

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

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COMITE MARITIME INTERNATIONAL

QUARTERLY

BULLETIN TRIMESTRIEL

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Ratification of International Conventions

NEWS FROM THE CMI

IMPLEMENTATION OF THE LLMC CONVENTION

Francesco Berlingieri presented to the Legal Committee of IMO at its 80th session held from 11 to 15 October 1999 the proposal of the CMI to carry out a research on the manner in which maritime conventions have been implemented by Contracting States in order to ascertain the extent to which actual uniformity has been achieved. As decided by the Executive Council, he suggested that such research should be first conducted in respect of the 1976 Convention on Limitation of Liability for Maritime Claims and that a questionnaire should be circulated amongst all States Parties to the Convention in order to collect the necessary information.

The proposal was very well received by the Legal Committee and was endorsed by it. Following certain comments made by the delegates, the questionnaire, a draft of which had been previously made available to the Legal Committee, was amended in order to take such comments into account.

The final text of the Questionnaire was approved by the Executive Council at its 12 November meeting and will now be sent to the Governments of all States Parties as well as to the Maritime Associations concerned. The text of the Questionnaire follows.

Draft Questionnaire

1. *How has the Convention been implemented?*
 - 1.1. *Has it been given the force of law?*
 - 1.2. *Has it been given effect to by the enactment of national rules?*
 - 1.3. *Which other method has been adopted?*
2. *Which changes or additions, if any, have been made to the text of the Convention?*
 - 2.1. *Has priority been granted to claims in respect of damage to harbour works, basins and waterways and aids to navigation pursuant to Article 6(3)?*

- 2.2. *Is the constitution of a fund required in order to invoke the right to limit liability as permitted by Article 10(1)?*
- 2.3. *If so, how has Article 11(1) been given effect to? Is it necessary that proceedings are commenced in respect of claims subject to limitation before a fund may be constituted?*
- 2.4. *If proceedings are instituted in different courts, is the person invoking limitation entitled to constitute the fund with one of such courts at his choice?*
- 2.5. *Has Article 13(2) been given effect to without any change? If not, what changes have been made?*
3. *What rules relating to the constitution and distribution of the limitation fund and what other rules of procedure have been enacted?*
4. *Does the Convention apply to vessels intended for navigation on inland waterways or is a different system of limitation of liability applicable to such vessels?*
5. *Does the Convention apply to vessels of less than 300 tons or is a different system of liability applicable to such vessels?*
6. *Does the Convention apply to claims arising in cases in which interests of persons who are nationals of other States parties are in no way involved?*
7. *Does the Convention apply to ships constructed for, or adapted to, and engaged in, drilling?*
8. *Has the application of Article 2 paragraphs 1(d) and (e) been excluded?*
9. *When replying to questions 3-8 please provide an English translation of the relevant statutory provisions or, if this is more convenient, a summary of such provisions.*
- 10.1. *Does the interpretation of international conventions, if given the force of law, or of the national enactment take into account the international origin of the rules and the need for a uniform interpretation?*
- 10.2. *Are the travaux préparatoires, when the conditions set in article 32 of the Vienna Convention apply, taken into consideration? (Text of article 32 attached).*
- 10.3. *Is the interpretation given to the provisions of a Convention by the Courts of other Contracting States taken into consideration?*
- 11.1. *Has the interpretation and application of the Convention or of the national implementing legislation been the subject of any decision by your Courts?*
- 11.2. *If so, please provide a summary of such decisions and state if the need for a uniform interpretation of such provisions has been taken into account.*

The States Parties to the LLMC Convention are the following (those marked with an asterisk are States where there is a Maritime Law Association member of the CMI):

* Australia	* Ireland
Bahamas	Liberia
Barbados	Marshall Islands
* Belgium	* Mexico
Benin	* Netherlands
* China	* New Zealand
* Croatia	* Norway
* Denmark	* Poland
Egypt	* Spain
Equatorial Guinea	* Sweden
* Finland	* Switzerland
* France	* Turkey
Georgia	United Arab Emirates
* Germany	* United Kingdom
* Greece	Vanuatu
Guyana	Yemen
* Japan	

DIARY OF FUTURE CMI AND OTHER MARITIME EVENTS

YEAR 2000

January 27 and 28 - London

International Sub-Committee on Issues of transport law

March 9 and 10 - London

International Sub-Committee on Issues of transport law (to be confirmed)

May 11 - London

Executive Council
Average Adjusters AGM Dinner

May 12 - London

Assembly
Tulane BMLA Dinner

July 6 - New York

Uncitral/CMI Colloquium on Issues of transport law

September 17/20 - Toledo

Colloquium
Topics:

- Implementation and interpretation of international conventions
- Issues of transport law
- Issues of marine insurance
- General average

October 10/12 - Shenzhen, China

China Maritime Law Association - Fourth International Conference on Maritime Law

YEAR 2001

February 12/17 - Singapore

XXXVII CMI Conference

Topics:

- (i) Issues of marine insurance
- (ii) Issues of transport law
- (iii) General average (IUMI proposal)
- (iv) Piracy - Model law

Seminar Subjects:

- (a) Athens Convention / Warsaw-Montreal
- (b) Implementation and interpretation of Conventions

February 11 and 16 - Singapore

CMI Executive Council

February 16 - Singapore

CMI Assembly

March 21/23 - New Orleans

Tulane Admiralty Law Seminar

THE TOLEDO COLLOQUIUM, 17-20 SEPTEMBER 2000

The CMI in conjunction with the Spanish Maritime Law Association is organising a colloquium at the hotel Beatriz, Toledo. Delegates will gather on Sunday September 17th and the conference will run from Monday to Wednesday evening. There will be an excursion for all delegates and the partners on the Tuesday afternoon following a full working session in the morning.

We intend taking the opportunity of this Colloquium to progress our discussions on the following topics which are currently under consideration by the CMI.

Issues of Transport Law

Here is widespread demand in shipping circles for a new liability regime to reflect modern commercial practice and to replace the Hague, Hague/Visby and Hamburg Rules. The CMI is

involved in a joint exercise with UNCITRAL to develop a new Convention or other instrument to cover numerous aspects of maritime transportation which have not previously been covered by International Convention. Subject to UNCITRAL's approval we hope to develop a new set of rules governing liability and compensation for loss or damage to cargo which will be appropriate to the new regime. Delegates to the Colloquium will receive reports of progress with this project and will have an opportunity to contribute to the work of the CMI.

Issues of Marine Insurance

The CMI has identified twelve issues of marine insurance law which frequently give rise to the problems before the courts of member nations. A Questionnaire has recently been distributed to National Associations and a number of responses

have already been received. Delegates to the Colloquium will receive a report on the progress of this project and will be invited to contribute to the work on this subject.

General Average

The CMI, as the custodian of the York / Antwerp Rules, has been approached by IUMI and requested to conduct a full revision of the Rules. The basic proposal is that the guiding principle should be common danger rather than common benefit. Delegates will have an opportunity to receive a report from the members of the CMI International Working Group and to contribute to this debate.

Implementation and Interpretation of International Conventions.

It has for many years been recognised that the uniformity intended in a maritime convention breaks down at the stage of implementation and interpretation resulting in wide diversity of application. In conjunction with IMO CMI is conducting a pilot study of the LLMC 1976 to ascertain the extent to which the intended

uniformity has been lost. Delegates will receive a report from the International Working Group and will be encouraged to contribute to the discussion of this important subject.

International Maritime Issues

The speakers at this session will analyse the current projects of intergovernmental and non-governmental bodies in the field of international maritime legislation. In particular there will be an update on all the current projects before the IMO Legal Committee including the compulsory provision by shipowners of security for maritime claims, bunker pollution and wreck removal. Delegates will also be offered an outline of the current UNESCO project on the Underwater Cultural Heritage.

It is hoped that many members of National Maritime Law Associations will attend this important Colloquium which should be regarded as offering a fore taste of the CMI's 37th Conference to be held in Singapore in the week beginning February 12th 2001.

THE SINGAPORE CONFERENCE, 12-17 FEBRUARY 2001

Synopsis of topics

Issues of Transport Law

The study of this topic will continue after the Toledo Seminar and it is hoped that the preliminary draft of an instrument will be ready for consideration by the Conference.

Issues of Marine Insurance

Delegates will be invited to consider a study prepared by the CMI which explains the twelve issues identified by the CMI, examines the problem under a substantial number of National Laws and seeks for commonly accepted solutions to these problems. The work product from this conference will influence national legislatures contemplating a revision of marine insurance law and may also influence the practice in insurance markets around the world.

General Average

Delegates to the Conference will be invited to consider a discussion document based upon the responses of National Maritime Law Associations to a CMI Questionnaire prepared following the approach from IUMI and on the outcome of the debate on this subject which will take place during the Toledo Colloquium.

Piracy/Model Law

Piracy continues to be a major problem throughout the world. Whilst many states have a law relating to Piracy enforcement of that law is often ineffective. On the other hand many states

do not have a specific law on Piracy and the CMI, with the support of IMO and other inter-governmental organisations has drafted a model law on Piracy which, in its approved form, would be appropriate for adoption by national legislatures. Delegates will be invited to consider this draft law, propose amendments and vote through a final text.

Passengers Carried by Sea - Should They be Granted the Same Rights as Airline Passengers?

This will be a Seminar session addressed by a number of distinguished speakers who will consider the apparent paradox that passengers carried by air have rights under the 1999 Montreal Protocol to the Warsaw Convention which differ widely from the rights accorded to ship passengers under the 1974 Athens Convention. Delegates will wish to join the debate on this topical subject.

Implementation and Interpretation of International Conventions.

It is hoped that the pilot study of the LLMC 1976 which CMI is now starting with the view to ascertaining the level of uniformity achieved in practice by this Convention will have reached a stage such as to enable a report to be prepared for consideration of and further action by the Conference. This pioneer operation may lead to examination of other Conventions with a view to ensuring that as much uniformity as possible is achieved within countries ratifying International Conventions.

NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

NEWS FROM IMO

IMO LEGAL COMMITTEE - 80TH SESSION

The Legal Committee of IMO held its 80th Session in London from 11 to 15 October, 1999 under the continuing Chairmanship of Mr. A.H.E. Popp Q.C. Delegates from 62 member governments attended as did observers from 21 non-governmental organisations including CMI.

In his opening remarks the Secretary General drew the Committee's attention to the Council's decision to support the convening of a 3 day Diplomatic Conference in 2000 – 2001 to review the OPRC Convention and a one week Diplomatic Conference on anti fouling systems. He highlighted that as a consequence of this the Legal Committee might have to forego one of its four meetings in the 2000 – 2001 biennium. The Secretary General emphasised the importance of the Agenda items for the amendment of the Athens Convention and the draft Bunkers Convention. He then highlighted the importance of the work of the IMO/ILO Ad Hoc Expert Working Group on liability and compensation for claims for death, personal injury and abandonment of seafarers which was to meet during the week.

The Secretary General emphasised the desirability of the HNS Convention entering into force as soon as possible and noted the Committee's deliberations aimed at promoting the adoption and implementation of all conventions resulting from its work, including the HNS Convention. Finally, he emphasised the importance of those States still parties to the 1969 Civil Liability Convention and the 1971 Fund Convention denouncing them as soon as possible and at the same time becoming parties to the 1992 Protocols to both Conventions.

The main items on the Agenda were:-

- (A) Provision of financial security.
 - (a) Passenger claims – Protocol to Athens Convention
 - (b) Guidelines on Shipowners' Responsibilities in Respect of Maritime Claims – New Guidelines to be adopted extra-conventionally internationally.
- (B) Compensation for pollution from Ship's bunkers – new draft convention.
- (C) Wreck removal – new draft convention

A. Provision of Financial Security

(a) Passenger claims - Revised Protocol to Athens Convention.

A revised draft Protocol to the Athens Convention and a consolidated text of the Athens Convention incorporating the revised changes proposed by the Protocol were placed before the Committee for consideration and discussion.

1. Form of Insurance

At its 79th Session the Committee determined that the only way in which a Shipowner would be able to comply with his obligations would be to purchase liability insurance cover following strong opposition to the CMI proposal of personal accident insurance (PAI) as an alternative to liability insurance. At the 80th Session this debate was reopened. It was proposed that article 4 bis (1) have a sentence providing that liability insurance was the only acceptable form of compulsory insurance. Some delegations favoured the inclusion of such a sentence arguing that the possibility of liability insurance co-existing with other types of insurance would lead to confusion and a proliferation of litigation. Other delegations spoke against the retention of a provision which prevented the Shipowner taking out insurance other than liability insurance. They argued that systems such as PAI could provide adequate protection to passengers. A compromise was eventually reached whereby the carrier who actually performs the carriage would be required to insure its liability without, however, restricting the possible choices as to the different types of insurance available. In consequence the CMI initiative to allow PAI as an optional form of insurance remains very much alive.

2. Jurisdiction

The Committee debated at length a draft of the new article 17 bis which contained provisions for the establishment of jurisdiction against an insurer or other person providing financial security pursuant to article 4 bis. There was a clear lack of consensus and in view of this the Committee decided to revert to consideration of this matter at a later stage in the hope that further work on these provisions, taking into account the points made, might result in an acceptable compromise wording being reached.

3. Compatibility – Athens Convention and the Law of Nuclear Liability

The Committee agreed to incorporate an amendment to article 20 of the Athens Convention proposed by Japan and Norway to bring that article into line with the 1988 Protocol to the Vienna and Paris Convention and the 1997 Protocol to the Vienna Convention on Civil Liability For Nuclear Damage.

4. Limits of Liability

There was a considerable debate with interventions from many delegations. No consensus could be achieved and it was decided to revert to the matter at a later date in view of the

wide divergence of opinions. The following points were made:

(a) The Committee was divided on whether the limits established in the 1990 Athens Protocol should remain the same or be amended. Several delegations indicated that their reason for not becoming a party to that Protocol was the provision of limits which were considered too low. Other delegations considered the limits to be too high.

(b) Reference was made to the recent ICAO conference which introduced the concept of unlimited liability into the Montreal Convention for air passenger claims and made the point that there should be uniformity in the level of compensation given to both air passengers and sea passengers.

(c) Some delegations expressed the view that limits of compensation could be substantially increased above the limits to be imposed by the new provisions for compulsory insurance. Other delegations opposed separate provisions for compulsory insurance limits and liability limits.

(d) There was a debate on the relationship between limits per capita and the possibility of establishing an overall cap per incident per ship. Some delegations were against the imposition of such a cap as this might dilute the amounts recoverable in instances where there might be a large number of passenger claimants.

(e) Some delegations highlighted the importance of avoiding discrepancies between different treaties, particularly remembering that the limits established in the 1996 LLMC Protocol were in line with those established by the 1990 Athens Protocol.

(f) One delegation reserved its right to propose an entirely new liability regime perhaps at the 81st Session of the Legal Committee.

5. Article by Article consideration of Draft Protocol

(a) Article 2 (amending definitions Article 1 of the Convention).

A proposal that the word “charterer” in the definition of “performing carrier” be replaced by “demise or bare boat charterer” was rejected.

(b) Article 4 bis – compulsory insurance.

The proposed amendment to the effect that insurance, which is not liability insurance should not be acceptable, was rejected.

There was discussion of a proposal to impose an overall cap of SDR 90m per ship per incident. This provoked a repeat of the inconclusive debate referred to above under the heading “Limits of Liability”.

Paragraph 8 (a) deals with jurisdiction for claims against insurers or others who provide the intended compulsory financial security. As drafted it was proposed that such claims could

not be brought directly against such insurers or others providing financial security where the claimant had already brought proceedings against the carrier or the performing carrier and such proceedings had not been stayed or dismissed or where the security given by the insurer or other person providing financial security was considered by the Court to be in all respects satisfactory and available to the claimant. Issue was taken on the words “brought” and “or dismissed” and it was suggested that these words be deleted and replaced by the “pending” before the word “proceedings”. The thinking behind this proposal was that if a claimant had issued proceedings and obtained an unsatisfied judgment he would by the original words be debarred from bringing subsequent proceedings against the insurer who had provided the financial security. The view of the Committee after various interventions was that more thought was needed to consider this point and that there should be added to this paragraph the words “for example a limitation fund” as coming within the concept of providing security.

6. Conclusion

As can be seen from the above resume of the main points which arose for debate and bearing in mind the other minor points which also produced many interventions, the Committee concluded that it is not in the position to produce a final draft Protocol to amend the Athens Convention and decided to defer this for consideration at the 81st Session of the Committee to enable work to be done on all of the points raised in the many interventions and for a new draft Protocol to be produced.

The author of this note, who attended the sessions, would comment that the complexity of the issues arising and the divergence of opinions of delegations on these issues causes concern as to whether or not it will in fact be possible without much further debating time within the Committee to produce a wording of a Protocol capable of agreement by the Committee and, perhaps most importantly, which will have a realistic prospect of standing the test of a Diplomatic Conference. Hopefully the author is wrong, but only time will tell.

(b) Guidelines on Shipowners’ Responsibility in Respect of Maritime Claims

A revised version of these Guidelines was produced by the delegation of the United Kingdom incorporating the points made at the 79th Session. It was noted that these Guidelines provided an opportunity for self regulation by the shipping industry and that they were consistent with the ISM Code. The Committee decided to approve the Guidelines, subject to a minor amendment on the definition of a ship’s tonnage. The Committee further decided to recommend to the Council that the Guidelines, amended as above, be submitted to the Assembly for its consideration and adoption.

7. *Report of Joint IMO/ILO ad hoc Expert Working Group on liability and compensation regarding claims for death, personal injury and abandonment of seafarers*

This working group met during the same week as the IMO Legal Committee. An oral report was received and a written report is expected for discussion by the Legal Committee at its next Session.

B. Compensation for pollution from ship's bunkers

At the 79th Session of the Legal Committee it was resolved that at this 80th Session a Draft Convention should be produced for consideration by a Diplomatic Conference in the 2000/2001 biennium. On behalf of the sponsoring delegations Australia introduced a draft text of a proposed new convention to be entitled "International Convention on Civil Liability for Bunker Oil Pollution Damage". The Committee then considered a number of drafting issues of which the major were as follows:-

(1) Definition of Shipowner (Article 1)

There was an extensive debate on whether to adopt either the definition of shipowner contained in the LLMC Convention or that contained in CLC 92. The committee eventually opted for the former which reads as follows:-

"Shipowner means the owner, including the registered owner, bareboat and demise charterer, manager and operator of the ship".

(2) Compulsory insurance and direct action (Article 7).

There was a wide debate on whether the compulsory insurance obligation should fall upon all those falling within the definition of shipowner in Article 1 (see above) or whether it should be limited to the registered owner only. The proposers of the latter finally won the day and the opening words of draft Article 7 (1) will now read:-

"The registered owner of a ship having a gross tonnage greater than () registered in a State Party shall be required to maintain insurance or other financial security, such as a bank guarantee, to cover his or her liability under this convention...".

It was noted that as a consequence of this decision and with Article 3 imposing liability on the shipowner as widely defined in Article 1 (see above) it must be understood that only the registered owner would be under a compulsory insurance obligation with others falling within the definition of shipowner under Article 1 not being under any such obligation.

Some delegations expressed the view that rules of subrogation would apply but the Committee was generally of the view that it was not necessary to introduce into the text any subrogation provisions

on the basis that these were unnecessary and might conflict with national laws.

(3) Definition of Pollution Damage (Article 3 (5))

The definition of pollution damage is in fact contained in Article 1 (9) and follows Article 1 (6) of CLC 92. However, Article 3 (5) contains a provision that no claims for compensation for pollution damage shall be made against the shipowner otherwise than in accordance with the proposed convention. The International Group of P & I Clubs expressed concern that the CLC definition, although intended to exclude speculative claims associated with natural resource damage, did not, in fact do so. They therefore suggested that Article 3 (5) should be amended to provide that no claims for compensation for pollution damage "or other damage arising from the same incident" shall be made against Shipowners otherwise than in accordance with the proposed convention. The committee decided not to adopt this proposed amendment with some delegations expressing the view that the term "pollution damage" should be determined by the Courts and national laws when it was outside the scope of the proposed convention.

(4) Responder Immunity

ITOPF made the point that provisions should be avoided which might be seen as discouraging a response to bunker oil spills because of exposure to potential liability.

One delegation proposed that Article 3 (4) of the CLC be included in the draft Bunker Convention but the Committee recalled its previous debate and that it had already been agreed that there should not be included in the draft Convention a long list of parties who would be immune from liability particularly as, unlike the CLC regime, there is no Fund available, thus rendering such exemptions inappropriate.

Another delegation made the point that the purpose of the draft Convention is to establish liability and not to provide immunity.

IUCN argued that if Responder Immunity is removed this would have the effect of discouraging preventive measures being taken.

Several delegations were sympathetic to the idea of Responder Immunity and the Committee eventually decided that the way forward should be to prepare a resolution on the matter for consideration by the Diplomatic Conference.

(5) Direct Action – Article 7 (8)

The International Group of P & I Clubs expressed concern about the enormous administrative burden which would be created for Clubs, other insurers and also for States by the direct action provisions contained in draft Article 7 (8). The International Group of P & I Clubs also questioned the necessity for a direct action provision. However, the Committee decided to retain the direct action provisions in this article.

C. Draft Convention on wreck removal

At the 79th Session of the Legal Committee a draft Wreck Removal Convention was discussed. In the light of that discussion the Correspondence Group produced a revised updated text of the Convention which excluded provisions on financial liability, compensation and reporting requirements. The co-ordinator of the Correspondence Group drew the Committee's attention to the provisions in the draft Convention dealing with definition of wreck, reporting and location of wrecks, rights and obligations to remove hazardous wrecks, financial liability for locating, marking and removing wrecks and contributions from cargo. He hoped that the Committee would be in a position to recommend the convening of a Diplomatic Conference by 2003 in view of the progress which had been made and bearing in mind the outstanding matters to be dealt with.

Several delegations liked the new scaled down version of the draft articles. Other delegations expressed concern that the most controversial matters had been left to national legislation to regulate. However, it was noted that the Convention was principally aimed at dealing with wreck removal outside territorial waters.

Several delegations were concerned that the draft Convention did not reflect the balance of rights and duties under UNCLOS 1982 and urged that further work be done to deal with this point. Concern was expressed by some delegations that the definition of "wreck", incorporating some aspects of a casualty, was too wide and could lead to confusion and overlap with other treaties such as the 1989 Salvage Convention.

The Committee urged the Correspondence Group to continue its work and report at the next session.

Concluding matters and future work program

Various Member delegations provided details of various Conventions to which their country had acceded.

The Committee decided to recommend the draft Bunker Convention to the Council for a Diplomatic Conference in the 2000/2001 biennium.

The Committee confirmed its commitment to producing a draft Protocol to the Athens Convention for consideration by a Diplomatic Conference as soon as possible.

The Committee confirmed that its future work would include:

(i) Provision of financial security (Athens

Convention and Guidelines on Shipowners' Responsibilities in respect of Maritime Claims).

(ii) Consideration of a draft Convention on wreck removal.

(iii) Monitoring implementation of the HNS Convention.

(iv) Draft Convention on offshore mobile craft.

The Committee fixed as its proposed meeting dates for the year 2000:

81st Session 27 – 31 March, 2000.

82nd Session 16 – 20 October, 2000.

A Correspondence Group was formed to provide a forum for an exchange of views on HNS Convention implementation issues, to follow the implementation process in states and guidance on issues arising in the implementation and operation of the HNS Convention.

Professor Francesco Berlingieri, President of Honour CMI, introduced a paper identifying the problems which may arise where, following ratification, State Parties adopt different methods of implementation and where the Courts of State Parties fail to give consistent interpretation to Convention provisions. He produced a draft questionnaire for circulation to States concerning their implementation of the LLMC Convention. He advised that CMI is willing at its own expense to conduct this research. This initiative of CMI was welcomed by many delegations and the Committee endorsed the project with instructions to the Secretariat of IMO to work with CMI on the project. The Committee asked CMI to report back on the progress of its research.

The International Group of P & I Clubs spoke to their paper highlighting the difficulties of ships registered in non-Party States to the Civil Liability Convention, 1969 in obtaining 1969 CLC Certificates for the year beginning 20th February, 2000.

It can be seen from the length of this report that much varied ground was covered during the week long meeting with significant progress made on three draft Conventions with the proposed Protocol to the Athens Convention being moved forward for consideration for a diplomatic conference in the 2000/2001 biennium and with the Voluntary Guidelines on Shipowners' Responsibility in respect of Maritime Claims being referred to the Assembly for consideration and adoption..

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NEWS FROM IOPCF

IOPC FUNDS SECOND INTER-SESSIONAL WORKING GROUP MEETING HELD ON 26 AND 27 APRIL 1999

There were two main issues discussed during my attendance:

1. To which ships did the definition of “ship” in the 1992 Civil Liability Convention and the 1992 Fund Convention apply to.
2. The applicability of the 1992 Civil Liability Convention to Offshore Craft.

1. Definition of Ship

As to the first, papers were submitted by the Director of IOPC Funds, the UK delegation, the International Group of P&I Clubs and by the French delegation.

The definition of “ship” is laid down in Article 1.1 of the 1992 Civil Liability Convention and in identical form in Article 1.2 of the 1992 Fund Convention:-

“Ship” means any seagoing vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil on board.”

The definition of “oil” in Article 1.5 of the 1992 Civil Liability Convention which reads:

“Oil” means any persistent hydrocarbon mineral oil such as crude oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship”.

The UK Delegation’s paper detailed several possible constructions of the definition of “ship” and drew attention to the Draft Bunker Convention of 1992 which specifically would not apply to pollution damage as defined in the 1992 Civil Liability Conventions. They suggested that it would be simpler if all tankers whether carriers of persistent oil or clean tankers fell within 1992 CLC and all non-tankers within the Bunker Convention, leaving only combination carriers (which they defined to mean only combined oil and solid cargo carriers) to be caught by either convention depending on their condition at the time of the bunker pollution incident.

The UK delegation ultimately proposed that to reflect this possible approach the definition of ship should be interpreted as if it had been drafted:

“Ship” means any sea going vessel and sea borne craft of any type whatsoever constructed or adapted for carriage (be it exclusively or not) of oil in bulk as cargo, provided that a ship designed to carry either oil or solid cargoes in bulk shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is

proved that it has no residues of such carriage of oil in bulk aboard.”

The International Group of P&I Clubs written position was that it had never been intended that the 1992 Conventions should apply to non-persistent oil carrying ships. Bunker pollution by clean tankers should not be covered. The governing point should be the nature of the oil carried. If it involves carriage of persistent oil whether on an actual voyage or subsequent voyages or voyages when residues of the persistent oil are still on board then the Convention applies, if no persistent oil is involved as cargo then bunker pollution even though from a tanker is outside the Convention.

The French Paper asserted that:

“the status of combination carriers must be assessed in regard to two situations:

- *either they are engaged in the carriage of oil in bulk as cargo, in which case they fall within the scope of the convention*
- *or, after engaging in the carriage of oil, they return unladen or are transferred to the carriage of other types of cargo, in which case the presence of residues should be established so that the protection of the Convention applies during the voyage which follows such carriage”.*

They acknowledged that this leaves some difficulty as to the definition of voyage.

Mr Wren of the UK Delegation was voted to chair the meeting. Many nations expressed various views as to what was intended both in principal when the definition was agreed at the 1984 Diplomatic Conference and based also on academic analysis of the wording of the definitions of ship and of oil quoted.

The first part of the definition in particular “any seagoing vessel... constructed or adapted for the carriage of oil in bulk as cargo” was held by some to mean any which is capable of carrying persistent oil whether it does so or not. Others expressed the view that the intention was highlighted by the words “for the carriage of oil” which given the definition of oil must mean persistent oil. There was perhaps a balance in favour of a wide construction so that the first part of the definition could include clean tankers. This meant that the Groups attention turned to the effect of the proviso and the meaning of “capable of carrying oil and other cargoes”. Did the expression “other cargoes” mean only bulk solid cargoes as you would expect of an OBO which was very much the type of ship in mind when the wording was originally formulated or did the phrase “other cargoes” include all cargoes other than a cargo of persistent oil? If the latter, then clean tankers not involved in the carriage of oil would be excluded from the CLC even though they carried bunkers.

After much discussion the consensus was that the scope of the 1992 CLC and Fund Convention should be more limited than that proposed by the UK delegation. One of the factors albeit not determinative was that clean cargo owners do not contribute to the fund!

The working group concluded that:

“... since “oil” is defined as persistent oil, “other cargoes” in the proviso of the definition of ship refers to bulk solids, chemicals, gases and non persistent oils.”

This would mean that a ship capable of carrying both persistent and non persistent oil would be regarded as a “ship” in unladen condition only during any voyage after the carriage of persistent oil and unless it is proved that it has no persistent oil residues of such cargo on board.

The question of “burden of proof” regarding the presence of oil residues from a previous voyage was also debated. The conclusion was that the burden of proof that there were no such residues would fall on the shipowner.

Finally the question whether the expression “any voyage” covered only the voyage following the carriage of persistent oil or whether it covered any voyage (however many voyages were done) during which persistent oil residues remained on board. The conclusion was generally toward the latter interpretation.

2. *Applicability of the 1992 Conventions to Offshore Craft*

Papers on this issue were submitted by the Director of IOPC Funds, the Australian, French and UK delegations and the International Group of P&I Clubs.

The Director’s note set the general background describing the functions of FPSO’s and FSU’s; it considered the absence of National Liability regulations for such craft, explained that the 1977 London Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources had not entered into force, touched on the P&I Clubs position that offshore craft were covered on a different basis to oil tankers, drew attention to the voluntary liability scheme, i.e. the Offshore Pollution Liability Agreement (OPOL) which is funded by oil companies which operate in Northern and Western Europe, emphasising that the definition of “facilities” covered by the Agreement includes fixed or mobile installations used for treating, storing or transporting crude oil from the seabed.

All of this led to the most important point which is the need to clearly define the extent to which offshore craft and oil on board if any, fall within the definition of “ship” and of “oil” in the 1992 Civil Liability Convention quoted above.

The Director took the view that in order to be covered by the 1992 Conventions a craft should fulfil two criteria. Firstly it should fall within the definition of “ship”, i.e. it should be “constructed or adapted for the carriage of oil in bulk as cargo”.

Secondly the craft should have “oil” on board, namely persistent hydrocarbon mineral oil on board or as bunkers.

The question for interpretation is whether the definition means “constructed or adapted in such a way that it is capable of carrying oil” or whether it comes within the definition only when it is “constructed or adapted for the purpose of carrying oil in bulk as cargo”.

The UK delegation’s paper concentrated more on the phrase “carried as cargo” setting out three possible scenarios for inclusion of offshore craft within the Convention.

1. Only oil carried on voyages to and from a port or terminal is “carried as cargo”.
2. Oil carried on any voyage between two distinct points is “carried as cargo”.
3. Oil carried on any movement whatsoever is “carried as cargo”.

It was also pointed out that the definition of “offshore facilities” in OPOL has been extended to include:

“any installation of any kind, fixed or mobile, intended for the purpose of exploring for, producing, treating or storing oil from the seabed or its subsoil where such installation has been temporarily removed from its operational site for whatever reason”.

The UK paper observes:

“This would, for example, include installations that have to be moved in heavy weather. By making this amendment, the offshore industry would appear to have recognised that such movements are an operational matter”.

The UK delegation recommended that Scenarios 1 and 2 were consistent with the aims of the 1992 Convention but, that whilst there were problems with regard to 3 it should be excluded. Above all they sought clarity.

The Australian delegation’s paper favoured a wider interpretation which could even include scenario three but reserved its position as to whether an offshore craft could come within the Convention when in operating mode.

The French delegation’s paper sought to limit the application of CLC to such craft. The only craft they wished to see included were shuttle tankers which provide a service between a terminal and an onshore (sic) storage facility. They felt that a grazing tanker which they defined as a tanker being involved in “The collection of oil from different wells belonging to a single field” is under the control of the operator and not involved in an activity involving carriage.

The International Group of P&I Clubs position was that:

- (a) Craft constructed or adapted for production operations should not normally be considered “ships” within the meaning of CLC ’92.
- (b) Craft should not fall outside the scope of the definition on the mere ground that they are constructed or adopted for storage; an FSU should be capable of being considered a ship.

(c) CLC 92 should not apply to incidents involving oil held in storage, but where the craft is a "ship" the Convention should apply to movements of oil leading to discharge at another location.

During the meeting many delegations offered possible further examples of the activities of such craft to be taken into account. Some were unhappy with the idea that an offshore craft could be a "ship" at one moment but not a "ship" at the next. The issue of non-contribution to the CLC fund by FPSO/FSU's was raised although not felt to be determinative. The historical perspective of the intentions at the 1984 diplomatic conference when the definition of "ship" was set were covered. The issuing of Blue Cards by the P&I Clubs was raised as was the issue of whether Bill of Lading had to be issued before there could be carriage of oil although this was not felt to be necessary. Some felt that as the purpose of the Convention was to protect people against pollution a wide construction should be given. However as the meeting progressed it became clear that the majority of delegations were keen to limit the occasions that offshore craft were to fall

within the Convention rather than to extend their scope.

The result was that there was general acceptance of Scenario 1, some enthusiasm was expressed in favour of Scenario 2 but the balance of opinion was against its inclusion. Very little enthusiasm was expressed for Scenario 3.

The position has subsequently been summarised in a brief IOPC Funds Summary:

"As regards offshore craft the Working Group concluded that since FSU's and FPSO's are primarily engaged in exploration and production operations, they should only be regarded as "ships" under the 1992 Civil Liability Convention when they carry oil as cargo on a voyage to or from a port or terminal. Offshore craft would therefore fall outside the scope of the Convention when, for example, they leave an offshore oil field to take shelter in the event of bad weather".

The next step is for the Working Group's conclusions to be examined by the 1992 Fund Assembly at its October 1999 session.

SIMON FLETCHER

MEETINGS OF THE 1971 AND 1992 INTERNATIONAL COMPENSATION FUNDS HELD ON 18-22 OCTOBER 1999

The 6 monthly meeting of the IOPC Funds Executive Committees and Assemblies took place at the IMO Building in London between 18th and 22nd October 1999.

A number of current cases were reported and reviewed, the most significant being the following: HAVEN: This long running saga was brought to a final conclusion at the end of May 1999 when settlement funds agreed in a tripartite agreement between the Government of Italy, the Shipowners and their P and I Club, and the 1971 IOPC Fund were paid, and all legal proceedings terminated.

AEGEAN SEA: The proliferation of proceedings in Spain and, in some cases, the effect of the time bar on claims for which proceedings have not been commenced, has made an overall settlement along the lines of the HAVEN case more difficult to achieve. An active intervention by the Central Government in Madrid, which has commissioned a detailed report on the fishery claims by the Spanish Oceanographic Institute, has advanced matters. A small Consultation Group has been tasked with the search for an overall solution.

BRAER: Over £44 million has already been paid to claimants. Several large claims pursued in court, including that of Landcatch Limited, have been dismissed. Four other legal proceedings are to be heard in the coming year. Until these are resolved it is unlikely that further payments can be made.

SEA EMPRESS: Of a total of £46 million claims received, some £16 million have been settled and paid, and negotiations continue with the remainder. It appears unlikely that total claims will exceed the 1971 Fund's limit of 60 million SDR.

NAKHODKA: This is the largest pollution claim in the history of the IOPC Fund, and is complicated by the fact that at the time of the casualty Japan was a party to the 1992 Convention whereas Korea was still party to the 1971 Convention. Damage was suffered in both countries. Steady progress is being made in settling the claims.

Interesting questions of principle were raised in two small cases:

PONTOON 300: This barge, laden with about 500 tons of fuel oil, sank off Sharjah while under tow. It was originally constructed for the transport of offshore platforms from the construction site to the location, but the ballast tanks were used for the carriage of oil. It was decided during a previous session that this barge fell within the definition of "ship" in the 1969 CLC Convention, (although it would probably not do so under the different definition in the 1992 Convention) but since the owner could not be traced and there was no insurance in force, the Fund agreed to settle reasonable clean-up claims.

SANTA ANNA: This relatively minor incident has raised some interesting questions of law. The vessel was a tanker in ballast when she ran aground off the coast of Devon (U.K.). Her previous two cargoes were clean petroleum products, but she had substantial quantities of fuel oil bunkers on board. She was refloated without causing pollution, but the cost of reasonable preventive measures was claimed by the U.K. under the 1992 Convention. The legal question was whether this vessel was a "ship" within the

meaning of the definition in Art. 1(1) of the 1992 CLC. That article contains the words “constructed or adapted for the carriage of oil in bulk as cargo”. “Oil” is defined as persistent (“dirty”) oils, but the definition goes on to include a ship capable of carrying oil and other cargoes, and the Working Group which studied this question concluded that “other cargoes” included non-persistent oil. Thus, the cost of reasonable preventive measures would be recoverable from the 1992 Fund, if not recoverable from the owner or its P and I Club.

A Working Group, set up in 1998 to review the meaning to “ship” and “oil” in the CLC and Fund Conventions, reported to the meetings, and it was agreed that it should meet again in April 2000 to continue its work.

The most interesting debate, however, concerned the future of the 1971 Fund. At the time of the Meetings there were still 45 states parties to the 1971 Fund, of which 5 states have deposited instruments of denunciation which will take effect during the coming 12 months. 17 states were represented at the meetings, not sufficient for a Quorum of the 1971 Fund Assembly, but sufficient to constitute a quorum of the 1971 Fund Executive Committee.

More critical, however, is that of the existing 45 member states, only 13 are importers of more than 1 million tons of contributing oil per annum, and more than half do not import quantities of oil above the threshold which requires their oil importers to contribute to the Fund. Italy and 5 other states have deposited instruments of denunciation of the 1971 Fund which will take effect during the coming year, and three states, including Malaysia, have indicated an intention to denounce the 1971 Convention. Since between

them they represented well over half the tonnage of contributing oil in 1998, the burden of a major spill will fall very heavily on the remaining 1971 Fund member states who import oil, notably India, Portugal, Morocco, Poland and Côte d’Ivoire, Ghana, Kenya, Cameroon and Malta.

When some or all of these states denounce the 1971 Fund Convention, there will be no significant contributors left, and therefore no source of funds to reimburse the remaining 1971 Fund member states and their citizens for pollution damage occurring on their shores.

For these reasons all assembled delegates representing not only 1971 Fund but also 1992 Fund member states agreed:

1. to urge all state members of the 1971 Fund to denounce the 1969 CLC and 1971 Fund Conventions, and to join the 1992 CLC and Fund Conventions as soon as possible;
2. to ask IMO to convene a Diplomatic Conference as soon as possible to adopt a protocol amending the 1971 Fund Convention to permit its dissolution if the number of member states falls below 25 or the total tonnage of contributing oil falls below 100 million tons.

National maritime law associations of states which are still members of the 1971 Fund are urged to consider urgently with their Governments:

- i. prompt steps to denounce the 1969 CLC and 1971 Fund Conventions and to ratify the 1992 Fund and CLC Conventions; and
- ii. when the IMO convenes shortly a Diplomatic Conference on this subject, to urge their Government to send a delegate to represent their country at that diplomatic conference.

RICHARD SHAW

RATIFICATION OF INTERNATIONAL CONVENTIONS

Instruments of ratification of and accession to the following conventions have been deposited with the depositary:

- **International Convention for the unification of certain rules relating to arrest of sea-going ships, 1952**
Portugal - Extension to the territory of Macao: 23 March 1999*
- **International Convention for the unification of certain rules relating to civil jurisdiction in matters of collision, 1952**
Portugal - Extension to the territory of Macao: 23 March 1999*
- **International Convention for the unification of certain rules relating to penal jurisdiction in matters of collision and other incidents of navigation, 1952**
Portugal - Extension to the territory of Macao: 23 March 1999*
- **International Convention relating to the limitation of the liability of owners of sea-going ships, 1957**
Portugal - Extension to the territory of Macao: 23 March 1999*

* On 23 September 1999 the Embassy of Portugal in Brussels informed the Ministère des Affaires Etrangères, du Commerce Extérieur et de la Coopération au Développement of Belgium that pursuant to the joint declaration of the Government of the Portuguese Republic and of the Government of the Peoples Republic of China on Macao signed on 13 April 1987 Portugal will maintain its international responsibility for Macao until 19 December 1999 and China will exercise its sovereignty over Macao commencing from 20 December 1999. Consequently Portugal will terminate its responsibility in respect of the obligations of international law relating to the above Convention from 20 December 1999.