EDITORIAL

The renaissance of maritime codes – a need for international guidance?

In recent years several countries have taken initiatives to renovate their maritime laws. The trend is striking and merits consideration.

A few facts to start with: among the states that recently adopted new maritime codes we may mention France (2010), Germany (2013), Spain (2014) and Turkey (2011). New codifications are currently on the stocks in Belgium, Brazil, Japan and Poland and if we widen our chronological angle of vision to take in the past 15 years, we see that there has also been new legislation in Panama (2008), Slovenia (2001) and Vietnam (2005). Furthermore the final decade of the previous century saw the revamping of maritime legislation in China, Croatia, Denmark, Finland, the Netherlands, Norway, Russia, Sweden and the United Kingdom. Indeed this list of projects, whether finalized or ongoing, is almost certainly incomplete. Moreover we should take account of the fact that one country may establish a separate maritime law or legal code, while another might simply include the maritime component in a broader commercial or civil code, and that the thematic range diverges for example with or without the inclusion of public law.

Historically, it was France's *Great Ordinance of Marine* of August 1681 that marked the start of the national codification of maritime law. Hitherto recourse had to be made to custom and usage, case law and local regulation. The *Ordinance* was highly influential, and in 1807 was almost slavishly adopted into the *Code de Commerce* in Napoleonic France, which at the time was busy codifying virtually every aspect of the law. The second half of the nineteenth century became the golden age of the codification of maritime law in the industrialised world. It was during this period that the first maritime codes of countries such as Argentina, Belgium, Brazil, Chile, Colombia, Costa Rica, Denmark, the Dominican Republic, Ecuador, Egypt, Finland, Germany, Greece, Guatemala, Haiti, Italy, Japan, Mexico, the Netherlands, Nicaragua, Norway, Peru, Portugal, Romania, Spain, Sweden and Turkey were elaborated. Even though the period witnessed the rapid development of steam propulsion, liner shipping, fast data communications and massive increases in scale, the legislators of the era made abundant use of concepts from the era of sail and pre-industrial overseas trade. Many of the legal codes of the period were economically and technologically out of date by the time they were adopted. Was this, we may ask, an expression of the conservatism, inertia or the ivory tower mentality of the drafters or a combination of all these? Whatever the case, what strikes us today is that several of the new legislative projects seem to be aimed precisely at burying these nineteenth century codes. Out with casuistic articles about the power of the master to buy new sails and cordage and the liability of the owner when wine casks start to leak. Romance makes way for multi-modal shipping containers, chemicals, IT and automation. The status of the crewless merchant vessel may not be defined just yet, but the previous issue of this journal did in fact make a number of suggestions in that respect (*see* (2014) 20 JIML (6) 40–23).

At first sight the adjustment of maritime legislation to the modern realities of shipping and maritime trade would appear to be a good thing. Nonetheless, questions inevitably arise about the possible dangers of such a course. International trade and shipping benefit like no other from the uniformity of legal rules. The Comité Maritime International (CMI) – an organisation which Belgium's maritime lawyers may rightly be proud of – was established in 1897 with precisely the object of unifying maritime law and making it easier to do business throughout the world. However, at that time many industrial countries had already codified their national maritime law. As the underlying law had

sprung largely from a common legal tradition these codes showed considerable similarities – at least with respect to the basic concepts and fundamental rules. The differences had more to do with the technical implementation, for example the question of what claims could give rise to a lien on a ship.

The pressing question, though, is of what the maritime law landscape will look like once all the projects for new maritime codes both current and in preparation come into effect. In other words what is the trend of the content of these codes? Is there not a threat of their leading to a new divergence of legal rules? The danger seems to be more acute now that the high noon of the international harmonisation convention seems to be behind us. All too many conventions have not been ratified or have only come into effect after frustratingly long delays, while the availability of alternative versions of unifying conventions often leads to a new fragmentation of the law. A disintegrating corpus of treaties and a multiplicity of uncoordinated domestic laws with on top of these, in Europe at least, a growing collection of regional instruments might give rise to a situation that would make the founding fathers of the CMI turn in their graves. Will the campaign for unification soon have to start from scratch?

Perhaps the foregoing is just an unpleasant dream, and the reality is different, quite the reverse even. The Belgian Commission for Maritime Law has certainly painstakingly analysed the laws of neighbouring countries – all leading maritime countries with a diversity of maritime law traditions – in order to underpin each and every one of its proposals, and has moreover studied, when relevant, the approach of other countries with new or potentially interesting laws. Belgium's draft maritime code is internationally inspired and affirms the interpretation rule that its provisions should be construed in an international spirit. At the same time the code is modest. During the preparation of the code, it was observed that many other national regulators have developed highly idiosyncratic and sophisticated ideas and arrangements regarding the charterparty, and in doing so seem to have forgotten that the entire world uses standard contracts and ignores the various national laws with a certain degree of benevolent disdain. Moreover, these contracts refer systematically to English maritime law for the resolution of disputes, even though English statute law does not even mention the charterparty. Adopting their habitual low profile approach, the Belgians have restricted themselves to working out basic non-mandatory arrangements that paraphrase the most commonly encountered standard contracts (in simplified form). Should this law ever be applied, it will at least be concordant with international practice as far as the principles are concerned. By taking this step the Belgian reform commission acknowledges the widespread wish of the local shipping industry to make the new law conform to international current practice.

Whether and to what extent other drafters of new maritime legislation share this internationalist vision is an open question. During the preparatory work there were numerous useful exchanges and of course all parties concerned worked with their eyes firmly fixed on the most recent international developments. To us it seems that the task of following up the legislative trend is eminently suited to the CMI. During the 2014 CMI conference in Berlin, a special session was devoted to the study of a selection of national legislative initiatives. The question arises of whether the CMI, with its fundamental mission of promoting the unity of maritime law, might not start to play a more proactive role. As long ago as the early 1980s the CMI, acting in response to a request from the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), lent its assistance to the preparation of valuable guidelines for the drafting of the maritime legislation of the developing countries in the region concerned. Revised versions of these guidelines were subsequently published. Perhaps the CMI might consider the preparation of such guidelines for the entire, increasingly closer knit, world of today.

Professor Dr Eric Van Hooydonk
Lawyer in Antwerp
Research Professor at the University of Ghent
Chairman of the Belgian Commission for Maritime Law