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## Shipping in Portugal

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### **Trends and developments**

*Trends and developments*

#### **Are there any notable trends or recent legal developments in your jurisdiction's shipping industry?**

Since the beginning of 2017, ships calling at Portuguese ports are receiving a single invoice for their stay in port, including all the services and expenses incurred during the ship's stay. This single invoice system presents the benefit of allowing clear identification of the various items charged by the different authorities and services, all presented in one document.

Jurisdiction clauses inserted into the bill of lading have generally been accepted as valid by the Portuguese courts, but recent decisions have considered that such clauses do not apply, essentially because the bill of lading was not signed by the parties and the shipper had not accepted or been expressly informed of the contents of the jurisdiction clause inserted into the bill of lading before contracting the carriage.

### **Registration**

*Eligibility*

#### **Which ships are eligible for registration in the national shipping register(s) and which parties may register ships?**

All ships are eligible for registration in the national shipping register, provided that they comply with the applicable rules in force regarding the type of ship. Shipowners are entitled to apply for the register. Temporary registration is also possible on the basis of a time charter contract. Portugal has a second register of ships, the Madeira International Shipping Register.

*Procedure*

#### **What are the procedural and documentary requirements for registration?**

The procedure starts with an application for registration, including all the necessary supporting documents. Evidence of ownership must be provided, showing a valid title as well as the full characteristics of the ship, by means of a building certificate or the last issued certificates for the ship. The ship must undergo a technical

inspection for the purposes of registration approval and establishment of the necessary flag technical certificates (eg, minimum crew on board and safety conditions necessary for the operation of the ship). Commercial ships are to be registered at both the harbour master office and the commercial register.

#### *Grounds for refusal*

#### **On what grounds may a registration application be refused?**

Grounds for refusal may include lack of documentary evidence of ownership or non-compliance with technical requirements considering the type of ship and the shipping activity to be developed.

#### *Advantages*

#### **Are there any particular advantages of flying your jurisdiction's flag?**

The Portuguese flag is a flag of the European Union and on the Whitelist of the Paris Memorandum of Understanding. Ships registered in the Madeira International Shipping Register also sail under the Portuguese flag.

#### **Liens and mortgages**

#### *Registration*

#### **How are encumbrances such as maritime liens and mortgages registered in your jurisdiction and what are the effects of registration?**

Mortgages and other registerable encumbrances on a ship are registered in the ship's commercial register entry. Deletion will only take place either with the agreement of the parties engaged, the mortgagor and mortgagee or within the rules applicable to cancellation of encumbrances (eg, subsequent to the judicial sale of the ship).

#### *Securable claims and priority*

#### **What claims can be secured by maritime liens and what is the order of priority?**

The identification and the order of priority of the claims giving rise to a lien on the ship are determined by Article 578 of the Portuguese Commercial Code in the following order:

- court costs and expenses made in the common interest of the creditors;
- salaries due for assistance and salvage;
- credits guaranteed by a mortgage or lien on the ship;
- pilotage and tug expenses for entering the port;
- tonnage, lighthouse, anchor, public health and any other port dues;
- expenses with the watchkeeping of the ship and warehousing of its belongings;
- wages for the master and crew;
- expenses incurred and repairs made for the needs of the ship and its equipment;
- reimbursement of the price of cargo that the master had to sell;
- insurance premiums;
- amounts in debt referring to the last purchase price of the ship;
- expenses incurred with repairs of the ship and equipment during the last three years before the voyage and starting from the time the repairs were concluded;
- debts arising from the contracts for the building of the ship;
- insurance premiums referring to the ship, if all of the ship is insured or only part of its accessories, not included in the insurance premiums listed above; and
- indemnities due to the shippers for lost or damaged cargo.

## *Extinguishment*

### **Under what circumstances are maritime liens extinguished?**

According to Article 579 of the Commercial Code, liens on the ship are extinguished in the usual way of extinguishment of obligations, such as through:

- payment;
- the judicial sale of the ship after the transfer of the liens to the sale price deposited; or
- a voluntary sale with service to the creditors after three months have elapsed with no opposition from the creditor to the sale price.

## *Foreign liens*

### **Are foreign liens recognised in your jurisdiction?**

Yes, if applicable under the law of the flag of the ship. Under Portuguese law, issues regarding the ranking of credits are determined according to the law of the flag of the ship at the time the privileged credit arose.

## *Transfer and assignment*

### **Which rules govern the transfer and assignment of liens, mortgages and other encumbrances?**

In principle, assignment documents must follow the same formal rules as the original documents giving rise to the charge in question and must be registered in the same way to be validly opposable to third parties.

## **Arrest**

### *Grounds for arrest*

### **Under what circumstances can a ship be arrested in order to secure a claim against it?**

Portugal is a party to the 1952 Brussels Convention relating to the arrest of sea-going ships; therefore, a maritime claim under the Brussels Convention may give rise to an arrest. The arrestor must provide the judge with sufficient evidence on the existence of the claim and on the identification of the debtor and the ship to be arrested.

### **Can a ship be arrested to secure a non-maritime claim?**

Yes, provided that the shipowner is the debtor of such non-maritime claim. National civil law rules apply to such arrests.

### **Can a ship be arrested to secure a claim against a sister ship?**

Yes, provided that the sister ship belongs to the same debtor.

## *Procedure*

### **What are the procedural and documentary requirements for seeking arrest of a ship?**

An arrest application must be submitted to court, explaining the grounds for arrest and enclosing all the supporting documents evidencing the existence of the claim and the ownership of the ship; a power of attorney and a list of witnesses must also be attached to the arrest application. After analysing the claim application, the judge will give a first detention order preventing the ship from leaving the port. Such order is immediately sent by the court to the harbour master office and the ship is prevented from leaving the port. Witnesses for the arrestor will be heard if the judge considers it necessary to prepare the decision on the arrest. The arrestee is then notified of the arrest order, normally through the master of the arrested ship, and has 10 days to oppose the arrest

with counter-arguments. After analysing the arguments of the arrestee, the judge may confirm the arrest, reduce the amount guaranteed or release the ship. The arrest decision is subject to appeal. All documents are submitted to court by lawyers via a particular court's database.

### *Security*

#### **What security must the arresting party put up in order to secure arrest of a ship and how is this security calculated?**

In principle, no security is requested from the arresting party. The judge has the legal possibility to establish an adequate security, but in our experience such security has never been requested.

#### **What security can the arrested party provide for release of an arrested ship?**

In the first place, the security considered acceptable by the arresting party. If there is no agreement from the arresting party, a cash deposit into the court or a bank guarantee from a Portuguese bank (wording to be analysed and accepted) will be considered acceptable by the judge.

### **Judicial sale of ships**

#### *Procedure*

#### **What is the legal procedure for the judicial sale of ships in your jurisdiction?**

After a decision allowing for the judicial sale of the ship has been issued, the court will appoint a person in charge of the sale, indicating the minimum sale price and the sale modality – normally through private negotiation. The person in charge of the sale must publicise the sale in the best way possible and receive the various offers. The list of offers will be presented to the court and the ship will be sold to the best offer. If the offers do not reach the minimum sale price established by the court, the person in charge of the sale must inform the judge thereof; prior to any relevant decision, the various intervening parties will be heard by the court.

#### *Foreign sales*

#### **Under what circumstances are foreign sales recognised?**

Any judicial sale decision from a foreign court must be revised and confirmed in Portugal, depending on the country of origin of the decision.

### **Limitation of liability.**

#### *Eligibility*

#### **What parties may limit liability for maritime claims?**

The shipowner and its insurers.

For what claims can liability be limited? Are any claims explicitly exempt from the limitation of liability?

Portugal recently approved accession to the 1976 Convention on Limitation of Liability for Maritime claims (LLMC) and the 1996 Protocol. These rules came into force in January 2018 and are applicable, namely Articles 2 and 3.

#### *Limits*

#### **What limits are set for eligible claims?**

The limits established in Articles 6, 7 and 8 of the LLMC as amended by the 1996 Protocol.

## *Limitation funds*

### **What rules and procedures govern the establishment of limitation funds?**

An application must be presented to court stating:

- the grounds for limitation;
- the amount of the limitation fund;
- the method of calculation of such amount and the manner to establish the fund (eg, cash deposit or bank guarantee); and
- a list of the creditors known to the applicant entitled to be paid from the limitation fund.

After analysing the application – and provided that it is considered correct and the capital deposited or guaranteed – the judge will give an order declaring the fund established. The listed creditors will be informed thereof and advertisements will then be published to inform third parties of the establishment of the fund, giving them a time limit to present their claims or to oppose the establishment of the limitation fund. The distribution of the fund capital will take place at the end of the procedure.

### **How are liability funds distributed?**

*Pro rata*, on the basis of the amount claimed.

## **Carriage of goods**

### *International conventions*

Is your jurisdiction party to any international conventions on the carriage of goods by sea? If so, does the relevant domestic implementing law contain any notable modifications (eg, extensions to the scope of application)?

Portugal is a party to the 1924 Brussels Convention on the unification of certain rules of law relating to bills of lading. A national law dated October 1986 is applicable to those situations not covered by the Brussels Convention. The national law updated some concepts not clearly defined in the Brussels Convention. The rules on the liability of the carrier and the limits of liability established in the Brussels Convention were extended to cargo carried on deck with the approval of the shipper, to carriage on deck performed on container ships and when the cargo is obliged to be carried on deck on the basis of mandatory legal provisions.

### *Carrier's responsibility*

### **What is the official extent of the carrier's responsibility for goods?**

Since 1986, when the 1924 Brussels Convention was updated, the extent has corresponded to €498.80 per unit or package described on the bill of lading.

### *Contractual limitation of liability*

### **May parties contract out of any legal provisions governing cargo liability?**

Only to establish limits of liability or obligations of the carrier wider than those established in the 1924 Brussels Convention.

### *Title to sue*

### **Who has title to sue on a bill of lading?**

In principle, the parties entitled to sue on a bill of lading are those parties identified on the bill of lading – the shipper, the carrier and the consignee.

#### *Time bar*

#### **What is the time bar for cargo claims?**

The time bar for cargo claims is one year counting from the delivery of the cargo to the receiver/port operator. Provided that the agreement of the carrier is obtained before time bare elapses, this limit may be validly extended.

#### *Definition of 'carrier' and 'goods'*

#### **How are 'carrier' and 'goods' defined in respect of cargo claims? Is there any especially pertinent case law on this issue?**

The definition of 'goods' is included in Article 1 of the 1924 Brussels Convention. The 'carrier' is normally defined as the one entering a contract of carriage. According to national law, if the carrier is not identifiable by the terms of the bill of lading, it is possible to sue the ship that performed the transport – a very particular rule allowing the carrying ship to acquire juridical personality for the purpose of the application of this rule.

#### *Defences available to carrier*

#### **Under what circumstances may the carrier rely on the perils of the sea defence? What other defences are available to the carrier?**

As Portugal is a party to the 1924 Brussels Convention, all exclusion clauses referred to in Article 4(2) are available to the carrier. Perils of the sea are included in line c of Article 4(2). It will be for the carrier to produce suitable evidence of the existence of the defences put forward, whereas opponents will eventually try to disqualify such facts as excluding the carrier's liability. Decisions will take into account the analysis of the particular facts of the case in dispute.

#### *Third parties*

#### **What legal protections and defences against cargo claims are available to agents of the carrier and other third parties (eg, Himalaya clauses)?**

In principle, the carrier will be liable for the acts of the agents contracted for the fulfilment of the contract of carriage; therefore, normally, agents are considered as acting for the carrier. Nevertheless, according to national law the carrier has a recourse right against the port operator in case of damages to the cargo under the contract of carriage. National law also governs the relationship between the shipping agent and the owner, whereby shipping agents are considered as acting for the owner.

#### *Deviation from route*

#### **Under what circumstances is deviation from the agreed route allowed?**

No particular rules apply to this subject. The rules stated on the bill of lading, provided that they are not contrary to the 1924 Brussels Convention, may apply. Basically, deviation should be reasonable and determined by non-foreseeable reasons.

#### *Claims against shipper*

#### **What claims can the carrier pursue in respect of the shipper's failure to meet its obligations?**

The carrier has a retention right against the shipper in case of non-payment of credits arising from the contract of carriage. The carrier may also pursue the shipper in respect of all claims regarding damages caused by the cargo to the carrier or carrier's assets.

### *Multimodal carriage of goods*

#### **How is multimodal carriage regulated in your jurisdiction?**

No particular rules govern this subject. The rules applicable to the particular contract of carriage at the origin of the claim in dispute will be applicable.

#### **Marine accidents**

##### *Collision and pollution*

#### **What rules and procedures (under both domestic and international law) apply to the prevention of, liability for and remedy of:**

##### **(a) Collision?**

Portugal is a party to the 1910 Brussels Convention for the unification of certain rules of law relating to collision between vessels; therefore, the rules stated in this convention will apply. Portugal is also a party to the 1952 Brussels Convention for the unification of certain rules relating to penal jurisdiction in matters of collision or other incidents of navigation, as well as the 1952 Brussels Convention on certain rules concerning civil jurisdiction in matters of collision.

##### **(b) Oil pollution?**

Portugal has adopted the International Convention for the Prevention of Pollution from Ships, as amended by the 1978 Protocol. Portugal has also adopted the 1992 Convention on Civil Liability for Oil Pollution Damages, as well as the 1992 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage and the subsequent 2003 Protocol.

In 2006 Portugal adopted the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation, and the 2000 protocol to this convention regarding preparedness, response and cooperation to pollution incidents by hazardous and noxious substances.

In 2015 Portugal adopted the 2001 Bunkers Convention.

##### **(c) Other environmental damage caused by a ship?**

Domestic law applies to pollution incidents caused by the ship in Portuguese ports.

Basically, the ship will be prevented from leaving the port until adequate security has been put forward, normally by the shipping agent acting on behalf of the shipowner or charterer. The final amount of the penalty to be paid will be established at the end of an investigation procedure and may include the amount of the penalty plus reimbursement of expenses incurred with the cleaning operations.

### *Salvage*

#### **What is the legal regime governing salvage and general average?**

Portugal is a party to the 1910 Brussels Convention for the unification of certain rules of law relating to assistance and salvage at sea.

In 1998, with the publication of Decree-Law 203/98, the rules applicable to salvage were updated in line with the new 1989 Salvage Convention. The criteria for fixing the salvage reward were updated and enlarged in a way similar to those referred to in the 1989 convention, with special compensation for situations where there is a threat of damage to the environment.

General average is governed by the old 1888 Commercial Code. Provisions on the bill of lading referring to the York-Antwerp rules are considered applicable under the rules of the bill of lading.

### *Places of refuge*

#### **What framework governs access to places of refuge for ships in distress?**

National law determines that the various administrative bodies involved in maritime issues – including the port authorities, environmental institutes and the navy – will establish the necessary plans to be followed in a situation involving the need for a suitable place of refuge for ships in distress. The plans must be approved by the government.

### *Wreck removal*

#### **What rules and procedures apply to the removal of wrecks in your jurisdiction?**

Wreck removal is governed by Decree-Law 64/2005 (15 March 2005). Within four days of the incident, the shipowner is requested to put up security that is considered adequate by the authorities, taking into account the particular characteristics of the ship. Security may be provided by way of a bank guarantee or by an insurance company, and must cover for possible damages until the removal of the ship. The owner is ordered to present to the harbourmaster for approval, within a maximum of 30 days after the incident, a suitable plan for the removal of the ship.

#### **Under what circumstances can the authorities order removal of wreckage?**

In cases where there is a risk of pollution, and if the owner does not comply with the harbourmaster's orders, the authorities are allowed to choose the most suitable entity to remove the ship, bunkers or other polluting substances on board the ship. The owner or disponent owner of the ship is liable for the payment of expenses incurred.

### **Marine security**

#### *Legal regime*

#### **What regime governs the imposition of security measures on ships and in port facilities?**

EU Regulation 725/2004 on enhancing ship and port facility security, together with national Decree-Law 226/2006, apply.

#### *Security officers*

#### **What rules apply to the qualification and conduct of security officers on ships and in port facilities? Are armed guards allowed on ships?**

Ships sailing under the Portuguese flag must have on board their security plan duly approved by the authorities as stipulated in Decree-Law 226/2006.

### **Security information**

What rules govern the provision of security information to port authorities?

All relevant information must be provided to port authorities before the ship enters the port. The shipping agent, through the port database, must disclose all relevant information on the ship before obtaining clearance to enter the port. All relevant entities – such as port administration, harbour master, customs and frontiers control – have access to the information in this database.

## **Insurance**

### *Mandatory coverage*

#### **What maritime risks must be covered under the law and what is the mandatory level of coverage?**

Ships entering Portuguese ports or Portuguese waters must show evidence of insurance coverage up to the amounts established in the 1976 Convention on Limitation of Liability for Maritime Claims and the 1996 Protocol.

### *Insurable risks and ships*

#### **What other risks are typically covered by marine insurance contracts concluded in your jurisdiction and what ships are insurable?**

Labour accident coverage for crew members is mandatory. Hull and machinery insurance contracts are also common, although not mandatory. According to the type of activity, civil liability insurance may be mandatory (eg, for all activities including carriage of passengers by sea).

### *Subrogation rights*

#### **What is the legal regime governing marine insurers' subrogation rights?**

The subrogation regime is the same for all insurers. According to national law governing the contract of insurance, the insurer is legally subrogated into the rights of the assured in case an indemnity is paid to the assured, thus allowing the insurer to act against the third party responsible for the damages caused and indemnified.

## **Jurisdiction and dispute resolution**

### *Competent courts*

#### **What courts are empowered to hear maritime cases in your jurisdiction?**

The Maritime Court in Lisbon is competent to hear all maritime cases where the parties are located or the facts of the case occurred in the continental mainland. For cases involving the islands of Madeira and the Azores, the local civil courts will be competent to hear maritime cases (eg, in case of arrest of a ship).

### *Exclusive jurisdiction and arbitration clauses*

#### **Under what conditions will exclusive jurisdiction and arbitration clauses in shipping contracts be held as valid?**

Jurisdiction clauses and arbitration clauses are generally accepted, provided that such clauses have been accepted by both parties in writing or the contents of such clauses have been clearly disclosed to the other party. In case of dispute, the party benefiting from the contents of the jurisdiction or arbitration clause must provide evidence that the opposing party was clearly informed of its contents before entering into the contract.

### *Maritime arbitration*

#### **What is the general state and prevalence of maritime arbitration in your jurisdiction?**

Provided that the arbitration clause has been established in writing and accepted by both parties, it will be considered valid.

### *Recognition and enforcement*

#### **What regimes govern the recognition and enforcement of foreign judgments and arbitral awards?**

Portugal is a member of the European Union and therefore EU Regulation 1215/2012 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters applies to recognition and enforcement of EU member states' decisions.

Judgments obtained from outside the European Union are subject to the procedure of recognition of foreign judgments before the Appeal Court, before being suitable for enforcement. This recognition procedure aims at verifying:

- the authenticity of the foreign judgment;
- that the decision is final and not subject to appeal;
- that the defendant has been regularly served;
- that the decision contains no provision contrary to the principles of international public order in force in Portugal; and
- that the decision does not concern matters within the exclusive competence of Portuguese courts.

Portugal is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.