

THE HONG KONG CONVENTION, EU REGULATION AND OUTSTANDING LEGAL ISSUES IN VARIOUS STATES

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With the accessions of Bangladesh and Liberia as contract parties, the Hong Kong Convention (“HKC”) will enter into force in 2025. The HKC applies to ships flying the flag of a contract party and ship recycling facilities (“SRFs”) under the jurisdiction of a contract party. Bangladesh, Belgium, Denmark, France, Germany, India, Japan, Liberia, Luxembourg, Malta, the Netherlands, Norway, Panama, Portugal and Turkey are among the contract parties to the HKC.

The EU had already taken on a pioneering role with the EU Ship Recycling Regulation (“SR Regulation”) in 2013. Among other things, it requires that ships with EU flags may only be recycled by SRFs on the so-called “European list”. For ships with non-EU flags, on the other hand, the EU Waste Shipment Regulation (“WS Regulation”) applies as a catch-all provision: waste materials (including ships) from the EU may not be shipped to a non-OECD country, and to an OECD country only with a notification procedure. In order to sanction violations of the SR Regulation and the WS Regulation, each EU Member State must enact its own criminal laws.

What does the entry into force of the HKC mean in practice? The SR Regulation and WS Regulation still apply as EU regulations and must continue to be observed by owners. Just because an SRF complies with the requirements of the HKC, a violation of the SR Regulation (for example, an EU-flagged ship is dismantled by a SRF that is not on the European list) or the WS Regulation (a ship with non-EU flag is transferred from the EU to another country) may still apply. Also, the buyer’s obligation in a “scrapping MoA” to recycle a ship according to the HKC does not release the owner from his obligations under EU rules.

It is interesting to note that some EU member states have not yet enacted, or only partially enacted, criminal laws to sanction violations of EU rules. While Denmark severely punishes violations of the SR Regulation and WS Regulation with imprisonment of up to two years, France only punishes violations of the SR Regulation with imprisonment of up to two years. If a French-owned vessel flies a non-EU flag and “only” violates the WS Regulation, it is only punished with a fine of up to €3,000, a much lesser deterrent. Germany has not done its homework either. Violating the WS Regulation is punishable according to § 18a AbfallVerbrG with up to five, possibly even 10 years. For ships with an EU flag, however, the SR Regulation applies, superseding the WS Regulation. In such cases, those involved will probably go unpunished as Germany has not yet enacted a criminal law for violating the SR Regulation.

Perhaps most startling in Germany is the dispute concerning the member state of the EU from which a ship shipped for scrapping. Hamburg senior public prosecutor Elsner argues that it is sufficient for a ship to be transferred from *any* EU member state for it to be punishable under § 18a AbfVerbrG, at least if the purchase contract was concluded in Germany (Elsner, NSTZ 2023, 135, 138). According to an opposing opinion, § 18a AbfVerbrG requires that ships qualifying as waste be taken out of *German* waters (Altenburg/Kremer, wistra 2023, 133, 139f.). This opposing opinion is coherent, as, according to § 1 no. 1 AbfVerbrG, the German Waste Shipments Act only applies to shipments of waste “to, from or through the territory of the Federal Republic of Germany” (Altenburg/Kremer, loc. cit.). Moreover, there is no need for prosecution in Germany as things currently stand: if all EU member states fulfil their obligation to introduce criminal laws in case of violation of the SR Regulation or WS Regulation, prosecution in the EU is guaranteed. However, as long as the issue is not clarified by the courts, owners should not rely on the opposing opinion.

It is also noteworthy that Bangladesh and India, as recycling states, are parties to the HKC, but not Pakistan. Ships can still be recycled there without regulation. After initial discussions in Pakistan about joining the HKC, interest in doing so to have died down recently.

The entry into force of the HKC is a big step in the right direction. However, even after it comes into force, the legal framework will remain confusing and complex.

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