CMI Arbitration Working Group Questionnaire
Response of Canadian Maritime Law Association

Q. 1 Would you encourage the CMI to play a role in maritime arbitration?

Unless there is a consensus among other national maritime law associations for such a role, Canada does not see such a need.

Q. 2 If the answer to point 1 is affirmative, to which extent would you consider the CMI should engage itself in this field?

The creation of a website accessible database or clearinghouse of information may be of assistance, if such information is not readily available from other sources and if there is an ongoing commitment to maintain the information completely and currently.

Q. 3 Would you support the three above areas of investigation or only some of them?

a) *Comparative Analysis*

The CMLA does not see the utility of the CMI making a comparative analysis of institutional rules or the availability of enforcement mechanisms. There is already an extensive literature on both topics. The New York Convention is widely adopted and any inconsistencies in its application may be more a matter of local law or policy in states in which enforcement is attempted. To the extent existing arbitral institutions may be perceived to be unresponsive to or unsuited for resolution of maritime disputes in certain industry sectors, institutional arbitration will develop in other centers as has happened, for example, in Singapore. For countries such as Canada which have adopted the Uncitral model law, it is open to contracting parties to agree to noninstitutional arbitration and the arbitral tribunal itself has jurisdiction to determine its own procedures.

b) *Arbitration for countries with suboptimal legal systems*

It is unclear whether this question is directed toward jurisdictions whose legal system is insufficiently supportive of arbitration or toward those who struggle to resolve disputes on their merits consistently with the rule of law. Because commercial maritime arbitration is voluntary, the parties will agree, or not, to arbitrate disputes based on the alternative legal and arbitral systems available to them and the balance of bargaining strength in perception of which body of law or arbitral system may appear to favour the interests of a particular party. In this context, it is difficult to see how the promotion of arbitration itself could address the larger systemic problem of some countries not meeting commonly accepted international standards for the administration of justice. A country with a suboptimal legal system is less likely to predictably enforce foreign arbitral awards. Facilitating purely domestic arbitrations would be straying too far from the CMI mandate.

i) *Facilitation of alternate methods of arbitration*

We refer to our comments above that market forces and the desire of particular countries to facilitate international commerce are already driving a diversity of arbitral institutions. To the extent some countries' domestic law does not recognize, or applies differing standards for recognition of, foreign arbitral awards or noninstitutional arbitral awards, it is difficult to see how the promotion or facilitation of arbitration by the CMI as a private non-governmental organization could encourage such countries to view maritime arbitrations conducted under the CMI's aegis more favourably.

ii) *Online dispute resolution*

The development of legal cognitive AI systems [1] may soon revolutionize dispute resolution and may be particularly suitable to high numerical data volume cases such as laytime/demurrage disputes and general average adjustment. The threshold question is which aspects of maritime ADR are so distinct from general commercial ADR as to warrant particular attention, lest the development of online and cognitive AI ADR systems overlook the needs of the maritime industry. Challenges such as the need for efficiently acquiring evidence from far-flung sources and enforcing awards are not particular to maritime disputes. Factors influencing ADR effectiveness or efficiency particular to the maritime context include the necessity for interim measures of protection such as arrest of vessels. However, such interim measures of protection to be immediately enforceable would necessarily need to be pursued through judicial process.

c) A model law for maritime arbitration

The CMLA does not see the utility of the CMI developing a fresh model law for maritime arbitration. Some existing institutional rules are not receptive to party autonomy in deciding arbitral procedures. If existing institutional arbitral procedures do not accommodate the needs or preferences of the parties, such institutional rules will be avoided and the parties should be able to draft suitable arbitration clauses. The existing Uncitral model law appears to be a reasonable framework on which to base maritime arbitration.

General Comments

The International Congress of Maritime Arbitrators, meeting every five years, is a well attended international forum for the discussion of maritime arbitration generally. There is a considerable body of academic and practitioner comment on maritime arbitration. What can the CMI usefully add?

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[1] For example, see http://www.itbusiness.ca/news/meet-ross-the-watson-powered-super-intelligent-attorney/53376 (accessed April 17, 2015)

The ICMA and other commentators have noted developing challenges to the existing maritime arbitral system.

- Inadequate foresight in contractual integration of arbitration clauses providing for arbitral fora or procedures which may be unsuitable for the parties' transactional or commercial needs

- The "judicialization" of arbitrations such that the process is moving along the continuum from the summary resolution of disputes by commercial persons toward the private court system model

- The increasing delay and expense of maritime arbitrations

- Inconsistencies between differing cultural norms in the negotiation of agreements and keeping of records on the one hand and arbitrators' expectations and application of rules of evidence on the other

If the national MLA responses show sufficient interest in the CMI moving into the maritime arbitral sphere, these could be useful areas to examine. The CMLA cautions that developing new institutional or rule-based systems may not be the most appropriate or productive responses to these challenges.

While it is commendable that the CMI would establish working groups on identified areas of interest, there are some higher-order structural and process challenges which should be the subject of examination by the existing working group on the future of the CMI. Changing client and commercial expectations, assisted by continuous electronic communication access have markedly increased the expected revenue working hours of transportation executives and lawyers. How is CMI participant volunteer time to be used most effectively? It would be an appropriate area of inquiry by the working group on the future of the CMI to examine whether the present methods of canvassing national MLAs concerning domestic application of maritime laws and then relying upon interaction within working groups to develop recommended responses is the most appropriate project development process into the future. There have been instances of academic interest and government policy development not sufficiently engaging certain chronic legal uncertainties affecting the shipping industry which hamper commercial development and challenge legal advisers to give predictive advice and opinions. The CMI could productively identify and address such gaps.

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Canadian Maritime Law Association