TENTH CADWALLADER MEMORIAL LECTURE

LAW MAKING AND IMPLEMENTATION IN INTERNATIONALSHIPPING:
WHICH LAWS DO WE OBEY

Implementation and Conflict of Laws

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Mr Secretary General and Chairman of the event, Lord Mustill, Dr Aleka Mandaraka-Sheppard, Members of the Panel, Ladies and Gentlemen,

May I first of all express my thanks to the organizers of this event for the honour of the invitation to participate in it and to make a presentation on the issue of conflict of laws. I wish also to take the opportunity to congratulate IMO, not just for having managed to be around for 60 years, but especially for having so fully justified the expectations of those who battled to establish the organization, against concerted opposition from many fronts. I have had the privilege of spending a major part of my career with the Organization, so modesty constrains me from being too profuse in my praise of its accomplishments. However, I cannot but agree with the many people around the world who have repeatedly asserted that the IMO story has been, for the most part, a real success story. Some may not agree with the view that IMO is the most successful of the UN agencies, but few, if any can deny that it has been one of the high achieving organizations in its field. For this, thanks go to all who have helped to bring it to where it is now. In particular, praise is rightly due to the current members of the staff, so ably led and motivated by the Secretary General, my former esteemed colleague and very good friend, Tim Mitropoulos.

I have been asked to speak on the topic of Implementation and Conflict of Law. It is a very wide subject and I can only give a very cursory outline in this short statement. I shall, however, be ready to answer any questions that you may have during the subsequent discussions.

The shipping industry is international in almost all its aspects. As the IMO website puts it “the ownership and management chain surrounding any ship can embrace many countries and ships spend their economic life between different jurisdictions, often far from the county of registry”. For this reason, it has from time immemorial been recognized that the standards and requirements applicable to ships and shipping operations should, as far as possible, be uniform regardless of the country of ownership or registration of the ship or where the ship may be operating. Accordingly, these standards and requirement have in the main been adopted internationally and implemented largely through agreed procedures.

The law regulating international shipping is made up of the large body of international principles, regulations and standards contained in international instruments adopted between different States. These international instruments deal with the various areas of shipping. Some of them contain rules and standards on technical aspects, such as the design, construction and equipment of ships; measures for the operation of ships in order to prevent collisions at sea and other incidents that may cause pollution of the marine environment; standards for training and certification of persons who serve on ships; criteria for the tonnage measurement of ships and rules for the loading of different types of ships in different geographical and climatic conditions. There are also international instruments dealing with social matters, such as the protection and welfare of ships' personnel; commercial and contractual issues such as the rights and obligations of the owner of the ship vis a vis the persons who have interests in the cargoes carried on board the ships; and the liability of the shipowner to persons and entities who may suffer damage as a result of the activities of the ship. Some instruments establish procedures and mechanisms for compensation for victims of loss or damage from shipping operations. In addition there are instruments that set out the rights of the various persons and entities that perform services for the ship, including such services as salvage operations and pilotage of ships from, to and within ports. Other instruments deal with maritime mortgages and liens, with details on the rights of the holders of such mortgages and liens and the procedures for the arrest of ships to enforce the rights of third parties against ships or their owners.

Among the major international instruments for the regulation of shipping are the conventions, codes and recommendations of IMO as well as other instruments adopted elsewhere. They include the 1974 International Convention on the Safety of Life at Sea and its various amendments and related codes and recommendations, the 1973/78 International Convention on the Prevention of Marine Pollution from Ships (MARPOL) and its amendments and codes, the International Convention on the Prevention of Collisions at Sea, the International Convention on Training, Certification and Watch-keeping of Seafarers, the 1989 International Convention on Salvage, the 1992 Convention on Civil Liability for Oil Pollution Damage; The Hague/Visby Rules on Bills of Lading, the York Antwerp Rules on General Average, the 1996 Convention on Arrest of Ships and many others.

The provisions of the international instruments are, in almost all cases, supplemented by national laws enacted by individual states to apply and enforce the agreed principles and standards. National laws are necessary because effective implementation of the international principles and standards requires the active participation of states. For this purpose States utilize laws and regulations to ensure ships and shipping operations by persons under their authority or in areas within their jurisdiction follow the applicable procedures and apply the relevant standards. States are entitled to adopt and enforce their laws in their

different capacities, either as flag States or coastal States or Port States, and the criteria which qualify States as flag states, or coastal states or port states are set out internationally, mainly in the 1982 United Nations Convention on the Law of the Sea. This Convention sets out, among others, the conditions for determining the nationality of a ship. Article 91 accords to each State the right to fix the conditions for the grant of its nationality to ships, while article 94 sets out the duties of a flag state in respect of ships to which it has given the right to fly its flag. The Convention also delimits the circumstances in which a ship may be subject to the laws of particular states. For example, article 217 sets out the rights and obligations of the flag States to enforce national and international rules against ships of its nationality, regardless of where the ships may be, while articles 218 and 220 stipulate the circumstances in which port states and coastal states may exercise jurisdiction over foreign ships. For this and other purposes, the Convention defines and sets the limits of the various maritime zones and indicates the powers, rights and obligations of states with respect to ships in the zones, and the corresponding obligations and safeguards available to foreign ships in the respective zones. For instance, there are provisions on the extent of the territorial sea, and on the conditions under which foreign ships may exercise the right of innocent passage in the territorial sea. Similarly, there are provisions on the extent of the contiguous zone and the exclusive economic zone, and the powers which coastal states may exercise against foreign ships in those zones. There are also provisions relating to other special zones, such as straits used for international navigation and archipelagic waters.

The rights of states over shipping in the various maritime zones may be exercised by individual states acting on their own or may be exercised co-operatively by agreement between groups of states organized at regional or sub-regional levels. Thus for example, states in different regions of the world have established mechanisms that enable them to co-operate on the measures to enforce national and international rules and standards on maritime safety and prevention of marine pollution. These cooperative mechanisms have been established through Memoranda of Understanding under which the Administrations concerned agree to support each other in taking the measures that they are each entitled to take against foreign ships in ports or waters under their jurisdiction. This is done largely by co-ordinating the inspection of foreign ships within the ports of the participating states. Examples of these co-operative arrangements are the 1982 Paris Memorandum of Understanding, with at least 27 member administrations and the 1993 Tokyo Memorandum of Understanding for the Asia Pacific Region, with the participation of 18 administrations

Similarly, the members of the European Community have agreed to apply legislation and directives adopted by the Community in exercising their rights and discharging their responsibilities under the Convention on the Law of the Sea and other international instruments for the regulation of shipping.

But whether such rights are exercised individually or in a group, they are always subject to the limits and constraints imposed by the applicable international legal instruments or principles. In other words, a state which seeks to implement its national laws against a foreign ship may be obliged to have due regard to its obligations vis a vis the ship or its owner or the personnel on board the ship. Such obligations may arise under international law rules and regulations that are applicable to the state concerned in its relationships to the flag state of the ship or other states. Where a provision or requirement in the laws of a state or a group of states are in conflict with the corresponding provisions or requirements in an applicable international instrument the state or group of states concerned may be unable to apply their law to the ship, or it may be necessary to modify the application of the law in a way that does not violate rights of other states.

As is to be expected in an area where laws governing the same industry are made and enforced at national, regional and global levels, there are bound to be cases in which the laws established by one or other of the law-makers conflict or are not entirely compatible with the regulations or principles that are claimed to be equally applicable to the same ships or operations. In such a situation, three issues may need to be resolved. These are first, whether the contending rules and principles are necessarily applicable to the ship, person or incident and, second, whether there is in fact a conflict or incompatibility between the rules or principles involved. Where it is confirmed that the contending rules or principles are applicable to the same situation and do in fact conflict with each other, the third question will be to determine which of the conflicting rules should be accorded priority in the circumstances or, alternatively, whether it is possible to make an adaptation that would permit the application of both rules or standards without necessarily creating a conflict.

Conflict between international law principles and provisions of national law may occur with respect, inter alia, to standards on the design, construction, equipment and manning and operation of ships; rules and regulations for the protection and preservation of the marine environment; the penalties to be imposed on ships and their personnel for violations of national or international law requirements; the rights and obligations of the various persons and entities engaged in shipping operations; the duties and entitlements of parties to shipping contracts, such as shipowners, shipbuilders, ship mortgagees, cargo owners, ship personnel (seafarers), classification societies, port operators and governmental regulators. And conflict may occur with regard to issues of liability and compensation for loss or damage suffered as a result of activities of ships or incidents involving ships and their cargoes

There are many situations in which such conflict of laws will create real and practical problems. First, there is conflict of law where a law or requirement of a State is not compatible with a relevant international law principle, regulation or standard in an international instrument dealing with the same subject matter. For example, Article 21 of the Law of the Sea Convention gives power to the coastal

state to enact laws and regulations to regulate passage of foreign ships in its territorial seas. However, the article specifically states that the laws adopted by the State shall not apply to "the design, construction, manning or equipment of foreign ships unless (the national laws) are giving effect to generally accepted international rules or standards". Thus a national or regional law that seeks to impose on foreign ships design or construction standards that are higher than those in "generally accepted international rules or standards" might be considered to be invalid, although the same law may be entirely proper in so far as it is applied only to ships belonging to the State that passed the legislation. Thus when the United States enacted the Oil Pollution Act of 1990, concerns were expressed about the provision in the Act requiring double bottoms for all oil tankers. At the time it was argued that the requirement could not be applied to foreign tankers since it was stricter than the equivalent standard in the 1973/78 MARPOL Convention. In the end the 1990 Act did not create the conflict that was feared, first because the requirement for double bottoms was stated to become operative only after 2015 and, second, because the same requirement was eventually incorporated in the MARPOL Convention.

A similar conflict may arise concerning the penalties that may be imposed on ships and their personnel for violations of national or international law requirements or standards. Thus while certain provisions of the Law of the Sea Convention empower States to impose penalties on ships which violate national laws and international rules, some of these provisions contain restrictions on the penalties that may be imposed on the offending ship and its personnel. For example, article 73 of the Convention empowers a coastal state to take measures to ensure compliance with its laws and regulations for the conservation and management of the living resources of its exclusive economic zone, However, paragraph 3 of the same article declares that "coastal state penalties for the violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment". Further, paragraph 2 of that article provides that ships and crews arrested for violations of the coastal state laws and regulations "shall be promptly released upon the posting of reasonable bond or other security". Along the same lines, article 220, paragraph 7, of the Convention provides that ships detained for violations of national or international law for the prevention of marine pollution shall be released upon compliance with appropriate procedures for bonding or other appropriate financial security has been assured. Where the Convention applies, a national law (or a regional law) which imposes terms of imprisonment for such violations or which does not make provision for the release of an arrested ship and its crew may be said to be in conflict with the international law rules and principles and, as such, invalid.

A similar conflict arises where a national legislation seeks to empower a State to take measures within a maritime zone that it is not otherwise entitled to take under international law. An example of such a conflict was identified in the first

case before the International Tribunal on the Law of the Sea (the M/V Saiga Case) where the Tribunal declared that a law passed by the Republic of Guinea was not compatible with the Convention on the Law of the Sea. The Tribunal's conclusion was that "by applying its customs laws to a customs radius which includes part of the exclusive economic zone, Guinea acted in a manner contrary to the Convention". Accordingly, the Tribunal found that "the arrest and detention of the ship by virtue of the invalid law was contrary to the Convention.

Another situation in which a national law would have been in conflict with the corresponding provisions of an international instrument was when the 1990 Oil Pollution Act introduced maximum limits of the tanker owner's liability for oil pollution damage that were radically higher than the corresponding limits set in the relevant international instruments, These were the 1984 Convention on Civil Liability for Oil Pollution Damage and its supplementary convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (which eventually became the 1992 Convention on Civil Liability for Oil Pollution Damage and the 1992 Convention on the Establishment of an International Fund for Liability for Oil Pollution Damage). However, the conflict did not in fact materialize because the United States decided not to become a party to the 1984 Convention, and the subsequent 1992 Convention.

A conflict of law situation may also arise where a regulation or standard adopted in a particular region or sub-region is different from the corresponding regulation or standard in an international instrument that is applicable to all or some of the States of the region or sub-region. This was the issue with respect to the Directive on Ship-source pollution issued by the European Commission in 2005 (Directive 2005/35/EC). The challenge to the Directive, as mounted by organizations representing substantial interests in the maritime shipping sector, claimed that the Directive was not valid because it was in conflict with the relevant provisions of international instruments to which Community Member States were parties, one of which was actually binding on the European Community itself. The international instruments in question were the 1973/78 International Convention on the Prevention of Marine Pollution from Ships (MARPOL) and the 1982 Convention on the Law of the Sea (UNCLOS). In its judgment, issued in June 2008 the European Court of Justice stated that "the European Community institutions are bound by international agreements concluded by the community; and therefore, international treaties have primacy over secondary community legislation. Consequently, the validity of a directive, inter alia, may be affected by a failure to comply with international rules". With respect to the specific Directive the Court, following its examination of the facts and applicable law, came to the conclusion that it was not in a position to assess the validity of a European Community measure in the light of either the MARPOL Convention or the Convention on the Law of the Sea.

Yet a third situation of conflict of law arises is when a provision in one international instrument is different in a material particular from the corresponding

provision in another international instrument, and the two instruments are dealing with the same subject matter. An example of such conflict between international instruments dealing with the same subject matter is provided by the two global conventions relating to bills of lading i.e. the Hague Visby Rules as contained in the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and its Protocols of Amendment, on the one hand, and the Hamburg Rules as contained in the 1978 United Nations Convention on the Carriage of Goods by Sea. For instance, while under the Hague Visby Rules the period of liability of the ship for loss of or damage to goods carried as cargo extends from the time of delivery to the ship and the time of unloading from the ship (i.e. from tackle to tackle), the Hamburg Rules make the carrier responsible for damage or loss in the entire period during which the goods are in the charge of the carrier at the port of loading during the carriage and at the port of discharge. Further, the exemptions available to the carrier for damage or loss are more liberal under the Hague Visby Rules. Thus for example, while the Hague Visby Rules permit the carrier to escape liability for damage or loss which results from negligence in the navigation or management of the ship, no such exoneration would be available to the carrier under the Hamburg Rules. Of course, there is a conflict of law only where both the conflicting international instruments is applicable between the same states. To avoid such conflicts, states which have accepted the 1924 instrument do not accept the 1978 Convention or, if they do, they first denounce the earlier instrument.

In cases where it is agreed that there is a conflicts of law, the States involved will normally seek to resolve the conflict. For this purpose they may utilize the peaceful procedures for dispute settlement as provided for in the Charter of the United Nations or in the relevant international treaties and instruments. These peaceful procedures include negotiation, conciliation, and mediation. In appropriate cases, a dispute may be submitted to arbitration by persons chosen by the parties or to judicial settlement before an agreed court or tribunal with competent jurisdiction**.** The 1982 Convention on the Law of the Sea has established a dispute settlement mechanism involving the use of established judicial bodies as well as the non-judicial procedures provided for in the Charter of the United Nations. For the resolution of any particular case of conflict, the procedures that to be used will depend, among others, on the nature of the conflict, the instruments that are applicable to the States involved and the choices that the States in the dispute have made (or may make) as to how to resolve their disputes.