APPLICATION OF LAW BY THE MARITIME ARBITRATION COMMISSION IN SETTLING DISPUTES*

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I. INTRODUCTION

Set up in Moscow more than 40 years ago, the Maritime Arbitration Commission (MAC) at the USSR Chamber of Commerce and Industry appears to be today the "oldest" among institutional arbitral bodies established in the socialist countries and at the same time one of the "oldest" among the maritime arbitration associations existing now in the world.

One may hardly doubt that emergence of the so-called specialized arbitrations which, in contrast to arbitrations of "general jurisdiction" open for adjudicating any dispute of a commercial character, are competent to deal with specific types of such disputes, for instance, with disputes relating to merchant navigation, manifests a remarkable aspect of the evolution of the institution of arbitration, reflecting in some sense the objective processes of diversification and specialization of commercial relations. The specialized arbitral tribunals which concentrate on the adjudication of a relatively restricted range of disputes and which accordingly have their personnel selected from specialists in a certain branch of commerce, present a plausible form of adapting the arbitration to the requirements of commercial practice, in particular by bringing it closer to the specifics of relationships which come within the competence

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* This article and the companion piece of Mr. G.A. Maslov, *infra* at 529 are papers which were presented at the Second International Congress of Maritime Arbitrators held in Athens, Greece, from March 6 to March 10, 1974. The Congress was organized by the Greek Productivity Centre under the patronage of the Minister of Culture and Science and the Minister of Mercantile Marine with the cooperation of the Union of Greek Shipowners, the Greek Chamber of Shipping, the Greek National Tourist Organization, and the Piraeus Marine Club. The Congress considered such issues and topics as (1) the regard paid to Law and Precedent in Maritime Arbitration Awards, (2) Time Charter-Speed and Consumption Warranties, (3) the concept of "Safe Ports," (4) Uniformity in Composition and Presentation of Maritime Arbitration Awards, (5) the cost of Arbitration and Arbitration fees, and (6) the establishment of closer ties with UNCITRAL, UNCITRAD, UNCTAD, the CMI and the Liner Conferences.

The First International Congress of Maritime Arbitrations was held in Moscow on October 5, 1972. It was an informal meeting of representatives from most Maritime Law and Shipping Departments of the Soviet Union.

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rationae materiae of a respective tribunal. In this connection a reference may be appropriate to the provisions on specialized arbitrations to be found in the Convention on Settlement by Arbitration of Civil Law Disputes Emerging from Relations of Economic, Scientific and Technological Cooperation, signed in Moscow on May 26, 1972 by the member countries of the Council of Mutual Economic Assistance (CMEA). Having attributed such disputes, as a principal rule, to the competence of arbitrations of "general jurisdiction,"[1] the said Convention at the same time provides in art. I, para. 2 that "in cases where for resolving particular types of disputes specialized arbitral tribunals are in existence in countries participants to this Convention, such disputes upon mutual consent of the parties involved shall be settled by these tribunals." Submission of respective disputes to the jurisdiction of specialized (maritime) arbitration is explicitly provided also by section II (2) of the "General Conditions of Mutual Supply of Sea-Going Tonnage and Foreign Trade Cargoes of the CMEA Member-Countries," approved by the CMEA Standing Committee on Transport in September 1972.

II. DISPUTE SETTLEMENT AND THE MAC

A. *Background Information*

The creation of the Maritime Arbitration Commission as the specialized institution for arbitration of maritime matters has provided adequate opportunities for impartial, competent, quick and inexpensive adjudication of civil law disputes pertaining to merchant navigation, both domestic and international.

1. *Competence and Range of Activities*

At present the competence *rationae materiae* of MAC embraces a wide range of the most typical "maritime" disputes, including disputes relating to salvage and collisions of ships, carriage of goods by sea, towage of and agency services to ships, marine insurance and damage to fishing vessels and their fishing gear, as well as some other types of disputes.

During more than forty years of its activities the Maritime Arbitration Commission has dealt with almost 2,500 cases, which in many cases involved shipowners, trade, insurance, agency and other

[1] By such arbitrations of "general jurisdiction" are understood foreign trade arbitration commissions or tribunals set up at Chambers of Commerce in the CMEA member-countries; for example, the Foreign Trade Arbitration Commission, established in 1932 at the USSR Chamber of Commerce and Industry, is such a commission.

firms from more than 50 countries, thereby having gained vast experience in resolving maritime disputes and deserved recognition among Soviet and foreign business circles associated with merchant shipping.

2. *Place in the Soviet System*

The Maritime Arbitration Commission does not come within the Union or Republican systems of judicial, administrative or any other state agencies, being a nongovernmental organization by its legal nature, which, like any other arbitration institution of this kind, provides its facilities for adjudication of certain disputes on the basis of a voluntary submission by the disputants concerned. Disputes referred to MAC are tried not by professional judges but by persons who are among 25 members of the Commission appointed for a term of one year by the Presidium of the USSR Chamber of Commerce and Industry from representatives of shipping, trade, and insurance organizations, and other persons possessing special knowledge in the sphere of merchant shipping, maritime law, and marine insurance. These persons, among whom there are lawyers, captains, and practioners of commercial professions, compose the board of members of the Commission from which each of the two parties in every individual case may choose a desired arbitrator.

3. *Procedural Rules*

The proceedings before MAC are governed not by the norms established by civil procedural legislation for ordinary courts, but by the provisions of the special "Statute" of MAC, enacted in a legislative manner, and by the "Rules of Procedure," approved on the basis of the said "Statute" by the Presidium of the Chamber, which, as noted also by foreign observers, set up a rational procedure preserving the principal classic phases of arbitration proceedings and being largely and reasonably simplified at the same time.

The arbitrators of the Maritime Arbitration Commission are entirely independent: Neither a state organ or an official of the state, nor any organization, including the USSR Chamber of Commerce and Industry, are entitled to instruct arbitrators how the dispute in question should be resolved.

At the same time the arbitrators charged with resolving individual disputes referred to the Maritime Arbitration Commission are not to act as representatives of one or the other party, including the party who selected the respective arbitrator.

According to the established procedure the arbitrators of MAC, in contrast to some foreign arbitrations, are not allowed to act as "amiable compositeurs", seeking to find a compromise acceptable to both parties or to settle the dispute *ex aequo et bono.*

B. *The Applicable Soviet Law*

1. *The Arbitrator's Duty*

When considering disputes submitted to them the arbitrators shall be governed by the terms and conditions of contract, the customs and laws applicable.

The arbitrators' duty to resolve disputes in accordance with laws ensues from art. 10 of the MAC "Statute," which provides a possibility to challenge MAC's awards before the highest judiciary of this country, *viz.*, before the Supreme Court of the USSR which may vacate the award and remand the case to the Maritime Arbitration Commission for new arbitration proceedings "if in the award of the Maritime Arbitration Commission the laws in force are contravened or wrongly applied."

2. *The USSR Merchant Shipping Code (MSC)*

Owing to the very nature of disputes referred to MAC, the primary importance among the legislative acts applied by the Commission belongs to the USSR Merchant Shipping Code (MSC). The Merchant Shipping Code now in force was promulgated by the Decree of the Presidium of Supreme Soviet of the USSR of September 17, 1968, and put into effect on October 1, 1968.[2] The code governs diverse relations arising out of merchant shipping, namely, "activities connected with the use of ships for carriage of goods, passengers, luggage and mail, for fishing and other maritime trades, for the extraction of useful minerals, for the performance of towage, icebreaking, and salvage operations, as well as for other economic, scientific, and cultural purposes."

3. *The MSC vis à vis International Treaties*

Reproducing the overall principles of the Soviet law with particular regard to the regulation of merchant shipping, art. 17 of the MSC provides that "where an international treaty to which the USSR is a party contains provisions different from those contained in this Code, the provisions of the international treaty shall apply." As an

[2] The enactment of this Code rendered inoperative the former 1929 USSR Code of Merchant Shipping which had been in force for almost 40 years.

illustration it may be noted that in most cases connected with salvage of or collisions between ships and involving a foreign party, the Maritime Arbitration Commission applied the provisions of the Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea[3] and the Convention of the Unification of Certain Rules of Law with Respect to Collisions Between Vessels.[4]

4. *Matters Not Covered by the MSC*

In accordance with art. 18 of the USSR Merchant Shipping Code, matters of civil law character which arise in connection with merchant shipping and which are not covered by the MSC shall be governed "by the provisions of the civil . . . legislation of the USSR and the Union Republics."

In the Soviet law the term "legislation" in the broad sense of this word[5] is meant to include both (1) the statutes proper, *i.e.*, the normative acts promulgated by the organs of state authority (for example the USSR Merchant Shipping Code of 1968 or "Fundamentals of Civil Legislation of the Union of SSR and Union Republics" of 1961 adopted by the Supreme Soviet of the USSR as the highest All-Union organ of state authority, or the Civil Codes of the 15 Union Republics, adopted by the Supreme Soviets of these Republics) and (2) the so called under-statutory acts (*podzakonnye akty*), introduced first of all by executive and administrative organs of the state on the basis or in implementation of statutes, or within the competence commissioned to them by a statute (for example, normative enactments by the USSR Council of Ministers, ministries, and other state agencies—in particular by the Ministry of Merchant Marine of the USSR).[6]

In contrast to some foreign countries, particularly those which follow the pattern of the "common law," in the Soviet Union a court decision in an individual case, even if made by the Supreme Court of the USSR, is not treated as a source of law or as a "precedent" to be followed in the future by other courts in all similar cases on pain of annulment of their decisions when otherwise made. In re-

[3] Sept. 23, 1910, 37 Stat. 1658, T.S. No. 576, 1 Bevans 780 (effective for United States Mar. 1, 1913).

[4] Sept. 23, 1910, 7 Martens Nouveau Recueil 3d. Ser. 711, 749.

[5] *See* FUNDAMENTALS OF CIVIL PROCEDURE OF THE USSR AND UNION REPUBLICS art. 12.

[6] For example, by virtue of article 5 of the 1968 MSC, the Ministry of the Merchant Marine of the USSR, subject to the MSC or to other acts of legislation in force or to international treaties to which the USSR is a party, shall, within its competence, issue rules, instructions, or regulations on the matters of merchant shipping.

solving a dispute, the Soviet court applies legal rules in force and does not introduce such rules.[7] Hence, a court decision has the "force of law" for the particular case for which it was made.

As to so-called court practice or jurisprudence, which is used to mean the generalized expression of a uniform line by judicial organs as evidenced by their decisions on disputes of a given type, it may be noted that the role of jurisprudence is very significant from the standpoint of ascertaining the meaning of the legislation in force and the correct application of the legislation. But insofar as court practice has not been fixed in a form of normative rules of general application but instead remains a sum of separate decisions on individual cases, such practice is not treated in the Soviet Union as a source of law.

C. *The MAC and Conflicts Rules*

In accordance with the law, *i.e.*, in cases provided for by the conflict rules of Soviet legislation, the Maritime Arbitration Commission applies foreign laws in resolving individual disputes. According to the penultimate part of art. 14 of the new MSC of 1968, the rights and duties of the parties in most typical contracts of merchant shipping, *viz.*, in a contract of carriage of goods by sea, a contract of carriage of a passenger by sea, a contract of chartering a ship for a time, a contract of marine towage and a contract of marine insurance, "shall be determined by the law of the place where the contract is concluded, unless otherwise agreed by the parties (Article 15 of this Code). The place of the conclusion of the contract shall be determined according to Soviet law."

By virtue of the quoted article, importance should be attached to the will of the parties themselves who, by common consent, may subject their contract rights and duties to the law of a specific country (*lex voluntatis*) irrespective of the place of the conclusion of the contract. Hence, the parties may subject their contract made abroad to Soviet law or may choose a foreign law when contracting in the USSR. The conflict rule referring to the law of the place where the contract is concluded (*lex loci contractus*) shall operate only in

[7] The court is not allowed to refuse to resolve a civil law dispute on the ground of lack or incompleteness of legislation governing such dispute. By virtue of article 12 of the FUNDAMENTALS OF CIVIL PROCEDURE OF THE USSR AND UNION REPUBLICS, the court in the absence of a law governing the conflict relationship shall apply the law governing the similar relationship or, lacking even such a law, shall proceed from general principles and from a sense of the Soviet legislation.

the case where the parties have made no agreement as to applicable law.

In one of the cases recently tried by MAC, (under the claim of the Sudanese firm El Shahada Trading Corporation against the Black Sea Steamship Line), the charter-party signed by the parties in Khartoum in December 1968 did not contain any provision about applicable law. However, the bills of lading issued by the carrier to the said firm upon completion of loading incorporated a clause on the applicability of the Merchant Shipping Code of the USSR. Relying on that clause and being governed by art. 120[8] and art. 14 of MSC, the Maritime Arbitration Commission held that the Soviet law should apply on the basis of the parties' agreement in the case under consideration.

At the same time art. 15 of MSC, referred to in the quoted text of art. 14, provides that "the inclusion in contracts covered by this Code of clauses about the application of foreign laws and customs of merchant shipping shall be allowed where the parties may, in accordance with this Code, depart from its provisions." Virtually the same limitation also had been provided in art. 5 of the MSC of 1929, interpreted in the arbitration and court decisions in the sense that the parties' selection of a foreign law may not remove the application of the few but important mandatory provisions of the Code—the departure from which by way of an agreement of the parties had been explicitly forbidden. That was the case, for example, with the mandatory provisions of the MSC of 1929 relating to the seaworthiness of a vessel, the principles of carrier's responsibility for cargo, the abandon of a vessel or cargo in the terms of marine insurance, and some other matters (now arts. 129, 160, 226, etc., of the MSC of 1968). For instance, in the case under the claim of the Cuban foreign trade enterprise Alimport against the Black Sea Steamship Line for shortage of the cargo of wheat brought by *S.S. Balashikha* from the Canadian port of Sorel to Cuba, it was found that the bills of lading under which the carriage had been performed provided for application of the Canadian Act of Water Carriage of 1936.[9] Relying on art. 5 of the MSC of 1929, the Maritime Arbitration Commission in its award of January 12, 1968 held:

> that in considering the present case it was appropriate, in conform-

[8] By the terms of article 120 of the MSC, "the existence and content of the contract (of carriage of goods by sea) may be proved by the charter-party, the bill of lading, or other written evidence."

[9] Water Carriage of Goods Act of 1936, 1 Ed. VIII, c. 49 (Can.).

> ity with the clause included in para. 1 of the bills of lading, to be guided by the said Canadian Act of 1936 save for the exceptions which might ensue from Art. 5 of the Code but which did not matter, in the Commission's opinion, for that particular dispute.

As such, the parties' agreement on selecting an applicable law does not need to be inserted, in the form of a specific clause, into the very text of the contract at the time of its conclusion. Such an agreement may be made by the parties in many different ways. For instance, in the case under the claim of the Cuban enterprise Alimport against the Baltic Steamship Line, which dealt with the *S.S. Krasnogvardeisk*, the bill of lading concerned contained a reference to Canadian legislation. However, in the course of the proceedings before MAC both parties relied on the rules of the USSR Merchant Shipping Code in their written and oral arguments. In this connection, the Maritime Arbitration Commission, in its award of November 4, 1969, held "that existence of a provision, written in the text of contract, about application of a specific law shall not preclude the parties to subsequently change such provision by common consent, having agreed for application of another law, in this case it being the USSR Merchant Shipping Code."

It should be stressed also that the Soviet court and arbitration practice, including the practice of the MAC, does not adhere to the principle *qui eligit judicem eligit jus*, whereby the contractual submission of a dispute to the local jurisdiction is treated as implied consent of the parties for application of the substantive law of the country where the court or arbitration panel sits.

Article 14 of the MSC also lays down some other conflict rules in regard to specific matters connected with civil law relationships which arise in the field of commercial navigation and which may become a subject matter to be considered by the MAC. In particular, by virtue of para. 11 of article 14, the code's provisions on limitation of actions (arts. 305-308) shall apply in those cases where the relevant relations (pertaining to carriage of goods, collisions between vessels, etc.) are themselves governed by the code. As to the provisions contained in Chapter XVI of the MSC ("Limitation of Shipowner's Liability"), the same must apply, pursuant to art. 14, para. 8 of the code, "to shipowners whose ships sail under the State Flag of the USSR."

In the course of proceedings before the MAC, references not infrequently are made to the customs of merchant shipping. For example, in cases of collisions between vessels the Maritime Arbitration

Commission, when appraising maneuvers of the vessels concerned, shall take into consideration the requirements of "good maritime practice." The given example virtually represents a particular case of application of the general rule set up in art. 33 of the "Fundamentals of Civil Legislation" and provides that, in the absence of a specific normative or contractual provision, obligations shall be performed "in accordance with requirements usually made." Explicit references to the application of customs are also found in some articles of the Merchant Shipping Code (arts. 134, 135, 151 and others).

D. *The MAC's Application of Customs of a Port*

In some cases dealt with by MAC a provision on application of customs was included by the parties in their contracts and the task of the Commission consisted in ascertaining the actual meaning of a custom. Noteworthy in this regard is the award of MAC in the case under the claim of the French firm *Societe Professionelle de Papiers de Press* against the owners of the Swedish *S.S. Atlant Bris* to recover dispatch money for hastening the discharge in Rouen. According to the contract conditions, the laytime allowed for discharge should have been calculated for some ports at fixed rates and for Rouen "in accordance with the customs of the port." In support of his claim the claimant referred to the discharging rates fixed in the Collection of Customs published by the Rouen Chamber of Commerce in 1925, and asserted that the shipowners, when they concluded the contract, knew or ought to have known that according to established French procedure, the port customs were, above all, those rules laid down in collections of customs drawn up by the local Chamber of Commerce, and that these remained in force until replaced by new ones. From his side, the respondent pleaded that by the time of the conclusion of the contract the above rates had considerably increased. The evidence produced by the respondent was rejected by the Maritime Arbitration Commission as not convincing. Apart from that the Commission, in its award of May 17, 1961, held that "since there existed in the port officially determined customs contained for instance, in a Collection of Customs, published by the local Chamber of Commerce or other competent organization, the parties' reference, in the contract of carriage, to "the customs of the port," like the clause to be found in para. 17 of the present charter-party, must be understood as referring to the officially determined customs, no matter to which degree such a custom

reflects the actual situation existing at each particular moment. A different understanding of the parties should have been explicitly shown in their contract.

III. CONCLUSION

The general observations made above to the effect that court decisions in the Soviet Union are not considered as a source of law, fully apply to awards rendered by the Maritime Arbitration Commission. No award rendered by MAC shall have the force of "precedent" which would be binding upon its arbitrators in resolving other disputes in the future.

Notwithstanding what was said above, the considerable importance which is enjoyed in fact by the practice of MAC is being formed as the result of resolving conflict issues capable of arising in various cases. The formation of such practice is a natural tendency and undoubted advantage of institutional arbitration as compared with ad hoc arbitration.

Without having the character of legal precedent, the practice of MAC serves, nevertheless, as certain guidelines or orientation for those organizations and persons who enter into various relationships in connection with merchant navigation.

First of all, MAC awards contain material which reveals the causes of the emergence of disputes and consequently allows such disputes to be avoided in the future. What is even more important, MAC awards not infrequently provide an interpretation of specific terms and conditions of contracts made in merchant navigation and hence contribute to ascertaining the real meaning of such terms and conditions, including those usually incorporated into respective types of contracts. For example, in several awards made by MAC, a charter-party provision for "loading (discharging) cargo at a fixed rate per day per hatch" was interpreted as meaning that the quantity of goods to be handled daily should amount to the fixed rate multiplied by number of ship's hatches; in other words, the concept of calculating laytime in such cases according to the "largest hatch" (or largest hold) has not been upheld.

As mentioned above, the Maritime Arbitration Commission when resolving particular disputes relies sometimes on customs and usages of merchant navigation. Insofar as unwritten customs and usages are concerned, MAC awards serve to ascertain the actual meaning of respective customs and usages.