CHAPTER 16

The Impact of EU Secondary Legislation on Issues Concerning Ships: A Case Study of National Proceedings in Respect of Waste Liability and Insolvency

Rosa Greaves

Introduction

The EU is a new comer to the international community. However, unlike other international organizations, the EU has, over a short period, created and developed a “new” legal order. It is the creation of this legal order, together with the transfer of sovereignty from the member states to the EU, which makes the latter a significant player in international relations, including international maritime law. The core principles of the EU legal order, the principles of supremacy and of direct effect of EU law, ensure that in the fields where sovereignty has been transferred to the EU, EU law prevails both within the member states and also in their relationship with each other and with third parties. How does this new legal order impact on international shipping agreements incompatible with EU Law? How does it affect the law applicable and the jurisdiction of EU national courts over disputes concerning ships? The answers to these questions will be examined in this chapter in the context of EU secondary legislation. Some secondary legislative measures have been adopted specifically to reconcile the application of an international shipping norm with EU law but other measures have been drafted and adopted with no consideration of how they impact on the manner in which national courts deal with disputes involving ships. However, before considering some examples, a brief review of the EU’s competence in the field of maritime transport sector will be undertaken.

* Professor, University of Glasgow; Professor II, University of Oslo.
EU’s Competence in the Maritime Transport Sector

When the EU1 was established in the late 1950s, a separate chapter on the provision of transport services was included in the Treaty of Rome which imposed an obligation on the member states to establish a Common Transport Policy (CTP). It was expressly stated in the chapter2 that measures adopted to implement a CTP required the specific approval of the EU Council3 when such measures were to be applied to air and sea transport. Thus in those early years concerns that EU measures would have an impact on international maritime law or that international maritime measures would be “adapted” as to how they would be applied between EU member states so as to ensure compatibility with EU law, was simply not in anyone’s radar.

Sixty years later the situation is very different. First, a CTP has been adopted which has replaced the member states’ sovereignty in road, railway and inland waterways sectors, and in some aspects of air and sea transport. Second, slowly but purposely, EU measures have been adopted which have had significant impact on ships calling at EU ports or sailing in EU waters.4 Third, the Court of Justice of the European Union (CJEU) has played an active role in integrating international conventions into the main body of EU law as well as finding ways of giving priority to EU secondary legislation when it is found to be in conflict or different from international norms.5

In this chapter the focus will be primarily on how EU secondary legislative measures, which were not designed with shipping disputes in mind such as those dealing with compensation for damage caused by waste and those governing the lex forum in insolvency of undertakings proceedings, have impacted on how EU national courts resolve disputes concerning liability for ship waste

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1 For the purposes of this chapter the term “EU” will be used as a general term for the “European Economic Community”, the “European Community” and the “European Union.” Similarly the term “EU Law” will be used for “EEC Law”, “European Law” and “Community Law” and term “EU Treaty” to embrace the original and the subsequent Treaties amending or consolidating the original Treaty of Rome.

2 Art. 80 EC Treaty, now Art. 100(2) of the Treaty on the Functioning of the European Union (TFEU).

3 Previously known as “Council of Ministers”. It was originally the sole EU institution with legislative competence.

4 See the contribution by B. Marten in chapter 5 of this volume.

5 See e.g. the CJEU case law on the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”). The role that the CJEU has played in this area is explored by Alexander Proelss in chapter 17 of this volume. See also R. Greaves “EC External Competence: recent developments and its implications for maritime agreements” (2007) Marius No 360 175–197.