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Jovi Tenev

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Some observations on Dr Ole Böger's 'The case for a new shipping Protocol to the Cape Town Convention covering security over ships' – a modest proposal

Jovi Tenev*

A new shipping Protocol to the Cape Town Convention would be beneficial, though challenging to implement. Containers and Offshore Drilling may be the favored course to speedier ratification.

Dr Ole Böger offers an erudite exposition and overview of maritime law wonderfully covering so many of the issues and making a compelling case for a new shipping Protocol to the 2001 UNIDROIT Convention on International Interests in Mobile Equipment (the 'Cape Town Convention'). Dr Vincent Power's short, concise commentary quite effectively hones in on the key issue: the 'problem of pragmatism' rather than the 'problem of theory'.

Surely a shipping Protocol would be useful in resolving problems of international ship finance: the question, therefore, is whether a new Protocol could, rather than should, be adopted and ratified, or perhaps more narrowly, what aspect of such a Protocol could reasonably be expected to be adopted and ratified.

It is certainly appropriate and fitting that the Conference consider a shipping Protocol here at Oxford, this ancient center of learning, still standing and still flourishing. However, we must note, too, that it is quite interesting – and not without some irony – that we meet here in the United Kingdom, which recently voted to leave the European Union, certainly among the grandest of attempts at the harmonization of legal framework among nations.

* Jovi Tenev, Partner, Holland & Knight, 31 West 52nd Street, New York, NY 10019, USA. jovi.tenev@hkllaw.com

The need for harmonization

The benefit of harmonization that a shipping Protocol would bring is patent.

Seemingly obvious commercial matters too often founder in a Babel of conflicting or ineffective legal norms. The *Hanjin* bankruptcy, so much in the news, is instructive. Ninety-five per cent of the world's manufactured goods are transported on container ships. Hanjin's fleet of ships represents 3.2% of world container capacity. But recently, *The Wall Street Journal* (9 September 2016, p A9) reported, some 82 of its ships carrying \$14 billion of cargo have been denied port access or are not coming into ports, because of legal uncertainties as to who will pay for docking, unloading, and storage fees, and moreover for fear of ship arrests.

The recent decisions of the Courts of the State of São Paulo, Brasil, in the OSX 3 mortgage matter are as shocking as they are troubling.¹

¹ See (i) State of São Paulo (Brazil). State Court of the State of São Paulo. City of São Paulo Judicial District. 29th Civil Court of First Instance. Case No. 1116479-65.2014.8.26.0100. Execution of Extrajudicial Instrument – Guarantee – Plaintiff: Banco BTG Pactual S/A – Cayman Branch. Defendant: OSX 3 Leasing B.V. São Paulo, June 09 2015. (Estado de São Paulo (Brasil). Tribunal de Justiça do Estado de São Paulo. Comarca de São Paulo. 29ª Vara Cível. Processo n. 1116479-65.2014.8.26.0100. Execução de Título Extrajudicial – Fiança. Exequente: Banco BTG

Nordic Trustee is the Mortgagee of the Liberian flag vessel, *OSX 3*, which is owned by OSX 3 Leasing BV, a Dutch corporation, which, in turn, is an indirect subsidiary of OSX Brasil SA.

The Mortgage (the 'Mortgage') of the *OSX 3* in favor of Nordic Trustee was duly executed and recorded in accordance with Liberian law. The *OSX 3*, an FPSO (floating production, storage, and offloading unit) located on a long-term project some 94 kilometers off the coast of Rio, is the subject of legal proceedings and an attachment filed there by Banco BTG Pactual S/A, Cayman Islands branch.

The Brazilian courts, in the proceedings thus far, have refused to recognize or give legal effect to the Mortgage because (1) the Mortgage was not recorded in Brasil under Brazilian law (which provides only for recordation of ship mortgages on Brazilian flag vessels), and (2) Liberia is not a party to two international conventions to which Brasil is party, the Bustamante Convention and the 1926 Brussels Convention. In fact, none of the major commercial maritime flags, except Panama, is a party to either of these conventions.

The ship mortgage-secured financing structure in the *OSX 3* matter is a common one around the world, with a long pedigree, and is commonly used to finance the vessels

needed to develop Brasil's natural resources. Indeed, Brasil Plural reports that in 2015, there were approximately 302 Liberian, and 300 Marshall Islands, flagged ships currently located in Brazilian waters. The ship mortgage-based financing of all these vessels, valued in the many billions of Dollars, is now imperiled due to the Brazilian court's decision.

No comity afforded – UNCLOS ignored

The Brazilian court failed to give due deference to a first preferred mortgage on a Liberian flag vessel located on the high seas (albeit within Brasil's economic zone),² on a long-term employment arrangement approved and licensed by, and a financing arrangement known to, a host of official Brazilian governmental agencies.

Interestingly, the Brazilian court felt it had jurisdiction to attach a Liberian flag vessel on the high seas.³ Nevertheless, the Brazilian court refused to accord basic comity to Liberian law, indeed one of the most basic laws of any maritime flag state, its ship mortgage law applicable to vessels in its ships registry.

Even more troubling, the Brazilian court did not even consider, under The United Nations Convention on the Law of the Sea of 10 December 1982 ('UNCLOS') (authoritatively

Pactual S/A – Cayman Branch. Executado: OSX 3 Leasing B.V. São Paulo, 09 de junho de 2015.); (ii) *ibid.* July 15 2015. (15 de julho de 2015.); (iii) State of São Paulo (Brazil). Court of Appeals of the State of São Paulo. 13th Chamber of Private Law. Interlocutory Appeal No. 2153991-40-2015.8.26.0000. Vote No. 8848. Appellant: Nordic Trustee ASA. Appellee: Banco BTG Pactual S/A – Cayman Branch. São Paulo, February 03 2016. (Estado de São Paulo (Brasil). Tribunal de Justiça do Estado de São Paulo. 13ª Câmara de Direito Privado. Agravo de Instrumento n. 2153991-40-2015.8.26.0000. Voto n. 8848. Agravante: Nordic Trustee ASA. Agravado: Banco BTG Pactual S/A – Cayman Branch. São Paulo, 03 de fevereiro de 2016.); and (iv) *ibid.* Motion for Clarification No. 2153991-40-2015.8.26.0000/50000. Vote No. 10.852. Appellant: Nordic Trustee ASA. Appellee: Banco BTG Pactual S/A – Cayman Branch. São Paulo, June 1 2016. (Embargos de Declaração n. 2153991-40-2015.8.26.0000/50000. Voto n. 10.852. Embargante: Nordic Trustee ASA. Embargado: Banco BTG Pactual S/A – Cayman Branch. São Paulo, 1º de junho de 2016.).

² UNCLOS provides: 'Article 3, *Breadth of the territorial sea* Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention'; 'Article 57 *Breadth of the exclusive economic zone* The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured'; 'Article 58 *Rights and duties of other States in the exclusive economic zone* 1. In the exclusive economic zone, all States ... enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and ... other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships ...'.

³ See UNCLOS: 'Article 87 *Freedom of the high seas* 1. The high seas are open to all States ... Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law ...'; 'Article 89 *Invalidity of claims of sovereignty over the high seas* No State may validly purport to subject any part of the high seas to its sovereignty.'

published on the website of the International Tribunal for the Law of the Sea <https://www.itlos.org>), to which both Brasil and Liberia are party, that Brasil is obligated to recognize the Liberian flag of the *OSX 3*,⁴ and that Liberia has the right to administer vessels under its flag.⁵

Thus, as the *Hanjin* and *OSX 3* examples illustrate, the question in international shipping of how to treat shipowners and their vessels in insolvency is a critical one, especially for the financiers of shipping companies – no less the shipowners.

Equally critical in shipping is the question of maritime liens, both consensual liens and non-consensual liens.

Unless these questions are somehow meaningfully addressed in a Protocol, little will be solved in a practical sense.

Solving the pragmatism puzzle

Dr Böger and Dr Power both rightly stress the importance of early involvement of the broadest possible group of stakeholders and interested parties in the shipping community. However, is there a sufficient number of commercially involved people interested in the shipping Protocol? Is there a critical mercantile mass interested in maritime finance?

Any initial first draft of the shipping Protocol would ideally be prepared with a very strong input, and reflective really, of the concerns of the commercial shipping community.

The Rotterdam Rules and their adoption by the UN General Assembly offer some perspective on the effort and timing needed for a shipping Protocol. The Rotterdam Rules is the short name for the United Nations Convention on Contracts for the International Carriage of Goods Wholly Or Partly By Sea.

My partner Chester Hooper reports that he first started working on the Rotterdam Rules in 1992. In 2002, UNCITRAL working

⁴ *ibid.* 'Article 90 *Right of navigation* Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.'

⁵ *ibid.* 'Article 94 *Duties of the flag State* 1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag ...'

group meetings began; these were held twice a year until 2008, when the Convention was finally presented to the UN General Assembly and signed by 16 member nations, including the United States of America. However, in 2016, some 20 member nations are waiting for the USA to ratify the Rotterdam Rules.

'A ship in harbor is safe, but that's not what ships are built for.'

I agree with Dr Böger and Dr Power that a shipping Protocol is certainly worth pursuing, although, to be sure, it is a daunting task.

One reason the Aviation Protocol to the Cape Town Convention was adopted was the concerted interest of a key commercial group, aircraft manufacturers and aircraft financiers, including national export credit agencies. As we noted previously, establishing interest among a significant portion of the commercial shipping community would be of critical importance in advancing the shipping Protocol.

However, shipping and vessel manufacturers and vessel financiers seem to be a more disparate group, far more widely spread, than their counterparts in the aviation and aerospace industries. Perhaps a less ambitious, but perhaps more effective, approach would be to take a more focused slice of the shipping community and a smaller swath of the ocean sea as the object of a new shipping Protocol to the Cape Town Convention.

A modest proposal

One possibility might be a Protocol directed exclusively to shipping containers.

Another shipping Protocol possibility to consider would be offshore drilling rigs and platforms.

Each of these maritime related industries is characterized by a relatively smaller and more discrete group of commercial, financial, and legal constituencies that may well be more likely to coalesce in forming a new and effective working group supporting a new shipping-related Protocol to the Cape Town Convention. Breaking up a gargantuan task into more manageable pieces is hardly a novel approach, but, with tenacity, it can pave the way to success.