

Shipping

Contributing editor
Kevin Cooper



2016

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Shipping 2016

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Mozambique

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Newbuilding contracts

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

It is important to note that, at this point in time, Mozambique does not have up-to-date legislation dealing specifically with shipbuilding contracts. The existing legislation, apart from being out of date as it was enacted before Mozambique's independence from Portugal in 1975, does not reflect the current international situation in the sector. The government of Mozambique is considering adopting updated legislation to reflect current international trends in the shipbuilding industry. Currently, shipbuilding contracts are regarded as mere sale and purchase agreements. Pursuant to the relevant provisions of sale and purchase agreements under Mozambican law, the principle of the private autonomy of the contracting parties is prevalent, by which the contracting parties are sovereign to negotiate and agree any provisions in the sale and purchase agreement, in conformity with the applicable laws. However, despite the principle of the private autonomy of the contracting parties, in shipbuilding contracts the title in the ship normally passes from the shipbuilder to the shipowner upon full payment.

Following the principle of the private autonomy of the contracting parties (pursuant to article 405 of the Mozambican Civil Code), parties are free to agree when the title in a ship may be transferred from the shipbuilder to shipowner.

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

In the normal course of a shipbuilding contract, a provision is made to deal specifically with the formalities to be complied with by the shipbuilder for granting the shipowner a valid refund guarantee. Furthermore, under the principle of the private autonomy of the contracting parties, the parties are sovereign to negotiate and agree whatever they may wish in that respect. Although the shipbuilding contract does not contain any provisions dealing with this particular issue, it is worth noting that, pursuant to article 921 of the Mozambican Civil Code, the guarantee is valid for a period of six months from the date of its issuance.

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

Article 756 of the Mozambican Civil Code states that any retention of a vessel without good reason is unlawful. The shipowner is legally entitled to draft and file at court a court action against the shipbuilder to claim compensation for losses sustained as a result of such unlawful refusal to deliver the vessel.

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?

First, it is important to distinguish the relationship that exists between the shipbuilder and shipowner. Under Mozambican law, when the shipowner receives a vessel from the shipbuilder that has recently been built or repaired, he or she has 30 days from the date of its delivery to notify the shipbuilder to remedy any detected defects on the vessel. In the event that the shipowner fails to do so, he or she is in agreement with the shipbuilding

or repairing. If the shipbuilder, after being duly notified by the shipowner to remedy detected defects on the vessel, fails to remedy such defects, then the shipowner is entitled to request a reduction of the agreed price or to terminate the shipbuilding or repairing contract.

Within three years from the date of detection of reported defects on the vessel, the shipowner must draft and file at court a respective court claim against the shipbuilder.

Taking into account that the relationship is established solely between the shipbuilder and the shipowner, the situation described above is the normal course of proceedings in Mozambique. Therefore, outside the contractual agreement between the shipbuilder and the shipowner, we cannot imagine a third party bringing a direct claim against either the shipbuilder or shipowner.

Ship registration and mortgages

5 What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Only vessels owned by nationals of the Republic of Mozambique (either individuals or corporate entities where 51 per cent of the shareholding structure is held by nationals) are permitted to be registered under the Mozambican flag. It is not common practice to register a vessel under construction. However, as the situation may arise and upon any specific application or request in this regard, we believe that the relevant Mozambican maritime authority may evaluate the application and decide as it deems appropriate.

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

Only vessels owned by nationals of the Republic of Mozambique (either individuals or corporate entities where 51 per cent of the shareholding structure is held by nationals) are permitted to be registered under the Mozambican flag.

7 What are the documentary requirements for registration?

In Mozambique we have a complex system of registration of vessels, comprising: inscription of the vessel at the local maritime authority (namely, Maputo city and province, Gaza, Inhambane, Sofala, Nampula and Cabo Delgado provinces) in order to obtain the respective certificate or title of ownership of the vessel; and after the applicant obtains the certificate or title of the vessel, he or she must register the vessel at the Legal Entities Registrar's Office.

It is important to note that both the inscription and registration of the vessel are made through the submission at the corresponding authority of an application signed by the shipowner or his or her legal representative or power of attorney. The application must contain, inter alia, the name, place and date of construction and propulsion system of the vessel or apparatus, the activity and area where the vessel is to be engaged and the supporting documents, as set out below:

- document proving the Mozambican nationality of the shipowner;
- certificate or title of ownership of the vessel; and
- shipbuilding or purchase and sale agreement of the vessel, including the particulars of the vessel (eg, tonnage certificate, survey completion certificate, certificate of incorporation of the company and certificate of registration of the company at the Legal Entities Registrar's Office).

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

Dual registration and flagging out are not permitted.

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

Any mortgages or maritime liens over the vessel must be registered at the respective local maritime authority and at the Legal Entities Registrar's Office. The registration must identify the parties (eg, the mortgagor and mortgagee), the nature of the mortgage or maritime lien and the amount of such mortgage or maritime lien.

Limitation of liability

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

Mozambique is not a state party to the Convention on Limitation of Liability for Maritime Claims 1976.

Concerning the limitation of liability relating to the carriage of goods by sea, Mozambique is a contracting party of the Hague Rules Convention of 25 August 1924. The carrier (in its capacity as the shipowner or charterer of the vessel) is legally entitled to limit its liability.

11 What is the procedure for establishing limitation?

It is not necessary to provide a cash deposit. In maritime claims proceedings, it is common for the claimant to submit a formal claim to the party liable for the damages or losses sustained. After the wrongdoer assesses whether the reasons for the claim are fair, he or she may determine the final settlement amount payable. Subsequently, the wrongdoer issues a cheque and notifies the claimant to collect it. If the claimant is in disagreement with the final settlement amount, he or she may draft and file at court a court action against the wrongdoer.

12 In what circumstances can the limit be broken?

In the event that the claimed damages or losses result from the neglect, fault, omission or an act practised by the wrongdoer or his or her agents, servants or other persons hired by him or her, the wrongdoer is not entitled to limit his or her liability.

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

Mozambique is not yet party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. We do not have clear rules dealing with this matter.

Port state control

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

In Mozambique, the Maritime Authority is the public entity that exercises the power of port state control. It is under the authority of the Ministry of Transport and Communications.

15 What sanctions may the port state control inspector impose?

Depending on the gravity of the offences committed, the Maritime Authority may impose fines or sanctions for minor offences and heavy fines for more serious offences, with the possibility of imprisonment.

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

In the event that the wrongdoer is in disagreement with the fines or sanctions imposed, he or she may submit a formal complaint to the person who imposed such fines or sanctions. If the fines or sanctions are upheld, the wrongdoer may submit an appeal to the boss of the person who imposed such fines or sanctions. If the fines or sanctions are still upheld, the wrongdoer may lodge an appeal at the Administrative Court.

Classification societies

17 Which are the approved classification societies?

Although Mozambique has approximately 2,700 kilometres of coastline, it does not currently possess any merchant vessels for carriage of goods by sea. There are currently no approved classification societies in Mozambique.

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

Not applicable, since there are no approved classification societies in Mozambique. There is also no approved legislation dealing with the liability of classification societies. However, we are of the opinion that the general principles of civil liability must be applied.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Yes, whenever the wrecked ship represents an obstacle or a risk to the safety of navigation at sea or to the marine environment. Wreck removal on the initiative of the Maritime Authority always occurs in the event that the shipowner does not comply with the relevant provisions of the Port Regulation.

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

In Mozambique only the International Convention on Civil Liability for Oil Pollution Damage (CLC) and the International Convention for Prevention of Collision at Sea (COLREG/72) are in force.

Mozambique is not a party to the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910, or the International Convention on Salvage 1989.

In relation to marine pollution, the international conventions and protocols in force in Mozambique include:

- the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended (MARPOL 73/78);
- Annexes III, IV and V to MARPOL 73/78;
- the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969;
- the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; and
- the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990.

Concerning collision, the only international convention in force is the Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended.

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. The Lloyd's standard form of salvage agreement is acceptable. Terms and conditions may be agreed under the specific salvage agreement.

Ship arrest

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

The International Convention Relating to the Arrest of Sea-Going Ships 1952.

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

It is common in arrest proceedings for the court to grant the arrest to the applicant whenever he or she gives evidence of: his or her credit over the vessel in question; and his or her justifiable concern that the debtor is about to leave the country without paying the outstanding amount.

24 What is the test for wrongful arrest?

It is important to note that an arrest granted by a court is valid for a period of 30 days from the date when the court order is served to the applicant. Within this period, the applicant must draft and file at court the main court action against the shipowner. In the event that the applicant fails to do so, the arrest shall be shifted. Pursuant to article 621 of the Mozambican Civil Code, if an arrest is unfounded or expires for reasons attributable to the applicant, he or she will be held liable for damages or losses caused to the shipowner by his or her misleading behaviour.

25 Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Yes.

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

It is common in arrest proceedings that, when the defendant presents an opposition at court, he or she simultaneously applies for the submission of a bond as security for the payment of the outstanding amounts due by the charterer. If the judge considers the bond adequate and enough to secure the payment of outstanding amounts due by the charterer, he or she may shift the arrest granted to the applicant.

27 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 the general principle of law (ie, civil law) that the amount of security should be adequate and enough for payment of the claimed amount. In even that the claimed amount exceeds the value of the ship under this circumstance the amount of security can exceed the value of the ship.

It is common in arrest proceedings for applicants to indicate the amount claimed in their application submitted at court. Therefore, the amount of security should be adequate and enough for payment of the claimed amount. Although the judge is sovereign to decide in this regard, before he or she makes a decision the applicant will be notified to respond as to the form in which the security should be provided.

The final amount can be reduced if the claimed amount does not reflect the amount effectively due by the charterer.

28 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?

Under the Mozambique laws and jurisdiction lawyers are appointed through the power of attorney. After the power of attorney is signed by its grantor being the signatures certified and legalised by the public notary officer above is submitted at court through a formal application for its attachment. The country is not a state party of the International Apostille Convention. In Mozambique the documents cannot be filed electronically. Legally, there is no specific provision dealing with such matter. However, for an arrest to be made an urgent court relief above must be drafted and submitted at court within a short period of time

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

It is common practice, while the arrest is pending at court, for the judge to appoint someone who will be responsible for the custody and maintenance of the vessel.

30 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?

It is not possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere.

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

Apart from ship arrest, the following forms of attachment order or injunction are also available: seizure or attachment of any other property owned by the debtor, other than ships; and non-specified injunctions.

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

Yes.

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

Yes.

Judicial sale of vessels

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

The potential creditors of an arrested vessel.

35 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?

If a creditor has a judgment or any valid mortgage or maritime lien, he or she can initiate a proper process of execution of such judgment, mortgage or maritime lien at court. We are not in a position to estimate the time that it may take to conclude the judicial sale. However, in our experience it may take between one and two years.

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

The order of priority is established under article 578 of the Mozambican Commercial Code, and is as follows:

- court fees made in the common interest of the creditors;
- salvage rewards;
- claims secured by mortgages or pledges over ships;
- pilotage and towing expenses for entry into port;
- tonnage, anchorage, public health, light and other harbour dues;
- expenses for the keeping of the vessel and storage of her appurtenances;
- master and crew wages;
- repair costs of the vessel, her appurtenances and equipment;
- reimbursement of the price of the cargo that the master was forced to sell;
- insurance premiums;
- the outstanding price of the last purchase of the vessel;
- repair costs of the vessel, her appurtenances and equipment, in the three years previous to the voyage at issue and counted from the date of termination of the repairs;
- costs related to shipbuilding contracts;
- the insurances premiums over the ship, if entirely covered, or over the covered part or her appurtenances not mentioned in paragraph (xi) of article 578 of the Commercial Code; and
- indemnities owing to the shippers for shortage or damage of goods.

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

In principle, the judicial sale of a vessel gives the purchaser clean title.

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

Any judgment or arbitration awarded by a foreign court or arbitration is subject to a proper process of recognition by the Supreme Court of Mozambique.

39 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

40 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?

Only the Hague Rules Convention is in force. Pursuant to subparagraph (e) of article 1 of the Hague Rules Convention, the carriage of goods covers the period from the time when the goods are loaded at a certain port and shipped on board the vessel until their discharge at the port of discharge.

Update and trends

Mozambique does not have an update maritime legislation. The existing maritime legislation was enacted during the Portuguese colonial power before Mozambique became independent on 25 June 1975. Therefore, above does not reflect the current international position in the sector. The government of Mozambique emerged from last general elections has set up an inter-ministerial unit to review and update the existing maritime legislation in order to reflect the current international trend in the maritime industry.

41 Are there Conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

There are currently no multimodal legal instruments in force in Mozambique.

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

Pursuant to article 3 of the Hague Rules Convention, the cargo owner, shipowner, master or captain of the vessel or shipowner's agent are entitled to sue on the bill of lading.

43 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?

Pursuant to the principle of the private autonomy of the contracting parties, they are free and sovereign to negotiate and agree the incorporation of any terms of the charter party into a bill of lading that they may wish, without any limitation or restriction.

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

Yes.

45 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?

A shipper whose cargo sustained any damages or losses may bring a direct court action separately or jointly against the shipowner and the carrier. However, the shipowner can deny such liability.

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

Pursuant to paragraph 4 of article 4 of the Hague Rules Convention, deviation is allowed and is not subject to any punishment.

47 What liens can be exercised?

All maritime liens legally vested to the carrier, purchaser or lien creditor.

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

The bill of lading has three functions: it is proof of the contractual agreement between the carrier and the shipper; it is a receipt that the cargo therein described was or was not effectively received on board the vessel; and finally, it is a title of credit. If the carrier delivers the cargo without producing the bill of lading, anyone can collect the cargo without any valid title, in which case the carrier will not be entitled to limit his or her liability.

49 What are the responsibilities and liabilities of the shipper?

The Hague Rules Convention sets out the contractual obligations of the shipper in relation to the shipment (please refer to paragraph 5 of article 3 of the Hague Rules Convention), and states that the shipper may provide the carrier with accurate data or information concerning the shipment and

shall compensate the carrier for any damages or losses that may occur due to inaccurate data or information provided by the shipper. However, pursuant to paragraph 3 of article 4 of the Hague Rules Convention, the shipper will not be liable for any damages or losses sustained by the carrier or ship due to any act, omission or neglect not attributable to the shipper, his or her agents or employees, or any third party hired by him or her.

Shipping emissions**50 Is there an emission control area in force in your domestic territorial waters?**

No.

51 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 currently no specific legislation dealing with this matter.

Jurisdiction and dispute resolution**52 Which courts exercise jurisdiction over maritime disputes?**

It is important to note that, in Mozambique, maritime courts were formally created by Law No. 5/96 of 4 January 1996, but were not formally installed. The process of their installation is under way. Therefore, currently, maritime disputes are dealt with by the civil courts.

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

When the defendant is located out of the jurisdiction, court summons are served through a precatory letter.

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

No.

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

Pursuant to article 1094 of the Mozambican Civil Code of Procedure, any judgment or arbitration awarded by a foreign court or arbitration is subject to a process of recognition by the Supreme Court of Mozambique.

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

No remedies are available.

57 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 raise the heading argument that the domestic court is incompetent to handle the proceedings, since the conflicting parties elected a foreign court or arbitral tribunal to settle any disputes that may arise.

Limitation periods for liability**58 What time limits apply to claims? Is it possible to extend the time limit by agreement?**

Depending on the particular case we have time bars of three, five and 20 years. The time period granted by the Mozambican courts cannot be extended.

59 May courts or arbitral tribunals extend the time limits?

No, see question 58.

Miscellaneous**60 How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?**

Mozambique is not party to the Maritime Labour Convention.

61 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?

There are two potential scenarios:

By contract

All contracts are to be strictly complied with, clause by clause or point by point, under the principle of pacta sunt servanta contained in article 406 of the Mozambican Civil Code. However, according to the Civil Code, the parties are free to stipulate what they want to be in the contract, so they can agree that external factors, such as economic conditions, can affect the legal rights and liabilities of the parties.

By law

Under article 437 of the Mozambican Civil Code, a party that feels damaged may elect to terminate the contract or have it modified under equity, if the circumstances on which the parties based their decision to contract suffer an abnormal change and as long as compliance with its contractual duties breaches the principles of good faith and is not covered by the inherent risks of the contract. If the other party does not agree, it may oppose the valid termination of the contract by accepting the contract's modification.

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

No.



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