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Spain: Law & Practice
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Law and Practice

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1. MARITIME AND SHIPPING LEGISLATION AND REGULATION

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

Spain does not have exclusive courts specialised in maritime and shipping matters.

Within the Spanish Civil jurisdiction there are, however, two types of courts: First Instance Courts and Mercantile Courts. All maritime and shipping matters are to be adjudged by the Mercantile Courts. Following the Law of the Judiciary Power, Article 86 ter paragraph 6.c), Mercantile Courts have exclusive competence over those claims relative to the application of Maritime Law and other mercantile matters (including corporate law, insolvency law, carriage in general, etc).

Consequently, if a claim that involves the application of Maritime Law is filed before a First Instance Court, the Respondent may challenge its competence. Likewise, the Court also has ex officio powers to reject the matter.

Common claims filed before the Mercantile Courts are cargo claims, collisions, claims arising from ship construction or repair contracts, contractual disputes, stevedore damages to the ship or the cargo and insurance disputes. Ship arrest is also a common application dealt by Mercantile Courts.

Salvage and emergency towing claims, however, may be heard before the Maritime Arbitration Conseil (an administrative body) if there is an agreement for that between salvors and ship-owners. In the absence of such an agreement and, following the Second Additional Disposition of the Spanish Shipping Act 2014 (SSA), Mercantile Courts would also have jurisdiction for salvage and emergency towing claims. It should

be noted that, until the Maritime Arbitration Conseil's Regulation is enacted, the Conseil's functions will be exercised by the Central Maritime Courts (an Army body).

Claims related to labour issues, such as seafarers' claims related to their employment contract, labour rights, personal injury affecting crew and others, are subject to the jurisdiction of Labour Courts according to Article 9.5 of the Law of the Judiciary Power.

Cases concerning marine sanctioning proceedings derived from breach of maritime regulations (the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL), etc), port dues and/or against the Spanish Maritime Administration are subject to the Contentious Administrative Courts following Article 9.4. of the Organic Law of the Judiciary Power.

1.2 Port State Control

Royal Decree 1737/2010, of December 23rd, approves the Regulation that establishes the inspections of foreign vessels in Spanish Ports. These inspections are carried out to ensure compliance with International and European Conventions and Regulations for the safety of life at sea, marine and environmental protection, and life and work standards for seafarers, all within the frame of the Memorandum of Understanding of Paris (the Paris MOU).

The competent authority for foreign vessel inspections is the Ministry of Development through the Harbour Master Offices in each port.

Groundings and wreck removal outside internal waters are also subject to the powers of the Ministry of Development through the Harbour Master Offices, whereas grounding and wreck removal within internal waters are subject to the

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relevant Port Authority. In both cases, the competent authorities have the power to request salvage or wreck-removal operations to the owner or its insurer. If owners or insurers do not comply with this request, the competent authorities are empowered either to sink the vessel or remove the wreck, all at the owners'/insurers' expense, without the possibility to claim limitation of liability. Authorities would have a lien on the recovered property and can sell it to recover the costs incurred.

In order to prevent marine pollution, the Harbour Masters and Port Authorities are empowered to visit, inspect and arrest vessels within Spanish jurisdictional waters and to initiate judicial actions or any other action they deem necessary to protect the environment.

As a State party to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990, Spain has developed the National Marine Response Plan and the National Shore Protection Plan to prevent and fight pollution at sea and on shore under the powers of the Ministry of Development and Coastal Directorate, who will co-ordinate the response to pollution with the assistance of the Spanish salvage public company (SASEMAR), the Army, the police, fire fighters, scientific public agencies, etc. Costs for this response will be claimed against the polluter.

1.3 Domestic Legislation Applicable to Ship Registration

Ship registration is regulated by the State Port and Merchant Navy Act (ie, the Royal Legislative Decree 2/2011 of November 5th), the SSA and the Royal Decree 1027/1989, of July 28th, that regulates ship registration and the Maritime Registry.

All vessels in Spain must be entered on two registries of different natures: a) the Marine Admin-

istrative Registry, and b) the Registry of Movable Goods, where ownership, mortgages and encumbrances will be registered.

The Marine Administrative Registry is in charge of the Ministry of Development and is located in the different Harbour Master Offices. The Registry provides for the register of ships through a list system that depends on the activity to be performed by each ship. The Registry of Movable Goods, however, is in charge of the Ministry of Justice.

It is worth mentioning the Special Registry of Ships and Shipping Companies of the Canary Islands (known as the REBECA), which provides for important tax allowances and corporate benefits.

1.4 Requirements for Ownership of Vessels

Under the Spanish Port's Act, only individuals or companies domiciled in Spain or in any of the European Economic Area (EEA) countries, provided that they have a representative within Spanish territory, can own a Spanish-flagged vessel. For companies domiciled outside the EEA, the Spanish Flag is only accessible if the vessel is registered under the REBECA.

Title to ownership (sale contract) shall be in writing and ownership will be acquired with the delivery of the vessel after the contract of sale purchase. However, in order to register the ownership of the vessel, the sale contract needs to be contained in a public deed.

Vessels under construction are registered in the Marine Administrative Registry within list nine. List nine is a temporary registration for these vessels. Once the construction has finished, the vessel is registered in the appropriate list according to the purpose of the vessel and the temporary registration is closed.

Vessels under construction can also be registered in the Registry of Movable Goods. In fact, registration on the Registry of Movable Goods is compulsory when the vessel under construction is subject to a mortgage.

1.5 Temporary Registration of Vessels

Temporary registration of vessels under the Spanish flag is permitted when a foreign-flagged vessel is under a bareboat charterparty and the charterer has its domicile in Spain. The temporary registration will last for the duration of the charterparty.

Similarly, Spanish-flagged vessels chartered by a person domiciled outside Spain may be temporarily registered in the country of the charterers for the duration of the charterparty.

Spain does not permit, however, a dual registration. Vessels registered in Spain may fly only the Spanish flag. Temporary registration of a foreign vessel in Spain will only take place after the Registry is satisfied that the vessel has been suspended from its original flag.

1.6 Registration of Mortgages

The constitution, modification or cancellation of a mortgage or encumbrance on a vessel must be recorded in the Registry of Movable Goods in the charge of the Ministry of Justice. The Mortgage Agreement may be granted by means of a private contract or a Notarial Deed. The mortgage agreement must identify the parties, the loan guaranteed by the mortgage, the date of payment of capital and interests, the description and identification of the vessel, the value of the vessel, if two or more vessels are mortgaged, the amount for which each vessel is mortgaged, and any other contractual provision to which the parties have agreed.

1.7 Ship Ownership and Mortgages Registry

The Registry of Movable Goods and the Maritime Registry are public. Any person may obtain information from their records by applying to the registry and paying register dues for that information.

2. MARINE CASUALTIES AND OWNERS' LIABILITY

2.1 International Conventions: Pollution and Wreck Removal

Spain is a member state of the 1992 International Convention on Civil Liability for Oil Pollution (CLC Convention), the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC Fund) and the 2003 Supplementary Fund Protocol and, finally, the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER).

Owners' and interested parties' civil liability in the event of pollution is also regulated by the SSA, although the application of the above-mentioned Conventions is preferential over domestic law. The SSA regulates, in its Articles 386, 388, 389 and 391, a strict liability regime for the owner of the polluting vessel, its right to limit liability and its obligation to subscribe a civil liability insurance covering liability for pollution.

As for wreck removal, Spain is not a party to the International Convention on the Removal of Wrecks (the 2015 Nairobi Convention). Accordingly, wreck removal is regulated by Articles 369 to 383 of the SSA and by Article 304 of the Spanish State Ports and Merchant Navy Act.

Spanish domestic law establishes owners' direct liability for wreck removal and provides that the Administration costs arising from wreck-removal

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activities are privileged. Owners do not have a right to limit liability under the Convention on Limitation of Liability for Maritime Claims (LLMC 76/96) in accordance with the Reservation made by Spain to this Convention for wreck-removal claims.

2.2 International Conventions: Collision and Salvage

Regulation of Collisions

Collision is regulated by the 1910 Collision Convention and other related Conventions, such as the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in the matter of Collisions or other Incidents of Navigation, made in Brussels in 1952 or the 1972 International Regulations for Preventing Collisions at Sea (COLREGS). In Spanish domestic law, collisions are regulated in Articles 339 to 346 of the SSA.

Regulation of Salvage

Salvage is regulated by the 1989 International Convention on Salvage and Articles 357 to 368 of the SSA.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Setting aside specific liability regimes to be applied in Spain, such as the Hague-Visby Rules, the CLC, the Athens Convention, the Bunker Convention, etc, owners are entitled to limit their liability in accordance with the 1976 International Convention on Limitation of Liability and its 1996 Protocol. The SSA grants ship-owners and carriers the right to opt for the application of the LLMC76/96 limit or the applicable specific limit.

The SSA also regulates the Limitation of Liability in its Articles 392 to 405, referring to the LLMC 76/96 as the applicable regime.

2.4 Procedure and Requirements for Establishing a Limitation Fund

The SSA regulates, in its Articles 403 to 405, the owners' right to establish a limitation fund. The limitation fund must be constituted by placing the amount of the limitation (including the interests accrued as of the date of the incident) before the competent court or providing security to the court's satisfaction. Once the fund has been constituted, claimants cannot pursue their claims against any other asset. The constitution of the fund will also give rise to the release of any ship arrest (for the same claim). The release will be ordered by the court in which the fund has been constituted.

3. CARGO CLAIMS

3.1 Bills of Lading

Spain is a member state of the Hague-Visby Rules, which apply to cargo claims under bills of lading. Where the Hague-Visby Rules are not directly applicable, Spanish domestic law, the Spanish Shipping Act 2014 (SSA) remits the regulation of the liability regimes for all cargo claims, irrespective of whether the carriage is contracted under a Bill of Lading, to the Hague-Visby Rules.

Regulation of the carrier's liability for loss, damage or delay under the SSA can be found in Articles 277 to 285 of the SSA.

It must be noted, however, that the First Final Disposition of the SSA provides that the SSA will adapt to the Rotterdam Rules if these come into force in the future. Consequently, it is expected that, if the Rotterdam Rules enter into force in the future, all carriage of goods by sea contracts will be subject to their regime.

3.2 Title to Sue on a Bill of Lading

Title to sue under a bill of lading corresponds to the lawful holder of the bill of lading. Valid transfer of the bill of lading entails the transfer of rights and actions to the transferee, except for the jurisdiction and arbitration clauses. These clauses will only be transferred if they had been individually and separately negotiated and agreed by the transferee.

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

A carrier may be liable for partial or total loss or damages to the cargo and for delays. The carrier's liability regime, including limitation, extends to both the contractual and the actual carrier, which are considered to be jointly and severally liable towards the holder of the bill of lading.

Unless the nature and value of the goods have been declared by the shipper before shipment, a carrier may limit its liability to an equivalent of 666.67 special drawing rights (SDR) per loss or damaged package or two SDR per kilogram of gross weight of the goods actually lost or damaged, whichever is the higher.

The carrier's liability for delay will be limited to two and a half times the amount of freight charged for the affected cargo, with the maximum limit equivalent to the freight charged for the complete cargo.

The right to limit liability does not apply in the case of wilful misconduct or gross negligence of the carrier.

Carriers are entitled to opt for the aforementioned limitation of liability regime or to apply the limitation of liability regime under the Convention on Limitation of Liability for Maritime Claims (LLMC 76/96).

3.4 Misdeclaration of Cargo

The carrier can establish a claim for damages against the shipper for misdeclaration of cargo, as established in Article 260 of the SSA. Other remedies are the right to discharge the cargo in certain circumstances and the right to destroy it in the case of dangerous goods (following Article 232 of the SSA). Up to January 2022, no relevant judgment on these SSA provisions has been published.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

The time bar to file a claim for lost or damaged cargo is one year. This time limit applies to both contractual and tort claims.

The Hague-Visby Rules provide that this time bar can be extended by agreement of the parties (ie, a time extension). The time bar cannot be interrupted by a letter of demand to the respondent. If the claim is not filed within that one-year period or within the time extension, the action is time-barred.

Under Article 268 of the SSA, however, and notwithstanding the remission to the provisions of the Hague-Visby Rules, it is not clear whether this one-year time bar will be considered interruptible by a letter of demand or whether it will require the claimant to obtain a time-extension agreement. There are appeal court judgments suggesting that the one-year time bar is not interruptible, but this will be a decision for the Supreme Court to rule upon.

4. MARITIME LIENS AND SHIP ARRESTS

4.1 Ship Arrests

Spain is a member state of the International Convention on Arrest of Ships signed at Geneva

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on 12 March 1999 (1999 Arrest Convention) that came into force on 14 September 2011.

The domestic law that covers the ship arrest in the Spain is the Spanish Shipping Act (SSA), in its Articles 470 et seq, and in the provisions regulating general conservatory measures that can be found in the Spanish Code of Civil Procedure 1/2000, January 7th (Articles 721 et seq).

4.2 Maritime Liens

Spain is a member state of the International Convention on Maritime Liens and Mortgages signed at Geneva on 6 May 1993 (the Lien Convention) that entered into force in Spain on 5 September 2004.

Furthermore, the SSA, in its Articles 122 et seq, also provides that maritime liens be governed by the 1993 Lien Convention.

Accordingly, and as established in Article 4.1 of the Lien Convention, the following claims are considered liens:

- claims for wages and other sums due to the Master, officers and other crew members with respect to their employment on the vessel, including repatriation costs and social insurance contributions payable on their behalf;
- claims with respect to loss of life or personal injury, whether occurring on land or water, in direct connection with the operation of the vessel (with the exception of Article 4.2 “a” and “b”);
- claims for reward for the salvage of the vessel;
- claims for port, canal and other waterway dues and pilot dues;
- claims based on tort arising out of physical loss or damage caused by the operation of the vessel, other than loss of or damage to cargo, containers and passengers’ effects

carried on the vessel (with the exception of Article 4.2 “a” and “b”).

Following Article 124 of the SSA, any other possible liens (outside the Lien Convention) recognised under domestic law, European Union Regulations or any other International Treaty applicable in Spain would have lower rank than mortgages and other registered charges.

Currently, the Spanish Government is considering amending the SSA to include claims related to ships’ supplies and to ships’ repairs, done in Spanish Ports, as maritime liens.

Spain differentiates between maritime liens and maritime claims.

Maritime claims are all those claims, listed in Article 1 (1) of the Arrest Convention, that enable a claimant to arrest a ship. This includes not only the maritime liens of the Lien Convention but also other claims.

A maritime lien is a claim that “follows” the vessel. Liens are considered “actions in rem”, and thus they enable the arrest of a ship and/or the enforcement of a claim on the ship, regardless of any potential change of ownership/register number or flag.

A vessel can be arrested in Spain by alleging before Spanish courts any of the following maritime claims listed in Article 1 of the 1999 Arrest Convention:

- loss or damage caused by the operation of the ship;
- loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of

- a ship which by itself or its cargo threatened damage to the environment;
- damage or threat of damage caused by the ship to the environment, coastline or related interests, measures taken to prevent, minimise, or remove such damage, compensation for such damage, costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken, loss incurred or likely to be incurred by third parties in connection with such damage, and damage, costs, or loss of a similar nature to those identified in this sub-paragraph;
 - costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board that ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
 - any agreement relating to the use or hire of the ship, whether contained in a charterparty or otherwise;
 - any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charterparty or otherwise;
 - loss of or damage to or in connection with goods (including luggage) carried on board the ship;
 - general average;
 - towage;
 - pilotage;
 - goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
 - construction, reconstruction, repair, converting or equipping of the ship;
 - port, canal, dock, harbour and other waterway dues and charges;
 - wages and other sums due to the Master, officers and other members of the ship's

- complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
- disbursements incurred on behalf of the ship or its owners;
 - insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the ship-owner or demise charterer;
 - any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the ship-owner or demise charterer;
 - any dispute as to ownership or possession of the ship;
 - any dispute between co-owners of the ship as to the employment or earnings of the ship;
 - a mortgage or a “*hypothèque*” or a charge of the same nature on the ship;
 - any dispute arising out of a contract for the sale of the ship.

4.3 Liability in Personam for Owners or Demise Charterers

In order to arrest a vessel under Spanish Law, it is necessary that its owners or demise charterers have in personam liability for the maritime claim. Exceptions to this principle are maritime liens. When a claim is a maritime lien, the claimant may arrest the offending vessel, even if its owner or demise charterer is not liable in personam for the claim.

4.4 Unpaid Bunkers

Bunker supply to a vessel is considered a maritime claim and the bunker supplier (contractual or actual supplier) can arrest the vessel for unpaid bunkers by virtue of Article 1.1) of the 1999 Arrest Convention, provided that these bunkers were purchased by the ship-owner or by the demise charterer.

Bunkers ordered by a charterer would not enable the claimant to arrest the vessel following Arti-

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cle 3.3 of the Arrest Convention, as a claim for unpaid bunkers is not considered a lien and does not create an in rem action against the vessel. However, in cases in which the terms and conditions of the actual supplier establish a direct action against the ship-owner or demise charterer and these terms and conditions have been accepted by the Master by signing the “bunker receipt”, Spanish courts have agreed to arrest the vessel.

4.5 Arresting a Vessel

The arrestor must appoint a Court Agent (also known as a Procurator) and must be assisted by a lawyer in the arrest proceedings. The court will require a notarial power of attorney (POA) evidencing that appointment. If the power of attorney is issued before a foreign public notary, it will need to be legalised.

Under the SSA, a mere allegation of the maritime claim would suffice for the arrest application. It is, however, advisable to submit with the arrest petition prima facie evidence of such a claim. Any document submitted to the court must be translated into Spanish. Free translations of both the POA and evidence will suffice for this purpose.

In practice, the arrest petition, including the POA and any other document, will be presented electronically by the Procurator, via the e-official system of the Spanish Ministry of Justice, to the court. Accordingly, the documents will be presented as copies.

The SSA requires that the arrest petitioner provide counter-security, prior to the court enforcing the arrest, which shall amount to a minimum of 15% of the maritime claim. This counter-security is provided to guarantee possible damages in the case of wrongful arrest. In most cases, the counter-security requested by Spanish courts is limited to this 15% of the maritime claim and

is only occasionally increased when the court considers that there are other relevant factors that may give rise to the need to set a higher guarantee (eg, passenger vessels or when the vessel to be arrested is subject to a regular line). The Spanish Government is proposing to amend the SSA so that there is no minimum amount security required, leaving at the entire discretion of the judge the determination of the amount.

4.6 Arresting Bunkers and Freight

The Arrest Convention is not applicable to bunker or freight arrest, only to ship arrest.

The regulation of arrest of bunkers or freight falls on the provisions regarding conservatory measures of the Spanish Code of Civil Procedure. These provisions require not only that the claimant provide counter-security but also that they present a prima facie case of claim (*fumus boni iuris*) and proof of the *periculum in mora*, or danger in delay. In practice, since a bunker arrest entails detaining a vessel without a claim against its owner or maritime lien, Spanish courts are reluctant to agree to bunker arrest.

4.7 Sister-Ship Arrest

Any other ship owned by the debtor, also known as a sister ship, can be arrested under Spanish Law in accordance with Article 3.2. of the Arrest Convention, as referred to by Article 475 of the SSA. Accordingly, a court may arrest not just the offending ship, but also other ships owned by the company liable for the claim, provided that this company was the owner or demise charterer of the offending ship when the claim arose.

4.8 Other Ways of Obtaining Attachment Orders

Other ways to obtain security would be regulated by the provisions for conservatory measures of the Spanish Code of Civil Procedure and would include the attachment of assets (other than a vessel) or rights, injunctions, etc.

4.9 Releasing an Arrested Vessel

The first and quickest option to release an arrested vessel is by placing security before the court:

- the type of security (eg, an LOU (Letter of Undertaking) of a Protection and Indemnity insurance (P&I) Club) can be agreed with the arresting party. This agreement should be respected by the court;
- if an agreement on the security is not possible, in order to release the vessel, security must be placed before the court in any of the means admitted by Spanish Procedural Law. This would include a cash deposit, or an unconditional – and unlimited in duration – bank guarantee issued by a first-class Spanish bank. A P&I Club LOU will not be admitted by the Spanish courts if the arresting party has not agreed to do so.

The second way to obtain the vessel's release involves disputing the arrest order on the basis that it is a wrongful arrest, ie, that it does not comply with the requirements of the Arrest Convention. This second possibility takes longer than the first (several weeks or even months), because the court will schedule a hearing prior to deciding on the issue.

The third possibility would involve the arresting party not complying with his or her obligation to commence and file the proceedings on the merits before the competent court/arbitrator within the period of time granted by the Spanish court. This period is usually 20 to 90 days and will depend on where the competent court is located. If Spain has jurisdiction, the period will be only of 20 days. The period starts counting from the date that the arrest order was notified to the owners (usually via the Master or ship agents and served by the court via the Harbour Master).

4.10 Procedure for the Judicial Sale of Arrested Ships

Under Spanish law, the arrest does not give the claimant the legal right to seek direct enforcement against the vessel.

The procedure for judicial sale of the arrested ship is subject to the commencement of recognition (when the judgment or award has been issued by a foreign – non-European – jurisdiction or international arbitration) and enforcement proceedings of the final judgment or award on the merits of the claim.

The enforcement proceedings of a (national or recognised foreign) judgment or award against any asset located in the Spanish territory is regulated by the Spanish Code of Civil Procedure and the subsequent judicial sale of the vessel is regulated by Articles 480 to 486 of the SSA which mandate the observance of the Lien Convention provisions and, subsidiarily, the Spanish Procedural Rules.

The order granting the judicial sale of the vessel must be served to:

- the authorities and vessel's Registrar of the flag state;
- the registered owner;
- the holder of a nominative mortgage or charge duly recorded;
- any holders of mortgages/charges duly recorded – maritime lien – *hypothèques* that put the court/authority on notice of them.

Provided that the recipients of such notifications are known, the aforementioned service containing all particulars of the auction (place, date, proceedings, circumstances, etc) shall be made in writing at least 30 days before the date of the auction.

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Any holder of a maritime lien can appear in the auction proceedings to safeguard, defend, or assert a third-party preference claim.

Upon the sale of the vessel at public auction, all the mortgages, *hypothèques*, charges, maritime liens and claims will be cancelled.

The sale of the vessel can be delegated to a specialised body, usually a Port Authority or a broker.

During the arrest, the vessel must be maintained by the arresting party. Spanish courts will not require the arresting party to pay the costs of maintenance of the vessel during the arrest. Furthermore, the port where the vessel is retained will look after the safety of the port and may take, at the ship-owner's expense, measures to guarantee such safety.

Ranking of Claims

First, and pursuant to Article 386 of the SSA, the following costs and expenses take preference over the list of liens contained in the 1993 Liens Convention:

- any wreck-removal expenses that must be settled to the Spanish Maritime Authorities; and
- the cost and expenses arising out of the ship-arrest proceedings and her subsequent sale. These costs include maintenance of the vessel and those crew wages accrued from the moment the arrest is in place, and any other sums as referred to in Article 4.1.a) of the Lien Convention.

Second, any remaining funds shall be distributed, according to their preference ranking set forth in the Lien Convention, up to their full and final settlement.

Lastly, any possible remaining balance (after all credits have been paid) will be returned to the owner.

Maritime liens, according to the Lien Convention, take priority over registered mortgages.

4.11 Insolvency Laws Applied by Maritime Courts

Spain has insolvency laws which regulate the re-organisation or liquidation of a company in financial distress that are similar to Chapter 11 of the United States.

Mercantile courts are competent to adjudge not only maritime matters but also insolvency matters.

Once bankruptcy protection has been requested and bankruptcy proceedings initiated, a court cannot enforce against any asset owned by the debtor outside the bankruptcy proceedings. Accordingly, any individual enforcement will be stopped.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

A court will order the arresting party to pay for damages or costs caused by the arrest and to run with all legal costs in three scenarios. These are:

- if the arrest is in dispute and after the hearing it is finally lifted by the arresting court, as set forth in Article 741.2 of the Spanish Procedural law;
- if the arresting party fails to initiate the proceedings on the merits in due time before the competent court or in arbitration, as set forth in Article 730.2 of the Spanish Procedural law;
- if the claim on the merits is dismissed in full, as provided by Article 745 of the Spanish Procedural law.

5. PASSENGER CLAIMS

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

International Conventions and Domestic Laws Applicable to the Resolution of Maritime Passenger Claims

Passenger claims in Spain are regulated by International Conventions, European Regulations, and domestic laws.

International conventions

Spain is a member state of the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 13 December 1974 and of the 2002 Protocol to that Convention.

The Athens Convention and its Protocol provide a liability and insurance regime for passenger claims and their luggage.

Following Article 2, the Convention shall apply to international carriage when the ship is flying the flag of a member state, the contract of carriage has been made in a member state, or the place of departure or destination is in a member state.

European Regulations

With the objective of creating a single set of rules for all Member States, the European Union adopted Regulation (EC) 392/2009 of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents. This Regulation lays down the European regime relating to liability and insurance of passengers by sea, as set out in the relevant provisions of the 1974 Athens Convention, as amended by the 2002 Protocol.

European Regulation 392/2009 extends the scope of application of the Athens Convention to any carriage by sea within a single Member State on board ships of Classes A and B, where:

- the ship is flying the flag of a Member State;
- the contract of carriage has been made in a Member State; or
- the place of departure or destination is a Member State.

Domestic laws

The Spanish Shipping Act (SSA) regulates the contract of carriage of passengers by sea in Articles 287 et seq. The SSA applies to all international and domestic carriage of passengers and their luggage by sea and provides, in Article 298, that carriers' liability shall be regulated by the 1974 Athens Convention, as amended by the Protocols to which Spain is a party, the Regulations of the European Union and by the SSA.

The Spanish Constitution establishes that International Conventions duly ratified by Spain and European Regulations are not only directly applicable, but they also prevail and take preference over domestic law in the event of conflict. Therefore, while the three sources of law are currently directed to the 1974 Athens Convention, as amended by the 2002 Protocol, this has not always been the case, and conflict of law rules may have to be considered when deciding the applicable law in the future.

Time Limit to File a Claim

The time limit for any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage is two years. This time limit is the same for actions under the Athens Convention, the European Regulation or the SSA.

Spain considers that this two-year period may be subject to interruption and renewal by sending a letter so to demand or from the moment liability is accepted.

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Limitations on Liabilities Available to the Owners in Respect to a Passenger's Claim

The liability of the carrier for the loss suffered as a result of the death or personal injury to a passenger caused by a shipping incident is limited to 400,000 SDR per person on each distinct occasion.

Within that limit, the carrier will be responsible for any loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident up to 250,000 SDR, unless the carrier proves that the incident resulted from an act of war, hostilities, civil war, insurrection or *force majeure*, or was wholly caused by an act or omission by a third party with the intent to cause the incident.

For death or personal injury not caused by a shipping incident, the carrier will be liable up to that limit if the incident was due to the fault or neglect of the carrier. The burden of proof lies on the passenger.

Spain has not exercised the option to increase the limits of liability in the case of death or personal injury.

Liability of the carrier for the loss of or damage to cabin luggage is limited to 2,250 SDR per passenger, per carriage. Liability of the carrier for the loss of or damage to vehicles, including all luggage carried in or on the vehicle, is limited to 12,700 SDR per vehicle, per carriage. For other types of luggage, liability shall not exceed 3,375 SDR per passenger, per carriage.

A deductible amount, not exceeding 330 SDR for a vehicle and 149 SDR for other luggage, may be agreed between the carrier and the passenger.

The limits of liability may be increased by agreement between the carrier and the passenger.

6. ENFORCEMENT OF LAW AND JURISDICTION AND ARBITRATION CLAUSES

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

Validity of Jurisdiction Clauses Stated in Bills of Lading

The Spanish Shipping Act establishes that, notwithstanding International Conventions to which Spain is a party and the Regulations of the European Union, submission clauses in a bill of lading, either to a foreign jurisdiction or foreign arbitration, are to be deemed null and void unless they are negotiated separately and individually.

Furthermore, even in cases where the shipper may have negotiated separately and individually with the carrier a clause submitting any dispute to a foreign jurisdiction or international arbitration, the SSA establishes that the conveyance of the bill of lading to the consignee implies the conveyance of all the rights and actions of the shipper except for any arbitration or jurisdiction clause, which requires the express and written consent of the transferee or holder of the bill of lading.

Exceptions to the foregoing are submission clauses that refer any dispute under a bill of lading to the jurisdiction of a court of a Member State of the European Union. According to Regulation (EU) No 1215/2012, of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels II), any such agreement conferring jurisdiction will be valid between the parties to the contract, regardless of where they are domiciled, if it has been made:

- in writing or evidenced in writing;

- in a form which accords with practices which the parties have established between themselves; or
- in international trade or commerce, in a form which accords with the usage of which the parties are or ought to be aware and which is regularly observed by parties to contracts of the type involved in the particular trade or commerce.

Based on this provision, which prevails over domestic law, submission clauses in bills of lading to European courts will be deemed valid, even if not separately and individually negotiated, between the shipper and the carrier. Whether this validity may be extended to the consignee or holder of the bill of lading is a question in dispute. According to the judgment issued in *Coreck Maritime (C-387/98)* by the Court of the European Union, this submission clause may only be invoked against the holder of the bill of lading if, following “national applicable Law”, the holder subrogates in all rights and liabilities of the shipper. That said, *Coreck Maritime (C-387/98)* does not establish which is to be the “national applicable law” and this is left to the judge deciding on the question of jurisdiction.

If this “national applicable Law” is Spanish Law, following the SSA, foreign jurisdiction and international arbitration clauses are not transferred with the bill of lading. However, the matter is not clear and there are different doctrinal opinions on the issue. Some learned authors defend that, when the SSA is applied, the submission clause will be considered null and void towards the consignee or holder of the bill of lading by virtue of Article 468 of the SSA. Others consider that a new analysis of the consent to the jurisdiction clause by the holder of the bill of lading is to be made under the terms, once again, of Brussels II, which prevails over domestic law, concluding that it may be arguable that the clause is valid and enforceable.

Finally, if the submission to a foreign court or arbitration is valid, it may be raised by both the contractual carrier (ie, the freight-forwarder) and the effective carrier according to the interpretation of Spanish Courts (eg, the Judgment by the Court of Appeals of Valencia No 106/2021 dated 21 July 2021).

Validity of Law Clauses Stated in Bills of Lading

Law clauses stated in bills of lading are recognised by Spanish courts and are enforceable against both the shipper and the holder of the bill of lading. Having said this, the fact that a bill of lading remits to a foreign legislation does not imply that the analysis of the validity of a potential foreign jurisdiction or international arbitration clause should be made under the perspective of such a law. If an action is brought before a Spanish court, the court will apply Spanish conflict of law provisions to determine the validity of the jurisdiction clause. If the court decides that Spain is competent to hear the matter, the Spanish court may and will apply the provisions of a foreign legislation (to the merits of the claim) if the parties have agreed to that legislation. It will be for the parties to provide evidence of the content of that legislation for the Spanish court to apply. This is usually done by means of two sworn affidavits issued by jurists.

Notwithstanding the foregoing, a proposal has been made to include law clauses in the restrictions of Article 251 of the SSA. If this proposal is approved in the future, law clauses may follow the same regime as jurisdiction or arbitration clauses.

6.2 Enforcement of Law and Arbitration Clauses Incorporated into a Bill of Lading

An international arbitration clause incorporated to a bill of lading will have to be separately and

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individually negotiated by the shipper and the consignee to be valid.

It must be noted, however, that the SSA only requires individual and separate negotiation of a submission clause when it refers to international jurisdiction or arbitration. It does not expressly refer to domestic jurisdiction or arbitration. Therefore, in principle, a domestic jurisdiction or arbitration clause should be considered valid between a carrier and a shipper under the SSA. There is, however, no consolidated case law to this effect yet. Furthermore, even if in principle a domestic jurisdiction or arbitration clause is considered to be valid against the shipper, this does not necessarily extend to the holder of the bill of lading and the question yet to be answered by Spanish courts is whether a domestic jurisdiction or arbitration clause will need to be negotiated separately and individually also by the holder of the bill of lading to be valid towards him or her.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable in Spain for international arbitration.

Spain has also enacted the Arbitration Act (Law 60/2003 of December 23rd) for domestic arbitration and for international arbitration, which follows the UNCITRAL Model Law on International Commercial Arbitration.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

Spain is a party to the 1999 Geneva Convention on the arrest of ships.

Following the Arrest Convention, a ship may be arrested in Spain for the purpose of obtaining security, notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any rel-

evant contract, or otherwise, the maritime claim is to be adjudicated in a State other than Spain. This is also stated in Article 474 of the SSA.

If the vessel is arrested in Spain, however, Spanish courts will be considered to have jurisdiction over the claim unless the parties validly agree or have validly agreed to submit the dispute to a court of another State which accepts jurisdiction, or to arbitration.

6.5 Domestic Arbitration Institutes

There is no specific domestic arbitration institute that specialises in maritime claims active in Spain. Accordingly, if the parties to a contract wish to refer the matter to arbitration, they will have to appoint one of the Courts of Arbitration of the Chambers of Commerce in Spain or another non-specialised institute in Spain.

The Spanish Maritime Law Association is currently promoting arbitration in maritime matters.

6.6 Remedies where Proceedings are Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

When a claim is prosecuted in Spain in breach of a foreign jurisdiction or arbitration clause, the defendant must file a motion to dismiss for lack of jurisdiction (a “*Declinatoria*”). The time bar to file such a motion is ten working days from the date of service of the claim. Once the *Declinatoria* has been filed, the deadline to present points of defence is stalled and will only resume after the court’s ruling, if it dismisses the motion. Upon receipt of the motion, the court will give the claimant five working days to file a response and will make a ruling after examining both parties’ arguments.

7. SHIP-OWNER'S INCOME TAX RELIEF

7.1 Exemptions or Tax Reliefs on the Income of a Ship-Owner's Companies Spanish Tax Lease System

The Spanish tax lease system is currently regulated by the Spanish Corporate Income Tax Law 16/2012, of December 27th, which entered into force on 1 January 2013.

The former Spanish tax-lease system was considered by the European Commission to be an unlawful aid granted by the Spanish Authorities "incompatible" with the European principles of the market and competition, and recently, the judgment dated 23 September 2020 of the General Court of Justice of the European Union (T-515/13RENV – Spain v Commission) ratified the position of the European Commission (200/EU 17 July 2013). This judgment can be appealed in cassation before the Court of Justice of the European Union and does not have any impact on the new tax-lease system that is in force at present in Spain.

Basically, the new Spanish tax lease is a system of accelerated and anticipated depreciation of assets acquired through financial leasing, including any kind of vessel of sea transport (passengers, tugs, fishing, dredgers, barges, platforms, boats/yachts, etc), manufactured in or out of Spain, provided that (i) it is not manufactured in series/mass and (ii) its manufacturing period is at least one year. This new tax-lease system is not subject to prior approval by the Spanish Tax Administration.

Tonnage Tax in Spain

The Spanish Tonnage Tax regime is an alternative tax system to the regular rules of taxable profit determination for the companies that usually produce a tax benefit for the taxpayer.

This regime is a tax system for (qualifying) shipping companies to calculate their shipping-related profits for Corporation Tax purposes. The shipping-related profits are calculated based on the tonnage of the (qualifying) ships used in the company's shipping trade.

The tonnage tax system in Spain is regulated by the Spanish Corporate Tax Act, 27/2014, December 27th.

This tax system is voluntary and subject to previous authorisation by the Spanish Directorate General for Taxation.

The main requirements to be met-by the shipping companies and their vessels-in order to be taxed on the bases of a tonnage tax system are the following:

Qualifying companies:

- must be registered in any of the Spanish Shipping registries (including the Spanish Shipping Registry of the Canary Islands (REBECA) in the Canary Islands);
- their business activity must include shipping management of owned and chartered vessels;
- they must themselves conduct the technical and crew management of the vessels and assume completely the responsibility derived from the nautical operation of the vessel(s) and ISM Code (IMO Resolution A 741).

Qualifying ships:

- must be operated from Spain or any country of the European Union;
- must be sea-going vessels for sea transport, carriage of goods or passengers, rescue vessels and other services that must be rendered at sea (tugs and dredgers have some specific requirements).

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This system will not apply:

- if all vessels are not registered in Spain or any other country of the European Union;
- if the vessels are intended, directly or indirectly, for fishing, recreational or sports activities;
- if certain circumstances derived from or in connection with particular European Regulations occur at the same time at the shipping company.

Spanish Shipping Registry of the Canary Islands

Finally, for those shipping companies whose vessels are registered in the special Spanish Shipping Registry of the Canary Islands (REBECA), Spanish Law 19/1994 for the modifications of the Canary Islands' economic regime and tax system establishes—together with other tax advantages such as bonuses in Social Security and others—a corporate tax rebate of 90%.

8. IMPLICATIONS OF THE CORONAVIRUS PANDEMIC

8.1 COVID-19-Related Restrictions on Maritime Activities

During the State of Alarm declared by the Spanish Government, an abundance of Ministerial Orders and recommendations were issued in order to reduce the impact of the pandemic caused by COVID-19. Some of these restrictions applied to the entry of cruise ships, to the entry of recreational yachts that did not have their port of stay in Spain or to limited cabotage sea transportation, among others. Most of these restrictions are not in force anymore.

In any event, it is important to note that the Spanish Government and Authorities' orders and recommendations are under continuous revision to adapt their content to any changes in the progress of the pandemic and, currently,

the authorities are focused on controlling the embarkment and disembarkation of crew members and passengers and have restrictions in place for when a case of COVID-19 is detected on board that may affect the issuing of the Free *Pratique* Certificate necessary to berth and operate in a Spanish port.

8.2 Non-performance of a Shipping Contract

There are two legal instruments to deal with the cases of inability to perform a contractual obligation that have been raised during the pandemic.

One is based on Article 1105 of the Spanish Civil Code that regulates force majeure. This Article establishes that no liability will be awarded when there are unforeseeable circumstances that prevent someone from fulfilling a contract. Under Spanish law, the parties do not need to contemplate this exception in the contract for it to apply. Therefore, to be able to raise the force majeure defence, courts analyse the particular circumstances of the case to determine whether these totally prevent the party from fulfilling a contract and whether they are really unforeseeable.

A similar exception is the principle of “rebus sic stantibus” (meaning “things standing thus”) created by case law that stipulates that, where there has been a fundamental and extraordinary change of circumstances that are unforeseeable and alter the contractual equilibrium, a party may request a modification of its contractual obligations, withdraw from or terminate a contract. At the beginning of the pandemic, Spanish courts applied the principle of rebus sic stantibus when any such fundamental change of circumstances was unforeseeable and made compliance with the contract extremely onerous for the parties. Courts have applied the rebus sic stantibus doctrine in a very cautious and limited manner and the circumstances of the matter are always analysed on a case-by-case basis.

At present, taking into account the current circumstances surrounding the pandemic as a result of COVID-19, and unless new developments appear, it is possible that a defence based on force majeure or rebus sic stantibus would not succeed.

It must also be noted that many shipping contracts provide for English law to apply.

8.3 Enforcement of the “IMO 2020” Rule Relating to Limitation on the Sulphur Content of Fuel Oil

Spain has implemented IMO 2020, which limits the sulphur content of fuel oil used on board ships from 3.5 to 0.5% m/m (mass by mass). The Authorities responsible to enforce sulphur-content limitations are the Directorate General of the Merchant Navy (DGMM) and the Harbour Master Offices that are subordinated to the DGMM.

According to Articles 10 and 11 of Royal Decree 61/2006 of January 31st (as amended by Royal Decree 290/2015 of April 17th), there are two limits:

- a limit of 0.10% m/m for vessels within Spanish ports or operating in territorial waters and exclusive economic zone (EEZ) waters within the emission control areas (ECAS);
- a limit of 0.5% m/m for territorial waters and EEZ waters outside the emission control areas (ECAS).

Spain, however, does not have any ECAS at the present time. Therefore, the current limit is 0.10% m/m for vessels at Spanish ports and 0.5% m/m for vessels operating in Spanish territorial waters or in waters within the Spanish jurisdiction.

Should a Harbour Master detect an infringement of the aforementioned limits, normally in the course of a PSC inspection, a sanctioning

proceeding will be initiated against the Master and ISM Manager of the vessel and this proceeding may result in a penalty of a maximum of EUR120,000.

The Spanish Marine Authorities are very active in the monitorisation of sulphur contents in marine fuel oils and penalties have already been imposed for breaching the limit.

8.4 Trade Sanctions

Spain implements all the international trade sanctions of both the UN and the EU. Spain does not have an autonomous sanctions regime.

The international trade sanctions adopted by the EU are implemented and/or adopted through national measures. The national competent authorities are responsible for establishing internal sanctions in the case of violation of restrictive measures, granting exceptions, receiving and co-operating with other Member States and acting as a liaison with the sanctions' committees. The Spanish competent authorities are the Secretariat of Commerce and the Secretariat of Treasury, both belonging to the Ministry of Economic affairs, and the Secretariat of Taxes, belonging to the Ministry of Finance and Civil Service.

Spain has not published its own list of sanctioned individuals and entities and refers to the EU and UN lists.

9. ADDITIONAL MARITIME OR SHIPPING ISSUES

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

One of the topics that could be of interest and that is not covered in previous sections would be the possibility of a direct action against P&I Clubs under the SSA.

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Under Spanish Law, a direct action against the civil liability marine insurer is possible. Not only does the Criminal Code establish this for civil liability derived from a criminal offence, but it is also established in general for maritime risks in civil matters by the Spanish Shipping Act 2014 (SSA). The Spanish Shipping Act declares that any clause on a marine insurance contract preventing a direct action by a third party (the victim) would be null and void. The question to be decided is whether this provision extends to P&I Clubs, which are regularly subject to the “pay to be paid” rule and establish the application of English law in their Rules. Prior to the Spanish Shipping Act, the Spanish Supreme Court had ruled that there was no direct action against P&I Clubs, as they are considered large-risk insurance contracts. However, there are no definitive

and clear precedents under the new Spanish Shipping Act. There are some judgments that, in obiter dicta, suggest that P&I Clubs may be subject to a direct action (eg, a judgment issued by Mercantile Court 3 of Vigo dated 16 January 2018) but the issue has yet to be judicially clarified. However, in crew-member personal injury claims, the Spanish Labour Courts have established the existence of a direct action against the P&I Club, based on the SSA.

The project to modify the SSA includes a provision to amend Article 465 of the SSA and to regulate P&I insurance, establishing that a direct action will exist when it is so established by International Conventions to which Spain is a party, or by European Regulations.

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Aiyon Abogados S.L.P. is a boutique law firm formed by a team of top-tier lawyers highly experienced in litigation, arbitration, negotiation and contract-drafting. The firm offers assistance in any port and court in Spain, through its four offices in Bilbao, Madrid, Algeciras and Cadiz. The firm's main areas of practice are shipping (both dry and wet), transport, international trade, and insurance law. The firm is known for its excellent emergency-response capabilities. Among regular clients of Aiyon Abogados are ship-owners, charterers, large trading companies, freight-forwarders (NVOCC), P&I clubs,

defence clubs, H&M insurers, cargo insurers, tug companies, port terminals and ship agents. Some relevant cases in which Aiyon lawyers have intervened are the PRESTIGE, MAERSK HONAN, Hanjin Shipping bankruptcy, MODERN EXPRESS, GRANDE AMERICA, COSTA CONCORDIA, FRIESLAND, DENEBA and SOROLLA. Aiyon is a member of the Spanish MLA and other relevant professional associations. Aiyon regularly co-operates with the Spanish Maritime Institute, other maritime LLM and many universities (Deusto, Basque Country, La Laguna, Cadiz and others).

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SPAIN LAW AND PRACTICE

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