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TRANSPORT BY SEA AND AIR - ARE THE LEGAL REGIMES CONVERGING?

by

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This paper is an exercise in speculation. There are existing legal regimes for transport by sea and air. There are also certain proposals currently being made which will affect those regimes. What effect the proposals will have is a matter of guesswork. It can be informed guesswork from a study of the various factors at play. But the guesswork becomes much more speculative as we study the possible operation of those proposed changes in conjunction with one another. That is the purpose of this paper; to study what may happen, to ask why it might come about and to suggest ways of avoiding any untoward consequences.

Why compare the legal regimes for transport by sea and air? Although change for each may be proposed, is there any significance in the possibility that the two regimes may be converging? There are two reasons for answering affirmatively. One, in the continuing debate over the means for facilitating multimodal transport of goods, the suggestion has often been made that a simple solution to the legal problems involved would be to have one single legal regime for the entire transport. If the regimes are converging, this would be a feasible proposition. The second reason is that the suggestion is sometimes made that the legal regime for transport by air provides a fairer system overall for both shipper and carrier than does that by sea. On that premise the demand is then made for altering the legal regime applicable to sea transport to bring it into line with that for air transport. Does such a suggestion have a hope of succeeding? Are there good reasons why it should not succeed? These two questions can be answered, at least partially, by looking to see what is actually proposed for the two forms of transport.

To succeed in these aims we must first describe what is meant by the concept of "legal regime". Secondly, we must examine whether or not convergence is in fact taking place. If there really is no conveyance, what is happening? Are the two regimes being taken further apart or is one passing the other?

LEGAL REGIME

The concept of "legal regime" means the entire range of legal controls impinging on and governing a particular activity. It is impossible to comprehensively discuss all such controls on sea and air transport. The most that we can do is take what seems to be the major areas of control and examine the way in which they are developing. The three selected for the purposes of this paper are: state jurisdiction, liability of carrier and restrictive trade practices.

State Jurisdiction

State jurisdiction has two aspects that are relevant to transport by sea and air: control of the means of transport and control over the area where the transport is occurring. The first is usually exercised through a process of

registration - the state of registration being responsible for the activities of the vessel or aircraft bearing its registration. The second depends on the exact relationship of the vessel or aircraft to the territory of the state claiming control.

Registration and nationality of aircraft are matters dealt with in the Chicago Convention on International Civil Aviation 1944 (Chicago Convention - 140 states party thereto). This convention states that aircraft have the nationality of their state of registration and cannot have dual nationality (Arts. 17 & 18). In Shawcross and Beaumont on Air Law (4th ed. 1977) it is submitted that an aircraft which is not registered in any state would be considered stateless (p. 154). Under Article 12 of the Chicago Convention each Contracting State undertakes to adopt measures to ensure that every aircraft carrying its nationality mark, wherever that aircraft may be, shall comply with the local rules and regulations relating to flight and manoeuvre of aircraft.

The convention further states that registration of aircraft in a Contracting State is to be made in accordance with the laws and regulations of that state. This was taken by Bin Cheng as leading to the result that there is no reason why the "genuine link" theory of nationality enunciated by the International Court of Justice in Nottebohm's Case [1955] I.C.J. 24 "with regard to individuals cannot be extended to ships and aircraft so as to exclude flags of convenience". However, he does go on to say that the combined effect of Articles 17 and 19 of the convention may well preclude states party to the convention from contesting the nationality of an aircraft registered in accordance with the laws and regulations of another Contracting State (Bin Cheng, The Law of International Air Transport (1962) 128). This is moving towards the views expressed in Shawcross and Beaumont that the Chicago Convention does not require a "genuine link" between the ownership of the aircraft and its nationality. Such a link may, of course, be required by bilateral agreements on air transport. There does not appear to be any pressure to alter this position.

Turning to the registration and nationality of ships, we find that basically the same position exists but a contrary trend is developing. Article 5 of the Geneva Convention on the High Seas 1958 states: "Ships have the nationality of the State whose flag they are entitled to fly". It is generally accepted that, under international law, merchant vessels on the high seas are required to possess a nationality and be able to prove its existence. However, there are no rules in international law laying down specific conditions for the acquisition of nationality by merchant vessels. It is up to each state to determine the conditions for the grant of its nationality consequent on registration. Thus, Article 5 of the Geneva Convention further states: "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag". Up to that point, the Geneva Convention has much the same provision as

the Chicago Convention. However, Article 5 goes on to say that there must be a "genuine link" between the state and the ship: "There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag". The phrase - "genuine link" - had undoubtedly been taken from the Nottebohm Case, but how does this apply in the case of ships? Generally speaking, some states have required little in the way of connection in order to establish such a "genuine link". This has given rise to the "flag of convenience" registry - states which have very liberal provisions allowing registration of ships and liberal rules for the running of those ships. A number of definitions are used to describe a "flag of convenience" - the emphasis usually being on the particular aspect which the defining body is investigating eg. labour relations, safety, ownership. As Boczek states: "The universal practice of states, both on international and national levels, shows that registration, usually accompanied by appropriate documents issued by the competent authority, is the only test of a ship's nationality. The test of registration is independent of any requirements which may be, and in most cases are, imposed by national laws before a vessel is admitted to a particular merchant marine, and are dictated by exclusive national policies of the states" (Flags of Convenience (1962) 106).

The operation of flags of convenience registries has been under attack - the major opponent of them being the United Nations Conference on Trade and Development (UNCTAD). This body emphasises the concept of a "genuine economic link". They state: "Flags of convenience fleets comprise all those vessels which fly flags of countries with which they have no genuine economic link". In UNCTAD's view, this implies that "the flag state has no share in a vessel's beneficial ownership or management, and does not provide a significant - or even any - part of its crew". In May-June, 1981, the UNCTAD Committee on Shipping passed a resolution recommending that "the present regime of open registries be gradually and progressively transformed into normal registries by a process of tightening the conditions under which open-registry countries retain or accept vessels on their registers so that they will be capable of identifying owners and operators and making them accountable for all shipping operations including the maintenance of standards and the welfare of their crews". The resolution further recommended that an Intergovernmental Preparatory group be convened to propose "a set of principles concerning the conditions upon which vessels should be accepted on national shipping registers." The end result of this action will probably be a draft international agreement through adoption by a diplomatic conference.

The pressure is thus increasing to restrict the freedom allowed shipowners to register their ships in whatever state they choose; subject to the requirements imposed by any particular state. The use of "flags of convenience" is not so widespread in the case of aircraft registration - due to closer government control of access to national facilities,

thus denying landing rights to aircraft not maintained according to international standards; the wide spread of national air fleets with government involvement both in operation and ownership and the very nature of the industry itself where safety plays such an important role. Nonetheless, it is interesting to note the insistence that legally there is no requirement for a "genuine link" whereas, at sea, the position is changing rapidly.

The second aspect of state jurisdiction mentioned as relevant to transport by sea and air is that of the relationship of the vessel or aircraft to the territory of the state. As is well known, a state exercises what is called "sovereignty" over its territory which includes the territorial sea. Very broadly, sovereignty means supreme authority - a state can do what it likes within its own territory provided it does not infringe international undertakings or treaties nor harm other states. This exercise of sovereignty extends to the air space above the territory and territorial sea of the state. Article 1 of the Chicago Convention states: "The Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory". How far from the Earth such airspace extends is a vexed question. There seems almost universal agreement that it extends to the highest point at which normal aircraft can fly. On the other hand, the United Nations Outer Space Treaty of 1967 confirms the principle of freedom of exploration and use of outer space. The crucial question is where outer space begins and airspace ends. The answer is most important for satellites - particularly those in geostationary orbits - and rockets.

Within state territory both ships and aircraft are subject to the controls of the state, but these controls must be exercised in accordance with well established rules of international law. There is, however, a distinction in that the rules for aircraft are identical whether over the land mass, internal waters or the territorial sea of the state. This comes from Article 2 of the Chicago Convention: "the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto". On the other hand, the Geneva Convention on the Territorial Sea and the Contiguous Zone 1958 deals only with the operations of merchant shipping in those particular zones. Such operations within the internal waters of a state are only slightly protected by rules of public international law eg. access to certain trading ports in time of peace.

Under the Chicago Convention, Contracting States agree that the aircraft of other Contracting States, on non-scheduled flights, have the right "to make flights into or in transit non-stop" across their territory. This right is subject to various possible restrictions arising from navigational safety and public security. Scheduled air services require the consent of the state concerned. In respect of this, the International Air Services Transit Agreement 1944 ("Two Freedoms Agreement" - 92 states party thereto) provides that each Contracting State grants to the other Contracting

States

> "(1) the privilege to fly across its territory without landing;
> (2) the privilege to land for non-traffic purposes."

The exercise of these privileges is subject to military exigencies and the right of the state concerned to designate the routes and airports that may be used.

Merchant ships do not have any such right of access to internal waters as even the limited rights of non-scheduled and scheduled flights to fly above them. In the territorial sea, merchant ships have a right of innocent passage. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. This gives the coastal state considerable room for exercise of control in the name of these qualifying aspects. In sum, it would seem that there is not a great deal of difference between the control a state can exercise in respect of a plane over the territorial sea and a merchant ship sailing in that area. The legal terminology is indeed different but the practical effect is likely to be very similar.

The width of territorial sea permissible under public international law is at the moment in a state of some confusion. Traditionally, it has been three nautical miles. Today some states claim up to 200 miles. The weight of authority would appear to favour 12 miles as acceptable.

Beyond the 12 mile limit lies what would traditionally be regarded as the high seas. Here one of the four freedoms of the high seas would apply; namely, freedom of navigation. The merchant ship can travel where it wills subject only to the jurisdiction of the flag state save in cases of piracy and slave trading. For aircraft over the high seas, the rules in force are those under the Chicago Convention (Art. 12).

However, significant changes are taking place in that a new zone of state interest is in the process of emerging - the exclusive economic zone. This extends 200 nautical miles to sea and covers a substantial proportion of the world's oceans. The basic idea is that the coastal state should have exclusive rights to the economic resources within the zone. Other rights, such as freedom of navigation and overflight should not be interferred with. The Draft Convention on the Law of the Sea takes great pains to spell out exactly what rights a state shall enjoy within the zone. The fate of the Draft Convention is uncertain. Meanwhile, a number of states have already enacted legislation claiming and purporting to control an exclusive economic zone. Even if the Draft Convention does come into force, it would seem but wistful thinking to expect that states will be content to accept the limited economic rights given therein. For example, the Draft Convention gives the coastal state jurisdiction for the protection and preservation of the marine environment. This may easily

be expanded in an imaginative way to interfere with merchant shipping. Reasons of security may be used to justify such interference. Why was it that Great Britain used 200 miles as the distance for a "no-go" area around the Falkland Islands? Many representatives at the Law of the Sea Conference are fearful of these consequences of endorsing the concept of an exclusive economic zone but the idea has gone beyond the control of such a conference.

If the possibility of increasing state control in the zone comes to be a reality, and is accepted eventually as lawful, how will this affect merchant shipping and aircraft operations? Will it affect both to the same extent? The answer may be "No"; merchant shipping will be more greatly affected than aircraft operations. The reason for this is that aircraft operations over the high seas in the vicinity of states is already often closely controlled. This is not only for security purposes but also for reasons, in a number of cases, of navigational safety. Navigation of ships is not so controlled. Therefore, an extension of state control, as seems likely, over a two hundred mile zone will have a greater impact on transport by sea than on that by air.

Liability of Carrier

The international legal regime for carriage by sea is formed by the Hague Rules, the Hague-Visby Rules and, prospectively, the Hamburg Rules. The regime for carriage by air is constituted by the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 (Warsaw Convention), the Protocol to the Warsaw Convention 1955 (Hague Protocol) and, prospectively, the Montreal Additional Protocols 1975. Two of the last deal with the unit of account under the Warsaw Convention and the Hague Protocol while the fourth amends the provisions of the Warsaw Convention and Hague Protocol dealing with carriage of cargo.

The first point of comparison is the scope of regulation of the contract. As a generalization, the Hague Rules and the Hague-Visby Rules apply only to carriage under a particular document - the bill of lading - whereas the Convention and Protocol apply to carriage of a particular type ie. international carriage.

The Hague Rules (and the Hague-Visby Rules make no change here) of themselves apply only to contracts of carriage of goods by sea. The phrase "contract of carriage" is defined to apply "only to contracts of carriage covered by a bill of lading or similar document of title". This provision has been interpreted to include some contracts for carriage under which no bill of lading has actually been issued. The matter turns on whether the shipper is entitled to demand a bill of lading under the original contract of carriage. If he is, then the contract is covered by a bill of lading. The next question is: which bills of lading will be governed by the Rules? The International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924

(Brussels Convention - incorporating the Hague Rules) stated that the "provisions of this convention shall apply to all bills of lading issued in any of the contracting States" (Art. 10). In practice states have applied the Rules to outward shipment only; to both inward and outward shipment; to outward shipment and inward shipment but only when the latter comes from a convention country. The primary questions to be asked here are: how does a particular national law apply the Rules? Will the court give affect to the Rules so applied by a foreign law but not actually incorporated in the contract of carriage as required by the foreign law? The Hague-Visby Rules are more specific:

> The provisions of this Convention shall apply to every Bill of Lading relating to the carriage of goods between ports in two different States if:
>
> (a) the Bill of Lading is issued in a contracting State,
>
> or
>
> (b) the carriage is from a port in a contracting State,
>
> or
>
> (c) the Contract contained in or evidenced by the Bill of Lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract
>
> whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

States are required to take whatever action within their own constitutional system is necessary to apply the Hague-Visby Rules to bills of lading coming within the above classifications.

For international air carriage of cargo the primary question is: what is its nature? Is it "international"? A carriage is "international" within the terms of the definition if the place of departure and the place of destination are situated in two different states party to the Warsaw Convention and/or Hague Protocol or, if these places are in one such state, there was an agreed stopping place in the territory of another state. If the carriage is "international" the applicability of the Warsaw Convention or Hague Protocol will depend on which of the two agreements the states of departure and destination are party to.

To sum up, the Hague Rules and Visby Rules - particularly the former - are much more restricted in their application to carriage of goods by sea than are the Warsaw Convention and Hague Protocol to carriage by air.

The Montreal Additional Protocol No. 4 makes no change to the above described situation under the Warsaw Convention and Hague Protocol. The Hamburg Rules, on the other hand,

have an inherent scope far wider than that of the Hague Rules or the Visby Rules. No longer are the Rules restricted to "contracts of carriage covered by a bill of lading". The Hamburg Rules are applicable to "all contracts of carriage by sea"; meaning thereby "any contract whereby the carrier undertakes against payment of freight to carry goods by sea". The port of loading and the port of discharge must be located in a Contracting State. To this extent the application of the Hamburg Rules is similar to that of the Warsaw Convention. But the Rules go further. They will also be applicable if the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State or provides that the provisions of the Convention or the legislation of any State giving effect to them are to govern the contract. The Hamburg Rules appear to be applicable in a greater range of circumstances than do the Warsaw Convention and Hague Protocol, and by implication, the Montreal Protocol.

The second point of comparison concerns the respective systems of liability. An analysis of the Hague Rules and the Warsaw Convention appears in O'Keefe and Tedeschi, The Law of International Business in Australia (1980) at p. 65:

> It can be seen that the various forms of government regulation of carriage of goods by sea and air establish systems of liability from which the parties cannot derogate by contract. To summarize: the scheme of the Hague Rules is to oblige the carrier to exercise due diligence in providing a seaworthy ship at the commencement of the voyage; once this obligation is fulfilled the carrier is only liable for loss or damage if he is unable to bring himself within the catalogue of exceptions set out in Article 4(2) of the rules. A much simpler and stricter system of liability applies to carriage by air. The Warsaw Convention establishes a presumption of fault in the case of damage to the goods during air carriage. The carrier then has the opportunity of setting up certain defences. If he cannot, he is liable. Under both systems the liability of the carrier is limited provided he does not take himself outside the system of regulation, eg., by deviation at sea or carrying goods without an air waybill.

Under Montreal Protocol No. 4 the carrier is held liable "for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air". The Protocol does not affect the existing liability for delay under Article 19 of the Warsaw Convention whereby the carrier is liable for any damage sustained by delay in the carriage of cargo. The basis of liability under the Hamburg Rules is that the carrier "is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge". The effect of the formulation

in both cases would appear to be the same.

However, the provisions for exoneration are stricter under Montreal Protocol No. 4 than they are under the Hanburg Rules. The carrier by sea under the latter rules can gain exemption from liability if he proves that "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences". In the case of damage for delay in the carriage of cargo by air, under the Montreal Protocol, "the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures" (Art. V). This formulation is the same as that in Article 20 of the Warsaw Convention. Although U.S. courts have sometimes taken a stricter interpretation, the approach adopted by British courts has been to interpret "necessary" as meaning "reasonable" eg. Chisholm v. BEA (1961) 1 Lloyds L.R. 626. For damage caused by delay, liability would appear to be similar under the Hanburg Rules and the Montreal Protocol. However, in the case of "destruction, loss of, or damage to, the cargo", the carrier by air under the Montreal Protocol would be exempted only if he proved that the destruction, loss or damage resulted solely from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

This would appear to impose a stricter regime than that of merely proving that you or your servants or agents took all reasonable measures to avoid destruction, loss or damage.

To this extent, the proposed regime for carriage by air will still be more strict than that for carriage by sea. Both, however, are stricter than existing rules on such carriage. Those set out in the Hamburg Rules are more closely akin to what may be currently found in the Warsaw Convention. The latter convention does allow the additional defence for liability arising in the carriage of cargo of negligent pilotage "or negligence in the handling of the aircraft or in navigation". However, this provision was deleted by the Hague Protocol and, indeed, is seldom resorted to under the convention.

A third point of comparison between the legal regimes for the two systems of carriage is that of the limitation of liability. There are two problems here: one, the reference point on which the limit of liability is to be assessed; two, the figure fixed as the limit.

As to the reference point, as is well known, the Hague Rules used the phrase "package or unit". In 1977 Mr James presented a paper to the Annual Conference of the MLAANZ on this topic. That paper focussed on the controversy raging over the question of whether a container constituted a "unit". There would appear to be little satisfaction of the debate since that paper. In the Hague-Visby Rules the phrase used is also "package or unit" but the reference point is expressed in the alternative: "Frs. 10,000 per package or unit or Frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher". In addition, the phrase, "package or unit" is partially defined:

> Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

This will probably be effective in solving the container controversy. The Hamburg Rules use the phrase "package or other shipping unit" which, although slightly different in wording would appear to have the same coverage; particularly as the same explanatory statement or partial definition is included. The Hamburg Rules also include the alternative of calculating limits of liability on a pure weight basis expressed in kilogrammes.

In the Warsaw Convention, the Hague Protocol and the Montreal Protocol the reference point is the kilogramme. This would appear to be a more simple system to apply than that of the alternative points of reference under the Hamburg Rules. Although the container controversy may be solved, it will still be necessary for the carrier to pay attention to how the cargo is expressed on the bills of lading and compare this with the weight of the consignment in order to arrive at the lowest exposure to liability.

As to the figure fixed as the limit of liability, we find in the Brussels Convention version of the Hague Rules the figure of "100 pounds sterling". Article 9 states further: "The monetary units mentioned in this convention are to be taken to be gold value". This has occasioned a number of problems in practice as states have sought to convert it into their own currencies following British rejection of the gold standard. Others have solved the problem by a less than strict following of the convention eg. the Sea-Carriage of Goods Act 1924 (Cwth) refers to "one hundred pounds" only. The Hague-Visby Rules turned to the Poincaré franc as the unit of measurement. This is a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.

The Poincaré franc was already used in both the Warsaw Convention and the Hague Protocol. Under the former the limit

of liability for cargo was 250 francs per kilogramme. This was not affected by the Hague Protocol. Under the Hague-Visby Rules, the amount per kilo of the gross weight of goods lost or damaged is 30 francs.

Placing a value on the Poincaré franc in terms of national currencies is a notoriously difficult exercise. Should it be the market price of gold? At one time it was taken to be the official price but that no longer exists. In the United Kingdom, the sterling equivalents are fixed by statute. This makes for certainty in one sense but can lead to parties playing for tactical advantages around proposed dates for alteration of the rates.

Against this background, both the Hamburg Rules and the Montreal Protocol have opted for the same unit of measurement - the Special Drawing Right on SDR. This is a notional unit carrying a value assessed from a basket of currencies. It can be converted into particular currencies from rates established by the International Monetary Fund. For example, Article 26 of the Hamburg Rules states: "The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions". The amount for the Hamburg Rules is 835 units of account (SDR's) per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. Under Montreal Protocol No. 4 "the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme". On a pure weight basis, the carrier by air is subject to much greater liability than his counterpart at sea.

To sum up this section of the paper, it would seem that, while the system of liability for sea carriage is becoming stricter, that for air carriage is also increasing in severity. There is no overall uniformity in changes. The applicability of the international rules for sea carriage is moving from a narrower scope vis-a-vis air carriage to a wider one. The nature of liability for air carriage proposed would still be stricter than that for sea carriage; the latter coming into alignment with that currently existing for the former. The proposed limitation of liability in the case of air carriage would still be higher than that for sea carriage and more easily established from the applicable reference points - this even though the limits for sea carriage would rise.

Government Regulation

The third point of comparison concerns the application of government regulations restricting competition or controlling the distribution of total cargo to be carried among those offering their services.

A feature of transport by sea has been the existence of the shipping conference. This has been defined in the following

terms: "... a meeting of lines ... serving any particular route, aimed at agreement on uniform and stable rates of freight and the provision of services, under stated working conditions in that trade". An alternative definition, emphasizing different aspects of the concept, is: "A group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services." It is noteworthy that, whereas the first definition stresses the stability and efficient provision of services by the conference, the second tends to lay emphasis on their anti-competitive and restrictive nature. These two aspects lie at the centre of the debate over the role of such bodies. Secondly, conferences exist only in the liner trades and thus cover only a portion of world trade. However, it is a crucial portion particularly for the smaller and medium size exporter.

Because of their provision of services requiring large capital outlays, the tradition in many countries has been to keep transport by liner operating companies free from regulation of competition. In most areas of commerce Governments have often been concerned to break up or regulate the activities of monopolies in order to promote the virtues of competition. But for shipping, merit has been seen in allowing a degree of monopolization, of limiting competition through restrictive agreements and organizations such as shipping conferences. The first of these was established in 1875 - the Calcutta Conference organized by Samuel Swire of Liverpool. Today there are some 360 conferences operating in the various trades of the world.

This is not to say that there has not been some control exerted over shipping conferences. For example, in 1971 a European Code came into force as a voluntary instrument to regulate some aspects of conference operations. In Australia Part X of the Trade Practices Act was inserted in 1965. This requires confidential disclosure of conference procedures to an official of the Federal Government; establishes and sets out the role of the Export Council; defines the power of the Minister for Transport in relation to the conduct of conferences. Similarly, in the United States of America, the Federal Maritime Commission has certain powers in relation to conferences. Conferences must file all agreements with the Commission. The Commission must then decide on the legality of each agreement according to criteria set forth in the Shipping Act 1916 (U.S.A.).

Significant changes are in store for such relatively unregulated operations. In 1974 an international conference called by the United Nations adopted a Convention on a Code of Conduct for Liner Conferences. Based on a draft prepared by UNCTAD, this convention seeks to bind the shipping conferences by rules agreed by national governments who are involved in

the whole process of consultation. The convention is not yet in force. It will enter into force "six months after the date on which not less than 24 States, the combined tonnage of which amounts to at least 25 per cent of world tonnage, have become Contracting Parties". For the purpose of calculating percentages the relevant tonnage is taken to be that set out in Lloyd's Register of Shipping - Statistical Tables 1973. The Convention is not yet in force. The necessary number of states have ratified or adhered to it. However, the relevant tonnage percentage has not yet been met. This will probably take place in the near future - possibly within the next year. On 15 May, 1979, the European Economic Community adopted a regulation proposed by the Council of Ministers providing for ratification by the EEC member states subject to certain reservations. Since then the member states have been preparing their own legal systems for the effect of ratification. For example, legislation to this effect has recently been introduced into the British Parliament. The EEC reservations will allow full application of the Code to conferences serving developing states but exempt those operating between EEC states from many of the most controversial of the Code's provisions.

For merchant shippers the two most significant aspects of the Convention are the stipulated cargo sharing arrangements and dispute settlement procedures. The cargo sharing arrangements provide for what is known as the 40:40:20 division. This means that when a share of trade within a pool of member lines or national shipping lines is determined, the "group of national shipping lines of each of two countries the foreign trade between which is carried by the conference" participate equally in the freight and volume of traffic. Third country shipping lines have the right to acquire up to 20% of that freight and volume of traffic generated by that trade.

In May, 1976, the Australian Federal Minister for Transport said:

> ...unlike the Australian Act, the Convention provides a direct participatory role for Governments in negotiations. So, if I may use the Europe trade again as an example, we could have shipper bodies in each of those 30 countries, and the Governments of those countries, all with the right to participate in those negotiations and all with the right to take disputed decisions to what is a cumbersome dispute settlement procedure. While solutions to this may be found they are not yet decided.
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> Perhaps the part in the Convention which has provoked most controversy is that which goes to determining the shares of trade that efficient national flag carriers may take if these are disputed within a Conference - the so called 40:40:20 rule. The Australian Act contents itself with requiring that efficient Australian flag participation shall be to an extent that is reasonable,

without applying a rigid mathematical solution. Our approach was that as far as possible these decisions should be made in an essentially commercial atmosphere. I should add that to some extent this approach is followed by the Convention. The difference is that in the final resort, shares by flag are spelled out within the Convention; that is, national flags at each end of the trade shall be entitled to 40 percent of the Conference share and the third flag carrier shall be entitled to 20 percent.

The Convention deals with disputes between

(a) A conference and a shipping line;

(b) The shipping lines members of a conference;

(c) A conference or a shipping line member thereof and shippers' organization or representatives of shippers or shippers; and

(d) Two or more conferences.

Parties are enjoined to first attempt to settle their disputes by an exchange of views or negotiations. If these fail, disputes of the following nature shall, at the request of one of the parties, be referred to international mandatory conciliation:

(a) Refusal of admission of a national shipping line to a Conference serving the foreign trade of the country of that shipping line:

(b) Refusal of admission of a third-country shipping line to a conference;

(c) Expulsion from a conference;

(d) Inconsistency of a conference agreement with this Code;

(e) A general freight-rate increase;

(f) Surcharges;

(g) Changes in freight rates or the imposition of a currency adjustment factor due to exchange rate changes;

(h) Participation in trade; and

(i) The form and terms of proposed loyalty arrangements.

International mandatory conciliation is a complicated procedure in which the "appropriate authorities of a Contracting Party shall, if they so request, participate... in support of a party being a national of that Contracting Party, or in support of a party having a dispute arising in the context of the foreign trade of that Contracting Party". Recommendations of the conciliators are not binding until they have

been accepted by the parties.

Scheduled international air services are probably those air transport operations which can be most closely aligned with liner services at sea. Here there have been no calls for any international regulation of air carriage similar to that of sea carriage in respect of the Code of Conduct. There are three reasons for this. One is the nature of the cargo. Such cargo flown by air is not of vital importance to the developing countries as are the larger bulkier cargoes in the agricultural sector. Secondly, air carriage has traditionally been tightly controlled by governments. Carriage of cargo coincident with passengers depends on the frequency of scheduled flights. These are the subject of intergovernmental negotiation and are invariably spelt out in detail in bilateral treaties. Thirdly, and most important of all, has been the existence of the International Air Transport Association (IATA). This is a free association of airlines which operate international commercial air services. In form it is a company incorporated by a special act of the Canadian Parliament dated 18 September 1945. Its membership is open to all airlines subject only to the condition that the state in which they are registered is a member of the International Civil Aviation Organization (ICAO). This body IATA has been described as one of the world's largest cartels and its activities have been attacked on that basis. In the past IATA has played a major role in fixing freight rates for the various routes served by member airlines. Its position, however, has been weakened by the policy of deregulation pursued by some governments, particularly that of the United States of America in recent years, and the advent of airlines which have refused to join the Association.

Examining the above changes in the extent of government control of the operations of air and sea carriage of cargo it becomes obvious that in respect of the former such control has, if anything, slightly relaxed. On the other hand, for sea carriage it is intensifying.

ASSESSMENT

What, then, is the overall situation? One must inevitably be drawn to the conclusion that there is no convergence in the legal regimes governing transport by air and sea. What we have is a situation where the regime for air transport is remaining fairly constant with only minor changes in the offing eg. less government control of operations, some increase in liabilities. These do not constitute radical departures from the current regime. The position is very different for the legal regime governing carriage by sea. In many respects that regime is becoming more restrictive, in some respects it will be stricter than that for air transport; a reversal of the traditional position. Two questions emerge: Why should this be so? What effect will it have?

INCREASING RESTRICTIONS - WHY?

There appear to be two reasons for the increasing restrictiveness of the regime governing sea transport. One is political, the other organizational.

The political reason is well known. The developing countries, or a great many of them, take the view that the laws regulating the actual carriage of goods were developed by the major European nations at a time when such nations provided the great bulk of the world's shipping and held the reins of world economic and political power. The rules as developed thus favoured the carrier. Similarly, the conference system is seen by those countries as a device whereby existing shipping lines - often owned by nationals of the developed states - restrict competition to keep freight rates high and prevent the emergence of national shipping lines. The economic viability of the country's produce - often agricultural produce - is thus seen to be at least partially at the mercy of foreign interests intent on pursuing their own economic objectives. The position of the merchant ship within the exclusive economic zone is largely a by-product of the rapacity of states in securing for themselves the greatest possible access to the resources of the sea. This seems to represent the current step in a gradual process of state encroachment on the concept of the high seas - a process which will next move to securing control of passage through the exclusive economic zone. Control of shipping in itself will probably not be the goal - rather it will be the outcome of state efforts to secure greater control over the zone whether it be to preserve economic assets therein or enhance the security of the state.

The second reason for increasing restrictiveness of the regime governing sea transport was said to be organizational. The law of the sea negotiations are in a class by themselves. Aspects of state security and access by naval vessels have been playing an important role in those negotiations. The part plyed by and need for access by merchant vessels does not seem to have figured at all substantially in those negotiations. In a sense this is logical because freedom of navigation in the exclusive economic zone is preserved. The thrust of the argument in this paper is that maintenance of that freedom cannot be guaranteed. Nevertheless, it does seem true to say that the interests of merchant shipping have had little significance in the law of the sea negotiations.

As for the other aspects of the legal regimes for carriage by sea and air, we find a considerable difference between the means whereby alteration in those regimes is brought about. In the case of air transport there is one major organization involved with proposals for change. This is ICAO - a body established by the Chicago Convention whose aims and objectives are:

> to develop the principles and techniques of international air navigation and to foster the planning and development of international air

transport so as to:

(a) Insure the safe and orderly growth of international civil aviation throughout the world;

(b) Encourage the arts of aircraft design and operation for peaceful purposes;

(c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;

(d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

(e) Prevent economic waste caused by unreasonable competition;

(f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;

(g) Avoid discrimination between contracting States;

(h) Promote safety of flight in international air navigation;

(i) Promote generally the development of all aspects of international civil aeronautics.

There are other bodies involved with the legal regime of air transport but they operate under the umbrella of ICAO and the major world-wide role is played by that body.

On the other hand, the legal regime for transport by sea is affected by the operations of a number of organizations - three major ones in all. There is the International Maritime Organization (IMO). This body is concerned with such aspects as traffic separation schemes and navigation in general; safety; pollution etc. In a sense it was intended to play a similar role to ICAO but has nowhere near the same status and power. The United Nations Commission on International Trade Law (UNCITRAL) was the body responsible for the Hamburg Rules. The object of this body is "the promotion of the progressive harmonization and unification of the law of international trade". The United Nations Conference on Trade and Development (UNCTAD) prepared the draft for the Convention on a Code of Conduct for Liner Conferences. Primarily concerned with development of the world's poorer economies through increasing trade, this body "has regarded increasing intervention in shipping, often in a concerted manner, as an effective means of improving the situation of developing countries vis-à-vis the OECD countries" (Turner, D.L. "International Shipping and National Aspirations" 1980 Conference of the MLAANZ). UNCTAD is also responsible for action on the flags of convenience problem.

The criticism is made, not of the organizations themselves nor of their desire to bring about change, but of the apparent

lack of communication between the bodies and the lack of some type of overall continuing study of where the desire for change is taking sea carriage of goods. There needs to be overall assessment made of the effect of proposed changes. At the moment there is some study of the effect of proposals. However, it usually relates to the effect of that change on the existing situation - not how it will relate to other changes proposed. What assessment as there is appears to take place in isolation. Even then such studies are very elementary. Little attempt is made to survey the world wide scene.

How could such overall assessment be made? I hesitate to suggest yet another international organization. It would appear to be a matter that should be properly handled by IMO. Such activity would require a considerable change in that body's emphasis. However, it is a matter that is becoming of greater urgency as change proposed over the past decade starts to flow on.

SIGNIFICANCE OF CHANGE

The present system of transport by sea is based largely on free enterprise in conjunction with state owned shipping lines. Many of the latter are organized as independent entities with considerable freedom in their method of operation. With that freedom, however, also goes the obligation to make a profit. The danger is that changes made in the legal regime may ultimately lead to a situation where organizations such as those together with private companies can no longer operate effectively so that carriage is dominated by government controlled ships - a situation that would have profound implications for the efficient and economic carriage of world trade.