

# MARITIME LAW COURTS AND JUDICIARY CREATION OF LAW: EFFECTS ON CIVIL LAW COURTS

*Vincenzo Battistella*

*Ph.D. Candidate in Maritime Law at Autonomous University of Barcelona*

*“Whether we be judges, lawyers, professors, students, commercial men and women, or persons connected in some way with maritime commerce, we are all pilgrims in search of a just and comprehensible international maritime law”*

*Prof. W. Tetley<sup>1</sup>*

## Abstract

Maritime law is contemplated to be one of the most relevant areas of legal science whereby law is created by judges.

On one side because maritime law is principally based upon common law doctrine where legal precedents are the rule and on the other hand, English and other common law Courts adopt a commercial law approach, prioritising a balance in international trade rather than taking more protectionist or paternalistic decisions. Therefore making them more suitable choices when trying to obtain a balanced decision on issues relating to international trade especially concerning sea carriage. Indeed, an increasing number of judges of civil law Countries quote maritime judgements held by common law Courts in order to support their judicial ruling.

The present contribution aims to underline under the maritime law perspective, how judiciary decisions are a source of law, capable of being used by foreign Courts in order to determine a decision.

SUMMARY: 1. Premises. – 2. *Lex mercatoria* and *Lex Maritima*. – 3. Common law cases and effects on civil law courts. – 3.1. European Union case law – 4. Final Remarks. – Bibliography.

### 1. Premises

It is not an easy task to pinpoint the exact relevance of the phrase “judge-made law” especially because with respect to other sources of law<sup>2</sup>, case law is considered to be the factor more

---

<sup>1</sup> W. TETLEY: *Marine Cargo Claims*, Third Edition, Les Éditions Yvon Blais Inc., Montreal 1988, p.16.

fluctuating in time and space (even in within the same legal system). Notably because it is made of many cases that are in turn based on different case law, mainly complicated by variables that often significantly affect the legal classification of the event <sup>3</sup>.

It is not about the application of foreign law, a matter very dear to Italian international private law and procedural law scholars, but of the use of a decision model made by a foreign tribunal to which national courts recall in order to reach a satisfactory decision on the case that has to be governed, being the judge acquaintance called on from the defenses. In other terms it would be a comparison of legal systems <sup>4</sup> on voluntary basis.

## 2. *Lex mercatoria* and *lex maritima*

In order to understand the relevance of the judiciary creation <sup>5</sup> of law in international shipping trade it should be considered the specialty <sup>6</sup> of this particular field of law which finds its roots in the history of maritime commerce. As a matter of fact, since its commencement, maritime law has been itself a legal system, having its own specific law of sale of ships; the hiring of vessels which is made through standards forms called charter parties<sup>7</sup>; bailment and contract in order to rule the carriage of goods by sea; marine insurance which is undoubtedly the first form of insurance; furthermore maritime law could benefit from its own Tribunal: the Admiralty Court <sup>8</sup> in the USA,

---

<sup>2</sup> In continental civil law systems, among the sources of law appear neither the Courts' rulings, as it is in common law system, nor the legal scholars' opinions as it would happen in times past. While judges interpret the law in order to apply it to the case, scholars do it in order to put forward responses: rules are made neither by the ones nor by the others. Moreover the judge is subject only to the law, namely he is not bound by the legal precedent, not even of a higher court.

<sup>3</sup> G. ALPA, *La giurisprudenza civile in Il giudice e l'uso delle sentenze straniere. Modalità e tecniche della comparazione giuridica*, edited by G. Alpa, Atti del convegno organizzato dalla Corte Costituzionale e dal consiglio nazionale forense, Roma, 2005. According to the scholar, civil law courts follow a deductive reasoning that moves from statutory law rather than from judicial precedent, hence the comparison of case law is less frequent in those juridical framework than in common law legal systems.

<sup>4</sup> See at this regards U. DROBNIG, *The Use of Foreign Law by German Courts*, in *The Use of Comparative Law By Courts*. XIV International Congress of comparative law, edited by Drobnig and Van Erp, L'Aya, Londra, Boston, p. 131.

<sup>5</sup> F.J. ANSUÀTEGUI ROIG, *Creacion judicial del Derecho: critica de un paradigma*, in *El Derecho en Red, Estudios en Homenaje al professor Mario G. Losano*, AA.VV., Madrid, 2006, p. 509 ff.

<sup>6</sup> See A. ANTONINI, *L'autonomia del diritto della navigazione, banco di prova e fucina dell'ordinamento giuridico*, in *Diritto dei Trasporti*, 2007, III, p.725 ff.; IB., *L'autonomia del diritto della navigazione, il ruolo del diritto comune e la posizione sistematica della legislazione sulla navigazione da diporto*, in *Diritto dei Trasporti*, 2014, II, p.453 ff.

<sup>7</sup> The charter party is a basic contract of hire of a ship whereby goods are carried by sea and its beginning go back much further than the Bill of lading. The *charta partita* or charter party was a document written in duplicate on a single piece of paper, then torn or cut in half, a part being given to each signatory of the agreement. Charter parties were referred to in the Byzantine Rhodian Sea-Law of 600 to 800 A.D., at section 20: «where a man hires a ship, the contract to be binding must be in writing and subscribed by the parties, otherwise is void».

<sup>8</sup> The term “Admiralty” referred to the specialized court that was established to oversee the Royal Navy, and later encompassed the judicial hierarchy that applied to all cases involving ships and ocean commerce. The word “maritime” simply described the general nature of the type of cases that were heard, and the laws that applied to them. Over time, the differences between “admiralty” and “maritime” lost their significance, and the two words are now used interchangeably.

and Commercial Court in other common law countries such as England<sup>9</sup>. On those grounds came to be created the *Lex Maritima*<sup>10</sup> or general maritime law.

Maritime law, in fact, may be defined as a mixed legal system in its own legislation, found in all jurisdictions, including those belonging to only one major legal tradition. *Lex Maritima* is civilian in its origin and had been, in the last two centuries at least, influenced by certain English common law principles<sup>11</sup>.

Over time, relevant pillars of the *Lex Maritima* were committed to writing in primitive codifications, of which the three most important were the *Rôles of Oléron* (1190 A.D.), which applied in northern and western Europe from the Atlantic coast of Spain to Scandinavia; the *Consolato del Mare*, which governed Mediterranean maritime affairs from about the late 1300s; and later the *Laws of Wisbuy* (or *Visby*), based on the *Rôles of Oléron*, which regulated trade on the Baltic<sup>12</sup>.

The *lex mercatoria*<sup>13</sup> and its maritime strand, the *lex maritima*, as mentioned above, were administered by independent courts, called "*piedpoudre*" courts during medieval fairs, which typically heard the disputes between the merchants concerned and rendered judgments between tides, so as not to delay the merchants overly on their voyages. A surprising amount of this historic, civilian maritime *ius commune* continues to exist in the admiralty law of modern nations, to name only a few examples in substantive law such as abandonment in ship owners' limitation of liability, proportionate fault in marine collisions, the awarding of prejudgment interest as an integral part of damages from the date of the casualty. Also procedural law reflects the same heritage in the maritime attachment like admiralty application of the *saisie conservatoire* of traditional civil law<sup>14</sup>.

---

<sup>9</sup> See W. TETLEY, "The General Maritime Law: The *Lex Maritima*", 20 *Syracuse Journal of International Law & Commerce* 105, 1996.

<sup>10</sup> In medieval Europe, beginning as early as the ninth century and continuing up until the sixteenth century, there existed a remarkably uniform body of customary mercantile law which was applied by merchant courts in commercial disputes. This transnational custom was known as the *Lex Mercatoria*, or in English, the "Law Merchant".

The *Lex Mercatoria* incorporated a body of customary private maritime law, the *Lex Maritima*, or "*Ley Maryne*" as it was called in Law French. The two were interrelated because of the importance of seafaring commerce in medieval Europe. The relationship was colourfully described as follows by Malynes writing in 1622:

"And even as the roundness of the globe of the world is composed of the earth and waters; so the body of the *Lex Mercatoria* is made and framed of the Merchants Customs and the Sea Laws, which are involved together as the seas and the earth."

<sup>11</sup> See W. TETLEY, *International Conflict of Laws. Common, Civil and Maritime*, Les Editions Yvon Blais, Montreal 1994; IB., *The General Marit cit.*; IB., *Maritime Law as a Mixed Legal System*, in *Tul. Mar. L.J.* 1 at 4-6 and 10-29, 1999.

<sup>12</sup> See W. TETLEY, *Maritime Law cit.*

<sup>13</sup> Today *lex mercatoria* is one of the most excellent example of globalization and circulation in different legal system due to the international trade and exchange of goods.

<sup>14</sup> See W. TETLEY, *Maritime Law cit.*

As a consequence of the increased globalization of trade characterized by the overcoming of national borders, it has been developed the "New" Law Merchant<sup>15</sup>, the modern *Lex Mercatoria*<sup>16</sup> which has the purpose of standardize the regulatory framework of commercial relations and trades through the practice of the principles and rules of international commerce.

As regards the future of *the Lex Mercatoria* some facts need to be stated as a premise. After the creation of states and the tenacious defence of their sovereignty, what prevails nowadays is the creation of zones of free trade worldwide. Over time, nation states began to regard the independent, merchant centered authority provided by the *Lex Mercatoria* as a potential threat to their political power<sup>17</sup>. Since national regulations are not able to offer satisfactory answers to the challenges of international trade, the conclusion appears logical: the main instrument of innovation will continue being the contract – mainly the circulation of international models of contract – and what practitioners feel to be binding.

Such general principles of international market can derive either from International law or from international arbitrators who create law. One of the areas in which growth of a modern *Lex Mercatoria* is most visible is in international commercial arbitration<sup>18</sup>. Case law principles emerging from International arbitration awards are considered to be sources of law. According to one of the most relevant and consolidated of the International Chamber of Commerce award N. 4131 held in 1982, the awards create the law which is necessary to take into account because formed as a consequence of the economic reality complying to international trade needs. International arbitrators' judicial activity and maritime awards can be considered sources of the *Lex Mercatoria* and therefore of the *Lex Maritima* being the result of contemporary globalization. The judicial creation of law coming from the arbitrators awards is the outcome of the freedom of the arbitration

---

<sup>15</sup>C.P. GILLETTE, *The Law merchant in the modern Age: Institutional design and International Usages under the CISG*, in *Chicago Journal of International Law*, 2004. According to the author, the new *lex mercatoria*'s most devoted proponents describe it as a third system of law, independent of both national and public international law. Its essential characteristics are its spontaneity, its universality, and its autonomy from legal systems. Others take a more limited view, regarding the *lex mercatoria* as providing a streamlined process for resolving disputes or as a system for filling the gaps left by existing law. Other scholars have adopted an even more skeptical stance towards the *lex mercatoria*, challenging both its Roman and medieval roots as well as the existence of its modern revival.

<sup>16</sup>See *inter alia* F. MARRELLA, *La nuova lex maercatoria: Principi Unidroit e usi dei contratti del commercio internazionale*, Padova, 2003, F. GALGANO, *Lex Mercatoria*, Bologna, 2010.

<sup>17</sup>See F. MARRELLA, *op. cit.*, 2003. The author explains how during the course of the nineteenth century, the *lex mercatoria* was absorbed into national law. In civil law countries, the principles previously governed by the *lex mercatoria* were incorporated into commercial codes. In common law countries (particularly England), the view that the *lex mercatoria* was part of customary transnational business law and "not a law established by the sovereignty of any Prince" gave way as merchant courts were dissolved in favor of national common law courts. The attitude driving this shift of power away from the *lex mercatoria* is perhaps epitomized by the admonition that "[m]erchants ought to take their law from the courts and not the courts from the merchants; and when the law is found inconvenient for the purpose of extended commerce, application should be made to parliament for redress.

<sup>18</sup>See *inter alia* leading arbitration cases law like *Transfield Shipping Inc. v Mercator Shipping Inc. The "Achilleas"* 2008 regarding late redelivery of a ship and *The Athena – Minerva Navigation Inc v. Oceana shipping* 2013 concerning the payment of the hire and the hypothesis of off-hire.

scheme which is distant from the strict substantial and procedural formalism of national law. With each passing year, there is an ever-increasing volume of reported arbitral awards, and arbitrators are tending more and more to refer to previous awards rendered in similar cases, thus gradually developing a system of arbitral precedent<sup>19</sup> both in international trade and maritime industry.

In shipping, in fact, the influence of the contemporary “New” Law Merchant may be seen both in the use by shippers and ship owners and their respective agents of a multitude of standard-form contracts, particularly as mentioned above, standard-form bills of lading, and charter parties both in the growing number of maritime arbitration awards<sup>20</sup>.

### 3. *Common law cases and effects on civil law Courts*

The number of national judgements in countries based on a civil law legal system like Italy and Spain with expressed references to foreign law cases is increasing. Unfortunately it still remains little compared to the massive usage of the comparison made by German judges and English Courts such as the House of Lords <sup>21</sup>.

When approaching the topic of this workshop in regards to my research field of law it was not a surprise discovering that a large number of relevant case law have as an object maritime and international trade issues. This is due to the particular and peculiar approach of English and common law courts that tend to rely on the commercial interests of the parties involved in a lawsuit. On a national level, in order to better appreciate the work of Italian Courts’ use of foreign case law it would be convenient to recall a few emblematic cases.<sup>22</sup> One leading case regards a typical maritime clause: the So called cancellation clause. This clause is usually used in time charter party for the carriage of goods.<sup>23</sup> In that case the owner of the cargo had signed a contract with the charterer containing a clause of a hermetic content, nevertheless very common in the maritime practice according to which the vessel did not have to enter into the Port either before 11

---

<sup>19</sup>The latter instrument offers a complete legislative framework for international commercial arbitration, including both substantive and procedural rules. Legislation based on the Model Law is now in force in such widely divergent jurisdictions as Australia, Bulgaria, Canada, Cyprus, Hong Kong, Nigeria, Peru, Scotland and Tunisia, as well as in several U.S. states. As scholar, T. Carbonneau, has noted:

«There is a body of legal rules that represents a world law on arbitration. States basically agree directly and indirectly on those legal principles that should attend the operation and define the legitimacy of the arbitral process. These rules of law surround arbitration and regulate its activity on a world-wide basis. They have arisen as a result of the arbitral process and represent its acceptance within most national legal systems. They constitute, in effect, a body of world law on the procedure and regulation of arbitration that is highly consistent in both principle and policy».

<sup>20</sup> See *inter alia* F. Berlingieri, *Trasporto marittimo e arbitrato*, in *Dir Mar.*, II, 2004, F. MARRELLA, *Unità dell’arbitrato internazionale: l’arbitrato marittimo*, in *Dir Mar.*, III, 2005.

<sup>21</sup> See A. GAMBARO, *Il diritto comparato nelle aule di giustizia ed immediati dintorni, L’uso giurisprudenziale della comparazione giuridica*, 2004, Milano, pp. 287-299

<sup>22</sup> See G. ALPA, *op. cit.*, Milano, 2006.

<sup>23</sup> Court of Treviso, 8 March, 2003, in *Dir. Maritt.*, 2005, p. 223.

September or after 15 September. The clause was written in these terms: “L/C 11/ 15<sup>th</sup> sept”. As the ship could not be taken to the agreed designed port within the prescribed time limit, the charterer alert the cargo owner of its delay; the latter despite refused the delivery. On 16 September, one day after the time limit agreed, the vessel entered into the elected Port in order to start the loading operations, but the cargo owner confirmed his intention of not profiting of the agreed performance. Once a dispute arose, the Treviso Court applied to the clause Article 1373 of the Italian Civil Code entitled “unilateral termination”<sup>24</sup> hence considering lawful the cargo owner termination. The Court’s decision was based on the fact that due date, written in an unambiguous manner, must be deemed as essential. In order to arrive at his conclusion, the Court takes into consideration the commercial practice and the common law case laws which have over the years validate this practice, interpreting restrictively the “cancellation clause”.

Another example on the use of foreign case-law by the Italian Court may be provided by the usage of the United States Uniform Commercial Code (UCC). This code can be considered nothing else than the outcome of collected court decisions resulting from “living law”.

One remarkable case -law is the one referring to the establishment of the juridical effects of a letter of credit which had been verified by a bank: the letter of credit (as earned from the UCC) does not give raise – as clarifies the joined sessions of Italian Court of Cassation <sup>25</sup> – to an accessory obligation to the one originally taken by the issuer, but rather represents the ordinary mean for the satisfaction of the beneficial owner’s credit.

Professor Alpa’s contribution mentioned one more noteworthy case law,<sup>26</sup> which concerns the application to an Italian case of a common law principle which has been formulated within all court levels and has brought to the pronouncement of a leading precedent. That was the case of *Adamatos Shipping Co. Ltd. v. Anglo Saxon Petroleum Co. Ltd.* The case regarded the proceeding to the annulment of an arbitral award concerning the contrast between two clauses contained in a charter party, the Court of Appeal of Genoa, refers precisely to English legal precedent in order to establish

---

<sup>24</sup> Recesso unilaterale: “se, ad una delle parti è attribuita la possibilità di recedere dal contratto, tale facoltà può essere esercitata finché il contratto non abbia avuto un principio di esecuzione. Nei contratti a esecuzione continuata o periodica, tale facoltà può essere esercitata anche successivamente ma il recesso non ha effetto per le prestazioni già eseguite o in corso di esecuzione. Qualora sia stata stipulata la prestazione di un corrispettivo per il recesso questo ha effetto quando la prestazione è eseguita. È salvo in ogni caso il patto contrario. Full author’s translation: Unilateral termination: “if it is attributed to one of the party the possibility to terminate the contract, such discretion may be carried out as long as the contract had not had a commencement of performing. In those contracts performed permanently or periodically, such discretion may be carried out also thereafter but the termination does not have the effect for the performances already fulfilled or in course of performance. If the performance of the consideration for the withdrawal has been taken out, this will have effect when the performance is fulfilled. In any case this without prejudice if agreed otherwise”.

<sup>25</sup> Italian Court of Cassation Joined Session, 13 November 2000, n. 1169, in *Dir. Maritt.*, 2002, p. 926.

<sup>26</sup> G. ALPA, *op. cit.*, 2006 the scholar analyses a decision held by the Court of Appeal of Genoa on 5 June 2000, whose comment has been published in *Dir. Maritt.* 2005, p. 223ff.

that the Arbitrators were wrong in the application of the “Paramount clause”.<sup>27</sup> The judgement is even more significant because the Genoa Court of Appeal in order to highlight their interpretation, do not quote only the above mentioned precedent but also the way the English Court has expressed: “... the parties could not have introduced in the charter party a clause smothered from its birth, therefore it had to survive, rather than fall with respect to the other clause considered with the latter in contradiction and prevalent on it”.

In common law the *ratio decidendi* is extremely important. In fact this principle implies the binding and compulsory character of lower courts to follow the criterion already determined in similar previous cases. It operates the application of the principle *stare decisis* according to which a judge is compelled to apply the guidelines and the principles embodied in previous decisions.

A recent distinctive case law where once again it has been drawn the attention to the particular significance of the *stare decisis* principle is provided by the *Res Cogitans*<sup>28</sup> case whose final judgement has been handed down in May 2016 by the United Kingdom Supreme Court.

The issue was very complex: it was the case to determine if the bunkering supplying could be considered as a sale contract or not and if the application to the present case of a previous judgement the so called Caterpillar [*FG Wilson ( Enginnering) Ltd. v John Holt & Co (Liverpool) Ltd*]<sup>29</sup> was wrong and had to be considered void.

Again, in common law the general principle of *stare decisis et non quieta movere*<sup>30</sup> which consists in settling a point through a decision, that constitutes a precedent, it will not stop to apply, unless others circumstances modify the status quo. For this reason, departing from what has been previously established, will require to argue firmly the adopted change, for what the *stare decisis* principle does not prevent to reconsider, and if necessary, annul the past decision, with the difficulties of considering a set of factors the time of the precedent that will be ceased following, the nature and the degree of public and private reliance which supports the change and last the compatibility or incompatibility with other legislative enactment.

---

<sup>27</sup>The *Paramount Clause* is a provision which may be contained either in a charter party or in a Bill of Lading that specifies what law of jurisdiction will govern the agreement.

<sup>28</sup>See *inter alia* I. ARROYO, J. A. RUEDA, *Las operaciones de aprovisionamiento de combustible (bunkering operations)* en el caso «*The Res Cogitans*». Comentarios de un jurista de Civil Law a proposito de la sentencia de la Corte Suprema del Reino Unido del 11 de mayo de 2016, in *Anuario de Derecho Maritimo*, vol. XXXIII, 2016, M. Lopez de Gonzalo, *La vicenda OW BUNKER: competing claims e il dilemma del creditore*, in *Dir. Comm. Intern.*, III, 2016

<sup>29</sup>See *Caterpillar (NI) Ltd (formerly known as FGWilson (Engineering) Ltd) v. John. & Company (Liverpool) Ltd* [2013] EWCA civ. 1232 (17 October 2013)

<sup>30</sup>See I. ARROYO, J. A. RUEDA, *op. cit.*, 2016, p. 171.

### 3.1. *European Union case law*

Notwithstanding, even if the relevant difference that separates civil law systems from common law countries, can be found in the creative function which vested to a judge, having as a consequence the judicial binding precedent that embodies the authentic method of Anglo-American legal systems,<sup>31</sup> European law has made English legislation less effective since UK courts cannot make its own ruling without considering the legal provisions stipulated by the EU on certain issues.

In this regard, must be recalled a leading European Court of Justice case stating the primacy of European Court law over national law that has been settled by the European Court of Justice in *Costa v ENEL* (1964), The case was significant as the European Court of Justice said that national courts were to ignore any national law that ran contrary to European law<sup>32</sup>.

It is of a considerable relevance the fact that European Court of Justice's<sup>33</sup> position adopted since the beginning of the twenty first century was to be deemed as fungibles different case law coming from various national Members State's courts in order to strengthen the guidelines concerning the implementation of European Directives, and the stricter position which forces the national Court to apply European regulation, contemplating as penalty the liability of a Member State for violation of the Law of EU<sup>34</sup>. In addition the Italian Court of Cassation believes that foreign decision is not considered as a simple "fact" but reestablishes its status of binding decision.

---

<sup>31</sup>With regards to the latin brocade «*staredecisis*» o «*staredecisis et no quieta movere*» see among others G. ADELEYE, K. ACQUAH -DADZIE, *World dictionary of Foreign Expressions: A Resource for Readers and Writers*, Bolchazy – Carducci Publishers, 1999, p.371, LORD DENNING, *The discipline of the Law*, London, 1979, pp. 285-314.

<sup>32</sup>The principle of primacy of EU law has been established by the ECJ with its judgement of 15 July 1964 in the Case 6/64, *Costa v. E.N.E.L.* (Case 6/64, *Flaminio Costa v. E.N.E.L.*, [1964] ECR 00585. The principle of primacy of EU law has been specified more explicitly in a later judgement of the ECJ. See Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 00629, para. 17, 18, 21–24) by drawing this principle from the 'letter and spirit' of the Treaty establishing the European Economic Community. However, this idea can be traced back to previous ECJ judgements, i.e. the judgement of 5 February 1963 in the Case 26/62, *Van Gend and Loos*, and the judgement of 16 December 1960 in the Case 6/60, *Jean-E. Humblet v. Belgian State*.

<sup>33</sup>F. WASSERFALLENS, *The Judiciary as Legislator? How the European Court of Justice shapes Policy- Making in the European Union*, in *Journal of European Public Policy*, 2010,17 (8), pp. 1128- 1146. The author highlights how many scholars focus in their studies about the judiciary only on the doctrines of supremacy and direct effect, without analysing the limits of judge-made law. This leads to a onesided picture of the Court's power. It should be considered, when actions by the judiciary effectively influence Europeans everyday life. In this perspective, the judiciary is not anymore an autonomous institution, equipped with an almost unlimited potential to shape integration, but an actor, constrained by the competences of other institutions. Rules and doctrines become effective, when they are incorporated in legislation. The power of constitutional review enables the Court to influence policy-making directly. While the general pattern of the Court's influence in policy-making is rather straightforward, more systematic research is needed to identify, in which policy areas this pattern is relevant and to what extent.. The European Court of Justice is in highly salient policy areas a major centre of policymaking.

<sup>34</sup>European Union law is a body of court judgments, treaties and law which acts together with other legal systems in the European Union member states. The law is highly respected in the member countries and in case of conflict whether economic, political or those involving human rights, the law is given priority over the national law in the member countries. EU law is generally categorized into three categories namely; primary law, secondary law and supplementary law.



Only the judge to whom Court of Cassation returns the case for the judgement, after having stated the principle according to which the case should be settled, shall apply, for that case, the principle itself.

However, if it is true the level of the sources *stricto sensu* or formal, this is not the case in terms of the effective evolution of law.

In fact, the way judges-case law as a whole – the activity of the judicial bodies and the flow of their decisions – directed towards the interpretation and the application of a law, is of prime importance in order to determine similar decisions, creating the strength, of the legal precedent, in particular through the Court of Cassation's decisions, to which is attributed a function of framework law and the resolution of conflicts of case laws <sup>35</sup>.

In June of 2016 after the United Kingdom voted in favour of leaving European Union, the relationship between European Union commercial maritime trade and English maritime sector has not suffered yet any negative impact. However due to the uncertainty of the negotiations, there is a little doubt that EU shipping law and UK shipping law would diverge, although is not clear what the extent of that divergence would be <sup>36</sup>. The fact remains that more than ninety percent of international trade is by sea and commercial interests of different Countries go beyond domestic legislation through the application of standards contracts forms and the judiciary creation of the international arbitration awards. The incorporation of the *Lex Mercatoria* and the *Lex Maritima* core principles into the arbitration awards aim to pursue through the creative law function, a continuous and constant dialogue between judges not only of the same legal system but also between judges who belong to different legal cultures.

It should also be reminded that the EU legal framework is composed not only of regulatory acts and general principles of law, but also of case law included in the judgements made by courts of this organization, especially the ECJ as the major representative of the judiciary in the EU. The case law of the ECJ is formed from legally important statements consisting of interpretation of legal provisions made by the ECJ and judge-made law found through further law-making <sup>37</sup>. According to the legal doctrine, today the ECJ is one of the most influential courts in the world that has deeply

---

<sup>35</sup> G. IUDICA, P. ZATTI, *Linguaggio e regole del diritto private*, 2016, pp. 17- 21.

<sup>36</sup> See V. POWER, *Brexit and shipping* in *The Journal of International maritime law*, V. 22, Issue 2, 2016, p. 78.

<sup>37</sup> In the declaration concerning primacy annexed to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon on 1 December 2009, there is no doubt that the case law of the ECJ belongs to the binding legal sources. Such status has been given (de facto – accepted) to this case law by the Declaration adopted by the member states together with the Treaty of Lisbon. The Declaration states that the general principles of law and their concretization included in the case law of the ECJ are binding legal provisions, regardless of whether they are written in any of the EU regulatory acts, including the EU founding treaties. Thus, the main legislator of the EU, i.e. totality of the member states, has accepted one of the most criticized operations of the ECJ, namely the invention of general principles of law, and has recognized the general principles of law and their concretization included in the case law of the ECJ as binding legal provisions.

and broadly made an impact on the overall European integration, and its judgements have crucially affected different political areas. Therefore, it is important to ascertain *de iure and de facto* binding force<sup>38</sup> of the case law of this court and to determine its place in the national system of legal sources.

The European Court of Justice itself refers to the case law of this court, namely its *de facto* binding force and its place in the national system of legal sources<sup>39</sup>.

Despite this background, conflicts may arise between international conventions ratified by EU Member States and EU law when the EU is not a party to the treaty in question. Pursuant to the jurisprudence of the European Court of Justice, the European Union is not bound by a treaty to which is not a party simply because all EU member States are party to the treaty at issue. In this regard with specific reference to maritime law, it would be worth mentioning, the *Intertanko and Others v. Department of Transportation* case (Case C-308/06; ECR 2008 I-4057) which concerns an alleged conflict between MARPOL Convention 73/78<sup>40</sup> and Directive 2005/35/EC on ship source pollution and on the introduction of penalties for infringements. There were, for instance, potential conflicts between maritime liability conventions on the one hand, and Directive 2008/98/EC on waste, Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, on the other hand<sup>41</sup>.

---

<sup>38</sup>The binding force of the case law of the ECJ has indirectly been recognized by other authors as well, comparing its importance and impact to the EU regulatory acts of different legal force. French legal doctrine has suggested that legal provisions regulating the preliminary ruling proceedings can be found in Article 234 of the Treaty establishing the European Community and the case law of the ECJ relating to it. Constantinesco has concluded that according to many significant ECJ rulings, the EU law consists of not only regulatory acts, but also of judge-made law and the ECJ creates the EU law on the constitutional level.

<sup>39</sup>GUNDEGA MIKELSONE, *The binding force of the case law of the Court of Justice of the European Union*, in *Jurisprudence*, 20(2), 2013. The author || highlights how ECJ judgements are often referred to as the precedents, and this is the most common view in legal science. Legal doctrine also suggests that authors rarely explain what meaning they assign to the term 'precedent', and it is obvious that they often mean a former ECJ judgement, which has persuasive rather than binding force. Sometimes the ECJ judgements are simply called precedents which, in contradistinction to the English law, are not binding.

In judgement of 9 December 2003 given in the Case C-129/00, *Commission of the European Communities v. Italian Republic*, the ECJ referred to the legally important statement (case law) included in the preliminary ruling of 9 February 1999 in the Case C-343/96, *Dilexport*, and decided the case, namely found the failure to fulfil obligations, exactly on the basis of this statement.

<sup>40</sup>The International Convention for the Prevention of Pollution from Ships (MARPOL) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. The MARPOL Convention was adopted on 2 November 1973 at IMO. The Protocol of 1978 was adopted in response to a spate of tanker accidents in 1976-1977. As the 1973 MARPOL Convention had not yet entered into force, the 1978 MARPOL Protocol absorbed the parent Convention. The combined instrument entered into force on 2 October 1983. In 1997, a Protocol was adopted to amend the Convention and a new Annex VI was added which entered into force on 19 May 2005. MARPOL has been updated by amendments through the years.

The Convention includes regulations aimed at preventing and minimizing pollution from ships - both accidental pollution and that from routine operations - and currently includes six technical Annexes. Special Areas with strict controls on operational discharges are included in most Annexes.

<sup>41</sup> See at this regard M. JACOBSSON, *To what extent do international treaties result in the uniformity of maritime law?* in *The Journal of International maritime law*, V. 22, Issue 2, 2016, p.109.

The above mentioned case law has the merit of underline and re-establish the judge-made law function of the ECJ that is just as binding as the provisions included in the EU legislation<sup>42</sup>.

In Italy and Spain like in other States of continental Europe, who belong to the so called written law countries, only regulatory acts are recognized as independent basic legal sources. Therefore, the case law of the ECJ can be added to the independent additional legal sources, i.e. the unwritten legal sources, which consist of binding provisions and the source of which is the sovereign, not the legislator, namely general principles of law and customary law<sup>43</sup>.

The unity and consistency of the EU law can only be ensured on condition that the case law of the ECJ as a binding legal source is applied to not only specific case, in which the question is raised, but also to each and every case in all member states to which this case law applies. A binding legal source is the case law included in both preliminary rulings and other judgements, for there is no sense in referring to the ECJ every question of interpretation<sup>44</sup> of EU law, when the question raised has already been answered in a ruling given in other procedure. As an institution ensuring the unity and consistency of the EU law, the ECJ will not make different interpretation of law<sup>45</sup> just because this law has been applied in a ruling given in other procedure<sup>46</sup>.

The ECJ judgements are not binding precedents (judge-made law) on courts of member states, for it is legally important statements of the ECJ that are binding on them. In a preliminary ruling, the ECJ interprets EU law, i.e. deals with legal problems, while a national court must apply this interpretation to the facts of the specific case – this has been recognized by both the ECJ itself and legal scientists. A national court should also apply the provisions found by the ECJ through further law-making.

---

<sup>42</sup> The legally important statements that the ECJ has found through further lawmaking or judge-made law comply with all three characteristics of a provision, i.e. the judge-made law of the ECJ is just as binding as the provisions included in the EU law. Consequently, the case law of the ECJ is a binding legal source.

<sup>43</sup> The Declaration has given to the general principles of law and their concretization included in the case law of the ECJ the force of binding legal provisions, regardless of whether they are written in any of the EU regulatory acts, including the EU founding treaties. EU law is what the ECJ decides by defining content of written EU law through interpretation, by finding new provisions through further law-making and by rendering acts of institutions, bodies, offices or agencies of the EU invalid.

<sup>44</sup> It has been said in legal science that interpretation helps to reveal the content, meaning, aim, grounds, purpose of the text of provision (all that is known as *ratio legis* in science of the law). It has been pointed out that a judge interprets and defines the will of the legislator and without the judge it lacks reality and affect and only action of the judge makes it alive. The meaning of the applicable EU law in turn is found by a court or by a judge of a member state through raising questions, and the ECJ judgement is a 'legally valid final answer' about the content of EU law. As it has been already stated, persons applying the law in member states discover the meaning of EU law by becoming acquainted with the case law of the ECJ found in both preliminary rulings and other judgements.

<sup>45</sup> Interpretation of written legal provision (within its results) made by the ECJ is not a newfound legal provision, yet it is binding as such that reveals content of the specific provision and, consequently, as a provision itself, for the EU legal provision and its interpretation made by the ECJ form an inseparable unit.

<sup>46</sup> This has been stated by the ECJ in paragraphs 13 and 14 of its judgement of 6 October 1982 in the Case 283/81, CILFIT. It is proved by the fact that the ECJ develops its case law relating to some legal question in judgements made in different procedures.

#### 4. *Final remarks*

Judiciary creation of law may be still considered a typical principle of common law tradition even if at European level also the Court of Justice is doing a great effort to raise the number of court decisions which are as binding as any other sources of law. Due to this commitment, members states are compelled to follow European Court of Justice case law included United Kingdom pursuant to the primacy principle of European Union law. With regards to the specific topic of this essay, the binding force of international arbitration awards which settle maritime disputes are considered a source of law. Moreover the increasing number of awards in maritime law is the result that globalization in contemporary international maritime trade requires today more than ever a uniform source of law which goes beyond national borders. The “New” *Lex mercatoria* and more specifically the *Lex Maritima* principles included in the arbitration awards constitute a current example of the judge made law principle that contribute to a flourishing dialogue between judges just as demonstrated in the Italian case law mentioned in the present article.

## Bibliography

- G. ADELEYE, K. ACQUAH- DADZIE, *World dictionary of Foreign Expressions: A Resource for Readers and Writers*, Bolchazy – Carducci Publishers, 1999.
- G. ALPA, *The Administration of justice and the Role of Lawyers*, in EBLR, vol. 17, n. 4, 2006.
- G. ALPA, *Basil Markesinis, Comparative law in the Courtroom and Classroom*, Book Reviews G. Alpa, in ICLQ, vol. 55, part 2, 2006.
- G. ALPA, *The British Contribution to Italian legal Thinking*, in *The British Contribution to the Europe of the Twenty-First century*, edited by B. Markesinis, 2002.
- G. ALPA, *In Partibus Angliae: Images of the “Common Law” in Italian Legal Culture*, in *Mediterranean journal of Human Rights*, vol. 5, 2001.
- G. ALPA, *La giurisprudenza civile*, in *Il giudice e l’uso delle sentenze straniere. Modalità e tecniche della comparazione giuridica*, a cura di G. Alpa, Atti del convegno organizzato dalla Corte costituzionale e dal Consiglio Nazionale Forense, Roma, 21 ottobre 2005
- F.J. ANSUÀTEGUI ROIG, *Creacion judicial del Derecho: critica de un paradigma*, in *El Derecho en Red, Estudios en Homenaje al professor Mario G. Losano*, AA.VV., Madrid, 2006.
- A. ANTONINI, *L’autonomia del diritto della navigazione, banco di prova e fucina dell’ordinamento giuridico*, in *Diritto dei Trasporti*, III 2007.
- A. ANTONINI, *L’autonomia del diritto della navigazione, il ruolo del diritto comune e la posizione sistematica della legislazione sulla navigazione da diporto*, in *Diritto dei Trasporti*, II 2014.
- I. ARROYO, J. A. RUEDA, *Las operaciones de aprovisionamiento de combustible (bunkeringoperations) en el caso «The Res Cogitans»*. Comentarios de un jurista de Civil Law a proposito de la sentencia de la Corte Suprema del Reino Unido del 11 de mayo de 2016, in *Anuario de Derecho Maritimo*, vol. XXXIII, 2016.
- F. BERLINGIERI, *Trasporto marittimo e arbitrato*, in *Dir Mar.*, II, 2004.
- L. DENNING, *The discipline of the Law*, London, 1979.
- U. DROBNIG, *The Use of Foreign Law by German Courts*, in *The Use of Comparative Law By Courts*. XIV International Congress of comparative law, edited by Drobnig and Van Erp, L’Aya, Londra, Boston 1999.
- F. GALGANO, *Lex Mercatoria*, Bologna, 2010.
- A.GAMBARO, *Il diritto comparato nelle aule di giustizia ed immediati dintorni, L’uso giurisprudenziale della comparazione giuridica*, Milano, 2004.

- C.P. GILLETTE, *The Law merchant in the modern Age: Institutional design and International Usages under the CISG*, in *Chicago Journal of International Law*, 2004.
- GUNDEGA MIKELSONE, *The binding force of the case law of the Court of Justice of the European Union*, in *Jurisprudence*, (2)20, 2013.
- G. IUDICA, P. ZATTI, *Linguaggio e regole del diritto private*, 2016.
- M. JACOBSSON, *To what extent do international treaties result in the uniformity of maritime law?* in *The Journal of International maritime law*, V. 22, Issue 2, 2016.
- M. LOPEZ DE GONZALO, *La vicenda OW BUNKER: competing claims e il dilemma del debitore*, in *Dir. comm. Intern.* II, 2016.
- F. MARRELLA, *La nuova lex mercatoria: Principi Unidroit e usi dei contratti del commercio internazionale*, Padova, 2003.
- F. MARRELLA, *Unità dell'arbitrato internazionale: l'arbitrato marittimo*, in *Dir Mar.*, III, 2005.
- V. POWER, *Brexit and shipping* in *The Journal of International maritime law*, V. 22, Issue 2, 2016.
- F. REYNOLDS, *Theoretical problems surroundings bunker supply contracts*, in *Dir. Mar.*, II, 2016.
- A. SANDULLI, *La giurisprudenza amministrativa italiana e l'uso delle sentenze straniere*, in *Il giudice e l'uso delle sentenze straniere. Modalità e tecniche della comparazione giuridica*, a cura di G. Alpa, Atti del convegno organizzato dalla Corte costituzionale e dal Consiglio Nazionale Forense, Roma, 21 ottobre 2005.
- L. STUART SUTHERLAND, *The Law Merchant in the Seventeenth and eighteenth Centuries*, in *Transactions of the Royal Historical Society*, XVII, 1934.
- W. TETLEY, *Marine Cargo Claims, Third Edition*, Les Éditions Yvon Blais Inc., Montreal 1988.
- W. TETLEY, *International Conflict of Laws. Common, Civil and Maritime*, Les Editions Yvon Blais, Montreal 1994.
- W. TETLEY, *The General Maritime Law: The Lex Maritima*, 20 *Syracuse Journal of International Law and Commerce* 105, 1996.
- W. TETLEY, *Maritime Law as a Mixed Legal System*, in *Tul. Mar. L.J.* 1 at 4-6 and 10-29, 1999.
- F. WASSERFALLENS, *The Judiciary as Legislator? How the European Court of Justice shapes Policy-Making in the European Union*, in *Journal of European Public Policy*, 2010.
- C. YOO, F. MARRELLA, *Is open source software the new lex mercatoria?* In *Virginia Journal of International Law*, IV 2007.