# La toma de decisiones en el ámbito marítimo: su repercusión en la cooperación internacional y en la situación de las gentes del mar

José Manuel Sobrino Heredia
(Director)

Editorial Bomarzo





Primera edición: diciembre 2016


c/ Dionisio Guardiola 1, 4º
02002 Albacete (España)
editorialbomarzo@ono.com
www.editorialbomarzo.es



Impreso en España.

ISBN: 978-84-16608-51-5

D.L.: AB 595-2016

Diseño: Javier Hidalgo Romero.

Maquetación: Juan Gómez Rubio.

Imprime: Publicep

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## 8. CONCLUSIONES

El problema del etiquetado de los alimentos ha constituido y sigue constituyendo, en general, un problema actual de la Unión Europea. Justo por esta razón, se nota una continua preocupación a nivel de las instituciones de la Unión Europea con el objetivo de mejorar los requisitos del etiquetado de los alimentos para garantizar a los consumidores finales el hecho de que los alimentos cumplen las normas existentes en la legislación de la Unión Europea y, a la vez, en el caso que no cumplieran los requisitos, las personas o instituciones responsables tienen que responder de forma jurídica.

El etiquetado de los alimentos en general y de los productos pesqueros, sobre todo, tiene un papel muy importante para asegurar la seguridad de los consumidores. Para que el consumidor pueda decidir, se le tiene que informar de manera legal sobre las cualidades del alimento que desea consumir. Por eso, a nivel europeo, el etiquetado de los alimentos ocupa un papel importante en el cumplimiento de las políticas adoptadas a este nivel.



# DECISION MAKING AND MARITIME LAW: THE ROLE OF THE LEX MARITIMA

***Andrea La Mattina***

*Professore di Diritto della Navigazione*

*Università di Genova*

1. The aim of this paper is to point out some specific features regarding the sources of maritime law and the very peculiar role of commercial operators as "decision makers" in this field.

It seems to me that in maritime law the "normal" interplaying between international organizations, State laws and operators assumes different characteristics with respect to other sectors of the international trade.

In particular, the specialty of maritime law in relation to this topic is marked and evidenced by two fundamental aspects.

2. *In the first place* maritime law is a '*jus commune mercatorum*' that originates from custom and is largely included in international conventions or in national laws: this ensures essentially similar legal solutions, although the wording is not always identical due to the difference of the doctrines from which each of them took inspiration. That it has been clearly stated by the US Courts since 1875: in the *The Lottawanna* case it has been affirmed that *"it happens that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world"*, hence *"the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole"*[484].

In this context, the important contribution of international organizations such as the Comité Maritime International (CMI), IMO, UNCTAD and UNCITRAL in the "making" of conventions for the (re)unification

[484] 88 U.S. 558, 573 (1875). See also HOUGH, *Admiralty Jurisdiction – Of Late Years*, in *Harv. L. Rev.*, 1924, 529 ff.: *"maritime law is a body of sea customs. (...) custom of the sea includes a customary interpretation of contract language"*; and CARBONE, S. and SCHIANO DI PEPE, L., *Conflitti di sovranità e di leggi nei traffici marittimi tra diritto internazionale e diritto dell'Unione europea*, Torino, 2010, 3 ff.

of different areas of maritime law in a large part it has to be interpreted as a "codification" of traditional customs or usages.

The general tendency to an international legal uniformity –that differentiates and characterizes this subject with respect to all other areas of international commerce– makes clear that within maritime matters, the question of what regulation applies to a single case gives rise not only to a choice-of-law issue, but also (and, perhaps, rather) to the need to reconstruct the most appropriate legal rule to decide the case at issue, by interpreting conventions and/or state laws as a 'uniform' system, taking into account the relevance of the practices of international maritime operators. In this sense, maritime law only accentuates something that is true for all international commercial law, namely the inadequacy of the traditional choice-of-law method to solve problems concerning the identification of the law governing a specific legal relationship.

3. *In the second place*, the other specific feature of maritime law is that party autonomy also takes greater relevance in this area as a tool of 'material justice' aimed at directly governing a given situation and without the filter of the provisions of private international law. In short, the maritime area confirms its 'speciality' in relation to other sectors of international commercial law.

It compels judges/arbitrators to determine the law applicable to a specific case having regards:

- *not only* to the practices of international maritime industry operators (which is a proper 'filter' through which maritime law should be interpreted even by state courts and in this sense it has been fundamental the work of international organizations such as CMI and BIMCO in the elaboration and collection of standard form contract, clauses and guidelines),
- *but also* to the actual will of the parties, which –in this area, and in particular in the context of the legal regulation of maritime carriage documented by charter parties– takes the decisive role of a 'material justice' standard, capable of outlining the actual legal background of each legal relationship. In this regard, relevant *common law* cases have clarified that in this sector customs are fundamental for interpreting and understanding the will of the parties[485].

[485] See, for example:

• *Stolt-Nielsen* v. *AnimalFeeds International Corp*, 559 U. S. Supreme Court (2010): *"Under both New York law and general maritime law, evidence of "custom and usage" is relevant to determining the parties' intent when an express agreement is ambiguous"*;





In sum, as it has been affirmed, self-regulation is a proper source of maritime law[486].

4. Notwithstanding that, we cannot deny the importance and meaning of the indication of English law as the applicable law in the forms most frequently used by international maritime operators.

But with such indication the parties certainly intend to 'rely' on the system that is, among all, the one that has contributed most to the development and the correct interpretation of the principles of the so-called *lex maritima*, which represents –even when the parties make no choice– the corpus of provisions on which maritime judges and arbitrators will have to found their decisions.

With such expression I mean, in particular, that the law applied by institutions called to decide international maritime disputes is based on a corpus of legal principles which –even when they are included or 'codified' in national legislations– have a common origin and are comprised of two 'constitutive elements':

- on the one side, the *lex mercatoria* (which includes both the international conventions on maritime transports, and the uses and customs commonly accepted in such industry[487],
- on the other side, the contractual forms and templates which are most frequently used by international maritime operators[488].

• *Samsun Corpag.* v. *Khozestan Mashine Kar Co.*, 926 F. Supag. 436, 439 (S.D.N.Y. 1996): *"[W]here as here the contract is one of charter party, established practices and customs of the shipping industry inform the court's analysis of what the parties agreed to"*;

• *Great Circle Lines, Ltd.* v. *Matheson & Co.*, 681 F. 2d 121, 125 (C.A. 1982): *"Certain longstanding customs of the shipping industry are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract"*.

[486] VAN HOOYDONK, E., *Towards a worldwide restatement of the general principles of maritime law* (2014) 20 JIML 171.

[487] See all the following cases quoted above: *Stolt-Nielsen v AnimalFeeds Intern Corp* 559 U. S. Supreme Court 559 (2010); *Samsun Corp v Khozestan Mashine Kar Co* 926 F.Supp. 436, 439 (SDNY 1996); *Great Circle Lines, Ltd v Matheson & Co, Ltd* 681 F.2d 121, 125 (2d Cir 1982); and A. FALL, *Defence and Illustration of Lex Mercatoria in Maritime Arbitration* (1998) J. Int'l Arb. 83. More in general on this topic see, among others, BASEDOW, J., Lex mercatoria *e diritto internazionale privato dei contratti: una prospettiva economica*, in *Liber Fausto Pocar*, Milano, 2009, 55 ff. and ANTONINI, A., *L'autonomia del diritto della navigazione, il ruolo del diritto comune e la posizione sistematica della legislazione sulla navigazione da diporto*, in *Dir. trasp.*, 2014, 479.

[488] TETLEY, W., *The General Maritime Law – The* Lex Maritima [1996] Eur.T.L. 497; CORTAZZO, R.J., *Development and Trends of the Lex Maritima from International Arbitration Jurisprudence*, in *J.Mar.L.& Com.*, 2012, p. 255. In general, on contractual forms and standard used by shipping operators see BOI, *I contratti marittimi. La disciplina dei formulari*, Milano, 2008.

Thus, clearly, the 'state-based' approach is increasingly losing weight in the context of maritime dispute solution.

5. This, however, should not be intended to mean that international maritime commerce relationships are completely impenetrable to state laws.

In this regard it should be considered in the first place that the *lex maritima* can only find fertile ground to the extent that a state law allows its development and application.

Moreover, as has been underlined even recently, the uniform transport law, like the commercial usages generally accepted by international maritime commerce operators, need *(i)* constant 'additions' by internal law provisions to fill their gaps or permit their actual implementation, and *(ii)* the enforcement by national judges (also when recognizing and implementing arbitration decisions).

6. These considerations lead to a more general conclusion.

International maritime commerce increasingly takes 'centrifugal' directions with respect to state laws. The existence and the application in international maritime disputes of a modern *lex maritima* confirm the progressive shift from a 'state-centric perspective' in regulating the relationships among maritime industry operators and, consequently, confirm that the techniques based on choice of law are less and less significant to identify the legal provisions aimed at governing such relationships. Business operators of the maritime commerce industry see their relationships as not subject to a single national law, but to a different legal treatment, with peculiar group statutes (consisting of the *lex maritima*), which come into play to meet the needs of such operators. In other words, in transnational maritime law, the law, intended as the mandatory regulation, whereby a single state affirms its sovereignty, is replaced (in a large part at least) by a *ius commune mercatorum*, represented by the *lex maritima*, which applies in the relationships among international maritime commerce operators, as a consequence of their status.

This phenomenon that I have once called '*status mercatorius*' thus appears as a 'balancing element' of the legal regulation applying to international maritime commerce operators 'on a personal basis': that is, it allows them to benefit from a flexible treatment following the principles of the *favor commercii* and, in particular, to satisfy the needs for expeditiousness and promptness which are typical for maritime traffics[489].

[489] LA MATTINA, A., *L'arbitrato marittimo e i principi del commercio internazionale*, Milano, 2012, 215 ff; ID, *Clausole di deroga alla giurisdizione in polizza di carico e usi del commercio internazionale tra normativa interna e disciplina comunitaria*, in *Dir Maritt.*, 2002, 473-474.



# LA PARTICIPACIÓN DE LAS ORGANIZACIONES INTERNACIONALES EN LA CONSERVACIÓN Y GESTIÓN DE LA PESCA EN AGUAS PROFUNDAS

***Gabriela A. Oanta***[490]

*Profesora Contratada Doctora (acreditada Titular) de Derecho internacional público y Relaciones internacionales*

*Universidade da Coruña*



## INTRODUCCIÓN

La pesca en aguas profundas comenzó a llamar la atención de la Comunidad internacional hace escasos años. Esta pesca constituye una actividad económica que se realiza en aguas que se encuentran en las zonas más profundas de los mares y océanos, en aquellos lugares dónde es difícil que los Estados puedan ejercer un control eficaz de manera continuada. Muchas veces, además, esta pesca se desarrolla en espacios marinos que se encuentran más allá de la jurisdicción de los Estados, lo que ha llevado a una parte de la doctrina a considerar que ésta se realiza en los lugares menos protegidos en la Tierra[491].

Se considera que los fondos marinos y oceánicos albergan, en la actualidad, muchas especies pesqueras, a las que habría que añadir especies pesqueras que no se conocen por completo o incluso especies pesque-

[490] ORCID ID: 0000-0002-1098-4758. Coordinadora del Módulo Jean Monnet "Política marítima integrada de la Unión Europea".

[491] Opinion consultada en: MOORE, R.; ROBERTS FURGERSON, J., «Introductory Note to International Guidelines for the Management of Deep-Sea Fisheries in the High Seas", *ILM*, vol. 47, 2008, p. 994. Nueva Zelanda y Australia fueron los primeros países en pescar especies de aguas profundas, en los años setenta y ochenta del siglo pasado. Véanse igualmente: LOWRY, T., "Protecting the Mysteries of the Deep: Conserving Biodiversity in Marine Areas beyond National Jurisdiction", *Dalhousie Journal of Legal Studies*, vol. 16, 2007, p. 113; MOLENAAR, E.J., "Unregulated Deep-Sea Fisheries: A Need for a Multi-Level Approach", *The International Journal of Marine and Coastal Law*, vol. 19, nº 3, 2004, pp. 223-224.