

CIRCULAR 4A/2011 September 2011

SHIP ARREST IN SPAIN FOLLOWING THE COMING INTO FORCE OF THE 1999 INTERNATIONAL CONVENTION ON ARREST OF SHIPS

On 02/05/11 the Official State Bulletin published Spain's Adhesion Instrument to the International Convention on Arrest of Ships signed in 1999 that will come into force next September 14th, 2011. Spain made the reservation in the application of the Convention.

We will proceed to discuss the ship arrest practice following these changes in two parts: first, the substantive provisions introduced by the 1999 Convention and secondly, the effective implementation of the 1999 Convention in Spain.

LIST OF MARITIME CLAIMS:

During the preparatory work of the Ship Arrest Convention, the need was considered to align it with the 1993 Maritime Liens and Mortgages Convention – of which Spain is also a State Party, ensuring that all claims giving rise to a maritime lien would give rise to a right to arrest a vessel.

The list of claims of the 1999 Convention has been revised and updated, and we can now find some “new” claims listed:

- **Environmental damages:** the most important aspect to note is that it covers the costs of reasonable measures actually undertaken or to be undertaken, loss incurred or to be incurred.
- **Wreck removal and related:** this provision also includes the costs and expenses related to the preservation of abandoned ships and maintenance of the crew. Internally, the Spanish Ports Law has been recently modified in what concerns the measures that have to be undertaken by the Port Authorities in these incidents. (See our Circular 3A/2011).
- **Port, harbour and canal dues.**
- **Ship sale and purchase contract disputes.**
- **Insurance premiums, which include the mutual insurance calls:** this will of course be of interest for the Protection & Indemnity Clubs and fix premium insurers.
- **Commissions, brokerages or agency fees payable in respect the ship or on behalf of the ship owner or demised charter.**

Previously, unpaid Protection & Indemnity insurance claims, unpaid brokers' commissions could be secured – depending on the ship's flag – by the application of the Spanish Procedural Law, which required averring before the Court of the existence of a “fumus boni iuris” and a “periculum in mora”.

POWER AND EXERCISE OF THE RIGHT TO ARREST:

According to the 1999 Convention, a ship can be arrested for the purpose of obtaining security, notwithstanding the fact that the maritime claim on which the arrest is to be based is to be resolved in a different state other than that in which the arrest is done, or is to be arbitrated or adjudicated subject to the law of another state.

Notwithstanding, the efficacy in Spain of the above has to be judged together with what is established in Article 3.3 of the 1999 Convention. This article establishes that the arrest of a ship that is not owned by the person who is liable for the maritime claim will only be admissible if under the laws of the State Party in which the arrest is requested, a judgement rendered on the merits of the claim can be executed against that ship.

This can be debatable as the enforcement of the judgment could be done against the security placed in substitution for the arrested ship; but it would of course represent a further problem within the Spanish jurisdiction when the debtor is in default in the procedure on the merits of the claim and whereas no security was placed.

SECURITY TO RELEASE THE SHIP:

Another significant aspect concerns the amount of the security provided to release the ship. In case of absence of agreement between the parties, the Court shall determine its nature and the amount – which shall not exceed the value of the arrested ship.

According to our applicable Civil Procedure Law 1/2000, this security can be cash, bank guarantee, insurance bond or any other security that according to the Court criteria can guarantee immediate availability.

COUNTER SECURITY IN ORDER TO ARREST:

The 1999 Convention establishes the provision of a counter–security for any loss which may be incurred by the defendant as a result of the arrest.

In Spain, the Courts already required such counter–security, the amount of which usually varied according to the criterion of the Judge.

JURISDICTION FOR THE MERITS OF THE CLAIM PROCEDURE:

The general rule would be that the competent jurisdiction is that under which the Parties have submitted the contract due to a jurisdiction clause or arbitration clause. On the contrary, the jurisdiction would be that of the country in which the arrest is done or where the guarantee is lodged.

This is indeed an advance for the maritime claimants as it allows them to proceed to arresting a ship in a particular jurisdiction despite the existence of a contrary jurisdiction or arbitration clause, especially as arrests are being used more as a tool to obtain security rather than a way to proceed to the ship’s auction.

We will discuss in a forthcoming Circular the effective implementation of the 1999 Convention in Spain.

For the time being we can advance that on 30/08/11 was published in the Official State Bulletin the Royal Decree 12/2011 that internally applies the 1999 Convention and modified Spanish Procedural Law 1/2000 in what concerns the ship arrests. It also derogated the Spanish Law 2/1967 which applied internally the 1952 Convention.

Notwithstanding, this Royal Decree has left a lot of doubts, as it establishes that it shall come into force on March 2012.

Further information can be obtained from INDECO.
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