Current Legal Developments

1982 Law of the Sea Convention

Dispute Settlement Procedures for Foreign Merchant Ships

Introduction

It is believed that nearly 90 per cent of the world trade volume in weight is carried by sea. Accordingly, the settlement of disputes involving foreign merchant ships is of significance not only for the sound development of the law of the sea but also for the world trade and shipping industry. Under contemporary international law, coastal states enjoy broad competence over foreign merchant ships in their various maritime zones. At the same time, international law mainly embodied in the United Nations Convention on the Law of the Sea (the LOSC) sets forth both substantive and procedural limitations on coastal state jurisdiction. In practice, coastal states always incline to rely more upon facultative provisions, while flag states tend to underline the limitations thereto. In addition, in view of the nature of the Convention as a “package deal”, it is recognised that there are inevitably many ambiguous compromises and even conflicting provisions\(^1\) that may give rise to disparate perception on the same issues. Consequently, the law of the sea presents abundant opportunities for disputes, notwithstanding the requirement of good faith and the prohibition of an abuse of right in the Convention.\(^2\) The establishment of a mechanism for dispute settlement, which may produce further clarifications and help iron out disputes, is crucial to maintain law and order at sea.\(^3\)

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2. LOSC, Art. 300.
Settlement of Disputes under General International Law

As far as international disputes involving foreign merchant ships are concerned, two phases may be witnessed in the settlement process. In the first phase, the disputes manifest themselves as those between an authority of a state and a foreign person, as the case of contested detention of a foreign merchant ship may indicate. In the second phase, however, the disputes evolve into international disputes in a narrow sense, i.e. inter-state disputes.

Settlement of Disputes within Municipal Framework

Where a foreign ship has been detained or otherwise interfered with by local authorities in accordance with the coastal state laws, and the detention or interference is in breach of international law, the ship may make its case with the detaining authorities in the domestic proceedings. Nonetheless, the outcome of the arguments raised by the ship-owner based on international law may well depend on the standing of international law in the local legal systems.

Under English and Scottish law, municipal statutes invariably take precedence over international law, comprising customary rules and treaties, according to the doctrine of parliamentary sovereignty. Consequently, in the case of Mortensen v Peters in 1906, the Scottish Court of Justiciary chose to highlight the intention of parliament and enforce it, even though the court found that the statute under which the Danish master, Mortensen, of a Norwegian ship was convicted was indeed contrary to the then international law.

In some other states with civil law systems, international law, at least treaties, always prevails over the municipal legislation. That is the reason why the French Conseil d’État ruled, in the cases of The Sally and The Newton in 1806, that local authorities should not interfere with foreign merchant ships in French ports by virtue of a rule of international law reserving the matters of internal economy on board a foreign ship to the flag state concerned. Noticeably, Germany even gives that superior status to customary international law.

In national legislation, many states take a position between the two extremes as demonstrated by British and German practice. For example, in the US the self-executing provisions of treaties overrule the existing statutes that prevail over customary rules. In China, all the treaties to which it is a party have precedence of national enactments in the case of inconsistence between them, subject to reservations that may have been duly made.

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6 See Art. 25 of the German Basic Law (Grundgesetz).
7 Churchill and Lowe, note 4 above, p. 448.