

OBSTACLES TO UNIFORMITY OF MARITIME LAW

THE NICHOLAS J. HEALY LECTURE*

PATRICK J. S. GRIGGS**

I Introduction

There seems a certain inevitability about my presence here today to give the N.J. Healy Lecture, in the presence of the great man himself. In June 1961, by which time I had already spent three years as an articled clerk with Ince & Co, it was felt that I should gain first hand experience of life at sea. One of the firm's major clients at the time was States Marine Line and my principal, Donald O'May, asked the head of their legal department whether they would be prepared to put me aboard one of their ships for a transatlantic voyage. At that time, States Marine Line operated a large fleet of wartime built C4's, which were used almost exclusively for servicing the needs of US forces in Europe. (I think I am right in saying that, outbound, these ships carried PX cargo, though I can't remember what the PX stood for.¹) When subsequently I joined the *Hoosier State* one early morning in Southampton, I was shown a cargo manifest. It seemed to me that most of the cargo consisted of Volkswagen Beetles bought tax free in Europe by US military personnel being carried back to the States at the end of their tours of duty – no doubt at US tax payers' expense.

On board the *Hoosier State*, I reintroduced myself to her master. About three months earlier, I had visited the *Hoosier State* in the Scheldt, where she had just been refloated with the help of no less than fourteen tugs belonging to Union de Remorqueurs. I was there to take salvage statements. The *Hoosier*

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** President of the Comité Maritime International (CMI).

¹ Editor's Note: PX stands for "post exchange". Federation of American Scientists, Military Acronyms, Initialisms, and Abbreviations, available at <<http://www.fas.org/news/-reference/lexicon/acronym.htm>> (visited 1/25/03). A PX is a retail department store located on a military base. Those serving the armed forces of the United States are operated by non-appropriated fund activities of the Department of Defense. One such is the Army and Air Force Exchange Service (AAFES). AAFES, Corporate Profile, available at <http://www.aafes.com/pa/Corporate_Profile.htm> (visited 1/25/03).

State had survived that grounding experience, but her owners had found it necessary to “strap” her, i.e., to strengthen her by welding huge longitudinal girders to her upper deck – not pretty but evidently effective since afterwards we made it across the Atlantic.

Donald O’May had felt that I should not simply make the quick trip from UK to the US and back, but should take advantage of being in the US to find out about the world of maritime law in New York. At that time, Donald and my father both had close friendships and business relationships with Nick Healy, and Nick was asked whether he would be prepared to find a desk for me in his office, which was then in Wall Street. I was welcomed not only into the office, but also into the Healy household, and from that day I became part of the remarkable Healy extended family.

In the first of his books on maritime conventions,² Nagendra Singh includes a dedication on the flyleaf of the book that reads “at the feet of My Teacher”. Here am I, also about to talk about international conventions also at the feet of my teacher.

So, Nick, in a very real sense, this lecture is dedicated to you.

II

What is the CMI and what does it do?

According to our Constitution:

“The Comité Maritime International is a non-governmental international organisation, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall co-operate with other international organisations.”³

The CMI has been doing just that since 1897.

Why do we need “unification of maritime law”? In an address to the University of Turin in 1860, the Jurist Mancini said: “The sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of juridical regime.”⁴ In other words, those involved in the world of maritime trade need to know that wherever they trade the applicable law will, by and large, be the same.

Traditionally, uniformity is achieved by means of international conventions or other forms of agreement negotiated between governments and enforced domestically by those same governments. My intention this evening is to analyse the problems involved in this process.

² Nagendra Singh, *International Conventions of Merchant Shipping* (1973).

³ Comité Maritime International Const. Art. 1, 6F Benedict on Admiralty, Doc. No. 22-1 ((Frank L. Wiswall, Jr. ed., 7th rev. ed., 2000), available at <<http://www.comitemaritime.org/topics/consti/cons1.html>> (visited 01/25/03).

⁴ Le Comité Maritime International 1897-1972 by Albert Lilar et Carlo van den Bosch.

It has always been a source of puzzlement me why some conventions appear to be more successful then others. And here, like a good lawyer, I must qualify what I have just said. What, in this context, is “successful”, and is there some hidden meaning behind the word “appear to be” – in other words are some conventions actually successful even though they do not appear to be?

III Runners and riders in the Maritime Convention stakes

I have analysed the track records of a number of the better known maritime conventions.

A. *Collision Conventions*

It is tempting to measure the success of a convention on a strictly numerical basis. If that is the proper criterion of success, you could say that one of the most successful conventions ever produced was the very first CMI convention – the Collision Convention of 1910.⁵ The terms of this convention were agreed on September 23, 1910 and the convention entered into force less then three years later, on March 1, 1913. In total, eighty-eight⁶ countries have ratified or acceded to that Convention. One could say, with some confidence, that this Convention has met universal approval in that most maritime nations apply its terms. Another measure of the success of this Convention is that, ninety-two years on, nobody has felt it necessary to either to update it by protocol or replace it with a new convention.

B. *Salvage Conventions*

Almost as successful, in numerical terms, is a convention of similar vintage, namely the Salvage Convention of 1910.⁷ Again, the speed of take up was rapid (certainly by recent standards). Less then three years elapsed between agreement of the text at the Brussels Diplomatic Conference and entry into force on March 1, 1913. Eighty-six states have ratified or acceded to that convention. We are, quite properly, starting to see a number of denunciations of this convention, as countries adopt the new Salvage Convention of 1989.⁸

⁵ International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, Sept. 23, 1910, 212 Consol. Treaty Ser. 178; reprinted at 6 Benedict on Admiralty, supra note 3, Doc. 3-2.

⁶ The source of ratification statistics in this paper is the CMI Yearbook 2001(Singapore II).

⁷ Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658; 6 Benedict on Admiralty, supra note 5, Doc. No. 4-1.

⁸ International Convention on Salvage, Apr. 28, 1989, S. Treaty Doc. No. 102-12, 102d Cong., 1st Sess. (1991); 6 Benedict on Admiralty, supra note 3, Doc. No. 4-2A.

It is worth recording that the Salvage Convention of 1989, designed to replace the 1910 Convention, did not enter into force until July 1996, more than seven years after agreement (and four years longer than the 1910 Convention). The latest information available to me is that forty States have now ratified or acceded to the 1989 convention. Trying to compare like with like, it may or may not be significant that, thirteen years after the text of the 1910 Convention had been agreed, no less than sixty-eight states had already ratified or acceded to the Convention (nearly twice as many). We will have to decide whether this statistic tells us anything.

C. Carriage of Goods Conventions

In the past, there has been extensive analysis of the history of the Hague Rules⁹ and their Visby amendments.¹⁰ The Hague Rules were the product of a Brussels Diplomatic Conference in 1924, and they entered into force seven years later on June 2, 1931. Despite this relatively slow start, the Hague Rules have, at one time and another, been ratified or acceded to by eighty-nine states. The Visby Amendments, on the other hand, have only been acceded to or ratified by twenty-seven states, even though it was not necessary to denounce the Hague Rules before adopting the Visby Protocol. (In passing, it is worth noting that the take up of the Visby Rules was slow, in comparison with the original Hague Rules. It took nearly ten years from agreement of the text to entry into force.)

In order to complete the picture on carriage of goods by sea, we should just look at the Hamburg Rules,¹¹ which were produced by the United Nations Commission on International Trade Law (UNCITRAL), rather than by the CMI. The text of the Hamburg Rules was agreed in 1978, but did not enter force until 1992 – fourteen years later. As has been frequently pointed out, most of the states that have ratified or acceded to the Hamburg Rules are cargo importing and exporting countries, rather than states with substantial commercial fleets. Perhaps this reflects the fact that the Hamburg Rules are seen to favor cargo interests rather than the interests of carriers. The total number of states that have ratified or acceded to the Hamburg Rules is twenty-eight at a recent count.

As you are all aware, UNCITRAL is now busy considering a draft transport law convention, which contains a chapter on liability designed to replace all previous cargo liability conventions. I would like to publicly acknowledge the contribution made by the Maritime Law Association of the United States to the work of CMI on this project. This seems to be the best, and probably the last, chance of restoring international uniformity in this area.

⁹ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155.

¹⁰ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, February 23, 1968, 120 L.N.T.S. 187, 6 Benedict on Admiralty, supra note 3, Doc. No. 1-25.

¹¹ United Nations Convention on the Carriage of Goods by Sea, March 31, 1978, U.N. Doc. A/Conf. 89/13, reprinted at 17 I.L.M. 703 (1978), 10 J. Mar. L. & Com. 267 (1979), 6 Benedict on Admiralty, supra note 3, Doc. No. 1-3.

D. Liability Limiting Conventions

I turn to the limitation conventions, which operate in an area of the law in which I have taken a particular interest. The text of the first Limitation Convention¹² was agreed at the Brussels Diplomatic Conference in August 1924, but did not enter into force until 1931 – seven years after the text had been agreed. This convention was not widely supported, and eventually attracted only fifteen ratifications or accessions.¹³

The CMI had a second go at limitation with its 1957 Convention,¹⁴ the text of which was agreed in October of that year. It entered into force in May 1968 and has been ratified or acceded to by fifty-one states, though of course a number have subsequently denounced this convention in order to embrace the third CMI Limitation Convention, that of 1976.¹⁵ At the latest count the '76 Convention has been ratified or acceded to by thirty-seven states.¹⁶

The fourth instrument on limitation, namely the 1996 Protocol,¹⁷ has not yet come into force, despite the passage of six years since the Diplomatic Conference at which the text of the was agreed. I can give you no firm prediction as to when this protocol will enter into force.

E. Oil Pollution Conventions

You will be pleased to know that it is not my intention to analyse the track record of every international maritime law convention of the past 100 years, but I have particular reasons for wanting to refer to three sets of instruments, two of which have a common feature that to my mind have a vital part to play in their “success”. I start with what is, by almost any standard of measurement, the most successful maritime law convention of all time: the Civil Liability Convention of 1969.¹⁸ The text of that convention (to which the

¹² International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Ships, Aug. 24, 1924, 120 L.N.T.S. 123, reprinted in *Comite Maritime International, Handbook of Maritime Conventions* (mill. ed. 2001), as Doc. 5-1.

¹³ Curiously, despite the fact that there have been two subsequent limitation conventions – in '57 and '76 – there are still nine states of the original fifteen that have not denounced the '24 Convention, even though some of these nine have also ratified or acceded to the '57 or the '76 Conventions, or both. This, of course, is calculated to cause delicious confusion - I refer to this later.

¹⁴ International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships, 1957, reprinted in *CMI Handbook*, supra note 12, as Doc. 5-2.

¹⁵ International Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, reprinted at 8 J. Mar.L. & Com. 533 (1977). I call it a CMI Convention. Much of the drafting was done by CMI, but the old system of Brussels Diplomatic Conferences had long ceased, and the final text was agreed at a Diplomatic Conference convened by IMO.

¹⁶ Or 38, depending on the true status of the accession by Trinidad and Tobago, to which some mystery attaches.

¹⁷ Protocol of 1996, to Amend the Convention on Limitation of Liability for Maritime Claims, 1976, May 2, 1996, reprinted in *CMI Handbook*, supra note 12, as Doc. 5-7.

¹⁸ International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, reprinted at 1 J. Mar. L. & Com. 373 (1969).

CMI contributed both in background research and drafting) was agreed at a Diplomatic Conference in 1969 and it entered into force six years later, in June 1975. The convention has, at various stages, been acceded to or ratified by 103 states (with two additional “provisional” ratifications). If we add to this the various states and dependencies that come in under the UK umbrella, we realise that we are looking at a hugely successful convention. The 1976 CLC Protocol,¹⁹ which came into force in April 1981, was acceded to or ratified by only fifty-six states. That some states did not bother to ratify this instrument is of no great significance.

Turning now to the instrument that supplements the CLC 1969, the Fund Convention of 1971,²⁰ we find that the text of this was agreed at a Diplomatic Conference in December 1971, and the convention came into force in October 1978 – seven years later. It has been acceded to or ratified by seventy-five states,²¹ but ceased to have effect on May 24, 2002.

The Fund Convention of 1971 also has its 1976 SDR Protocol²² – ratified or acceded to by fifty-six states.

We then have the 1992 Protocols to the CLC²³ and the Fund Convention²⁴ the texts of which were agreed in November 1992. They both entered into force in May 1996 and have so far been ratified or acceded to by eighty and eighty-one states respectively.

F. Conventions on Maritime Liens and Mortgages

Because they illustrate a point that needs to be made, I must refer to the Maritime Liens and Mortgages Conventions of 1926,²⁵ 1967²⁶ and 1993.²⁷

¹⁹ Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969, Nov. 19, 1976, reprinted in CMI Handbook, supra note 12, as Doc. 6-2. This is the so-called “SDR Protocol” whereby gold francs were replaced by Special Drawing Rights.

²⁰ International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 110 U.N.T.S. 57, reprinted at 3 J. Mar. L. & Com. 624 (1971).

²¹ I am sure that there is some reasonable explanation why approximately 30 states that adopted the CLC 1969 did not adopt the complementary Fund Convention.

²² Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, Nov. 19, 1976, reprinted in CMI Handbook, supra note 12, as Doc. 6-7.

²³ 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969, Nov. 27, 1992, reprinted in CMI Handbook, supra note 12, as Doc. 6-3.

²⁴ 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, Nov. 27, 1992, reprinted in CMI Handbook, supra note 12, as Doc. 6-8.

²⁵ International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, 1926, art. 2, reprinted at 27 Am. J. Int'l L. 28-38 (Supp. 1933); in 6E Benedict on Admiralty, supra note 3, as Doc. No. 15-6.

²⁶ International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, May 27, 1967, reprinted at 8 Singh, supra note 2, at 1397-1402; in 6E Benedict on Admiralty, supra note 3, as Doc. No. 15-5.

²⁷ International Convention on Maritime Liens and Mortgages, May 6, 1993; reprinted at 33 I.L.M. 353 (1994); in 6E Benedict on Admiralty, supra note 3, as Doc. No. 15-4.

The 1926 Convention was ratified or acceded to by twenty-eight states, but neither of the other two conventions has ever entered into force.

G. The HNS Convention

I promise that I am now at the end of this tedious statistical analysis, and will shortly be embarking upon what I hope will be a rather more exciting analysis of the result of my researches. Sadly, there is not a great deal in the way of encouraging statistics to report in relation to the HNS Convention.²⁸ The text was finally agreed in May 1996, and it remains well short of meeting requirements for its entry into force. Indeed, so worried are a number of states that this instrument may never come into force that the subject came back into the work programme of the IMO Legal Committee in October 2001.²⁹ The committee has been asked to look at the problems of implementation. The UK Government has sponsored a set of implementation guidance notes and has created a website to aid states battling with the technical and legal problems involved.³⁰ I believe that this move is almost without precedent, reflecting the complexity of the HNS instrument.

IV

What are the obstacles to uniformity?

A. Absence of Need

Historically the CMI was the only international organisation concerned with unification of international maritime law. This remained the situation until the *Torrey Canyon* incident of 1967. Following that major oil spill, IMCO³¹ created a Legal Committee with a specific mission to devise a convention that would deal with issues of liability and compensation for pollution caused by tankers. In 1964, the United Nations General Assembly created the United Nations Conference on Trade and Development (UNCTAD) to deal with matters of trade and development. Two years later, in 1966, the United Nations established the United Nations Commission on International Trade Law (UNCITRAL) as a specialist legal body to deal with the technical examination of legislation regulating international trade.

Inevitably the activities of these three organisations trespassed upon what had previously been CMI's territory: private international maritime law. The IMO Legal Committee has now become the primary source of harmonising instruments in the field of private international maritime law.

²⁸ International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, May 3, 1996, reprinted at 35 I.L.M. 1415 (1966).

²⁹ IMO/LEG 83

³⁰ <http://folk.iriio.iro/erikio/www/HNS/hns.html> (?)

³¹ Inter-Governmental Maritime Consultative Organization, established in 1948. IMCO was renamed the International Maritime Organisation (IMO) in 1982.

The CMI continues to work on its own independent projects and acts as a consultant to IMO, UNCITRAL and UNCTAD.

In its early years, the CMI had no shortage of projects – the only constraint was the availability of enough volunteers to work on them. (CMI was then, and still is, constrained by shortage of funds.) I have no doubt that, on many occasions, there have been discussions within the CMI Executive to determine whether time and effort should be devoted to a particular project. The CMI could not afford, in any sense of that word, to tackle a project where there was no need for uniformity or realistic prospect of its achievement. I do not pretend that in every instance the CMI made the right decision. For example, much CMI time and effort was devoted to drafting the Stowaways Convention 1957.³² If ratification is the proper test of success, this was something of a disaster, as it attracted only ten ratifications or accessions and never entered into force. Another example of apparent mis-judgment of need can be found in the Maritime Liens and Mortgages Conventions of 1926, 1967 and 1993.³³ Here is a clear case of the application of the law of diminishing returns. The 1926 Convention eventually entered into force and was ratified or acceded to by twenty- eight states. The 1967 Convention never entered into force and only found support from five States. The 1993 Convention has not entered into force and has likewise found support from only six states.

Like the CMI, the IMO and the other UN agencies to which I have referred also have to decide whether there is a “need” for a unifying instrument. Indeed, the IMO Assembly has directed that conventions or other instruments designed to harmonise international maritime law should only be produced where a “compelling need” is established.³⁴ It worries me that this issue of “compelling need” is often glossed over in the early stages of discussion of a new harmonising instrument. By the time the issue is addressed, the forward momentum that the project has developed meanwhile cannot be checked. An unwanted, unloved and therefore unratified convention may then be the result.

What should we conclude from this? In analysing the success or failure of a convention, we may be forced to conclude that the area of the law covered by the instrument was not suitable for harmonisation because there was no “compelling need”, and that time, in consequence, has probably been wasted.

In 1990, Mr Justice Hobhouse, (as he then was) 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.”³⁵

³² International Convention Relating to Stowaways, Oct. 10, 1957, reprinted in CMI Handbook, *supra* note 12, as Doc. 14-1.

³³ See *supra* notes 25-27.

³⁴ Resolutions A.500(xii) and A.777(18).

³⁵ [1990] L. Q. Rev. Col. 106 pp. 530-535.

Obstacles to Uniformity of Maritime Law

Elsewhere in his paper, he draws an interesting distinction between conventions that are regulatory in nature (for example, those imposing safety standards in ship construction) and those in the private international law sphere that seek what he calls “stark uniformity”. The latter, he suggests, are frequently treated by the commercial community “as too obviously lacking in merit to justify... adoption.”³⁶ The message: if you want a convention that will be widely accepted, “compelling need” must be a precondition to starting work.

B. Time scale

Conventions and other unifying instruments are born in adversity. An area of law may come under review because one or two states have been confronted by a maritime legal problem that has affected them directly³⁷. Those sponsoring states may well spend some time reviewing the problem and producing the first draft of an instrument. Eventually, this draft may be offered to the IMO’s Legal Committee for inclusion in its work programme. Over ensuing years (the Legal Committee meeting every six months or so), issues presented by the draft will be debated, new issues will be raised, and the instrument will be endlessly re-drafted. At some stage, the view will be taken that the instrument is sufficiently mature to warrant a Diplomatic Conference at which the text will be finalised. If the instrument is approved at the Diplomatic Conference, it will sit for twelve months awaiting signature, and then be open to ratification and accession. The instrument will contain an entry into force requirement, which will need to be satisfied. This requirement may involve accession by fifteen or more states. Once the instrument has entered into force, it will not be a truly harmonising instrument until ratified or acceded to and implemented by a respectable number of states. Implementation may well require parliamentary time and attention for primary legislation. All this while the clock has been ticking.

I have headed this section of my paper “Time Scale”. Creating an instrument may take years. It may surprise you to know that the need for a Bunker Pollution Convention was recognised when the 1969 CLC was being drafted. However, it was not until 2001 that a convention on this subject was finally agreed. I could cite many other examples of the long delays between conception and birth.

This delay has two major consequences. Firstly, states with a real problem may get fed up with waiting and decide instead on national legislation to deal with the problem. Secondly, if the instrument contains

³⁶ *Id.* at _____. See, e.g., the Hague Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S 107; incorporated in English law by the Uniform Laws on International Sales Act 1967, ch. 45, and largely ignored by the commercial community.

³⁷ A recent example of this is the draft Wreck Removal Convention, sponsored by the Netherlands, the UK and Germany, who had all experienced problems with wrecks situated a short distance outside territorial waters and with wrecks belonging to bankrupt owners. See Draft Convention on Wreck Removal, IMO LEG 85/3.

limits of financial liability, these limits may be outdated before the instrument ever comes into force. No state will implement a convention that requires it to apply limitation figures that do not meet current domestic needs. A fine illustration of this problem is to be found in the Athens Convention of 1974 and its various Protocols.³⁸ I analyse this hereafter.

There is no obvious solution to this timing problem. Speeding up the process of drafting an instrument is a reasonable aspiration but an ill-considered instrument is even less likely to attract support than one which has gone through the lengthy refining process to which I have referred.

C. *Differences in assessment of claims*

With some diffidence, I raise a related problem. In these days of political correctness, we are required to accept that all men and women of whatever race or creed are equal. As I prepared this paper, we were building up to a Diplomatic Conference to finalise a protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Under the 1974 Convention, the limit of liability for death or personal injury to a passenger was 46,666 SDRs (£38,173.40 or \$62,000)³⁹ per capita. I did not attend the Conference at which this figure was fixed, but I do know that, by the time the convention came into force on April 28, 1987, the UK Government (and many other European governments) considered that figure unrealistically low. In fact, in June 1987, following the *Herald of Free Enterprise* disaster, the UK Government exercised an option it had reserved when incorporating the Athens Convention into English law, whereby the UK could unilaterally increase the limit for carriers whose principal place of business was in the UK. The new limit was fixed at 1,525,000 Gold Francs or £80,009.00 (\$120,000). This resulted in the odd situation that the limit for a cross channel ferry was £80,009.00 (\$120,000) for UK operators but only £38,173.40 (\$62,000) for foreign operators – hardly international uniformity.

At an IMO Conference held in London in March 1990, a protocol to the Athens Convention was agreed to “enhance compensation” payable to passengers.⁴⁰ The limit in respect of death or personal injury to a passenger

³⁸ Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, December 13, 1974, reprinted in 6 J. Mar. L. & Com. 461 (1975); Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea, Nov. 19, 1976 (SDR Protocol), reprinted in CMI Handbook, supra note 12, as Doc. 2-4; Protocol to Amend the Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea, Mar. 29, 1990, id., Doc. 2-5; Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea, 1974, Nov. 1, 2002, summarized at <http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=663#4> (visited 1/24/03). See Erik Erik Røsæg, Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea, 2002, Unofficial consolidation 2003-01-08, at <<http://folk.uio.no/erikro/WWW/corrgr/dipcon/Athens02.pdf>> (visited 01/25/03).

³⁹ 100,000 Gold Francs in the 1976 Convention; replaced by SDR by the 1976 Protocol (“the SDR Protocol”).

⁴⁰ Protocol to Amend the Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea, Mar. 29, 1990, reprinted in CMI Handbook, supra note 12, as Doc. 2-5.

was increased to 175,000 SDRs (\$232,750). This protocol received precisely three accessions and never entered into force, probably because the new limit was widely regarded as too low.

Many limitation figures were bandied about in the run up to the recent Diplomatic Conference on the new Athens Protocol. In a submission to the IMO Legal Committee, the UK Government pointed out that, if the 1990 Protocol figure of 175,000 SDRs (\$232,750) was right in 1990 (which it was not in the UK Government's view), the appropriate figure in the year 2000 would have been 425,000 SDRs (\$550,000). The UK Government's submission⁴¹ to the Diplomatic Conference was that the appropriate figure for 2002 should be 500,000 SDR plus (\$650,000 plus) per passenger. By the time this protocol comes into force, the 400,000 SDR (\$520,000), actually adopted, may be deemed too low for some states, with the result that they will feel obligated to exercise the "opt out" right, contained in Article 7(2) of the Convention as amended by the 2002 Protocol, and increase this overall limit per passenger. This would save the protocol, but only at the cost of uniformity in overall limits.

I now turn to my politically incorrect thought. For every "developed" country that finds 400,000 SDRs (\$520,000) inadequate, there will be 2 or 3 "less developed" countries for whom the figure is too high, with the result that governments of those countries will be under pressure from their domestic ship owners and insurers not to expose them to this unnecessary extra financial burden. This represents a real dilemma, not only with respect to the Athens Convention but also with respect to other limitation conventions.

I have, on a number of informal occasions, suggested that a solution to this problem would be to insert in the limitation articles of conventions a range of figures, any one of which a state might adopt and still be treated as a ratifying state. The same result could be achieved by including higher maximum figures in an "opt out" clause. I accept that either approach would lead to forum shopping and to problems of conflict of laws, but compromise in this context might at least ensure that the instrument's responses to other fundamental liability and compensation issues are more widely embraced.

Whenever I have made this suggestion, I have been told that an international organisation such as the IMO cannot be seen to discriminate in this way. If that is the final word on that subject, I think that we may see instruments that contain compromise limitation figures struggling for international recognition.

D. Drafting in a void

Drafting a wreck removal convention is currently part of the work programme of the IMO Legal Committee. The project was initially sponsored by the governments of the UK, the Netherlands, and Germany. When the matter was first presented at the seventy third session of the IMO Legal

⁴¹ Oct. 25, 2002.

Committee in April 1996, the submission consisted of an introductory memorandum and a draft convention. I would describe this draft instrument as having been “drafted in a void”. By that, I mean that, whilst it may have drawn some inspiration from the laws of the three sponsoring states relevant to the subject of wreck removal, it was not preceded by a careful review of the wreck removal laws of a large number of states. Those of you who have been involved in CMI projects will know that, before we put pen to paper to create a new instrument, we consult our member associations on current law. Thus, when the drafting team gets to work, it has a clear knowledge of domestic law in a large number of states. This firm base ensures, as much as skilful drafting, that the resultant instrument will be compatible with the domestic law of a substantial number of states.

I deprecate drafting in a void.

E. Over elaboration

The 1910 Salvage Convention has sixteen articles and occupies just four pages in the CMI Handbook of Maritime Conventions. The 1989 Salvage Convention, designed to replace the 1910 Convention, consists of thirty-four articles, as well as a “Common Understanding” and two resolutions. It occupies ten pages in the Handbook. This illustrates a tendency towards over elaboration of texts. I believe that the longer and more complex a document the less likely it is that national governments will embrace it. This may explain why the 1910 Convention was ratified by eighty-six states while the 1989 Convention has been ratified by only forty – at the latest count.

Let me give you a very recent example of what I see as over elaboration. Under the Athens Convention 1974, carriers are presumed to be at fault if the loss arises from “shipwreck, collision, stranding, explosion or fire, or defect in the ship”. Since the convention came into force in 1987, there has never, to my knowledge, been a case in which the meaning of “defect in the ship” has been an issue. So why not leave well enough alone? In the Athens Protocol of 2002, it has been thought necessary to define “defect in the ship” as:

“any malfunction, failure in any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers; or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving or leaving berth or anchorage, damage control after flooding, or stability, or when used for the launching of life saving appliances.”

If definition is intended to give clarity of meaning, I think this exercise in drafting fails to achieve its aim. In fact, it also creates endless opportunities for arguments about interpretation. Whilst “defect in the ship” might be subject to different interpretations in different jurisdictions, I believe that would be a fair price to pay for the sake of keeping the text short and simple.

F. Have we got the right instrument?

I have spoken so far on the assumption that the only instrument of harmonisation is a convention. However, we should not forget that there are

also codes, model laws, guidelines and rules, which, under the circumstances, may be more appropriate than a convention for harmonisation of law.

A model law has its place, and perhaps the best example of this is the UNCITRAL Model Law on Arbitration,⁴² which now forms the basis of arbitration law in a substantial number of countries. The CMI has recently produced a Model Law on Piracy and Acts of Maritime Violence.⁴³ Again, the model law approach was deemed more appropriate than a full-blown convention.

Back in 1996, the delegation of the United Kingdom to the IMO Legal Committee proposed that there should be an international convention to ensure that ship owners meet their financial liabilities to third parties by insurance or other means. This was known as the Compulsory Insurance Proposal. It subsequently became known as Provision of Financial Security. Somewhere along the line, it became apparent that this was not going to be a workable proposition. Instead we have the 2002 Protocol to the Athens Convention, which is designed to protect the rights of passengers not only by a modern liability regime but also by the requirement that ship owners obtain insurance cover or provide other security to meet legitimate claims. The UK did not entirely abandon its proposal that all shipowners should be adequately insured to meet the types of claim which arise on a regular basis out of ship operations. This could not be a convention for various reasons, but in the end, the IMO Legal Committee at its eightieth session in April 1999 approved the text of "IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims".⁴⁴ This calls upon member States to urge the owners of ships flying their flag to carry insurance (and to be able to produce evidence of that insurance) to cover their liability for the types of claim currently insured by the International Group of P&I Clubs⁴⁵.

The problem with such guidelines is that they are unenforceable, and will probably be ignored by the very ship owners and flag states at which the exercise was initially aimed. Guidelines are certainly the poor relation of conventions, but they may be better than nothing.

G. Politics

We can immediately identify two types of international convention: those to which votes may be attached and those that will win no votes at all.

⁴² June 21, 1985, UN Doc. A/40/17, Annex 1, reprinted at 24 I.L.M. 1302 (1985); available at <<http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>> (visited 1/25/03).

⁴³ Available as Final Report of the Joint International Working Group, Annex A, at <<http://www.comitemaritime.org/singapore2/singafter/modelgen/modelgen2.html>> (visited 1/24/03).

⁴⁴ Available at the web site of the Maritime & Coastguard Agency, as the annex to Marine Guidance Note MGN 135 (M), <<http://www.mcga.gov.uk/mgn/mgn0135.htm>> (visited 1/30/03).

⁴⁵ The 2002 Protocol to the Athens Convention includes a Resolution urging governments to persuade the owners of vessels flying their national flag to carry adequate insurance to cover any claims to which the Protocol applies.

Obviously, those falling into the first category are more likely to gain legislative time and those in the second category are less likely to do so.

In the first category will certainly be found those conventions that protect citizens (and governments) from the effects of a maritime incident.

It is unsurprising that the 1969 CLC falls into the first category and attracted accession or ratification by ninety-five states. This was the “perfect” convention. It offered a clear liability regime, compensation for the consequences of oil spills, and a direct cause of action against liability insurers. For the UK government, ratifying and implementing this convention was going to be a sure vote winner in Cornwall, which had been devastated by the *Torrey Canyon* spill. The Fund Conventions obviously fall into the same category, and I would certainly include in this category the Athens Convention and its protocols. A government in power at the time of a major ferry disaster might find it very difficult to explain a shortfall on claim payments, if this resulted from a failure to sign up to the latest passenger convention.

Having said that, one would perhaps have expected to see the HNS Convention of 1996 picked up with greater zeal by governments of states exposed to the risk of pollution from hazardous substances other than oil. That has not happened to date and is a cause of some concern, so much so that the problems of implementation have recently been brought back into the Legal Committee’s work programme. (It may be that the problem with the HNS Convention is slightly different and I will refer to that later.)

As regards the second category of convention (those to which no votes are attached), one is forced to conclude that a number of the less successful conventions have been less successful because they fall into this category.

That there are no votes to be gained by government attention to stowaways may explain the failure of that 1957 convention. There were certainly no votes attached to the implementation of the Convention on Maritime Liens and Mortgages.

A further subdivision of the second category may contain those conventions that actually would be unpopular to an influential section of the community. In this group might appear the Hamburg Rules, which were widely seen as favoring the interest of cargo owners over the interests of ship owners.

H. Expenses of application

This should, perhaps, be treated as a subsection of politics. A state may find the financial and other benefits offered by a convention for itself and its citizens a good reason for implementation. Governments may be less excited if they discover that the convention requires them to set up administrative machinery manned by highly paid civil servants to administer some aspect of the convention. I venture the suggestion that this may be one of the problems with the HNS Convention, which requires states to monitor and report the movement of cargoes falling into the category of HNS. If the expense of setting up the administrative machinery falls, however, on industry (as in the case of the Fund Conventions) the expense argument may be less potent.

I. *High thresholds*

“Threshold” is the word used to describe the number of states that must ratify a convention before it comes into force internationally.

The Athens Convention 1974 had a threshold of ten states, whereas the threshold for the Bunker Convention is eighteen. Why the difference? I understand that the Bunker Convention’s threshold was set so that it will need ratification by more than just the European maritime states to bring it into force. In other words, the Bunker Convention ought to be shown to have truly universal (as opposed to merely regional) appeal before it can become operational. High thresholds, however, may delay a convention’s entry into force.

J. *Failure to denounce superseded conventions*

I mentioned earlier that some states ratify and implement a new convention but fail to denounce the one that it is designed to replace. Poland, for example, appears to have ratified and implemented the 1924, 1957 and 1976 Limitation Conventions, but not to have denounced the 1924 and 1957 conventions before moving on. It would follow that if a Polish ship has a collision with a ship from Turkey (a 1924 convention country), and the case comes before the Polish court, that court would be obliged to permit the Turkish ship to apply the 1924 convention. According to the Vienna Convention on the Law of Treaties 1969,⁴⁶ states must apply the “treaty in force” between them – in this case, the 1924 Convention, which is the only one that they have in common.

K. *Implementation and interpretation*

I mention this only in passing because there is no doubt that governments do find it difficult to convert an international convention into an accessible piece of domestic legislation. Some states implement the convention *en bloc*, whilst others amend their existing legislation to reflect the terms of the convention. Still others may “cherry pick” a convention and incorporate in domestic law only those parts of which they approve. A convention may therefore actually be more successful than the statistics of ratification reveal.⁴⁷

We should not overlook the work currently being undertaken for the CMI by Professor Francesco Berlingieri, who is publishing at our website reports of cases heard by national courts which involve the interpretation of

⁴⁶ May 23, 1969, 1155 U.N.T.S. 331, reprinted at 8 I.L.M. 679 (1969).

⁴⁷ It is worth mentioning in this context, that the International Maritime Law Institute (IMLI) in Malta provides an excellent grounding for government lawyers in the understanding and implementing of international conventions.

international conventions.⁴⁸ It is hoped to build up a body of case law to which judges in national courts may turn for help in interpreting international conventions.

L. Failing to set a good example

Here, I risk insulting my hosts. It would be so nice if, when seeking to encourage states to implement conventions, we could point to major maritime nations, such as the USA, and say: "If its good enough for them, it must be good enough for you." The U.S. is not alone in failing to implement conventions, but it is very influential, and I know that there are governments that say: "If it's not good enough for the U.S., why should we bother". I know that there are many in this audience who share my sense of disappointment, but nonetheless continue to work diligently on CMI projects. When listing, as I have done, obstacles to uniformity, I must include the failure of leading maritime nations to lead by example as a major obstacle.

M. Are we just conventioned out?

I definitely sense a certain inertia amongst national governments when it comes to ratifying or acceding to international conventions. This is probably due to a combination of many factors: availability of legislative time, availability of lawyers capable of drafting the necessary national legislation, discovery of national opposition to a particular instrument, etc., etc. It may also be that, in certain respects, states relish the diversities of law. For example, I cannot see the South African government ratifying the 1999 Arrest Convention⁴⁹ since it would require them to change their law and would circumscribe the current freedom of arrest in that country. There is no doubt that a beneficial legal regime can attract foreign business and therefore foreign currency.

Time alone will tell, but I continue to believe that if proper attention is given to the selection of the project, the appropriate instrument is used, and painstaking ground work is undertaken before the drafting process starts, there remain areas of maritime and maritime/commercial law which would benefit from harmonisation. I like to think that the current efforts of CMI with UNCITRAL to devise a new transport law convention is one such area. I know that many in this audience are watching progress on that front with interest and I repeat my thanks to the USMLA for the support that it has given the CMI in this project. Without the outstanding work of Professor Michael Sturley as Rapporteur, the project would have died in infancy.

⁴⁸ Jurisprudence in Interpretation of Maritime Conventions, at <http://www.comitemaritime.org/jurisp/ju_intro.html> (visited 01/31/03).

⁴⁹ International Convention on Arrests of Ships, Mar. 12, 1999, reprinted in CMI Handbook, supra note 12, as Doc. 9-2, and available at the web site of the University of Capetown's Marine and Shipping Department <<http://www.unctad.org/en/special/imo99ou.htm>> (visited 01/30/03).