



ICLG

The International Comparative Legal Guide to:

Shipping Law 2018

6th Edition

A practical cross-border insight into shipping law

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Bahamas

Graham Thompson

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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 Bahamas is party to the International Regulations for Preventing Collisions at Sea 1972 (“COLREGS”) which were implemented by the Merchant Shipping Act, 1976 (“MSA”) and apply to all Bahamian ships and other ships while in The Bahamas. An owner or master of a ship is guilty of an offence if it operates a ship in breach of the COLREGS.

(ii) Pollution

- The Merchant Shipping (Oil Pollution) Act, 1978 implements the International Convention for the Prevention of Pollution from Ships, 1973 as amended by the Protocols of 1978 and 1995 (“MARPOL”), and provides for criminal liability for the discharge of oil from a vessel in Bahamian waters and by Bahamian registered ships anywhere in the world.
- The Bahamas is also party to the International Convention On Civil Liability For Oil Pollution Damage, 1992 (“Liability Convention”) and the International Convention on the Establishment of an International Fund for Compensation Fund for Oil Pollution Damage, 1992 (“Fund Convention”) which were also implemented by the Merchant Shipping (Oil Pollution) Act and have the force of law. Any ship carrying, in bulk, cargo of more than 2,000 tons of persistent hydrocarbon mineral oil is required to have in force insurance cover or other security satisfying the requirements of Article VII of the Liability Convention. The failure to carry such insurance results in criminal liability for the master and owner.
- The Bahamas has also acceded to the International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969 and to the International Convention on Civil Liability for Bunker Oil Pollution Damage (“Bunkers Convention”).

(iii) Salvage / general average

The key provisions relating to wrecks and salvage are governed by Part VI of the MSA. The Minister with responsibility for maritime affairs may appoint a receiver of wreck whose duty is to preserve the wreck. By section 279(1)(a) MSA, a lien securing a claim for salvage, wreck removal and contribution in general average takes priority over all other maritime liens which have attached to a ship prior to the time when the operations giving rise to the said liens were

performed. Claims for salvage or contribution in general average are not subject to limitation.

(iv) Wreck removal

The Bahamas acceded to the Nairobi International Convention on the Removal of Wrecks. It is a requirement to remove or have removed any wrecks in The Bahamas territorial sea and exclusive economic zone.

Any person in possession of any wreck in The Bahamas must deliver the wreck to the wreck receiver. Failure to deliver the wreck is an offence and liable to a fine on summary conviction not exceeding twice the value of the wreck and forfeiture of any claim or right to salvage.

Any ship with a gross tonnage of over 300 tons shall not leave or enter a port in The Bahamas and a Bahamian ship shall not leave or enter a port of any state unless it has wreck removal insurance cover or other financial security to cover their liability for costs involved in the location, marking and removal of wrecks. A claim for wreck removal constitutes a maritime lien.

(v) Limitation of liability

The Bahamas ratified the Convention on Limitation of Liability for Maritime Claims, 1976 (“Limitation Convention”) and the Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 and 1976 Protocol, which were implemented by the Merchant Shipping (Maritime Claims Limitation of Liability) Act, 1989 (“Limitation Act”).

Claims in respect of death, personal injury, loss of or damage to property occurring on board or in direct connection with the operation of a ship are subject to limitation.

(vi) The limitation fund

Pursuant to the Limitation Act, a limitation fund consisting of cash deposited into court or a guarantee may be established by any person alleged to be liable in respect of legal proceedings instituted in respect of claims subject to limitation.

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

Pursuant to Part VI of the MSA, the owner or master of the ship is required to report to the Bahamas Maritime Authority, by the fastest means available, any accident occasioning loss of life or any serious injury to any person or damage affecting the seaworthiness of a Bahamian ship. The Minister responsible for maritime affairs has the power to cause a preliminary inquiry to be held or a formal investigation to be conducted by the Wreck Commissioner with

respect to any casualty consisting of loss of life or damage done to or by a Bahamian ship or a ship in Bahamian waters. The Wreck Commissioner, upon holding a formal investigation, has the power to cancel or suspend any certificate or licence issued to any master, mate or engineer, who has the right to appeal to the Supreme Court any such suspension or cancellation. Where an inquiry or formal investigation has been held and either new evidence comes to light or there is suspicion that a miscarriage of justice may have occurred, the Minister has the power to order a rehearing of the case. The Minister also has the power to re-issue any certificate or licence or reduce any suspension time.

2 Cargo Claims

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

The MSA and the Carriage of Goods by Sea Act, 1926 (“COGSA”) govern marine cargo claims. The Bahamas, subject to certain modification, has implemented in local legislation content from the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”).

The Bahamas is also a party to the International Convention Relating to the Arrest of Seagoing Ships, 1952, Brussels (“Brussels Convention”) where, among other things, loss of or damage to goods, including baggage, constitutes a maritime claim which may give rise to the arrest of a ship.

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

Under the COGSA, the Hague Rules have mandatory effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in The Bahamas to any other port whether in or outside The Bahamas, therefore, unless the Bill of Lading stipulates otherwise, the Hague Rules apply.

Section 251 of the MSA, subject to certain exceptions, provides for the division of liability such that if by the fault of two or two more vessels, damage or loss is caused to one or more of those vessels or their cargo or freight or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault. If it is not possible to ascertain degrees of fault, then the liability will be apportioned equally.

Section 258 of the MSA imposes a time limit for bringing actions under the MSA such that proceedings must be commenced within one year after the commission of the offence or after the cause of action arises, as the case may be.

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

A carrier may establish claims against a shipper relating to misdeclaration of cargo according to the Hague Rules (as contained in the Schedule of the COGSA). Under Article 3 the shipper is obligated to indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies regarding the marks/labelling, number, quantity and weight as furnished by him on the cargo to be transported.

Article 4 (5) of the Hague Rules limits the liability of a carrier or ship. A carrier or ship will only become liable for the loss of or damage to goods exceeding a specified sum per package or unit,

or its equivalence in another currency if the nature or value of such goods has not been declared by the shipper in the Bill of Lading before shipment. While this declaration in the Bill of Lading is *prima facie* evidence, it is however not binding or conclusive on the carrier. Further, a carrier or ship will not be held liable where the nature or value of the goods has been knowingly misstated by the shipper in the Bill of Lading. The carrier will be compensated for all losses caused by the shipper as a result.

Section 207 of the MSA waives all liability against the carrier or ship in cases of misdeclaration or failure to properly mark dangerous cargo. In these instances, the cargo may be either thrown overboard with neither the master nor the owner of the ship subjected to any civil or criminal liability, or forfeited or disposed of by court order.

Further, in the common-law principles of breach of contract or tort, the shipper will be under strict liability if it ships goods without giving notice to the carrier of the character of the goods; specifically, goods which are liable to delay or cause damage to the vessel or other cargo shipped on it. Consequently, the shipper may be liable for all the losses resulting from any delays or damages in the shipment of goods, whether the shipper knew or did not know, as the Bill of Lading holder relied on statements in the Bill of Lading that turned out to be untrue.

3 Passenger Claims

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

The Bahamas is a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (1974 and 1976 Protocols) and the Limitation Convention, both of which were implemented by the Limitation Act referred to in question 1.1 above. The liability for passenger claims, including incidents causing personal injury, death, loss of or damage to luggage is limited. Any action for damages arising out of personal injury or death of a passenger, or for the loss of or damage to luggage, shall be time-barred after a period of two years.

The Athens Convention applies to passengers whether or not there is a contract of carriage and mandates that passenger ships have financial security for the purpose of satisfying any liability in respect of death or personal injury.

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 Supreme Court Act, 1981 (“SCA”) governs the procedure to arrest a ship under Bahamian law. Section 8 sets out a number of claims that may be brought against a ship, including but not limited to claims in respect of: a mortgage of a charge or share in a ship; injury or loss of life; damage to goods; damage done by a ship; salvage; wreck removal; contribution in general average; and other maritime liens.

The action to arrest a ship is commenced by a writ of summons after inspection of the caveat book to ascertain whether the owner of the ship has entered a caveat against the arrest of the ship. In the event that no such caveat has been entered, the legal representative of the owner must be contacted to advise him of the claim and to secure his undertaking that an appearance would be entered and that an

acceptable bond or guarantee from a bank or financial institution would be put in place. If no caveat has been entered, a summons is filed in the Supreme Court Registry, together with a praecipe for a Warrant of Arrest and an affidavit in support filed in the Supreme Court. An application is then made to the Supreme Court for the issuance of a Warrant of Arrest. Upon an undertaking being given to the court to pay the expenses of the Admiralty Marshal, the court will issue the warrant of arrest to be executed by the Admiralty Marshal on the vessel and master. The ship will remain in the custody of the Admiralty Marshal, subject to the owner obtaining a release from the court.

An action *in rem* may also be brought in The Bahamas against a sister ship, where the person liable on the claim was the owner or charterer of the ship when the cause of action arose and the person liable was the beneficial owner of or demise charterer of the other ship when the action was brought.

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?

Yes. Section 8 of the SCA confers jurisdiction on the Admiralty Court to hear and determine any claim for goods or materials supplied to a ship for its operation or maintenance.

4.3 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?

Section 277 of the MSA sets out the claims that can be secured by maritime liens which are then enforceable against a vessel by arrest. Maritime liens include: unpaid seamen wages and other sums due; unpaid port, canal, other waterway dues and any other outstanding fees payable; loss of life and personal injury claims against the shipowner; tort claims against the owner (demise or other charterer, manager or operator of the ship); and claims for salvage, wreck removal and contribution in general average.

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

A bond or guarantee from a bank or financial institution would be acceptable forms of security for the release of a vessel.

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?

Documentary evidence in admiralty proceedings can be preserved by the usual applications available under civil litigation procedure (discovery, interim injunctions, witness statements, and affidavits) which are available to an applicant as part of a pre-action protocol or during the course of litigation. Admiralty matters also have the benefit of relief which is only available in admiralty matters for the preservation of goods, such as a Warrant of Arrest. The procedure for the litigation of admiralty claims in The Bahamas is set out in Order 67 of the Rules of the Supreme Court, 1978.

5.2 What are the general disclosure obligations in court proceedings?

The parties to an action are under a strict duty to disclose all non-privileged documents in their possession relating to the action, including all documents intended to be relied upon at trial. The court has the discretion to direct the timeframe within which documents must be disclosed during Case Management. The duty of disclosure is ongoing and failure to disclose all relevant documents will provide grounds for the opposing party to make an application for specific discovery.

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.

National courts

The Bahamian judicial system consists of the Magistrates' Courts, the Supreme Court and the Court of Appeal. The final appeal is the Judicial Committee of the Privy Council in London, England. The Judicial Committee of the Privy Council serves as the ultimate Court of Appeal in all matters where appeal is permissible.

A Magistrate has jurisdiction to investigate all charges of indictable offences, try all summary offences and to hear and determine any civil case with a limit on the value of the property in dispute or the sum not exceeding BS\$5,000.00, unless a statute provides jurisdiction in relation to a higher amount, as is the case in a number of regulatory statutes.

Under Section 110 of the MSA, claims instituted on behalf of a seaman for the recovery of wages are first heard by a Magistrate, except where it is for the recovery of wages, and:

- the owner of the ship is insolvent;
- the ship is under arrest or is sold by the authority of the Supreme Court;
- a Magistrate's Court refers the claim to the Supreme Court; or
- neither the owner nor the master resides in or within 20 miles of the place where the seaman or apprentice is discharged or put ashore.

Section 8 of the SCA confers jurisdiction for admiralty matters on the Supreme Court. Proceedings with respect to commercial claims are commenced in the Supreme Court by virtue of a Writ of Summons wherein the nature of the claim is outlined. Preliminary issues may be dealt with by virtue of interlocutory applications. The timeline from filing of the Writ of Summons to completion of trial, and obtaining a written ruling, would be approximately 12 to 18 months.

Arbitration

Arbitrations locally are governed by the Arbitration Act, 2009 implemented in accordance internationally with the New York Convention on Arbitration. Parties may agree on timelines and arbitration procedures or choose to adopt the timelines and arbitration procedures prescribed under institutional rules.

Mediation / alternative dispute resolution

There has been a recent surge in support for the usage of mediation and other forms of alternative dispute resolution at every stage of proceedings, resulting in significant growth in the number of attorneys

that are being trained as certified mediators. An ADR Group has been established, dedicated to training and providing for all forms of dispute resolution.

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

Bahamian jurisprudence is based on English common law. Decisions of English appellate courts (especially the Supreme Court of the United Kingdom and the Court of Appeal of England and Wales), although technically not binding in The Bahamas, are and have always been given great deference and respect by Bahamian courts. The same applies to decisions of other common-law based Commonwealth jurisdictions. English and other Commonwealth country decisions are routinely followed by Bahamian courts as a matter of tradition and practice in the absence of any Bahamian judicial authority to the contrary.

Unfortunately, the Supreme Court, on its civil side, only has two judges sitting in New Providence and one sitting in Grand Bahama, resulting in significant delays for trial dates and interim applications. However, due to the nature of admiralty law, and the accruing expenses of the Admiralty Marshall, security and wharfage, once a Warrant of Arrest is issued, the issuing judge tends to make every effort to set aside time in the calendar to accommodate the matter.

7 Foreign Judgments and Awards

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

The Bahamas Reciprocal Enforcement of Judgments Act, 1924 (“Reciprocal Enforcement of Judgments Act”) allows for a judgment obtained in a superior court outside of The Bahamas to be registered or otherwise given recognition by the Supreme Court of The Bahamas. For countries that are party to this arrangement, a Bahamian court will recognise and enforce any final and conclusive judgment provided that:

- such courts did not contravene the rules of natural justice of The Bahamas;
- the foreign court had proper jurisdiction over the parties subject to such judgment;
- the judgment is for a debt or definite sum of money other than a sum payable in respect of taxes or charges of a like nature or in respect of a fine or penalty;
- such courts did not contravene the rules of natural justice of The Bahamas;

- the judgment was not obtained by fraud;
- the enforcement of the judgment would not be contrary to the public policy of The Bahamas;
- the correct procedures under the laws of The Bahamas are duly complied with;
- the judgment is not inconsistent with a prior Bahamian judgment in respect of the same matter; and
- enforcement proceedings are instituted within six years after the date of the judgment.

The judgment creditor may apply within 12 months of the judgment date, and it is at the discretion of the Bahamian court whether to register and enforce such judgment. These judgments include arbitral awards which were enforceable in the jurisdiction in which they were made. The application is made *ex parte* and notice of the application is not made to the judgment debtor until the order granting registration is made. The judgment debtor may challenge the registration of the foreign judgment. If the challenge fails, the foreign judgment is then registered as a recognisable and enforceable judgment in The Bahamas.

For those countries which fall outside the scope of the Reciprocal Enforcement of Judgments Act, a common-law action would have to be commenced in order to enforce the judgment.

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

The Bahamas is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and, pursuant to the Arbitration (Foreign Arbitral Awards) Act, 2009, the courts of The Bahamas will recognise as valid and enforce an arbitral award.

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.

As arbitration is a common method of dispute resolution in shipping cases, the present government has indicated that it is set to table the International Commercial Arbitration Bill, 2018 which will facilitate commercial dispute resolution hearings in The Bahamas by incorporating the United Nations model law known as UNCITRAL into its provisions.


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Michelle Pindling-Sands, a Partner, heads up the Firm's Maritime Practice Group, advising primarily major international financial institutions on complex structured financing transactions, but her broad knowledge of Bahamian corporate structures aligns well with her large practice of advising on commercial financing transactions generally, and includes registering ships, drafting ship mortgages, and preparing Bahamian all-asset security and share pledges, providing enforceability opinions in connection therewith. Michelle has recently acted as lead Bahamian counsel for a US\$550 million note offering to refinance existing debt for a market leader in the luxury cruise industry secured by Bahamian law-governed all-asset debentures and share securities.



Established in New Providence in 1950, and serving a client base that is both domestic and international, the top-ranked Graham Thompson Attorneys is a highly regarded Bahamian law firm with expertise in: admiralty & maritime; banking and financial; corporate & commercial; employment & labour; immigration & naturalisation; insurance; litigation & dispute resolution; private client, trusts and estates; and real estate & development law.

Founded by Peter Graham CMG and Bernard Thompson, the firm has played a leading role in shaping both the political and legal landscapes of The Bahamas. Public service and leadership in public service remains a distinguished tradition of the firm. The Graham Thompson family includes former attorneys general, cabinet ministers, justices and other leading roles including chairmanships of public boards, councils and special commissions.

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