THE FUTURE ROLE OF THE CMI IN THE HARMONISATION OF INTERNATIONAL MARITIME LAW

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I must start by confessing to a serious misrepresentation. The title of my paper, as billed, is the future role of the CMI in relation to the "reform" of international maritime law. The CMI, as I hope everyone knows, has nothing to do with reform of the law. We need only go back to the mission statement of the founding fathers of the CMI 100 years ago to find that the declared aim of the CMI was to be the unification or harmonisation of maritime law on an international basis. I suppose you could argue that unification may indeed produce reform. But the CMI is not in the business of law reform as such. It is interesting to note that 10 years prior to the creation of the CMI, the Belgian Government organised two international Congresses (1885 and 1888) whose aim was to produce a complete international maritime code covering every aspect of maritime law. These two Congresses established one thing at least - that this was an over ambitious and impossible project. Those attending the Congresses decided that an incremental approach to harmonisation would be more effective. In other words; first identify a specific topic within the maritime law field and then concentrate on seeking uniformity in that limited area.

Over the years people have questioned whether the time and energy spent in seeking uniformity or harmonisation is really worth it. Is it really such a big problem that different maritime nations should have and apply different laws? We find an early expression of the perceived need for uniformity in an address by the jurist Mancini to the University of Torino in 1861. He said :-

> "The sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of juridical regimes"

Using more modern terminology we might say that in the world of maritime trade those involved need a level playing field and a degree of certainty of law if commerce is to thrive.

That said it is now recognised that governmental and non-governmental organisations can get carried away by this urge for uniformity and the IMO Assembly by resolutions A 500 (xii) and A 777 (xviii) cautioned that conventions or other instruments designed to harmonise

International Maritime Law should only be produced where a "compelling need" has been established. In this context it is interesting to me to note that in relation to the three draft Conventions currently under discussion at the IMO Legal Committee this issue of "compelling need" was raised in initial discussion but was not resolved at that time. It was simply shelved. One has to assume that the Legal Committee will form a view on the question of need before finalising the text of an instrument and not leave it to a full UN Diplomatic Conference to deal with the issue when studying a draft Convention.

A brief historic note about the work of the CMI before I look at the current projects in the immediate and future work programme of the CMI. For the first 70 years of its existence the CMI was effectively the only international organisation involved in projects aimed at achieving unification of private maritime law. (I emphasise the word "private" to draw a distinction between private law and public or regulatory law). During that productive period of its life the CMI was instrumental in the creation of no less than 22 Conventions including the Collision and Salvage Conventions of 1910, the Limitation Convention of 1924, the Hague Rules 1924 Arrest of Seagoing Ships 1952 etc, etc. These Conventions came into existence using the time honoured methods of the CMI. Once a suitable topic for uniformity had been identified a Questionnaire would be formulated by an International Working Group and sent to all affiliated National Maritime Law Associations. The responses would be analysed and an International Sub-Committee, drawing members from all member nations, would be set up to create a draft instrument using the information regarding national laws as a firm base upon which to draft an instrument which would achieve unification without creating too many conflicts with existing national laws. Once the text of the instrument had been finalised the Belgian Government would host a Diplomatic Conference to approve the text. Once a text had been agreed all participating nations would have the opportunity of ratifying and incorporating the Convention into domestic law. Ratification of such an instrument imposes upon each ratifying state the obligation to apply that instrument to all matters which might come before its courts involving nationals of other ratifying states.

In the late 60's governments started to take an interest in private international law. Following the Torrey Canyon incident the UK Government proposed to IMO (then IMCO) that this intergovernmental organisation should take responsibility for creating an oil pollution regime. A Legal Committee was created with a specific mission to consider questions of liability and compensation for pollution caused by tankers.

This process led to the 1969 Civil Liability Convention and the 1971 Fund Convention and marked the beginning of the Legal Committee's involvement in the field of private international maritime law which had previously been the sole preserve of CMI. Since that time IMO and its sister UN organisations UNCITRAL and UNCTAD have created a further 25 Conventions. In most instances the CMI has been involved in the creation of those instruments either by producing an initial draft text (viz the 1976 Limitation Convention and the 1999 Arrest Convention) or in a general consultative role.

From the CMI's point of view there is a third category of instrument - those for which the CMI alone is responsible. These are currently 5 in number and include the York – Antwerp Rules, the Rules on Sea Waybills, Rules on Electronic Bills of Lading and Rules relating to the Conduct of Classification Societies.

I hope that this puts the role of the CMI in its historic perspective. You need only look at part III of a CMI Yearbook to measure the extent to which the CMI has contributed to the work of harmonisation in its first 100 years.

When I became President of the CMI in 1997 a number of long term projects were coming to an end and it seemed a suitable opportunity to consult members on the future of the CMI both in relation to its organisation and in relation to its future work programme. I was delighted by the response received to a Questionnaire on the Future of the CMI which was sent out to all National Associations. The informed debate which took place on the final morning of the Centenary Conference in Antwerp in 1997 gave all of us on the Executive Council plenty to think about . Those of you who read our Newsletter will know that by the end of 1997 I was able to write to the Presidents of all National Associations summarising the Centenary debate and outlining the steps which the Executive Council had taken to resolve the problems identified by members. We still have certain organisational problems. These would be readily resolved if we had huge sums of money to throw at them. Unfortunately (or perhaps fortunately) we have limited funds which means that much of the work has to be done by volunteers. But then that, perhaps, is the genius of the CMI. We are not Government sponsored, we have no political axe to grind and are solely concerned with producing harmonising instruments which will benefit those in the shipping trades.

Let me now tell you a little bit about our current work programme and the way that I see this developing over the next few years.

In July this year, I wrote a letter to the Presidents of all National Maritime Law Associations headed "CMI – Where we are". I very much hope that members of this Association will have received a copy of that letter. At the risk of repeating myself let me outline some of the projects which are in hand

Issues of Transport Law

Perhaps the most important instrument produced by the CMI in its long history is the Hague Rules of 1924. By 1930 the Hague Rules had been ratified by 85 states and it could, with justification, be said that in relation to issues of liability for seaborne cargo there was substantial international uniformity. Since then it has been down hill all the way. This trend towards disunity started, ironically, with the CMI's Visby Protocol of 1968. Subsequently UNCITRAL produced the Hamburg Rules of 1978. Since then national governments around the world either alone or in conjunction with neighbouring states have introduced new liability regimes thought to reflect more closely modern thinking. The latest in the line of those taking unilateral action is the USA with its Carriage of Goods by Sea bill currently before Congress. For some years Professor Francesco Berlingieri has chaired an International Sub-Committee of the CMI which was set up to consider what provisions a new liability regime might contain. (The Report of this Sub Committee was formally adopted at this years Assembly in New York and has been published). However, it has for some years been recognised that to create a new liability regime (a sort of Hague / Hamburg Rules) would simply add to the tendency towards dis-unification.

About a year ago CMI agreed to take up a challenge laid down by UNCITRAL to carry out a study which might lead to a much more broadly based Convention or other instrument designed to cover as many aspects as possible of the law of Maritime Transportation which had not previously been covered by a Convention. For this purpose the CMI set up an International Working Group under the chairmanship of Stuart Beare (whom many of you will know as a past senior Partner of Richards Butler in London). He and his group have now produced a Questionnaire which

covers 5 facets of the Maritime Transportation process. As I speak some of you may be sitting out there wondering whether the response to the Questionnaire from your Association will beat the end of September deadline.

I have recently issued a press release in relation to this project in agreement with UNCITRAL in which I gave notice that when we report on this project to a meeting of UNCITRAL in New York in July next year the CMI will be proposing that the project be extended to consider, once again, issues of liability. I believe that the only way we can hope to re-establish a degree of uniformity and a new liability regime is by creating a comprehensive instrument which would prove attractive to a large number of maritime nations who would accept a new liability regime as part of a more comprehensive package.

Under the prompting of the Canadian Maritime Law Association and conscious of the fact that a number of Governments are planning unilateral reform of the law relating to liability for maritime transportation, the CMI will maintain the pressure and hope to have a preliminary draft instrument available for debate at our next big conference in Singapore in February 2001. That is our ambition and I very much hope that when, towards the end of this year, the CMI sets up its International Sub-Committee on this subject your Association will be able to send a delegate to Sub-Committee meetings.

Issues of Marine Insurance

At the Centenary Conference in Antwerp it was suggested, by no less a figure than Lord Mustill, that the CMI should put marine insurance on its agenda. At a subsequent conference in Oslo, organised by the Scandinavian Maritime Law Institute, delegates identified 14 issues which regularly crop up and cause problems within their own marine insurance law. Of the issues identified perhaps the most important are the need for the assuered to have an insurable interest, does breach of a policy warranty atumatically avoid the policy (regardless of causation), does the duty of disclosure persist throughout the duration of the policy cover, what is the effect on the policy of misconduct by the assured,dot the insurer and assured have a shared dity of good faith, what happens where the risk changes during the period of cover, what risks are commonly excluded by operation of law, what limitation peroid applies to claims.

Dr. Thomas Remé is currently Chairman of the International Working Group which has been being set up by the CMI and a Questionnaire is currently in the hands of National Associations. Response so far has been encouraging and I believe that I am right in saying that the response from your Association was prepared by Sarah Derrington. I am most grateful for this contribution as your two governments seem to share quite distinct views about the need for reform in this area.

Of course the reasonable question you might ask is what will we do with this material once it has been collected together. The CMI believes that there is no demand for a Convention or other instrument in the field of marine insurance. Indeed the UNCITRAL model clauses (which were the last attempt at uniformity in this area) have not been widely adopted. The feeling of the CMI is that we could, at the end of this exercise, produce an authoritative report which, having identified the particular problems, could list what appears to be the most universally accepted solution. If, for example, we find that there is a consensus that a breach of warranty must be causative of the loss if the underwriter is to be exonerated from liability then we should clearly say so. Whilst this will not help the courts of any particular country interpret their existing law it may well form the basis of any new national legislation which may be contemplated.

Future Newsletters and Yearbooks will keep you up to date with the developments on this project.

General Average

You may wonder why General Average should appear in the CMI work programme so soon after the substantial amendments achieved at the Conference in 1994 in Sydney. The fact is that earlier this year I received a letter from the Secretary General of IUMI which invited the CMI (as the custodians of the York – Antwerp Rules) to carry out a root and branch revision of the York – Antwerp Rules designed to re-establish the guiding principle of common safety and displacing the current guiding principal of common benefit. In effect IUMI would like to see the York – Antwerp Rules amended so that sacrifice and expenditure incurred in getting ship and cargo to

a place of safety would be allowed in General Average but excluding all expenses incurred at and after the port of refuge from General Average.

Dr. Tom Remé, a member of the CMI Executive Council, who worked for many years in the insurance industry, has been appointed chairman of an International Working Group. His current mission is to ascertain whether there is a general feeling amongst members of National Associations that this work should be done. If your Association has not yet responded to that Questionnaire I am sure that we can hope to receive a response shortly.

I express no personal view at this stage (it would be wrong for me to do so) but if there is a general desire for such a change I feel sure that the CMI will be happy to put its mind to the matter.

UNESCO Draft Convention on Underwater Cultural Heritage

Since the subject of Underwater Cultural Heritage is so intimately tied up with the activities of salvors it is, perhaps, a pity that this particular project is the responsibility of UNESCO rather than IMO. Because UNESCO is leading this project the draft Convention is very much orientated towards protection of historic wrecks and other artefacts from the attentions of amateur divers and professional salvors. As drafted the Convention would seriously effect the freedom of commercial salvors and the CMI has set up a International Working Group under Professor Eric Japikse to study the draft Convention and we shall certainly be lobbying to ensure that any new Convention complements rather than conflicts with the 1989 Salvage Convention. Some of you here may be working on a response to the Questionnaire sent out by Professor Japikse.

Offshore Craft

The CMI has for some years now been looking at the possibility of extending to offshore craft the operation of numerous existing Conventions. Richard Shaw, who many of you know, has chaired an International Sub-Committee reviewing this project and a comprehensive report was submitted by the CMI to the IMO Legal

Committee at its last meeting. You will find a copy of the Report in the recently published Yearbook for 1998. It remains to be seen whether the Governments, which send delegates to IMO Legal Committee Meetings, would wish to see this proposal develop further. As I say, the report prepared by Richard Shaw's Committee is very detailed and delegates to the Legal Committee, when they decision time comes, will be debating the issue that decision on a clear understanding of the subject thanks to the work of this CMI Committee.

Ratification, Implementation and Interpretation of International

This is a new project on which CMI is working in conjunction with the IMO Legal Committee. It has for years been recognised that ratification of an international convention is the first step on a long journey. The way in which a Convention is incorporated into national legislation can vary enormously and the practical results can be unpredictable. The way in which rights of reservation are exercised can undermine the level of unification intended by the instrument. How the text of a Convention, once incorporated, is interpreted by local courts again gives opportunities for a breakdown in the intended unification. The CMI has submitted a paper to the IMO Legal Committee which will be discussed at the October session. This paper contains a number of suggestions as to how the CMI might assist in progressing from theoretical unification to unification in practice. I emphasis that this project is in its infancy.

Other Current Projects

I mention briefly in passing the work which the CMI has done with FONASBA on a Time Charter Interpretation Code and express my thanks to Francesco Berlingieri and Charles Goldie who represented the CMI at the Diplomatic Conference in Geneva in March this year at which the text of the new Arrest Convention was agreed. You may recall that the original text of this Convention was drafted at the CMI Conference in Lisbon in 1985. I should also mention that we are accepting observer status at meetings of a Joint Working Group set up by IMO / ILO to consider ways in which Seafarers might be protected in the event of their being abandoned (following a casualty or the bankruptcy of the owner).

I should also mention the work of Frank Wiswall's International Joint Working Group on Uniformity of the Law of Piracy. We are hoping that we may have a model law for you to look at, at our next big Conference in Singapore in February 2001.

I should remind you that the CMI has observer status at the IMO Legal Committee meetings and continues to contribute by way of research and comment to the work of that Committee. I should mention in particular the excellent report prepared by Dr. Sotiropolous on the proposed amendments to the Athens Convention. This report was widely welcomed by delegates to the last Legal Committee meeting who recognised the importance of understanding current national domestic law on these topics before drafting an international instrument.

Future Projects

At the Centenary Conference in Antwerp it was agreed that in the year preceding each major conference we would set up a Planning Committee whose task it would be to consider the current and future work programme of the CMI with a view to reporting to delegates to the next conference. At our November Executive Council Meeting we will consider who might serve on that Committee. I am please to say that I already have several volunteers.

So there you have it. We are poor but busy (often a good combination) and I believe strongly that the CMI has an important role both as an initiator of projects of unification but increasingly importantly as a consultant to other International Organisations who have the power to create new international instruments but may not have the knowledge to make them workable.

May I take this opportunity of thanking you for inviting me to speak and thank you also for letting us have the services of Ron Salter on the Executive Council. He has almost become a fixture on the Council but I am sorry to say that his second, and final, 4 year term of office is due to expire in May next year. We shall miss him. His contributions to our discussions are always apt and to the point. Strong on substance and short on waffle.