



Shipping

in 35 jurisdictions worldwide

Contributing editor: Jonathan Lux

2011



Published by
Getting The Deal Through
in association with:

Adepetun, Caxton-Martins, Agbor & Segun
Albors Galiano Portales
Ali Budiardjo, Nugroho, Reksodiputro (ABNR)
Andrade Dias & Associados
Attorneys at law Borenus & Kempainen Ltd
Batini Traverso & Associati (BB & Partners)
Bull, Housser & Tupper LLP
Cabinet Isabelle Corbier
Chrysses Demetriades & Co LLC
De Castro & Robles
Garza Tello & Asociados, SC
GTG Advocates
Hafnia Law Firm
Haridass Ho & Partners, Advocates & Solicitors
HWL Ebsworth Lawyers
Ince & Co
International Law Offices
K&L Gates LLP
Larrain Rozas Lackington Rencoret & Urzua Abogados Ltda
Law Offices Carl Kincaid – Mendes Vianna Advogados Associados
Logos Legal Services
Maersk Line
Marine Legal Services SIA
Naschitz Brandes & Co
Okabe & Yamaguchi
Rajah & Tann LLP
Segelken & Suchopar
Simonsen Advokatfirma DA
Singhanian & Co
Sokolov, Maslov and Partners
Straits Consulting Group
Suh & Co
Van Steenderen Mainport Lawyers BV
Vukić, Jelušić, Šulina, Stanković, Jurcan & Jabuka



Shipping 2011

Contributing editor:

Jonathan Lux,
Ince & Co

Business development manager

Joseph Samuel

Marketing managers

Alan Lee
George Ingledew
Robyn Hetherington
Dan White
Ellie Notley
Sarah Walsh

Marketing assistant

Alice Hazard

Subscriptions manager

Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistant

Nina Nowak

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Senior subeditor

Kathryn Smuland

Subeditors

Kristy Barker
Chloe Harries

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Shipping 2011

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd
2010

No photocopying: copyright
licences do not apply.

ISSN 1759-0744

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2010, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law

Business

Research

CONTENTS

| | |
|---|------------|
| Introduction Martin A Clausen <i>Maersk Line</i> | 3 |
| Australia Maurice Thompson with Danella Wilmshurst <i>HWL Ebsworth Lawyers</i> | 4 |
| Brazil Godofredo Mendes Vianna, Camila Mendes Vianna Cardoso and Lucas Leite Marques <i>Law Offices Carl Kincaid – Mendes Vianna Advogados Associados</i> | 13 |
| Canada John W Bromley and Michael J Posnikoff <i>Bull, Housser & Tupper LLP</i> | 22 |
| Chile Ricardo Rozas <i>Larrain Rozas Lackington Rencoret & Urzua Abogados Ltda</i> | 29 |
| Croatia Gordan Stanković and Maja Dotlić <i>Vukić, Jelušić, Šulina, Stanković, Jurcan & Jabuka</i> | 38 |
| Cyprus Michael McBride, Yiannis Christodoulou and Michael Papadopoulos <i>Chrysses Demetriades & Co LLC</i> | 45 |
| Denmark Peter Schaumburg-Müller and Mathias Steinø <i>Hafnia Law Firm</i> | 51 |
| England & Wales Jonathan Lux, Anna Fomina and Ina Gueorguieva <i>Ince & Co</i> | 58 |
| Finland Jan Aminoff and Johanna Fagervik <i>Attorneys at law Borenius & Kempainen Ltd</i> | 69 |
| France Isabelle Corbier <i>Cabinet Isabelle Corbier</i> | 77 |
| Germany Kathrin Janka Riehmer <i>Segelken & Suchopar</i> | 83 |
| Greece George Iatridis and Dimitris Kapsis <i>Ince & Co</i> | 90 |
| Hong Kong Max Cross and Su Yin Anand <i>Ince & Co</i> | 95 |
| Iceland Einar Baldvin Axelsson <i>Logos Legal Services</i> | 104 |
| India Krrishan G Singhanian, Yadu Bhargavan, S N Verma and Vijay Purohit <i>Singhanian & Co</i> | 112 |
| Indonesia M Husseyn Umar <i>Ali Budiardjo, Nugroho, Reksodiputro (ABNR)</i> | 118 |
| Israel Peter Gad Nashitz <i>Naschitz Brandes & Co</i> | 123 |
| Italy Alberto Batini <i>Batini Traverso & Associati (BB & Partners)</i> | 127 |
| Japan Shuji Yamaguchi <i>Okabe & Yamaguchi</i> | 135 |
| Korea Dong-Hee Suh and Zachary Sharpe <i>Suh & Co</i> | 141 |
| Latvia Edward Kuznetsov and Julia Kazmina <i>Marine Legal Services SIA</i> | 148 |
| Malaysia Primila Edward and Jainil Bhandari <i>Straits Consulting Group / Rajah & Tann LLP</i> | 154 |
| Malta Robert Tufigno and Cynthia van der Weerden <i>GTG Advocates</i> | 160 |
| Mexico Fernando Escamilla and Anais Vivanco <i>Garza Tello & Asociados, SC</i> | 170 |
| Netherlands Arnold J van Steenderen and Merlijn Hijzen <i>Van Steenderen Mainport Lawyers BV</i> | 176 |
| Nigeria Funke Agbor and Chisa Uba <i>Adepetun, Caxton-Martins, Agbor & Segun</i> | 186 |
| Norway Lars Musæus, Katherine H Støvring and Thomas Aa Rasmussen <i>Simonsen Advokatfirma DA</i> | 192 |
| Panama Gabriel R Sosa, Eduardo A Real and Alberto Lopez Tom <i>De Castro & Robles</i> | 199 |
| Portugal Mateus Andrade Dias <i>Andrade Dias & Associados</i> | 205 |
| Russia Mikhail Sokolov, Anna Arkhipova and Sergey Seliverstov <i>Sokolov, Maslov and Partners</i> | 216 |
| Singapore Ajaib Haridass, Thomas Tan, V Hariharan and Eddy Teng <i>Haridass Ho & Partners, Advocates & Solicitors</i> | 222 |
| Spain Eduardo Albors, Javier Portales and Alfonso de Ochoa <i>Albors Galiano Portales</i> | 231 |
| Ukraine Arthur Nitsevych and Nikolay Melnykov <i>International Law Offices</i> | 241 |
| United Arab Emirates Bob Deering, Graham Crane, Pavlo Samothrakakis, Alexandra Bailey and Jacqueline McFadden <i>Ince & Co</i> | 247 |
| United States Jeffrey S King, Robert M Kritzman and Susan B Geiger <i>K&L Gates LLP</i> | 254 |
| Quick Reference Tables | 260 |

United States

Jeffrey S King, Robert M Kritzman and Susan B Geiger

K&L Gates LLP

Newbuilding contracts

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

The time for title to pass is governed by contract. The parties are free to negotiate the terms of when title and risk of loss may transfer. Title to a partially built ship and parts intended for a ship could be transferred to the prospective shipowner upon those assets entering the yard. The contract could require that specific bills of sale for parts and materials be issued to the shipowner upon receipt of progress payments. 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. A prospective shipowner should aim to have minimal conditions in the refund guarantee (which may take the form of a letter of credit in the US) other than the shipowners' certification of a default. The shipowner should seek to obtain a demand guarantee capable of being called by a certificate from the shipowner stating that the yard is in default of an applicable obligation under the contract. The guarantee will typically provide that, if the shipbuilder challenges the certificate, the guarantee will be paid only in accordance with the final judgment of an arbitration panel or applicable court. The shipowner should ensure the guarantee remains in 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 US law, a contract for the construction of a vessel is not a maritime contract and, as a result, the matter is governed by applicable state contract law. The remedies would depend on the contract's choice of law provision, or if none, then the law of the state where the action is located or the contract was performed. Generally, the yard will have a possessory lien against the vessel (a mechanic's lien) for any unpaid amounts due under the contract. Also, injunctive relief or an order to compel action by a party (an order to deliver the ship in this instance) can only be issued if the party seeking relief can prove it will suffer irreparable harm that cannot be monetarily compensated. The uniqueness of a ship for a particular market could be proof of irreparable harm but the determination depends on the facts. Contract recitals regarding uniqueness and irreparable harm are helpful but not dispositive.

- 4 Where the vessel is defective and damage results, would a claim lie in 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 by the purchaser and any end-user. However, theories of product liability cannot be used to recover for damage or economic loss to the defective product itself. Courts have determined those damages are best controlled by warranty provisions or general negligence. Product liability claims under US maritime law can only be brought for injury or damage to persons or property other than the defective product itself.

Ship registration and mortgages

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

As a general rule, for a vessel to fly the US flag, the vessel must be owned by US citizens, be at least 5 net tons, and never have been sold outside the United States. Vessels operating in the coastwise trade must also have been built in the United States. 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 US citizens, and no more than a minority of the number of directors necessary to constitute a quorum may be non-citizens. In addition, for vessels operating in the coastwise trade, among other requirements, at least 75 per cent of the stock and voting power must be vested in US citizens. Other vessel trading endorsements, including fishing, have differing requirements. It is not possible to register vessels under construction in the United States. The US does not have a shipbuilding registry. Title to and interests in partially constructed ships would be controlled by the Uniform Commercial Code (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 under the applicable state UCC.

- 6 What are the requirements for company formation?

Each of the 50 states has its own laws relating to corporate formation requirements. The most popular state for corporations is Delaware because of its long history as a corporate centre and its well established case law relating to corporate governance and other matters. The process for forming a corporation in Delaware is very simple, with forms that can be completed online.

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

No. A US flag vessel cannot be simultaneously flagged to another nation. Depending on the size and use of the vessel, flagging out may require Maritime Administration approval.

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

Preferred ship mortgages can be registered with the United States Coast Guard National Vessel Documentation Center. Information can be found online at www.uscg.mil/hq/cg5/nvcd/default.asp.

Limitation of liability

- 9 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. (Please note that at the time of publication, the US Congress was considering changes to the Limitation on Liability Act and its provisions should be reviewed for any changes post-publication.)

- 10 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, 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 therefore) plus such sums (or approved security therefore) 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 therefore) 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.

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 times the tonnage of the vessel, that portion must be increased to US\$420 times 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 non-descript vessels.

- 11 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 or operator 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 506 (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.

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

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

The United States Coast Guard (USCG) is responsible for port state control. The authority to inspect vessels is granted to the USCG under various authorities, including 46 USC section 3301 et seq, 46 USC section 3711, and Resolution A787(19) of SOLAS.

- 13 What sanctions may the port state control inspector impose?

The USCG may impose a variety of penalties, including detention of the vessel. Monetary penalties may be as high as US\$25,000 per day per violation, up to US\$50,000. In addition to being detained, a vessel can also be added to a target list making it subject to more frequent inspections. In determining the amount of the penalty the government is required to consider:

the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters that justice requires.

46 USC section 2107

- 14 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

- 15 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 US Coast Guard. IACS members include:

- American Bureau of Shipping (ABS);
- Bureau Veritas (BV);
- China Classification Society (CCS);

- Lloyd's Register (LR);
- Germanischer Lloyd (GL);
- Det Norske Veritas (DNV);
- Korean Register of Shipping (KRS);
- Nippon Kaiji Kyokai (NK);
- Registro Italiano Navale (RINA); and
- Russian Maritime Register of Shipping (RS).

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

This issue is complex and is currently being litigated in the United States. Generally speaking, a classification society is like any other service provider and can be held liable for its own acts of negligence. Negligence, however, is defined as a breach of duty, and there are questions regarding which parties are owed a duty by the classification society. In addition, contract terms may limit the exposure of a classification society to a vessel owner. Classification societies should understand that liability could arise when they issue class certificates that will be relied upon by purchasers of ships or purchasers of ship owning companies. Classification societies have been held liable for negligently issuing clean class certificates relied on by third-party purchasers if that reliance was foreseeable.

Collision, salvage, wreck removal and pollution

17 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.

18 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. 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.

19 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 preexisting 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

20 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 Sea-Going Ships (1952) or the International Convention on Arrest of Ships (1999). Ship arrests and attachments are governed by the Federal Rules of Civil Procedure, Supplemental

Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Rule B governs attachment and garnishment, Rule C governs vessel arrests, and Rule E governs security and release of property.

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

Supplemental Rule C 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 or operated by the United States government is immune from in rem arrest whether the ship is 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. Supplemental Rule B governs such actions. The provisions of Supplemental Rule E regarding posting of security, release of the property, and judicial sale of the property apply to both arrested and attached property.

22 What is the test for wrongful arrest?

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

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

Yes. A bunker supplier with a maritime lien against a charterer can seek to enforce that lien through arrest of the vessel.

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

The US Marshal's Service typically requires deposit of sufficient funds to cover anticipated custodial costs before arresting a vessel. In addition, if the vessel owner asserts a counterclaim, the court may require that security be provided for damages demanded in the counterclaim. Under Supplemental Rule E, the court may require security in an amount to pay all costs and expenses that may be awarded against a party.

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

When a vessel is arrested, the arresting party is responsible for maintenance of the vessel. This is generally done through the appointment of a substitute custodian.

26 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 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.

Judicial sale of vessels

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

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

28 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 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 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 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 a non-marshal, the court may set the fee. Whether the vessel is sold by a marshal or by a court-ordered non-marshal, the fee shall not be less than US\$100 nor more than US\$50,000. Court 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.

29 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:

- claims allowed by a court as an expense of the administration of justice while the vessel is in custody;
- a preferred mortgage lien;
- claims for seamen's wages;
- salvage and general average claims;
- tort claims;
- contract claims, including claims for necessities;
- claims on liens given by state law which are maritime in nature;

- 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.

30 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 – does not give rise to clear title. Instead, the purchaser takes subject to any remaining liens.

31 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.

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

No. The United States is not a signatory to the International Convention on Maritime Liens and Mortgages, 1993.

Carriage of goods by sea and bills of lading

33 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 signed the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) but has not ratified the Rules. The Rules will become international law one year following ratification by twenty 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, a period commonly called the 'tackle to tackle' period. However, many bills of lading contain explicit clauses that extend COGSA to periods prior to loading and after discharge.

34 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 multi-

modal shipment, even inland portions. The governing law will often permit parties to extend COGSA inland. When state law is inconsistent with COGSA, however, it will override the contractual choice. Courts disagree as to whether the Carmack Amendment, 49 USC section 11706 (governing railways) and section 14076 (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 through bill of lading.

35 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 that 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.

36 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 absent some unusual circumstances, 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, including against third parties whose rights are governed by the contract of carriage. 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 permits.

37 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 chapter[.]

38 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 without 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 an NVOCC). The vessel owner can raise all contractual and statutory defences permitted by COGSA, including enforcement of the forum selection clause, if any.

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

Deviation 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.

40 What liens can be exercised?

The United States recognises maritime liens arising from 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 lien can also be created in favour of parties who supply 'necessaries' to a vessel. Examples of necessities include vessel repairs, supplies, towage, and wharfage. A carrier may also have a possessory lien for freight against the cargo that was carried.

41 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.

42 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 the insufficiency of marks, the inherent vice of the cargo, insufficiency of packing, or losses caused by the acts or omissions of shipper or his agents.

Jurisdiction and dispute resolution

43 Which courts exercise jurisdiction over maritime disputes?

The state and federal courts have concurrent jurisdiction; however, certain claims are only cognizable 'in admiralty' and must be brought in federal courts (eg, ship mortgage foreclosures, vessel arrests, attachments under Supplemental Rule B and maritime claims brought on the admiralty side of the federal courts).

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

The US 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.

- 45** 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.

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

Most states have laws allowing the courts to enforce foreign judgments through adoption of the Uniform Foreign-Country Money Judgments Recognition Act (only Indiana, Massachusetts and Vermont have not adopted). 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 did not have sufficient notice, or the forum was 'seriously inconvenient' to the defendant.

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

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

The remedy (discussed below) is to bring a motion to stay or dismiss the proceedings in the United States. Generally, attorneys' fees are not recoverable unless they are provided for by statute, contract, or other exceptional circumstances.

- 48** 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

- 49** 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, and claims for limitation of liability within six months. 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.

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

Yes. In some cases courts have extended the time periods for equitable reasons.

Miscellaneous

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

Yes. A person possessing a maritime lien can seek to enforce that lien through arrest of bunkers or other property.

- 52** Can external factors, such as the recent global restriction on the availability of credit, affect the legal rights and liabilities of the parties to a shipping contract?

It would depend on the specific terms of the contract between the parties, including any financing arrangements. Many financing arrangements include material adverse change provisions.

- 53** 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 US waters), the procedural aspects of Rule B attachments, development on the law related to antisuit injunctions, and damages or liability arising from bunker contamination are just a few such developing areas. The US Congress is also considering many changes to maritime liability and oil spill response laws as a result of the Deepwater Horizon oil spill that could have major impacts on the maritime and energy industries.

K&L Gates LLP

Jeffrey S King

jeffrey.king@klgates.com

State Street Financial Center
1 Lincoln Street
Boston, MA 02111
United States

Tel: +1 617 261 3100
Fax: +1 617 261 3175
www.klgates.com



Annual volumes published on:

| | |
|-----------------------------------|------------------------------|
| Air Transport | Merger Control |
| Anti-Corruption Regulation | Mergers & Acquisitions |
| Arbitration | Mining |
| Banking Regulation | Oil Regulation |
| Cartel Regulation | Patents |
| Climate Regulation | Pharmaceutical Antitrust |
| Construction | Private Antitrust Litigation |
| Copyright | Private Equity |
| Corporate Governance | Product Liability |
| Dispute Resolution | Product Recall |
| Dominance | Project Finance |
| e-Commerce | Public Procurement |
| Electricity Regulation | Real Estate |
| Environment | Restructuring & Insolvency |
| Franchise | Right of Publicity |
| Gas Regulation | Securities Finance |
| Insurance & Reinsurance | Shipping |
| Intellectual Property & Antitrust | Tax on Inbound Investment |
| Labour & Employment | Telecoms and Media |
| Licensing | Trademarks |
| Life Sciences | Vertical Agreements |

**For more information or to
purchase books, please visit:**
www.gettingthedealthrough.com



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006



The Official Research Partner of
the International Bar Association