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The Maritime Shipping Law

Law 14/2014, of July 24, 2014, on Maritime Shipping (*Ley de Navegación Marítima* or "LNM" or the Maritime Shipping Law) was published in the Official Gazette on July 25, 2014. Besides updating, modernizing and codifying a large part of Maritime Law, it contains exhaustive provisions on the rules and legal relationships arising in connection with maritime shipping to resolve the existing contradictions between the international treaties in force in Spain and Spanish law, and attempts to bring an end to the dual legal regimes previously applicable to national and international cases for some specific matters (carriage by sea, collisions, salvage, etc.).

The LNM expressly repeals, among other provisions, Book III and other articles of the Spanish Commercial Code in force, the 1893 Ship Mortgage Act (LHN), the 1949 Law on the Carriage of Goods by Sea under a Bill of Lading (LTM) and Law 60/1962 on assistance, salvage, towage, objects found and removed at sea (LAS), (except for the provisions in Title II, which will continue in force as regulations).

The new Law will come into force on September 25, 2014, two months after its publication in the Official Gazette. The aim of this special issue of our Newsletter is to report on some features of the new legislation introduced by the LNM, such as:

1. Proprietor, shipowner and shipping company

The LNM attempts to resolve the existing legal doubts and contradictions, and takes a stand in a long-standing doctrinal debate to make a distinction between proprietor, owner and operator for a vessel which can be the same individual or entity (they can be proprietor, owner and operator all at once), even though this is not necessarily so (a person can, for example, be just a proprietor or owner or operator, or, for example, owner and operator at the same time).

The LNM thus defines the owner as the person, not necessarily the proprietor, who has the possession of a vessel or craft, directly or through dependent parties, and uses it for sailing on its own behalf and at its responsibility, whereas the operator is an individual or legal entity who operates its own or other merchant ships, even where this is not its primary activity, under any type of arrangement admitted by international usage.

The express repeal of article 586 of the Commercial Code and article 3 of the LTM which, as is widely known, equated operator and ship agent, will definitely make understanding and implementing the above definitions of proprietor, owner and shipper an easier task.

Any owner who sails the vessel for trading purposes must be registered at the commercial registry. An owner who is not the proprietor may register that status at the personal property registry. The proprietor will also be authorized to apply for registration of the non-proprietor owner.

Lastly, it establishes that unless registered or proven otherwise, the proprietor registered at the personal property registry will be deemed to be the owner.

2. The master

The master is defined as the person who is in command of and manages the vessel and the person in charge of the crew, and the master is represents public authority on board.

In line with the existing settled case law that places the captain in the role of senior management, it establishes that, in view of the special relationship of trust, the owner will be responsible for appointing and removing the captain. It makes an important new addition, however, that this will be notwithstanding any severance that may be payable under employment law which, unless there is an indemnity clause, will generally be much higher than the severance entitlement for senior managers. Moreover, owners will not be able to dismiss the master or take any other penalty measures against him as a result of the master being compelled to depart from their instructions out of the need to act in a more suitable manner to protect safety, in the professional opinion of a competent sailor.

3. Ship management agreement

The Law explicitly regulates ship management agreements for the first time, although only partially and in predominantly optional provisions. Under these agreements, one party (the ship manager) undertakes, in exchange for remuneration, to manage, for and on behalf of the owner, some or all of the elements involved in the operation of the vessel, such as, among others, management of commercial, technical, employment, or insurance matters in relation to the vessel.

Manning agencies and/or management agencies for vessels will fall in this category. Although they have existed for decades and been regulated in forms such as those issued by the Baltic and International Maritime Council (BIMCO), there were no express provisions on agencies of these types beyond certain exceptions that simply acknowledged their existence for certain tax and employment purposes, although specific employment legislation is expected to be issued for them.

The relationships between owners and their managers will now be governed by the terms in the management agreement and, in their absence, by the provisions on commercial agencies or dealerships according to whether or not the relationship is long-standing.

In his relationships with third parties, the manager must state that he is acting under a mandate given by the owner and, if he fails to do so, he will be jointly and severally liable with the owner for any obligations acquired on the owner's behalf. The manager will be jointly and severally liable with the owner for any noncontractual damage caused to third parties by the manager's acts or those of anyone dependent on him, although both of them have the right to limit their liability on the terms established in Title VII of the LNM, which basically applies the provisions of the 1976 London International Convention on Limitation of Liability for Maritime Claims (including the 1996 Protocol).

4. The ship agent

The LNM reestablishes, again in clear and categorical terms, that the ship agent will not be liable to the recipients of the carried goods for any indemnification against any loss or damage to them or delay in their delivery. It clarifies, however, that the ship agent will be liable to the owner or operator for any damage that was his own fault. Lastly, the ship agent will have the obligation to receive any claims and protests submitted in relation to the goods, all of which he must notify to the owner or to the shipping company.

We believe that the LNM aims to resolve the recent settled case law of the Supreme Court which, by ignoring the previous legislative reforms that had taken place due to considering they only applied for administrative purposes, established a direct legal equivalence between the operator and ship agent (based on article 586 of the Commercial Code and Article 3 of the 1949 Law on Sea Carriage, which the LNM has just repealed) for the purposes of goods carried by sea, and made the ship agent liable in relation to goods carried by sea (for loss, damage or delayed delivery) even if the ship agent did not enter into the carriage itself on its own behalf, or performed it, or took any part in it at all.

The LNM expressly clarifies that the ship agent will be liable for carriage, jointly and severally with the owner or shipper, if he signs bills of lading without stating that he acts on their behalf. It similarly clarifies that the ship agent will be liable as will the freight forwarder or the port operator (for goods handling) where they acted as such and not as ship agent per se.

5. The pilotage agreement

The LNM clarifies and specifies the pilotage liability regime that had hitherto been provided basically in the General Pilotage Regulations (approved by RD 393/1996) and, in short, defines the pilotage agreement as one with reciprocal obligations (between pilot and captain) under which the pilot agrees, in exchange for a price, to advise the master on the performance of various operations and maneuvers for the safe movement of vessels through port and adjacent waters, for which the master and pilot must cooperate at all times in both planning and performing the maneuver.

The LNM mirrors the existing case law on liability and, by clarifying the already existing provisions in the General Pilotage Regulations, confers higher authority on the master over everything that has to do with controlling and steering the vessel, but makes the pilot liable for any damage caused which is attributable only to the pilot, as occurs with inaccuracy in, or failure to provide the necessary advice or failure to provide the required technical support. As often more than one party is at fault, the owner is required to pay the cost of its own damage and to provide indemnification for those of others, and the law clarifies that all the parties to whom fault may be apportioned (owner, master and pilot) will be jointly and severally liable, notwithstanding any legal action for nonpayment to which each may be entitled in the internal distribution of that fault.

Lastly, the LNM expressly provides that the rules on the limitation of the civil liability of owners and pilots will apply, which in the case of the pilots is limited to a sum of twenty euros per gross registered tonnage of the vessel for which they provide the service, subject to a ceiling of one million euros, under the Revised State Ports and Merchant Navy Law, approved by Legislative Royal Decree 2/2011, of September 5, 2011 ("RSPMNL").

6. Classification societies

Under the LNM, classification societies will be contractually liable (to the operator and to the shipyard, for example) for any damage or loss resulting from the absence of diligence in inspecting the vessel and in issuing the certificate.

It likewise determines that the liability of classification societies to third parties will be determined under the law generally applicable in Spain, notwithstanding the applicable international and EU legislation.

Lastly, following the definitive elimination of article 101.3 (in its original wording) on the liability of classification societies to the authorities where they act under powers given by the authorities under an administrative authorization that liability will continue to be unlimited (as it has been to date). There will also be unlimited liability in cases of willful misconduct and serious negligence, and in cases of ordinary negligence, because liability has not been limited by the law on the terms provided in EU law in this respect. This implies that the authorities may recover from the classification societies contribution in respect of the indemnification paid (if applicable) where the public authority is held liable, in a court or arbitration proceeding, or has indemnified third parties in respect of personal or property damage caused to them by the classification society in performing those authorized tasks.

7. Carriage by sea

The existence of dual legal regimes on carriage by sea of goods and passengers has been brought to an end and the same provisions will be applicable for both domestic (cabotage) and international carriage.

On the carriage by sea of goods under bills of lading (intended for regular lines), it has retained basically the same regime of mandatory and unrepealable law for the parties as that hitherto in force (in the Hague-Visby Rules), although with some changes (delay can give rise to indemnification, etc.) to update those Rules and adapt them partially to the future Rotterdam Rules. The main new change will be that the regime will apply not only to international carriage by sea as it has done to date, but also to domestic carriage, which will no longer be governed by the Commercial Code whose provisions it expressly repeals. Moreover, the express repeal of the LTM, which introduced the Hague-Visby Rules in Spain, will facilitate the implementation of the new regulations because the contradictions hitherto existing between the Hague-Visby Rules and the LTM will have disappeared.

The carriage of goods by sea under charter (intended for non-regular lines or tramp traffic) will, as it has been to date, be governed predominantly by the charter agreements covenanted by the parties, and exemption or limitation of liability clauses can be validly covenanted by the parties.

On the carriage of passengers and their luggage, the previous mandatory regime has basically been retained (the regime under the Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 and its Protocols), although with the important new change that it will not only apply, as it has to date, to international carriage but also to domestic carriage, which will no longer be governed basically by the Commercial Code (whose provisions have been expressly repealed).

8. Collisions

The existence of dual legal regimes on collisions has also been brought to an end, since all collisions will now be governed by the 1910 Brussels Collision Convention, all other conventions on collisions to which Spain is a party, and the provisions on collisions in the LNM itself. This means that those provisions will apply not only to collisions that occurred between vessels of different nationalities if they have both signed the Brussels Convention (as has been the case to date), but also to collisions between vessels flying the Spanish flag which, until now, were subject to the Commercial Code, whose provisions have now been expressly repealed.

This is no trivial matter, above all if two or more vessels are at fault (the immense majority of cases), since while the Convention establishes subjective rules for apportioning liability in proportion to the degree of fault of the respective vessels, the Commercial Code sets out an objective rule under which both operators are liable for the damage irrespective of the degree of fault of each.

Lastly, to resolve the divergent interpretations expressed in the case law, it establishes that the 1910 Brussels Convention is applicable, along with the other existing conventions on collisions to which Spain is a party and the provisions in the LNM on criminal or administrative proceedings in which financial liability is claimed on a secondary basis to criminal or disciplinary liability, because the actual rules on these subjects cannot change simply because liability is claimed in one jurisdiction or another.

9. Maritime salvage

From a substantive standpoint and, because the LAS is expressly repealed (except for Title II on jurisdiction and procedure which continues in force as secondary legislation and as regulations not as primary legislation), a single catch-all definition of maritime salvage has been established. From now on, salvage will be governed only by the 1989 London Salvage Convention, and the protocols amending it and the provisions on salvage in the LNM.

As a new feature, the master and the owner are authorized to conclude salvage agreements on behalf of the owner of the property that is on board. It also acknowledges a retention right for the salvor in the saved vessel or property until a sufficient guarantee is provided to him for the amount of the reward that is claimed, notwithstanding a potential arrest of the saved vessel and attachment of the property. Lastly, it also regulates the intervention of the shipping authorities in salvage operations so as to ensure protection of the environment.

The civil courts will hear salvage claims, unless the parties decide to submit the case to administrative shipping arbitration before specialized bodies of the Spanish navy, or unless there is a covenant to submit claims to other types of arbitration (as is usually the case if the Lloyds Open Forms are used), or where the intervention of those authorities is made necessary in cases involving salvage of property that has been abandoned at sea and the owner is unknown. The specialized bodies of the Spanish navy will be the Shipping Arbitration Councils and Shipping Arbitration Auditors, but while they are being set up, the Central Shipping Court and Permanent Shipping Courts under the LAS will perform these tasks.

10. Shipping insurance

The LNM regulates shipping insurance contracts, which adapt, without any major new additions, the legislation in the Commercial Code to the insurance policies in the tradition of common law countries that are commonly used in the sector. The provisions in the LNM, which are predominantly optional, regulate all insurable interests, including insurance on the vessel, freight, cargo or civil liability, along with a number of mandatory types of insurance such as insurance for liability for death and injury to passengers or other mandatory insurance (bunkers', or civil liability, insurance for damage caused by oil and gas pollution, etc.). Craft used for sport or pleasure fall outside the scope of the Law and their mandatory insurance will be governed by the provisions in the Insurance Contract Law, a law that will also apply on a secondary basis to other shipping insurance contracts.

In relation to civil liability insurance, a major new feature is the introduction of the right to action for injured third parties in any type of insurance in this class (beyond the cases of mandatory insurance in which the international legislation already laid down direct action for

the injured party), which makes any contractual covenant against direct action invalid. The LNM provides that the insurer's maximum liability is the insured sum for each of the events that gave rise to its liability over the term of the contract, and that it can raise the same exceptions to the injured party that would be available to its insured, and especially the quantitative limits on liability that the insured had under the applicable law or the agreement under which the liability arose.

11. Procedural provisions: jurisdiction, arrest of vessels, compulsory sale and procedure for limiting liability for maritime claims

The LNM sets out the procedural provisions on carriage by sea, and determines, among other matters, the criteria for conferring international jurisdiction for any disputes arising in connection with shipping agreements. Thus, in relation to the jurisdiction clause in sea carriage documents, the LNM makes it obligatory for them to have been negotiated individually and separately to be valid, whereby simply including a jurisdiction or arbitration clause into the printed conditions for an agreement is not evidence *per se* of its validity and of the parties' consent.

On the procedure for the arrest of vessels as an injunction, the sources of law for such a measure, for both domestic and foreign vessels, are first the 1999 International Convention on Arrest of Ships, followed by the provisions in the LNM and after that by the provisions in the Civil Procedure Law (LEC). An interesting feature is the distinction between arrest rights based on the nationality of the vessel that the LNM makes, which departs from the standard in international conventions on this point.

The LNM also sets out the procedure for compulsory sales of vessels which will be carried out under the provisions in the LEC and in the applicable international legislation.

Lastly a new procedure is set out to limit the liability for maritime claims. Importantly, it makes it obligatory to constitute a limitation fund within ten days from when the procedure for limiting liability for maritime claims is invoked. This will be done before the commercial judge hearing any claim for which liability can be limited that has been filed against the holder of the right to limit.

We believe, however that this was a missed opportunity to clarify whether the fund can be created before civil action is brought against the holder of the right to limit. It appears that this scenario is only contemplated for where the limitation is invoked in other proceedings in other judicial or administrative jurisdictions.

The provisions on the proceeding include the contents and admission of the application, the formation and distribution of sections, the appointment of trustee-liquidador, etc.

12. New statute of limitations periods for bringing action

The LNM establishes throughout its articles, some new time periods for validly bringing action in connection with agreements and scenarios related to maritime shipping.

One of the main new additions is a significant reduction in the statute of limitations period for bringing remedies arising from a breach of a shipbuilding contract (both in the case of a breach by the builder and if the owner defaults on payment of the price), for which the statute of limitations period will be three years from the date provided in the contract or, in the absence of that date, from when the delivery took place, in contrast to the 15-year statute of

limitations period previously applied by the Supreme Court (the time period for personal action provided in the Civil Code) from the payment of the price of the vessel or from when the intention to terminate the agreement was known.

Likewise, in the field of marine insurance, rights under marine insurance contracts expire within two years from when they could be exercised, in contrast to the previous three year period from the termination of the contract or from the date of the loss as provided in the disappeared article 954 of the Commercial Code.

13. Noncontentious procedures

The provisions on noncontentious procedures have been updated, by eliminating any that have become obsolete, such as authorization to unload the vessel or the procedure for opening hatch covers. Other procedures have been kept in place, however, such as sea protest, average adjustment, the bailment and sale of goods and equipment in carriage by sea, and notaries have been given the power to conduct procedures of this type.

A new procedure has been added, regarding mislaid, stolen or destroyed bills of lading, in which the holder of the disappeared bill can appear before the competent notary, and ask him to request that the carrier not deliver the goods to a third party so that the instrument can be redeemed and he can be acknowledged as the owner of the disappeared bill of lading.

14. Shipping Conferences

The provisions on shipping conferences in article 261 and article 262 of the Law on State Ports and on the Merchant Navy have been expressly repealed.

15. New yacht and pleasure craft legislation

The way in which the LNM defines the legal status of yachts and pleasure craft gives an idea of the spirit of renewal of a law which legitimizes and makes applicable for the first time a portion of the legislation which until now had been reserved for merchant vessels to pleasure vessels and craft. There are references throughout the various chapters of the LNM to pleasure vessels and craft which, generally, had only been mentioned a few times in domestic and international legislation. Thus, the legislation on the sale and purchase of vessels, on shipbuilding and repair, etc., expressly mention that the rules it contains will be applicable to craft and sailing artifacts.

Although the LNM expressly says in its preamble that *"the distinctions between public or private, civil or military, merchant or pleasure, sports or scientific vessels have disappeared"*, at various times throughout its articles it sets out provisions on pleasure vessels and craft such as, for example, that it will be optional to register them at the personal property registry, although it retains the duty to register the various security interests in craft so that they can be relied on as against third parties. Furthermore, in the field of sport or pleasure sailing, the person appearing as the owner at the personal property registry or at the registry of ships and shippers is treated in the law as the owner of the vessel, which is irrefutable.

For the LNM, ships of twenty-four meters in length and under not having a continuous bulkhead deck will be classed as *"craft"* and the smallest ones may be defined in the regulations as *"smaller units"*.

Furthermore, sailboat charter agreements are regulated for the first time as agreements in their own right. Until now, in the absence of specific provisions, international models and forms were used and the rules on charters or on bareboat charters were applied, according to whether they were chartered with or without a crew.

The LNM has clarified the legal regime on an agreement, the sailboat charter agreement that has gained currency in recent years. It provides that sailboat charter agreements can be with or without a crew; in the first case they are governed by the specific provisions on sailing charters and secondarily by those applicable to sailboat charters. And in the second case, secondarily by the provisions on agreements for the use of boats for purposes other than for carrying goods, which apply the charter regime.

Lastly, for these types of arrangements, it sets out the regime on delay in delivery; the charterer's instructions and the skipper's professional opinion; the duty to inform of the damage caused; the mandatory insurance and the regime on the statute of limitations period.

Hermosilla, 3 - 28001 Madrid (Spain)
T +34 91 514 52 00 - **F** +34 91 399 24 08