

Shipping 2022

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Shipping

2022

Contributing editors**Kevin Cooper and Nico Saunders****MFB Solicitors**

Lexology Getting The Deal Through is delighted to publish the 14th 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 new chapter on India.

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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 editors, Kevin Cooper and Nico Saunders of MFB Solicitors, for their continued assistance with this volume.



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Contents

Global overview	5	Malta	113
Kevin Cooper and Nico Saunders MFB Solicitors		Kevin F Dingli and Suzanne Shaw Dingli & Dingli Law Firm	
Angola	8	Mozambique	126
José Miguel Oliveira, Filipe Rocha Vieira and Ivo Calueio Mahumane VdA		Filipe Rocha Vieira, José Miguel Oliveira and Kenny Laisse VdA	
Australia	18	Netherlands	136
Geoff Farnsworth, Nathan Cecil and Joshua Clarke Holding Redlich		Charlotte van Steenderen and Arnold van Steenderen Van Steenderen MainportLawyers	
Brazil	28	New Zealand	154
Godofredo Mendes Vianna, Camila Mendes Vianna Cardoso and Lucas Leite Marques Kincaid Mendes Vianna Advogados		Simon Cartwright, Zoe Pajot and Lydia Sharpe Hesketh Henry	
Cyprus	40	Nigeria	163
Michael McBride and Yiannis Christodoulou Chrysses Demetriades & Co LLC		Funke Agbor and Chisa Uba Dentons ACAS-Law	
Ecuador	48	Norway	173
Leonidas Villagran Villagran Lara Attorneys		Anne Dahl Frisak, Geir Gustavsson, Per Aksel Hammer Krog and Sondre Vegheim Advokatfirmaet BAHR AS	
Egypt	57	Portugal	188
Hamdy Madkour and Mohamed Farid Eldib Advocates		Ana Cristina Pimentel Ana Cristina Pimentel & Associados Sociedade de Advogados SP RL	
Ghana	65	Russia	196
Akua Serwaa Asomani-Adem, Kimathi Kuenyehia, Sr, Akua Pinamang Addae and Enid Baaba Dadzie Kimathi & Partners Corporate Attorneys		Alexander Mednikov Jurinflot International Law Office	
India	76	Singapore	204
Gautam Bhatkar Phoenix Legal		Haridass Ajaib, Augustine Liew, Thomas Tan and V Hariharan Haridass Ho & Partners	
Italy	84	South Korea	217
Filippo Pellerano and Francesco Gasparini Studio Legale Mordiglia		Sung Keuk Cho and Thomas Lee Cho & Lee	
Japan	95	Taiwan	226
Shuji Yamaguchi Okabe & Yamaguchi		Daniel T H Tsai Lee and Li Attorneys at Law	
Malaysia	103	Turkey	235
Siva Kumar Kanagasabai and Trishelea Ann Sandosam SKRINE		Caglar Coskunsu, Burak Cavus and Onur Azakli Cavus & Coskunsu Law Firm	

United Arab Emirates **246**

Bashir Ahmed, Chatura Randeniya and Mevan Bandara
Afridi & Angell

United Kingdom **255**

Kevin Cooper, Nico Saunders and Kirsten Jackson
MFB Solicitors

United States **273**

Bruce G Paulsen and Brian P Maloney
Seward & Kissel LLP

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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?

The Civil Code of Ecuador provides the general rule. A construction contract can be assimilated either to a service agreement or a sale agreement depending on which party provides the materials.

Therefore, in a shipbuilding contract if the main materials are provided by the person who hires the work then the title belongs to the shipowner and not to the shipbuilder. In contrast, if the materials are provided by the shipbuilder and approved by the shipowner then the contract shall be considered as a sale contract.

Moreover, in a sale contract, title is passed to the shipowner when it is executed by public deed before a notary public and registered before the harbour master. Registration is mandatory for the transfer of property of vessels.

In addition, the Code of Commerce 2019 states that parties in a shipbuilding contract are able to agree when title will pass from the shipbuilder to the shipowner but maintaining the requirement to be by public deed. In the case of vessels with less than 10 gross register tonnage, there is no need for a public deed but the signatures in the sales contract need to be recognised before a notary.

To clarify, the law of Ecuador differentiates a public deed from a document whose signatures are recognised by a notary. In the case of a public deed, the notary public certifies that the agreement was executed before him or her and the original document is maintained in the public deed files of the notary who provides copies to the parties or any other interested person. For authentication of signatures on a contract, the contract is a private document and the notary public certifies the signatures in the document.

Refund guarantee

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

A refund guarantee is considered a financial document that can only be executed by a bank or financial institution. Anyway, the law of Ecuador does not have specific provisions for refund guarantees in a shipbuilding contract. Therefore, the terms of the agreement are to be considered as well as the terms of the issuance of the refund guarantee. Notably, general rules of the law also apply. For example, if parties amend the original contract with a new term to comply with the delivery of the vessel then the guarantee may no longer be valid.

Moreover, it is recommended that the refund guarantee be provided as unconditional, for immediate payment and with automatic renovation upon its expiry date or upon the sole petition of the

beneficiary. The idea is that the issuer shall pay the guaranteed funds under the allegation of non-compliance by the buyer and no evidence is required, nor any previous declaration of rights by a judge or an arbitration award.

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?

General rules of the law of Ecuador apply in the case of breach of a shipbuilding contract by the shipyard. Therefore, if the shipyard has not delivered the vessel at the agreed time the buyer can file a lawsuit before the Civil Court or request arbitration if this method of conflict resolution has been agreed upon, with two options:

- request termination of the contract; or
- request compliance with the agreement.

In both options, the party that claims can pursue monetary compensations.

Moreover, if the yard refuses to deliver the vessel owing to a failure of payments in relation to the shipbuilding contract, then it is understood that the shipbuilder holds a lien against the subject vessel. Also, there is a principle in the law recognising that if one party is in non-compliance the other party is justified in not continuing to comply.

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?

General rules of the law of sales contracts apply. If the vessel is defective the shipowner has the option of claiming termination of the contract or a reduction in the price. These are also known as redhibitory defects.

The test to claim under redhibitory defects includes:

- that the defective condition existed at the moment of the sale;
- that if the buyer had known about the defect then the decision would have been not to buy or to buy at a lower price as the goods sold are worthless for its natural purpose; or
- there is no information from the seller about the defective condition and the buyer being unaware of the defects.

Moreover, if the shipbuilder (the seller) was advised of the defective condition and this was not communicated to the buyer then the shipowner is able to claim damages.

These rules will also apply if the shipowner sells the vessel to a third party. Therefore, the third party may have a claim against the original shipowner.

Also, if the defective condition causes harm to any other third party, then the affected party is able to claim in delict against the shipowner, the shipbuilder and any other entity that the claimant considers liable as being the producers or entities in charge of the maintenance of a defective material in the vessel if the malfunction of such material is to be attributed as the proximate cause of the loss.

In certain cases, the contractual relations may fall under the Consumer Protection Law. This occurs when the buyer is not a merchant and when an individual buys or orders the construction of a boat for his or her personal use.

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?

According to the Ecuador Navigation Act 2021, it is possible to register shipbuilding contracts. This is the same for mortgage contracts in relation to vessels under construction, as stated in the Code of Commerce.

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

The Code of Commerce 2019 states that all persons or entities with the capacity to agree contracts may own a ship. There is no current restriction in relation to foreign nationals.

Documentary requirements

7 | What are the documentary requirements for registration?

In relation to the first-time registration of a vessel built in Ecuador, these documents shall be provided:

- certificate of property registered in the harbour master's office;
- ship construction plans approved by the National Directorate of Aquatic Spaces;
- tonnage certificate, appraisal and classification; and
- certification of representation of the buyer entity if applicable.

Moreover, if the vessel has been built outside Ecuador, a certificate of cancellation of the foreign registration and evidence of clearance of the ship from customs must be provided.

Dual registration

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

The law of Ecuador allows for bareboat charter registration. This provides special benefits for the charterer that includes the possibility of operating with the Ecuadorian flag, cabotage and tax exemptions as stated in the Strengthening and Development of Maritime Transport Act. The vessel must comply by having at least 70 per cent of the crew as locals, and other obligations of a national vessel. According to a regulation on safe manning, the master is allowed to be a foreign national.

To obtain this benefit the charterer first has to qualify and obtain approval from the maritime authorities. This information is shared with the customs service for the import process.

The bareboat charter has to be registered before the maritime authorities no more than 30 days after its execution.

Mortgage register

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

Mortgage registration is subject to Decision 487 of the Cartagena Agreement (Andean Community). Moreover, the Code of Commerce 2020 has similar provisions in regard to the mortgage of vessels. The general rule is that the registration of mortgages is valid for vessels already registered in a member country. In the case of Ecuador, the registry office is the harbour master.

The registration of mortgages is based upon the execution of a public deed by the parties involved, in which certain information has to be included as follows:

- identification of parties in the mortgage contract;
- name, number class, call sign and registration of the vessel;
- gross tonnage, maximum length and other specific characteristics of the ship;
- delimitation of the guarantee (if freights are included, etc); and
- the amount guaranteed, agreed interests, terms of payment.

LIMITATION OF LIABILITY

Regime

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

Ecuador is not a party to the Convention on Limitation of Liability for Maritime Claims 1976. The Code of Commerce 2019 includes provisions in regard to the limitation of liability for carriers, but these provisions only rely on Andean Community law and international conventions to which Ecuador is a party.

There is no general Andean Community regulation in regard to limitation of liability for maritime claims, but for multimodal transportation, there is a limitation regime.

In relation to international conventions that include specific regimes for limitation of liabilities, Ecuador is a party to the Hague-Visby Rules and the International Convention on Civil Liability for Oil Pollution Damage 1992.

Procedure

11 | What is the procedure for establishing limitation?

Ecuadorian law does not consider any specific procedure. Therefore, limitation of liability is generally to be alleged as a defence. However, there is an option to raise a demand claiming limitation of liability as an action.

Break of limitation

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

The Ecuador Code of Commerce 2019 states that limitation of liability is not to be invoked by the carrier or agents when the loss results from malice or from actions carried out in the knowledge that such damage would probably result.

Passenger and luggage claims

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

Ecuador is not a party to the Athens Convention. However, the Code of Commerce states a ceiling of 100 unified basic salaries (currently US\$40,000 per month) that the carrier can pay to claimants in the case

of death or injuries of a passenger. The same provision maintains that, despite this general rule, there is a possibility for claimants to file a lawsuit for what they consider proper compensation for damages.

PORT STATE CONTROL

Authorities

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

Under the Ecuador Navigation Act 2021, full authority regarding port state control belongs to the Ecuadorian Navy through its agency DIRNEA. The Ecuadorian Navy holds authority over coastal, flag and port state matters, and, under the Act, is considered the national maritime authority.

Sanctions

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

Ecuador is a party to the Latin American memorandum of understanding, the Latin American Agreement on Port State Control of Vessels also known as Viña del Mar Agreement. Hence, a vessel can be detained as a result of a port state control inspection. These inspections are currently carried out by inspectors from the Ministry of Transportation.

Inspections are normally based on documents and certifications to verify the normal condition of the ship, her equipment and crew. Detailed inspections are to be conducted if documents are not available or if there are grounds for the existence of risks for safety or the environment. Any non-conformities must be rectified before the vessel is allowed to sail.

Nevertheless, vessels are not to be detained if deficiencies found are not possible to be corrected in the same place. The maritime authority will, therefore, authorise the vessel to sail to any other port subject to appropriate conditions and provided it is not exposed to excessive risks regarding safety and the environment.

Also, vessels that en route to the specific port have been subject to accidental damage are not to be detained if adequate notice was given to the flag state administration and the port state control, and under specific requirements.

Appeal

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

There are no relevant provisions in the Navigation Act 2021 regarding appeals against detention orders or fines as a result of port state control inspections. Therefore, the general rules for appeals apply under the Organic Administrative Code, meaning that an appeal will be acknowledged by the Minister of Defence or their delegate. It is believed that the enactment of a regulation of the Navigation Act 2021 is pending which will include procedures for these appeals.

If a fine is the result of an investigation into a marine casualty, there is the option to make an appeal before the national or regional director of the DIRNEA, the maritime authority agency of the Ecuadorian Navy.

Also, in certain cases regarding breaches of constitutional rights, a constitutional action may be an option instead of an appeal. This action must be submitted before a judge, who can order the immediate suspension of the administrative decision.

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

According to several regulations, certifications by classification societies that are members of the International Association of Classification Societies (IACS) are accepted in Ecuador. A classification society that is not a member of IACS must register with the National Maritime Authority.

Liability

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

Under the general principles of Ecuador's civil law, a classification society can be held liable. For example, if a certification has been issued by negligent actions or omissions.

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

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

Wreck removal orders are primarily based on environmental law. The Ecuador Constitution has included the strict liability principle for pollution incidents. Therefore, the shipowner is obliged to minimise or prevent pollution that may come from wrecks.

International conventions

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

Ecuador is not a party to the Brussels Collision Convention 1910 but most of its principles have been introduced in the new Code of Commerce 2019 as in regard to apportioning liabilities, time bars (prescription), and the non-existence of legal presumptions of fault, valid also for internal waters.

Moreover, Ecuador is not a party to the Nairobi International Convention on the Removal of Wrecks 2007, but it is a party to the International Convention on Civil Liability for Oil Pollution Damage. In regard to pollution, the Constitution of Ecuador states that actions in regard to pollution have no prescription term.

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, but the Lloyd's Standard Form is normally used for international vessels. For some incidents involving towage services, confusion may arise over whether the service is merely a towage service or a salvage operation, thus involving discussions on the amount of the fees. Certain towage services have specific rates determined by port authorities.

Salvage operations are regulated under the Ecuador Navigation Act 2021 and the Code of Commerce 2019.

The Ecuador Navigation Act 2021 states that no salvage operation may be undertaken without the consent of the vessel's master or shipowner, according to the principles of international maritime law. It mentions that costs, expenses and rewards are to be paid according to a regulation that will be issued in the future. It is also to be considered that salvage operations must be authorised by a harbour master and failure to comply is a breach of law that results in a fine.

The Code of Commerce 2019 regulations are basically the principles and rules of the International Convention on Salvage, 1989.

SHIP ARREST

International conventions

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

Ecuador is a party to the International Convention on the Arrest of Ships 1999.

As a member of the Andean Community, Ecuador is subject to Community Decision 487 related to Maritime guarantees (mortgages and liens) and arrest of ships. This Decision is aligned with the provisions contained in the International Convention on Maritime Liens and Mortgages 1993, and the International Convention on Arrest of Ships 1999.

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?

A petition to arrest a ship can be filed to obtain security but only for maritime claims. For a definition of what a maritime claim is our Code of Commerce submits to community law and international conventions to which Ecuador is a party. Therefore, the International Convention on Arrest of Ships 1999 and the Andean Community Decision 487 are to be applied. Basically, both are similar in terms of provisions regarding the arrest of ships.

Sister-ships can be arrested in Ecuador in regard to maritime claims. Both the above-mentioned pieces of legislation state the general rule that with the exceptions of claims related to the possession or ownership of the vessel, an arrest can be executed of any other vessel that belongs to the person who is liable in the maritime claim, with the condition that at the moment the credit or the claim arose that person was its shipowner, demise, time or voyage charterer. This is not to be applied for claims related to ownership or possession.

In relation to associated ships, Ecuadorian legislation does not contemplate pursuing claims against the beneficial owner for private purposes. There is a trend towards this, but to date, this is only related to credits in which the state appears to be the creditor.

Maritime liens

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

Ecuador is a party to the International Convention on Maritime Liens and Mortgages, 1993. Decision 487 of the Andean Community introduces the rules of this Convention. Therefore, the concept of maritime liens or 'privilege credits' is duly recognised under Ecuadorian law.

Moreover, the Code of Commerce 2019 submits the regime for maritime liens to International Conventions to which Ecuador is party, and to Community law.

Therefore, maritime liens are, in brief, related to these claims:

- monies to be paid to the master, officers and crew, their repatriation and social insurance contributions;
- personal injury or death, on land, on board or in water in relation to the operation of the ship;
- salvage rewards;
- port, canal, pilotage fees, etc; and

- claims based on delict arising out of property loss or damage caused by the operation of the ship other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

In addition, the Code of Commerce grants the right of retention to the shipyard either for works related to shipbuilding or repairs.

Wrongful arrest

25 | What is the test for wrongful arrest?

A wrongful arrest may fall under a general rule of civil law stating that all damage that can be attributed to malice or negligence of another person must be compensated. Therefore, if a person or entity obtains the arrest of a vessel with the knowledge that its petition is not legitimate, then the affected party is able to claim damages.

Nevertheless, wrongful arrests actions are rare in Ecuador. Recently, a decision in a court of appeals (Provincial Court) confirmed a judgment by which the arresting party of a vessel was held liable to compensate cargo insurers in a subrogation action owing to cargo damage. The vessel and cargo were arrested due to an alleged credit between the arresting party and the seller of the cargo onboard, with the allegation that the seller was still the owner of the cargo.

The case on the merits against the seller of the cargo was dismissed. Hence, insurers filed a lawsuit based on the decisions of the court, and the allegation of malice and negligence from the arresting party was mentioned as the basis of the claim.

The subrogation case is still pending a decision by the National Court as a cassation claim was filed by the defendants. The action is from the cargo interest not from the vessel interests and it was based on damages due to the illegal arrest of the vessel and the cargo.

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?

It may not be the case that a bunker supplier is able to arrest a vessel in relation to contractual relations with a time charterer and not with the shipowner. It may be possible if the case is in relation to the demise charterer.

Security

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

According to Andean Community law and the Code of Commerce, judges may require security for the arrest of vessels. The amount decided by the judge.

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?

It is a principle that the amount of security shall not exceed the value of the ship. According to the law, the judge is entitled to determine the value of the security, and this amount can be changed upon request by the arrested party.

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?

A power of attorney is mandatory to file an arrest petition. The arrest petition is in effect a complaint. Therefore, the same rules as for filing complaints apply. Representation has to be justified from the beginning of the action as well as evidence of the claim.

Moreover, in Ecuador, powers of attorney for representation before courts of law must be executed before a notary public, and only in favour of a lawyer. If the power of attorney is issued outside Ecuador then there the document must be legalised and authenticated by the Ecuadorian Embassy. However, the Embassy's authentication can be skipped if the document is apostilled. Ecuador is a party to the Hague Apostille Convention.

Ecuador courts are currently very formal, and always require originals or certified copies for documents to be admitted as evidence. Translations executed abroad are recognised if they are notarised and apostilled (or legalised). Notably, local translations of documents are also admitted in court.

Ship maintenance

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

According to law, the judge appoints a judicial depository to be in charge of the vessel and formally the depository is in charge of her maintenance. This is not often the case in practice.

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?

The general rule is that if a vessel in Ecuador is subject to an arrest then the judges in Ecuador have jurisdiction over the merits of the claim, unless parties have agreed on a different jurisdiction or arbitration.

Injunctions and other forms of attachment

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

The Code for Administrative Affairs includes a provision in which the administration is able to order the arrest of a vessel as a precautionary measure. Moreover, the Ecuador Navigation Act 2021 states that a harbour master is able to request a security to guarantee third party claims regarding a marine casualty investigation before a ship sails.

Also, in relation to pollution incidents, the Ecuador Navigation Act 2021 forbids a vessel involved in a pollution incident from sailing until security is provided in the amount stated by the harbour master to guarantee payment of damages without prejudicing the payment of fines and the costs of cleaning, remediation, mitigation and compensation.

Delivery up and preservation orders

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

Yes, our Procedural Code states several options for the preservation of evidence as a preliminary action. These options are, for example, judicial inspection, depositions.

On the criminal law side, prosecutors and criminal judges are authorised to exercise urgent actions to preserve evidence of retention of property for investigative purposes.

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?

The arrest of bunkers falls under the scope of general rules for the arrest of goods stated in Ecuador's Code of Procedure. Therefore, according to the Code's specific terms, the arrest of bunkers could be an option.

JUDICIAL SALE OF VESSELS

Eligible applicants

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

Creditors in a final judgment and mortgagees are able to 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 Code of Commerce 2019 states that judicial sale of a vessel shall be conducted according to general rules of procedural law. In the case of vessels of more than 10 deadweight tonnage, the judicial sale is to be conducted as if the vessel were real estate.

The arrest is a precautionary measure. After the arrest, and if the losing party has not paid the debt, the judge will issue a new decree ordering the seizure of the vessel and the registration of the seizure.

After this, the judge will order the appraisal of the vessel by a judicial expert. Once the expert files its report the appraisal is discussed and decided in a hearing called by the judge. Once the appraisal is approved the judge names the date for the auction. All auctions, unless agreed by the parties, are to be conducted through the official website of the Council for the Judiciary.

During the first round, bids for the auction must be at least for the same amount the property was valued at, with an advance payment of at least 10 per cent. If offers include payment in instalments then the initial payment shall be 15 per cent. Offers that include payment in instalments shall not include more than five years for payments. The creditor is not obliged to execute any advance payment.

Once offers have been submitted, then the judge will call a hearing to acknowledge all offers and to evaluate them to determine the winner of the auction. After this, payment needs to be completed by the winning offer. With this requirement, the judge issues the decision that will serve as the title of property to be registered in the harbour master's register of vessels.

Claim priority

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

Interested parties must appear before the judge in the relevant lawsuit and claim their respective priorities. Priority is conferred on maritime liens in the same order as stated in the International Convention on Maritime Liens and Mortgages, 1993. Hence, those mentioned maritime liens have priority over registered mortgages, hypothecs and charges. The Code of Commerce 2019 provides a right of retention to shipyards regarding claims for construction or repair of ships that are ranked after the maritime liens and mortgages that were registered before the registration of the right of retention.

All costs related to the arrest and judicial sale of the vessel shall be paid prior to distributing the monies.

Legal effects

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

In the case of a valid judicial sale of a vessel the buyer will enjoy clean title. All mortgages, hypothecs and charges are to be considered extinct. This is the same for maritime liens. However, there is a condition that the vessel shall be in Ecuadorian waters at the moment of the judicial sale and that all steps for the judicial sale have complied with what is stated in the International Convention on Maritime Liens and Mortgages 1993 and the Code of Commerce 2019.

Foreign sales

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

A judicial sale of a vessel in a foreign jurisdiction would be recognised by maritime authorities but a previous homologation will be needed before the Ecuador judiciary.

International conventions

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

Ecuador is a party to the International Convention on Maritime Liens and Mortgages 1993. It was published on 15 April 2004 in the Official Gazette number 314.

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?

Ecuador is a party to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and protocol of signature 1924 and its Protocol 1968 (Hague-Visby Rules) but is not a party to the SDR Protocol 1979.

Moreover, the Rotterdam Rules have not been ratified by Ecuador.

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?

Yes, as Ecuador is a member of the Andean Community, its Multimodal Transportation regulations apply. These regulations state that they are binding whether multimodal transportation began or ended in a member state.

Title to sue

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

The general rule is that the lawful holder of the bill of lading has title to sue. However, other cargo interests are able to file lawsuits in delict for any alleged damages. Also, insurers can exercise subrogation actions.

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?

The Code of Commerce 2019 contemplates the possibility that the terms in a charter party are incorporated in the bill of lading. Also, a jurisdiction clause in a charter party in which terms are incorporated in the bill of lading is to be considered valid. This is a topic that has been much discussed, as in several cases judges have denied the validity of clauses in which the local party submits to a foreign law and jurisdiction and foreign arbitration application.

Demise and identity of carrier clauses

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

The general rule under the Code of Commerce 2019 is that the party executing the bill of lading as the carrier is liable. But also, the Code states that the contract of transportation can include a clause that a performing carrier will take care of the transport and the liability will be with the performing carrier. This provision is new and appears in article 1019 but it is ambiguous, generating confusion that may lead the validity of demise clauses to be rejected.

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?

Liability can be determined by way of statute or the contract. As an example, if cargo damage is a result of defective stowage then the Code of Maritime Police would be invoked because there is a provision that assigns the harbour master responsibility for proper stowage. The same applies to cargo damage owing to defects in the machinery or persons operating such machinery.

Moreover, the general principle is that according to the Code of Commerce 2019 the performing carrier is jointly liable with the contractual carrier.

Deviation from route

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

According to the Code of Commerce 2019, in a time charter the shipowner is obliged to comply with the voyages according to contractual terms and agreed navigation zones. The owners are liable for damages to the cargo if those damages are the result of a breach of its obligations. The owners are also liable for damages to the charterer due to nautical fault of the master or crew unless they arose from instructions by the charterer in relation to the commercial management or use of the ship. These rules in the case of deviation may involve voyage charter.

In regard to the liability to carriers, as stated in Rule 4.4 of the Hague-Visby Rules, there is no liability for damages that arise from a reasonable deviation or a deviation whose objective is to save lives or attempting to save lives or property.

Moreover, the charterer will be liable to pay all relevant costs upon its decision to deviate for discharge of cargo in any port or place on the vessel's route.

Liens

48 | What liens can be exercised?

Liens that can be exercised are those determined in the International Convention Maritime Liens and Mortgages 1993. Besides, the Code of Commerce 2019 determines that the shipyard has a right of retention upon the vessel for claims in regard to construction or repairs of said vessel.

In regard to cargo, freight and sub-freight the Code of Commerce 2019 includes several provisions in which the owner has the right to claim against the charter and sub-charterers for non-payment of freight by the charterer.

The first rule states that the contract will state all rights to the owner in the case of non-payment of freight. Moreover, in the case of non-compliance in the payment of freight, the owners have the option of terminating the charter and petitioning a judge for the judicial sale of the cargo to recover the freight.

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?

The Bills of Lading under Ecuador law are negotiable. There are two relevant general rules in the Ecuador Code of Commerce 2019 in regard to a carrier's obligations of delivery. First, the carrier is obliged to deliver cargo to a person determined against the receipt of the original bill of lading. Second, the carrier will be the custodian of the goods until they are delivered to the consignee.

If the bill of lading has been endorsed to a third person as a bank or other merchant and the cargo is delivered to the initial consignee without production of the original of the bill of lading, then the carriers will incur liability.

Shipper responsibilities and liabilities

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

Under the Code of Commerce, the shipper is responsible for losses sustained by the carrier or damage to the ship if the losses are the result of fault or negligence by the shipper, as in the case of dangerous cargo. If the shipper does not declare the nature of the cargo it will be liable before the carrier for any damages.

SHIPPING EMISSIONS

Emission control areas

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

Ecuador has not subscribed the Annex VI of MARPOL.

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?

There is no cap at this time.

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?

Ship recycling is regulated under the General Shipping Law 1972, which attributed authorising recycling to the previous maritime authority DIGMER. This function and others were passed to the Undersecretariat of Maritime Transportation of the Ministry of Transportation. By a resolution of 9 January 2014, the Undersecretariat of Maritime Transportation issued several rules for ship recycling.

Currently, there are two ship recycling facilities authorised to operate in Ecuador.

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

Civil judges exercise jurisdiction over private maritime disputes.

Service of proceedings

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

According to the Code of Commerce, in the case of a lawsuit filed against a shipowner whose domicile is outside Ecuador, it is possible to execute the service through its agent.

Arbitration

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

There are several arbitration centres though not specialising in maritime arbitration. The most active are the Commercial Chambers arbitration centres.

Foreign judgments and arbitral awards

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

Ecuador is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

In addition, the General Code of Procedure includes specific provisions for the recognition of foreign judgments, awards in arbitration proceedings and agreements in mediation processes.

Recognition or homologation must be performed before a panel of judges of the provincial court in the domicile of the defendant. The court will basically verify the external formalities to be considered as authentic according to Ecuador law: that the decision is final, duly translated if applicable, that service of process was adequately executed and that parties involved had the proper opportunity to exercise a defence.

Once the suit is filed, the defendant is served and opposition can be filed in five days. The decision of the Provincial Court is final.

Asymmetric agreements

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

In our opinion, asymmetric jurisdiction and arbitration agreements are valid. However, in Ecuador, there is an ongoing discussion on validity regarding submission clauses to foreign law and jurisdiction. There are several court cases deciding not to recognise these clauses as a breach of public law, but also to have other judges consider foreign jurisdiction submission as valid.

Breach of jurisdiction clause

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

Contesting jurisdiction has to be done in the same lawsuit as a defence. The judge will issue its decision in the preliminary hearing. Another remedy is to file a jurisdiction claim before the judge who holds jurisdiction. This judge will then require the initial judge to step down from the case. If the initial judge declines then the case will be decided in a provincial court.

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 defendants need to provide the allegation of lack of jurisdiction as a defence in the same lawsuit. The judge will decide on jurisdiction in the first hearing. The decision can be appealed.

LIMITATION PERIODS FOR LIABILITY

Time limits

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

According to the Code of Commerce 2019, a prescription term can be suspended if agreed upon by the person who benefits from it.

General terms are as follows:

Term	Duration of suspension
Payment of freight/demurrage	one year
Declaration of General Average (GA)	six months
Recovery of GA contribution	one year
Cargo claims under a bill of lading	one year
Collision	two years*
Claims for damages in delict by non-passengers†	four years
Other actions	two years‡

Term	Duration of suspension
Cargo claims in international multimodal transportation to/from a member of the Andean Community	nine months

- * Three years if the ship could not be detained or sued while she was in national waters
- † Injury or death cases, property damages cases
- ‡ Contractual or in delict

Court-ordered extension

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

If a claim in a lawsuit is served on process within six months of being filed then the interruption of prescription shall be considered as the moment the complaint was filed, according to the Procedural Code.

Moreover, the Code of Commerce states that prescription terms for merchants are to be counted from the date those actions or rights are able to be enforced. The understanding is that this provision relates to the contra non valentem doctrine, but there are no other provisions to apply this principle.

Basically, courts or arbitral tribunals are not authorised to extend time limits in relation to prescription unless the benefited party agrees, but are authorised to declare that terms in the specific lawsuit are not to be counted because of an agreement by the parties or a force majeure situation, so as to avert a declaration abandoning the lawsuit.

MISCELLANEOUS

Maritime Labour Convention

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

Ecuador is not a party to the Maritime Labour Convention (MLC) 2006 nor to the Work in Fishing Convention 2007. In March 2017, the Constitutional Court approved the terms of the MLC. Therefore, the Convention is pending approval by the legislature.

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?

The general rule is that a contract is law for the parties involved. Therefore, any change to contractual obligations must come via the agreement of the parties. The option in regard to a change of economic conditions or any other condition is to verify whether this situation could be considered as force majeure.

Other noteworthy points

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

Yes, related to the fishing sector, a new statute for aquaculture and fishery was introduced in 2020.

UPDATE AND TRENDS

Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The Ecuador Navigation Act 2021 was recently enacted and published in the Official Gazette on 14 June 2021. This is a fundamental change in Ecuadorian shipping law that confers the Ecuador Navy with full power as the maritime authority. The Act also brings dramatic increases in the amounts of fines related to maritime infractions.

The Act is intended to provide certainty in relation to the process of administrative investigation of maritime incidents and the appeal process. However, more developments are expected, as some provisions of the Act are to be submitted as regulations that must be enacted by the president of Ecuador.

Coronavirus

67 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The National Assembly passed the Humanitarian Aid Act. The legislation includes several provisions to mitigate negative effects due to the pandemic, such as measures related to fighting unemployment. The Act creates a new system of employment, authorises a reduction of work time of 45 per cent and earnings to be paid according to the time employed.

The Act also promotes online education within all levels of the education system, with the aim of increasing offerings from schools and universities.



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