

# MEMBER ALERT



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## **SANCTIONS IN SPAIN FOR BREACH OF THE PARIS MEMORANDUM OF UNDERSTANDING**

Your managers have been informed that the Spanish authorities are currently taking a very firm line with vessels which fail Port State Control (PSC) inspections. If the authorities discover serious deficiencies during a PSC inspection, the vessel may be detained and an “administrative sanction file” may be opened against the shipowner. The following is an outline of the procedure that is followed upon detention:

### **Detention of a vessel at port**

The Master is served with two orders of detention issued by the Harbor Master’s Office: one for the serious deficiencies found during the PSC inspection and one for security to cover the possible sanction to be imposed in the administrative file.

The first order is served with the report of the PSC inspection and it is lifted only once all the deficiencies are repaired to the satisfaction of the PSC inspectors. Irrespective of such repairs, the order for detention can be challenged within three days before the Harbor Master’s Office or within one month before the Spanish Directorate General of the Merchant Marine (“*Dirección General de Marina Mercante*”, hereinafter DGMM).

The second order can be served at the same time as the report of the PSC inspection or at a later moment. This order is lifted only when the requested security is posted. The amount of the security is fixed by the Harbor Master’s Office and will usually reflect the financial amount of the sanction that could potentially be imposed by the Spanish Administration. Security must be lodged in cash or by way of a Spanish bank guarantee. There is no procedure to negotiate the amount of the security.

### **Appointment of a representative in Spain**

Before the vessel can leave the Port the shipowner must appoint a representative in Spain for service of the administrative sanction file. The representative can be any person in Spain (lawyer, ship agent, etc). The representation can be granted through the Master by swearing an “*apud acta*” Power of Attorney before the Harbor Master or by the owner before a notary public in their country of origin. In practice, the Harbor Master’s Offices consider the ship agents as the representative of the shipowner and serve on them directly any documentation related with the

administrative sanction file until such time as a representative is formally appointed by the shipowner.

### **Opening of an administrative sanction file**

The Harbor Master's Office will serve on the shipowner's representative the Notice of Initiation of the Administrative Sanction File ("*Acuerdo de Iniciación del Procedimiento Administrativo Sancionador*") where the civil servant in charge of the file (the Instructor) will set out the facts, the alleged breaches, the grading of the same as light, serious or very serious and the potential financial sanction. The detention order seeking security is served with this Notice unless it was already served on the Master with the report of the PSC inspection. From the moment of service of the said Notice, the shipowner is given 15 working days to file comments and to propose evidence in support. In principle the administrative procedure is on documents alone.

### **Proposed Resolution**

Once the shipowner has filed a challenge and the evidence requested has been obtained, the Instructor will serve on the shipowner's representative the Proposed Resolution ("*Propuesta de Resolución*").

This pleading will summarize the facts, whether a breach has occurred, the grade of the breach and the amount of the proposed sanction depending on the grading of the breach. The shipowner is then given a further 15 working days to challenge the proposed resolution. Alternatively, it is possible to offer payment at this stage. In any event, the administrative file is then sent by the Instructor to the DGMM in Madrid for resolution.

### **Resolution of the file**

The DGMM will review the Proposed Resolution and any challenge filed on behalf of the shipowner or payment offered. The DGMM can increase or reduce the proposed sanction irrespective of any offer to pay the sum identified in the Proposed Resolution. The Resolution of the DGMM can be appealed before the Ministry of Fomento within one month of service of the Proposed Resolution.

### **Appeal to Ministry of FOMENTO**

The appeal to the Ministry of Fomento is a last right of appeal in the administrative procedure to challenge the Resolution of the DGMM. The Ministry of Fomento will usually ratify the Resolution of the DGMM. If within a period of three calendar months the Ministry of Fomento does not respond (administrative silence), the appeal is deemed rejected and from this moment the shipowner can pursue any challenge to the sanction before the Spanish Administrative Courts within six months.

## **Payment of sanction**

The payment of the sanction can be made at any time prior to resolution by the DGMM but does not prevent the DGMM raising or reducing the sanction once the file is received by them from the Instructor. Payment is not set-off against the security retained by the Harbor Master's Office. The sanction must first be paid and only upon proof of such payment will the security be released. Only where it is clear that payment will not be made voluntarily, the Harbor Master's Office will seize the funds held as security.

The Harbor Master's Office can seek enforcement against the security once the file has been resolved by the DGMM and irrespective of whether the shipowner intends to challenge the sanction before the Administrative Courts.

## **Administrative Courts**

Administrative Courts can only hear the claim once the administrative procedure described above has been exhausted. The procedure before the Administrative Courts is notoriously slow but the Administrative Courts Judges can and often do reverse or reduce sanctions imposed by the DGMM.

## **Legal fees**

Legal fees to defend against any Port State Control sanction are calculated in accordance with the Spanish Local Bar Association rules for each stage of the administrative procedure.

*We would like to thank Rogers & Co. of Madrid for this information. It should be noted that costs incurred in connection with a breach of the above nature are not covered by the Association*