Международная Юридическая Служба

Interlegal

Shipping

F.A.Q

F.A.Q. – Shipping – Ukraine

Newbuilding contracts

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

Generally title in the ship passes from the shipbuilder to the shipowner at the moment of delivery. Another time for the title to pass can be provided for in the contract between the parties. A vessel's delivery is legally determined by the protocol of delivery and acceptance. Parties can agree that title in the ship belongs to the shipowner from the very beginning of ship construction. If the shipowner's refusal to accept the work performed has caused changes in the deadline for the acceptance of the work, it shall be considered that title in the ship was transferred to the shipowners as of the date when such transfer should have taken place.

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

Refund guarantees are not widely used in Ukraine due to the high level of formalities stipulated by the local legislation and unwillingness of banks. It is a huge problem for Ukrainian banks, shipowners and shipbuilders and they try to resolve this problem by using diverse instruments. At the same time there is no legal prohibition on issuing a valid refund guarantee.

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

The shipbuilding contract is an agreement for the construction of the res (vessel) and transfer of the work results to the shipowner. It creates the substantive ground for the shipowner to file a claim with the local courts to compel delivery of the res when the yard refuses to do so. The yard has to compensate for any damages.

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?

Where the vessel is defective, the shipbuilder bears contractual liability at the suit of the original shipowner or a customer (party to the shipbuilding contract). Product liability may be placed by the purchaser on the seller or the shipbuilder, despite the fact that the latter is not a party to the contract of sale. As a general rule, the party that suffered a loss is entitled to compensation from the offender. The person who suffered the damage will certainly prefer to claim the damages and, in some cases, it is the only possibility of being indemnified; for example, a passenger who has suffered harm to his or her health, can only bring an action against the carrier for the injury, as a contract of carriage exists between him or her and the carrier. As a buyer has a contract with a seller, or a shipbuilder, he or she may impose a contractual liability on them, even if no damage has been suffered by the buyer. In particular, he may file a claim for cancellation of the contract and the return of the vessel if the vessel's quality does not meet the standards provided in the contract or the common requirements and standards.

Ship registration and mortgages

What vessels are eligible for registration under the Ukrainian flag? Is it possible to register vessels under construction under the flag of Ukraine?

The right to sail under the flag of Ukraine belongs to any ship owned by the state of Ukraine, a Ukrainian citizen or a Ukrainian legal entity established solely by Ukrainian owners; or to any ship possessed by such persons under bareboat charter terms. Thus, if a non-resident has a share in a vessel, such vessel may not be registered in the Ukrainian Ship Registry, which is exclusively national.

Passenger ships, tankers, ships intended for transportation of hazardous cargo, tugboats (irrespective of engine power or gross tonnage); self-propelled vessels with an engine power of 55kW; and other vessels of 80 GT are eligible for registration under the flag of Ukraine. Cutters, lifeboats and other vessels that are tenders to another vessel and vessels powered by oars that are less than two-and-a-half metres long cannot fly the flag of Ukraine.

Vessels under construction may not be registered under the flag of Ukraine.

Who may apply to register a ship in Ukraine?

Ukrainian citizens and entities 100 per cent owned by Ukrainians may apply for the registration of a ship, including those acting as charterers under a bareboat charter. National law does not provide for registering a ship owned by a foreign company with Ukrainian capital, that operates mainly in Ukraine. In any case, such situation has no practical significance as Ukrainian registers are not international and, on the contrary, are considered purely national.

What are the documentary requirements for registration?

All the documents required for registration in the Shipping Register of Ukraine must be attached to the application, a template of which is approved by the Ministry of Transport and Communications (now the Ministry of Infrastructure) by its Order dated 13 December 2006 with further amendments. A special application form is approved for pleasure crafts, as well as a separate application form which is required for registration in the Shipping Book. The following documents must also be included: copies of the tonnage certificate; the certificate of seaworthiness or classification survey certificate of a vessel; a copy of the passenger certificate; the manning certificate; the civil liability insurance policy of the shipowner for damage from oil pollution under international treaties of which Ukraine is a signatory; and a document confirming the presence or absence of encumbrances. Photographs of the vessel taken from both port and starboard are to be attached. The owners must submit copies of documents showing that they legally own the ship. Registering the ship in the Shipping Book is somewhat simpler as there is no requirement for evidence of having paid mandatory fees and taxes, including a new fee imposed by the Tax Code of Ukraine (articles 231 to 239) for the first registration of a vehicle in Ukraine. To register a vessel in a bareboat charter (temporary registration), the following documents must be presented:

- a copy of the bareboat charter party;
- the shipowner's agreement for registration of the vessel;
- the permit for the registration of the vessel issued by the competent authority of the foreign state where the ship is registered; and
- the permit of the mortgagee, if the vessel is mortgaged.

Originals of these last documents must be submitted and all copies must be certified by a notary or other competent person, or by the state registration body itself.
In addition, documents must be submitted proving the identity of individuals who acquire and dispose of the vessel if she is alienated. Vessels that are not registered in the Shipping Register of Ukraine are subject to registration in the Shipping Book.

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

In Ukraine, dual registration is possible under a bareboat charter for the term of its validity, under the condition that the foreign state's legislation allows the vessel to enter more than one register. Other conditions of registration in the Ukrainian ship register (e.g. no foreign owners of the ship) must be observed. A copy of the bareboat charter party, the written consent of the shipowner and a written consent for the dual registration from the competent body in the other flag state are to be presented.

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

The State Registry of Encumbrances of Movables is maintained by the Ministry of Justice of Ukraine. This register contains the following information:

- details about the mortgagee and the mortgagors;
- grounds of origin of the encumbrance and its content;
- description of the object of mortgage;
- information about limitations on the right of the debtor to dispose of the object;
- details of the registrar; and
- the date of the state registration.

Although the vessel can be treated as immovable property in Ukraine, a maritime mortgage is registered in the State Registry of Encumbrances of Movables. Data on registered mortgages is sent to the harbour master of the port of registration.

Limitation of liability

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

The shipowner shall be liable for his obligations with all his property on which an action for recovery may be brought in accordance with the law. The liability of a shipowner shall be limited in regard to claims arising of:

- death or injury to a person onboard the vessel or loss of or damage to property onboard the vessel; and
- infringement of any right; loss of life or personal injury or damage to property whether on land or on water caused by the fault of any person on board the ship for whose act the owner is liable or, if not on board, the fault occurred in the navigation or management of the ship, or in the loading, carriage or discharge of cargo or passengers.

The liability of the carrier and the stevedore can be limited as well.

What is the procedure for establishing limitation?

If there is a claim brought before the courts or arbitration and the defendant intends to limit liability, the defendant has the right (not the obligation) to establish a liability limitation fund in accordance with the provisions of domestic law. In fact, such practice is absent in Ukraine. The defendant is obliged to provide other security for the claim by the order of the court. Thus, it is not necessary to plead limitation when setting up a liability limitation fund. The limitation fund is calculated according to the scale established by the Merchant Shipping Code of Ukraine. Its amount depends upon the vessel's capacity.

In what circumstances can the limit be broken?

The shipowner's liability shall not be limited if it is proved that the damage caused by the actions made deliberately or presumptuously by the owner personally. A limitation of liability shall not be applied in respect of the following claims:

- salvage or general average;
- crew members and other employees of the shipowner;
- wreck removal;
- damages from pollution; and
- nuclear damage.

This does not mean limitation of liability for such claims is impossible. There are some special rules of limitation of liability applicable to these claims, but the general rules of limitation of liability are inapplicable to such claims. Such a complicated structure of liability limitation is a big problem in contemporary maritime law.

What limitation regime applies in Ukraine in respect of passenger and luggage claims? Is it the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea or some other limitation regime?

Ukraine is a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the Protocol thereto of 19.11.1976. However, article 194 of the Merchant Shipping Code of Ukraine provides rules set by the Protocol of 29.03.1990. Thus, the carrier's liability for personal injury or death shall not exceed 175 000 SDR; for loss of or damage to cabin luggage - 1 800 SDR; for loss or damage to vehicles including all luggage being on it or in it, - 10 000 SDR and, in addition, 2 700 SDR per passenger in case of loss or damage to other luggage per carriage.

Port state control

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

The port state control agency is a division of the Office of the Harbour Master. The harbour master is a subordinate to the head of the On Sea and River Transport Safety State Inspection of Ukraine, who in his turn is subordinate to the Ministry of Infrastructure.

What sanctions may the port state control inspector impose?

The port state control imposes the following sanctions:
- preventing a vessel from leaving the port; and
- prohibiting the use of vessels or the performance of works that threaten life and health of people until the violations are eliminated, etc.

What is the appeal process against detention orders or fines?

The order of appeal against administrative penalties or other sanctions imposed by the port state control authorities can be divided into two main branches: administrative and court trial. Administrative procedure envisages a pleading to the harbour master. Local administrative courts are an alternative.

Classification societies

Which are the approved classification societies?

The approved classification societies are: the American Bureau of Shipping; Bureau Veritas; Det Norske Veritas Classification AS; Germanischer Lloyd; the Hellenic Register of Shipping; the Shipping Register of Ukraine; and the Russian Maritime Register of Shipping.

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

In practice Ukrainian shipping and maritime law envisages no circumstances in which a classification society is held liable for damages. In theory it may be possible to hold a classification society liable, for example, in case of fraud.

Collision, salvage, wreck removal and pollution

Can the state or local authority order wreck removal?

The Administration of Sea Ports, which is a public company subordinated to the Ministry of Infrastructure, in agreement with the interested state authorities, shall give an adequate term for wreck removal to take place. If the owner intends to raise sunken property, he or she shall inform the harbour master of the nearest port within one year from the moment the sinking took place. In cases where the sunken property does present an obstacle to merchant shipping; marine works; hydrotechnical or other works; or a threat to human life or health or the environment, the property owner shall immediately notify the nearest port about the incident and, at the port harbour master's demand, shall raise, remove or demolish said property within the term prescribed by the harbour master. If the owner does not remove the wreck, which creates direct danger to maritime safety or life and health of people or contamination of the environment the port authorities shall have the right to take all necessary measures for wreck removal immediately and for account of the owner.

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

The following international conventions are in force in Ukraine: the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78); the Protocol of 1997 to amend MARPOL 73/78; the International Convention on Maritime Search and Rescue, 1979 (SAR); and the International Rules of Preventing Collisions at Sea, 1972 (COLREG).
The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 1910 and the International Convention of Salvage, 1989 are not in force in Ukraine.

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

There are recommended local forms of salvage agreement endorsed by the Ministry of Infrastructure and the Chamber of Commerce and Industry in Ukraine. The Lloyd's standard form of salvage agreement and other standard forms of salvage agreement are acceptable. Salvage operations may be carried out by a professional salvor and a rescuer, who is effectively a volunteer. Recently the trend towards the professionalization and nationalisation of the rescue operations is becoming stronger. In section 2, part 3 of article 19 of the Law on the Sea Ports of Ukraine it is stated that the provision of rescue operations should be carried out only by public corporations.
Usually the salvor consists of a shipmaster and other crew members. If the master of the ship in distress chooses one shipmaster in particular, then this shipmaster is the main salvor, who may enlist other shipmasters' support in the rescue operation. The associate salvors must coordinate their activity with the main salvor. In Ukraine there is a public company, Maritime Accident Rescue Service, subordinated to the Ministry of Infrastructure of Ukraine.

Ship arrest

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

Ukraine acceded to the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships (Brussels, 1952) in May 2012, but there is no special procedure for arresting a foreign ship which means that foreign ships will be arrested in the same manner as any other property.
Judicial practice remains quite controversial, but there is a growing trend towards the application of the Convention by the courts.

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

A vessel in respect of which a maritime claim has arisen may be arrested only on one of the following conditions:

- a claim referred to the category of privileged claims, particularly:
  - claims arising out of labour relations, claims for reimbursing damage inflicted by injury, other impairment of health or death;
  - claims arising out of nuclear damage and pollution of the maritime environment as well as the elimination of that pollution;
  - claims regarding port and channel dues;
  - claims regarding salvage and payment of general average contribution;
  - claims for reimbursement of losses resulting from collision of vessels or from other sea casualties, or from damage to port facilities and other property located in the port as well as to navigational aids; and
  - claims for reimbursement of losses related to cargo or baggage;
  - claims based upon the vessel's registered mortgage; or
  - claims referring to the rights of vessel ownership or possession; or
- claims, that are not specified above, against the owner of the ship, liable to such a claim as of the time when the procedure on the ship's arrest commenced.

The vessel's flag or law governing the claim does not make a difference. Associated ships may be arrested in certain cases, like any other property of the defendant.

What is the test for wrongful arrest?

The person upon whose request the vessel has been arrested is liable for any losses inflicted on the vessel's owner or bareboat charterer as a result of wrongful arrest of the vessel. An arrest will be regarded as wrongful if it is an unjustified arrest or an excessive security to a maritime claim is requested.

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?

It depends on the type of charter. In the case of a voyage charter or time charter the liable party is the owner of the vessel, but in the case of a bareboat charter the liable party is the charterer. If the claim referring to the person that is the vessel's owner by the moment of origination of said claim and is responsible on this claim by the moment of a procedure connected with the vessel's arrest a vessel can be arrested. If charterer of the vessel on bareboat charter contract is liable on said claim and is the vessel's charterer or her owner by the moment of a procedure connected with her arrest vessel also can be arrested.

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

The court of law or commercial court at the place where the arrested ship is registered or located at the time of the filing of the arrest application, and the head of the Maritime Arbitration Commission may, where a vessel is arrested or delayed, request the arresting party to provide security, the amount and conditions of which are determined by the court or the head of the Maritime Arbitration Commission. In practice this happens very rarely in Ukraine, as it can be regarded as a denial of justice. However, if a decision is made that the arresting side should provide security, that security should cover all damages that may be caused to the owner of the vessel or its bareboat charter from the arbitrary arrest or excessive security of the maritime claim, for which a person claiming arrest of the vessel or extension of detention imposed earlier may be responsible. As a rule, such person shall provide security in the form of a bank guarantee.

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?

An arrested ship shall be released from arrest subject to the provision of security for the maritime claim, which is acceptable to the claimants both in form and in amount. As a general rule, the sufficient amount in this context means the amount which covers all possible claims and interest, but in any case the amount of security shall not exceed the value of the ship. The form of security may be various – cash payment to the deposit account of the court, bank guarantee etc.
In the absence of agreement between the parties in respect of the form and amount of security, the court, the commercial court or the Maritime Arbitration Commission determine the form and amount of security. In practice, it is most likely that the courts will stick to the approximate amount which includes the principal amount of claim plus possible interest and costs.
The person who provided the security for the maritime claim may at any time apply to the courts or to the Maritime Arbitration Commission with a motion for reduction, modification or revocation of security, but in practice there are not many chances that such motion shall be granted, since it may affect the position of the claimant.

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

In general, the shipowner or the person who maintains the vessel is responsible for the maintenance of the vessel under arrest.

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?

The arresting party must pursue the claim on the merits in the courts of Ukraine to arrest the vessel. As a general rule, there are no insurmountable obstacles to pursuing proceedings on the merits elsewhere after obtaining security.

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

In connection with the entry into force of the 1952 Ship Arrest Convention (the Convention) in Ukraine, the Commercial Procedure and the Code of Civil Procedure, articles 16 and 114 respectively (where the exclusive jurisdiction of the arrest institution is regulated) have been supplemented by the Law of 20 December 2011 as follows: 'Cases on the arrest of ships to secure maritime claims shall be considered by the court at the location of the seaport of Ukraine in which the ship is located, or the port of registration of the ship.'
Thus, the entry into force of the Convention in Ukraine has not caused serious legal innovations which would provide proper procedural specifics to the institute of the ship arrest for maritime claims. Therefore, in the court practice the arrest of a ship may be performed in the form of general measures to secure the claim or interim (preventive) measures, which are used in action proceedings.

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

As preventive measures the following actions are applied by Ukrainian commercial courts:
- reclaiming of evidence;
- inspection of premises in which the action relating to the infringement takes place; and
- attachment of property belonging to the person against whom preventive measures are taken, and which is in that person's or another person's possession.

The following security measures are applied, in particular:
- seizure of property or monies belonging to the defendant;
- prohibition on the defendant from performing certain actions; and
- prohibition on other persons from taking actions relating to the subject matter.

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

Arrest of bunkers is possible in Ukraine.

Judicial sale of vessels

Who can apply for judicial sale of an arrested vessel?

The following persons can apply for judicial sale of arrested vessels:
- crewman;
- salvor;
- pilot;
- port authorities;
- any person who suffered personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel; and
- any other person, who suffered tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

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?

The creditor of the owner, demise charterer, manager or operator of the vessel may initiate the forced sale of the vessel after judgment lien for the plaintiff or arbitrator's award. Prior to the forced sale of a vessel, the competent authority shall ensure notice is provided to:
- the authority in charge of the register in the state of registration;
- all holders of registered mortgages, hypothecs or charges which have not been issued to bearer;
- all holders of registered mortgages, hypothecs or charges issued to bearer and all holders of the maritime liens, provided that the competent authority conducting the forced sale receives notice of their respective claims; and
- the registered owner of the vessel.

Such notice shall be provided at least 30 days prior to the forced sale and shall contain either:
(i) the time and place of the forced sale and such particulars concerning the forced sale or the proceedings leading to the forced sale as the authority conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice; or
(ii) if the time and place of the forced sale cannot be determined with certainty, the approximate time and anticipated place of the forced sale and such particulars concerning the forced sale as the authority conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice.

If notice is provided in accordance with (ii), additional notice of the actual time and place of the forced sale shall be provided when known but, in any event, not less than seven days prior to the forced sale.
The notice shall be given in a judgment or arbitrator's award by press announcement in the central state newspaper for three consecutive days. The publication must contain an invitation for other creditors to file a claim against the vessel within 60 days from the date of the publication.
The court duty is 1 per cent of the amount of the claim.

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

The order of priority of claims is as follows:

- claims arising out of the arrest or seizure and subsequent sale of the vessel, including the claims for the upkeep of the vessel and the crew as well as wages, other sums and costs, for example, costs of repatriation and social insurance contributions payable on their behalf;
- claims for reward for the salvage of the vessel;
- claims in respect of loss of life or personal injury occurring in direct connection with the operation of the vessel;
- claims for port, canal, and other waterway dues and pilotage dues;
- claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel; and
- claims out of other registered mortgages, hypothecs or charges.

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

In the event of the forced sale of the vessel, all registered mortgages, hypothecs or charges, except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatever nature, shall cease. So, the purchaser may get clean title to the vessel, if he does not assume some encumbrances or if the holders of these encumbrances do not agree to this act. The costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel shall be paid. The balance of the proceeds shall be distributed in accordance with the respective claims. Upon satisfaction of all claimants the residue of the proceeds, if any, shall be paid to the owner.

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

The judicial sale of a vessel in a foreign jurisdiction is recognised in Ukraine.

Is Ukraine a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Ukraine signed the International Convention on Maritime Liens and Mortgages 1993 on 22 November 2002.

Carriage of goods by sea and bills of lading

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

The Hague Rules, Hague-Visby Rules, Hamburg Rules and Rotterdam Rules are not ratified by Ukraine, but the regulations of the Hague Rules are implemented in Ukrainian maritime law without ratification. Carriage covers the period from the time when the goods are loaded on board up to the time when they are discharged.

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?

There are no laws in force in respect of carriage under multimodal bill of lading. However, combined transport and multimodal bill of lading have fairly good usage in practice. The Association of International Forwarders of Ukraine has been a national member of the International Federation of Freight Forwarders Associations (FIATA) since 1994, and the members of this association may use combined transport bill of lading and other FIATA forms.

Who has title to sue on a bill of lading?

The cargo shall be delivered at the port of destination:

- on producing of a straight bill of lading – to the consignee indicated in the bill of lading or to the person by whom it was endorsed;
- on production of an order bill of lading – to the shipper or the consignee, depending on whose order it was made ('to order of a shipper' or 'to order of a consignee') and, if the said bill of lading contains an endorsement, to the last person endorsed, or to the holder of the said bill of lading with the last blank endorsement; or
- on production of a bearer bill of lading – to the bearer of the said bill of lading.

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

The terms of the contract not included in the bill of lading shall be binding on a consignee if there is a note in the bill of lading referring to a document wherein they are included. Thus, when the consignee and shipper or charterer is not the same person, the terms of charter are not binding on the consignee. But if in the bill of lading there is a note referring to the charter party, then, the charter party terms are considered incorporated. The more general the character of the note in the bill of lading, the narrower is the range of the charter party terms that can be incorporated into the bill of lading. A note such as 'all other terms – in compliance with charter party' is a note of the most general character. If some term in the charter party does not make sense in the context of the bill of lading, then this term is to be considered as unincorporated into the bill of lading.
If the content of the arbitration clause in the charter party does not envisage consideration of disputes under the bill of lading, it cannot be incorporated; if not, it can be incorporated in the bill and it is binding on third parties.

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

The demise clause and identity-of-carrier clause are not recognised or binding.

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

The shipowner is not liable for cargo damage where he is not the carrier under bill of lading and he cannot rely on its terms. The shipowner is liable for cargo damage if he is guilty of trespass or if the shipowner is liable on the claim of recourse.

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

Any deviation of the vessel from the planned route with the purpose of saving life, vessels or cargoes at sea and, similarly any other reasonable deviation (if it has not been caused by wrongful actions of the carrier), shall not be considered a violation of the contract.

What liens can be exercised?

The carrier is at liberty not to deliver the cargo until payment is received or secured. The carrier shall retain the right of lien on the cargo if he deposits the cargo in a warehouse not belonging to the consignee, provided the carrier informs the warehouse owner of the said right.

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

If the value of cargo has not been declared and included in the bill of lading, the reimbursement for a missing or damaged unit of cargo shall not exceed 666.67 units of account or 2 units of account per kilogram of gross mass of the missing, damaged or spoiled cargo, whichever sum is greater.

What are the responsibilities and liabilities of the shipper?

Among the most important responsibilities and liabilities of the shipper are complete and distinct marking, proper packing of cargo requiring care and packing for safe delivery to the receiver of cargo. The shipper has to sign and hand in all necessary documents when transferring the cargo to the carrier. These documents must contain all data necessary to issue the bill of lading or other document providing the receipt of cargo for carriage. The shipper shall be liable to the carrier for any consequences that arise out of incorrect or incomplete data entered in said documents. The shipper shall, in a timely manner, pass to the carrier all the documents related to cargo as required by the port, customs, sanitary and other administrative rules. The shipper shall be liable to the carrier for any losses caused by untimely transfer, incorrectness or incompleteness of these documents. Timely loading of cargo is one of the most important duties of the shipper. Delay of the vessel for completion of cargo loading entails demurrage, and completing the loading prior to expiry of lay time entails dispatch as an award to the shipper. If loading the vessel continues past the expiration of the demurrage time, the shipper has to recover the losses incurred by the carrier, and the carrier may send the vessel to the sea even if unavailable cargo is not loaded on board for reasons not dependent on the carrier, who preserves his right to receive the freight in full. Usually the shipper has to advance the charter freight.

Shipping emissions

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

In the territorial waters of Ukraine, there are three specific areas aiming at the:

- prevention of marine oil pollution;
- prevention of pollution by noxious liquid substances carried in bulk; and
- prevention of marine pollution by waste materials.

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 current MARPOL Annex VI, Regulation 14 (1.2), the content of sulphur in bunker fuel shall not exceed 3.5 per cent m/m as from 1 January 2012, with further reduction to 0.5 per cent by 2020. Ukraine intends to gain EU membership, therefore it aspires to implement domestic requirements which correspond with the Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC. Unfortunately, the standards established by this Directive have not yet been met by Ukraine. Nevertheless, Ukrainian legislation imposes liability, including criminal liability, for air pollution if it has caused a danger to the life or health of people or has caused environmental damage. There is also an administrative responsibility for a breach of the duty to register in the ship's documents operations involving harmful substances. Civil legislation generally deals with environmental protection matters and particularly liabilities in tort.

Jurisdiction and dispute resolution

Which courts exercise jurisdiction over maritime disputes?

Commercial courts and courts of general jurisdiction are the state courts that exercise jurisdiction over maritime disputes.

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

The Law on International Private Law, Commercial Procedural Code, and the Civil Procedural Code contain the rules that govern service of court proceedings on a defendant located outside Ukraine. In general, it is impossible to file a claim on a defendant located out of the jurisdiction, unless he has trade representation, immovable assets or movable property on the territory of Ukraine.

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

The Maritime Arbitration Commission at the Chamber of Commerce and Industry of Ukraine is a domestic arbitral institution with a panel of arbitrators specialising in maritime arbitration.

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

Ukraine is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. The UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 is the basis of the Law on International Commercial Arbitration of 24 February 1994. The Rules of the International Commercial Arbitration Court and Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry are annexes to this Law. Ukraine is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965. According to their regulations and the regulations of Ukrainian domestic legislation, a judgment creditor can enforce a foreign judgment in Ukraine. Bilateral treaties between Ukraine and foreign countries also may be legal grounds for enforcement. The enforcement of a foreign judgment may be implemented within three years from the date the judgment came in force.

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

If the claimants initiate proceedings outside Ukraine in breach of a jurisdiction clause, the defendants will have no remedies to stop or dismiss the matter by an action in Ukraine. But an award coming from such proceedings will rarely be enforced in Ukraine.

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?

The filing of a claim with a domestic court, when a jurisdiction clause provides another forum for hearing the case, is not considered an infringement of justice unless the defendant requests to stop or dismiss the matter because of the lack of jurisdiction of domestic court. According to the provisions of the New York Convention 1958, the court, when seized of an action in a matter in respect of which the parties have made an arbitral agreement, shall, at the request of one of the parties, refer the parties to arbitration, unless the court finds that the said agreement is null and void, inoperative or incapable of being performed.

Limitation periods for liability

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

General limitation of action is established for three years. For certain types of claims the laws establish a special limitation of action. For recovery of a forfeit (penalty, fine, etc.) or for disputes connected with freight, a one-year limitation shall be applied. The limitation period established by the law may be extended by agreement of the parties in writing.

May courts or arbitral tribunals extend the time limits?

Upon an application of the claimant, the court may consider that the limitation period was missed for good reasons. Thus, the time limits may be extended.

Miscellaneous

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

Ukraine is not a signatory of the Maritime Labour Convention, 2006. Therefore in Ukraine, ships will not be checked for compliance with the terms of this Convention. However, many shipowners whose vessels fly the Ukrainian flag voluntarily procure certification of compliance with the terms of the Convention before calling at the ports of signatories to the Convention.

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?

Despite the general principle of 'pacta sunt servanda', the principle of 'rebus sic stantibus' is enshrined in article 652 of the Civil Code of Ukraine. The essence of this principle is to ensure that a material change in the circumstances of the contract may allow the contract be amended or terminated by agreement of the parties. If such an agreement is not reached, the contract may be terminated or modified by the court. The courts are permitted to alter a contract in exceptional cases, if terminating the contract would be contrary to the public interest or would expose the parties to damages which significantly exceed the costs required to perform the unmodified contract. In any case, there should be a substantial change in conditions, namely, a change that the parties could not have foreseen and that, had those conditions been prevailing at the time, would have stopped the parties from entering into the contract in the first place. In addition, the party that requires termination of the contract in court must prove that:

- at the time of conclusion of the contract the parties proceeded from the fact that such a case would not occur;
- a change of circumstances occurred due to reasons that the interested party could not resolve with the exercise of all diligence and prudence required from him or her;
- performance of the contract would violate the property interests of the parties and would deprive the party concerned of what was expected at the conclusion of the contract; and
- from the nature of the contract or customs of business it is not intended that the risks of changing circumstances lie with the interested party.

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