

Shipping 2020

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Shipping 2020

Contributing editor**Kevin Cooper****MFB Solicitors**

Lexology Getting The Deal Through is delighted to publish the twelfth edition of *Shipping*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 a new chapter on Egypt.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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.

 **LEXOLOGY**
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NEWBUILDING CONTRACTS

Transfer of title

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

In principle, title in the ship passes from the shipbuilder to the shipowner when the shipowner takes possession of the ship and the parties agree that the title shall pass. The parties can agree on when the title shall pass. However, in order to defend against the good faith third party, transfer of title in the ship shall be done in writing and in conformity with the following conditions:

- where the transfer takes place in Taiwan, an application to local shipping administrative authority for their certification and seal; and
- where the transfer takes place in a foreign country, an application to the consular or representative office of the Republic of China (Taiwan) or any other institute empowered by the Ministry of Foreign Affairs located in that country for their certification and seal.

Refund guarantee

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

In principle, no formalities need to be complied with for the refund guarantee as long as agreed by the parties. However, if the guarantee is in the form of a bank letter, the bank may have some requirements on the formality.

Court-ordered delivery

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

The shipowner may file a claim with the court to compel delivery of the vessel. If the shipowner wins and obtains a final and binding judgment, he or she may enforce the judgment and compel delivery of the vessel. The shipowner may seek for the provisional measure (preliminary injunction) and after depositing the bond with the court, the shipowner may compel the delivery of the vessel provided that the strict requirements of provisional measure can be met.

Defects

- 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?

Where the vessel is defective and damage results, the shipowner may bring a claim against the shipbuilder on the grounds of breach of contract between the shipowner and the shipbuilder. Owing to privity of contract, the purchaser from the original shipowner and the third party who are not the parties to the shipbuilding contract may not have a claim in contract.

Under section 1, article 191-1 of the Civil Code:

The manufacturer is liable for the injury to another arising from the common use or consumption of his merchandise, unless there is no defectiveness in the production, manufacture, process, or design of the merchandise, or the injury is not caused by the defectiveness, or the manufacturer has exercised reasonable care to prevent the injury.

If the above-mentioned section 1, article 191-1 is met, the purchaser and the third party may have a claim under product liability against the shipbuilder.

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 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?

Vessels that are defined under the Law of Ships are eligible for registration under the flag of the Republic of China (Taiwan). It is possible to register a mortgage on vessels under construction. It is not practical to register a vessel under construction under the flag of the Republic of China (Taiwan).

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

Under section 2, article 5 of the Law of Ships, a ship may be applied for registering as a Republic of China-flagged ship under any one of the following conditions, so anyone who meets the requirements stated in the following conditions may apply:

- the ship is owned by the Republic of China government;
- the ship is owned by a Republic of China national; or
- the ship is owned by a company that is established under the Republic of China laws with a principal office in the Republic of China and meets the following requirement (as the case may be):

- where the company is an unlimited company, all shareholders of the company are Republic of China nationals;
- where the company is a limited company, at least half of the company's capital is owned by Republic of China nationals, and the director authorised to represent the company is a Republic of China national;
- where the company is a joint company, all shareholders with unlimited liabilities are Republic of China nationals; or
- where the company is a company limited by shares, the chairman of the board and at least half of the directors are Republic of China nationals, and at least half of the capital is owned by Republic of China nationals; or
- the ship is owned by a juristic entity, which is established under the Republic of China laws, with its main office in the Republic of China and at least two-thirds of its members and its statutory representative are Republic of China nationals.

Documentary requirements

7 | What are the documentary requirements for registration?

The following documents are required for registration:

- application form;
- documents evidencing the cause of registration;
- registration of certificate of former registration, if any;
- documentary proof, if the cause of registration involves any third person; and
- documentary proof of registration as to the right of the obligor.

The last two points may not be required if the application for registration is based on an enforceable judgment.

Dual registration

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

In principle, dual registration and flagging out are not allowed in Taiwan.

Mortgage register

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

The Maritime and Port Bureau (MPB) of the Ministry of Transportation and Communications maintains the register of mortgages of ships.

The information in the register of ship mortgages includes, among others:

- the basic information of the ship (eg, name);
- the basic information of the mortgagee and the mortgagor (eg, name and contact details); and
- the amount of the debt, date of repayment, interest, payment date of interest, ranking of the mortgage, former registered mortgage, etc.

LIMITATION OF LIABILITY

Regime

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

Taiwan is not a party to the Convention on Limitation of Liability for Maritime Claims 1976. Taiwan has its own maritime legislation (the Maritime Act (MA)), which has combined several international conventions.

Shipowner's limitation

Under article 21 of the MA, the liability of a shipowner is limited to an amount equal to the value of the ship, the freight and other accessories of the particular voyage in respect of the following claims:

- claims in respect of the loss of life, personal injury or loss of or damage to property, occurring on board or which directly resulted from the operation of the ship or salvage operations;
- claims in respect of damage which is the result of infringement of interests or rights caused by the operation of the ship or salvage operations; provided, however, that any damage resulting from a contractual relationship should be excluded;
- claims in respect of the removal of a sunken ship or property lost overboard; provided, however, that a reward or payment made under a contract should be excluded; and
- claims in respect of the obligations incurred for taking measures to avert or minimise the liabilities set out in above points (ii) and (iii).

However, if the sum of limitation of liability under the preceding paragraph is less than the following, the shipowner shall be liable for the deficit:

- regarding property claims, an aggregate amount of 54 special drawing rights (SDR) as defined by the International Monetary Fund for each tonne of the ship's registered gross tonnage (GT);
- regarding loss of life or personal injury claims, an aggregate amount of 162 SDR for each GT;
- where the claims in above points (ii) and (iii) occur concurrently, an aggregate amount of 162 SDR for each GT, of which a first portion amounting to 108 SDR for each GT shall be exclusively appropriated to the payment of personal claims in respect of loss of life or personal injury, and of which a second portion amounting to 54 SDR for each GT shall be appropriated to the payment of property claims; provided, however, that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank, according to rate, with the property claims for payment against the second portion of the fund; and
- the GT of a ship weighing less than 300 tonnes shall be deemed to be 300 tonnes.

The owner, charterer, manager and operator of the ship may limit their liability as mentioned above.

Package limitation

Under article 70 of the MA, where the nature or value of the cargo is fraudulently declared by the shipper at the time of shipment, neither the carrier nor the shipowner shall be liable for any damage to, or loss of, the cargo. Unless the nature and value of the cargo have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the shipowner shall be liable for any damage to or loss of the cargo in an amount exceeding 666.67 SDR per package or 2 SDR per kilogram, whichever is the higher.

Procedure

11 | What is the procedure for establishing limitation?

It is not necessary to provide a cash deposit or set up a limitation fund before asserting the limitation of liability in Taiwan.

Break of limitation

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

Shipowner's limitation

Under article 22 of the MA, the aforementioned limitation of liability does not apply to:

- obligations arising out of an intentional act or negligence of the shipowner;
- obligations arising from the contract of employment with the shipmaster, seafarers or any other personnel serving the ship;
- reward for salvage or contribution in general average;
- damage arising out of carrying toxic chemical substances or oil pollution;
- damage arising out of nuclear incidents caused by nuclear substances or nuclear waste being carried on ships; or
- claims for nuclear damage caused by nuclear ships.

Package limitation

Under article 70 of the MA, unless the nature and value of the cargo have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the shipowner shall be liable for any damage to or loss of the cargo in an amount exceeding 666.67 SDR per package or 2 SDR per kilogram, whichever is the higher. However, under section 4, article 70 of the MA, neither the carrier nor the shipowner shall be entitled to the benefit of the limitation of liability provided in section 2, article 70 of the MA if the damage or loss has resulted from an intentional act or gross negligence of the carrier or the shipowner.

Theoretically, if the above article 22 of the MA or section 4 of article 70 of the MA is met, the limitation would be broken. But we seldom see the cases in which the plaintiff successfully proved the intentional act or gross negligence of the carrier or the shipowner and then broke the limitation. More cases focused on whether the value of cargo has been inserted in the bill of lading and what is the 'per package'.

Nothing will happen with the fund if the limitation of liability is broken because the current maritime legislation in Taiwan, including the MA, does not have any limitation fund mechanism.

Passenger and luggage claims

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

Taiwan is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. However, under section 1, article 81 of the MA, accident insurance for transporting passengers in the specific navigation routes and area is required; the passenger ticket shall state the amount insured and constitute part of the contract; the insurance premium shall be included in the ticket fare; and the amount insured shall be deemed as the highest amount of the damages. The specific navigation routes and areas and the amount insured referred to above are decided by the Ministry of Communications and Transportation from time to time.

PORT STATE CONTROL

Authorities

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

The Maritime and Port Bureau of the Ministry of Transportation and Communications is the main port state control agency.

Sanctions

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

Under article 92 of the Law of Ships, in the event of violation of certain inspection provisions under the Law of Ships, the shipping administration authority will impose a fine on the owner or master of a ship and order a prohibition of navigation and improvement to be made by a specified deadline. The ship may be released for sailing only after the improvement is made.

Under article 32 of the Law of Ships, for a non-Republic of China flagged ship that departs from a Republic of China international port, the master of the ship shall submit the inspection document or proof of passing inspection to the shipping administration authority of the port for examination. For a non-Republic of China flagged ship that fails to submit the inspection document or proof of passing inspection for examination or whose documents have expired, the shipping administration authority of the port may order improvement to be made by a specified deadline, and the ship shall not depart from the port before fulfilment of the order. The master of the ship who disagrees with the order for improvement or prohibition to depart from the port may appeal to the shipping administration authority of the port within five days.

Appeal

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

Unless otherwise provided by law, the person who is imposed with detention orders or fines may make an appeal in accordance with the Administrative Appeal Act, and if the person does not agree to the administration appeal decision, he or she may further file an administrative litigation to the administrative court.

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

CR Classification Society is the approved classification society in Taiwan.

Liability

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

A classification society may be held liable for breach of its contract with clients or violation of the regulations in respect of the duties (eg, survey, inspection) commissioned by the government authorities.

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

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

Yes. If a ship becomes stranded, sinks or malfunctions and drifts outside the commercial port area due to beaching or other accidents, the competent authority may order wreck removal at the expense of the shipowner. If the sunken ships, objects, flotsam, pollutants and rafts within the fishing port area endanger or could endanger voyage and anchoring of vessels entering or departing the port, or contaminate or could contaminate the fishing port area, the competent authority may order wreck removal at the expense of the shipowner.

In addition, if a ship suffers a maritime disaster or other accident that causes marine pollution or concern of pollution, the shipmaster and shipowner shall promptly adopt measures to prevent, eliminate or mitigate pollution and shall promptly notify the local navigation and aviation

competent authority, port management authority and local competent authority. For the above circumstance, the competent authority may order the adoption of necessary measures and, when necessary, the competent authority may directly adopt the measures at the expense of the shipowner, such measures including wreck removal.

International conventions

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

Taiwan is not a party to international conventions or protocols in respect of collision, wreck removal, salvage and pollution. Nevertheless, where there is a lack of applicable provisions under Taiwanese laws, government authorities and courts often refer to the relevant international conventions or protocols as standard practice.

Salvage

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

There is no mandatory local form of salvage agreement in Taiwan. The parties may negotiate and agree on their own terms and conditions. Therefore, the parties may agree to accept Lloyd's standard form of salvage agreement. Although there are no legal restrictions on who may carry out salvage operations in Taiwan, in practice most of the salvage works are done by companies that have the expertise and reputation in the market.

SHIP ARREST

International conventions

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

Taiwan is neither a party to the International Convention Relating to the Arrest of Sea-Going Ships 1952 nor a party to the International Convention on the Arrest of Ships 1999. Nevertheless, where there is a lack of applicable provisions under Taiwanese laws, courts often refer to the relevant international conventions as standard practice.

Claims

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?

There is no specific restriction on which claims allow the arrest of a vessel provided always that the debtor of the claim is the shipowner. Shipowner's creditors may arrest the shipowner's vessel if the creditors have obtained a writ of execution against the shipowner. There is no action in rem in Taiwan. People who have a maritime lien or a mortgage against the vessel and have obtained a writ of execution against the vessel may arrest the vessel.

In principle, associated ships may not be arrested.

A bareboat (demise) chartered vessel, in principle, cannot be arrested for the claim against the bareboat charterer because the bareboat charterer is not the owner of the vessel. A time-chartered vessel, in principle, cannot be arrested for a claim against a time-charterer because the time-charterer is not the owner of the vessel. However, if the shipowner and the bareboat charterer or time-charterer are co-debtor, it is possible to arrest the vessel subject to the court's discretion.

Maritime liens

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

Taiwan recognises the concept of maritime liens. Under article 24 of the Maritime Act, the claims listed hereunder may be secured by maritime liens and are entitled to a preferential right of compensation:

- claims of the shipmaster, seafarer and other members of the ship's complement that have arisen from their contracts of employment;
- claims against the shipowner in respect of loss of life or personal injury directly arising from the operation of the vessel;
- claims for salvage rewards, expenses for wreck removal and ships' contribution on general average;
- claims against the shipowner, based on tort in respect of damage to or loss of property occurring, whether on land or on water, in direct connection with the operation of the vessel; and
- harbour charges, canal and other waterway dues and pilotage dues.

Wrongful arrest

25 | What is the test for wrongful arrest?

If the arresting party intentionally or negligently arrests an irrelevant third party's ship, the third party may have a claim in tort against the arresting party for damages.

Bunker suppliers

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?

If the claim against the charterer is a claim secured by maritime liens, or if the charterer is deemed an agent of the shipowner in respect of the contract, the bunker supplier may arrest the vessel.

Security

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

Yes. In the event of provisional attachment, the court would normally order the arresting party to provide cash, a letter of undertaking or guarantee issued by an appropriate bank or insurance company in the amount of one-third of the full monetary amount of the claim. But this is still subject to the discretion of the applicable court or government authorities.

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?

In the event of provisional attachment, the court would normally order the arrested party to provide the full monetary amount of the claim in order to release the ship. The arrested party may request a review of the amount. Normally cash, a letter of undertaking or guarantee issued by an appropriate bank or insurance company may be acceptable, but this is still subject to the discretion of the applicable court or government authorities. In principle, the amount of security cannot exceed the value of the ship.

Formalities

- 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?

An original power of attorney (POA) is required for the appointment of a lawyer to make the arrest application. In principle, if the POA is issued by a foreign entity, the POA needs to be notarised and legalised. If the POA is made in a language other than Chinese, a translation is required, but the translation is usually not required to be made from a sworn public translator. The POA and other documents for arrest cannot be filed electronically.

If there is insufficient time available before filing the arrest application, the arresting party might be allowed to submit a POA without notarisation and legalisation first, and submit an original of notarised and legalised POA later. If all required documents and security are in good order, the arrest usually can be completed in one or two business days. However, all the above is still subject to the discretion of the court or government authorities.

Ship maintenance

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

In practice, the court may appoint the shipping government authority, the master of the ship or other appropriate person to maintain the vessel while under arrest. The court may order the creditor to pay the costs of the maintenance in advance.

Proceedings on the merits

- 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?

In the event of provisional attachment, the court should, upon the arrested party's motion, order the arresting party to pursue the claim on its merits within a specified period of time. In principle, the claim on its merits should be pursued in Taiwan, unless there is an arbitration contract.

Injunctions and other forms of attachment

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

In practice, provisional attachment is the most common form of attachment in respect of ship arrest. If the arresting party's claim is non-monetary, he or she may apply for provisional measure (preliminary injunction). Generally, to obtain preliminary injunction, the creditor should show impossibility or extreme difficulty to satisfy the claim by compulsory execution in the future should there be a change in the status quo of the claimed object.

Delivery up and preservation orders

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

Yes. If it is likely that evidence could be destroyed or its use in court could be difficult, or with the consent of the opposing party, a party may move the court for perpetuation of such evidence; if necessary, the party who has legal interests in ascertaining the status quo of a matter or

an object may move for expert testimony, inspection or perpetuation of documentary evidence. A motion for perpetuation of evidence may be made before or after initiating a lawsuit.

Bunker arrest and attachment

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

If the bunkers belong to the shipowner, the bunkers may be arrested by the creditors of the shipowner through the provisional attachment or the final judgment.

JUDICIAL SALE OF VESSELS

Eligible applicants

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

Generally, creditors who have obtained certain kinds of writs of execution (eg, final and binding judgment, arbitral award, but not provisional attachment or injunction order) may apply for judicial sale of an arrested vessel.

Procedure

- 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?

The court would ask shipyards, shipping government authorities, the master mariners' association or other appropriate bodies to evaluate the value of the ship in order to determine the basic auction price. The court would publicise the information on the auction of the ship, and inform the relevant parties of the auction. The auction is usually carried out through a bidding process.

It might take several months for the judicial sale to be concluded following an application for sale. If the ship is not sold in the first auction and if a second (or even third) auction is necessary, it will take longer to conclude the judicial sale. The judicial sale is part of the procedure of compulsory execution. Generally, the application fee for initiating compulsory execution is 0.8 per cent of the claim or the value of the ship, depending on the nature of the claim. There will probably be other fees in relation to the judicial sale (eg, fees of evaluation and maintenance). Basically, the applicant will be requested to pay such fees in advance.

Claim priority

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

The proceeds of sale are used to pay for the fees in relation to the compulsory execution first. Generally, the remainder of the proceeds will be paid for maritime liens, then to rights of retention (in respect of claims in relation to building or repairing the ship), then to ship mortgages, and then to other creditors whose claims are not secured.

Legal effects

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

In principle, the judicial sale will serve to extinguish all prior liens and encumbrances on the vessel, including maritime liens.

Foreign sales

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

Taiwanese law is not clear on this issue; but we believe most Taiwanese courts would consider the similar requirements of reciprocity as to recognition of foreign judgments.

International conventions

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

No.

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

- 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?

Taiwan is not a party to the Hague Rules, Hague-Visby Rules, Hamburg Rules, or the Rotterdam Rules, but Taiwan's Maritime Act is partly based on these Rules, and some Taiwanese courts would refer to these Rules in their judgments as standard practice.

In principle, carriage at sea begins when the carrier loads the cargo and ends after the carrier discharges the cargo.

Multimodal carriage

- 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?

Taiwan is not a party to the international conventions in respect of road, rail or air transport. In domestic law, there is no provision specifically regulating combined transport and multimodal bill of lading. Nevertheless, under article 75 of the MA:

Where there is a consecutive carriage of cargo involving carriage by sea and other modes of carriage, the leg of the journey involving carriage by sea shall be governed by the Maritime Act. If the time of the loss of or damage to the cargo occurred could not be ascertained, it shall be presumed as occurring during the carriage by sea.

Title to sue

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

In principle, the holder of the bill of lading has title to sue on the bill of lading.

Charter parties

- 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?

Even if the bill of lading states incorporation of the terms in a charter party, many Taiwan courts still take the view that the terms in a charter party are not incorporated into the bill of lading, unless there is clear evidence indicating that the holder of the bill of lading has accepted the terms in the charter party.

Demise and identity of carrier clauses

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

Taiwanese law is not very clear on the demise clause or identity of carrier clause. In determining who should be liable as a carrier, Taiwanese courts basically would look, among other factors, at who signed the bill of lading and who gave the authority to sign it. If it is difficult to determine the identity of the carrier, some courts would assume that the shipowner is the carrier.

Shipowner liability and defences

- 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?

If it is clear from the bill of lading that the shipowner did not sign or authorise others to sign it, the shipowner might be able to avoid the liability for cargo damage under the bill of lading. However, if the identity of the carrier cannot be clarified, some Taiwanese courts tend to believe that the shipowner is the carrier, in which case the shipowner may rely on the terms of the bill of lading provided always that the court may have discretion on the validity of the terms of it.

Deviation from route

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

Deviation usually results in breach of contract of carriage. However, under article 71 of the MA, deviation in saving or attempting to save life or property at sea or for other reasonable cause shall not be deemed to be a breach of the contract of carriage, and neither the carrier nor the shipowner shall be liable for the damage or loss resulted therefrom.

Liens

- 48 | What liens can be exercised?

Basically, maritime liens can be exercised on the following objects:

- the ship, all her equipment and appurtenances, and any other residual materials;
- the freight to be earned for the voyage the maritime lien has occurred;
- compensation due to the shipowner for material damage sustained by the ship, or for loss of freight during that particular voyage;
- compensation due to the shipowner in respect of general average; and
- remuneration due to the shipowner for salvage rendered at any time before the end of the voyage.

Carriers may exercise liens on cargo to secure payment of freights and other fees.

Shipyards may exercise liens on the vessel in order to secure payment of fees in relation to building or repairing ships provided that the cargo is the property of the debtor.

Delivery without bill of lading

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

If a carrier delivers cargo without one or all bills of lading being surrendered (depending on whether the delivery is made at the port of destination or not), the carrier will probably be liable for delivery of the same cargo or liable for damages to the holder of the bill of lading. Since delivery of cargo without production of the bill of lading is likely to constitute gross negligence, the carrier is unlikely to limit such liability.

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

Under article 55 of the MA:

The shipper shall guarantee to the carrier the accuracy of the notifications of the name, quantity, the kind of packing, and the number of packages of the cargo to be delivered, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The carrier is not entitled to a defence against any holders of the bill of lading other than the shipper on account of his claim against the shipper as aforementioned.

SHIPPING EMISSIONS

Emission control areas

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

Not at present.

Sulphur cap

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?

Taiwanese law is not very clear on this issue. Nevertheless, as Taiwan is a participant in the international shipping industry, the standards set up in the relevant international rules on shipping emissions would generally be referred to and followed by the relevant entities in the shipping industry in Taiwan.

SHIP RECYCLING

Regulation and facilities

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

The Commercial Port Law and the regulations thereunder apply to ship scrapping and recycling in Taiwan. Ship scrapping and recycling require approval from the harbour authorities and should be carried out in the areas designated by the harbour authorities. Usually the harbour authority will take reference from the international ship recycling

regulations on a case-by-case basis, although the harbour authority has no obligation to follow them since Taiwan cannot sign the international ship recycling regulations will apply. It would need to be assessed on a case-by-case basis. There might be ship scrapping and recycling facilities in some shipyards in Taiwan, but there are fewer and fewer ship scrapping and recycling businesses in Taiwan owing to environmental protection and labour difficulties.

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

There is no maritime court in Taiwan. Maritime disputes may be submitted to any court in Taiwan that has jurisdiction over the dispute under the Code of Civil Procedure. A few courts in Taiwan have internal maritime divisions designated to handle maritime disputes.

Service of proceedings

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

Under section 1, article 145 of the Code of Civil Procedure, where service is to be made in a foreign country, it shall be effectuated by requesting the competent authorities of such country, or the relevant Republic of China ambassador, minister envoy or consul, or other authorised institutes or organisations in that country to make the service. In practice, the court would request the Ministry of Foreign Affairs to further make a request to the relevant Republic of China ambassador, minister envoy or consul, or other authorised institutes or organisations in that country to make the service.

Arbitration

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

There are some arbitrators specialising in maritime arbitration in Taiwan. However, there is no specific panel of maritime arbitrators in Taiwan's arbitral institutions. If there is an arbitration clause between the parties, most of the parties in Taiwan usually will choose London arbitration. If there is no arbitration clause between the parties, the parties in Taiwan usually will choose to submit the disputes to the competent court instead of referring to arbitral institution since it will be difficult for the parties to reach an arbitration agreement after the occurrence of the event. The Arbitration Association of the ROC used to add a clause in the MA to enable that the maritime cases in Taiwan shall be referred to maritime arbitration, but it failed.

Foreign judgments and arbitral awards

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

A final and binding judgment rendered by a foreign court may be recognised in Taiwan. However, this is not the case under any of the following circumstances:

- (i) where the foreign court lacks jurisdiction pursuant to Republic of China laws;
- (ii) where a default judgment is rendered against the losing defendant, except in cases where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under Republic of China laws;

- (iii) where the performance ordered by such judgment or its litigation procedure is contrary to Republic of China public policy or morals; or
- (iv) where there exists no mutual recognition between the foreign country and the Republic of China.

Regarding obstacle (iv), since Taiwan is not currently a signatory of the relevant international conventions, a Taiwan court will tend to consider that obstacle (iv) will not exist if there is no court case in that foreign country in which the recognition of a Taiwan court judgment was rejected. A foreign judgment may be enforced in Taiwan if none of the foregoing circumstances exists and the enforcement rule of the foreign judgment is granted by a Republic of China court.

A foreign arbitral award is enforceable in Taiwan if recognised by a Republic of China court rule first. A Republic of China court will refuse to recognise the arbitral award under any of the following grounds:

- recognition or enforcement of the arbitration award violates the public order or good morals of the Republic of China;
- under Republic of China laws, the subject matter of the arbitration award lacks arbitrability;
- the arbitration agreement is invalid due to the parties' incapacity in accordance with applicable laws;
- the arbitration agreement is invalid in accordance with applicable laws agreed upon by the parties, or in the absence of agreed laws, in accordance with the laws of the place of arbitration;
- one of the parties was not served with a notice of appointment of arbitrators or with the arbitration procedures, or other matters giving rise to a lack of due process;
- the arbitration award is irrelevant to the subject matter of the arbitration agreement, or beyond the scope of the arbitration agreement, unless the offending portion can be severed from the remainder of the arbitration award without affecting the remainder;
- the composition of the arbitral tribunal or the arbitration procedures are contrary to the parties' agreement; or in the absence of an agreement, contrary to the law of the place of arbitration; and
- the arbitration award has no binding force upon the parties or the award has been set aside or suspended by a competent court.

Asymmetric agreements

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

Taiwan courts' position on this issue has not been very clear up to now. We believe that asymmetric jurisdiction and arbitration agreements are likely to be valid and enforceable in Taiwan if the agreements are signed by the parties, except in the scenario of exclusive jurisdictions stipulated by law. If it is only stated on the bills of lading, the Taiwan court usually will not consider it as mutual consent and thus will resort to the relevant laws.

Breach of jurisdiction clause

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

If only Taiwanese courts have jurisdiction over the dispute and the claimant issues proceedings in a foreign country, the defendant might not be able to apply for an injunction to force the claimant to submit to the jurisdiction of Taiwan. Nevertheless, if the claimant wins the case in that foreign forum and applies for enforcement of the foreign judgment (or arbitral award) in Taiwan, the defendant may argue lack of jurisdiction of the foreign forum and request the Taiwanese court to reject the claimant's application for enforcement.

- 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?

The defendant may make an objection and request the court to dismiss the case. But in practice, some Taiwanese courts would still adjudicate the case regardless of the clause providing for a foreign court to have jurisdiction. If the parties stipulated that the arbitration shall be held in a foreign country, the court will order the claimant to seek the arbitration within a period of time, and will dismiss the domestic court proceeding if no arbitration is taken within the period. If the claimant seeks the arbitration in the foreign country accordingly, the court will wait for the result of the arbitration.

LIMITATION PERIODS FOR LIABILITY

Time limits

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

Time limits depend on the nature of the claims:

- claims for damages for loss, damage or delay in the transportation of cargo are extinguished by prescription if not exercised within one year from the date of completion of transport, or from the date when completion of the transport ought to have taken place;
- claims arising out of a collision are extinguished if not duly exercised within two years commencing from the date of the collision; and
- claims for salvage reward shall be extinguished if not duly exercised within two years commencing from the date of the completion of the salvage operation.

The time limits may not be extended or reduced by mutual agreement. Time limits may not be waived in advance either.

Court-ordered extension

- 62 | May courts or arbitral tribunals extend the time limits?

No.

MISCELLANEOUS

Maritime Labour Convention

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

Taiwan is not a party to the Maritime Labour Convention.

Relief from contractual obligations

- 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?

Yes. Under section 1, article 227-2 of the Civil Code:

If there is change of circumstances which is not predictable then after the constitution of the contract, and if the performance of the original obligation arising therefrom will become obviously unfair, the party may apply to the court for increasing or reducing his payment, or altering the original obligation.

Other noteworthy points

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

Although Taiwan is not a party to most international conventions, the maritime legislation in Taiwan is deeply influenced by international conventions. Where there is a lack of applicable provisions in Taiwanese laws, courts might refer to the relevant international conventions.



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