

B. THE MAKING OF INTERNATIONAL TRANSPORT CONVENTIONS

By RICHARD COOPER

As highlighted by the Executive Secretary of the Association elsewhere in this edition of the Journal, at the Tenth Annual General Meeting and Conference of the Association, Richard Cooper delivered a commentary, which is reproduced below, on the papers of two of the overseas speakers at the Conference: those of Frank Wiswall Jr on "International Regulation of Merchant Shipping" and W. Birch Reynardson on "C.M.I., its Past Achievements and Expectations".

It was interesting to find, somewhat surprisingly, how well the two papers interlocked. One was a review of past achievements with a sense of introspection and an optimistic plea for a role in future international affairs. The other was a review of past achievements with a sense of outgoing excess calling for an honest broker or professional handmaiden. The need, and future of C.M.I., lies in the professional middle ground.

Each paper emphasises the dominant part political social and economic aspirations now play in the creation of maritime conventions. In its basest terms there is a pronounced user/supplier split.

Asking an Australian to comment on two overseas papers of the type presently under consideration is to seek a statement of ambivalence. We are a user of shipping services yet we have a merchant marine. In a sense we are a developing country yet in UNCTAD we are grouped in Group B — the developed western economies. We are a young country in a region of developing countries with a desire to be seen to be supportive of the United Nations and its agencies. Yet we want to develop our trade in a tough international market and seek uniform and certain trading laws in that market. This ambivalence sometimes results in conflicting foreign affairs, trade, transport and legal priorities, overlapping with federal/State issues. To an impartial outside observer Australian performance may at times appear irrational and inconsistent: thus, it may be that transport policies predominate in the working sessions, legal refinement in the drafting sessions and mayhem in the plenary sessions at diplomatic conferences.

It is eight or nine years since I had direct contact with the United Nations' agencies. With that caveat I would like to comment on Dr Wiswall's paper using one convention — the UNCTAD Code of Conduct for Liner Conferences ("the UNCTAD Code") to illustrate the point.

Dr Wiswall's paper raises three issues:

1. Whether the proliferation of technical regulatory controls

are achievable and necessary and in consequence likely to achieve broadly based acceptance.

2. The need for consultation and a direct professional representation in delegation membership. He also raises the question — who is responsible for the present excess — the international or national bureaucrats?
3. The standard of draftsmanship of conventions.

The comments of the Minister for Transport yesterday indicate that Australia finds the technical convention easier to implement. This reflects a contemporary concern with the environment. Additionally, our merchant marine is small but technologically advanced. Therefore, the convention requirements are economically achievable, socially acceptable and industrially necessary. Those criteria do not apply in many developing countries. I suspect that many of the technical conventions are seen by developing countries as a means to exclude them from national merchant fleets, to price them out of the market for new tonnage and to exclude them from older tonnage on environmental and safety grounds. That is, a ploy to maintain the status quo of traditional suppliers/users of shipping services.

There is a desire in developing countries to gain access to world cargo tonnage and to develop an indigenous merchant marine. This desire lay behind the UNCTAD Code. It is also the user/supplier split which lead to the Hamburg Rules. Without some immediate user benefit it is difficult to obtain developing country support. For example, there was originally general resistance to the multimodal code. It was perceived as requiring an acceptance of containerised shipping with the attendant infrastructure costs and the social and economic costs of displacing waterside labour. It follows, in my view, that while I would not disagree with Dr Wiswall's first proposition as to the technical conventions I see more basic reasons for the patchy acceptance of some of these conventions.

In the UNCTAD Code deliberations Australia had an interesting position. Conference freight rate negotiations existed under the Restrictive Trade Practices Act 1971 (Cth). There was general industry support. We had some experience of the beast. However, the delegation were all government officers — one trade, one transport, two lawyers, one foreign affairs. Rightly or wrongly Group B had little faith in the confidentiality of the UNCTAD Secretariat. It was also seen as being too supportive of the Group of 77 position. Also, the position papers and drafts of the Group of 77 had a substantial Secretariat import. In consequence, Group B was serviced by the O.E.C.D. Secretariat which tended to reflect supplier views.

International bureaucrats, in my view, must be seen to be devoid of any partisan involvement. We all like to see tangible results for our labours. International bureaucrats are no different from the rest

of us. In UNCTAD, where the Group of 77 has a perpetual majority, there is a temptation to sponsor initiatives which are philosophically acceptable to that Group to get tangible results. The UNCTAD Code and the original revision of the Hague Rules were, in my opinion, such exercises. That is not to say that they should not have been undertaken. However, the first position papers and drafts produced by the Secretariat reflected a significant user bias which was productive of a negative attitude in supplier countries. I, therefore, disagree with Dr Wiswall that international bureaucrats are actively blameworthy for the excesses which have occurred. My other concern only indirectly involves the international bureaucrats: it concerns national career officers and it is the undue pressure for a consensus at all costs. Consensus is necessary but it is the "don't make waves" syndrome which is destructive of real consensus.

In Geneva everyone has to work together on a daily basis for the duration of their posting and the career diplomats simply have to live and work with the permanent secretariat. It is, therefore, important that delegations have a significant number of home based officers and some independent professional representation. For example, on the UNCTAD Code, the delegations from the United Kingdom and United States contained private lawyers and practical shipping operators. These people can afford to say harsh things when necessary, provide on the spot advice and then leave town. If a few prides are bruised in the process then so be it. But these people can identify the real issues and effects in a practical way, articulate rational interests and advise where the concessions can be made. If consensus results, it is a real consensus not the consensus of convenience.

When Australia and others split with Group B on the UNCTAD Code we found ourselves without any secretariat, we were a delegation without outside assistance and, when a double dissolution of the Australian Parliament was called shortly before the final plenary, we were left unsure as to whether we had an Australian policy. At various points, when agreement appeared possible, immediate decisions had to be made sometimes without an opportunity to consult with Canberra. These were times when an independent view was necessary to give a balanced judgment as to the choice of Australian policy options. Industry consultations which occur in Australia are a second best option. Therefore, I support Dr Wiswall's call for a direct professional role at conference level.

The problems of drafting conventions is that they are subject to certain limitations which, in my view, may prove insoluble.

- (a) The pristine working documents are torn to pieces at the conference plenary. Therefore, the original intergrated draft does not "hang together" in the end result.
- (b) Generally, documents are drafted by committee and the

language and structure are not the product of the logical working of a single draftsman.

- (c) There may be a desire to achieve a document of language reflective of a particular policy attitude.

For example, the UNCTAD Code contained provisions for mandatory conciliation which required model rules. Having recently come from private practice I was appointed the Group B spokesman in the drafting group. What do you call the originating documents? Having regard to the conciliatory nature of the proceedings I suggested "request". The Group of 77 insisted on "statement of claim". After a philosophical debate I had no chance of winning I conceded the point. What do you call the response? I thought "reply" was appropriate. I was advised that it would be "defence". This, I suggested, was the antithesis of conciliation proceedings between equal parties and had connotations of wrong doing and was advised that the practices of liner conferences were synonymous with wrong doing. Also, if I didn't agree they would walk out. Now, I had had some experience of judges taking a position and continually pressing for concessions. To concede had never done me any good in the long run so I dug in. They walked out and the boy from the bush was left wondering as to how he was going to explain this to Canberra. Thankfully my friends on the other side of the table returned and we finally, albeit bumpily, produced a document.

Similar problems occurred with the substantive terms of the Convention. Due to an apparent misunderstanding as to what I thought was agreed text, it became necessary to redraft key provisions in a back room as the Convention was being voted on clause by clause in plenary. The clauses were drafted in the early hours of the morning after many hours of plenary, they were drafted under pressure and, at times, acrimoniously. The final result was a compromise to achieve a text which could attract some Group B support because tonnage was necessary for entry into force. It is history that the original convention had to be reworked years later. The original drafting was bad in places. All I can plead is the circumstances of its creation. Nevertheless, I do not see those circumstances generally changing once one departs the area of technical conventions.

If I have said little about Mr Birch Reynardson's paper I do not mean thereby to show any disrespect. The fact is there is much in it with which I agree. The biggest problem for C.M.I. is one of identity. The developing countries have in the past seen it as representing shipowner interests — the Hague Rules; Limitation of Shipowners' Liability and the like. This work did not seem to have an immediate relevance and, indeed, was perceived as being onerous to user interests. The user countries have looked elsewhere to redress the balance and, depending on your viewpoint, there has been an over compensation.

For me, C.M.I. must broaden its base, be seen to cover discernible user areas of interest, it must sell itself to developing countries by its own direct initiatives. Its future must be in being accepted by all parties as professional, experienced, non-sectional.

If there is an answer to the drafting problem or the unreal expectations Dr Wiswall spoke of, it can only occur if, when the negotiations are under way and the consensus ultimately struck, somebody can properly articulate that agreement in language that reflects the true agreement, is precise and workable and is simply voted through in plenary. That is the challenge for C.M.I. Mr Birch Reynardson's paper gives some hope that C.M.I. sees the challenge and intends to rise to it.