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INVESTIGATIONS INTO MARITIME CASUALTIES AND JURISDICTION CLAUSES IN INTERNATIONAL MARITIME CONVENTIONS

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INVESTIGATIONS INTO MARITIME CASUALTIES AND JURISDICTION CLAUSES IN INTERNATIONAL MARITIME CONVENTIONS

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1. INVESTIGATIONS INTO MARITIME CASUALTIES: AN EXAMPLE HOW THE EUROPEAN UNION ENSURES PROTECTION OF THE ENVIRONMENT AND SAFETY AT SEA

- 1.1. Among legislative developments in the European Union there are those regarding Investigations into marine casualties. In fact Directive 2009/18/EC establishes the fundamental principles governing investigations. This Directive, which has been implemented in Italy with Legislative Decree 6 September 2011, n. 165, is one of the seven legislative measures constituting the Third Maritime Safety Package, the so called Erika III Package which contemplates a variety of actions aiming at improving the safety of marine transportation and the protection of environment.
- 1.2. Following the “Erika” accident in December 1999 the European Union determined to make efforts to enhance maritime safety and pollution prevention. Such efforts were increased after the “Prestige” accident in November 2002 but actually originated in 1994 from the casualty of m/v “Estonia”. This ro-ro ferry sank in the Baltic Sea after the flooding of the car deck due to the opening of the bow door caused by adverse weather conditions and heavy waves’ hitting and 852 lives were lost.
- 1.3. Improvement of maritime safety was therefore sought by the European Union also by investigating the causes of an accident at sea in order to prevent other casualties. In addressing the way on how investigations are to be conducted, the European Union underlines *inter alia* that the bodies responsible for the investigations are to be independent of all parties involved in an accident, which may well include the national

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maritime authorities, and that the investigations do not seek to determine or assign any civil or criminal liability.

- 1.4. Comparing the Directive with the provisions of Italian law, contained from Art. 578 to Art. 584 of Code of Navigation, it may be noted that such provisions, which continue to be applied concurrently with the EU Directive, have a different approach. In fact marine casualties are analyzed, and investigations are carried out, mainly to determine liability and apportion blame. This is outlined by Art. 1241 of the Code of Navigation which in fact provides that if the Investigative Body finds that the casualty is due to gross negligence or wilful misconduct, a report is made to the Public Prosecutor. Another substantial difference is that the Investigative Body is not independent as its members are officers of the Coast Guard or of the Ministry of Infrastructures and Transport or are appointed by the Ministry of Environment.

2. JURISDICTION CLAUSES IN INTERNATIONAL CONVENTIONS: AN ISSUE FOR THE EU AND EU MEMBER STATES

- 2.1. The 1999 Arrest Convention (entered into force the 14 September 2011 after the accession of Albania. Ten ratifications or accessions were required by its art. 14 for its entry into force and in addition to Albania, Ecuador, Liberia, Algeria, Benin and Syria, there are four EU member States: Spain, Latvia, Bulgaria and Estonia which are parties to the Convention. Art. 7 of the Convention provides that the Courts of the State where arrest was effected or security was provided “*shall have jurisdiction to determine the case upon its merits*” unless there is an agreement to refer the dispute to a Court of a different State or to arbitration.
- 2.2. The ratification or accession of EU Member States to the 1999 Arrest Convention, as well as to other International Conventions containing jurisdiction clauses, conflicts with their lack of competence to become parties of conventions ruling on jurisdiction. In fact art. 71 of EC Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides:

“This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments”

The position for EU Member States as to jurisdiction was different and certainly easier under the system as that of the Brussels Convention of 27 September 1968 which, as amended by article 25(1) of the Access Convention was providing:

“This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.”

With the new regime, as the EU Member States became or will become parties to the 1999 Arrest Convention after EC Regulation 44/2001, it is quite evident that the Convention does not prevail and cannot be ratified by EU Member States.

- 2.3 This unless the European Union adopts a decision authorizing Member States to ratification as it took place for other international conventions. This was the case for the Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 whose articles 9 on jurisdiction and 10 on recognition and enforcement affect the rules laid down in Regulation 44/2001. However with Decision 2002/762/EC of 19 September 2002 the European Union authorized Member States to sign, ratify or accede the Bunker Convention. The Decision first underlines that *“the Community has sole competence in relation to Articles 9 and 10 of the Convention”* and then states that *“the objective of this Decision is to authorize the Member States to sign, ratify or accede to the Convention and to place an obligation on them, when they do so, to make a declaration committing themselves to apply Regulation (EC) no. 44/2001 in their mutual relations”*.
- 2.4 The same took place for the Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances y Sea 1996 (the HNS Convention) whose articles 38, 39 and 40 deal with jurisdiction, recognition and enforcement. In fact with Council Decision 2002/971/EC of 18 November 2001 Member States are authorized to ratify the Convention without prejudice to the existing European Community competence on the matter of jurisdiction and recognition and enforcement of judgments.
- 2.5 The authorizations by the European Community were motivated:
- as to the Bunker Convention:

“The Bunker Convention fills a significant gap in the international regulations on marine pollution liability. This Convention makes for improved victim protection, in keeping with the 1982 United Nations Convention on the Law of the Sea”

- and as to the HNS Convention:

“The HNS Convention is particularly important, given the interests of the Community and its Member States, because it makes for improved victim protection under international rules on marine pollution liability, in keeping with the 1982 United Nations Convention on the Law of the Sea”

2.6 The protection of the environment and of the victims of marine pollution is within the primary interests of the European Community and it is therefore understandable that there is a wish of the Community that Member States become parties of such Conventions. However it is doubtful that the European Community will authorize Member States to become parties of other conventions such as the 1999 Arrest Convention given that its object is to secure maritime claims although also in connection with damages to the environmental.

2.7 Given the interest of the European Community to the Bunker Oil and to the HNS Conventions both Council Decisions referred to above contain an identical article 5 which states:

“Member States shall, at the earliest opportunity, use their best endeavours to ensure that the Bunkers Convention (HNS Convention) is amended to allow the Community to become a contracting party to it.”

This puts a question regarding the possibility that an Organization such as the European Community becomes party to a convention without need of an express provision contained in the Convention.

2.8 The first example of such a provision in a maritime convention is that of the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea which in art. 17 provides rules on jurisdiction.

Its Art. 19 in fact states:

“Regional Economic Integration Organizations

1 A Regional Economic Integration Organization, which is constituted by sovereign States that have transferred competence over certain matters governed by this Protocol to that Organization, may sign, ratify, accept, approve or accede to this Protocol. A Regional Economic Integration Organization which is a Party to this Protocol shall have the rights and obligations of a State Party, to the extent that the Regional Economic Integration Organization has competence over matters governed by this Protocol.

... ..

4 At the time of signature, ratification, acceptance, approval or accession the Regional Economic Integration Organization shall make a declaration to the Secretary-General specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organization by its Member States which are signatories or Parties to this Protocol and any other relevant restrictions as to the scope of that competence. The Regional Economic Integration Organization shall promptly notify the Secretary-General of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph. Any such declarations shall be made available by the Secretary-General pursuant to Article 24 of this Protocol.

2.9 The same possibility is provided by the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) which under art. 93-Participation by regional economic integration organizations provides:

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention . The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention . When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. *Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.*

2.10 In addition to such a possibility, and given that the provisions of the Rotterdam Rules on jurisdiction and arbitration are in conflict with those of Regulation 44/2001, a consensus was also reached by making the chapters on jurisdiction and arbitration applicable only if States, pursuant to Art. 74, declare to be bound by its provisions. The so called “opt in” option as to jurisdiction could therefore be a way to allow success to a convention as far as ratification and accession of EU Member States are concerned. In fact they do not need to seek an authorization from the EU as it would be necessary for the 1999 Arrest Convention.

For the time being and in order to avoid that EU Member States are accused of violation of the EU competences it may be suggested that Member States, before making accession to the 1999 Arrest Convention, await to see which attitude the EU will take or, alternatively, contact the Commission and suggest that an evaluation is made regarding the possibility that the Council becomes party of the Convention in lieu of the Member States.