100th Session of the IMO Legal Committee – Seminar. Thursday April 18th 2013.

Comite Maritime International and the Legal Committee – working together.

On March 18th 1967 the oil tanker *"Torrey Canyon"* ran aground off the south west coast of England. She broke her back and 31,000 tons of crude oil cargo escaped, creating a 270 – square mile slick which contaminated 170 miles of the coasts of England and France. Lawyers representing claimants were faced with a series of legal problems when seeking to recover damages. Under English and French law the legal rights of private claimants were unclear but the principal problem was establishing jurisdiction and obtaining security for claims. The ship had sunk and therefore could not be arrested and detained. Limitation of liability was also an issue in that the then limit (based on the 1957 Limitation Convention) was a mere £1,500,000 – much less than the total claims arising.

In the event (and thanks to the co-operative attitude of the P. & I. Club and Excess Underwriters involved) all the claims, both government and private, were settled. However, it was widely recognised that the legal regime was not satisfactory and, on April 18th 1967 the British Government submitted a Note to IMCO (IMO since 1982) calling for changes in international law governing oil pollution. IMCO responded by setting up the Legal Committee charged, inter alia, with the task of producing an international convention to tackle the twin issues of liability and compensation for oil pollution. At about the same time the Comite Maritime International (since 1897 the only international organisation involved in the harmonisation of maritime law) set up an International Sub-Committee under the chairmanship of Lord Devlin to consider the private law aspects of oil pollution and to co-operate with the IMCO Legal Committee in producing a draft convention. The CMI draft convention was finalised at its Tokyo Conference in April 1969 and was immediately submitted to IMCO. In November 1969 an International Legal Conference on Marine Pollution Damage was held in Brussels. Delegates had before them the CMI draft and also one produced by the IMO Legal Committee. The Conference also considered the, so-called, TOVALOP agreement. This was a voluntary scheme set up jointly by the oil and shipping industries to provide compensation for oil pollution. And so, the 1969 CLC, IMO's most successful legal maritime law convention ever, was created. This was shortly followed by the 1971 Fund Convention. Between them these two Conventions solved all the legal problems which had been faced by the "*Torrey Canyon"* claimants.

For over 70 years the CMI had the field of private maritime law conventions to itself and it was a little put out when the Legal Committee became a permanent fixture and it was made plain that, if there were to be more international maritime law conventions, they would be produced by IMO or other UN bodies. The CMI has come to accept this situation and has, since the creation of the Legal Committee, assisted in the creation of many maritime law conventions by producing early drafts and by offering support from the sidelines during the drafting process. It will continue to do this.

So, that is the history of how the Legal Committee came into existence and inherited the mantle of the CMI.

On October 1st 2008 many of you will have attended the annual Cadwallader Lecture held in this hall to mark the re-opening of the IMO Building after refurbishment. The topic was "Lawmaking and Implementation in International Shipping". Quite rightly much emphasis was placed on the considerable achievements of IMO in its first 60 years. However, several speakers expressed concern at the poor rate of uptake of conventions and at the conflicts between conventions and domestic law in member states. At its peril does this committee ignore the poor rate of uptake and these conflicts. We should ask ourselves why is it that States which have enthusiastically joined in the drafting of an instrument then fail to ratify it?

I make the following remarks as someone who has sat on the Observer benches at the back of this hall for nearly 20 years and has participated in the development of several complex instruments. It follows that any criticisms which I now make are, in part, self-criticisms. So, here are my reflections from the vantage point of the "back benches".

1. Is this committee spending enough time establishing whether there really is a compelling need for an instrument? We are getting better at this but must understand that if there is no compelling need the convention will probably fail. There was a period in the 20th Century when there was the time and the inclination to harmonise maritime law for the sake of having a universal law on a particular topic – those days are long gone. Instruments now need to offer an improved liability regime, more compensation or higher limits to have any chance of widespread adoption.

2. I suggest that this committee should be attempting to produce instruments which states can implement without finding that its terms conflict with their national laws. I wonder whether we should consider a new method of work which would involve carrying out an initial careful survey of national laws on the proposed subject in member states? A draft built on this firm foundation of knowledge of existing national law stands a chance of achieving harmony rather than creating the conflicts which states are experiencing.

3. Should we be more suspicious of any proposal initiating a new instrument which is delivered to the Committee complete with a draft convention attached? Such a draft will, at best, reflect the national law of the proposing state or states only. An example of this is the WRC where the initial proposal came complete with a draft convention seeking to create a law relating to wreck removal outside territorial waters. Frankly, we struggled for 11 years with that initial draft with its geographically limited scope of application and it was not until 6 months before the Nairobi Dip. Con. that this committee finally decided to give states the option to apply the convention within territorial waters. Too late – we had missed a golden opportunity to create a popular, universal law on wreck removal to be applied within and without territorial waters (perhaps with a territorial waters opt-out) and the resulting instrument (which has not yet come into force) may have limited appeal for that reason. (I have just come back from IMLI in Malta and confess that I found it

difficult to explain to the students the hastily drafted "opt-in" provisions which the WRC contains.)

4. Are our instruments too wordy and complex? Probably. An outsider might look at some of our instruments and wonder why we appear to have used two words where one would have done. Many of you will remember that in the Athens 2002 Protocol it was thought necessary to define "defect in the ship" –this was a phrase which had never caused problems under the 1974 Athens Convention. We then used no less than 64 words to define "defect in the ship" which clarified nothing – we have simply provided more words for lawyers to pick holes in. This Committee should beware of using more words than are necessary - we should not seek to dot every "i" or cross every "t". We should concentrate on the essence of the instrument and leave the detail to local legislators or courts. Good examples of this approach are the limitation conventions which leave all procedural matters to national law.

5. The more complex the instrument the more difficult will it be for legislators to find the motivation or make the time to implement it. The HNS Convention has (so far) - even with its 2010 Protocol - proved to be too complicated for state legislators to get to grips with. This is a great pity as it offers protection which will certainly be needed one of these days.

6. We have been criticised for taking too long to develop instruments.
However, meeting once or at most twice a year makes rapid progress very difficult and as long as the time is used wisely in refining (but not over-complicating) the text that is time well spent. Perhaps we should consider the creation of more Intersessional Working Groups in order to maintain momentum.

7. In the current financial climate governments are reluctant to set aside legislative time to implement conventions unless they produce tangible benefits for them or their citizens. That fact must be borne in mind when new projects are being undertaken. Needless to say any instrument which requires a state party to take on extra employees will not be popular.

8. We find ourselves in a bind over limitation figures - too high for some states, not high enough for others which results in poor take-up. Could this committee find some way round this? If we can't come up with a solution to this problem we will find, in a few years time, that a Protocol or tacit amendment increasing limits will attract only regional support - that already shows signs of happening with Athens 2002.

On a more positive note I should mention that the CMI has recently set up a Standing Committee which is actively liasing with the ICS and the IMO Secretariat on "Promotion of Conventions". The idea is to get CMI affiliated National Maritime Law Associations and local ICS affiliates working with national government officials to find out why a target list of conventions are not receiving support and to offer assistance by holding seminars etc. We hope that this initiative will be welcomed by Legal Committee delegates and will produce results.

These are a few of my thoughts – I have others. I suggest that they are matters which need to be addressed if the Legal Committee is to enjoy a productive future.

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