D. 2867/07
SF 2.240

PROPOSAL FOR A REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME 1)

Comments of ECSA, ICS, BIMCO and the International Group of P&I Clubs

Introduction

The shipping industry, represented by the European Community Shipowners' Associations (ECSA)[1], the International Chamber of Shipping (ICS)[2], BIMCO[3] and the International Group of P&I Clubs[4] takes the opportunity to comment on the proposal for a Regulation on the law applicable to contractual obligations (Rome 1), particularly on Article 1 (scope of application), Article 3 (freedom of choice), Article 4 (applicable law in the absence of choice), Article 4a (contracts of carriage), Article 5 (consumer contracts), Article 5a (insurance contracts), Article 8 (overriding mandatory provisions) and Article 23 (relationship with existing international conventions).

Proposed Regulation

Article 1 (scope of application)

The shipping industry supports adding to the list of exclusions under Article 1 (2) "questions regarding maritime law". The reasons for such exclusion are two-fold.

Firstly, in maritime law there are sector-specific international conventions which contain a significant number of uniform mandatory rules. These conventions include the international Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules"), the Protocol to amend the international Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague-Visby Rules"), the United Nations Convention on the Carriage of Goods by Sea ("Hamburg Rules") and soon the forthcoming UNCITRAL Instrument on the Carriage of Goods (wholly or partly by sea), and the Athens Convention relating to the Carriage of passengers by sea. As a consequence of this far-reaching substantive harmonisation of maritime law, which includes an extensive body of case law and court decisions, there has been no perceived need to establish choice of law rules for this sector.

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[1] The European Community Shipowners' Associations (ECSA) is the trade association representing the national shipowners' associations of the EU Member States and Norway, the members of which control over 40% of the world merchant fleet.

[2] The International Chamber of Shipping (ICS) is the international trade association for merchant ship operators. The ICS membership comprises national shipowners' associations representing over 70% of the world's merchant tonnage.

[3] BIMCO's membership spans 123 countries and includes more than 2,550 companies. Owner members alone control 65% of the world merchant fleet. One of the organisation's core activities is the development of standardised maritime contracts, such as Charter Parties, Bills of Lading and other specialised maritime contracts. It has been estimated that over three quarters of transactions within the shipping industry take place using BIMCO approved forms.

[4] The 13 P&I Clubs that comprise the International Group of P&I Clubs are mutual not-for-profit insurance organizations that between them cover the third party liabilities (which include pollution, loss of life and personal injury, cargo loss and damage, wreck removal and collision risks) of approximately 92% of the world's ocean-going tonnage.

Secondly, maritime transport is uniquely characterised by complex relationships with a simultaneous involvement of many parties based in different jurisdictions. The afore-mentioned international conventions cover to a large extent these relationships, which makes it difficult to establish what would be the most appropriate choice of law rules.

However, if it is believed that the term "questions regarding maritime law" is too broad, the industry would suggest a provision along the following lines: The Regulation shall not apply to:

"(j) obligations arising under maritime contracts, which term includes contracts of carriage of goods and passengers including multimodal transport involving carriage by sea, charterparties and other contractual arrangements for the use and operation of a ship or ships."

If nevertheless maritime law/contracts are not excluded from the Regulation, industry has comments on the following articles:

Article 3 (Freedom of Choice)

Maritime contracts and the rights and obligations arising under them are essentially a matter of private law as opposed to public law. Other than certain consumer contracts where one party is a private individual buying goods or services, the parties to maritime contracts, in particular in relation to the carriage of goods, are almost invariably commercial entities. One of the prime concerns for commercial entities is certainty, particularly in respect of their rights and obligations under contracts into which they enter. Such contracts will generally therefore contain a choice of law clause. The parties may choose a particular governing law for a variety of reasons e.g. established system of law, expertise in that jurisdiction in adjudicating particular types of commercial activities, perceived neutrality, etc. Giving effect to choice of law provisions is accordingly of a very real importance to commercial entities. This is particularly so in the context of contracts relating to international transactions which may involve rights and obligations arising in a number of different jurisdictions. Maritime contracts fall into this category.

For the reasons stated above however, the shipping industry would support retaining the Commission wording for Article 3 (1) which provides that an agreement of the parties to confer exclusive jurisdiction on the courts of a Member State is indicative of a conclusive choice of law, and not just one factor to be taken into account in determining whether a choice of law was clearly demonstrated.

The proposed paragraphs 4 and 5 also introduce a very substantial and undesirable degree of uncertainty in that they provide for certain elements of the law of a country not chosen by the parties to govern their contractual obligations. For instance, the parties are most unlikely to know what provisions of that country's law can or cannot be derogated from by agreement. The adoption of these paragraphs would therefore undermine the fundamental right of the parties to choose the applicable law in accordance with Article 3 (1).

Article 4 (Applicable law in the absence of choice)

If the view of the shipping industry, notably that the scope of the Regulation should not be extended to maritime law/maritime contracts, is not accepted and if Article 4 of the Convention is to be amended in the format proposed (with contracts of carriage governed here rather than in a new Article 4a), the shipping industry would support the Commission wording for Art 4.1 (c) - that is deleting the proposed Presidency wording in bold and square

brackets but replacing the term "habitual residence" with "principal place of business". This will create certainty in that only a single system of law could govern a contract of carriage.

Article 4(a) – (Contract of Carriage)

The shipping industry refers to its comments on Article 4 (1) (c). However, if it is believed that a separate article should be created for contracts of carriage, as suggested by the Presidency, the shipping industry has the following comments:

The proposed Article 4 (a) 1 introduces a further element of uncertainty in that the law governing a contract for the carriage of goods could be either the law of the habitual residence of the carrier or the law of the place of delivery. As the shipping industry has said above in relation to Article 4, if the Convention is to extend to contracts of carriage, then the shipping industry believes that in the absence of a choice of law, the law governing the contract should be that of the "principal place of business" of the carrier since carriers providing carriage on standard terms need certainty and predictability regarding forums and chosen law applicable to dispute resolution. This cannot be dependant on a variable such as where delivery takes place or the habitual residence of the consignor as this could lead to inconsistent decisions in respect of identical contract terms. This is counter to the objectives of the Regulation which are to promote clarity and uniformity.

The shipping industry does not see the need to create separate rules for goods and passengers. Therefore, industry could accept Option 1 (together with Article 4 (1) (c)), with the amendment on "principal place of business". Option 1 would promote a degree of certainty since claims brought by passengers, carried under the same contract terms, in different jurisdictions but arising out of the same incident would be governed by the same system of law. Options 2, 3 and 4 introduce elements of uncertainty, as does paragraph 3.

Article 5 (consumer contracts)

The shipping industry believes that the principle established under Article 5 § 4 (a) of the Rome Convention of excluding contracts of carriage from consumer contracts should be retained and therefore proposes that Article 5 § 3 (b) should read “a contract of carriage”.

Article 5a (Insurance Contracts)

The shipping industry does not believe that the Regulation should cover insurance contracts. Neither the Rome Convention nor the Commission's original draft text govern the law applicable to insurance contracts covering risks situated within the Member States since the current regime of the law applicable to insurance contracts is laid down in the First Council Directive 73/239/EEC of 24 July 1973 and the Second Council Directive 88/357/EEC of 22 June 1988. The rules contained in these Directives are understood and have not led to any significant problems that would suggest that there is either a pressing need to extend the scope of the Regulation to govern insurance contracts covering risks within the Member States and in a third country, or to provide distinctions between insurance contracts governing large risks and those that do not.

Furthermore, Article 5a (2) governing insurance contracts covering a risk for which a country imposes compulsory insurance may give rise to conflicts with existing insurance practice in the field of Protection & Indemnity and other types of commercial rather than consumer insurance. There are a number of international maritime liability and compensation Conventions (e.g. international Convention on liability and compensation of damage resulting

from the Carriage of Hazardous and Noxious Substances by Sea, 2002 Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001) which require shipowners to maintain third party liability insurance provided by the shipowner's P&I Club or other liability insurer. Under such Conventions third party claims are brought in and are subject to the law of the country in which the liability arises. However, P&I insurance contracts between the Club and the entered shipowner member (covering, amongst others, risks for which a country imposes compulsory insurance) are governed by the law agreed by the parties and set out in the policy terms and not the law of the country imposing the compulsory insurance requirement.

If this provision were to be adopted it would result in the law of the country imposing the compulsory insurance also governing the insurance contract despite the parties having made a specific choice of law. This would be contrary to the fundamental principle set out in Article 3 upholding the freedom for contracting parties as to choice of law. This would also create considerable uncertainty and will not promote uniformity (one of the main objectives of the Regulation) since the terms and conditions of the insurance contract will be potentially subject to different systems of law that may interpret these terms and conditions in different ways. If industry's proposal were accepted, this would not detract from the rights of the third parties who are the beneficiaries of compulsory liability insurance schemes.

Article 8 (Overriding mandatory provisions)

The shipping industry does not support the inclusion of Article 8 since it will clearly promote a lack of uniformity and certainty in that it is vague and ambiguous, and different States are likely to interpret what constitute "crucial" provisions in different ways given the very broad scope to which such provisions relate. One of the main objectives of the Regulation is to promote uniformity. Parties to a contract wish certainty and the law governing the contract is of prime importance in this context and will, in almost all cases, have been chosen by the parties for sound commercial reasons e.g. because the law of a particular State has a well established and tested legal framework.

Furthermore, Article 8 (2) would seem to override the basic rule set out in Article 23, namely that existing international conventions take precedence over the proposed Regulation. This is not supported by industry if this is the case since this will also create considerable uncertainty as to compliance with Member States' international commitments.

Article 23 (relationship with existing international conventions)

The shipping industry suggests Member States should ensure that the Rome 1 Regulation should not only respect existing conventions, as provided for under Article 23 (1), but it should equally respect <u>any</u> future conventions, particularly in the field of maritime law. The industry would therefore support retaining the wording of Article 21 of the Rome 1980 Convention, which provides that the Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Whilst Article 23 of the draft Regulation only covers conventions dealing with conflict of law rules, it should not be overlooked that several maritime law conventions, including the forthcoming UNCITRAL Instrument on the carriage of goods (wholly or partly by sea) and the Athens Convention relating to the Carriage of passengers by sea, require that contracting states apply on a mandatory basis the rules of the conventions. As mentioned in the comments on Article 1, as a consequence of this far-reaching substantive harmonisation of maritime law, which includes an extensive body of case law and court decisions, there has been no perceived need to establish choice of law rules for this sector.

Furthermore, it should be noted that in the maritime area a great many international conventions are or will in the future come into force and if article 23 is not amended as suggested above, would create significant procedural and practical difficulties for the industry.

Therefore, the shipping industry is of the opinion that any international maritime convention with substantive rules applying on a mandatory basis should take precedence over the Regulation.

The shipping industry would urge that this document be given careful consideration.