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THIRD PARTY ACTION UNDER SPANISH LAW AND OTHER RECENT LEGAL DEVELOPMENTS

I. DIRECT ACTION AGAINST THE P&I CLUBS IN SPAIN

The Spanish Code of Commerce enacted in 1885 remained partially unchanged the exception being the various International Conventions ratified by the Kingdom of Spain as well as some relevant domestic legislation.

Said Code of Commerce does not contemplate the direct action.

The direct action against underwriters of civil liabilities is contained in article 76 of the 1980 Spanish Insurance Act.

According to this provision of law, a third party who has sustained a loss covered by an insurance policy may bring a direct action against the insurer.

After the enactment of the Spanish Insurance Act a trend to sue, simultaneously, the shipowner or carrier and its P&I Club for cargo claims was started in Spain.

However, it has been held by our scholars and courts that the 1980 Spanish Insurance Act does not apply to marine insurance; and thus it has been argued and held that the direct action against P&I Club is not possible in Spain.

The most relevant decision on the issue is the judgment of the Spanish Supreme Court of 3 July 2003.

Relevant findings of the decision of 3 July 2003:

> *I. In the Spanish law there is no provision for the so-called protection and indemnity sea transport policy, known as P&I. It is a shipowners' civil liability insurance where shipowners themselves or related people are organized in Clubs in order to cover each other, subject to the legislation of that country where they are stablished the submission to a particular legislation -usually the British- and the arbitration in London clause -also usual- being valid.*
>
> *II. In this type of insurance, the insured risk is the liability derived from eventual damage to third parties: the indemnity to be paid is not covered by the insurance, but said indemnity -once paid to a third party- is refunded, and for this reason it does not even comprise the possibility of a third party's direct action against the insurance company.*

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III. *The direct action provided in article 76 of the 1980 Insurance Act is not applicable in any maritime insurance.*

Previously, the judgment of the Court of Appeal of Madrid issued on 5 March 2002 had held in another case that a stipulation by which English law, and consequently the "pay first" rule, is to apply to an insurance contract between the insured and the P&I Club is valid under the Spanish conflict of laws provisions and public order principles

Said decisions have been important to deter cargo claimants from attempting to sue P&I Clubs directly in the past years.

HOWEVER there are who still sustain that the direct action against the P&I Clubs is possible in Spain, Others believe otherwise and are still awaiting a second Supreme Court judgment upholding the lack of direct action as two judgments from the Spanish Supreme Court are needed to create Case Law

In the meantime, the 2005 Proposal of a pre-draft of a new Spanish Shipping Act covering many areas is presently under discussion.

On the issue, article 531 of this pre-draft specially contemplates the direct action against underwriters for civil liability holding invalid any agreement excluding such direct action.

The debate would be closed in the case that the new Spanish Shipping Act were finally approved setting out the direct action against the P&I Clubs according to article 531 of the draft.

In practical terms, it could be one the most relevant provisions of law contained in the pre-draft of the new Spanish Shipping Act, if this finally passed.

II. OTHER RECENT LEGAL DEVELOPMENTS

New trend followed by the Spanish Courts as to the ways to interrupt the limitation periods.

Until recently, the way to interrupt the time bar of the mercantile claims (which include most of the maritime ones) was to commence legal proceedings against the defendants. (Article 944 of the Spanish Commercial Code).

Nowadays, the trend has been changed after several decisions of Spanish Supreme Court which, assimilating the interruption of mercantile claims to the interruption of civil claims, are accepting an out of court claim as a way to interrupt a mercantile claim.

This is supposing that out-of-court settlements are being increased.

New trend followed by the Spanish Courts as to the foreign jurisdiction clauses in the bills of lading.

During many years the Spanish courts have been reluctant to accept the validity of the usual foreign jurisdiction clauses in bills of lading.

The jurisdiction clauses were only accepted in the past by the Spanish Courts where:

A.- Cargo interests expressly agreed.

B.- Contained an express and clear waiver of their own jurisdiction.

In fact, this requested in order to obtain the validity of the jurisdiction clause before the Spanish Courts that the bill of lading were signed!.

Such a requirement is unthinkable in other countries as opposed to practice in shipping and transport.

The result was that most of the attempts by carrier to challenge the jurisdiction of Spanish courts usually failed.

However, said efforts are now bearing fruit and in recent past times the Spanish courts are presently dismissing cargo claims brought by cargo owners or their subrogated underwriters for lack of jurisdiction in the presence of jurisdiction clauses in bills of lading, the requirement of the signature in the bill of lading no longer being necessary.

The legal grounds for this new trend has been article 17 of the Brussels Convention on jurisdiction and the Enforcement of judgments in Civil and Commercial matters, changed when the UK become a member of the EC in the Luxemburg Convention of 9 October 1978. The final version is now contained in article 23 of the Council Regulation (EC) 44/2001.

Such cargo underwriters have still some arguments:

1. The general invalidity set out in article 54,2 of the Spanish Act of Civil Procedure with regard jurisdiction clause contained in general conditions.

2. The clause is not clear enough.

3. The court selected has no connection with the case.

4. Article 21 of the Hamburg Rules.

5. It does not bind the subrogated cargo underwriters.

However, in view of the present trend of our courts as regards jurisdiction clauses by virtue of the Brussels Convention and the Council Regulation 44/2001, the position now is that cargo underwriters presently consider that it is better to accept settlements avoiding litigation.

The present trend followed by courts accepting to the jurisdiction clauses in the bills of lading is a relevant development in the Spanish legal system and the Carriers, Owners an P&I Clubs may look at the future with optimism.

NEW DOMESTIC LAW RULING CONTAINER SECURITY MEASURES.

In line with the co-operative G-8 action on transport security to develop and implement an improved global container security regime to identify and examine high-risk containers and ensure their in-transit integrity, a new law ruling container security measures has come into force in Spain (Royal Decree 2319/2004) and is now being implemented.

This regulation incorporates the International Convention for Safe Containers, 1972 (CSC), and its modifications, and gives compliance to IMO Circulars CSC/100/Cir. and CSC/124/Cir., as well as to the recommendations of the Maritime Safety Committee (MSC) of the IMO, specially as regards control in ports and container handling terminals.

This Royal Decree details that containers manufactured after 13th September 1977 will need a certificate of conformity, in accordance with the type of container, and a Safety Approval Plate, in accordance with the International Convention (CSC). The containers manufactured before 13th September 1977 lacking the certificate of conformity will need a Safety Approval Plate with a countersign issued by the competent authority of the state signatory to the CSC.

A good maintenance of a safety-approved container is the responsibility of the owner, who is also required to have the container periodically inspected. In this respect, the regulation also establishes that the validity of the inspection of a new container will be of five years and that of an existing container will be of two years and a half.

Containers which do not comply with the previous conditions can not be used for transport and will remain retained by the competent authority in Spain (Ministry of Industry) until the deficiency has been corrected.

The owner of a container can incur an infraction if the container is not well maintained or has not passed the necessary inspection or has no Safety Approval Plate and he will be liable to pay the sanction, despite the fact that the container is being maintained by another company. According to the law, shipowners, operators and charterers calling to Spanish ports can incur severe infractions, if, i.e. they unload a container which does not comply with the regulations and / or when there is a risk or severe danger to people, flora, fauna and to the environment.

The breach of any article of RD 2319/2004 will be sanctioned by the Ministry of Industry in accordance with section V of Spanish Law 21/1992 of Industry. The sanctions detailed in this law depend on the type of infraction:

a) Small infringement: fines up to Euros 3,005.06
b) Severe infringement: fines from Euros 3,005.06 up to Euros 90,151.81.
c) Very severe infringement: fines from Euros 90,151.81 up to Euros 6 01,012.10.

This is in fact a relevant provision of law with relevant practical implications. For instance, the ports of Barcelona, Valencia and Algeciras presently move in between 2 and 3.3. million containers each (Barcelona is expecting to grow to 4.5. million in 2008 with the new terminal).

INTERNATIONAL CONVENTIONS MOST RECENTLY ADOPTED BY SPAIN.

Spain has recently adhered to the 2003 Protocol to the 1992 Convention on International fund for compensation of oil pollution damage, establishing a supplementary fund for international oil pollution compensation.

Spain also recently adhered to the 1996 Protocol to the 1976 Convention on Limitation of Liability for maritime claims, which purpose is to substantially increase the amount of compensation payable for maritime claim for loss of life or personal injury and loss or damage to property than those in the 1976 CLMC.

The International Convention on Salvage of 1989 has also come recently into force in Spain, replacing the Convention on law of salvage adopted in Brussels on 1910.

Since 31st March 2006 the 1996 Protocol to the London 1972 is in force in Spain baning the dumping of wastes from ships.

This Protocol represents a major change of approach to the question of how to regulate the use of the sea as a depository for waste materials in that, in essence, dumping is prohibited, except for those materials, on an approved list. The 1972 Convention permitted dumping of wastes at sea, except for those materials on a banned list.

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