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I. PRELIMINARY QUESTIONS

1. Has your jurisdiction ratified the following conventions (the "Conventions")?

a. International Convention on Civil Liability for Oil Pollution Damage 1969 ("CLC 1969")

Yes, by way of Ratification Instrument of 15 November 1975 (BOE No. 58 of 8 March 1976)

b. 1992 Protocol to the CLC 1969 ("CLC 1992)

Yes, by way of Ratification Instrument of 6 June 1995 (BOE No. 225 of 20 September 1995)

c. Convention on Limitation of Liability for Maritime Claims 1976 ("LLMC 1976")

Yes, by way of Ratification Instrument of 22 October 1981 (BOE No.310 of 27 December 1986)

d. 1996 Protocol to the LLMC 1976 ("LLMC 1996")

(references to "LLMC" shall be understood as references to either LLMC 1976 or, where applicable, to LLMC 1976 as amended by LLMC 1996)

Yes, by way of Ratification Instrument of 1 December 2004 (BOE No. 50 of 28 February 2005)

e. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 ("HNS 1996")

No.

f. 2010 Protocol to the HNS 1996 ("HNS 2010")

(references to "HNS" shall be understood as references to either HNS 1996 or, where applicable, to HNS 1996 as amended by HNS 2010)

No.

g. International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 ("Bunkers Convention")

Yes, by way of Ratification Instrument of 10 November 2003 (BOE No. 43 of 19 February 2008)

h. Nairobi International Convention on the Removal of Wrecks 2007 ("WRC")

No.

2. Please indicate whether the a.m. Conventions apply directly in your jurisdiction or whether the stipulations have been translated and incorporated into domestic legislation.

According to art. 96.1 of the Spanish Constitution, the International Treaties validly adopted by Spain will be an integral part of the legal system once published in the Official Gazette and their contents cannot be derogated or amended save with the formalities required in the treaty itself.

As regards maritime conventions and specifically those referred to in this questionnaire, art. 2 (sources of law) of the Spanish Shipping Act 14/2014 of 24th July (hereinafter SSA) sets forth that it will be applied in so far as is not contrary to the international treaties in force in Spain or to the laws of the European Union. However, the same SSA adds the regulation of the liability for pollution, limitation of liability and the procedure to limit liability in different Titles and Sections. In all these matters, the SSA follows many of the rules and principles found in the international maritime conventions.

In general, therefore, all ratified conventions directly apply in the Spanish jurisdiction according to their own terms. Only when they do not apply in accordance to their material or geographic scope of application, the domestic provisions in the SSA on the related matters will apply.

3. Is the wording of domestic provisions incorporating art. V(2) CLC 1969/art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS/art. 6 Bunkers Convention/art. 10(2) WRC into domestic legislation different to the original text of the Conventions?

No. The Spanish Shipping Act 14/2014 of 24th July (SSA) includes specific provisions enhancing the priority of the International Conventions ratified by Spain, which, once ratified, become self-executing. In addition to art. 2 SSA commented above, art. 391 SSA refers to the preferent application of the International Conventions to which Spain is a Contracting State, on civil liability for oil pollution and for bunker oil pollution. Art. 392 SSA establishes that the general limitation of liability will be governed by the LLMC 1996.

As above informed, Spain is not Party to the HNS nor to the WRC.

3a. If the answer to the previous question is in the affirmative, what are the differences?

4. If your jurisdiction has not ratified the Conventions, does your jurisdiction recognize a right of limitation of liability for claims that would otherwise fall under the Conventions (the "Equivalent Claims")?

The Title VII of SSA (arts. 392 to 405) regulates the limitation of liability but making specific reference to the 1996 Protocol and the 1976 Convention considering the reservations made by Spain. Art. 393 states that the limitation shall be applied irrespective of the civil, labour, criminal or administrative kind of the legal proceeding.

4a. If the answer to the previous question is in the affirmative, what are the requirements for breaking the right to limitation for Equivalent Claims?

5. Are there any general principles of law in your jurisdiction that may serve to break the right to limitation otherwise than through the specific provisions contained in the Conventions (e.g. abuse of right)?

Spanish general regime contained in the Spanish Civil Code does provide the unlimited lability of the debtor in its art. 1911 (whether in tort or in contract). Thus, any debtor responds of its debts with all its present and future assets. For this reason, it is difficult to find general principles of law specifically applicable to the breaking of the limitation rights out of the scope of the relevant Conventions.

Having said that, some articles may be considered as general rules in the sense that abuse of the rights is prohibited.

Art. 7 of the Spanish Civil Code, that is considered a principle of law and of constitutional relevance, states that all rights shall be exercised according to the requirements of good faith and that the laws do neither shelter the abuse of right nor the exercise of a right contrary to the common interest. Every act or omission made with by intention, aim or circumstances which may go beyond the normal limits of its exercise and causes damage to a third party will be prosecuted and will give rise to the appropriate indemnity, as well as to the judicial and administrative measures to impede such abuse.

This leads to the conclusion that there are some general principles in Spanish Law that may serve to sustain the breaking of the right to limit if the limitation is an abuse.

II. "PERSONAL ACT OR OMISSION" – Attribution to the person liable

6. How is the requirement for a "personal act or omission" in art. V(2) CLC 1992, art. 4 LLMC, and arts. 7(5) and 9(2) HNS interpreted in your jurisdiction?

The fundamental rule in Spanish maritime law is set in art. 149 of the SSA that specifically provides liability of the owner for the acts and omissions of captain and crew, notwithstanding its right to limit liability according to Title VI of the Act. Thus, the personal acts or omissions of the Master and crew do not necessarily affect the right to limit of the Owner.

The caselaw of the Supreme Court has not yet dealt with the interpretation of art. 4 LLMC.

However, there have been few Court decisions in Spain concerning the application of art. V of the CLC 69 and of the CLC 92.

In the matter of the "AEGEAN SEA" (CLC 69), the Supreme Court upheld in a Judgement of 22nd April 2009 the ruling of the Court of Appeal of La Coruña of 18th June 1997 the Criminal Court num. 2 of La Coruña (Judgment dated 30 April 1996) and ruled that the Master and the Pilot were both liable for a criminal offence and determined their unlimited civil liability.

The Supreme Court also ruled that the civil liability of the Owner was subject to the right of limitation under arts. III and V of the CLC 69, and the P&I Club was also entitled to the right of limitation under art. V of the CLC 69.

In the matter of the "PRESTIGE" (CLC 92) the Spanish Supreme Court (Judgment 865/2015, 14 January 2016) ruled that the Master was liable for a criminal offence and civil liable for the consequences arising thereof. It further determined the vicarious liability of the Owner and prevented them from limiting liability under the CLC 92 because their conduct fell within its art. V(2). The right to limit of the Owner was broken because the Court considered that it was aware or was bound to be fully aware of the unseaworthiness of the vessel before she started the voyage.

Thus, from the available caselaw it can be sustained that the acts and omissions of servants and agents cannot be considered as a straight basis to break the Owner's right to limitation of liability; and it can be stated that the act or omission referred to in Art. V of the CLC 92 has to be an action personally performed by the person entitled to limit its liability.

7. Where the party entitled to limitation is an entity, what are the requirements for attributing an act or omission to the party entitled to limitation?

This is a complex matter and the outcome will much depend upon which type of jurisdiction adjudges each case (Civil or Criminal Courts).

The Civil and Commercial Courts will apply just the Companies' Act and the general principles of the Code of Commerce. Under such rules and principles, and within the context of tort liability, the act or omission of a legal entity takes place when it is made by the company's directorship body (i.e., by one or more directors, acting in their capacity as such). As a general principle, directors must be formally appointed for having authority to represent the company. However, when a person informally acts as a director with the privity of the company, it will be also considered a director (the so-called "de facto director"). The basic consequences in this case (without prejudice of all consequences of the actions by formal directors) are twofold: first, the company may be bound by the actions of a de facto director, and, second, a person acting as such will be subject to all obligations and liabilities of companies' directors. In brief, therefore, under company law rules acts or omissions of directors (whether formal or de facto ones) will be attributed to the company as its personal actions.

The Criminal Courts will apply the new so called "Compliance Law" ex art. 31 bis of the Criminal Code, as amended in 2014, that imposes on entities criminal liability, against the traditional principle "*societas delinquere non potest*". The company itself and its board of directors or any other administration person or body may be attributed a personal act or omission if they have not implemented a Compliance program to minimize or avoid damages from criminal act or neglects leading to maritime casualties. There have not yet been Judgements applying this new compliance requirements to damages regulated in the Conventions analysed in this questionnaire and it is too soon to know how they could affect the responsibility of an entity and its representatives.

8. **Are there court decisions or legal texts in your jurisdiction where the right to limitation under the Conventions or equivalent domestic legislation has been broken (or where it has been submitted that such right should be broken), respectively confirmed (or where it has been submitted that such right should be confirmed), for acts/omissions of:**

8a. The Master? Yes, see above mentioned caselaw of the "AEGEAN SEA" and "PRESTIGE" in answer to question 6.

8b. Crew members? No

8c. The Designated Person Ashore/Company Security Officer? No

8d. Other individuals within the entity entitled to limitation? No

8e. Third-party contractors (e.g. agents of the vessel)? No, but the P&I Club was prevented to limit its liability in the "PRESTIGE" matter under answer to question 6, because the Supreme Court ruled that they did not appear in Court to argue their right to limit.

If your answer is in the affirmative in any of the above questions, please briefly describe (a) the relevant facts; and (b) the rationale for the attribution of the relevant act or omission to the party entitled to limitation.

The leading case regarding the breach of the right to limitation is the above mentioned one the "PRESTIGE". The Court held that the Captain, convicted for a crime against the environment, bears the civil liability and must compensate the damages. Although the general rule is that liability entails limitation of liability, the Court rejected the right to limit liability to the master and the Owner on the grounds that they both had acted with gross negligence/recklessly.

The Spanish academy discussed whether gross negligence equated to "*dolo eventual*" (recklessly and with knowledge that such damage would probably result). The Supreme Court decided positively. Besides, it held vicariously liable the owner. The Captain committed the

crime in the exercise of its duties. The ship was in such poor condition that the Court asserted that it was logical to think that the owner could not ignore it. Therefore, the owner consciously despised the risks generated by the defective condition of the ship, thereby losing the right to limit its liability.

A different approach was taken with reference to a collision case where the LLMC was applicable. The Judgement of the Court of Appeal of the Balearic Islands of 8th October 2015, considered that even when the captain was condemned in a criminal procedure by a criminal offence of "reckless imprudence", it did not meet the requirements of art. 4 of the 1976 Convention, as it was not considered "dolo" (dolus) or wilful misconduct, but gross negligence.

This Judgement of the Court of Appeal of Baleares 08/10/2015 specifically mentions the CMI and reads:

"It has to be considered that the CMI wanted to reinforce the right to limit, by making it less vulnerable and thus, proposing the substitution of the position adopted by the 1957 Convention, resting in the personal fault of the owner, by the "dolo" or dolus (direct or eventual) and reckless behaviour. The Committee justified the extension of the limitation of liability on the considerable increase of the maximum limits of liability.

Applying the said Doctrine here, the behaviour of the master of vessel "[NAME DELETED BY DATA PROTECTION]" responsible of the collision, even when condemned of a criminal offence of imprudence, does not meet the requirements of art. 4 of the 1976 Convention, necessary to exclude limitation, as we are not before a case of wilful misconduct, reckless conduct, but before gross negligence… insufficient to meet the requirements of the said art. 4 of the 1976 Convention; as it refers to wilful misconduct, reckless conduct , but it does not reach faulty conducts (even conscious behaviour)…"

Please note that one Judgement of a Court of Appeal does properly not constitute caselaw under Spanish law.

III. "WITH THE INTENT"/ "RECKLESSLY" – Degree of fault

9. How is "intent" in art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS or relevant implementing domestic legislation interpreted in your jurisdiction?

The Spanish version of the relevant IMO Conventions reads as follows: "…*con intención de causar ese perjuicio…*", which is construed in our Jurisdiction as an intentional act or direct "dolo" (*dolus*, in latin) bound to give rise to an unlimited liability. Such a behaviour may well entail a criminal liability as added to the unlimited civil blame.

10. How is recklessness under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS or relevant implementing domestic legislation interpreted in your jurisdiction? Does negligence qualify as recklessness ("Qualifying Negligence") under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS in your jurisdiction?

The Spanish version of the relevant IMO Conventions reads as follows:*"...o bien temerariamente…*", which alone means a behaviour unintentional but so careless and risky that goes against prudency and diligence. Together with "and with knowledge that such loss would probably result" (the Conventions qualify them to come together by the "and") is to be construed as a thoughtless omission of care that renders the harmful result to be one of probability, which would have not otherwise been such had knowledge been made use of diligently. Under Spanish law such an example of conduct may well amount to a criminal "*dolo eventual*" (dolus by eventuality, not direct).

The expression "qualifying negligence" may not be of use for our purposes. The answer, though, is that negligence alone does not amount to "*temerariamente*" (recklessly in the English version), which in any event goes together with "and with knowledge…" in the Conventions.
In any event, please refer to the answers to questions 6 ,7 and 8 above.

10a. If the answer to the previous question is in the affirmative, what are the elements of Qualifying Negligence under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

N/A, see answer to question 10.

11. What is the standard for recklessness under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

Always subject to the Spanish version of the Conventions (as good as any of other five official texts) and under Spanish law "recklessness", as thereunder, refers to an imprudent thoughtless omission carried out without intent but aware or consciously of a harmful result. The standards or degrees are to be ascertained by the Courts in the circumstances. An example might be the case of an owner who sends his unseaworthy ship to sail in winter to stormy waters. It must be noted that the Spanish term "*temeridad*" does not have a precise equivalent in English language.

12. How is "actual fault" in art. V(2) CLC 1969 interpreted in your jurisdiction?

"Actual fault" is interpreted as specific personal fault of the Owner that has a direct causative link with the incident.

13. How is "privity" in art. V (2) CLC 1969 interpreted in your jurisdiction?

"Privity" is an English term. The Spanish version of the IMO´s CLC69 is "*culpa del propietario*"**,** which would mean that the fault is not one of his own but was committed by the persons (the Master, servants or agents) for whose acts he may be responsible. In the well-known English case of "The Eurysthenes" (1976) it was granted that such faulty act or omission of those persons was executed or omitted with the knowledge and consent of the principal. The Spanish understanding is that the Owner is responsible for the acts and omissions of those persons and to that extents he may be liable (non-personal "culpa").

In any case, see answers to questions 9 and 10 above.

IV. KNOWLEDGE OF THE LIKELIHOOD OF THE HARMFUL RESULT

14. How is the requirement for knowledge in art. V (2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS interpreted in your jurisdiction?

"Knowledge" means "*a sabiendas*", which is a mental status of awareness based upon the care and diligence expected from an owner. That is, a knowledge qualified by the amount of care and diligence that ought to be expected from a shipowning entrepreneur.

15. Does imputed or background knowledge suffice for the purposes of art. V(2) CLC 1992/arts. 4 LLMC/arts. 7(5) and 9(2) HNS?

An imputed or background knowledge is not necessarily enough to break the limitation. See the answer to question to 15.a.

15a. If the answer to the previous question is in the affirmative, what are the relevant requirements?

If it is evidenced that the incident was due to causes of which the owner was or had to be necessarily aware, the imputed or background knowledge may suffice.

16. Does failure to obtain the necessary information suffice for the purposes of art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

Failure to obtain the necessary information, e.g., over areas of navigation or charts, may be one, but not limited to, of the examples but it would not be a matter for a test case. Such a failure alone would not suffice but it would depend on the context or the circumstances of the case, e.g., the charts of the port roads were not yet available after some underwater works had been carried out.

16a. If the answer to the previous question is in the affirmative, what are the relevant requirements?

The construction of the facts is a matter for the Courts as there are not specific requirements for defining or qualifying the knowledge of an owner. This a matter of evaluation of the evidences produced to the Court.

V. "SUCH DAMAGE" /" SUCH LOSS"

17. How has the term "such loss"/ "such damage" (art. 4 LLMC – art. V(2) CLC 1996/arts. 7(5) and 9(2) HNS 1996, respectively) been interpreted in your jurisdiction?

The LLMC 1996 and the CLC 1992 are authentic in Spanish language.

The Spanish version of the LLMC 1996 translated *loss* for the Spanish term "*perjuicio"* in its art. 4. However, in other articles the Spanish version of the LLMC uses a different term, "*daño",* while the English version refers to loss. Thus, the Spanish version uses indistinctly the terms "*perjuicio"* and "*daño"*, both meaning damages of any nature (property, personal, direct or indirect) that give rise to a claim.

The Spanish version of art. V(2) of the CLC 1992 uses the expression "*daños ocasionados por contaminación"*, which is defined in art. I(6) by reference to "*pérdidas"* o "*daños"*. This expression is comprehensive of damages of any nature that give rise to a claim.

We are aware that at least in the English jurisdiction, there have been interpretation issues regarding the potential different scope of the terms *loss* and *such loss* within art. 4 of the LLMC. This is not the case in Spain, since both terms, either in art. 4 LLMC or in art. V (2) CLC 1992, have the same meaning and scope: The loss that gave rise to the claim is comprehensive of damages of any nature which give rise to a claim under the Convention".

VI. BURDEN OF PROOF

18. Who bears the burden of proof to show that the requirements for breaking the right to limit are fulfilled?

The person challenging the right to limit bears the burden of proving that the requirements for breaking such right to limit are fulfilled (both the reckless conduct and knowledge that the relevant loss would probably result). The expression "*si se prueba*" (if it is proved), included in the Spanish versions of both the LLMC 1996 and the CLC 1992 deems to place the burden of proof on the person who is entitled to assert a claim under the Convention.

19. Is it possible under the procedural rules of your jurisdiction that the burden of proof may shift to the person liable under certain conditions?

The civil procedural principles in our jurisdiction determine that each party must prove the relevant facts leading to the legal consequences that is pleading before the Court, in particular under art. 217 of the Spanish Civil Procedure Act. This same article provides that when a legal provision establishes a special criterium regarding the burden of proof, it will prevail over the above.

On such basis, the person challenging the right to limit will bear the burden of proving the relevant act or omission committed with the intent to cause the loss or recklessly and with knowledge that the loss would probably result. Otherwise, the person holding the right to limit will rely upon such benefit.

There is a last rule in the same article which refers to the proof availability. It provides that the Court will, in each case, consider the availability of proof for each party. While we do not have any judicial precedent related to shipping matters, depending on the particular facts of a case we might open a door to the possibility that the Court shifts the burden of proof from the person challenging the right to limit to the beneficiary of such right, on the basis of the above rule. This might happen if the Court concludes that the beneficiary of the right to limit took advantage of the fact that the opponent did not have access to the relevant evidence. In this regard, there are a few cases in road carriage where the Spanish Courts prevailed the carrier from limit its liability for not having disclosed relevant evidence on the causes and circumstances of the loss of or damage to the cargo.

VII. INDICATIVE REFERENCE TO OTHER CONVENTIONS

20. What is the wording used to implement art. 10(2) WRC and art. 6 of the Bunkers Convention in your jurisdiction?

Art. 6 of the Bunkers Convention expressly preserves owner's right to limit liability under the LLMC. The wording used in art. 6 of the Bunkers Convention in order to preserve that right seems to us to be effective as a matter of Spanish law so that the relevant test and its interpretation is the same as with art. IV of the LLMC.

21. How have art. 10(2) WRC and art. 6 of the Bunkers Convention been interpreted in your jurisdiction in the context of breaking the right to limitation?

Art. 6 has not been the subject of caselaw yet in Spain. However, it is non-controversial among the commentators that the test is that of art. 4 of the LLMC.

VIII. EQUIVALENT PROVISIONS

22. The same language for the test for breaking the liability limits is used in art. IV (5)(e) of the Hague Rules as amended by the Visby Protocol:

22a. Has your country ratified the Hague-Visby Rules or enacted these rules into their domestic legislation?

Yes. Spain ratified the Hague Rules and Rotterdam Rules as well. Until the entry into force of the SSA 2014 the Hague Rules were enacted by an Act of 22nd December 1949 on the unification of certain rules for the bills of lading in merchant vessels (that could have been called the Spain's COGSA). However, for the sake of precision, The Hague rules had been published in the Official Gazette on the 31st July 1930 and the Visby Protocol (including the Protocol of 21st December 1979) was ratified on the 16th November 1981 published in the Official Gazzette on the 11th February 1984 Since the entry into force of the SSA the Title IV (shipping contracts), Chapter II (contract of affreightment), Section 5th (On the Bill of Lading) contains provisions about the carriage of goods under bills of lading and sea waybills. Section 9th refers to the liability of the carrier by loss, damage or delay.

Art. 282.1 reads that the limitation will be according to the Hague-Visby Rules and art. 282.3 states that the limitation shall be applied to all claims whether in contract or in tort and irrespective if the carrier or its agents are sued. The same article, paragraph 4 says that the carrier cannot rely on its right to limit when it be evidenced that the damage or loss have been caused by himself, wilfully ("*intencionadamente*") or recklessly ("*de forma temeraria*") and with knowledge of the probability of the damage ("*con conciencia de su probabilidad*").

22b. If the answer to the previous question is in the affirmative, how are the relevant criteria as listed above (II-V) interpreted in the context of the respective provision incorporating art. IV (5)(e) of the Hague-Visby Rules?

There is more caselaw in Spain with regards to the test for breaking limitation in the context of actions under contracts of carriage where the Hague-Visby Rules apply. There is very little caselaw since the entry into force of the SSA, but the test remains the same even though art. 283.3 of the SSA does not copy verbatim the Spanish version of the Hague-Visby Rules.

The Courts have applied the test purportedly in the same manner as they apply the test under the LLMC. However, the actual standard used by the Courts in applying the test has varied slightly from Court to Court. Some Courts have required a conduct that is closer to gross negligence (see Judgment of the Court of Appeal of Valencia of 13 July 2011) whereas others have applied a quasi-criminal standard ("*dolo*" or "*dolo eventual*") (see the Judgments of the Court of Appeal of Vizcaya of 15 July 2009 and Court of Appeal of Barcelona of 6 March 2017).