

# Shipping

*Contributing editor*  
**Kevin Cooper**



**2017**

GETTING THE  
DEAL THROUGH

GETTING THE  
DEAL THROUGH 

# Shipping 2017

*Contributing editor*

**Kevin Cooper**  
**Ince & Co LLP**

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Senior business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016  
No photocopying without a CLA licence.  
First published 2008  
Ninth edition  
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 August 2016, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

<b>Global overview</b>	<b>7</b>	<b>Japan</b>	<b>124</b>
Kevin Cooper, Reema Shour, Monika Humphreys-Davies and Sophia Hendrie Ince & Co LLP		Shuji Yamaguchi Okabe & Yamaguchi	
<b>Brazil</b>	<b>10</b>	<b>Korea</b>	<b>130</b>
Godofredo Mendes Vianna, Camila Mendes Vianna Cardoso and Lucas Leite Marques Kincaid   Mendes Vianna Advogados		Sung Keuk Cho and Hee-Joo Lee Cho & Lee	
<b>Chile</b>	<b>19</b>	<b>Liberia</b>	<b>136</b>
Ricardo Rozas and Max Morgan Jorquiera & Rozas Abogados		Lawrence Rutkowski and Keith A Kessinger Seward & Kissel LLP	
<b>China</b>	<b>28</b>	<b>Malta</b>	<b>141</b>
James Hu, Mervyn Chen, Lawrence Chen and Jasmine Liu Wintell & Co		Kevin F Dingli and Suzanne Shaw Dingli & Dingli Law Firm	
<b>Colombia</b>	<b>40</b>	<b>Mozambique</b>	<b>150</b>
José Vicente Guzmán Guzmán Escobar & Asociados (GEA)		José Camilo Mate CGA Couto, Graça & Associados	
<b>Croatia</b>	<b>46</b>	<b>Netherlands</b>	<b>155</b>
Gordan Stanković, Maja Dotlić and Iva Parlov Vukić & Partners		Arnold J van Steenderen and Charlotte J van Steenderen Van Steenderen MainportLawyers BV	
<b>Cyprus</b>	<b>54</b>	<b>Nigeria</b>	<b>168</b>
Michael McBride, Yiannis Christodoulou and Michael Papadopoulos Chrysses Demetriades & Co LLC		Funke Agbor and Chisa Uba Adepetun Caxton-Martins Agbor & Segun	
<b>England &amp; Wales</b>	<b>60</b>	<b>Norway</b>	<b>175</b>
Kevin Cooper, Reema Shour, Monika Humphreys-Davies and Sophia Hendrie Ince & Co LLP		Christian Bjørtuft Ellingsen and Hege Hellström Henriksen Advokatfirmaet Simonsen Vogt Wiig AS	
<b>Estonia</b>	<b>74</b>	<b>Panama</b>	<b>183</b>
Indra Kaunis Consolato del Mare OÜ		Gabriel R Sosa, Eduardo A Real and Alberto Lopez Tom De Castro & Robles	
<b>Finland</b>	<b>81</b>	<b>Peru</b>	<b>189</b>
Nora Gahmberg-Hisinger and Matti Komonen HPP Attorneys Ltd		Francisco Arca Patiño and Carla Paoli Consigliere Estudio Arca & Paoli Abogados SAC	
<b>France</b>	<b>88</b>	<b>Poland</b>	<b>196</b>
Christine Ezcutari Norton Rose Fulbright LLP		Marek Czernis and Rafał Czyżyk Marek Czernis & Co Law Office	
<b>Germany</b>	<b>96</b>	<b>Portugal</b>	<b>203</b>
Christian Finnern Watson Farley & Williams		Ana Cristina Pimentel Ana Cristina Pimentel & Associados, Sociedade de Advogados, SP, RL	
<b>Hong Kong</b>	<b>103</b>	<b>Russia</b>	<b>209</b>
Andrew Rigden Green and Evangeline Quek Stephenson Harwood		Mikhail Sokolov, Anna Arkhipova and Sergey Seliverstov Sokolov, Maslov and Partners	
<b>Indonesia</b>	<b>111</b>	<b>Singapore</b>	<b>216</b>
Sahat AM Siahaan, Ridzky Firmansyah Amin and Desi Rutvikasari Ali Budiardjo, Nugroho, Reksodiputro		Ajaib Haridass, Thomas Tan, Augustine Liew and V Hariharan Haridass Ho & Partners	
<b>Italy</b>	<b>117</b>	<b>South Africa</b>	<b>226</b>
Pietro Palandri and Marco Lopez de Gonzalo Studio Legale Mordiglia		Tony Norton, Mike Tucker and Kate Pitman ENSafrica	
		<b>Spain</b>	<b>235</b>
		Marie Rogers, David Diez Ramos and Luis Alberto García Villar Rogers & Co Abogados	

<b>Switzerland</b>	<b>244</b>	<b>Turkey</b>	<b>263</b>
Alexander Blarer and Anton Vucurovic Bratschi Wiederkehr & Buob SA		Burak Çavuş Çavuş & Coşkunsu Law Firm	
<b>Taiwan</b>	<b>250</b>	<b>United States</b>	<b>271</b>
Daniel T H Tsai and James Chang Lee and Li, Attorneys-at-Law		Bruce G Paulsen and Jeffrey M Dine Seward & Kissel LLP	
<b>Thailand</b>	<b>256</b>	<b>Quick Reference Tables</b>	<b>277</b>
Alan Polivnick, Tossaporn Sumpiputtanadacha, Natcha Anantakul and Laura Caines Watson Farley & Williams			

# United States

Bruce G Paulsen and Jeffrey M Dine

Seward & Kissel 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?

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

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

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

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

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

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

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

---

## Ship registration and mortgages

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

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

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

One can apply for documentation while a vessel is under construction in order to pre-obtain the official number, but a permanent, full-term certificate of documentation cannot be issued until completion.

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

As noted above, a US-flagged vessel must be owned by a US citizen to be documented with the NVDC. However, there are different levels of citizenship with respect to certain entities and for certain trades (eg, a corporation seeking to register a vessel must be formed under the laws of the United States or a state thereof, its chief executive officer must be a United States citizen, no more of its directors may be non-citizens than a minority of the number needed to constitute a quorum of the board, but the shareholders need not be US citizens). However, if the vessel is intended to be used in the US coastwise trade (or the American fisheries trade), the corporation must be at least 75 per cent owned by US citizens. The complete rules and procedures for determining when an entity (as opposed to an individual) is a US citizen are voluminous and the foregoing is a mere example. A full analysis is beyond the scope of this summary and each case must be looked at thoroughly and independently.

### 7 What are the documentary requirements for registration?

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

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

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

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

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

---

## Limitation of liability

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

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

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

#### 11 What is the procedure for establishing limitation?

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

#### 12 In what circumstances can the limit be broken?

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

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

Under the Limitation Act, claims against a ship or its owner for cargo loss, personal injury and death are subject to limitation (claims subject to limitation 'are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel [...] any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner') (emphasis added). Moreover, under the Limitation Act, a shipowner may not limit liability for negligence to passengers.

Outside of the US, passenger claims concerning personal injury or death and claims for loss or damage to luggage are governed by the Athens Convention on the Carriage of Passengers and Their Luggage by Sea. However, the US has not acceded to or ratified the Athens Convention.

#### Port state control

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

The US Coast Guard is responsible for port state control and vigorously implements port state control initiatives.

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

The Coast Guard of the Department of Justice and other federal agencies may issue fines and other sanctions for violations of security and environmental regulations. Sanctions are frequently issued in the environmental area and are common in 'magic pipe' and other environmental cases that the government pursues. The Coast Guard can also deny entry or expel ships from port. Vessels may be required to post a bond or letter of undertaking covering the amount of the penalty to gain entry to a US port or obtain clearance to depart, or as security for possible fines.

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

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

#### Classification societies

#### 17 Which are the approved classification societies?

International Association of Classification Societies members, or other classification societies approved by the Coast Guard, may survey or certify the construction, repair or alteration of a vessel in the United States.

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

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

#### Collision, salvage, wreck removal and pollution

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

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

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

The United States does not frequently adopt international conventions, and has not adopted the 1910 Collision Convention or the Nairobi International Convention on the Removal of Wrecks 2007, although the International Convention for the Safety of Life at Sea, the 1989 International Convention on Salvage, and the International Convention for the Prevention of Pollution from Ships have been adopted in whole or in part by the United States. The US is a signatory but not a contracting party to the International Convention on Civil Liability for Oil Pollution Damage.

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

There is no mandatory form of salvage agreement. The standard Lloyd's Open Form is often used and local salvors may have their own forms containing local or foreign arbitration clauses. Salvage operations may be carried out by any person or company and salvage awards may be issued depending on the order of salvage. Salvors have possessory liens on salvaged vessels.

#### Ship arrest

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

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

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

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

be attached under Rule B and, where the defendant owns a vessel and if the requirements of Rule B are met, that vessel may be seized.

#### **24 What is the test for wrongful arrest?**

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

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

A bunker supplier's claim is the classic maritime lien for necessities. A supplier of necessities must provide them on the order of the owner or a person authorised by the owner and the supplier must rely on the credit of the vessel (reliance is presumed) and will be entitled to a maritime lien unless it has actual notice of a 'no lien' clause in the charter. Vessels are routinely arrested to enforce bunker suppliers' maritime liens and many ship mortgage foreclosures are commenced by such suppliers rather than mortgage banks.

#### **26 Will the arresting party have to provide security and in what form and amount?**

Initially, security is not required for a vessel arrest. The US Marshals Service, however, will require a deposit of sufficient funds to cover anticipated custodial costs before arresting a vessel, usually less than US\$50,000. In addition, under Rule E of the Supplemental Rules, the court may require security in the form of a sufficient amount to pay all costs and expenses that may be awarded against a party. If the vessel owner asserts a counterclaim, the court will require that counter-security be provided under Rule E(7). Rule E mandates that security be in the form of a bond or other suitable security.

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

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

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

A general bond is used to prevent a future arrest or attachment of a ship. For the bond to prevent a future arrest or attachment, the bond must be twice the aggregate value of the plaintiff's claim.

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

No power of attorney or other formal such document need be provided to the court in the event of a ship arrest in the United States. Court papers to be filed in a ship arrest action include a verified complaint against the ship in rem (and usually against its owner in personam as well), a summons to be issued by the court, a warrant of maritime arrest

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

#### **29 Who is responsible for the maintenance of the vessel while under arrest?**

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

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

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

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

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

#### **32 Are orders for delivery up or preservation of evidence or property available?**

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

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

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

### **Judicial sale of vessels**

#### **34 Who can apply for judicial sale of an arrested vessel?**

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

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

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

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

**36 What is the order of priority of claims against the proceeds of sale?**

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

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

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

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

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

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

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

**39 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**

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

The United States applies a version of the Hague Rules through the Carriage of Goods by Sea Act (COGSA) as well as the Harter Act. The United States also signed the Rotterdam Rules, which are not

yet ratified. COGSA has been in place for generations and provides a reasonable and predictable cargo loss and damage liability regime. COGSA applies 'tackle to tackle' but the period it covers is frequently extended by clauses in bills of lading.

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

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

**42 Who has title to sue on a bill of lading?**

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

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

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

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

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

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

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

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

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

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

**47 What liens can be exercised?**

Characteristic maritime liens recognised under US law include:

- wages of a ship's master and crew;
- salvage;



- general average;
- breach of charter party;
- ship mortgages, both US and foreign flag;
- contract liens, such as contracts for repairs, supplies, towage, pilotage and a wide variety of necessities;
- maritime tort liens for personal injury, death and collision;
- claims for cargo loss or damage;
- claims for unpaid freight and demurrage; and
- pollution claims.

**48 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, negotiable bill of lading can be liable to the holder of the original bill of lading. In most circumstances the owner will demand a letter of indemnity in cases where the original bills are not presented.

**49 What are the responsibilities and liabilities of the shipper?**

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

**Shipping emissions**

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

ECAs exist along certain areas of the US coast and other waters, in general up to 200 nautical miles from the coast. See: [www2.epa.gov/enforcement/marpol-annex-vi#marpol](http://www2.epa.gov/enforcement/marpol-annex-vi#marpol).

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

Ships may not use fuel oil with a sulphur content greater than 0.1 per cent m/m from 1 January 2015. There are some limited opportunities for waivers and exemptions, the use of which is strictly scrutinised. Violation of these requirements can result in civil or criminal penalties and fines.

**Jurisdiction and dispute resolution**

**52 Which courts exercise jurisdiction over maritime disputes?**

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

**Update and trends**

Due to the global collapse of the OW Bunker group in 2014, a large number of cases are now being litigated throughout the US that could affect the law of maritime liens and claims. These cases involve the interplay between maritime law and bankruptcy, maritime law and the federal interpleader statute and issues of liability for both in rem and in personam claims. Decisions of interest have begun to issue in these cases, which are ongoing.

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

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

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

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

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

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

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

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

# SEWARD & KISSEL LLP

Bruce G Paulsen  
Jeffrey M Dine

paulsen@sewkis.com  
dine@sewkis.com

One Battery Park Plaza  
New York  
NY 10004  
United States

Tel: +1 212 574 1533  
Fax: +1 212 480 8421  
[www.sewkis.com](http://www.sewkis.com)

---

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

A defendant may bring a motion to stay or dismiss an action brought in violation of a foreign arbitration or venue provision. In particular, the US Federal Arbitration Act provides a well-developed body of law for the enforcement of domestic and foreign agreements to arbitrate.

---

**Limitation periods for liability**

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

Under the general maritime law, there are no strict statutes of limitation and the doctrine of laches applies. However, courts will generally look to analogous state statutes in the district where the action is brought to see if the claim should be barred by laches. Under a laches analysis, the defendant generally must have suffered some prejudice by the failure of the plaintiff to timely make its claim. In addition, there are maritime statutory rules for bringing claims, such as the one-year limitations period under COGSA and personal injury claims generally must be brought within three years.

---

**59 May courts or arbitral tribunals extend the time limits?**

In some cases limitations periods can be extended.

---

**Miscellaneous**

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

The United States has not ratified the Maritime Labour Convention.

---

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

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

---

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

While maritime creditors' rights are described above, recently there has been an upturn in the number of bankruptcy proceedings brought by shipping companies in the United States and often bankruptcy law and maritime law come into conflict. Maritime lien claimants, whether by virtue of possession contract liens or ship mortgages, will be secured creditors in maritime bankruptcies and the rank and priority of liens should ultimately reflect maritime law, even in bankruptcy court. However, it is very important to know both areas of law and have advice in both areas before making a claim in a bankruptcy proceeding. In addition, although bankruptcy courts may sell vessels 'free and clear of liens' it is still not fully established whether foreign admiralty courts will recognise US bankruptcy court sales as admiralty sales fully cleansing the vessels of liens.

## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Equity Derivatives  
Executive Compensation & Employee Benefits  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
High-Yield Debt  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



Shipping  
ISSN 1759-0744



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law