THE CANADIAN MARITIME LAW ASSOCIATION AND THE FEDERAL COURT OF CANADA

"THE PROTOCOL PROCESS"

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THE PROTOCOL PROCESS

1. Introduction

The purpose of this paper is to explain how international maritime law conventions are developed, how Canada is involved in the process and how the results of that process are implemented in Canadian law. Because maritime transport is to a large extent an international business, shipowners, cargo owners and others involved in the business have always advocated the establishment of international rules to govern their business. International rules usually take the form of international conventions, the substance of which is then implemented in national legislation.

It is not surprising to note that maritime law can boast one of the oldest international organizations in modern times, the Comité Maritime International (CMI), which in just under two years time will celebrate its 100 anniversary. The Committee reflects the long-standing desire of the maritime community to develop uniform rules to govern the various aspects of maritime transport.

Composed of national associations of maritime law, such as the Canadian Maritime Law Association (CMLA), the object, according to Article 1 of the CMI constitution

> *"is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects".*

Since World War II a number of other international organizations have been established, principally under the auspices of the United Nations, aimed at developing uniform rules for international maritime transport. While the CMI is a private body, representing shipowners, insurers, cargo interests, port authorities, pilots, to name but a few, the new organizations are principally government driven organizations.

For present purposes, it is intended, first of all, to provide a brief description of the main international organizations that concern themselves with developing uniform international rules in the realm of maritime law. Some of these organizations, it will be seen, are exclusively devoted to this subject, while others will touch upon this subject from time to time. Then, it is intended to deal with the way Canada participates in the work of these organizations. Finally, the manner of implementing international conventions will be studied.

2. International Organizations

(a) CMI

This is an appropriate international organization to begin with since, over the years, the CMI has prepared many draft maritime law conventions which have

subsequently been adopted by representatives of governments at diplomatic conferences.

The first thing to note about this organization is that, in contrast to other organizations that will be discussed, it is exclusively devoted to the development of maritime law. It is also important to note that its membership is not confined to maritime lawyers but extends to a variety of other interests that are concerned with the promotion of uniform maritime law. Its governing bodies consist of an Assembly and Executive Council. Every four years the CMI hosts an international conference, attended by members of national maritime law associations, the aim of which is to adopt draft conventions. The details of such draft conventions have usually been developed in international sub-committees composed of members drawn from national associations, after the need and scope for the particular international instrument has been extensively explored in questionnaires to national maritime law associations.[1]

In the early days before the creation of the various governmental international organizations, to be discussed below, the diplomatic conferences for the adoption of CMI draft conventions were often convened by the Belgian government and

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[1]. Just to give some idea of the work of the CMI, the following is a sample of conventions for which the CMI did the preparatory work: The 1910 Salvage Convention, and its 1989 update, the Hague Rules of 1924, the 1968 Visby Rules, both instruments having to do with carriage of goods by sea, the 1969 Convention on Civil Liability for Oil Pollution Damage, and the 1976 Convention on Limitation of Liability for Maritime Claims.

held in Brussels[2]. In recent years the CMI has worked closely with the appropriate intergovernmental organization, most notably with the International Maritime Organization (IMO), who have then convened the necessary diplomatic conference.

(b) UNCITRAL

Next it is proposed to focus briefly on the United Nations Commission on International Trade Law (UNCITRAL). This organization was established in 1966 by the General Assembly of the United Nation[3] out of a recognition:

> *"that it would be desirable that the process of harmonization and unification of the law of international trade be substantively coordinated, systemized and accelerated ..."*[4]

Topics identified for its initial work program included international legislation on shipping, it being recognized that uniform rules governing many aspects of maritime transport would be an effective means of reducing and removing legal obstacles to the flow of international trade.

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[2]. It should be noted that the CMI has its headquaters in Antwerp, Belgium

[3]. General Assembly Resolution 2205 (XXI).

[4]. UNCITRAL, Second Edition, United Nations Publication, at 3.

The chief body of the organization is its Commission which holds annual sessions, alternatively in New York and Vienna, the latter city being where the organization has its seat and its secretariat. The Commission provides a report on its annual sessions to the United Nations General Assembly. The detailed work on selected topics is carried out in working groups composed of experts from member states. Such work may result in the adoption of draft conventions or model laws. In the former case they are then referred to diplomatic conference for adoption by states. Thereafter, the ratification process follows.

One of the most notable instruments prepared by this process in UNCITRAL pertaining to shipping legislation are the Hamburg Rules designed to replace the Hague/Visby Rules[5]. An example of a model law of particular significance for Canada is the code on commercial arbitration, adopted by UNCITRAL in 1985 and enacted in Canada, both at the federal and provincial level, in 1986.[6]

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[5]. The full title of this convention is the United Nations Convention on the Carriage of Goods by Sea, 1978,(Hamburg). The Hague Rules refer to the 1924 Convention on Rules relating to Bills of Lading and the Visby Rules to1968 Protocol to amend the 1924 Convention.

[6]. Commercial Arbitration Act, R.S.C., C-34.6. According to ss. 5(2) this Act applies "in relation to maritime and admiralty matters". For an interesting case regarding the application of this legislation, see Navigation Sonamar c. Algoma Steamships [1987] R.J.Q. 1346

(c) UNCTAD

The United Nations Conference on Trade and Development (UNCTAD), another organization set up by the UN, has a broader mandate than UNCITRAL and is, as its name clearly states, aimed at fostering international trade and development. It is thus concerned with all aspects of international trade and development, not just the legal aspects. It owes its origin to the first United Nations Conference on Trade and Development, held in 1964. Subsequently it became a permanent organ of the United Nations[7]. Its seat and secretariat is located in Geneva. Over the years this organization, too, has involved itself in developing international maritime law conventions[8].

In this instance, the organization is essentially inter-governmental, its work in various committees and sub-committees being carried out by government led delegations. The Organization was responsible for the development of the 1986 Convention on Conditions for Registration of Ships and, jointly with the International Maritime Organization (IMO), for the 1993 Convention on Maritime

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[7]. General Assembly Resolution 1995 (XIX). Since the initial conference, there have been six conferences in various parts of the world.

[8]. For an interesting discussion about the background leading to the formation of this organization, see Edgar Gold, Maritime Transport, The Evolution of International Marine Policy and Shipping Law, Lexington Books, 1981, at 275-284.

Liens and Mortgages. Currently, again in collaboration with the IMO, it is working on the revision of the 1952 Convention on the Arrest of Sea-going Ships.

(d) UNIDROIT

It may also be appropriate to mention this organization. The International Institute for the Unification of Private Law (UNIDROIT), headquartered in Rome, has from time to time focused on transport matters. This organization, in contrast to the two previous ones, was established under the auspices of the League of Nations. Although the Institute is supported by member states, it is not, strictly speaking, an inter-governmental organizations, since its Governing Council is composed of legal experts in various fields, some of whom may be government people, but also drawing heavily on professionals and academics.

The Institute devotes its energies to the development of international covnentions, uniform laws and model laws. It co-operates with other international bodies, such as the IMO and UNCITRAL. As in the case of the other bodies already mentioned, where the work of the Institute results in draft conventions, it is then necessary to convene a diplomatic conference, often in a member state, for the formal adoption of the Convention.[9]

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[9]. In 1988, for example, Canada hosted a UNIDROIT Conference on the International Convention on International Factoring and Financial Leasing.

(e) IMO

Over the last 25 years the Legal Committee of the International Maritime Organization (IMO) has assumed an important role in the development of international maritime law conventions. The IMO itself owes its origins to the 1948 Convention on the Inter-governmental Maritime Consultative Organization (IMCO) and plays a role in maritime transport similar to that of the International Civil Aviation Organization (ICAO) in air transport, headquartered in Montreal.

Both organizations were conceived at the end of World War II or in the immediate post war period. In the case of IMO it took states some ten years to bring the convention establishing the organization into force. This contrasts significantly with the speed with which ICAO was established, the Chicago Convention entering into force only three years after its adoption in 1944.[10]

It would go beyond the scope of this paper to speculate on the reasons for this difference in treatment. Perhaps it is sufficient for present purposes to note that the long waiting period in the case of the IMO reflected the reluctance of states, particularly maritime states, to accept such an organization. Hence, in the initial years of its existence, the emphasis was very much on the "consultative" nature of the organization aimed

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[10]. 1944 Convention on Civil Aviation (Chicago).

at providing governments with a forum in which to "consult" on the technical aspects of shipping, mainly to ensure safety of life at sea.[11]

In the wake of the "Torrey Canyon" incident in 1967, involving a Liberian registered tanker and causing extensive oil pollution damage off the coasts of the United Kingdom and France, it was recognized that something needed to be done to prevent or minimize such incidents. It was further recognized that a scheme of liability was required that would compensate victims of such pollution incidents. The IMO (or IMCO as it was known at the time) was given the mandate to deal with this matter on an urgent basis. The elaboration of the treaty instruments arising out of this incident really marks the beginning of the life of the Legal Committee of the IMO as a regular body. Since then the Committee has become one of the principal committees of the Organization[12].

Working in close consultation with the CMI, the Legal Committee has been responsible for developing a number of international law conventions and is now

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[11]. As a result of amendments to the IMO Convention in the mid 1970s the words "consultative" and "inter-governmental" were deleted and the organization because the International Maritime Organization (IMO) in the early '80s when those amendments came into force.

[12]. Up until the creation of the Legal Committee the legal work of the Organization had been carried out on an ad hoc basis by convening legal experts when they were needed. Besides the Legal Committee, there is the Maritime Safety Committee (MSC), the Marine Environment Protoection Committee (MEPC)and the Technical Co-operation Committee.

regarded as the principal organ, at an inter-governmental level, for the preparation of such conventions[13].

The Committee, working under the direction and supervision of the Assembly and Council, usually meets twice a year in regular sessions of one weeks duration. In addition to working on draft conventions, the Committee also acts as legal advisor to the organization and in that capacity will also spend time on legal questions referred to it by other bodies of the Organization.

3. The Process

Having described the principal international organizations that concern themselves with the development of international maritime law conventions, it is now proposed to describe briefly how the Canadian government and its experts participate in the work of these organizations. In the case of the CMI, being a private, non-governmental body, the principal contribution to the work of the Organization from Canada comes from the

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[13]. The following conventions have been prepared by the Legal Committee: in addition to the 1969 Convention on Civil Liability for Oil Pollution Damage prepared in response to the "Torrey Canyon" pollution incident, the Committee developed the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, the 1976 Convention on Limitation of Liability for Maritime Claims, the 1989 Convention on Salvage, the 1990 Protocol to the 1974 Convention on the Carriage of Passengers and their Luggage and the 1992 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention, referred to above. Earlier this year, the Committee completed its work on a draft Convention on Liability and Compensation for Damage caused by the Maritime Transport of Hazardous and Noxious Substances(HNS).

Canadian Maritime Law Association(CMLA). As in the case of the CMI, the detailed work on Canadian contributions to the various CMI projects are developed by sub-committees struck by the Executive Committee to study these projects. Such committees will usually focus on questionnaires received from the CMI probing the need and scope for international uniform rules in a particular area. The responses submitted will then form the basis for the Canadian position to guide Canadian delegates to meetings of international sub-committees.

Over the past 10 to 15 years government officials have actively participated in the work of these CMLA sub-committees, where appropriate, for the purpose of understanding projects being tackled by the CMI at an early, developmental stage. In the process of doing so, government policy, where relevant, can be considered at an early stage. As already noted, when the work of the CMI has been completed by the adoption of a draft convention or protocol, the instrument is then referred to one of the intergovernmental organizations, in recent years most frequently either to the IMO Legal Committee or UNCTAD, to prepare the way for the convening of the necessary diplomatic conference.

The final stage of any international negotiation of a new treaty is, as has already been noted, the convening of a diplomatic conference, either at the invitation of the international organization under whose auspices the draft treaty has been developed or at the invitation of a particular state that has agreed to host the conference.

Delegates to such conferences will usually be furnished with additional powers for the purpose of either adopting or authenticating the text of the treaty. In some cases the national delegation may have the power to bind the state that it represents by its signature, but in the Canadian context, at least as far as maritime law treaties are concerned, this is relatively rare since in most cases the implementation of the treaty will require a change in the law. Where the delegation has power to sign the treaty, as opposed to merely authenticate it, such signature is usually subject to ratification, acceptance, approval or acceptance[14].

As a particular project progresses through the intergovernmental organization, Canadian delegations, usually led by members of the Department of Justice acting on instructions of the Department of Transport, will of course be consulting with the private sector through various industry associations, as well as government departments that may have significant policy contributions to make.[15]

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[14]. For more detail as to what these and other expressions mean in relation to the conclusion of treaties, see Part II, Section 1 of the Vienna Convention on the Law of Treaties.

[15]. Depending on the subject matter, a variety of government departments may have an interest in a particular convention or protocol. In addition to Transport Canada, the Department of Fisheries and Oceans may have an interest, as well as Environment Canada, Foreign Affairs, Natural Resources, Industry and Finance. While Transport Canada is the lead department for IMO and UNCTAD, the Department of Justice is the lead department for UNCITRAL and UNIDROIT.

Government delegations frequently include private sector experts to assist the delegation in the negotiations. This is important not only at the developmental stage of a particular international instrument for example, in the Legal Committee of IMO, but also later when, after the adoption of the final instrument at the diplomatic conference, a decision has to be made as to whether it should be implemented with a view to Canada becoming a party to the instrument.

4. Implementation

When it comes to the implementation of international treaties, it might be appropriate to begin with a statement of two obvious legal facts, namely, that in Canada the making of international treaties is an executive act, while the performance of their obligations, if they entail alteration of existing domestic law, require legislative action[16]. Moreover, legislative authority in Canada is devided between Parliament and the provincial legislatures.

In the case of international maritime law treaties, these are implmented under the power of Parliament to legislate in the field of navigation and shipping[17]. One of the main vehicles for the implementation of maritime treaties has been the Canada Shipping Act. Baut this

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[16]. A-G. Can. v. A-G. Ont [1937] A.C. 326.

[17]. Section 91. 10, Constitution Act (1867).

is not the exclusive vehicle. The rules relating to the carriage of goods by water are regulated in the Carriage of Goods by Water Act. Should it ever be decided to implement the 1993 Convention on Maritime Liens and Mortgages, one option might be to do so by means of an amendment to the Federal Court Act.

An examination of the legislative practice in Canada suggests that various methods have been used to implement maritime treaties in Canada. In the case of the technical conventions governing the design, construction and operation of ships the Governor in Council has usually been given extensive regulation making powers to implement them.[18]

Maritime law treaties, on the other hand, have been given various kinds of treatment. Thus, conventions dealing with limitation of liability have tended to be implemented by substantive provisions in the legislation itself. This is the case, for example, for the rules governing the right of shipowners to limit their liability for maritime claims and the regime of liability and compensation for oil pollution damage.[19] By contrast, the text of the 1989 Salvage Convention has been appended to the legislation and the same method has been used in the case of the treaties on the carriage of goods by water.[20]

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[18]. See, for example, s.s. 314, 339, 339.1, 658, of the Canada Shipping Act which empower the Governor in Council to implement various maritime technical conventions.

[19]. See, for example, s.s. 574 - 584 for general limitation which follows, broadly speaking, the 1957 Convention on Limitation of Liability of Owners of Seagoing Ships, and s.s. 680 - 695 for the 1969 Convention on Civil Liability for Oil Pollution Damage.

[20]. R.S.C. (1985) C-27.

As a general proposition it is perhaps fair to observe that Canada has not had a very good record in the implementation of maritime law conventions. In some cases Canadian legislation reflects treaties that are out of date. This is the case, for example, in relation to the international conventions dealing with the right of shipowners and others to limit their liability for maritime claims, a fundamental principle of maritime law. The rules governing the carriage of goods by sea, too, have not kept pace with international developments.

In other instances where Canada has implemented and become party to international instruments, as, for example, in the case of the conventions governing liability and compensation for oil pollution damage, previously referred to, it has taken a long time to do so. The question is why is there this apparent reluctance to implement and become party to international maritime law conventions. A number of factors can be put forward for consideration.

In the first place, in spite of its long maritime history, Canada, without a deep sea fleet to speak of, has tended to view matters maritime from the point of view of a coastal and port state, interested, on the one hand, in cheap shipping services to move its considerable maritime trade, but also concerned in protecting its vast internal and coastal waters, frequented by large numbers of foreign flag ships, from actual or potential pollution caused by such ships. It has thus tended to concentrate on the technical conventions aimed at ensuring that ships are operated safely, both from the point of view safety of life

and protection of the marine environment. Maritime law conventions, on the other hand, have received less urgent attention.

But there are other factors to which attention must be drawn. Most maritime law conventions represent a balance between the interests of shipowners and those who use shipping services, namely the cargo interests. But those are not the only parties involved. Charterers, ship finance, ship suppliers, port authorities, canal operators, insurers and others may also have an interest. Shipowners, charterers and their insurers are interested, to the extent possible, to limit their exposure for damage that can be caused by their ships, while others, the potential victims, are concerned that remedies should be adequate and should not be unduly restricted.

In some instances, these conflicts are never satisfactorily resolved and so the process of implementation is delayed or never completed.

Last but not least and perhaps arising out of all of the above, is the lack of priority that maritime legislation enjoys on the parliamentary agenda. As already noted, the technical conventions haveing to do with safety of life at sea and protection of the marine environment seem to attract more attention. And so the process of achieving international uniformity in Canada has been a slow one, even though Canadian participation at the developmental stage is very active.

5. Conclusions

The move to uniform internationally agreed rules in maritime law, goes back a long time. It reflects the desire of those engaged in maritime transport to know what the rules are that govern their business regardless of the jurisdiction in which they operate. Variation in rules from jurisdiction to jurisdiction inevitably leads to added costs for one party or the other and encourages forum shopping.

While it is difficult to assess the precise amount of additional costs caused by the lack of internationally agreed rules in any particular case, in at least one class of cases, namely pollution cases, some comparisons based on actual Canadian experience can be made. In the "Nestucca" case (1989), involving a U.S. registered barge that caused damage both in U.S. and Canadian (B.C.) waters, expensive and time consuming litigation ensued in U.S. courts because there was no internationally agreed regime in place between the two countries.

In the "Rio Orinoco" incident (1990), on the other hand, involving an asphalt carrier registered in the Cayman Islands, costs and expenses arising out of measures to deal with the pollution were completely settled within 18 months by the International Oil Pollution Claims Fund (IOPC Fund), Canada being a member of that Fund. In this case the courts were hardly involved.

The existence of uniform rules has other advantages. In the intepretation of those rules courts can more readily look at the interpretation in other jurisdictions. This in itself leads to greater uniformity. Again in the case of oil pollution, the IOPC Fund has, over the 16 years of its existence, developed rules and practices that provide a high degree of uniformity in handling oil pollution damage claims which has inevitably lead to a reduction of costs for claimants.[21]

As a concluding observation, it can be said that maritime lawyers and the interests they represent, in developing uniform rules, to be applied world wide, are forerunners, early advocates, of an evolution that is rapidly spreading to other fields of law governing activities that have world wide implications. The cry for uniform rules has spread to many fields of legal endeavour and is likely to grow stronger. It can be observed in such diverse fields as, on the one hand, maritime law, and, on the other hand human rights, business law taxation and intellectual property, emphasizing the internationalization of human activities, the scope and consequences of which can often no longer be dealth with on a purely national basis. This has long been recognized and understood in maritime law.

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[21]. Even the IOPC Fund has not been able entirely to avoid litigation. Currently the Fund is caught up in major litigation in the "Haven" incident (1991) in Italy involving a number of questions. For details, see IOPC Fund Annual Report, 1994, at p.46-55.