The elusive panacea of uniformity: is it worth pursuing?

Paper presented at the AMTAC Annual Address 2013

Sydney 18 September 2013

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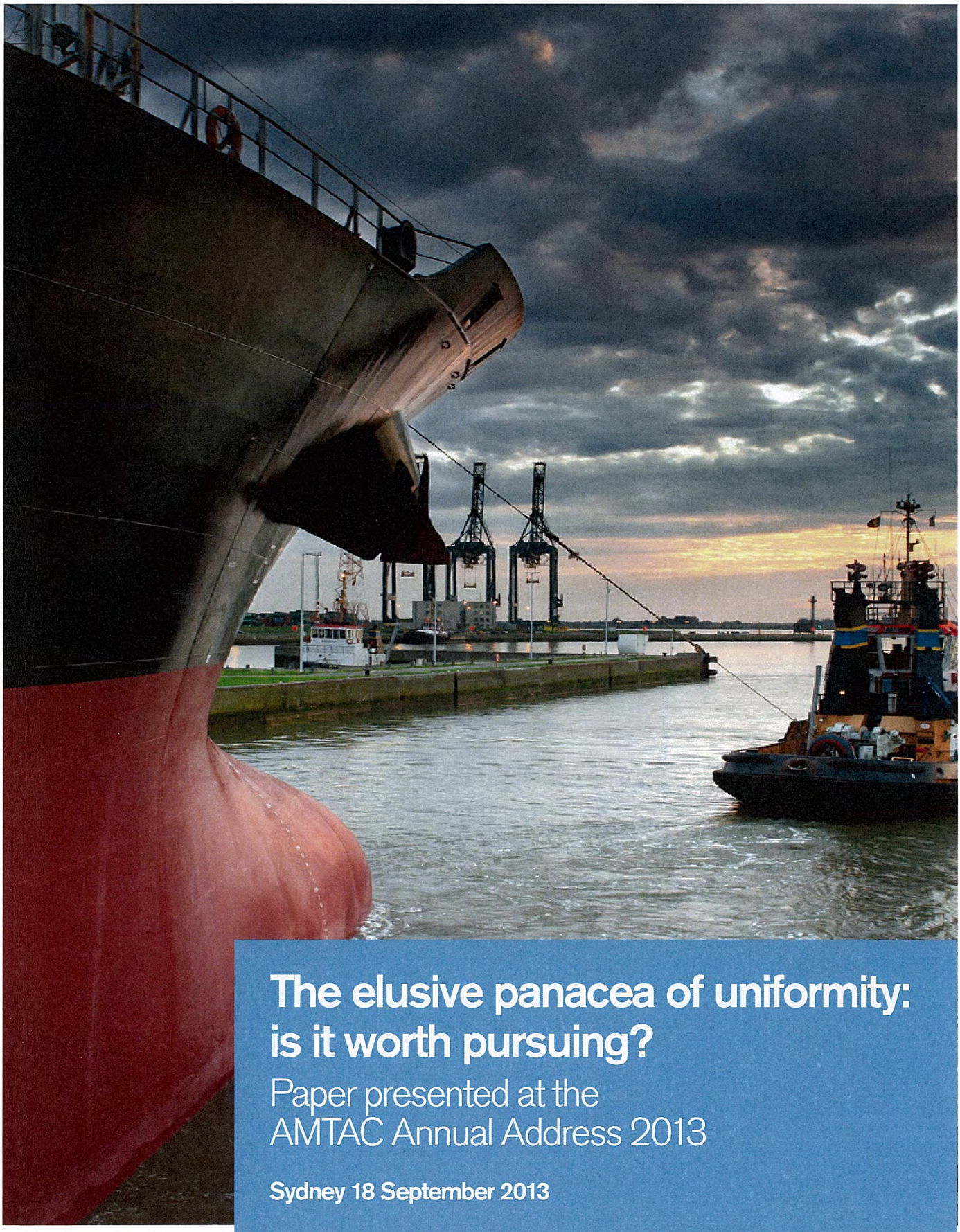
President, Comité Maritime International



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Abstract

This paper refers to the history of the Comité Maritime International (CMI), its raison d'etre being to seek to bring uniformity to maritime law internationally; the long history of attempts to achieve uniformity; and the reasons identified by others as to what has stood in the path of greater uniformity in the past. It examines the history of the carriage of goods liability regimes over the last 120 years, makes a recommendation as to how commercial parties could achieve greater uniformity and move the reform agenda more speedily in relation to the carriage liability regime, describes the current work of the CMI, looks at CMI's limited role in relation to arbitration and recent disparate cases in the law on recognition of international arbitration awards; commits the CMI to continue its role of seeking to achieve uniformity, whatever obstacles it encounters.

Comité Maritime International

The CMI was established in 1897 and is the oldest international organisation in the maritime field. It was founded several years after the International Law Association (ILA) and was perhaps in one sense, as Frank Wiswall says in his Centenary publication: "A Brief Structural History of the First Century" (of the CMI), a descendant of the ILA. It was, however, the first international organisation concerned exclusively with maritime law and related commercial practices. Its origins lie in the efforts of a commercial and political group led by Belgians, who came together in the early 1880s to discuss and to put before the ILA a proposal to codify the whole body of maritime international law.

Wiswall goes on to describe the two failed diplomatic conferences of 1885 and 1888 and the establishment of the CMI as a direct result . Agreement was reached with the ILA for a separate specialist organisation to continue to pursue the goal of unifying maritime law. Amongst those involved were the acknowledged founding fathers of the CMI, Louis Franck, an Antwerp barrister, Charles Lejeune, a Belgian marine underwriter, and Auguste Beernaert, the President of the Belgian Chamber of Deputies, who later became Prime Minister. The same people were involved in setting up the Belgian Association in the CMI.

A meeting was held in Brussels in June 1897 to formally establish the CMI as the parent international organisation to carry on the effort to unify the world's maritime laws and to adopt a constitution for the CMI. In attendance were representatives of eight nations, including Belgium, Denmark, France, Germany, Italy, Netherlands, Norway and the United Kingdom.[1]

As Wiswall points out, the failed diplomatic conferences of the 1880s laid the foundation for the partnership between the Belgian government and the CMI that resulted in the famous series of Brussels Diplomatic Conferences on Maritime Law, which adopted the many conventions and protocols drafted by the CMI over more than 80 years and which were held between 1910 (Collision and Salvage) and 1979 (Hague-Visby/SDR)[2].

1 Following the formation of the CMI in 1897 France formed its association in the same year, Germany in 1898, Norway, Sweden, Denmark, Italy and the US in 1899, Japan in 1901, Argentina and the Netherlands in 1905, Britain in 1908, Greece in 1911 and many others in the 1950s and 60s including Canada, Chile, Dominican Republic, Ireland, Israel and Morocco; with our own Association being formed in 1974 (New Zealand joining us in 1977), China in 1988 and the most recent being Indonesia and Ukraine in 2012. There are now over 50 maritime law associations around the world.

2 Collision Convention (1910); Salvage Convention (1910); Limitation Conventions (1924 and 1957); Arrest Convention (1952 and 1999); Maritime Liens and Mortgages (1924 and 1967); Hague and

With the formation of the Legal Committee of the International Maritime Organisation in 1968, following the "Torrey Canyon" wreck off the Scilly Isles, resulting in pollution, the IMO began to take over from the government of Belgium the role of organising diplomatic conferences in the field of maritime law. It may not be appreciated by this audience that the International Sub-Committees of the CMI and subsequent CMI conferences have done the initial drafting of every convention considered by the IMO Legal Committee (up to 1997) (except the 1969 Intervention Convention and 1973 Protocol and 1996 HNS Convention).

The CMI was one of the first NGOs to be granted consultative status by the IMO and has observer status at IOPC Funds meetings.

When I visited Antwerp earlier this year I also had a meeting in Brussels with a senior Belgian diplomat who expressed confidence that while the present government is in power it would be prepared to host a diplomatic conference, if the CMI produced work that did not sit comfortably within IMO's responsibility. This discussion took place in the context of "Judicial Sales", a draft instrument of which is currently being worked upon by the CMI and likely to be concluded in Germany next year.

One of my predecessors as President of the CMI (1947-1976)[3], Albert Lilar, said the following:

> *The history of maritime law bears the stamp of a constant search for stability and security in the relations between the men who commit themselves and their belongings to the capricious and indominatable sea. Since time immemorial the postulate which has inspired all the approaches to the problem has been the establishment of a uniform law.*

That is still the primary object of CMI today.

It is also important to remind ourselves that Louis Franck and his co-founders of the CMI said, when explaining their concept:

> *It is with the object of overcoming multiple opposition, national particularism, of resolving difficulties not by means of abstract and theoretical solutions but from the needs of practice, of obtaining the ear of the Parliaments, that we had the idea of appealing, not only to the jurists who are interested in maritime law, but to the very people who, in their interests, in their problems of every day, have to submit to the consequence of good and bad laws. We have taken into consideration that the shipowner, the merchant, the underwriter, the average adjuster, the banker, the person who is directly interested, all take a preponderant part in our work; that the task of the jurist is to discern that which, in this maritime community, is the general purpose, that which, among these divergent interests, is common to all; to discern what, among the diverse solutions, is the best, to contribute one's learning and one's experience; but that in the final analysis, the jurist must hold the pen and that it is the man with the experience who must dictate the solution.*[4]

Hague-Visby (1924 and 1968)

3 Albert Lilar and Carlo Van Den Bosch: "Le Comite Maritime International 1897-1972"

4 Albert Lilar and Carlo Van Den Bosch:"Le Comite Maritime International 1897-1972"

Early attempts at uniformity

Albert Lilar referred also to the fact that:

> *...methods have differed and still vie these days with one another. Certain nations, with various fortunes, have endeavoured to impose their law on all those who use the marine spaces which are under their domination. "Mare nostrum", "Mare clausum, sive de dominio maris" are typical expressions of a method opposed to that of "Mare liberum" vindicated by Hugo Grotius...*

We know that Rhodian Sea Law (the Lex Rhodia), based on the Code of Justinian, had a role to play in the Mediterranean from the 7th to the 12th centuries AD, particularly in the area of liability for lost or damaged cargo,[5] and The Rolls of Oleron[6] and their successors, were also widely adopted, at least in the Atlantic trades around the coasts of France, Spain, Belgium, Holland and Britain, from the 13th Century. They dealt with topics that we would today describe as salvage, general average, the rights and obligations of masters and crew, shippers, pilots and demurrage - in admittedly simplistic terms. Whatever their reach and effectiveness, it is of interest, is it not, that in the 13th Century both traders, carriers and rulers saw benefits in seeking to have commonality in the laws as they applied to shipping. Interestingly, apart from in a general average situation those rules did not seek to lay down how cargo claims would be dealt with.

It is suggested by Valentin Vermeersch and his collaborators in their paper[7] that numerous copies of the Laws of Oleron are to be found in different parts of Europe, and were clearly extended when in 1407 twenty two Hanseatic cities met in Lubeck and produced a codification of maritime law. That codification, the Laws of Wisby (on Gotland in the Baltic Sea) was actually nothing more than a compilation of the articles of Lubeck, of the Amsterdam ordinance, and of the Laws of Oleron, which thus were taken up virtually integrally into a broader whole. The Laws of Wisby became the leading sea law on the Atlantic coastal route and were disseminated by the trading activities of the Hansa. "Only in England, where the original and pure laws of Oleron were registered in the Black Book of the Admiralty did they find little acceptance."

I mention that history because it does show a desire of traders, shipowners and rulers to seek to have a codified version of the law to govern many aspects of their endeavours from the 6th to 14th Centuries.

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5 See Places of Refuge for Ships edited by Aldo Chircop, Olof Linden. Martinus N Johoff Publishes at pages 170-175 for a discussion of the "numerous efforts at codifying maritime trade practices; including the Code of Hammrob; from around 1780 BC, the laws of Manu, 1500 BC-200AD, Justinians Digest 529-565AD), Rhodian Sea Law and the Rolls of Oberon

6 It is said that the introduction into the laws of England of the Rolls of Oleron was due to that remarkable woman Eleanor of Aquitaine. She became the Queen Consort of both France and England (as a result of marriage to two different men, King Louis VII of France and then Henry II of England). She had eight children by Henry, two sons of whom would become kings, Richard I and John. It is said that she went on the Second Crusade and whilst in the Eastern Mediterranean she learned about maritime Conventions and customs developing there and she introduced those Conventions into her own lands on the Island of Oleron in 1160 and later in England as well, through her son Richard I.

7 Bruges and the Sea from Bryggia to Zeebrugge" edited by Valentin Vermeersch and others (Mercatorfonds/Antwerp).

Empire

You will be pleased to know that I do not intend to discuss the intervening centuries between the 13th and 14th Centuries and the late 19th Century, except to refer, as did Albert Lilar to the Ordonnance de la Marine of 1681, which made liberal use of laws and customs of the past and to Mancini (I am assuming the reference was to Pasquale Stanislao Mancini of the University of Turin at the time of the Risorgimento), quoted by Lilar who, in his inaugural address at the University of Turin stated:

> *The sea with its winds, storms, dangers, does not change; it calls for a necessary uniformity of juridical regimes*[8]

Perhaps the single most unifying feature of the latter part of that period is of course the effect of the British empire. For example, those of us that were in practice prior to 1988 know that as shipping lawyers, a large part of our practice, was at one with those other countries in the empire that inherited the *Admiralty Court Act 1840*, the *Admiralty Court Act 1861*, and the *Colonial Courts of Admiralty Act 1890*, and that our admiralty jurisdiction had remained static since the beginning of the 20th Century. In 1924 we gave effect to the Hague Rules, as so many other Commonwealth countries were also to do.

By way of further example, let us not forget the work, at the end of the 19th Century in the legislative sphere, of Sir Mackenzie Chalmers. I commend to you the paper by Chief Justice Allsop and Michael Wells on the occasion of the Centenary of the *Marine Insurance Act* 1909[9] where the amazing achievements of that man were identified in relation to three key pieces of commercial legislation in the UK: the *Sale of Goods Act* 1894, the *Bills of Exchange Act* 1902, and the *Marine Insurance Act* 1906 and which were replicated throughout the Empire.

At paragraphs 28 and 29 of their paper, the authors made the following comments which are relevant to my topic:

> *28.* *Chalmers' intention in writing his digest and in drafting the Bill is disclosed in the Memorandum attached to the 1894 Bill, in which he said:*
>
> *"In dealing with rules of law, which may be modified by stipulations of the parties, it is to be borne in mind that the certainty of the rule laid down is of more importance than its theoretical perfection. What mercantile men require is a clear rule to provide for cases where the parties have either formed no intention or have failed to express it clearly. Where the rule is certain, the parties know when to stipulate and what to stipulate for.*
>
> *29.* *These ideas rest on the potency of the idea that commerce requires clarity and simplicity. They reveal a healthy scepticism of any "genius" in the organic development of unstructured principle.*

The search for uniformity has therefore existed for hundreds of years.

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8 Albert Lilar and Carlo Van Den Bosch: "Le Comite Maritime International 1897-1972"

9 "Marine Insurance Act 1909 100th Anniversary" paper of the 11th November 2009 (by Justice James Allsop and Michael Wells, researcher to Justice Allsop)

Why?

Why did the medieval traders, carriers and rulers think that codification or uniformity was so important and to what extent have trading nations achieved it today are the questions that I want to look at. In seeking to answer the first part of the question I can do no better than what Charles Haight Jnr, (Justice Charles Haight, United States Senior District Court, Southern District of New York), had to say in his paper "Babel Afloat: Some Reflections on Uniformity in Maritime Law" being the third Nicholas J Healy Lecture at New York University School of Law in 1996[10]. He explained his title with reference to Genesis Chapter 11 verses 1 through 9. I will not give you all of the text but simply quote a part which reads:

> *And the whole earth was of one language and of one speech. And they said to one another, Go to, let us build us a city and a tower, whose top may reach unto heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth... so the Lord scattered them abroad from thence upon the face of all the earth; and they left off to build the city. Therefore is the name of it called Babel; because the Lord did there confound the language of all the earth; and from thence did the Lord scatter them abroad upon the face of all the earth.*

Justice Haight then posed the question as to what "that bleak old Testament passage" (as he described it) had to do with uniformity in the maritime law and answered his question as follows:

> *Those who strive to achieve a uniform maritime law, nationally and internationally, seek to have the people of the maritime community - shipowners, cargo owners, insurers, lenders, furnishers of supplies, salvors - "be of one language and of one speech", so that rights and obligations may be certain and predictable. I believe that to be a desirable goal and hope that, before this audience, I am in large measure preaching to the choir.*
>
> *And progress in achieving uniformity has been made from time to time throughout history. But it seems that whenever the maritime world begins to achieve one legal language, so that the tower of a uniform maritime law starts to arise, some force confounds that language, and scatters the maritime community upon the face of all the earth, so that uniformity, having taken two steps forward, then takes one step back.*

Measuring success

How does one measure success in relation to uniformity? Patrick Griggs in the 6th Nicholas J Healy lecture at New York University of Law in 2002[11] pointed out that "Traditionally, uniformity is achieved by means of international Conventions or other forms of agreement negotiated between government and enforced domestically by those same governments". He said it was "tempting to measure success on a strictly numerical basis", then analysed the track records of some of the major Conventions - Collisions Convention 1910 (88 ratifications); Salvage Conventions 1910 (86 ratifications) and 1989 (40 ratifications); the Carriage of Goods Convention 1924 (89 ratifications); Hague-Visby (32 ratifications), Hamburg Rules (28 ratifications), (to which I will return); Limitation Conventions 1924 (15 ratifications), 1957 (51 ratifications) and 1976 (37 ratifications); Oil Pollution Conventions: CLC 1969 (103 ratifications); Fund Convention 1971 (75 ratifications); Maritime Liens

10 Journal of Maritime Law & Commerce Volume 28, No 2 April 1997.

11 Patrick Griggs "Obstacles to Uniformity of Maritime Law" - Journal of Maritime Law and Commerce Vol 34, No.2 April 2003)

and Mortgages Conventions 1926 (28 ratifications); 1967 (5 ratifications) and 1993 (6 ratifications)[12].

Patrick Griggs then identified a number of obstacles to uniformity:

Absence of need: There is much to be said for the IMO Assembly direction to the effect that Conventions or other instruments should only be produced "where a compelling need is established". This is something that I had to be mindful of when chairing the CMI International Working Groups on "Places of Refuge" and the "Review of the Salvage Convention", since to submit any draft instrument to the IMO without having satisfied ourselves of that requirement would have been a waste of time. Patrick Griggs quoted Hobhouse J (as he then was) in a paper where his Lordship had said:

> *What should no longer be tolerated is the unthinking acceptance of a goal of uniformity and its doctrinaire imposition on the commercial community. Only Conventions which demonstrably satisfy the well proven needs of the commercial community should be ratified and legislation should only be agreed to if it is demonstrably fit to be enacted as part of the municipal law of this country.*[13]

Time scale: This is a reference to the long delay between conception, finalisation and coming into force, especially where limitation amounts (a good example is the Athens Convention) may be out of date by the time states give effect to a Convention);

Differences in assessment of claims: He referenced The Athens Convention as a good example of the difficulties of establishing appropriate limitation amounts;

Drafting in a void: The Wreck Removal Convention is an example cited by Patrick Griggs. The initial draft was prepared by the three sponsoring countries without the usual preparatory work to ascertain domestic law in a large number of states, which would have been carried out by the CMI at the commencement of any such work program;

Over elaboration: Patrick Griggs compared the 1910 Salvage Convention with 16 articles (which occupy 4 pages of the CMI Handbook of Maritime Conventions) and the 1989 Salvage Convention (which consists of 34 articles, a "Common Understanding", and two resolutions which occupy 10 pages in the CMI Handbook);

Have we got the right instrument: Patrick Griggs identified the various alternatives: codes, model laws, guidelines and rules as opposed to a convention. Eg UNCITRAL Model Law on Arbitration;

Politics: Patrick Griggs cites the CLC Convention because it offered a clear liability regime, compensation for the consequences of oil spills and a direct cause of action against liability insurers as reasons for its success;

Expense of application: Patrick Griggs queried whether this might be the reason that the HNS Convention has not thus far been successful in gathering support;

High thresholds: Patrick Griggs compared the Athens Convention with a threshold of 10 states before coming into force with the Bunker Convention, requiring 18 states;

Failure to denounce superseded conventions: As an example Patrick Griggs noted

12 CMI Yearbook 2001 (Singapore II)

13 JS Hobhouse, International Conventions and Commercial Law: The Pursuit of Uniformity 106. LQ. Rev. 530 (1991)

Poland has ratified and implemented the 1924, 1957 and 1976 Limitation Conventions and not denounced the earlier two.

Implementation and interpretation: As the work done by Professor Francesco Berlingieri has pointed out, states give effect to conventions in many varied ways, such as by cherry picking and incorporating into domestic law only parts of the conventions. Although Australia did not ratify the 1952 Arrest Convention, we have largely accepted it within our Admiralty Act 1988. A review of the 1999 Arrest Convention by the NSW Committee of the MLAANZ identified a few provisions within it that might be beneficial for our law, but not a sufficient number to warrant amendment to the legislation, or ratification of the Convention. Should we cherry pick some of those provisions?

Failing to set a good example: The United States is a significant maritime nation that generally does not give effect to international conventions. A good example is the United Nations Law of the Sea Convention which the US Coast Guard is very keen for the US to give effect to but which mining interests appear to oppose.

Finally, Patrick Griggs asked: ***are we just conventioned out?*** There is no doubt that all of those suggestions play a part in the success or otherwise of a convention. I would like to concentrate on implementation and interpretation and to consider whether there is a better way.

Implementation and interpretation

This is an area to which Francesco Berlingieri has devoted considerable attention. In an article co-authored by him with the late Professor Anthony Antapassis, they drew attention to the following:

> *The methods of national implementation of international Conventions differ from country to country and, sometimes, various methods are used on different occasions in the same country. In some countries treaties, if self-executing, have the force of law as a consequence of their ratification, and they are therefore automatically incorporated in the national legal system. In most countries, however, some sort of implementing legislation is required. This is so in the United Kingdom and in the countries of the Commonwealth. This is also the case in many other countries, such as, for example, most of the civil law countries. The implementing legislation may vary from the promulgation or publication to the enactment of a Convention, to the translation of substantive provisions of the Convention into terms of national law, and to the application of a Convention within the framework of a more general law.*

Carriage of goods liability regimes

Another method of seeking to evaluate the success or otherwise of the international community in achieving uniformity in the maritime area might be to look at the history of the carriage of goods liability regimes since the 19th Century. There are presently four easily identifiable variants: the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and now the Rotterdam Rules, as well as many states, like our own, that have aspects of the Hague/Hague-Visby and Hamburg Rules in their regimes.

In the late 19th century, the ILA became involved in early attempts at unification. Professor

Michael Sturley describes this in an article in the Journal of Maritime Law and Commerce[14] where he refers to the ILA's early attempts to achieve uniformity to prepare a "Code of International Law". As Sturley says:

> *The founders believed that such a code was a pre-requisite to the judicial settlement of international disputes, and would therefore be a major contribution to world peace. The Association, however, quickly turned its attention to private law subjects with a heavy emphasis on maritime topics.*

In 1890 for example, it achieved its first great success: the York-Antwerp Rules, which have (with various revisions) effectively unified the law of general average for over a century. It is interesting that the Rolls of Oleron had also directed so much attention to that topic, namely how carriers and merchants should share the costs and expenses of a common adventure when disaster strikes.

(i) Model bill of lading

Sturley continues his history of the Hague Rules in his work on the Travaux Preparatoire of the Hague Rules[15] and the article in the Journal of Maritime Law and Commerce to which reference has already been made. He notes that the ILA turned to bills of lading at its Liverpool Conference in 1882, but the model bill of lading adopted at that Conference, which was designed for voluntary adoption by carriers and shippers, did not achieve general acceptance.

(ii) Set of rules

A few years later, the ILA temporarily abandoned the conference form of bill of lading in favour of a set of rules, known as the Hamburg Rules of Affreightment, for the parties to incorporate voluntarily by reference into their bills of lading. (I will suggest below that the consolidation of liner shipping into a few mega carriers may provide an opportunity for that failed 19th century model to be revived in favour of the more tortuous path of international conventions.) Although they were adopted by a few German companies, they had little immediate impact, according to Sturley. They were abandoned by the ILA a couple of years later in 1887 when it reaffirmed the principles of the "conference form" of bill of lading.

(iii) Domestic legislation

The next development, as Sturley points out, is that several countries unilaterally enacted domestic legislation governing exoneration clauses in bills of lading[16]. This was in frustration at the failures of the international community to develop a unified system. There was clearly frustration that carriers were able to exclude themselves from having any liability. The first country to introduce unilateral legislation was the United States with its Harter Act[17], which

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14 Michael Sturley: "The History of COGSA and the Hague Rules", Journal of Maritime Law and Commerce, Volume 22 No. 1 January 1991

15 The Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoire of the Hague Rules by Michael Sturley, Volume 1, 1990 published by Fred B Rothman & Co

16 1893 Harter Act (US); 1903 Shipping and Seamen Act (NZ); 1904 Sea-Carriage of Goods Act (Australia); 1910 Water Carriage of Goods Act (Canada).

17 The key features of the Harter Act were that it was deemed unlawful for carriers from or between ports of the United States and foreign ports to insert provisions in bills of lading relieving them "from liability for loss or damage arising from negligence, fault or favour in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge" and any such provisions were to be null and void and of no effect (section 1); and similarly it was unlawful for them to "insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise

was signed into law by President Harrison in 1893. Other countries (including Australia) followed suit[18].

(iv) Convention

It was not until the end of World War I that steps were taken to achieve an international convention. Countries such as Australia, New Zealand and Canada lobbied Britain because consignees in those countries were unable to obtain the benefits of their own Harter Act style of legislation and carriers were able to benefit from the wide exclusion clauses which were still permissible. This led to a number of meetings[19]. An early version of the Hague Rules of 1921 was designed, as Sturley points out "for voluntary incorporation by reference into bills of lading" (ie another attempt to circumvent the convention model).

Australia gave effect to the Hague Rules in its Sea Carriage of Goods Act 1924. It was not until 1936 that the United States passed its Carriage of Goods by Sea Act.

Professor Sturley has also pointed out that it was only after US adoption that Canada passed its new Water Carriage of Goods Act (two months after the US COGSA); within two years of the US ratification of the Brussels Convention (France, Italy, Germany, Poland, Finland and the three Scandinavian countries all followed suit). That is not to say that there had not been a number of countries that had come on board earlier. They included a large number of Commonwealth countries in the 1930s.

The **Hague-Visby Rules**, which were agreed in Brussels on 23 February 1968, did not enter into force until 23 June 1977.

The **Hamburg Rules of 1978** entered into force in November 1992. The last ratification was that of Albania in 2006. It is fair to say that none of the major trading nations such as the United States, China or Japan have ratified the Hamburg Rules.

Quite apart from the Hague-Visby Rules there are of course many countries (China, Australia and Scandinavian countries in particular amongst them) who have now given effect to, essentially, a hybrid regime that straddles Hague, Hague-Visby and Hamburg Rules.

By 1990 it had become apparent to the CMI that the Hamburg Rules were not proving

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due diligence to properly equip, man, provision and outfit the said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any ways be lessened, weakened or avoided (section 2); section 3 which was the precursor of the nautical fault defence and provided protection to carriers where damage or loss resulted from faults or errors in navigation or in the management of said vessel", as well as introducing an exclusion in respect of "losses arising from damages of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process or from loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service; section 4 required bills of lading to be issued which stated, amongst other things, "the marks necessary for identification, number of packages, or quantity, stating whether it be carriers or shippers weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described".

18 New Zealand: Shipping and Seamen Act 1903; Australia: Sea-Carriage of Goods Act 1904; Canada: Water Carriage of Goods Act 1910

19 1917 Dominion's Royal Commission; 1918 Imperial War Conference; 1921 Imperial Shipping Committee Report; 1921 Imperial Conference; 1921 ILA Maritime Law Committee Meeting (London); 1921 ILA Maritime Law Committee Conference (Hague); 1922 CMI Conference (October 1922) (London); 1922, 1923 and 1924 further diplomatic conferences (Brussels).

attractive to trading nations and the then President Francesco Berlingieri formed an International Working Group to consider what the CMI could do. The US MLA started work in the 1990s on the drafting of a Bill to replace the US COGSA of 1936.

As Professor Sturley recounts in an article in 1995[20], an ad hoc Liability Rules Study Group had been established by the US MLA earlier that year. It had proposed a number of amendments to the US COGSA. He concluded his article on the work done by that Study Group by saying:

> *The merits of the Study Group's proposal are open to debate. ... But the effect of the proposal on international uniformity has been a major part of that debate, and an area where there have been many misconceptions and ill-informed arguments.*
>
> *On careful analysis it can be seen that any international uniformity in this field is rapidly breaking down. In any event, US law has been out of step from the rest of the world for many years, and under current political conditions, there is no realistic prospect of bringing the United States into either of the international regimes. The Study Group's proposal may damage apparent uniformity, but this damage is merely cosmetic. Taken as a whole, the proposal does far more in bringing the United States into substantive uniformity with its trading partners than any other option available and most encouraging of all, if Congress adopts the proposal it may provide some of the impetus to help restore some of the international uniformity that has followed Congress' previous efforts in this field.*

In his 1995 article Sturley said the following about uniformity:

> *If the law is uniform, everyone involved in the transaction will know that its liability (or recovery) will be the same wherever a dispute is resolved. Results will be more predictable, litigation will be less necessary, and the parties will be able to make their underlying business decisions with confidence, knowing what law will be applied if loss or damage occurs.*
>
> *A lack of uniformity imposes real costs on the commercial shipping system that the Hague Rules govern. Every covered transaction involves at least two countries: the shipper's and the consignee's. The carrier may be from yet a third country. The carrier's indemnity insurer, the cargo underwriter, and the bank that finances the transaction may increase the total number of countries involved to six and each of these parties may participate in a number of other transactions, each involving a different group of countries. Any one of the transactions could be subject to litigation in any of the countries involved - or even in an unrelated country where a claimant obtains jurisdiction over a ship. Only a uniform international code can provide the certainty and predictability that they all require to make rational and efficient decisions.*

Rotterdam Rules

In 2001 a draft CMI instrument was concluded at the Singapore Conference which was then forwarded to UNCITRAL. Work then proceeded over seven years until the Rotterdam Rules of 2008 were finalised. They have been signed by 22 countries, including the United States, but since ratified by only two countries: Spain and Togo. A number of countries seem to be moving towards ratification but are awaiting developments in the US or EU states.[21]

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20 Journal of Maritime Law & Commerce, Volume 26 No. 4553

21 The Maritime Law Commission of Norway recommended that "Norway should ratify the Rotterdam

In April, together with Chet Hooper of the US MLA (who was President of the US MLA between 1994 and 1996), I met with two employees of the State Department. We were told that what is described as the "transmittal package" was nearing completion. That is the document which we would understand to be similar to, but I suspect more extensive than, an explanatory memorandum, as well as the text of the Convention.

On completion of the package, it is then sent to other government agencies such as the Federal Maritime Commission, Maritime Administration and the Justice Department. I was informed by Chet Hooper on 13 June 2013 that the package was on its way to the other agencies. (We like to think that our visit had something to do with that). Those departments have been involved in the process previously and it is not thought likely that there will be much delay in obtaining their sign-off on the package. Once that has taken place, the Secretary of State sends the transmittal package to the President for his approval. The President then sends it to the Senate for its approval. No estimate is given as to how long those processes may take. There is no certainty that they will be completed.

A Solution?

International liner shipping has changed significantly since the late 19th Century. The consolidation of carriers, the conference system (where it still exists) as it applies to liner shipping, the recent coming together by Maersk, MSC and CMA CGM (the P3 Alliance), the similarity in the forms of bills of lading, the influence of the International Chamber of Shipping and BIMCO on documentary matters, all suggest to me that at least in relation to containerised carriage of cargo, it should be possible for carriers with the support of their P&I Clubs to incorporate the Rotterdam Rules into their bills of lading. Whilst local laws may give effect to regimes that pre-date the Rotterdam Rules, it is hard to see why parties would seek to rely on those other regimes, when by private contract they have agreed to another regime, especially when there would be provisions which are beneficial to them. For shippers and consignees there are clearly benefits in having higher package limitations, the ability to sue for delay and an absence of nautical fault being a defence to a carrier. For carriers, the benefits include a clearer responsibility on shippers and certainty insofar as regime is concerned. It might be thought unlikely that carriers would seek to take advantage of more beneficial limitations in the country in which proceedings take place, if they have taken the step of incorporating the less beneficial regime into their contract.

If carriers were to take such a step, it would, in my view, impress governments and accelerate the process of ratification. Certainly in a visit (to which I will also refer later) which I made with the President of the Maritime Law Association of Australia and New Zealand (MLAANZ) to the Department of Infrastructure and Transport in May, it was said that that would influence the Australian government.

Overall, whilst the period after 1924 saw some measure of uniformity (particularly after 1936), the history of the Hague Rules since the 1970s does not supply very much evidence that the Convention system (if I can refer to it in that way) has greatly assisted commercial parties. As we have seen, there are presently four sets of Rules to choose from.

Rules in order to secure and promote a uniform legal regulation of carriage of goods internationally when USA or larger EU States ratify". The Danish Maritime Law Committee has made a similar recommendation.

Recent work of the CMI:

Review of the Salvage Convention and Recognition of Foreign Judicial Sales of Ships

The two principal topics which were discussed at the Beijing Conference in October last year were a Review of the Salvage Convention and Recognition of the Foreign Judicial Sales of Ships. The former had been carried out as a result of a request made to CMI by the International Salvage Union, who have been very unhappy with the convention for many years. Sadly for the Salvage Union, the CMI was not convinced that there was a "compelling need for reform".

Judicial Sales started on the initiative of Chinese lawyer Henry Li, who was concerned that the absence of a Convention in this area meant that sales of ships by order of the Courts in one jurisdiction were not always being recognised in other jurisdictions. There are to be further discussions on this topic in Dublin in late September and the project will, hopefully, be concluded in Germany next year. Both those topics were classic CMI projects, that is, IWG's working on wordings for an international instrument before a Conference and then for it to be debated over a number of days at a Conference in sessions that have much in common with a diplomatic conference.

The present work of the CMI

Review of the Rules of General Average

The CMI is the custodian of the York Antwerp Rules and initiated in October 2012 a major review of those Rules by appointing a new International Working Group (**IWG**) under the chairmanship of Bent Neilsen. Amendments made in 2004 to the York Antwerp Rules at the CMI Vancouver Conference have not received widespread support. The main reasons the 2004 Rules were unacceptable to the shipping community were that salvage (Rule VI) was excluded from General Average and crew wages in ports of refuge (Rule XI) were abolished. There were additional provisions but those appear to be the primary concerns. The questionnaire which was sent out to Maritime Law Associations on 15 March 2013 raises those issues, but also seeks to know whether General Average should be abolished, whether the Rules need amendment in the light of the Rotterdam Rules, whether the Rules should attempt to define terms used, whether they should incorporate provisions relating to arbitration or mediation of disputes, whether they should incorporate key documents such as average guarantees and average bonds, whether changes are needed to assist further in relation to absorption clauses (where hull insurers pay general average in full up to a certain limit), whether express wording is needed in the Rules to deal with the payment of ransoms, whether there are any steps which can be taken to minimise costs, as well as detailed questions posed in relation to particular rules. Some of the problems named in the answers to date include the large container ship cases, the administrative difficulties of obtaining security, low value cargoes and currency of adjustment. The current Rules, which are most in use, are the 1994 rules drafted in Sydney at the CMI Conference.

Offshore activities - pollution liability and related issues

Another topic which was debated at Beijing was "Offshore Activities". CMI sent a draft instrument to the IMO after the Rio de Janeiro Conference in 1977. At the 1994 CMI Conference in Sydney a revised version of the 1977 Rio draft Convention was adopted (Draft International Convention Off-shore Mobile Craft). At the same time it established a working group to "further consider and if thought appropriate draft an International Convention on

offshore units and related matters". The Sydney draft was considered by the IMO Legal Committee in 1995 but it became apparent that it did not commend itself to the Legal Committee and the CMI was encouraged to pursue its efforts to draft a comprehensive treaty[22]. That history was brought up to date by Richard Shaw in a report he prepared for the Beijing Conference last year [23]. He noted that the CMI had submitted a report to the IMO Legal Committee in 1998 containing a review of the subject, with a survey of the principal legal issues which should, in the view of the CMI International Sub-Committee, be covered by such a Convention. In 2001 the Canadian Maritime Law Association produced a draft framework document for an International Convention on Offshore Activities[24]. As Richard Shaw noted in his Beijing report:

> *The need for an international Convention to clarify the application of legal principles relating to subjects such as registration, mortgages, salvage, limitation of liability and liability for oil pollution appears to be widely recognised, although it would not be right to overlook the view expressed in certain quarters, notably by the International Association of Drilling Contractors and the E&P forum (Exploration and Production)[25], that there is no need for such a Convention.*

Since the Deepwater Horizon and Montara disasters, some states, especially Indonesia, have argued that something needs to be done in this area. Justice Steven Rares of the Federal Court of Australia has written eloquently on the subject and believes that an international Convention modelled on the CLC (dealing with oil pollution) should be prepared. A new IWG (Offshore Activities - Pollution Liability and related issues) has been set up by the CMI under the Chairmanship of Richard Shaw and Patrick Griggs. A Questionnaire was sent out to National Maritime Law Associations in July 2013.

Tabetha Kurtz-Shefford has pointed out in a paper published last year[26]:

> *...It is obvious that there is little appetite for a global regime. The probability of one arising within the near future is very low, especially without the support of some of the more influential nations and organisations. Although it will never be explicitly cited as a reason for failure, it is almost certain that such a regime faces strong resistance from the main oil and gas entities within the industry. ...The subject has now turned from the establishment of a global regime to the shape regional guidelines might take.*

Other topics

Other topics discussed at Beijing and which have CMI IWGs working on them between conferences include Fair Treatment of Seafarers, Piracy and Maritime Violence, Marine Insurance, Cross Border Insolvency, and the Arctic and Antarctic Legal Regimes. All are extremely topical and require CMI to utilise the services of its worldwide network of maritime law experts.

22 The work done by that IWG can be seen in the CMI Yearbooks 1996 and 1997

23 CMI Yearbook 2011-2012 Beijing 1

24 CMI Newsletter 2004

25 Now known as the International Association of Oil and Gas Producers

26 Liability for Offshore Facility Pollution Damage after the Deepwater Horizon? What happened to the Global Solution? The Journal of International Maritime Law (2012) 18 JIML 453

Promotion of ratification of maritime conventions

A new initiative launched at the Beijing Conference was the setting up of a Standing Committee to investigate the possibility of joining with the International Chamber of Shipping (ICS) and IMO to seek to have more conventions ratified. This has now occurred. It is believed that National Maritime Law Associations could do much (in conjunction with the ICS worldwide membership) to educate states about the conventions that they have not ratified. A brochure has been published listing the conventions upon which a major focus is sought to be addressed[27].

On 20 June 2013 I visited Canberra with Matthew Harvey, the President of MLAANZ and we met with officers of the Department of Infrastructure and Transport. As a result of that meeting I am hopeful that MLAANZ will be in a position to provide assistance to the department when it is putting together ministerial submissions for Australia to put in train steps to ratify some of these Conventions, such as Rotterdam Rules, HNS, Wreck Removal and Athens. Dr Sarah Derrington has initiated steps to produce working papers. I have posed the question to MLAANZ whether Australia should revisit the Arrest Convention 1999, the Maritime Liens & Mortgages Convention (1993) and debate whether there is anything in these Conventions which would benefit Australia (and New Zealand).

A Convention that I knew nothing about until recently was the Cape Town Convention 2007 on International Interests in Mobile Equipment 2001 and its three protocols relating to aircraft, railways rolling stock and space assets. It seems that UNIDROIT is giving consideration to incorporating ships within that Convention. This was opposed by the CMI and the IMO, when it was first raised in the 1990s and it looks as if we are going to have to re-debate that issue over the coming months. The IMO was concerned that there would be a conflict with the Convention on Maritime Liens and Mortgages 1993 and the exclusion of the application of the treaty to registered ships would "preserve the features of international maritime law as a distinctive *corpus juris*". The CMI was concerned as to whether states would be prepared to abandon their own ship registries and if not how any protocol to the convention could deal with a dual registry situation, and how conflicts would be resolved.

Handbook of maritime conventions and website

CMI has in the past worked with a publisher to produce a handbook containing the most significant Maritime Conventions. With the assistance of Frank Wiswall and IMLI in Malta, work is being done to produce a new edition. At the same time consideration is being given to having that material posted on the CMI website. In recent years the CMI website (www.comitemaritime.org) has been considerably upgraded.

A further initiative of the CMI is to employ a French lawyer to gather together important decisions worldwide on international Conventions, which would be available on the CMI

27 They include: Protocol of 1997 to MARPOL (Annex VI - Prevention of Air Pollution from Ships); International Convention for the Safe and Environmentally Sound Recycling of Ships (Hong Kong), 2009; Convention on the Facilitation of International Maritime Traffic (FAL), 1965; Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims (LLMC), 1977; Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL) ,1974; International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996, and Protocol of 2010; Nairobi International Convention on the Removal of Wrecks (Nairobi WRC), 2007; Maritime Labor Convention (MLC), 2006; Seafarers' Identity Documents Convention (Revised) (ILO 185), 2003; and United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), 2009.

website. Francesco Berlingieri has already worked on this for some years voluntarily but has been reliant on volunteers around the world sending him decisions, and it is thought that someone working full time on such a project for a six month period could assemble very much more material and establish a more committed network of volunteers around the world to gather such material in future. We will be looking for a volunteer in this country to assist her.

Arbitration

Given the role of AMTAC, it would be remiss of me not to say something about arbitration. This is a subject that has not exercised the minds of the CMI much. In fact until recently I was unaware of the fact that it had been on the CMI agenda at all. Albert Lilar noted in 1972 that one of the subjects on CMI's agenda of future work at that time was "International Arbitration in maritime matters". It appears from the records that following upon the Conference of the CMI in Rio de Janeiro in 1977 there were discussions concerning a joint initiative with the ICC in the field of maritime arbitration. There was the thought that the CMI could assist in ensuring that maritime disputes could be solved with expediency and certainty and, accordingly, the Assembly at the Rio de Janeiro Conference empowered the Executive Council to finalise a set of arbitration rules for subsequent implementation by the 1978 Assembly. It was however stressed at that time that the contemplated ICC/CMI arbitration would not seek to infringe upon the present practices to refer disputes to arbitration in London, New York, Moscow, Tokyo etc, but the parties should be left free to determine the place for arbitration procedure. It was recognised however that parties might agree upon arbitration in a particular place outside their home country if they could be reassured that the umpire or sole arbitrator would be chosen with due consideration to the nature of the dispute and the nationalities of the contracting parties.

The CMI Newsletter of October 1978 reproduced the Arbitration Rules of the CMI-ICC and its model clause. The Rules (known as the IMAO Rules) were approved by the CMI Assembly in March 1978 and by the ICC Council in June 1978. At that time they established the International Maritime Arbitration Organisation (IMAO), which seems to have been referred to as the Commission on International Arbitration. A Working Party was set up in February 1997 to determine whether the IMAO Rules needed to be revised, relaunched or allowed to go to sleep. Its report of that year noted that the Rules were set up to follow, generally, the system of the ICC Arbitration Rules. The arbitration tribunal and the parties would interact with the IMAO Secretariat which was effectively the ICC Secretariat. The report does however notice differences between the ICC Rules and the ICC/CMI Rules. Over the 20 years since its creation at the time of the Working Party report, there had only been nine cases brought, of which only two had proceeded to a final award. However, as the report noted, 56 cases which had come before the ICC Court of Arbitration would have fallen under the scope of the IMAO. It was noted that a relatively high proportion of those cases involved African countries.

The responses to the questionnaire which had been sent to MLAs by the Working Party noted that the favourite centres for arbitration were London and New York, there was generally a lack of familiarity with the IMAO Rules, the maritime community is very traditional and not keen to change, non-institutional arbitration is preferred in maritime matters, the link between the IMAO Rules and the ICC was seen by some as a negative, the ICC being perceived as bureaucratic and expensive, some thought that a renewed IMAO system could constitute a supranational counterweight to the traditional London and New York arbitrations and should therefore be geared towards ad hoc arbitrations.

The Working Party therefore concluded as follows:

(i) *Part of the shipping world desires an alternative to the present London and New York maritime arbitration systems. This group wants the alternative for reasons of lower legal fees, another language than English and a different culture and environment.*

(ii) *An alternative system must be non-bureaucratic, flexible and of an ad hoc type. The arbitrator's fees should be transparent and fixed by the IMAO. A revised set of IMAO Rules might in the extreme case be limited to the function of an appointing authority and the supply of a list of arbitrators.*

(iii) *The "market" for the IMAO rules is difficult to define.*

(iv) *An alternative set of rules should not detract present users of the traditional ICC arbitration system.*

(v) *If the IMAO Rules are to be relaunched in one form or another, not only marketing will be necessary, but also lobbying of shipowners' organisations, underwriters, brokers, charter associations and other drafters of forms. The CMI as such is unable to lobby, it will be the task of its individual members. An important role must be played by the ICC.*

(vi) *No real support for a relaunch of the IMAO Rules can be found in the answers given by the CMI and the ICC members.*

The concluding recommendation of the Working Party was that:

> *Unless CMI and ICC intend to spend resources to promote the IMAO Rules the Rules should be allowed to continue to exist as at present and the standing committee be kept in place so that requests for arbitration can be dealt with if and when they come.*

Since that report of 1999 the position has not changed significantly, although of course there has been a continuing development of alternative arbitration centres to London and New York, especially Singapore and China. As a result of a conversation which I had in New York earlier this year with a maritime lawyer, I have again put this matter on the agenda for the Executive Council of CMI to consider and have been instructed to set up an ad hoc working group to consider whether there is a role for the CMI to play in international arbitration.

The New York Convention

As has already been pointed out, if one measures success in achieving uniformity by the number of ratifications then the fact that the New York Convention has 148 member States would suggest that it scores highly in terms of uniformity. However, as the Court of Appeal's decision in Victoria in the case of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*[28] demonstrates, the manner in which the Convention has been implemented has given rise to differences in procedures to register awards in different parts of the world. I referred to this in a CBP case note in November 2011 entitled "The Lack of Uniformity in Enforcement of International Arbitral Awards".

The divergence of judicial opinion arises out of essentially the same factual matrix, namely when a party against whom an award made in one jurisdiction is sought to be enforced in

28 [2011] VCA 248 (22 August 2011)

another was not the named party to the original arbitration agreement.

In a commendably short judgment Chief Justice Warren in the Victorian Court of Appeal said the following:

> *Both parties made extensive reference to international authorities. In so far as the Act implements an international treaty, Australian courts will as far as they are able, construe the Act consistently with the international understanding of that treaty. Uniformity also accords with the Act's stated purpose to facilitate the use of arbitration as an effective dispute resolution process.*
>
> *No Australian court and few foreign courts have considered the present issues. Most of those foreign courts have held that whether an award debtor is a party to the relevant arbitration agreement falls to be considered as a defence under their equivalent section 8(5)(b), rather than as a threshold issue.*

Her Honour did not accept that the foreign decisions were determinative of the approach that the Court should take. The first reason for coming to that decision was that construction contended for on the basis of those foreign decisions would render section 8(1) of the International Arbitration Act 1974 (Cth) superfluous. Section 8(1) reads as follows:

> *Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.*

As her Honour also pointed out, sections 8(5) and (7), which identify circumstances in which a court may refuse to enforce the award, do not identify as one such circumstance one where the party against whom the award is sought to be enforced is not a party to the arbitration agreement.

Her Honour distinguished the two United Kingdom decisions in *Dardana Ltd v Yukos Oil Co*[29] and *Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*[30] where reliance on the equivalent provision in the *Arbitration Act 1996* (UK), section 103(2)(b), was accepted, and in doing so she placed emphasis on the difference in wording of that comparable provision to section 8(1). The UK Act provides in that provision that "an award shall be recognised as binding", as her Honour explained: not on the parties to the applicable arbitration agreement but "on the persons as between whom it (the award) was made."

The point made by Francesco Berlingieri concerning how uniformity can be adversely affected by the variety of ways countries implement international conventions is well exemplified in this decision.

Conclusion

What I have sought to demonstrate in this paper is that throughout known history attempts have been made to make the law of the sea, as it applied to trade, uniform and that there have been many different ways used to seek to achieve uniformity. Since the end of the 19th century, great efforts have been made in the area of international conventions. Some would say there has been a surfeit of work in that area and governments have failed to rise to the challenge of giving effect to them, either when they were originally agreed or in later years when amendments or new conventions were prepared to deal with problems that had not been considered originally.

29 [2002] 2 Lloyds Rep 326

30 [2010] UKSC 46

What I have also tried to show, at least in relation to private international law topics such as the carriage of goods liability regime, is that there might be another way, that is the way which was attempted at the end of the 19th century: reliance on a standard form of contract to be entered into between carriers and merchants. The two processes are not mutually exclusive. It may be that the dilatoriness of governments requires carriers to take the lead and incorporate into their bills of lading via the clause paramount the Rotterdam Rules, which will send a strong message to governments that they need to renounce the Hague, Hague-Visby and Hamburg Rules at the very least and, further, ratify the Rotterdam Rules. If BIMCO and the P&I Clubs, together with the International Chamber of Shipping, decided that giving effect to the Rotterdam Rules is an urgent need in order to bring greater certainty to the carriage of goods and reduce legal costs substantially where disputes occur, then it is my belief that we could achieve a situation which is even better than that which was achieved during the lifetime of the Hague Rules, effectively between 1924 and 1968.

I have also, I hope, demonstrated that even in the area of international arbitration the way in which states have implemented the New York Convention has given rise to litigation around the world. There is much work to be done in educating states to try and achieve greater uniformity in the way in which they give effect to conventions they ratify (and the procedures they utilise to give effect to them under their national laws).

As so many others more learned than me have said, the goal of uniformity, or at least greater uniformity, is a noble one and it should be pursued. The panacea, as we have seen is indeed elusive, but we should not give up our pursuit. Like the Black Knight in the film "Monty Python and the Holy Grail" we should not be dismayed when, in the words of Justice Haight, having taken two steps forward we take one step back, and with the Black Knight we can perhaps shout:

> *Running away eh? Come back here and take what's coming to you! I'll bite your legs off!*

The CMI will continue to seek greater uniformity in the area of maritime law, whatever hurdles we have to overcome.

Stuart Hetherington
President, Comité Maritime International

September 2013