

Shipping

Contributing editor
Kevin Cooper



2019

GETTING THE DEAL THROUGH

GETTING THE
DEAL THROUGH 

Shipping 2019

Contributing editor

Kevin Cooper

MFB Solicitors

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Preface

Shipping 2019

Eleventh edition

Getting the Deal Through is delighted to publish the eleventh edition of *Shipping*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Marshall Islands and Mexico.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Kevin Cooper, of MFB Solicitors, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
June 2018

Mexico

Eduardo Corzo

Haynes and Boone

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?

Article 82 of the Mexican Navigation Law (the Navigation Law) establishes two options for the transfer of ownership under shipbuilding contracts:

- purchase agreement of a future item, in which case the shipbuilder shall provide at its own cost the materials for the construction of the ship and the ownership will be transferred to the shipowner once the construction process is finished; and
- works agreement, in which case the shipowner will provide for the materials of construction and therefore the ship will be its property since the beginning of the works.

It is more common to agree on a purchase agreement of a future item. A ship construction agreement will typically provide for transfer of ownership at the very end and upon delivery of the ship by the shipbuilder to the shipowner, once the complete purchase price is paid.

Parties may agree to change when title will pass, as a shipbuilding contract is a commercial contract in which the intent and will of the parties prevail.

A ship is considered a movable good and as such is regulated under the Navigation Law and the Federal Civil Code. A ship comprises its hull and machinery, its equipment and fixed or movable accessories that are destined permanently for navigation and ornament, constituting a universal fact (*corpora ex consentibus*) (article 78 of the Navigation Law).

The document showing ownership of a ship, a change in ownership or the creation of a lien upon it must be in the form of a public instrument granted by a Mexican notary public or public broker. If the document is executed in a foreign state, Mexican law requires legalisation at a Mexican consulate or an apostille (article 79 of the Navigation Law).

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

Under Mexican maritime law, there are no specific regulations on the matter: the parties are free to agree on the terms of the refund of the guarantees in the construction agreement or in the refund guarantee itself.

To provide more legal certainty most agreements are formalised before a notary public in order to constitute full proof and uncontested evidence in court.

The wording of the refund guarantee must be clear as to the procedure for making a claim and to collect, otherwise parties may face challenges when enforcing their rights in court.

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

If one of the parties breaches its obligation under an agreement, the other party is entitled to request a court for specific performance of its obligations, and in any case payment for lost profits and damage that the delay of performance may cause. Therefore, if a shipyard unlawfully refuses to deliver the vessel, the buyer can claim specific performance of the agreement.

According to article 96 of the Navigation Law, the shipyard has the right to retain a newly constructed vessel until the client pays all amounts due for its construction.

As a precautionary measure, a shipowner may seek a court order resolving the seizure of the newly constructed ship during the main proceedings in the dispute arising from ownership and construction contracts (articles 268 and 269 of the Navigation Law).

Self-help remedies are not available in Mexico.

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?

Liability of the shipbuilder for hidden defects of the ship will be time-barred after two years from the date these defects are discovered by the shipowner, purchaser or third party suffering the damage, but in any event cannot exceed four years as from the date of delivery under the shipbuilding contract (article 79 of the Navigation Law).

Under the Federal Civil Code, liability for hidden defects is also regulated. The general rule is that the transferor is obliged to indemnify the transferee for hidden defects of the transferred goods that make the goods inadequate for their use, and that if the transferee would have known the defects, it would have refused to purchase the goods or would have paid less for its purchase. This will apply to a purchaser from the original shipowner or a third party that has sustained damage.

The right to claim indemnity for hidden defects under the provisions of the Federal Civil Code will be time-barred after six months as from the date of the transfer or delivery of the goods (including the ship). This provision would not be applicable to hidden-defects claims between shipbuilder and shipowner, as there is a special provision in article 79 of the Navigation Law, as explained above.

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?

Mexican shipowners or operators (shipping companies) may flag and register vessels in Mexico. Article 10 of the Navigation Law classifies vessels that are eligible for registration as follows:

- by use: passenger transport, transport of cargo, fishing, sports and recreation;
- of extraordinary specialisation by reason of technology and the nature of the services rendered: construction vessels, offshore supply, oil tankers, production of hydrocarbons and related services of the industry;
- mixed use: passenger and cargo transport;
- dredging; and
- by size: major vessels (500 tonnes or above) and minor vessels (below 500 tonnes or below 15 metres in length when the tonnage units are not available).

Major vessels cannot exceed 20 years of age from date of construction, but a technical authorisation from the Mexican Maritime Authority

(the Maritime Authority) may be obtained as an exception (article 36 of the Regulations of the Navigation Law).

Vessels under construction cannot obtain the Mexican flag until construction and class are completed, but if the future owner intends to flag and register the vessel in Mexico, the construction project may be submitted for approval by the Maritime Authority (article 289 of the Regulations of the Navigation Law).

Construction agreements are registered before the Maritime Registry if the construction is in Mexico or overseas if the vessel is intended to be flagged as Mexican (article 17(iv) of the Navigation Law).

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

Mexican law requirements for the flagging and registration of vessels are very strict. Only Mexican individuals and entities may register and flag vessels with a Mexican flag, provided that the vessel is owned by such party or is under its possession pursuant to a financial lease (article 11 of the Navigation Law). Vessels cannot be registered and flagged in Mexico under a bareboat charter agreement.

Pursuant to the Mexican Foreign Investment Law, the participation of foreign investment in the capital stock of Mexican shipping companies that are engaged in the business of operating vessels in interior and cabotage navigation is restricted to 49 per cent of such capital stock.

A Mexican shipping company may operate a foreign flag vessel in Mexico, provided that a navigation permit has been previously obtained. Navigation permits are effective for a term of three months and may be renewed for additional three-month periods, provided that no navigation permit may be renewed for more than seven times, except if the relevant vessel is qualified by the Ministry of Communications and Transport (SCT) as a vessel with extraordinary specialised technical characteristics, in which case such permits may be extended at the discretion of the SCT. No other exemptions are available.

7 What are the documentary requirements for registration?

A written application request must be filed with the Maritime Authority, together with the following documents, pursuant to articles 37 and 39 of the Regulations of the Navigation Law):

- power of attorney;
- articles of incorporation and by-laws;
- document evidencing ownership of the ship, which can be in the form of a shipbuilding agreement, purchase and sale agreement, bill of sale or invoice; in Mexico, the bill of sale is most commonly used;
- in the event that the flagging and registration is not made on the 'ownership' form, but rather on the 'possession or use' form, an original of the financial lease agreement will be required, duly formalised in a public deed (meeting all requirements under Mexican law);
- statutory certificates of the ship (under current foreign flag);
- copy of the blueprints of the vessel's deck and hull;
- copy of the blueprints of the vessel's control and machine room (if applicable);
- original and apostilled or legalised deletion certificate of previous flag and any other document showing deletion of the ship in the previous ship registry of the foreign state; this requirement is usually the last to be completed; and
- payment of fees.

Note that a vessel cannot sail without a flag. Once the deletion certificate of the flag is filed with the Maritime Authority, a safe-conduct permit will be issued for a term of 25 business days, until the flagging and registration procedure is concluded, during which time the vessel may navigate. The safe-conduct may be considered as a provisional Mexican flag.

As a result of the flagging and registration filings, the Maritime Authority will order and coordinate the inspections of the ship, to confirm safety and seaworthiness. At the conclusion of the inspection process, Mexican law statutory certificates for the ship will be issued.

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

Dual registration and flagging is not permitted under Mexican law. Vessels that are located in Mexican waters must be flagged and registered in a single state, in accordance with the United Nations

Convention on the Law of the Sea. Ships must sail under the flag of one state only (article 10, final paragraph of the Navigation Law).

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

The register of ship mortgages is maintained by the National Maritime Public Registry, as a special registry for maritime matters at the SCT.

In addition, ship mortgages may also be recorded at the Sole Registry of Guarantees over Movable Assets, which is part of the Ministry of Economy.

Upon registration of the mortgage in the National Maritime Public Registry, this will provide priority against other liens (including tax credits), unsecured creditors and shall produce legal effects in relation to third parties (articles 18, 101 and 102 of the Navigation Law).

In order for a ship mortgage to be recorded at the National Maritime Public Registry, the corresponding vessel must be flagged with the Mexican flag and have a Mexican registration number or the vessel must be navigating in Mexican waters under a safe-conduct (articles 15 and 17 of the Navigation Law).

The National Maritime Public Registry contains the following information (article 17 of the Navigation Law):

- Mexican shipping companies, shipping agents and operators;
- purchase agreements, transfer, assignments, guaranties, ownership, mortgages and other encumbrances over Mexican vessels;
- bareboat charters of Mexican vessels;
- shipbuilding agreements performed within Mexico or abroad when the vessels will be flagged in Mexico;
- court orders and other administrative resolutions; and
- other contracts or documents related to vessels, maritime commerce and port activities, when the law provides for this registration formality.

Limitation of liability

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

Mexico has ratified the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976) and the 1992 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage (CLC PROT 1992), but has not ratified the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 1996 (HNS 1996) nor LLMC PROT 1996.

The persons entitled to limit liability and the claims subject to limitation are those provided in articles 1 and 2 of LLMC 1976, respectively.

Claims for oil pollution are handled according to CLC PROT 1992 and the Fund Convention 1971 and Fund PROT 1992.

The Navigation Law (articles 177 and 305) provides that all claims deriving from maritime accidents or casualties and limitation of liability will be subject to the LLMC and the CLC PROT 1992. The law also provides a special chapter regulating the limitation of liability proceedings before the federal courts.

11 What is the procedure for establishing limitation?

A claim to limit liability will commence with the submission of a brief making the request to the federal court with jurisdiction in the port in which the event occurred. If the event occurred offshore, then the competent court will be that of the jurisdiction in the next port of arrival. If the ship is prevented from arriving into port owing to the event that originates the limitation claim, then the competent court will be that with jurisdiction in the port of exit of the last voyage, or the port of destination, at the election of the plaintiff.

The statute of limitations to file a claim to limit liability is one year either from when the owner, operator or legitimate party is notified of the first claim from third parties in connection with the claim subject matter of the limitation, or the occurrence of the event that will result in the limitation claim, even when there is no claim from third parties.

Mexican law does not entitle a shipowner or salvor to plead limitation without setting up a fund. Thus article 10 of the LLMC is not applicable.

To benefit from the limitation, the fund must be constituted or guaranteed. Forms of guarantee normally accepted by Mexican courts are bonds, deposits and letters of credit.

12 In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The limitation can be broken when it is proved that the shipowner or salvor acted with negligence, bad faith or wilful misconduct when causing the marine event that is the subject matter of the limitation claim. This principle is not only embedded in article 4 of the LLMC, but also in Mexican law regulating strict liability (Federal Civil Code).

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

Mexico is not party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL 74).

The Navigation Law expressly regulates passenger transport contracts (articles 138 to 147). Generally, these provisions are inspired by PAL 74.

The liability of the carrier will be limited as follows:

- 16,000 special drawing rights (SDR) for the death of or personal injury to a passenger;
- 400 SDR for the loss of or damage to cabin luggage;
- 1400 SDR for the loss of or damage to vehicles including all luggage carried in or on the vehicle; and
- 600 SDR for the loss of or damage to luggage other than that mentioned above.

Port state control

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

The Ministry of Navy (SEMAR), through local offices of a harbour master in each Mexican port.

15 What sanctions may the port state control inspector impose?

There are many sanctions that the SEMAR may impose on shipowners and operators who breach the provisions of the Navigation Law (articles 323 to 328). These sanctions may vary depending on the materiality and recurrence of the breach. Penalty fines (monetary) are set on the basis of unit values (UVs). One UV is approximately US\$4.

Some examples are as follows:

- 50 to 1,000 UVs for:
 - Mexican shipping companies that are not incorporated as Mexican companies;
 - masters and owners that do not carry on board ship the original certificate of registration; or
 - general breaches to the Navigation Law and international maritime conventions;
- 1,000 to 10,000 UVs for:
 - masters that breach specific provisions applicable to general average;
 - shipowners and operators that fail to maintain safety and good order on board; or
 - masters and shipowners that fail to fly the flag; and
- 10,000 to 50,000 UVs for:
 - shipowners and operators that fail to have valid protection and indemnity (P&I) insurance;
 - persons that commit fraudulent acts to obtain navigation permits; or
 - ship agents or operators that fail to register with the Mexican Maritime Registry.

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

These fines and penalties can be challenged in federal administrative Courts. An *amparo* proceeding, which is a special constitutional proceeding (habeas corpus), is also available.

Classification societies

17 Which are the approved classification societies?

Classification societies approved by the Maritime Authority are those that are members of the International Association of Classification Societies.

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

Classification societies will be held liable under general rules of liability for damage caused for the acts and omissions that they may incur in the performance of their services. This liability regime will be governed by contract and by the contract rules of the Federal Civil Code.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

The SEMAR may order wreck removal when a vessel, aircraft, naval artefact, cargo or any other object is adrift and may be a risk or danger to navigation and other marine activities, the navigation communication channels and the environment (article 167 of the Navigation Law).

A shipowner or operator has the obligation to perform wreck removal within six months as of the date of the event (article 168 of the Navigation Law).

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

Mexico is a party to the following conventions:

- Convention for the Unification of Certain Rules of Law with Respect to Collision;
- International Convention on Civil Liability for Oil Pollution Damage; and
- International Convention on Salvage 1989.

Mexico is not a party to the Nairobi International Convention on the Removal of Wrecks 2007.

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?

Parties to a salvage operation are entitled to enter into salvage agreements in any form, including international industry standard forms such as the Lloyd's salvage agreement. The only limitation to the freedom of contract is not to breach the 1989 Salvage Convention.

Ship arrest

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

Mexico is not a party to the International Convention Relating to the Arrest of Sea-Going Ships 1952 or the International Convention on the Arrest of Ships 1999.

Ship arrests are regulated under the Navigation Law (articles 268 to 274).

23 In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Ship arrest is available for the following claims (article 269 of the Navigation Law):

- loss or damage caused as a result of the use of the ship;
- loss of life or personal injury caused by direct operation of a ship;
- salvage;
- environmental;
- wreck removal, refloating and recovery of a ship, including costs of maintenance of crew;
- charter parties, including bareboat charters and time-charters;
- contracts of transport of goods and passengers, bills of lading;
- loss and damage to cargo and luggage;
- general average;
- towage;
- pilotage;
- goods, materials, supplies, bunker, equipment, containers supplied to the ship or services supplied to the ship;
- construction and repair;
- fees for the use of ports, canals, docks and other facilities or navigation channels;
- wages of masters, officers, or crew;

- master's disbursements, including disbursements made by ship-
pers, charterers or agent on behalf of a ship or its owner;
- insurance premiums;
- ship agent fees;
- disputes of ownership and possession of a ship;
- disputes between co-owners of any ship as to the ownership,
possession, employment or earnings of that ship;
- mortgages and pledges; and
- purchase and sale of ships.

The arrest measure must have a direct claim over the ship or its cargo, despite the owner, charterer or affiliate company. In other words, the claim, subject matter of the arrest, must be directly related to the ship or cargo. For this reason, associated ships may not be arrested.

24 Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Mexico recognises the concept of maritime liens or privileges (articles 91, 92, 95 and 98 of the Navigation Law).

The following claims give rise to maritime liens:

- wages and other debts owed to the vessel's crew, including repa-
triation costs and health and housing contributions;
- indemnities derived from death or injuries resulting from the
exploitation of the vessel;
- rewards for rescue or salvage of the vessel;
- credits for the usage of port premises, maritime signage, naviga-
tion lanes and navigation;
- indemnities derived from damage caused by pollution result-
ing from the spill of hydrocarbons, radioactive substances, toxic,
explosive or other hazardous materials of nuclear fuel or radio-
active products or waste;
- indemnities derived from civil liability resulting from loss or mate-
rial damage caused by the exploitation of the vessel, different from
loss or damage caused by carriage, containers and personal prop-
erty of the passengers on board the vessel;
- maritime privileges derived from the most recent voyage shall be
preferred to those derived from previous voyages;
- construction and repair claims, which are extinguished when the
vessel is delivered; and
- liens over cargo for claims deriving from carriage, offload and stor-
age, wreck, salvage and general average.

The statute of limitations for maritime liens or privileges is one year from when these may be claimed.

25 What is the test for wrongful arrest?

A claim for wrongful arrest will generally be sustained when bad faith or gross negligence is demonstrated in court. A plaintiff that arrests a ship may ultimately fail to sustain its principal claim, thus the ship arrest will be released and the court will award damages to the defendant (arrestee). The test for wrongful arrest will be reviewed by the court in the final judgment.

26 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. Under Mexican law, a bunker supplier may 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 (article 269 XII of the Navigation Law). A bunker supplier will have a credit right against the contracting party of the bunker service, either the shipowner or charterer.

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

The plaintiff will be required to post a bond to guarantee damages to a defendant if the defendant can prove that the arrest was wrongful (eg, it was made in bad faith without any rights to arrest the ship). The amount of the bond is set at the discretion of the court. Later, the defendant will have the opportunity to post a counter-bond once the arrest has been carried out in order to have the ship released. Note

that all procedures before the arrest is ordered and carried out are ex parte and the defendant is not party to such procedures. A defendant's rights against a wrongful arrest are guaranteed by the bond placed by the plaintiff.

Letters of undertaking from P&I clubs may also be available, subject to the fact that such issuers are recognised and approved by the Maritime Authority.

28 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?

The claim amount and value of the vessel will be considered by the judge to determine the amount of the bond. Generally, however, the amount of the bond should correlate with the amount of the potential damage that the defendant may suffer if the arrest is wrongful.

The amount of the security may range at the court's discretion but will not exceed the total value of the ship.

29 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?

Mexican law is very formalistic, especially referring to representation and submission of evidence. Representation is in the form of a power of attorney. Foreign plaintiffs must comply with certain formalities when granting powers of attorney to be exercised in Mexico, such as specific legal language formulae, translation into Spanish, notarialisation in the country of origin, apostille or legalisation (depending on the state) and further formalisation of the power of attorney document with a Mexican notary public.

Mexico is a party to the Apostille Convention. In addition, legalisation of documents through a Mexican embassy may be undertaken.

All legal proceedings must be in writing and all documents and evidence must be submitted as original or certified true copies by a Mexican notary public. Under Mexican law all documents should be filed in Spanish or be accompanied by a Spanish translation made by a Mexican court-approved translator (a sworn public translator). Further formalities may be required when reviewing documents on a case-by-case basis.

As mentioned above, Mexican law is very formalistic, especially with regard to civil or commercial rules of procedure. When filing the arrest application all the required formalities must be satisfied. It is not possible to set the arrest procedure in motion and then complete the formalities at a later stage. The risk of doing so is to have the court dismiss the claim. No electronic filings are permitted under Mexican law.

On average, five business days are required to prepare an arrest application.

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

Once the arrest is granted, the court will communicate with the Ministry of Marine, the SCT and the chief of port to request their assistance in securing the ship. The arrest will be evidenced by a court document describing the condition and specifics of the arrest, including the location where the ship will stay and the person who will have custody of the ship. The plaintiff will have the right to appoint a person to take custody of the ship.

A depositary will be appointed by the plaintiff. Generally the depositary will be the shipowner or ship operator (defendant), who will have strict duties of care.

31 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?

Ship arrest may be requested to the Mexican court before or after litigation is commenced on the merits of the principal claim. Litigation proceedings of the principal claims may occur in Mexico or abroad.

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

Yes. The rules of procedure in civil or commercial disputes provide other forms of interim measures and injunctions to obtain security (article 1168 of the Code of Commerce), such as attachment of assets when there is justified reasons to believe that the assets to secure or guaranty payment will be hidden, fraudulently transferred, damaged or that may be insufficient to guaranty a claim. These interim measures will be granted if the plaintiff can prove to the court the test of urgency, need and of having the right to request such measure.

In addition, executive proceedings, which are special proceedings that allow a plaintiff to seize assets of the defendant at the commencement of litigation (immediately after filing a claim) may be available when the documents that are the subject matter of the claim are invested with legal formalities of executive legal actions, such as a final judgment (*res judicata*), promissory note or an acknowledgement of debt agreement duly formalised with a Mexican notary public.

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

Yes. Under the Federal Code of Civil Procedure (articles 379 to 399) orders for delivery up or preservation of evidence or property are available. These interim measures will be granted if the plaintiff can prove to the court the test of urgency, need and of having the right to request such measure.

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

Yes. Arrest, attachment order or injunction in respect of bunkers are available.

Judicial sale of vessels

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

Creditors, mortgagees and beneficiaries under guarantee trusts, whose credits are secured with the vessel.

36 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?

Creditors under ship arrests, other than mortgagees and beneficiaries under guarantee trusts, which have a special procedure for judicial sale, will have the right to commence the judicial sale proceedings as a result of a final judgment. The rules governing judicial sales are provided in the Code of Commerce (articles 1408 to 1413 for executive proceedings).

The value of the judicial sale will be based on appraisal made by an independent third party authorised by the court. Each plaintiff and defendant will have the right to submit their appraisals for consideration of the court.

The judicial sale will be announced to the public by means of a court edict published in important newspapers and official gazettes. Judicial sales will be in the form of public auction. In each successive auction, a 10 per cent discount price will be fixed. Any surplus will be delivered to the debtor. The plaintiff is entitled to request the court that ownership of the ship be transferred to the plaintiff.

As to the enforcement of ship mortgages, the Navigation Law provides for a special chapter (article 275). The judicial sale will follow the rules of procedure established in the Code of Civil Procedure of Mexico City applicable to foreclosure of mortgage special proceedings. The judicial foreclosure procedure shall take place through a public bid; provided that the initial price of the vessel shall be that agreed by the mortgagor and the mortgagee or, in the absence of agreement, the price resulting from the appraisal submitted by the parties or by a third-party appraiser appointed by both parties or the court. Before the foreclosure procedure begins, the court shall require the issuance of an encumbrance certificate issued by the Maritime Registry and, as the case may be, the registered creditors shall be called upon so that they may exercise their rights. Once the foreclosure procedure has concluded, the vessel shall be delivered to its buyer free of any lien, subject to the

payment of the offered price, and the court shall order the formalisation of the sale in a public deed granted before a notary public or commercial broker; the Maritime Registry shall be ordered to make the relevant registrations on the vessel's maritime folio and, if the buyer is a foreign entity or individual, to proceed with the deletion of the Mexican flag and cancellation of the registration (article 275 of the Navigation Law).

Under normal circumstances the special mortgage proceeding may take anywhere from four months to one year; however, such proceeding may be extended if the debtor appeals and initiates a constitutional law suit (*amparo*), in which case such proceeding may take more than one year.

Under Mexican law there are no self-help remedies such as repossession or taking over the property upon default, therefore the mortgagee must wait until it obtains a final judgment to proceed with the sale of the vessel under a foreclosure sale in a public auction.

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

Maritime liens or privileges (as described in question 24) will have priority against the proceeds of a sale.

Ship mortgages shall rank subsequent to maritime privileges established under article 102 of the Navigation Law.

Mortgagees are privileged in the category of creditors in bankruptcy procedures only after certain constitutional labour obligations with the employees and the expenses of litigation (articles 217, 219 and 224 of the Insolvency Law of Mexico).

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

Once claims under maritime lien or privilege are time-barred (one year), the judicial sale will have full effect, extinguishing all prior liens and encumbrances on the vessel, including maritime liens, and thereby giving the purchaser clean title.

To prevent the rights of creditors under a maritime lien being affected, prior to the commencement of judicial sale the court shall order the issuance of an encumbrance certificate issued by the Maritime Registry and the registered creditors shall be called upon so that they may exercise their rights in terms of the rules of priority for creditors.

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

In Mexico a judicial sale of a vessel ordered in a foreign jurisdiction will be recognised. The foreign judgment or award ordering the judicial sale would need to be enforced in Mexico in the event that the vessel is located in Mexican territory, irrespective of the flag state. There are formal rules of procedure governing the recognition and enforcement of foreign judgments and arbitral awards (articles 1347A and 1461 of the Code of Commerce).

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

Mexico is not a party to the International Convention on Maritime Liens and Mortgages 1993.

Carriage of goods by sea and bills of lading

41 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?

Mexico is party only to the Hague-Visby Rules, which are incorporated by reference to the Navigation Law (article 134).

In addition, the Navigation Law (article 133) regulates contracts of carriage of goods by sea and bills of lading when:

- the loading or offloading port described in the bill of lading is in Mexico;
- the bill of lading includes Mexican law as governing law; and
- that an alternative port of offloading is located in Mexico.

42 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?

Mexico is party to the following international conventions:

- United Nations Convention on International Multimodal Transport of Goods (Geneva 1980), which is not yet in force;
- Convention on International Civil Aviation (Chicago Convention 1944); and
- Convention for Unification of Certain Rules of International Air Transport and Protocol (Warsaw 1929).

Rail, road, air combined and multimodal transport is regulated at a federal level by the following laws:

- Civil Aviation Law and its Regulations;
- Federal Autotransport Law and its Regulations;
- Rail Service Law and its Regulations; and
- Regulation for International Multimodal Transport.

Each of these laws regulates bills of lading. The Code of Commerce also regulates bills of lading.

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

Any of the parties to the bill of lading: shipper, carrier, consignee and endorsee or any holder of the bill of lading.

44 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 can be incorporated by reference, including the arbitration clause. It is advisable to have express language in this regard in the bill of lading document or endorsement document.

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

It is likely that a 'demise' clause or identity of carrier clause may not be found valid by a Mexican court. The reason lies in article III rule 8 of the Hague/Visby Rules, which appears to outlaw non-responsibility clauses. However, under Mexican law, parties can freely regulate their liability in contract.

46 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?

Article 21 of the Navigation Law establishes that a shipowner is presumed to be the ship operator, unless proven otherwise. Ship operators must make a written representation (and record it with the Maritime Registry) assuming such liability for the operation of the ship in order to release shipowner from such liability. If such representation is not made then the shipowner and the ship operator will be jointly liable for all obligations deriving from the operation of the ship.

When held liable under a claim for breach of a carriage contract or bill of lading, the shipowner would have to prove to the court that the breach was caused by the true operator or carrier and that shipowner is unrelated to the claim. However, bills of lading may include shipowners as carriers. The definition of 'carrier' under the Hague-Visby Rules (which are applicable in Mexico) includes the owner or charterer of the vessel. Shipowners may rely on the terms of the bill of lading even though they are not contractual carriers.

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

Deviation is considered to be lawful when saving human life and when protecting the cargo and the ship. This principle is embedded in the Hague-Visby Rules (which are applicable in Mexico).

Unjustified deviation will most certainly cause a contract breach, and may also create adverse effects in insurance, such as loss of insurance coverage (articles 198(iv) and 201 of the Navigation Law).

48 What liens can be exercised?

Creditors with a maritime lien will be entitled to foreclose, up to the value of their credits, over the vessel, cargo, freights and sub-freights (article 100 of the Navigation Law).

Creditors will have a maritime lien over goods transported by sea for claims arising from (article 98 of the Navigation Law):

- freight and accessories, including costs of loading, offloading and storage;
- removal of wreck cargo;
- rewards for salvage; and
- general average contribution.

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

The carrier will be responsible towards the shipper for any possible wrongful delivery. Thus the importance for the carrier to obtain a written acknowledgment and receipt of delivery of goods, signed by the 'apparent' consignee. Liability may be limited by contract.

Under article VI of the Hague-Visby Rules special agreements may be justified without the issuance of a bill of lading, subject to all terms, conditions and liabilities of the carrier being set forth in the agreement.

50 What are the responsibilities and liabilities of the shipper?

The shipper shall indemnify the carrier for losses, damage and costs arising from any error or inaccuracy of the information delivered by shipper to the carrier necessary to identify the goods (article 132 of the Navigation Law and article III 5 of the Hague-Visby Rules).

The shipper shall be liable for damage and expenses resulting from goods of an inflammable, explosive or dangerous nature when the carrier has not consented with knowledge of their nature (article 132 of the Navigation Law and article IV 6 of the Hague-Visby Rules).

Shipping emissions

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

Mexico has been actively exploring international action to reduce air pollution from large commercial marine ships in Mexican waters. Currently Mexico is in advanced negotiations with the United States and Canada to establish an ECA covering most of the territorial waters of the three countries, but to date there is no existing ECA in force.

Mexico is not party to Annex VI of the MARPOL, which regulates atmospheric pollution prevention caused by ships, including shipboard incineration, and the emissions of volatile organic compounds from tankers.

52 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?

According to the NOM-016-CRE-2016 the cap of sulphur content of fuel oil used by vessels (maritime diesel) in Mexican territory is 500mg/kg.

To comply with the requirements for all fuels within Mexican territory, the producer, importer, transporter, distributor and retailer shall present an annual report prepared by an expert third party to the Maritime Authority that proves that the product complies with the regulatory requirements. In the case of a breach of the obligations the authority may impose a fine between US\$67,000 and US\$680,000 (this amount may vary according to the exchange rate).

Ship recycling

53 What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

Mexico is not part of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships of 2009, but Resolution A.962(23) Guidelines on Ship Recycling are applicable on the matter; this resolution is referred to in article 681 of the Regulations of the Navigation Law.

There are only about 60 shipyards in Mexico and only a few offer ship recycling services.

Jurisdiction and dispute resolution

54 Which courts exercise jurisdiction over maritime disputes?

The Federal Courts.

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

Service of process of court proceedings in a maritime dispute will be made by letter rogatory when the defendant has its domicile outside Mexican territory. Also, process service may be performed through the ship agent of the defendant located and authorised in Mexico (article 265 of the Navigation Law).

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

No, in Mexico there is no institution specialising in maritime arbitration.

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

Mexican law specifically regulates recognition and enforcement of foreign judgments and arbitral awards. These provisions may be found in the Code of Commerce.

A foreign judgment would be recognised and enforced by the courts in Mexico without retrial or examination of the merits of the case, provided that:

- compliance with international conventions on letters rogatory;
- such judgment was not rendered as an action for a thing or action in rem;
- the court issuing the judgment is considered competent under the rules internationally accepted that are compatible with Mexican procedural laws;
- process service was made personally on the defendant;
- the judgment is a final judgment according to the laws of the foreign state;
- that the action that originated the court proceedings is not the subject matter of pending litigation in Mexico between the same parties;
- Mexican courts do not determine that the obligation to which enforcement is sought violates Mexican law or public policy; and
- the judgment fulfils the necessary requirements to be considered authentic.

As to foreign arbitral awards, Mexico is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Commerce Code incorporates the most relevant provisions of the convention together with the UNCITRAL Model Law on Arbitration.

To enforce an award, an original or certified copy of the award must be filed with the Mexican courts, along with the original document that contains the arbitral agreement. If it is not originally in Spanish, a translation from an expert witness certified by the Mexican courts must be filed as well.

58 Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Mexican law provides for an exclusive 'mutual' jurisdiction approach rather than 'asymmetric' jurisdiction. The choice of jurisdiction must be expressly agreed and must be a mutual choice between the contracting parties. Mexican law does permit plural or multiple jurisdiction clauses, whereby different forums may be mutually agreed and the plaintiff may choose freely from these multiple jurisdiction where to initiate a claim.

Mexican courts are unlikely to uphold asymmetric jurisdiction clauses. The same approach applies to arbitration agreements.

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

A defendant would have to file a defence or exception based on the non-competence of the court. This action is called 'inhibitory action' or

Update and trends

Cabotage navigation is a hot topic. Currently the operation of vessels in cabotage navigation is restricted to Mexican shipping companies.

The Mexican maritime industry has historically been protective of the national fleet and Mexican operators. Fair competition is crucial between Mexican nationals and foreign companies. Abusive, simulated or fraudulent conduct must be prevented.

Industry trends are moving to a more open market where strategic alliances between Mexican and foreign shipping companies are coming into play. Pemex contracts continue to be the most desired to employ vessels, but opportunities are growing in the private and spot markets.

The industry is slowly moving to globalisation and the legal regime is starting to be left behind.

The Mexico energy reform of offshore deep and shallow water operations is increasing demand for foreign operators and foreign flag vessels. This is the greatest challenge for the Mexican fleet industry: renovation.

'improper venue'. This motion will be filed with the competent court to request the non-competent court to decline jurisdiction.

60 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 would have to file a defence or exception based on the non-competence of the court. This action is called 'inhibitory action' or 'improper venue'. This motion will be filed with the same non-competent court to request it to decline jurisdiction.

Limitation periods for liability

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

The general statute of limitations in commercial contracts is 10 years as from the moment the obligation is due. For obligations that are not subject to a term, the specific performance of the obligation may be claimed as from the date that the creditor formally requests the debtor to pay the obligation, through a notary public, two witness or court proceedings.

The statute of limitations for strict liability (similar concept to torts) is two years as from the date of occurrence of the illicit act (article 1161(v) of the Federal Civil Code).

There are special statute of limitations provisions for different particular subject matters. In maritime law, the following special statutes of limitation shall apply:

- maritime liens or privileges: one year;
- hidden defects of the shipbuilder: two to four years;
- mortgage claims: three years;
- charter parties: one year;
- bills of lading: one year;
- passenger claims: one year;
- towage: six months;
- collision: two years;
- general average: one year; and
- insurance: two years.

62 May courts or arbitral tribunals extend the time limits?

No. Statutes of limitation may not be extended by a court or arbitral tribunal. Time limits may be interrupted in certain cases such as an express acknowledgment of debt by a debtor or a partial payment. The filing of a claim or lawsuit with a court also interrupts time limits.

Miscellaneous

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

Mexico is party to the Maritime Labour Convention and its provisions are incorporated into the Mexican Federal Labour Law in articles 187 to 214 related to seafarers.

64 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?

Under commercial contracts, parties may not generally seek relief in court based on release of obligations or early termination of contract, for changes of economic conditions or circumstances that make obligations more onerous to perform. In other words, the principle of pacta sunt servanda prevails.

However, if the parties expressly agree in the contract to a 'change of circumstances' clause, such as change in law or economic conditions, allowing them to be released from performance or to be entitled to renegotiate conditions, then such an agreement will be valid and upheld in court.

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

In June 2017, as a result of certain amendments to the Navigation Law, the regulating government authority in shipping matters is now shared between the SCT and the SEMAR.

The main purpose of the amendment is to vest the SEMAR with authority not previously held by it to regulate certain matters in the maritime industry, with a specific mandate to have full control of all of Mexico's harbour masters.

The effects of the reform have been positive, as both authorities have made regulation of the marine industry more efficient:

- the SEMAR is now considered as the main national maritime authority, but the SCT remains responsible of certain aspects of commercial navigation;
- harbour masters will retain substantially their current functions and authority, but they are controlled by the SEMAR and not by the SCT;
- the SEMAR is now responsible for the flagging and registration of vessels (including naval artifacts – eg, towed vessels and rigs), as well as for all matters pertaining to safety inspections and certification of Mexican and foreign vessels (both formerly responsibility of the SCT);
- authorisations and permits, such as temporary navigation permits, will remain with the SCT; and
- the National Maritime Public Registry remains under the SCT's control.

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