

# Towards a worldwide restatement of the general principles of maritime law

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An international restatement of the general principles of maritime law could be a way of at long last making practical use of the *lex maritima* theory. It would offer a remedy to the current faltering of the progress of harmonisation through conventions and the threat of the disregard of the specific nature of the maritime sector by moves towards the harmonisation of the civil law. An adequate restatement of the principles of maritime law could be the lubricant that smooths the path of new international and national regulatory initiatives, eases contract negotiation, dispute resolution, and the spread of knowledge.

## 1. In search of a new source of maritime law

Maritime law is supported by a long tradition of international uniformity. In recent years, however, the development of a universal maritime legal order by the adoption of unifying treaties has slowed. At the same time general, non-maritime contract law has started to find a way to wider harmonisation. In this article it is argued that the uniformity and, even more ambitiously, the satisfactory functioning of maritime law could be promoted by the restatement of the general principles of maritime law.

## 2. The sources of maritime law: from enthusiasm to malaise

In mediaeval Western Europe, maritime law underwent a spontaneous unification that owed little to political rulers. Shared customs and case law were carried from port to port and eventually constituted a more or less uniform *lex maritima*, which formed a very specific part of the wider *lex mercatoria*. As the power of central governments grew, national maritime legislation came into being, which codified the *lex maritima* while at the same forcing it into the straitjacket of national law.<sup>1</sup>

Thanks to the enthusiasm of the Comité Maritime International (CMI), numerous conventions were adopted in the 20th century aimed at the international (re)unification of specific areas of the maritime law, and which were gradually transposed into the national legislation of the states parties. Although these conventions were not all equally successful, they constitute to this day the core of the uniform international maritime law. In recent decades, institutions such as the IMO, UNCTAD and UNCITRAL have updated and supplemented the treaty apparatus. The maritime law based in international public law also has a soft law component consisting of numerous non-binding recommendations, also emanating from the IMO.

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<sup>1</sup> For an excellent historical overview, see G W Paulsen 'An historical overview of the development of uniformity in international maritime law' (1982–1983) 57 *Tulane Law Review* 1065–91.

The second leg of the uniform maritime law continues to be self-regulation (in the broad sense). A major part of self-regulation is the custom and usage of maritime law.<sup>2</sup> Numerous conventions of maritime law (as well as national laws) expressly refer to custom and usage as a supplementary source of law. A second part of self-regulation is the standard form contracts, clauses and guidelines that have been adopted at the international, national and local level, and which may develop into usage or custom. The international elaboration of such self-regulation is largely the work of institutions such as CMI and BIMCO.

National maritime legislation plays an important, but nonetheless subordinate role. It may not run counter to the content of the unifying conventions (although it may extend their application to national situations) and, where it provides non-mandatory rules, it is often neutralised by contracting parties because they prefer the self-regulating instruments mentioned above. National maritime case law is also seriously undermined by arbitration and jurisdiction clauses. Despite the limitations of national maritime law, states continue to take the trouble of modernising their maritime laws. Recent examples include China, Panama, Germany, Spain and Belgium. The review project of the latter country is based on a broad, innovative and internationalising vision of the sources of maritime law, inspired by the pioneering role played by Belgium, and in particular Antwerp, in the 19th and 20th centuries.

Whereas a lack of uniformity was the most crucial problem of the sources in the 19th century, nowadays the greatest problem is the faltering performance of the unifying conventions. The list of recent unifying conventions that fail to achieve what they set out to do or achieve it only after long delays is becoming ever longer. As conventions are updated with new, alternative versions or amendments, the result often threatens to be a greater fragmentation rather than unification, as there is no guarantee that all the states party to the initial convention will unanimously adopt the new arrangements. In addition, national methods of implementing international conventions vary widely, the unified provisions may be applied and interpreted in different ways and some national law-makers have unilaterally adopted hybrid or divergent regimes.<sup>3</sup> At first sight it appears that the malaise concerning the adoption of conventions for the unification of maritime law is difficult to overcome. In his astute analysis of 2002, still relevant at the time of writing, Griggs identified a long and not very encouraging series of obstacles to unification projects.<sup>4</sup> At present the CMI, once the pacemaker of the movement towards greater international uniformity, tends to take a low profile approach, focusing on subjects such as the implementation and interpretation of international conventions, the collection of jurisprudence on the interpretation of maritime conventions and improving the level of ratification of a number of important existing conventions.

In contrast to the existential concerns of the practitioners of maritime law there is growing interest in the international unification of general contract and trade law. The UNIDROIT Principles of International Commercial Contracts came into being in 2004. Europe has seen the establishment of the Principles of European Contract Law and a Draft Common Frame of Reference, and some day these might become the basis of a European Civil Code. There is, however, little enthusiasm for these initiatives on the part of maritime interest groups such as the International Chamber of Shipping (ICS) and the European Community Shipowners' Associations (ECSA), as maritime shipping is intrinsically an international and consequently internationally regulated activity and adequate standard contracts and terms have long been a feature of the sector. Writing from an academic perspective, Lorenzon confirms that the application of European contract law to the maritime sector could well have undesirable consequences. Furthermore he points out the satisfactory functioning of maritime law,

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<sup>2</sup> I do not consider the endless discussion about the distinction between custom, usage and customary clauses. The terminology and interpretation differs widely internationally and a cacophony of different opinions may reign even within national legal systems.

<sup>3</sup> See for example the reports by A Antapassis and F Berlingieri in Comité Maritime International *Yearbook 2007–2008. Athens I. Documents for the Conference* (CMI Antwerp 2008) 308 ff; P Myburgh 'Uniformity or unilateralism in the Law of Carriage of Goods by Sea?' (2000) 31 *VUWLR* 355–83.

<sup>4</sup> P Griggs 'Obstacles to uniformity of maritime law' in *CMI Yearbook 2002* (CMI Antwerp 2003) 158–73.

which is due in part to its self-regulating character.<sup>5</sup> In my view caution is advisable particularly in view of the earlier disregard for the special character of maritime law in international and European instruments establishing common conflict-of-law rules (although the latter takes us beyond the scope of this article).

Whereas maritime law seems to advance towards uniformity only in fits and starts and threatens to be absorbed by the one-size-fits-all approach of international and/or European contract law, the fundamental question arises as to whether the crisis in the progress of the unification of maritime law can as yet be overcome. Can the fading unification ideal be rekindled after 150 years? This author believes that a worldwide restatement<sup>6</sup> of the general principles of maritime law would make this possible and be a modern expression of the *lex maritima*.<sup>7</sup>

### 3. Status of the *lex maritima* and the general principles of maritime law today

#### 3.1 Declarations of faith

The themes of the *lex maritima* and the general principles of maritime law are by no means new. The existence of both is even quite widely acknowledged, although often only in general terms, without any further identification or description of the rules of law being referred to.

Eminent modern authors have continued to defend the existence of the *lex maritima*. In 1859, the French authority Bédaridde started his commentary on the *Code de commerce* with the observation that maritime law, as a legal framework for international trade relations, has always been based on a general consensus between traders of all nations, and that national law-makers have always looked towards universally applied customs and usage.<sup>8</sup> Little has changed one and half centuries later. The late lamented Professor Tetley, a major contemporary proponent of the recognition of maritime law as an independent, fundamental and international system of law, writes with conviction:

Is there a *lex mercatoria* in the twentieth century? The answer must be 'yes' in maritime law, it being the general maritime law in such countries as the U.K., the U.S. and Canada (the *lex maritima*), derived from the *lex mercatoria*, the Rôles of Oleron, the merchants' and admiralty courts, going as far back as the twelfth century. It also exists in various international documents and understandings which have no legal authority, national or international, such as BIMCO bills of lading, standard form charterparties, the CMI's Uniform Rules for Sea Waybills and the York/Antwerp Rules 1994 on general average.<sup>9</sup>

<sup>5</sup> F Lorenzon 'The European contract law project and maritime law' in *The Emerging European Maritime Law. Proceedings from the Third European Colloquium on Maritime Law Research. Ravenna, 17–18 September 2004* (Marlus nr 330) (Sjørettsfondet Oslo 2005) 137–58.

<sup>6</sup> For the purposes of this article, the word 'restatement' should not be understood in any specific technical sense. To propose a 're-statement of principles that have never been formulated in any systematic manner before may sound odd, and civil lawyers would probably prefer the term 'codification'. Whatever its title, the intended instrument would consist of an elaboration of a structured set of basic principles in written form.

<sup>7</sup> When reading through a draft of this article, John Hare was so kind as to draw my attention to his earlier dream of putting onto the world wide web a 'New Blacke Book of the Admiralty' or 'Lex Maritima electronica', containing all the achievements of the early years of the third millennium. See J Hare 'Of black books, white horses, and sacred cows: the quest for international uniformity in maritime law', address to the BLMA (11 November 1999) <http://web.uct.ac.za/depts/shiplaw/bmlafram.htm>, esp. 9 and 15). See also his 'The omnipotent warranty: England v the World' in M Huybrechts (ed) and E Van Hooydonk, C Dierckx (co-eds) *Marine Insurance at the Turn of the Millennium* vol II (Groningen Antwerp/Intersentia Oxford 2000) 37 at 54.

<sup>8</sup> The actual words of Bédaridde were: '*Le commerce maritime a été régi, de tout temps, bien plutôt par des usages que par des lois positives. Ce n'est là que la conséquence forcée du but qu'il se propose. Destiné à ouvrir, à entretenir des relations de peuple à peuple, de nation à nation, ses règles doivent offrir un caractère de généralité que ne pouvaient donc résulter que de l'assentiment, au moins tacite, des commerçants de tout les pays. C'est cet assentiment qui est devenu le fondement du droit maritime. C'est en se préoccupant des us et coutumes universellement pratiqués, que chaque législateur a pu imposer des règles susceptibles d'assurer au commerce maritime l'essor qu'il entendait et voulait lui imprimer*'. See J Bédaridde *Commentaire du code de commerce* vol I (Durand Paris 1859) 3 (no 1); compare more recently P Chauveau *Traité de droit maritime* (Librairies techniques Paris 1958) 10 (no 5).

<sup>9</sup> W Tetley 'The general maritime law: the *Lex Maritima*' (1996) *European Transport Law* 469 at 506.

Such statements – like those of other authorities – present the *lex maritima* as a somewhat amorphous whole and sound more like passionate declarations of faith, rather than contributions to an analytical and practical determination of the law. In other words, the argument deserves better expression. In the following I provide a number of concise pointers.

### 3.2 Customs, usages and standard clauses

Let me begin with the status of customs and usage in positive law. These sources of course also play a role in the general law of contracts and commerce.<sup>10</sup> For example, both the CISG Vienna Convention<sup>11</sup> and the general Principles of European Contract Law<sup>12</sup> mentioned above recognise the binding force of contractual usage and practice.

The special importance of the usage of the port for the maritime sector is emphasised by its mention in the comment appended to the UNIDROIT Principles of International Commercial Contracts.<sup>13</sup> It is internationally acknowledged that the Hague Rules operate in conjunction with local port usage.<sup>14</sup> Nonetheless, there is no general international regulation of the status of shipping and port usage. What is striking, however, is the express reference to ‘the usage of the particular trade’ in the Hamburg Rules<sup>15</sup> and to ‘the customs, usages or practices of the trade’ in the Rotterdam Rules.<sup>16</sup> Such formulations abundantly confirm the special importance of customs and usage in the maritime sector. Similar observations may be made in connection with inland navigation. The CMNI refers no less than eight times to usage in connection with a wide variety of topics.<sup>17</sup> In this convention the terminology is strikingly diverse (‘the practice prevailing in the port’; ‘rules and practices generally recognised in inland navigation’ – used twice – ‘inland navigation practice’, ‘the usage of the particular trade’, ‘the practice of the particular trade’, ‘established practice’ and ‘the applicable [. . .] practices’). Away from the contractual field, in the context of the public law regulation of navigation, a somewhat similar normative value is given to ‘the ordinary practice of seamen’<sup>18</sup> or, in short, good seamanship.

The position of the ‘believers’ in the *lex maritima* is also supported in the internationally widespread application of standard contracts and clauses, including the virtually endless list of model texts for charterparties, transport documents, bunkering contracts, ship management agreements etc prepared by BIMCO. I may also mention the York-Antwerp Rules, the General Average Rules IVR for inland navigation, the Norwegian Saleform, the SAJ and AWES shipbuilding contracts, the Lloyd’s Standard Form of Salvage Agreement (LOF 2011), the Lloyd’s Standard Salvage and Arbitration Clauses (LSSA), the LOF 2000 Procedural Rules, the Special Compensation P&I Club (SCOPIC) Clause, the FONASBA Standard Liner & General Agency Agreement, the FONASBA Standard Port Agency Conditions, the FONASBA Sub-Agency Agreement, the ISSA Conditions of the International Ship Suppliers Association, the London and Antwerp insurance terms, the requirements for bills of lading and other transport documents set out in the ICC Uniform Customs and Practice for Documentary Credits (UCP 600) and the hundreds of other similar arrangements that have been developed and are

<sup>10</sup> See for example J-M Jacquet, P Delebecque and S Corneloup *Droit du commerce international* (Daloz Paris 2010) 22 ff, 34 ff.

<sup>11</sup> See CISG Vienna Convention art 9 and commentary on it in eg V Heuzé *La vente internationale de marchandises* (LGDJ Paris 2000) 94–96, 98.

<sup>12</sup> Principles of European Contract Law art 1:105.

<sup>13</sup> See art 1.9 and the associated preamble in International Institute for the Unification of Private Law *UNIDROIT Principles of International Commercial Contracts 2004* (Rome 2004) www.unidroit.org 25–26 and in International Institute for the Unification of Private Law *UNIDROIT Principles of International Commercial Contracts 2010* (Rome 2010) www.unidroit.org 26–27.

<sup>14</sup> See in this connection W Tetley *Marine Cargo Claims* vol I (Thomson Carswell Cowansville 2008) 190–92.

<sup>15</sup> See and compare Hamburg Rules arts 4.2(b)(ii) and 9.1.

<sup>16</sup> *ibid* arts 25.1(c), 43 and 44.

<sup>17</sup> *ibid* arts 3.4(b), 6.3, 6.4, 8.1(b), 10.2, 18.1(c), 19.4 and 19.5.

<sup>18</sup> International Regulations for the Prevention of Collisions at Sea art 2.

used at national and local levels. In addition, some written instruments of self-regulation refer the parties to usage and practice. For example, the INCOTERMS for international contracts of sale refer expressly to the custom of the port in connection with FOB delivery.

If they are widely applied, certain standard arrangements may over time become accepted as usage or custom. The Italian researcher Rimaboschi, for example, stresses the importance of '*usages maritimes*', which are often codified by professional organisations or the CMI. Such '*usages*' may even operate *contra legem*; they may be distinguished from '*pratiques d'affaires*' or '*usages conventionnels*', which acquire their legitimacy solely from the will of the contracting parties, but which may sometimes find themselves transformed into custom.<sup>19</sup>

In his recent doctoral dissertation on the *lex maritima* the German jurist Maurer points out that it is the thoroughgoing consultations between the various parties to standard charterparties within BIMCO that raises these texts to a level superior than that of general conditions of contract. The same author suggests that such forms of self-regulation based on broad consultation and acceptance be recognised by the legislator as a source of law and be exempt from the testing of their content by courts of law.<sup>20</sup> In more theoretical terms he regards maritime law as an excellent example of the 'transnationalisation' of the law.<sup>21</sup>

National systems of maritime law confirm the central position of self-regulation. For example, this is the case in Germany.<sup>22</sup> In maritime law in particular commercial usage plays an important role.<sup>23</sup> This may be based on the extensive application of certain general contractual conditions.<sup>24</sup> In English maritime law the customs of the trade in particular play a role in chartering and contracts for the carriage of goods.<sup>25</sup> There is a rich body of case law reaching back far into the past on the subject.<sup>26</sup> In French maritime law the binding force of both *usages conventionnels* and *coutumes* is upheld.<sup>27</sup> The literature of general commercial law has long drawn the attention of the reader to the particular importance of the customs of the port.<sup>28</sup> The essential role of self-regulation is also recognised by Dutch practitioners of maritime law. They record that standard arrangements and contracts, custom and usage supplement conventions and legislation and that international self-regulation is an essential contribution to uniformity.<sup>29</sup> The maritime law of the Soviet Union too recognised the importance of custom and port usages as a source of maritime law,<sup>30</sup> which is in itself a good indication of the important role of maritime self-regulation, regardless of the dominant political doctrine.

The above acquires an even more definite outline in the text of those national legislative codifications that explicitly designate custom and/or usage as a source of maritime law. This is the case, for example, for the Italian Shipping Code<sup>31</sup> that, unlike civil law, recognises practice *contra legem*, at least to the extent that such practice is not in breach of mandatory law or public policy. According to Italian commentators, the particular role of custom is another illustration of the

<sup>19</sup> See M Rimaboschi *Méthodes d'unification du droit maritime* vol I (EUT Trieste 2005) 148–54.

<sup>20</sup> A Maurer *Lex Maritima: Grundzüge eines transnationalen Seehandelsrechts* (Mohr Siebeck Tübingen 2012) 100–101.

<sup>21</sup> *ibid.*, and especially at 22 and 221.

<sup>22</sup> Clause 346 of the German *Handelsgesetzbuch* expressly acknowledges the value of practice. The former clause 514 of the *Handelsgesetzbuch* referred to good seamanship in connection with loading, discharging and stowage.

<sup>23</sup> R Herber *Seehandelsrecht* (Walter de Gruyter Berlin/New York 1999) 23.

<sup>24</sup> See H Wüstendörfer *Neuzeitliches Seehandelsrecht* (Verlag JCB Mohr Tübingen 1950) 23, 27.

<sup>25</sup> S C Boyd and others *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell London 2008) 12–14 (no A10).

<sup>26</sup> *ibid.*

<sup>27</sup> R Rodière, E du Pontavice *Droit maritime* (Daloz Paris 1997) 18 (no 18); see P Bonassies, C Scapel *Droit maritime* (LGDJ Paris 2010) 19 (24); M Remond-Gouilloud *Droit maritime* (Pedone Paris 1993) 14 (no 35); R Rodière *Traité général de droit maritime. Introduction. L'armement* (Daloz Paris 1972) 125–27 (no 73); compare the earlier A Desjardins *Introduction historique à l'étude du droit commercial maritime* (Pedone-Lauriel Paris 1890) 252.

<sup>28</sup> See C Lyon-Caen, C Renault *Traité de droit commercial* vol I (LGDJ Paris 1921) 90 (no 77).

<sup>29</sup> See in this respect K F Haak 'Uniform vervoerrecht: verwezenlijking en beperking' and G J Van der Ziel 'De jongste ontwikkelingen in het zeevervoer' both in F De Ly, K F Haak and W H van Boom (eds) *Eenvormig bedrijfsrecht: realiteit of utopie?* (Boom The Hague 2006) 183 at 192–93 and 203 at 213–18 respectively.

<sup>30</sup> M Mateesco *Le droit maritime soviétique face au droit occidental* (Pedone Paris 1966) 24 (no 2).

<sup>31</sup> *Codice della navigazione* art 1.

autonomy of the maritime law.<sup>32</sup> Chile's Maritime Code expressly acknowledges the value of customs by stating that they can be proven by experts.<sup>33</sup> The brand new Spanish Maritime Navigation Act explicitly refers to maritime usage and custom as a supplementary source of law, which takes priority over the interpretation of maritime law *per analogiam* and, in the last resort, the general civil law (*el Derecho común*).<sup>34</sup> This reproduces the wording of earlier enactments such as the Argentinean Navigation Act of 1973.<sup>35</sup> In the same vein, an increasing number of national maritime laws make no attempt to elaborate provisions on general average and limit themselves to declaring the York-Antwerp Rules to be applicable. Examples include the laws of Luxembourg,<sup>36</sup> the Netherlands,<sup>37</sup> Norway,<sup>38</sup> Switzerland<sup>39</sup> and, in the near future, probably Belgium too.<sup>40</sup>

### 3.3 General principles of maritime law

In legal doctrine the *lex maritima* is often based on, or otherwise linked to, the general principles of maritime law, which may often be derived from long-standing custom. The importance of the general principles of law is of course also recognised in general international trade law<sup>41</sup> and in national systems of contract law.

Émérigon, writing long ago, noted in the ancient maritime laws on which the *Ordonnance de la Marine* 1681 was based principles that arose from the nature of things, and which were true for all times and in all countries.<sup>42</sup> Bédaridde, who has already been referred to above, wrote that maritime law can only be understood in the light of the oldest customs and their further development, so that the law is learned from its principles.<sup>43</sup> Indeed, an understanding of the legal history of the origins of the typical rules of maritime law is of great importance. In this respect consider the Dutch pioneer of maritime law, Cleveringa, who said that the true content of a rule of maritime law could only be learnt by exploring its content from its history.<sup>44</sup> The link between general principles and custom is not to be denied. The French specialist in maritime law Desjardins suggested that the courts should take the international customs of maritime law into consideration.<sup>45</sup> And in the same sense Professor Tetley has written elsewhere:

<sup>32</sup> In this respect see S M Carbone, P Celle and M Lopez de Gonzalo *Il diritto marittimo* (G Giappichelli Editore Turin 2006) 1–3.

<sup>33</sup> See *Código de Comercio* art 825 and, in that connection, E Cornejo Fuller *Derecho Marítimo Chileno* (Eugenio Raul Cornejo Fuller Valparaiso 2003) 39–41.

<sup>34</sup> See *Ley 14/2014 de Navegación Marítima* art 2 on 'Fuentes e interpretación'.

<sup>35</sup> See Act No 20094 of 20 January 1973 art 1; J D Ray, G Arrola 'Argentina' in M Huybrechts, E Van Hooydonk (eds) *International Encyclopaedia of Laws: Transport Law* (Kluwer Law International Alphen aan den Rijn December 2007 (looseleaf)) 21 (no 31).

<sup>36</sup> *Loi du 9 novembre 1990 ayant pour objet la création d'un registre public maritime luxembourgeois* art 119.

<sup>37</sup> See *Burgerlijk Wetboek* art 8:613 and, for inland navigation, art 8:1022.

<sup>38</sup> Norwegian Maritime Code art 461.

<sup>39</sup> *Loi fédérale sur la navigation maritime sous pavillon suisse* art 122.

<sup>40</sup> See E Van Hooydonk *Achtste Blauwboek over de herziening van het Belgisch scheepvaartrecht* (Maklu Antwerp/Apeldoorn 2011) in particular art 8.43 of the Draft.

<sup>41</sup> See for example Jacquet, Delebecque and Corneloup (n 10) 28 ff, 42 ff.

<sup>42</sup> Old and stiffly formal, but all the more striking: '*Les anciennes lois maritimes sont les sources qui furent ouverts aux rédacteurs de l'Ordonnance, et dans lesquelles doivent puiser ceux qui veulent remonter aux principes. Elles renferment des règles d'autant plus sûres, qu'elles dérivent de la nature des choses. Ces règles font partie du droit des nations; elles sont par conséquent de tout âge et de tout pays*'. See P S Boulay-Paty *Traité des assurances et des contrats à la grosse d'Émérigon* vol I (Molliex Rennes 1827) ii (the same text in older publications)).

<sup>43</sup> And again a quotation from Bédaridde: '*Il faut donc, pour l'exacte appréciation de ces règles, interroger les coutumes des nations mêmes les plus anciennes, chez lesquelles la navigation fut en honneur; saisir le droit dans son principe, le suivre dans ses développements, et constater l'état où se trouvèrent les législateurs successivement appelés à le régir*'. J Bédaridde *Du commerce maritime* vol I (Larose/Achille Makaire Paris/Aix 1925) 4 (no 1).

<sup>44</sup> R P Cleveringa *Zeerecht* (W E J Tjeenk Willink Zwolle 1961) 10. The New Zealander Myburgh, who is less optimistic about the existence of a *lex maritima*, acknowledges that the historical tradition of maritime law provides at least a sound starting point for harmonization, an internationalist perspective and a (largely) mutually intelligible conceptual vocabulary for maritime lawyers from common law and civil law jurisdictions that is perhaps not as evident in other areas of law, and that it also fosters a strong expectation that uniformity in modern maritime law is both desirable and achievable. See Myburgh (n 3) 357.

<sup>45</sup> See Desjardins (n 27) 253; F A Querici *Diritto della navigazione* (Cedam Padua 1989) 26.

The general maritime law is a *ius commune*, is part of the *lex mercatoria* and is composed of the maritime customs, codes, conventions and practices from earliest times to the present, which have had no international boundaries and which exist in any particular jurisdiction unless limited or excluded by a particular statute.<sup>46</sup>

In his highly original manual of *Seehandelsrecht* published earlier in 1997 the German maritime law specialist Puttfarcken – another champion of the *lex maritima* – pointed out that the application of the principles of international maritime law in the absence of conventions or national laws did not mean that the maritime law of all countries ought to be compared. That would be utopian and also unnecessary because maritime law has long been a distillation of what he calls '*Institutionen: quellen- und länderübergreifenden Regelungskomplexen*', that is to say, institutes consisting of regulatory complexes which transcend sources and states.<sup>47</sup> Puttfarcken ends his overview with a brilliant characterisation of maritime law as an *Institutionenrecht*.

English judgments and French legislation are the richest sources for the institutes of maritime law, but they themselves are not these institutes. These are international and rise above the French, English or any other national maritime law. They are international, because their validity precedes the applicability criteria of national law and absorbs these. They are institutes because they themselves are not based on any grounds of applicability, be it legislation, a treaty or case law. Again, according to Puttfarcken, the institutes are formed and developed further by all 'factors' of maritime law, namely the usage of maritime trade, the practice of maritime law, the conditions of bills of lading, charterparties, letters of credit and insurance policies, court and arbitral rulings, the national legislative acts of all countries and the unifying conventions of organisations and conferences, legal doctrine and science and, finally, by the fundamental concepts, as determined by the technology of maritime transport, of justice and injustice and right and wrong.<sup>48</sup>

In 2005 Rimaboschi argued the case for a similar approach. Following Brunetti he posited that it was possible to deduce a number of '*principes généraux de droit maritime universellement reconnus*' from the repetition of certain concepts in maritime customs.<sup>49</sup> According to his argument nobody can deny that there are common, general principles of maritime law, which can be learnt from international and national codifications but which lead an independent existence beyond such codifications.<sup>50</sup> Like Querci, Rimaboschi speaks of the existence of an '*ordre juridique maritime général*', or general maritime juridical order.<sup>51</sup> In this view, maritime law is not simply formed from an assembly of abstract rules, but is the expression of a legal order that has an institutional basis in the social relations within the communities of shipping and ports.<sup>52</sup> Again echoing Querci, Rimaboschi argues that the foundation, the '*Grundnorm*' of the maritime legal regime lies in the postulate that international maritime trade should be made possible and promoted.<sup>53</sup> The theory of an '*ordre juridique maritime général*' contributes through scientific interpretation to the unification of maritime law.<sup>54</sup> Ultimately, therefore, legal research is made to bear considerable responsibility: the problem of divergent national interpretations of unifying conventions must be resolved with the help of legal doctrine, which must provide a uniform and unifying interpretation based on the general principles of maritime law.<sup>55</sup>

It would be wrong to dismiss the foregoing propositions as the wild imaginings of academics or professorial playfulness. To begin with, they are in full accordance with established American case

<sup>46</sup> See Tetley 'The general maritime law' (n 9) 472; see also W Tetley 'Nationalism in a mixed jurisdiction and the importance of language' (2003) 78 *Tulane Law Review* 175–218 <http://www.mcgill.ca/files/maritimelaw/nationalism.pdf>, point XII.3.

<sup>47</sup> H-J Puttfarcken *Seehandelsrecht* (Verlag Recht und Wirtschaft Heidelberg 1997) 408 (no 985).

<sup>48</sup> *ibid* 412–13 (nos 993 and 995).

<sup>49</sup> M Rimaboschi *Méthodes d'unification du droit maritime* vol I (EUT Trieste 2005) 161, 167.

<sup>50</sup> *ibid* 274.

<sup>51</sup> *ibid* 275.

<sup>52</sup> *ibid* 277–78.

<sup>53</sup> *ibid* 280.

<sup>54</sup> *ibid* 281–82.

<sup>55</sup> *ibid* 288, 306.

law. In its 1999 judgment in *RMS Titanic, Inc. v. Haver*, the United States Court of Appeals, Fourth Circuit, recalled the existence of common principles of the law of the seas, which precede the American Constitution and continue to enjoy considerable authority today:

The body of admiralty law referred to in Article III [of the US Constitution] did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution. It was the well-known and well-developed ‘venerable law of the sea’ which arose from the custom among ‘seafaring men, [ . . . ]’ and which enjoyed ‘international comity,’ [ . . . ]. Nations have applied this body of maritime law for 3,000 years or more. Although it would add little to recount the full history here, we note that codifications of the maritime law have been preserved from ancient Rhodes (900 B.C.E.), Rome (Justinian’s *Corpus Juris Civilis*) (533 C.E.), City of Trani (Italy) (1063), England (the Law of Oleron) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681), all articulating similar principles. And they all constitute a part of the continuing maritime tradition of the law of nations – the *jus gentium*.

The framers drafted Article III with this full body of maritime law clearly in mind. This is not to say that the Constitution recognized an overarching maritime law that was to bind United States courts. On the contrary, the Constitution conferred admiralty subject-matter jurisdiction on federal courts and, by implication, authorised the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction. As Chief Justice Marshall observed:

A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise. [ . . . ]

Since the time of the Founding Fathers, federal courts sitting in admiralty jurisdiction have steadfastly continued to acquiesce in this *jus gentium* governing maritime affairs. Indeed, the Supreme Court has time and again admonished that ‘courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality’. [ . . . ] This body of maritime law ‘has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations’. [ . . . ] Thus, when we say today that a case in admiralty is governed by the general maritime law, we speak through our own national sovereignty and thereby recognise and acquiesce in the time-honoured principles of the common law of the sea.<sup>56</sup>

What is more, several national codes refer expressly to the general principles of maritime law as a source of law. For example, the 1953 Swiss Federal Law on Maritime Navigation under the Swiss Flag provides:

Article 7. Power of interpretation and appraisal by the court

1 If Federal legislation, in particular this law, and the rules of international law to which it refers, do not contain any applicable provisions, the court shall rule in accordance with the general principles of maritime law. If such principles are lacking, it shall rule in accordance with the rules that it shall draw up as if acting as a legislator having regard for the legislation, the customs, the doctrine and jurisprudence of maritime States [ . . . ].<sup>57</sup>

<sup>56</sup> *RMS Titanic, Inc. v. Haver*, 171 F.3d 943, 960–961, 1999 AMC 1330 (4th Cir. 1999); see also T J Schoenbaum *Admiralty and Maritime Law* vol I (Thomson West St Paul MN 2004) 180–81 para 5-1, discussing the similar judgment from 1795 in *Thompson et al v the Ship Catharina* (Peters *Admiralty Decisions* vol 1 104) and K J Christensen ‘Of comity: *Aerospatiale as Lex Maritima*’ (2003) 2 *Loy. Mar. L.J.* 1–43.

<sup>57</sup> The official French version of the relevant provision of the *Loi fédérale sur la navigation maritime sous pavillon suisse* reads: *Article 7: Pouvoir d’interprétation et d’appréciation du juge: 1 Si la législation fédérale, notamment la présente loi, ainsi que les règles juridiques internationales auxquelles il est fait renvoi, ne contiennent pas de dispositions applicables, le juge prononce selon les principes généraux du droit maritime. Si ces principes font défaut, il prononce selon les règles qu’il établirait s’il avait à faire acte de législateur, en tenant compte de la législation, de la coutume, de la doctrine et de la jurisprudence des Etats maritimes.* [ . . . ].

This remarkable provision confirms the importance of the general principles of maritime law, the customs and the maritime law of other states, specifically the 'maritime States'. In 1964, Werner confirmed that in order to understand the Swiss legislation it is necessary to consider it as an application by the positive law of the country of much more general principles which, in general terms, are common to all seagoing nations.<sup>58</sup> It comes as no surprise to see Germany's Puttfarcken use the Swiss provision – typical of a small maritime country lacking national pretensions – as an illustration of his theory and place it in the spotlight.<sup>59</sup> In a recent outline of Swiss maritime law, the contemporary Swiss commentator von Ziegler similarly stressed the importance of the provision of the law referred to above.<sup>60</sup>

Nor should anybody think that other legislators have not approached maritime law in similar fashion. A striking and economically significant confirmation of the normative function of international maritime practice can be found in the 1992 Chinese Maritime Code:

Article 268

If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those contained in this Code, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People's Republic of China has announced reservations.

International practice may be applied to matters for which neither the relevant laws of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China contain any relevant provisions.

This reference to '[i]nternational practice' as a source of law is yet another confirmation of the markedly universal character of maritime law and the existence of common principles and/or global usages. It is expounded in Chinese legal doctrine as follows:

An international shipping practice is understood to be a practice in international shipping, which is followed by the people in their business of international shipping and the contents of which are reasonable, certain and notorious to the people in the area of international shipping. A typical example might be the York-Antwerp Rules that are universally followed in the adjustment of general average. Where provision to the contrary is contained in any applicable statutory law or international treaty or contained in the contract concluded by the parties concerned, an international shipping practice shall not be applied.<sup>61</sup>

A more or less comparable rule is to be found in the 2004 Croatian Maritime Code in a separate chapter dealing with shipping-related conflict of laws that bears the inscription 'The applicable law and exclusive jurisdiction of Courts in the Republic of Croatia for relations of international character'. Although it does not specifically refer to the principles of maritime law in particular, the following provision most certainly merits our attention:

Article 986

If this Code does not contain provisions on the law applicable for certain relations from this part of this Code, provisions and principles of this Code, provisions and principles of other laws that regulate relations of international character, principles of the legal system of the Republic of Croatia and generally accepted principles of the international private law shall apply accordingly to those relations.<sup>62</sup>

The 2011 preliminary draft of the Belgian Maritime Code explicitly sets out arrangements regarding the sources of maritime law and the law of inland navigation. This is inspired by a carefully

<sup>58</sup> A-R Werner *Traité de droit maritime général* (Librairie Droz Geneva 1964) 12 (no XI).

<sup>59</sup> Puttfarcken (n 47) 413 (no 995).

<sup>60</sup> A von Ziegler 'Helvetia and the sea', in *Scritti in onore di Francesco Berlingieri* (special edition of *Il diritto marittimo* 2010) II 1162 at 1172.

<sup>61</sup> H Zhengliang 'China', in Huybrechts and Van Hooydonk (eds) *International Encyclopaedia of Laws* (n 35) 64 (no 62).

<sup>62</sup> See 1994 Code art 1007.

considered vision that hopes to align Belgian maritime law with international commercial practice and allow self-regulation and the general principles of maritime law to play their part to the full.<sup>63</sup> It is, for example provided, as follows:

Article 2.4. Sources of maritime law

Specific sources of maritime law are:

- 1 the general principles of maritime law;
- 2 usages;
- 3 general conditions;
- 4 guidelines.<sup>64</sup>

The preliminary draft defines these key concepts as follows:

Article 2.1

- 1 'the general principles of maritime law': principles that underlie the order of maritime law and which are internationally recognized;
- 2 'usages': rules of maritime law that has become generally or almost generally accepted in the area of activity or place concerned;
- 3 'general conditions': a clause or a set of clauses recorded in writing in order to be included in an indeterminate number of maritime shipping contracts;
- 4 'guidelines': a non-binding rule of maritime law whose application is recommended by an organisation representative of service providers or experts.

The commentary on the articles refers to the Swiss example, and explains the notion of 'general principles of maritime law' as follows:

It is the task of case law and legal doctrine to work out these principles in greater detail, in particular by means of historic and comparative legal research. In Belgium such investigations have yet to be started. The elaboration of these principles is thus a new task, which has been imposed by the provision proposed here.<sup>65</sup>

The Belgian draft makes it clear in an extensive and fully argued section that the general principles of maritime law play a role in the interpretation of the code and of contracts of maritime law and when general conditions of contract are tested in the courts. One of the important innovations of the draft is an arrangement for the formal publication of instruments of self-regulation in the Belgian *Official Gazette*, which in turn has consequences regarding cognisance and consent, and the testing of the content of cognisance and consent in the courts. At the time of writing it is not known whether this arrangement will find its way into law. At the very least the Belgian Maritime Law Commission, which is consulting with every branch of the sector, seeks the inclusion of the legal recognition of the general principles and usages of maritime law in the future code. If this object is achieved the new Belgian code will uphold the view of international legal doctrine set out above and follow the example set by the Swiss, Chinese and Croatians.

### 3.4 Interim conclusion

It may be concluded from the foregoing remarks that the existence of a *lex maritima* consisting of a complex of internationally accepted rules of maritime law that may be traced in particular back to usage and general principles is widely, and even increasingly, subscribed to by legal doctrine. Moreover, this view finds support in numerous elements of positive law, including case law and recently adopted national codifications of maritime law. On the other hand, the statements of legal literature to which reference has been made seem to lack precision. Above all, there is no instrument

<sup>63</sup> See the general explanation in E Van Hooydonk *Eerste Blauwboek over de herziening van het Belgisch scheepvaartrecht* (Maklu Antwerp/Apeldoorn 2011) 168–74 (nos 1.206–1.207).

<sup>64</sup> See the text and detailed explanation in E Van Hooydonk *Tweede Blauwboek over de herziening van het Belgisch scheepvaartrecht* (Maklu Antwerp/Apeldoorn 2011).

<sup>65</sup> *ibid* 68–69 (no 2.90).

of practical use available in which this virtually mythical *lex maritima* with all its customs, usages and principles is clearly articulated.

#### 4. The case for an international restatement of the general principles of maritime law

##### 4.1 Potential form and content

A restatement of the general principles of maritime law would be of considerable utility. I conceive of it as an elementary – that is, concise and flexible – description of the typical concepts and rules of maritime law that may be regarded as being internationally accepted and common to most, if not all, legal systems and traditions. In other words, it is an exposition of the foundations of positive maritime law, such as those encountered in the conventions, national laws and the more specific and thematic self-regulating sources. This will be a search for the innermost core of maritime law, as it is expressed in the concrete, practical legal rules in daily use in the maritime and legal community. Perhaps the main difference between the proposed restatement of principles and previous unification efforts is that the former will have to explore and focus on common ground, rather than tackle issues of disagreement and divergence that require resolution. Ideally, the restatement endeavour should receive the support of the various international maritime institutions (IMO, CMI, BIMCO etc) and other maritime interest groups and organisations, with a view to winning acceptance of its legitimacy, authority and status.

It should also be made clear what the proposed restatement is *not* (and may not be). It may certainly not be allowed to have any intent of replacing existing unifying conventions, national maritime law and instruments of self-regulation, such as standard contracts. Nor may it be allowed to become a repetition or duplicate of international or European treaties or principles relating to general contract law. Even less is it to be a concise summary of existing maritime law, as it is supposed to be an attempt to sound out the shared, underlying and fundamental concepts of maritime law. For the same reason, the project will not result in a comprehensive, detailed systematisation of international maritime law in all its aspects. Finally, it is difficult to speak of general principles regarding matters that are the subject of international controversy.

The exact rules that should specifically be included in a restatement of the general principles of maritime law thus merit closer investigation and close consultations between experts and practitioners. It would therefore be premature to start summarising what the content of these rules might be. Even so, merely by way of contribution to an initial working hypothesis, the following non-exhaustive list of themes might be mentioned:

- the relationship of the principles to other law
- the recognition of self-regulation, including port custom, as source of the law
- the internationalising interpretation of conventions, legislation and contracts
- freedom of navigation
- freedom of maritime contract (subject to express mandatory rules)
- the fundamental distinguishing characteristics of the ship (in contrast among other things to a wreck)
- the application of the law of the flag to the property law status of the ship
- the function of the ship as an asset and centre of liabilities
- negligence as a maritime liability principle
- the perils of the sea and solidarity between interested parties as a rule of interpretation
- the general duty of care of contracting parties in maritime law ('due diligence')
- the essential characteristics of the various forms of chartering
- the essential characteristics of the bill of lading and the sea waybill
- the authority, powers and responsibility of the master of the ship
- the humanitarian treatment of crew and stowaways
- the advisory role of the pilot

- the role of the tug when providing towing assistance in port
- fault-based liability in the event of collision
- the principle of general average
- the principle of 'no cure no pay' in salvage law
- the right of limitation of liability and the loss of this right
- the duty of environmental care.

## 4.2 Potential uses

As we have seen above, Rimaboschi argued that the recognition and application of the general principles and rules of maritime law constitute a useful instrument for remedying the insufficiencies of the international unifying conventions.<sup>66</sup>

In my view a restatement of the principles of general maritime law would in the first place play a valuable interpretative and complementary role. It could be used by the courts to understand regulations and contracts, where necessary to complement them, and to appraise the legitimacy of the acts of parties (compare the *RMS Titanic* judgment referred to above).

Apart from this, a restatement of general principles could be a source of inspiration when developing new international and national rules and contract terms. Moreover, there would be nothing to stop law-makers and contracting parties from expressly referring and adhering to the principles – in a manner analogous to current provisions in maritime statutes (or draft statutes) in Argentina, Belgium, Chile, China, Croatia, Italy, Spain and Switzerland.

More generally, such a restatement would in effect make a major contribution to the international harmonisation of the law. As it would not be recorded in a multilateral convention, its chances of success would not be dependent on the caprice of government policy in the maritime countries. The fact of their being based on principle and their wide applicability would, in all likelihood, make it easier for them to find their way into daily legal practice than is the case for model laws and guidelines, which often have little or no real impact.

Restatement would also be an expression of the independence of maritime law from the law as practised on land, particularly in respect of general contract law. This is not a matter of boosting the morale of the practitioners of maritime law, but rather a very useful signal to the practitioners of other branches of the law that maritime law constitutes a specific whole, with its own concepts and rules and which cannot simply be subjected to general regulatory initiatives taken at the international, European or national level (see the criticism of European contract law and conflict of laws above). Furthermore, a restatement project led by the CMI – requiring periodical updating – would of course bolster the authority and influence of the latter organisation. Finally, the existence of a systematised set of principles could serve didactical and educational purposes.

## 4.3 Potential working procedure

Any restatement of the general principles of maritime law must be carried out thoroughly and with due care.

The first essential step would be a critical examination of the legal nature and basis of the general principles of maritime law. Relations to other sources of law, the general *lex mercatoria* and similar but wider restatement or codification initiatives would also merit study. The identification of the principles that must be considered would require particular attention and would have to be based on historical and comparative legal research, the identification of common principles underlying case law, legislation and standard contracts, a well designed questionnaire addressed to national maritime law associations, and consultations with professional organisations, the practitioners of

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<sup>66</sup> M Rimaboschi *Méthodes d'unification du droit maritime* vol III (EUT Trieste 2005) 172.

maritime law and entrepreneurs. Certain principles might also apply to inland navigation. The drafting of the principles would above all have to bear the essentials in mind yet avoid the trap of falling into vacuous and pointless commonplaces. As already mentioned, the desired set of principles would have to be submitted for the approval of the relevant organisations at various levels and then be distributed and promoted among the interested parties. To avoid confusion, let me reiterate that I do not intend the instrument to take the form of an international convention or a model law. Its chances of success, authority and impact will be only enhanced if it takes the shape of an informal expression of the common principles of maritime law, as presently understood by the world's leading maritime organisations.

## **5. Conclusion: a new wind in the sails of the endeavour to unify maritime law**

The existence of a *lex maritima* as a set of universally accepted maritime customs and general principles has long been upheld and this has increasingly been confirmed by contemporary researchers. The concept, nonetheless, lacks precision and is therefore of little practical use. An international restatement of the general principles of maritime law could be a way at long last of making practical use of the *lex maritima* theory and would, moreover, be a valuable contribution to the further harmonisation of maritime law.

It would offer a remedy to the current faltering of the progress of harmonisation through conventions and the threat of the disregard of the specific nature of the maritime sector by moves towards the harmonisation of the civil law and, in particular, the law of contract. An adequate restatement of the principles of maritime law would promote the satisfactory functioning of the maritime law. It could be the lubricant that smooths the path of new international and national regulatory initiatives, easing contract negotiation and dispute resolution, as well as the spread of knowledge. The authority of such a restatement would be much enhanced were it to receive the support of the various official and private international and European maritime institutions. It is to be hoped that it would give new life to the ancient yet beautiful and valuable endeavour to bring about the unification of maritime law.