

Contribution of the Hague Conference on Private International Law (HCCH) to the second part of the report of the Secretary-General on oceans and the law of the sea

Private Maritime Law has been subject to unification and harmonisation in the past century, due to an increase in maritime commerce and a need for increased predictability, especially regarding private international law rules. As a result, multilateral conventions incorporating various rules and customs have become one of the main instruments achieving such unification. The main organisation creating such treaties is the *Comité Maritime International* (CMI) and the International Maritime Organisation (IMO). Some existing instruments deal with the prevention of marine pollution, liability and compensation or maritime safety and security and include private international law provisions on jurisdiction, recognition and enforcement, for instance the 1969 *International Convention on Civil Liability for Oil Pollution Damage* (CLC) and the Protocol of 1992; the 1992 *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (FUND 1992) and the *International Oil Pollution Compensation Supplementary Fund* (FUND 2003); the 2001 *International Convention on Civil Liability for Bunker Oil Pollution Damage*; the 1996 *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea* (HNS).

Due to other existing instruments, the HCCH has traditionally excluded maritime law from its scope of work. However, because several important matters in the area of private maritime law still have not been fully addressed by a definitive international instrument, some of the HCCH instruments do include within their scope maritime issues, and therefore may be relevant to the report entitled "Oceans and the law of the sea".

A. Hague Choice of Court Convention (2005)

The *Hague Convention of 30 June 2005 on Choice of Court Agreements* ("Choice of Court Convention") aims to ensure the effectiveness of choice of court agreements (also known as "forum selection clauses" or "jurisdiction clauses") between parties to international commercial transactions.

The Choice of Court Convention excludes a number of matters relating to private maritime law from its scope. Article 2(2)(f) excludes carriage of passengers and goods, which, as explained in the Explanatory Report on the Choice of Court Convention, drawn up by Professors Trevor Hartley and Masato Dogauchi, covers carriage by sea, as well as by land and by air or any combination of the three. The reason for the exclusion is that international carriage of persons or goods is subject to a number of other conventions. Introducing this exclusion avoids the possibility of a conflict of conventions. For example, States that are Parties to the *Hague Rules on Bills of Lading* might be unwilling to accept a choice of court clause in a bill of lading if it granted jurisdiction to the courts of a State that was not a Party to the Rules, since this could allow the ship owner to evade the mandatory provisions laid down in the Rules.

A second reason for the exclusion is that at the time when the Convention was drafted, these issues were the subject of a new project by UNCITRAL. The HCCH did not address this issue in the Convention because it preferred to avoid potential interference with the work of UNICTRAL.

Article 2(2)(g) excludes five maritime matters: marine pollution; limitation of liability for maritime claims; general average; emergency towage; and emergency salvage. As indicated in the Explanatory Report, the application of choice of court agreements to these matters would create challenges for some States. Other maritime (shipping) matters, for example, marine insurance, non-emergency towage and salvage, shipbuilding, and ship mortgages and liens, are included in the scope of the Convention.

It can be deduced from the above two provisions that in spite of the exclusions, the Choice of Court Convention applies to certain important cases relating to oceans and sea, for example, though carriage of goods by sea is excluded, a contract to insure goods carried by sea is not.

B. Ongoing Normative Project on the Recognition & Enforcement of Foreign Judgments

The HCCH is currently developing a global instrument in facilitating the recognition and enforcement of foreign judgments in civil or commercial matters (Judgments Project). The Judgments Project has reached the stage of State-level negotiations. During the previous two Special Commission meetings, which were convened in June 2016 and February 2017 respectively, matters related to oceans and sea were discussed.

As is the case for the Choice of Court Convention, “the carriage of passengers and goods” and “marine pollution; limitation of liability for maritime claims; general average; emergency towage and salvage” are excluded from the current draft, the “February 2017 draft Convention”. This is because the future Judgments Convention intends to mirror the Choice of Court Convention, in that there is consensus that the future Judgments Convention will not depart from the Choice of Court Convention, unless there is a strong reason to do so. As such, the future Judgments Convention, once it is adopted, would still apply to certain important cases relating to oceans and sea, as concluded above in Section A.

Mention should also be made to the proposal submitted by the *Comité Maritime International* (CMI) during the second meeting of the Special Commission. The CMI proposed that a chapter on the recognition of judicial sales of ships be included in the draft convention, or in an annexed protocol. The proposal dealt with four main issues:

- Defining the concept of a judicial sale of a ship
- Setting out the key, minimum procedural requirements of judicial sales of ships
- Determining the effects of judicial sales of ships
- Establishing the parameters within which States should and should not recognise the legal effects of the foreign judicial sale of ships

The representative of the CMI highlighted the importance of this topic in order to facilitate trade and development, and stressed the global importance of the shipping industry. He also mentioned that the uncertainty generated by the lack of rules in recognition and enforcement has various negative consequences on the value of ships, shipping finance and the global market. It was, however, concluded by the Special Commission that the scope of the draft Convention should not be extended to address this topic. As such, it appears unlikely that the future Judgments Convention would include this topic within its scope.

Conclusion

In conclusion, although traditionally the HCCH has not been the appropriate forum to deal with private maritime law issues, and therefore excludes most of the topics related to private maritime law (and more broadly, law of the sea), the Choice of Court Convention nonetheless includes certain important maritime matters within its scope. Similarly, as the negotiations of the Judgments Project thus far demonstrate, certain important maritime matters will also be covered by the future Judgments Convention. However, this may not be the case for the recognition of judicial sales of ships.

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