INTERNATIONAL UNIFORMITY IN MARITIME LAW: THE GOAL AND THE OBSTACLES

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That the genesis of private international law was in the maritime area is scarcely surprising when we recall that international trade was at first conducted almost exclusively by sea. Because the Mediterranean was the principal commercial highway of the Western World, the customs adopted by the seafarers who sailed it and the merchants they served evolved in time as a fairly uniform system of supranational maritime jurisprudence. As the Italian port cities began to prosper in the early Middle Ages, each adopted its own maritime code, but because these compilations were derived from the maritime customs of the Mediterranean, to a large extent they were all similar.

The most significant of the codes was the *Consolat de Mar* — the Consulate of the Sea — an elaborate compilation of judgments promulgated in Barcelona, which was used as a *corpus juris* or restatement of the maritime law and which had a profound effect on its development. Thus, the right of a shipowner to limit the extent of his liability for certain casualties — a right still recognized throughout the maritime world — appears to have been established for the first time in the *Consolat de Mar.*

The earliest compilation of maritime laws to emerge beyond the Mediterranean was the "Rolls of Oleron," thought to have been promulgated by Eleanor of Aquitaine. The Rolls became the nucleus of the maritime laws, not only of France and England, but of Flanders, Prussia, and Castile and were closely followed in the Laws of Wisby, headquarters of the Hanseatic League until 1361. The Rolls are occasionally cited as authority to this day, even by United States courts.

A tendency away from uniformity in the maritime law, first noticeable in the late Renaissance, was accelerated by the rise of

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nationalism in the Seventeenth Century. The most significant of a number of national codifications of maritime law promulgated during this period was the Marine Ordinances of Louis XIV of France, the substantive provisions of which were closely followed in the Code de Commerce of 1807. The Code, however, treated maritime law as part of the commercial law, to be administered by the commercial courts rather than by the French Admiralty Court or the consular courts which preceded it. The result was that thereafter less attention was paid to the customs and usages of the sea in deciding maritime disputes.

A movement to restore uniformity in the maritime law became manifest during the late Nineteenth Century. Professor Mancini of Turin pleaded that "the sea with its winds, storms, and dangers does not change; it calls for a necessary uniformity of juridical regimes," and at his suggestion the Italian Parliament, in 1863, adopted a resolution in favor of reducing disparities between national maritime laws by international agreement. A decade later a similar resolution was adopted by the Netherlands Parliament.

Meanwhile, in 1864 the British National Association for Social Science drafted rules, intended for universal adoption, concerning general average — the principle of maritime law ascribed to the ancient Rhodians — whereby the parties to a maritime venture who benefit by a jettison of cargo or other sacrifice, made to save the venture as a whole from a marine peril, must contribute toward the loss of the party whose property has been sacrificed. These rules were followed by the adoption of the International Law Association's York/Antwerp Rules in 1890. While these Rules, which were revised under the auspices of *Le Comité Maritime International* in 1924, 1950, and 1974, have never been made mandatory by an international convention, they are incorporated by reference in virtually every charter party and ocean bill of lading in use today.

In 1896 Louis Franck of Antwerp founded the Belgian Association of Maritime Law with the blessing of the International Law Association. Several other national maritime law associations modeled on the Belgian association were quickly formed, and in 1897 they joined together to form the International Maritime Committee, much better known, even in the English-speaking countries, by its French name, *Le Comité Maritime International*, or "C.M.I." The Maritime Law Association of the United States was founded two years later and became a constituent member of the C.M.I. as

well as an affiliate of the American Bar Association, with a right of representation in its House of Delegates.

The C.M.I. has continued to grow over the years and is now composed of the national maritime law associations of some thirty-three countries. While most of these are industrially developed, some are not. The C.M.I. includes the maritime law associations of not only the Western democracies, but the U.S.S.R., Poland, Yugoslavia, Bulgaria, and the German Democratic Republic.

The C.M.I. has pursued its goal of international uniformity, not by attempting a comprehensive codification of all maritime law but by drafting a series of conventions, each dealing with a particular area. Its efforts have met with remarkable success and have resulted in twenty international conventions, most of which are now in force.

The most widely accepted of these are the Brussels Conventions on Collisions at Sea (1910), Assistance and Salvage at Sea (1910), Limitation of Shipowners' Liability (1926 and 1957), Bills of Lading (1924, commonly known as the Hague Rules), Maritime Liens and Mortgages (1926), and the Arrest of Seagoing Ships (1952). As their titles indicate, all of these conventions are concerned with private international maritime law. But the C.M.I. has on occasion busied itself with public law. Thus, it drafted the 1926 Convention on Immunity of State-owned Ships and the 1952 Convention on Penal Jurisdiction in Matters of Collision, prompted by the *Lotus* decision.

The C.M.I., as a private organization, obviously has no power to bring any of its draft conventions into force. Happily, however, in 1905 the Belgian government established the "Diplomatic Conference on Maritime Law," sessions of which have been called from time to time over the years to consider conventions drafted by the C.M.I.

The last session of the Diplomatic Conference was held in 1967-68 for the purpose of considering C.M.I. draft conventions on Registration of Rights in Vessels under Construction, Carriage of Luggage, and Maritime Liens and Mortgages (designed to replace the 1926 Convention), as well as protocols to the 1910 Salvage Convention and the 1924 Convention on Bills of Lading.

Prior to 1967, the Intergovernmental Maritime Consultative Organization (IMCO) concerned itself with regulation of navigation, ship construction, and equipment — matters traditionally considered at the diplomatic conferences on safety of life at sea, held

periodically in London. In April of that year, crude oil from the ruptured tanks of the Torrey Canyon caused pollution on an enormous scale to the British and French coasts. Since the vessel was of Liberian registry and the stranding occurred beyond Britain's territorial sea and contiguous zone, the British government at first hesitated to destroy the vessel in an effort to prevent the escape of additional oil, although this is what was finally done. Both the French and the British governments then spent huge sums in an effort to clean up the pollution.

The British government was concerned with two problems posed by the Torrey Canyon disaster. First, they wanted the removal of any doubt about the right of a coastal state to do what was finally done in the case of the Torrey Canyon, that is, to destroy deliberately a foreign flag vessel while on the high seas in an effort to avert or at least minimize serious pollution to the coastal state's territorial waters and adjacent shores. Second, they were concerned that in litigation to recover the costs of clean-up operations a government might be met with a "good Samaritan" defense, insofar as such costs included amounts expended in removing oil from privately owned waterfront property. The British government therefore suggested that IMCO consider the formulation of conventions designed to resolve these questions.

IMCO accepted the suggestion, and in November 1969 two oil pollution conventions were signed at Brussels. The first, commonly known as the Intervention Convention, governs the right of a coastal state to protect its territorial waters and shorelines from the consequences of a major oil spill by taking whatever action is necessary, including destruction of the vessel. The second, commonly called the Civil Liability Convention or C.L.C., imposes strict liability, limited in amount, for oil pollution damage as well as for the costs of taking preventive measures, once there is a spill, and of cleaning up such pollution as does occur. The C.M.I., as such, did not participate in the drafting of the Intervention Convention, but it had much to do with the C.L.C., and its assistance in preparing the initial drafts of that Convention was welcomed by IMCO. The C.L.C. has since been augmented by a so-called Fund Convention signed at Brussels in 1971. This Convention establishes an international fund of approximately $36 million, supported by a tax on oil, from which oil pollution claimants may be compensated to the extent they are unable to recover under the C.L.C. All three Conven-

tions are now in force, although the United States has thus far ratified only the Intervention Convention.

The C.M.I. likewise prepared the initial drafts of a 1976 IMCO Convention of Limitation of Liability, designed to update the 1957 Convention. Two draft conventions, both formulated at the 1977 C.M.I. Conference at Rio de Janerio, have been submitted to IMCO for consideration. The first is a Convention on Jurisdiction, Choice of Law, and Recognition and Enforcement of Judgments in Collision Cases, designed to replace the 1972 Convention on Civil Jurisdiction, one of the few C.M.I. conventions which has not gained wide acceptance. The second is a Convention on Offshore Mobile Craft, designed to bring drilling rigs within the coverage of various conventions relating to vessels. (In the United States, drilling rigs *are* treated as vessels, but they are not so regarded in certain other states).

In addition to IMCO, which, while affiliated with the United Nations, is not a part of that organization, two United Nations commissions have taken an interest in the uniformity movement: the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations Commission on Trade and Development (UNCTAD).

UNCITRAL's Draft Convention on Carriage of Goods by Sea, with relatively few significant changes, was adopted at a diplomatic conference held at Hamburg in March (1978). This Convention, which is not yet in force, is designed to replace the Brussels Bills of Lading Convention of 1924.

The Need for Uniformity

Those of us who have driven cars in the British Isles know that every year a number of accidents occur because Americans and other visitors from abroad have momentarily forgotten to drive on the left. It would obviously be a good thing if some day we had uniform driving rules, so that the next generation of drivers, at least, would have no difficulty in remembering on which side of the road they should drive, wherever they might happen to be.

In the maritime field, uniformity of the navigational rules governing the high seas is absolutely essential. One can imagine the utter confusion that would result if the law of some flag states required a red light on the port side of a vessel and a green light on the starboard side, while under the law of others the rule was reversed.

Long before there was any international convention governing navigation at sea, the mariners themselves adopted certain customs such as the custom of placing a red light on the port side of a vessel and a green light on the starboard side and the custom requiring meeting vessels to pass each other port side to port side. There does not seem to have been any international treaty embodying these and other navigational customs until the Nineteenth Century, when France and Britain entered into a treaty governing the navigation of vessels of each country. The first multilateral treaty regulating navigation at sea was signed in Washington in 1899. Thereafter, Britain took the lead, and the so-called "Collision Regulations" or "Rules of the Road at Sea" were periodically revised by conventions adopted at diplomatic conferences on Safety of Life at Sea held at London. More recently, IMCO has taken over the responsibility; the regulations now in force were adopted at a diplomatic conference held in London in 1972, under IMCO's auspices.

In other maritime areas, while the need for uniformity may not be quite as self-evident as in the case of high seas navigation, it is still of vital importance, for a number of reasons. First of all, uniformity makes for ease in administration. Since ships move freely from one country to another, it is by no means uncommon to have litigation in State *A* concerning a collision or other casualty in the territorial waters of State *B*, involving vessels of flag States *C* and *D*. The courts and the lawyers of State *A* will obviously have an easier time if the law governing not only the navigation of the vessels but such matters as the effect of contributory fault and the rights of owners of cargo damaged as a result of the collision is common to all four states. If it is, there will be no need to incur the trouble and expense of proving foreign law. Furthermore, settlement will be facilitated if all concerned know that the law of all four states is the same.

Secondly, uniformity results in a reduction of "forum shopping". Thus, prior to 1975 the American law in collision cases provided for an equal division of damages in "both-to-blame" cases, regardless of the respective degrees of fault chargeable to the vessels involved. The law of the United Kingdom and most of the other major maritime powers is the 1910 Collision Convention, which incorporates the proportional fault rule. In 1975, the Supreme Court abandoned the American equal division rule and adopted the proportional fault rule, thus bringing American law into line with that of the 1910 Convention countries, insofar as con-

cerns the division of damages between colliding vessels in both-to-blame cases. The result was the elimination of a certain amount of forum shopping in collision cases. However, it has not been eliminated altogether because of the differences between the American law of limitation of liability and the law of other maritime countries which have adopted the 1957 Limitation of Liability Convention.

A third reason why uniformity is desirable is that ocean carriers and merchants who ship goods by sea know what risks to insure, and marine insurers know how to fix premiums if there is uniformity in the laws governing carriage of goods by sea, marine collision, limitation of liability, and liability for water pollution.

If we accept the principle that uniformity in international marine law is desirable, why has it not long since been completely achieved? There are several obstacles standing in the way. First of all, there are now 150 or so sovereign states, some developed and some not; the days are of course gone forever when delegates of the United Kingdom or France could each sign a convention on behalf of scores of colonies. Obtaining a consensus is therefore much more difficult than it was before World War II, and the difficulty is enhanced by natural suspicion, on the part of the developing countries, of proposals made by the more highly industrialized states. Thus, although the C.M.I. includes the national maritime law associations of a number of Iron Curtain countries and those of some of the developing countries, including India, it is still regarded in some of the developing countries as a kind of rich men's club, because the first national associations to join the C.M.I. were those of highly developed countries such as the United Kingdom, France, Belgium, and the United States.

A second obstacle is the abandonment of the gold standard and the high rates of inflation, which have prevailed in so many countries for such a long period. Like the Warsaw Convention, a number of maritime conventions provide for limitations of liability expressed in terms of Poincaré gold francs. These include the 1926 and 1957 Conventions on Limitation of Liability, the 1924 Convention on Bills of Lading, and the 1969 Convention on Civil Liability for Oil Pollution Damage.

The C.M.I. is presently endeavoring to find a solution to the gold-standard problem, which may take the form of protocols to existing conventions to substitute Special Drawing Rights for Poin-

caré francs. When and if the 1976 Convention on Limitation of Liability enters into force it would do the same.

The gold-standard problem is not as formidable as inflation. Thus, limits of liability that were considered realistic in 1957, when the Limitation of Liability Convention presently in force in most of the important maritime countries was adopted, are not realistic today. Limits could, of course, be adjusted periodically by protocols designed to reflect inflation, but having a protocol ratified by a substantial number of maritime states is so time-consuming a process that by the time widespread adoption is achieved, so much further inflation may have intervened as to render the protocol out of date.

Perhaps the answer lies in providing in new conventions, and in protocols to existing conventions, for periodic increases in limits based upon findings concerning inflation made by an international organization such as IMCO. This might, however, present constitutional problems in some countries, including the United States.

Still another obstacle is the unwillingness of some states to surrender jurisdiction to the courts of certain other states, or to recognize and enforce their judgments. For example, an EEC country may be willing to surrender its jurisdiction to another EEC country's courts in certain instances, and to enforce their judgments, but may not be happy about the thought of surrendering jurisdiction to the courts of some other states; for example, those of certain Iron Curtain countries and certain developing countries that do not have a long tradition in the administration of maritime law.

Finally, a major obstacle to the goal of uniformity is the reluctance of the United States to subscribe to international maritime conventions. This country has so far ratified only two of the C.M.I. conventions — the 1910 Salvage Convention and the 1924 Convention on Bills of Lading. We have not adopted any of the Limitation of Liability Conventions, the Arrest of Ships Convention, the Conventions on Maritime Liens and Mortgages, or the 1952 Conventions on Penal Jurisdiction and Civil Jurisdiction in Collision Cases. Nor has the United States subscribed to either the Convention on Civil Liability for Oil Pollution Damage or the Fund Convention. We have not adopted the 1910 Collision Convention, although the Supreme Court has made the proportional fault rule of that Convention part of the general maritime law of the United States.

Why this reluctance on the part of the United States? First of all, there may be a certain "pride of authorship" on the part of

some senators, who appear to believe that an existing act of Congress, particularly one that they sponsored, is necessarily preferable to a proposed international convention governing the same subject matter.

A bad convention should not, of course, be adopted merely for the sake of uniformity. But it is submitted that it is usually preferable to accept a convention embodying rules *almost* as good as we conceive our own to be if it will make for international uniformity.

Secondly, there appears to be a tendency on the part of some senators, and some officers of the State Department, to reject conventions regulating liability in the maritime field on the ground that they do not go far enough; for example, the Civil Liability Convention, the Fund Convention, and the 1957 and 1976 Limitation of Liability Conventions. In some instances, the result is that we keep on our books laws which do not go even as far as a proposed convention because some senators are advocating "tougher" laws, although they have been unable to persuade their colleagues in the Senate and the House to enact them.

Still another reason is the tendency on the part of some senators and other people in government to give the individual states a more or less free hand in the maritime area. Both the American Bar Association and the Maritime Law Association of the United States have in recent years adopted resolutions deploring the proliferation of state laws in the maritime field and advocating national uniformity, without which international uniformity is of course impossible to achieve. In the past few years there have been a few encouraging signs, but much remains to be done before we have a completely national maritime law.

What can be done to overcome the obstacles to uniformity? It is submitted that, in the national sphere, there should be closer liaison between private organizations, such as the American Bar Association and its affiliate, the Maritime Law Association of the United States, on the one hand, and the governmental agencies, particularly the State Department, the Department of Transportation, the Federal Maritime Commission, and the Maritime Administration, on the other. In the international field, there should be closer liaison between private and public agencies, specifically, between the C.M.I. and IMCO, UNCITRAL and UNCTAD.

Such liaison would lead to mutual trust and a better understanding of the problems facing both the national and the interna-

tional governmental agencies and the various groups concerned with carriage of goods and passengers by water. A better understanding will, in turn, lead to greater international uniformity in the maritime law.