

International Comparative Legal Guides



Shipping Law 2020

A practical cross-border insight into shipping law

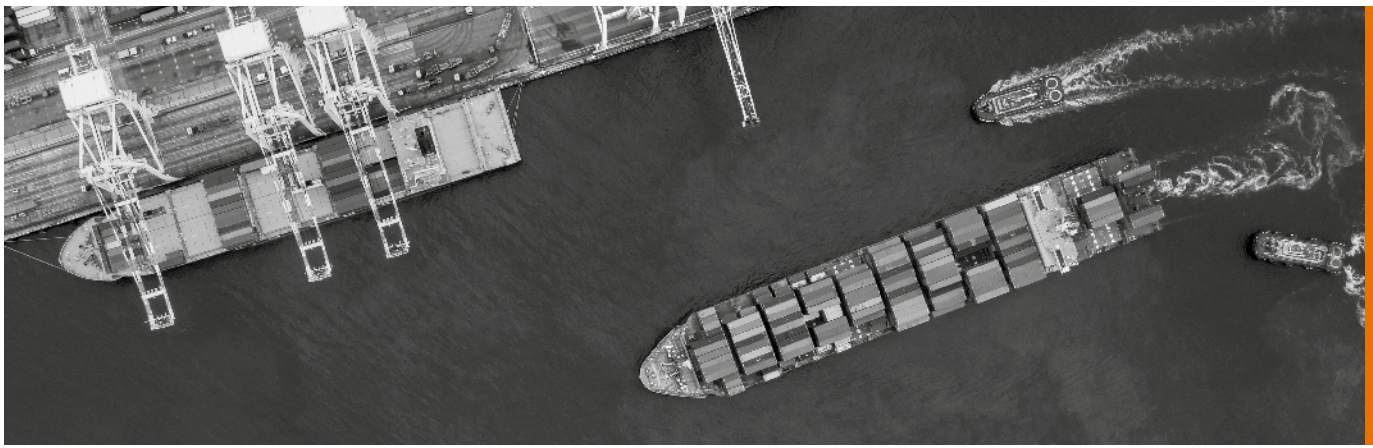
Eighth Edition

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Mozambique

VdA



João Afonso Fialho



José Miguel Oliveira

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 are enforceable 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”).

The above conventions and regulations are supplemented, in some cases, by domestic statutes, notably on rules of traffic within port areas, inland navigation, among others.

(ii) Pollution

The Environmental Law (Law 20/97, of 1 October 1997), as amended by Law 16/2014, of 20 June, sets out the general provisions pertaining to the protection of the environment and 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 which may have a direct or indirect impact on the environment. In a nutshell, 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 with a potential 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.

In order 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. It should be noted that this Decree prevents pollution arising from maritime activity, particularly from oil tankers and VLCC vessels. Considering the prospective gas reserves found offshore Mozambique, Decree 45/2006, of 30 November 2006 also details the activities that, due to 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 in the sea. The carrying out of such activities (except in the cases expressly provided for in the Decree 45/2006 of 30 November 2006) may entail the assessment of heavy fines.

Furthermore, 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 the purpose of controlling and maintaining the acceptable levels of pollutant concentrations in environmental components.

Both of the above-mentioned 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, the provisions of 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. The removal of wrecks must therefore be dealt with in light of the domestic law, namely the Environmental Law and ancillary statutes and regulations.

(v) Limitation of liability

Angola is not a signatory of the Convention on Limitation of Liability for Maritime Claims. Conversely, 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 apply.

(vi) The limitation fund

The limitation fund can be established in any way admitted in the law and is dependent on the filing of a proper application before the relevant court. The application 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 along with the vessel's documents supporting the calculation of the amount of the fund (e.g., a tonnage certificate).

1.2 Which authority investigates maritime casualties in your jurisdiction?

The National Maritime Institute ("INAMAR") is the governmental body in charge of investigating and responding to maritime casualties. In performing its duties, the INAMAR is assisted by the local port authorities and captaincy with jurisdiction over the area in which the casualty took place. In the event of (eventual) environmental damage, environment authorities may also be called to act, notably the Ministry of Environment. Moreover, the National Institute of Hydrography and Navigation ("INAHINA") has an ancillary role on maritime safety.

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

Within the area of maritime safety, it is worth mentioning that INAMAR is specifically responsible for (a) exercising control over foreign vessels when they are in Mozambican waters, (b) applying and implementing safety standards for national and foreign vessels engaged in maritime trade, (c) supervising pilotage in ports, (d) conducting enquiries on accidents, incidents and maritime infringement proceedings, and (e) licensing and supervising the exercise of towage and salvage activities within Mozambican waters.

In this respect, it is worth mentioning that, back in 2017, Mozambique ratified the International Code of Protection of Vessels and Port Facilities ("ISPS"), which foresees responsibilities to governments, shipping companies, shipboard personnel, and port facility personnel to detect security threats and take preventative measures against security incidents affecting ships or port facilities used in international trade.

2 Cargo Claims

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

The 1924 International Convention for the Unification of Certain Rules of Law relating to bills of lading, also known as the Hague Rules, applies. Under 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 therefore governed by the terms of the Hague Rules and the 1888 Commercial Code (Article 538 *et seq.*), in the absence of detailed provisions set out in the relevant contract.

It is important to note that, if the shipment (i.e. loading and place of destination) takes place between two countries party to the Hague Rule, these rules shall apply. However, if the country of destination of the goods is not a signatory to the Hague Rules,

then the applicable law would be determined by 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 who holds an interest over the cargo and can demonstrate that it has suffered losses or damages arising from the carrier's actions and/or omissions is entitled to sue for losses or damages. Taking the above into consideration, the rights to sue under a contract of carriage therefore assist (1) the shipper, and (2) the rightful holder of the bill of lading. In this respect, it is noteworthy that when in the presence of a: (i) straight bill of lading, the right to bring a claim remains with the named consignee; (ii) order bill of lading, only the latest endorsee is eligible to sue; and (iii) bill of lading to bearer, it is up to the rightful holder at a given moment to sue.

In addition to the above, 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), as long as the relevant rules provided 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 regarding the information (marks, number, quantity and weight) on the cargo to be transported.

2.4 How do time limits operate in relation to maritime cargo claims in your jurisdiction?

The general time bar for claims arising out of contracts is 20 years, although there are certain cases in which this statutory limitation period is shorter. Still, the statute of limitation for cargo claims arising out of contracts ruled by the Hague Rules is one year, counting as from the date of delivery of the goods or of the date when the goods should have been delivered.

3 Passenger Claims

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

A carrier's liability is mostly fault-based. In the event of delays, unexpected changes of route, 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.

3.2 What are the international conventions and national laws relevant to passenger claims?

Mozambique is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Generally, the rules applicable to the carriage of passengers are set forth in the Commercial and Civil Codes and the Consumer Law, this is in addition to the individual terms of the contract of carriage.

3.3 How do time limits operate in relation to passenger claims in your jurisdiction?

As mentioned above, the general time bar for claims arising out from commercial contracts is 20 years. Nevertheless, there are grounds to argue that claims for loss of life or personal injury (including for damages on property) arising out of shipping incidents impose strict liability to the carrier, being, in this case, the applicable limitation period of three years, counting as from the moment that the claimant becomes aware of its rights.

It is worth noting that, in certain cases, the running of the statute of limitation period may be (i) suspended (in which case the period of suspension is not to be counted when assessing if the statute of limitation has expired), or (ii) interrupted (in which case the interruption renders the time already elapsed of no effect and a new statute of limitation will restart counting as from the interruption).

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 in Mozambique. Under the 1952 Convention, any person alleging that it holds a maritime claim is entitled to seek the arrest of a ship. A “maritime claim” is deemed to be a claim arising out of one or more of the situations named under Article 1.1 of the 1952 Convention.

Outside the scope of the 1952 Convention, i.e., 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, the claimant must make use of the provisions of the Mozambican Code of Civil Procedure (“CPC”). In this case, and aside from the jurisdiction issue that needs to be properly assessed, in addition to providing evidence on the likelihood of its right/credit, the claimant shall also produce evidence that there is a risk that the debtor/arrestor may remove or conceal the ship (security for the claim) or that the ship may depreciate in such a way that, at the time that the final judgment is handed down in the main proceedings, the ship is no longer available or has substantially decreased in value.

Before ordering the arrest, the arrestee is granted the opportunity to oppose/challenge the arrest application. 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 chance to oppose to the arrest application. The arrestee has 10 days to oppose to the arrest application/order.

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 as of the arrest order. During the proceedings, the parties are free to settle by agreement and withdraw the claim. If the main claim should 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.

Recently, Mozambique approved the Movables Security Law (Law no. 19/2018, of 28 December 2018), which establishes a special regime regarding the perfection rules and enforcement

regime of security interests over movable assets, including vessels. The main feature of this regime is the fact that the creditor may dispose of the movable asset given as security, without having to appeal to court or any other entity, provided that it is allowed to do so under the security agreement and complies with the procedure provided for in the law.

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?

A claim arising from a bunker supply may be considered as a maritime claim under Article 1.k of the 1952 Convention.

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.

4.6 Is it standard procedure for the court to order the provision of counter security where an arrest is granted?

There is no standard practice in this regard (this will ultimately depend on the assessment made by the judge in charge for the file and the specifics of the claim/parties).

4.7 How are maritime assets preserved during a period of arrest?

While the arrest is pending, a custodian appointed by the court is responsible for ensuring the preservation of the assets.

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?

Mozambican civil law provides the possibility of the applicant requiring from the court a motion aiming at ensuring the preservation of documents or property whenever there is a serious risk of their loss, concealment or dissipation. This motion shall be duly grounded. Parties may also request the production of evidence within the control of the other party, or request the anticipatory production of evidence if there is a justifiable concern that the production of evidence at a later stage will be impossible or very difficult.

5.2 What are the general disclosure obligations in court proceedings? What are the disclosure obligations of parties to maritime disputes 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. In addition, parties have the burden of presenting the facts of their interest and producing evidence in respect thereof. The court will take into account 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.

No specific procedure disclosure obligations are foreseen regarding maritime disputes.

5.3 How is the electronic discovery and preservation of evidence dealt with?

There is no specific provision regarding the electronic discovery in Mozambican civil law. However, the court shall consider all the evidence produced and it is common to consider that the electronic evidence has the same probative value of the documents.

As noted above, Mozambican civil law provides the possibility of the applicant requiring from the court a motion aiming at ensuring the preservation of documents whenever there is a serious risk of their loss, concealment or dissipation.

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.

6.1.1 Which national courts deal with maritime claims?

Mozambique has specialised courts in maritime and shipping matters, which are established in the most important cities of the country. These are independent courts exercising jurisdiction over all sorts of maritime contracts (from engineering, procurement and construction contracts for vessels to bareboat charters) and disputes. The general time bar for commercial matters is 20 years,

although there are certain cases in which this statutory limitation period is shorter (e.g., general average-related claims are time-barred after one year and salvage claims are time-barred if legal proceedings do not commence within two years following the day on which the salvage operations are concluded or terminated).

6.1.2 Which specialist arbitral bodies deal with maritime disputes in your jurisdiction?

Mozambique does not have an arbitral institution specialised on maritime disputes. Thus, such matters are dealt with by the general arbitral bodies, governed by the Law on Arbitration, Conciliation and Mediation, commonly referred to as LACM. The LACM governs both international and domestic commercial arbitration, recognises the New York and Washington conventions but applies the rules set out in the Mozambican Code of Civil Procedure for arbitration proceedings. The LACM does not diverge itself from the UNCITRAL Model Law on International Commercial Arbitration and follows the general standards and terms of UNCITRAL Model Law for the conduct of proceedings, tribunal composition and recognition of the award given.

Mozambique has also created the Centre for Arbitration, Conciliation and Mediation ("CAMC") to oversee and promote arbitration, as well as other alternative dispute resolution mechanisms.

There is no specific time limit for the duration of arbitral proceedings, as the parties may agree in the mediation agreement on a deadline for the conclusion of the arbitral proceeding.

6.1.3 Which specialist alternative dispute resolution bodies deal with maritime mediation in your jurisdiction?

There is no alternative dispute resolution body specialised in maritime mediation.

6.2 What are the principal advantages of using the national courts, arbitral institutions and other ADR bodies in your jurisdiction?

The main advantage of resorting to arbitral institutions instead of national courts relates to the celerity of the proceeding. On the other hand, the cost of resorting to arbitral institutions is significantly higher by comparison to those of the judicial courts.

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

Despite the efforts of the Mozambican Government and the achievements reached in the past few decades, the country needs to continue developing its infrastructure and support the training and qualification of its citizens. Bureaucracy and a lack of qualified technicians continue to be some of the biggest challenges to operating in the country. Despite the country's high debt level, which has been a problem over the past few years, Mozambique's economy is showing signs of recovery after the economic recession in 2016.

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 set out 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/grounds of the judgment, but a simple 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. In order for the foreign decision to be recognised by the Supreme Court, the following set of requirements must be met:

- There are no doubts 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 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.

Considering that Mozambique has acceded to the 1958 New York Convention, Mozambican courts are to give effect *prima facie* to an arbitration agreement and award rendered in other signatory to the New York Convention. Where the arbitral award was not granted by another contracting state, to be enforceable it must have previously been 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.

Since its independence in 1975, Mozambique has been steadily revising its laws and regulations, at the same time as ratifying and

adhering to a number of international treaties and conventions. In this respect, it is worth mentioning that a number of pivotal conventions on maritime and shipping-related matters applicable in the country result from the time when Mozambique was still a Portuguese overseas territory (e.g., the 1952 Arrest Convention). In fact, although after its independence Mozambique has not specifically adhered to the treaties/conventions to which Portugal was already a party, as formally required under the Vienna Convention on Succession of Treaties, it is commonly accepted that the treaties ratified by Portugal and extended to Mozambique over time still apply in light of Article 71 of the Constitution, approved immediately after the country’s independence, which provided for the survival of any (Portuguese) laws and regulations in force at the time of independence, as long as these did not conflict with the letter and spirit of the Constitution.

More recently, the Government of Mozambique has been enacting important domestic legislation to support the shipping industry, and paving the ground for foreign and national investments. Significant steps have been made in that 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. In respect of cabotage activities, in April 2019 the Mozambican Government approved the Regulations of the Customs Procedures on the Maritime Cabotage, which establishes the rules and procedures on the transport of goods, merchandise and values under the Customs Procedures of Maritime Cabotage.

The Government recently 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”), one of the world’s most important regulations on shipping activities, is also a clear indicator of the Government’s commitment to creating a more favourable background for the development of shipping activities in Mozambique.

The LNG project in Offshore Areas 1 and 4 and the setup of a Logistic Corridor in Nacala, as well as other infrastructure projects that are expected in the near future, will certainly enhance the shipping industry in Mozambique in the coming years. In addition to the legislative initiatives, the Government is currently investing in the refurbishment and expansion of the existing marine ports and the construction of new ones, aiming at making the country’s infrastructure able to support the enhancement of the shipping industry.

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