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United States

Jeffrey S King, Julius H Hines and Jorge Romero

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Newbuilding contracts

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

Unless otherwise agreed by the parties, title to the vessel passes when the shipbuilder delivers a completed vessel to the shipowner and the shipowner accepts delivery. However, the contracting parties are free to negotiate the terms of when title and risk of loss may transfer. Even though a contract may provide that title to a partially built ship and parts intended for a ship be transferred to the prospective shipowner as payments are made, risk of loss typically remains with the shipbuilder until delivery of the completed vessel. Since interpretation of contract terms is a matter of state and not federal law (see question 3), there is no uniform rule. The United States does not have a shipbuilding registry.

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

Any refund guarantee is governed by its contract terms and the laws of the state governing interpretation of the contract. Refund guarantees are typically secured by an undertaking by a third party, such as a bonding or surety company. The guarantee can also be in the form of a bank letter of credit or a parent corporation guarantee. Ideally, conditions to payment of a refund guarantee should be limited to the shipowner's certification of a default. Refund guarantees typically provide that, if the shipbuilder challenges the shipowner's certificate of default, the guarantee will be paid only in accordance with a final judgment of an arbitration panel or applicable court. The contract terms and the terms of any third-party undertaking should provide that the refund guarantee remain in full force and effect during the pendency of any court or arbitration proceedings.

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

Under United States law, a contract for the construction of a vessel is not a maritime contract and, as a result, the matter is governed by the Uniform Commercial Code (UCC) (in force with variations in all 50 states and the District of Columbia) and other applicable state law. The remedies would depend on the contract's choice of law provision, or if none, then the law of the state where the judicial proceeding or arbitration is located or the contract is made or performed. In general, the buyer may have a right to recover possession if the vessel is unique or has been 'identified' to the contract with no substitute vessel being reasonably available on the market. The buyer may also be entitled to recover the vessel if it has been identified to the contract and the yard becomes insolvent within 10 days of receipt of the first instalment of the price. Generally, the yard will have a possessory lien against the vessel (a mechanic's lien) for any unpaid amounts due under the contract.

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

Product liability claims can be brought against the shipbuilder. However, theories of product liability cannot be used to recover for damage or economic loss to the defective product itself. Thus, claims for defective work alone, without damage to other persons or property, are contractual in nature. Since vessel construction warranties are not governed by federal maritime law, state law (usually the UCC as adopted by the relevant state) is likely to apply. If defective work results in personal injuries or damage to property other than the vessel, United States maritime law recognises a product liability claim.

Ship registration and mortgages

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

Generally, for a vessel to fly the United States flag, it must be owned by United States citizens and be at least 5 NT. Vessels operating in the coastwise trade must also have been built in the United States and never sold or registered foreign. Vessels may be owned by individuals, corporations, partnerships and other entities capable of holding legal title. For a corporation to be deemed a citizen, the corporation must be incorporated under the laws of the United States or a state, the chief executive officer by whatever title and chairman of the board of directors must be United States citizens, and no more than a minority of the number of directors necessary to constitute a quorum may be non-citizens. (Similar requirements apply to other types of legal entities.) In addition, for vessels operating in the coastwise trade, among other requirements, at least 75 per cent of the stock and voting power and control must be vested in US citizens. Other vessel-trading endorsements, including fishing, have differing requirements. Compliance with the 75 per cent citizen-ownership requirement can be difficult to establish and monitor in publicly traded entities. In late 2012, the United States Coast Guard (USCG) National Vessel Documentation Center issued helpful guidance in this area.

US law defines 'vessel' as including 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.' In early 2013 the US Supreme Court issued a decision (*Lozman v City of Riviera Beach*) that adds a 'reasonable observer' test into this definition, holding that a houseboat was not a 'vessel' and thus not the proper subject of a maritime lien. The decision is very new and its practical consequences – if any – for documentation and mortgaging of vessels are unknown. In the meantime, care should be taken when dealing with unusual vessels or those that may be or have been rendered incapable of transportation over water.

It is not possible to register vessels under construction in the United States. The United States does not have a shipbuilding registry. Title to and interests in partially constructed ships would be controlled by the UCC of the state where the vessel is located. Security interests in personal property (a partially constructed vessel would be deemed personal property under the UCC) can be filed and perfected under the applicable state UCC.

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

Individuals or legal entities that are US citizens may apply for registration of a vessel under US flag with a registry endorsement (which entitles the vessel to engage in the foreign trade of the United States). For a corporation to be deemed a citizen for this purpose, it must be incorporated under the laws of the United States or a state, the chief executive officer by whatever title and chairman of the board of directors must be United States citizens, and no more than a minority of the number of directors necessary to constitute a quorum may be non-citizens. Similar requirements apply to other types of legal entities. For a registry endorsement, the owning entity can be 100 per cent owned by persons who are not US citizens.

7 What are the documentary requirements for registration?

In order to register a vessel under US flag, the applicant must provide evidence of citizenship, title, build, tonnage and dimensions, and designate a managing owner, a vessel name and hailing port. Form CG-1258 must be filled out and submitted with the required fees. This form, when properly filled out, provides evidence of citizenship and makes the required designations (managing owner, vessel name and hailing port). Evidence of title can be a builder's certificate for new vessels, or a bill of sale for vessels previously documented under the US flag (for vessels previously documented under another flag the applicant will also need to provide evidence of deletion). Tonnage and dimensions can be established by an international tonnage certificate or by a simplified method for vessels without an international tonnage certificate.

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

No, a US flag vessel cannot be simultaneously flagged to another nation nor can a charterer register a vessel under the United States flag. Depending on the size and use of the vessel, flagging out may require Maritime Administration approval.

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

The register of ship mortgages is maintained by the USCG National Vessel Documentation Center (NVDC). An abstract of title is a certified copy of a list of all the documents that have been recorded by the NVDC affecting that vessel. For example, it will show the builder, previous owners, mortgages and amendments, assignments, assumptions and releases thereof, notices of claim of liens (and releases thereof) and judicial sales.

Limitation of liability

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

The United States applies its own Limitation of Liability Act. Under this Act, only vessel owners may limit liability. The Act defines 'owner' to include demise charterers and co-owners. Case law has further expanded the definition to include, for example, shareholders, mortgagees, and ship management companies.

The Limitation of Liability Act limits liability in a broad range of claims:

Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

There are, however, exceptions to the broad scope of the Act. For example, certain pollution liabilities, wreck removal costs, wages due, and personal liabilities of the owner are not subject to limitation.

11 What is the procedure for establishing limitation?

Rule F of the Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the Supplemental Rules), establishes the procedure for a limitation action under the Limitation of Liability Act. To limit liability, a vessel owner or demise charterer must file a complaint in the proper United States district court within six months of receiving a claim in writing. The owner must deposit with the court a sum equal to the value of the owner's interest in the vessel and pending freight (or approved security therefor) plus such sums (or approved security therefor) as the court may deem necessary to carry out the provisions of the Act. Alternatively, the owner may choose to transfer to a court-appointed trustee its interest in the vessel and pending freight plus such sums (or approved security therefor) as the court may deem necessary. Security for costs is required. If the owner elects to give security for the vessel and its pending freight, the owner must also provide security for interest at the rate of 6 per cent per year. As an alternative to filing a limitation complaint, a vessel owner may also assert limitation as a defence to an action brought against the vessel owner.

If the amount of liability of a seagoing-vessel owner, as established under the Act, is insufficient to pay all losses in full, and the portion available to pay claims for personal injury or death is less than US\$420 multiplied by the tonnage of the vessel, that portion must be increased to US\$420 multiplied by the tonnage of the vessel (see 46 USC section 30506). This requirement does not apply to pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels, fish tender vessels, canal boats, scows, car floats, barges, lighters, or nondescript vessels.

12 In what circumstances can the limit be broken?

Limitation can be broken if the loss is deemed to have occurred with the 'privity and knowledge' of the owner of the vessel. 'Privity' has been classically defined as:

personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it.

Lord v Goodall, Nelson & Perkins SS Co, 15 F Cas 884 (CCD Cal 1877).

In addition, in a claim for personal injury or death:

the privity or knowledge of the master or the owner's superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner.

46 USC section 30506.

Modern advances in communications, and statutory enactments such as the Oil Pollution Act of 1990 and the implementation of the International Safety Management Code, have made it more difficult for owners to claim that they lack privity and knowledge of shipboard conditions and, as a result, it is becoming more difficult for owners to obtain limitation.

Port state control

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

The USCG is responsible for port state control. The authority to inspect vessels and exercise port state control is granted to the USCG under various statutes and international agreements, including 46 USC chapters 32, 33, and 37, 33; USC chapter 25; IMO Resolutions A.741(18), A.913(22), A.882(21), and A.787(19); and the International Convention for the Safety of Life at Sea (SOLAS).

14 What sanctions may the port state control inspector impose?

Most violations of marine safety, security and environmental protection regulations are subject to a civil penalty which can be imposed by the USCG or other responsible agency. The amount of those penalties varies widely by offence, and some penalties increase for each day of violation. The USCG may impose other sanctions in addition to a civil penalty, including detention of the vessel, denial of entry, or expulsion from the port. The vessel may be required to post a bond or letter of undertaking in the amount of the penalty to gain entry to a US port or obtain clearance to depart. In addition, a vessel may also be added to a target list making it subject to more frequent inspections in the future. See USCG Navigation and Vessel Inspection Circular (NVIC) 04-05.

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

Port state control actions may be challenged in a written procedure or an oral administrative hearing, or both, as detailed in 46 CFR subpart 1.03. Appeal can also be taken to the appropriate United States district court.

Classification societies

16 Which are the approved classification societies?

In order to review, examine, survey, or certify the construction, repair or alteration of a vessel in the United States, a classification society must be a full member of the International Association of Classification Societies (IACS) or approved by the USCG. IACS members include:

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

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

Generally, a classification society is not liable to a shipowner for negligently performing its classification services. US courts have

repeatedly stated that a classification certificate is not a guarantee of seaworthiness upon which the shipowner can rely. This principle derives from the shipowner's non-delegable duty to furnish a seaworthy vessel. Some cases, however, have suggested that a classification society may be liable to the shipowner when it fails to detect observable defects during the survey, or fails to notify the owner of those defects. Other cases have indicated that third parties, such as vessel purchasers, may in certain limited circumstances sue a classification society for negligent misrepresentation. The third party must prove that it relied on the classification certificate and that the classification society was aware of such reliance prior to issuing the certificate.

Collision, salvage, wreck removal and pollution

18 Can the state or local authority order wreck removal?

Yes. This authority generally rests with the federal and state authorities. The owner, lessee, or operator of a vessel that has sunk in a navigable channel has the duty to mark and then promptly remove the vessel. Failure to do so in a timely manner may result in an abandonment of the wreck, in which case the United States government would assume responsibility for marking and removal and may then seek reimbursement from the owner, lessee, or operator. See 33 USC section 409.

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

The United States has not adopted the 1910 collision convention, although US courts will apply the convention to collisions in international waters if both vessels are flagged with nations where the convention is in force. Of course, SOLAS has been adopted by the United States. The 1989 International Convention of Salvage came into force in the United States effective 14 July 1996. MARPOL has been adopted by the United States and implemented by the Act to Prevent Pollution from Ships.

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

There is no mandatory local form of salvage agreement. Lloyd's open form is often used. Salvage operations may be carried out by any person or company. A person or company may qualify for a salvage award provided the person is under no pre-existing duty to perform the act in question. For example, an officer or crewmember of a salvaged ship or firemen acting within their job duties are not entitled to an award.

Ship arrest

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

The United States is not a signatory to the International Convention Relating to the Arrest of Seagoing Ships (1952) or the International Convention on Arrest of Ships (1999). Ship arrests and attachments are governed by the Supplemental Rules. Rule B governs attachment and garnishment, rule C governs vessel arrests, and rule E governs security and release of property.

22 In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested?

Rule C of the Supplemental Rules provides that a vessel may be arrested in admiralty 'to enforce any maritime lien' or 'whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.' This would apply regardless of

the vessel's flag or the law governing the claim with the following possible exceptions. A ship owned, possessed, or operated by or for the United States government or a federally owned corporation, as well as cargo owned or possessed by the United States government or a federally owned corporation, is immune from in rem arrest regardless of whether the ship is used in commercial or public service. A ship owned by a state within the United States is immune to an admiralty arrest unless the state has waived its immunity. One should exercise caution in considering the arrest of a ship owned by a foreign government. While foreign states are not immune from an admiralty suit insofar as their commercial activities are concerned, they generally enjoy immunity from suits in United States courts, subject to a few, enumerated statutory exceptions. Associated vessels may be subject to attachment when the requirements of an in personam claim are established against the entity with the interest in the associated vessels. Rule B of the Supplemental Rules governs such actions. The provisions of rule E regarding posting of security, release of the property, and judicial sale of the property apply to both arrested and attached property.

23 What is the test for wrongful arrest?

An arrest is wrongful if it is made in bad faith, with malice, or with gross negligence.

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

Yes. US maritime law recognises a maritime lien for necessities, including bunkers. A supplier of necessities is presumed to rely on the credit of the vessel and is entitled to a maritime lien unless it has actual notice of a 'no lien' clause in the charter. The vessel can be arrested to enforce the supplier's maritime lien. (Note, however, that a maritime lien may not be available if the bunker supply contract states that it is governed by the law of a country that does not recognise a lien for necessities.)

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

The United States Marshals Service typically requires deposit of sufficient funds to cover anticipated custodial costs before arresting a vessel. In addition, under rule E of the Supplemental Rules, the court may require security in an amount to pay all costs and expenses that may be awarded against a party. If the vessel owner asserts a counterclaim, the court may require that security be provided for damages demanded in the counterclaim. The amount of security required can be the subject of discussion, and if agreement cannot be reached, the arresting party could seek intervention from the court, but the stated requirements of the Marshals Service will carry significant weight with the court. There is no required form for the security, but the most typically accepted form is a bond. Cash can be deposited into the court as security. Other forms may be available and would be subject to agreement by the Marshals Service.

26 How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided?

Security must be posted in order to obtain release of the arrested property. It is common for the parties to agree upon the amount and the form. However, in the event agreement cannot be reached, the court will set the security amount and conditions. Rule E of the Supplemental Rules governs this process. That rule provides that the principal sum of the bond or stipulation will be set at an amount sufficient to cover the amount of the plaintiff's claim fairly stated

with accrued interest and costs; but the principal sum shall in no event exceed the lower of: twice the amount of the plaintiff's claim or the appraised value of the arrested property. The bond or stipulation shall provide for the payment of the principal sum plus interest at 6 per cent per year. The court may, on motion and hearing, for good cause shown, reduce or increase the amount of security that is required. The security can take various forms as long as they are acceptable to the parties or ordered by the court. Bonds and letters of undertaking are common, but other forms may be acceptable.

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

When a vessel is arrested, it is within the custody of the United States Marshals Service. However, a substitute custodian is generally appointed. At any time, the marshal can apply to the court for directions with respect to the arrested vessel. The court and the United States Marshals Service are empowered to collect additional security to cover costs and expenses, including those related to maintenance of the vessel through the conclusion of litigation.

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

In an in rem action, an arresting party must institute arrest by filing a complaint in the federal district court in which the ship is present and generally the action will be tried in that district. If the party instead files an in personam action against the owner of a ship, the action can be transferred to another district within the United States federal court system. With respect to arbitration, a party may arrest a vessel or other property in a US district court and then request an order directing the parties to arbitrate in accordance with their charter or other agreement. The district court retains jurisdiction to enter judgment on the arbitral award.

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

As noted in question 22, in addition to arrests, attachments are available to obtain security in certain circumstances. The attachment process is governed by rule B of the Supplemental Rules.

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

It is possible to petition the court for an order to release wrongfully held or detained property back to its proper owner. It is generally not necessary to seek an order for the preservation of evidence as that obligation is imposed on the parties by common law principles – as soon as there is reason to believe a dispute exists, it is improper for a party to destroy or dispose of relevant evidence. In cases where the property that is arrested or attached cannot be taken into the possession of the US marshal or a properly appointed substitute custodian, it is possible to obtain an order from the court regarding the preservation of that property – such procedure is governed by rule E(10) of the Supplemental Rules.

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

Bunkers can be attached or arrested – those procedures are governed by rules B and C of the Supplemental Rules. Bunkers can be attached to secure a maritime claim against a defendant who is not resident in the federal district where the vessel is found. The defendant must have title to the bunkers in order for the bunkers to be subject to attachment. Under the UCC as adopted by most US jurisdictions, the

purchaser of bunkers receives title even if the bunker supply contract states otherwise. Most US courts, however, will enforce a choice of law clause in a bunker supply contract, in which case another country's law may govern the question of title.

Judicial sale of vessels

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

Parties to an in rem, in personam, or possessory action, the marshals, or other custodian of the arrested or attached property can apply to the court for sale of the property.

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

A party, marshal, or custodian of the vessel can apply to the court for sale of the vessel if: the attached or arrested property is perishable or liable to deterioration, decay or injury by being detained; the expense of keeping the property is excessive or disproportionate; or there is an unreasonable delay in securing release of the vessel. The court may order sale of the vessel by auction. The sale by auction is not finalised until the court confirms the sale. The sales proceeds, or as much of them as will satisfy the judgment, are paid to the court to be disposed of according to law.

The length of time to complete a judicial sale can vary considerably and depends on many variables. Generally, a person asserting a right of possession or ownership interest in the vessel has 14 days following execution of process (arrest) to file a statement of right or interest and 21 days from filing that statement to serve an answer to the complaint. If the property is not released within 14 days following execution of process, the plaintiff must give public notice of the action and arrest in a court-designated newspaper. The Model Local Admiralty Rules require that persons asserting an interest in the vessel must file a statement of interest within 10 days after publication and serve an answer to the complaint within 30 days after publication. Under the Model Local Admiralty Rules, a plaintiff may move for entry of default and a default judgment once the time for filing an answer has passed and notice requirements have been satisfied. (These deadlines may vary under the various local admiralty rules that apply in different jurisdictions.) Judicial sale of a vessel is not likely to occur until the foregoing procedural events have occurred and is subject to numerous variables that make an accurate estimate of total time difficult to provide.

In a sale conducted by a marshal, the marshal receives a commission of 3 per cent of the first US\$1,000 of proceeds and 1.5 per cent of proceeds over that amount. In a sale conducted by an individual who is not a marshal, the court sets the fee. Whether the vessel is sold by a marshal or by a court-ordered non-marshal, the fee shall not be less than \$100 nor more than \$50,000. The proceeds of a sale are paid into the registry of the court for disbursement according to law. Costs associated with the sale, such as wharfage charges, arrest expenses, and custodian fees, that are not satisfied by security already provided, are also deducted from sale proceeds.

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

While disagreement exists about the exact order of priority of claims under admiralty law in the United States, the following order of claims is generally supported by courts, assuming the maritime liens are of equal age:

- expenses, fees, and costs allowed by the court, including those incurred while the vessel is in custody;
- a preferred maritime lien, including:
 - a maritime lien arising before a preferred mortgage was filed;

- for damages arising out of maritime tort;
- for wages of vessel crew and certain stevedores; and
- for salvage and general average claims;
- a preferred mortgage lien;
- contract claims, including claims for necessities;
- claims on liens of a maritime nature that are given by state law;
- government tax claims;
- claims on non-maritime liens; and
- non-lien maritime claims.

Where liens are not of equal age, the general rule is that liens of the same priority take precedence in the inverse order of their time of accrual, that is, the later lien prevails over the earlier lien.

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

A judicial sale of a vessel in an in rem proceeding completely extinguishes all prior liens and encumbrances on the vessel. The purchaser obtains 'free and unencumbered title'. A judicial sale of a vessel through the course of an in personam proceeding – that is, an action against defendants based upon a lien on the vessel – generally does not give rise to clear title. Instead, the purchaser takes subject to any remaining liens.

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

United States courts of admiralty will recognise foreign judicial sales of vessels as long as the court overseeing the sale properly has jurisdiction over the vessel in question. Such jurisdiction, according to United States courts, only exists if due process has been accorded those who have legal interests in the vessel. In the case of judicial sales, due process is satisfied if notice and an opportunity have been provided through actual arrest of the vessel.

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

No.

Carriage of goods by sea and bills of lading

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

The United States Carriage of Goods by Sea Act (COGSA) (see generally 46 USC appendix, section 1300 et seq and statutory note at 46 USC section 30701) and the Harter Act govern the rights and liabilities of the shipper and carrier. COGSA is similar in most respects to the Hague Rules. The United States has signed the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) but has not ratified the Rotterdam Rules. The Rotterdam Rules will become international law one year following ratification by 20 nations. Therefore, future changes in applicable law are possible. COGSA applies to the period from the time when the goods are loaded on the first ship to carry the goods at the initial port of loading to the time when they are discharged from the last ship at the final port of destination (the 'tackle-to-tackle' period). However, many bills of lading contain explicit clauses that extend COGSA to cover periods prior to loading and after discharge.

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

Yes. Courts have held that a through bill of lading is a maritime contract and that admiralty jurisdiction exists over the entire multimodal shipment, even inland portions. While the governing law will often permit parties to contractually extend COGSA inland, state law that is inconsistent with COGSA overrides a contractual choice to apply COGSA. Courts disagree as to whether the Carmack Amendment, 49 USC section 11706 (governing railways) and section 14706 (governing trucks), applies to an inland portion of a multimodal shipment where there is a separate bill of lading governing the inland carriage. The Supreme Court has held, however, that the Carmack Amendment 'does not apply to a shipment originating overseas under a single through bill [of lading]'.

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

Under the Federal Rules of Civil Procedure, all cases, including admiralty cases, must be brought by a real party in interest. A holder in due course who has relied on the bill of lading can bring an action. Suit can also be brought by both the subrogated underwriter of the shipper and the receiver of the goods.

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

The terms of a charter party can be fully incorporated into a bill of lading, but generally, this would result in the bill of lading being viewed as only a receipt and not as the contract of carriage.

Foreign forum selection clauses and foreign arbitration clauses are presumptively valid and are routinely enforced. 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'.

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

There is no definitive answer to this question as different circuit courts have taken conflicting positions. COGSA defines the 'carrier' to include 'the owner or the charterer who enters into a contract of carriage with a shipper.' As a result, some courts have held that any effort to limit the exposure through the demise or identity of carrier clauses is contrary to COGSA section 3(8) which declares 'null and void' any:

clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act.

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

Some circuits require the carrier and the shipper to be in privity before they will impose liability under COGSA. Thus, if an agent

signs a bill of lading, but does so without the authority of the vessel owner or master, it may be that the shipper and the actual carrier are not in privity. In most cases, however, the agent is authorised to sign bills of lading on behalf of the master, and the shipowner is liable as the carrier under the bill of lading (such as when the bill of lading is issued by a non-vessel operating common carrier). The vessel owner can raise all contractual and statutory defences permitted by COGSA, including enforcement of the forum selection clause, if any.

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

COGSA provides that carriers are not liable for losses resulting from reasonable deviations, including those to save life or property at sea. Other deviations may deprive the carrier of the right to limit liability to the package limitation (US\$500 per package or customary freight unit). In addition, there is a split in authority regarding whether an unreasonable deviation deprives the carrier of the one-year time for suit provision and other defences that are not causally related to the deviation.

45 What liens can be exercised?

The United States recognises maritime liens arising from preferred mortgages, maritime torts, and certain breaches of maritime contracts. Preferred maritime liens on a vessel are available for: preferred mortgages; damage arising out of maritime tort; wages of a stevedore; wages of the crew of the vessel; general average; or salvage, including contract salvage. Maritime torts that give rise to a lien include: common law negligence; failure to pay maintenance and cure; collision liabilities; injury to property; tort liability for breach of contracts; conversion; and tower's liability. Contract claims that give rise to a maritime lien include failure to pay seamen's wages, general average contributions, and salvage services. A maritime lien can also be created in favour of parties who supply 'necessaries' to a vessel. Examples of necessaries include vessel repairs, bunkers, supplies, towage, and wharfage. A carrier may also have a possessory lien for freight against the cargo that was carried.

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

A carrier that delivers the cargo without presentation of the original bill of lading can be liable for misdelivery of the goods even if the delivery is made to the consignee named in the bill of lading. In most cases, such misdelivery will not constitute an 'unreasonable deviation' from the contract sufficient to deprive the carrier of the benefit of the COGSA limitation of liability provisions.

47 What are the responsibilities and liabilities of the shipper?

Under COGSA, the shipper (not necessarily the bill of lading holder) is responsible for proper marks, number, quantity, and weight of the cargo, and must indemnify the carrier 'against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars'. In addition, the shipper may be responsible for the proper packaging of the cargo. The carrier is not responsible for loss of or damage to cargo caused by, among others, the insufficiency of marks, the inherent defects or vices of the cargo, insufficiency of packing, or losses caused by the acts or omissions of shipper or his agents.

Shipping emissions

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

Under the Act to Prevent Pollution from Ships and the Clean Air Act, the Environmental Protection Agency (the EPA) created

emissions control areas along the coasts of the continental United States, the Caribbean, Hawaii, Alaska, and the Great Lakes. The map and explanation can be found here: www.epa.gov/otaq/regs/nonroad/marine/ci/mepc1-circ-re-na-eca.pdf. The ECA is enforced jointly by the EPA and the USCG.

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

Under the ECA rules, ships may not use fuel oil with a sulphur content greater than 1 per cent m/m as of 1 August 2012, and may not use fuel with a sulphur content greater than 0.1 per cent m/m from 1 January 2015. There are some limited opportunities for waivers and exemptions. Violation of these requirements can result in administrative, civil, or criminal penalties (including imprisonment for knowing violations), and fines of up to US\$37,500 per day of violation under the Clean Air Act. These matters are enforced by the EPA and the United States Department of Justice.

Jurisdiction and dispute resolution

- 50** Which courts exercise jurisdiction over maritime disputes?

The state and federal courts have concurrent jurisdiction; however, certain claims are only cognisable 'in admiralty' and must be brought in federal courts (eg, ship mortgage foreclosures, vessel arrests, attachments under rule B of the Supplemental Rules and maritime claims brought on the admiralty side of the federal courts). A maritime case cannot be removed to federal court on that basis alone, but there may be other grounds, such as diversity of citizenship, for removing a case to federal court.

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

The United States applies the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents. The defendant must also have contact or activity in the state where the case is brought to be subject to the personal jurisdiction of the court. Some states allow service of process on foreign corporations through an official such as a secretary of state. Some also have statutory agents for service on non-resident vessel operators.

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

Yes, the Society of Maritime Arbitrators in New York. See www.smany.org.

- 53** What rules govern recognition and enforcement of foreign judgments and awards?

Many states have laws allowing the courts to enforce foreign judgments through adoption of the Uniform Foreign-Country Money Judgments Recognition Act. Under that Act, a court may not recognise and enforce a foreign judgment in certain cases, including where: the foreign tribunal is not impartial or does not provide due process of law; the foreign tribunal lacked personal or subject matter jurisdiction; the defendant was not given sufficient notice; or the forum was 'seriously inconvenient' to the defendant.

The United States has adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, foreign arbitration awards will be recognised and enforced by United States federal and state courts in accordance with the terms of that Convention.

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

If an action is brought outside the United States, despite a US jurisdiction clause, an action could be filed in the proper US jurisdiction while the foreign action is attacked pursuant to the laws of the foreign jurisdiction. Generally, attorneys' fees are not recoverable unless they are provided for by statute, contract, or other exceptional circumstances. Jurisdictional clauses are subject to review for fundamental fairness, and will not be enforced if found contrary to public policy. These are very limited exceptions; jurisdictional clauses are usually enforced in maritime cases.

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

A defendant may bring a motion to stay or dismiss an action brought in violation of a foreign arbitration or venue provision.

Limitation periods for liability

- 56** What time limits apply to claims? Is it possible to extend the time limit by agreement?

There are myriad limitation periods, depending on the claims involved, and there are also equitable tolling rules. As a result, it is best to consult an attorney in the appropriate jurisdiction. As a general rule, claims for personal injury to crew members must be brought within three years, claims for cargo damage within one year, claims for salvage within two years, and claims for limitation of liability within six months after a claimant gives the owner written notice of a claim. Limitation periods generally may be extended by agreement. However, contracts between sea carriers and passengers must generally allow passengers at least one year from the date of the injury to sue. Other claims are subject to the rule of laches, in which the defendant has the burden of proving prejudice resulting from delay. In addition to the limitation periods in which to bring a legal action, there are also various time limitations during which notice of certain claims must be made. Again, it is best to consult an attorney in the appropriate jurisdiction.

- 57** May courts or arbitral tribunals extend the time limits?

Yes. In some cases time periods can be extended for equitable reasons.

Miscellaneous

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

The United States has not yet ratified the Maritime Labour Convention (MLC). The USCG is in the process of implementing a voluntary compliance program to assist US-flagged vessels which call in ports where the MLC is in effect (see NVIC 02-13).

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

It is possible, but difficult, to challenge the enforceability of a contract on the grounds that there have been significant changes in economic conditions. The arguments one would raise would fall into a variety of doctrines, including force majeure, mutual mistake, or frustration of purpose. However, as noted, the presumption is that the parties could have anticipated changes in circumstances and addressed those possibilities in the contract. For that reason, challenging a contract on these grounds can be very difficult.

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

Yes. There are several issues that are considered significant to maritime clients in the United States, including issues related to many state and federal environmental laws (including the requirement to have a valid Vessel General Permit, which includes federal and individual state requirements governing vessel discharges while in United States waters, and USCG ballast water discharge standards), temporary banishment of vessels from US waters by the USCG due to significant oil pollution violations, the application of certain US sanctions against entities and persons engaged in or supporting business with Iran or Iranian entities, and USCG guidelines for the self-defence of US-flag vessels against piracy, and cruise vessel security and safety.

Update and trends

Efforts last year to adopt the United Nations Convention on the Law of the Sea were unsuccessful. It seems unlikely that those efforts will be renewed in the current legislative session. The ECA regulations will begin to take effect in a progressive manner – whether any changes to the regulations or their schedule will occur is an open issue. The USCG and Department of Justice continue to pursue active enforcement of MARPOL violations, particularly oily water separator bypasses and false oil record book entries. The EPA is releasing a new vessel general permit (VGP) in 2013. Vessels operating in US waters must give notice of their intention to operate under the VGP with respect to unavoidable vessel discharges, such as deck run-off or antifouling leachate.

The anticipated completion of the Panama Canal upgrade is expected to have a significant impact on traffic patterns and the need for increased deep-water port capacity on the United States East Coast. Finally, the increase in production of oil and gas from domestic shale fields is heading towards a situation where the US will be an exporter of LNG and crude oil – this is expected to have significant impact on vessel volume and traffic patterns.

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