



ICLG

The International Comparative Legal Guide to: **Shipping Law 2019**

7th Edition

A practical cross-border insight into shipping law

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EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Shipping Law*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of shipping laws and regulations.

It is divided into two main sections:

Seven general chapters, which explore topical issues affecting shipping law from a cross-border perspective.

Country question and answer chapters. These provide a broad overview of common issues in shipping laws and regulations in 44 jurisdictions.

All chapters are written by leading shipping lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Andrew Bicknell of Clyde & Co LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Mozambique

João Afonso Fialho



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VdA

1 Marine Casualty

1.1 In the event of a collision, grounding or other major casualty, what are the key provisions that will impact upon the liability and response of interested parties? In particular, the relevant law / conventions in force in relation to:

(i) Collision

The following international conventions and regulations are applicable in Mozambique:

- 1910 International Convention for the Unification of Certain Rules of Law Related to Collision Between Vessels;
- 1952 International Convention for the Unification of Certain Rules concerning Civil Jurisdiction in Matters of Collision;
- 1952 International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation; and
- 1972 International Regulations for Preventing Collisions at Sea (“COLREGS”).

In some cases, these international statutes are complemented by domestic statutes, regarding, notably the rules of traffic within port areas, inland navigation, among others, as well as the provisions stated in the 1888 Commercial Code (Article 664 *et seq.*), since the rules regarding the maritime commerce were not expressly revoked upon the enactment of the new Commercial Code (Decree Law 2/2005, of 27 December).

(ii) Pollution

The Environmental Law (Law 20/97, of 1 October 1997), as amended by Law 16/2014, of 20 June, besides setting out the general provisions regarding the protection of the environment, also imposes an environmental impact assessment process (which is governed by the Regulations on the Environmental Impact Assessment Procedure, approved by Decree 54/2015, of 31 December 2015) on companies carrying out activities that may have a direct or indirect impact on the environment. Essentially, the Environmental Law sets forth the legal basis for a proper management of the environment, cumulatively with the development of the country. It applies to both private and public entities pursuing activities that may have an impact on the environment. Core principles such as the “polluter pays” principle, rational management and use of the environment and the importance of international co-operation are referred to and integrated in the Environmental Law.

To specifically protect marine life and limit pollution resulting from illegal discharges by vessels or from land-based sources along the Mozambican coast, the Government enacted Decree 45/2006, of 30 November 2006, that aims to prevent pollution arising from maritime activity, particularly from oil tankers and very large crude carriers (“VLCCs”). Considering the prospective gas reserves found offshore Mozambique, which are currently being exploited, this Decree also details the activities that, because of their potential harm to the environment, fall within the oversight of the maritime authority, such as the loading, offloading and transfer of cargo, tank cleaning and discharge of water waste into the sea. The carrying out of such activities (except in the cases expressly provided for in Decree 45/2006 of 30 November 2006) may result in heavy fines. Moreover, the Regulation on Environmental Quality and Emission of Effluents (Decree 18/2004, of 2 June 2004, as amended by Decree 67/2010, of 31 December 2010) also establishes environmental quality and effluent emission standards for controlling and maintaining the acceptable levels of pollutant concentrations in environmental components.

The aforementioned statutes are complemented by the Conventions and Protocols signed by Mozambique, such as the:

- 1985 Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, and Related Protocols;
- 1973 International Convention for the Prevention of Pollution from Vessels (“MARPOL 73/78”) and Annexes I/II, III, IV and V;
- 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (“OPRC 90”);
- 1992 Protocol to Amend the 1969 International Convention on Civil Liability for Oil Pollution Damage (“CLC 1969”); and
- 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (“FUND”).

(iii) Salvage / general average

Salvage is governed by the 1910 Salvage Convention and, where applicable, by the provisions stated in the 1888 Commercial Code (Article 676 *et seq.*).

General average is governed by the provisions of the 1888 Commercial Code (Article 634 *et seq.*).

(iv) Wreck removal

Mozambique is not a signatory of the Nairobi International Convention on the Removal of Wrecks, 2007. Therefore, the removal of wrecks must be dealt with in light of the domestic law, namely the Environmental Law and ancillary statutes and regulations.

(v) Limitation of liability

Mozambique is a signatory to both the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels, and the 1957 International Convention relating to the Limitation of the Liability of Owners of Seagoing Vessels. In addition to these conventions, it is also important to consider the limitations arising from the Hague Rules, to the extent that they are applicable.

(vi) The limitation fund

The limitation fund can be established in any way admitted by law. It is, however, dependent on the filing of a proper application before the relevant court, which must identify/list:

- the occurrence and damages;
- the amount of the limitation fund;
- how the fund will be established;
- the amount of the reserve; and
- the known creditors and the amount of their claims.

The application must be filed together with the vessel's documents supporting the calculation of the amount of the fund (e.g., a tonnage certificate).

1.2 What are the authorities' powers of investigation / casualty response in the event of a collision, grounding or other major casualty?

The National Maritime Institute (*Instituto Nacional da Marinha – "INAMAR"*), in its role as the Maritime Authority, under the supervision of the Ministry of Transport and Telecommunications, is the key entity responsible for maritime safety and in charge of investigating and responding to any maritime casualty. In performing its duties, INAMAR is assisted by the Harbourmaster with jurisdiction over the area where the casualty took place. Additionally, the National Institute of Hydrography and Navigation ("INAHINA") also has an ancillary role on maritime safety.

In this regard, Mozambique has ratified, by means of Decree 71/2017, of 31 December 2017, the International Code of Protection of Vessels and Port Facilities ("ISPS"), which makes governments, shipping companies, shipboard personnel and port facility personnel responsible for detecting security threats and taking preventative measures against security incidents affecting ships or port facilities used in international trade. Moreover, the Mozambican Government has recently adhered to the 2005 Protocol for the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA") and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("SUA PROT"), by means of Resolutions 28/2018 and 29/2018, both of 3 July 2018.

2 Cargo Claims

2.1 What are the international conventions and national laws relevant to marine cargo claims?

Cargo claims are regulated by the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, also known as the Hague Rules. Pursuant to the Hague Rules, the carrier is liable *vis-à-vis* the consignee in relation to the loading, handling, stowage, carriage, custody, care and discharge of such

goods. Contracts of carriage are thus governed by the terms of the Hague Rules and the 1888 Commercial Code (Article 538 *et seq.*), in the absence of specific provisions set out in the relevant contract.

It must be noted that the Hague Rules shall apply if the shipment (i.e., loading and place of destination) occurs between two of the signatory countries. Notwithstanding, in case the country of destination of the goods is not a signatory to the Hague Rules, then the applicable law would be decided by the Mozambican courts in accordance with the *lex rei sitae* principle.

2.2 What are the key principles applicable to cargo claims brought against the carrier?

As a general principle, any party to a contract of carriage that can demonstrate that it has suffered losses or damages arising from the carrier's actions or omissions and that holds an interest over the cargo is entitled to sue for losses or damages. Taking this into consideration, the rights to sue under a contract of carriage belong to (1) the shipper, and (2) the rightful holder of the bill of lading. In addition, when in the presence of a straight bill of lading, the right to bring a claim remains with the named consignee; in the case of an order bill of lading, only the latest endorsee is eligible to sue; and, with a bill of lading concerning a bearer, it is up to the rightful holder at a given moment to sue.

Additionally, rights under a contract of carriage may also be validly transferred to third parties either by way of assignment of contractual position or subrogation of rights (which is typically the case when insurers indemnify cargo interests and then seek reimbursement from the carrier), provided that the relevant rules foreseen in the Civil Code are met.

2.3 In what circumstances may the carrier establish claims against the shipper relating to misdeclaration of cargo?

In light of article 3.5 of the Hague Rules, the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies provided in the bill of lading, regarding the information (marks, number, quantity and weight) on the cargo to be carried.

3 Passenger Claims

3.1 What are the key provisions applicable to the resolution of maritime passenger claims?

Mozambique is not a contracting party to the Athens Convention concerning the Carriage of Passengers and their Luggage by Sea. The carriage of passengers is generally governed by the Mozambican Civil and Commercial Codes (Article 564 *et seq.* of the Commercial Code) and the Consumer Law, in addition to the individual provisions foreseen in the contracts of carriage. The carrier's liability is mostly fault-based. In the event of delays, unexpected changes of route, interruption of the transport, damages or loss of carriage, passengers are entitled to claim compensation for losses and damage caused by an action attributed to the carrier, regardless of its wilful misconduct. In addition, any expenses that the passenger may incur that arise from the delay, interruption or change of route shall be undertaken by the carrier.

4 Arrest and Security

4.1 What are the options available to a party seeking to obtain security for a maritime claim against a vessel owner and the applicable procedure?

The 1952 Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Vessels (“1952 Convention”) is applicable to Mozambique. Under this Convention, any person that alleges holding a maritime claim is entitled to seek the arrest of a ship. A “maritime claim” is deemed to be a claim that arises out of one or more of the situations foreseen in Article 1.1 of the Convention.

For the purposes of obtaining security for an unlisted maritime claim (e.g., arrest for a ship sale claim, unpaid insurance premiums, protection and indemnity (“P&I”) dues, amongst others) or to seek the arrest of a vessel sailing under the flag of a non-contracting state, i.e. situations that do not fall within the scope of the 1952 Convention, the claimant must make use of the provisions of the Mozambican Code of Civil Procedure (“CPC”). In this case, and besides the jurisdiction issue that needs to be properly assessed, in addition to providing evidence on the likelihood of its right/credit (*fomus bonus iuris*), the claimant shall also produce evidence that at the time that the final judgment is handed down in the main proceedings, there is a risk that the debtor/arrestor may have already removed or concealed the ship (security for the claim) or that the ship may depreciate in such a way that the ship is no longer available or has substantially decreased in value (*periculum in mora*).

Before ordering the arrest, the arrestee is granted the opportunity to oppose/challenge the arrest application/order within 10 days. Please note, however, that if the arrest application is properly filed and duly documented, the court may order the detention of the vessel before summoning the arrestee or granting the arrestee the possibility to oppose the arrest application. With the arrest in place, the claimant is required to file the initial claim for the main proceedings, of which the injunction will form an integral part, within 30 days of the arrest order.

During the proceedings, the parties are free to settle by agreement and withdraw the claim. If the main claim can be filed with a foreign court, then the judge dealing with the arrest application must set out the period within which the claimant must commence proceedings on the merits in the appropriate jurisdiction. The defendant is entitled to post a security before the relevant court in the amount of the claim brought by the claimant, and seek the release of the vessel pending foreclosure and auction.

4.2 Is it possible for a bunker supplier (whether physical and/or contractual) to arrest a vessel for a claim relating to bunkers supplied by them to that vessel?

Under Article 1.k of the 1952 Convention, a claim arising from a bunker supply may be considered a maritime claim.

4.3 Is it possible to arrest a vessel for claims arising from contracts for the sale and purchase of a ship?

Claims arising from ship sale and purchase contracts do not qualify as “maritime claims” for the purposes of the 1952 Convention. As such, and as named under question 4.1 above, those willing to arrest

a vessel for an unlisted maritime claim must make use of the provisions of the CPC (in order for measures to be taken, a claimant must provide evidence of the likelihood of its right and justified fear of irreparable damage or damage that is difficult to repair).

4.4 Where security is sought from a party other than the vessel owner (or demise charterer) for a maritime claim, including exercise of liens over cargo, what options are available?

Assets (e.g., bunkers) belonging to the arrestee may be subject to arrest, provided that it is possible to establish ownership in respect thereof. Additionally, the carrier is entitled to exercise a possessory lien over cargo. In this regard, please note that in accordance with Mozambican law, a lien is only enforceable by operation of the law and not merely by contract. By way of illustration, Article 755 of the Civil Code provides that any debts resulting from shipping services entitle the carrier/creditor to retain goods in its possession until those debts are fully discharged.

4.5 In relation to maritime claims, what form of security is acceptable; for example, bank guarantee, P&I letter of undertaking.

Typically, cash deposits (at the court’s order) and bank guarantees are the most effective forms of security. Letters of undertaking (“LoUs”) are acceptable in very limited situations and their acceptance is always dependent on the other party’s agreement.

5 Evidence

5.1 What steps can be taken (and when) to preserve or obtain access to evidence in relation to maritime claims including any available procedures for the preservation of physical evidence, examination of witnesses or pre-action disclosure?

Parties may start an action and file a motion requiring it to be enlisted by the court or taken prior to the hearing whenever there is a serious risk of loss, concealment or dissipation of property or documents, as well as when it becomes impossible or nearly impossible to obtain testimony or certain evidence by way of inspection. The relevant motion can be lodged whenever deemed suitable, but the applicant is required to provide due grounds for its request.

5.2 What are the general disclosure obligations in court proceedings?

As a general rule, it is up to the parties to establish the object of their claim/proceedings and the judge cannot go beyond the limits of the claim as put forward by the parties. Moreover, parties have the burden of presenting the facts of their interest and producing evidence in respect thereof. The court will analyse the evidence produced/requested by the parties, but it is not limited to this. In fact, the court is also allowed to request and compel the parties to disclose all evidence deemed necessary to the discovery of the truth and/or to the best resolution of the dispute.

6 Procedure

6.1 Describe the typical procedure and timescale applicable to maritime claims conducted through: i) national courts (including any specialised maritime or commercial courts); ii) arbitration (including specialist arbitral bodies); and iii) mediation / alternative dispute resolution.

i) National courts:

Specialised courts in maritime and shipping matters were established in the most important cities of the country, such as Maputo, Inhambane, Beira, Quelimane, Nacala and Pemba, with the enactment of Law 5/96. These are independent courts that exercise jurisdiction over all sorts of maritime contracts (from engineering, procurement and construction contracts for vessels, to bareboat charters) and disputes.

In general, Mozambican courts are competent to rule on claims where the parties in dispute and the claim itself have a close connection or link to Mozambique.

Regarding the legal procedures before national courts, these can be generally described as follows:

- Proceedings commence with the filing of an initial written complaint before the court. In addition to listing the facts and arguments sustaining the claim, the claimant is required to list its witnesses and request the other evidence proceedings, such as inspections or surveys.
- Service is made by the clerks, in person. Shipping agents represent owners'/disponent owners'/managers' interests and can receive documentation on their behalf.
- Generally, the defendant has 30 days to challenge and oppose the claim. If it fails to present its defence, the facts presented by the claimant are deemed proven (exceptions apply).
- With the opposition lodged, the judge will summon the parties and will try to resolve the dispute amicably or, that not being possible, prepare the final hearing.
- At the final hearing, the witness will be examined and cross-examined by the lawyers representing each party, and the judge may intervene whenever it is deemed necessary. At the end, lawyers are required to issue their final arguments verbally.
- The judge will then prepare and issue the judgment which, depending on the amount of the claim, can entail an appeal.

As to the duration of maritime proceedings, as with any other legal proceedings, it is highly unpredictable. In our experience, besides arrests and any other interim measures, it should not be expected to take less than one year to 18 months, as it depends on several variables, such as the court's current caseload.

ii) Arbitration and mediation / alternative dispute resolution:

The Law on Arbitration, Conciliation and Mediation, commonly referred to as LACM (Law 11/99 of 8 July 1999) is the primary source of domestic law relating to arbitration. The LACM governs both international and domestic commercial arbitration, recognises the New York and Washington Conventions but applies the rules set out in the CPC for arbitration proceedings. It must be noted that the LACM does not diverge from the UNCITRAL Model Law on International Commercial Arbitration, and that it follows the general standards and terms of the UNCITRAL Model Law for the conduct of proceedings, tribunal composition and recognition of the award given.

To submit a dispute to arbitration, there must be an arbitration agreement (often a clause which is express, valid and enforceable), which is required to be in writing (in the contract under which the dispute arises or in any correspondence exchanged between the parties).

Lastly, it is worth mentioning that to oversee and promote arbitration, the Government of Mozambique created the Centre for Arbitration, Conciliation and Mediation ("CAMC"), as well as other alternative dispute resolution mechanisms. The CAMC's headquarters are in Maputo but it also has branches in the cities of Beira and Nampula.

6.2 Highlight any notable pros and cons related to your jurisdiction that any potential party should bear in mind.

The country needs to continue developing its infrastructure and support the training and qualification of its citizens and public officers, although a remarkable progress in this matter has been made in the recent years by the Mozambican Government. Bureaucracy, outdated statutes, poor infrastructure and a lack of qualified technicians/clerks are still the biggest challenges that one faces in this regard.

7 Foreign Judgments and Awards

7.1 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of foreign judgments.

Articles 1094 and 1095 of the CPC foresees that any judgment awarded by a foreign court is, as a rule, subject to review and confirmation by the Supreme Court in order to be valid and enforceable locally (i.e., to obtain the "*exequatur*").

The review and confirmation of foreign decisions under the CPC is mostly formal and should not involve a review of the merit or grounds of the judgment, but simply a re-examination of the relevant judgment and additional judicial procedure requirements. The process must begin with the filing by the interested party of an application to that effect with the Supreme Court. For the foreign decision to be recognised by the Supreme Court, the following set of requirements must be met:

- There must be no doubt that the judgment is authentic and its content understandable.
- It must constitute a final decision (not subject to appeal) in the country in which it was rendered.
- The decision must have been rendered by the relevant court according to the Mozambican conflict-of-law rules.
- There is no case pending before or decided by a Mozambican court, except if it was the foreign court which prevented the jurisdiction of the Mozambican courts.
- The defendant was served proper notice of the claim in accordance with the law of the country in which the judgment was rendered, except in cases where, under Mozambican law, there is no need to notify the defendant, or in cases where the judgment is passed against the defendant because there was no opposition.
- The judgment is not contrary to the public policy principles of the Mozambican state.
- The decision rendered against the Mozambican citizen/company does not conflict with Mozambique's private law, in cases where this law could be applicable according to the Mozambican conflict-of-law rules.

After the application is filed, the court must serve notice of same on the defendant. Once the notice is served, the defendant may oppose the *exequatur* if any of the above requirements are not met.

If the defendant opposes the *exequatur*, the applicant may reply to the defendant's arguments. Afterwards, the case follows various procedural steps until the decision is made on whether to grant the *exequatur*. The losing party may still appeal against the court's decision.

7.2 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of arbitration awards.

As a result of Mozambique ratifying the 1958 New York Convention, Mozambican courts are to give effect *prima facie* to an arbitration agreement and award rendered in any other signatory country to the New York Convention. For an arbitral award that was not granted by another contracting state to be enforceable, it must have been previously reviewed and confirmed by Mozambique's Supreme Court (see question 7.1 above).

8 Updates and Developments

8.1 Describe any other issues not considered above that may be worthy of note, together with any current trends or likely future developments that may be of interest.

Mozambique has been sought to update and enact a considerable number of laws and regulations applicable to the shipping industry, at the same time as ratifying and adhering to a number of international treaties and conventions (although a number of pivotal conventions on maritime and shipping-related matters applicable in the country date from the time when Mozambique was still a Portuguese overseas territory).

Over the last years, the Government of Mozambique has been enacting important domestic legislation to support the shipping industry, and paving the way for foreign and national investments. Significant steps have been made in this direction, with the setting

up of maritime courts, the creation of an institute exclusively dedicated to regulating and overseeing the shipping industry (INAMAR) and the opening of cabotage activities to foreign vessels and owners. More recently, the Government has boosted its drive to set up a consistent legal regime for maritime and shipping activities, with the enactment of new regulations on the private use of the Mozambican maritime space (Decree 21/2017, of 24 May 2017) and the new regulations on port work (Decree 46/2016, of 31 October 2016). The ratification of the International Code of Protection of Vessels and Port Facilities ("ISPS"), along with the adherence to the Maritime Labour Convention, and the revisions and updates recently made to the Regulations for Pilots and Ports Certification (Decree 24/2018, of 7 May 2018), are a clear sign that the Government is focused on meeting the international standards applicable to the shipping industry.

In addition to the named legislative initiatives, the Government is currently investing in the refurbishment and expansion of the existing ports and logistics facilities, including the handling capacity of the port of Maputo (expected to increase to an annual 48 million tonnes by 2033) and the construction of new ones, aiming at making the country's infrastructure able to support the enhancement of the shipping industry in the coming years.

Mozambique has seen both imports and exports increase for the past five years, especially due to the strong investment flows in connection with the liquified natural gas project in Offshore Areas 1 and 4. Moreover, Mozambique's Government plan to set up a Logistics Corridor in Nacala, which is also expected to enhance cabotage and bunkering services, as it will serve to promote the shipment of goods and passengers along the Mozambique coast.

In essence, all these developments are considerable indicators of the country's potential for shipping and its openness to receive foreign investments in this sector.

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