

# Soft Law in the Conventions for the Unification of Maritime Law

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<b>1</b>	<b>Introduction</b> .....	270
<b>2</b>	<b>Overview of the Conventions</b> .....	270
<b>3</b>	<b>The Obligations as Expressed in the Conventions</b> .....	272
<b>4</b>	<b>The Tenor of the Conventions</b> .....	274
<b>5</b>	<b>Vagueness Implies Soft Law</b> .....	274
<b>6</b>	<b>Lack of Adjudication Mechanisms</b> .....	276
<b>7</b>	<b>Bilateralism in Multilateral Conventions</b> .....	278
7.1	Bilateralism gives Room for Soft Law .....	278
7.2	A Reference Grid .....	278
7.3	Supersession Clauses, etc. ....	279
7.4	Generalization .....	281
7.5	Is a Convention Necessary? .....	282
7.6	Prohibition of Reservations .....	282
7.7	Clarifying Clauses .....	282
<b>8</b>	<b>Conclusion</b> .....	283

## 1 Introduction

After a century of conventions for the unification of maritime law, a web of old and new convention provisions on a variety of subjects has been created. It is hardly possible to negotiate a new convention or an amendment to an existing convention without running into conflicts with existing conventions (if that is not what is intended). One example is the introduction of strict liability for pollution damage in 1969,<sup>1</sup> which had a tiny intersection with the Collision Convention, 1910, which does not allow strict liability.<sup>2</sup>

After a few years of negotiating such conventions in the International Maritime Organization (IMO), I asked the perhaps naïve question: Would it not be better to soften the obligations under such conventions, in order to avoid the problems that inevitably will arise in the next round, when an adjacent convention should be negotiated? Norway proposed an “escape clause” that simply said that one could let the new convention prevail over the old convention in the next round of negotiations, if that was thought desirable at that point of time.<sup>3</sup> But this proposal did not get any support.<sup>4</sup> One preferred to be mast-bound. The obligations for unification had to be strict law, it was said.

In the following, I will challenge this perception of the conventions for the unification of maritime law. To which extent are they really strict law?

There is no doubt that there is a strict core obligation in all the conventions for the unification of maritime law. But that is not the point when the problem is conflicts with future conventions, the problem pertinent to the escape clause. This will always concern the fringes of the existing conventions – if not the existing convention is about to be replaced. The point here is therefore to explore the soft law fringes of these conventions.

## 2 Overview of the Conventions

The conventions for the unification of maritime law are not necessarily very familiar to those interested in soft law. There are conventions of this kind in the following categories, pursuant to the CMI Handbook<sup>5</sup>:

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- 1 International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC 1969), Article III.
  - 2 International Convention for the Unification of Certain Rules of Law Relating to Collision Between Vessels, 1910 (Collision Convention, 1910), Article 2 *et seq.*
  - 3 IMO Document LEG 79/4/4.
  - 4 IMO Document LEG 79/11 paras 30-32, where the proposal politely was referred to a broader consideration by the International Law Commission or in other fora. Some core delegations that had promised support withdrew at a very late stage. Had it not been for those promises of support, the proposal would, of course, have been withdrawn before the debate.
  - 5 CMI, *Handbook of Maritime Conventions* (2004). CMI (Comité Maritime International) is the international association of national maritime law associations.

- Contracts for the transport of goods
- Contracts for the transport of passengers and luggage
- Collision and navigation
- Salvage and general average
- Limitation of liability
- Pollution: Liability and compensation
- Maritime liens and claims
- Registration of ships, mortgages, rights and claims
- Arrest and immunity of ships
- Offshore mobile craft

In two of these categories – marked by asterisk – there are no binding instruments that have entered into force at this time.

The conventions vary in length, but few include more than 20 operational articles. Some of the conventions have been issued in the 1920ies and have been replaced or amended (by protocol) two or three times in respect of substantive issues. It is common that such revisions close for further ratification of the older convention.<sup>6</sup> The conventions often include a grandfather clause ((non-)supersession clause), allowing for older convention obligations to be maintained in relation to non-parties to the new convention.<sup>7</sup> They may also specify that certain older conventions shall be denounced.<sup>8</sup>

The way the conventions are negotiated varies. Nowadays they are typically negotiated in an appropriate forum of an international organization in the UN system or a UN agency. The draft is thereafter adopted – or rejected – either by a specially summoned Diplomatic Conference (*e.g.*, IMO) or agreed by the Assembly of that organization (*e.g.*, UNCITRAL<sup>9</sup>). The conventions always require ratification. There may or may not be a tacit amendment procedure for specified types of amendments.<sup>10</sup> Such procedures typically have a narrow

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6 *See, e.g.*, Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (Athens Convention, 1974), Article 26(3).

7 *See below* in section 7.3.

8 *Ibid.*

9 United Nations Commission on International Trade Law.

10 *See, e.g.*, Protocol of 1996 to Amend the International Convention on Limitation of Liability for Maritime Claims (1976) (LLMC Protocol, 1996), Article 8.

scope, such as enhancement of limitation amounts within strictly defined limits.<sup>11</sup>

The conventions typically enter into force when 10-20 states have ratified, perhaps with a proviso that they must represent a certain percentage of the world tonnage.<sup>12</sup> An individual state must give six months' or one year's notice before a ratification/accession or a denunciation is effective for that state.<sup>13</sup> For the unification, formal binding is, however, not very important, and sometimes states choose to take advantage of the conventions as a model law without formal ratification.<sup>14</sup>

### 3 The Obligations as Expressed in the Conventions

A common format of conventions on provisions to be implemented in national law is to make the convention expressing the obligations rather short and put the provisions to be implemented in annexes. An example is the SOLAS 1974<sup>15</sup>:

#### Article I

##### General obligations under the Convention

- (a) The Contracting Governments undertake to give effect to the provisions of the present Convention and the annex thereto, which shall constitute an integral part of the present Convention. Every reference to the present Convention constitutes at the same time a reference to the annex.
- (b) The Contracting Governments undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect, so as to ensure that, from the point of view of safety of life, a ship is fit for the service for which it is intended.

In the following articles of that Convention these provisions are clarified, *e.g.*, with exceptions for emergency situations.

In the conventions for the unification of private maritime law, on the other hand, the obligations of the States Parties are not precisely defined. A typical

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11 *L.c.* Article 8(6).

12 *See, e.g.*, International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention, 1996), Article 46.

13 *E.g., l.c.* Article 49.

14 *See e.g.*, EU Document COM(2002) 158 final (Communication from the Commission on the enhanced safety of passenger ships in the Community), Section 4.2.1 footnote 17 on the Athens Convention, 1974.

15 International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974).

example is the Rotterdam Rules, 2008.<sup>16</sup> The text just says that the States Parties «Have agreed as follows», followed by a mixture of private law rules and international law obligations.<sup>17</sup> The idea must have been to reflect an agreement on substance rather than an agreement on form and format. But it remains unclear exactly what are the obligations of the States Parties. Do they have to incorporate the text as it is (or perhaps only the parts of it that do not address the relation between states) into their national law, or does it suffice with harmonization in substance?<sup>18</sup> Can they add provisions, *e.g.*, concerning another type of transport document in addition to those defined in the Rotterdam Rules?<sup>19</sup> And do they have to make sure that that the national implementation of the Convention is construed in light of the practice under the Convention in other states, even if the Convention does not have a provision to this effect?<sup>20</sup>

Occasionally, the language is softened even further by using the modality “should” rather than “shall” in respect of the obligations of the parties.<sup>21</sup> The States Parties may also be allowed to freely modify certain obligations set out in the convention by national law.<sup>22</sup> The extreme version of this is model laws or CMI Rules (which are, strictly speaking, not conventions at all). Mere memoranda of understanding or codes have not yet been used for the unification of private maritime law.

The point here is not to complain about lack of clarity in conventions; that is common, and understandable for anyone who knows how multilateral conventions are made. The point is to demonstrate that what could seem like a stringent obligation really is far from it. There is a core of agreement, but in the fringes it is more akin to a soft law obligation.

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16 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (Rotterdam Rules, 2008).

17 Rotterdam Rules, 2008, Preamble *i.f.* An example of a rule of private law is Article 17 on the basis of carrier’s liability for cargo, and an example of a rule of public international law is Article 74, providing that Chapter 14 of the Rules will only be binding on States Parties that expressly declare that they will be bound by it.

18 State practice varies. A curiosity is that Convention on the Liability of Operators of Nuclear Ships, 1962 (Nuclear Ships Convention, 1962) has an Additional Protocol to preserve the right to transform the Convention into a national law format: «The Contracting Parties expressly reserve the right to give effect to this Convention either by giving it the force of law or by including in their national legislation, in a form appropriate to that legislation, the provisions of this Convention.” Similar clauses are sometimes added as reservations at ratification, presumably *ex tuteo*, see, *e.g.*, the Norwegian reservation in connection with the ratification of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1967 (Liens and Mortgages Convention, 1967) (information obtained from “diplomatie.belgium.be/fr/ binaries/i16\_tcm313-79775.pdf”).

19 See, *e.g.*, the proposal of the Norwegian Maritime Law Commission in this respect, NOU 2012:10 Gjennomføring av Rotterdamreglene i sjøloven, draft § 311.

20 Express clauses to this effect are not found in my material.

21 This is frequent in United Nations Convention on Conditions for Registration of Ships, 1986 (Registration Convention, 1986).

22 See, *e.g.*, Rotterdam Rules, 2008, Article 73.

#### 4 The Tenor of the Conventions

Even within this core, the tenor of the conventions for the unification of private maritime law is generally such that only a small part of it is apt as an object for a convention commitment. Thus, there is perhaps a tendency to over-emphasize the political choices over the pragmatic and conceptual. The pragmatic and conceptual choices are important for unification, but more epistemic than obligatory in nature.

Both political choices, on the one hand, and pragmatic and conceptual choices on the other are statements relating to the law, but only the former are statements of intention capable of forming an agreement. The others remain a soft law framework, neither intended to nor capable of being enforced under international law.

An example: It may make sense to make a legally binding agreement between states on limitation amounts in respect of torts and contract liabilities.<sup>23</sup> But, *e.g.*, the issue whether the principle should be extended to servants<sup>24</sup> is more a matter of negotiation capacity and understanding of the problems than making a choice or a compromise. Although all matters can be politicized, the matters in the latter category are generally resolved by explaining rather than arguing the pros and cons. Consequently, when matters are well understood and a common conceptual platform has been established, the consensus is quite irreversible. It will stand regardless of formalized agreements, and will not be reinforced by making it a legal obligation adhere to the common way of seeing things. Convention provisions in respect of such matters constitute a common understanding more than an agreement; like a soft law statement.

#### 5 Vagueness Implies Soft Law

The conventions for the unification of maritime law are to some extent almost like sketches, as if they were mere agreements on principle. A well-known example is the term “unit” in the Hague Rules which is understood differently in different jurisdictions.<sup>25</sup> Still there is never any communication between states on such matters; as far as I know, not even informal exchanges. One simply accepts that unification only succeeded to a limited extent. When the treaty negotiations are finished, the matter is closed.

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23 *See, e.g.*, International Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976), Article 6.

24 LLMC 1976, Article 1(4).

25 *E.g.*, Erling Selvig, *Unit limitation of carrier's liability: the Hague Rules Art. IV (5) : a study in comparative maritime law* (1961). The matter relates to the understanding of the term «unit» in the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules, 1924), Article IV(5). The issue was not really reconsidered when the Rules were revised in 1968 (Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 (HVR 1968)).

Avoidable or not; desirable or not: Such ambiguities leave so much leeway for a State Party (its courts or legislature) that other States Parties must rely on its intentions and good will rather than the stringent obligations of the convention. This is soft law.

This type of ambiguities is not uncommon even on practical, core points. Fundamental terms like ship<sup>26</sup>, flag State<sup>27</sup> (in the case of bareboat chartering) and shipowner/operator/”reder”<sup>28</sup> are commonly left undefined.

Likewise, it is quite typical that the conventions are vague in respect of whether they apply to the rights and obligations of individuals or ships. Thus the Collision Convention, 1910, only implicitly assumes the more common understanding that all on board the ship should be identified with the errors of the master when they make a claim.<sup>29</sup> And the LLMC, on the one hand, provides a right of limitation to individuals<sup>30</sup> and protects their interests regardless of the flag of the vessel<sup>31</sup>, while it on the other hand assumes (the only practical arrangement) that one limitation fund can be established for all persons entitled to limit liability, despite that the different persons may be entitled to invoke different limitation conventions.<sup>32</sup>

Usually it does not matter very much that the framework is as loose as it is. The states implement the conventions very much as they are. Then it is left to their courts to find the more precise meaning of the conventions if and when a case is brought before it. That is fairly unproblematic, as the courts are generally believed to be independent and not being agents for a state’s attempts to escape their obligations under the conventions (whatever these obligations may be).

In some cases, however, it is fair to say that States Parties (including their courts) have taken advantage of the leeway of the conventions to avoid undesirable rules.

One example is that the carrier’s liability under the Hague Rules, 1924, have been held not to apply fully when the loading and/or discharging operations are performed by the shipper.<sup>33</sup> A sensible result, but it is hardly in line with the text of the Rules.<sup>34</sup>

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26 See, e.g., LLMC 1976, Article 1.

27 See, e.g., 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC 1992), Article I(4).

28 See, e.g., LLMC 1976, Article 1(1).

29 See, e.g., Thor Falkanger, Hans Jacob Bull and Lasse A. Brautaset Lasse Brautaset, *Scandinavian maritime law: the Norwegian perspective* (2011) p. 231.

30 LLMC 1976, Article 1(4), etc.

31 LLMC 1976, Article 15(1) and (3).

32 LLMC 1976, Article 11(3). As explained below in 7, a State may be bound by more than one convention of this kind on the same subject-matter so that the link between the conventions and the protected interests become crucial.

33 N. J. J. Gaskell, Regina Asariotis and Yvonne Baatz, *Bills of lading: law and contracts* (2000), para 8.21 *et seq.*

34 Hague Rules, 1924, Article 7: «Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the

Another example is that the EU introduced a new limitation rule for wheelchairs, *etc.*, in addition to the other limits of the Athens Convention.<sup>35</sup> Until then, the limitation amounts set out in the Convention<sup>36</sup> presumably had been considered to cover all types of damages within the scope of the Convention. The move was quite creative and was based on a liberal construction of the Convention, perhaps necessitated by the desire to demonstrate willingness to legally protect disabled people.

However liberal these interpretations of the respective conventions were, they have not (to my knowledge) been protested by any other State Party. This is remarkable, for how meritorious the rules created may be, they could motivate forum shopping, contrary to the purpose of the unification conventions. This illustrates my point that the conventions do not place very strict obligations on the States Parties.

## 6 Lack of Adjudication Mechanisms

Even the vaguest obligations can be clarified by authoritative interpretation, and their character of soft law can thereby be diminished. However, the conventions on the unification of private maritime law generally lack mechanisms for common authoritative interpretation.

Some fifty years ago, there were attempts to include in the conventions specific clauses on dispute resolution.<sup>37</sup> But such clauses have to my knowledge never been used. The practice of including them has been discontinued for many years, and today, it is not considered to be a need for them.

To some extent the IOPC Fund clarifies its practice and thereby its understanding of the related conventions,<sup>38</sup> and at some rare occasions the Legal Committee of the IMO has expressed opinions on the correct

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responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea.” When the Rules were revised in 1968 (HVR 1968), the point was not clarified. This was again a confirmation of the relaxed attitude towards the details.

35 Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, Article 4.

36 Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 2002 (Athens Convention, 2002), Article 8.

37 International Convention for the Unification of Certain Rules Relating to Carriage of Passengers' Luggage by Sea, 1967 (Luggage Convention, 1967), Articles 17-18; Nuclear Ships Convention, 1962, Articles XX-XI; International Convention Relating to the Arrest of Sea-Going Ships, 1952 (Arrest Convention, 1952), Article 11. The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (Intervention Convention, 1969), which strictly speaking is public international law, includes an elaborate scheme for mediation and dispute settlement in Article VIII and the Annex.

38 See, e.g., International Oil Pollution Compensation Fund, *Claims manual. December 2008 Edition* (1992).



understanding of some IMO conventions.<sup>39</sup> The Depositary of a convention may also occasionally clarify substantive issues when preparing the authoritative text or shortly thereafter.<sup>40</sup> Still, the general impression is that there are no general mechanisms for clarification, dispute resolution and enforcement.

On the contrary, it seems like much is deliberately left in the hands of the States Parties. In respect of the CLC insurance certificates, it is even left to the States Parties themselves to apply the rules, so that other States Parties would have to recognize their certificates evidencing that the standards of insurance are complied with in respect of a specific vessel.<sup>41</sup> This is a legislative technique well known from technical conventions<sup>42</sup>, but is perhaps not necessary in private law unless one actually wishes to give the States Parties some flexibility. In the technical conventions, there is a possibility to check the correctness of the certificate on certain conditions<sup>43</sup>; a possibility not found in the conventions for the harmonization of private maritime law.

In line with this, there are no clauses requiring reciprocity in order that a State Party shall be bound by the treaty obligations.

Similarly, when the Supplementary Fund Convention<sup>44</sup> was negotiated it was a major concern that some States Parties would not effectively implement the provisions on payment of levies to the Fund in respect of contributing cargoes.<sup>45</sup> In some ways therefore, this Convention is stricter on the States Parties than its model, the Fund Convention, 1992.<sup>46</sup> However, one stopped far short of effective clarification and enforcement procedures, such as making States Parties liable for lack of reasonable efficient implementation of the Convention. It was simply too delicate and too much in breach of the tradition of these conventions to make provisions that could be strictly and efficiently applied and enforced.

Thus if the wording of a convention for uniform maritime law is ambiguous, it will remain so. The obligation of a State Party set out in the convention will be akin to a soft law obligation, at least within the specter of possible interpretations of the text.

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39 See, e.g., IMO Document LEG 74/13 para 59 *et seq.* on the HNS Convention, 1996.

40 See, e.g., UN documents CN.563.2012.TREATIES-XI-D-8 and C.N.105.2013.TREATIES-XI.D.8 on the Rotterdam Rules, 2008.

41 CLC 1992, Article VI(6-7).

42 See, e.g., SOLAS 1974, Annex, Chapter I, Part B Regulation 17.

43 See, e.g., SOLAS 1974, Annex, Chapter I, Part B Regulation 19(b).

44 Protocol of 2003 to the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Supplementary Fund Protocol, 2003).

45 This statement is based on my own recollection.

46 Compare the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention, 1992), Article 15, and the Supplementary Fund Protocol, 2003, Article 15.

## 7 Bilateralism in Multilateral Conventions

### 7.1 *Bilateralism gives Room for Soft Law*

One should think that if State A enters into a convention for the unification of law, State B would insist that State A should use the uniform system generally, and not only when State B is involved. The same goes the other way around. Only then can the states have a hope that the rules of the convention can be uniform as in universal. However, it will be submitted in the following that in many respects even multilateral conventions for the unification of private maritime law are not understood in this way. They are understood as a series of bilateral conventions (“bilateralism”), so that all that State A can require from State B is that the rules of the convention are applied in so far State A is involved. The application of the conventions in relation to third parties is in this way a matter of soft law. This is so whether the third parties are parties to the same convention or not.

### 7.2 *A Reference Grid*

For the following discussion some readers may find it useful to have a shorthand notation of the different situations. I will frequently refer to a situation of two conventions on the same subject matter, one new and one old. One can then imagine different combinations of membership of the two conventions:

		New convention	
		Party	Non-party
Old convention	Party	$N_yO_y$	$N_nO_y$
	Non-party	$N_yO_n$	$N_nO_n$

The letters N and O refer to the New and Old Convention respectively, and the indices y and n (for Yes or No) refer to whether or not a state is a party to each of these conventions. The relationship between a state that is a party to both the new and the old conventions and a state that is a party only to the old convention can then be referred to as a  $N_yO_y - N_nO_y$  relation.

### 7.3 *Supersession Clauses, etc.*

The “bilateralism” in the conventions for the unification of maritime law is evident from the frequent use of supersession clauses. These are clauses in a new convention dealing with the obligations of States Parties to that convention and its predecessor (the old convention) towards states that are parties to the old convention but not to the new convention (a  $N_yO_y - N_nO_y$  relationship). The clauses typically look like this:<sup>47</sup>

#### Article 11 Supersession Clause

This Convention shall supersede any Convention in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such Convention would be in conflict with it; however, nothing in this Article shall affect the obligations of States Parties to States not party to this Convention arising under such Convention.

The provision allows States Parties to maintain existing convention obligations in relation to non-parties, and is a way to deal with conflicts of conventions. In this way, the clause is rather a non-supersession clause than a supersession clause.

In some conventions, there are no supersession clauses, most likely because one has thought that all possible conflicts with other conventions are resolved<sup>48</sup> or should be resolved by denunciation of earlier conventions.<sup>49</sup>

As between parties to both conventions (the  $N_yO_y - N_yO_y$  relationship), the supersession clause provides that the new convention shall supersede (prevail over) the old. In relation to the old convention this creates a special arrangement akin to Article 41 of the Vienna Convention, 1969:<sup>50</sup>

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47 International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention, 2001). Other supersession clauses are United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, 1991 (Terminal Operator Convention, 1991), Article 15; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971 (Nuclear Carriage Convention, 1971), Article 4; LLMC Protocol, 1996, Article 9 (on the relation between the Protocol and the original Convention); CLC 1969, Article XII; CLC 1992, Articles XII and XI bis; HNS Convention, 1996, Article 42; as well as the quite elaborate regulation of United Nations Convention on the Carriage of Goods By Sea, 1978 (Hamburg Rules, 1978), Article 25 and United Nations Convention on International Multimodal Transport of Goods, 1980 (Multimodal Convention, 1980), Articles 30 and 38.

48 Cf. Rotterdam Rules, 2008, Article 82.

49 Cf. Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (Athens Protocol, 2002), Article 17 and IMO Document LEG 79/11, paras 40-42.

50 Vienna Convention on the Law of Treaties, 1969 (Vienna Convention, 1969).

## Article 41

### *Agreements to modify Multilateral Treaties between certain of the Parties only*

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
  - (a) the possibility of such a modification is provided for by the treaty; or
  - (b) the modification in question is not prohibited by the treaty and:
    - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
    - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

If such special arrangements are allowed, that is an indication that the (old) convention does not require the States Parties to apply its provisions in all relations; its norms are soft law in relation to third parties.

In our context, therefore, the inclusion of a supersession clause in a convention first of all says something about the views of the draftsmen of that (new) convention on other (older) conventions for the unification of maritime law: They presuppose that the parties to the old convention can make special provisions as between themselves while remaining parties to the old convention. State A cannot insist that State B shall use the uniform system generally, but only when State A is involved, and must accept special arrangements in a new convention between States B and C.

The notification procedure of Article 41 of the Vienna Convention, 1969, is usually not followed in these cases, perhaps because the conventions and their revisions are multinational and already well known.

Even the CLC must be interpreted in this way. Albeit they do include provisions to the effect that a certificate of insurance shall be required from all vessels, regardless of flag,<sup>51</sup> the revisions make use of supersession clauses.<sup>52</sup> For periods of time states have remained parties to the old version alongside

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51 CLC 1969, Article VII(11); CLC 1992, Article VII(11).

52 CLC 1969, Article XII and XIIbis as revised by Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC 1984); CLC 1992, Articles XII and XI bis.

the new.<sup>53</sup> This is a clear indication that states generally do not object to the use of the mechanism of Article 41 of the Vienna Convention, 1969, and that even CLC can be dispensed from if it follows from special agreements with third parties.

Although the CLC is not only a minimum convention – it sets out the insurance requirements in clear terms (“to the extent”<sup>54</sup> rather than “at least to the extent”) – it would perhaps be more controversial to relax the insurance requirement than to enhance the required insurance. Arguably there is a soft obligation not to treat ships from non States Parties more leniently than ships from States Parties; unification is after all one of the purposes of these conventions.

The use of supersession clauses also says something about the draftsmen’s view of the convention in which it is included, namely that it to a large extent is soft law except in the relation between the two States Parties who have not made other arrangements between themselves: Albeit the supersession clause makes clear that the convention supersedes old conventions between the States Parties, the wording does not prevent that these States Parties make special arrangements under Article 41 of the Vienna Convention, 1969, as between themselves. Again one can refer to the CLC: CLC 1969 includes a supersession clause,<sup>55</sup> but that did not prevent that States Parties to that convention made special arrangements between themselves by ratifying CLC 1992 and maintaining the CLC 1969.<sup>56</sup>

In sum, the use of a supersession clause in a convention is both an indication that the draftsmen consider the superseded convention as a soft law obligation in relation to third parties, and that the obligation under the convention including the clause is not so strict in relation to third parties that it will prevent special arrangements between two of the parties pursuant to Article 41 of the Vienna Convention, 1969. The scope of mere soft law obligations is thus remarkably wide for conventions for the unification of private maritime law.

The way of thinking that makes this possible is that even multilateral conventions of this kind first and foremost are bilateral obligations between pairs of States Parties. It is not like a society, where all members have to adhere to the same, common standards. This “bilateralism” maximizes the scope of soft law.

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53 See the information at the web site of the depositary IMO at “[www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx](http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx)”.

54 CLC 1969, Article VII(11); CLC 1992, Article VII(11).

55 CLC 1969, Article XII.

56 CLC 1992, Article XI bis presupposes that membership in CLC 1969 can be retained. The CLC 1984 Article XIIbis is similar.

#### **7.4 Generalization**

It is submitted that the use of supersession clauses as discussed above reflects the general attitude to conventions for the unification of maritime law; bilateralism is the main rule, and a State Party is only under a soft law obligation to apply the uniform rules in relation to third parties. It is unlikely that the use of such clauses is caused by lack of stringency. And the generality of the bilateralism is evident from the widespread use of supersession clauses.<sup>57</sup>

#### **7.5 Is a Convention Necessary?**

Even if third party relations are soft law in this context, there may be a formal requirement. So even if a State Party can establish a special regime in relation to a third party at will, it may be that this option can only be taken advantage of by establishing or maintaining a formal treaty relation to that third party.

Article 41 of the Vienna Convention, 1969, refers to an “agreement.” There is no requirement as to form. Presumably, even a lenient practice not amounting to a real agreement suffices, as the other States Parties to the convention (under the assumptions here) cannot object to the special arrangements anyway. The requirement to notify under Article 41(2) applies (if complied with) on the basis of intent to make special arrangements, and does not presuppose any special formalities.

It is not stated in the standard supersession clauses whether a formal treaty is necessary to maintain an old or special regime to a non State Party. The text just says that a convention suffices to make an exception to the new convention as between the States Parties to the new convention. But if a formal convention is not necessary under Article 41 (previous paragraph) and if Article 41 generally allows special regimes to be established between two parties to a convention for the unification of maritime law (above 7.3 and 7.4), then a formal treaty can hardly be necessary in the context of supersession clauses either.

This means that supersession clauses are not really conflict of convention clauses. It is right that they do in fact prevent conflicts between old and new conventions by making clear that old convention obligations can be maintained. But they reflect a principle that is broader than only the conflict of convention situations. This is the principle that conventions for the unification of maritime law are mere soft law obligations in relation to third parties.

#### **7.6 Prohibition of Reservations**

Some conventions include restrictions on reservations. One could imagine that such clauses prevented parties from making exceptions also by use of Article

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<sup>57</sup> See footnote 47 above.

41 of the Vienna Convention. But again, there is multilateral state practice in favor of soft law. When the 1976 LLMC, which restricts reservations<sup>58</sup>, was amended in 1996, the amendment protocol presupposed that states still might keep the original convention in parallel with the revised convention.<sup>59</sup> The obligations of the 1976 LLMC were thereby understood not to extend to a hard law obligation not to make Vienna Convention Article 41 agreements.

Again one can see that the conventions for the unification of private maritime law apply between two and two of the parties, and that the application in other relations at the most is a matter of soft law.

### 7.7 *Clarifying Clauses*

There are convention clauses that depart from or clarify the starting point of bilateralism in the sense that conventions for the unification of maritime law are mere soft law obligations in relation to third States.

The new conventions on *arrest and mortgages* also protect ships registered in non contracting states.<sup>60</sup> Then the port state, State Party A, has an obligation towards State Party B to apply the conventions also in relation to ships from State C whether or not State C is a State Party to the conventions. This is an exception to the general rule submitted here.

In *global limitation conventions* there are explicit provisions to the effect that the conventions, in line with what is here submitted to be the main rule, do not protect ships from states that are not parties to the Convention.<sup>61</sup> In a way it makes sense that a state should not get the privilege of limitation for its ships without becoming a State Party. On the other hand, all states tend to use one of the global limitation conventions – the newest they have ratified – as the basis for their limitation legislation, applicable to all ships subject to their laws (nowadays typically *lex fori*). The soft law application of the conventions is thus much wider than the application *stricti juris*. Exceptions are only made if old convention obligations require it.

## 8 Conclusion

The obligations of the States Parties of the conventions for the unification of maritime law are to a large extent soft law obligations at least in the fringes, in the sense that their implementation depends on the good will of the implementing states. The obligations are not as precise as one could expect in such conventions, and there are many possibilities not to apply the uniform rules universally within the jurisdiction.

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58 LLMC 1976, Article 18.

59 LLMC Protocol, 1996, Article 9.

60 International Convention on Maritime Liens and Mortgages, 1993 (Liens and Mortgages Convention, 1993), Article 13; International Convention on Arrest of Ships, 1999 (Arrest Convention, 1999), Article 8.

61 See, e.g., LLMC 1976, Article 15(1). A similar provision is found in the Arrest Convention, 1952, Article 8.

It is likely that the conventions, despite this, serve their purpose. It is therefore remarkable that the States Parties insist that such conventions should prevent the making of new conventions without denouncing the old if there is the smallest conflict with the existing convention. There should be an opening to escape from such obligations, *e.g.*, by an escape clause of the type mentioned in the introduction to this paper.