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The International Comparative Legal Guide to:

Shipping Law 2015

3rd Edition

A practical cross-border insight into shipping law

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the third edition of *The International Comparative Legal Guide to: Shipping Law*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of shipping laws and regulations.

It is divided into two main sections:

Two general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting shipping law, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in shipping laws and regulations in 41 jurisdictions.

All chapters are written by leading shipping lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Ed Mills-Webb of Clyde & Co LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Chapter 18

France

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1 Marine Casualty

1.1 In the event of a collision, grounding or other major casualty, what are the key provisions that will impact upon the liability and response of interested parties? In particular, the relevant law / conventions in force in relation to:

(i) Collision

The Brussels Convention of 23 September 1910 will apply to a collision between vessels which fly the flag of a state which is a party to this Convention. Otherwise, articles L5131-1 to L5131-7 will apply to a collision within French territorial waters.

The principal provisions of these texts are:

- the liability of interested parties is submitted to the proof of a fault; and
- an action for collision will be time barred two years after the event.

(ii) Pollution

Civil liability:

France has ratified the Convention on Civil Liability for Oil Pollution Damage of 1992 as amended by the 18 October 2000 amendment (the "CLC 1992") and the Supplementary Fund Protocol of 2003.

The CLC 1992 essentially channels claims for damages resulting from an oil pollution incident towards the shipowner of the vessel carrying the oil. It lays down a principle of strict liability for shipowners. However, the shipowner is normally entitled to limit his liability to an amount linked to the tonnage of the vessel, unless the damage resulted from its personal act or omission, committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result (referred to below as "inexcusable fault").

In particular Article III.4 provides that no claim for damages for pollution damage may be made against a number of listed parties unless the damage resulted from their inexcusable fault.

If the claim is against a party not listed in the CLC 1992, articles 1382 and *seq.* of the French Code Civil may also be applicable: mere negligence/carelessness can form the basis for liability in tort for any damage caused as a result of the oil pollution. There is no limitation of liability under these articles.

Articles L541-1 and *seq.* of the French Code of the Environment (implementing the European Directive 75/442 relating to waste) may also be relevant if the oil is to be considered as waste. In this context, it essentially provides that the costs of disposing of waste must be borne by the holder who has waste handled by a waste collector and/or the previous holder or the producer of the product from which the waste came. Similarly, there is no limitation of liability.

Criminal liability:

Under articles L218-18 and *seq.* of the Code of Environment, a mere fault of carelessness or negligence (as opposed to the usual inexcusable fault under the CLC 1992) will be sufficient to impose criminal liability, the penalties for which can be significant (up to Euros 37.5 million and even more – up to Euros 52.5 million – if the fault is more than carelessness/negligence).

Determining whether an act was careless or negligent will be left to the discretion of the court which is likely to include a broad variety of acts particularly in case of major pollution.

(iii) Salvage / general average

Salvage:

The Convention on Salvage of 28 April 1989 is applicable. However, it is applicable only save to the extent that a contract otherwise applies expressly or by implication. Unless in emergencies, a contract will be concluded most of the time (Lloyd's Open Form or less often *Formule Villeneau*).

French internal law also contains provisions regarding salvage. However, these will be applicable only where the Convention on Salvage is not applicable (for instance, where non-commercial State owned vessels are concerned).

Under both texts, the principles are similar. The salvage operations which have had a useful result give rise to a reward, with a number of criteria, such as the salved value of the vessel and other property, the skill and efforts of the salvors in preventing or minimising damage to the environment, the measure of success obtained by the salvor, etc., the reward being in the end determined by the judge in case there is no agreement between the parties. Both texts also provide for a special indemnity for salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment to cover all the expenses incurred by the salvor and, if it has in fact prevented or minimised damage to the environment, this special indemnity shall be increased by between 30 and 100% of the expenses actually incurred.

General average:

Articles L5133-1 to L5133-19 of the French Code of Transport and the decree of 7 July 1967 governs general average. However, these provisions are applicable unless the parties have agreed otherwise. In practice, as most of the bills of lading/charter parties incorporate Antwerp and York Rules, the latter will almost always apply rather than the French legal provisions.

While the Antwerp and York Rules are more precise than French internal law, the principles are similar, i.e. the expenses voluntarily incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure will be paid by those with an interest in the ship and its cargo in proportion to their values exposed to the common danger. Under both texts, the fact one of the parties committed a fault that was the cause of the endangering of the vessel does not prevent the opening of the general average procedure. However, the party not at fault may have a recourse action against the party at fault for any general average contribution it has paid/been held liable to pay. Special attention should be attached to time limits as both texts do not provide for the same (Antwerp and York Rules: six years from the termination of the voyage or one year from the issuing of the general average adjustment; French law: five years from the termination of the voyage).

(iv) Wreck removal

Since the ratification of the Convention on Salvage of 1989, the terms of which are broad enough to include the salvage of any property in danger, wreck removal will essentially be subject to the terms of the Convention, as a wreck can usually be considered as in danger.

The provisions of internal French law (articles L5142-1L5142-8 of the Code of Transport and decree of 26 December 1961) may be residually applicable, in particular, so far as the obligations of the owner of the wreck (in particular, where the wreck presents a danger), the ownership of the wreck, the sale of the wreck are concerned.

(v) Limitation of liability

France has ratified the Convention on Limitation of Liability for Maritime Claims of 19 November 1976 (LLMC) and the amending Protocol of 1996 (which is applicable to events which occurred after 23 July 2007).

There exist also French internal legal provisions as set out in the Code of Transport under articles L5121-1 and *seq.* regarding the limitation of liability which will be applicable to vessels below 300 tonnes or where no foreign interests are involved.

Under both texts, a number of listed parties (the list is more restrictive under French internal law, as for instance insurers are not listed; they may limit their liability under French internal law only if a limitation fund has been created) are entitled to limit their liability for maritime claims unless it is proven that the loss resulted from their personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. The limitation is to be calculated according to the tonnage of the vessel. However, for vessels below 300 tonnes, the limitations under French internal law are half those of the LLMC 1976 as amended.

It is worth mentioning that on 19 April 2012, the IMO announced new limits to enter into force, in accordance with the tacit acceptance procedure provided for in the amending Protocol of 1996 (which France has ratified). These new limits, which have been increased by 51%, have now come into force as from 8 June 2015.

(vi) The limitation fund

The Convention on Limitation of Liability for Maritime Claims of 19 November 1976 (LLMC) will be applicable (to the exception of the situations described in paragraph (v) above). The LLMC provides that the constitution, distribution of a limitation fund, and all rules of procedure therein will be governed by the law of the State Party in which the fund is constituted.

If the fund is constituted in France, articles L5121-6 and *seq.* of the Code of Transport and articles 59 and *seq.* of the Decree of 27 October 1967 will be applicable.

Essentially, upon an *ex parte* application before a commercial court which will authorise the opening of the constituting fund procedure and determine the modalities of constitution of the fund. Once the funds/guarantee have been remitted, the court will render another decision confirming the fund has been constituted.

As from the constitution of the funds, no enforcement measures can then be taken against assets of the party which has constituted the fund for any claims entitling the debtor to limit its liability. Additionally, if the LLMC is applicable, any conservatory arrest of the vessel will be lifted if the fund has been constituted in the port where the occurrence took place or, if the incident occurred outside a port, in the first port of call thereafter, the port of disembarkation, or the port of discharge or in the State where the arrest has been made. If only French internal law is applicable, the judge may ascertain first whether the party which has constituted the funds appears to be entitled to limit.

1.2 What are the authorities' powers of investigation / casualty response in the event of a collision, grounding or other major casualty?

After a casualty, the BEAMer, which is a State body, is seised by the administration to conduct technical investigations to ascertain the cause of the accident and to draw all consequences thereof to improve maritime safety. The BEAMer will request disclosure of the necessary documents, may interview the relevant parties, will request comments from the owners and will then issue its final report. The report has no legal value, but is often used as evidence by the parties.

The maritime authorities have broad powers to conduct investigations and/or to order parties to take appropriate steps and/or to themselves take these steps, in particular where the casualty is causing a danger (e.g.: they may order the removal of a wreck), and even more where a criminal offence has been or is being committed as a result of the casualty (e.g.: death of a crew member; pollution, etc.). In the latter case, the investigations may be conducted by the maritime police or the customs or a judge in charge of criminal investigations.

2 Cargo Claims

2.1 What are the international conventions and national laws relevant to marine cargo claims?

The following international conventions are applicable:

- The Brussels Convention of 25 August 1924 (the Hague Rules).
- The Hague-Visby Rules (the Hague Rules as amended by the Brussels Protocol of 23 February 1968).
- The Brussels Protocol of 21 December 1979.

Conversely, neither the Rotterdam Rules nor the Hamburg Convention of 31 March 1978 are in force in France. However it has to be noted the latter may be applicable by agreement.

Further, French internal provisions are contained in articles L5422-1 to L5422-26 of the Code of Transport.

2.2 What are the key principles applicable to cargo claims brought against the carrier?

Title to sue

According to circumstances, the following persons are entitled to sue the carrier for cargo claims:

- The parties to the contract of carriage (i.e. the shipper and the receiver).
- The lawful holder of the B/L.
- The real receiver.
- The shipper who suffered any damages.
- Any party interested in the carriage.

Liability of the carrier

Internal French law as well as Brussels Conventions provide the maritime carrier is responsible for lost and damaged cargo unless it demonstrates the loss and damage was caused by an exception provided for by these texts. Article L5422-12 of the French Code of Transport provides for nine exceptions and the Brussels Convention of 1924 provides for 17 exceptions such as act, neglect, or default of the master or insufficiency of packing. It has to be noted the fault of the carrier prevents the operation of the exceptions.

Limitation

Further, the maritime carrier is allowed to limit his liability. However, if it is demonstrated that a gross negligence/inexcusable fault has been committed, the limitation will not apply.

Time bar

Finally, the action against the maritime carrier is time barred one year after the cargo has been delivered to the receiver or should have been so.

2.3 In what circumstances may the carrier establish claims against the shipper relating to misdeclaration of cargo?

The shipper is liable towards the carrier for statements in the bill of lading.

3 Passenger Claims

3.1 What are the key provisions applicable to the resolution of maritime passenger claims?

Articles L5421-2 and L5421-3 of the Code of Transport provide the carrier is liable for the damage the passenger would have suffered individually provided his fault is proved. However, the fault of the carrier will be presumed in case of a major event. In these two cases, the carrier will be allowed to limit his liability.

Further, article L211-16 of the Tourism Code provides the cruise organiser will be liable towards the passenger without needing to prove any fault.

The European Regulations of 23 April 2009 (on the liability of the carrier) and 24 November 2010 (on assistance of passengers) entered into force on 18 and 31 December 2012.

The European Regulation of 23 April 2009 incorporates the Athens Convention of 1974 and its 2002 protocol. This Regulation provides different regimes of liability of the carrier depending on the type of event (major event or individual accident) and on the amount of the indemnity.

4 Arrest and Security

4.1 What are the options available to a party seeking to obtain security for a maritime claim against a vessel owner and the applicable procedure?

A party with a maritime claim against a vessel owner can arrest the vessel in respect of which the maritime claim arises or another vessel owned by the vessel owner. The claimant will base the arrest upon the 1952 Brussels Convention which will apply to the exclusion of French internal legislation if the vessel to be arrested in France flies the flag of a Convention state, or upon the French domestic regime as defined in the Code of Transport and the Code of Civil Procedures of Execution.

It is to be noted the Brussels Convention does not permit the arrest of a vessel owned by the vessel owner, but which does not relate to the maritime claim if the claim is in connection with the title or ownership of a particular ship or with disputes between co-owners or the mortgage or hypothecation of this ship.

The applicable procedure is as follows:

The application for the arrest order is made *ex parte* by a "*requête*" or summons. This document would normally contain brief details of the claim alleged and attach documents sufficient to allege a claim and/or to demonstrate there is a claim which appears to be well founded, depending on the applicable regime.

There is no duty of disclosure and it is therefore not necessary to outline any documents or defences that may be available to the opponents. No affidavit is required in support of the application. No security is necessary.

Once the arrest order has been signed by the judge, it has to be served on the master of the vessel amongst other persons, including the port authority. Then, the ship is under arrest.

A challenge to the arrest order should be made to the same judge who issued it. In theory, it is possible to obtain a hearing almost immediately.

If the judge following a challenge maintains the arrest order, the owner of the vessel is obliged to appeal to the regional Court of Appeal. It may take several weeks to obtain a hearing (though it has been done in 10 days) and in the meantime the vessel would remain under arrest.

4.2 Where security is sought from a party other than the vessel owner (or demise charterer) for a maritime claim, including exercise of liens over cargo, what options are available?

Pursuant to article 3.4 of the Brussels Convention and to the case law which interprets it, the holder of a maritime claim against time charterers or voyage charterer is allowed to arrest the vessel which relates to this claim (or another vessel in the ownership of the charterer) even if the vessel has been redelivered to a further charterer and even if the claim is not supported by a maritime lien.

Finally, the holder of a maritime claim can arrest a vessel owned by another party other than the debtor provided he demonstrates the

company which owned the vessel to be arrested is fictitious and that the "real" shipowner is the debtor. In other words, associated arrest is possible.

4.3 In relation to maritime claims, what form of security is acceptable; for example, bank guarantee, P&I letter of undertaking.

When the arrest order is obtained, it usually provides for the release of the vessel against a guarantee issued by a first class French bank, although theoretically the owner of the vessel arrested has the option of filing a P&I letter of undertaking or of making a cash deposit.

5 Evidence

5.1 What steps can be taken (and when) to preserve or obtain access to evidence in relation to maritime claims including any available procedures for the preservation of physical evidence, examination of witnesses or pre-action disclosure?

In the matters where there are technical issues or complex facts, the parties can commence summary proceedings requesting the court to nominate a court expert who will draft a report with his opinion on the facts/technical causes of damages. Then, in the proceedings on the merits, the court will usually follow the opinion of the court expert.

5.2 What are the general disclosure obligations in court proceedings?

There is no disclosure obligation under French procedural law. However, the judge may draw inferences from the absence of disclosure of a document by a party. A party may also request the judge to order the disclosure of a document under a daily financial penalty in case of failure to do so.

6 Procedure

6.1 Describe the typical procedure and time-scale applicable to maritime claims conducted through: i) national courts (including any specialised maritime or commercial courts); ii) arbitration (including specialist arbitral bodies); and iii) mediation / alternative dispute resolution.

i) National courts

A maritime case will usually be dealt with before commercial courts. The claimant will have proceedings served on the defendant for a hearing at which the court will usually adjourn the case to a further hearing to allow the claimant to disclose the documents in support of its claim and to enable the defendant to prepare its defence. Several adjournments may then take place before the case is pleaded before the court. Proceedings may take between one to several years until the first instance judgment is rendered depending on the number of parties and their conduct. The first instance decision can be appealed to the Court of Appeal which shall examine the entire case again. An appeal against the appeal decision may then be lodged before the Cour de Cassation which will consider only legal issues.

ii) Arbitration

If submitted to arbitration, most maritime cases would be referred to the Chambre Arbitrale Maritime of Paris (CAMP). The proceedings are initiated by sending a letter to the CAMP setting out the claim. The parties will then appoint their arbitrator, the third one being appointed by the CAMP, will exchange submissions and supporting documents, and will eventually plead the case before the arbitrators. The proceedings may take six months to 18 months before the decision is rendered.

iii) Mediation

A mediation procedure, as an alternative to proceedings before the Tribunal de Commerce has been put in place. Such a procedure is confidential. The mediation process is headed by a judge of the Tribunal de Commerce. However, this practice has not really developed yet in maritime matters. This is probably so because maritime disputes usually involve a large number of parties, mediation could involve revealing weaknesses which may be detrimental if the mediation aborts, and correspondence between French lawyers is confidential (which means that settlement negotiations can be initiated without the fear the exchanges are subsequently disclosed).

6.2 Highlight any notable pros and cons related to France that any potential party should bear in mind?

A notable pro compared to some common law jurisdictions such as England is that the overall cost of obtaining a first instance judgment can be significantly lower.

However, the availability of appeals means proceedings can be rather protracted.

A significant disadvantage is the absence of compulsory disclosure which means it can be difficult to gather crucial evidence to prove a claim or defence.

7 Foreign Judgments and Awards

7.1 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of foreign judgments.

Since 10 January 2015, the Regulation (EU) n°1215/2012 "*on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*" replaced Regulation (EU) n°44/2001 of 22 December 2000 which has the same title and scope.

Recognition of EU judgments

According to Article 36.1 of the EU Regulation n°1215/2012, "*a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required*". Such recognition prevents a dispute which has been ruled on by a court of the EU to be introduced again before another court of the EU. Further, this recognition is "automatic": the judgment is recognised without any further proceedings. However, the EU Regulation n°1215/2012 provides for some limited cases where the recognition can be challenged.

Enforcement of EU judgments

The main innovation of the new Regulation n°1215/2012 is the abolition of the "enforcement" proceedings which had to be undertaken to enforce in an EU Member State a judgment rendered in another EU Member State and which was provided by the Regulation (EU) n°44/2001. According to Article 39 of the new Regulation n°1215/2012: "*a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required*".

Finally, the EU Regulation n°805/2004 facilitates the circulation of judgments regarding indisputable claims.

Recognition and enforcement of foreign judgments (except EU judgments)

Other foreign judgments may be enforced after enforcement proceedings during which the international regularity of the judgment is checked. The reinforcement proceedings are commenced by a summons before the Tribunal de Grande Instance.

7.2 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of arbitration awards.

The recognition and the enforcement of arbitration awards (provided by articles 1514 to 1527 of the French Code of Civil Procedure) before the French courts are both submitted to the same conditions: the claimant must demonstrate the existence of the award; and the absence of conflict with international public policy.

The application for the enforcement proceedings is made *ex parte* by a "*requête*" or summons which are filed before the President of the Tribunal de Grande Instance. An appeal may be lodged against the order rendered by the President of the Tribunal de Grande Instance. Then the proceedings become *inter partes*.

However, the cases in which the enforcement can be refused are limited and are set out in article 1520 of the French Code of Civil Procedure as follows:

1) if the arbitration tribunal stated wrongly he had or had no jurisdiction;
2) if the arbitration tribunal has been unlawfully constituted;
3) if the arbitration tribunal has ruled upon the matter contrary to the assignment referred to him;
4) if the rights of the defence have not been respected; or
5) if the recognition or the enforcement of the award is contrary to the international public policy.

8 Updates and Developments

8.1 Describe any other issues not considered above that may be worthy of note, together with any current trends or likely future developments that may be of interest.

There are no issues other than those discussed above.

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Leïla is a member of the French Maritime Law Association (AFDM). She is also a lecturer on Anglo-French translations in insurance, maritime and road carriage law at the University of Paris VII. She also teaches French procedural law and cargo insurance policies to insurers and brokers.

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Guillaume is a member of the French Maritime Law Association (AFDM).

LEWIS & CO AARPI

A truly Anglo-French Law firm, LEWIS & CO AARPI is based in Paris with four lawyers, Guillaume de Bascher, Leila Esnard, Peter Iglikowski and Lars Lewis. All are avocats at the Paris Bar, and the two founding partners, Peter Iglikowski and Lars Lewis, are also qualified and practise as solicitors in England and Wales. LEWIS & CO AARPI provides a full range of international services in shipping, international trade, insurance and commercial law.

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