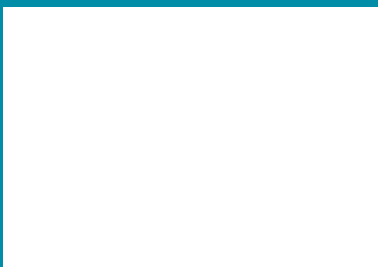


Shipping & International Trade Law

This second edition of *Shipping & International Law* aims to provide a first port of call for clients and lawyers to start to appreciate the issues in numerous maritime jurisdictions. Each chapter is set out in such a way that readers can make quick comparisons between the litigation terrain in each country, determining the differences between, for example, the rights of cargo interests to claim for cargo loss or damage in Italy and England.

A remarkable breadth of jurisdictions is covered, while the contributors are all leading lawyers in their countries and are ideally placed to provide practical, straightforward commentary on the inner workings of their respective legal systems.



SECOND
EDITION
2015

Shipping & International Trade Law

General Editor:
David Lucas, Hill Dickinson LLP

THE EUROPEAN LAWYER
REFERENCE

Shipping & International Trade Law

Jurisdictional comparisons

Second edition 2015

Preface Norman Hay Cargill International SA

Foreword David Lucas Hill Dickinson LLP

Angola João Afonso Fialho & José Miguel Oliveira Miranda Correia Amendoeira & Associados in association with Fátima Freitas Advogados

Argentina Fernando Ramón Ray & Alejandro José Ray Edye, Roche, De La Vega & Ray

Australia Geoff Farnsworth & Natalie Puchalka Holding Redlich

Canada Douglas G Schmitt Alexander Holburn Beaudin + Lang LLP

China Chen Xiangyong & Wang Hongyu Wang Jing & Co

Cyprus Vassilis Psyrras, Andreas Christofides & Costas Stamatiou Andreas Neocleous & Co LLC

Denmark Johannes Grove Nielsen Bech-Bruun

England & Wales David Lucas, Jeff Isaacs & David Pitlarge Hill Dickinson LLP

Finland Ulla von Weissenberg & Linda Ojanen Attorneys at Law Borenus Ltd LLP

France Laurent Garrabos BCW & Associés

Germany Jobst von Werder & Ingo Gercke REMÉ Rechtsanwälte

Greece Maria Moisidou Hill Dickinson International

Hong Kong Damien Laracy & Michael Ng Laracy & Co and
Mike Mallin Hill Dickinson Hong Kong LLP

India Prashant S Pratap

Indonesia Juni Dani Budidjaja & Associates

Israel Amir Cohen-Dor S Friedman & Co

Italy Paolo Manica & Michele Mordiglia Studio Legale Mordiglia

Japan Tetsuro Nakamura, Tomoi Sawaki & Minako Ikeda Yoshida & Partners

Malta Dr Ann Fenech & Dr Adrian Attard Fenech and Fenech Advocates

Mexico Enrique Garza, Roger Rodriguez & Ramiro Besil Garza Tello & Asociados SC

Mozambique João Afonso Fialho & Sofia Paramés Miranda Correia Amendoeira & Associados in association with Pimenta Dionísio & Associados

The Netherlands Wilbert ten Braak, Rene van Leeuwen, Hans Posthumus Meyjes & Elisabeth T A Naaykens Hampe Meyjes advocaten

Nigeria Emmanuel Achukwu The Campbell Law Firm

Panama Jorge Loaiza III Arias, Fabrega & Fabrega

Peru Percy Urday Moncloa, Vigil, Del Rio & Urday

Poland Sławomir Nowicki, Alina Łuczak, Katarzyna Bielarczyk & Agnieszka Nowicka
Wybranowski Nowicki Law Office

Portugal João Afonso Fialho & José Miguel Oliveira Miranda Correia Amendoeira & Associados

Russia Elena Popova Sokolov Maslov & Partners

Singapore Raghunath Peter Doraisamy Selvam LLC

South Africa Shane Dwyer & Jennifer Finnigan Shepstone & Wylie

South Korea Byung-Suk Chung Kim & Chang

Spain Verónica Meana Larucea & Santiago López-Caravaca Boluda Meana Green Maura & Co

Turkey Emre Ersoy & Zihni Bilgehan Ersoy Bilgehan Lawyers and Consultants

Ukraine Alexander Kifak & Artyom Volkov ANK Law Office

United Arab Emirates Adrian Chadwick & Raymond Kisswany Hadeef & Partners

United States John Kimball & Emma Jones Blank Rome LLP

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General Editor
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Dawn McGovern

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Preface to the first edition

Cargill International SA Norman Hay

I am greatly honoured to be asked to write the preface to this timely worldwide review of shipping and trading law.

Over the last 30 years, the volume and variety of international trade in and shipping of commodities has grown dramatically. Liberalisation of global markets, and the need for commodity inputs as those markets have developed, have promoted this growth.

International shipping trade is central to the economy of the planet. Without it, there can be no increase in economic value which allows billions of people to raise themselves out of poverty.

However, as with all such rapid growth, there comes a parallel increase in risk associated with the commodities being transported and the vessels undertaking such transport.

The notion of risk in international trade goes back thousands of years and in each period of growth there has been the need for legal frameworks to handle disputes. The necessity for such legal systems is of utmost importance to the trade itself. Without such structures, an understanding of where risk occurs and how to mitigate it becomes clouded and there will be a drag on the growth of trade itself.

This book represents a milestone in providing an international comparative survey of legal risks, issues and indeed opportunities pertaining to shipping and trading activities. The volume takes a pragmatic approach by setting out a series of answers to questions that confront market participants to illustrate the variety and types of legal dispute that can arise, and to help managers and practitioners navigate through the risk areas.

The sheer size and complexity of the shipping and trading business would, on its own, lead to significant legal disputes. In addition, however, there has been a substantial increase in price volatility in the markets for the goods that these vessels carry. This volatility is increasing as the list of importing and exporting countries and the variety of the goods they trade also increases dramatically.

While the companies and businesses involved in international trade have adopted a wide variety of methods to limit their risk (eg, stringent counterparty credit control, surveillance technologies and sophisticated trading instruments), such methods are insufficient to reduce to zero default risk and the inevitable legal disputes.

This volume provides invaluable introductions to the diverse ways in

which the various legal systems address common forms of default and the legal remedies which are available to the parties to resolve their differences.

The majority of international trade and shipping contracts are governed by English Law. However, given the vast number of countries now engaged in trade, it is inevitable that other legal systems will impinge on the underlying contracts. This volume details and examines how such legal overlap can occur and presents new ideas on the implications and the methodologies that parties faced with legal disputes can adopt in such conflicting situations.

Without a doubt, this volume provides a unique set of insights into this complicated but incredibly important area of global trade and its authors and editors are to be commended on the quality of the analysis.

*Norman Hay,
President, Cargill International SA
Geneva, 2011*

Foreword to the first edition

Hill Dickinson LLP David Lucas

Until recently, shipping and commodities law was considered by the wider world to be a fairly esoteric specialism of restricted general relevance. Laymen hardly focused on vagaries of market movements (except during times of historic crisis such as the aftermath of the Yom Kippur War) let alone the transnational impact of those movements.

Now, all that has changed. Everyone in the world who has to buy food, fuel, garments or who has access to the media is only too well aware of the impact of fluctuations in commodity prices. They have seen the prices of, say, wheat and sugar soar (roughly doubling in the six months from June 2010), cotton rocket (almost quadrupling in the two years from early 2009), crude oil rise inexorably (almost tripling in the same period), back nearly to the dizzy heights reached before the collapse in mid-2008. Similar rises have been experienced with non-ferrous metals, iron ore, coal, fertilisers and numerous other commodities. The list is almost endless. All these price movements are, virtually without exception, overshadowed by the quite spectacular boom and bust of 2008.

Equally, freight rates have undergone even more spectacular convulsions with, for example, the Baltic Dry Index rising to well over 11,000 in mid-2008, before collapsing to less than a mere tenth of that figure within the space of a very few months.

The causes of this turmoil in the markets are too well known to merit repetition in this brief introductory Foreword. But what does merit consideration here is the stark way in which such turmoil illustrates the interconnectedness of the modern world. When China imports record quantities of crude oil, prices at the petrol pumps in Europe rise. When Russia suffers drought and bans wheat exports, the price of bread in Egypt soars.

This would not happen if the modern world economy were not so inextricably wedded to international trade on a vast scale. The world as it has fashioned itself could not exist without it. Although trade between nations and regions goes back to the ancient Phoenicians and perhaps beyond, the present level of global interdependence is unprecedented.

The rest of this volume will be devoid of statistics, so I hope I will be forgiven for offering just three sets of impressive figures which, I suggest, place in context the importance of the topics covered in this book:

- about 90 per cent of world trade is carried by the international shipping industry;

- according to the International Maritime Organisation, in 2008 (the last year for which figures are currently available) there were almost 53,000 cargo carrying ships with a total deadweight of almost 1.2 billion tonnes (almost double the figure for 1990). Cargo traffic exceeded 8 billion tonnes and almost 34 billion tonne miles were sailed; and
- seaborne trade in the main bulk cargoes (iron ore, grain, coal, bauxite/ alumina and phosphate) grew from 448 million tonnes in 1970 to 1,997 million tonnes in 2007 and other dry cargoes grew from 676 million tonnes to 3,344 million tonnes in the same period.

The economic interdependence of the modern world economy is reflected in the interdependence of its diverse national legal systems. Legal practitioners in the field of international trade, whether in law firms or in-house, will be only too familiar with the need, often the very urgent need, to seek advice, assistance or local intervention, whether in the courts or with local authorities, in jurisdictions worldwide. Although English law remains the most common choice of governing law in trade-related contracts and the English court or arbitral jurisdiction remains the most popular contractual forum, other legal systems and fora are frequently chosen (particularly with the burgeoning growth of international arbitration) and, irrespective of contractual choice, often become relevant to the challenges facing a party in crisis. Examples are boundless but include: a ship owner whose vessel faces arrest; a cargo owner whose goods face the exercise of a lien by the ship owner; a buyer who is seeking to prevent a bank from paying under a letter of credit against fraudulent documents; unexpectedly, a transaction suddenly involves dealings with a state or entity subject to UN, EU or US sanctions; an underwriter of cargo on board a vessel which has suffered a collision. Advice may be needed as a matter of extreme urgency in one or more relevant jurisdictions where the crisis is occurring.

The purpose of this volume is to give those involved, or potentially involved, in such a crisis a brief and readily accessible guide as to how the relevant issues might be approached in the affected jurisdiction or jurisdictions. Needless to say, it cannot be a substitute for formal advice from a lawyer well versed in the relevant legal system after he has been fully briefed, but it is hoped that the short summaries of key legal issues will assist those seeking to manage a crisis by focusing expectations and enabling them to brief local lawyers with an awareness of the opportunities and pitfalls afforded by the relevant legal system. Within the constraints of the format of this volume it has only been possible to provide summaries of the law in a limited number of legal systems. To those states not represented, and to those who had hoped for guidance as to the law in any of those states, I extend my apologies.

I could not have carried out my functions in the preparation of this book without the tireless efforts of many to whom my profuse thanks are gladly offered. Also thanks to the eminent lawyers in the various jurisdictions who had so unstintingly given their time and expertise in providing their respective chapters. My colleagues at Hill Dickinson LLP, Jeff Isaacs, Andrew Meads, Andrew Buchmann and David Pitlarge, provided enormous help

both in formulating and refining the questionnaire for each chapter (which had to be thoughtfully composed to elicit the most helpful responses from our contributors) and in contributing the substantive content of the English chapter. Kay O'Brien worked selflessly to coordinate the project and to keep it on track. Not least, my warm thanks are owed to Michele O'Sullivan, the International Director, Emily Kyriacou, the Commissioning Editor, and the editorial team, for both inspiring me and my colleagues to undertake this project and tirelessly bringing it to fruition.

David Lucas, Hill Dickinson
General Editor
London, 2011

Foreword to the second edition

Hill Dickinson LLP David Lucas

When the publishers asked Hill Dickinson to work with them on a second edition of this volume, my immediate reaction was that it might be premature, given that the basic principles in the various legal systems covered in the first edition were perhaps unlikely to have changed that much, if at all; and this book never claimed to cover more than basic principles, given that in the first edition 25 jurisdictions were covered within the span of just 400 pages.

However, it was pointed out to me that this would be an opportunity to expand the scope of the book to cover a number of jurisdictions which, for very good practical reasons, we had been unable to cover first time round. This opportunity has been seized with enthusiasm and I am delighted that this second edition has been expanded to cover some 36 jurisdictions, including many of considerable significance to the international trade and shipping community.

In the Foreword to the first edition, I described the commercial and geopolitical trends and convulsions, natural catastrophes and conflicts which so often underlay and drove the issues which had confronted international trade and shipping lawyers every day in their work: Such events did not of course cease with the first edition: a mere list of names, acronyms and words suffices to make the point: Syria, Ukraine, sanctions, OFAC, Costa Concordia, Ebola... This list could be expanded indefinitely.

Market prices of commodities and freight rates have of course continued to fluctuate – not as wildly, perhaps, as in some previous times, but sufficiently to drive defaults and thus to generate disputes between market participants. Meanwhile, statistics have continued to balloon. In the Forward to the first edition, I noted that in 2008 the world fleet of cargo carrying vessels accounted for a total deadweight of almost 1.2 billion tonnes; by January 2013 that figure had risen to 1.63 billion tonnes. Although the rate of growth of world GDP has slowed, nonetheless between 2008 and 2012 total cargo traffic increased from 8 to 9.2 billion tonnes. Just as trade continues to expand, so does the need for legal advice in multiple jurisdictions.

As before, it is my pleasure to thank the numerous contributors to this book for their support and time-consuming work aimed at making it as useful as possible to its readers. My colleagues at Hill Dickinson LLP, Jeff Isaacs and David Pitlarge have greatly contributed to the review and

updating of the English chapter. Not least, grateful thanks are due to the team at Thomson Reuters who have brought this second edition about: Emily Kyriacou, Katie Burrington, Dawn McGovern, Nicola Pender and Callie Leamy.

David Lucas, Hill Dickinson
General Editor
London, 2014

Panama

Arias, Fabrega & Fabrega Jorge Loaiza III

1. CONTRACTS OF CARRIAGE

1.1 Jurisdiction/proper law

1.1.1 In the absence of express provisions in a bill of lading (or charterparty), by what means will the proper law of the contract be determined?

In case of a dispute tried before Panamanian courts, the laws of the place where the goods shipped would be deemed applicable to resolve the rights and obligations between the parties to the contract for transportation (ie, applicable substantive law).

1.1.2 Will a foreign jurisdiction or arbitration clause necessarily be recognised?

In some instances such clauses would be abided by and it would also be discretionary for the court to decline jurisdiction. Proceedings can be challenged after the same have been initiated on the grounds of an existing jurisdiction or arbitration clause.

1.1.3 In the event that an injunction or order preventing proceedings is obtained in the agreed jurisdiction (whether court or arbitration), will this be recognised in your court?

The process of recognition would have to be through the Supreme Court (exequatur) and based on a final (not subject to recourse/appeal) ruling.

1.1.4 Arbitration clauses

1.1.4.1 Will an arbitration and/or a jurisdiction clause set out in an incorporated document (such as a charterparty referred to in a bill of lading) be recognised if its text is not set out in the contract in question?

The law expressly provides that such clauses in an 'adhesion contract' (ie, a legally binding agreement between two parties to do a certain thing, in which one side has all the bargaining power and uses it to write the contract primarily to his or her advantage) would not be considered as an agreement for purposes of the Panamanian Maritime Court taking jurisdiction.

1.1.4.2 Will the incorporation of an unsigned arbitration agreement into a contract be recognised?

We believe that the Maritime Courts would deem an unsigned arbitration agreement to be an 'adhesion contract' for the purposes of determining if the agreement to submit the matter to arbitration has been validly entered.

1.1.5 In any event, will all of the provisions of a charterparty incorporated into a bill of lading contract be recognised? Specifically, if a charterparty with an arbitration clause is incorporated into a bill of lading, is it necessary for the incorporating words to make express mention of the arbitration clause of the charter?

Whilst all of the general terms of the charter party would be deemed incorporated into the bill of lading, when it comes to choice of forum or arbitration to resolve any disputes the intention of the law is that the parties should expressly subscribe any such agreements as part of the bill of lading or under a special signed agreement to such effect.

1.1.6 If a bill of lading refers to the terms of a charterparty, but without identifying it (eg, by date):

1.1.6.1 Will incorporation be recognised without such detail?

It seems to us that this would be a matter of fact to be determined within the proceedings.

1.1.6.2 If so, which charterparty will be incorporated?

The judge would most likely rule on the basis of the real intent of the parties, based on evidence presented during the proceedings.

1.2 Parties to the bill of lading contract

1.2.1 How is the carrier identified? In particular, what is the relationship between statements on the face of the bill and/or the signature by or on behalf of the Master and demise clauses/identity of carrier clauses?

Law 55 on Maritime Commerce provides the following definitions:

- ‘1. Carrier. Is the person who, in his own name or through another person acting on his behalf, shall enter into a contract for carriage of goods by waterways with a shipper.
2. Actual Carrier. Is the person upon whom the carrier shall entrust the execution of the carriage of goods by waterways or any part thereof and who shall, in fact, carry out the same.’

In addition:

‘Article 80. The Bill of Lading will contain the following information:

1. Description of the goods, brand, number of packages or pieces, weight or quantity, and a statement, if applicable, on the dangerous nature of the goods.
2. Name and main place of business of the carrier.’

Therefore, the carrier is to be clearly identified in the Bill of Lading.

1.2.2 Who is entitled to sue for loss or damage arising out of the carrier’s alleged default? In particular, by what means, if at all, are rights under the contract of carriage transferred?

The law does not expressly provide towards whom the carrier is liable. Therefore under general principles of contract law, entitlement to sue lies in the hands of the persons entering into the contract or any party being

benefited by an assignment of rights thereof.

As concerns the transfer, Law 55 provides the following:

'Article 86. The negotiability of a Bill of Lading is governed by the following dispositions:

- 1. A direct Bill of Lading is non-negotiable.*
- 2. A Bill of Lading to order may be negotiated with a blank or to order endorsement.*
- 3. A Bill of Lading to bearer is negotiable by delivery.'*

1.3 Liability regimes

1.3.1 Which cargo convention applies – Hague Rules/Hague Visby Rules/Hamburg Rules? If such convention does not apply, what, in summary, is the legal regime?

Article 83 of Law 55 provides as follows:

'Article 63. The amount of indemnity for loss of goods will be calculated based on the value of the goods, while those due to damage to the goods will be calculated on the basis of the difference between the value of the goods before and after the damage or based on repair expenses.

The aggregate amount due shall be calculated based on the value of the goods at the place and time where they were unloaded according to the contract, or at the place and time where they should have been unloaded.

The value of the goods is determined by stock exchange quote or, if not listed, according to regular market price or, in the absence of stock exchange quote or regular market price, according to the regular value of goods of the same nature and quantity.'

Some provisions of the Hague Rules have been copied into the law.

1.3.2 Have the Rotterdam Rules been ratified?

No.

1.3.3 Do the Hague/Hague Visby Rules apply to straight bills of lading?

Only if the parties so provide in the bill.

1.3.4 Are any such rules compulsorily applicable to shipments either from your jurisdiction or to it (or both)?

No.

1.4 Lien rights

1.4.1 To what extent will a lien on cargo be recognised? Specifically:

1.4.1.1 Will liens arising out of obligations under the bill of lading contract be enforceable as against the receiver for, eg, freight, deadfreight, demurrage, general average and any shipper's liabilities in respect of the cargo?

Law 55 provides for the following liens against the cargo:

'Article 248. The following liens shall have preference over

the cargo and shall be preferred on the proceeds of their sale in the order indicated in this Article:

1. Any judicial costs caused in the common interest of creditors.
2. Any expenses, indemnities and salaries for assistance and salvage due for the last voyage.
3. Any commercial taxes or fiscal rights owed for the same things at the place of unloading.
4. Any transportation and cargo expenses.
5. Any leasing of storage for the things unloaded.
6. Any amounts owed by general average contributions.
7. Bottomry bonds and insurance premiums.
8. Any amounts of capital and interest owed by virtue of the obligations contracted by the captain on the freight, with the legal formalities.'

1.4.1.2 Can the owner lien cargo for time charter hire? If so, is this limited to hire payable by the cargo owners?

See above.

1.4.1.3 Is it necessary for the owners to register its right to lien sub-freights as a charge against a charterer incorporated in your jurisdiction for that lien to be recognised in the event of the charterer's insolvency?

No.

2. COLLISIONS

2.1 Is the 1910 Collision Convention in force?

No.

2.2 To what extent are the Collision Regulations used to determine liability?

Not applicable.

2.3 On what grounds will jurisdiction be founded – what essentially is the geographical reach?

Generally, the Maritime Courts of Panama would have jurisdiction as per Law 8 of 1982 (of Maritime Procedure), on disputes that arise from acts related to the maritime commerce, transport and traffic that occur within Panamanian territorial waters.

In addition, the Maritime Courts of Panama shall have jurisdiction to try claims that occur outside Panamanian territory when any of the following conditions are met:

- when the action is directed against a vessel or its owner and the arrest is carried out within the Panamanian jurisdiction as a consequence of such actions;
- in the cases where the Maritime Court has arrested other assets that belong to the defendant, although they are not domiciled in Panama;

- when the defendant is within Panamanian jurisdiction and has been served with of any action presented to the Maritime Court;
- in the cases where one or more Panamanian vessels are involved, or when the Panamanian law is suitable for the situation being discussed, or when the parties have agreed to it either by contract or by convenience.

2.4 Can a party claim for pure economic loss in the event of a collision?

Yes. Under Panamanian law the term for economic loss is 'loss of profit' and it is therefore viable to claim the same before the Maritime Courts.

3. SALVAGE

3.1 Has your country enacted any salvage conventions? If so, which one?

No.

3.2 In any event, what are the principal rules for obtaining non-contractual salvage? In the event that a salvage contract is signed, will this clearly displace any general law on salvage liabilities?

Law 55 of 2008 on Maritime Commerce provides a set of rules, and limitation of liability would be available through special proceedings before the Maritime Courts of Panama as provided in Law 8 of 1982.

The rules in Law 55 are as follows:

'Article 210. Every act of assistance or salvage leading to a useful result will give rise to equitable remuneration. If the help provided leads to no such result, no remuneration is due.

In no case will the amount payable exceed the value of the objects salvaged.

Article 211. Persons who have taken part in assistance activities despite an express and reasoned prohibition by the vessel assisted will not be entitled to any remuneration.

Article 212. The tug will not be entitled to remuneration for helping or salvaging the vessel that she tows or her cargo, unless she has provided special services that cannot be considered as fulfilment of the towing contract.

Article 213. An indemnity will also be payable even when the assistance or salvage takes place between vessels having the same owner.

Article 214. The amount of the remuneration will be fixed by agreement between the parties and, in default of this, by the Judge.

The same procedure will apply as regards the proportion in which their remuneration is distributed among the salvors.

The distribution between the owner, Master and other persons at the service of each one of the salvors' vessels is

governed by the nationality of the vessel.

Article 215. Any agreement for help and salvage concluded at the time and under the conditions of the danger present may, at the instance of one of the parties, be annulled or modified by the Judge, if the latter rules that the conditions agreed upon are inequitable. In all cases, if it appears that the agreement of one of the parties is vitiated by fraud or deception, or if the remuneration is excessive on one side or the other, and disproportionate to the service rendered, the agreement may be annulled or modified by the judge at the instance of the interested party.

Article 216. The remuneration will be fixed by the judge:

1. According to the circumstances, taking as a basis the success obtained, the efforts and expertise of those who have provided the assistance, the danger facing the vessel assisted, its passengers and crew, its cargo, and salvors and the salvors' vessel, the time spent, the expenses and damage incurred, the responsibilities and risks assumed by the salvors, the value of the equipment utilized by the latter; taking into account, if arising, the degree to which the vessel rendering assistance is suitable for salvage operations.
2. The value of the items salvaged.'

The same provisions apply for the distribution envisaged in the above Article. The judge may reduce or cancel the remuneration if it emerges that the salvage or assistance became necessary through the culpable actions of the salvors, or that the latter have engaged in thefts or other fraudulent acts.

'Article 217. No remuneration shall be payable for the rescue of persons, subject to the legal provisions of the vessel's nationality for the case in question.

The salvors of human lives in the course of their intervention in the mishap giving rise to the salvage or assistance are entitled to an equitable share of the remuneration granted to the salvors of the vessel and of its cargo and accessories.

Article 218. A time bar of two years applies to an action to claim payment of the remuneration, running from the date on which the salvage or assistance operations took place.

Reasons for suspending or interrupting this time bar will be determined by the laws of the jurisdiction of the Court dealing with the matter.

Article 219. Every vessel's Master has an obligation to render assistance to any person found in danger of being lost

at sea, even though he be an enemy, providing he can do so without seriously endangering his vessel, crew or passengers.

The owner of the vessel shall not be responsible in the event of any dispute relating to the effect of the above provision.

Article 220. The provisions of this Chapter do not apply to military vessels or those belonging to the State and used exclusively for public service.'

3.3 What is the limitation period for enforcing salvage claims in your jurisdiction?

See Article 218, above.

3.4 To what extent can the salvor enforce its lien prior to the redelivery of ship/cargo?

Referring to Article 210, above, so long as the right was been acquired by the salving act, we believe that a lien may be made effective, irrespective of delivery of the goods. However, the judge in doing so, would have to assess if any third party rights could be affected by such enforcement.

4. GENERAL AVERAGE ('GA')

4.1 Will any general average claim (whether under the contract, generally or GA securities) necessarily follow the contractual provisions in relation to general average, in particular, the chosen version of the York Antwerp Rules ('YAR')?

Law 55 of 2008 contemplates the application of the laws of the registry of the vessel. Subject to this, an agreement would be subject to such laws.

Otherwise, Law 55 of 2008 contains rules to determine the scope of general average, the volume and nature of items to be considered therein and procedure to be observed on board during relevant events, in a similar manner as YAR.

4.2 Time bars

4.2.1 Will general average claims under the contract of carriage be governed by any contractual time bar – in particular, any which might be set out in the YAR (eg, YAR 2004)?

The time bar would be in principle determined under applicable law, as provided above. Otherwise, claims may be time-barred in one year, if Panama law applies.

4.2.2 In the event that claims should be pursued under general average securities in your jurisdiction, what is the applicable time bar for such claims? Will this be affected by the provision of YAR 2004 Rule XXIII if 2004 YAR is specified in the relevant contract?

The situation would be similar as stated in 4.2.1 above.

4.2.3 To what extent is any general average adjustment binding?

The adjustment may be subject to review by the court at the request of the shipper.

5. LIMITATION

5.1 What is the tonnage limitation regime in respect of claims against the vessel?

As per Article 588 of Law 8 of 1982, the limitation on liability for vessels in respect to tonnage, is as follows:

'Article 588. The limits of liability for claims other than those mentioned in second Section of this Chapter, arising on any distinct occasion, shall be calculated as follows:

- (1) In respect of claims for loss of life or personal injury,*
 - (a) 333,000 units of account for a vessel with a tonnage not exceeding 500;*
 - (b) for a vessel with a tonnage not exceeding said limit (sic), the following amount in addition to that mentioned in a: For each tonne from 501 to 3,000 tonnes, 500 units of account; For each tonne from 3,001 to 30,000 tonnes, 333 units of account; For each tonne from 30,001 to 70,000 tonnes, 250 units of account; For each tonne in excess of 70,000 tonnes, 167 units of account;*
- (2) In respect of any other claims,*
 - (a) 167,000 units of account for a vessel with a tonnage not exceeding 500 tonnes;*
 - (b) For a vessel with a tonnage in excess thereof, the following amount in addition to that mentioned in (i): for each tonne from 501 to 30,000 tonnes, 167 units of account; for each tonne from 30,001 to 70,000 tonnes, 125 units of account; for each tonne in excess of 70,000 tonnes, 83 units of account.'*

Furthermore, the term 'units of account' is contemplated under Article 595 of Law 8 of 1982, as follows:

'Article 595. The unit of account referred to in the first and second Sections of this Chapter is the 'Special Drawing Right' as defined by the International Monetary Fund. The amounts mentioned in the 1st and 2nd Sections of this Chapter shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, or payment is made, or security is given which under the Law of that State is equivalent to such payment.'

5.2 Which parties can seek to limit?

Law 8 of 1982 provides in Article 576 that the limitations are available to

shipowners and salvors. Article 577, defines the ‘shipowner’ as either a charterer, the manager, or the operator of a seagoing vessel.

5.3 What is the test for breaking the limitation?

Law 8 provides likewise:

‘Conduct Barring Limitation

Article 586. The person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.’

5.4 To what degree do any limitation provisions found jurisdiction for the substantive claim?

To the extent the agreements do not contravene the rules contained in Law 8 of 1982.

5.5 Which package limitation figure applies.

Law 55 of 2008 provides for carrier’s limitation as follows:

‘The carrier’s responsibility for loss or damage to the goods shall be limited to an amount equal to 666.67 units of account per package or other shipping unit or 2.0 units of account per kilogram of gross weight of the goods lost or damaged, whichever is higher, except whenever the nature and value of the goods is declared by the shipper prior to loading and stated in the Bill of Lading, or whenever an amount larger than the liability limit stated in this statute is agreed to between the carrier and shipper.

Whenever a container, pallet or similar transportation device is used to consolidate the goods, the number of packages or other shipping units listed in the Bill of Lading as packaged in said transportation device shall be construed to be the number of packages or shipping units.

Whenever the transportation device does not belong to or has been provided by the carrier, the transportation device will be construed to be a package or shipping unit.’

6. POLLUTION AND THE ENVIRONMENT

6.1 Which Civil Liability Convention (‘CLC’) regime applies?

The Civil Liability Convention and Protocol of 1992, which is also adopted by law.

7. SECURITY AND ARREST

7.1 Is your jurisdiction a party to any particular arrest convention? If so, which one?

No.

7.2 Which claims afford a maritime lien in your jurisdiction?

Law 55 of 2008 provides for maritime liens against the vessel, freight and cargo, as follows:

'Article 244. The following maritime credits shall enjoy a lien against the vessel and shall concur in respect to its price in the order of preference expressed in this article, to wit:

- 1. judicial costs incurred in the common interest of maritime creditors;*
- 2. expenses, indemnities and wages for aid and salvage due from the last voyage;*
- 3. wages, compensations and indemnities of the master and crew members due for the last voyage;*
- 4. the naval mortgage;*
- 5. amounts due the Panamanian Government for the annual tax and 'tasas' of the vessel;*
- 6. wages and stipends due to stevedores and other wharfmen engaged directly by the owner, operator or master of the vessel for the loading and unloading of the vessel at its last arrival;*
- 7. compensation for damages caused by fault or negligence; and*
- 8. contributions to general average;*
- 9. amounts due on obligations incurred for the necessities and supplies of the vessel;*
- 10. amounts taken in bottomry over the hull of the vessel and its apparel for supplies, equipment and tackle if the contract were entered into and executed prior to departure of the vessel from the port where such obligations were contracted; and the insurance premiums for the last six months;*
- 11. wages of pilots and watchmen and expenses of conservation and custody of the vessel, its apparel and supplies after the last voyage and entry into port;*
- 12. indemnities due to shippers and passengers for failure to deliver the cargo or effects loaded or for damage thereto, attributable to the master or crew in the last voyage;*
- 13. the price of the last acquisition of the vessel and interest due for the last two years.'*

Liens on freight

'Article 247. The following liens shall have preference over the freight and concur over its price in the order indicated in this Article:

- 1. Any judicial costs caused in the common interest of creditors.*

2. Any expenses, indemnities and salaries for assistance and salvage due for the last voyage.
3. Any salaries, retributions and indemnities owed to the captain and crew members for the voyage in which the freight was earned.
4. Any amounts due by way of general averages contributions.
5. Bottomry bonds on freight earned.
6. Insurance premiums.
7. Any amounts of capital and interest owed by virtue of the obligations contracted by the captain on the freight, with the legal formalities.
8. Any indemnities owed to carriers and passengers for failure to deliver the goods carried or for any damages thereto imputable to the captain or the crew in the last voyage.
9. Any other duly registered indebtedness guaranteed by bottomry bond or naval mortgage or pledge on the freight.'

Liens on cargo

'Article 248. The following liens shall have preference over the cargo and concur over its price in the order indicated in this Article:

1. Any judicial costs caused in the common interest of creditors.
2. Any expenses, indemnities and salaries for assistance and salvage due for the last voyage.
3. Any commercial taxes or fiscal rights owed for the same things at the place of unloading.
4. Any transportation and cargo expenses.
5. Any leasing of storage for the things unloaded.
6. Any amounts owed by general averages contributions.
7. Bottomry bonds and insurance premiums.
8. Any amounts of capital and interest owed by virtue of the obligations contracted by the captain on the freight, with the legal formalities.
9. Any other loan with pledge on the cargo, if the lender shall hold the Bill of Lading.'

7.3 In any event, to what extent does a mortgagee have priority over claims for loss and damage which are not maritime liens?

See Article 244 in section 7.2 above.

7.4 Is there any suggestion that an arrest claim might lead to the founding of substantive jurisdiction?

Law 8 of 1982 on Maritime Procedure expressly provides for the arrest of

property to give jurisdiction to the court in case of disputes arising outside of Panama and the defendant is not otherwise present or domiciled in Panama.

7.5 To what extent can sister/associated ships be arrested?

In some instances when the (foreign) substantive law deemed applicable to a dispute, when tried before a Maritime Court of Panama, so provides.

7.6 Is it possible to arrest ships for claims arising out of (a) MOAs; (b) ship repair; and (c) ship construction contracts?

Generally, an arrest can be made over an asset, such as a vessel, for obligations of the owners.

7.7 To what degree can an arrest be anticipated/prevented by the lodging of security?

Upon service being made to the master, or when alerted by the marshal that the vessel would be boarded for such purposes.

7.8 If a vessel can be arrested, by what means can the claim be secured? Specifically:

7.8.1 Can an arresting party insist on a cash deposit or a bail bond?

The law provides several options, which also include bank or insurance company surety and Panama Government bonds, which shall be sufficient.

7.8.2 Will the court accept a letter of guarantee from a protection and indemnity club?

Yes, but this would require the express consent of the plaintiff.

7.8.3 Does any guarantee have to be provided by a domestic bank or other acceptable guarantor?

In principle yes, as the domestic bank and insurance companies' guarantees are expressly stated in the law as valid means to serve as security. Otherwise, see 7.8.2 above.

7.9 Briefly summarise the further security options: eg, freezing orders, attachment of debts due to the defendant, etc.

Law 8 of 2008 provides mostly for arrest of specific assets. Injunctions can be allowed under a provision of general protection requests.

8. CONTRACTS OF SALE OF GOODS

8.1 Jurisdiction/proper law

8.1.1 In the absence of express provision in a contract of sale, by what means will the proper law of the contract be determined?

Refer to 1.1.1. above.

8.1.2 Will a foreign jurisdiction or arbitration clause necessarily be recognised? In the event that proceedings can be commenced before your court notwithstanding such provisions, can such proceedings be challenged?

Refer to 1.1.2. above.

8.1.3 In the event that an injunction or order preventing proceedings is obtained in the agreed jurisdiction (whether court or arbitration), will this be recognised by your court?

Refer to 1.1.3 above.

8.2 Arbitration clauses

8.2.1 What are the essential elements for the recognition of an arbitration agreement?

The same would have to be in writing and would have to be contained as part of a signed document, as opposed to one incorporated by reference or under an adhesion contract. See 1.1.4.1 above.

8.3 Passing of title/property/risk

8.3.1 What terms if any are implied by your rules as to the passing of:

8.3.1.1 title (property) to the goods?

Generally, physical delivery.

8.3.1.2 risk?

As well with delivery unless the payment becomes overdue.

8.3.2 In relation to the passing of title and risk, do your rules apply even if the underlying contract applies another law?

In general, yes; but there could be limitations if the delivery is made in Panama.

8.4 Description and quality

8.4.1 Do your rules imply terms on (a) the description of the goods and/or (b) their quality?

Both. The Code of Commerce provides for an implied right to examine the goods which have not been previously inspected as to description and quality.

8.5 Performance

8.5.1 Delivery: What provisions does your law make as to delivery of the goods (eg, on timing and method of delivery)?

Law 55 of 2008, provides for the following obligations of the carrier in this respect:

‘Article 56. The carrier will proceed properly and carefully to the loading, handling, stowing, carriage, custody, care and unloading of the goods carried.

Article 57. The carrier will carry the goods to the unloading port in the agreed manner and by the usual or most geographically direct route.

Deviations for the purpose of saving lives or property in waterways or other reasonable detours will not be construed to be a deviation in accordance with the dispositions of the above Article.

Article 58. Delays in delivery will occur whenever the goods are not delivered at the designated unloading port and within a reasonable period, unless the parties shall agree to a specific term.

The carrier will be responsible for loss or damage to the goods caused by delays in delivery due to the fault or negligence of the carrier, except for those resulting from causes for which the carrier shall not be responsible under the relevant provisions of this Chapter.'

8.5.2 Acceptance: When is the buyer deemed to have accepted the goods?

Article 88 of Law 55 of 2008 provides as follows:

'Article 88. Except if, upon delivering the goods by the carrier to the consignee, the latter gives notice of loss or damage in writing to the carrier, the delivery will be *prima facie* evidence that the goods were delivered to the consignee in accordance with the carriage documents and of the apparent good state and condition of the goods.

Whenever the loss or damage to the goods is not apparent, the dispositions of the above paragraph will be applicable if the consignee has not given such notice in writing within seven days, counted as of the day following the delivery date of the goods or in the case of goods carried in containers, within 15 days, counted as of the day following the delivery date.

No notice is required to be given in writing in connection with loss or damage if the state of the goods on the delivery date has been the subject of a joint inspection or assessment by the carrier and the consignee.'

8.5.3 Payment: In the absence of express provision, by when must a buyer pay for the goods?

Upon delivery of the goods.

8.6 Other terms

8.6.1 Classification of terms

8.6.1.1 Do your rules differentiate between warranties (breach of which only entitles the innocent party to damages) and conditions (breach of which also entitles him to terminate the contract), and if so what is the effect?

In our system the law provides for certain rights and obligations as to the

nature of the goods (*vicio oculto*) that would entitle a buyer to terminate the contract. Such rights could be waived by agreement of the parties. In such instances the breach of such rights on the part of seller would entitle the owner to choose between the termination of the contract or a reduction of the sales price. The level of indemnity could also depend if the seller acted in good or bad faith.

The conditions of a contract would entitle termination or right of indemnity based on the actual terms agreed upon by the parties.

In other words, there seems to be a difference between one and the other as the first would pose some standards that the parties further agree as to the same would apply under a specific contract, and the conditions could be openly negotiated as their effect when a breach occurs.

8.6.1.2 In English law, we also have the concept of intermediate (or innominate) terms. Breach of such terms may have differing effects depending on the gravity of the consequences of the breach. Do you have a similar concept under your system?

Yes, subject to the above.

8.6.2 Exemption clauses

8.6.2.1 Do your courts recognise exemption (ie, exclusion) clauses, such as *force majeure*?

Yes.

8.6.2.2 What are the key requirements for relying on an exemption clause?

The key element is that the party asserting the exemption could not have foreseen the same when entering into the contract.

8.7 Remedies

8.7.1 What are the seller's remedies where the buyer is in breach of contract?

Terminate the contract, request performance before the courts which could include obtaining security and injunctions, without prejudice to damages.

8.7.2 What are the buyer's remedies where the seller is in breach of contract?

Likewise, terminate the contract, request performance before the courts including injunctions and attachment of the assets, without prejudice to damages. Consequential loss or loss of profit can be claimed as part of damages.

8.7.3 Are there any general limitations on the remedies available?

The value of the asset lost, subject to possible addition of loss profit or interest, as the case may be.

8.8 Time limit

8.8.1 What is the statutory limitation period?

The general statutory limitation is five years, although it can be interpreted that when performance of the sale involves contracts of carriage by sea, the limitation for this type of contract, which is one year, could apply

8.8.2 Do your courts uphold shorter contractual limitation periods?

The period is to be determined in accordance with the substantive law deemed applicable to the contract.

8.9 Finance

8.9.1 In what circumstances is it possible for your courts to prevent payment out under:

8.9.1.1 a letter of credit?

Generally, as part of a breach of conditions for payment or in some instances on insolvency.

8.9.1.2 performance bonds?

Generally, as part of a breach of conditions for payment or in some instances on insolvency.

8.9.2 What does one have to show to prevent payment out?

That it would be difficult or impossible for the honoring party to be reimbursed from the seller, in the case of a letter of credit or end beneficiary in the case of a performance bond.

8.10 Security

8.10.1 What remedies are available to obtain security for the claim:

8.10.1.1 where the substantive claim is being litigated?

Preventive attachment.

8.10.1.2 where the substantive claim is not being litigated in your jurisdiction?

There would be none. However, it is possible to attach assets if new similar judicial proceedings to the ones abroad are initiated in Panama in case of maritime causes of action and the Maritime Judge may decline jurisdiction, keeping the asset so attached to the order of the foreign court.

8.10.2 Must the applicant have already commenced substantive proceedings (whether by litigation or arbitration) to be able to obtain security?

No. It is possible to obtain security prior to the commencement of the proceedings.

8.10.3 Is there a distinction between the remedies available for a claim which is subject to litigation and one which is referred to arbitration?

Yes, within an arbitral dispute it would not be possible to seek arrest of

assets, whilst it would be possible to do so within judicial proceedings. However, the procedure stated in 8.10.1.2 would be available also when there are arbitral proceedings abroad, thus a Maritime Court of Panama could decline jurisdiction and keep the asset arrested in Panama to the order of the foreign arbitral tribunal.

8.10.4 What tests are applied to establish a right to each remedy?

Generally, the existence of a debt could support the remedy.

8.10.5 Is the applicant required to provide counter security, and if so by what means?

Yes, although in some instances the counter-security or liability bond could be relatively low.

8.10.6 What exposure does an applicant have for damages if the attachment is deemed wrongful?

Law 8 of 2008 provides that damages can be claimed within the same proceedings, once the motion is resolved in favour of the attached party.

8.11 Enforcement

8.11.1 Is your country a signatory to the New York Convention?

Yes.

8.11.2 To what extent is the New York Convention applied in practice?

As enforcement is a slow process, it is not too common but it is viable

8.12 Vienna Convention

8.12.1 Is your country a signatory?

No.

9. GENERAL FORMALITIES

9.1 Does a lawyer require a formal power of attorney to be able to act?

Yes. In some instances it is possible to act prior to receiving the power of attorney for a period of time, by posting certain bonds based on the amount of the complaint, which applies to both plaintiffs and defendants.

9.2 Do claim documents (and their translation) require notarisation?

In general all those issued or executed abroad.

Contact details

GENERAL EDITOR

David Lucas
Hill Dickinson LLP
The Broadgate Tower
20 Primrose Street
London EC2A 2EW
T: +44 20 7280 9208
F: +44 20 7283 1144
E: david.lucas@hildickinson.com
W: www.hilldickinson.com

ANGOLA

João Afonso Fialho & José Miguel
Oliveira
Miranda Correia Amendoeira &
Associados in association with Fátima
Freitas Advogados
Av. Engenheiro Duarte Pacheco, 7
1070-100 Lisboa
Portugal

Ed. Monumental - Rua Major
Kanhangulo, 290, 1st Floor
Luanda, Angola
T: +351 21 781 48 00
F: +351 21 781 48 02
E: joao.fialho@mirandalawfirm.com
E: jose.oliveira@mirandalawfirm.com
W: www.mirandaalliance.com

ARGENTINA

Fernando Ramón Ray &
Alejandro José Ray
Edye, Roche, De La Vega & Ray
25 de mayo 489 5to
CPA C1002ABI
C.A.B.A. Buenos Aires
T: +54-11 4311-3011
F: +54-11 4313-7765
E: fray@edye.com.ar
E: aray@edye.com.ar
W: www.edye.com.ar

AUSTRALIA

Geoff Farnsworth & Natalie Puchalka
Holding Redlich
Level 65, MLC Centre
19 Martin Place
Sydney NSW
2000 Australia
T: +61 2 8083 0416
F: +61 2 8083 0399
E: geoff.farnsworth@holdingredlich.
com
E: natalie.puchalka@holdingredlich.
com
W: www.holdingredlich.com

CANADA

Douglas G Schmitt
Alexander Holburn Beaudin + Lang
LLP
2700-700 West Georgia Street
Vancouver, BC
Canada V7Y 1B8
T: +604 484 1754
F: +604 484 9754
E: dschmitt@ahbl.ca
W: www.ahbl.ca

CHINA

Chen Xiangyong & Wang Hongyu
Wang Jing & Co
Rm. 2807-12, 28/F., Bank of China
Tower, 200 Yincheng Road Central,
Pudong, Shanghai, P. R. China
200120
T: +86 21 5887 8000
F: +86 21 5882 2460
E: wanghongyu@wjnco.com
E: chenxiangyong@wjnco.com
W: www.wjnco.com

CYPRUS

Vassilis Psyrras, Andreas Christofides
& Costas Stamatiou

Andreas Neocleous & Co LLC

Neocleous House

195 Makarios Avenue

Limassol CY 3608

T: +357 25 110000

M: +357 25 110001

E: vassilis.psyrras@neocleous.com

E: andreas.christofides@neocleous.
com

E: stamatiou@neocleous.com

W: www.neocleous.com

DENMARK

Johannes Grove Nielsen

Bech-Bruun

Langelinie Allé 35

2100 Copenhagen

T: +45 72273377

M: +45 25263377

E: jgn@bechbruun.com

W: www.bechbruun.com

ENGLAND & WALES

David Lucas

Hill Dickinson LLP

The Broadgate Tower

20 Primrose Street

London EC2A 2EW

T: +44 20 7280 9208

F: +44 20 7283 1144

E: david.lucas@hilldickinson.com

W: www.hilldickinson.com

FINLAND

Ulla von Weissenberg & Linda
Ojanen

Attorneys at Law Borenus Ltd

Yrjönkatu 13 A

FI-00120 Helsinki

T: +358 9 6153 3460 (Ulla)

T: +358 9 6153 3240 (Linda)

F: +358 9 6153 3499

E: ulla.weissenberg@borenus.com

E: linda.ojanen@borenus.com

W: www.borenus.com

FRANCE

Laurent Garrabos

BCW & Associés

25, rue du général Foy

75008 Paris

T: +33 1 42 84 84 70

F: +33 1 42 84 84 71

E: lgarrabos@bcw-associes.com

W: www.bcw-associes.com

GERMANY

Jobst von Werder & Ingo Gercke

REMÉ Rechtsanwälte

Ballindamm 26

D-20095 Hamburg

T: +49 0 40 32 52 99 0

F: +49 0 40 32 75 69

E: j.werder@reme.de

E: i.gercke@reme.de

W: www.reme.de

GREECE

Maria Moisdou

Hill Dickinson International

2 Deferas Merarchias St

Piraeus 185, 35

T: +30 210 428 4770

F: +30 210 428 4777

E: maria.moisdou@hilldickinson.
com

W: www.hilldickinson.com

HONG KONG

Damien Laracy

Hill Dickinson Hong Kong LLP in

Association with Laracy & Co.

Room 3205, 32nd Floor

Tower Two, Lippo Centre

89 Queensway

Admiralty

Hong Kong

T: +852 2525 7525

F: +852 2525 7526

E: damienlaracy@laracyco.com

W: www.laracyco.com

INDIA

Prashant S Pratap
Senior Advocate
Maker Chambers III
151, 15th Floor
Nariman Point
Mumbai 400021
T: +91 22 6669 5669
F: +91 22 6669 5699
E: prashant.pratap@psplawoffice.com
W: psplawoffice.com

INDONESIA

Juni Dani
Budidjaja & Associates
The Landmark Center II, Floor 8
Jl. Jend. Sudirman No. 1
Jakarta 12910
T: +62-21 520 1600
F: +62-21 520 1700
E: juni@budidjaja.com
W: www.budidjaja.com/

ISRAEL

Amir Cohen-Dor
S Friedman & Co
One Matam Towers
9 Andrei Sakharov St, P.O.Box 15065
Haifa 31905
T: +972 4 8546666
F: +972 4 8546688
E: amirc@friedman.co.il
W: www.friedman.co.il

ITALY

Paolo Manica & Michele Mordiglia
Studio Legale Mordiglia
Via XX Settembre 14/17
16121 Genova
T: +39 010 586841
F: +39 010 532729/562998
E: paolo.manica@mordiglia.it
E: michele.mordiglia@mordiglia.it
W: www.mordiglia.it

JAPAN

Tetsuro Nakamura, Tomoi Sawaki &
Minako Ikeda
Yoshida & Partners
4th fl. Suitengu Hokushin Bldg.
1-39-5 Nihombashi-Kakigaracho
Chuo-ku, Tokyo 103-0014
T: +813 5695-4188
F: +813 5695-4187
W: www.japanlaw.co.jp

MALTA

Dr Ann Fenech & Dr Adrian Attard
Fenech and Fenech Advocates
198, Old Bakery Street
Valletta, VLT1455
T: +356 2124 1232
F: +356 2599 0645
E: ann.fenech@fenlex.com
E: adrian.attard@fenlex.com
W: www.fenechlaw.com

MEXICO

Enrique Garza
Garza Tello & Asociados SC
Camino Sta. Teresa 187C 5 piso
México DF 14010
T: +5255 54 24 84 61
F: +5255 51 71 0763
E: egarza@garzatello.com.mx
W: www.garzatello.com.mx

MOZAMBIQUE

João Afonso Fialho & Sofia Paramés
Miranda Correia Amendoeira &
Associados in association with
Pimenta Dionísio & Associados
Av. Engenheiro Duarte Pacheco, 7
1070-100 Lisboa
Portugal

Rua Changamire Dombe (D. Diniz),
14, Sommerschield
Maputo
Mozambique
T: +351 21 781 48 00

F: +351 21 781 48 02
E: joao.fialho@mirandalawfirm.com
E: sofia.parames@mirandalawfirm.com
W: www.mirandaalliance.com

NETHERLANDS

Rene Van Leeuwen
Hampe Meyjes Advocaten
Sluisjesdijk 151, 3087 AG Rotterdam
P.O. Box 55288, 3008 EG Rotterdam
T: +31 10-494 55 00
F: +31 10-494 55 07
E: rene.van.leeuwen@hampemeyjes.nl
W: www.hmlaw.nl

NIGERIA

Emmanuel Achukwu
The Campbell Law Firm
Eleganza House, 2nd Floor
15B Joseph Street
Lagos
T: +234-1 2711505
E: thecampbell@hyperia.com
W: www.tclfllegal.com

PANAMA

Jorge Loaiza III
Arias, Fabrega & Fabrega
Plaza 2000, 16th Floor
50th Street
T: +507 205 7068
F: +507 205 7001/02
E: jloaiza@arifa.com
W: www.arifa.com

PERU

Percy Urday
Moncloa, Vigil, Del Rio & Urday
Calle Chacarilla N° 485, San Isidro
Lima, 27
T: +51 1 4224101/ 4401246
F: +51 1 4401246/ 4227593
E: murdayab@amauta.rcp.net.pe
E: murdayab@murdayab.com

POLAND

Sławomir Nowicki, Alina Łuczak,
Katarzyna Bielarczyk & Agnieszka
Nowicka
Wybranowski Nowicki Law Office
Energetyków ¾ Street
70-952 Szczecin
T: +48 91 4624 839
F: +48 91 4624 056
E: nowicki@wn-bp.pl
E: luczak@wn-bp.pl
E: bielarczyk@wn-bp.pl
E: nowicka@wn-bp.pl
W: www.wybranowskinowicki.pl

PORTUGAL

João Afonso Fialho &
José Miguel Oliveira
Miranda Correia Amendoeira &
Associados
Av. Engenheiro Duarte Pacheco, 7,
1070-100 Lisboa
T: +351 21 781 48 00
F: +351 21 781 48 02
E: joao.fialho@mirandalawfirm.com
E: jose.oliveira@mirandalawfirm.com
W: www.mirandalawfirm.com

RUSSIA

Elena Popova
Sokolov, Maslov and Partners
Barklaya Street 17
121309 Moscow
T: +7 499 145 21 30
F: +7 495 956 22 45
E: elena.popova@smplawyers.ru
W: www.smplawyers.ru

SINGAPORE

Raghunath Peter Doraisamy
Selvam LLC
16 Collyer Quay #17-00
Singapore 049318
T: +65 6311 0030
F: +65 6311 0058
E: pdoraisamy@selvam.com.sg
W: www.selvam.com.sg

SOUTH AFRICA

Shane Dwyer & Jennifer Finnigan
Shepstone & Wylie
PO Box 305,
La Lucia, 4153
Durban
T: +27 31 575 7308
F: +27 31 575 7300
E: dwyer@wylie.co.za
E: finnigan@wylie.co.za
W: www.wylie.co.za

SOUTH KOREA

Byung-Suk Chung
Kim & Chang
1st Floor, 223 Naeja-dong,
Jongno-gu,
Seoul 110-720
T: +82 2 3703 1103
F: +82 2 737 9091
E: bschung@kimchang.com
W: kimchang.com

SPAIN

Verónica Meana Larrucea & Santiago
López-Caravaca Boluda
Meana Green Maura & Co
C/ Velázquez 92 - 2º Dcha
28006 Madrid
T: +34 91 432 3875
F: +34 91 432 3876
E: info@meanagreenmaura.com
E: vmeana@meanagreenmaura.com
W: www.meanagreenmaura.com

TURKEY

Zihni Bilgehan & Emre Ersoy
Ersoy Bilgehan
Maya Akar Center,
Buyukdere Cad. No:100-102 K:26
34394 Esentepe, Istanbul
T: +90 212 213 23 00
F: +90 212 213 36 00
E: zbilgehan@ersoybilgehan.com
W: ersoybilgehan.com

UKRAINE

Alexander Kifak & Artyom Volkov
ANK Law Firm
9 Lanzheronovskaya Street,
Odessa, 65026 Ukraine
T: +38 0482 348 716
F: +38 0482 348 716
E: office@ank.odessa.ua
E: avolkov@ank.odessa.ua
W: www.ank.odessa.ua

UAE

Adrian Chadwick &
Raymond Kisswany
Hadeef & Partners
Emaar Square
Building 3, Level 5
Downtown Dubai
PO Box 37172
Dubai, UAE
T: +971 4 429 2960 (Adrian)
T: +971 4 429 2949 (Raymond)
T: +971 4 429 2999
F: +971 4 429 2888
E: a.chadwick@hadeefpartners.com
E: r.kisswany@hadeefpartners.com
W: www.hadeefpartners.com

UNITED STATES

John Kimball & Emma Jones
Blank Rome LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174-0208
T: +1 212 885 5259 (John)
T: +1 212 885 5128 (Emma)
F: +1 917 332 3730
E: jkimball@blankrome.com
E: ejones@blankrome.com
W: www.blankrome.com