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GUIDES 2023**

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Panama

SHIPPING

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This country-specific Q&A provides an overview of shipping laws and regulations applicable in Panama.

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PANAMA SHIPPING



1. What system of port state control applies in your jurisdiction? What are their powers?

Article 30 of Law Decree 7 of 1998 which creates the Panama Maritime Authority ("PMA") establishes that the Directorate General of Merchant Marine ("DGMM"), which is one of the divisions within the PMA, shall enforce the national rules and standards, as well as the international conventions ratified by Panama related to port state control.

Panama is part of the Latin American Agreement of Viña del Mar on Port State Control since 1992 and by way of Resolution No. 106-29-DGMM from 11 July 2008, the DGMM created the rules for its application and enforcement.

As concerns their powers, Article 118 of Law 57 of 2008 of the Merchant Marine ("Law 57") establishes that the DGMM shall be responsible for inspecting ships of any nationality navigating in Panama's territorial waters and may order their detention for violation of any national regulations pertaining to maritime safety and security and on the prevention of pollution, as well as similar offenses under international conventions. The respective procedure to be followed by the DGMM for such purposes has been set forth by Resolution No. 107-OMI-0199-DGMM of 6 August 2018.

2. Are there any applicable international conventions covering wreck removal or pollution? If not what laws apply?

Panama is a party to the 2007 Nairobi International Convention on the Removal of Wrecks and the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the 1978 Protocol relating thereto and by the 1997 Protocol.

Additionally, as per Numeral 22 of Article 187 of Law 57, the DGMM is entitled to handle matters related to and to formally evaluate and declare a vessel as a "shipwreck".

The respective procedure to be followed by the DGMM for such purposes has been set forth by Resolution J.D. No.051-2016 of 21 September 2016.

3. What is the limit on sulphur content of fuel oil used in your territorial waters? Is there a MARPOL Emission Control Area in force?

Pursuant to the implementation of IMO 2020 Sulphur regulations, effective as of 1 January 2020 the maximum allowed has been reduced from 3.5% to 5%. There is no specific area into force, but Panama may deem that it could implement the same within jurisdictional territorial waters as well as any vessel of Panamanian registry.

4. Are there any applicable international conventions covering collision and salvage? If not what laws apply?

Panama became a party to the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREG) since 1978 and ratified the same pursuant to Law 7 of 9 November of 1978.

5. Is your country party to the 1976 Convention on Limitation of Liability for Maritime Claims? If not, is there equivalent domestic legislation that applies? Who can rely on such limitation of liability provisions?

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

Law 8 of 1982 on Maritime Procedure ("Law 8") has a special section dedicated to the limitation of liability for maritime claims from article 576 to 597 and in addition, articles 20 and 63 of Law 55 of 2008 (the "Law 55").

The Limitation included in the in the aforementioned

articles are applicable to the following:

- Shipowners (Art. 576, 577 and 580 of Law 8);
- Salvagers (Art. 576 and 578 of Law 8);
- Charterer (Art. 577 of Law 8);
- Naval Managers (Art. 577 of Law 8);
- Claims against individuals subordinated to the Shipowners or the Salvagers (Art. 579 of Law 8 and Art. 20 of the Law 55);
- The insurer with the same limitations as the insured (Art. 581 of Law 8); and
- The Carrier (Art. 63 of the Law 55).

6. If cargo arrives delayed, lost or damaged, what can the receiver do to secure their claim? Is your country party to the 1952 Arrest Convention? If your country has ratified the 1999 Convention, will that be applied, or does that depend upon the 1999 Convention coming into force? If your country does not apply any Convention, (and/or if your country allows ships to be detained other than by formal arrest) what rules apply to permit the detention of a ship, and what limits are there on the right to arrest or detain (for example, must there be a “maritime claim”, and, if so, how is that defined)? Is it possible to arrest in order to obtain security for a claim to be pursued in another jurisdiction or in arbitration?

Panama is not a party to the 1952 International Convention for the unification of certain rules related to Arrest of Sea-going Ships nor to the 1999 International Convention on Arrest of Ships.

However, Article 166 of Law 8 allows for the arrest of assets for the following purposes:

1. To keep the proceeding from having illusory effects and keep the defendant from transposing, dissipating, encumbering, alienating or impairing properties susceptible to said measure.
2. To bring within the jurisdiction of the Panamanian Maritime Courts cognizance of causes emerging within or outside the national territory as a result of facts or acts related to navigation when the defendant is outside of the jurisdiction, and in causes arising within the national territory when the defendant decides to arrest a property with

the purpose of serving them notice of the complaint.

3. To physically attach property susceptible of arrest in order to assert privileged maritime liens, maritime encumbrances or any other claim which, according to the Law applicable to the proceedings, allows addressing the complaint directly against these. Arrest shall have the effect of giving personal notice on the sued property.

As concerns the possibility of an arrest for purposes of obtaining security for a claim to be pursued in another jurisdiction or in arbitration, numeral 4 of Article 22 of Law 8 establishes that the Maritime Courts may refrain, upon request from a party, of trying or continue trying proceedings related to cases originated outside the territory of the Republic of Panama if the dispute has been submitted to arbitration, or submitted to the arbitration or to the jurisdiction of a court in a foreign country and a decision is still pending for such action.

Despite of such provision, it is common to seek the arrest of assets, so long as the arbitration arrangements do not contain any limitation as to seek security. Otherwise, the arrest could be deemed wrongful.

In this order of ideas, Article 22 also provides for some assurances that the Judge could impose as to ascertain that if the cause is declined in favour of foreign arbitration, sufficient security is posted thereat or even the Panamanian judge could keep the asset (or substitutive bond to have the asset released) to the order of the foreign arbitration tribunal.

7. For an arrest, are there any special or notable procedural requirements, such as the provision of a PDF or original power of attorney to authorise you to act?

The petition for arrest would be generally accompanied or within the pleading containing the complaint and the same would be authorized simultaneously (Article 167 of Law 8) although it could be done separately in the course of the proceedings.

As general rule, a party must act through a qualified lawyer in Panama. This implies that an original power of attorney is to be filed with the court. Generally, if granted in private documents (as opposed to public instrument) and by a non-resident or foreign entity or person, the same would have to be certified by notary public and further legalized by a Panamanian Consul or Apostilled. It is also necessary to provide evidence of the existence of the legal entity, unless such confirmation is

given within the notarial certification of the power of attorney. Nonetheless and in accordance with the rules of Civil Procedure which supply law 8, it is possible for the lawyer to act in lieu of power of attorney, as negotiorum gestor, by posting a bond with the Court. The law allows 2 months from the time that the lawyer is so admitted in order to file the corresponding power of attorney.

8. What maritime liens / maritime privileges are recognised in your jurisdiction? Is recognition a matter for the law of the forum, the law of the place where the obligation was incurred, the law of the flag of the vessel, or another system of law?

When it comes to vessels of Panamanian registry Law 55 of 2008, provides for maritime liens over the vessel, over the freight and over the cargo, respectively, as follows:

MARITIME LIENS AGAINST THE VESSEL.

Article 244: The maritime liens that shall have preference over the vessel, shall concur over its price in the following order:

1. Any judicial costs caused in the common interest of maritime creditors.
2. Any expenses, indemnities and salaries for assistance and salvage.
3. Any salaries, retributions and indemnities owed to the captain and crewmembers.
4. The naval mortgage.
5. Any credits in favour of the Panamanian State on account of fees and taxes.
6. Salaries and stipends owed to longshoremen and dock workers contracted directly by the owner, operator or captain of the vessel for the loading and unloading of the latter.
7. Any indemnities payable for damages caused by fault or negligence.
8. Any amounts due by way of general averages contributions.
9. Any amounts due by virtue of the obligations contracted for the necessities and provisioning of the vessel.

10. Any amounts taken by bottomry on the vessel's hull and rigs for gear, arms and apparel, and insurance premiums.

11. Any salaries of pilots and watchmen and conservation and custody expenses of the vessel, its rigs and gears.

12. 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.

13. The price of the last acquisition of the vessel and any interest owed.

MARITIME LIENS AGAINST THE FREIGHT.

Article 247: The maritime liens that shall have preference over the Freight, shall concur over its price in the following order:

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 crewmembers 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.

MARITIME LIENS AGAINST THE CARGO.

Article 248: The maritime liens that shall have preference over the Cargo, shall concur over its price in the following order:

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.

We must point out that Law 8 contains the following conflict of law rules regarding maritime liens against the vessel and cargo.

Article 566. Except as otherwise provided by international treaties ratified by the Republic of Panama, the rights and obligations of the parties to an action filed in the Panamanian Maritime Courts shall be determined in accordance with the following special principles of private international law and, in the cases not expressly covered by this Chapter, in accordance with that established by the common law:

...

2. With respect to the rights in rem, privileged liens that affect the vessel, the laws of the country of registry.

3. With respect to the rights in rem and privileged liens on cargo or freight, the laws of the Republic of Panama, unless there is an express agreement to the contrary.

However, in accordance with other rules which are relevant to maritime contracts such as the following:

Law 8

Article 566: ...

10. With respect to the effects of carriage contracts for cargo or passengers, including bills of lading, unless there is an express agreement to the contrary, the laws of the country where the cargo was loaded or where the passengers boarded the vessel.

...

13. With respect to the effects of contracts for services rendered to the vessel or cargo and contracts to furnish supplies to the vessel, unless there is an express agreement to the contrary, the laws of the country where the service is rendered; and if the services have been rendered to a vessel or its cargo in international waters, the laws of the vessel's country of registry.

The Maritime Courts have interpreted that the substantive law that are deemed applicable to a contractual claim can also be applied to determine if the underlying claim can be asserted against the vessel or cargo as a maritime lien, which includes foreign substantive law.

9. Is it a requirement that the owner or demise charterer of the vessel be liable in personam? Or can a vessel be arrested in respect of debts incurred by, say, a charterer who has bought but not paid for bunkers or other necessities?

The arrest of an asset from a Panama law, which is civil system based, would be relevant to the asset being owned by the defendant or the vessel being liable in-rem, regardless of who incurs the underlying obligation, which includes necessities.

Considering that in accordance with conflict of law rules, foreign substantive law could apply, then it would be relevant to view certain aspects of the arrest from such perspective.

10. Are sister ship or associated ship arrests possible?

From a Panamanian procedural law perspective, the ownership element would be relevant on in personam causes of action. Likewise, a maritime lien which affects a vessel cannot be enforced against another vessel, unless the lien originates of an obligation of a common owner, in which case the arrest would be based on the liability of the owner rather than that of the vessel.

In some instances, if foreign substantive law is deemed applicable, the arrest of a sister ship may be considered by the Court.

Our own perception is that in such jurisdiction where the sister or associated ship arrest is allowed, it relates to procedural rather than substantive law, and as such could not be imposed in Panama over Panamanian procedural law, as a matter of public international law.

11. Does the arresting party need to put up counter-security as the price of an arrest? In what circumstances will the arrestor be liable for damages if the arrest is set aside?

As per Article 168 of Law 8 the arresting party must post a guarantee security of one thousand dollars (\$1,000.00) in order to respond for the damages that the arrest may cause.

However, in cases of an arrest petition that has been filed to keep the proceeding from having illusory effects and keep the defendant from transposing, dissipating, encumbering, alienating or impairing properties susceptible to said measure, the guarantee security shall be fixed by the judge, at his discretion, and shall not be less than twenty percent (20%) or more than thirty percent (30%) of the amount in the complaint.

Notwithstanding the guarantee security provided, the party requesting an arrest shall consign to the order of the Marshal a sum not to exceed two thousand five hundred dollars (\$2,500.00), as an advance for the expenses brought about in the conservation and custody of the seized property, as well as the required expenses for its execution and release.

Furthermore, Article 187 of Law establishes that whoever, in fault, error, negligence or in bad faith arrests a property or properties not belonging to the defendant or in contravention of a prior and express agreement between the parties of not arrest, or whoever files for arrest for the execution of an extinguished or inexistent privileged or in rem maritime lien, shall be liable for the damages caused, as well as for the payment of the costs and expenses arising out of said action. The determination of the liability of the plaintiff as well as the damages caused to the offended party shall fall under the jurisdiction of the Court that decreed the arrest which will render a decision pursuant to what is proven in the corresponding proceeding.

In this sense, the subsequent Article 188 of Law 8 establishes the right for the owner of the property or properties that have been arrested or whoever has their administration or custody to file a petition for the Maritime Court to order the arrest ("Apremio") of the arresting party to appear, in the due course of the proceedings, to justify that the arrest was justified at the time that it was ordered.

As per Article 190 of Law 8, once the Apremio is admitted, a notice thereof shall be personally delivered to the arresting party to appear before the Court for a hearing, where the Judge shall assess the evidences filed

by the parties and the party defeated shall be ordered to pay, at the discretion of the Court, judicial costs which shall include any damages caused by their his actions.

12. How can an owner secure the release of the vessel? For example, is a Club LOU acceptable security for the claim?

According to article 185 of Law 8 of 1982, the defendant or an interested third party may request the unilateral release of arrest by posting an amount determined by the court, which should be sufficient to cover the amount of the complaint, plus three years of the standard commercial (for contractual claims) or civil (for extracontractual claims) interest, the judicial costs, and expenses. Such amount should not exceed the market value of the arrested vessel.

An expert shall perform the appraisal of the vessel in accordance with the provisions of Law 8 of 1982.

The law provides the following methods to post the amounts to release the arrest:

1. Cash or Certificate of Judicial Deposit at the National Bank of Panama;
2. Letter of Guarantee, Certified or Cashier's Cheque from a local bank holding a general license;
3. Surety from an insurance company licensed in Panama; and
4. Other which the parties may agree, including a Club LoU.

13. Describe the procedure for the judicial sale of arrested ships. What is the priority ranking of claims?

As concerns the judicial sale, Article 553 of Law 8 of 1982 states that before ordering the judicial sale of a ship, the court shall determine the amount of the expenses of arrest incurred to the date and additionally a forecast of the possible expenses until the completion of the procedure of auction and judicial sale of the ship and the market value of the ship in the international market by means of appointing an expert appraiser.

Thereafter, the court ordering the auction shall issue one sole order setting three dates for the auction, with no less than five days no more than ten days between one and another. Said order shall be published at least twice a week, until the auction and judicial sale proceeding is concluded, in a newspaper of national circulation and on

journals and specialized publications that the parties consider as convenient.

The auction shall be carried out by the Marshal on the date fixed by the Court. If it may not be carried out on the date set, it shall be made on the first business day following.

As concerns the ranking of claims over a ship, Article 244 of Law 55 of 2008 on Maritime Commerce as established in answer 7 above.

14. Who is liable under a bill of lading? How is “the carrier” identified? Or is that not a relevant question?

According to Law 55, either the Shipper or the Carrier (which definition includes, if different, the Effective Carrier and the Carrier identified in the bill of lading), may be liable under bill of lading. According to that same law, the Carrier is the person or entity that enters into a contract of carriage by sea, while the Effective Carrier is the entity entrusted to perform the carriage by sea.

15. Is the proper law of the bill of lading relevant? If so, how is it determined?

In accordance with numeral 10 of Article 566 of Law 8 mentioned in answer 7 above, the law included in the bill of lading is relevant to the rights and obligations of the parties to an action filed in the Panamanian Maritime Courts. If the bill of lading does not provide the substantive law applicable to the contract, the laws of the country where the cargo was loaded to the vessel, would apply.

If Panamanian Law is applicable to the bill of lading, rights and obligations of the carrier and holder of the bill of lading will be determined by its clauses, except if the bill of lading is part of the charter party, in which case, the latter will serve as the contract, as provided in article 85 of Law 55.

16. Are jurisdiction clauses recognised and enforced?

According to numeral 3 of article 22 of Law 8, the Maritime Courts may refrain upon request of a party, of trying or continue trying a proceeding on cases originated outside the territory of the Republic of Panama, if the parties have negotiated, previously and expressly, to submit their controversies to arbitration or to a court in a foreign country, and they have agreed to this in written. Pro forma contracts or adhesion contracts

are not considered being previously and expressly negotiated.

The context in which the jurisdiction clause is evaluated may vary depending on the circumstances, including how lawyers can defend or oppose to the viability of the same.

17. What is the attitude of your courts to the incorporation of a charterparty, specifically: is an arbitration clause in the charter given effect in the bill of lading context?

According to article 85 of Law 55, only if the bill of lading is part of a charterparty, then the charter party is to be considered as the contract. According to article 87 of Law 55, the same applies to a document other than a bill of lading, if issued by the carrier as evidence of the contract of carriage of goods by waterways.

However, in the event of conflict of law with respect to the effects of the contract of carriage, unless there is an express agreement to the contrary, the laws of the country where the cargo was loaded, would be applicable law to the matter.

18. Is your country party to any of the international conventions concerning bills of lading (the Hague Rules, Hamburg Rules etc)? If so, which one, and how has it been adopted - by ratification, accession, or in some other manner? If not, how are such issues covered in your legal system?

No, Panama has not adopted any international conventions concerning bills of lading. Issues related to bills of lading are covered mainly by articles 46 to 93 of Law 55 of 2008, which have a wording similar to the Hague -Visby Convention. Provisions of the Civil and the Commercial Code, law 8 of 1982 are also applicable.

19. Is your country party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? If not, what rules apply? What are the available grounds to resist enforcement?

Yes, Panama became a party to the 1958 New York Convention since 1984 and ratified the same pursuant to Law 5 of 15 June 1984 (The “NYC1958”).

The grounds to resist the enforcement of a foreign arbitral award are provided in articles 5 and 6 of the NYC1958 and in cases where the NYC1958 do not apply, article 72 of Law 131 of 2013 National and International Arbitration, as follows:

1. That the parties to the agreement are under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
2. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
3. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;
4. The composition of the arbitration court or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
5. The award has not yet become binding on the parties, or has been set aside or suspended by the arbitration court the country in which, or under the law of which, that award was made; or
6. If the Fourth Chamber of the Supreme Court of Justice finds that:
 - a. The subject matter of the controversy is not capable of settlement by arbitration; or
 - b. The recognition or enforcement of the award

would be contrary to the international public policy of Panama.

20. Please summarise the relevant time limits for commencing suit in your jurisdiction (e.g. claims in contract or in tort, personal injury and other passenger claims, cargo claims, salvage and collision claims, product liability claims).

The Maritime Courts of Panama would apply Law 8 of 1982 as the applicable procedural law to proceedings brought before them, however, as concerns any particular contract over dispute, the law stated in the contract as the applicable substantive law would apply to try the case.

In any event, for claims derived from a contract of land or sea transport, or chartering, where the Panamanian law would apply as the applicable substantive law, the time bar for such actions would be of 1 year in accordance with Article 1651 of the Code of Commerce.

21. Does your system of law recognize force majeure, or grant relief from undue hardship? If so, in what circumstances might the Covid-19 pandemic enable a party to claim protection or relief?

Force majeure and Acts of God are contemplated under the Civil Code (Article 34-D) and apply to commercial obligations in general. A pandemic, itself may not be deemed any of these, but the closure of ports and other legislation which has for instances prevent event the use of Courts to seek relief, could be and has been deemed as force majeure.

In our view, the determination of such situations would be a matter of fact to be assessed by Courts on a case-by-case basis.

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