

Spain

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Part II. Flag and Registration of Vessels Mortgages of Vessels

*This chapter has been reviewed by the Author and
is up-to-date as of June 2021*

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Part II. Flag and Registration of Vessels Mortgages on Vessels Priority of Claims

A. *Flag and Registration of Ships and Vessels under Construction*

1. FLAG AND REGISTRATION OF VESSELS

1.1. *Sources of law and principal rules*

The Spanish registration of vessels is a dual system. The vessel must be registered in the Movable Property (Chattels) Register within the Mercantile Register (*Registro de Bienes Muebles del Registro Mercantil*) and the Maritime/Administrative Register (*Registro de Buques y Empresas Navieras*). In addition, the Maritime Register comprises an Ordinary Register (*Registro Ordinario*) and a Special Register for special tax regimes (*Registro Especial*), located in the Canary Islands. Furthermore, fishing vessels must be registered in a special Fishing Vessels Register. This Administrative Register is governed by the General Directorate of Merchant Marine.

The effects of the Chattels Property Register are private and affect ownership and other rights over the vessel. The Register is of importance in transactions between individuals: buying and selling, mortgages, arrests and other liens, legitimization of ownership and other rights over the vessel. The general effects of the Register are: principle of presumption, legality, continuity (*tracto sucesivo*), registration qualification, substantive and formal publicity. From an organizational point of view, the Mercantile Register comes under the General Directorate of Registers and Notaries (*Dirección General de los Registros y del Notariado*) of the Ministry of Justice (*Ministerio de Justicia*).

By contrast, the Maritime Register has administrative, policy and control effects. It exercises its jurisdiction in the public sphere before government agencies and before the State. However, it has no jurisdiction over private transactions, such as those mentioned above, which are reserved for the Mercantile Register.

Registered vessels in Spain are protected by Spanish legislation and have the right and obligation to carry the Spanish flag at all times (in fact her absence is fined by the Maritime Authority). Effects such as those of nationality, domicile, jurisdiction, legislation arise from registration of the vessel and entry in the Maritime Register. Administratively, the Maritime

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Register is organized and managed by the ‘Maritime Administration’ – the General Directorate of Merchant Shipping (*Dirección General de La Marina Mercante*) of the Ministry of Transport and Mobility.

The principal sources of law concerned with one or the other of the Registers are given below in chronological order:

- (a) Register of Chattels within the Mercantile Register:
 - (1) The 14/2014 Act, Maritime Shipping Law.
 - (2) The Shipping Mortgage Act 1.893 of 21 August (*Ley de Hipoteca Naval*) hereinafter referred to as LHN, still in force, although any of the articles have been repealed by Act 14/2014.
 - (3) Maritime Shipping Law 14/2014, 24 July 2014.
 - (4) Articles 145–176 of the Mercantile Register Regulation of 14 December 1956 (*Reglamento del Registro Mercantil*), hereinafter referred to as RRM, modified by the later RD 1.828/1.999.
 - (5) Royal Decree 1828/1999 (*Disp. Adic. Un.*) on the Registry of Chattels that unifies the previous regulations of the Mercantile Register for Vessels and Airplanes.
 - (6) Order of 19 July 1999 on instalment sales (*Orden de 19 de Julio de 1999 por la que se aprueba la Ordenanza para el Registro Mercantil de Ventas a Plazos de Bienes Muebles*). Its second, third and fourth transitory provisions establish that the following will be registered in section 1 of the Chattels Property Register: vessels and airplanes, the rules applicable to the property registered, and the competency rules regarding the different types of vessels.
 - (7) Royal Decree 388/2.000, Chattel Mortgage and Pawn (particularly Article 7).
 - (8) Article 86 ter 2.c) of Judiciary Organization Power Act, 1985 (*Ley Orgánica del Poder Judicial 6/1985, de 1 de julio*) grants jurisdiction and competence to Commercial Courts in all civil disputes about Maritime Law (Gazette, No. 164, 10 July 2003).
- (b) Administrative Maritime Register:
 - (1) Royal Decree 1027/1989 of 28 July on flagging-in, vessel registration and the Maritime Register, hereinafter referred to as RD 1027/1989, modified by the Royal Decree 638/2.007 of 18 May on Maritime Captaincy and Districts (First Final Provision).
 - (2) Royal Decree 544/2007 of 27 April on flagging-in and registration of pleasure ships, boats, craft and yachts.
 - (3) Royal Legislative Decree 2/2011, of 5 September, which approves the revised text of the State Ports and the Merchant Marine Act (former *Ley de Puertos del Estado y de la Marina Mercante*), hereinafter referred to as RDL 2/2011. This Regulation compiles all the previous Port Acts, such as Ley 27/1992, Ley 62/1997 and Ley 33/2010; all of them are repealed by the cited 2/2011 Royal Legislative Decree.

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Finally, it is worth noting that the Spanish Constitution (*Constitución Española de 1978*) grants exclusive competency over ‘Mercantile Legislation’ and ‘Merchant Shipping and Flagging-in of Vessels to the Central Government’. The Autonomous Communities and other territorial entities have no competency over these matters.

1.1.1. Restrictions as to the nationality and/or domicile of the owners

Royal Decree 1027/1989 does not clearly determine the nationality or domicile requirements for shipowners wishing to register their vessels in Spain. However, the LPEMM (Ley de Puertos del Estado y Marina Mercante, the old 27/1992 Act), which, as previously stated, has been repealed by Royal Legislative Decree 2/2011 TRLPPEMM (Reformed text Port Law and Merchant Marine), eliminates all restrictions based on the nationality of the owners and authorizes the flagging-in of vessels in Spain by individuals with residency and by legal entities domiciled in Spain or in any of the European Union (EU) countries, provided that in the latter case they nominate a legal representative in Spain (Article 252.2 RDL 2/2011). Under this Regulation, therefore, it is only necessary to have Spanish residency (individuals) or domicile (legal entities), and in the case of being domiciled in another EU country, to have permanent representation in Spain.

The situation is similar for the Special Register of the Canary Islands (known as the second Register), although, in this instance, access is limited to shipping companies operating merchant vessels (excluding fishing boats and pleasure craft). All ships may apply for registration as long as they comply with the minimum requirement of having an establishment or permanent representation in the Canary Islands, through which they will exercise their rights and fulfil the obligations assigned by the applicable legislation (Additional Provision 16.4) RDL 2/2011).

Where the owner is a legal entity, no restrictions exist on the nationality of the company’s partners or shareholders or on that of the administrators (this is clearly implied by the LPEMM and by Article 10(2) RD 1027/1989).

According to the general legislation applicable to foreign investments in Spain (which repeals the restrictions contained in Decree 390/1966 of 10 February on foreign participation in Spanish shipping companies), no restrictions exist here either. This legislation does not consider maritime transport to be a specific sector subject to administrative authorization. Administrative or ‘audited’ control (*verificación*), as it is known, is only necessary when foreign participation exceeds 50% of the capital or of a fixed amount (*see* the text of Royal Decree 664/1999, 23 April, on Foreign Investment).

Every reference to the conditions for registration in the Maritime Register is relevant for inscription of the vessel in the Mercantile Register, as access to

the latter is reserved for ‘vessels carrying a Spanish flag and registered in Spain’ (Article 145(1) of the RRM). In other words, entry in the Mercantile Register is impossible without prior registration in the Maritime Register.

1.1.2. Links between registration and flag

Vessels registered and flagged-in Spain are subject to Spanish legislation in all respects (Article 252 RDL 2/2011). The relationship between the vessel’s nationality and Spanish interests is established by the ownership and domicile requirements (or those of domicile and representation according to the RDL 2/2011).

This link is also assured by the requirement that the Master and First Officer in Spanish vessels hold a European citizenship (in line with EU law, the LPEMM has eliminated the previous condition that all crew members of Spanish merchant vessels should be Spanish. With the sole exception in certain cases – when, i.e., public power could be a compromise – of the Master and the First Officer, it is possible to contract EU citizens to sail in Spanish vessels).

With regard to vessels entered in the Special Register of the Canary Islands, the regime is even more liberal. In general, the Master and the First Officer should be Spanish; the remaining 50% of the crew should be EU citizens and the other 50% may be of any other nationality. However, if unavailability of workers, economic viability or any other reasons of fundamental importance to the service render it necessary, the Maritime Administration (Ministry of Transports and Mobility) may authorize up to 100% of the crew to be either Spanish or EU citizens, excluding as always the Master and the First Officer (*see* Additional Provision 16 RDL 2/2011).

Finally, the role carried out by the Spanish Maritime Administration in regulating and controlling the navigation of Spanish vessels is effective in guaranteeing its international obligations, exercising jurisdiction and controlling the administrative, technical and social areas.

1.1.3. The possibility to flag-in or flag-out

The export or import of vessels is permitted and governed by the general legislation applicable to the foreign trade of goods. The need to obtain administrative authorization from the Treasury Department (*Ministerio de Economía y Hacienda*) depends on the country of departure or destination (in general foreign trade between EU, America Caribbean Pacific and European Free Trade Association countries is totally free and, in other cases, there tends to be no problem in obtaining authorization).

From the point of view of maritime legislation, the basic rules are found in the RDL 2/2011 (Article 255). A general freedom surrounds imports. The

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only requirement is to provide evidence of de-registration from the Register of origin and to pass all technical safety inspections or any others applicable. Likewise, there is a general freedom associated with exports, which are only subject to the payment or provision of a guarantee to safeguard the interests of those creditors entitled to exercise an action in rem against the ship and who have registered their credit in the Mercantile Register. Applications for de-registration from the Maritime Register are presented by the interested party to the Directorate General of Merchant Shipping and are assumed to be granted in forty-five days unless informed otherwise. The LPEMM anticipates some restrictions on the export of vessels which the Government may impose in exceptional cases. A significant number of documents and paying relevant minor taxes are also required to fulfil the process.

As to the specific procedure to be followed, the concession of the Spanish flag to imported foreign vessels requires the process of *abanderamiento* (flagging-in) which must be authorized by the Directorate General of Merchant Shipping. Likewise, de-registration from the Register and export of a national vessel requires the authorization of the Directorate General of Merchant Shipping.

Articles 13 and 22–24 of RD 1027/1989 describe the documentation to be presented and the procedure to be followed for the flagging-in of imported vessels.

De-registration of a Spanish vessel from the Maritime Register in order to be transferred overseas is considered and regulated in detail by Articles 57, 58 and 59 of RD 1027/1989.

De-registration of a vessel from the Mercantile Register to be transferred overseas is considered by Articles 155 and 176 RRM. These provisions, together with those of RD 1027/1989, imply the need to lodge a public deed or original document recording the transfer, for the notaries or consular authorities to approve the transfer, and to notify the Mercantile Register, thus enabling it to record the vessel's de-registration (*see* Articles 155–176 RRM).

2. REGISTRATION OF A VESSEL

2.1. *Types of Register*

– *Maritime Register*

Each Maritime District (or Maritime Captaincy or Harbour Master Office according to the terminology employed by the LPEMM) has a Maritime Register or Register for the Registration of Vessels (*Registro de Matricula de Buques*), a Home Port system present in all the important ports. Each vessel may be registered in one of these Registers simultaneously, any one of which may be freely selected by the interested party but not changed once

definitive registration is granted and while the vessel has the right to carry the Spanish flag.

In addition, there is a Central Register in Madrid managed by the Directorate General of Merchant Shipping. This Register records all the information on the vessel that may be necessary to ascertain its potential use and destination. In addition, it registers all changes related to the ship's ownership, name, list, export, works and important repairs, break-up, loss by accident, as well as other incidents which may befall a vessel from its entry in the Register to its de-registration (Articles 8–10 of RD 1027/1989).

– *Special Maritime Register (Canary Islands Register)*

The Special Register was created by the LPEMM (and still regulated by the RDL 2/2011) is known as the 'The Special Register of Vessels and Shipping Companies' (*Registro Especial de Buques y Empresas Navieras*). This Register is located in the Community of the Canary Islands and has an administrative office in the Marine Captaincy of Canary Islands, Las Palmas de Gran Canaria, and another in the Maritime Captaincy of Santa Cruz de Tenerife, reporting at all times to the Ministry of Transport and Mobility – Actual name since 2020 of the competent Ministry.

– *Chattels/Movable Property Register within the Mercantile Register*

The books for the registration of vessels in the Mercantile Register are located in the main maritime cities having an office of this Register (*see* Article 10(2) RRM, which must be considered as being valid due to its concordance with Articles 145 et seq.). Royal Decree 1027/1989 stipulates that vessels shall be entered in the Mercantile Register corresponding to the province or maritime district (Maritime Captaincy) in which they have been registered (Article 19).

– *Fishing Vessels Register*

The fishing vessels must be registered in a third Register as well, the so-called Fishing Vessels Register (*Registro de Buques Pesqueros*). According to Act 33/2014 of 26 December, on National Sea Fisheries, the Ministry of Agriculture, Fisheries and Food has a special section for fishing vessels in the general 'European Fishing Vessels Register', the so-called 'Fishing Vessels Register'. This Register must communicate all data to the Maritime Register. This Register is a mere Administrative Register which main aim is allocating the fishing quotas belonging to every fishing boat.

2.2. *Types of vessels eligible for registration*

All vessels, craft or naval apparatus, whatever their country of origin, tonnage or activity, are eligible for registration in the Maritime Register

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(Article 1 RD 1027/1989). This Register comprises several books known as *Listas*, in which different types of vessels are entered:

First List: Platforms used for the extraction of products from the marine subsoil, sea-going tugboats, support vessels and those assigned to the provision of supplies to the platforms (off-shore);

Second List: Vessels dedicated to the maritime carriage of goods, passengers or both;

Third List: Vessels destined for the capture and extraction for commercial purposes of fish and other live marine resources;

Fourth List: Auxiliary fishing craft, auxiliary craft for aquaculture and apparatus used for the cultivation or classification of marine species;

Fifth List: Tugboats, craft and naval apparatus assigned to port services or bays;

Sixth List: Sport or pleasure craft used for lucrative purposes;

Seventh List: Craft used exclusively for sporting or recreational purposes, including non-professional fishing; the Order of 16 December 1998 also includes marine motorcycles.

Eighth List: Ships and vessels belonging to public/governmental entities;

Ninth List: Ships, vessels and naval craft under construction.

There are particular rules for the Special Maritime Register of the Canary Islands. All merchant vessels, constructed or under construction, are eligible for registration as long as they are 100 GT or over, and the *Registro de Buques y Empresas Navieras* is not limited to recording the vessel's belonging to or being in the possession (in commercial and maritime matters) of the shipping company applying for their registration (Additional Provision 16(4) RDL 2/2011). These vessels may not be used for coastwise trade, although the Act authorizes the Government to eliminate this restriction when it is considered convenient in view of EU proceedings for the deregulation of coastwise trade (Additional Provision 16(5) RDL 2/2011).

All these vessels, craft and lifesaving apparatus falling under the wide legal definition contained in Articles 146 and 147 RRM are obliged to be registered in the Mercantile Register. In practice, this means that access to the Register is available to all those crafts coming under Lists 1–6 and List 9. Registration of those vessels under List 7 (for exclusively sporting use) is not obligatory but optional. The only vessels which seem to be clearly excluded are those in List 8 (vessels employed by the State for public services of a non-commercial nature).

2.3. *Legal form under which owners of registered ships may be organized*

As mentioned previously, the owners of those vessels registered and flagged-in Spain may be physical persons (including joint owners) or legal entities of any nature (partnerships, commercial companies, cooperatives, joint venture, civil entities, etc.).

2.4. *Particulars recorded in the Register*

The RDL 2/2011 states in general terms that, for identification purposes, the Maritime Register must specify in detail the registered ship, its essential circumstances, modifications, any acts, transactions and contracts pertaining to the transfer or acquisition of its ownership, and those related to the creation of mortgages or imposition of liens and any other matter established legally or in due form (Article 251 RDL 2/2011).

Royal Decree 1027/1989 emphasizes the need to enter in the Maritime Register all details related to the identification of the vessel and its owners, from the very beginning of its construction if this occurs in a Spanish shipyard, or, if relevant, from the moment of import. Chapters III and IV of RD 1027/1989 specify in detail the full requirements and procedures to be observed for registration and for maintenance of the Register's folios also called 'Hoja de Asiento' (kind of Register physical page) throughout the life of the vessel.

The above is without prejudice to the obligation of registering the vessel in the Mercantile Register. As stated in the RDL 2/2011 TRLPEMM, in a clear reference to the Mercantile Register, the Maritime Register system does not provide exemption from the obligation to register in other public Registers (Article 251(4)) (Article 75(4)). All details necessary for the adequate identification of the vessel, as well as any modifications made to them, must be entered in this Register. In addition, all acts, transactions and contracts by virtue of which the ownership or transfer of ownership of the vessel is affected or effected or which modify or cancel encumbrances of any type must also be entered (Article 145 RRM). Article 152 RRM states all the facts and information on the vessel that must be recorded in the Mercantile Register.

Under Spanish law, therefore, there exists not only a double system of registration but a complete duplication. The Maritime/Administrative Register (technical aspects and identification) and the Mercantile Register (Movable Property Register) are not restricted to the indication of ownership of and encumbrances on the vessel. Both encompass the two types of issues. Their correlation and harmony are assured through inter-connected provisions. The first entry which must be made in the Mercantile Register is that of ownership. This is accomplished by presenting a certified copy of the flagging-in and registration in the Maritime Register (*see* Article

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149 RRM). In order to safeguard the coordination between the two Registers, the Maritime Register is obliged to notify the Mercantile Register directly of any entries made related to changes of name or lists, vessel modifications, de-registration due to loss by accident, break-up or overseas sale (*see* Article 59 RD 1027/1989). On the other hand, for the same purposes of coordination, transfer of ownership, duties and encumbrances are first recorded in the Mercantile Register and the interested parties must subsequently notify the Maritime Register (Articles 52–57 RD 1027/1989). All the technical details in the Mercantile Register are those recorded in the so-called document ‘Hoja de Asiento’.

2.5. Cost of registration

Prior to the LPEMM, no special fees existed for the registration of vessels in the Maritime or Mercantile Registers. The LPEMM established a fee system for registration in the Maritime Register which is applicable to the traditional or primary Register, as well as to the special or secondary one. There are three types of fees: (a) registration fee; (b) de-registration fee; (c) annual fee for retention in the Registers. The shipping company is responsible for payment of these fees and the amount is set at EUR 0.15 per unit of ship measurement (gross tonne, GT), with a minimum of EUR 1503. According to the nature of the act the fees vary although costs are quite reduced. This amount is revised annually in line with the consumer price index (Twenty-Eighth Additional Provision (6) RDL 2/2011).

2.6. Errors and changes in the Register

No special provisions exist with regard to errors made in the entries of vessels in either of the two Registers. All included technical data must be the same in both Registers. With regard to the Maritime Register (traditional and special), it is necessary to follow the general system set out in the Administrative Procedure Act (*Ley de Procedimiento Administrativo* (LPA Act 39/2015)). The authority responsible for the Register may rectify, at any moment, directly or at the request of the interested party, any substantive, factual or arithmetical errors (Article 109 LPA). If the error cannot be determined to be either substantive or factual, the interested party, if it so desires, may file an appeal with the Minister for Public Works and Transport requesting an amendment in the administrative transactions and acts by virtue of which registration was effected (Articles 112–126 LPA).

Rectification of errors in the Mercantile Register is governed by Article 40 RRM. This provision relates to the mortgage legislation applicable to this matter (Articles 211–220 of the Mortgage Act (*Ley Hipotecaria*)) granted by

the Decree of 8 February 1946 and Articles 314–331 of its Regulation (*Reglamento Ley Hipotecaria*) granted by the Decree of 14 February 1947.

Changes not resulting from the previously discussed errors may normally be made in both Registers on request by the interested party authorized to do so (*see*, for example, Article 58 RD 1027/1989 on changes to lists or to the vessel's name in the Maritime Register). However, only those vessels in the first or second lists or those which are bareboat- or time-chartered may change their names once they have obtained their identification (*see* Article 17 RD 1027/1989).

Authorized changes of name are recorded in the Mercantile Register with a marginal annotation and upon notification from the Maritime Captainty. Other important substantive alterations to the vessel require a new entry, which is made on application by the interested parties with supporting documents and the appropriate certificate from the Maritime Captainty (*see* Article 153 RRM).

3. DOCUMENTATION REQUIRED FOR REGISTRATION

3.1. Generally

In general, the documents listed in Article 44 RD 1027/1989 are necessary for the maritime administration (Directorate General of Merchant Shipping) to issue the ship's documentation, that is, the *Rol (Crew List) de Despacho y Dotación* or *Rol de Navegación* (or the *Rol Provisional* if applicable) which, together with the *Patente de Navegación* (Certificate of Navigation), are the documents authorizing a vessel to navigate under a Spanish flag.

As the access to the Mercantile Register can only be gained through prior registration in the Administrative/Maritime Register, and such registration is not official until the above documents are granted, the vessel may not be registered in the Mercantile Register without their prior submission and without the relevant registration by the Administrative Register.

3.2. Differences between registration for a new building (first registration) and a ship previously registered in another country

In the general case of vessels constructed in Spanish shipyards, RD 1027/1989 regulates, in detail, the entire process of administrative intervention, from the initial application by the building constructor and the official contracting party to the granting of the *Rol Definitivo* and the *Patente de Navegación*. This process is known as 'flagging-in' (Article 14). The flagging-in of imported vessels, which has already been discussed, is considered to be a special case (Articles 22–24 and 13 and, in general, Chapter III RD 1027/1989).

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In the particular case of the registration and flagging-in of an imported vessel, the provisions related to construction, launching and official tests are logically not applicable. However, in addition to the submission of the documentation mentioned in section 1.1.3. *supra*, the vessels must pass required technical inspections in order to obtain the official certificates listed in section 3.1. Only then is it possible to obtain the necessary documentation (*Rol Definitivo* and *Patente de Navegación*) and be definitively registered in Spain.

The RDL 2/2011 TRLPMM exempts foreign vessels which are provisionally registered in Spain in the Special Register of the Canary Islands, from having to de-register from the flag of origin (Additional Provision 16(4) RDL 2/2011). However, it seems that this should be understood as meaning that a certificate of 'suspension of registration' from the Register of origin must be at least presented.

At the same time, the act demands that vessels coming from other Registers and requesting registration in the Special Register prove their compliance with the safety rules established by the Spanish legislation (including the incorporated international conventions) and for which purpose they may be subjected to an inspection, of a technical nature, to be carried out prior to the granting of registration.

In all cases, regardless of whether they involve the ordinary Maritime Register or the special one, vessels proceeding from other Member States of the EU used to be governed by the Council of Ministers' Regulation (EU) No. 613/91, 4 March 1991, related to the change of Register by vessels within the EU, which has been repealed by Regulation (EC) No. 789/2004 of the European Parliament and of the Council of 21 April 2004 on the transfer of cargo and passenger ships between Registers within the union. This provision allows those ships already identified and certified by the maritime administration of the country of origin to be exempted from certain technical and registration requirements.

3.3. *Vessel sold in a forced sale*

The cases considered in RD 1027/1989 for the flagging-in of an imported vessel are applicable. Included are those foreign-flag ships which have been salvaged or seized for breach of obligations, as well as those which have been appropriated through judicial resolution. The same procedures apply in all these cases as for any other imported vessel, the import having to be certified in the corresponding document issued by the Treasury Department.

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4. DE-REGISTRATION

4.1. *After a sale*

De-registration of a vessel from the Spanish Maritime Register may occur as a result of its break-up, overseas sale (be it a voluntary sale or a forced sale by judicial adjudication), sinking or suffering total loss by accident, and is regulated by Articles 58 and 59 RD 1027/1989.

4.2. *After a total loss*

De-registration from the Mercantile Register occurs once the vessel's disappearance, destruction or transfer overseas has been entered in the Maritime Register. The Maritime authority (Maritime Captaincy) must notify the Mercantile Register of the de-registration to enable the latter to make the closing entry (Articles 176 and 155 RRM).

4.3. *Is the mortgagee's consent required?*

Yes, as mentioned, RD 1027/1989 prohibits the transfer overseas of a vessel burdened with charges or encumbrances (Article 57). The RDL 2/2011 specifies that the encumbrances in question are those entered in the Mercantile Register and requires the provision of substitutive guarantees in the national territory at the disposal of the creditors. In particular reference to mortgages, the Shipping Mortgage Act (LHN) states in Article 40 that encumbered vessels may not be transferred overseas without the vendor having previously deposited in trust, in the manner prescribed in Act 15/2015 on Voluntary Jurisdiction, the amount of the credit secured by the mortgage. Otherwise the sale will be void and the vendor will incur the sanction established in the Criminal Code.

In practice, the transfer overseas of a vessel which is the object of any registered encumbrance (not only a mortgage), is authorized, provided that a public deed signed before a public notary (and duly apostilled) is presented certifying the consent of all the creditors of such charges or encumbrances.

4.4. *Government's consent*

This question has already been answered in section 1.1.3. *supra*. No prohibition exists on the export of vessels. It is only necessary to comply with the export procedure as set by the Treasury Department as is done for the export of any other types of goods. In addition, it is necessary to obtain the permission of the Directorate General of Merchant Shipping which is

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granted without difficulty once de-registration is legalized and without prejudice to that discussed in section 4.3. *supra*.

5. LEGAL EFFECTS OF THE REGISTRATION

Registration in the Maritime Register subjects vessels to Spanish legislation and to all its effects. In particular, it allows them to enjoy the rights granted by the legislation and to carry the Spanish flag.

Nevertheless, for a vessel to be authorized to sail the seas under the Spanish flag, it is necessary to obtain a document known as the 'Navigation Certificate' (*Patente de Navegación*). This is the very document which authorizes the master to discharge his/her functions on board the vessel. The Navigation Certificate is granted by the Ministry of Transports and Mobility and is issued by the Directorate General of Merchant Shipping to a particular ship. As an exception, the flag and command of vessels with a gross tonnage inferior to 20 GT are not accredited by the certificate but by the 'Rol de Navegación'. In these cases, the application for the certificate is optional and not obligatory. Rules exist for the attainment, retention, loss and renovation of the certificate, etc. (Articles 25–33 RD 1027/1989).

An entry in the Mercantile Register has the principal effect of permitting third parties to contest the registered deeds and contracts in accordance with the principles of registration (Act 14/2014, 24 July, on Maritime Navigation and Article 147 RRM).

Finally, as far as the effects of international private law are concerned, vessels flagged-in Spain are governed by Spanish law regarding ownership and encumbrances (Article 10(2) Civil Code) year 1889.

6. THE INTERNATIONAL CONVENTIONS FOR UNIFICATION OF CERTAIN RULES RELATING TO MARITIME LIENS AND MORTGAGES, 1926 AND/OR 1967 AND PARTICULARLY 1993

Spain was a Contracting State of the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 10 April 1926 (ratifying instrument of 2 June 1930, Gazette No. 212, 31 July 1930).

This 1926 Convention was superseded by the ratification of the new Convention of 1993, according to the denunciation published in the State Official – Spanish – Gazette No. 99 (23 April 2004).

Certain doubts exist as to the Convention's scope of application. The clearly prevalent interpretation of Article 14 is that Spanish tribunals are to apply the Convention's uniform provisions in preference to internal ones only where the vessel belongs to a Contracting State and possesses a foreign element. However, case law seems to accept the application of the

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Convention in circumstances where the only requirement satisfied is that of being a vessel of a Contracting State, that is, even where all the interested parties, the creditors and the vessel, are Spanish (some examples are the Sentences of the Supreme Court STS 22 May 1989, 9 March 1990, 18 June 1990, 5 November 1992 and 1 June 1992). Nevertheless, this is not a question which may be considered as being definitely resolved.

The International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 27 May 1967, has never been ratified by Spain. However, Spain has ratified the International Convention on Maritime Liens and Mortgages, done at Geneva, 6 May 1993, by publication of the text of the said Convention in the State Official Gazette No. 99, 23 April 2004.

7. FLAGGING-IN VESSELS WHICH REMAIN REGISTERED IN ANOTHER COUNTRY

This procedure is permissible under Spanish law and is associated with an international shipping lease. The RDL 2/2011 has maintained this permissive regime (Article 252 RDL). The procedure is regulated by RD 1027/1989 (Articles 4(2), 13(4), and 22(2)). In addition, the procedure is assumed to be a case of temporary import and consequently, apart from having to observe the formalities of the Maritime Register listed below, it is necessary to comply with those provided by the Treasury Department's foreign-trade legislation. On this point, the RDL 2/2011 is confined to stating that Spanish civilian vessels (included are those of any list) may be provisionally flagged-in overseas and foreign ones flagged-in Spain, in those cases which are legally determined.

7.1. Permission required

It is necessary to lodge an application with the Directorate General of Merchant Shipping. This Directorate, in turn, lodges a proposal with the Minister for Transports and Mobility – the authority which approves the provisional flagging-in of foreign vessels in Spain.

7.2. Time for which permission can be granted

No limits exist. Permission is granted for the requested period and may also be extended on application by the interested party.

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7.3. Conditions to be fulfilled to receive permission

No special conditions exist related to the vessel's type, age or claimed activity. Any vessel from any list may be provisionally flagged-in, as long as a lease has been previously contracted, in which the lessee is a physical person or a legal entity domiciled in Spain. Previous public permission must be received.

7.4. Documentation required

The following documents are to be submitted: (a) official document certifying the temporary import; (b) certificate of de-registration from the Maritime Register of origin; (c) a lease (Article 13(4) RD 1027/1989). In addition, the interested party must lodge an application proposing three names for the vessel, as well as present proof of having liquidated any customs charges applicable (Article 22(2) RD 1027/1989). Any documents granted overseas must be certified by the Spanish Consulate with jurisdiction at the place where they have been granted. Such legalization is to be endorsed by the Ministry of Foreign Affairs and its text translated into Spanish (Article 24 RD 1027/1989).

7.5. Will the ship be registered (double registration), in which kind of register and with which particulars?

As already mentioned, RD 1027/1989 stipulates that deletion from the Register of origin is necessary. However, the Directorate General of Merchant Shipping has specified that this deletion may be as much temporary as permanent. Consequently, there seems to be no impediment to the vessel retaining its entry in the Register of origin as long as this includes an annotation of deletion or temporary suspension. This is also the solution provided by the LPEMM for the temporary flagging-in of a foreign vessel in the Special Register of the Canary Islands.

Vessels provisionally flagged-in are entered under a 'Special List' which complements each of the Registration Lists described in RD 1027/1989. There are, therefore, nine special lists related to provisional flagging-in, depending on the type of vessel or craft involved (Article 4(2) RD 1027/1989). On the other hand, it does not seem possible for vessels provisionally flagged-in Spain to be entered in the Mercantile Register, as the first entry must be that of ownership and only Spanish property may be recorded in that Register (Article 149 RRM).

7.6. *Which kind of evidence or certificate of the permission to carry the flag will be available to the owner?*

Although not specifically stated in RD 1027/1989, there is no doubt that a ship flagged-in Spain is a Spanish vessel which must have the same documentation as any other national vessel. It will need to hold, therefore, the Navigation Certificate (or the *Rol*, if its gross tonnage is less than 20 GT), which is the document certifying its nationality and the master's command. In addition, a copy of the page of the relevant 'Special List', where the entry is recorded, is issued.

7.7. *Cost and procedure*

Registration charges discussed in section 2.5 *supra* are applicable. The procedure is as already mentioned above and is regulated by Articles 22–24 RD 1027/1989.

8. ESSENTIAL LAWS AND REGULATIONS APPLYING TO VESSELS WHICH CARRY THE SPANISH FLAG IN RESPECT OF MANNING, EMPLOYMENT, SOCIAL SECURITY, ETC.

8.1. *International Conventions*

The employment of crews on board Spanish vessels is subjected to the prescriptions of the IMO STCW/78 Convention, of which Spain is a Contracting State. Likewise, numerous International Labour Organization (ILO) Conventions ratified by Spain are applicable, for example, Convention No. 147 of 1976, on the minimum rules applicable in merchant shipping and particularly the late MLC – Maritime on Labour Convention 2006, amended in 2014, 2016 and 2018.

Spain has ratified all ILO Conventions and followed all Instruments and Recommendations of the ILO. Furthermore, as an EU Member State, Spain has incorporated all EU Directives on education and training of seamen (Directive 2001/25, 4 April 2001, modified by Directive 2003/103/EC of the European Parliament and of the Council of 17 November 2003 on the minimum level of training of seafarers which is implicitly repealed by Directive 2008/106/EC of 19 November 2008 on the minimum level of training of seafarers. Directive 2003/105, 17 November 2003, incorporated by Royal Decree 2.062/1.999 that has been repealed by Royal Decree 973/2009 of 12 June which regulates the Professional Qualifications of the Merchant Marine and RD 1312/2004).

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8.2. National laws and regulations

Working conditions are periodically set by collective bargaining agreements; these are generally of an enterprise-wide scope, valid for two years, and negotiated by workers and employers. Sectoral Labour Rules (*Ordenanzas del Trabajo*) are applied as a supplement, the most important being the one on Merchant Shipping passed by the Rule of 20 May 1969 (BOE Nos 156–160, 1–5 July 1969). In the same manner, the general labour regime, the Labour Act (*Estatuto de los Trabajadores* – Act 2/2015, 23 August) is applicable to those areas not covered by the Rules. As far as social security is concerned, a special scheme exists for sea workers; it is in force consolidated is approved by Decree 2864/1974, 30 August, which is repealed (in respect to fishing crews) by Act 47/2015, 21 October, regulating the social protection of workers in the Fishing sector. No discrimination whatsoever is permitted from a legal point of view with regard to the different nationalities of the seaman. Foreign seamen are treated equally with Spanish seamen.

The general labour conditions may be different when the ship is registered in the Special Canary Island Register. The special regimen does not affect the security and health conditions of the seamen but it does affect their economic regime.

There are special Sectoral Conventions agreed by shipowners and unions, such as, for example, the National Association of Tugs and harbours internal navigation (Official Gazette, 30 October 2012).

This scheme grants seamen the same advantages and benefits as those enjoyed by other Spanish workers but is more favourable in terms of retirement age. Specific legislation exists to regulate working hours and rest periods on board ships. Spain has incorporated the EU Directives 2003/88 and 1999/1995 of the European Parliament and Council on maximum working time for fishing vessels and sea-going vessels, respectively. The Spanish Royal Decree 525/2002, 14 June 2002, has incorporated it and also Royal Decree 1561/1995 would be applicable particularly Articles 15–19.

The RDL 2/2011 has established a new regulation for the embarkation of foreign seamen on Spanish ships registered in the Special Register of the Canary Islands. In general, it provides for the working conditions and social security of foreign personnel to be governed by the legislation freely agreed to by the interested parties, as long as it respects the legislation of the ILO. In the absence of an express agreement, Spanish legislation shall apply and this includes the international conventions endorsed by Spain (Additional Disposition 16(7) RDL 2/2011).

8.2.1. Number of officers and crew

The Ministry for Public Works and Transport, through the Directorate General of Merchant Shipping, regulates and controls the number and type

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of crew that must be on board, stipulating the qualifications and professional rank necessary for maritime safety in accordance with the characteristics of each vessel. Each ship has a certificate of minimum crew.

The RDL 2/2011 requires that the size and professional capacity of the crew be adequate to ensure at all times the ship's safety and navigation, bearing in mind its operational and technical characteristics. The RDL 2/2011 regulates, in a slightly more detailed manner, the minimum composition of the crew of those vessels registered in the Special Register of the Canary Islands (Additional Disposition 16(6)).

In all cases, the maritime and safety inspectors of the Directorate General of Merchant Shipping and of the Maritime Captaincy may arrest a ship and impede its navigation if the crew is inadequate. IMO Convention STCW/78 is applicable to foreign vessels. A Paris MOU – Port State Control Inspection could be carried on.

8.2.2. Nationality of officers and crew

The nationality requirements for crew members of Spanish ships have already been mentioned in section 1.1.2. *supra*.

8.2.3. Certificates of masters and officers

The execution of practically all the functions associated with the positions on board, a vessel requires the possession of the relevant qualifications or certificates, as the case may be. Those in command of larger vessels must hold a university degree and a professional qualification. The body of intermediate officers and those in command of minor vessels may operate with only a professional qualification. Seamen, galley personnel, etc., need to only have an accredited certificate of completion of certain short courses.

The principal provisions on this subject are Royal Decree 2841/1980, 4 December 1980 and Royal Decree 1522/1988, 2 December 1988 (higher qualifications); Royal Decree 1833/2004 and the Order of 20 May 1988 (BOE No. 125, 25 May 1988) (middle and lower qualifications) and particularly the Rules dated 17 June 1997 on certificates. Qualifications also exist for pleasure craft (Order of 31 January 1990), which regulates the qualifications for the operation of pleasure craft (BOE No. 43, 19 February 1990). Certificates and qualifications are nowadays mostly equivalent all across the EU.

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9. ESSENTIAL LAWS AND REGULATIONS APPLYING TO SHIPS WHICH FLY THE SPANISH FLAG WITH RESPECT TO SHIP SAFETY AND ENVIRONMENTAL PROTECTION

9.1. *International conventions*

Spain is a Contracting State of the principal IMO Conventions on this matter and, in particular, of the following ones: SOLAS/74–78, MARPOL/73–78, STCW/78, LL, TM, COLREG, LDC, CLC/59, FUND/71, INTERVENTION/69 and SAR/79.

9.2. *Essential national laws and regulations*

Spanish legislation has a great number of internal provisions which aim either to develop and effectively implement the application of international conventions or to offset their deficiencies and gaps by establishing regulations of a national scope in the areas of maritime safety and pollution. The most important rules are perhaps those of the SOLAS/74 Convention with its amendments, the Regulation for the Recognition of Merchant Ships (*Reglamento de Reconocimiento de Buques Mercantes*) passed by RD 3384/1971, 28 October 1971, almost derogated by Royal Decree 1837/2000 and the regulation on the control of the accomplishment of the international regulation on maritime safety, pollution prevention and life and work conditions on foreign vessels that use Spanish ports (RD 1737/2010).

In relation to fishing ships Spain has ratified the International Convention on Safety of Fishing Ships, 1977 (Torremolinos, 1977), and its Protocol, 1993. The IMS Code (IGS Code, in the Spanish language), approved by IMO Resolution A 74(18), was introduced as Chapter IX in the SOLAS Convention, and therefore it is in force in Spain and amended by the Cape Town Agreement in 2012.

10. FLAGGING-OUT OF SHIPS WHICH REMAIN REGISTERED IN THE COUNTRY

10.1. *Permission required?*

The process of provisional flagging-out of a Spanish vessel overseas is also authorized by the LPEMM (Article 76(3) and (4)) and regulated by Royal Decree 1027/1989 (Article 60). This process is deemed to be a case of temporary export involving a ship lease where the lessor is a national and the lessee is a foreigner. Permission from the Directorate General of Merchant Shipping is required which may, or may not, grant authorization (in contrast to the previous case, the maritime administration seems to possess, in this instance, discretionary power).

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10.2. Time for which permission can be granted; possibilities of extension

There is no fixed maximum period. The administration makes a decision, at its discretion, on the basis of the submitted application. The same applies to submissions for extensions.

10.3. Conditions to be fulfilled to receive permission

The interested party must submit its application together with the following documents: (a) a lease; (b) the page containing the vessel's record or entry in the Register; (c) a certificate from the Mercantile Register certifying that the vessel is free of charges and encumbrances (or if this is not the case, a public deed certifying the creditor's consent); and (d) documentation supporting the application for temporary export (processed by the Treasury Department). In all cases, authorization is conditional on the lease explicitly stating that the flagging-out will become invalid and that the vessel will regain its Spanish flag in the event of Spain entering a war or becoming involved in other extraordinary circumstances which may lead the Government to demand the suspension of the provisional flagging-out (Article 60 RD 1027/1989).

10.4. What influence has flagging-out on the status of the ship?

The fact that the vessel remains under a foreign flag does not imply its permanent deletion from the Maritime Register. The ship retains its entry in the same folio and list, in which is recorded the date of the change of flag and its reinstatement. However this entry remains 'dormant' in the sense that it is recorded under the following number.

11. LAWS AND REGULATIONS APPLYING TO VESSELS PERMITTED TO CARRY
THE FLAG OF ANOTHER COUNTRY

As long as the vessel carries a foreign flag it is governed, to all intents and purposes, by the law of the new flag in public, as well as in administrative aspects, such as those related to labour, ownership and liens of the vessel (Article 10(2) Civil Code). Moreover, while these vessels carry a foreign flag, any deeds, acts and contracts related to them do not seem to be able to be registered in the Spanish Mercantile Register (Article 145(1) RRM only considers vessels carrying 'the Spanish flag').

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12. REGISTRATION OF RIGHTS IN RESPECT OF VESSELS UNDER CONSTRUCTION

12.1. Register

Spanish law allows vessels under construction to be registered and mortgaged. In fact, as already mentioned, this is the general case considered by Royal Decree 1027/89. Registration in the Maritime Register is predominantly of technical importance and has the principal goal of subjecting the shipbuilder's entire activity to the control of the maritime administration, particularly for the purpose of construction safety. The Mercantile Register is accessible to vessels under construction so as to enable their financing through ship mortgages.

12.1.1. Type of Register

Vessels or craft under construction are entered in the Maritime Register's Ninth List. This entry is recorded at the very moment that the construction is authorized. The construction's authorization is granted by the Maritime Captain or the Directorate General of Merchant Shipping, depending on whether the vessel's length is 6 meters or less. Once authorization is obtained, the Maritime Captaincy in question notifies the interested party and instructs the authorization to be entered in the Ninth List (*see* Articles 4(2)(i), 7(2), 34 et seq., RD 1027/1989).

The Mercantile Register also has a 'Special Section for Ships Under Construction', in which vessels under construction may be provisionally entered. However, the terms of Article 151 RRM, in conjunction with Article 16 LHN, imply that vessels under construction only have access to the Mercantile Register if they are mortgaged. The RDL 2/2011 allows the registration of vessels under construction in the Special Register of the Canary Islands.

12.1.2. Content of the Register

The 'folio' or page corresponding to the Ninth List is used to record the date the authorization was granted, the name of the shipbuilder and the contract-holder, the ship's characteristics, its estimated value and any warnings or objections to the project which must be redressed during construction. Any vicissitudes, encumbrances and other circumstances occurring during the construction are to be subsequently recorded in the same folio (*see* Articles 15, 16 and 18 RD 1027/1989).

When registering a ship in the Mercantile Register in order to mortgage it, the prescriptions of Article 16 LHN must be observed. The owner is obliged to first register the vessel's ownership by means of an application

accompanied by a certificate issued by a shipbuilder, showing the vessel's construction phase, the length of its keel and other dimensions, tonnage and probable displacements, its seaworthiness, if it is to be sailed or power-driven, place of construction and description of materials to be employed, project cost and plan of the ship. If the transaction is effected by a private contract, the latter will have to be registered and a copy signed by the future shipowner also has to be submitted (Article 149 RRM).

12.2. *Type of ship which may be registered*

All vessels under construction are entered in the Ninth List, with the sole exception of mass-produced pleasure craft. These crafts are directly entered in the corresponding Sixth or Seventh List. In all cases, the construction of the prototype must be authorized by the Harbour master's Office or the Directorate General of Merchant Shipping, depending on whether its length is less, equivalent to or more than 6 meters.

12.2.1. At what stage during construction may a vessel be registered?

As already mentioned, registration in the Maritime Register's Ninth List occurs from the very moment that the construction is authorized, although it may have physically commenced before. Nevertheless, in order to create a ship mortgage on a vessel under construction, it is indispensable to have invested in a third of the estimated value of the hull (Article 16 LHN). As accessibility to the Mercantile Register is only available to mortgaged vessels, only those ships whose physical construction has reached this stage may be registered.

12.3. *Type of rights which can be registered*

As mentioned in section 1.1.2. *supra*, all types of encumbrances affecting the vessel may be registered in the Maritime/Administrative Register. Likewise, all mortgages and other encumbrances affecting the ship may be entered in the Mercantile Register, particularly the deferred sale price and credits derived from construction, maintenance and repairs (*créditos refaccionarios-refactional loans Article 138 LNM 14/2014 Act*), as long as the requirement of having invested a third of the estimated value of the hull is satisfied.

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12.3.1. Restrictions as to the nationality of the purchaser of a vessel under construction

It has already been stated that an entry in the Ninth List is possible, independent of the ship's phase, that is, export or definitive registration in Spain. No special restrictions exist. It is only necessary to comply with the export regulations highlighted in section 2, *supra*.

12.3.2. Ownership of a vessel under construction

Although the legal nature of the ship's construction contract is under debate, the predominant view in Spanish law is to consider it to constitute a lease (*un contrato de arrendamiento de obra*) in all those cases where a person entrusts the construction to a shipbuilder. In such instances, and if the builder undertakes to supply the construction materials, the ownership of the vessel(s) belongs to the shipbuilder and he/she must suffer the loss if the project is destroyed before delivery (Article 1589 Civil Code). If the materials are supplied by the contractor and the builder only provides the labour or trade, the risk of the project being destroyed while under construction is borne by the contractor; however, the latter may not make a claim for any amount whatsoever unless there has been a delay in receiving the project, or unless the destruction results from the use of poor-quality materials (Article 1590 Civil Code). This differs from the case where the builder constructs 'stock' (*contra almacén*), that is, without a contract or previous construction order. In this case the builder is the sole owner, and delivery of the ship will normally occur through a contract of sale.

The Spanish Supreme Court had already solved in the 1980s the issue of the legal nature of the shipbuilding contract, affirming its commercial nature (*see* SSTS 10 February 1984, 1 December 1988 and 20 October 2004). Nowadays, the LNM Act 14/2014, on Maritime Navigation, has solved any potential interpretation and regulates specifically the shipbuilding contract in Articles 108–116.

B. Registration of Mortgages on Ships and Legal Nature of these Mortgages and Registration of Mortgages on Vessels under Construction

13. REGISTRATION OF MORTGAGES ON SHIPS AND LEGAL NATURE OF THESE MORTGAGES

13.1. *Sources of law*

In Spain, the rules applicable to ship mortgages are:

- The basic legal text is the LNM Act 14/2014, particularly Articles 126–144 being the Mortgage Act 1946 subsidiary in all that is not regulated specifically by Act 14/2014 (subsidiarity expressly referred Article 144 LNM). The LNM – Repealing Disposition – repealed the LHN (Naval Mortgage Law 1893).
- The International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 10 April 1926. (*Convenio Internacional para la unificación de ciertas reglas relativas a los créditos e hipotecas marítimos, Brussels, 10 de abril de 1926*), superseded by the new Convention 1993.
- The International Convention on Maritime Liens and Mortgages, done at Geneva, 6 May 1993 (Official Gazette No. 99, 23 April 2004).
- The Mercantile Register Regulation of 1956 (*Reglamento del Registro Mercantil de 14 de diciembre de 1956*) (RRM).
- Regulation for the Enforcement of the Mortgage Act of 14 February 1947 (*Reglamento para la Ejecución de la Ley Hipotecaria de 14 de febrero de 1947*), hereinafter referred to as RELH.
- Civil Procedural Law 2000 (*Ley 1/2000 de 7 de enero, de Enjuiciamiento Civil*), hereinafter referred to as LEC 2000.
- Article 10(2) Civil Code (*Código Civil*) hereinafter referred to as CC.

The Spanish ship mortgage (*hipoteca naval*) is economically equivalent to the Anglo-Saxon mortgage, but it observes a different legal structure. It involves a figure who serves to offer the vessel as a special and real guarantee for the fulfilment of a personal obligation; this is generally undertaken by the vessel's owner in favour of the mortgagee. In the case of the obligation not being fulfilled, the mortgagee may apply for the judicial sale of the mortgaged vessel and satisfy his/her credit with the amount received from such a sale, having priority over all other creditors except those with maritime liens over the vessel. The principal difference with the mortgage is that the *hipoteca* does not transfer the right to the vessel's ownership, and the

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creditor cannot dispose of it under any circumstances. He/she only has the right to apply for its judicial sale.

14. REGISTER

According to Article 128LNM, the contract creating the mortgage will only be granted through:

- (a) a public deed;
- (b) through a broker's policy signed by the parties or their legal representatives before a public notary;
- (c) a private document signed by the interested parties or their legal representatives and lodged with the Mercantile Register by both parties, or at least by the one consenting to the mortgage upon presentation of proof of identity.

For the ship mortgage to produce its proper effects, it must be registered in the Mercantile Register of the province in which the vessel is registered. The entry will be made in either the Ninth List (vessels under construction) or, for those vessels which have already obtained definitive registration, under the list corresponding to their class (*see* Article 128 LNM Act 14/2014).

All acts and transactions modifying or discharging the mortgage and other encumbrances affecting the vessel must also be registered in the Mercantile Register. Once registered, notification of these must be given to the maritime administration (Directorate General of Merchant Shipping) which will proceed to enter them in the vessel's registration 'folio' (*see* Articles 56 and 57 RD 1027/1989).

15. DEFINITION OF A SHIP WHICH CAN BE MORTGAGED

Although Article 1 LHN specifically stated that merchant vessels can be mortgaged, doctrine and registration practice interpret this broadly and allow vessels from any list to be mortgaged (except those from the Seventh List, which may not be encumbered). This interpretation was based on the broad definition of a vessel established by Article 146 RRM (*see supra*, section A, 2.2.). Following Article 126 LNM Act 14/2014 all vessels (even those under construction) can be mortgaged.

16. WHO MAY BE A MORTGAGOR AND A MORTGAGEE

16.1. *Mortgagor*

Only shipowners who have total control over their goods or have acquired such a power by law, may create a mortgage. Those having the right to do so may create a mortgage personally, or through a legal representative with a special power of attorney to contract this type of obligation, Article 130 LNM Act 14/2014. The power must be granted before a public notary (Article 1.713 CC).

In the case of joint ownership, it is necessary to have the consent of all the joint owners or of the majority.

16.2. *Mortgagee*

Any creditor may secure his/her credit with a ship mortgage regardless of his/her nationality. However, the movement of capital coming from the formalization of a ship mortgage in favour of a foreigner is subject to the administrative provisions governing foreign exchange controls and circulation of capital as regulated by Article 134 LNM Act 14/2014.

In practice, loans secured by ship mortgages tend to be made through credit organizations (banks and other finance bodies). The Commercial Code specifically mentions the provision of loans with vessels as guarantees as being one of the characteristic operations of credit companies (Article 175(7) Commercial Code).

17. RIGHTS AND/OR CLAIMS FOR WHICH A MORTGAGE CAN BE REGISTERED

The LNM stated that, among other things, *'the amount of the loan guaranteed by mortgage and of the sums that, if appropriate, shall cover the encumbrance for enforcement costs and expenses, and of the remuneration and delay interest and other expenses'* (Article 132.1b). However, this cannot be understood to mean that mortgages may only guarantee pecuniary credits. Shipping mortgages may be created as security for all types of obligations. It must be borne in mind that Article 164 RRM considers the creation of mortgages subject to special legislation regarding liquidation and interest rates (*hipoteca legal*), in favour of the persons listed in Article 168 LH. Some of these, for example, those requested by minors or legally incompetent persons over their tutor's goods, are established to secure non-pecuniary obligations.

On the other hand, the RRM envisages the ship mortgage as a guarantee for current account credits and as security for bearer instruments (Article 163 RRM).

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All types of licit obligations may therefore be secured by a ship mortgage. The mortgage contract should bear either the liquid and fixed amount of the secured credit or the basis for its establishment, that is, the credit must be liquid and fixed or liquidatable and ascertainable.

18. CLAIMS FOR INTEREST AND COSTS

The mortgage covers the interest incurred in the last two years and in the current annuity's matured portion. A wider cover may be negotiated (Article 132.b LNM Act 14/2014). Nevertheless, such an agreement does not affect a third-party purchaser of the vessel. In fact, the LHN stipulates that a ship's mortgage created for an interest-incurring loan shall not guarantee, to the prejudice of a third party, any more than the principal amount and the interest incurred in the last two years and in the matured part of the current annuity (Article 132.2 LNM Act 14/2014) unless parts agree otherwise.

As to legal costs, Article 132.3 LNM Act 14/2014 stipulates that the mortgage contract must show the sum of the legal costs which, if applicable, will increase the encumbrance. This provision tends to be understood as meaning that legal costs are included in the mortgage even when they exceed the amount mortgaged, as long as the mortgaged vessel belongs to the debtor. However, if the vessel is the property of a mortgagor who is not the debtor, or if it has passed into the control of a third party, the vessel should only be accountable for the sum of the agreed costs. This amount tends to be stipulated as a maximum sum as it is impossible to determine it precisely *a priori*.

19. PARTICULARS RECORDED

These are provided by the LNM Act 14/2014 and previously by LHN (formal Naval Mortgage Act) and pertain to the identification of personal elements (debtor and creditor), the loan secured, the type of mortgage, and the type of ship or ships mortgaged. All these details are to be entered in the Mercantile Register (Article 152 RRM).

20. OTHER PRECONDITIONS

Before creating a mortgage, it is indispensable to have made an entry of ownership in the Mercantile Register (Article 128 LNM Act 14/2014). Another precondition for the registration of the mortgage in the Mercantile Register is that the mortgage must be recorded in the certificate of ownership issued by the Register. This certificate must be carried on board by the master in accordance with Act 14/2014. The absence of this document and

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failure to comply with this requirement gives grounds to the Register to deny registration, except in the case of the vessel owner showing that the ship is on a journey, in which event the entry in the above-mentioned certificate will be recorded immediately upon the vessel's return (Article 154 RRM).

In addition, prior to the entry being made, it is necessary to submit the deed to the competent Treasury Administration in order to discharge the rates imposed on the formalization and legalization of the mortgage. Without the prior payment of these duties, no act or transaction whatsoever may be registered in the Mercantile Register.

21. PRIORITY OF MORTGAGES AMONG THEMSELVES

The priority among the creditors regarding ship mortgages is determined by the rule *prior in tempo potior in jure*. The date of submission to the Mercantile Register, which should appear in the registration record, determines priority. Where two dates are the same, priority is given to the one recorded at the earlier time (Article 137 LNM Act 14/2014).

22. OTHER RECORDED ENCUMBRANCES

As a general rule, the ship mortgage has priority over all other credits recorded in the Mercantile Register (Articles 123 and 124 LNM) unless privileged credits. Litigious rights and credits registered before the mortgage by virtue of a judicial judgment and court order have preference over the mortgage, even though they may be of a merely personal nature.

On the other hand, the following credits have priority over the ship mortgage, as long as they have been created according to a series of formalities recorded in Articles 123 and 124 LNM Act 14/2014:

- (1) When it is not possible to determine the ship on board which a lien has arisen regarding wages and other sums owned to the master and other members of the ship's crew arising from the ship's shipment contract and from Article 4.1.a of the International Convention on Maritime Liens and Mortgages, due to having generated the credits on different ships operated by the same company or same corporate group, the privilege shall cover them all.
- (2) In addition to the liens listed in the International Convention on Maritime Liens and Mortgages Geneva Convention 1993, a ship may also be subject to other liens recognized pursuant to the civil law or special laws, although such liens, whatever the rank of pre-emption they are granted pursuant to the laws that recognize them, shall be classified after mortgages and other registered charges and encumbrances. Likewise, pursuant to the terms foreseen in the EU

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provisions, or in the applicable treaties and, failing that, subject to the principle of reciprocity, other liens apart from those foreseen in Article 4 of the International Convention on Maritime Liens and Mortgages may be recognized, encumbering foreign ships pursuant to the law of the country where registered.

- (3) Credits arising from deferred payment of the proceeds from the sale or construction of the vessel, as well as those resulting from repairs not included in the previous section.

23. UNREGISTERED PREFERENTIAL RIGHTS

There is a difference in this instance depending on whether or not the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1926 is applicable (*see* cases for application in section A, 6 *supra*). If the Convention is applicable, all maritime liens listed in section 2 of the Convention have priority over the ship mortgage (section 3 of the Convention). However, the preferential rights of negotiated loans and cargo sales undertaken in accordance with the conditions prescribed in sections 5 and 3 of the Convention, that is, those resulting out of necessity during the voyage, are subject to the formalities described in Article 124.2 LNM Act 14/2014 (section 11(2) of the Convention).

24. TO WHAT DOES A REGISTERED MORTGAGE ATTACH?

The mortgage directly and immediately binds the vessel or vessels described in the mortgage as security until the fulfilment of the obligations, for which it is created (Article 127 LNM Act 14/2014).

This *erga omnes* effect exists in respect of the vessel and any part whatsoever thereof, even when the remaining part has disappeared (Article 134 LNM Act 14/2014). Together with the ship's hull and unless an express agreement to the contrary exists, the following are understood to be mortgaged: the rig, spares, supplies and engines, freight due and not received in the last voyage, and insurance indemnities due to shipwreck. The creditor is not entitled to be directly compensated by the insurer. He/she may only stop the insurance company from paying the owner, provided that he/she has given the company notification of the mortgage contract through a public notary (Article 136 LNM). On the other hand, several vessels may be mortgaged by one sale credit, in which case the contract shall stipulate the amount secured by each vessel.

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25. EFFECT OF PAYMENT

According to the principle of *accessority*, the extinction of a secured credit also discharges the mortgage. As payment is one of the causes of extinction of obligations (Article 1.156 CC), there is no doubt that it leads to the discharge of the encumbrance. Cancellation of the mortgage's entry in the Register may only occur through a public deed certifying the mortgagee's consent, through the personal appearance of the creditor or his/her legal representative before the Registrar or through a writ or final judicial decision (not subject to appeal). The cancellation entry shall record the time, day, month and year of the deletion and the act, transaction or contract by virtue of which it has been executed (Articles 167, 168, 172 and 173 RRM). The cancellation is entered in the certificate of ownership which must be carried on board by the master in accordance with Article 174 RRM.

It must be borne in mind that only payment of the total secured obligation results in the discharge of the mortgage. The encumbrance over the vessel continues to exist in its entirety even when partial payments are made (Article 134.4 LNM, 14/2014 Act).

26. ASSIGNMENT

According to the mortgage principle of 'accessority', the mortgage follows the same fate as the secured credit and is transferred with it.

The ship mortgage may be created in favour of a particular person or to the order of a person (Articles 129 and 132.1.a) LNM, 14/2014 Act). If it is formalized in favour of a particular person, the mortgage may be assigned without the debtor's consent, it only being necessary to notify the latter of the assignment for him/her to be bound to the new creditor (Article 347 Commercial Code). However, for it to be registered, the assignment must be recorded in some of the documents mentioned in Article 128 LNM, with the entry providing the name, surname and nationality of the assignor, the portion of the credit assigned if not in total, the circumstances leading to the assignment, the notification made to the debtor, the name, surname, profession, address and nationality of the assignee and the date and place of assignment (Article 161 RRM).

If established to the order of a person, it may be assigned by endorsement, which may be registered in the Mercantile Register so that whoever receives it may demand its payment (Article 127 LNM Act 14/2014). The endorsement shall be entered on the mortgage deed itself and shall contain the same particulars mentioned in the previous paragraph with the exception of the notification to the debtor (Article 162 RRM).

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27. EFFECT OF CHANGE OF OWNERSHIP OF THE VESSEL

As established previously, the mortgage binds the vessel directly and immediately to the fulfilment of the obligations for which it acts as security, whoever the owners might be. This rule only reflects the rule of the genuine and permanent link (*reipersecutoriedad*) – Article 8, 1993 Convention and the whole spirit of Act 14/2014 ‘The privileges always follow the vessel’ peculiar to the mortgage law. Consequently, the change of the vessel’s ownership does not affect the mortgagee’s lien. In the case of the debtor not fulfilling the principal obligation, the mortgage holder may apply for and obtain the judicial sale of the vessel for payment of his/her credit, despite the vessel having changed owners. The new owner has to bear the consequences of the distraint.

28. PROTECTION AGAINST SEIZURE

In the case of the mortgaged vessel being seized by another creditor, the mortgage holder may exercise his/her right through the procedure of third-party intervention with a paramount right, considered in a general manner by Civil Procedural Act (LEC) Articles 595–604 and 614–620. Competency resides with the civil jurisdiction courts even when contesting a labour credit under which an arrest has been granted by the labour court, or a salvage lien granted by an administrative procedure (*see* Article 207 Consolidated Labour Procedural Act and Act 60/1962 on maritime salvage and Article 365 LNM, 14/2014 Act).

29. MORTGAGE PROTECTION IN THE CASE OF DE-REGISTRATION OF A VESSEL

Article 8, 1993 Convention and formerly Article 40 LHN stipulates that mortgaged vessels cannot be transferred overseas without the consent of the mortgagee or without the vendor having previously consigned the credit amount secured by the mortgage, in the manner prescribed in Final Disposition, Act 15/2015 on Voluntarily Jurisdiction (former Articles 1.177–1.180 Civil Code). Otherwise the sale would be void and the vendor will incur the sanction established in Article 547 of the Spanish Criminal Code. In addition, the maritime administration shall not withdraw the vessel from the Maritime Register, meaning that the vessel shall continue to be considered Spanish and subject to Spanish legislation (*see* section A, 4.3 *supra*).

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30. LIABILITY OF MORTGAGEES

In contrast to the mortgage, the *hipoteca* does not present the problem of the creditor's liability as a result of possessing and operating the vessel. The mortgaged vessel remains, to all intents and purposes, in the debtor's possession and he/she alone is responsible for its operation in contractual as well as in extra-contractual matters. Once the term of the debt has expired without it having been paid, the creditor may apply for the judicial sale of the vessel without, at any time, having to acquire its ownership.

30.1. *In tort*

As above.

30.2. *In contract*

As above.

30.3. *Liability of the mortgagee in possession of the ship*

Although, as mentioned, the mortgagee is not obliged to acquire possession of the vessel in order to realize his/her credit, he/she is certainly entitled to make an application to the judge for the interim possession of the vessel, and run it with the aim of using the cargo or leases obtained as payment for his/her credit. This is the case of judicial administration of the vessel (Article 131, Rule 6 LH) (*see infra*).

The law does not define the exact legal position of the mortgagee who has interim possession and, by judicial concession, use of the vessel. At times, it has been maintained that the relationship involved is one of mandate, which obliges the shipowner to be judicially accountable for the result of the ship's operation, without retaining a direct link before third parties. However, the prevalent and clearly preferable view is the one which considers the mortgagee to be a real interim owner with all the consequences associated with ownership. Consequently, the mortgagee remains, like the shipowner, responsible for all the economic contractual or extra-contractual consequences resulting from the operation and navigation of the vessel.

31. SUBMISSION TO ENFORCED EXECUTION UNDER THE MORTGAGE

Articles 141 LNM (Act 14/2014) regulate the procedure to bring an action, which in time refer to Articles 634 et seq. LEC 2000. In addition, the

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mortgagee may use the judicial summary procedure or the extrajudicial procedure, both regulated by Articles 129 and 130 LH (*see* Article 165 RRM). Apart from its greater speed, the main advantage for the mortgagee is that, if negotiated in the mortgage deed, he/she may apply from the very beginning of the process for the administration and interim possession of the vessel. If granted by the judge, the creditor may operate the ship and obtain the freight resulting from its operation as credit against the mortgage (Article 131, Rule 6 LH).

In the absence of an expressed or tacit agreement, any of the following judges, selected by the plaintiff, has competency to decide any lawsuits arising from the execution of a ship mortgage:

- (1) The judge of the place where the mortgage was formalized.
- (2) The judge of the place of the port where the mortgaged vessel has entered.
- (3) The judge pertaining to the defendant's domicile.
- (4) The judge of the place of the Register where the mortgage was registered.

The action expires after three years counted from the moment when it can be exercised (Article 142.1 LNM).

31.1. Forced sale

The International Convention 1993 would be the preferable applicable regulation, and on a subsidiary manner, Articles 480–486 LNM, 14/2014 Act; and LEC. Regarding mortgages, the most important issue are the effects of that forced sale as described in Article 484 LNM. Effects of a forcible sale: ‘1. *As a consequence of a forcible sale of the ship, all the mortgages and encumbrances registered, except those the buyer may have subrogated itself in with the consent of the creditors, as well as all the liens and charges of any kind that may befall the ship shall be without effect and, where appropriate, their cancellation shall be ordered.* 2. *The terms set forth in Articles 666, 668.3, 670 and 672 of the Civil Procedure Act on appraisal and declaration of charges and encumbrances shall not apply (in this particular case).’*

32. REGISTRATION OF MORTGAGES ON VESSELS UNDER CONSTRUCTION

32.1. Type of mortgage

The mortgages available over a vessel under construction are the same as the ones which affect vessels in operation (*see* section B, 17 *supra*). It is specifically regulated by Article 131 LNM ‘*Mortgage on ships under*

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construction. In order to be able to register the mortgage on a ship under construction, it is indispensable for a third of the budgeted amount of the total hull value to have been invested in it and for the ownership of the ship to be registered on the Register of Moveable Assets.'

32.2. Preconditions for registration of a mortgage on a vessel under construction

In order to be able to formalize a mortgage on a vessel under construction, it is necessary to have invested, as a minimum, one-third of the total quoted value of the hull (*see section A, 2.1 supra*).

32.3. Documentation required for registration of a mortgage on a vessel under construction

The owner is required to lodge an application with the Mercantile Register, accompanied by a certificate issued by the shipbuilder providing the following details: construction phase, length of vessel's keel and other dimensions, tonnage and probable displacement, vessel's seaworthiness, if it is to be sailed or power-driven, place of construction and description of materials to be employed, cost of the hull and plan of the vessel. If the construction is verified by contract, a copy signed by the owner must be entered in the Register (Article 151 RRM).

32.4. Evidence of a duly registered mortgage

The entries of the Mercantile Register constitute proof of the ownership of vessels and the registered encumbrances affecting them (Article 166 RRM). The Mercantile Register is a public body, which means that any interested party may obtain the relevant mortgage's accreditation certificate.

32.5. Who can legally set up a mortgage?

The mortgage over a vessel under construction can only be set up by the owner or by a person expressly empowered for this purpose in the construction contract (Article 130.3 LNM). When the construction materials are supplied by the shipbuilder (usual practice), ownership is only acquired by the contracting party upon completion and delivery of the vessel (*see section A, 3.2 supra*). In order to facilitate the vessel's financing, the builder, in the construction contract, tends to authorize the contracting party to create a mortgage.

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As to the creditor, this may be anyone whomsoever, as described for mortgages of constructed vessels (*see* section B., 16 *supra*).

32.6. *How is a valid charge created on a ship under construction?*

The mortgage over a vessel under construction is valid for all intents and purposes once it is entered in the Mercantile Register of the province corresponding to the place of construction (Article 134 LHN).

32.7. *Legal effects of a valid mortgage on a ship under construction*

The legal effects of a mortgage on a vessel under construction are basically the same ones as those produced in the case of mortgages over a constructed vessel, that is, reciprocity and preference (*see* section 13, *supra*). Once the mortgage has been entered in the Mercantile Register, it will have full effects against third parties

32.8. *To what does a registered mortgage on a ship under construction attach?*

No specific rules exist. The general rules contained in LNM may be applied, except for those which are not logically applicable due to the special nature of the mortgaged object (*see supra*, section B, 24).

32.9. *Effect of payment of a mortgage*

No special rules exist. The general ones for constructed vessels apply (*see supra*, section B, 13).

32.10. *May a mortgage of a vessel under construction be assigned?*

Yes, under the same terms as for constructed vessels (*see supra*, section B, 14).

32.11. *Effect of a change of ownership of a vessel under construction*

As described in section B, 15 *supra*.

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32.12. Procedure on delivery of the ship

No rules exist governing this matter. The clauses of the construction contract tend to stipulate the conditions of payment and the procedure to be followed by the builder for delivery of the vessel. In all cases, the record in the Mercantile Register related to the ownership and mortgage of a vessel under construction is of a provisional nature until the vessel is completed and registered in the Mercantile Register's definitive list corresponding to the vessel class. Once this registration is completed, the entry becomes definitive (Article 151 RRM).

The administrative legislation states that the shipyard holder must certify before the Directorate General of Merchant Shipping the transferor's conformity and that of the entities which have provided credit for the construction (Article 52 RD 1027/1989).

32.13. Enforcement of the mortgage on a vessel under construction

The same may apply as for the enforcement of the mortgage on vessels in operation (*see* section B, 19 *supra*).

32.14. International conventions

The International Convention on Maritime Liens and Mortgages, Geneva 6 May 1993, is in force in Spain since the signature of the legal instrument approving its incorporation to the Spanish Legal Regime. The Legal Instrument is dated 31 May 2002 and was published in the State Official Gazette on 23 April 2004.

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