be entitled to claim damages in the following four circumstances.

- Where, following the arrest, the arresting party without valid reason does not commence proceedings on the merits before the competent court or tribunal within the stipulated 20-day timeframe permitted at law.
- Where the creditor failed to make a demand for payment from the debtor within the 15 days preceding the arrest. This, however, does not apply when there is an urgent need for the issuance of the warrant. Thus, where there exists an imminent threat that the vessel would have otherwise left Maltese waters, the owner would not be able to rely on this ground.
- Where the arresting creditor had knowledge of the ship-owner's solvency and its clear financial ability to pay the claims. This ground, however, is hardly used, given that most registered ship-owners are special-purpose vehicle companies. Furthermore, case law shows that the threshold of proof required in this regard is rather high.
- Where the arrest was filed maliciously, frivolously or vexatiously.

There is no statutory limit on the amount of damages which a court may award, and the onus is on the ship-owner to bring evidence of the damages it suffered as a result of the wrongful arrest.

The above four grounds also give rise to the owner's right to claim statutory penalties from the arresting parties. In terms of quantum, the law dictates that the penalties which may be awarded by the court would generally amount to a sum of no less than EUR1,164.69 and no more than EUR6,988.12.

However, should the court conclude that the arrest was filed maliciously, the penalties to be imposed would be of no less than EUR11,600. In such cases, the law does not stipulate any maximum threshold. It should be noted, however, that the Maltese courts are extremely reluctant to impose statutory penalties and jurisprudence in this regard is quite consistent.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

Malta is a party to the Athens Convention on the Carriage of Passengers and their Luggage by Sea, 1974, incorporated by means of the Merchant Shipping (Carriage of Passengers by Sea) Regulation, subsidiary legislation 234.52 of the Laws of Malta. The resolution of maritime passenger claims are also dealt with under the Limitation of Liability for Maritime Claims 1976, as amended by the 1996 protocol, which was transposed into Maltese domestic legislation by means of the 2003 Limitation of Liability for Maritime Claims Regulations, subsidiary legislation 234.16 of the Laws of Malta.

Malta is further bound by Regulation (EC) No 392 of 2009 on the liability of carriers of passengers by sea in the event of accidents, which incorporated the 2002 Protocol to the Athens Convention and Regulation (EC) No 1177/2010 on the rights of passengers when travelling by sea and inland waterway.

Time Limit for Filing a Claim

Any action for damages arising out of the death of or personal injury to a passenger or for loss or damage to luggage shall be time-barred by the lapse of two years. The two years begins to run as follows:

- personal injury – from the date of disembarkation;
- death – from the date when the passenger should have disembarked, or if a personal injury resulting in death, from the date of death, if occurring within three years from disembarkation;
- loss or damage to luggage – from the date of disembarkation or from the date when disembarkation should have occurred, whichever is the later.

Limitation of Liability in respect of a Passenger's Claims

Under Subsidiary Legislation 234.16 of the Laws of Malta, a ship-owner may limit his or her liability in respect of a passenger's claims to the following.

- 1.51 million Units of Account for a ship with a tonnage not exceeding 2,000 tons.
- For a ship with a tonnage in excess thereof, the following additional amounts in addition to those mentioned in the first point would apply:
  (a) for each ton from 2,001 to 30,000 tons, 604 Units of Account;
  (b) for each ton from 30,001 to 70,000 tons, 453 Units of Account; and
  (c) for each ton in excess of 70,000 tons, 302 Units of Account.
- Malta has exercised its discretion allowed under the Convention and has determined that, for a ship with a tonnage not exceeding 300 tons, limitation will be at 500,000 Units of Account.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

The Maltese courts will largely recognise and enforce a law and jurisdiction clause stated in bills of lading. However, where the court identifies that there is a closer connection with Malta, and where the law and jurisdiction clause is included in a document that has not been negotiated by the parties, and/or is presented post facto, the court may be swayed to deviate from the clauses in the bills of lading in favour of Maltese jurisdiction (naturally, provided that the Maltese courts would have jurisdiction to determine the matter).

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

A law and arbitration clause in a charterparty that has been incorporated into the relevant bill of lading will not automatically be recognised by the Maltese courts unless it satisfies certain criteria. In the "Northeastern Breeze", the court held that a generic clause incorporating the terms of the charterparty would not suffice, and that the arbitration clause would have to be specifically incorporated into the bill of lading for this to be given effect or specific reference to its applicability to the bill of lading would have to be made in the charterparty. This is a position borne out of common law and commercial practice.

This is also evident from the Arbitration Act, Chapter 387 of the Laws of Malta that provides in Article 2(c) that "an arbitration agreement is also concluded by the issuance of a bill of lading, if the latter contains an express reference to an arbitration clause in a charterparty".

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable in Malta. This has been incorporated by means of Part III of the Arbitration Act, Chapter 387 of the Laws of Malta. The process by which a foreign arbitral award can be registered in Malta is set out in the Arbitration Rules, Subsidiary Legislation 387.01.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

As previously explained, a vessel may be arrested in rem in Malta by means of a warrant of arrest issued on any of the grounds listed in Article 742B of the Code of Organisation and Civil Procedure (COCP) if the vessel concerned is physically present within the territorial jurisdiction of the Maltese courts or as security of an in personam claim where the ship-owner is subject to the ordinary jurisdiction of the Maltese Court under Article 742 of the COCP.

However, the matter is not straightforward and much will depend on whether one is dealing with an arbitration clause or a jurisdiction clause.

With regard to arbitration clauses, Article 742(4) of the COCP provides that any person who is party to an arbitration agreement may demand a precautionary act (including a precautionary arrest warrant) to be issued and, where the party has not brought forward his or her claim before an arbitrator, he or she shall have 20 days from the date of issue of the precautionary act to commence the arbitration proceedings.

With respect to a jurisdiction clause, however, the decision of the court will in turn depend on whether the clause points towards a jurisdiction established within the European Union, or otherwise.

If the jurisdiction clause refers a dispute to a court within a European Union Member State, then, pursuant to the provisions of Article 35 of Regulation 1215/2012 (Brussel I Recast Regulation), a party may apply for a provisional arrest warrant, including protective measures in Malta in order to secure their claim on the merits being pursued before the courts in another EU Member State.

If the jurisdiction clause directs disputes to a court outside of the EU, jurisprudence is varied. There is case law to suggest that the issuance of precautionary warrants to secure a claim, such as the precautionary arrest of a vessel, will only be valid if the Maltese courts would have notional jurisdiction in terms of Article 742 of the Code of Organisation and Civil Procedure. There is, however, case law which suggests that an arrest in support of an action heard before a foreign court, even if the Maltese court has notional jurisdiction, would not be permitted.

Nonetheless, and in all cases, it is commonly held, even when the merits are not to be heard in Malta, that an arrest of a vessel in rem must satisfy the grounds of jurisdiction provided for under Article 742B of the COCP, together with the "relevant person test" requirement under Article 742D of the COCP.

6.5 Domestic Arbitration Institutes

Malta does not have a domestic arbitration institute that specialises in maritime claims. Nonetheless, where parties opt for arbitration proceedings in Malta, which would be conducted in accordance to the rules found under the Arbitration Act, they can nominate a panel of arbitrators who are specialised in maritime disputes. This helps to ensure that the matter is handled with the necessary expertise.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

Where proceedings are commenced in breach of a foreign jurisdiction or arbitration clause, a defendant may challenge those proceedings and request that a preliminary decision be given, limited to the point of jurisdiction.

Where the courts find that the proceedings have been commenced wrongly, it will declare it does not have jurisdiction to hear the matter and may order court costs to be paid by the plaintiff. The defendant would also retain a right to institute an action to recover any damages suffered.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Maltese companies (as well as those organised and existing under the laws of any European Union State) which own, operate, administer or manage a tonnage tax ship are exempt from (i) income tax which would otherwise be payable on income arising from shipping activities, (ii) any income, profits or gains derived from the sale or other transfer of a tonnage tax ship which had been acquired and sold whilst under the tonnage tax system or from the disposal of any rights to acquire a ship which, when delivered or completed, would qualify as a tonnage tax ship, and (iii) the distribution of profits derived from shipping activities or from other transactions previously referred to.

A tonnage tax ship is a ship of any net tonnage engaged in shipping activities.

"Shipping activities" comprises the international carriage of goods or passengers by sea or the provision of other services to or by a ship as may be ancillary thereto or associated therewith, including the ownership, chartering or any other operation of a ship, and includes also ship-management activities of a ship manager.

A company which benefits from the tonnage tax system will be required to pay an annual fixed tonnage tax to the Registrar of Ships, which is calculated in accordance with the net tonnage and age of the vessel.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

The coronavirus pandemic has resulted in a number of restrictions aimed at ensuring the safety and continued smooth running of the maritime sector in Malta. Thankfully, these restrictions have now been repealed.

Nonetheless, by means of Port Notice 11/2020, the Authority reminded ship-owners, operators and Masters of the need to submit the Maritime Declaration of Health in order to obtain clearance "free pratique" from the local health authorities. Once duly granted, personnel may embark or disembark from the vessel. Until this clearance is given, a ship Master is required to display the Q flag.

In reaction to the difficulties ship-owners are facing with crew changes, the Authorities have allowed ship-owners, managers

and Masters to extend seafarers' employment agreements to a maximum of four months from the original termination date. When doing so, they must provide the Authorities with a repatriation plan that provides for the seafarer's repatriation at the earliest opportunity.

8.2 Force Majeure and Frustration in Relation to COVID-19

The concepts of *force majeure* and frustration are both recognised by the Maltese Courts and can under certain circumstances be applied in relation to the coronavirus pandemic.

Under the Civil Code, *force majeure* is a permitted defence for the non-performance or the delay of an obligation, in cases where the person relying on it can prove that the non-performance or delay was due to an "extraneous cause not imputable to him".

Furthermore, a person will not be held liable for damages if he or she was prevented from giving or doing anything he or she undertook to give or do, or if he or she did anything he or she was forbidden to do, in consequence of an "irresistible force or a fortuitous event".

Maltese case law defines a *force majeure* event as one that could not be avoided by the exercise of due diligence of a bonus pater familias. The event complained of must have been inevitable, and not merely disruptive or burdensome.

Moreover, *force majeure* cannot be claimed if the person has contributed to the damage by a positive or negative act.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

One final comment would be to state that judges in Malta are not bound by the law of precedent. Thus, a judge is not bound to interpret a law in the same manner as another judge. That said, parties often cite case law to support their respective positions because they do have a great deal of persuasive value. Finally, particularly with regard to maritime matters, if there is a lacuna under Maltese law, Maltese courts very frequently rely on English case law and judgments for guidance.

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Fenech & Fenech Advocates was established in 1891 and has diverse areas of expertise, including corporate and commercial law, ICT law, M&A transactions, financial services, tax, banking, trusts and foundations, aviation, intellectual property, employment law and environmental law. It is particularly well known for its extensive maritime practice, with four distinct departments dedicated to the maritime sector: marine litigation, ship registration, ship finance and yachting. The firm represents major industry players, ranging from the largest ship-owners, tug and salvage operators and port facilities to bunker operators, charterers and financiers, yacht-builders and yacht-owners. It has worked on the drafting of numerous maritime laws.

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The main domestic laws establishing the authorities of the maritime and shipping courts in Nigeria are the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the Constitution), the Admiralty Jurisdiction Act, Cap. A5, (AJA), Laws of the Federation of Nigeria (LFN) 2004, and the Federal High Court (FHC) Act, Chapter F12, LFN 2004, which vests the FHC with exclusive jurisdiction over first-instance maritime and shipping matters in Nigeria.

All appeals from the FHC (including maritime and shipping disputes) go to the Court of Appeal of Nigeria, and thereafter, to the Supreme Court of Nigeria.

The common maritime and shipping claims filed in practice in Nigeria are proprietary and general maritime claims as defined by the AJA. Proprietary maritime claims relate to the ownership, possession or mortgage of a ship, a share in a ship or its freight. General maritime claims include:

- claims for damage done or received by a ship;
- claims for crew wages;
- claims by a Master, shipper, charterer or agent in respect of disbursements on account of a ship;
- claims in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance;
- claims for loss of or damage to goods carried by a ship;
- claims arising out of agreements relating to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise;
- claims arising out of the acts or omissions of the owners or charterer of a ship;
- claims for loss of life, or for personal injury sustained in consequence of a defect in a ship or in its apparel or equipment;
- claims in respect of the construction of a ship (including such a claim relating to a vessel before it was launched);
- claims for the enforcement of, or claims arising out of arbitral awards (including foreign awards in relation to a proprietary or general maritime claims);
- claims for insurance premiums, or for mutual insurance calls, in relation to a ship, or goods or cargoes carried by a ship;
- claims for salvage, general average, pilotage, towage, port and harbour dues.

1.2 Port State Control

The Memorandum of Understanding on Port State Control for West and Central African Region (Abuja MoU) applies to Nigeria, and the Nigerian Maritime Administration and Safety Agency (NIMASA), which is an executive agency of the Federal Ministry of Transportation, is Nigeria's port state control agency.

The NIMASA's general port state control powers and authorities, pursuant to the NIMASA Act 2007 (NIMASA Act), the Merchant Shipping Act 2007 (MSA) (which gives several conventions, such as the United Nations Convention of the Law of the Sea (UNCLOS), force of law in Nigeria) and other relevant legislations, include the power to:

- board and inspect and search any vessel and to detain any vessel within the Nigerian maritime zone;
- demand the production of any licence, permit, record, certificate or any other document;
- expel any vessel which may endanger the safety of the Nigerian maritime zone; and
- enter ports, terminals and vessels to investigate matters related to maritime labour, ship safety and security.

In relation to marine casualties, the NIMASA is authorised and empowered to:

- provide search-and-rescue services;
- make enquiries as to shipwrecks or other casualties affecting ships, or as to charges of incompetence or misconduct on the part of seafarers in relation to such casualties;
- issue regulations to prevent pollution in Nigerian waters and govern the removal of wrecks which constitute navigation risks; and
- issue regulations governing the carriage of harmful substances by sea.

1.3 Domestic Legislation Applicable to Ship Registration

The registration of vessels under the Nigerian flag is primarily governed by the MSA. Other relevant legislations include the NIMASA Act and the Coastal and Inland Shipping (Cabotage) Act 2003 (the Cabotage Act).

The Nigerian Ship Registration Office (domiciled with the NIMASA and under the control of the Registrar of Ships) (the NSRO) is responsible for the domestic registration of vessels in Nigeria.

1.4 Requirements for Ownership of Vessels

Under Section 18 (1) of the MSA, the registration of vessels under the Nigerian flag is limited to vessels wholly owned by

(i) Nigerian citizens, (ii) bodies corporate and partnerships established under and subject to Nigerian law and having their principal place of business in Nigeria, and (iii) other persons such as the Minister of Transportation (Minister) may, by regulations prescribe; the Minister has yet to issue any regulation in this regard.

Notwithstanding the foregoing, Section 19 (6) to (9) of the MSA permits a foreign-owned vessel, which is bareboat-chartered for more than one year to a Nigerian citizen or a Nigerian body corporate or partnership to be registered under the Nigerian flag as a Nigerian ship for the duration of the bareboat charter. The aforesaid registration is, however, subject to, inter alia, the suspension of the foreign flag of the foreign-owned vessel in favour of the Nigerian flag registration for the duration of the bareboat charter.

Where a foreign-owned and bareboat-chartered vessel is to engage in cabotage operations within Nigerian waters, it is required to be registered under the Special Register for Cabotage (Bareboat-Chartered Vessel). Further to the Coastal and Inland Shipping Cabotage (Bareboat Registration) Regulations 2006, made pursuant to the Cabotage Act, eligibility for the Special Register for Cabotage (Bareboat-Chartered Vessel) requires (i) the vessel to be bareboat-chartered to Nigerian citizens and to be under the full control and management of Nigerian citizens or a company, wholly and beneficially owned by Nigerian citizens, where all the shares in the company are held by Nigerian citizens free from any trust or obligation in favour of any person not a citizen of Nigeria, and (ii) the bareboat-charter period must be for five years and above.

By virtue of Section 34 (1) of the NIMASA Act, small vessels, including fishing vessels, that are wholly or partly owned by Nigerian citizens and foreigners who are resident in Nigeria are registrable under the Nigerian flag.

Whilst the MSA requires the Registrar of Ships to keep a register for ships that are under construction in Nigeria, only fully constructed vessels can be registered under the Nigerian flag as a Nigerian ship.

1.5 Temporary Registration of Vessels

The MSA permits the issuance of Provisional Certificates of Registry for provisional registration of vessels under the Nigerian flag. Thereto, vessels that are (i) located in a foreign country and owned by persons eligible to register a vessel under the Nigerian flag, and (ii) to be registered under the Nigerian flag, are issued Provisional Certificates of Registry to sail the vessels to Nigeria. A Provisional Certificate of Registry is valid for six months or until arrival of the vessel at a Nigerian port, whichever is earlier.

In other circumstances, Provisional Certificates of Registry are issued to vessels that are within Nigerian waters, and owned by persons eligible to register a vessel under the Nigerian flag, but who have yet to fulfil the requirements for permanent registration and the issuance of a Certificate of Nigerian Registry.

Nigerian law does not permit dual registration of vessels. As such, where a vessel is registered under a foreign flag, (i) a deletion certificate, from the foreign flag, is required for temporary or permanent registration under the Nigerian flag, or (ii) a suspension certificate is required, from the foreign flag, for the duration of the bareboat charter, for the registration of a foreign bareboat-chartered vessel under the Nigerian flag.

1.6 Registration of Mortgages

The Registrar of Ships (in the NSRO) is responsible for the registration of mortgages on Nigerian-registered ships. Where the mortgagor is a Nigerian-registered company, the ship mortgage is also required to be registered with the Corporate Affairs Commission (CAC).

For the registration of a ship mortgage with the NSRO, the following documents are required:

- the NSRO's consent to a mortgage;
- a formal letter of application by the ship-owner or his or her authorised representative. In practice, the mortgagor would have granted a power of attorney to the mortgagee's solicitor to undertake the registration of the ship mortgage;
- a board resolution of owners, authorising the mortgage (corporate owners only);
- a duly signed and sealed NIMASA mortgage form, with stamp duty paid;
- an executed deed of mortgage, duly stamped;
- a copy of a Certificate of Registration of Mortgage, as issued by the CAC;
- evidence of payment to the NIMASA of the prescribed fees for mortgage registration.

For registration of a ship mortgage with the CAC, the following documents are required:

- an executed deed of mortgage, duly stamped;
- a duly signed and sealed statutory Form CAC 9 (Particulars of Charge), with stamp duty paid;
- a board resolution of owners, authorising the ship mortgage;
- evidence of payment to the CAC of the required statutory fees for mortgage registration.

1.7 Ship Ownership and Mortgages Registry

In Nigeria, the ship-ownership and mortgages registries are open to the public subject to set preconditions. In particular, a

person who is not the owner of a vessel must apply formally to the NSRO to conduct a search on the status of registration of a ship or mortgage over a ship.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Pursuant to Section 12 of the Constitution, every Convention is required to be domesticated via a law of the National Assembly before it can have force of law in Nigeria. Further to this, Section 335(1)(i) of the MSA domesticated the following international conventions which govern the liability of owners and interested parties for pollution by vessels:

- 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 (LLMC);
- the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 and its Protocol of 1992;
- the Basel Convention on the Control of Trans-boundary Movements of Wastes and their Disposal, 1989; and
- any international agreement or convention relating to the prevention, reduction or control of pollution of the sea or other waters by matters from vessels, and civil liability and compensation for pollution damage from vessels, to which Nigeria is a party.

Other Nigerian laws relating to pollution are set out below:

- the Environmental Impact Assessment Act, CAP E12, LFN 2004;
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 as amended (Ratification and Enforcement) Act, Cap I30, LFN 2004;
- the National Environmental Standards and Regulations Enforcement Agency Act, 2007;
- the NIMASA Act;
- the Ship Generated Marine Waste Reception Facilities Regulations 2012;
- the Sewage Regulations 2012;
- the Sea Protection Levy Regulations 2012;
- the Oil Pollution Preparedness, Response and Co-operation Regulations 2012;
- the Convention Regulations 2012;
- the Sea Dumping Regulations 2012;
- the Dangerous or Noxious Substances Bulk Regulations 2012;
- the Liability and Compensation Regulations 2012;
- the Harmful Substances in Packaged Form Regulations 2012;
- the Anti-Fouling Regulations 2012;
- the Ballast Water Regulations 2012;
- the Prevention of Pollution by Garbage Regulations 2012;
- the Prevention of Oil Pollution Regulations 2012.

In relation to wreck removal, the MSA (Part XXVI - Sections 361 to 368) is the primary domestic legislation which governs the liability of owners and interested parties for wreck removal in Nigeria. Particularly, Section 365 of the MSA places the responsibility for removal of any ship that becomes a wreck on her owners.

Nigeria is a signatory to the Nairobi International Convention on the Removal of Wrecks, 2007 (the Nairobi Convention). However, the Nairobi Convention does not have the force of law in Nigeria, as the National Assembly has yet to enact a legislation to domesticate the Nairobi Convention as required by the Constitution.

2.2 International Conventions: Collision and Salvage

The MSA domesticated the following international conventions, which will impact upon the liability of owners and interested parties in the event of collision and salvage:

- the International Convention for the Safety of Life at Sea (SOLAS);
- the 1988 Protocol relating to SOLAS and Annexes I to V thereto;
- the Search and Rescue Convention, 1979;
- the International Convention on Salvage, 1989.

The MSA, in Sections 338 to 344, provide for liability in collision cases, in particular, Section 344 provides that the damages recoverable by the claimant in a collision case shall be the restoration of the claimant back to the same position as it would have been in had the collision not occurred. In relation to salvage, Section 386 to 404 of the MSA provides for the remuneration of a salvor and protection of a salvor's claim.

Other Nigerian laws on collision and salvage include:

- the Merchant Shipping (Collision) Rules, 2010, which are modelled after the Convention on International Regulations for Preventing Collisions at Sea, 1972 (COLREGS);
- the Merchant Shipping (Wrecks and Salvage) Rules, 2010;
- the AJA;
- the Admiralty Jurisdiction Procedure Rules, 2011 (AJPR);
- the Cabotage Act;
- the NIMASA Act.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The LLMC (and its 1996 Protocol) are applicable in Nigeria pursuant to Section 335(1) (f) of the MSA.

Parties who may limit their liability for maritime claims, under the MSA, are ship-owners (including the owners, charterers, managers and operators of a ship), salvors and their insurers.

The MSA provides for the following claims to be 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 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 sea bed or the subsoil thereof; and
- claims in respect of the 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.

The claims set out in points four, five and seven above shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

The increased liability for maritime claims, as provided in the amendment to the 1996 Protocol which entered into force on 8 June 2015 (the Protocol Amendment 2015), is inapplicable in Nigeria because Sections 356 to 358 of the MSA expressly state the limits under the 1996 Protocol. As such, the MSA needs to be amended by the National Assembly before the Protocol Amendment 2015 (and any subsequent amendment to the 1996 Protocol) is applicable in Nigeria.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Where an eligible party (as previously stated) anticipates that a claim is likely to be made against him or her by any other party under any maritime law, including the MSA, he or she may apply to the FHC to determine whether or not his or her liability(ies) may be limited under law.

The AJPR provides that a limitation of liability proceeding shall be commenced through the filing of an originating summons at the registry of the FHC. An originating summons is expected to be accompanied by the following processes: (i) an affidavit setting out the facts relied upon; (ii) copies of all the exhibits to be relied upon; and (iii) a written address.

An action for limitation is commenced as an admiralty action in personam against at least one of the (possible) claimants in a maritime claim (as a defendant), who must be served before the case may be set down for hearing or determination given in default of appearance.

After determination of the applicant's entitlement to a limitation of its liability, the court may order (i) 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 (ii) advertisement of its determination to allow anyone with a maritime claim against the vessel or any other parties previously named to apply to set aside, vary the court's determination or lodge its interest.

The order for the constitution of the limitation fund would also specify the method of calculating the fund, which is usually based on the tonnage of the vessel and the applicable limit as prescribed in the MSA.

It is not required to provide a deposit in relation to a constituted limitation fund.

3. Cargo Claims

3.1 Bills of Lading

The international conventions regarding bills of lading which are enforceable in Nigeria are as follows:

- the Hague Rules (which were domesticated via the Carriage of Goods by Sea Act, Cap. C2, LFN 2004 (COGSA));
- the Hamburg Rules (which were enacted into law by the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act 2005).

Both the Hague Rules and Hamburg Rules are applicable in Nigeria, as the National Assembly failed to repeal/denounce the Hague Rules, as required by Article 31 of the Hamburg Rules.

Nigeria is not a party to the Hague-Visby Rules, but it has ratified the Rotterdam Rules and would need to make them an Act of the National Assembly in order for the Rotterdam Rules to apply in Nigeria once they come into force.

3.2 Title to Sue on a Bill of Lading

Generally, only a party to a contract contained in a bill of lading can sue on it; that is, the carrier, shipper (consignor), consignee or the endorsee on the bill of lading.

A notifying party is not a party to a contract contained in a bill of lading and lacks the locus standi to sue or institute an action on the bill of lading, unless the party is also endorsed as an endorsee.

Notwithstanding the foregoing, Nigerian law recognises some notable exceptions to these rules, including the Brandt v Liverpool doctrine, whereby the holder of the bill of lading can maintain an action at common law where the court is able to infer or imply a contract on the bill of lading terms between the holder and the carrier, in circumstances where the holder:

- takes delivery of the goods;
- pays freight or demurrage; or
- presents the bill of lading.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Pursuant to Article 5 of the Hamburg Rules, a ship-owner who is the contractual or actual carrier is liable for loss resulting from damage to the goods, if the occurrence which caused the loss, damage or delay took place while the goods were in its charge, unless it can be proven that the ship-owner, its servants, and agents took all measures that could reasonable be required to avoid the occurrence and the consequent damage to the goods. In the case of damage caused by fire, the ship-owner who is the contractual or actual carrier will be liable if it is proven that the fire arose from the fault or neglect of the ship-owner, its servants or agents.

The provisions of the Hamburg Rules are not applicable to charterparties. However, where a bill of lading is issued pursuant to a charterparty, the provisions of the Hamburg Rules shall apply to that bill of lading if it governs the relations between the carrier and the holder of the bill of lading who is not the charterer.

Pursuant to Article 6 of the Hamburg Rules, the liability of the carrier for loss resulting from damage to goods is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher. According to Article 36 of the Hamburg Rules, the unit of account is the Special Drawing Right, as defined by the International Monetary Fund converted into naira at the date of the judgment, unless otherwise agreed by the parties.

However, Section 354 of the MSA states that the limitation of liability will not apply where it is proved that the loss or damage resulted from the ship-owner's, or its servants' or agents', personal act or omission or the act or omission of his or her servants or agents acting within the scope of their employment committed with the intent to cause that loss or damage or recklessly and with knowledge that such a loss would probably result.

There will be no difference in the liability of the ship-owner for cargo damage where it is the actual carrier or the contractual carrier. Article 2 of the Hamburg Rules states that the basis of liability and limitation of liability apply to both the contractual carrier and the actual carrier. Article 10 further states that, where the contractual carrier engages an actual carrier, the contractual carrier remains liable.

3.4 Misdeclaration of Cargo

The carrier may maintain a claim against the shipper for misdeclaration of dangerous goods. Section 323 of the MSA requires a shipper to mark dangerous goods distinctly, with details of the nature of the goods on the outside of the outermost package containing the goods, and the shipper must first give written notice of the nature of the goods and of the name and address of the sender, to the Master or owner of the ship.

Additionally, Article 13 of the Hamburg Rules provide that the shipper must inform the carrier of the dangerous character of the goods and, if necessary, of the precautions to be taken and, where the shipper fails to do so, the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of those goods; the goods may at any time be unloaded, destroyed without payment of compensation. Article 17 of the Hamburg Rules also provides that a shipper is liable to indemnify the carrier against the loss resulting from inaccuracies stated in the bill of lading.

Article IV (6) of the COGSA also states that the shipper shall be liable to the carrier for any damages and expenses directly or

indirectly arising out of the shipment of inflammable, explosive or dangerous goods, where the shipper fails to notify the carrier of the nature of the goods.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

As previously stated, both the Hamburg Rules and Hague Rules are in force in Nigeria and as such, the limitation periods indicated in each of these conventions is applicable in Nigeria.

Under the Hague Rules, the time bar for the institution of claims for loss of or damage to goods is one year from the date on which the goods were delivered or, in the case of lost goods, one year from the date the goods should have been delivered.

In relation to the Hamburg Rules, the limitation period is two years from the date the goods were delivered or on the last day on which the goods should have been delivered. Notwithstanding the foregoing, the Hamburg Rules entitle the person against whom the claim is made to extend the limitation period by making a declaration in writing.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

There is no international convention in force in relation to the arrest of vessels in Nigeria.

The AJA, MSA and AJPR are the domestic legislations which cover ship arrests in Nigeria.

4.2 Maritime Liens

Section 5(3) of the AJA defines maritime liens as a lien for:

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

In addition to these definitions, Section 66 of the MSA (as inspired by the Maritime Liens and Mortgages Convention, 1993, to which Nigeria acceded but which it has yet to domesticate in accordance with the Constitution) expanded the definition of maritime liens to the following claims:

- loss of life or personal injury occurring, whether on land or water, in direct connection with the operation of the relevant ship;
- salvage, wreck removal and contribution in general average; or
- ports, canal and other waterways, dues and pilotage dues.

The AJA distinguishes between maritime claims (ie, proprietary and general maritime claims, as previously explained) and maritime liens. Proprietary maritime claims and maritime liens are vested with in rem rights against a vessel.

Notwithstanding the foregoing, a vessel may be arrested in relation to a general maritime claim where the claim arises in connection with a ship and the person who would be liable on the claim in an action in personam (the Relevant Person) is, at the time the action is filed, (i) the owner, in respect of all the shares in the offending ship, or its bareboat charterer, or (ii) the owner, in respect of all the shares, in any other ship (sister ship).

4.3 Liability in Personam for Owners or Demise Charterers

In relation to a proprietary maritime claim or a maritime lien, it is not required for the owner or demise charterer to be liable in personam before a vessel can be arrested.

For a general maritime claim, the relevant person (ie, the owner or demise charterer) needs to be liable in personam before a vessel or its sister vessel can be arrested.

4.4 Unpaid Bunkers

Pursuant to Section 2(3)(k) of the AJA, a claim for unpaid bunkers amounts to a general maritime claim for goods, materials or services supplied to a ship for its operation and maintenance. As such, the supplied vessel may be arrested if the Relevant Person (who ordered the unpaid bunkers) wholly owns all the shares in the supplied vessel, or is the demised charterer of the supplied vessel, at the time the arrest is filed. Also, any other vessel, which is wholly owned by the Relevant Person (in respect of all the shares) at the time the arrest if filed, may be arrested in relation to the claim for unpaid bunkers supplied to another vessel.

Where the Relevant Person (who ordered the unpaid bunkers) is the time charterer, the bunker supplier would be unable to arrest the supplied vessel pursuant to the AJA.

Notwithstanding the foregoing, it is possible to arrest a vessel for unpaid bunker claims where the (i) governing law for the bunkers supply contract creates an in rem right against the supplied vessel (in the form of a maritime lien), or (ii) the terms and conditions of the bunkers supply contract creates an in rem right against the supplied vessel.

Neither case law nor any legislation makes any distinction between a contractual supplier or the actual supplier of unpaid bunkers for an in rem right to arrest of a vessel.

4.5 Arresting a Vessel

Further to the AJPR and the Federal High Court (Civil Procedure) Rules 2019 (the FHC Rules), an application for the arrest of a vessel is brought via an ex parte application (if the vessel is within Nigerian territorial waters - that is, 12 nautical miles off the coast of Nigeria from the low-water mark, or of the seaward limits of inland waters according to the Territorial Waters Act, Cap. T5, LFN 2004, or expected to arrive there within three days) disclosing a strong prima facie case for the arrest order. This application must be supported by, inter alia:

- an affidavit and an affidavit of urgency deposed to by the applicant, its counsel or its agent;
- an undertaking to indemnify the ship against wrongful arrest; and
- an undertaking to indemnify the Admiralty Marshal in respect of any expenses incurred in effecting the arrest.

The applicant is also required to pay, fortnightly, the Admiralty Marshal's minimum cost of NGN100,000 (circa USD220) for maintaining the vessel under arrest.

Original copies of the supporting documents are required. However, where an original document has been lost or is unavailable, a notarised copy of the document will suffice. If the document provided is a public document within the meaning of Section 102 of the Evidence Act 2011 (ie, documents forming the official acts or records of the official acts of the sovereign authority, official body or tribunals or public officers, agencies of the legislative, judicial or executive arms of government and public records kept in Nigeria of private documents), a certificate written at the foot of that copy, by the relevant public officer, declaring that it is a true copy of the document, is required in certification of that document.

Documents prepared in a language other than the English language are required to be translated into the English language.

The FHC does not require a security deposit from the arresting party. However, Order 13 of the AJPR provides that the court may order security for costs, on the application of the arrested party, where the sum claimed is more than NGN5,000,000 or its foreign currency equivalent (circa USD11,000), or where the arresting party has no assets in Nigeria. The security for cost may be in the form of a cash deposit into court, a letter of undertaking (LOU) from a member of the International Group of Protection and Indemnity Clubs (IGP&I) or a guarantee from a Nigerian bank or insurance company.

Where the ordered security for costs is not provided within the set timeline, the vessel would be released from arrest.

4.6 Arresting Bunkers and Freight

Claims for bunkers and freight are maritime claims under the AJA. It is therefore possible to arrest bunkers and freights in Nigeria. See **1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts** and **4.4 Unpaid Bunkers**.

4.7 Sister-Ship Arrest

Section 5(4) permits sister-ship arrests, provided the Relevant Person is, at the time the action is filed, the owner, in respect of all the shares of the sister ship.

4.8 Other Ways of Obtaining Attachment Orders

Apart from ship arrests, another possibility of obtaining attachments orders is through an application for a Mareva injunction, which is an interim attachment of assets equivalent to the value of the claimant's claim. Nigerian courts will only grant a Mareva injunction where the claimant has a justifiable cause of action against the defendant and there is a real risk of the defendant removing their assets from jurisdiction.

4.9 Releasing an Arrested Vessel

Pursuant to the AJPR, an arrested vessel may be released upon an application by a party where:

- an amount equal to the amount claimed or the value of the ship has been paid into court;
- the defendant provides security in an amount equal to the amount claimed in the suit or the value of the vessel, whichever is the lesser. However, where the claim relates to salvage, the release is subject to the value of the vessel being agreed upon by the parties or being determined by the court;
- the arresting party consents to the release in writing;
- the suit is discontinued or dismissed and there is no caveat against the release of the vessel; or
- where the cargo on board the ship is under arrest, but the ship is not.

An LOU from a member of the IGP&I would be acceptable for the release of an arrested vessel. A bank guarantee from a foreign bank would not be accepted by the FHC as it is not one of the forms of security prescribed by the AJPR. Notwithstanding the foregoing, the FHC may accept a foreign bank guarantee for the release of an arrested vessel where the arresting party is willing to accept such a guarantee.

4.10 Procedure for the Judicial Sale of Arrested Ships

Where a vessel has been under arrest for more than six months and her owners have failed to provide security for her release, the court may, on the application of the arrestor or any interest-

ed party, order that the vessel be valued and sold by the Admiralty Marshal and the proceeds of the sale placed in an interest-yielding fixed-deposit account in the name of the Admiralty Marshal, pending further orders from the court.

Notwithstanding the foregoing, the court may also, (i) on the application of the arrestor or any interested party, or (ii) on its own volition, but with notice to the relevant parties and subject to a valuation, order the sale of the arrested vessel where it is deteriorating in value.

Whilst the Admiralty Marshal has custody from the arrest of the vessel, the arrestor(s) are liable for the cost of maintaining the vessel under she is released or sold by the Admiralty Marshal. An application by the arrestor or any interested party for an order for the valuation and sale of the arrested vessel constitutes an undertaking by that party to pay, on demand to the Admiralty Marshal, the cost of complying with the order. The Admiralty Marshall is also entitled to deduct 2% from the proceeds of the sale of the ship to cover his or her costs for the valuation and sale of the vessel.

Unless ordered by the court, the judicial sale of an arrested vessel will be undertaken by a public auction conducted 21 days after the Admiralty Marshal places an advertisement to that effect in two national daily papers. Where the parties agree to the sale of the arrested vessel by private treaty, this may be ordered by the court.

After the sale, the Admiralty Marshal will file a return of sale, as well as an account of sale and the vouchers of sale. The Admiralty Marshal will also pay the proceeds of sale to the court.

The priority of claims upon the sale of an arrested ship will be determined by the court upon application by a party. Pursuant to Section 67 of the MSA, maritime liens have priority over mortgages and any other claims in the following order:

- claims for salvage, wreck removal and contribution in general average;
- 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 ports, canal and other waterways, dues, and pilotage dues.

Pursuant to Section 56 of the MSA, the priority of mortgages is determined by the date on which each mortgage is recorded in the register and registered mortgages have priority over unregistered mortgages.

4.11 Insolvency Laws Applied by Maritime Courts

Nigeria has a scheme of insolvency and restructuring laws, some of which are provided in the Companies and Allied Matters Act 2020 (CAMA) and the Bankruptcy Act. These schemes include administration, and companies' voluntary arrangements which are analogous to Chapter 11 bankruptcy proceedings.

The AJA, which governs the arrest and judicial sale of vessels, does not include these bankruptcy proceedings as grounds for the arrest and judicial sale of a vessel. However, the CAMA and the Bankruptcy Act grant administrators, liquidators and others wide powers with respect to the sale of a company's assets, with or without an order of court.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

Section 13 of the AJA states that the arresting party will be liable for wrongful arrest where:

- where the arrest was obtained unreasonably and without good cause; or
- the arresting party, unreasonably and without good cause, demands excessive security in the proceeding, or fails to give a consent required for the release of a ship or other property.

Following the dismissal of the suit, on the basis that there was no probable ground for instituting that suit, the AJPR states that the arrestor would be liable for damages for any loss, injury or expenses that the defendant may have sustained by reason of the arrest, upon the application of the defendant made at any time before the expiry of three months from the termination of the suit.

In addition, the AJPR provides the defendant with the right to institute an action for wrongful arrest against the arrestor if the action is not based on the same grounds upon which the court may have made the award of compensation, and the defendant shall be awarded costs, damages, demurrage and expenses against the arrestor where the court is satisfied that the arrest was wrongful.

The AJPR also empowers the FHC summarily to determine the issue of wrongful arrest, granting or refusing damages, further to an oral application of the defendant immediately after the judgment of the court (in favour of the defendant) is read.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

The following international conventions are applicable to the resolution of maritime passenger claims:

- the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974, and its Protocol of 1990; and
- the LLMC.

The AJA and the MSA are the domestic legislation applicable to resolution of maritime passenger claims in Nigeria.

Actions relating to passenger claims must be commenced within two years after the loss or life or injury occurred.

The MSA also imposes a limit of liability on ship-owners in passenger claims arising on any distinct occasion for loss of life or personal injury.

As previously stated, the increased liability for passenger maritime claims, as provided in Protocol Amendment 2015, is also inapplicable in Nigeria because Section 357 of the MSA expressly states the limits under the 1996 Protocol. As such, the MSA needs to be amended by the National Assembly before the Protocol Amendment 2015 (and any subsequent amendment to the 1996 Protocol) in relation to passenger maritime claims is applicable in Nigeria.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Generally, Nigerian courts usually recognise law and jurisdiction clauses stated in contracts, including bills of lading. However, where the competence of an action is challenged on the ground that a bill of lading states a foreign jurisdiction and not a Nigerian court, the court is not bound to enforce such clauses and can exercise a discretion in determining whether to make a stay of proceedings to enable the parties to pursue dispute resolution in the foreign jurisdiction.

Additionally, Section 20 of the AJA provides that any jurisdictional clause in an agreement which seeks to oust the jurisdiction of the court will be void where the agreement relates to any admiralty matter under the AJA (only the jurisdictional aspects of the clause are affected, not the entire agreement) and where:

- the place of performance, execution, delivery, act or default is or takes place in Nigeria; or
- any of the parties is in Nigeria; or
- the payment under the agreement is made or 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 Government or State submits to the jurisdiction of the court; or
- under any convention currently 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 is adjudicated upon in Nigeria.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

Nigerian courts recognise and enforce law and arbitration clauses in charterparties and bills of lading. Specifically, Section 10 of the AJA empowers the FHC to recognise and enforce arbitration clauses in admiralty agreements.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Nigeria is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which has force of law in Nigeria pursuant to the Arbitration and Conciliation Act, Cap. A18, LFN 2004 (ACA).

The ACA is the principal domestic law on arbitration in Nigeria.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Nigerian courts can order the arrest of vessels or other attachments where the relevant claim is subject to a foreign arbitration and/or jurisdiction, due to a foreign jurisdiction or arbitration clause.

6.5 Domestic Arbitration Institutes

The Maritime Arbitrators Association of Nigeria (MAAN) is the primary domestic arbitration institute which specialises in maritime claims. It is a non-governmental body which comprises maritime practitioners and maritime lawyers who are experts in both arbitration and maritime law practice in Nigeria. Other arbitration bodies which deal with general commercial arbitration, including maritime, include the Chartered Institute of Arbitrators UK (Nigeria branch), the Lagos Regional Centre for International Commercial Arbitration, and the Lagos Court of Arbitration.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

In relation to a foreign jurisdiction clause, the defendant may file an anti-suit injunction in the relevant foreign court. This approach is aimed at ensuring that the party in breach terminates the Nigerian proceedings in favour of proceeds in the foreign court, as prescribed by the foreign jurisdiction clause.

The defendant may apply for a stay of the proceedings before the FHC in accordance with the relevant foreign arbitration clause that has been breached and further to the provisions of the AJA and the ACA. If the FHC sees merit in the defendant's application, it will grant the stay. Where a vessel is under arrest, the FHC may order that the proceeding be stayed on condition that the arrest and detention of the vessel shall stay or satisfactory security for the release of the vessel be given as security for the satisfaction of any award that may be made in the foreign arbitration.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Nigerian law does not have special tax exemption or tax reliefs applicable to the income earned by vessels.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

At the beginning of the COVID-19 pandemic, the NIMASA, in conjunction with the Federal Government, directed that Nigeria would only allow cargo vessels that have been at sea for more than two weeks to dock in its ports, to prevent the spread of coronavirus. Further, the directive also provided that the arrival of crew on board those vessels would be predicated on the crew testing negative for COVID-19. Nevertheless, these restrictions did not extend to vessels carrying oil and gas products.

The NIMASA also issued guidelines requiring maritime stakeholders to develop policies to control the spread of COVID-19 on board vessels, including:

- the requirement to develop risk assessments and safety intervention guidelines for their personnel and operations on the areas of vulnerabilities of their maritime operations that can be affected by COVID-19;
- the requirement for all ongoing and/or other scheduled offshore operations requiring new crew or crew changes from affected countries shall ensure that pre-departure tests for COVID-19 are conducted on those persons, and self-isolation procedures for the prescribed period are instituted for the new crew/personnel before their exposure to other personnel;
- that only international marine vessels that have thermal screening facilities for passenger and crew may be allowed in the ports;
- that the shipping agent or Master of a vessel must submit all documents related to crew and passengers regarding their travel to/from the COVID-19-affected countries.

In April 2020, the NIMASA extended the validity of statutory and trading certificates for all Nigerian-registered vessels (including Nigerian seafarers and seafarers with a Nigerian Certificate of Competency and sailing on foreign-flagged ships). The foregoing was to permit seafarers to continue performing their duties in view of the COVID-I9 pandemic and the nationwide lockdown.

With effect from 23 March 2020, the Nigerian Ports Authority (NPA) directed all terminal operators to suspend all demurrage and storage charges on imported cargoes in the wake of COVID-19 in Nigeria for an initial period of 21 days. As a result of the continuing COVID-19 nationwide lockdown, the aforesaid suspension was further extended by the NPA for another 14 days, effective on 13 April 2020.

8.2 Force Majeure and Frustration in Relation to COVID-19

Nigerian courts recognise the concepts of *force majeure* and frustration and uphold them. Whether the coronavirus pandemic will be regarded as a *force majeure* event by a Nigerian court will be dependent on the provisions of the *force majeure* clause (if any) in the relevant contract.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

Cabotage Operations

The Cabotage Act provide that only vessels which are wholly owned and manned by Nigerian citizens and built and registered in Nigeria can engage in the cabotage trade/cabotage (ie, the domestic coastal carriage of cargo and passengers within the coastal and territorial inland waters, or any point within the waters of the exclusive economic zone of Nigeria).

The Cabotage Act further provides that vessels shall not be registered or used in cabotage, unless:

- the vessel is wholly and beneficially owned by Nigerian citizens or by a company wholly and beneficially owned by Nigerian citizens; a vessel or company is deemed to be wholly and beneficially owned by Nigerian citizens where all the shares in the vessel or in the company are held by Nigerian citizens, free from trusts or other obligations (fiduciary or otherwise) in favour of non-Nigerians;
- the vessel is under a bareboat charter to Nigerian citizens or companies and is under the full control and management of Nigerian citizens or a company wholly and beneficially owned by Nigerians;
- the vessel is owned by a company registered in Nigeria and the percentage of shares held in the company by Nigerian citizens is not less than 60%; and
- the vessel is exclusively manned by officers and crew of Nigerian citizenship.

However, the Minister may grant waivers on the requirement for a vessel to be wholly owned and wholly manned by Nigerian citizens and to be built in Nigeria, if the Minister is satisfied that there is no wholly owned Nigerian vessel suitable to provide the services or perform the activities required, no qualified Nigerian officer or crew for the position specified or no Nigerian shipbuilding yard with the capacity to construct the type and size of vessel specified. Further to a five-year strategy set in April 2019, the NIMASA (and by extension the Minister) seeks to cease the issuance of cabotage waivers, which has become the norm instead of the exception, thus giving continued advantage to foreign-flagged vessels and foreign-owned vessels, as well as foreign crew. The strategy, which is to be implemented in phases, has commenced with the stoppage of manning waivers (with the exceptions of captains and chief engineers).

The NSRO is also responsible for maintaining the cabotage register for vessels eligible to undertake coastal trade in Nigeria.

The Cabotage Act established a Cabotage Vessel Finance Fund (CVFF) and it also stipulates that a surcharge of 2% of the contract sum performed by any vessel engaged in coastal trade shall be paid into the CVFF.

Seafarers' Rights

Several international conventions on seafarers' rights have been implemented, pursuant to Section 215 of the MSA. These include:

- rights with regard to their employment contracts (and obligations of their employers), including wages, leave benefits and discharge from service; and
- rights regarding general welfare, health and accommodation.

The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (the STCW Convention) has the force of law in Nigeria via the rule-making authority of the Minister (Section 408 of the MSA) by way of subsidiary legislation in the Merchant Shipping (Medical Examination of Seafarers) Regulations 2001 and the Merchant Shipping (Safe Manning, Hours of Watchkeeping) Regulations 2001.

The ILO Convention (No 32 of 1932) on Protection Against Accident of Workers Employed in Loading or Unloading Ships (Dockers Convention Revised 1932) and the Placing of Seamen Convention, 1920 are the other international conventions on seafarers' rights that have been domesticated by the MSA.

Nigeria has ratified the Maritime Labour Convention 2006 (MLC) but has yet to domesticate it in accordance with the Constitution. Notwithstanding the foregoing, the NIMASA, by requesting evidence of compliance with the MLC financial security provisions before certain operational permits are issued to vessels, has started to implement the provisions of the MLC.

Enforcement of Foreign Judgments

A foreign judgment is required to be registered before it can be enforced in Nigeria. There are two applicable statutory regimes dealing with the enforcement of foreign judgments in Nigeria: the Reciprocal Enforcement of Judgments Ordinance Cap 175 of the Laws of the Federation of Nigeria and Lagos, 1958 (the Ordinance); and the Foreign Judgment (Reciprocal Enforcement) Act, 2004 (the FJA). Alternatively, parties may bring an action under common law.

However, only the Ordinance is presently in force in Nigeria as the extant enabling law. The FJA is inchoate, as the relevant minister (ie, the Minister of Justice) has not exercised its power, since its promulgation, to extend the application of the law to the registration and enforcement of foreign judgments of superior courts to any foreign country, including the United Kingdom, as required by the FJA. The FJA provides for a one-year limitation period for the registration and enforcement of foreign judgments, and the Ordinance has a six-year limitation period.

The Ordinance applies to judgments of certain commonwealth countries, including the United Kingdom, Ireland, and Ghana. Under the Ordinance, for a foreign judgment to be enforceable in Nigeria, an applicant must file a petition ex parte or on notice to a judge for leave to register the foreign judgment in Nigeria. The petition ex parte or on notice shall be supported by an affidavit of the facts which, inter alia, must state that, to the best of the information and belief of the deponent, the judgment

creditor is entitled to enforce the judgment and the judgment does not fall within any of the cases precluded from registration. The petition and the affidavit in support shall be accompanied with a written address, addressing all the legal issues involved in the matter.

If the court finds merit in the petition, it shall order that the foreign judgment be registered as a judgment of the Nigerian court, and the order will usually specify a time limit within which the judgment debtor can apply to set aside the order - this is usually 14 days if the judgment debtor is within the territory of the registering court, or longer if otherwise.

Under common law, a party seeking to enforce a foreign judgment in a maritime claim must institute fresh proceedings in the FHC, with the foreign judgment as the basis for the claim. The judgment creditor may apply for the case to be placed on the undefended list, an expedited procedure for cases where there is no reasonable defence to the claim, and the existence of the foreign judgment will be the judgment creditor's basis for belief that there is no defence to the claim. A certified copy of the foreign judgment will be attached as an exhibit to the application.

Bloomfield LP is a specialist commercial law firm that operates out of Lagos and other littoral Nigerian cities, including Port Harcourt and Warri. The firm offers comprehensive and exceptional legal solutions for those who expect more. The firm's lawyers, more than 25 in number, include leading shipping experts (in contentious and non-contentious as well as dry and wet shipping matters) who continue to influence the industry and shipping jurisprudence in Nigeria. The clientele spans across owners, charterers, managers, shipyards, financiers, brokers, insurers (including P&I members of the IGP, as well as fixed-premium marine insurers), oil servicing companies, port and terminal operators/promoters, petroleum marketing and distribution companies and commodity trading houses. Bloomfield's lawyers have contributed to, or authored, leading texts within many key sectors, and are often called upon to attend Nigerian and international seminars/workshops and to serve as public and private-sector office-holders, advisers, and consultants.

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NORWAY

Law and Practice

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1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

There are no specialised maritime and shipping courts in Norway. The Dispute Act of 2005 provides that any court has the authority to decide on the maritime and shipping matters brought before it. This is one of the reasons why arbitration is often used to resolve maritime disputes in Norway. Reference to arbitration is particularly relevant in cases where a high degree of technical or maritime expertise is required. A common maritime arbitration venue is the Nordic Offshore and Maritime Arbitration Association (NOMA).

Maritime and shipping claims filed in the Norwegian jurisdiction commonly relate to arrests, claim for hire under charterparties, cargo damage, ship-building disputes and recognition of foreign judgments and arbitration awards.

1.2 Port State Control

Norway maintains an effective system for port state control through the Ship Safety and Security Act of 2007 and its affiliated regulations. Vessels on the Norwegian continental shelf, the exclusive economic zone and in territorial waters may be subject to supervision by the various Norwegian maritime authorities and the Norwegian Coast Guard. Passage through the territorial water may be refused if the vessel is not in compliance with international regulations pertaining to ship safety and security.

Norway is furthermore a party to the 1974 International Convention for the Safety of Life at Sea (SOLAS) and is thus committed to accepting certificates issued by other flag states party to the convention. Under the 1982 Paris Memorandum of Understanding on Port State Control, Norwegian authorities have a duty to act against vessels that are clearly in a different condition than their certificates provide. As such, Norwegian authorities may inspect vessels where there are clear indications that the condition of a vessel or its equipment does not correspond to its certificates.

Maritime casualties are investigated by three authoritative bodies:

- the Accident Investigation Board Norway;
- the national police; and
- the Norwegian Maritime Authority.

1.3 Domestic Legislation Applicable to Ship Registration

The Norwegian Maritime Code of 1994 is the key piece of domestic legislation applicable to ship registration. The Act concerning the Norwegian International Ship Register of 1987 is also relevant. The Norwegian Maritime Authority is the responsible governmental authority handling domestic registration of vessels.

1.4 Requirements for Ownership of Vessels

Norway maintains three ship registers:

- the Norwegian Ordinary Ship Register (NOR), which is national;
- the Norwegian International Ship Register (NIS), which is international;
- the Shipbuilding Register (BYGG), which is for ships under construction in Norway.

The NIS and the BYGG are open to foreign tonnage, while the NOR requires a certain percentage of Norwegian and/or EU/EEA ownership and management.

Norwegian Ordinary Ship Register

For registration in the NOR, the following ownership requirements must be met:

- if the owner is a person, this person must be Norwegian;
- if the owner is an unlimited liability partnership, at least 60% of the partners must be Norwegian;
- if the owner is a limited liability partnership, at least 60% of the general and limited partnership capital must be on Norwegian hands; or
- if the owner is a limited liability company, at least 60% of the share capital and voting rights must be on Norwegian hands. In addition, the company's head office and a majority of the board of directors must be domiciled in Norway and have been so for the past two years.

EU/EEA citizens and/or companies are considered equivalent to Norwegian citizens and companies as long as the vessel is operated from Norway and engaged in the owner's commercial activities in Norway.

Norwegian International Ship Register

For registration in the NIS, it is sufficient that commercial or technical management of the vessel is performed by a Norwegian manager. In addition, the ship-owner must appoint a representative in Norway who is authorised to accept service on behalf of the ship-owner.

Shipbuilding Register

There are no requirements concerning ownership when registering a vessel in the BYGG.

1.5 Temporary Registration of Vessels

In relation to the access to temporary and dual registration, both the NOR and the NIS permit bareboat registration to/from any country.

A requirement for bareboat registration is that both the ship-owner and mortgagees give their consent. The bareboat registration period in the NOR and the NIS is limited to ten years, with the possibility of subsequent five-year extensions.

1.6 Registration of Mortgages

The Department of Ship Registration at the Norwegian Maritime Authority maintains the registration of mortgages in the Norwegian ship registries (the NIS, the NOR and the BYGG; see **1.4 Requirements for Ownership of Vessels**).

To register a mortgage, two documents must be provided:

- consent from the existing mortgagee; and
- a new mortgage document.

The existing mortgagee must consent to the registration of the new mortgage or sign the existing mortgage for deletion. The new mortgage must then be submitted, containing information about the new creditor, as well as the face value and currency of the mortgage. The two documents must be forwarded, as originals, to the Department of Ship Registration with binding signatures.

If the mortgagee is a foreign entity, a notary public must confirm both the identity and the authority of the person signing. The notary's signature is then to be legalised by a Norwegian Foreign Service Station or by the amendment of an apostille.

1.7 Ship Ownership and Mortgages Registry

Information pertaining to ship ownership and mortgages is available to the public at www.sdir.no/en/shipsearch/.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Pollution

Liability for pollution is governed by the Norwegian Maritime Code of 1994, Chapter 10, which incorporates the 2001 Convention on Civil Liability for Bunker Oil Pollution Damage, the 1992 Convention on Civil Liability for Oil Pollution Damage and the 1992 Fund Convention with the 2003 Supplementary Protocol. The provisions establish a strict liability on the ship-owner for pollution damage, with the exception of certain events of force majeure and third-party malicious acts. Negligence by public authorities concerning the maintenance of lights and navigational aids is another circumstance that may lead to the ship-owner escaping liability.

The ship-owner may generally limit its liability for pollution damage, except in the case of oil spillage and nuclear damage; cf, the Norwegian Maritime Code, Chapter 9.

Wreck Removal

Norwegian authorities may order wreck removal for the purpose of ensuring safe passage and navigation, as well as for environmental reasons. Liability for wreck removal may be limited based on certain amounts of special drawing rights (SDRs) depending on the vessel's gross tonnage.

Conventions Not Yet in force

Although Norway has ratified both the 2010 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea and the 2007 Nairobi International Convention on the Removal of Wrecks, these are not yet in force.

2.2 International Conventions: Collision and Salvage

The 1910 Brussels Collision Convention is applicable in Norway and for Norwegian vessels, and is incorporated into the Norwegian Maritime Code of 1994, Chapter 8. In determining liability for collisions, the court will assess where fault can be apportioned and will, to a large extent, rely on the 1972 International Regulations for Preventing Collisions at Sea, incorporated into Norwegian law through the 1975 Regulation on Prevention of Collisions at Sea (Rules of the Road).

As for liability in relation to salvage, the 1989 International Convention on Salvage is applicable. The convention is incorporated into the Norwegian Maritime Code, Chapter 16.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The 1976 Convention on Limitation of Liability for Maritime Claims is incorporated into the Norwegian Maritime Code of 1994 and is, as such, applicable.

2.4 Procedure and Requirements for Establishing a Limitation Fund

A limitation fund may only be established by a ship-owner after a petition for an arrest, enforcement proceedings, a lawsuit or a request for arbitration has been filed against the ship-owner. The court in which the petition or suit is filed is considered competent to establish a limitation fund. In the case of arbitra-

tion, the court of the district where the arbitration takes place is considered the competent court.

Furthermore, the ship-owner may request and set up a limitation fund. Upon the competent court's request, the ship-owner (or its insurer) must then make payment, the amount of which is limited, or post security for the amount in a Norwegian bank. Indemnity letters are generally not accepted.

The amount of the limitation is calculated as follows:

- passenger liability – SDR250,000 multiplied by the certified passenger capacity of the vessel;
- other personal injury – SDR3,020,000 plus an additional amount per ton over 2,000 tons based on a regressive scale; or
- other claims – SDR1,510,000 plus an additional amount per ton based on a regressive scale.

3. Cargo Claims

3.1 Bills of Lading

Of the international conventions concerning bills of lading, Norway has only fully incorporated the 1968 Hague–Visby Rules. The provisions in the Norwegian Maritime Code of 1994 have, however, been aligned with the 1978 Hamburg Rules in so far as they do not derogate from the Hague–Visby Rules.

An important exception is that the Hague–Visby Rules do not automatically apply to domestic trade. In order for such rules to apply, there must be an explicit reference in the bill of lading.

Norway has signed, but not yet ratified, the 2009 Rotterdam Rules.

3.2 Title to Sue on a Bill of Lading

The holder of a bill of lading has the title to sue the carrier or sub-carrier on the bill of lading.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Ship-Owner's Liability

The ship-owner's (carrier's) liability for cargo damage is based on fault with a reversed burden of proof. This entails that the cargo owner must prove that:

- the goods have been damaged while in the carrier's custody; and
- that the cargo owner has suffered an economic loss.

The description in the bill of lading is decisive in the assessment of whether damage has occurred. If it can be established that the goods have been damaged while in the carrier's custody, it is the carrier who must prove that the loss was not due to personal fault or neglect of the carrier or of anyone for whom he is responsible.

The carrier is, however, not liable for fire or navigational errors as long as such errors are not due to the fault or neglect of the carrier or someone he is vicariously liable for. If the damage can be assigned to the unseaworthiness of the vessel at the commencement of the voyage, the carrier will, in any case, be held liable.

Whether the actual carrier or the subcarrier is liable for the damage does not impact the scope of liability.

Limitation of Liability

The carrier's (or the subcarrier's) liability is, in all events, limited to SDR667 for each lost or damaged unit, or to SDR2 per kilo. The rules on global limitation may also be triggered in the event of excessive damage.

For Norwegian domestic trade, there is a higher limitation of SDR17 per kilo. In the case of gross negligence on the part of the carrier(s), the right to limitation will be lost.

3.4 Misdeclaration of Cargo

The carrier may establish a claim against the shipper for misdeclaration of cargo. It follows from the Norwegian Maritime Code of 1994, Section 301 that the shipper is strictly liable towards the carrier for the correctness of the information in the bill of lading added on request of the shipper.

There are no recent judgments concerning claims for misdeclaration of cargo. One likely reason for such lack of recent judgments is the fact that there are explicit provisions regulating misdeclarations in a bill of lading.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The time bar for filing a claim for damaged or lost cargo is one year from the date the cargo was delivered or ought to have been delivered. The time limit runs until a suit is filed. Once the claim exists, the parties may extend the limit by agreement (for a maximum of three years at a time).

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4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

The 1952 Brussels Convention relating to the Arrest of Sea-Going Ships is applicable in Norway and incorporated into Chapter 4 of the Norwegian Maritime Code of 1994. The 1999 Geneva Convention on Arrest of Ships has been signed but not ratified.

The Maritime Code is supplemented by the general rules on arrest of property in the Dispute Act of 2005, Chapters 32 and 33. Some of the provisions in the Enforcement Act of 1992 are also of relevance.

4.2 Maritime Liens

Introduction

The Norwegian Maritime Code of 1994 differentiates between maritime liens and maritime claims. Maritime liens are statutory liens automatically created in vessels in respect to certain categories of claims. The term "maritime claims" is a joint designation of claims for which a ship may be arrested.

While most claims secured by a maritime lien are considered maritime, not all maritime claims are secured by maritime liens. The scope and wording of the definitions differ.

Maritime Liens

Maritime liens may attach to the ship or its cargo. A claim is secured by a maritime lien on the ship if the claim concerns one or more of the following:

- hire and other remuneration to the Master and other employees on board in connection with their service on the ship;
- port, canal and other waterway charges and pilotage charges;
- compensation for loss of life or injury to a person incurred in direct connection with the operation of the ship;
- compensation for loss of, or damage to, property arising in direct connection with the operation of the ship, provided that the claim is not based on an agreement; and
- salvage award, compensation for removal of wrecks and contribution to general average.

The claim must be against the ship-owner, the charterer, the manager or a person to whom the ship-owner has delegated its functions.

Maritime liens on cargo must be based on the following claims:

- claims for salvage award and contribution to general average;
- claims arising out of the carrier or the Master acting in accordance with his statutory authority, having entered into a contract, taken action or incurred expenditure on the account of the cargo owner, and a cargo owner's claim for compensation for goods sold for the benefit of other cargo owners; and
- claims by the carrier arising out of the contract of affreightment, provided that the claim can be directed against the person or entity claiming delivery.

Maritime Claims

To be considered a maritime claim, the claim must be based on one or more of the following:

- damage caused by a ship by collision or otherwise;
- loss of life or personal injury caused by a ship or incurred in connection with the operation of a ship;
- salvage and wreck removal;
- agreement relating to the use or hire of a ship, by charterparty or otherwise;
- agreement relating to the carriage of goods on a ship, by charterparty or otherwise;
- loss of, or damage to, goods, including luggage being carried by a ship;
- general average;
- bottomry;
- towage;
- pilotage;
- goods or materials delivered to a ship at any place to be used for operation or maintenance of the ship;
- construction, repair, or equipment of a ship, including docking costs and fees;
- wages and other remuneration to the Master and other employees on board, in connection with their service on the ship;
- the Master's disbursement, including disbursements made by shippers, charterers or agents on behalf of the ship or its owner;
- dispute concerning the ownership of a vessel;
- dispute between co-owners of a vessel about the ownership, possession, use or income from the vessel; and
- the mortgage or other security in a vessel, except for maritime liens.

The definition of maritime claims in the Norwegian Maritime Code mostly corresponds to the definition in Article 1 of the 1952 Brussels Convention Relating to the Arrest of Sea-Going Ships.

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Reason for Arrest

A further condition for arrest under Norwegian law is that the arresting party proves, on the balance of probabilities, that there is reason for arrest.

The condition is satisfied if the behaviour of the debtor gives reason to fear that:

- enforcement of the claim will be impossible or significantly more difficult if an arrest is not granted; or
- the enforcement of the claim must take place outside Norway if an arrest is not granted.

This condition does not apply if the arresting party has a lien on the ship (eg, a mortgage or a maritime lien) that is due for payment.

4.3 Liability in Personam for Owners or Demise Charterers

In the case of a maritime lien, the vessel can be arrested regardless of the ship-owner's personal liability for the underlying claim.

With regard to maritime claims, the ship-owner must be the debtor of the claim.

4.4 Unpaid Bunkers

A claim for payment of bunkers is considered a maritime claim under the Norwegian Maritime Code. Hence, a bunker supplier may arrest a ship in respect of unpaid bunkers if the ship-owner is debtor for the claim (see **4.3 Liability in Personam for Owners or Demise Charterers**). It is only the bunker supplier with a contractual claim against the ship-owner who can arrest the ship.

If the charterers of the vessel are debtors of the claim, the bunker supplier may not arrest the vessel but may be entitled to an arrest in the bunkers. See **4.6 Arresting Bunkers and Freight**.

4.5 Arresting a Vessel

Formalities

There are few formalities required to arrest a ship in Norway. A petition for arrest must be submitted to the district court at the venue where the vessel is located or is expected to arrive.

The arresting party must substantiate, on the balance of probabilities, that the conditions for arrest are fulfilled. Any documentation supporting the claim for arrest should be submitted together with the petition. If the arresting party is represented by counsel, the petition with enclosures is submitted through a digital portal named *Aktørportalen*. Digital copies of documents are sufficient.

The court principally accepts documents in Norwegian and English. Documents in other languages should be translated. No powers of attorney or supporting affidavits are required by the court.

Procedure

The court usually decides on the petition ex parte; ie, without notifying the defendant. If delay poses a risk, the court may order arrest even if the arresting party's claim is not substantiated. The petition for arrest is normally considered by the court within one business day.

If an arrest is granted, the defendant may require a subsequent oral hearing. Following such oral hearing, the court will render a new decision, where the first decision may be upheld, amended or set aside. The decision may be appealed.

Security

The court shall require that the claimant within one week provides security for port fees incurred during the arrest (normally limited to port fees payable for any 14-day period). Except as aforesaid, there are no general requirements for the arresting party to provide a security deposit. However, the court may, in its own discretion, require that the claimant provides security for potential liability in the event of unlawful arrest. If the arrest is granted despite the underlying claim not being substantiated (see above), the court is obliged to require security.

If security is required, the security must be in the form of cash deposited with a Norwegian bank or a bank guarantee (see **4.9 Releasing an Arrested Vessel**).

4.6 Arresting Bunkers and Freight

Any property of a debtor may principally be subject to arrest under the general rules of the Dispute Act of 2005. This includes bunkers and freights.

To arrest bunkers or freight, the arresting party must substantiate that he has an underlying claim against the owner of the bunkers/freight and that there is sufficient "reason" for being granted security (see **4.2 Maritime Liens**). There is no requirement that the underlying claim is a maritime claim.

4.7 Sister-Ship Arrest

Sister-ship arrest is recognised under Norwegian law under two circumstances.

If a ship-owner is the debtor to a maritime claim that concerns one of his ships, the arresting party may arrest any other ship owned by the same ship-owner at such time when the claim arose.

If the maritime claim is against someone other than the owner of a ship, the arresting party may arrest other vessels owned by the debtor of such maritime claim.

4.8 Other Ways of Obtaining Attachment Orders

Under Norwegian law, an unsecured creditor must principally obtain a basis for enforcement (eg, a court decision or an arbitration award) to secure his claim in the debtor's property by an execution lien.

Arrest is a special exception from the regular enforcement process and is the primary remedy for an unsecured creditor to obtain security for his claim. No similar remedies are available under Norwegian law.

4.9 Releasing an Arrested Vessel

Releasing an Arrested Vessel

An arrested ship may be released if the ship-owner can show that the conditions for the arrest are no longer present. This may, for instance, be the case if the underlying claim is paid by the debtor.

The arrest will also lapse if one of the following circumstances occurs:

- when an execution lien is established on the vessel for the underlying claim;
- when the arresting party has exceeded any time limits set by the court for providing security or commencing legal proceedings or enforcement proceedings;
- when legal proceedings or enforcement proceedings are not commenced within one year after the decision for arrest;
- when the defendant settles the underlying claim, or it lapses in any other way, or the defendant is found not to be liable for the claim in a final and enforceable decision;
- when the claimant abandons his or her rights in the arrest; and
- when the claimant has obtained a legally enforceable judgment, but an execution lien is not pursued within one month after the judgment became legally enforceable.

Finally, the arrested ship may be released if the defendant provides security for the underlying claim and potential legal costs of the arresting party.

Security Accepted by the Court

Two types of security will be accepted by the court. The defendant may provide security by way of a cash deposit in a Norwegian bank. A declaration must be obtained from the bank stating that a deposit has been made and that the deposit cannot be disposed of without the consent of the relevant enforcement authorities, usually the district court. The defendant may also provide security by way of an unconditional guarantee from a Norwegian bank or other financial institution.

As such, a foreign bank guarantee or a letter of undertaking issued by a mutual club will not be accepted by a Norwegian court.

4.10 Procedure for the Judicial Sale of Arrested Ships

Consequences of the Arrest

When a ship is arrested, the ship-owner loses the right to dispose of the ship to the disadvantage of the claimant. The ship may not leave the place where it is physically located.

Responsibility for Maintenance

As a starting point, neither the ship-owner nor the court is under an obligation to maintain the ship while under arrest. Since the arresting party is required to provide security for port fees incurred during the arrest, it may be implied that the arresting party is liable for port fees.

If the court has appointed a third party to assist during the judicial sale, the assistant is obliged to ensure that the ship is not deteriorating and to take appropriate action if required.

Procedure for the Judicial Sale

Unless the arresting party already has a lien on the vessel (eg, a mortgage created by agreement or a maritime lien), an arrest does not entitle the arresting party to demand an immediate judicial sale of the ship. He must first obtain a basis for enforcement pursuant to the Norwegian Enforcement Act; usually a legally binding judgment or arbitration award.

Once the basis for enforcement (ie, a binding judgement or arbitration award) has been obtained, the arresting party must obtain an execution lien by filing an application to the Norwegian enforcement authorities.

When an execution lien has been granted, the arresting party can file an application for settlement of the claim to the district court where the ship is located. The district court renders a decision on whether a judicial sale shall be carried out. The decision is subject to appeal.

If necessary to prevent considerable loss, the court may decide that the arresting party will be entitled to demand a judicial sale of the ship without first obtaining basis for enforcement and an execution lien.

Priority in the Sales Amount

The sales amount obtained from the judicial sale is distributed to its creditors in accordance with the priority of their mortgages and liens.

Claims with maritime liens have priority over all other claims. Their internal ranking is according to their order as set out under **4.2 Maritime Liens**. Claims for salvage award, compensation for removal of wrecks and contribution to general average, however, have priority before all maritime claims attached before such claim.

For other claims, registered mortgages and liens have priority before unsecured claims. Registered mortgages and liens have priority based on the time of registration.

4.11 Insolvency Laws Applied by Maritime Courts

Insolvency and Reconstruction

In 2020, Norway adopted a temporary insolvency law scheme analogous to Chapter 11 of the US Bankruptcy Code. The scheme is currently set to expire on 1 January 2022. Under this scheme, a ship-owner may seek protection from arrests and/or judicial sale of its vessels subject to the agreement of the court.

To be eligible for the scheme, the Temporary Reconstruction Act of 2020 requires that the ship-owner is in serious financial difficulties. In addition, at least half of the ship-owner's debtors must agree to admit the ship-owner to the reconstruction scheme.

Recognition of Foreign Insolvency Proceedings

Norwegian courts only recognise foreign bankruptcy proceedings in the other Nordic countries. Insolvency proceedings in countries outside the Nordics will not automatically be recognised in Norway.

Thus, if a ship-owner is declared bankrupt in one of the Nordic countries, its creditors will be refused arrest in the ship-owner's vessels located in Norway. However, if the ship-owner is under insolvency proceedings in a country outside the Nordics, such insolvency proceedings will not prevent a Norwegian court from granting an arrest in the ship-owner's vessels located in Norway.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

In the event of a wrongful arrest, the defendant may be entitled to compensation for losses resulting from the arrest and necessary costs of setting it aside.

If the underlying claim, as asserted by the arresting party, did not exist when the petition for arrest was submitted, the arresting party will be strictly liable for the defendant's losses; ie, without any consideration of fault. The arresting party will also be liable if he negligently or intentionally has provided incorrect or misleading information to the court with regard to the "reason" for security (see **4.2 Maritime Liens**).

On a separate note, if the ship-owner succeeds in dismissing the arrest claim, he will normally be awarded legal costs.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

International Conventions and Domestic Law

Norway is subject to several international conventions applicable to the resolution of maritime passenger claims; inter alia, the Athens Convention, the Athens Protocol and the EU Passenger Rights Regulations (EU 1177/2010) as incorporated through the EEA Agreement, and which again is implemented in the Norwegian Maritime Code.

Limitation of Liability

Pursuant to the Athens Protocol, a ship-owner's liability for death or personal injury of a passenger is limited to SDR400,000 per passenger. The liability for death or injury to passengers is limited to SDR250,000 if the ship-owner can establish that the accident is not caused by the ship-owner's negligence.

Subject to the EU Passenger Rights Regulations, a ship-owner may limit its liability to SDR4,694 per passenger for delay, SDR3,375 per passenger for valuables (luggage) and SDR2,250 per passenger for hand luggage. Damage to motor vehicles is limited to SDR12,700. Other limitation limits for special circumstances are further listed in the Norwegian Maritime Code, Chapter 15.

Time Barring of Passenger Claims

Passenger claims under Norwegian law must be filed to a court of law within two years after the end of the voyage. If not filed within this date, the passenger claim will be time barred. Only after the claim has arisen may the parties agree to extend the deadline.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Norwegian courts are somewhat restrictive in recognising and enforcing law and jurisdiction clauses stated in a bill of lading;

see the Norwegian Maritime Code, Section 310. These rules are complicated and require assessment on a case-by-case basis.

With regard to governing law, a Norwegian court will apply the rules of the Norwegian Maritime Code, Chapter 13, which is mandatory in, inter alia, the following cases:

- if the agreed loading port is in a Hague–Visby Convention state;
- if the agreed discharge port is in Norway, Denmark, Finland or Sweden;
- if the bill of lading is issued in a Hague–Visby Convention state; and
- if it is stated in the bill of lading that the Hague–Visby Convention, or the laws of a Hague–Visby Convention state (which is based on the Hague–Visby Convention), shall apply.

However, if the agreed loading port, and the agreed or actual discharging port, is outside Norway, Denmark, Finland or Sweden, Norwegian courts will recognise a governing law clause referring to the laws of another Hague–Visby Convention state.

With regard to jurisdiction clauses, Norwegian courts will, to a significant extent, disregard such clauses if the place where the goods were delivered for shipment, or the agreed or actual place of receipt of goods after shipment, is located in Norway, Denmark, Finland or Sweden.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

Law and arbitration clauses of a charterparty incorporated (referred to) in the bill of lading will, to a large extent, be subject to the same rules of law and jurisdiction clauses stated in the bills of lading; see **6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Ladings**.

However, for an arbitration clause to be binding towards a bona fide transferee of a bill of lading, the bill of lading must specify that the arbitration clause contained in the charterparty shall be binding upon the transferee.

If the bill of lading or the charterparty (referred to in a bill of lading) contains an arbitration clause, and the place where the goods were delivered for shipment, or the agreed or actual place of receipt of goods after shipment, is located in Norway, Denmark, Finland or Sweden, the Norwegian Maritime Code provides that the claimant will be entitled to commence arbitration proceedings at several alternative locations (irrespective of the wording in the arbitration clause). Such locations include the place of the claimant's country of domicile, the place where the cargo was delivered for shipment and the agreed or actual place of receipt of goods after shipment.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable in Norway.

In addition, the Norwegian Arbitration Act of 2004 provides for general recognition and enforcement of foreign arbitral awards irrespective of in which country the arbitral award was rendered. There are some exceptions to this general rule; inter alia, if there are any shortcomings concerning the arbitral procedure itself, or the award has already been set aside by a foreign court. Recognition and enforcement will also be denied if enforcement would be contrary to public policy (ordre public).

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

It is not required that a Norwegian court has jurisdiction over the underlying claim in order to arrest a ship in Norway. A Norwegian court may thus also grant arrest if the underlying claim is subject to a foreign law and jurisdiction clause in the relevant contract, bill of lading or charterparty. The same applies to clauses referring the claim to arbitration.

6.5 Domestic Arbitration Institutes

The Nordic Offshore and Maritime Arbitration Association has recently been established on the initiative of the Danish, Finnish, Norwegian and Swedish Maritime Law Associations. NOMA is an arbitration institute that specialises in maritime claims and is a well-renowned dispute settlement body.

For the benefit of foreign, non-Nordic parties, NOMA provides best practice "soft rules" for conducting an arbitration process in Norway. The guidelines are available at www.nordicarbitration.org.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

If legal proceedings are commenced in breach of a foreign jurisdiction or arbitration clause, the Norwegian court will be obliged to dismiss the case if this is requested by one of the parties.

As for proceedings commenced in breach of arbitration clauses, a party must request the case be dismissed no later than in his or her first submissions on the merits of the dispute.

Contributed by: Norman Hansen Meyer, Christian Steen Eriksen, Eline Hellem Langeland and Snorre Qveim-Leikanger, Selmer Law Firm

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

A ship-owner in Norway enjoys tax relief for the income earned from its vessels. The tax relief scheme is voluntary, and a ship-owner may elect whether he or she wants to be a part of the scheme and for how long.

Companies encompassed by the scheme are ultimately exempt from tax on income earned by their vessels, and only pay a moderate tonnage tax. The scheme ultimately results in a tax exemption for all income earned by the ship-owner's vessels, and the tonnage tax is calculated by multiplying a predetermined daily rate by the vessel's registered tonnage (dwt).

If the vessel complies with certain environmental standards, a further reduction of the tonnage tax may be applied for. The standard tonnage tax rates are between NOK9 and NOK18 per registered 1,000 tons based on a regressive scale.

To be eligible for the tax relief, the ship-owner cannot engage in other business not related to the ships that he owns and manages. There are also limitations tied to the allowed fraction of bareboat charters in the ship-owner's fleet (which may constitute a maximum of 40% of the total fleet) and what flags the ship-owner's vessels may fly (a minimum of 10% of the vessels must fly an EU/EEA flag).

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

Norwegian authorities have imposed several restrictions on maritime activities in view of the coronavirus pandemic. The restrictions are frequently amended, and the below is up to date as of February 2021.

Maritime actors should consult the websites of the Norwegian Maritime Authority and the Norwegian Coastal Administration for updated information concerning the applicable restrictions. Generally, seafarers and vessels have been exempted from the most restrictive provisions allowing for crew changes and loading and discharge operations in Norwegian ports.

Crew Change

In respect of carrying out a crew change in Norway, it is a mandatory requirement for the seafarers to register with the authorities before entry. Seafarers en route to or from active duty are exempt from testing prior to entry into Norway, and do not need to be residents or citizens of Norway.

Upon entry into Norway, a COVID-19 test must be taken, and the seafarer shall thereafter travel directly to the vessel, where he or she must quarantine onboard (in a single cabin) for three days. After three days, a second test shall be taken, and if negative, the seafarer may start working on the vessel. When the seafarer is off duty, he or she shall, however, remain in quarantine. Only after ten days from entry into Norway is the seafarer no longer required to maintain such quarantine whilst off duty.

Entry of Vessels and Crew to the Ports of Norway

Vessels may enter ports of Norway subject to registration of crew members. If crew members are suspected to be COVID-19 positive, the Coastal Administration shall be notified via SafeSeaNet Norway.

Special Restrictions for Cruise Voyages

Before a cruise can commence, the ship-owner must, inter alia, prepare and provide the Ministry of Health with a plan for disease protection and control on board the vessel. Crew and passengers may not disembark in Norwegian ports during the cruise, and the number of passengers may not exceed 50% of the cruise vessel's registered capacity.

Loading and Discharge Operations

Certain police districts in Norway have imposed specific restrictions relating to loading and discharge operations. For example, in northern Norway, crew members are not allowed to leave the quay area when performing such operations and must remain on board the vessels during leisure time.

8.2 Force Majeure and Frustration in Relation to COVID-19

Force majeure is generally recognised by Norwegian courts. If a force majeure event can be established, contractual relief will generally be granted by the court.

However, force majeure protection is only available to the extent one could not reasonably have expected the alleged force majeure event to occur at the time of entering into the contract. As such, only relief sought for contracts entered into before the coronavirus outbreak may qualify the current pandemic as a force majeure event, and, as such, give grounds for relief.

Parties entering into contracts following the global outbreak in 2020 are thus expected to have taken such risks into consideration, and the coronavirus pandemic is generally not likely to constitute a force majeure event under Norwegian law.

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9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

It is important to keep in mind that Norwegian maritime law tends to differentiate as to whether goods are shipped as a part of Norwegian trade, part of trade to/from any Nordic county or as part of international trade (ie, none of the two aforementioned).

Shipping in Norway and between the Nordic countries tends to be strictly subject to the provisions of the Norwegian Maritime Code (which is equivalent to the Danish, Swedish and Finnish maritime codes), without much freedom of contract to choose another venue and/or jurisdiction in matters of affreightment. In Norway, the ship-owner's right to limitation of liability also tends to be harmonised with the limitation rules under road and rail transportation. This is a distinct feature of Norwegian shipping law, and is due to the fact that transportation in Norway tends to be multimodal.

One should also note that there are certain provisions on cabotage between Norwegian ports, including to/from platforms and installations on the Norwegian continental shelf, which applies to vessels flagged outside the EU/EEA.

Lastly, one should finally note that Norwegian contractual tradition is quite pragmatic (compared with, inter alia, the "four-corner rule" of English law) and maritime actors should therefore, under Norwegian law, expect the court to go beyond the explicit wording of the contract and rely on other auxiliary sources and evidence in order to establish the meaning of the various contractual clauses.

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Selmer Law Firm is one of Norway's leading corporate and commercial law firms, with offices in Oslo and Stavanger. Selmer's shipping & oil services team is recognised for its industry knowledge and comprises highly regarded lawyers renowned for their extensive experience advising on both contentious and non-contentious work. The team assists Norwegian and foreign ship-owners and operators, as well as marine insurers, ship-yards, equipment suppliers, banks and financial institutions. In addition to advising on various types of charterparties, management agreements, drilling contracts and insurance contracts, it has extensive experience with sale and purchase as well as ship-building, conversion and modification projects, including offshore and subsea installation projects. The team has been involved in many of the major financial restructurings within the Norwegian maritime industry of recent years. Selmer's shipping & oil services team offers clients the expertise of five partners and eight associates, covering all areas of shipping and maritime law.

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PANAMA

Law and Practice

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

Law 8 of 30 March 1982, which created the Maritime Courts and dictates the Rules of Maritime Procedure, with the modifications, additions and deletions adopted by Laws No 11 of 1986, No 12 of 2009, and others, establishes a specialised maritime jurisdiction composed of two first-instance maritime courts, of equal standing, and a Maritime Court of Appeals with nationwide jurisdiction.

The most common maritime and shipping claims are the following.

- Ordinary Proceedings (in personam).
- Special Proceedings:
  - (a) collision;
  - (b) ship-owner's limitation of liability;
  - (c) enforcement of maritime liens (in rem);
  - (d) enforcement of naval mortgage;
  - (e) creditors' concursus;
  - (f) abbreviated proceedings seeking summary judgment; and
  - (g) special proceeding for enforcement of domestic and foreign decisions.

All these claims are subject to the specialised maritime jurisdiction of the Republic of Panama.

1.2 Port State Control

The inspections of Port State Control (PSC) in Panama are carried out by technical staff of the General Directorate of Merchant Marine of the Panama Maritime Authority, which is the government entity which must guarantee compliance with the Maritime Conventions approved and ratified by the Republic of Panama. These inspections are carried out in accordance with the provisions of international maritime 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 (MARPOL), Standards of Training, Certification, and Watchkeeping (STCW), Tonnage and Ballast Water Management (BWM) for the purposes of identifying deficiencies in ships visiting Panamanian ports. Ships which may be rendered sub-standard under the terms of these conventions should take measures to remedy the deficiencies found and the inspectors of the Panama Maritime Authority will take the necessary steps to ensure that such remedial measures are taken to guarantee safety and protection of the marine environment.

Panama is part of the Viña del Mar Memorandum of Agreement (the Latin American Agreement on Port State Control of Vessels) and the Tokyo Memorandum of Understanding (MOU), so port state control inspections are carried out following the guidelines of those two memorandums of understanding, as well as based on the guidelines established in the International Maritime Organization (IMO) Resolution A.1138(31), adopted on 4 December 2019, updating the procedure for Port State Control Inspections.

In relation to marine casualties such as grounding, investigations are carried out by the Panama Maritime Authority as the Flag State. These functions in practice are not mixed with the obligations of the authority as Port State. As a flag state, it is the Maritime Casualty Investigations Department of the Panama Maritime Authority which co-ordinates the casualty investigations aboard flag ships around the world and also incidents in Panama's jurisdictional waters.

In the case of pollution or wreck removal, the Directorate General of Ports of the Panama Maritime Authority is the entity in charge of investigating and carrying out related actions.

1.3 Domestic Legislation Applicable to Ship Registration

Laws 55 and 57 of 6 August 2008, known as the Maritime Commerce Law and the General Merchant Marine Law, respectively, are the pieces of legislation that govern all matters related to the registration of domestic and international service vessels under the laws of the Republic of Panama.

There are two governmental institutions within the Panama Maritime Authority (PMA) in charge of the registration of vessels:

- the Directorate General of Merchant Marine (DIGEMAR) which is in charge of all administrative matters such as the enrolment of vessels and ensuring safety and security matters thereof; and
- the Directorate General of Public Registry of Property of Vessels (Ships Registry) which is in charge of recording all matters related to the legal status of the vessels concerning ownership and encumbrances.

1.4 Requirements for Ownership of Vessels

There are no citizenship requirements for registration of a vessel under the Panamanian Register. Any person, natural or juridical, irrespective of the nationality, may enrol a vessel under the Panamanian flag.

Panamanian laws allow the registration of a vessel while under construction. To that end, a certificate issued by the shipyard

describing the vessel which is being built, the name of the company for which the vessel is being constructed and a declaration of the intention to transfer ownership thereof will serve as title of ownership to be registered at the Ships Registry.

1.5 Temporary Registration of Vessels

The General Merchant Marine Laws of Panama allows temporary registrations as follows:

Special Registration for Temporary Navigation

This registry allows the enrolment of a vessel for a period of up to three months for ultimate scrapping, for a delivery voyage or any other kind of temporary navigational purpose. The interested party needs to pay a sole charge of 40% of the net tonnage of the vessel plus USD150.

The vessel will be deleted by operation of law at the end of the three-month period at no cost, but the interested party may, at any moment, request such deletion by way of filing a petition thereof and effecting payment of the regular deletion of governmental fees.

The registration of title of ownership or mortgages is optional for this type of registration. Nevertheless, if a mortgage is to be recorded, the registration of title must contain acknowledgment by the mortgagee that the registration of the vessel will elapse at the end of the three-month registration period.

Lay-up Registration

This registration is valid for one renewable year and allows the registration of vessels under Lay-up status, subject to certification issued by a Recognised Organisation (RO) or the applicable Port Authority where the vessel is located.

One of the advantages of this type of registration is that no enrolment fees apply to vessels that will be enrolled in Panama under this type of registration for the first time, and they will be exonerated from paying part of the applicable regular annual tonnage taxes and fees. In addition, they will be exempt from having technical, safety and security certificates on board, but the respective RO should make the pertinent annotations concerning the Lay-up status in the subject certificates.

Once re-activated, an inspection must be carried out by an RO to ascertain that the vessel is duly fitted and in accordance with all national and international maritime laws and regulations as a requirement to revert to a regular international service registration.

In addition, Panamanian laws allow dual bareboat-charter registrations. It is permitted that a ship with primary registration on a foreign registry be registered under the laws of Panama as a secondary registry, pursuant to bareboat charterparty arrangements. The inverse situation is also permitted by Panama's laws.

The system contemplated under Panamanian laws results in the dismemberment of the features or attributes of registration. On the one hand, the laws of the primary registry govern the juridical status of a vessel in terms of the concept of ownership and encumbrances, while, on the other hand, the laws of the special subordinated registry govern matters regarding the administrative and technical operation of the vessel, ie, manning, labour relations, safety and security matters.

A vessel registered in Panama under a bareboat-charter agreement will have a registration valid for a period up to the validity of the bareboat-charter agreement; this period may be renewed as per renewals of the subject charter agreement.

A vessel registered under this special type of registration will be considered a Panamanian-registered vessel and will only be allowed to fly the Panamanian flag. Likewise, it will be subject to all regular applicable taxes, fees and duties in accordance with Panamanian law. Payment in respect of those applicable during the whole period of registration must be made in advance upon enrolment.

1.6 Registration of Mortgages

Ship mortgages are required to be registered at the Ships Registry in order to provide legal and binding effects against third parties.

A Panamanian mortgage may be executed in any language and must be notarised by way of acknowledgment of the legal capacity of the signatories and the authenticity of the signatures thereof. Thereafter, the notary's signature must be legalised by a Panamanian Consul or via apostille.

Registration may be effected preliminarily via the filing of an application form containing the description of the essential terms of a mortgage. This preliminary registration is completed during the course of one business day and it has full legal effect for a period of six months, within which period of time the interested party must file for permanent registration. Upon completion of permanent registration, the effects are retroactive to the time and date of the preliminary registration.

Permanent registration may be effected via two alternative procedures:

- by way of a full translation of the mortgage into the Spanish language and protocolisation before a Panama notary public into a Public Deed, which is filed for registration with the Ships Registry; or

- if the mortgage is executed in English, it can be registered in its original English version, provided a short mortgage extract is executed in respect of the mortgage and that extract is translated into Spanish for permanent registration, together with the original mortgage and any relevant attachments in English.

1.7 Ship Ownership and Mortgages Registry

The records related to ship ownerships and mortgages kept at the Ships Registry are available on the public website of the Panama Maritime Authority and any third party may access this in order to obtain information about ownership title and encumbrances registered over Panamanian vessels.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

The following international conventions on pollution and wreck removal have been ratified by Panama and, therefore, will impact upon the liability of owners and interested parties in events of pollution and wreck removal:

- the International Convention for the Prevention of Pollution from Ships (MARPOL) and annexes;
- the International Convention on Civil Liability for Oil Pollution (CLC);
- the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER);
- the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention);
- the Nairobi International Convention on the Removal of Wrecks.

2.2 International Conventions: Collision and Salvage

The following international conventions on collision and salvage have been ratified by Panama and, therefore, will impact upon the liability of owners and interested parties in events of collision and salvage:

- the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS);
- the Convention on Facilitation of International Maritime Traffic (London 1965).

In addition, Chapters I and II of Title III of the Law 55 of 2008 of the Republic of Panama (the Panama Maritime Commerce Law) regulate collisions and salvage.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The Republic of Panama is not a signatory to the 1976 Convention on Limitation of Liability for Maritime Claims. Notwithstanding, most of the substantive rules established in that international agreement have been incorporated into Panamanian domestic legislation, specifically in Law 8 of 1982, as amended, on maritime procedure.

Therefore, the Republic of Panama, without being part of the 1976 Convention on Limitation of Liability for Maritime Claims, in practice follows the general principles or rules of that convention, albeit with certain modifications and deletions.

Panama has not passed into law the limits as modified by the 1996 Protocol to amend the 1976 Convention on Limitation of Liability for Maritime Claims.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Constitution of the Limitation Fund

The constitution of the limitation fund for the payment of claims is subject to the following rules:

- any person alleged to be liable may constitute a fund with the court or other competent authority in any State in which legal proceedings are instituted in respect of claims subject to limitation;
- the fund shall be constituted in the sum of those of the amounts set out in the article relating to General Limits, and special articles relating to passenger claims, together with interest thereon from the date of occurrence giving rise to the liability under the date of the contribution of the fund;
- the fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked;
- the fund may be constituted either by depositing the sum or by producing a guarantee which is acceptable and which the court or other competent authority considers to be adequate. In Panama's Maritime Courts the guarantees usually accepted are cash (Certificate of Judicial Deposit), cashier's or certified cheques drawn against banks licensed to operate in the Republic of Panama, and irrevocable payment guarantees issued by those banks.

Parties Entitled to Petition the Limitation of Liability

Law 8 of 1982 regulates the parties who are recognised as having substantive legitimacy or standing to limit the liability of the claims described in that law. The rules contained therein are in essence the same rules contained in Article I of the 1976 Convention on Limitation of Liability for Maritime Claims.

In this respect, Law 8 of 1982 establishes that ship-owners and salvors have standing to limit their liability arising from the claims described in this law. The following are the different categories of persons who have standing and are entitled to limit liability, as follows:

- the ship-owner, understood as the registered owner of the vessel, and other parties who may be considered as owners: the charterer, the manager, and the operator of an ocean-going vessel;
- the salvor of the vessel, understood as any person rendering services in direct connection with salvage operations;
- any persons for whose acts, neglects, or defaults, the ship-owner or salvor is responsible may avail themselves of limitation of liability;
- regarding in rem claims, the law establishes that the liability of a ship-owner shall include liability in an action brought against the vessel herself;
- any insurer of liability for claims subject to limitation in accordance with Law 8 of 1982 shall be entitled to the benefits to the same extent as the assured itself.

It should be noted that Law 8 of 1982 clearly states that the act of invoking limitation of liability shall not constitute an admission of liability.

Limitation of Liability Fund Calculation

Law 8 of 1982 establishes that the liability limits for claims (excluding the claims of passengers) will be calculated as follows.

In respect of claims for loss of life and personal injury

- 333,000 units of account for a vessel with a tonnage not exceeding 500 tons;
- for a vessel with a tonnage in excess thereof, the following amount in addition to that mentioned in the first point:
  (a) from 501 to 3,000 tons, 500 units of account per ton;
  (b) from 3,001 to 30,000 tons, 333 units of account per ton;
  (c) from 30,001 to 70,000 tons, 250 units of account per ton; and
  (d) for each ton in excess of 70,000 tons, 167 units of account.

In respect of any other claims

- 167,000 units of account for a vessel with a tonnage not exceeding 500 tons;
- for a vessel with a tonnage in excess thereof, the following amount:
  (a) from 501 to 30,000 tons, 167 units of account per ton;
  (b) from 30,001 to 70,000 tons, 125 units of account per ton; and
  (c) for each ton in excess of 70,000 tons, 83 units of account.

Furthermore, claims for damage to harbour works, waterways, and aids to navigation, will have the priority determined by the law.

3. Cargo Claims

3.1 Bills of Lading

The Republic of Panama has not adopted any international conventions concerning bills of lading. However, Law 55 of 2008 on Maritime Commerce, which covers carriage by sea and bills of lading, adopts into domestic legislation provisions based on the Hague-Visby Rules.

3.2 Title to Sue on a Bill of Lading

Any party deemed affected may sue on a bill of lading. In particular, Law 55 of 2008, on Maritime Commerce, provides that both the shipper and the carrier or effective carrier may be liable under a bill of lading.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Law 55 of 2008, on Maritime Commerce, imposes the liability for damages on the vessel in rem, regardless of the party in control.

3.4 Misdeclaration of Cargo

Law 55 of 2008, on Maritime Commerce, states that a carrier can establish a claim against the shipper for misdeclaration of cargo if the goods are not properly packed or accurately described. The carrier will be indemnified on any loss resulting from poor packaging or inaccuracies in the information.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

As established by Panama's Code of Commerce, actions derived from land or sea transport contracts, or charterparty contracts, have a one-year time bar. Actions derived from liability in tort also have a one-year time bar, established by Panama's Civil Code. The one-year term will run from the date of the damage or the date of delivery of the cargo. This time limit cannot be extended or sustained.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

The Republic of Panama has not adopted any international conventions regarding the arrest of vessels. This matter is covered by Law 8 of 1982, as amended.

4.2 Maritime Liens

Maritime Liens are set forth in Law 55 of 2008, on Maritime Commerce, and are listed as liens against the vessel, the freight and the cargo.

The following liens will have privilege over the vessel and will concur on its price in the following order:

- any judicial costs caused in the common interest of the maritime creditors;
- any expenses, compensation and salaries for assistance and salvage;
- any salaries, remuneration and compensation due to the captain and crew;
- the naval mortgage;
- any credits in favour of the Panamanian State for fees and taxes;
- any salaries and stipends due to stevedores and dock workers hired directly by the owner, operator or captain of the vessel to load or unload it;
- any indemnities due for damages caused by fault or negligence;
- any amounts owed by way of contribution in general averages;
- any amounts owed by virtue of obligations contracted for the necessities and provisioning of the vessel;
- any amounts taken on the bottomry of the vessel and rigging for supplies, arms and apparel, and insurance premiums;
- any salaries of pilots and watchmen and conservation and custody expenses of the vessel, its rigs and supplies;
- any indemnities owed to carriers and passengers for failure to deliver the goods carried or for any damages thereto imputable to the captain or the crew;
- the price of the last acquisition of the vessel and any interest due.

The following liens will have privilege over the freight and will concur on its price in the following order:

- any judicial costs caused in the common interest of creditors;
- any expenses, indemnities and salaries for assistance and salvage;
- any salaries, remuneration and compensation due to the captain and crew for the voyage in which the freight was earned;
- any amounts due by way of general averages contributions;
- bottomry bonds on freight earned;
- insurance premiums;
- any amounts of capital and interest owed by virtue of the obligations contracted by the captain on the freight, with the legal formalities;
- any indemnities owed to carriers and passengers for failure to deliver the goods carried or for any damages thereto imputable to the captain or the crew;
- any other duly registered debt guaranteed by bottomry bond or naval mortgage or pledge on the freight.

The following liens will have privilege over the cargo and will concur on its price in the following order:

- any judicial costs caused in the common interest of creditors;
- any expenses, indemnities and salaries for assistance and salvage;
- any commercial taxes or fiscal rights owed at the place of unloading;
- any transportation and cargo expenses;
- any leasing of storage for the things unloaded;
- any amounts owed by general averages contributions;
- bottomry bonds and insurance premiums;
- any amounts of capital and interest owed by virtue of the obligations contracted by the captain on the freight, with the legal formalities;
- any other loan with pledge on the cargo, if the lender holds the Bill of Lading.

4.3 Liability in Personam for Owners or Demise Charterers

A vessel may be arrested in rem, regardless of the owner's personal liability. Notwithstanding, the owners or demise may be held liable in an in personam claim if the applicable law so allows.

4.4 Unpaid Bunkers

A bunker supplier may arrest a vessel in connection with unpaid bunkers. Under Panamanian Law, bunker claims generally permit the arrest of a vessel, regardless of whether the supply was requested by the owner, operator or charterer. Any party affected by that debt may file for the arrest.

4.5 Arresting a Vessel

To obtain an arrest order it is necessary to file an arrest request and complaint, with prima facie evidence of the claim. The plaintiff must also cover the court arrest and maintenance expenses. In the Panamanian jurisdiction, the arrest is available in three instances:

Physically to Seize Property Susceptible to Arrest in Order to Make Effective Privileged Maritime Liens over That Property

If filing an in rem claim against the vessel, the Maritime Courts may order the arrest of a vessel of any nationality in Panamanian

waters, in order to attain jurisdiction. It would be necessary to deposit before the Maritime Courts the following:

- security to act without a power of attorney, which is returned in full once the power of attorney and a certificate of the legal existence of the plaintiff is filed with the court;
- USD1,000.00 security for damages that the arrest may cause;
- USD2,500.00 initial maintenance fees. If the arrest is not lifted shortly, the Marshal may request plaintiffs to post additional fees for maintenance. The failure to post such fees may result in lifting the arrest.

The plaintiff must file the evidences in respect of the applicable laws (copy of the laws, Legal Opinions, Lawyer Affidavit and/or others).

To Bring within the Jurisdiction of the Panama Maritime Courts Cognisance of Causes Emerging within or outside the National Territory, as a Result of Facts, or Acts Related to Navigation, When the Defendant Is outside Its Jurisdiction

In this case, the plaintiff may request the arrest of the vessel (regardless of her nationality or of the ship-owner's nationality) while navigating in Panamanian waters or Panamanian ports, even if there are no other contacts with the Panamanian jurisdiction. It would be necessary to deposit before the Maritime Courts the following:

- security to act without a power of attorney, which is returned in full once the power of attorney and a certificate of the legal existence of the plaintiff is filed with the court;
- USD1,000.00 security for damages that the arrest may cause;
- USD2,500.00 initial maintenance fees.

To Assure That the Proceedings Will Not Have an Illusory Effect, and Keep the Defendant from Transferring, Dissipating, or Encumbering Properties Susceptible to Those Measures

In this case, the plaintiff may request the arrest of the vessel involved in the transaction that gave place to his or her claim, or any other vessel or property belonging to the defendant.

In such a case, the Maritime Courts would request security in an amount between 20% and 30% of the amount of the claim. The amounts would be affixed discretionarily by the judge. Security must be posted in cash, certified cheques issued by banks licensed to operate in Panama, or Panamanian public debt titles.

After filing the complaint and an arrest motion, as a general rule of proceedings, the following documents must be filed before the Maritime Court:

- power of attorney;
- a certificate of the legal existence of the plaintiff;
- a certificate of the legal existence of the defendant: this document will be necessary only if the claim is filed against the owner of the vessel (in personam complaint);
- evidence of the claim.

All foreign documents must be notarised as authentic and legalised according to the 1961 Hague Convention on the Apostille or legalised before a Panamanian Consulate at the place of issuance. Documents in languages other than Spanish must be translated by an official translator.

4.6 Arresting Bunkers and Freight

Law 8 of 1982, as amended, allows for arrests to be executed against bunkers and freight, under the general rules for arrest.

4.7 Sister-Ship Arrest

Sister ships or vessels owned by affiliates may be sued and arrested in rem in lieu of those on which the claim originated, when the applicable substantive law permits it. The plaintiff must file prima facie evidence demonstrating that, under the applicable substantive law, the arrest of a sister ship is viable, and that the vessel subject to the arrest is a sister ship under the applicable substantive law.

4.8 Other Ways of Obtaining Attachment Orders

Law 8 of 1982, as amended, allows a party with reason to believe that, during the time prior to a judicial recognition of their right, they will suffer imminent or irreparable danger, to request from the Maritime Court the most appropriate conservatory or protection measure which will provisionally guarantee, depending on the circumstances, the effect of a judgment on the merits (ie, an injunction order). Such measures normally are in the form of an order against the sale, transfer or mortgage of Panamanian vessels.

Accordingly, the Maritime Court may issue an order restraining the sale of a Panamanian-registered vessel upon the filing of a complaint against the vessel or her owner with a petition accompanied with evidence of the existence, and the merits, of the claim. The plaintiff must deposit with the court security, which is fixed by the court between USD10,000.00 to USD50,000.00.

The security must be posted in cash, certified cheques issued by banks licensed to operate in Panama, Panamanian public debt titles or any other guarantee agreed by the parties.

The plaintiff must file a complaint, together with security for damages and all the preliminary evidences to support the facts of the complaint. Initially, documents may be filed in fax or pdf

copies with an undertaking to produce the originals within a short period of time.

Once issued, the court sends the order to the Department of Registration of Titles and Encumbrances of the Shipping Bureau and these authorities make a note on the records of the vessel.

4.9 Releasing an Arrested Vessel

Once the arrest is executed, the defendant or any other interested party may petition the release of the arrest by posting a security which is affixed by the court to cover the amount of the claim, interest (three years), arrest expenses and legal fees. The security must be posted in cash, certified cheques issued by banks licensed to operate in Panama, Panamanian public debt titles or any other guarantee agreed by the parties.

The parties may agree the amount, the nature and the conditions of the security which will be substituted for the arrested vessel, and must jointly petition the judge for the lifting of the arrest, consigning at the same time the agreed bond. The parties may agree on other types of guarantees such as LOI/LOUs, Bank Letters, or P&C letters.

If the parties do not reach an agreement as to the amount and nature of the security to be consigned, the court, on a motion by the defendant or a third party interested in lifting the arrest, shall set the amount of the security so that it covers the amount claimed in the complaint plus interest (three years), costs and expenses. This amount shall not exceed the market value of the property.

Notwithstanding the foregoing, when the arrest is requested to make effective proprietary rights, or the possession and the use of the property under arrest, the arrest may not be lifted or suspended.

4.10 Procedure for the Judicial Sale of Arrested Ships

When ordering the judicial sale, the court will instruct the Marshal to carry out the sale procedure. The court will appoint a surveyor to survey the vessel and determine her market value. The plaintiff must pay the surveyor professional fees.

The court order fixing the judicial sale dates must be published at least twice a week until the sale is completed, in national newspapers and any other specialised publications that the parties deem convenient.

Bids and counter-bids will be received in writing by the Marshal. On the same date, the oral bidding and counter-bidding process will begin. Bids that have been submitted to the Marshal will be announced and the vessel will be provisionally adjudicated to the bidder with the highest price.

The successful bidder must pay the full purchase price within three working days after the provisional adjudication of the vessel. Payment must be made in cash, or by a certified cashier's cheque in the name of the Maritime Court. On the date of the sale, the Marshal will issue a Provisional Adjudication Certificate in favour of the successful bidder.

After the full purchase price has been paid by the successful bidder, the court will issue a Statutory Adjudication Certificate in favour of the purchaser. This document will constitute the legal title of the vessel and will state that the vessel has been acquired in a judicial sale free from any encumbrances.

The sums collected from the judicial sale of the vessel will be consigned with the court by the Marshal and will be deposited in a special account maintained by the court. The Marshal must apply to the court for payment of his or her fees and expenses of arrest, custody and sale.

Once the sale proceeds have been paid into the court, any party who has obtained a judgment in rem against the vessel or her sale proceeds may apply to the court for determination of priorities, if necessary, and for payment of their claim.

Notice of such an application will be given by the court to all parties who have actions filed against the vessel, warning them to lodge their claims. If claimants do not reach an agreement with respect to the distribution of the sale proceeds, the court will appoint an administrator to determine the order in which to pay the privileged maritime lien-holders. The naval mortgage will rank fourth in priority.

The Marshal's claim against the sale proceeds for his or her fees and expenses has the highest priority and until he or she has been paid in full, the court will always reserve sufficient funds in court for that purpose. The plaintiff will also be reimbursed for the sums that he or she supplied to the Marshal for the arrest, custody and conservation of the vessel, before payment is made to any maritime lien-holder. The order of priorities in which the sale proceeds will be paid will be determined by the applicable substantive law.

4.11 Insolvency Laws Applied by Maritime Courts

Panama has enacted Law 12 of 2016 on insolvency proceedings, which came into effect in January 2017. The Insolvency Law includes provisions similar to those included in Chapter 11 of the United States Bankruptcy Code, creating a specialised insolvency jurisdiction before the civil courts.

Bankruptcy financial protection will be granted by the civil courts to the debtor who undergoes a reorganisation process under Law 12 of 2016. During this period, no executory proceedings, executions of any kind, restitution of assets or evictions may be initiated against the debtor.

Law 12 of 2016 on insolvency proceedings is recent and has not been extensively tested by the courts.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

Any party who by mistake, fault, negligence or bad faith seizes an asset or property that does not belong to the defendant or in contravention of a prior and express agreement between the parties, or a party requests an arrest for a maritime lien which is inexistent or time-barred by the statute of limitation, will be responsible for the damages caused, as well as for the payment of the expenses and costs arising from such action.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

Chapter IV of the Panama Maritime Commerce Law regulates the Contract for the Carriage of Passengers by Sea, while Chapter II of Law 8 of 1982 (Code of Maritime Procedure) regulates the Procedure for Limiting the Ship-owner's Liability.

Article 1651 of the Code of Commerce of Panama establishes a one-year time-bar provision for indemnities derived from shipping transport or charter contracts and a time-bar provision of six months if its issuance is within the territory of the Republic of Panama.

Limitations on liabilities available in respect to a passenger's claim include:

- claims related to death and bodily injury which occurred on board or were directly connected to the exploitation of a vessel or salvage or assistance operations, and damages resulting from any of these causes;
- claims related to damages resulting from a delay in the transportation of passengers or their luggage by sea; and
- claims for damages different from those arising from contractual rights, caused in direct connection with the exploitation of the vessel or with salvage or assistance operations.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Law 8 of 1982, as amended, recognises the validity of the substantive law included in bills of lading. Maritime Courts may abstain from hearing a cause in which the parties have previously and expressly negotiated to submit their controversies to a court in a foreign country, and have thus agreed this in writing. However, pro forma or adhesion contracts (such as bills of lading) are not considered to be previously and expressly negotiated.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

Law 8 of 1982, as amended, recognises the validity of an arbitration agreement, provided it is in writing and has been negotiated between all parties. Arbitration can be conducted pursuant to the rules chosen by a party, otherwise the Panamanian law on arbitration will govern the arbitration proceeding. Maritime courts have to abstain, at the request of one of the parties, from continuing to hear a claim already submitted to arbitration, as well as in cases where an arbitration clause exists. In such cases, the maritime courts can order the taking of appropriate measures to safeguard a party's rights, such as the consigning of a surety bond before the competent court or a waiver of time-bar defence, if the statute of limitations has been interrupted. If an arrest or seizure has taken place, or it is not possible to consign a bond before the competent court, the maritime courts can stay the main proceeding and keep the arrest or seizure in place, subject to the results of the arbitral proceeding.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Foreign arbitral awards are recognised and enforced in Panama in accordance with either the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1975 Inter-American Convention on International Commercial Arbitration or any other treaty ratified by Panama on the recognition and enforcement of arbitral awards. The petition for recognition is filed before the Fourth Chamber of the Supreme Court of Justice.

Law 131 of 2013 regulates national and international arbitration in Panama, and incorporates modern international arbitration practices and principles.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

In practice, the maritime courts are likely to grant the claim if the plaintiff complies with the appropriate prima facie evidence.

Notwithstanding, the maritime courts may abstain from hearing a cause in which the parties have previously and expressly negotiated to submit their controversies to a court in a foreign country, and have thus agreed this in writing. However, pro forma or adhesion contracts (such as bills of lading) are not considered to be previously and expressly negotiated.

6.5 Domestic Arbitration Institutes

The Centre for Maritime Conciliation, Mediation and Arbitration of Panama (CECOMAP), founded in 2007 by the Panama Maritime Chamber and the Panama Maritime Law Association, specialises in maritime claims.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

In proceedings commenced in breach of a foreign jurisdiction or arbitration clause, the defendant may raise incidents or challenges which can lead to an annulment of proceedings, such as lack of jurisdiction and lack of competence.

The arbitration jurisdiction is recognised at the constitutional level in Panama and Law 131 of 2013, on Arbitration, dictates that, in disputes which include arbitration clauses, a judicial court shall decline jurisdiction in favour of the arbitral tribunal, and immediately forward the file to the arbitral tribunal.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

The Panamanian tax system is based on the principle of territoriality. Only income generated in the national territory is taxed and foreign-source income is exempt.

The 2010 amendments to the Tax Code introduced provisions in relation to transportation and include the international transportation in the portion corresponding to freight, passengers, cargo and other services of which the origin or final destination is Panama as an activity that shall be considered as income obtained from sources within Panama. Notwithstanding, it is important to indicate that the amended Tax Code specifies that these activities will be exempt if the international companies have their home port in Panama.

Income obtained within Panama from the operations of ships registered abroad will also be exempt if the income obtained by Panamanian-registered vessels in that country is given a similar exemption under the principle of reciprocity. The same applies to income obtained within Panama from operations of ships registered abroad by foreign persons resident, or not, in the national territory, provided that Panamanian natural or legal entities are given similar treatment in the country of the nationality of that person.

The sale of vessels registered under the Panamanian flag and engaged in international trade shall be exempt from income tax.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

There are no major restrictions in the operations of ports aside from biosecurity measures well known around the globe, which are carefully implemented and enforced.

In respect of crew changes, Panama has implemented protocols thereof under various modalities, such as:

- ship-to-ship crew change;
- group repatriation of Panamanian crew per ship;
- ship-to-ship repatriation with intermediate terrestrial modality;
- Panamanian-for-Panamanian crew change in national ports;
- foreign-for-Panamanian crew change in national ports;
- embarkation and disembarkation of Panamanian crew abroad; and
- co-ordination of charter flights for purposes of bringing to Panama crew of diverse shipping lines to achieve crew changes in Panama.

Between March and October 2020, more than 11,000 seafarers were able to return to their homes, thanks to the efforts of the Panama Maritime Authority in this respect.

8.2 Force Majeure and Frustration in Relation to COVID-19

The Maritime Courts of Panama have currently not made public any decision in regard to concepts of *force majeure* and/or frustration, or any other contractual relief, due to the coronavirus pandemic.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

There are no jurisdiction-specific and maritime issues that apply here.

Patton Moreno & Asvat has offices in London, which allows the firm a level of immediacy that enables it to provide legal services during the scope of different time zones. The firm's shipping department excels in the team's extensive knowledge in the area of maritime financing and naval mortgages and its timely assistance in solving issues and closing transactions. The experienced lawyers in the maritime department have a real and deep knowledge of the industry and have an active participation within the major maritime associations, such as the Panama Maritime Law Association (APADEMAR), thus contributing to the development of the sector. The firm's clientele includes ship-owners, charterers, shipyards, ports and port terminals owners, insurance companies, international banks and financial institutions, private equity investors, consortiums and other players in the maritime sector.

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María Teresa Diaz is a specialist in commercial law, corporate law, shipping and ship finance law. With an outstanding trajectory of more than 30 years, María Teresa is well recognised within the maritime industry. She has been advising the top ship-owning companies, ship managers, banks and financial institutions around the world, handling their maritime and corporate interests. She was member of the Drafting Commission of Law 57, 6 August 2008, on Panama Merchant Marine. Currently, she is a member of the Panama Bar Association (Director 2005-07), the Panama Maritime Law Association (Secretary 1993-94) and the Women's International Shipping & Trading Association (WISTA) – Panama Chapter.

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Nadya Price has more than 15 years of experience providing legal advice in a wide range of practice areas, currently focusing on corporate and financial law, including mergers and acquisitions, the establishment and implementation of joint ventures, strategic alliances and project finance. For nine years, Nadya headed the firm's London office, where she handled ship financing, ship registration and corporate matters. Since her return to Panama, in addition to assisting ship-owners in corporate matters, she continues to advise international banks in maritime financing. She is a member of the Panama Bar Association and the Panamanian Maritime Law Association.

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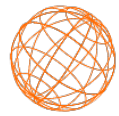

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Trends and Developments

Contributed by:
Belisario Porras
Patton Moreno & Asvat ***see p.256***

Introduction

Panama's role as a maritime country is undeniable. For centuries, Panama's geography has provided a bridge for communication between people from different countries and continents, through its water passageways. Through its maritime infrastructure and services, Panama has created a competitive and efficient logistics hub which has shortened distances and barriers for world trade.

The maritime industry in Panama consists of activities that are generated in several sectors, including the Panama Canal and its ports, the sale of marine fuels, agencies and shipping lines, fisheries, transport by rail between the port terminals in the Pacific and the Atlantic, domestic shipping, pipelines, port terminals, other maritime auxiliary services and the Ship Registry of Panama. These activities never stop and are a constant source of income, which supplies an important economic contribution of approximately 33.5% to the gross domestic product (GDP) of the Republic of Panama.

The Ship Registry of Panama

It is a matter of great pride for the nation of Panama to have a Ship Registry which has provided quality service to the international maritime community for over 100 years, comprising the largest merchant marine fleet in the world to date.

Throughout 2020, and despite the enormous limitations brought by the COVID-19 pandemic, the Panama Maritime Authority (AMP), through its General Directorate of Merchant Marine, was able to incorporate 1,033 vessels into its fleet and 29.7 million gross registered tonnage (GRT). From this group, 339 vessels corresponded to new-builds, representing a growth of 6.22% when compared to the total numbers obtained from 2019. In addition, deletions and transfers to other flags were reduced to 25.8%, which represents the best statistical facts in the last ten years.

With these positive results, for the first time ever, the Panamanian flag reached a total tonnage of 230,577,081 GRT, from 8,516 registered vessels, which roughly comprises 16% of the world's merchant fleet.

The size of the records can also be reflected in relation to their contribution percentage in the budget of the International Maritime Organization (IMO) which Panama, as an "A" member country, represents one of its ten major contributors.

Trends and Developments

The major trend in the maritime sector of Panama has been the modernisation of the Panama Ships Registry in order to update its procedures into the digital era.

The new applications integrate into a single platform, the technological systems utilised by the General Directorate of Merchant Marine and the General Directorate of the Public Registry of the Property of Vessels, to include innovations, adapting to the existing technology, and to undertake improvements to the workflow of the Panama Ship Registry.

Some of the applications worth mentioning are the following.

- Integral management of the naval registration process – this contemplates the integration of the workflow at the Panama Ship Registry, for the purpose of facilitating "red tape" for the user.
- Unification of the database – it will solve the problem that is presented by the incongruities of the different databases that are kept in both General Directorates.
- Remote presentation of documents – through the web platform, users may enter the system, load and present their documents upon both General Directorates. In this respect, as of 27 April 2020 remote reception of Public Deeds for titles of ownership and mortgages was initiated as part of the technical modernisation plan for the maritime administration. The implementation accelerated the process and reduced timeframes. Up to 31 December 2020, about 4.089 documents (68% of the registration procedures) were received remotely.
- Electronic signature – all the documents (including Public Deeds) will be signed electronically, at the external level as well as the internal level; this functionality involves an agreement with the Panama Public Registry and the General Directorate of Electronic Signatures. Public Deeds will be authorised by public notaries who will use duly registered electronic signatures certified by the Panamanian government, thus increasing legal certainty.
- Payment gateway – this contemplates the different payment methods utilised at present, such as credit and debit cards.
- Registry calculator – users may calculate the costs for each one of their operations through the web platform.
- Issuance of certifications electronically – through the webpage, users may request and receive their certifications

of property and encumbrances signed electronically; the certifications will be bilingual.
- Electronic apostille – the respective legalisation paperwork is filed before the Ministry of Foreign Relations of the Republic of Panama, thus the electronic modernisation of the issuance of the apostille in Panama will increase the level of satisfaction of the user and the competitiveness of the Panama Ship Registry.
- Notification of online procedures – implementation of an application for mobile devices for follow-up of the procedures executed before both directorates and the issuance of alerts by electronic mail.
- Bilingual platforms – the new web platform utilised to carry out the paperwork before the Panama Ship Registry will be in the English or Spanish language.
- Statistical module – the technological platform will permit the management of reports, dynamic graphs and management indicators for the purpose of extracting statistical data to facilitate decision-making and marketing by the national merchant marine.
- Validation of certificate of good standing – the physical presentation of the certificate of good standing will not be necessary for the paperwork required before the General Directorate of the Public Registry of the Property of Vessels, as the validation will be effected through the system.
- Electronic consular validation – the notarial certifications effected by the privative consuls of the merchant marine may be effected through the system and backed by their electronic signatures for the purpose of safeguarding registration safety.
- Unique window for maritime financing – this technological platform will contemplate the necessary paperwork for the procurement of the certifications of the entities established in Panama for the purpose of offering shipping financing or developing bankable maritime projects, for the procurement of fiscal, labour and migratory incentives, as established in Law 50 dated 28 June 2017.

Regulatory Initiatives

Amendment of the law of the public registry of vessels

In view of the upgrade being implemented on the technological platform of the registry's procedures, the maritime authorities of Panama, along with members of the Maritime Lawyers Association of Panama (APADEMAR), integrated a commission creating the project of a new decree amending Executive Decree No 259 of 31 March 2011, which regulates the different filing and legal documentation of the Public Registry of Vessels.

This new Decree will update and simplify the procedures for registration of title of ownership and mortgages, cancellation and correction of documents filed, registration of orders from administrative and judicial institutions, and certifications, as well as authentications.

The new Decree is expected to be approved by early 2021.

Creation of the law for maritime purpose companies

Panama's Company Law No 32 dates back to 1927. This has been the regulatory framework which maritime companies have incorporated in Panama, to date.

In order to keep up with other jurisdictions and with the new corporate trends, maritime authorities and members of APADEMAR have in addition established a commission to study the creation of a new law in order to incorporate maritime purpose companies. The new law anticipates being user-friendly for all types of maritime operations and at the same time upgrading its standards to present transparency and compliance requirements from the OECD and other international entities.

Challenges Ahead

COVID-19 perspective

Throughout 2020, the effects of the COVID-19 pandemic have impacted numerous commercial areas of the world's economy, including the maritime sector which accounts for almost 90% of total world trade.

A greatly affected sector has been the crew on board vessels and the need to apply the protocols set by the International Maritime Organization for change of crew and repatriation to their country of origin, with which Panama has complied to the letter, with excellent results.

While the application of vaccines and a possible end to the pandemic are awaited, similar conditions for 2021 or part thereof may still be expected. Therefore, the maritime administration will need to keep being resilient and adapt its procedures according to the short-term situations which may be presented along the way. Furthermore, the administration will need to make sure that conditions and treatment of crew are up to the standards required by the Maritime Labour Convention (MLC) 2006.

The LNG and LPG market and the situation in Panama

One of the most dynamic sectors in shipping is the LNG and LPG market, in which many of its vessels form an integral part of the Panamanian flag. LNG is a sensitive product and therefore requires specialised ports for handling, with many of these being in Asia and Europe.

The Panama Canal is one of the main navigating routes for LNG between continents. There is, however, a traffic-jam situation in the Panama Canal as well as a stronger demand for consumer

goods, due to the pandemic. This situation has forced LNG ships either to wait in line or to take other routes. Not reaching their destinations on time has caused LNG prices to increase.

The Panama Canal Authority (ACP) is very keen to have LNG and LPG traffic travel into its main waterway, due to its economic return, and the challenge will be how to increase the efficiency of its operations without decreasing the levels of security which are necessary for the handling of these types of ships.

Change of LIBOR

In the ship finance market, the projected deadline for the change of LIBOR to loan agreements is looming large. The issue covers both LIBOR loan agreements already executed as well as all LIBOR-based transactions that are likely to continue after 2021.

Based on the present Law No 55 of 6 August 2008, the change to LIBOR would entail the necessity to register possibly thousands of mortgage addenda in order to cover such an amendment of interest to the principal obligation. This additional documentary burden would be severely cumbersome for the shipping industry. It will still be necessary to wait and see what developments appear during this year with regard to this matter in order to decide what approach to follow. However, Panama must be prepared potentially to opt for a change of law, for the benefit of the present and future flag users.

Conclusions

Despite the recession and obstacles caused by the pandemic, with fewer vessels in the market as well as the pressure imposed by other flag competitors (mainly Liberia and the Marshall Islands), the Ship Registry of Panama has obtained positive results in its fleet growth. Prioritising the update of technology in the procedures has been positive, thus assuring the continuity of services. As an example, during the most crucial months of the pandemic, the General Directorate of Public Registry of Ships processed a total of 5,951 documents for registration as mortgages, titles of ownerships, certifications, etc. This policy should continue in order to sustain constant development.

Many challenges lay ahead; however, Panama should be ready to address these with its usual responsible and flexible business approach.

Patton Moreno & Asvat has offices in London, which allows the firm a level of immediacy that enables it to provide legal services during the scope of different time zones. The firm's shipping department excels in the team's extensive knowledge in the area of maritime financing and naval mortgages and its timely assistance in solving issues and closing transactions. The experienced lawyers in the maritime department have a real and deep knowledge of the industry and have an active participation within the major maritime associations, such as the Panama Maritime Law Association (APADEMAR), thus contributing to the development of the sector. The firm's clientele includes ship-owners, charterers, shipyards, ports and port terminals owners, insurance companies, international banks and financial institutions, private equity investors, consortiums and other players in the maritime sector.

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1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The Civil Procedure Code, along with the Commercial Code, are two important sources of local law covering maritime and admiralty issues.

Law No 35/86 of 4 September 1986 was originally intended to create five maritime courts in Portugal. However, only one was created and is currently operational in Lisbon. The Lisbon Maritime Court is the court of the first instance and the Supreme Court hears the appeals.

Law No 62/2013, of 26 August 2013, which describes the organisation of the judiciary system, provides the authorities for which the maritime court is competent, which encompass all the claims related to maritime law. These include shipping matters, given that the Portuguese jurisdiction does not have a specific shipping court. In practice, the most common maritime and shipping claims filed with the maritime court are related to disputes concerning cargo and passenger claims.

1.2 Port State Control

The General-Directorate for Natural Resources, Security and Maritime Services (DGRM) is the entity responsible for exercising port state control over all foreign vessels calling in and sailing within Portuguese waters and for ensuring that they meet and comply with the international safety, security and environmental standards, and that their crews have adequate living conditions and proper working conditions. Where irregularities are identified during inspections, the DGRM may apply fines and detain the vessel until these irregularities are cured.

The main domestic applicable statute regarding port state control is Decree-Law No 61/2012, of 14 March 2012, as amended, which transposes Directive No 2009/16/CE, of the European Parliament and of the Council of 23 April 2009, into the Portuguese jurisdiction. This statute provides the framework applicable to inspections that may be conducted by the port State to ensure compliance with the applicable international requirements.

Portugal is a signatory of the United Nations Convention on the Law of the Sea (UNCLOS) and a party to the Paris memorandum of understanding on port state control (Paris MoU).

Decree-Law No 43/2002, of 2 March 2002, created the National Maritime Authority (*Autoridade Marítima Nacional*, NMA), which is the competent authority in all matters related to the maritime sector in the country. The NMA is responsible for the safety and control of navigation, protection of the environment and the fight against pollution, and protection of human life in maritime activities and rescue operations, among others. Decree-Law No 265/72, of 31 July 1972, provides the framework applicable to port authorities. This statute includes the main attributions of these entities, emphasising their competence to ensure compliance with rules relating to safety and pollution. These powers are, in practice, exercised by the captains of the ports, who are competent to impose penalties and other measures in consequence of the violation of the statutes referred to above and to instruct the competent proceedings, in accordance with Decree-Law No 44/2002 and No 45/2002, both of 2 March 2002, as amended. These penalties may include, among others, the arrest of the vessel, the suspension of its operations, and the imposition of fines.

1.3 Domestic Legislation Applicable to Ship Registration

In the Portuguese judicial system, a vessel is considered to be a movable asset subject to registration.

All types of merchant vessels can be found under the Portuguese flag: product and chemical carriers, bulk carriers, container vessels, gas tankers, cruise ships, crude oil, etc (except that MAR does not permit the registration of fishing vessels). To fly the Portuguese flag, a merchant vessel must be registered either with the Conventional Ship Registry or the International Shipping Registry of Madeira (MAR). The Conventional Registry requires registration with both the Harbour Master and the Commercial Registry, whereas registration with the MAR is by way of registration with its Technical Commission as well as the Commercial Registry.

The conventional registration is regulated by Decree-Law No 43/2018, of 18 June 2018, which created the National System of Vessels and Seafarers (*Sistema Nacional de Embarcações e Marítimos*); and Decree-Law No 92/2018, of 13 November 2018, which established a simplified regime for conventional ship registration. This registration is made through an application submitted to the Electronic Counter of the Sea (*Balcão Electrónico do Mar*), a virtual desk responsible for receiving requests and instructing the procedures related to the registration of vessels and seafarers.

The international ship registry of Madeira is regulated by Decree-Law No 96/89, of 28 March 1989, as amended (the MAR Regulation). The entity responsible for this registration is the MAR, which is a branch of the Commercial Registry Office of the free trade zone of Madeira.

1.4 Requirements for Ownership of Vessels

No nationality requirements are applicable to the ownership of vessels in Portugal. In accordance with Article 6 of Decree-Law No 92/2018, of 13 November 2018, the registration of ships is mandatory, regardless of the nationality of a ship's owner.

The law allows the provisional registration of vessels and mortgages (and other similar encumbrances) over hulls/vessels under construction, as per Article 21.7 of the aforementioned statute.

For ship-owners to register their vessels in MAR they must appoint a local agent with all the necessary powers to ensure their full representation before the State authorities, the Regional authorities and third parties and who must be duly licensed to undertake maritime transport sector or recreational vessel activities in the Madeira Autonomous Region, in accordance with Article 8 and those following of the MAR Regulation.

1.5 Temporary Registration of Vessels

Article 16 of Decree-Law No 92/2018, of 13 November 2018, provides that bareboat-chartered vessels may be temporarily registered in the conventional registry. The temporary registration does not grant the applicant ownership of the vessel, and the request must be accompanied by the relevant bareboat-charter agreement, the consent of the owner of the vessel, and an authorisation of the entity with which the vessel is registered.

Article 15 of the MAR Regulation provides that bareboat-chartered vessels may be temporarily registered in the MAR, as long as this is duly authorised by the ship-owner, the entity with which the vessel is permanently registered, and by the mortgagee(s), if any.

Dual registrations are allowed only through the temporary registration mechanism.

1.6 Registration of Mortgages

With regard to the conventional registration, the registration of mortgages is maintained by the National System of Vessels and Seafarers and obtained from the virtual desk referred to in **1.3 Domestic Legislation Applicable to Ship Registration**. In order to register a mortgage over a vessel, a document constituting or amending the mortgage with a recognised signature of the owner must be submitted, as per Article 21.3 of Decree-Law No 92/2018, of 13 November 2018.

The MAR maintains the registration of mortgages, which must be created in writing, signed by the title-holder, with the seller's signature authenticated, reference being made to the powers and capacity to undertake the act, whenever applicable, pursuant to Article 14 of the MAR Regulation.

Ownership of the vessel and mortgages must also be registered on the Commercial Registry.

1.7 Ship Ownership and Mortgages Registry

The ship ownership and mortgages registry is not available to the public in Portugal. Only parties interested in the registration may request disclosure of this information. The law does not define what an "interest" in the registration means.

The MAR's records are not public. However, the MAR Regulation does not specifically address this matter. Nonetheless, its latest amendment introduced a greater digitalisation of the procedures and records. The full practical effects of these changes have still to be assessed.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

The international conventions that may impact upon the liability of owners and interested parties in events of pollution and wreck removal are the following:

- the Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels 10 April 1926;
- the Convention upon the Limitation of the Liability of Owners of Sea-Going Ships, Brussels 10 October 1957; and
- the Nairobi International Convention on the Removal of Wrecks of 2007.

As a member of the European Union, Portugal is also subject to the European maritime legislation in force.

Decree-Law No 202/98, of 10 July 1998, provides that the owner, unless proven otherwise, is liable for any damage caused as a consequence of an action or omission of any of the people working on board the vessel.

2.2 International Conventions: Collision and Salvage

The following international conventions have been ratified by Portugal:

- the Collision Convention 1910;
- the Collision Convention 1952;
- the Criminal Collision Convention 1952; and
- the COLREGs.

Portugal also ratified the Convention on the International Regulations for Preventing Collisions at Sea, dated 20 October 1972, on 17 October 1978.

Portugal is also subject to the International Convention on Maritime Search and Rescue, signed in Hamburg on 27 April 1979.

Regarding domestic law, the key statute that may have an impact on liability of owners and interested parties in event salvage is Decree-Law No 15/94, of 22 January 1994, which created the National Maritime Research and Rescue System (*Sistema Nacional para a Busca e Salvamento Marítimo*). There is no specific domestic legislation regarding collision.

Under the Collision Convention 1952, a claim for collision may be brought before the Portuguese courts in the following circumstances:

- Portugal is the only country where the defendant has its habitual domicile or place of business;
- Portugal is the country where arrest of the defendant's vessel has been effected or of any vessel belonging to the defendant which can be lawfully arrested or where arrest could have been effected and security has been provided; or
- the collision occurred within the limits of a Portuguese port or within its inland waters.

When there is a collision between a vessel sailing the Portuguese flag and another vessel sailing under the flag of a non-contracting state to any of the aforementioned conventions and regulations, reference should be made to the Civil Procedure Code, which provides that the claimant must commence an action before the court of the place where:

- the collision occurred (provided it was in Portuguese territorial waters);
- the defendant is domiciled;
- the vessel took refuge; or
- the vessel called for the first time after the collision.

Portugal is not a signatory of the Nairobi WRC 2007. The removal of wrecks is therefore dealt under Decree Law No 64/2005 of 15 March 2005, which, inter alia, lists the entities that hold powers to order the removal of the wreck and the obligations to the owners in respect thereof.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Decree-Law No 18/2017, of 16 June 2017, includes the 1976 Convention on Limitation of Liability for Maritime Claims in the Portuguese jurisdiction.

Further, Portugal is a party to both the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-Going Vessels and the 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Vessels and its 1979 Protocol (the 1957 Convention). The limitations arising from the Hague Rules and those provided in Decree-Law 352/86 of 21 October 1986 (as amended), which transposed into Portuguese law certain provisions contained in the Visby Protocol, should also be noted.

Reference should also be made to Article 12 of Decree Law 202/98, which provides that, in addition to the limitation of liability provisions included in international conventions ratified by Portugal, the owner can limit its liability to the vessel and to the freight at risk by abandoning the vessel to its creditors and establishing a limitation of liability fund.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Decree No 49029, of 26 May 1969, provides the procedure and requirements for establishing a limitation fund.

The owner of the ship and the entities referred to in Article 6 of the Convention upon the Limitation of the Liability of Owners of Sea-Going Ships (Brussels, 10 October 1957) may request from the competent court that the limitation fund be created. The request must be accompanied by the following information:

- the fact from which damages arose;
- the amount of the limitation fund, calculated in accordance with Article 3 of the aforementioned Convention;
- the way in which the fund is to be created;
- if applicable, the amount to reserve pursuant to Articles 3 and 4 of the Convention.

The request must be accompanied by the following documents:

- a list of the known creditors entitled to participate in the fund, including a reference to their residence/headquarters and amount of credit;
- elements to justify the calculation of the amount of the limitation fund.

As a way of limiting liability, a vessel's owner may abandon the vessel to its creditor(s) through the constitution of a limited liability fund.

The creditors are entitled to apply for the judicial sale of the vessel in order to be paid out of the sales proceeds. The judicial sale in this case is undertaken under the rules which apply to anticipated sales in enforcement proceedings. After the sale is

made, the next steps will be governed by the rules applying to sales in enforcement proceedings.

The enforcement rules will also be applied with the necessary adaptations to any judicial sale which may occur within the scope of the incorporation of a limited liability fund provided for by one of the many international conventions on limitation of liability.

3. Cargo Claims

3.1 Bills of Lading

The Hague Rules, created by the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, are applicable in Portugal. The Hague Rules apply mandatorily where the bill of lading was issued in the territory of a contracting state.

Although Portugal has signed the International United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), this instrument was not ratified and, therefore, these rules have not entered into force in this jurisdiction.

Decree-Law No 352/86, of 21 October 1986 (as amended), updated the applicable framework, but makes an express reference to the international conventions to which Portugal is subject.

Although Portugal has not signed or ratified the Visby Protocol, some of its provisions (in particular, those relating to package and unit calculations) were transposed into domestic law by Decree Law 352/86. Decree-Law No 352/86 applies on a subsidiary basis to the Hague Rules, also covering a number of issues that fall outside the scope of these Rules, for example, the pre-loading and post-discharge responsibilities and liabilities, calculation of package and units limitation. Decree-Law No 352/86 has also transposed into Portuguese law the limitation period of two years arising from the Hamburg Rules.

3.2 Title to Sue on a Bill of Lading

In general, any party to a contract of carriage that holds an interest over the cargo and is able to show that it has suffered loss or damage arising from the carrier's actions or omissions is entitled to bring a claim. Accordingly, the title to sue on a bill of lading includes the rightful holder of the bill of lading. It should be further noted that in respect of:

- a simple bill of lading, the right to bring a claim remains with the named consignee;
- an order bill of lading, only the latest endorsee can sue; and
- a bill of lading to bearer, this means that the rightful holder at any given moment may sue.

Further and subject to certain requirements, rights under a bill of lading may also be validly assigned to third parties or subrogated (for example when insurers indemnify cargo interests and then seek reimbursement from the carrier).

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Decree-Law No 202/98, of 10 July 1998, equates the liability of the carrier to that of the ship-owner. If third parties file claims against a ship-owner which is not the carrier, that ship-owner may not argue against the claimants that it is not the carrier, but may require a reimbursement from the carrier, pursuant to Article 6 of the aforementioned statute. The ship-owner may limit its liability through the creation of a limitation fund.

3.4 Misdeclaration of Cargo

A carrier may establish a claim against the shipper for misdeclaration of cargo under Article 4.2 of Decree-Law No 352/86, of 21 October 1986. It should be noted that, under Portuguese law, court decisions are not binding but persuasive, ie, unlike common-law jurisdictions where case law is binding.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

Article 27.2 of Decree-Law No 352/86, of 21 October 1986, provides that the claims arising from damage to cargo must be filed within two years, counted from the claimant knowing of the damage. The law provides no scenario in which this timeframe may be extended or sustained.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Portugal is subject to the Convention Relating to the Arrest of Sea-Going Ships, signed in Brussels on 10 May 1952. These matters are further regulated by Decree-Law No 201/98, of 10 July 1998, which provides the legal definition of vessel and the Civil Procedure Code, approved by Law No 41/2013, of 26 June 2013, which provides the requirements applicable to the arrest and the corresponding procedure.

4.2 Maritime Liens

Portugal acceded in 1931 to the Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels, 10 April 1926. However, in 2010 Portugal revoked its accession to this Convention with effect from 2012. The domestic Portuguese rules on the priority of maritime claims are contained in Articles 574–583 of the Commercial Code (sec-

tion I – Maritime Liens, of Chapter VIII – Maritime Liens and Mortgages).

This framework divides maritime liens in relation to the type of asset in question.

Thus, there are three types of maritime liens, each one having a list which establishes their ranking:

- liens on the vessel;
- liens on the unpaid freight; and
- liens on the cargo.

The liens included in these lists take priority over maritime claims.

The recognised list of liens against a vessel are the following:

- judicial costs and expenses borne in the common interest of the creditors;
- salvage and assistance salaries;
- mortgages and pledges over the vessel;
- expenses in respect of pilotage and towage in entering the port;
- port taxes, including (but not limited to) tonnage, lighthouse, anchorage and public health;
- expenses for the custody of the vessel and the storage of her equipment;
- Master and crew salaries;
- vessel's repair costs (including her equipment);
- reimbursement of the cargo which the Master needed to sell;
- insurance premiums;
- any part of the outstanding purchase price in debt since the last acquisition of the vessel;
- expenses relating to vessel repairs (including her equipment) in the three years prior to the voyage and counting from the date the repair was concluded;
- debts arising from the vessel's construction contracts;
- insurance premiums covering the vessel, if she was all insured, or over part of the vessel's accessories that are not included in the tenth point above;
- compensation due to the shippers for lack of delivery or of damage to the cargo.

Note, however, that the wording of Article 578 of the Commercial Code suggests that the liens set out in the first ten points above, with the exception of the third point, are only those incurred during and for the purposes of carrying out the vessel's last voyage.

The above liens may be actioned against the vessel; all other claims are maritime claims and require the establishment of a debt/pecuniary amount due.

4.3 Liability in Personam for Owners or Demise Charterers

If the owner is liable (even if only partially) in personam, any vessel it owns may be arrested. However, an arrest may be obtained over a specific vessel for maritime liens, regardless of its owner's personal liability.

4.4 Unpaid Bunkers

A bunker supplier could obtain the arrest of a vessel in connection to unpaid bunkers supplied to that vessel. The type of claim has no impact on the possibility of the vessel being arrested. Only the amount owed is relevant.

4.5 Arresting a Vessel

The arrest is an injunction procedure aimed at ensuring that the debtor does not dissipate the means to pay its debts. Therefore, it is a temporary solution. Under Portuguese law, only the courts have the capacity to determine that a vessel be arrested. The interested party in the arrest must present the facts that demonstrate the existence of the claim and that justify the fear that any such credit will not be satisfied. The arrest is first ordered on a provisional basis without a hearing. However, an inter partes hearing will be held before the final arrest order is made. A power of attorney and evidence will be required (simple copies and not originals). Important documents should be translated, but can be presented subsequently. The arresting party is not required to provide security.

4.6 Arresting Bunkers and Freight

It is possible to arrest bunkers and freight. Article 580 of the Portuguese Commercial Code provide the following maritime liens over cargo:

- legal costs incurred in the common interests of all claimants to preserve the cargo;
- salvage;
- official charges levied at the port of discharge;
- debts in respect of carriage, demurrage and discharge;
- warehousing charges;
- general average contributions;
- insurance premiums.

This statute further provides a list of maritime liens over freight, which are the following:

- legal costs incurred to protect the common interests of all claimants;
- crew wages;

- general average;
- insurance premiums;
- damages due to shippers.

4.7 Sister-Ship Arrest

In a case where the owner of a ship is personally liable for the claim upon which the request for the arrest is based, any ship which that debtor owns may be arrested. If this is not the case, a maritime lien over a vessel may not be enforced through the arrest of another vessel.

4.8 Other Ways of Obtaining Attachment Orders

Under Portuguese law, there are no other forms of attachment other than the arrest.

The only exception is the newly introduced amendment to the MAR Regulation, which provides that, in the event that the parties have expressly included this mechanism in the mortgage created over the vessel, the mortgagee may, in a case of default, take possession of the vessel without the need to resort to a judicial court. This mechanism grants the mortgagee the powers to seize, navigate and sell the vessel, in accordance with the terms provided in the agreement, in accordance with Article 14-I of the MAR Regulation.

4.9 Releasing an Arrested Vessel

The arrested vessel may be released in the following cases:

- if the underlying debt is settled;
- if the debtor provides adequate security (which is usually a bank guarantee);
- if, in the case that the Portuguese courts are competent to decide on the main claim, that claim is not filed by the creditor which obtained the arrest within 30 days of the arrest being ordered by the court.

4.10 Procedure for the Judicial Sale of Arrested Ships

The Portuguese legal system contains no specific legislation governing the judicial sale of vessels which is governed essentially by the Civil Procedure Code and the Commercial Code.

A judicial sale is possible only where certain specific mechanisms are put in place and it may take place in the following circumstances:

- at the conclusion of enforcement proceedings in which the vessel has been arrested;
- during the course of insolvency proceedings relating to her owner where it has been determined that these proceedings will result in the liquidation of assets;
- in the case of irreparable unseaworthiness where the Master applies for her sale without the consent of the owner;
- as the result of an act of abandonment by the owner resulting in the incorporation of a limitation of liability fund for the creditors.

The court may, however, exceptionally order an advance sale prior to that if it considers that the asset is subject to deterioration and depreciation.

The anticipated sale may be requested by the enforcement agent, the applicant for the enforcement, the defendant (vessel's owner) or any other registered creditor. The court will first hear all the interested parties and will decide afterwards, unless urgency is alleged, in which case the court will make a decision immediately.

However, it should be noted that, in practice, vessels are not usually sold during the course of the arrest procedure. A vessels is sold only after all claims against it are determined and a final judgment handed down, following the recognition and ranking of all claims. The judicial sale of arrested ships may take place through one of the following methods:

- sale after tender by sealed bids;
- sale by regulated capital markets;
- direct sale to a person or persons who have a right to acquire the asset;
- sale after a private negotiation;
- sale after an auction made by an auction establishment;
- sale made by public storage facility;
- sale after electronic auction.

The decision on which of the methods is adopted is made by the execution agent (*agente de execução*) after consulting with the claimant, the debtor and any secured creditors.

The port acts, in the case of the arrest of a vessel, as a de facto custodian for the vessel. The costs of maintaining the vessel are usually paid out of the proceeds of sale. Unless a special authorisation is given for the vessel to sail, the legal custody and maintenance of the vessel are the responsibility of the appointed judicial trustee, who has the powers to take all the decisions and to enter into all contracts deemed necessary, at his or her discretion, to assure the custody and maintenance of the vessel.

The ranking of the claims follows the order of the list referred to in **4.2 Maritime Liens** above. Mortgages are ranked third in this list.

4.11 Insolvency Laws Applied by Maritime Courts

There is no direct equivalent of Chapter 11; however, under Portuguese law, insolvency proceedings may be replaced or preceded by a reorganisation of the corporate entity in an effort towards keeping the company functioning in order to pay its debts. This is not, however, a decision of the court, but rather of the corporate entity itself or of its creditors. A Portuguese court can order the arrest and sale of a vessel owned by owners under Chapter 11 but may stay the action if formal evidence of the Chapter 11 proceedings is produced and recognised by the Portuguese court.

If a vessel's owner is declared insolvent, the vessel may be sold during the course of the insolvency proceedings if a decision is taken in these proceedings that the insolvent estate should be liquidated. The sale is undertaken by the insolvency administrator who is required to notify all lien holders of the method he or she proposes for the sale. The lien holders may, within one week from receiving this notification, make a proposal for the purchase of the vessel, either directly or through a third-party buyer. Such a proposal must include a cheque to the order of the insolvency estate in an amount equal to 20% of the offer. The insolvency administrator is allowed to reject this proposal and to pursue the sale through another method, but if this subsequent sale is concluded at a lower price, the insolvency administrator is liable for the difference.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

If a defendant demonstrates that an arrest was wrongfully procured by the claimant, it may ask the court to hold the claimant liable for damages pursuant to Articles 542 and following of the Portuguese Civil Procedure Code. Actions of this kind are not common.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

Portugal ratified the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, dated 13 December 1974. The time limit for filing any such claims is two years. The limitations on liabilities available to the owners in respect of passengers' claims are those provided under Articles 7 and 8 of the aforementioned convention.

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 also applies.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Portuguese courts recognise and enforce law and jurisdiction clauses stated in bills of lading, unless these are expressly aimed at excluding Portuguese jurisdiction, in accordance with Article 7 of Decree-Law No 35/86, of 4 September 1986.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

See **6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading**.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Portugal has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been in force since 16 January 1995. The Civil Procedure Code provides the procedure of confirmation of foreign decisions.

Enforcement proceedings of both foreign judgments and foreign arbitral awards are subject to advance exequatur proceedings in Portugal, the first under Brussels I and the second under the New York Convention.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

As previously referred to, an arrest is always obtained as an ancillary claim vis-à-vis a "main claim". Portuguese courts may order the arrest of vessels in Portuguese waters, regardless of whether they are competent regarding any such main action.

6.5 Domestic Arbitration Institutes

The primary domestic source of law for arbitration in Portugal is Law No 63/2011 of 14 December 2011 (the Voluntary Arbitration Law). This is based on the UNCITRAL Model Law, adapted to the Portuguese legal system and practice.

There is, however, no specialist maritime arbitration institute.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

If proceedings are commenced in breach of a foreign jurisdiction or arbitration clause, the defendant must be acquitted and the proceedings terminated.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Owners of vessels registered in Madeira enjoy, under Decree-Law No 92/2018, of 13 November 2018, an exemption from income tax and a partial exemption from social security contributions in respect of qualifying crew members.

Tonnage tax was introduced in Portugal in 2018. Only a corporate income taxpayer with a head office or place of effective management in Portugal who is engaged in shipping activities may opt to benefit from this regime.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

Measures were adopted by the Portuguese government with regard to cruise ships calling at ports in Portugal.

These measures determined a ban on the landing and shore leave of passengers and crew of cruise ships in national ports, due to the worldwide epidemiological situation, the increase in cases of infection in Portugal, with the gradual extension of its geographical reach, the need to contain the possible lines of contagion in order to control the epidemiological situation in Portugal and the fact that international experience shows the high risk arising from the disembarkation of cruise ship passengers and crew.

In concrete terms, the measures established the following:

- banning the landing and shore leave of passengers and crew of cruise ships at Portuguese ports;
- this ban does not apply to national citizens or to the holders of residence permits in Portugal;
- cruise ships are authorised to berth in Portuguese ports for supply and maintenance;
- the ban in point one does not prevent landing in exceptional cases, subject to authorisation from the health authority, in particular for humanitarian or health reasons or for the immediate repatriation without entry into the national territory.

No specific measures were taken regarding commercial loading and discharging operations.

8.2 Force Majeure and Frustration in Relation to COVID-19

Portuguese courts recognise the concepts of *force majeure* and frustration. However, given the fact that it has been occurring for almost a year, the likelihood of the pandemic situation being construed as a *force majeure* event or a cause of frustration by Portuguese courts is decreasing.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

Vessels registered in Madeira may be owned and managed by foreign incorporated companies and have full access to EU cabotage.

Recent changes made to the MAR Regulation provide shipowners with self-remedies which make this registry very dynamic, safe and, therefore, appealing.

Contributed by: Claudia Santos Cruz, Ana Corrêa Cardoso, António Magalhães Ramalho and Manuel Freitas Pita, Morais Leitão, Galvão Teles, Soares da Silva & Associados

Morais Leitão, Galvão Teles, Soares da Silva & Associados is a leading full-service international law firm, with a solid background and great experience. The shipping team provides a full range of legal services and has extensive international experience in advising on complex finance and leasing deals, security structures, ship sales, acquisitions and charter transactions, acting for a diverse range of clients worldwide. The International Ship Register in Madeira (MAR), a white flag Registry, is already established as an efficient and viable alternative to traditional ship registries, thereby attracting a number of international ship-owning groups and banks now looking to register their vessels in Madeira. ML is one of the few Portuguese law firms with its own offices in Madeira capable of providing a full service to all those interested in the temporary and permanent flagging-in of vessels, mortgage registrations and the incorporation of ship-owning and management companies in Madeira.

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RUSSIA

Law and Practice

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The Russian Federation has no special maritime and shipping courts. All commercial matters arising in this sphere are decided by commercial ("*arbitrazh*") courts, and claims involving individuals (crew, passengers, etc) fall within the jurisdiction of the courts of general jurisdiction.

Most common disputes in the area involve cases connected with claims arising out of or in connection with carriage agreements, cargo claims, freight claims and collision damages.

1.2 Port State Control

Under the Federal Law "On Sea Ports", port state control is exercised by the Federal Service on Transport Supervision and harbour masters. They have wide powers with regard to maritime safety in general, and safety of seaports in particular, which include, inter alia, supervision over compliance with maritime legislation, supervision over compliance with requirements for calling at a port and departing from a port, control over the existence of ship's papers and ship's compliance with them.

In the case of marine casualties, the Federal Service on Transport Supervision is in charge of conducting investigation. Major casualties can be investigated by forming a commission with the involvement of the harbour master and independent experts. The investigation of incidents with Russian-flag vessels is conducted in accordance with the Order of the Ministry of Transport No 308 dated 8 October 2013. Whenever at least one foreign-flag vessel is involved in the incident, the investigation shall be accomplished in accordance with the IMO Casualty Investigation Code (Resolution MSC.255(84)).

In the case of wreck removal, the obligation to remove the wreck is placed upon the ship-owner. Article 109 of the Merchant Shipping Code (MSC) provides that the owner of the vessel is obliged to raise and remove the wreck upon the order of the harbour master if the wreck presents a threat to safe navigation or poses a risk of damage to the marine environment or obstructs fishing activities or the normal functioning of a port.

1.3 Domestic Legislation Applicable to Ship Registration

State ship registration is regulated by Chapter III of the MSC (Articles 11-51) and the Rules for the State Registration of Vessels (the Order of the Ministry of Transport No 191 dated 19 May 2017). The authority exercising state registration of vessels, except for small crafts, is the harbour master.

1.4 Requirements for Ownership of Vessels

The vessels can be owned by Russian citizens, Russian legal entities, the Russian Federation as a state, the territorial subjects of the Russian Federation or municipal bodies. Nuclear-powered vessels can only be owned by the Russian Federation as a state or by Russian legal entities authorised by the President.

An exception to the above-mentioned rule is the Russian Open Register of Ships, which was introduced in 2019, and allows registration of vessels under the Russian flag that are owned by foreign citizens or legal entities that comply with the requirements set out in the Federal Law "On International Companies and International Funds".

Vessels under construction can be registered in the Register for Ships under Construction.

1.5 Temporary Registration of Vessels

Temporary dual registration of foreign-owned vessels under the Russian flag is recognised where the vessel is bareboat-chartered to a Russian legal entity and its principal flag is temporarily suspended for the period of its registration under the Russian flag. Such vessels can be temporarily registered in the Russian Bareboat Charter Register (RBCR), or in the Russian International Register of Ships (RIRS) or the Russian Open Register of Ships (RORS), which provide for special tax regimes and benefits. The vessel would have to be Russian-classed (by the Russian Maritime Register of Shipping) or in practice can hold a class of one of the International Association of Classification Societies (IACS).

Russian legislation also allows the temporary suspension of the Russian flag and the temporary dual registration of a vessel in a foreign register.

1.6 Registration of Mortgages

The procedure for registration of a mortgage in a ship register is set out in the Rules for the State Registration of Vessels. Mortgages are registered by the same authority that registered the vessel and in the same ship register, that is, the harbour master of the relevant port of registration of the vessel.

The principal documents that are required for the registration of a mortgage is an application to the harbour master, along with the corporate documents of a legal entity, a mortgage agreement, and payment of the state fee.

1.7 Ship Ownership and Mortgages Registry

Article 50 of the MSC provides that the ship registers are public. Any interested party is free to obtain information from the register. Upon written request (in Russian) to the harbour master, it is possible to obtain a whole range of information about the reg-

istered ship-owner, mortgages (the mortgagor, the mortgagee, the amount of secured obligation and the date of termination of the mortgage), as well as bareboat charterers, in the form of a certified extract from the register.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Pollution

The relevant conventions in force impacting on liability of owners for pollution are:

- the Civil Liability Convention (CLC) and International Fund for Compensation for Oil Pollution Damage (Fund) Convention (Protocols 1992);
- the Bunkers Convention 2001;
- the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976/1996 (2012 limits);
- the Anti-Fouling Convention 2001;
- the Ballast Water Management Convention 2004.

A number of these conventions are incorporated into Russian domestic legislation, in particular, into the MSC. Chapter XVIII of the MSC, which is based on the CLC Convention, regulates liability for oil pollution and provides for liability limits as adopted by the IMO Resolution LEG.1(82). Chapter XX.1 of the MSC implements the provisions of the Bunkers Convention.

There are numerous internal legislative acts regulating pollution and maritime pollution. The starting point is the Federal Law "On the Protection of the Environment", as well as other federal laws, followed by governmental decrees and regulations enacted by Russian administrative bodies, such as the Ministry of Transport and the Ministry of Natural Resources and Ecology.

Contrary to the provisions of the CLC Convention and the Bunkers Convention, national legislation provides for compensation for oil pollution damage (or damage caused by other pollutants) based on a formula, according to which the amount of compensation depends on the amount of oil spilled. Nevertheless, in cases falling within the scope of the CLC/Bunkers Convention, the latter shall prevail over domestic legislation. However, the courts are sometimes reluctant to apply the conventions directly and choose to follow national environmental legislation and by-laws.

Internal regulations also set requirements for oil response plans for ships and ship-operating companies and contain other environmental requirements.

Wreck Removal

Wreck removal is regulated mainly in Chapter VII of the MSC (Articles 107–114). Despite the fact that the Russian State Duma was scheduled to consider accession to the Nairobi Convention in 2019, the Russian Federation still has not ratified it, and it is unclear whether it will do so in the foreseeable future.

2.2 International Conventions: Collision and Salvage

Collision

Russian law on marine collisions can be found in Chapter XVII of the MSC (Articles 310–315), the provisions of which are based on the Brussels Collision Convention 1910. The International Regulations for Preventing Collisions at Sea (COLREGS) 1972 apply in the Russian Federation; however, their practical application in cases of collision occurring in ice and on the Northern Sea Route is somewhat peculiar.

Salvage

The Russian Federation is a party to the International Salvage Convention 1989. Russian legal rules on salvage are contained in Chapter XX of the MSC and are based on the Salvage Convention.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

In 1999, Russia acceded to the 1996 Protocol to amend the LLMC 1976, with some reservations. Limitation of liability is dealt with in Chapter XXI of the MSC (Articles 354–366), which largely implements the provisions of the LLMC. Article 355 of the MSC contains a list of maritime claims subject to limitation, which is based on Article 2 of the Convention. As of May 2020, the applicable liability limits are set by the 2012 Amendments to the LLMC and are implemented into Article 359 of the MSC. Similarly, the MSC incorporates rules on limitation of liability with respect to oil pollution, bunker pollution, cargo claims, and passenger claims based on the respective international conventions.

2.4 Procedure and Requirements for Establishing a Limitation Fund

The limitation fund may be established by a person who can be held liable in the total amount equal to the limit of liability with interest on that amount from the day of the incident until the day of fund establishment by placing a cash deposit or by providing a bank guarantee or a liability insurer's letter of undertaking to a commercial ("*arbitrazh*") court that could be dealing with the claims subject to limitation (eg, the court that has jurisdiction at the place of incident). P&I Club Letters of Undertaking (LOUs) used to be accepted; however, in recent years, in view of EU and US sanctions, the courts are reluctant to accept Club's LOUs.

3. Cargo Claims

3.1 Bills of Lading

The Hague-Visby Rules (with the 1979 SDR Protocol) apply. Most provisions of the Rules are incorporated in Chapter VIII of the MSC. However, some provisions of the Hamburg Rules have also been included into that Chapter, although Russia is not a party to the Hamburg Rules. Russian law on carriage of goods by sea is quite complex, since some of the Hague-Visby Rules relating to the contracts of carriage covered by a bill of lading are extended to apply to charterparties.

3.2 Title to Sue on a Bill of Lading

Depending on the circumstances of a case, a shipper, a consignee or a bill of lading holder can sue on a bill of lading.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

A ship-owner's liability with regard to cargo claims, under Russian law, shall be understood as the carrier's liability.

The carrier is liable for loss of goods – in the amount of lost goods, for damage of goods – in the amount of goods' diminished value, for loss of goods with declared value – in the amount of declared value of the goods. The carrier is liable for any delay of goods' delivery in accordance with the terms of a contract for carriage of goods.

The carrier's liability for any loss of or damage to the goods is limited to the equivalent of 666.67 units per package or two units per kilo of gross weight of the goods lost or damaged, whichever is the higher, provided that the nature and value of the goods had not been declared by the shipper before shipment and inserted into the bill of lading. The carrier's liability for any delay of goods' delivery is limited to the amount of freight to be paid under the terms of a contract for carriage of goods.

The carrier is not entitled to limit his or her liability if it is proven that the loss of or damage to the goods, or delay in their delivery, resulted from his or her personal act or omission committed intentionally or with gross negligence.

Under the MSC, the contractual carrier will be liable for the carriage of goods, even if the factual carrier will be delivering the goods. The factual carrier will be liable before the contractual carrier on the same grounds.

3.4 Misdeclaration of Cargo

If inflammable, explosive, or dangerous goods are misdeclared, and the carrier could not establish their nature and character by external inspection upon receipt, such goods may at any time be unloaded, destroyed, or rendered harmless by the carrier without compensation to cargo interests. The shipper is liable for all damages and expenses directly or indirectly arising out of or resulting from such goods. The freight for the carriage of such goods is non-returnable. If freight was not paid upon shipment, the carrier is entitled to recover it in full.

There is no established case law on claims between a carrier and a shipper arising out of misdeclaration by the latter of a cargo. Such claims usually arise between a shipper/a carrier and customs authorities.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The time bar for claims under contracts for carriage of goods is one year (Article 408(1) of the MSC). The date from which the limitation period runs may be different, depending on whether the claim is for cargo loss, damage, or delay, or whether it is to recover demurrage, detention, or dispatch (Article 408(2) of the MSC). The time bar for claims arising out of torts is three years.

The statute of limitations, according to the general rules of the Civil Code of the Russian Federation, cannot be extended or otherwise altered contractually. It must be specifically pleaded as a defence.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Russia is a party to the 1952 Arrest Convention. The provisions of Russian law on ship arrests are contained in Chapter XXIII of the MSC. It must be noted that Russia is not a particularly arrest-friendly jurisdiction. Most applications for arrest are denied. At the same time, a number of wrongful arrests are ordered each year. Arrests are usually granted to major state companies or state institutions. Despite having a maritime claim, a party seeking arrest must prove to the court on a probability basis that it will be impossible or difficult to enforce a judgement or an arbitral award on the merits, unless the arrest is granted. It is at the judge's sole discretion to assess that eventuality and is usually the ground for refusing the arrest.

4.2 Maritime Liens

There is a difference between maritime liens and maritime claims. Russia is a party to the 1993 International Convention on Maritime Liens and Mortgages. Article 367 of the MSC contains a list of claims secured by maritime liens which are the same as in Article 4 of the 1993 Convention (wages, loss of life and personal injury, salvage, port/canal/pilotage dues, and tort arising out of physical loss or damage caused by the operation of the vessel), which have priority over a registered mortgage of a vessel. Provided the lien is not extinguished (a period of

one year), a vessel can be arrested regardless of the change of ownership.

The list of maritime claims in respect of which a vessel may be arrested under Russian law includes claims listed in Article 1 of the 1952 Arrest Convention, as well as some claims from the 1999 Arrest Convention, such as claims for insurance premiums, commissions, brokerages or agency fees payable in respect of the ship.

A vessel may be arrested only in respect of a maritime claim if:

- the claim is secured by a maritime lien;
- the claim is based on a mortgage or the same type of collateral of the vessel;
- the claim relates to the ownership or possession of the vessel; or
- in respect of another maritime claim, provided that the person who owned the vessel at the time when the maritime claim arose is liable in respect of that claim and is its owner at the time when the arrest proceedings began, or that person was a bareboat charterer of the ship liable for the claim at the time when that claim arose and at the time when the arrest proceedings began. Russian law also recognises the arrest of sister ships.

4.3 Liability in Personam for Owners or Demise Charterers

A vessel can be arrested regardless of its owner's personal liability, provided the claim is secured by a maritime lien. For maritime claims that are not secured by a maritime lien, the owner or the bareboat charterer shall be personally liable in respect to the claim (see **4.2 Maritime Liens**).

4.4 Unpaid Bunkers

A bunker supply claim is a maritime claim, but under Russian law it is not secured by a maritime lien. Russian law recognises only in personam claims. Thus, only a contractual bunker supplier can arrest the vessel to secure a claim against his or her immediate contractual counterparty if the latter is the ship-owner. A physical supplier is not entitled to arrest the vessel if he or she has no contractual relationship with the ship-owner.

4.5 Arresting a Vessel

Article 6 of the 1952 Arrest Convention provides that the arrest procedure is governed by the law of the state in which the arrest is sought. In Russia, most arrest cases (except for personal injury and labour claims) are considered by the commercial (*arbitrazh*) courts under the provisions of Chapter 8 ("Measures to secure a claim") of the Commercial (Arbitrazh) Procedure Code (CPC) and arrests are treated as ordinary interim measures.

Under Articles 90 and 99 of the CPC, an arrest of property (including an arrest of a ship) can be granted by the commercial (*arbitrazh*) court at any stage of the already pending litigation, at the execution stage, and also before any proceedings on the merits.

In order to obtain an arrest order, the applicant must persuade the court that:

- without arrest, it would be "difficult or impossible to enforce" a judgment or an arbitral award on the merits, or that it may become necessary to enforce the court judgment outside Russia; or
- arrest is necessary to prevent "considerable damage" to the applicant.

It is at the judge's sole discretion to assess the arguments of the applicant with due regard to proportionality of the claim to any potential damages which the ship-owner may sustain.

If arrest is granted by the court before proceedings on the merits begin, the applicant must within 15 days from the date of the arrest order file his or her substantive claim with the arresting court or present evidence that proceedings on the merits commenced in another competent court or arbitral tribunal, failing which, the arrest is lifted.

The arrest may be lifted at the ship-owner's request if he or she provides security for the claim in the form of a cash deposit, bank guarantee, or a P&I letter of undertaking. Otherwise, the arrest will remain in force throughout the proceedings on the merits and until completion of the execution proceedings by a forced sale of the vessel.

An arrest application must be filed with a commercial (*arbitrazh*) court in the jurisdiction in which the vessel is located (ie, the port of discharge/loading) or with a court of general jurisdiction if the arrest is sought to secure a claim for death, personal injury, or wages. The applicant must present evidence that the vessel is within the court's jurisdiction (typically, a confirmation from a harbour master), evidence relating to the maritime claim and its amount, as well as evidence concerning the vessel's ownership, the party liable for the maritime claim, etc.

Under Article 93 of the CPC, an arrest application is considered by a single judge without notice to the parties. The decision whether or not to order an arrest must be taken within one day after the application is filed; if that day is a weekend or a public holiday – then on the day following immediately thereafter.

All documents must be filed in the Russian language, and powers of the applicant must be confirmed. If the original docu-

ments are in foreign languages, they must be translated and certified. The documents must be presented in original copies or in the form of officially certified copies, which will require notarisation and apostillisation (for documents in foreign languages).

4.6 Arresting Bunkers and Freight

There are no restrictions as to the arrests of bunkers or freight in Russian law; nevertheless, it is highly unlikely that arrests could be enforced effectively.

It is common practice across the globe that the bunkering companies have only emails in confirmation of bunkering. However, Russian courts are sceptical about emails. The Bunker Delivery Notes (if available in original) are better evidence for the Russian court: first, evidence of the fact that bunkers were supplied, and second, of the existence of a bunker supply contract.

Meanwhile, the Russian courts require counter-security and a significant amount of evidence. It is recommended to provide Russian courts with certified translations into Russian language of all documents originally executed in foreign languages, a certified and apostilled confirmation of the good standing of a claimant (if a foreign company) and strong evidence of the violation of rights of a claimant (the standard of proof is close to "beyond reasonable doubt"). Thus, in a matter of urgent issues, arrest in Russia could not be considered as an effective and recommended interim measure.

Nevertheless, it should be noted that arrests are usually granted to the Russian state authorities, Russian state-owned companies or by the courts of general jurisdiction to individuals.

4.7 Sister-Ship Arrest

Article 390(2) of the MSC implements the sister-ship arrest rule where any other vessel or vessels are arrested if, at the moment of initiation of the arrest procedure, the vessels are owned by the person liable under a maritime claim who was, at the time of the claim arising, the owner of the vessel relating to which a maritime claim had arisen, or the bareboat charterer, the time charterer or the voyage charterer of that vessel.

4.8 Other Ways of Obtaining Attachment Orders

Any type of security from any liable party is possible pursuant to the provisions of the CPC. The party seeking arrest of cargo, bunkers, etc, or requesting another form of security for securing its claim against a party other than the vessel's owner, shall prove to the court, on a probability basis, the risk of non-enforcement of a judgment or an arbitral award on the merits, or that the party seeking arrest will suffer considerable damage unless the arrest is granted.

4.9 Releasing an Arrested Vessel

Russian procedural codes do not contain a comprehensive list of acceptable forms of security. The most common types of security are cash deposits into a court's account and bank guarantees. LOUs of Russian fixed-premium insurers are also generally accepted. P&I Club LOUs are occasionally accepted but would have to be substantiated by additional evidence of the Club's financial standing, along with an explanation of the nature of a P&I Club, as most Russian judges are not familiar with this type of security. Russian courts may be especially reluctant to accept club's LOUs in cases where Russian state-owned entities and/or their subsidiaries affected by US and EU sanctions are involved in the proceedings. In 2017 and 2018, several commercial (*arbitrazh*) courts referred to sanctions specifically when refusing to accept club's LOUs as a security for releasing a vessel.

4.10 Procedure for the Judicial Sale of Arrested Ships

Where a mortgagor has failed to perform his or her duty to pay the debt, a vessel encumbered with a mortgage may be sold pursuant to a court decision at the place of location of the arrested vessel.

In the event of the forced sale of a vessel, all registered mortgages of the vessel, with the exception of those accepted by the buyer with the consent of their pledge holders, all pledges and other encumbrances of any kind shall cease to apply to the vessel.

Expenses incurred in connection with the arrest and subsequent sale of a vessel are primarily paid for at the expense of the proceeds from the sale. Such expenses include, in particular, expenses incurred from the moment of the vessel's arrest for the maintenance of the vessel and the crew of the vessel, as well as salaries and other amounts. The balance of the proceeds from the sale of a vessel shall be distributed in accordance with the priority of maritime liens and mortgages. Any remaining amount shall be returned to the owner of the vessel.

In the case of the forced sale of a stranded or sunken ship, the lifting of which is carried out by the administration of seaports in order to ensure the safety of navigation or protection from pollution of the marine environment, the costs of lifting a stranded or sunken ship shall be paid for from the amount received from its sale, prior to satisfaction of any claims secured by maritime lien on the ship.

If, at the time of the forced sale, the vessel or the vessel under construction is in the possession of a ship-building or ship-repair company with the right of retention, that company must refuse possession of the vessel or the vessel under construction in favour of the buyer; at the same time, the former has the right to satisfy his or her claim at the expense of the amount received

from the sale of the vessel or the vessel under construction. If there are claims secured by a maritime lien, the ship-repair company has the right to obtain satisfaction after the secured claims are satisfied.

In the event of the forced sale of a vessel, at the request of the buyer, a document certifying that the ship was sold, and that it is not burdened with any mortgages, with the exception of those accepted by the buyer with the consent of the mortgagees, can be issued.

When submitting that document, the authorities that registered the mortgages of the vessel are required to exclude from the corresponding register of ships all mortgages registered over the vessel, with the exception of those accepted by the buyer.

In accordance with Article 379 of the MSC, mortgage claims stand in priority before other maritime claims, except for the claims secured by a maritime lien.

4.11 Insolvency Laws Applied by Maritime Courts

There are no maritime courts in the Russian Federation. Insolvency procedures are regulated by Federal Law No 127-FZ and the CPC. Insolvency cases are considered by the commercial (*arbitrazh*) courts.

With regard to the possibility of arrest and judicial sale of the debtor's property outside the bankruptcy procedure, the following can be noted.

The law provides for several successive stages of insolvency: supervision of the process, company reorganisation, outside administration, and winding-up proceedings.

Starting with the reorganisation procedure, arrests on the debtor's property and other restrictions on the debtor in terms of disposing of the property belonging to him or her can be imposed only in the commercial process in the bankruptcy case. In the winding-up proceedings, the previously imposed arrests on the debtor's property and other restrictions on the disposal of the debtor's property are removed. The imposition of new arrests on the debtor's property and other restrictions on the disposal of the debtor's property is not allowed.

From the moment a bankruptcy case is initiated, creditors' claims for monetary obligations can be presented only in a bankruptcy case, and after the debtor is declared bankrupt: all claims, except for claims for recognition of ownership, for reclaiming property from someone else's illegal possession, for invalidating void transactions and on the application of the consequences of their invalidity.

The judicial sale of a vessel owned by a debtor is also possible only by a court considering a bankruptcy case in winding-up proceedings.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

Russian procedural legislation (namely, Article 98 of the CPC) establishes that the respondent or other person whose rights are violated by the interim measures is entitled to a claim for damages.

The above-mentioned rule is general and permits also the seeking of damages for the wrongful arrest of ships. A positive change in Russian case law may be noted on such matters. In 2015, The Supreme Court of the Russian Federation indicated that fault should not be established in such cases, therefore proving damage from unlawful arrest should be easier before the Russian courts.

Meanwhile, since the Russian jurisdiction is not ship arrest-friendly, there is no established case law on the damages in the event of the wrongful arrest of a vessel.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

In 2018, Russia acceded to the 2002 Protocol to the Athens Convention, denouncing the previously applicable 1974 Convention and the 1976 Protocol. National rules concerning passenger claims are contained in Chapter XI of the MSC (Articles 177-197) which has not yet been amended to reflect the changes and is still largely based on the old Athens Convention and the Protocol.

The time bar for most passenger claims is two years. The date from which the limitation period runs, and limitations of carrier's liability, may be different, depending on whether the claim is for personal injury or death, or for baggage loss or damage (Article 409(1)(1), Article 190 of the MSC).

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Depending on which parties are involved in a dispute and what the circumstances of a case are, Russian courts generally recognise and enforce clauses on foreign applicable law and jurisdiction stated in bills of lading. This basic conclusion follows from

the standpoint that the contracts for carriage of goods with the participation of Russian persons are not subject to the exclusive jurisdiction of the Russian Federation.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

Russian courts generally recognise and enforce clauses on foreign applicable law and arbitration incorporated from a charterparty into the relevant bill of lading.

A practical difficulty can occur when original evidence is presented to the court in a case when the counterparty denies either signing the charterparty or having seen the charterparty. In such a case, the enforcement of an arbitration clause could be successfully challenged.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Foreign arbitral awards are enforced and recognised under the 1958 New York Convention, which applies directly to such awards. Enforcement of awards is therefore a relatively straightforward procedure and the number of enforced awards is significant.

The Law of the Russian Federation "On International Commercial Arbitration" and Chapter 31 of the CPC are applicable to the procedure of recognition and enforcement of arbitral awards, and grounds for denying their recognition and enforcement, which are mostly identical to the provisions of the 1958 New York Convention.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Russia is a party to the 1958 Arrest Convention. A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the other Contracting States in respect of any maritime claim. Article 90 of the CPC allows the arrest of assets for securing a claim that is subject to foreign arbitration/jurisdiction.

6.5 Domestic Arbitration Institutes

A specialised maritime arbitration tribunal in Russia is the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation in Moscow, with a branch in St Petersburg.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

In the event that a claim is filed in breach of an arbitration clause, the Russian court shall leave the claim without consideration (Article 148 of the CPC, and Article 222 of the Code of Civil Procedure). A party seeking such a remedy must request it in its first submission to the court.

Similar consequences are provided for where a valid jurisdiction clause exists. In 2017, the Supreme Court of the Russian Federation has also confirmed that, even if the foreign court proceedings were not initiated, the Russian court should leave a claim without consideration in the presence of a valid and enforceable foreign jurisdiction clause. This remedy should be granted at the request of one of the parties declared in the first submission to the court.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Tax benefits are stipulated with regard to the registration of vessels in the Russian International Register (RIR), which provides that the operators of ships registered in the RIR are entitled to exemption from import customs duty and 0% VAT for the import of respective vessels, subject to registration in the RIR, 0% VAT if vessels which are subject to registration in the RIR are Russian new-builds. There are also exemptions from property tax, a reduced rate of social taxes and a number of exemptions from profit tax and VAT.

The income of ship-owners from the operation and (or) sale of the vessels registered in the RIR is not subject to income tax (Article 251 of the Tax Code of the Russian Federation).

For tax purposes, the operation is understood as the use of such vessels for the carriage of goods, passengers and their baggage and the provision of other services related to the implementation of the indicated carriage, as well as the leasing of such vessels for the provision of these services.

This benefit applies when the point of departure and/or the point of destination is outside the territory of the Russian Federation, or if the vessels were built by Russian ship-building organisations after 1 January 2010 – regardless of the location of the point of departure and/or destination.

Similar income tax benefits apply to ship-owners who have received the status of a participant in a special administrative region (SAR) in accordance with the Federal Law "On Special Administrative Regions within the Kaliningrad Region and Primorsky Region" for the vessels registered in the Russian Open Register (ROR).

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

The majority of measures were implemented by each harbour master of each of the seaports following the guidelines of the Russian Federal Service for Surveillance on Consumer Rights Protection and Human Wellbeing (Rospotrebnadzor) and of the Ministry of Transport. Nevertheless, not all the measures were identical across the Russian seaports; each harbour master has decided for themselves on the terms and the range of measures. The enforcement of measures also differed from port to port.

The most common measures were disinfection of the vessels and the obligatory temperature-screening of the crew members arriving from the coronavirus-affected countries, temporary prohibition for a shore leave for the citizens who had arrived fewer than 14 days before from coronavirus-affected countries. A requirement to provide the immigration authorities of Russia with a list of the previous ten ports of call was introduced, as well as the requirement for shore personnel to wear personal protective equipment while working on board the vessels coming from coronavirus-affected countries.

Although there was no official requirement for a 14-day quarantine at anchorage, at the beginning of March 2020, in some ports, a vessel coming from one of the coronavirus-affected countries was not allowed to proceed for berthing until the expected incubation period of 14 days had expired.

8.2 Force Majeure and Frustration in Relation to COVID-19

In April 2020, the Russian Supreme Court has clarified that the coronavirus pandemic could be recognised as a *force majeure*, depending on the category of the contract, and the debtor seeking for a contractual relief. The Supreme Court assumes that the contractual relief due to the coronavirus could be granted only if adverse financial consequences are caused by restrictive measures, and a reasonable participant in the turnover could not have avoided them.

The Russian courts have repeatedly stated that the pandemic itself, as well as the subsequent negative reactions of the markets, cannot be regarded as a *force majeure* circumstance. For example, it is hardly possible to absolve oneself of responsibility for a breach of contractual obligations due to a drop in demand for a particular product or service caused by the pandemic or fluctuations in purchase prices, even if these events were caused by the pandemic.

Thus, the contractual relief due to the coronavirus will mainly depend on the Russian judge's evaluation of the specific circumstances of the matter.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

Russia is generally a complex jurisdiction, with a lack of legal certainty and uniform application of law. As far as there are no specialised maritime courts or judges specialising in the field, complex maritime disputes are occasionally considered by ordinary commercial judges who are overloaded with work. The latter factors occasionally lead to an unexpected judgment.

The Russian courts have been increasingly protective in recent years towards Russian state institutions and major Russian companies, companies with the participation of the Russian state (as shareholder or otherwise).

An attempt to promote maritime law in Russia is being made by the establishment of RUMLA.org, the Russian Maritime Law Association, which publishes maritime law news reviews, articles, holds seminars and generally promotes the understanding of maritime law in Russia amongst the shipping industry and lawyers.

NAVICUS.LAW is one of the leading Russian maritime law firms, advising major Russian ship-owners and P&I Clubs, traders, banks and venture companies. The firm's professional standards comply with the International Code of Ethics of the International Bar Association. Based in St. Petersburg, the firm also practises across Russia and has associated lawyers in Moscow and Russia's regions (the Far East and South of Russia). The firm has an associated office in Ukraine. NAVICUS.LAW is a member of the Shiparrested.com network (an affiliation of hundreds of top practising lawyers from more than 100 countries) and hosted one of the annual members' conferences. NAVICUS' lawyers are the co-founders and members of the Russian Maritime Law Association RUMLA.org, and the Ukrainian Maritime Law Association, and annually attend the Committee Maritime International (CMI) meetings. NAVICUS.LAW renders exclusive and complex services, delivering fast, effective and creative solutions for corporates and individuals, covering various jurisdictions and branches of law.

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Trends and Developments

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Overview

The Russian Shipping sector usually follows the international trends and developments. In terms of legal framework, the Merchant Shipping Code of the Russian Federation, which was enacted in 1999 and has since been amended 45 times, reflecting the modern developments in international maritime law, such as, for example, the increase in ship-owners' liability limits (under the Convention on Limitation of Liability for Maritime Claims (LLMC) and the International Convention on Civil Liability for Oil Pollution Damage (CLC), and the implementation of the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers)) applies. Major maritime conventions are usually promptly acceded to by the Russian Federation, for example the Ballast Water Management Convention, 2017, and the anticipated ratification of the Nairobi International Convention on the Removal of Wrecks, 2007. As a party to the Maritime Labour Convention, Russia also follows the developments in maritime labour protection.

At the same time, there has been an increasing protectionism towards the Russian-flagged ship-owners and, in general, promotion of Russian ship-building and Russian-flagged vessels, whilst imposing restrictions on foreign-flagged vessels.

Restrictions on the Carriage of Hydrocarbons by Foreign-Flagged Vessels

Whilst cabotage carriages were always restricted to foreign-flagged vessels (except for some special exceptions) by Article 4 of the Merchant Shipping Code, the restrictions have been further extended to the carriage of hydrocarbons.

Promoting vessels to fly the Russian flag has been accomplished by allowing for the sea transportation of oil, natural gas, gas condensate and coal mined in the territory of the Russian Federation (including the continental shelf), and loaded onto ships in the water area of the Northern Sea Route, up to the first point of unloading/reloading, to be accomplished only by Russian-flagged vessels. The same applies for storage of those commodities, if such storage is carried out on a ship in the water area of the Northern Sea Route.

There is a trend of developing this protectionist policy further, where not only the requirement for the vessel to fly the Russian flag would be imperative, but also for the vessel to have been built in a Russian shipyard.

The Development of Ship-Building and the Import Substitution Trend Will Impact Hydrocarbon Export

The Russian government has been supporting Russian ship-building financially; a number of tax benefits were in place, and other measures to promote domestic ship-building. However, further support of the ship-building industry is anticipated, with a number of protective measures.

Early in 2019, the Russian government declared that the Russian shipyards require state support. The same year, a draft bill was brought for consideration of the State Duma (the Russian low chamber of Parliament). Following a number of hearings and considerations in 2019 and 2020, the bill passed in the first reading in October of 2020. The main legislative work on the bill is scheduled for 2021 and is likely to be completed.

The core proposal is to amend Article 4 of the Merchant Shipping Code. The article deals with activities exclusively dedicated to vessels flying the Russian flag, such as cabotage, ice-breaker support and salvage operations in the inland or territorial waters, carriage of oil and natural gas over the Northern Sea Route, etc. It suggests that certain shipping activities falling under the regulation of Article 4 should not only be allowed to be accomplished exclusively by vessels flying the Russian flag but should require the vessels to have been built in Russian shipyards.

It is underlined in the reports and accompanying letters to the bill that the requirements for vessels built in Russia will mainly relate to the transportation of oil and natural gas. The exact list of such activities which could be carried out by the Russian-built ships will be determined by the Russian government.

This strict protectionist rule is not anticipated to be retroactive, ie, it should not be applied to the contracts executed before the entry of the amendments into force, and/or the foreign-built vessels that have been constructed before entry of the amendments into force, or where the ship-building contracts were executed before these amendments. The amendments will require significant expense from the exporting companies and increase in capacity and quality from the Russian shipyards.

Standard A2.5.2 of the Maritime Labour Convention

In 2020, the Russian shipping industry faced a number of notable bankruptcy cases and accidents that resulted in declarations of abandonment by the Russian seafarers. The abandonment

of the seafarers traditionally is a complex issue, involving and even requiring co-operation between the ship-owner and the public state authorities and the involvement of the International Labour Organization (ILO) and the Convention on the International Maritime Organization (IMO). Standard A2.5.2. of MLC 2006 as amended, implementing the financial security of the abandoned seafarers, was introduced in 2014 (and entered into force in 2017) for the purpose of improving the protection of the seafarers and covering the so-called first-aid costs for repatriation and salary of the seafarers.

Russian maritime insurers are facing difficulties in resolving issues related to the abandoned seafarers (for example, who is entitled to the financial security, the point in time from which the seafarers should be considered abandoned, the sum of the payment, etc). Following the general negative impact on the shipping industry of COVID-19, it is anticipated that the cash-flow problems of the ship-owners could lead to an increasing amount of cases related to the enforcement of Standard A2.5.2. The matter is something new for the Russian courts and law enforcement. It is complicated to predict how the enforcement of a compensation scheme for the paid salary and repatriation costs from the ship-owners would work in practice.

One Step Closer to the 2007 Nairobi Convention

The Ministry of Transport of the Russian Federation has developed and sent to the Government the drafts of laws regulating matters of salvage and utilisation of ships sunk in the sea and inland waterways. The Codes of Merchant Shipping, Inland Water Transport and Administrative Offences are the subject of potential amendments. A new regime of record-keeping, salvage and utilisation of sunken ships is proposed. The owner of a sunken ship shall inform the harbour master about an incident within a month from the date of the incident; within the next month the harbour master shall establish conditions and a term of salvage. The ships creating a threat to safe navigation, or posing a risk of damage to or obstructing fishing activities, shall be salvaged within three months, and if there is no threat, within six months. If the ship-owner is refusing to salvage and utilise, it will be subject to payment of administrative fines amounting to millions of rubles.

The Government will define the criteria for compensation of expenses for record-keeping, salvage and utilisation of such ships. The Ministry of Natural Resources and Ecology has supported the initiative of the Ministry of Transport. It has proposed to take into account a period of time needed for carrying out the environmental impact assessment.

Keeping track in this direction is a positive sign of getting closer, with the assistance of governmental bodies, to the ratification of the 2007 Nairobi Convention. At present, the salvage and utilisation of sunken ships in Russia is governed by Chapter VII of the Merchant Shipping Code and Chapter VII of the Code of Inland Water Transport. These provisions are not effective. According to the data of the Federal Agency of Maritime and River Transport, there are about 1,500 sunken ships in the Russian inland waterways.

The Nairobi Convention applies to sea waters, but, if ratified, this conventional regime could also be expanded over a number of estuary harbours, such as Rostov-on-Don or Arkhangelsk.

Nevertheless, ratification of the Nairobi Convention requires supplemental responsibilities, not only for the ship-owners, but also for the Russian Government, therefore more research and analysis are expected before any decision on ratification of the Convention by the Russian Federation would be made.

Marine Insurance and Reform of the Russian Insurance Law

The Russian marine insurance market has significantly declined over the last several years. Traditionally, the Russian market attracted ship-owners by low insurance premiums and the possibility to insure old and/or substandard vessels against all risks, as opposed to the "named perils" Hull and Machinery (H&M) insurance.

At the same time, there are no standardised Russian marine insurance rules, such as one can find abroad (eg, the Institute Time Clauses (ITC) Hulls or the Nordic Plan). Each underwriter proposes their own hull insurance rules, which differ significantly. Subsequently, these varying terms give a wide scope to interpretation and disputes when underwriters refuse to pay. What complicated the matter even further were the occasionally unpredicted results of the interpretation of the insurance rules by courts.

Chapter 48 of the Russian Civil Code, which deals with insurance contracts, was enacted more than 20 years ago and since then a lot of lacunes and imperfections have been stumbled upon. In 2018, the Russian Federation Presidential Council for Codification and Improvement of the Civil Legislation (an advisory body to the President of Russia) formed a working group whose task was to prepare the concept of reform of the insurance law. After almost two years of work and about 30 meetings, the working group has developed the concept of the insurance law reform. The Council for Codification approved project reform in September 2020. The project consists of 59 blocks dedicated to the main existing problems of the Russian insurance law provisions. According to its elaborators, the key aim is to make the Russian insurance law more flexible and relevant to the current situation on the market.

It appears that the proposed reform indeed will resolve a lot of issues and is based on the practice of European jurisdictions. It is expected that the next few years will be dedicated to the negotiations and voting for the proposed amendments to Russian insurance law.

Northern Sea Route: the Future in the Arctic

Rusatom Cargo (a company of the state corporation "ROSATOM") has been incorporated for the organisation and development of international transit of sea freight traffic along the newly formed transport route of the Northern Sea Transit Corridor. One of the ongoing projects of the company includes two transport and logistics hubs (Murmansk and the Far East) which are going to be established for trans-shipment of containers from non-ice-class feeder ships to Arctic-class ones, and back. Rusatom Cargo is also planning to build its own fleet of Arc7 container carriers, establish digital logistics and organise feeder services. The plan is anticipated to be completed by 2024.

Further far-reaching projects involve the creation of a fleet of ice-breakers that should ensure year-round navigation at the Arctic. The fleet will include nuclear-powered ice-breakers of different classes, LNG-powered ice-breakers, tankers, bulkers and ice-class gas carriers. These new-builds are planned to be carried out for the Arctic until 2035.

The fleet operating in the Arctic is to be expanded by 2024, with multi-purpose rescuers, as well as rescue and fire-fighting tugboats. In addition, a number of new hydrographic survey ships and buoy tenders will operate in the Northern Sea Route (the NSR) waters.

One of the problematic issues connected with the NSR is related to the use of heavy fuel oil. The Russian government is making proposals to the International Maritime Organization, proposing to postpone the ban of heavy fuel oil until July 2024, without covering the ships ensuring safe navigation, ships involved in search and rescue operations, and oil-spill response vessels. Also, it was suggested to grant an extension until 1 July 2029 for vessels with tanks featuring structural protection in compliance with the International Convention for the Prevention of Pollution from Ships (MARPOL) and Polar Code requirements. The right to exclude national-flagged ships, including floating storage and offtake tankers, has been proposed as per the rights of the Arctic states.

Development of the Russian Maritime Law by the RUMLA

A new Russian Maritime Law Association (RUMLA.org) was established and registered by the Ministry of Justice of the Russian Federation. It is a non-profit organisation gathering practitioners, academics, representatives of ship-owning companies, insurers, brokers, etc, for the purpose of allowing Russia to have an input into important international shipping conventions and to bring about conformity in the enforcement of maritime law conventions in the Russian Federation. The RUMLA provides a forum for those who are engaged in international maritime trade and organises and participates in seminars and conferences in the maritime industry.

As of 2021, the Russian Maritime Law Association is publishing the Maritime Law Journal with reviews of Russian jurisprudence and developments in maritime law.

The RUMLA is an influencer in Russia in the shipping industry and facilitates the co-operation of different persons involved in the maritime sector, allowing for the better understanding of each other's needs, making contacts and promoting the shipping business in general.

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SINGAPORE

Law and Practice

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The main domestic laws establishing the authorities of the maritime and shipping courts in Singapore are:

- the High Court (Admiralty Jurisdiction) Act (Cap 123);
- the Maritime and Port Authority of Singapore;
- the Merchant Shipping Act;
- the Merchant Shipping (Maritime Labour Convention) Act 2014.

The High Court of Singapore has jurisdiction to hear maritime cases and there are two to three High Court judges assigned to hear maritime cases. Appeals from the High Court are made to the Court of Appeal. Common maritime claims include vessel collision, breach of charterparty obligations, cargo damage and demurrage.

1.2 Port State Control

The Maritime Port Authority of Singapore is the port authority, port regulator and port planner, and essentially regulates port activities in Singapore. This does not involve monitoring reports from owners. However, where there is movement of vessels into or out of the port, notifications and filings are required by the Maritime Port Authority of Singapore.

For pollution, the Prevention of Pollution of the Sea Act gives the Maritime Port Authority the power to take preventive measures to prevent pollution, such as denying entry or detaining ships.

For wreck removal, the Wreck Removal Convention, which has been adopted by Singapore, requires owner of vessels over 300 GT to take out insurance or provide other financial security to cover the costs of wreck removal, capped at an amount equal to the limits of liability under the application limitation regime. As a port entry requirement, owners will have to carry a Wreck Removal Convention State certificate to show that they have obtained adequate insurance coverage. All Singapore-registered ships over 300GT, therefore, must carry on board a WRC State certificate. This WRC State certificate can be obtained by applying to the Maritime Port Authority Registry Department.

1.3 Domestic Legislation Applicable to Ship Registration

Again, the Maritime Port Authority handles the domestic registration of vessels. An application for registration as a Singapore ship can be made online via the MPA website.

Relevant domestic legislation includes the Merchant Shipping (Registration of Ships) Regulations.

1.4 Requirements for Ownership of Vessels

Owners of Singapore-flagged ships must be Singapore citizens/permanent residents or bodies corporate incorporated in Singapore.

Vessels which are still under construction cannot be registered.

1.5 Temporary Registration of Vessels

In addition to the usual (permanent) registration, provisional registration of a vessel is permitted. Provisional registration is valid for one year, without the possibility of extension. The vessel must be transferred to the permanent register before the end of this period. No fee is charged for the transfer.

Dual-flagging is not permitted. Singapore-flagged vessels that are found to be dual-flagged will be deregistered as the vessel will not be allowed to remain in the register of the Singapore Registry.

1.6 Registration of Mortgages

A First Priority Statutory Mortgage (in the form prescribed in the Singapore Merchant Shipping Act) must be registered with the Registry of Ships in Singapore.

A charge under Section 131 of the Singapore Companies Act must also be registered with the Singapore Accounting & Corporate Regulatory Authority within 30 days of the creation of the First Priority Statutory Mortgage.

Registration fees payable to the Registry of Ships, Singapore, are charged according to the gross tonnage of the vessel at SGD48 plus SGD1 per 100 gross tons or part thereof. (It should be noted that goods and services tax is currently 7%, chargeable on those registration fees).

Documents required for the registration of a mortgage include: -

- an instrument of mortgage;
- if the vessel has a provisional registration where the original document of title to ownership has not been submitted, the mortgage will only be recorded upon confirmation by the mortgagee that they have signed the original documents.

1.7 Ship Ownership and Mortgages Registry

Information regarding the ship and her mortgage status is available to the public, and this information may be obtained upon application and payment of a prescribed fee. The link to the Singapore Registry of Ships is: mpa.gov.sg/web/portal/home/singapore-registry-of-ships.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Wreck Removal

The main sources of law dealing with wreck removal in Singapore may be found under part IX of the Merchant Shipping Act and the Merchant Shipping (Wreck Removal) Act) 2017 (No 25 of 2017), which gives effect to the Nairobi International Convention on the Removal of Wrecks, 2007 (for all Singapore registered ships over 300 GT).

Pollution

As for pollution from a vessel, the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL Convention) (Annex I to Annex V) and the 1997 MARPOL Protocol to the International Convention for the Prevention of Pollution from Ships (Annex VI) (MARPOL PROT) have been ratified by Singapore. The Singapore Parliament has thus included provisions to give effect to the International Convention for the Prevention of Pollution from Ships 1973 as modified and added to by the Protocol of 1978.

The Prevention of Pollution of the Sea Act (Cap 243) empowers the MPA to take preventive measures against pollution. In addition, the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act (Cap 180), which gives effect to the International Convention on Civil Liability for Oil Pollution Damage 1992 and to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, addresses liability for oil pollution. The Merchant Shipping (Civil Liability and Compensation for Bunker Oil Production) Act (Cap 180), which was enacted to give effect to the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, prescribes the penalty for bunker oil pollution.

2.2 International Conventions: Collision and Salvage

Collision

The Merchant Shipping (Prevention of Collisions at Sea) Regulations (COLREGS) incorporates the International Regulations for Preventing Collisions at Sea 1972, and the latter is set out in the Schedule to the Merchant Shipping (Prevention of Collisions at Sea) Regulations.

The rules contained in the International Regulations for Preventing Collisions at Sea 1972 apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels.

Salvage

The statute regulating salvage of vessels in Singapore is to be found in part IX of the Merchant Shipping Act (Cap 179).

A Bill in Parliament has been passed to implement the 1989 Salvage Convention in its entirety, except for salvage that takes place in inland waters involving inland water vessels or where the salvage operation concerns sea-bed maritime cultural property of prehistoric, archaeological or historical importance. In this regard, the Merchant Shipping (Miscellaneous Amendments) Act 2019 was passed to amend the Merchant Shipping Act (Cap 179) to implement the 1989 Salvage Convention. To date, there are no indications as to when the amendments may come into force.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Singapore has ratified the LLMC 1996 Protocol, including the 2012 Amendments (other than paragraph 1(d) and 1(e) of Article 2 of the Convention). Consequently, the applicable limits will be those of the 2012 Amendments. The applicable limits came into operation on 29 December 2019, applying to liability arising out of any occurrence which took place after 29 December 2019.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Article 11(2) of the 1976 Convention on Limitation of Liability for Maritime Claims permits the constitution of a limitation fund, either by depositing the sum or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the court or other competent authority.

Pursuant to amendments to the Rules of Court in 2018, a party wishing to constitute a limitation fund can do so using a Protection and indemnity insurance (P&I) Club's Letter of Undertaking (LOU), which brings Singapore in line with the UK position.

To establish a limitation fund, a summons application must be made, together with a supporting affidavit. Where a letter of undertaking is to be used, it would be prudent to annex the draft LOU to the application and the supporting affidavit will need to demonstrate the P&I Club's financial ability to meet their obligations under the LOU.

The limitation fund is calculated according the amended LLMC 1996 Protocol regime (2012 amendments).

The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows.

- In respect of claims for loss of life or personal injury:
  - (a) 3.02 million Units of Account for a ship with a tonnage not exceeding 2,000 tons;
  - (b) for a ship with a tonnage in excess of 2,000 tons, the following amount in addition to that mentioned in sub-paragraph (a):
    - (i) for each ton from 2,001 to 30,000 tons, 1,208 Units of Account;
    - (ii) for each ton from 30,001 to 70,000 tons, 906 Units of Account; and
    - (iii) for each ton in excess of 70,000 tons, 604 Units of Account;
- In respect of any other claims:
  - (a) 1.51 million Units of Account for a ship with a tonnage not exceeding 2,000 tons;
  - (b) for a ship with a tonnage in excess of 2,000 tons, the following amount in addition to that mentioned in sub-paragraph (a):
    - (i) for each ton from 2,001 to 30,000 tons, 604 Units of Account;
    - (ii) for each ton from 30,001 to 70,000 tons, 453 Units of Account; and
    - (iii) for each ton in excess of 70,000 tons, 302 Units of Account.

3. Cargo Claims

3.1 Bills of Lading

The Hague-Visby Rules are applicable and can be found in the Singapore Carriage of Goods by Sea Act.

3.2 Title to Sue on a Bill of Lading

The lawful holder of the bill of lading (Section 2(1)(a) of the Bill of Lading Act) has the title to sue on a bill of lading in Singapore. This will depend on the construction and endorsements on the bill of lading.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

A ship-owner may be liable in contract or in negligence for cargo damage. In the case of Wilmar Trading Pte Ltd v Heroic Warrior Inc [2019] SGHC 143, the court found that a ship-owner owed a duty of care to an FOB shipper to take care of the cargo, irrespective of whether the claimant shipper was the owner of the cargo. The court relied on the Court of Appeal case of NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and concluded that a cargo claimant without a proprietary interest in the cargo nevertheless had locus standi to sue for pure economic loss. The question therefore turned on whether the defendant ship-owner owed the plaintiff shipper a duty of care in respect of the loss suffered as a result of the damage to cargo.

The limitation of liability for cargo damage would be governed by the LLMC 1976. The general limits of liability are set out in **2.4 Procedure and Requirements for Establishing a Limitation Fund**.

There is no difference if the ship-owner is the actual or contractual carrier. As seen in Wilmar Trading Pte Ltd v Heroic Warrior Inc [2019] SGHC 143, even though the court found that there was no existing contract of carriage between the ship-owner and the shipper, the ship-owner was nevertheless liable in tort as the actual carrier.

3.4 Misdeclaration of Cargo

There are no reported cases in Singapore which deal with the misdeclaration of cargo. However, Article III Rule 5 of the Hague-Visby Rules stated that the shipper shall be deemed to have guaranteed to the carrier the accuracy of cargo information at the time of the shipment and that the shipper shall indemnify the carrier for losses arising from the inaccuracy of those particulars.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

Pursuant to Article III paragraph 6 of the Hague Visby Rules (as enacted by the Carriage of Goods by Sea Act), the limitation period for cargo damage is one year from delivery or the date on which the cargo should have been delivered.

The limitation period can be extended by agreement between the parties.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

There is no international convention that governs the arrests of vessels in Singapore. Singapore is not party to the 1952 Arrest Convention. However, the Singapore High Court (Admiralty Jurisdiction) Act remains applicable.

4.2 Maritime Liens

Maritime liens that are recognised in the Singapore jurisdiction include:

- a damage lien arising out of damage done by a ship;
- the Master's and crew's wages;
- claims for salvage.

4.3 Liability in Personam for Owners or Demise Charterers

It is a requirement that the owners or demise charterers be liable in personam. Pursuant to Section 4 of the High Court (Admiral-

ty Jurisdiction) Act, the arresting party must identify the party who would be liable in personam in the action.

4.4 Unpaid Bunkers

A vessel can be arrested for unpaid bunkers, pursuant to Section 3(1)(l) of the High Court (Admiralty Jurisdiction) Act relating to "any claim in respect of goods or materials supplied to a ship for her operation or maintenance". However, Section 4(4) of the High Court (Admiralty Jurisdiction) Act must be satisfied in order to obtain a warrant of arrest, namely, that the bunkers must have been ordered/purchased by the ship-owner or charterer of the vessel when the cause of action arose and that the purchaser remains the beneficial owner of the ship with respect to all the shares in it or the demise charterer of the vessel at the time the writ is issued.

4.5 Arresting a Vessel

In order to arrest a vessel, Sections 3 and 4 of the High Court (Admiralty Jurisdiction) Act must be satisfied. In essence, the arresting party's claim must be a claim arising in connection with a ship of a nature set out in Section 3.

The arresting party must also identify the relevant person who would be liable in person and show that this relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship (Section 4(b) of the Act). The arresting party must also show that the relevant person was, at the time the writ is issued, the beneficial owner of the ship as regards all the shares in it or the demise charterer of the ship (Section 4(b)(i) of the Act).

A supporting affidavit is required and a full disclosure of all relevant facts is required, given that the application is ex parte.

In general, the Singapore court does not require originals or notarised documents. Copies will suffice for the application to arrest a vessel and the authenticity of the document can be dealt with/objected to later.

The Sheriff may request that the arresting party place a deposit to cover the Sheriff's anticipated expenses in maintaining the vessel while under arrest, because the arresting party is obliged to maintain the vessel during the period of arrest.

4.6 Arresting Bunkers and Freight

With regard to bunkers, see **4.4 Unpaid Bunkers**.

It is possible to arrest a vessel for a claim for unpaid freight, as it relates to carriage of goods in a ship and is likely to fall under Section 3(1)(h) of the High Court (Admiralty Jurisdiction) Act. See the case of The Ocean Jade [1991] 2 MLJ 385, where this issue was left open.

4.7 Sister-Ship Arrest

Vessels under the same registered ownership as the offending vessel may be arrested, but vessels within the same group, or belonging to an affiliate but not under the same registered ownership as the offending vessel, may not be arrested.

4.8 Other Ways of Obtaining Attachment Orders

A plaintiff may apply for and obtain a Mareva injunction in respect of the defendant's assets. A worldwide Mareva injunction can also be obtained.

4.9 Releasing an Arrested Vessel

A ship may be released upon the provision of alternative security in several forms, including:

- a letter of undertaking from a P&I club;
- a bank guarantee from a first-class bank in Singapore; or
- a payment into the court.

4.10 Procedure for the Judicial Sale of Arrested Ships

The practice of the Singapore courts is to consider applications for the judicial sale of ships if security is not provided, in order to avoid a depreciating value of the ship under continual arrest. The sale of a vessel pendente lite is possible.

Pursuant to Order 70 Rule 21 of the Rules of Court, where, in an action in rem against a ship, the court has ordered the ship to be sold, any party who has obtained or obtains judgment against the ship or proceeds of sale of the ship may apply to the court by summons for an order determining the order of priority of the claims against the proceeds of sale of the ship.

As regards the order of priorities, it is as follows:

- port dues;
- the Sheriff's costs and expenses;
- the plaintiff's legal costs of arrest;
- maritime liens that arose prior to arrest;
- possessory liens;
- maritime liens post-arrest;
- the mortgagee's claim; and
- claims by other claimants who have statutory liens over the vessel.

4.11 Insolvency Laws Applied by Maritime Courts

In 2017, Singapore adopted some aspects of the Chapter 11 United States Bankruptcy Code. These include:

- an automatic moratorium which starts from the date of the moratorium application; and
- a worldwide moratorium.

Where there is a moratorium for a scheme of arrangement in place, the court may restrain further proceedings from being commenced or continued. However, in relation to in rem proceedings, Section 64(12) of the Insolvency, Restructuring and Dissolution Act 2018, read together with Section 4 of the Insolvency, Restructuring and Dissolution (Prescribed Arrangements and Proceedings) Regulations 2020, carves out an exception to the commencement (but not the continuation) of admiralty proceedings. This means that creditors will be able to file an in rem writ against a vessel, but will not be able to serve the writ or arrest the vessel.

In the recent case of The Ocean Winner [2021] SGHC 8, the court dealt with Section 64(8)(c) to 64(8)(d) of the Insolvency, Restructuring and Dissolution Act 2018, which prohibits the commencement of any proceedings against the company, or any execution, distress, or other legal processes against the property of the company during the automatic moratorium period, without leave of the court.

In that case, the plaintiff did not obtain leave of the court to file the writs against four vessels which belonged to a company under judicial management. The court found that the filing of the writs only created a statutory lien in favour of the plaintiff and merely created the security interest for the plaintiff; it did not yet invoke the admiralty jurisdiction. In that limited sense, the action did not substantively "commence" until service of the writs. Hence, the filing of the in rem writ crystallised the plaintiff's security interest, which is differentiated from a typical civil action where the claimant's right to bring his or her claim already exists. In this regard, the court observed that the moratorium in a scheme of arrangement was never intended by Parliament to prevent a plaintiff's security interest from even being created, because the purpose of the scheme of arrangement was simply to give the company "breathing space".

The court also found that the filing of the writs was not "against the company" (pursuant to Section 64(8)(c) IRDA) because it was an action against the res. The filing of the writs also did not constitute an "execution, distress or other legal process" under Section 64(8)(d) IRDA, because the filing of the in rem writ merely created the statutory lien (ie, the security interest in the ship) and did not involve an element of enforcement.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

The arresting party may be liable for damages when the arrest is a "wrongful arrest". In such a case, the defendant would have to show that the plaintiff had carried out the arrest with mala fide or with gross negligence as to imply malice on the arresting party which results in losses to the defendant. If the defendant is successful, the arrest may be set aside and damages may be claimed against the arresting party.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

The LLMC 1976 as amended by the 1996 Protocol governs "claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage" (Article 1(b) LLMC 1976).

Pursuant to Section 8 of the Maritime Conventions Act 1911, the time bar for claims against a vessel or the ship-owners for damage or loss, inter alia, for loss of life or personal injuries suffered by persons on board the vessel would be two years from the date of loss or injury.

Under Article 7 of the LLMC 1976, "In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the ship-owner of the ship is an amount of 175,000 Units of Account multiplied by the number of passengers that the ship is authorised to carry according to the ship's certificate."

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

The Singapore court generally recognises jurisdiction clauses that are expressly stated in the bill of lading. The force of an application for stay of Singapore proceedings in favour of arbitration will depend on whether the forum clause is exclusive or non-exclusive.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

As long as the arbitration clause is expressly stated in the bill of lading, courts in Singapore will recognise and enforce a law and arbitration clause of a charterparty that is incorporated into the relevant bill of lading. There is case law suggesting that general wordings may be insufficient to incorporate an ancillary charterparty arbitration clause and that the same result must follow with regard to the charterparty jurisdiction clause (see: The "Dolphina" [2012] 1 SLR 992). Parties should make clear in the bill of lading that the bill of lading is subject to an arbitration clause in the charter.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Singapore is a party to the 1958 New York Convention and the International Arbitration Act gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Pursuant to the International Arbitration Act (Cap 143A), some grounds to resist enforcement include:

- a party's lack of capacity to agree to arbitrate;
- an invalid arbitration agreement is involved;
- a party has not been given proper notice or is unable to present his or her case;
- the award goes beyond the scope of the arbitration agreement;
- the composition of the tribunal or procedure is not in compliance with the agreement or lex arbitri;
- the award is not yet binding;
- the award is set aside or suspended by a competent authority;
- the subject-matter of the dispute is not arbitrable; and
- the enforcement is against the state's public policy.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Section 7 of the International Arbitration Act provides that vessels may be arrested as security for a foreign arbitration. However, the Singapore Court has held in DSA Consultancy (FZC) v the "Eurohope" [2017] 5 SLR 934 that a vessel cannot be arrested in Singapore as security for foreign court proceedings.

6.5 Domestic Arbitration Institutes

The domestic arbitration institute which specialises in maritime claims that are active in Singapore is the Singapore Chamber of Maritime Arbitration (SCMA).

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

The defendant can apply for a stay of proceedings in favour of the arbitration/jurisdiction clause.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Profits derived from the operation of a Singapore-registered vessel are exempt from Singapore income tax. The exemption applies to the profits gained from the operation of the activities outside the limits of the port of Singapore, as set out at Section 13A(1) read with Section 13(16)(a) of the Income Tax Act. These activities include:

- the carriage in international waters of passengers, mail, livestock or goods;
- towing or salvage operations;
- the charter of ships;
- use of the vessel as a dredger, seismic ship or ship used for offshore oil or gas activity; and
- a gain on the sale of a Singapore ship.

For foreign vessels, tax exemption applies to income derived from the carriage of passengers, mail, livestock or goods uplifted from Singapore, except where that carriage arises solely from trans-shipment from Singapore, or is only within the limits of the port of Singapore (Section 13A(1) read with Section 13(16)(b) of the Income Tax Act).

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

MPA issues port circulars from time to time and the current regulations include:

General

Ship-owners/managers/agents must apply for a crew change in Singapore by applying online on the Marine Port Authority website, preferably 14 days ahead of the intended crew change.

Signing On

Stay Home Notice (SHN):

- all signing-on crew will have to serve a 14-day Stay-Home Notice (SHN) in the crew's originating country, immediately prior to the departure flight/ferry to Singapore;
- that being said, crew from specific low-risk countries will either not need to serve the SHN or will only have to serve a seven-day SHN in the originating country before departure to Singapore. These specific countries are set out on the ICA website.

Swab test:

- all crew must take a swab test in the originating country not more than 72 hours before departing to Singapore and must have a negative swab test result;
- during the entire crew-change process, including during the journey to Singapore, the crew should not be in a group of

more than five persons, and must remain in the same group. There must be no interactions between groups;
- the crew can only arrive in Singapore not more than two days before the vessel's departure from Singapore;
- if a crew member has previously had COVID-19 and has since recovered, he or she must submit documentary proof of his or her diagnoses of COVID-19, based on the earliest positive swab test result;
- if the date of the earliest positive swab test result is 21 days or fewer before the date of arrival in Singapore, he or she will not be approved for crew change;
- if the date of the earliest positive swab test result is 22 to 90 days before the date of arrival in Singapore, he or she will not need to serve his or her SHN or take a swab test;
- if the date of the earliest positive swab test result is 91 to 180 days before the date of arrival in Singapore, he or she must serve a 14-day SHN but does not need to take a swab test;
- if the date of the earliest positive swab test result is more than 180 days before the date of arrival in Singapore, he or she must serve a 14-day SHN and must take a swab test.

Signing Off
- the crew must not have gone ashore in the 14 days prior to disembarking the ship and must not have had contact with anyone who tested positive during that period;
- the crew must be certified as fit to travel by a Singapore doctor not more than 24 hours before disembarking the ship;
- swab tests will have to be conducted and the ship-owners/managers/agents will bear the costs of the swab tests.

8.2 Force Majeure and Frustration in Relation to COVID-19
Singapore law relating to *force majeure* largely follows the English position, which is that *force majeure* is premised on a contractual term which allows the parties to suspend or terminate their obligations to perform the contract, when specified disrupting events take place which are beyond their control. The *force majeure* clause must be expressly provided for in the existing contract.

Where a *force majeure* clause is incorporated into a contract, the question of whether the COVID-19 pandemic constitutes a *force majeure* event will depend on the wording of the *force majeure* clause, as well as on when the contract was entered into. It is arguable that the pandemic will be covered for events that have been identified, such as "epidemic" or "acts of government/government regulations". Conversely, if the contract were made after the outbreak of COVID-19, it would be difficult to argue that the pandemic was an unforeseeable event.

That being said, Singapore has implemented the COVID-19 (Temporary Measures) Act 2020, which seeks to offer temporary statutory relief to various businesses and individuals who have been affected by the global pandemic.

In brief, this Act covers a broad range of categories, such as relief for contracts affected by delays in construction, modifications to bankruptcy and winding-up applications and also temporary relief for companies that are unable to perform their contractual obligations. More information can be found at www.mlaw.gov.sg/covid19-relief/.

Temporary Relief from Inability to Perform Contractual Obligations
This temporary relief acts as a statutory moratorium on the enforcement of rights and obligations, but this is subject to several conditions.

First, this temporary relief is given only to specific categories of contracts and not to all types of contracts. More specifically, this Act only covers contracts entered into before 25 March 2020 and the prescribed period for some types of contracts has already expired.

The contracts which continue to qualify for this temporary relief include:

- options to purchase and sale and purchase agreements with housing, commercial and industrial developers (until 31 March 2021);
- hire-purchase and conditional sales agreements (until 31 January 2021);
- lease or rental agreements for commercial equipment (until 31 January 2021);
- event and tourism-related contracts (until 31 December 2020);
- construction and supply contracts (until 31 March 2021).

Under Part 2 of the Act, the party that is unable to perform their contractual obligations may file a Notification for Relief. If this Notification is disputed, the Notification may be referred to an Assessor.

Given the continual amendments to the Act, one should continue to check and review the updates to the Act to ascertain if the relevant contract continues to qualify for temporary relief under the Act.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

The working language in Singapore is English and, whilst oral evidence may be adduced in a foreign language in court (subject to interpretation at a hearing in court), all documents submitted in the course of litigation in Singapore need to be translated into English by a certified translator for use in court.

Gurbani & Co has, since its inception, represented clients in all areas of transport, freight-forwarding, aviation and the shipping industry, including ship-owners, operators and charterers, governments and government-owned carriers, marine insurers and reinsurers including P&I insurers, FD&D associations, hull and machinery underwriters and war risk insurers, freight-forwarders and other shipping agents, cargo interests, lending banks and other financial institutions. The firm undertakes and advises on ship arrests and all admiralty and maritime lien claims arising out of ship collisions, carriage of cargo, charterparties, hull and cargo limitation of liability, general average, ship repairs, salvage, bunkering and ship-chandling, ship agency/management, crew wages and injury/death claims. The firm is often commissioned to investigate and report on piracy incidents and maritime casualties such as groundings, fires and sinkings.

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SPAIN

Law and Practice

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1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

Spain does not have exclusive courts specialised in maritime and shipping matters.

Within the Spanish Civil jurisdiction there are, however, two types of courts: First Instance Courts and Mercantile Courts. All maritime and shipping matters are to be adjudged by the Mercantile Courts. Following the Law of the Judiciary Power, Article 86 ter paragraph 6.c), Mercantile Courts have exclusive competence over those claims relative to the application of Maritime Law and other mercantile matters (including corporate law, insolvency law, carriage in general, etc).

Consequently, if a claim that involves the application of Maritime Law is filed before a First Instance Court, the Respondent may challenge its competence. Likewise, the Court also has ex officio powers to reject the matter.

Common claims filed before the Mercantile Courts are cargo claims, collisions, claims arising from ship construction or repair contracts, contractual disputes, stevedore damages to the ship or the cargo and insurance disputes. Ship arrest is also a common application dealt by Mercantile Courts.

Salvage and emergency towing claims, however, may be heard before the Maritime Arbitration Conseil (an administrative body) if there is an agreement for that between salvors and shipowners. In the absence of such an agreement, and following the Second Additional Disposition of the Spanish Shipping Act 2014 (SSA), Mercantile Courts would also have jurisdiction for salvage and emergency towing claims. It should be noted that, until the Maritime Arbitration Conseil's Regulation is enacted, the Conseil's functions will be exercised by the Central Maritime Courts (an Army body).

Claims related to labour issues, such as seafarers' claims related to their employment contract, labour rights, personal injury affecting crew and others, are subject to the jurisdiction of Labour Courts according to Article 9.5 of the Law of the Judiciary Power.

Cases concerning marine sanctioning proceedings derived from breach of maritime regulations (the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL), etc), port dues and/or against the Spanish Maritime Administration are subject to the Contentious Administrative Courts following Article 9.4. of the Organic Law of the Judiciary Power.

1.2 Port State Control

Royal Decree 1737/2010, of December 23rd, approves the Regulation that establishes the inspections of foreign vessels in Spanish Ports. These inspections are carried out to ensure compliance with International and European Conventions and Regulations for the safety of life at sea, marine and environmental protection, and life and work standards for seafarers, all within the frame of the Memorandum of Understanding of Paris (the Paris MOU).

The competent authority for foreign vessel inspections is the Ministry of Development through the Harbour Master Offices in each port.

Groundings and wreck removal outside internal waters are also subject to the powers of the Ministry of Development through the Harbour Master Offices, whereas grounding and wreck removal within internal waters are subject to the relevant Port Authority. In both cases, the competent authorities have the power to request salvage or wreck removal operations to the owner or its insurer. If owners or insurers do not comply with this request, the competent authorities are empowered either to sink the vessel or remove the wreck, all at the owners'/insurers' expense, without the possibility to claim limitation of liability. Authorities would have a lien on the recovered property and can sell it to recover the costs incurred.

In order to prevent marine pollution, the Harbour Masters and Port Authorities are empowered to visit, inspect and arrest vessels within Spanish jurisdictional waters and to initiate judicial actions or any other action they deem necessary to protect the environment.

As a State party to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990, Spain has developed the National Marine Response Plan and the National Shore Protection Plan to prevent and fight pollution at sea and on shore under the powers of the Ministry of Development and Coastal Directorate, who will co-ordinate the response to pollution with the assistance of the Spanish salvage public company (SASEMAR), the Army, the police, fire fighters, scientific public agencies, etc. Costs for this response will be claimed against the polluter.

1.3 Domestic Legislation Applicable to Ship Registration

Ship registration is regulated by the State Port and Merchant Navy Act (ie, the Royal Legislative Decree 2/2011 of November 5th), the SSA and the Royal Decree 1027/1989, of July 28th, that regulates ship registration and the Maritime Registry.

All vessels in Spain must be entered on two registries of different natures: a) the Marine Administrative Registry, and b) the Registry of Movable Goods, where ownership, mortgages and encumbrances will be registered.

The Marine Administrative Registry is in charge of the Ministry of Development and is located in the different Harbour Master Offices. The Registry provides for the register of ships through a list system that depends on the activity to be performed by each ship. The Registry of Movable Goods, however, is in charge of the Ministry of Justice.

It is worth mentioning the Special Registry of Ships and Shipping Companies of the Canary Islands (known as "REBECA"), which provides for important tax allowances and corporate benefits.

1.4 Requirements for Ownership of Vessels

Under the Spanish Port's Act, only individuals or companies domiciled in Spain or in any of the European Economic Area (EEA) countries, provided that they have a representative within Spanish territory, can own a Spanish-flagged vessel.

Title to ownership (sale contract) shall be in writing and ownership will be acquired with the delivery of the vessel after the contract of sale purchase. However, in order to register the ownership of the vessel, the sale contract needs to be contained in a public deed.

Vessels under construction are registered in the Marine Administrative Registry within list nine. List nine is a temporary registration for these vessels. Once the construction has finished, the vessel is registered in the appropriate list according to the purpose of the vessel and the temporary registration is closed.

Vessels under construction can also be registered in the Registry of Movable Goods. In fact, registration on the Registry of Movable Goods is compulsory when the vessel under construction is subject to a mortgage.

1.5 Temporary Registration of Vessels

Temporary registration of vessels in the Spanish flag is permitted when a foreign-flagged vessel is under a bareboat charterparty and the charterer has its domicile in Spain. The temporary registration will last for the duration of the charterparty.

Similarly, Spanish-flagged vessels chartered by a person domiciled outside Spain may be temporarily registered in the country of the charterers for the duration of the charterparty.

Spain does not permit, however, a dual registration. Vessels registered in Spain may only fly the Spanish flag. Temporary registration of a foreign vessel in Spain will only take place after the Registry is satisfied that the vessel has been suspended from its original flag.

1.6 Registration of Mortgages

The constitution, modification or cancellation of a mortgage or encumbrance on a vessel must be recorded in the Registry of Movable Goods in the charge of the Ministry of Justice. The Mortgage Agreement may be granted by means of a private contract or a Notarial Deed. The mortgage agreement must identify the parties, the loan guaranteed by the mortgage, the date of payment of capital and interests, description and identification of the vessel, the value of the vessel, if two or more vessels are mortgaged, the amount for which each vessel is mortgaged, and any other contractual provision to which the parties have agreed.

1.7 Ship Ownership and Mortgages Registry

The Registry of Movable Goods and the Maritime Registry are public. Any person may obtain information from their records by applying to the registry and paying register dues for it.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

Spain is a member state of the 1992 International Convention on Civil Liability for Oil Pollution (CLC Convention), the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC Fund) and the 2003 Supplementary Fund Protocol and, finally, the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER).

Owners' and interested parties' civil liability in the event of pollution is also regulated by the SSA, although the application of the above-mentioned Conventions is preferential over domestic law. The SSA regulates in its Articles 386, 388, 389 and 391, a strict liability regime for the owner of the polluting vessel, its right to limit liability and its obligation to subscribe a civil liability insurance covering liability for pollution.

As for wreck removal, Spain is not a party to the International Convention on the Removal of Wrecks (the 2015 Nairobi Convention). Accordingly, wreck removal is regulated by Articles 369 to 383 of the SSA and by Article 304 of the Spanish State Ports and Merchant Navy Act.

Spanish domestic law establishes owners' direct liability for wreck removal and provides that the Administration costs arising from wreck-removal activities are privileged. Owners do not have a right to limit liability under the Convention on

Limitation of Liability for Maritime Claims (LLMC 76/96) in accordance with the Reservation made by Spain to this Convention for wreck-removal claims.

2.2 International Conventions: Collision and Salvage

Regulation of Collisions

Collision is regulated by the 1910 Collision Convention and other related Conventions, such as the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in the matter of Collisions or other Incidents of Navigation, made in Brussels in 1952 or the International Regulations for Preventing Collisions at Sea (COLREGS). In Spanish domestic law, collisions are regulated in Articles 339 to 346 of the SSA.

Regulation of Salvage

Salvage is regulated by the 1989 International Convention on Salvage and Articles 357 to 368 of the SSA.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Setting aside specific liability regimes to be applied in Spain, such as the Hague-Visby Rules, the CLC, the Athens Convention, the Bunker Convention, etc, owners are entitled to limit their liability in accordance with the 1976 International Convention on Limitation of Liability and its 1996 Protocol. The SSA grants shipowners and carriers the right to opt for the application of the LLMC76/96 limit or the applicable specific limit.

The SSA also regulates the Limitation of Liability in its Articles 392 to 405, referring to the LLMC 76/96 as the applicable regime.

2.4 Procedure and Requirements for Establishing a Limitation Fund

The SSA regulates, in its Articles 403 to 405, owners' right to establish a limitation fund. The limitation fund must be constituted by placing the amount of the limitation (including the interests accrued as of the date of the incident) before the competent court or providing security to the court's satisfaction. Once the fund has been constituted, claimants cannot pursue their claims against any other asset. The constitution of the fund will also give rise to the release of any ship arrest (for the same claim). The release will be ordered by the court in which the fund has been constituted.

3. Cargo Claims

3.1 Bills of Lading

Spain is a member state of the Hague-Visby Rules, which apply to cargo claims under bills of lading. Where the Hague-Visby Rules are not directly applicable by themselves, Spanish domestic law, the Spanish Shipping Act 2014 (SSA) remits the regulation of the liability regimes for all cargo claims, irrespective of whether the carriage is contracted under a Bill of Lading, to the Hague-Visby Rules.

Regulation of the carrier's liability for loss, damage or delay under the SSA can be found in Articles 277 to 285 of the SSA.

It must be noted, however, that the First Final Disposition of the SSA provides that the SSA will adapt to the Rotterdam Rules if these come into force in the future. Consequently, it is expected that, if Rotterdam Rules enter into force in the future, all carriage of goods by sea contracts will be subject to their regime.

3.2 Title to Sue on a Bill of Lading

Title to sue under a bill of lading corresponds to the holder of the bill of lading. Valid transfer of the bill of lading entails the transfer of rights and actions to the transferee, except for the jurisdiction and arbitration clauses. These clauses will only be transferred if they had been individually and separately negotiated and agreed by the transferee.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

A carrier may be liable for partial or total loss or damages to the cargo and for delays. The carrier's liability regime, including limitation, extends to both the contractual and the actual carrier, which are considered to be jointly and severally liable towards the holder of the bill of lading.

Unless the nature and value of the goods have been declared by the shipper before shipment, a carrier may limit its liability to an equivalent of 666.67 special drawing rights (SDR) per loss or damaged package or two SDR per kilogram of gross weight of the goods actually lost or damaged, whichever is the higher.

The carrier's liability for delay will be limited to two and a half times the amount of freight charged for the affected cargo, with the maximum limit equivalent to the freight charged for the complete cargo.

The right to limit liability does not apply in case of wilful misconduct or gross negligence of the carrier.

Carriers are entitled to opt for the above limitation of liability regime or to apply the limitation of liability regime under the Convention on Limitation of Liability for Maritime Claims (LLMC 76/96).

3.4 Misdeclaration of Cargo

The carrier can establish a claim for damages against the shipper for misdeclaration of cargo, as established in Article 260 of

the SSA. Other remedies are the right to discharge the cargo in certain circumstances and the right to destroy it in the case of dangerous goods (following Article 232 of the SSA). There has been no recently published judgment on these SSA provisions, up to January 2021.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The time bar to file a claim for lost or damaged cargo is one year. This time limit applies to either contractual or tort claims.

The Hague-Visby Rules provide that this time bar can be extended by agreement of the parties (ie, a time extension). The time bar cannot be interrupted by a letter of demand to the respondent. If the claim is not filed within that one-year period or within the time extension, the action is time-barred.

Under Article 268 of the SSA, however, and notwithstanding the remission to the provisions of the Hague-Visby Rules, it is not clear whether this one-year time bar will be considered interruptible by a letter of demand or whether it will require the claimant to obtain a time-extension agreement. There are appeal court judgments suggesting that the one-year time bar is not interruptible but this will be a decision for the Supreme Court to rule upon.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Spain is a member state of the International Convention on Arrest of Ships signed at Geneva on 12 March 1999 (hereinafter the 1999 Arrest Convention) that came into force on 14 September 2011.

The domestic law that covers the ship arrest in the Spain is the Spanish Shipping Act, in its Article 470 et seq, and the provisions regulating general conservatory measures that can be found in the Spanish Code of Civil Procedure 1/2000, January 7th (Articles 721 et seq)

4.2 Maritime Liens

Spain is a member state of the International Convention on Maritime Liens and Mortgages signed at Geneva on 6 May 1993 (hereinafter the Lien Convention) that entered in force in Spain on 5 September 2004.

Furthermore, the SSA, in its Articles 122 et seq., also provides that maritime liens shall be governed by the 1993 Lien Convention.

Accordingly, and as established in Article 4.1 of the Lien Convention, the following claims are considered liens:

- claims for wages and other sums due to the Master, officers and other crew members with respect to their employment on the vessel, including repatriation costs and social insurance contributions payable on their behalf;
- claims with respect to loss of life or personal injury, whether occurring on land or water, in direct connection with the operation of the vessel (exception Article 4.2 "a" and "b");
- claims for reward for the salvage of the vessel;
- claims for port, canal and other waterway dues and pilot dues;
- 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 (exception Article 4.2 "a" and "b").

Following Article 124 of the SSA, any other possible liens (outside the Lien Convention) recognised under domestic law, European Union Regulations or any other International Treaty applicable in Spain would have lower rank than mortgages and other registered charges.

Currently, the Spanish Government is considering amending the SSA to include claims related to ship's supplies and to ship's repairs done in Spanish Ports as maritime liens.

Spain differentiates between maritime liens and maritime claims.

Maritime claims are all those claims, listed in Article 1 (1) of the Arrest Convention, that enable a claimant to arrest a ship. This includes not only the maritime liens of the Lien Convention but also other claims.

A maritime lien is a claim that "follows" the vessel. Liens are considered "actions in rem", and thus they enable the arrest of a ship and/or the enforcement of a claim on the ship, regardless of any potential change of ownership/register number or flag.

A vessel can be arrested in Spain by alleging before Spanish courts any of the following maritime claims listed in Article 1 of the 1999 Arrest Convention:

- 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, coastline or related interests, measures taken to prevent, minimise, or remove such damage, compensation for such damage, costs of reasonable 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, costs, or loss of a similar nature to those identified in this sub-paragraph;
- 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 that 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 charterparty or otherwise;
- any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charterparty 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, reconstruction, repair, converting or equipping of the ship;
- port, canal, dock, harbour and other waterway dues and charges;
- 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, 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 ship-owner or demise charterer;
- any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the ship-owner 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 "*hypothèque*" or a charge of the same nature on the ship;
- any dispute arising out of a contract for the sale of the ship.

4.3 Liability in Personam for Owners or Demise Charterers

In order to arrest a vessel under Spanish Law, it is necessary that its owners or demise charterers have in personam liability for the maritime claim. Exceptions to this principle are maritime liens. When a claim is a maritime lien, the claimant may arrest the offending vessel even if its owner or demise charterer are not liable in personam for the claim.

4.4 Unpaid Bunkers

Bunker supply to a vessel is considered a maritime claim and the bunker supplier (contractual or actual supplier) can arrest the vessel for unpaid bunkers by virtue of Article 1.l) of the 1999 Arrest Convention, provided that these bunkers were purchased by the ship-owner or by the demise charterer.

Bunkers ordered by a charterer would not enable the claimant to arrest the vessel following Article 3.3 of the Arrest Convention, as a claim for unpaid bunkers is not considered a lien and does not create an in rem action against the vessel. However, in cases in which the terms and conditions of the actual supplier establish a direct action against the ship-owner or demise charterer and these terms and conditions have been accepted by the Master by signing the "bunker receipt", Spanish courts have agreed to arrest the vessel.

4.5 Arresting a Vessel

The arrestor must appoint a Court Agent (also known as a Procurator) and must be assisted by a lawyer in the arrest proceedings. The court will require a notarial power of attorney (POA) evidencing that appointment. If the power of attorney is issued before a foreign public notary, it will need to be legalised.

Under the SSA, a mere allegation of the maritime claim would suffice for the arrest application. It is, however, advisable to submit with the arrest petition prima facie evidence of such a claim. Any document submitted to the court must be translated into Spanish. Free translations of both the POA and evidence will suffice for this purpose.

In practice, the arrest petition, including the POA and any other document, will be presented electronically by the Procurator, via the e-official system of the Spanish Ministry of Justice, to the court. Accordingly, the documents will be presented as copies.

The SSA requires that the arrest petitioner provide counter-security, prior to the court enforcing the arrest, which shall amount to a minimum of 15% of the maritime claim. This counter-security is provided to guarantee possible damages in the case of wrongful arrest. In most cases, the counter-security requested by Spanish courts is limited to this 15% of the maritime claim and is only occasionally increased when the court considers that there are other relevant factors that may give rise to the need to set a higher guarantee (eg, passenger vessels or when the vessel to be arrested is subject to a regular line). The Spanish Government is proposing to amend the SSA so that there is no minimum amount security required, leaving at the entire discretion of the Judge the determination of the amount.

4.6 Arresting Bunkers and Freight

The Arrest Convention is not applicable to bunker or freight arrest, only to ship arrest.

The regulation of arrest of bunkers or freight falls on the provisions regarding conservatory measures of the Spanish Code of Civil Procedure. These provisions require not only that the claimant provides counter-security but also to present a prima facie case of claim (fumus boni iuris) and proof of the periculum in mora, or danger in delay. In practice, since a bunker arrest entails detaining a vessel without a claim against its owner or maritime lien, Spanish courts are reluctant to agree to bunker arrest.

4.7 Sister-Ship Arrest

Any other ship owned by the debtor, also known as a sister ship, can be arrested under Spanish Law in accordance with Article 3.2. of the Arrest Convention, as referred to by Article 475 of the SSA. Accordingly, a court may arrest not just the offending ship but also other ships owned by the company liable for the claim, provided that this company was the owner or demise charterer of the offending ship when the claim arose.

4.8 Other Ways of Obtaining Attachment Orders

Other ways to obtain security would be regulated by the provisions for conservatory measures of the Spanish Code of Civil Procedure and would include the attachment of assets (other than a vessel) or rights, injunctions, etc.

4.9 Releasing an Arrested Vessel

The first and quickest option to release an arrested vessel is by placing security before the court:

- the type of security (eg, an LOU of a P&I Club) can be agreed with the arresting party. This agreement should be respected by the court;
- if an agreement on the security is not possible, in order to release the vessel, security must be placed before the court in any of the means admitted by Spanish Procedural Law. This would include a cash deposit, or an unconditional – and unlimited in duration – bank guarantee issued by a first-class Spanish bank. A P&I Club LOU will not be admitted by the Spanish courts if the arresting party has not agreed to do so.

The second way to obtain the vessel's release involves disputing the arrest order on the basis that it is a wrongful arrest, ie, that it does not comply with the requirements of the Arrest Convention. This second possibility takes longer than the first (several weeks or even months), because the court will schedule a hearing prior to deciding on the issue.

The third possibility would involve the arresting party not complying with his or her obligation to commence and file the proceedings on the merits before the competent court/arbitrator within the period of time granted by the Spanish court. This period is usually 20 to 60 days, counting from the date that the arrest order was notified to the owners (usually via the Master or ship agents and served by the court via the Harbour Master).

4.10 Procedure for the Judicial Sale of Arrested Ships

Under Spanish law, the arrest does not give the claimant the legal right to seek direct enforcement against the vessel.

The procedure for judicial sale of the arrested ship is subject to the commencement of recognition (when the judgment or award has been issued by a foreign – non-European – jurisdiction or international arbitration) and enforcement proceedings of the final judgment or award on the merits of the claim.

The enforcement proceedings of a (national or recognised foreign) judgment or award against any asset located in the Spanish territory is regulated by the Spanish Code of Civil Procedure and the subsequent judicial sale of the vessel is regulated by Articles 480 to 486 of the SSA which mandate the observance of the Lien Convention provisions and, subsidiarily, the Spanish Procedural Rules.

The order granting the judicial sale of the vessel must be served to:

- the authorities and vessel's Registrar of the flag state;
- the registered owner;
- the holder of a nominative mortgage or charge duly recorded;
- any holders of mortgages/charges duly recorded – maritime lien – *hypothèques* that put the court/authority on notice of them.

Provided that the recipients of such notifications are known, the above service containing all particulars of the auction (place, date, proceedings, circumstances, etc) shall be made in writing at least 30 days before the date of the auction.

Any holder of a maritime lien can appear in the auction proceedings to safeguard, defend, or assert a third-party preference claim.

Upon the sale of the vessel at public auction, all the mortgages, *hypothèques*, charges, maritime lines and claims will be cancelled.

The sale of the vessel can be delegated to a specialised body, that are usually Port Authorities or brokers.

During the arrest, the vessel must be maintained by the arrested party. Spanish courts will not require the arresting party to pay the costs of maintenance of the vessel during the arrest. Furthermore, the port where the vessel is retained will look after the safety of the port and may take, at the ship-owner's expense, measures to guarantee such safety.

Ranking of Claims

First, and pursuant to Article 386 of the SSA, the following costs and expenses take preference over the list of liens contained in the 1993 Liens Convention:

- any wreck-removal expenses that must be settled to the Spanish Maritime Authorities; and
- the cost and expenses arising out of the ship-arrest proceedings and her subsequent sale. These costs include maintenance of the vessel and those crew wages accrued from the moment the arrest is in place, and any other sums as referred to in Article 4.1.a) of the Lien Convention.

Second, any remaining funds shall be distributed, according to their preference ranking set forth in the Lien Convention, up to their full and final settlement.

Lastly, any possible remaining balance (after all credits have been paid) will be returned to the owner.

Maritime liens, according to the Lien Convention, take priority over registered mortgages.

4.11 Insolvency Laws Applied by Maritime Courts

Spain has insolvency laws which regulate the re-organisation or liquidation of a company in financial distress that are similar to Chapter 11 of the United States.

Mercantile courts are competent to adjudge not only maritime matters but also insolvency matters.

Once bankruptcy protection has been requested and bankruptcy proceedings initiated, a court cannot enforce against any asset owned by the debtor outside the bankruptcy proceedings. Accordingly, any individual enforcement will be stopped.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

A court will order the arresting party to pay for damages or costs caused by the arrest and to run with all legal costs in three scenarios. These are:

- if the arrest is in dispute and after the hearing it is finally lifted by the arresting court, as set forth in Article 741.2 of the Spanish Procedural law;
- if the arresting party fails to initiate the proceedings on the merits in due time before the competent court or in arbitration, as set forth in Article 730.2 of the Spanish Procedural law;
- if the claim on the merits is dismissed in full, as provided by Article 745 of the Spanish Procedural law.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

International Conventions and Domestic Laws Applicable to the Resolution of Maritime Passenger Claims

Passenger claims in Spain are regulated by International Conventions, European Regulations, and domestic laws.

International conventions

Spain is a member state of the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 13 December 1974 and of the 2002 Protocol to that Convention.

The Athens Convention and its Protocol provide a liability and insurance regime for passenger claims and their luggage.

Following Article 2, the Convention shall apply to international carriage when the ship is flying the flag of a member state, the contract of carriage has been made in a member state, or the place of departure or destination is in a member state.

European Regulations

With the objective of creating a single set of rules for all Member States, the European Union adopted Regulation (EC) 392/2009 of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents. This Regulation lays down the European regime relating to liability and insurance of passengers by sea as set out in the relevant provisions of the 1974 Athens Convention, as amended by the 2002 Protocol.

European Regulation 392/2009 extends the scope of application of the Athens Convention beyond any international carriage to any carriage by sea within a single Member State on board ships of Classes A and B, where:

- the ship is flying the flag of a Member State;
- the contract of carriage has been made in a Member State; or
- the place of departure or destination is a Member State.

Domestic laws

The Spanish Shipping Act (SSA) regulates the contract of carriage of passengers by sea in Articles 287 et seq. The SSA applies to all international and domestic carriage of passengers and their luggage by sea and provides, in Article 298, that carriers'

liability shall be regulated by the 1974 Athens Convention, as amended by the Protocols to which Spain is a party, the Regulations of the European Union and by the SSA.

The Spanish Constitution establishes that International Conventions duly ratified by Spain and European Regulations are not only directly applicable, but they also prevail and take preference over domestic law in the event of conflict. Therefore, while the three sources of law currently direct to the 1974 Athens Convention, as amended by the 2002 Protocol, this has not always been the case and conflict of law rules may have to be considered when deciding the applicable law in the future.

Time Limit to File a Claim

The time limit for any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage is two years. This time limit is the same for actions under the Athens Convention, the European Regulation or the SSA.

Spain considers that this two-year period may be subject to interruption and renewal by sending a letter so to demand or from the moment liability is accepted.

Limitations on Liabilities Available to the Owners in Respect to a Passenger's Claim

The liability of the carrier for the loss suffered as a result of the death or personal injury to a passenger caused by a shipping incident is limited to 400,000 SDR per person on each distinct occasion.

Within that limit, the carrier will be responsible for any loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident up to 250,000 SDR unless the carrier proves that the incident resulted from an act of war, hostilities, civil war, insurrection or *force majeure*, or was wholly caused by an act or omission by a third party with the intent to cause the incident.

For death or personal injury not caused by a shipping incident, the carrier will be liable up to that limit if the incident was due to the fault or neglect of the carrier. The burden of proof lies on the passenger.

Spain has not exercised the option to increase the limits of liability in the case of death or personal injury.

Liability of the carrier for the loss of or damage to cabin luggage is limited to 2,250 SDR per passenger, per carriage. 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 per vehicle, per carriage. For other types of luggage, liability shall not exceed 3,375 SDR per passenger, per carriage.

A deductible amount, not exceeding 330 SDR for vehicle and 149 SDR to other luggage, may be agreed between the carrier and the passenger.

The limits of liability may be increased by agreement between the carrier and the passenger.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Validity of Jurisdiction Clauses Stated in Bills of Lading

The Spanish Shipping Act establishes that, notwithstanding International Conventions to which Spain is a party and the Regulations of the European Union, submission clauses in a bill of lading, either to a foreign jurisdiction or foreign arbitration, are to be deemed null and void unless they are negotiated separately and individually.

Furthermore, even in cases where the shipper may have negotiated separately and individually with the carrier a clause submitting any dispute to a foreign jurisdiction or international arbitration, the SSA establishes that the conveyance of the bill of lading to the consignee implies the conveyance of all the rights and actions of the shipper except for any arbitration or jurisdiction clause, which requires the express and written consent of the transferee or holder of the bill of lading.

Exceptions to the above are submission clauses that refer any dispute under a bill of lading to the jurisdiction of a court of a Member State of the European Union. According to Regulation (EU) No 1215/2012, of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels II), any such agreement conferring jurisdiction will be valid between the parties to the contract, regardless of where they are domiciled, if it has been made:

- in writing or evidenced in writing;
- in a form which accords with practices which the parties have established between themselves; or
- in international trade or commerce, in a form which accords with the usage of which the parties are or ought to be aware and which is regularly observed by parties to contracts of the type involved in the particular trade or commerce.

Based on this provision, which prevails over domestic law, submission clauses in bills of lading to European courts will be

deemed valid, even if not separately and individually negotiated, between the shipper and the carrier. Whether this validity may be extended to the consignee or holder of the bill of lading is a question in dispute. According to the judgment issued in Coreck Maritime (C-387/98) by the Court of the European Union, this submission clause may only be invoked against the holder of the bill of lading if, following "national applicable Law", the holder subrogates in all rights and liabilities of the shipper. That said, Coreck Maritime (C-387/98) does not establish which is to be the "national applicable law" and this is left to the judge deciding on the question of jurisdiction.

If this "national applicable Law" is Spanish Law, following the SSA, foreign jurisdiction and international arbitration clauses are not transferred with the bill of lading. However, the matter is not clear and there are different doctrinal opinions on the issue. Some learned authors defend that, when the SSA is applied, the submission clause will be considered null and void towards the consignee or holder of the bill of lading by virtue of Article 468 of the SSA. Others consider that a new analysis of the consent to the jurisdiction clause by the holder of the bill of lading is to be made under the terms, once again, of Brussels II, which prevails over domestic law, concluding that it may be arguable that the clause is valid and enforceable.

Validity of Law Clauses Stated in Bills of Lading

Law clauses stated in bills of lading are recognised by Spanish courts and are enforceable against both the shipper and the holder of the bill of lading. Having said this, the fact that a bill of lading remits to a foreign legislation does not imply that the analysis of the validity of a potential foreign jurisdiction or international arbitration clause should made under the perspective of such a law. If an action is brought before a Spanish court, the court will apply Spanish conflict of law provisions to determine the validity of the jurisdiction clause. If the court decides that Spain is competent to hear the matter, the Spanish court may and will apply the provisions of a foreign legislation (to the merits of the claim) if the parties have agreed to that legislation. It will be for the parties to provide evidence of the content of that legislation for the Spanish court to apply. This is usually done by means of two sworn affidavits issued by jurists.

Notwithstanding the foregoing, a proposal has been made to include law clauses in the restrictions of Article 251 of the SSA. If this proposal is approved in the future, law clauses may follow the same regime as jurisdiction or arbitration clauses.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

An international arbitration clause incorporated to a bill of lading will have to be separately and individually negotiated by the shipper and the consignee to be valid.

It must be noted, however, that the SSA only requires individual and separate negotiation of a submission clause when it refers to international jurisdiction or arbitration. It does not expressly refer to domestic jurisdiction or arbitration. Therefore, in principle, a domestic jurisdiction or arbitration clause should be considered valid between a carrier and a shipper under the SSA. There is, however, no case law to this effect yet. Furthermore, even if in principle a domestic jurisdiction or arbitration clause is considered to be valid against the shipper, this does not necessarily extend to the holder of the bill of lading and the question yet to be answered by Spanish courts is whether a domestic jurisdiction or arbitration clause will need to be negotiated separately and individually also by the holder of the bill of lading to be valid towards him or her.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable in Spain for international arbitration.

Spain has also enacted the Arbitration Act (Law 60/2003 of December 23rd) for domestic arbitration and for international arbitration.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Spain is a party to the 1999 Geneva Convention on the arrest of ships.

Following the Arrest Convention, a ship may be arrested in Spain for the purpose of obtaining security, notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim is to be adjudicated in a State other than Spain. This is also stated in Article 474 of the SSA.

If the vessel is arrested in Spain, however, Spanish courts will be considered to have jurisdiction over the claim unless the parties validly agree or have validly agreed to submit the dispute to a court of another State which accepts jurisdiction, or to arbitration.

6.5 Domestic Arbitration Institutes

There is no specific domestic arbitration institute that specialises in maritime claims active in Spain. Accordingly, if the parties to a contract wish to refer the matter to arbitration, they will have to appoint one of the Courts of Arbitration of the Chambers of Commerce in Spain or another non-specialised institute in Spain.

The Spanish Maritime Law Association is currently promoting arbitration in maritime matters.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

When a claim is prosecuted in Spain in breach of a foreign jurisdiction or arbitration clause, the defendant must file a motion to dismiss for lack of jurisdiction (a "*Declinatoria*"). The time bar to file such a motion is ten working days from the date of service of the claim. Once the *Declinatoria* has been filed, the deadline to present points of defence is stalled and will only resume after the court's ruling, if it dismisses the motion. Upon receipt of the motion, the court will give the claimant five working days to file a response and will make a ruling after examining both parties' arguments.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

Spanish Tax Lease System

The Spanish tax lease system is currently regulated by the Spanish Corporate Income Tax Law 16/2012, of December 27th, which entered into force on 1 January 2013.

The former Spanish tax-lease system was considered by the European Commission to be an unlawful aid granted by the Spanish Authorities "incompatible" with the European principles of the market and competition, and recently, the judgment dated 23 September 2020 of the General Court of Justice of the European Union (T-515/13RENV – Spain v Commission) ratified the position of the European Commission (200/EU 17 July 2013). This judgment can be appealed in cassation before the Court of Justice of the European Union and does not have any impact on the new tax-lease system that is in force at present in Spain.

Basically, the new Spanish tax lease is a system of accelerated and anticipated depreciation of assets acquired through financial leasing, including any kind of vessel of sea transport (passengers, tugs, fishing, dredgers, barges, platforms, boats/yachts etc), manufactured in or out of Spain, provided that (i) it is not manufactured in series/mass and (ii) its manufacturing period is at least one year. This new tax-lease system is not subject to prior approval by the Spanish Tax Administration

Tonnage Tax in Spain

The Spanish Tonnage Tax regime is an alternative tax system to the regular rules of taxable profit determination for the companies that usually produce a tax benefit for the taxpayer.

This regime is a tax system for (qualifying) shipping companies to calculate their shipping-related profits for Corporation Tax purposes. The shipping-related profits are calculated based on the tonnage of the (qualifying) ships used in the company's shipping trade.

The tonnage tax system in Spain is regulated by the Spanish Corporate Tax Act, 27/2014, December 27th.

This tax system is voluntary and subject to previous authorisation by the Spanish Directorate General for Taxation.

The main requirements to be met - by the shipping companies and their vessels - in order to be taxed on the bases of a tonnage tax system are the following:

Qualifying companies:

- must be registered in any of the Spanish Shipping registries (including "REBECA" in the Canary Islands);
- their business activity must include shipping management of owned and chartered vessels;
- they must conduct themselves the technical and crew management of the vessels and assume completely the responsibility derived from the nautical operation of the vessel(s) and ISM Code (IMO Resolution A 741).

Qualifying ships:

- must be operated from Spain or any country of the European Union;
- must be sea-going vessels for sea transport, carriage of goods or passengers, rescue vessels and other services that must be rendered at sea (tugs and dredgers have some specific requirements).

This system will not apply:

- if all vessels are not registered in Spain or any other country of the European Union;
- if the vessels are intended, directly or indirectly, for fishing, recreational or sports activities;
- if certain circumstances derived from or in connection with particular European Regulations occur at the same time at the shipping company.

Spanish Shipping Registry of the Canary Islands

Finally, for those shipping companies whose vessels are registered in the special Spanish Shipping Registry of the Canary Islands (REBECA), Spanish Law 19/1994 for the modifications of the Canary Islands' economic regime and tax system establishes - together with other tax advantages such as bonuses in Social Security and others - a corporate tax rebate of 90%.

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8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

During the State of Alarm declared by the Spanish Government and in order to reduce the impact of the pandemic caused by COVID-19, an abundance of Ministerial Orders and recommendations have been issued. Some of these restrictions and recommendations are still in force. Amongst other determinations, the Spanish Authorities have:

- restricted the entry for cruise ships from any port (still in force);
- restricted the entry of recreational yachts that do not have their port of stay in Spain, with certain exceptions;
- limited the cabotage sea transportation;
- limit the Harbour Master's inspection activities to those that are essential;
- regulated the documents to be presented by crew members during change of crew procedures, etc.

In any event, it is important to note that the Spanish Government and Authorities' orders and recommendations are under continuous revision to adapt its content to any changes in the progress of the pandemic.

8.2 Force Majeure and Frustration in Relation to COVID-19

The concept of *force majeure* is regulated in Spain by Article 1.105 of the Spanish Civil Code, which provides that, setting aside any other specific provision, contractual parties cannot be responsible for any unpredictable and unforeseen event. In order to determine the possible concurrence of *force majeure*, courts analyse and consider the particular circumstances of each case. Although the COVID-19 pandemic could have been an unpredictable and unavoidable event at the beginning of 2020, and thus accepted as an exception in some judgments, at this stage of the pandemic it would be hard to consider it as a *force majeure* exception.

"Rebus sic stantibus" or frustration of the contract, ie, a substantial, unavoidable and unpredictable change on any party's circumstances: this defence can also be argued by parties before a court due to the impact of COVID-19. However, again, this argument does not imply or cause under any circumstance a direct recessive, resolutory effect on any contract. Case-by-case analysis needs to be carried out by courts on this possible defence, which will require strong evidence(s) of:

- extraordinary alteration of the circumstances during the validity of the contractual relationship;
- a radical change in the obligations assumed by the party alleging the defence;
- production of this alteration by the occurrence of unpredictable circumstances which cannot be qualified as habitual, normal or inherent risk or as deriving from the contract.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

One of the topics that could be of interest and that is not covered in previous the sections would be the possibility of a direct action against P&I Clubs under the SSA.

Under Spanish Law, a direct action against the civil liability marine insurer is possible. Not only does the Criminal Code establish this for civil liability derived from a criminal offence, but it is also established in general for maritime risks in civil matters by the Spanish Shipping Act 2014 (SSA 14). The Spanish Shipping Act declares that any clause on a marine insurance contract preventing a direct action by a third party (the victim) would be null and void. The question to be decided is whether this provision extends to P&I Clubs, which are regularly subject to the "pay to be paid" rule and establish the application of English law in their Rules. Previous to the Spanish Shipping Act, the Spanish Supreme Court had ruled that there was no direct action against P&I Clubs as they are considered large risk insurance contracts. However, there are no definitive and clear precedents under the new Spanish Shipping Act. There are some judgments that, in obiter dicta, suggest that P&I Clubs may be subject to a direct action (eg, a judgment issued by Mercantile Court 3 of Vigo dated 16 January 2018) but the issue has yet to be judicially clarified.

The project to modify the SSA includes a provision to amend Article 465 of the SSA and regulate P&I insurance, establishing that a direct action will exist when it is so established by International Conventions to which Spain is a party, or European Regulations.

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Aiyon Abogados S.L.P. is a boutique law firm formed by a team of top-tier lawyers highly experienced in litigation, arbitration, negotiation and contract-drafting. The firm offers assistance in any port and court in Spain through its four offices in Bilbao, Madrid, Algeciras and Cadiz. The firm's main areas of practice are shipping (both dry and wet), transport, international trade, and insurance law. The firm is known for its excellent emergency-response capabilities. Among regular clients of Aiyon Abogados are ship-owners, charterers, large trading companies, freight-forwarders (NVOCC), P&I Clubs, Defence Clubs, H&M insurers, cargo insurers, tug companies, port terminals and ship agents. Some relevant cases in which Aiyon lawyers have intervened are the PRESTIGE, MAERSK HONAN, Hanjin Shipping bankruptcy, MODERN EXPRESS, GRANDE AMERICA, COSTA CONCORDIA, FRIESLAND and DENEB. Aiyon is a member of the Spanish MLA and other relevant professional associations. Aiyon regularly co-operates with the Spanish Maritime Institute, other maritime LLM and many universities (Deusto, Basque Country, La Laguna, Cadiz and others).

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Contents

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

Subject-matter jurisdiction over maritime disputes is held by the federal courts of the United States. State and federal courts have concurrent jurisdiction over many matters that are not specifically in admiralty, and personal injury claims are often brought in state court. However, certain claims such as vessel arrests, ship-mortgage foreclosures and attachment proceedings that present maritime disputes must be brought in federal courts. Just as there are no specialised first-instance courts specifically established for maritime matters, appeals of maritime matters in the federal system are handled by the Circuit Courts of Appeal, and (rarely and on a discretionary basis) the Supreme Court of the United States.

1.2 Port State Control

The United States Coast Guard is responsible for port state control and enforces compliance with regulations under the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL), and the International Ship & Port Facility Security (ISPS) Code and other applicable laws and international conventions on vessels trading in US ports.

The Coast Guard is authorised to conduct examinations and enforce compliance with the laws and regulations within its ambit, and to detain or deny entry to the territorial waters of the United States for vessels operating outside of acceptable standards. The Coast Guard may issue civil penalties for deficiencies, and vessels subject to a detention 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 also functions as a law enforcement agency that may conduct criminal investigations separately or in co-ordination with other federal agencies, such as the Department of Justice and the Environmental Protection Agency, which may result in the issuance of fines or other sanctions, including in some circumstances criminal prosecution, for violations of security and environmental regulations.

1.3 Domestic Legislation Applicable to Ship Registration

The primary regulatory bodies for maritime activities in the United States include the US Coast Guard, the Maritime Administration, and US Customs and Border Protection.

Vessel registration, mortgage recordation, safety and technical inspections are primarily the responsibility of the US Coast Guard. Registration of vessels and recordation of mortgages are handled by the US Coast Guard through the National Vessel Documentation Center (NVDC). Vessels of five net tons or more used for fishing or cabotage trade must be documented with the NVDC.

Among other things, the Maritime Administration assists with government sealift programmes and manages a reserve sealift fleet, administers certain maritime grant programmes, and manages cargo preference activities. The Maritime Administration also administers certain Jones Act waiver programmes. Maritime Administration approval is required to transfer a US-flagged vessel to foreign ownership, flag or registry.

US Customs and Border Protection is the primary regulator responsible for enforcing the Jones Act restrictions on cabotage trade and providing determinations regarding cargo compliance with the Jones Act.

1.4 Requirements for Ownership of Vessels

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. By way of example, a corporation seeking to register a US-flagged vessel must be formed under the laws of the US or a state thereof, its chief executive officer must be a US citizen, and no more of its directors may be non-citizens than a minority of the number needed to constitute a quorum of the board. Additional citizenship requirements apply to vessels being used for fisheries or cabotage trade.

The Jones Act, among other things, regulates cabotage trade within the United States. The Jones Act requires that vessels used for cabotage trade be built in the United States, be at least 75% owned by US citizens, and be US-flagged. Additionally, the Jones Act requires that the Master, officers, and 75% of the remaining crew of a vessel used for cabotage trade be US citizens. The complete rules and procedures for determining compliance with the Jones Act cabotage trade restrictions are voluminous and each case must be looked at thoroughly and independently.

1.5 Temporary Registration of Vessels

The laws of the United States do not permit the temporary registration of vessels, nor will they permit dual registrations.

1.6 Registration of Mortgages

With respect to US-flagged vessels, ship mortgages are required to be recorded with the NVDC. Perfection of security interests in certain other collateral common in ship finance transactions,

such as certain assignments of earnings, may be accomplished by filing Uniform Commercial Code (UCC) financing statements in appropriate jurisdictions.

1.7 Ship Ownership and Mortgages Registry

Potential creditors may request a Certificate of Ownership or Abstract of Title from the NVDC that evidences the existence of any liens that have been recorded against a US-flagged vessel. Generally, the only liens recorded with the NVDC are preferred mortgage liens, although US law also permits the filing of a notice of claim of lien by anyone asserting a lien against a US-flagged vessel. Note that, with the exception of ship mortgages, most maritime liens arise by operation of law and there is no requirement that they be recorded with the NVDC.

Potential creditors may also request a lien search from the relevant jurisdiction for recorded UCC financing statements relating to any potential debtors.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

With respect to wreck removal, the United States has not adopted the Nairobi International Convention on the Removal of Wrecks (Wreck Removal Convention) 2007. Certain provisions of the Rivers and Harbors Act of 1899, also known as the Wreck Act, impose a duty of diligent removal upon the owner, lessee or operator of a vessel sunken in a navigable waterway. Failure to remove such a vessel subjects it to removal by the US government, and subjects the vessel owner, lessee or operator to reimburse the government for the cost of removal or destruction and disposal.

With respect to pollution, currently, the United States is a signatory to Annexes I, II, III, V and VI of the International Convention for the Prevention of Pollution from Ships (MARPOL). Annexes I, II, V and VI have been incorporated into US law by the Act to Prevent Pollution from Ships (APPS) and implemented within 33 USC 1901 and 33 CFR 151. The US incorporates Annex III by the Hazardous Materials Transportation Act (HMTA) implemented within 46 USC 2101 and 49 CFR 171 -174 and 176. The US has not ratified Annex IV, but has equivalent regulations under the Federal Water Pollution Control Act (FWPCA) (as amended by the Clean Water Act, 33 USC 1251 et seq, and implemented by 33 CFR 159) for treatment and discharge standards of shipboard sewage.

On 4 December 2018, the "Vessel Incidental Discharge Act" or VIDA was also signed into law, restructuring the way the EPA and US Coast Guard (USCG) regulate incidental discharges from commercial vessels. The VIDA requires the EPA and the USCG to develop standards of performance and implementing regulations, respectively, for these discharges. The EPA expects these new regulations to be effective in late 2022. In the interim, the existing EPA Vessel General Permit (VGP) and USCG ballast water regulations remain in full force and effect.

The US likewise has an extensive body of federal and state environmental laws and regulations concerning oil-pollution prevention and spill response including, for example, the Oil Pollution Act of 1990, 33 U.S.C. §2701, et seq.

2.2 International Conventions: Collision and Salvage

The United States did not ratify the Brussels Collision Liability Convention of 1910, and has historically followed the general maritime law of the United States, only belatedly adopting principles of proportionate liability and comparative fault. The United States adheres to the International Regulations for Preventing Collisions at Sea 1972 (COLREGS). The US Departments of Defence and Commerce, as well as the Coast Guard within the Department of Homeland Security, publish regulations to ensure US compliance with COLREGS.

As for salvage, the United States has adopted the International Convention on Salvage, 1989. Courts have noted the parallels between the 1989 Salvage Convention and pre-existing general maritime law, and continue to look to applicable maritime law principles in those cases.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

The US is not a party to the 1976 Convention on Limitation of Liability for Maritime Claims, and continues to apply the Limitation of Liability Act (the Limitation Act), passed in 1851 to encourage investment in shipping. The Limitation Act permits vessel-owners (including demise charterers) to limit their 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 Limitation Act may be applied to a wide variety of claims but is not generally favoured by the courts, and there are different limits in cases of personal injury and death, pollution liabilities, wage claims and others. Limitation also may apply to claims brought by the US government.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Procedurally, a vessel-owner's action for limitation must be commenced within six months of the owner being given ade-

quate written notice of a claim, whether or not a claimant has initiated a legal proceeding. Deposit of the fund is required and disputes may arise with respect to valuation (ie, whether the deposit represents the value of the vessel).

3. Cargo Claims

3.1 Bills of Lading

The US Carriage of Goods by Sea Act (COGSA) governs all contracts for carriage of goods by sea to or from ports of the United States in foreign trade (and bills of lading as evidence of such contracts). 46 U.S.C. § 30701, Note § 13. The COGSA governs the carrier's liability to cargo interests whenever a bill of lading or similar document of title is the contract of carriage. The "carrier" is identified in the COGSA as "the owner, manager, charterer, agent, or Master" of a vessel and can include all owners or charterers involved with carrying the cargo.

The US applies a version of the Hague Rules through the Carriage of Goods by Sea Act as well as the Harter Act. The US has also signed the Rotterdam Rules, which are not yet ratified. The COGSA has been in place for generations and provides a reasonable and predictable cargo loss and damage liability regime.

3.2 Title to Sue on a Bill of Lading

With respect to the question who has title to sue on a bill of lading, such cargo claims are typically brought by cargo owners or their subrogated insurers.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

Under the COGSA, a ship-owner may not be liable if it is not the contractual carrier. However, the vessel itself may be liable in rem in respect of it carrying the cargo and ratifying the terms of the bill of lading.

3.4 Misdeclaration of Cargo

A claim for misdeclaration of cargo would be treated as a breach of contract claim under the governing bill of lading. Federal district courts have approved of such claims. See, eg, MSC Mediterranean Shipping Co v Metal Worldwide, Inc, 884 F. Supp. 2d 1269, 1275 (S.D. Fla. 2012) (granting summary judgment to the carrier for breach of contract arising from the shipper's failure accurately to declare weight and contents of the subject containers); Mitsui O.S.K. Lines, Ltd. v CB Freight Int'l, Inc, No 4:16-cv-05002-KAW, 2016 US Dist. LEXIS 181186, at *16 (N.D. Cal. 16 December 2016) (granting default judgment upon numerous misdeclarations and misdescriptions of cargo over a period of years).

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

Cargo claims must be brought within one year from the date when the goods were delivered or should have been delivered, under Section 3(6) of COGSA. 46 U.S.C. § 30701 note (formerly codified at 46 U.S.C. § 1303(6)). That said, claims for indemnity or contribution typically will not accrue until liability is fixed by a judgment against or payment by the indemnitee.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

The United States is not a signatory to international conventions that govern ship arrest. Rather, ship arrests are governed under substantive federal law and the Federal Rules of Civil Procedure.

4.2 Maritime Liens

With certain very limited exceptions, any person providing "necessaries" to a vessel on the order of the owner or a person authorised by its owner is entitled to a maritime lien claim enforceable by a civil action in rem in the federal courts. What comprises a necessary has been the subject of extensive litigation in the courts. Obvious necessaries are fuel oil and repairs, but particular contexts give rise to more esoteric issues. Litigation has taken place in the courts over whether a fish-finder on a fishing vessel is a necessary, whether a piano is a necessary on a cruise vessel and whether seismic equipment on an oil exploration vessel is a necessary. As in the case of other areas of the law, each asserted claim must be independently examined in the context in which it arises, but, as a general rule, the supplier of goods and services to a vessel essential for the operation and navigation of that vessel is likely to have a lien for the supply of necessaries. It is important to note that, in many circumstances, the US courts will look to the law of the jurisdiction in which the claim arose to determine the existence of the lien. Hence, notwithstanding the foregoing, if the jurisdiction where fuel oil was supplied to a vessel does not grant the supplier a lien under local law, the federal courts might not recognise it.

Other liens recognised under US law include:

- those for the wages of the Master and the crew of a vessel and for any stevedore employed directly by a vessel;
- liens for damages arising out of a maritime tort;
- liens for general average; and
- liens for salvage, including contract salvage.

The maritime liens listed above will have priority over a ship mortgage, as will expenses for a vessel while in possession of a court during a foreclosure proceeding. Additionally, a lien for

necessaries supplied in the US has priority over the lien of a preferred mortgage on a foreign-flagged vessel.

4.3 Liability in Personam for Owners or Demise Charterers

There is no requirement of in personam owner or demise charter liability in order for a vessel to be arrested. Under the Commercial Instruments and Maritime Lien Act (46 U.S.C. § 31301 et seq), vessel arrests may proceed in rem against the vessel as long as necessaries are supplied on the order of the owner or a person authorised by the owner. Under the statute, charterers are generally presumed to have authority to procure necessaries for the vessel and suppliers of necessaries are also generally presumed to rely on the credit of the vessel and will typically be entitled to a maritime lien unless they have actual notice of a "no lien" clause in the charter. Vessels are routinely arrested to enforce necessaries liens and many ship mortgage foreclosures are commenced by such suppliers rather than mortgage banks.

4.4 Unpaid Bunkers

Arrest proceedings commenced in rem against the vessel provide a vehicle for an unpaid supplier of bunkers — who provided necessaries on the order of the owner or a person authorised by the owner — to seek recovery of the reasonable value of the necessaries supplied. Under the Commercial Instruments and Maritime Lien Act (46 U.S.C. § 31301 et seq), charterers are typically presumed to have authority to procure necessaries for the vessel and suppliers of necessaries are also typically presumed to rely on the credit of the vessel and will generally be entitled to a maritime lien unless they have actual notice of a "no lien" clause in the charter. Vessels are often arrested to enforce necessaries liens and many ship mortgage foreclosures are commenced by such suppliers rather than mortgagee banks.

4.5 Arresting a Vessel

In a Rule B action, seeking in personam attachment or garnishment – which may include vessel seizures – the court requires a verified complaint by the plaintiff setting forth a prima facie valid admiralty claim at the time of the filing of the complaint, and an accompanying affidavit signed by the plaintiff or the plaintiff's attorney stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district.

In a Rule C in rem arrest action, the court likewise requires a verified complaint that describes with reasonable particularity the property that is the subject of the action, and that the property is within the district or will be within the district while the action is pending.

4.6 Arresting Bunkers and Freight

Although arrest proceedings are more commonly brought against the vessel itself, Rule B attachment proceedings could encompass proceedings to arrest bunkers or freight as part of a maritime lien claim or proceeding in aid of arbitration. Rule B provides that "a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process." Bunkers and freight may therefore be seized insofar as they are "defendant's tangible or intangible personal property."

4.7 Sister-Ship Arrest

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 as part of a maritime attachment proceeding. Maritime attachment is available under Rule B where a plaintiff has a maritime claim (not necessarily a lien claim) and that plaintiff can attach property of the defendant, provided that the defendant is not found within the federal judicial district where the property is located for jurisdictional and service of process purposes. Some parties may also seek to "pierce the corporate veil" to reach associated vessels.

4.8 Other Ways of Obtaining Attachment Orders

Apart from ship-arrest proceedings under Rule C, a Rule B attachment proceeding is the primary means by which prejudgment security may be obtained. See also Response to **4.6 Arresting Bunkers and Freight**, and **4.7 Sister-Ship Arrest**.

4.9 Releasing an Arrested Vessel

The options available to an owner or other interested party to release an arrested vessel are set out under Rule E(5) of the Supplemental Rules. Rule E(5) allows the parties to post security in order to secure a vessel's release, by stipulating to "the amount and nature of such security" by way of a special or general bond conditioned to answer the judgment of the court or of any appellate court. Accordingly, a Club LOU or other third-party surety bond may be acceptable, if the parties can agree.

In the absence of agreement between the parties, the court may direct that the principal sum of the bond be set at an amount sufficient to cover the plaintiff's claim, fairly stated with accrued interest and costs, up to a maximum of the smaller of twice the amount of the plaintiff's claim, or its value upon due appraisement, with interest upon that amount at 6% per annum. Motions to reduce or enhance the amount of security may subsequently be made for good cause shown under Rule E(6). The release of a vessel is likewise conditioned on the payment of all costs and

charges of the court and of the US Marshal or other substitute custodian.

4.10 Procedure for the Judicial Sale of Arrested Ships

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

In the event of an application for interlocutory sale, judicial input is limited to confirming that notice of the action and arrest of the vessel, as well as notice of the motion for sale, is in compliance with statutory authority and any applicable local rules of court. Although a broker may be involved or other procedures may be agreed pursuant to court order, judicial sales are otherwise conducted by the US Marshal. The Marshal will charge poundage in the amount of 3% of the first USD1,000 of proceeds and 1.5% of proceeds above that amount, and a brokerage commission may be paid if a broker is engaged for the sale. 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, at which point the vessel is delivered to the buyer free and clear of liens. In general, challenges to vessel sales may proceed prior to confirmation upon grounds of fraud, collusion, or gross inadequacy of price.

4.11 Insolvency Laws Applied by Maritime Courts

In the United States, insolvency proceedings are governed by the United States Bankruptcy Code and heard by federal bankruptcy courts, including reorganisation proceedings under Chapter 11 of the Bankruptcy Code. Generally, the automatic stay applicable in all Chapter 11 cases under the Bankruptcy Code would act to prohibit or stop any arrest and judicial sale of a vessel owned by owners that are subject to Chapter 11 proceedings. However, courts in at least one US jurisdiction have held that the automatic stay does not prevent actions with respect to certain types of maritime liens and would allow a federal court sitting in admiralty to retain in rem jurisdiction over an arrested vessel and to conduct a judicial sale, provided that the action was commenced prior to the filing of the Chapter 11 proceeding.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

Damages may be awarded against an arresting party under circumstances where that party has been found to have made a wrongful arrest. However, such a claim requires a showing that the arresting party has no bona fide claim, together with establishing bad faith, malice, or gross negligence.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

The United States is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974. As such, passenger claims in the United States that involve personal injury or death will be governed by applicable contracts of carriage and the general maritime law of the United States. Although a ship-owner may not limit its liability for negligence to passengers under the Limitation Act, that act may provide limitation in respect of cargo loss, personal injury or death incurred "without the privity or knowledge of the owner."

Unless modified by contact, the default limitations period for a claim of personal injury or death arising from a maritime tort is three years.

Other statutes also limit the scope of contractually modified limitations periods that may be agreed with respect to passenger claims. Contractual periods may be no less than one year to file suit running from the date of injury or death, and no less than six months to provide notice of, or file a claim for, personal injury or death, subject to tolling rules for claims involving a minor or mental incompetent or in the event of wrongful death, until the earlier of (i) the date that a legal representative is appointed or (ii) three years after the injury or death.

If a contract requires the claimant to provide notice of a claim, failure to provide notice may permit a defence to liability unless there is a finding that (i) the carrier knew of the injury or death and the vessel was not prejudiced by the failure; (ii) there was a satisfactory reason why notice could not have been given; or (iii) the owner failed to object to the failure to give notice.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Contracts for carriage of goods by sea must be construed in the same way as any other contracts: by their terms and consistent with the intent of the parties. As such, where parties clearly specify in their contractual agreement which law will apply, admiralty courts will generally give effect to that choice. The COGSA applies "tackle to tackle" by force of law, but the period it covers (eg, pre-loading and post-discharge or carriage between two non-US ports) frequently may be extended by clauses in bills of lading.

As a matter of contract interpretation, federal courts sitting in admiralty seek to interpret a contract "so as to give meaning to all of its terms — presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous." For example, Foster Wheeler Energy Corp v An Ning Jiang MV, etc, 383 F.3d 349, 354 (5th Cir. 2004). Ambiguities can lead to disputes – for example, if a competing regime applies a higher limitation of liability than the COGSA's USD500 per package limitation – and, as such, careful attention should be paid to the contract language including its choice-of-law and forum selection provisions. See id.

Forum selection, arbitration and choice of law clauses are enforced if they are properly incorporated into the bill of lading.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

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. In order 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." *Vimar Seguros Y Reaseguros* v. M/V Sky Reefer, 515 U.S. 528, 539, 115 S. Ct. 2322, 2329 (1995).

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The US is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), as implemented by the Federal Arbitration Act, 9 U.S.C. § 201 et seq (the FAA). The grounds to resist enforcement of the award are limited. As specified in the FAA, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." As such, the FAA incorporates only the limited enumerated exceptions or defences set forth in Article V of the New York Convention. In the absence of such a defence, a US court "shall confirm" the award.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Many states have laws allowing the courts to enforce foreign money judgments through adoption of versions of the Uniform Foreign-Country Money Judgments Recognition Act. The procedures and defences can vary from state to state and as such are beyond the scope of this summary. In the absence of a statutory scheme, states will rely on the common law primarily based on principles of international comity.

With respect to arbitral awards, the US is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), as implemented by the Federal Arbitration Act, 9 U.S.C. § 201 et seq (FAA). The grounds to resist enforcement of the award are limited. As specified in the FAA, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." As such, the FAA incorporates only the limited enumerated exceptions or defences set forth in Article V of the New York Convention. In the absence of such a defence, a US court "shall confirm" the award.

6.5 Domestic Arbitration Institutes

Arbitration and mediation are available as alternative sources of conflict resolution. 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 selected from any specific arbitral body.

The SMA provides only limited administration of arbitrations, which generally proceed autonomously under the rules published by that body. The SMA is very active in promoting maritime arbitration in the US, maintaining its roster of arbitrators and in publishing panel awards, which are available on the LEXIS and Westlaw services. The SMA likewise publishes rules for confidential, voluntary and non-binding mediation proceedings, should circumstances warrant the use of that device.

6.6 Remedies Where Proceedings Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

A motion to compel arbitration or a motion to dismiss for lack of jurisdiction would be the typical first-line remedies for a situation where proceedings are commenced in breach of a foreign jurisdiction or arbitration clause.

Additional remedies to respond to proceedings commenced in breach of a valid and enforceable foreign jurisdiction or arbitration clause, such as seeking an award of sanctions or attorneys' fees, would require an additional showing of clear evidence of bad-faith conduct, in order to place it outside the general rule in the US that each party pays its own attorneys' fees.

7. Ship-Owner's Income Tax Relief

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies

The United States imposes a flat 4% tax on a non-US corporation's US-sourced gross transportation income, which includes income from spot and time charters where the vessel carries cargo to or from a US port, to the extent such income is not considered Effectively Connected Income (ECI). A non-US corporation may be eligible for a statutory exemption from this tax if it is organised in a qualifying foreign jurisdiction and satisfies certain ownership and documentation requirements.

United States persons who own foreign corporations that own vessels may be subject to certain US federal income tax consequences and filing obligations. Beginning in 2018, shipping income that was previously excluded from subpart F income of a "United States shareholder" of a "controlled foreign corporation" was subject to US taxation as "global intangible low-taxed income," or GILTI. In 2019, the Internal Revenue Service released guidance informing taxpayers that an election could be made with respect to GILTI, which may mitigate potentially adverse US federal income tax consequences of GILTI.

8. Implications of the Coronavirus Pandemic

8.1 COVID-19-Related Restrictions on Maritime Activities

The inability of ship operators to conduct or facilitate crew changes as a result of the COVID-19 pandemic has created severe impacts on the health and wellbeing of seafarers around the world. In July 2020 a joint statement organised by the UK Department of Transport along with the governments of the United States and several other key shipping jurisdictions, encouraging all International Maritime Organization (IMO) states to designate seafarers as "key workers" providing an essential service and to co-ordinate and implement to the maximum extent possible standard protocols for ensuring safe ship crew changes and travel during the pandemic.

In the United States, the Coast Guard published Marine Safety Information Bulletin (MSIB) 02-20, setting out reporting and infection-control measures to maintain the safety of personnel on board vessels as well as within the port. In MSIB No 11-20, a variety of maritime transportation workers were identified as essential for sustaining the flow of maritime commerce and, in MSIB 13-20, the Coast Guard has noted that, although maritime transportation regulations remain in force related to issuance or renewal of transportation worker or merchant mariner credentials, it will show flexibility when compliance cannot reasonably be met as a result of COVID-19.

8.2 Force Majeure and Frustration in Relation to COVID-19

"*Force majeure*" is a concept recognised under US law and will in general be governed by the particular terms of the parties' agreement as well as the governing law, which may be subject to variation from state to state. Intervening events such as impacts resulting from the coronavirus pandemic have recently been cited as possible *force majeure* events, though the outcome of any given dispute will, of course, turn on the facts, including the particular terms of the parties' agreement as well as the governing law.

In the United States, the burden of demonstrating a *force majeure* event falls upon the non-performing party seeking to have its performance excused. That party must "demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted *force majeure*." Phillips P.R. Core, Inc v Tradax Petroleum, Ltd, 782 F.2d 314, 319 (2d Cir. 1985). In one case involving a warranty contract to supply fuel on a daily basis, for example, the Third Circuit found that "the non-performing party must still prove how it tried to overcome the event and its effects." Gulf Oil Corp v Fed Energy Regulatory Com., 706 F.2d 444, 452 (3d Cir. 1983). Under New York law where they are in play, these clauses are typically narrowly construed and "will generally only excuse a party's non-performance if the event that caused the party's non-performance is specifically identified... [they] are aimed narrowly at events that neither party could foresee or guard against in the agreement." In re Cablevision Consumer Litig., 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012). *Force majeure* clauses also do not typically protect against risks that are contemplated or obligations expressly assumed at the time of the contract.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

Readers should take note of several items covered in the **Trends & Developments** section of our submission, which survey a number of additional issues currently of note with respect to US legal developments concerning the shipping industry. These include:

- sanctions enforcement and compliance, including the publication in May 2020 of new compliance guidance directed at the shipping industry;
- environmental regulation and enforcement;

- alter ego claims in connection with prejudgment civil enforcement remedies;
- the declaration of "*force majeure*" events in the shipping industry;
- the coming sunset of the London Interbank Offered Rate and its impact on bank debt tied to that reference index; and
- the December 2020 National Defense Authorization Act's amendments to the Outer Continental Shelf Lands Act.

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Trends and Developments

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As we enter 2021, the impacts of the COVID-19 pandemic continue to be felt throughout the United States and the world. In the short term, the pandemic continues to exert pressure on international maritime trade, and has created obstacles for market participants such as supply chain disruptions or port restrictions on vessels and crew changes. However, the pandemic likewise underscores the crucial role of the shipping industry in the delivery of essential goods as markets continue to move toward the "new normal."

Beyond COVID-19, there have been several developments in shipping law and regulation worth noting. We set out below several items of interest in our survey, including:

- sanctions' enforcement and compliance, including the publication in May 2020 of new compliance guidance directed at the shipping industry;
- environmental regulation and enforcement;
- alter ego claims in connection with prejudgment civil enforcement remedies;
- the declaration of "*force majeure*" events in the shipping industry;
- the coming sunset of the London Interbank Offered Rate and its impact on bank debt tied to that reference index; and
- the December 2020 National Defense Authorization Act's amendments to the Outer Continental Shelf Lands Act.

Sanctions Enforcement and Compliance

We have seen a notable increase in shipping companies seeking advice with respect to international sanctions, particularly with respect to Iran, China and Venezuela. This has been an active area of regulation and enforcement. Although the change in administration may cause a shift in priorities for the US Department of Treasury's Office of Foreign Assets Control (OFAC), this focus is expected to continue.

With respect to encouraging best compliance practices in dealing with current and emerging sanctions trends, OFAC, along with the US Department of State and the US Coast Guard, in May 2020 announced a new advisory directed at the shipping industry, the "Guidance to Address Illicit Shipping and Sanctions Evasion Practices". The shipping advisory cautions that it is critical that members of the shipping industry assess their sanctions risk appropriately, and as necessary, implement compliance controls to address gaps in their compliance programmes. The advisory recommends taking a risk-based approach, which is particularly important when companies and individuals are operating in or near high-risk jurisdictions. In addition, the advisory notes that entities and individuals involved in the supply chains of trade in the energy and metals sector should also exercise caution, including those that trade in crude oil, refined petroleum, petrochemicals, steel, iron, aluminum, copper, sand, and coal.

The advisory identifies and addresses the following deceptive shipping practices, noting that those in the industry must be vigilant when confronted with these risks and should consider heightened due diligence, as necessary, including: disabling or manipulating the automatic identification system (AIS) on vessels, physically altering vessel identification, falsifying cargo and vessel documents, ship-to-ship transfers, voyage irregularities, false flags and flag-hopping, or complex ownership and management. Best practices detailed in the advisory, in order to identify more effectively potential sanctions' evasion, include institutionalising sanctions compliance programmes, establishing AIS best practices and contractual requirements, monitoring ships throughout the entire transaction life cycle, know your customers (KYC) and counterparties, exercising supply chain due diligence, implementing appropriate contractual language, and information sharing within the industry (including between and amongst, for example, P&I clubs and vessel owners).

Environmental Regulation and Enforcement

On 4 December 2018, the "Vessel Incidental Discharge Act" or VIDA was signed into law, restructuring the way the Environmental Protection Agency (EPA) and the United States Coast Guard (USCG) regulate incidental discharges from commercial vessels. The VIDA requires the EPA and the USCG to develop standards of performance and implementing regulations, respectively, for these discharges. The EPA has estimated that 66,000 US- and 16,000 foreign-flagged vessels will need to comply with the proposed standards, once finalised. Most recently, on 26 October 2020, the EPA published its notice of proposed rule-making and received public comments on the rule. The EPA will need to address comments received from the public prior to publication of the final rule, after which the USCG is to develop corresponding implementing, monitoring, and enforcement regulations by late 2022.

Alter Ego Claims

Powerful pre-judgment remedies are available to creditors with maritime claims in a US federal court, including the attachment of a debtor's assets or the arrest of its vessel. These remedies can provide significant leverage to a creditor seeking recovery on a maritime claim. From a ship-owner's perspective, however, an unwarranted maritime claim asserted against its vessel can create a substantial unexpected burden on the vessel and severely disrupt the ship-owner's business. These claims continue to be brought under increasingly complex theories.

Our maritime litigators have seen and successfully defended against complex "alter ego" claims under which vessels are arrested for the debt of an unrelated third party. In one case, the plaintiffs had alleged a complex theory that the ship managers, ship-owner and the underlying vessel were somehow each "alter egos" of one another. Plaintiffs argued that, because the ship managers were contractually obliged to perform all of the day-to-day management of the vessel, they "dominated and controlled" the ship-owner's decisions as well. If their "domination and control" allegations were accepted, the ship-owner and its shareholders would have been made responsible for the obligations of a wholly unrelated third party.

Often, plaintiffs seek to establish "domination and control" by pointing to indicia such as common ownership, overlapping officers or directors, under-capitalisation, or the failure to follow corporate formalities. If these factors are established, a court might permit a claim to enter discovery, but these factors should be insufficient standing alone to prevail unless they are shown to be part of an abuse of the corporate form or a scheme to defraud third parties. In fact, courts may only find alter ego status under limited circumstances in an admiralty case, where the controlling entity used its subsidiary to perpetrate a fraud or where it was engaging in such a course of domination and control that it was using the controlled entity for its own personal business rather than any separate corporate function. This is based on a long-standing policy of limited corporate liability protection in the United States. As found by the Supreme Court, a corporate veil should only be pierced in the extraordinary circumstances where the corporate form is "misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." See United States v Bestfoods, 524 U.S. 51, 62 (1998). This is particularly important in the shipping industry where "overlapping ownership structure and management agreements are... common." See Swaidan Trading Co, LLC v Dileton Mar. S.A., CV 18-994, 2018 WL 2017597, at *3 (E.D. La. 1 May 2018).

Force Majeure Events

The purpose of contractual "*force majeure*" clauses is in general to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated, although the burden of showing the applicability of such a clause falls to the party seeking to have its performance excused. In addition, these clauses typically do not protect against risks contemplated or obligations expressly assumed at the time of contracting.

In the shipping and transportation industries, international market declines and asset price volatility may incentivise parties to seek relief under their contracts by using an intervening event such as COVID-19 as a tool to renegotiate unfavourable contract positions. For example, LNG cargoes due to land in China were at risk in the past year as certain customers had reportedly declared the emergence of the virus as a "*force majeure*" event. Although the question of the pandemic's foreseeability is now largely in the past as a general matter, new variants of the virus emerging in the UK and South Africa or other similar developments continue to counsel in favour of a close review of existing or contemplated contractual clauses as to what unforeseen risks may fall within the scope of any *force majeure* or similar clause.

LIBOR

The London Interbank Offered Rate (LIBOR), which is commonly used as an index to determine the interest rate on financial contracts, is expected to be no longer available after 2021. While the exact timing may be delayed, the financial industry has been preparing itself for the eventual transition of LIBOR. For the maritime industry – being a capital-intensive one that has significant exposure to financial contracts tied to LIBOR – LIBOR's transition could have an impact as the financial industry develops a consensus around how the existing financial contracts will need to be transitioned and the new reference rate will be incorporated. One of the latest developments in this regard is a legislative solution being proposed in the New York State Senate, that will minimise legal uncertainty among those legacy contracts that do not currently have a mechanism for a reference rate that will replace LIBOR.

Outer Continental Shelf Lands Act

The National Defense Authorization Act, passed in the United States Senate in late December 2020, has affirmed that the Outer Continental Shelf Lands Act applies to offshore wind and other renewable energy projects constructed on the US Outer Continental Shelf, which will mean that all US laws, including the Jones Act, will apply to offshore wind development. As it relates to the maritime industry, vessels that work on these offshore wind developments will need to comply with the Jones Act to the extent their activities are within the reach of that statute.

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