

Brussels Commentary

EU Maritime Transport Law

Jessen / Werner

C.H.BECK · Hart · Nomos

Jessen / Werner
Brussels Commentary on EU Maritime Transport Law

EU Maritime Transport Law

edited by

Prof. Dr. Henning Jessen, LL.M. (Tulane)
Michael Jürgen Werner

2016

C.H.BECK · Hart · Nomos

Published by

Nomos Verlagsgesellschaft, Waldseestraße 3-5, 76530 Baden-Baden, Germany,
email: vertrieb@nomos.de

Co-published by

Verlag C.H.BECK oHG, Wilhelmstraße 9, 80801 München, Germany,
email: bestellung@beck.de

and

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW, United Kingdom,
email: orders@isbs.com

Published in North America (US and Canada) by Hart Publishing,
c/o International Specialized Book, Services,
930 NE 58th Avenue, Suite 300, Portland, OR 97213-3786, USA,
email: orders@isbs.com

ISBN 978-3-8487-1312-7 (Nomos)

ISBN 978-3-406-66718-3 (C.H.BECK)

ISBN 978-1-5099-0560-7 (Hart Publishing)

First Edition 2016

© Nomos Verlagsgesellschaft, Baden-Baden 2016. Printed in Germany.

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically those of translation, reprinting, re-use of illustrations, broadcasting, reproduction by photocopying machine or similar means, and storage in data banks. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to »Verwertungsgesellschaft Wort«, Munich, Germany.

Preface

The law of the European Union (EU) is now a major source of law in almost all regulatory areas. In the 21st century, maritime law – in particular the regulation of shipping – makes no exception anymore. Over the decades and largely driven by both the jurisprudence of the Court of Justice of the EU and the dynamic regulatory reaction to some disastrous shipping accidents in EU waters, EU maritime law has emerged to become an integral part of the EU's internal market. This area of law has hardened and deepened to cover various aspects of competition law and transport law in general as well as various maritime-related safety and security issues. This development has occurred despite the important position of the International Maritime Organisation (IMO) as the world's primary regulator for – in the words of the IMO itself – “*safe, secure and efficient shipping on clean oceans*”.

Though being a member of the United Nations Convention on the Law of the Sea (UNCLOS) the EU is still not a member of the IMO in its own rights. However, all EU member States are active members and participants in all IMO matters. Their individual position as sovereign IMO members is carefully coordinated in Brussels – under active leadership of the European Commission – mostly resulting in a common policy position of the “EU block” at the IMO in London. There are even some recent examples of IMO legal acts being identified as incompatible with EU law, thus resulting in new legal conflicts between those two regulators. Generally, EU maritime law now covers a wide array of both public law and even private law aspects of shipping as well. It is inextricably inter-linked with the work of the IMO and, ultimately, both regulators cannot globally succeed without the other. Even the EU's regional rules for the regulation of international shipping affect the rest of the world, for example, by introducing stricter regional environmental standards to be adhered to both by EU-flagged vessels and non-EU flags when entering EU waters and, in particular, EU ports.

The rise of EU maritime law as a separate source of law is also the result of shipping being one of the key factors for economic growth and prosperity throughout Europe's history. About half of the EU's population lives less than 50 km from the sea. Waterborne freight transport has proved to be a vital instrument for the development of the EU's trade whether national, intra-EU or external. Today, the maritime industry is an important source of revenues and jobs in Europe. But there are also dangers and risks inherent to maritime transport. The EU's reliance on maritime transport means that it is as surrounded and penetrated by the risk of pollution from shipping, both chronic and catastrophic, as it is by the sea itself. The words of the European Commission are both true in a positive and in a negative way: “*Maritime transport has a direct impact on the quality of life of citizens.*” As a result, the EU has the strongest interests in

- promoting safe, secure and efficient intra-European and international shipping on clean oceans and seas,
- assuring the long-term competitiveness of European shipping and related maritime industries in world markets, and
- assisting the entire seaborne transport system to adapt to the challenges of the 21st century.

This Commentary strives to be a reference work for everyone seeking to know more about how EU 21st century maritime law affects commercial practices and even the rights of consumers (for example as passengers of vessels) and everyone else (for example via the prescription of strict environmental standards for shipping). We have chosen to divide the book into five chapters, acknowledging that not every regulatory area of maritime law and not every single legal act can be analysed as intensely and as detailed as the provisions of a single comprehensive convention could be commented on. Thus, Chapter 1 introduces the overall regulatory framework for maritime transport in the EU. Above all, Chapter 1 serves as a legal and historic foundation for all following specific chapters. It also includes some information on issues like infrastructure, system development and integration, including port policy, and the EU's maritime-related external relations, which are cross-cutting topics not addressed specifically elsewhere in the Commentary. Furthermore, Chapter 1 also contains a separate summary on the regulation of inland waterway transport in the EU. As stated in Chapter 1, it is possible to break down the maritime policy of the EU into some core areas, most importantly

- seafarers' recruitment, training and working conditions,
- market access and conditions for offering maritime transport services,
- maritime safety and pollution control;
- maritime security.

This list of leading topics governs the following structure of the Commentary: At the outset, Chapter 2 addresses further cross-cutting issues which – under the current status of EU law and international law – are difficult to comment on via sole reference to specific statutes and provisions. Still in a “non-commentary style”, this chapter addresses the general role of EU regulatory activity for carriage of goods by sea contracts as well as conflict of laws and jurisdictional issues in the maritime context. The final topic of Chapter 2 – cross-cutting questions of EU law and international maritime labour law – is also directly inter-linked with possible conflicts of laws.

After that, Chapter 3 discusses the most important EU legal instruments to create a liberalised and competitive market in maritime services, arguably the most important and most traditional challenge related to intra-EU matters. Two of the six sub-chapters in Chapter 3 also address the difficult modern issue of passenger rights, generally when travelling by sea and on inland waterways and particularly, in the event of accidents possibly triggering certain liability claims.

Arguably, Chapter 4 (adding up to not less than 14 sub-chapters) forms both the heart and backbone of this Brussels Commentary. It is centred on the ever-

growing subject of the protection of the marine environment and the related acts of EU maritime safety law. The majority of the sub-chapters of Chapter 4 comment on EU Regulations and Directives which are part of the so-called “*Erika packages*”, a series of legislative acts adopted in the aftermath of the “*Erika*” oil tanker casualty which occurred in 1999 off the coast of France. Another maritime disaster in EU waters, the break-up of the oil tanker “*Prestige*” in late 2002, has fuelled the follow-up dynamics of the “*Erika packages*” even more. Six of the 14 sub-chapters are directly linked to the “*Erika III package*”, the latest (2005-2009) and most important “wave” of EU legislative activity in this field.

In an effort to also address one of the latest legislative acts within the context of Chapter 4, a basic commentary on the EU’s new Regulation on the monitoring, reporting and verification (MRV) of carbon dioxide emissions from shipping and its future practical implications concludes the discussion of the various environmentally-related sub-areas. Some critical readers might miss an individual commentary on the legislative acts paving the way for the most important establishment of the Lisbon-situated European Maritime Safety Agency (EMSA) in 2002. However, the EMSA and its continuously widening tasks – especially in support of the European Commission in monitoring the implementation of all legal acts discussed in Chapter 4 – are addressed in the various specific *rationae materiae* of almost all other sub-chapters. In sum, it seemed appropriate to us to refrain from commenting on the intra-EU provisions on the configuration and finance of the EMSA itself.

Chapter 5 concludes the Commentary by addressing the globally important challenges of security, in particular in relation to maritime transport and port infrastructure. This represents a topic which has gained the most practical prominence in the aftermath of the terrorist attacks of 11 September 2001.

Reviewing all specific regulatory topics addressed and all sub-chapters chosen for inclusion in the Commentary, there would still be a list of possible further themes and acts. Some of them are cross-cutting with other subject-matters like, e.g., waste management, as addressed by the relevant EU Regulation on ship-recycling, adopted in 2013 and implemented over the next years. Nevertheless, we think that the choice of topics and the relevant EU legal acts commented on is brought down to a sound and round figure. Additionally, the professional qualities of all authors involved should make the Commentary an essential reading to students, researchers, academics and practitioners. It is the result of arduous work involving many setbacks and shifted deadlines. However, in the end, this new Commentary shall still contribute to making a partly impenetrable, protracted and dynamic area of law more accessible to readers throughout the whole world.

Henning Jessen
Hamburg, December 2015

Table of Contents

List of Authors	XIII
Abbreviations	XV
Chapter 1: General Introduction: The Regulatory Framework for Maritime Transport in the European Union	
I. Maritime Transportation	1
<i>Robert Coleman/Henning Jessen</i>	
II. EU Law and Inland Waterway Transportation	48
<i>Henning Jessen</i>	
Chapter 2: Fundamentals and Cross-Cutting Topics of Maritime Law and EU Regulation	
	77
I. The EU and the Carriage of Goods by Sea under Private Law and EU Regulation	77
<i>Melis Özdel</i>	
II. Maritime Conflict of Laws and Jurisdiction	193
<i>Melis Özdel</i>	
III. Seafarers' Rights and Maritime Employment Contracts in the EU Legal Order ..	231
<i>Henning Jessen/Alexander Block</i>	
Chapter 3: Developing a Liberalised and Competitive EU Market for Maritime Transport	
	275
I. Introduction	275
<i>Robert Coleman/Henning Jessen</i>	
II. Commentary on Regulation EEC/3577/92/EC Applying the Principle of Freedom to Provide Services to Maritime Transport within Member States	298
<i>Marian Paschke</i>	
III. Application of EU Competition Rules to Maritime Sector – Commentary on the Liner Shipping Consortium Block Exemption Regulation No. 697/2014 (Regulation 906/2009)	322
<i>Michael Jürgen Werner</i>	
IV. Commentary on the Community Guidelines on State Aid to Maritime Transport and Regulation 3094/95 on Aid to Shipbuilding	342
<i>Michael Jürgen Werner</i>	
V. Regulation (EC) No 789/2004 on the transfer of cargo and passenger ships between registers within the Community	371
<i>Timo Nofsz</i>	
VI. Commentary on Regulation EC/1177/2010 Concerning the Rights of Passengers when Travelling by Sea and Inland Waterway	390
<i>Christine Wersel</i>	

Table of Contents

VII.	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	473
	<i>Antonios Politis</i>	
Chapter 4: EU Maritime Safety and Pollution Control		566
I.	Introduction	566
	<i>Robert Coleman/Henning Jessen</i>	
II.	Commentary on Directive 1999/32/EC as regards the sulphur content of marine fuels, as amended by Directive 2012/33/EC	589
	<i>Orestis Schinas</i>	
III.	Commentary on Directive 2000/59/EC of 27 November 2000 on Port Reception Facilities for Ship-Generated Waste and Cargo Residues	635
	<i>Thomas Brinkmann</i>	
IV.	Commentary on Directive 2001/96/EC Establishing Harmonised Requirements and Procedures for the Safe Loading and Unloading of Bulk Carriers	646
	<i>Michael Pimm</i>	
V.	Commentary on Regulation EC/782/2003 on the Prohibition of Organotin Compounds on Ships	649
	<i>Orestis Schinas</i>	
VI.	Commentary on Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences (as amended by Directive 2009/123/EC)	667
	<i>Henning Jessen</i>	
VII.	Commentary on Regulation EC/391/2009 on Common Rules and Standards for Ship Inspection and Survey Organisations and Directive 2009/15/EC on Common Rules and Standards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Administrations	713
	<i>Henning Jessen</i>	
VIII.	Commentary on Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on Port State Control	856
	<i>Michael Pimm</i>	
IX.	Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC	902
	<i>Michael Jürgen Werner</i>	
X.	Commentary on Directive 2009/18/EC Establishing the Fundamental Principles Governing the Investigation of Accidents in the Maritime Transport Sector	937
	<i>Sara Vatankhah</i>	
XI.	Commentary on Directive 2009/20/EC on the Insurance of Shipowners for Maritime Claims	1015
	<i>Michael Pimm</i>	
XII.	Commentary on Directive 2009/21/EC on Compliance with Flag State Requirements	1023
	<i>Michael Pimm</i>	
XIII.	Commentary on Regulation 530/2012/EU of Double-Hull or Equivalent Design Requirements for Single-Hull Oil Tankers	1034
	<i>Henning Jessen</i>	

Table of Contents

XIV. Commentary on Regulation (EU) 2015/757 on the Monitoring, Reporting and Verification of Carbon Dioxide Emissions from Maritime Transport	1060
<i>Henning Jessen</i>	
Chapter 5: Security of Maritime Transport and EU Port Infrastructure	1099
I. Introduction	1099
<i>Robert Coleman/Henning Jessen</i>	
II. Commentary on Regulation EC/725/2004 on Enhancing Ship and Port Facility Security	1112
<i>Alexandros Ntovas</i>	
III. Commentary on Directive 2005/65/EC on Enhancing Port Security	1191
<i>Mateusz Bek</i>	
Index	1227

List of Authors

Mateusz Bek, LL.B. (Soton), LL.M.,
Maritime Law (Soton), UK

Chapter 5, III.

Prof. Dr. Alexander Block, LL.M.,
Federal University of Applied Administrative Sciences, Brühl, Germany
Chapter 2, III.

Dr. Thomas Brinkmann, LL.M. (Tulane),
Partner, Schackow & Partner Law Firm, Bremen, Germany
Chapter 4, III.

Sir Robert Coleman, ret., UK,
former Director-General at the European Commission, former EU Liaison Officer of the Baltic and International Maritime Council (BIMCO)
Chapters 1, 3–5, I.

Prof. Dr. Henning Jessen, LL.M. (Tulane),
Institute for Maritime Law and the Law of the Sea, Law Faculty, University of Hamburg, Germany
Chapters 1, 3–5, I.; 1. II.; 2. III.; 4. VI.–VII., XIII.–XIV.

Timo Noftz, LL.M. (King's College London),
Partner at Norton Rose Fulbright LLP, Hamburg, Germany
Chapter 3, V.

Dr. Alexandros Ntovas,
Lecturer in International Shipping Law, Queen Mary University of London Centre for Commercial Law Studies, London UK
Chapter 5, II.

Dr. Melis Özdel,
Lecturer in maritime and commercial law, head of graduate maritime law studies at University College London (UCL) and deputy director of the UCL Centre for Commercial Law
Chapters 2, I.–II.

Prof. Dr. Dr. h.c. Marian Paschke,

Professor, Institute for the Law of the Sea, Hamburg, Germany

Chapter 3, II.

Michael Pimm,

English solicitor and a consultant with Orrick, Herrington & Sutcliffe (Europe) LLP.

Chapters 4, IV., VIII., XI.–XII.

Antonios Politis,

Research Associate at the Institute for the Law of the Sea and Maritime Law, University of Hamburg

Chapter 3, VII.

Prof. Dr. Orestis Schinas,

HSBA Hamburg School of Business Administration, Hamburg, Germany

Chapters 4, II., V.

Sara Vatankhah, LL.M. (East Anglia),

Legal Counsel (Maritime Law), German Shipowners' Association (Verband Deutscher Reeder), Hamburg, Germany

Chapter 4, X.

Michael Jürgen Werner,

Partner, Norton Rose Fulbright LLP, Brussels Office, Belgium

Chapters 3, III.–IV.; 4, IX.

Dr. Christine Wersel,

TUI AG, Hamburg, Germany

Chapter 3, VI.

Abbreviations

AFS	Anti-Fouling System
AIS	Automatic Identification System
Art.	Article
BGB	Bürgerliches Gesetzbuch (Germany)
BGBI	Bundesgesetzblatt
BGH	Bundesgerichtshof (Germany)
BIMCO	Baltic and International Maritime Council
CAS	Condition Assessment Scheme (for oil tankers)
CC	Civil Code
CCNR	Central Commission for the Navigation of the Rhine
CESNI	Comité Européen pour l'Elaboration de Standards dans le Domaine de Navigation Intérieure
cf.	Confer
CFR	Cost and Freight (INCOTERMS)
Chap.	Chapter
CIF	Cost, insurance, freight (INCOTERM)
CIP	Carriage and insurance paid to (INCOTERM)
Cir.	Circuit
CJEU	Court of Justice of the European Union
CMI	Comité Maritime International
Co.	Company
CO2	Carbon Dioxide
COGSA	Carriage of Goods by Sea Act
COSS	Committee on Safe Seas and the Prevention of Pollution from Ships
CPT	Carriage paid to (INCOTERM)
DAP	Delivered at place (INCOTERM)
DAT	Delivered at terminal (INCOTERM)
DEQ	Delivered ex quay (INCOTERM)
DES	Delivered ex ship (INCOTERM)
DOC	Document of Compliance
e.g.	for example
EC	European Communities
ECR	European Court Report
ECSA	European Community Shipowners' Associations
Ed(s)	Editor(s)
EDI	Electronic Data Interchange
edn	Edition
EEA	European Environment Agency
EEC	European Economic Community
EEDI	Energy Efficiency Design Index
EEOI	Energy Efficiency Operational Indicator
EEZ	Exclusive Economic Zone
ELAA	European Liner Affairs Association
ELR	European Law Review
EMEC	European Marine Equipment Council
EMSA	European Maritime Safety Agency
ENI	European Vessel Identification Number
EP	European Parliament
Et al	and others
Et seq.	and the following
Etc.	Etcetera

Abbreviations

ETS	Emissions Trading Scheme
EU	European Union
European J. Law & Econ.	European Journal of Law and Economics
FS	Festschrift
FSI	Flag State Implementation
GHG	Greenhouse Gas
GPS	Global Positioning System
Hague Rules (HR)	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924
Hague-Visby Rules (HVR)	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1968
Hamburg Rules	United Nations Convention on the Carriage of Goods by Sea 1982
HGB	Handelsgesetzbuch (Commercial Code, Germany)
HSSC	Harmonized System of Surveys and Certification
i.e.	that is
i.r.o.	in respect of
i.t.o.	in terms of
IACS	International Association of Classification Societies
ICC	International Chamber of Commerce
ICCLR	International Company and Commercial Law Review
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICS	International Chamber of Shipping
Id.	the same person
ILO	International Labour Organization
IHR	Internationales Handelsrecht, Zeitschrift für das Recht des internationalen Warenaufs- und -vertriebs
IMO	International Maritime Organization
Inc.	Incorporated
INCOTERMS	International Commercial Terms of the ICC (revised in 2010)
INTERCARGO	International Association of Dry Cargo Shipowners
INTERTANKO	Independent Tanker Owners Association
IOPC Fund	International Oil Pollution Compensation Fund
ISF	International Shipping Federation
ISM Code	International Safety Management Code
ISPS Code	International Ship and Port Facility Security Code
ITF	International Transportworkers' Federation
ITOPF	International Tanker Owners Pollution Federation
ITLOS	International Tribunal for the Law of the Sea
IUMI	International Union of Marine Insurance
LMAA	London Maritime Arbitrators' Association
LLMC	Convention on Limitation of Liability for Maritime Claims
LNG	Liquid Natural Gas
Ltd.	Limited
MARPOL 73/78	International Convention for the Prevention of Pollution from Ships 1973/1978, as amended
MBM	Market-based measures
MEPC	Marine Environment Protection Committee (IMO)
MLC 2006	Maritime Labour Convention 2006
MoU	Memorandum of Understanding
MRV	Monitoring, Reporting, Verification
MSC	Maritime Safety Committee (IMO)
n	Note
NAIADES	Integrated European Action Programme for Inland Waterway Transport

Abbreviations

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
NJW	Neue Juristische Wochenschrift
No.	Number
NOX	Nitrogen oxides
NVOCC	Non-Vessel Operating Common Carrier
OLG	Oberlandesgericht
OUP	Oxford University Press
p.(p)	Page(s)
Para(s)	Paragraph(s)
Paris MoU	Paris Memorandum of Understanding on Port State Control
PC	Privy Council
P&I Clubs	Protection and Indemnity Clubs
PSC	Port State Control
PSJ	Port State Jurisdiction
Pub	Publication
QACE	Quality Assessment and Certification Entity
Reg	Regulation
RIS	River Information System
Ros	Recognized Organizations
Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
Rome II	Regulation (EC) No 864/2007 regarding the conflict of laws
Ro-Ro	Roll on Roll off
Rotterdam Rules	UN Convention on Contracts for The International Carriage of Goods Wholly or Partly by Sea 2008
Sched	Schedule
Sect.	Section
Sent.	Sentence
SDR	Special drawing right
SECA	Sulphur emission control area
SEEMP	Ship Energy Efficiency Management Plan
SMC	Safety Management Certificate
SMS	Safety Management System
SOLAS	International Convention on the Safety of Life at Sea, 1974 (as amended)
SOX	Sulphur oxides
STCW Convention	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (as amended)
Supp.	Supplement
TEU	Twenty-foot equivalent units
TFEU	Treaty on the Functioning of the European Union
U.S.C.	United States Code
UCC	Uniform Commercial Code (US)
UCC Rep Serv.	Uniform Commercial Code Reporting Service
UCP 600	Uniform Customs and Practice
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UNCTAD	United Nations Conference on Trade and Development

Abbreviations

UNFCCC	United Nation Framework Convention on Climate Change
US	United States of America
USD	United States Dollar
USDC	United States District Court
v	versus
VAT	Value Added Tax
VLCC	Very Large Crude Carrier
Vol.	Volume
VUWLR	Victoria University of Wellington Law Review
WCS	World Council of Shipping
W.D.	Western District
WL	West Law, Database
WLR	The Weekly Law Reports
WTO	World Trade Organization