

## The jurisdiction of the Maritime Courts at the Panama Canal

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### History

On the 23<sup>rd</sup> day of January of 2009, Panamanian Legislature passed a bill amending the Maritime Procedure Code of Panama. The new law was sanctioned into force and published in official gazette number 26211. Law 12 of 2009 represents the second reform to this code, as it was previously amended in by Law 11 of 1986. The first maritime code was enacted in 1982; it was named Law 8 of the 30<sup>th</sup> of March of 1982.

The maritime courts of Panama were conceived from the beginning as a tribunal for the international administration of justice. Of course, blessed by a geographical position, which led to the building of an inroad, Panama has created a “vessel-rich” scenario as transit through the Canal saves costs in international trade. Panama is currently experiencing a steady growth and a firm movement in order to develop its maritime industry. Structure wise with the Canal expansion; investment wise with the development a soon to come new “mega port”; and legally by actualizing a complete packet of maritime laws, including a new merchant marine law, a new port law and finally a new procedural code for the administration of maritime jurisdiction which is the object of this article.

Litigation at the Panama Canal has evolved. The Panamanian jurisdiction has an innovative and effective procedural tool for the administration of maritime justice. Modern and fast litigation devices complemented with higher degree of Court control is the new rule of law. In this article we aim to display the new set of rules for our maritime jurisdiction.

### Jurisdiction

There are basically eight ways to exercise subject matter jurisdiction in the maritime courts of Panama:

1. A *maritime* case occurring **within** the territory of Panama;
2. A *maritime* case occurring **outside** the territory of Panama, and the action is directed at the vessel (*in rem* claim) or it's owner (in personam claim); and either the vessel or any other assets owned by the defendant is arrested in jurisdictional waters;
3. When the defendant can be personally served in Panama; (physical presence is required)
4. A seaman's negligence claim;
5. When the vessels or one of the vessels involved flies the Panamanian flag;
6. When the applicable law to the claim is the Panamanian law either by contract or by virtue of the Panamanian law itself.
7. Execution of a foreign judgments against assets found in Panama.
8. A limitation of liability process.

The exercise of jurisdiction depends on both subject matter jurisdiction and personal jurisdiction over the defendant. These concepts operate in a parallel form, meaning that both must exist to configure the power of the court. First lets examine the subject matter jurisdiction, and we will come back to view the rules of

personal jurisdiction. The third cornerstone of the jurisdiction triangle is the geographic jurisdiction. The simple answer is that the maritime courts of Panama have jurisdiction in the entire extension of the Republic of Panama, including marine spaces governed by the Law of the Sea Convention<sup>1</sup>.

### Subject Matter Jurisdiction

1. A *maritime* case occurring **within** the territory of Panama.

The maritime jurisdiction of the maritime courts can entertain cases occurred inside the territory of the Republic of Panama, it may also try cases occurring outside the country, but we will see those after. In regards to those cases that arise within the territory's limits, the courts of Panama can handle cases that are "*maritime*". The legally operative term of what is "*maritime*" is one of the biggest changes in our law. A case is "*maritime*" if it arises from "causes that emerge from acts regarding maritime commerce, transport or traffic."

A cause is the claim itself. In other words, the cause is the set of facts that give rise to the exercise of the right to sue. If these facts that give rise to the claim emerge from acts related to maritime commerce, the case is maritime<sup>2</sup>. Consequently we must look to the genesis of the activity to examine whether or not it furthers a maritime activity or enterprise.

Also, causes that can be heard by the Maritime Courts in Panama include claims that emerge from acts that are executed or should be executed from, to or through the Republic of Panama. Under this prong, the legislature extends the power to try cases to those situations in which the effects of maritime contracts or torts have any connection with the country not limited to the execution of these contracts or maritime civil wrongs in Panama, but also to any claim that arises from an act which its execution necessarily happens 'through' the Republic of Panama.

An important feature is the inclusion of an objective standard of conduct. If the cause arises from acts that were or *should have been* performed from, to or through the country, the Maritime Court can accept Jurisdiction. Consequently, to determine the basis of jurisdiction we must review the intention of the parties involved as well as the acts that generate a right to claim in order to determine is the effects of any maritime commercial activity or a maritime wrong (meaning any other claimable maritime action) where to be present in Panama.

The breath of this article is yet to be tested in Courts. Assuming for purposes of arguments, a case that involved for example a delivery or redelivery of a chartered vessel in Panama could be an "execution of a charter party contract through Panama"; a contract for the carriage of goods en route "through" the Panama Canal; a crew contract for a Panamanian crew which effects should take place "through" Panama, similar cases can be thought of. Nonetheless the goal is to deliver an expansive more efficient adjudicatory system.

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<sup>1</sup> The Law of the Sea Convention is also known as the Montego Bay Convention signed in Brussels in 1982. It is a public law instrument drafted to regulate the exercise of control over maritime spaces by the signatory nations.

<sup>2</sup> In CARMELINA GENTILE v. INVERSIONES NAVIERA CONDESA DE LOS MARES, C.A (1995)

The Court of Appeals, in upholding the maritime jurisdiction of the Court, explained that the key factor to determine jurisdiction is the act or acts from where the cause of action arises. This case involved the negotiation, financing and operation of a sequestered vessel, which was later fraudulently sold by another third party.

2. A *maritime* case occurring **outside** the territory of Panama, and the action is directed at the vessel (*in rem* claim) or its owner (in personam claim); and either the vessel or any other assets owned by the defendant is arrested in jurisdictional waters.

Cases occurring outside the jurisdiction of the Panama Court can be tried in Panama. To file cases occurring outside of Panama (meaning that the operative legal facts take place outside the country's territory) the law provides a two tier formula. First the case must be "*maritime*" in nature as explained above. And the action must be directed at the vessel or its owner and most importantly the arrest of property owned by the defendant (may include bank accounts, shares to a company, vessels and any other conceivable form of property) which would cause the defendant to be "brought" to the jurisdiction of the Panamanian Courts. **Note: Arresting property in this manner works conjunctively with Article 166 regarding arrests, this will be explained further ahead in the article.**

In other words, the filing of the claim together with the petition for the arrest of property owned by the defendant will enable the Court to hear a case even if the facts that give rise to the claim occurred beyond the jurisdictional borders of Panama. As an example, let imagine a contract for the carriage of goods from the west coast of the United States to the east coast of South America. A contract for the carriage of goods is inherently maritime. Let's assume further that cargo was damaged en route and that the vessel is scheduled for transit at the Canal. To exercise the Jurisdiction of the Court, an action must be filed against the vessel or the owner of the vessel *and* the arrest of the vessel must be solicited (together with the complaint). Once the vessel is apprehended, arguably the Jurisdiction of the Court over the case is configured.

3. When the defendant can be personally served in Panama; (physical presence is required)

The Courts may exercise jurisdiction when the defendant can be personally served of the complaint in Panama. If the defendant is a natural person the person must be personally notified and served. Conversely if the defendant is a corporation then the issue turns on whether or not the defendant is physically in Panama, in case of corporations, the corporation is "present" in Panama if its principal place of business is established in the country and not merely if the company is registered in the Public Registry of Panama.

In 2000, the Court handled a case that involved a suit against a company incorporated in Panama. In *Luz Marina Reyes v. Diamond Camellia, S.A. & Mitsui O.S.K. Lines*, a vessel floundered off the Coast of Korea, heirs to the seaman brought suit against the vessel owning company and its operator. The vessel owning company was registered in Panama. Plaintiff filed complaint arguing that the defendant although registered in Panama did not operate from Panama so its legal domicile could not be Panama. The Court ordered the arrest of the vessel, under Article 164(2)<sup>3</sup> in order to ascribe competence and attract the Panamanian-registered-non-domiciled owner to the Panamanian Jurisdiction. Defendants appealed the arrest order arguing that the Court had jurisdiction over a Panamanian company since it was registered in Panama regardless of the domicile of its directors. The Court held that the company was not "present" in Panama solely because it was incorporated in Panama because Panama was not its principal place of business thus Panama was not its effective legal domicile. Consequently it could not be personally served in Panama and the arrest was upheld.

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<sup>3</sup> Now amended and renumbered Article 166(2)

4. A seaman's negligence claim.

Labor cases may be filed in Maritime Courts of Panama. Panama has also enacted Law Decree 8 of 1998 which regulates labor relations involving seamen. The jurisdiction over a labor case turns on the nature of the obligation claimed. For Law 12 of 2009 (current law of Maritime Procedure) and Law Decree 8 of 1998 (Seaman Labor Law) read together, separate the jurisdiction over labor disputes. Disputes that involve the collection of wages, vacations, pensions and/or any form of salary will be seen by the Panamanian Maritime Labor Courts<sup>4</sup>. On the other hand, the Maritime Courts of Panama has Jurisdiction to hear cases arising out of a negligence claim for damages caused by fault between a seamen and his employer. Fault based tort cases may **only** be filed in the Maritime Courts of Panama.

5. When the vessel or one of the vessels involved flies the Panamanian flag.

Jurisdiction over Panamanian vessels is exercised through this article. As is apparent from a plain reading of it, when *a vessel or one of the vessels* involved flies a Panamanian flag, the Maritime Courts may exercise jurisdiction over a claim. Under a legal fiction (akin to the same principle of territoriality used for aircrafts and embassies) a vessel flying a Panamanian flag is considered Panamanian territory<sup>5</sup>.

This prong should be read in concordance with the Law of the Sea Convention.

6. When the applicable law to the claim is the Panamanian law either by contract or by virtue of the Panamanian law itself.

It is a customary industry practice that most contracts in the maritime industry contain choice of law clauses, whereby the law applicable to any claim is preselected and contractually agreed upon. Panamanian law is respectful of choice of law clauses contained in maritime contracts. Among the duties of the judges, is the duty to investigate and apply the laws of other countries when they turn out to be applicable to the case at hand. Even if there is no contract or the choice of law clause is rendered void, Panamanian procedural law includes a comprehensive choice of law article<sup>6</sup> in order to assist the judge in determining the applicable law to a claim in absence of an agreed one.

7. Execution of a foreign judgments against assets found in Panama.

International comity is an important feature of an international Court of Justice. Comity by definition involves the voluntary and informal by a Court of the laws and judicial decisions of another country<sup>7</sup>. Consequently, Panama respectful of other nations, allows for foreign judgments, arbitral awards, interlocutory decisions and court resolutions that order cautionary measures dictated by foreign Courts to be executed in Panama. According to Panamanian law, a foreign judgment may be enforced in Panama by way of process called "exequatur". An "exequatur" is a process by which the Supreme Court recognizes the validity of a foreign judgment and authorizes the enforcement of its effects within its jurisdiction. The petition for exequatur is filed with the Fourth Chamber of General Affairs of the Supreme Court. While the petition is being decided, an authenticated copy of the foreign judgment will suffice to solicit the Maritime Courts to carry out

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<sup>4</sup> The Maritime Labor Courts exist by statute only. Until the physical creation of these specialized Courts, the Sectional Labor Courts of Panama attend cases involving contractual labor disputes between seamen and their employers.

<sup>5</sup> This prong should be read in concordance with the Law of the Sea Convention.

<sup>6</sup> Article 566 Code of Maritime Procedure

<sup>7</sup> <http://www.merriam-webster.com/dictionary/comity>

cautionary measures, i.e. an arrest or attachment of property. However the Maritime Courts will be competent once the decision on execution is handed down by the Supreme Court.

#### 8. A limitation of liability process.

Limitation of liability in Panama is a type of process as well as a defense<sup>8</sup> for ship owners and salvors. A ship owner may initiate a limitation of liability proceeding in Panama which would have the effect of taking upon the jurisdiction of the Panamanian Court as well as enjoining all claims, domestic and abroad, and attract them all into one jurisdiction, in this case Panama as the forum selected by the ship owner. It is noteworthy to establish that filling a limitation process is **not** an admission of liability.

Once the interested party<sup>9</sup> files for a limitation proceeding, the Court will determine the amount of the limitation fund and will order the posting of the bond in the absence of willful misconduct, recklessness or knowledge that the act or omission would originate damage.

### Personal Jurisdiction

#### 1. Service of Process

In order to obtain personal jurisdiction over a defendant, the Court must serve the defendant with the complaint personally. According to Articles 400-403 of the Code of Maritime Procedure the Court decree that orders serving the defendant with process must personally notified. This process gets slightly complicated in two scenarios: 1) the defendant does not appear before the Court; and 2) the defendant domiciled outside of Panama.

If the defendant does not appear before the Court, there are two possible solutions. One is to try to notify the non appearing party by edict published in a national circulation newspaper. Secondly, file a motion for default judgment based on Article 70 which empowers the judge to decide the case on the merits. The judge is allowed to use the non answer as indicia against the defendant in conjunction with prove of the right to claim of the plaintiff in order to decide the case.

If the defendant is domiciled outside of Panama, notification takes place through an attorney admitted to practice in the country where defendant is domiciled. The Court will send an authenticated copy of the complaint to the attorney in the country of domicile of the defendant. The attorney will then deliver the complaint to the registered domicile of the defendant and perform a notarized (or apostilled) affidavit attesting to the delivery of the complaint. The affidavit of the attorney together with the received copy of the complaint is then filed in the Court. The time to answer the complaint starts upon the filing of the affidavit with the Court<sup>10</sup>.

#### 2. Article 166 Arrest

Personal jurisdiction happens when the Court services the defendant of a claim. The defendant may or may not be present within the reach of the Court. Once the Court personally serves the defendant with a claim,

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<sup>8</sup> Article 576 Code of Maritime Procedure

<sup>9</sup> An "interested party" may be the owner, charterer, naval solicitor or the operator of a sea going vessel.

<sup>10</sup> Article 499 establishes that the complaint must be answered within 30 days counting from the service of process.

personal jurisdiction is achieved. Many times the defendant is out of reach of the Court. Consequently, the Court has to use any other method to attract the defendant to its jurisdiction. This can be done by arresting property of the defendant in order to force him to appear before the Court<sup>11</sup>.

In Panama, the arrest of property is possible. Article 166 (1) of the Maritime Procedural Code establishes the rules to arrest a vessel to attract a “delinquent” defendant. These types of arrests have the objective of preventing the fraudulent disappearance or hiding of assets thus creating hardship on a plaintiff. Article 166(1) operates when the defendant is inside the territory of the country, and in order to arrest, the Court may require the posting of a bond of 20-30% of the amount claimed<sup>12</sup>.

In an Article 166(2) arrest, if the claim arises out of acts taken place outside of Panama, the arrest has the effect of establishing personal jurisdiction over the defendant by serving him. . The effect of this form of arrest is to ascribe competence to the Court for causes arising out of navigation. Numeral 3 of Article 166 contemplates the arrest of vessel for the execution of a maritime lien on the vessel. Numerals 2 and 3 do not require posting a bond beyond US\$1,000.00 to guarantee wrongful arrests.

Arrest under any of the three ways mentioned above, requires depositing with the Court arrest maintenance costs.

**Note: Sister Ship Arrest.** Article 530 of the Code Maritime Procedure institutes sister ship arrests in Panama. When the applicable law to an *in rem* claim so allows, a claim may be filed against a distinct vessel than the one over which the lien is attached regardless of whether the claim may be statutory or a right in rem or any other denomination, against the vessel, cargo, freight or any combination of these.

### 3. Conservative & Protective Measures

Article 206 of the Code of Maritime Procedure put in plain words the rules of the “administrative arrest”. An administrative arrest is a petition filed with the Court asking the judge to decree a conservative or protective measure when an immediate or irreparable harm is imminent pending a decision on the merits. Plaintiff must file prima facie evidence to support his claim and the judge is entitled to order the posting of a bond of up to US\$50,000.00 to guard against frivolous measures.

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<sup>11</sup> NOTE: “Special appearances” which is a term used to describe a procedural right whereby a defendant can appear before a Court to challenge jurisdiction are not lawed in the Procedural Rules of the Maritime Courts of the Republic of Panama. Article 399 of the Code of Maritime Procedure establishes that any act by defendant or his counsel, including filing a power of attorney, or acting on behalf of the defendant by filing any petition will have the effect of considering the defendant notified of the claim.

<sup>12</sup> Article 166 Code of Maritime Procedure