

**Joint Conference of the Maritime Law Association of the United States and Instituto Iberoamericano de Derecho Marítimo, Fajardo, Puerto Rico**

**The Quest for Uniformity in Maritime Law**

[1] The topic of uniformity in maritime law is multifaceted. One could write a chapter of a book, if not a whole book, on this subject in order to address it properly. In the time allocated to me today, I obviously will not be able to cover it in such detail. Thus, I have chosen to briefly address the following points:

- i) The methods available to harmonize the law in a global context;
- ii) Monism v. dualism;
- iii) The unique nature of maritime law;
- iv) Le Comité Maritime International (CMI) as champion of uniformity in maritime law and how the evolution of its role reflects global changes.

**The Methods Available to Harmonize the Law in a Global Context**

[2] Historically, multilateral and bilateral conventions or treaties, so-called “hard law” tools, were used to harmonize or unify maritime law and other domestic commercial laws. These were the methods of choice for many years. Although still useful and relevant, they are no longer the preferred tools, given the lengthy process involved in their development and adoption and their lack of flexibility, particularly when they require amendment. That said, as the business and shipping communities have always

required and still require certainty and predictability, given the increased speed at which change occurs and the need for rapid adaptation, so-called “soft law” tools appear to have become the tools of choice.

[3] Where the intervention of national legislators is not necessarily required to implement desired changes, the business and shipping communities have realized that they can more quickly adopt guidelines, best practices or model clauses that can be incorporated into their contracts or even model agreements through organizations such as the International Chamber of Commerce (ICC), Baltic and International Maritime Council (BIMCO) or the CMI.

[4] The International Commercial Terms (INCOTERMS) and the Uniform Customs and Practice for Documentary Credits (UCP) are good examples of this practice, as are the standard Bill of Lading and Charter Party forms adopted by BIMCO throughout the years. As will be discussed in more detail later on, the CMI, although historically oriented toward the preparation of “hard law” tools, has also used “soft law” tools when time was of the essence or when guidelines or standardized clauses were felt to be sufficient, for example, the York Antwerp Rules, the Guidelines on Oil Pollution Damage (1994), the Uniform Rules for Sea Waybills (1990), and the Uniform Rules for Electronic Bills of Lading (1990).

[5] Intergovernmental organizations such as UNCITRAL also realized that harmonization can be fostered by providing its members with model laws, accompanied

most of the time with guides to their enactment (for example, the Model Law on Electronic Commerce (2000), the Model Law on Electronic Signatures (2001) or the Model Law on Cross-Border Insolvency (1997)). Once again, these tools offer more flexibility, leaving national legislators with the discretion to assess how and to what extent to harmonize their legislation, based on their own policies and their legal system. These tools have become even more important with the intervention of regional organizations such as the European Union (EU) and the Mercado Comùn Del Sur (MERCOSUR).<sup>1</sup> With the increased use of “soft law” tools, intergovernmental organizations have also had to become more actively involved in promoting their implementation.

[6] Other organizations such as UNIDROIT have been busy developing another type of “soft law” tool that will help revive what used to be a prime source of international law – *lex mercatoria* of which the *lex maritima* was a part – with projects such as the Unidroit *Principles of International Commercial Contract* (2010). These can be used to supplement successful “hard law” instruments such as, in this particular case, the United Nations Convention on Contracts for the International Sales of Goods (CISG).

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<sup>1</sup> Other types of influential regional agreements dealing with trade and the harmonization of business law include the North American Free Trade Agreement (NAFTA) and the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA).

### **Monism v. Dualism**

[7] In a monistic system, the simple act of ratifying<sup>2</sup> an international convention will suffice to incorporate it into the signatory state's domestic law (though not always as a self-executing instrument) upon its entering into force. Examples of such systems include the Netherlands, France, Spain and Argentina.

[8] In a dualistic system, the signature and ratification of a treaty have no direct impact on its application in the state's territory. To become part of the state's domestic law, domestic legislation must be adopted that incorporates the terms of the treaty.

[9] For example, in Canada, the power to enter into a treaty is not expressly referred to in the Canadian Constitution.<sup>3</sup> Rather, that power flows from the royal prerogative, which was inherited by the executive branch of the federal government. However, because Parliament is the paramount legislative authority, a treaty that is signed by the executive branch cannot become part of our domestic law until it is adopted by Parliament.<sup>4</sup> The division of powers in the Canadian Constitution entails that to become part of domestic law, the statute incorporating the terms of the treaty must be adopted by the legislature that has the power to legislate in respect of the matter at issue. For example, property and civil rights are within the sole jurisdiction of the provinces. Therefore, although the signature and ratification of a treaty dealing with these issues would be done by the federal government, the treaty would then have to be implemented

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<sup>2</sup> For simplicity, I have used the term "ratification" as including all the different means by which a state expresses its consent to be bound and which may include acceptance, approval or accession.

<sup>4</sup> In some cases, no new legislation is required because existing law conforms to the obligations set out in the international or bilateral treaty.

by legislation adopted in each and every one of the provinces to ensure that Canada is not in breach of its international obligations.

[10] While a treaty signed and ratified is not directly binding in Canada, it is presumed that legislation enacted federally or provincially is consistent with international law and particularly with Canada's international obligations (see *Daniels v. White*, [1968] S.C.R. 517 at page 541, *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at paragraph 74, *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at paragraphs 175-76, *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paragraph 53). Obviously, this is a rebuttable presumption and where domestic legislation is clear, there is no need to look at international law. While there is still some tension as to when domestic legislation will be viewed as ambiguous (before or after reviewing the international context), the rule of statutory interpretation now favoured by the Supreme Court of Canada is the modern principle that every legislative text is to be read in its entire context, and international law may be, in appropriate cases, an important part of the context in which the legislation was adopted and operates.

[11] The United States have a somewhat unique and particularly complex system to enter into treaties<sup>5</sup> and make them part of American law.<sup>6</sup> There appears to be three distinct methods for making international law part of domestic law in the United States.

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<sup>5</sup> Article II, Section 2 of the US Constitution stipulates that the President "shall have Power, by and with the Advice and Consent of the Senate", to make Treaties.

<sup>6</sup> I am indebted to Professor Hathaway of Yale Law School for her detailed and scholarly papers on the subject. See Oona A. Hathaway, "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States" (2008) 117 Yale Law Journal 1236 at 1239; "Presidential Power over International Law: Restoring the Balance" (2009) 119 Yale Law Journal 140.

[12] First, the Treaty Clause (based on Article II, Section 2 of the U.S. Constitution) requires a super majority in the Senate and totally bypasses the House of Representatives. It appears to be the better known of these methods. It was used by President Coolidge in 1927 to ratify the Hague Rules and resulted in the adoption of COGSA in 1936.

[13] The second path is the Congressional-Executive Agreement, which is now used in virtually every area of international law. This path only requires a simple majority in both houses of the United States Congress – the House of Representatives and the Senate.

[14] The third route is through sole-executive agreements made by the President. These used to cover only matters within the President's authority. Nowadays, they appear to cover a whole range of matters in which Congress has delegated authority to the President.

[15] U.S. law also provides for further distinction between self-executing treaties, which do not require additional legislative action and non self-executing treaties, which require the enactment of new laws.

[16] The complexity of the American system may well explain in part why so few maritime conventions have actually been signed and ratified by the American government. Most of you will be aware that the United States, who participated very actively in the drafting of the United Nations Convention on the Law of the Sea

(UNCLOS), have been trying since the Convention came into force in 1994 to get the Senate's approval. Despite support from both Republican and Democrat presidents, it has failed to gain acceptance. For example, in July 2012, thirty-four Republican senators expressly indicated that they would vote against ratification; this was sufficient to block adoption of the Convention. It is important to note however that the American government has expressly recognized that UNCLOS implements customary international law.

### **The Unique Nature of Maritime Law**

[17] The unique nature of maritime law is well illustrated by the comments of Justice Binnie of the Supreme Court of Canada in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907 at paragraph 25:

25 Shipping was one of the earliest activities that required international cooperation in the regulation of the rights and obligations of its participants. "For the cradle of our maritime law we must turn to the Mediterranean Sea where the sea commerce has had a continuous history for nearly five thousand years": Benedict on Admiralty (7th ed. (loose-leaf)), vol. 1, at p. 1-4; and see generally W. Tetley, *Maritime Liens and Claims* (2nd ed. 1998), at pp. 7-8. Maritime lawyers were forced to confront the need for rules to govern international commerce centuries before the "universalist approach" became a key issue in bankruptcy. Seamen, salvors, ship chandlers, repairers and other suppliers of essential goods and services to the ship in foreign ports required some assurance of payment. They looked to the ship. Common rules were essential because suppliers dealt with ships from many countries and the Masters found themselves in distant ports in an age when communications with ship owners were slow and unreliable. In maritime commerce, "rules of practical convenience commanding general assent are a virtual necessity": *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530, per Rand J., at p. 545. See also:

Q.N.S. Paper Co. v. Chartwell Shipping Ltd., [1989] 2 S.C.R. 683, at p. 695. Practicality required an in rem proceeding against the ship as distinguished from an in personam action against the shipowner. The need for predictability and uniformity was so strong that even the common law courts, ever protective of their own ways, ceded jurisdiction to specialized courts of admiralty applying a largely international law of maritime commerce. As Professor Tetley, *supra*, writes, at p. 56:

[M]aritime law as we know it today is civilian in nature, finding its source in the *lex maritima* (the law maritime) which is a part of the *lex mercatoria* (the law merchant). Maritime law was codified international law and, in England, it was apart from, and opposed to, its nearly mortal enemy, the common law.

[18] The importance of maritime law to support strong maritime commerce also explains why in the Canadian Constitution (and this is also true for the United States),<sup>7</sup> the power to legislate in respect of navigation and shipping and to appoint federal courts dealing with such law rests with the federal legislator rather than the provinces (or states). In exercising their admiralty and maritime law jurisdiction, our courts have had little difficulty applying domestic law with an eye as to how the rest of the world construes and applies the maritime conventions in force and the basic concepts of *lex maritima* incorporated in our domestic maritime law.

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<sup>7</sup> Although this is achieved slightly differently as Article III, Section 2, Clause 1 of the U.S. Constitution authorizes the Federal Courts to try “all Cases of admiralty and maritime jurisdiction”. Maritime and admiralty law “has strong roots in international custom. In extending judicial power to all cases of admiralty and maritime jurisdiction, the framers of the Constitution apparently had English admiralty practice in mind, itself based on the Civil law of Continental Europe”, James A.R. Nafziger, “The Evolving Role of Admiralty Courts in Litigation Related to its Historic Wreck”(2003) 44 *Harvard International Law Journal* 251 at 266 (see also William Blackstone, *Commentaries on the Laws of England* at page 67 “stating that the Laws of Nations is “universal law” that encompasses “mercantile questions such as bills of exchange and the likes”, “all marine causes”, “the law merchant” and “dispute relating to prices, to ship wreck, to hostages, and ransom bills”).



[19] It is also important to note that in Canada, “Canadian maritime law” is defined by the federal Parliament in sections 2 and 42 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 so that to adopt in bulk what was described by the courts as a body of national common law. This is quite a unique situation.

[20] This definition reads as follows:

2. (1) In this Act, [...]

“Canadian maritime law” means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament;

42. Canadian maritime law as it was immediately before June 1, 1971 continues subject to such changes therein as may be made by this Act or any other Act of Parliament.

[21] The Supreme Court of Canada made this clear in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (*Ordon Estate*), when after reviewing the most important cases defining the parameters of Canadian maritime law, our highest Court confirmed once and for all that our maritime law was a comprehensive body of law dealing with all claims in respect of maritime and admiralty matters that is uniform across the country and does not include either the legislation or the common law (or the civil law as the case may be) of any of the provinces. The decision also makes it clear that uniformity of maritime law is a fundamental value and that its importance is universal. It also confirms the Supreme

Court of Canada's willingness to adapt and evolve our non-written law to fit not only the national context, but also the international one. I particularly recommend the reading of paragraphs 71, 75 to 79, 89 and 90 of the *Ordon Estate* decision.

[22] In *Maritime Law as a Mixed Legal System*, (1999) 23 *Tulane Maritime Law Journal* 317, William Tetley, Q.C., a friend of many here and an esteemed titular member of the CMI, provides an interesting discussion of the theoretical and practical significance of the broad international sources of maritime law (see also William Tetley, *International Maritime and Admiralty Law* (Éditions Yvon Blais, 2002). Maritime lawyers around the world may not realize that the basic principles of salvage, general average and maintenance and cure, as well as the concept of *in rem* proceedings and maritime liens, have their roots in civil law.

[23] Given that in *Ordon Estate*, our Supreme Court was dealing with the rights of claimants after a fatal boating accident that occurred in the inland waters of Ontario, it is fitting to compare it with the reasoning of the U.S. Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375. In this very interesting decision, the U.S. Supreme Court was also dealing with a wrongful death arising from the unseaworthiness of a vessel in the inland waters of Florida. The Court had to determine whether Florida law applied and if not, what the content of American maritime law was. Justice Arlan delivering the opinion of the Court, stated at pages 386-387 that:

Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a

particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages...

These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea.

[24] The unique nature of maritime law and the fact that different rules may well apply depending on whether a situation involved a ship or a land-based structure or activity explains the importance of the recent U.S. decision of *Lozman v. City of Riviera Beach, Florida* discussed by my co-panelist, Daniel J. McDermott.

### **CMI, Champion of Uniformity and how the Evolution of its Role Reflects the Global Changes in the World**

[25] Mr. McDermott said a few words about the U.S. MLA's history and its mission. This rich history is intimately linked to that of its parent international organization, the CMI. The venerable age of the U.S. MLA shows that its members were involved in the activities of the CMI from the very beginning, as the CMI itself was formally created only two years before – in 1897, in Antwerp.

[26] To understand the present and to better forecast the future, one needs to be cognizant of the past. I therefore urge you to read the three interesting articles about the

CMI's history available on the website of the CMI.<sup>8</sup> However, as this history is so important, I will say a few words about it.

[27] As Frank J. Wiswall, a former vice-president of the CMI, notes in one of these articles, the second half of the 19<sup>th</sup> century was “an age of idealism in international law”. At that time, a group of jurists led by a Belgian politician and the International Law Association (ILA) believed that they could quickly prepare an international code of maritime law, relying on the uniform sources that informed the *lex maritima*. This was obviously an overly ambitious project. After failing to make any progress at two diplomatic conferences held in 1885 and 1888, those involved determined that they needed a group of commercial and legal experts to deal with these issues, one topic at a time. This led to the creation of the CMI in 1897. The first two topics it was tasked to address were collision and salvage, leading to the adoption of the first conventions on those subjects in 1910.

[28] Simultaneously to these projects, the law with respect to carriers' liability under bills of lading was becoming more and more fragmented. In reaction to an imbalance in power that enabled carriers to impose wide exclusions of liability for maritime claims, the United States had adopted the *Harter Act* in 1893. Other maritime nations responded by adopting various different legislations, leading to legal confusion that hindered international commerce.

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<sup>8</sup> [www.comitemaritime.org](http://www.comitemaritime.org)

[29] CMI decided to deal with this issue by drafting what would become known as the Hague Rules in 1924. Those Rules, as well as other maritime conventions prepared by the CMI in respect of limitation of liability, maritime liens and mortgages, and arrest of vessels, for example, eventually needed to be modified. The CMI kept a watching brief and proposed amended instruments from time to time to deal with the required changes. In respect of the carriage of goods by sea, this resulted in the adoption of the Hague-Visby Rules in 1968 and the SDR Protocol in December 1979.

[30] Between 1905 and December 1979, the CMI's *modus operandi* was to study the national laws on a given subject through its national associations, debating the best way to harmonize them through its international sub-committees and to then draft conventions that were submitted to the Belgian government who convened a diplomatic conference to adopt them. Despite the suspension of its activities during the two world wars, the CMI was able to produce an important body of maritime conventions despite the increasing number of independent states and the resulting loss of power of the leading maritime nations.

[31] After the creation of the United Nations, the International Maritime Organization (IMO) was set up in 1948 (it was then referred to as IMCO). The mandate of this intergovernmental body was to ensure safety and security of shipping. It was only as a result of the first accident involving major oil pollution (Torrey Canyon) in 1967 that the IMO's Legal Committee was created to develop a convention dealing with the issues raised by this incident. Since then, the IMO's Legal Committee has taken over the role of

calling diplomatic conferences to deal with maritime conventions. One must recall that the 1969 diplomatic conference organized to adopt the first Convention on Civil Liability for Oil Pollution Damage was chaired by Albert Lilar, the then president of the CMI, and that the CMI prepared a draft of the instrument.

[32] Since then, the CMI has maintained a close relationship with the IMO's Legal Committee. It was among the first organizations to receive consultative status, and a representative of CMI has attended almost all of the meetings of the Legal Committee since this recognition.

[33] As noted by Nigel Frawley, the Secretary General of the CMI, in one of the historical articles referred to earlier, it is not generally recognized that CMI was responsible for the first draft of the vast majority of maritime conventions adopted through the IMO's Legal Committee. The CMI also worked in collaboration with UNCTAD on the 1993 Conventions, the Convention on Maritime Liens and Mortgages, and the 1999 Convention on the Arrest of Ships.

[34] Except for the York Antwerp Rules and what is referred to as the Tokyo Rules in Albert Lilar's article on the CMI's website, the CMI focused on preparing "hard law" tools up to the mid-1980s. Many of the conventions it drafted were successfully adopted and improved the level of uniformity of maritime law. Even some of the conventions which have yet to come into force proved useful in that they prompted some countries to

adopt some of the proposed rules into their domestic law. Canada is a good example of this.

[35] As indicated by Dr. Rosalie T. Balkin, the former Director of Legal Affairs at the IMO, as recently as last month in Dublin at the Joint Seminar of the CMI and the Irish Maritime Law Association, CMI plays a crucial role in the development of maritime law as the IMO is ill-equipped to do the ground work and to draft international instruments. Dr. Balkin also noted that the political and economic context in which intergovernmental organizations such as the IMO operate means that important but difficult subjects are only really dealt with when a public outcry following a major incident demands action from their governments. Thus, it is still worthwhile to produce material such as the Draft Instrument on Places of Refuge.

[36] My co-panelist, Mr. McDermott mentioned the Rotterdam Rules in his presentation and I would like to say a few words about how these Rules came about.

[37] The uniformization achieved by the Hague Rules and the Hague-Visby Rules had deteriorated with the adoption of the Hamburg Rules by UNCTAD and UNCITRAL in 1978. To become universal, the rules embodied in a maritime convention must strike a proper balance between diverging interests. For many of the great trading nations, it was believed that the Hamburg Rules did not strike such a balance and that the price for uniformity was just too great.

[38] It is worth noting that Professor Rolf Herber, the past president of the Diplomatic Conference where the Hamburg Rules were adopted, wrote many years later that one of the mistakes in the preparation of these Rules was to neglect the CMI's opinion on the matter.<sup>9</sup>

[39] Today, more than ever, the international shipping community needs the certainty and predictability of uniform rules applicable to contracts for the carriage of goods by sea or partly by sea. This is not only because the rights and obligations traditionally covered by these conventions need to be updated (and they certainly do) or because a more balanced compromise is required to stop the fragmentation, but also because commercial practices have changed tremendously.

[40] In the Hamburg Rules, the drafters had tried to adapt to what was then a new practice – the use of sea waybills instead of bills of lading.<sup>10</sup> Today, what the community needs is to evolve to meet the challenges of electronic commerce and the use of information technology as well as to modernize the liability regime *per se*.

[41] Already, in 1990, the CMI had recognized the need to provide the industry, at least for an interim period, with contractual clauses such as the CMI Rules for Electronic Bills of Lading. This enabled various systems such as Bolero to develop. But this was always meant to be a temporary measure while best practices were developed in the field

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<sup>9</sup> Rolf Herber, "The Hamburg Rules: Origin and Need for the New Liability System, The Hamburg Rules: A Choice for the ECC?" International Colloquium of the European Institute of Maritime and Transport Law (Antwerp: 1994).

<sup>10</sup> The rejection of the Hamburg Rules by a very large portion of the shipping nations led to the adoption of the CMI Uniform Rules for Sea Waybills to bridge the gap.



to deal with the challenges arising from the diminishing role played by the traditional bill of lading.

[42] Nations are aware that legislation is required to pave the way to a truly paperless system. In Canada at least, there has been little appetite to tackle the issue without enlisting our trading partners. Despite the courts' willingness to construe existing law in a purposive manner, taking into account modern developments and realities, Canadian courts cannot avoid the impact of legislation such as the old *Bills of Lading Act*, R.S.C., 1927, c. 17, based on a similar statute in the UK, which among other things gave the right to sue under the bill of lading to the consignee, even if the consignee was not a party to the contract of carriage evidenced by the bill of lading.

[43] Bills of lading developed as documents of title in an era where possession or control of the goods meant ownership. With more sophisticated rules having been developed to determine ownership, the bill of lading's description as a document of title has become a misnomer: see, for example, *The Rafaela F.*, [2003] 2 Lloyd's Rep. 113 at 133 (CA) affirmed [2005] 1 Lloyd's Rep. 347 (H.L.). Nevertheless, there is a need to preserve the vast body of case law that has developed around the world in respect of the carriage of goods under bills of lading. Certain general principles that should continue to apply even in a paperless world should be codified. In my view, in many respects, the Rotterdam Rules are a re-statement of these principles. These Rules not only deal with electronic contracts of carriage but they also seek to include all that is necessary to enable

the international community to go further than simply replicate in the electronic world what used to be in the paper world. Times are changing and we must change with them.

[44] Due to the multiplication of independent nations (at the time the Hague Rules were adopted in 1924, there were only 55 countries in the League of Nations – this number has more than tripled in the United Nations today), achieving acceptable solutions for a majority of players is much more difficult and inevitably involves compromises. It is somewhat easy for scholars to say that they could have done better. But the process of adopting the text of conventions now requires the involvement of as many government representatives as possible. They are not all scholars, but they are well aware of their domestic policies and what they find acceptable. Once again, internationalizing the law necessarily requires compromises. This is a simple reality. Although, some may argue that uniformity is not desirable, this cannot be a valid argument in this specific field of the law. As the late Professor Kurt Grönfors said: “a good rule with world-wide application is better than a better rule opposed by a number of nations.”<sup>11</sup>

[45] UNCITRAL, this time with CMI’s help and close involvement throughout the process (as well as inclusion of many members of the national associations in their respective country’s delegations), has made an ultimate attempt at harmonizing the law in this crucial area. I personally do not believe that, at least in my lifetime, a similar attempt will be undertaken. Twenty-five countries have signed the Rotterdam Rules; two have ratified it (Spain and Togo). Many countries have already prepared drafts of domestic

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<sup>11</sup> K Grönfors “Why Not Independent Contractors?” (1964) *Journal of Business Law* 25 at 27.

legislation implementing these Rules while waiting for their main trading partners to adopt them. Countries such as Canada and China have made it known that they are prepared to adopt the Rules once the United States have done so. Mainly, this is because many of the provisions included in these Rules were adopted at the request of the American delegation. The American Ambassador strongly spoke in favour of the Rules at the signature session held in Rotterdam as did the U.S. delegation at the U.N.

[46] I congratulate the U.S. MLA for its consistent efforts in bringing the matter along. Among others, Chet Hooper and Michael Sturley are to be congratulated for their contribution to this common cause. I also wish to recognize the work of your recently deceased colleague, George Chandler, who participated in many of the discussions and sessions leading to the adoption of these Rules.

[47] Turning now to another topic, as I said earlier, CMI has already made good use of the so-called “soft law” tools. It has produced the following:

- Lisbon Rules (1987);<sup>12</sup>
- Uniform Rules on Sea Waybills (1990);
- The Rules for Electronic Bills of Lading (1990);
- Guidelines on Oil Pollution Damage (1994);
- A Model Law on Maritime Criminal Acts (2007);<sup>13</sup>

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<sup>12</sup> These rules deal with damages following a collision.

<sup>13</sup> The CMI drafted a model law on acts of piracy and maritime violence (2001), which because of the event of September 11, 2001 and other serious piracy incidents, had to be revised to cover more grounds. This document was prepared by a Joint International Working Group in collaboration with many other international organizations including BIMCO, INTERPOL, the International Maritime Bureau, the International Transport Workers Federation (ITF) and the International Union of Marine Insurance.

- Guidelines in respect of procedural Rules Relating to Limitation of Liability in Maritime Law (2008).<sup>14</sup>

[48] Today, the CMI's work in progress includes traditional and non-traditional topics such as unfair treatment of seafarers, cross-border insolvency, Arctic and Antarctic issues, and a draft international instrument dealing with the recognition of foreign judicial sales of ships.<sup>15</sup>

[49] There is so much going on in the CMI that I would need another hour to even briefly deal with it. Instead, I will comment on a couple of initiatives that are especially important in my view because they illustrate new ways in which the CMI can promote uniformity of maritime law in all its aspects. I remain available to answer questions regarding any of the other initiatives of the CMI following this presentation.

[50] The first is a joint project between the CMI, the International Chamber of Shipping (ICS) and the IMO to promote ratification of a number of maritime conventions adopted through the IMO's Legal Committee. An international sub-committee of the CMI has been asked to identify the reasons why the various states have failed to ratify these instruments. This can only be done through the NMLAs. This stage of the work is important to enable the sub-committee and our partners to identify where the problem is and potential solutions. This is especially so, given that the task of the sub-committee in collaboration with ICS and in consultation with the IMO is to recommend specific

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<sup>14</sup> These will be published as soon as the Notes and Commentaries accompanying them are completed.

<sup>15</sup> For a full list and details about the CMI Work in progress, please visit [www.comitemaritime.org](http://www.comitemaritime.org), as well as the website of the Dublin Seminar at [www.cmi2013dublin.com](http://www.cmi2013dublin.com).

actions to be taken by each partner. It may well be that presentations to government officials individually or through regional seminars hosted by the IMO will have to be organized. In that context, members of the NMLAs and the national chapters of ICS will be invited to get involved.

[51] Some may say that it is evident that when one has chosen to work on a “hard law” tool to achieve uniformity, one should also get involved in ensuring the adoption of these instruments. However, historically, CMI has not been particularly involved in such activity. This has started to change with the CMI being actively involved in promoting the Rotterdam Rules through seminars and meetings with some leading decision makers. With this new project, the CMI’s role will change significantly.

[52] The second project is in relation to building a better database of foreign case law interpreting maritime conventions. A bilingual jurist has been given the task to prepare over the next six months a definite business plan and to propose a workable system to keep the database up to date. This will involve, among other things, the participation of national courts and NMLAs.

[53] In my view, this database would be a very useful tool for lawyers and courts and would definitely promote uniformization of the law.

[54] To illustrate my point, I will use a recent example where I was personally involved. In *Canada Moon Shipping Co. v. Companhia Siderurgica Paulista-Cosipa*,

2013 AMC 319, 2012 FCA 284, the Federal Court of Appeal had to determine whether the term “contract for the carriage of goods” in the *Marine Liability Act*, S.C. 2001, c. 6, included “voyage charter parties”. This Canadian statute, among many other things, implements the Hague-Visby Rules and precludes the enforcement of an arbitration clause to oust the jurisdiction of the Canadian courts or arbitrators in Canada in defined instances (similar but not identical to article 22 of the Hamburg Rules). This Act did not define this expression and one of the parties argued that the definition in the annexes (the Hague-Visby and the Hamburg Rules) could not be used to limit its normal and customary meaning. An almost identical issue had arisen in Australia and there the Federal Court judge had decided that the provision prohibiting arbitration outside of Australia applied to “voyage charter parties”. The Federal Court of Appeal did not agree with the reasoning of the Australian Judge in that case, which in our view failed to consider the whole context.

[55] What is interesting is that the majority of the court sitting in appeal of that decision in Australia considered and followed our general approach (*Dampskibsselskabet Norden A/S v. Gladstone Civil Pty Ltd.*, [2013] FCAFC 107).

[56] It is evident that the judges of the Federal Court of Australia sitting on this appeal did not feel bound to follow the decision of my court. But it certainly informed their reflection and confirmed their own analysis. Such an approach is commonly accepted in Canada. However, the problem remains that to benefit from other courts’ cogent

reasoning, the lawyers and the judge must be in a position to easily identify the relevant decisions.

[57] I am conscious that in the context of construing the American Constitution, the use of foreign jurisprudence has been the subject of much controversy in various legal circles, including the U.S. Supreme Court. But this debate has nothing to do with what I am referring to here. It does not affect nor should it detract from the use of foreign case law to interpret maritime conventions that have either been incorporated into or are in line with the principles of American maritime law.

[58] Certainly, from my discussions with judges in China and in Dublin, there is much enthusiasm and support for this project. The Chinese courts have already agreed to work with the Chinese MLA to ensure that their relevant decisions are summarized and translated to facilitate their inclusion in the database.

[59] In my view, members of the judiciary should be made more aware of the work of the CMI and the importance of uniformization of maritime law. In fact, I believe that judges dealing with admiralty and maritime matters would benefit from discussing issues of common interest with judges in other jurisdictions. To that end, with the help of the CMI, I have organized small meetings with judges in Beijing and recently in Dublin. My personal goal is to have a larger session for judges in New York in 2016 with leading admiralty judges from all continents.

[60] To summarize:

- The CMI's efforts have had, in my view, a significant impact on the uniformization of maritime law;
- The CMI is still a necessary and important player on the international scene. Its expertise and experience mandate that it remain an active "proposer" of solutions to achieve uniformization of maritime law in all its aspects;
- The CMI is now involved in the monitoring and studying of a number of non-traditional topics in order to protect the interests of the shipping community and the integrity of maritime conventions;
- The CMI has become more involved in promoting implementation of maritime conventions as well as providing guidance to the maritime legal community through the use of "soft law" tools;
- The CMI recognizes that educating the next generation through the IMO International Maritime Law Institute (IMLI) is also an aspect of its mandate, as is ensuring that younger members of its national associations have the means to develop a network of like-minded jurists working toward uniformity of maritime law and to learn about substantive rules of



international maritime law (see the very interesting videos currently on the CMI website for use by younger members of the CMI).

### **The Future and its Challenges**

[61] There is no longer a tight compartmentalization between private and public maritime law. The international law-making arena is much more crowded and complex to navigate.

[62] We are not only facing continuously changing technology and business practices, but also difficult political and economic times. This is true for every one of us.

[63] Extra time and money are rare commodities. The practice of law has also changed and is more demanding than ever. Even this humble judge knows that her “daily bread” is not the application of maritime conventions.

[64] But members of the shipping community have traditionally been bold, courageous and adventurous.

[65] I can only hope that this will remain true for the next generation of jurists involved in maritime law. May they be as passionate and generous with their time and energy as those who preceded them.

[66] I am not a 19<sup>th</sup> century idealist, but I am a very passionate member of the maritime law community who, like so many within the CMI family, believes in giving their time to this worthy cause. The CMI cannot function without the support of its NMLAs. The CMI, in my view, deserves this support because it is a vibrant organization which has reinvented itself in the last 20 years in order to meet the changes in the global context in which it operates.<sup>16</sup>

[67] I would like to conclude by saying that CMI has been, is and will continue to be the champion of uniformity in maritime law. Its objectives can never be said to have been achieved, as in this changing world, there will always be something else to do. It is certainly never boring.

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<sup>16</sup> The president of the CMI, at the suggestion of the U.S. MLA, has also appointed an ad hoc committee chaired by Liz Burrell to look at the future and make recommendations as to the CMI's path forward.