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# Shipping

## USA

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## Law and Practice

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## Contents

<b>1. Overview</b>	<b>p.3</b>	<b>5. Maritime Labour</b>	<b>p.6</b>
1.1 Regulatory Bodies	p.3	5.1 Labour Laws and Conventions	p.6
1.2 Competition Laws and Regulation	p.3	5.2 Local Seafarers	p.6
1.3 Top Ten Flag States	p.3	5.3 Minimum Wage Requirements and Overtime	p.6
1.4 Maritime Conventions	p.3	5.4 Justified Dismissal	p.6
1.5 Classification Societies	p.3	5.5 Occupational Injuries and Insurance	p.6
1.6 Types of Registrations	p.3	5.6 Maritime Disputes	p.7
1.7 Types of Discounts	p.3	5.7 Repatriation	p.7
1.8 Citizenship Requirements for Registration	p.3	5.8 International Bargaining Forum (ITF) Agreements	p.7
1.9 Cabotage Laws	p.3		
<b>2. Ship Finance and Securities</b>	<b>p.4</b>	<b>6. Maritime Courts</b>	<b>p.7</b>
2.1 Ship Finance Centre	p.4	6.1 Courts of First Instance and Appeal	p.7
2.2 Document Registration	p.4	6.2 Determining a Maritime Dispute	p.7
2.3 Preferred Modes of Ship Finance Registrations	p.4	6.3 Arbitration and Mediation	p.7
2.4 Collateral Guarantees	p.4	6.4 Judicial Sale of Vessels	p.8
2.5 Public Registry	p.4	6.5 Execution of Foreign Resolutions	p.8
2.6 Certified Information	p.4	6.6 Order of Priority of Maritime Claims	p.8
2.7 Reflagging	p.4	6.7 Sister Ships or Vessels Owned by Affiliates	p.8
2.8 Costs of Registering a Ship Mortgage	p.4	6.8 Limitations of Liability	p.8
2.9 Multiple Mortgages	p.4	6.9 Exceptional Actions for Ending a Maritime Claim	p.9
2.10 Pledge Agreements	p.4		
2.11 Maritime Liens	p.4	<b>7. Legislation on Corporations and Tax System</b>	<b>p.9</b>
2.12 Duly Recorded Mortgages	p.5	7.1 New Corporate or Tax Legislation	p.9
		7.2 Tax System	p.9
<b>3. Government Requisition of Vessels</b>	<b>p.5</b>	7.3 Settling Matters Once a Company Ceases to Exist	p.9
3.1 Authority to Requisition Vessels	p.5	7.4 International Tax Treaties	p.9
<b>4. Capital Markets</b>	<b>p.5</b>		
4.1 Typical Means of Raising Capital	p.5		
4.2 Fleet Mortgages and Syndicated Loans	p.5		
4.3 Role of the Flag of the Vessel	p.5		
4.4 Securitisation	p.6		
4.5 Participation of Capital Markets in Shipping Transactions	p.6		

## 1. Overview

### 1.1 Regulatory Bodies

The primary regulatory bodies for maritime activities in the United States include the US Coast Guard, the Maritime Administration, and US Customs and Border Protection.

Vessel registration, mortgage recordation, safety and technical inspections are primarily the responsibility of the US Coast Guard. Registration of vessels and recordation of mortgages are handled by the US Coast Guard through the National Vessel Documentation Center (NVDC). Vessels of five net tons or more used for fishing or cabotage trade must be documented with the NVDC.

Among other things, the Maritime Administration assists with government sealift programmes and manages a reserve sealift fleet, administers certain maritime grant programmes, and manages cargo preference activities. The Maritime Administration also administers certain Jones Act waiver programmes. Maritime Administration approval is required to transfer a US-flagged vessel to foreign ownership, flag or registry.

US Customs and Border Protection is the primary regulator responsible for enforcing the Jones Act restrictions on cabotage trade and providing determinations regarding cargo compliance with the Jones Act.

### 1.2 Competition Laws and Regulation

The Shipping Act addresses antitrust issues in the maritime industry. Under the Shipping Act, the Federal Maritime Commission is tasked with oversight of ocean common carriers and preventing anti-competitive behaviour that would impact the US maritime industry. The Federal Maritime Commission can seek injunctive relief against prohibited anti-competitive acts. The US Department of Justice may also prosecute violations of US antitrust law in the maritime industry.

### 1.3 Top Ten Flag States

The United States is not within the top ten Flag States by number of vessels or gross tonnage.

### 1.4 Maritime Conventions

The IMO maintains a list of the status of ratifications of IMO conventions by state. Note that, while certain maritime conventions have not been ratified by the United States, the United States will often adopt equivalent regulations or accept and agree to a convention despite not having ratified the convention. For example, the United States has not ratified the United Nations Convention of the Law of the Sea, but the United States generally accepts and acts in accordance with the provisions of the Law of the Sea Convention. The United States has also not

ratified Annex IV of MARPOL, but has adopted equivalent regulations for the treatment and discharge of shipboard sewage.

### 1.5 Classification Societies

As of 5 April 2018, the US Coast Guard recognised the American Bureau of Shipping, DNV-GL, Lloyd's Register, Bureau Veritas, RINA, ClassNK and the Indian Register of Shipping. Note that the authorisations provided to classification societies vary and that current recognition and authorisations should be confirmed with the US Coast Guard.

### 1.6 Types of Registrations

The NVDC may endorse a US-flagged vessel for fishery, coastwise (cabotage), registry, or recreation. Additional citizenship, build, and crewing requirements apply to fishery and coastwise registration endorsements.

### 1.7 Types of Discounts

To the extent that a ship-owner earns taxable income in the United States, US-flagged vessels are subject to the accelerated cost-recovery system rules which allow owners to depreciate the vessels faster than ordinary straight-line depreciation for tax purposes.

### 1.8 Citizenship Requirements for Registration

A US-flagged vessel must be owned by a US citizen to be documented with the NVDC. However, there are different levels of citizenship with respect to certain entities and for certain trades. By way of example, a corporation seeking to register a US-flagged vessel must be formed under the laws of the US or a state thereof, its chief executive officer must be a US citizen, and no more of its directors may be non-citizens than a minority of the number needed to constitute a quorum of the board. Additional citizenship requirements apply to vessels being used for fisheries or cabotage trade.

Note that the complete rules and procedures for determining when an entity is a US citizen are voluminous and that a full analysis is beyond the scope of this summary. Each case must be looked at thoroughly and independently.

### 1.9 Cabotage Laws

The Jones Act, among other things, regulates cabotage trade within the United States. The Jones Act requires that vessels used for cabotage trade be built in the United States, be at least 75% owned by US citizens, and be US-flagged. Additionally, the Jones Act requires that the Master, officers, and 75% of the remaining crew of a vessel used for cabotage trade be US citizens.

As noted previously, the complete rules and procedures for determining compliance with the Jones Act cabotage trade restrictions are voluminous and each case must be looked at thoroughly and independently.

## 2. Ship Finance and Securities

### 2.1 Ship Finance Centre

The United States, and New York in particular, is a major ship finance centre and is a leading jurisdiction for ship-owners looking to raise capital. New York law is common in documenting ship finance transactions and select New York law firms regularly advise clients on the laws of other significant shipping jurisdictions, including the Republic of the Marshall Islands and Liberia.

### 2.2 Document Registration

With respect to US-flagged vessels, ship mortgages are required to be recorded with the NVDC. Perfection of security interests in certain other collateral common in ship finance transactions, such as certain assignments of earnings, may be accomplished by filing Uniform Commercial Code (UCC) financing statements in appropriate jurisdictions. See **2.10 Pledge Agreements** below for further discussion of perfection requirements relating to pledge agreements.

### 2.3 Preferred Modes of Ship Finance Registrations

The most common mode of ship finance registration for a US-flagged vessel is the recordation of a ship mortgage with the NVDC and the entry into a related collateral package, which may include granting a security interest in the financed vessel's earnings, insurances, charters, requisition compensation, and bank accounts. Sale and leaseback financings of US-flagged vessels are also utilised.

### 2.4 Collateral Guarantees

Ship finance transactions commonly include guarantees from a parent company (or a vessel-owning subsidiary, where the parent company is the borrower). In addition, where there are multiple vessels in a single financing, it is common for the parent company or each of the vessel-owning subsidiaries to act as guarantors or joint and several borrowers.

Regarding the security package, ship finance transactions typically also include security interests in the financed vessel's earnings, insurances, charters, and requisition compensation. Ship finance transactions also often include a share pledge over the shares in the vessel-owning subsidiary and certain bank accounts of the vessel-owning subsidiary and/or the parent company.

### 2.5 Public Registry

Potential creditors may request a Certificate of Ownership from the NVDC that evidences the existence of any liens that have been recorded against a US-flagged vessel. Generally, the only liens recorded with the NVDC are preferred mortgage liens, although US law also permits the filing of a notice of claim of lien by anyone asserting a lien against a US-flagged vessel. Note that, with the exception of ship mortgages, most maritime liens

arise by operation of law and there is no requirement that they be recorded with the NVDC.

Potential creditors may also request a lien search from the relevant jurisdiction for recorded UCC financing statements relating to any potential debtors.

### 2.6 Certified Information

The NVDC issues Abstracts of Title, Certificates of Ownership and other vessel documents in English. There may be substantial processing delays when requesting Abstracts of Title, Certificates of Ownership or other vessel documents from the NVDC, and the return of documentation evidencing that a ship mortgage over a US-flagged vessel has been recorded may take several weeks.

### 2.7 Reflagging

Vessels of at least five net tons are eligible to be reflagged under the US flag, provided the vessel is owned by a citizen of the US. There may be substantial processing delays involved with reflagging a vessel under the US flag.

### 2.8 Costs of Registering a Ship Mortgage

The NVDC charges filing fees for recording ship mortgages over US-flagged vessels. These filing fees are currently USD4.00 per page. The NVDC also currently charges USD25.00 for the issuance of an Abstract of Title and USD125.00 for issuance of a Certificate of Ownership.

### 2.9 Multiple Mortgages

US-flagged vessels may be subject to multiple ship mortgages, and second or even third mortgages over US-flagged vessels are not uncommon.

### 2.10 Pledge Agreements

Perfection of pledge agreements, such as pledges over the shares or limited liability company interests of a ship-owner debtor, are governed by the UCC. Pledges of certificated securities (such as shares in a corporation and certificated limited liability company interests that have opted into Article 8 of the UCC) are perfected by control of the share certificate or limited-liability company certificate. Pledges of uncertificated limited-liability company interests are generally perfected by filing UCC financing statements in the appropriate jurisdictions. The perfection requirements may vary depending on the location and type of collateral being pledged and any pledge agreement and underlying collateral should be reviewed individually.

### 2.11 Maritime Liens

With certain very limited exceptions, any person providing "necessaries" to a vessel on the order of the owner or a person authorised by its owner is entitled to a maritime lien claim

enforceable by a civil action in rem in the federal courts. What comprises a necessary has been the subject of extensive litigation in the courts. Obvious necessities are fuel oil and repairs, but particular contexts give rise to more esoteric issues. Litigation has taken place in the courts over whether a fish-finder on a fishing vessel is a necessary, whether a piano is a necessary on a cruise vessel and whether seismic equipment on an oil exploration vessel is a necessary. As in the case of other areas of the law, each asserted claim must be independently examined in the context in which it arises, but as a general rule the supplier of goods and services to a vessel essential for the operation and navigation of that vessel is likely to have a lien for the supply of necessities. It is important to note that, in many circumstances, the US courts will look to the law of the jurisdiction in which the claim arose to determine the existence of the lien. Hence, notwithstanding the foregoing, if the jurisdiction where fuel oil was supplied to a vessel does not grant the supplier a lien under local law, the federal courts might not recognise it.

Other liens recognised under US law include:

- those for the wages of the Master and the crew of a vessel and for any stevedore employed directly by a vessel;
- liens for damages arising out of a maritime tort;
- liens for general average; and
- liens for salvage, including contract salvage.

The maritime liens listed above will have priority over a ship mortgage, as will expenses for a vessel while in possession of a court during a foreclosure proceeding. Additionally, a lien for necessities supplied in the US has priority over the lien of a preferred mortgage on a foreign-flagged vessel.

## **2.12 Duly Recorded Mortgages**

A US-flagged vessel with an outstanding mortgage may not be sold or removed from documentation. Once the underlying debt obligation is satisfied or discharged, the mortgagee should complete and record a satisfaction of mortgage with the NVDC.

## **3. Government Requisition of Vessels**

### **3.1 Authority to Requisition Vessels**

The government has authority to requisition vessels in times of war or national emergency. Additionally, the 60 US-flagged vessels participating in the Maritime Security Program have agreements with the United States to make the vessels available as needed to the Department of Defense during war and national emergencies and are paid a stipend for participating in the programme.

## **4. Capital Markets**

### **4.1 Typical Means of Raising Capital**

Bank finance remains a common method of raising capital for ship-owners in the United States. Public company ship-owners also continue to access the public equity markets in New York to raise capital. Ship-owners also continue to raise capital via note and bond issuances.

Alternative sources of capital are playing an increasingly important role in raising capital for ship-owners, as some traditional shipping banks have exited the market or reduced their lending activity. Ship-owners are increasingly raising capital directly from private equity firms, pension funds, insurance companies or family offices. Joint ventures between private equity firms and ship-owners are another growth area.

### **4.2 Fleet Mortgages and Syndicated Loans**

Fleet mortgages are frequently used for US-flagged vessels where multiple vessels are party to the same financing. These loans are often syndicated “club” deals with two to seven lenders, although financing multiple vessels with a single lender remains common as well. In a syndicated ship finance loan, the lenders will appoint a security trustee to act as mortgagee.

### **4.3 Role of the Flag of the Vessel**

Banks will consider, among other things, the market value of a vessel and the earnings potential of a vessel when calculating the amount of debt finance to be made available to a ship-owner.

The United States government operates subsidy and cargo preference programmes, and imposes legal restrictions on foreign competition for cabotage trade. These programmes and legal restrictions can affect a US-flagged vessel's value and earnings potential. First, US-flagged vessels that are eligible for coastwise trade are the only vessels (subject to very limited exceptions) able to transport cargoes between two US ports, and vessels eligible for coastwise trade can obtain higher charter rates accordingly. Second, the United States government mandates that all military cargoes, all export import bank cargoes, and 50% of civilian agencies cargo and agricultural cargo funded by the federal government be shipped on US-flagged vessels, thereby giving US-flagged vessels preferred access to additional cargoes. Third, US-flagged vessels that participate in the Maritime Security Program are paid a stipend for participating in the programme.

Note that US-flagged vessels generally have higher operating costs than foreign-flagged vessels and the commercial decision to operate US-flagged vessels will often depend on the ability to obtain higher charter rates for coastwise trade, the ability to ship preference cargoes, or the ability to obtain a stipend for participating in the Maritime Security Program.

#### 4.4 Securitisation

Securitisation of ship finance transactions remains, for now, a small part of the US ship finance market.

#### 4.5 Participation of Capital Markets in Shipping Transactions

While the New York public equity markets remain and will continue to be a leading market for shipowners to raise capital, generally speaking, public company shipowners have suffered from low equity valuations in recent years, and it has been difficult for shipowners hoping to go public to launch a traditional IPO in the past several years. The New York public equity markets remain active for shipowners in other ways, however, and a number of shipowners have gone public with direct listings in recent years. Shipowners also continue to raise capital in the United States public markets outside of IPOs, including through bonds and follow-on equity offerings.

### 5. Maritime Labour

#### 5.1 Labour Laws and Conventions

The US has not ratified the Maritime Labour Convention (MLC). However, because US-flagged vessels that are unable to demonstrate compliance with the MLC may be subject to Port State Control (PSC) actions when engaged on international voyages to countries that have ratified the MLC, the US Coast Guard established a voluntary inspection programme for vessel-owners and operators who wish to document compliance with the MLC, with particular focus on US-flagged vessels that operate on international routes to ports of countries that are parties to the MLC: the Navigation and Vessel Inspection Circular (NVIC) No 02-13. This voluntary regime was updated by the Coast Guard's Marine Safety Information Bulletin No 001-17, advising US-flagged vessels of the 2014 Amendments to the MLC concerning financial security requirements for the repatriation of seafarers or for seafarers' costs associated with an event of injury, sickness and death in connection with their employment. Although US-flagged vessels are not subject to the MLC, there is an amalgam of common-law remedies available to seafarers, such as maintenance and cure, statutory claims such as Jones Act claims for negligence or general maritime law claims for unseaworthiness, wage and hour claims supplied by the Fair Labor Standards Act, or wrongful death claims under the Death on the High Seas Act. Additionally, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950 (1988) (LHWCA), provides causes of action to land-based workers who are injured or killed in connection with certain types of maritime employment. Likewise, the Seamen's Protection Act (46 U.S.C. § 2114), discussed further below (see Section 5.4 Justified Dismissal) and implemented via the Department of Labor through the Occupational Safety and Health Administra-

tion, contains certain whistle-blower (anti-retaliation) provisions that generally provide that employers may not discharge or otherwise retaliate against a seafarer who has filed a complaint or exercised rights provided by that statute.

#### 5.2 Local Seafarers

As noted above (see 1.9 Cabotage Laws), the Jones Act regulates cabotage trade within the United States and requires that the Master, officers, and 75% of the remaining crew of a vessel used for cabotage trade be US citizens.

#### 5.3 Minimum Wage Requirements and Overtime

The current federal minimum wage under the Fair Labor Standards Act (FLSA) is USD7.25 per hour. Employers are required to pay employees an overtime rate of one and a half times their regular rate for all hours worked in a work week in excess of 40, unless the employee is otherwise exempt from the FLSA's overtime requirements. However, the FLSA exempts "seamen" who work on foreign-flagged vessels from its minimum wage requirements, and seamen on both US- and foreign-flagged vessels are likewise exempt from the FLSA's overtime requirements.

#### 5.4 Justified Dismissal

In the absence of a contractual provision to the contrary, seafarers are typically at-will employees who may be discharged for any reason. However, the Seaman's Protection Act (46 U.S.C. § 2114) prohibits the discharge of a seafarer who in good faith has reported or is about to report a violation of a maritime safety law or regulation to the US Coast Guard (or other appropriate federal agency or department). Additionally, a seafarer may bring an action for wrongful discharge if he or she is discharged in retaliation for bringing a personal injury suit against his or her employer.

#### 5.5 Occupational Injuries and Insurance

Injured seafarers are not entitled to workers' compensation benefits under federal or state law. Instead, as previously noted above, seafarers have common-law and statutory remedies, including for negligence under the Jones Act, maintenance and cure, and unseaworthiness of the vessel. The amount of damages for such claims is not statutorily set, but instead will vary according to the facts of each case. By contrast, the LHWCA provides a statutory compensation scale depending on the type of injury (33 U.S.C. §§ 908-910). Further, individuals covered by the LHWCA may be entitled to pursue (in the alternative) compensation benefits under state statutory schemes.

Ship-owners' private insurance will typically cover liability for injuries or illness sustained by seafarers or individuals covered by the LHWCA, although the availability and level of coverage will depend upon the terms of the plan.

## 5.6 Maritime Disputes

Seafarers who are union members are subject to collective bargaining agreements, governed by US labour law, which typically set forth a process for the adjustment of labour disputes between the employee and management. If such disputes are not resolved informally through the grievance process, the parties will often proceed to binding arbitration in accordance with the procedures specified in the applicable agreement. In the absence of a collective bargaining agreement or other agreement to arbitrate, maritime claims may be brought in either state or federal courts pursuant to the “saving to suitors” clause, 28 U.S.C. § 1333. As noted in **6.1 Courts of First Instance and Appeal**, however, certain types of claims, including an in rem claim against the vessel, must be brought in a federal court, and claims for benefits under the LHWCA are heard by the federal Office of Workers’ Compensation Programs (which administers the LHWCA), although the injured worker generally retains the right to bring suit against the vessel in rem, a non-vessel third party, or against the employer itself for failure to pay compensation.

## 5.7 Repatriation

Seafarers working aboard US-flagged vessels are to be repatriated at no cost to themselves in the case of illness, injury, or abandonment, including in the event of an interlocutory sale of the vessel following an arrest or attachment. Collective bargaining agreements may provide supplementary arrangements concerning repatriation. Owners or operators of US-flagged merchant ships are responsible for the repatriation of all seafarers separated from their vessels at foreign ports for any reason (ill or injured), including stragglers, except in cases of shipwreck, desertion, or other acts of misconduct by the mariner. In the event that the vessel is unable to repatriate the seafarer, a local US consular officer will arrange the repatriation, with costs to be borne by the US government.

## 5.8 International Bargaining Forum (ITF) Agreements

International Bargaining Forum (ITF) Agreements are not used with respect to US-flagged vessels. Unions such as the Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters, AFL-CIO, and the Marine Engineers’ Beneficial Association negotiate collective bargaining agreements on behalf of professional United States merchant mariners, engineers and deck officers sailing aboard US-flagged vessels in the deep sea, Great Lakes and inland trades, and assist in referring seafarers to jobs on US-flagged vessels.

## 6. Maritime Courts

### 6.1 Courts of First Instance and Appeal

Subject-matter jurisdiction over maritime disputes is held by the federal courts of the United States. State and federal courts have concurrent jurisdiction over many matters that are not specifically in admiralty, and personal injury claims are often brought in state court. However, certain claims such as vessel arrests, ship-mortgage foreclosures and attachment proceedings that present maritime disputes must be brought in federal courts. Just as there are no specialised first instance courts specifically established for maritime matters, appeals of maritime matters in the federal system are handled by the Circuit Courts of Appeal, and (rarely and on a discretionary basis) the Supreme Court of the United States.

### 6.2 Determining a Maritime Dispute

The federal courts have original jurisdiction over any civil case of admiralty or maritime jurisdiction (saving to suitors all other remedies to which they are otherwise entitled), and permit arrest or attachment proceedings for “maritime claims” under Rule B or in personam matters, and Rule C for in rem proceedings, each contained within the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Such claims include suits to enforce a judgment of a foreign admiralty court or to obtain security in aid of arbitration. In general, maritime claims include actions under contracts with sufficient reference to maritime service or maritime transactions, see, eg, *Norfolk S. Ry. v James N. Kirby, Pty Ltd.*, 543 U.S. 14, 24, 125 S. Ct. 385, 393 (2004), and tort claims occurring on the high seas, or on the navigable waters of the United States where they bear a sufficient connection with maritime activity, see, eg, *Jerome B. Grubart, Inc. v Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S. Ct. 1043, 1048 (1995).

The federal courts are responsive to Rule B and Rule C applications, which often can proceed ex parte and on an expedited basis in connection with the arrest or attachment of a vessel. If an arrest or attachment is ordered, the owner may appear and has the right to a prompt hearing seeking relief or to vacate the arrest or other seizure. However, if the arrest is found to be valid and the owner does not post alternative security within a reasonable time, the court may order an interlocutory sale of the vessel.

### 6.3 Arbitration and Mediation

Arbitration and mediation are available as alternative sources of conflict resolution. The relevant arbitral body is the Society of Maritime Arbitrators (SMA) in New York. Houston and Miami also are looking to become centres of maritime arbitration. Many charters specifying arbitration in New York are ad hoc and do not require that arbitrators be selected from any specific arbitral body.

The SMA provides only limited administration of arbitrations, which generally proceed autonomously under the rules published by that body. The SMA is very active in promoting maritime arbitration in the US, maintaining its roster of arbitrators and in publishing panel awards, which are available on the LEXIS and Westlaw services. The SMA likewise publishes rules for confidential, voluntary and non-binding mediation proceedings, should circumstances warrant the use of that device.

#### 6.4 Judicial Sale of Vessels

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

In the event of an application for interlocutory sale, judicial input is limited to confirming that notice of the action and arrest of the vessel, as well as notice of the motion for sale, is in compliance with statutory authority and any applicable local rules of court. Although a broker may be involved or other procedures may be agreed pursuant to court order, judicial sales are otherwise conducted by the US Marshal. The Marshal will charge poundage in the amount of 3% of the first USD1,000 of proceeds and 1.5% of proceeds above that amount, and a brokerage commission may be paid if a broker is engaged for the sale. The proceeds of the sale of the vessel are paid into the registry of the court and distributed according to the rank and priority of liens subsequent to the confirmation of sale of the vessel, at which point the vessel is delivered to the buyer free and clear of liens. In general, challenges to vessel sales may proceed prior to confirmation upon grounds of fraud, collusion, or gross inadequacy of price.

#### 6.5 Execution of Foreign Resolutions

Many states have laws allowing the courts to enforce foreign money judgments through adoption of versions of the Uniform Foreign-Country Money Judgments Recognition Act. The procedures and defences can vary from state to state and as such are beyond the scope of this summary. In the absence of a statutory scheme, states will rely on the common law primarily based on principles of international comity.

With respect to arbitral awards, the US is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), as implemented by the Federal Arbitration Act, 9 U.S.C. § 201 et seq (FAA). The grounds to resist enforcement of the award are limited. As specified in the FAA, “[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” As such, the FAA incorporates only the limited enumerated exceptions or defences set forth in Article V of the New York

Convention. In the absence of such a defence, a US court “shall confirm” the award.

#### 6.6 Order of Priority of Maritime Claims

With respect to the rank and priority of claims, although it may vary 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 the 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 that arrive last in time take precedence. In practice, in distressed situations, any claimant coming after the mortgagee is unlikely to recover.

#### 6.7 Sister Ships or Vessels Owned by Affiliates

There is no associated or sister-ship arrest regime in the US. However, property of the defendant may be attached under Rule B of the Supplemental Rules and, where the defendant owns a vessel and if the requirements of Rule B are met, that vessel may be seized as part of a maritime attachment proceeding. Maritime attachment is available under Rule B where a plaintiff has a maritime claim (not necessarily a lien claim) and that plaintiff can attach property of the defendant, provided that the defendant is not found within the federal judicial district where the property is located for jurisdictional and service of process purposes. Some parties may also seek to “pierce the corporate veil” to reach associated vessels.

#### 6.8 Limitations of Liability

The US continues to apply the Limitation of Liability Act (the Limitation Act), 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 Limitation Act may be applied to a wide variety of claims but is not generally favoured by the courts, and there are different limits in cases of personal injury and death, pollution liabilities, wage claims and others. Limitation also may apply to claims brought by the US government.



Procedurally, a vessel-owner's action for limitation 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.

## **6.9 Exceptional Actions for Ending a Maritime Claim**

In addition to any procedural or substantive defences that may apply generally (such as a challenge to the subject-matter jurisdiction of the court or the sufficiency of the pleadings or evidence), statutes of limitation apply to limit actions on many species of maritime claims. For example, suits for damages for personal injury or death arising out of a maritime tort must be commenced within three years after the cause of action arose. 46 U.S.C. § 30106.

Where no statute applies, US courts apply the equitable doctrine of laches to ask whether there has been "inexcusable delay" and resulting prejudice to the party against whom the claim is brought. In making this determination, a court sitting in admiralty will often use analogous local limitation statutes as a rule of thumb. If outside of the analogous limitations period, the burden will fall on the plaintiff to show that laches does not apply. If within an analogous limitations period, a presumption of laches would not attach and the burden of showing inexcusable delay would fall on the defendant.

In maritime arrest and attachment cases, in addition to the right to seek an order vacating the seizure (see **6.2 Determining a Maritime Dispute**), a plaintiff who has proceeded with a wrongful arrest or attachment and detention of a vessel may be subject to suit and liable for damages for wrongful arrest or attachment and detention upon a showing of bad faith, malice or gross negligence.

## **7. Legislation on Corporations and Tax System**

### **7.1 New Corporate or Tax Legislation**

There have not been significant developments regarding the United States' taxation of shipping activities in 2019.

The United States imposes a flat 4% tax on a non-US corporation's US-sourced gross transportation income, which includes income from spot and time charters where the vessel carries cargo to or from a US port, to the extent such income is not considered "ECI". A non-US corporation may be eligible for a statutory exemption from this tax if it is organised in a qualifying foreign jurisdiction and satisfies certain ownership and documentation requirements.

United States persons that own foreign corporations that own vessels may be subject to certain US federal income tax consequences and filing obligations. Beginning in 2018, shipping income that was previously excluded from subpart F income of a "United States shareholder" of a "controlled foreign corporation" was subject to US taxation as "global intangible low-taxed income," or "GILTI." Earlier in 2019, the Internal Revenue Service released guidance informing taxpayer that an election could be made with respect to GILTI, which may mitigate potentially adverse US federal income tax consequences of GILTI.

### **7.2 Tax System**

United States persons, including corporations formed in the United States, are subject to US federal income tax on their worldwide income. Non-resident persons are subject to tax in the United States on their US-sourced income. Non-US corporations engaged in a shipping business may be subject to a flat 4% tax on their gross US-sourced gross transportation income.

### **7.3 Settling Matters Once a Company Ceases to Exist**

The requirements for settling matters once an entity is dissolved are governed by the laws of the jurisdiction of incorporation or organisation of the entity. The timing and requirements for dissolution of an entity vary between jurisdictions. Delaware corporations, for example, are continued for a term of three years (or any such longer period as the Delaware Court of Chancery may direct) following dissolution for the purposes of prosecuting and defending suits, disposing and conveying of property, discharging liabilities and distributing any remaining assets to the stockholders.

### **7.4 International Tax Treaties**

The United States has an extensive network of tax treaties. If a non-US corporation is not eligible for exemption from the 4% tax on US-sourced gross transportation income under section 883 of the Internal Revenue Code of 1986, as amended, it may be able to avail itself of a tax treaty to claim exemption from tax on its shipping income. Generally, if a non-United States person is claiming treaty benefits, it must satisfy one of the tests contained in that treaty's limitation on benefits article.

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**Seward & Kissel LLP** is a full-service maritime practice, and enjoys a global reputation as a “go-to” US law firm in the maritime arena. The firm’s attorneys in the maritime practice serve as trusted advisers to many of the world’s most notable public and private maritime companies, financial institutions and

other industry participants in the areas of banking and finance, capital markets, mergers and acquisitions, private equity, restructuring and insolvency, tax, litigation and regulatory, and have handled many of the world’s biggest, most complex and innovative transactions in the US and around the globe.

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# USA LAW AND PRACTICE

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