

CMI INTERNATIONAL WORKING GROUP

on

THE LEX MARITIMA

1. Background

Maritime law is supported by a long tradition of international uniformity. In recent years, however, the development of a universal maritime legal order by the adoption of unifying conventions has slowed. At the same time general, non-maritime contract law has started to find a way to wider harmonisation.

The existence of a 'Lex Maritima' consisting of a complex of internationally accepted rules of maritime law that may be traced in particular back to usage and general principles is widely, and even increasingly, subscribed to by legal doctrine. Moreover, this view finds support in numerous elements of positive law, including case law and recently adopted national codifications of maritime law.

On the other hand, there is no instrument of practical use available in which this virtually mythical 'Lex Maritima' with all its customs, usages and principles is clearly articulated. Preparing and promoting such an instrument is quintessentially a task for the Comité Maritime International.

2. Scope

The CMI IWG on the Lex Maritima should work towards the preparation of an elementary – that is, concise and flexible – description of the typical concepts and rules of maritime law that may be regarded as being internationally accepted and common to most, if not all, legal systems and traditions.

In other words, it is an exposition of the foundations of positive maritime law, such as those encountered in the conventions, national laws and the more specific and thematic self-regulating sources. This will be a search for the innermost core of maritime law, as it is expressed in the concrete, practical legal rules in daily use in the maritime and legal community.

Perhaps the main difference between the proposed restatement of principles and previous unification efforts is that the former will have to explore and focus on common ground, rather than tackle issues of disagreement and divergence that require resolution. Such a restatement of the general principles of maritime law could promote the satisfactory functioning of maritime law.

A CMI instrument setting out the contemporary Lex Maritima may certainly not be allowed to have any intent of replacing existing unifying conventions, national maritime law and instruments of self-

regulation, such as standard contracts. Nor may it be allowed to become a repetition or duplicate of international or European treaties or principles relating to general contract law. Even less is it to be a concise summary of existing maritime law, as it is supposed to be an attempt to sound out the shared, underlying and fundamental concepts of maritime law. For the same reason, the project will not result in a comprehensive, detailed systematisation of international maritime law in all its aspects. Finally, it is difficult to speak of general principles regarding matters that are the subject of international controversy.

3. Methodology

The exact rules that should specifically be included in a restatement of the general principles of maritime law thus merit closer investigation and close consultations between experts and practitioners. It would therefore be premature to start summarising what the content of these rules might be. Even so, merely by way of contribution to an initial working hypothesis, the following non-exhaustive list of themes might be mentioned:

- the relationship of the principles to other law
- the recognition of self-regulation, including port custom, as source of the law
- the internationalising interpretation of conventions, legislation and contracts
- freedom of navigation
- freedom of maritime contract (subject to express mandatory rules)
- the fundamental distinguishing characteristics of the ship (in contrast among other things to a wreck)
- the application of the law of the flag to the property law status of the ship
- the function of the ship as an asset and centre of liabilities
- negligence as a maritime liability principle
- the perils of the sea and solidarity between interested parties as a rule of interpretation
- the general duty of care of contracting parties in maritime law ('due diligence')
- the essential characteristics of the various forms of chartering
- the essential characteristics of the bill of lading and the sea waybill
- the authority, powers and responsibility of the master of the ship
- the humanitarian treatment of crew and stowaways
- the advisory role of the pilot.

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4. Membership

- Eric Van Hooydonk (Belgium), Chairman
- John Hare (South Africa)
- Alexander von Ziegler (Switzerland)
- Jesus Casas (Spain)
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