

*The Secretary General*

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Dear Mr Under-Secretary-General,

I write in reference to your correspondence of 11 May 2018, inviting our Organisation to contribute to the report of the United Nations Secretary-General on oceans and the law of the sea, pursuant to United Nations General Assembly resolution 72/73 of 5 December 2017, entitled "Oceans and the law of the sea".

It is my pleasure to present to you the contribution of the Permanent Bureau of the Hague Conference on Private International Law (HCCH) to the report, which you will find enclosed with this letter. This contribution provides an update on the information which the HCCH submitted on 20 June 2017 on this topic.

Further to the above-mentioned earlier contribution, it should be reiterated that the HCCH has traditionally excluded maritime law from its scope of work, principally due to the existence of other instruments. Nevertheless, some issues of private maritime law have been addressed in the *Hague Convention of 30 June 2005 on Choice of Court Agreements*. The topic has also been discussed more recently during the meetings of the Special Commission, which has met to negotiate a future Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. In the Fourth and final Meeting of the Special Commission, which took place in May 2018, the Special Commission considered a proposal to include certain maritime matters, which were excluded in earlier drafts, within the scope of the draft Convention, and decided to reserve the matter for further discussion at the Diplomatic Session, to be held in mid-2019.

As you kindly requested, the Permanent Bureau would be pleased for you to publish the full text of this contribution on the website of the Division for Ocean Affairs and the Law of the Sea.

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On behalf of the Permanent Bureau, I would like to thank you for providing us with the opportunity to offer a contribution to this important work; I apologise for the delay in responding but do hope that this contribution is of use to you and your colleagues. The Permanent Bureau is grateful for the ongoing co-operation between the Office of Legal Affairs and the HCCH, and looks forward to continuing this co-operation in the future.

I take this opportunity to renew to you, Mr Under-Secretary-General, assurances of my highest consideration.

Christophe Bernasconi

## **Contribution of the Hague Conference on Private International Law (HCCH) to the report of the Secretary-General on oceans and the law of the sea**

Due to other existing instruments, the HCCH has traditionally excluded maritime law from its scope of work. However, because several important matters in the area of private maritime law still have not been fully addressed by a definitive international instrument, some of the HCCH instruments do include within their scope maritime issues, and therefore may be relevant to the report entitled "Oceans and the law of the sea". For further background information on the significant treaties and organisations operating in private maritime law, please refer to the previous contribution of the HCCH on this topic, provided on 20 June 2017.

### *A. Hague Choice of Court Convention (2005)*

The *Hague Convention of 30 June 2005 on Choice of Court Agreements* ("Choice of Court Convention") aims to ensure the effectiveness of choice of court agreements (also known as "forum selection clauses" or "jurisdiction clauses") between parties to international commercial transactions and to facilitate the recognition and enforcement of the ensuing judgments.

As stated in the previous contribution of the HCCH in 2017, the Choice of Court Convention has relevance to private maritime law matters, despite the fact that it explicitly excludes carriage of passengers and goods,<sup>1</sup> and five maritime matters: marine pollution; limitation of liability for maritime claims; general average; emergency towage; and emergency salvage.<sup>2</sup> As explained in the Explanatory Report on the Choice of Court Convention, drawn up by Professors Trevor Hartley and Masato Dogauchi, the Convention does indeed cover carriage by sea, as well as by land and by air or any combination of the three. Other maritime (shipping) matters, for example, marine insurance, non-emergency towage and salvage, shipbuilding, and ship mortgages and liens, are also included in the scope of the Convention.

Since September 2017, Denmark has acceded to the Convention, making it the 31<sup>st</sup> Contracting Party. The People's Republic of China and Montenegro signed the Convention and are working towards ratification.

### *B. Update on the Ongoing Normative Project on the Recognition and Enforcement of Foreign Judgments*

The HCCH is currently developing a global instrument on the recognition and enforcement of foreign judgments in civil or commercial matters (Judgments Project). At its Fourth Meeting in May 2018, the Special Commission on the Judgments Project completed its mandate given by the Council on General Affairs and Policy – the governing body of the HCCH – by preparing a draft Convention, which will be the basis for the final round of negotiations at the Diplomatic Session to be convened in mid-2019. Matters related to oceans and seas have been discussed at various Special Commission meetings, including the most recent one convened in May 2018.

The [2018 draft Convention](#) explicitly excludes certain matters, such as "the carriage of passengers and goods" and "marine pollution; limitation of liability for maritime claims; general average;

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<sup>1</sup> Art. 2(2)(f).

<sup>2</sup> Art. 2(2)(g).

emergency towage and salvage". This language is imported directly from the Choice of Court Convention, as the future Judgments Convention is based on that Convention. As such, the future Judgments Convention, once it is adopted, would still apply to certain important cases relating to oceans and seas, as stated above in Section A. Nonetheless, it should be noted that at the recent meeting of the Special Commission the question of bringing certain maritime matters within the scope of the future Convention was raised. It was proposed that, while maintaining the exclusion of limitation of liability for maritime claims and general average, matters of marine pollution, emergency towage and salvage should be reintroduced to the scope of the future Convention, given that there are strong common interests among States against marine pollution and in favour of emergency towage and salvage. If such judgments were excluded from scope, and therefore would not circulate under the future Convention, there would be a potential to discourage desirable activities, and to allow polluters to externalise the costs of their activities. The Special Commission concluded that further consultation is needed on this topic. It is likely that this will be discussed again at the Diplomatic Session in 2019.

### *C. Conclusion*

In conclusion, although traditionally the HCCH has not been the appropriate forum to deal with private maritime law issues, and therefore excludes most of the topics related to private maritime law (and more broadly, the law of the sea), the Choice of Court Convention nonetheless includes certain important maritime matters within its scope. As for the Judgments Project, the current draft Convention, which echoes the wording of the Choice of Court Convention, would have the same coverage of maritime matters. However, given the discussion at the recent Special Commission meeting, it remains to be seen whether, and if so which, other maritime-related matters may be dealt with by the future Convention, which will be finalised at the Diplomatic Session in mid-2019.

*The Hague, June 2018*