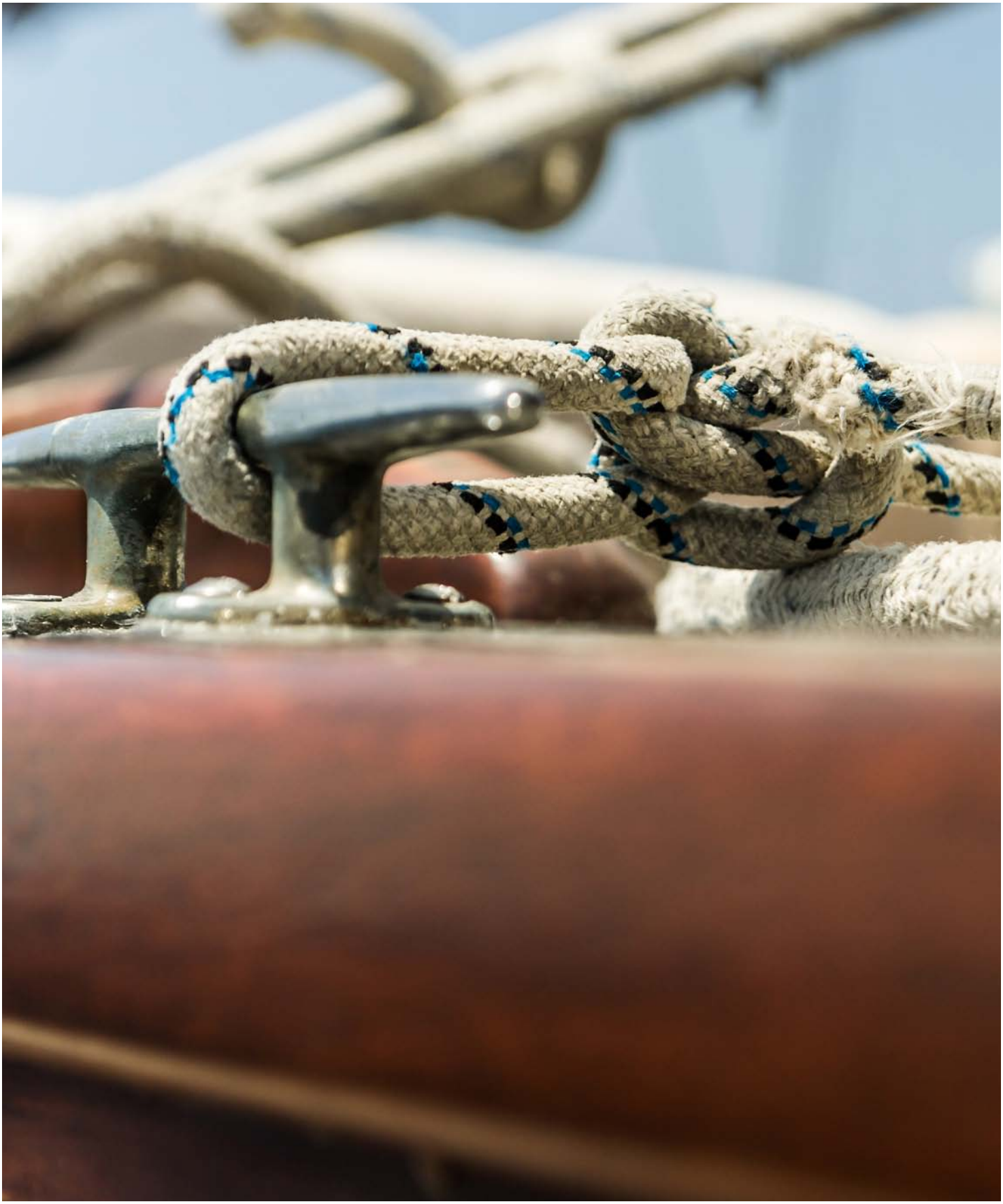
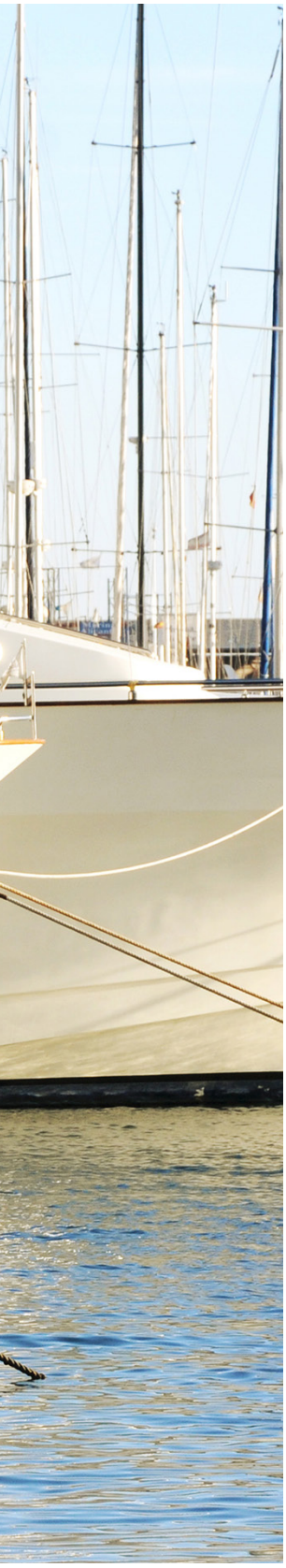
# GARRIGUES

**TRANSPORT & SHIPPING**

NOVEMBER 2016





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1941-2016 GARRIGUES

**SHIPPING & TRANSPORT**

# 01 EUROPEAN UNION AND INTERNATIONAL

## 1.1. LEGISLATION AND LEGISLATIVE DEVELOPMENTS

### 1.1.1 Towards sustainable shipping

The Marine Environment Protection Committee (MEPC) attached to the International Maritime Organization (IMO) approved, in its 70th session held recently in London, the following resolutions in support of sustainable shipping:

- January 1, 2020 was confirmed as the implementation date for the last rung towards the global cap on sulfur emissions from marine fuels (0.5% outside the SECAs), in other words, the same date as that already determined for the EU.

- The monitoring, reporting and verification system for the CO2 emissions of every ship in international shipping was adopted to be implemented from 2019.

- In relation to the International Convention for the Control and Management of Ships' Ballast and Water Sediments (BWM Convention) discussed below, the committee welcomed the streamlining of the conditions on the exemptions to be granted for ships operating only in a same risk area, which might make it easier for those exemptions to be granted on short sea shipping (short international voyages, cabotage, etc.).

### 1.1.2 The International Convention for the Control and Management of Ships' Ballast and Water Sediments (BWM Convention) will enter into force next year

Following Finland's recent accession, the IMO's BWM Convention will enter into force on September 8, 2017, after being ratified by more than 30 States (Spain –in the Official State Gazette (BOE) on November 22 2016- and Panama, among others) and by 35% of the world merchant shipping tonnage. The shipping companies this affects therefore have just under a year to adapt their ships to the requirements in this BMW Convention.

Water has been used as a ballast to stabilize seafaring vessels since the appearance of steel-hulled vessels. Ships carry ballast water to maintain safe operating conditions in their voyages. While needed for safe and efficient shipping operations, ballast water (especially when it is discharged) may cause environmental problems due to the array of marine species present in the water. The transferred species are able to survive and establish a reproductive population in the recipient environment, which may potentially become invasive by ousting native species and multiplying into pest proportions.

The BWM Convention provides that all ships must install an approved ballast water management system and implement a management plan (discharge, official, ad hoc, record book, etc.) with the aim to eliminate, neutralize or prevent the entry or discharge of aquatic organisms and pathogen agents present in ballast water. This is no trivial obligation, as it would seem to require an investment of between US$ 1 million and US$ 5 million per vessel.

Party states may also go beyond the measures required by the BMW Convention, such as making it binding for cabotage vessels. The US has chosen a notable course in that, while not having ratified the BMW Convention, it has approved domestic legislation which, besides already being in force, places some obligations which are more stringent than those in the BMW Convention and lays down a different approval procedure for systems.

### 1.1.3 Measures against antidumping practices and injurious pricing of vessels

On June 30 the Official Journal published Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 on protection against injurious pricing of vessels, which will be applicable after the entry into force of the Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry (the "Shipbuilding Agreement") which it supplements.

The Regulation implements the Shipbuilding Agreement by establishing measures to prevent the injurious pricing of vessels where the purchaser is from the EU provided the ship is not a military vessel.

Such measures include providing detailed rules on the calculation of the normal market value of ships and allowing a charge to be imposed on the builder of any injuriously priced vessel if the sale of that vessel to a buyer other than a buyer of the country in which the vessel originates causes injury. A vessel is considered to be injuriously priced for these purposes if its export

price is less than a comparable price for a like vessel, in the ordinary course of trade, when sold to a buyer of the exporting country. The Regulation also details the methods for calculating both the normal value of a ship, and the amounts relating to selling, general and administrative costs and the injury caused.

There are also provisions on the investigation procedure to determine the existence, degree and effect of any alleged injurious pricing, initiated upon a written complaint by any individual or legal entity or by any association not having a legal personality acting on behalf of the Union industry. The complaint may be submitted to the Commission or to a member state, which must forward it to the Commission.

## 1.2.- RECENT CASE LAW

### 1.2.1 The CJEU examines the scope of the directive on the systems of chartering and pricing in inland waterway transport

El Tribunal de Justicia de la UE (TJUE) dictó, el pasado 12 The EU Court of Justice (CJEU) delivered, on October 12, 2016, its judgment in case C-92/15 in response to a request for a preliminary ruling submitted in relation to the interpretation of article 2 of Council Directive 96/75/EC of 19 November 1996 on the systems of chartering and pricing in national and international inland waterway transport in the Community ("Directive 96/75").

The request for a preliminary ruling was made in proceedings between a "chartering broker" for a vessel and its charterer over damages relating to the difference in carriage charge which arose in the performance of a contract for the transport of sand by boat on inland waterways between two fixed points in Belgian territory.

The dispute submitted to the CJEU surrounded whether or not the Belgian law on inland waterway chartering of May 5, 1936 is compatible with articles 1 and 2 of Directive 96/75/CE, insofar as a person who is not the owner or operator of an inland waterway vessel concludes a contract for the carriage of goods on inland waterways as carrier, and is not acting as an agent ("charterer") within the meaning of article 3 of the law on inland waterway

chartering. All of the above, from the standpoint that Directive 96/75 defines "carrier" as the owner or an operator of one of more inland waterway vessels, and that article 2 of the same directive establishes that in that field contracts must be freely concluded between the parties concerned.

The court held that Directive 96/75 is specifically limited to prohibiting the two characteristic features of the functioning of charter exchanges by rotation, namely the system of allocation according to the order in which the vessels become available and a predetermined pricing system. Accordingly, its aim is not the general regulation of contracts for the carriage of goods by inland waterway, nor does it mention a party intervening as a "chartering broker" or "charterer" in contracts in the field of inland waterway transport, and therefore the directive in no way governs the intervention of chartering brokers in contracts of this type and is neutral on this subject.

The court concluded from the above reasoning that articles 1 and 2 of Directive 96/75 must be interpreted as not precluding national legislation such as that applicable to the dispute in the main proceedings, which would enable a person who does not meet the definition of "owner" of a vessel to conclude a contract of carriage as a carrier.

### 1.2.2 An unscheduled stopover on a flight cannot be treated as a cancellation if its places of arrival and departure match the planned schedule

In an Order delivered on October 8, 2016 in case C-32/16, the court settled a request for a preliminary ruling on the interpretation of article 2.(l) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing the common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

The request was submitted in proceedings between a passenger and an air carrier, concerning the refusal by that carrier to compensate her when her flight had been subject to an unscheduled stopover before reaching her final destination.

That is to say, the aircraft making the flight at issue took off on the date and at the time scheduled, although it made an unscheduled stopover before finally landing at the agreed destination two hours and twenty minutes late.

The court held that according to the definition of "cancellation" within the meaning of Regulation (EC) No 261/2004, a flight such as the one at issue in the main proceedings, for which the places of departure and arrival matched the planned schedule although there had an unscheduled stopover, and therefore did not give rise to the transfer of passengers onto another flight due to the flight on which they had booked being removed from the schedule, may not be regarded as non-operation within the meaning of that article.

In this regard, continued the court, the fact that the flight gave rise to an unscheduled stopover is not at all a scenario involving in itself, for the passengers, serious trouble or inconvenience such as that arising from a denied boarding, a cancellation or a lengthy delay, for which Regulation No 261/2004, as interpreted by the court, provides compensation.

Such serious trouble and inconvenience would only arise if the stopover means that the aircraft making the flight reaches its final destination with a delay equal to or in excess of three hours compared with the scheduled time of arrival, a situation which, in principle, entitles the passenger to the compensation laid down in article 5(1)(c) and article 7 of Regulation 261/2004. Besides, if a flight that arrives at its planned final destination after an unscheduled stopover were equated to a cancellation, that would recognize the right to receive compensation for a passenger who, owing to an unscheduled stopover, suffered a delay in arriving of less than three hours, whilst a passenger who suffered the same length of delay for a different reason would not have a right to the compensation, which would be contrary to the principle of equal treatment.

Based on that reasoning, the court ruled that article 2(l) of Regulation (EC) No 261/2004 must be interpreted as meaning that a flight in respect of which the places of departure and arrival accorded with the planned schedule but during which an unscheduled stopover took place cannot be regarded as cancelled

# 02 SPAIN

## 2.1. LEGISLATION AND LEGISLATIVE DEVELOPMENTS

### 2.1.1 Amendment to the information to be notified by ships for the receipt of ship-generated waste and cargo residues

Commission Directive (EU) 2015/2087 of 18 November 2015 amending Annex II to Directive 2000/59/EC of the European Parliament and the Council on port reception facilities for ship-generated waste and cargo residues has been implemented in Spanish domestic law in Order FOM/1320/2016, of July 28, 2016 amending annex II of Royal Decree 1381/2002, of December 20, 2002, on port facilities for the receipt of ship-generated waste and cargo residues, published in the Official State Gazette (BOE) on August 3, 2016 and entering into force on December 9, 2016.

The amendments to annex II have been made to update the data and information that the master of a ship must notify on the amount and type of waste it is carrying. This must be done by the masters of all ships arriving at Spanish ports, who, for these purposes, must complete the form and report that information to the Habormaster's Office (*Capitanía Marítima*) and to the management organization for the port concerned.

With the aim to reduce the amount of ship-generated waste and cargo residues discharged into the sea, information on the type and amount of ship-generated waste actually delivered to port facilities in the last port of delivery has been included in the table provided in annex II. The information to be notified by the master of the ship notably includes new categories of waste in addition to information on the amount and type delivered with respect to all classes of waste and residues delivered in the previous port of call.

Lastly, the ministry of development has been given authorization to amend the contents of the annexes if new information needs to be added, in the interests of better monitoring of the protection of the marine environment.

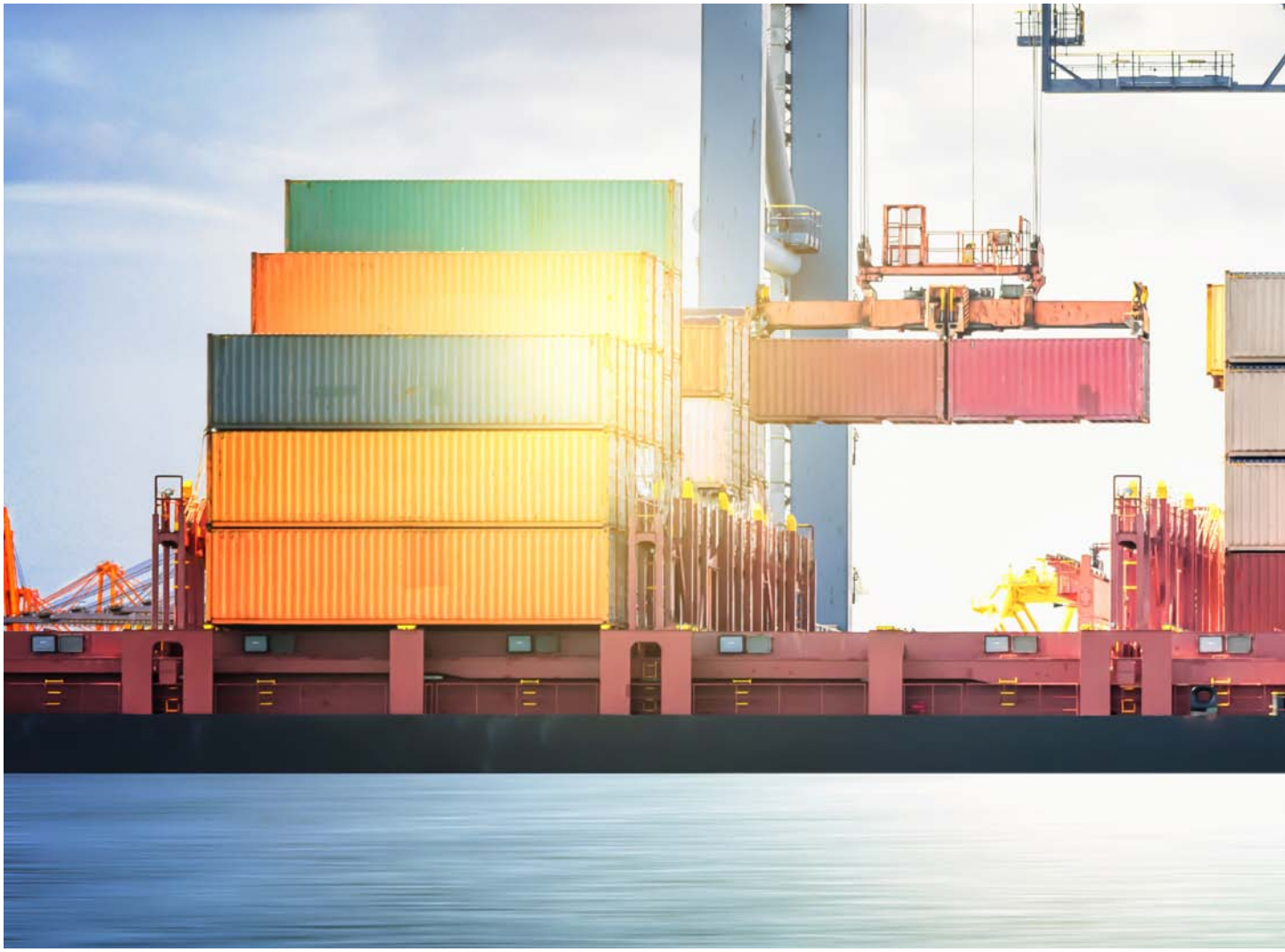
## 2.2. RECENT CASE LAW

### 2.2.1 Discharging cargo at an unsuitable dock falls within the sea leg of the carriage and is subject to the time limits for bringing action in that sea leg

In a judgment delivered on June 29, 2016, the Supreme Court (Civil Chamber) settled a cassation appeal brought by a shipper of frozen fish products against the sea carrier concerning the non-expiry of its right to bring action for indemnity in respect of the damage caused to the cargo, which was discharged by the carrier at an unsuitable dock with no electricity connection.

The supreme court chamber held that, after it had become clear that the carriage by sea was hired under a bill of lading contract and, by reference to the date on which it took place, was governed by the 1949 Law on Sea Carriage (now expressly repealed by Maritime Shipping Law 14/2014 in force), the shipper's right to bring action for indemnity against the carrier had expired, insofar as the shipper's claim was not filed until after one year had passed from the delivery and the time limit under article 22 of the Maritime Shipping Law (and under article 3.6 of the Hague-Visby Rules) was one year (from delivery) which is a strict time bar, and therefore, nontollable.

In the face of the shipper's pleading that because the time limits for bringing action are not applicable, insofar as the damage was not caused in the sea leg of the carriage, but in the land leg, the one-year statute of limitations under Law 15/2009, on contracts for the carriage of goods by land and under article 952.2 of the Commercial Code (also repealed by Maritime Shipping Law 14/2014 in force) applied, the Supreme Court held that this argument had to be rejected: the damage arose because the shipper discharged the cargo at an unsuitable dock, an error of choice which took place in the sea leg of the carriage, regardless of whether the occurrence of the damage became evident after the container had been discharged on land.



For that reason, because the action for indemnity against the carrier was subject to a strict time bar of one year under the 1949 Law on Carriage at Sea and the Hague-Visby Rules, the cassation appeal was dismissed.

### 2.2.2 A lease agreement on port facilities cannot be renewed after termination of the concession that conferred the authority to lease them

In a judgment delivered on June 14, 2014, the Supreme Court (Civil Chamber) dismissed the appeal over procedural infringement and the cassation appeal lodged by a port terminal for chemicals against a judgment dismissing an appeal by the terminal operator against a chemicals company with which it had signed with it an agreement for the storage and handling of chemicals at the port of Tarragona. The proceedings concerned a claim for rental payments on tanks for dates on which the lease agreement had allegedly terminated.

The judgment by the court of first instance had upheld the claim by considering that, in the absence of the three months' notice covenanted in the agreement, the agreement had been renewed automatically. For the court of first instance, the fact that the terminal operator's public concession had terminated was not an issue because there were temporary authorizations to continue using the facilities enabling the defendant to do so until it unilaterally decided to stop.

The Supreme Court, however, held that the agreement signed between the parties rested, with respect to the appellant's authority to conclude it, on the operator holding the public concession on the port facilities under the agreement. Therefore, the clause providing for its renewal, unless prior notice of termination had been given, necessarily required it to continue holding the concession, because otherwise it would not have the authority to enter into an agreement on terms such as those in the agreement at issue

Under that reasoning, the terminal operator could not found the action it had brought on the automatic renewal of the concluded agreement, when it was not able to guarantee

that the agreement could be performed, because there was the additional factor that the facilities reverted to the port authority, in other words, after the termination of the concession the terminal operator did not have the authority to become bound in relation to the subject-matter of the agreement and could no longer enter into agreements, let alone renew the agreement executed at an earlier date.

In short, argued the Supreme Court, the appeals lodged by the operator (over procedural infringement and a cassation appeal) had to be dismissed, because the operator could no longer guarantee to the respondent that it could perform an agreement which terminated when the operator lost the public concession at the port.

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