

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL

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NEWS FROM THE CMI

IN MEMORIAM

Professor Feng Liqi

Professor Feng Liqi was elected a member of the CMI Executive Council at the Singapore Assembly meeting which took place in February 2001. He attended his first Executive Council meeting on the morning of Saturday February 17th. The record of that meeting reveals how much he had to contribute to the work of the CMI. Professor Feng died on last November 2001 at the tragically early age of 56. Professor Feng was that ideal combination of an

academic with a commercial background. He studied Ocean Shipping at Shanghai Maritime College and spent 4 years working at the Zhangjiang Port. He returned to Shanghai Maritime College and got his Master in Maritime Law before moving on to work as a judge in the Qingtao Admiralty Court. He began his judicial career in 1984 and eventually rose to Deputy Chief Justice of the Transportation Division of the Supreme Peoples Court of the Peoples Republic

of China, Beijing. He took time out in 1989 and 1990 to visit the Institute of Maritime Law in Southampton as a visiting scholar. He had relatively recently left the Supreme Court and become a Professor of Law at Shanghai Maritime University.

These bare facts reveal nothing of the man. He was a charming man with a courteous manner. He expressed his strongly held views in a clear and conscious way and those of us on the CMI

Executive Council who had known him before he joined the Council were delighted that he had been elected as our first Chinese Councillor and had looked forward to a long association with him. Sadly that was not to be. His death is a great loss to the maritime law field in general and the CMI in particular.

Our condolences go to his family and to his friends and colleagues in China and around the world.

CMI DRAFT INSTRUMENT ON TRANSPORT LAW

1. On 11 December 2001 the CMI delivered to UNCITRAL the Draft Instrument on Transport Law and the Secretary General of UNCITRAL acknowledged receipt of the Draft Instrument with the following letter:

Dear Colleagues,

Thank you very much for the successful completion of the first stage of our work: the preliminary draft instrument on the carriage of goods by sea, which has been submitted for translation into the other UN languages and which will be discussed at the UNCITRAL Working Group on Transport Law in New York (15-26 April 2002). In addition to being sent to all States, the document will be posted in all 6 languages on www.uncitral.org (click "Working Groups" and then look under Working Group III – Transport Law).

On behalf of UNCITRAL, I wish to thank the CMI, its Executive Council and its chief officers, Mr. Patrick Griggs and Mr. Alexander von Ziegler, for their excellent and efficient cooperation, members of the CMI working group, in which I had the pleasure of participating for some time, and special thanks to the drafters, who worked under the wise guidance of Mr. Stuart Beare.

Mr. Franco Ferrari, Secretary of the UNCITRAL Working Group on Transport Law, and I are looking forward to the continued active involvement of CMI during the negotiations in UNCITRAL.

Kind regards,

JERNEJ SEKOLEC

The completion of this Draft Instrument represents the culmination of three and a half years intensive work by CMI on its Issues of Transport Law project.

2. This project began with UNCITRAL's request to CMI, following its 29th Session in 1996, to gather information about current practices and laws in the area of international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed. UNCITRAL noted that "*existing national laws and international conventions left significant*

gaps regarding issues such as the functioning of the bill of lading and sea waybills, the relation of those transport documents to the rights and obligations between the seller and the buyer of goods, and to the legal position of the entities that provided financing to a party to the contract of carriage."

3. CMI set up an International Working Group on Issues of Transport Law in May 1998 chaired by Stuart Beare, who had recently retired as a partner of Richards Butler. In accordance with CMI's well established practice the Working Group prepared a questionnaire on the above topics, to which sixteen National Maritime Law Associations, affiliated to the CMI, responded. The Working Group analysed these responses and identified what it considered should be the principal issues for discussion at the first meeting of the International Sub Committee ("ISC"), which the Executive Council had set up in November 1999. These issues have been refined as discussions in the ISC have proceeded.

4. Chapters 9-13 of the Draft Instrument cover areas not at present governed by international regimes, but in which the CMI considers that greater uniformity would be desirable. These chapters contain provisions relating to

- freight,
- delivery, including some limited provisions relating to the problem of delivery without production of the bill of lading,
- the right of control, that is the right to give the carrier instructions in respect of the goods,
- transfer of rights incorporated in a transport document or electronic record,
- rights of suit against the carrier.

It is proposed that many of the provisions relating to freight and the right of control should not be mandatory. In other words they should only apply to the extent that the parties' agreement does not provide otherwise.

5. Issues of liability were not included in the brief to the Working Group's when it was established in May 1998. These issues had been over a period of some years, considered by the CMI International

Sub Committee on the Uniformity of the Law of the Carriage of Goods by Sea (“the Uniformity Sub Committee”) under the chairmanship of Prof. Francesco Berlingieri. However some members of the “Round Table” of representatives of the industry (which the Executive Council had set up at the same time as it established the Working Group) urged that they should be brought into the project. It had also already become clear that consideration of some of the functions of the bill of lading or sea waybill inevitably impinged on such issues. Prof Berlingieri submitted his report on the work of the Uniformity Sub Committee in May 1999 and the CMI recommended to UNCITRAL that the project be extended to include issues of liability.

6. Chapter 5 and 6 set out the obligations and liabilities of the carrier. The “core” basis of liability is contained in article 6.1.1 and article 5.4 contains the familiar Hague Rules due diligence obligation in respect of seaworthiness. It is for further consideration whether this obligation should be a continuous obligation throughout the voyage. The equally familiar Hague Rules exceptions are retained in article 6.1.3, but as presumptions of absence of fault on the part of the carrier rather than as exonerations from liability. It is also for further consideration whether the contentious exception of nautical fault, which is included in article 6.1.2 as an exoneration, should be retained. Other matters, such as delay, deviation, deck cargo and limitation of liability, are also dealt with in chapter 6. Generally these provisions have been developed from the conclusions of the Uniformity Sub Committee and Prof. Berlingieri’s report was the starting point for discussion in the ISC. The obligations of the shipper are set out in chapter 7.

7. Chapter 8 deals with the issue and content of the transport document or electronic record. The provisions of this chapter go beyond the current provisions of the Hague-Visby and Hamburg regimes and seek to update and expand them, particularly as regards containerised goods.

8. The third meeting of the ISC, at which issues of liability were first discussed, was held in July 2000 immediately after a UNCITRAL/CMI Colloquium. Comments made at this Colloquium suggested that it should be considered whether the liability regime should extend beyond the sea leg. Considerable support was expressed at the CMI Conference in Singapore in February 2001 for extending the period of the carrier’s responsibility to cover inland carriage preceding or subsequent to nautical carriage from the time of receipt by the carrier to the time of delivery to the consignee and for a “network” system of liability. The ISC was therefore instructed to cover the possibility that the Instrument could apply to other forms of carriage associated with the carriage by sea.

Chapter 4 accordingly provides for the carrier’s responsibility for the goods to run from receipt to delivery and for the carrier to be liable in accordance with the provisions of chapter 6 for loss, damage or delay occurring during carriage preceding or subsequent to the sea carriage. The only exception is where an international convention, which constitutes mandatory law for inland carriage, is applicable to the inland leg of a contract for the carriage of goods by sea, and it is clear that the loss, damage or delay in question occurred solely in the course of such inland carriage. This has been described as a limited or minimal network system. Where tackle to tackle transport is agreed, the responsibility of the carrier does not extend beyond the tackle.

9. The ISC was also instructed at Singapore to include provisions in the Instrument to facilitate the needs of electronic commerce. There was a consensus at the Singapore Conference that the final Instrument must facilitate and be compatible with electronic commerce and that the provisions covering these aspects should be technology-neutral. The Instrument has therefore been drafted to apply to all contracts of carriage (save for charterparties and possibly some other similar contracts), including those concluded electronically. Rather than define the word “document”, which is widely felt to mean paper, to include information recorded in any medium, the expression “electronic record” has been used to deal with contracts concluded electronically, or evidenced by messages communicated electronically. Chapter 2 emphasises the need for the consent of the parties to communicate electronically and provides for the incorporation of the rule-book applicable to the relevant system to govern the functioning of a negotiable electronic record.

10. The scope of the Draft Instrument is therefore extremely ambitious. It

- provides for uniform rules in areas which are not currently subject to an international regime,
- sets out a new regime of carrier’s liability which, whilst retaining many of the familiar features of the Hague-Visby regime, and hopefully much of the body of law based on this regime, is put forward in the hope that it may form the basis of a regime which could supersede the Hague-Visby and the Hamburg regimes,
- updates and expands the provisions of the existing regimes to take account of modern transport practices,
- covers inland carriage preceding and subsequent to the sea carriage, thus recognising the fact that today, the majority of contracts for the carriage of goods by sea, include an element of land carriage,
- covers not only contracts evidenced by

traditional documents but also contracts concluded electronically.

11. Following the Singapore Conference a draft of the Instrument was circulated for comment to all National Associations and a number of international organisations, including some which had not previously been members of the Round Table. A further meeting of the ISC was held in July 2001 at which discussion was concentrated on those chapters which had been substantially redrafted after Singapore. Responses and comments were received from fifteen National Associations and nine international organisations and a further draft was circulated (on which some further comments were received) for final revision at the sixth meeting of the ISC in November 2001. Many organisations and individuals, both within and outside the CMI (to whom the CMI is most grateful), have contributed to the production of the Draft Instrument, which has thus been the

subject of as wide a consultation process as was possible in the allotted time frame.

12. A number of issues of principle nevertheless remain to be resolved, as indicated by the bracketed text and explained in the commentary, and in view of the very tight time frame in which it was produced, the CMI does not claim that the Draft Instrument is perfect. It will no doubt provoke controversy, comment and criticism, but it is to be hoped that this will be largely constructive, and the CMI will remain involved as the project develops within UNCITRAL. However the CMI is confident that in submitting the Draft Instrument to UNCITRAL, and thence to governments, it is reflecting broad support within the industry for further detailed consideration of the matters covered by the Draft Instrument in the hope that a major step forward towards uniformity of the law of the carriage of goods by sea can soon be achieved.

EXCERPTS OF THE MINUTES OF THE CMI EXECUTIVE COUNCIL HELD IN LONDON ON 7 AND 8 DECEMBER 2001

Attending

<i>President:</i>	Patrick GRIGGS
<i>Vice-Presidents:</i>	Karl-Johan GOMBRII, Frank L. WISWALL, Jr.
<i>Councillors:</i>	Luis COVA ARRIA, Johanne GAUTHIER, John HARE, Stuart HETHERINGTON, Thomas REME, Jean-Serge ROHART, Gregory TIMAGENIS,
<i>Secretary General:</i>	Alexander VON ZIEGLER
<i>Treasurer:</i>	Benoît GOEMANS
<i>Administrator:</i>	Pascale STERCKX
<i>Past President:</i>	Allan PHILIP (excused)
<i>Publication Officer:</i>	Francesco BERLINGIERI

The President opened the Meeting by welcoming the attendants.

Death of Prof. Feng Liqi

The Executive Council was shocked to hear earlier this year of the most tragic death of Professor Feng Liqi, Member of the Executive Council since the Singapore Conference. The President wrote to Professor Zhu and to the President of the Chinese Maritime Law Association offering our condolences.

Finances

(a) Report from Benoit Goemans, Treasurer

Benoît Goemans presented the interim financial report of CMI covering the period between 1 January and 30 September 2001.

Based on these figures, the Treasurer expects a surplus for the year 2001. He further analysed the situation of CMI relating to liquidity and reported on the new administrative measures to keep the CMI books at the CMI Office in Antwerp. CMI is

now allowed to become a VISA-member which will allow CMI to bill for several services and theoretically also for the fees for the Titulary Members through the payment mechanism of the VISA-card. This, of course, subject to a VISA fee per transaction.

(b) Legal status of CMI and new offices

B. Goemans further reported that CMI has now applied for the registration of our Constitution as approved in Singapore. The Belgian Authorities requested that the procedural rules for the exclusion of CMI Members be included in the Constitution. B. Goemans and F. Wiswall effected this change after consultation with the Executive Council. The administrative process is now following its path and it is expected that the final decree will be received within 2002. With the publication in the official gazette, CMI will have gained its legal status. The Executive Council

thanked B. Goemans for his remarkable work and effort relating to the establishment of the new legal status of CMI.

Since the process of registration in Belgium is not yet completed, it was decided that the Yearbook 2001 should reproduce the existing Constitution in its old version but referring in a footnote to the fact that 10 days after its publication in the Belgium official gazette, the new Constitution will enter into force.

Patrice Rambauville-Nicolle will be invited to join the Constitution Committee.

Once the CMI Constitution has become final pursuant to Belgium law, the CMI Newsletter will inform the MLAs and then, the text of the Constitution will be put on the CMI Website.

The President informed the Council of his visit of the new CMI premises in Antwerp. He was delighted with the way this new arrangement has been implemented and thanked Benoît Goemans, Pascale Sterckx and Wim Fransen for having achieved this efficiently.

Next two meetings of Executive Council

The next two meetings of the Executive Council will be held on 9 May 2002 in London and on 6/7 December 2002 in Antwerp. The meeting on 6 December will start in the afternoon and continue the next day (all day).

Assembly 2002

The Assembly of CMI will be held on 10 May 2002 in London at the Watermens Hall.

Nominating Committee

After the death of Professor Feng Liqi, and by the time of the next Assembly of 2002, two seats of the Executive Council will be vacant. The Chairman of the Nominating Committee has sent letters to all Maritime Law Associations for nominations for those vacancies in the Executive Council. He will in time circulate his report summarizing the outcomes of his consultation within the Nominating Committee and nominating the candidates for election.

Appointment of an Administrator

The President investigated the availability of Wim Fransen to act as Administrator for CMI. Wim Fransen has agreed to take this job. It was decided to invite Wim Fransen as acting Administrator and to support his nomination for the election at the Assembly 2002.

CMI Charitable Trust

The President reported that the CMI Charitable Trust increased its asset to £ 357,000. In 2006, however, under the provisions of the deed, the trust must discontinue the accumulation of income. Patrick Griggs will amend the deed to allow some form of reserve-building even after 2006.

CMI Colloquium and 38th International Conference

After comparing different conflicting dates and the ramifications of some venues, it was decided to hold a Symposium in 2003 (June) in Europe, preferably in France (Marseille) or Germany (Hamburg). This Symposium should receive a working title on a specific issue. In conjunction with this Seminar, CMI will hold some Working Group/ISC Meetings and possibly the Assembly 2003.

The 38th International Conference could be held in Vancouver. The preferable date for that Conference would be June 2004.

In 2006, CMI could hold an intermediate Seminar (place to be defined), whereafter in 2007, the 39th International Conference can take place in Athens. The President will further investigate this plan with the different Maritime Law Associations involved.

Work in progress

(a) Issues of Transport Law

Stuart Beare, Chairman of the International Working Group of the International Subcommittee of CMI on the project relating to "Issues of Transport Law", joined the Executive Council Meeting upon invitation by the President. He reported on the work of the WG and the ISC. In doing that, he referred in particular to the work undertaken during the last ISC meeting in Madrid and the subsequent finalization of the "Outline Instrument". He asked for leave to tidy up the Instrument where obvious mistakes were still contained in the document. Such a leave was granted by the Executive Council. Therefore, the Chairman will make the last drafting changes over this weekend.

Then, Stuart Beare went through the Outline Instrument and explained where the main contentious issues were detected. After discussion of the issues, the Executive Council, having considered the Draft Outline Instrument and commentary prepared by the ISC decided to make a number of minor adjustments and to adopt the document (to become known as the CMI Draft Instrument on Transport Law) and to request the Secretary General to forward it to the UNCITRAL Secretariat. The Secretary General should at the same time offer to UNCITRAL the continued co-operation of CMI in its future deliberations. The ISC to continue in existence.

It was decided that the Draft submitted to UNCITRAL will be circulated by being printed in the CMI Yearbook 2001 and by having it prominently displayed on the Website. Further, the text will be circulated to the MLAs, Round Table Organisations and the International Organisations involved (in particular UNCTAD, UNECE).

(b) General Average

Frank Wiswall reported that two meetings were held since the Singapore Conference, one on 8 May, the other on 5 December 2001. A report was prepared by Frank Wiswall and circulated to the Council.

The results of those meetings of the Joint Working Group are promising and it was decided that the work should continue in the form of a CMI International Working Group. This group was formed as follows:

- B. Nielsen (Chairman)
- B. Browne
- R. Cornah
- H. Levy
- P. Latron
- R. Shaw (Rapporteur)
- J. Middelboe

It was further decided that one member of the USMLA should be identified and nominated to be member of this Working Group.

Patrick Griggs thanked Frank Wiswall for his chairmanship during the two preparatory meetings which were held in the format of the Joint International Working Group.

(c) Issues of Marine Insurance

John Hare, Chairman of this Working Group, reported that no notable progress was made since the Singapore Conference within the CMI Working Group. There were some developments, however, in form of a seminar in Cambridge (UK); further, the Australian draft Act on Marine Insurance was presented through the Attorney General.

It was noted that further replies by MLAs are sought, where the MLA had not yet responded to the initial questionnaire. All replies will be incorporated in the further work of the Working Group.

One way to proceed is to group solutions to specific problems and possibly to propose new solutions. CMI will have to observe the level of interest given by different insurance markets to those subjects. This, since the CMI proposals will remain mere academic considerations as long as the markets will not show an interest and actually follow those suggestions.

(d) Piracy

Frank Wiswall, Chairman of the Joint International Working Group, presented four documents relating to the work of this group on Piracy (Final Report, Model Law, List of Participants and Abbreviated Responses of the CMI MLAs to the Questionnaire). This project is now finalised and the Model Law will now be circulated with the hope that some governments will pick up the solutions proposed by the Joint International Working Group.

A side effect of this project was that a number of co-operation patterns between the organisations involved were improved, this in particular after the events of 11 September in New York and Washington D.C. The Executive Council thanked Frank Wiswall for his work and chairmanship. This project has reached a very promising conclusion. It was emphasised (as also mentioned in the preamble of the Model Law) that the document is not

intended to shape the form of any national legislation, but that the Working Group's concern was the content rather than the form.

The documents of the Joint Working Group will be placed on the Website and published in the next Yearbook.

Further, it was decided that the Singapore presentations (as they are available) should be scanned and be placed in the Website, when ready.

(e) Implementation and Interpretation of International Conventions

Francesco Berlingieri reported on the format of the collection of judgments. He has discussed the new structure with Alfred Popp, Chairman of the Legal Committee of IMO. Based on this discussion the judgments should be summarised to approximately half a page per judgement.

Francesco Berlingieri will send a circular letter to the Executive Council asking them to identify individuals who could provide that information.

(f) UNESCO draft Convention on Underwater Cultural Heritage

After an invitation of the President, Professor A. Kolodkin, Russian Federation, visited the Executive Council to report on the UNESCO project. Indeed, this project was finalised within UNESCO this year. He particularly referred to the conflicts this new Convention will create with several existing Conventions, first of all with the UN Convention on the Law of the Sea (UNCLOS) and with the existing Salvage Conventions.

John Kimball (US), will draft a position paper for the IWG on this subject. When finalised it will be sent to the Executive Council for approval and for distribution. This position paper should be given very wide publicity. The CMI will also circulate the President's letter to the President of UNESCO within the Maritime Law Association and request that the position of CMI is made known to the respective Governments.

(g) International Interests in Mobile Equipment

It was reported that the protocol for aircrafts was finalized in Cape Town earlier this year. Currently there is also a discussion within the industry relating to an application of the Convention (through a protocol) to containers. It was decided to contact IICL (International Institute of Container Lessors) to see what position will be taken by the affected industry.

(h) Arrest Convention 1999

So far, no developments are to be noted. Only few ratifications have been registered for this Convention.

(i) US COGSA

As it looks today, the fate of US COGSA is closely linked to the UNCITRAL project, in the sense that US COGSA might be put forward in US Congress if it becomes clear that the UNCITRAL/CMI project fails.

(j) Places of Refuge

In co-operation with the IMO Legal Committee, CMI agreed to assist IMO in gathering views on this issue. An International Working Group was formed consisting of:

- Stuart Hetherington (Chairman)
- Gregory Timagenis (Deputy-chairman)
- Derry Devine (South Africa)
- Richard Shaw (UK)
- Eric von Hooydonk (Belgium)

A Questionnaire is being circulated within the MLAs. Upon receipt of the replies, an analysis will be prepared and timely relay it to IMO. The CMI Administration should send the addresses of the individuals, to whom the Questionnaires were sent, to Stuart Hetherington.

(k) E-Commerce

Johanne Gauthier, Chairperson of the E-Commerce Working Group, reported that this Group has mainly two functions at the current time. First of all, it is here to support the CMI/UNCITRAL project but secondly, to prepare something useful for the next Conference/Seminar. There is a particular need and demand for information and education of the Maritime Lawyers on the particularities of E-Commerce.

(l) Offshore Mobile Craft

There is not much interest within the Legal Committee of IMO in this subject and, therefore, it was removed from the Work Programme. It was decided that the CMI Working Group relating to this subject should continue in existence but should not be active.

Management Reports

(a) Young Lawyers

John Hare and Johanne Gauthier reported on their thoughts on this project so far. It was in particular a suggestion to have a competition which should be periodically arranged, and under which legal articles on shipping and marine law should be invited. The competition should be open for young lawyers up to the age of 35. The prize will be funded by the CMI Charitable Trust. Possibly, the prize could be linked with an invitation to an upcoming CMI Conference/Seminar.

Further, it was suggested that representatives of the young lawyers could be invited to Executive Council Meetings (as observer). This would, however, require that the Young Lawyers Organisation would be in place and, by then, operating satisfactorily.

Finally, it was suggested to have a dedicated page on our Website with a chat room, which CMI Young Lawyers could use for their "meetings".

(b) Regional membership

The President reminded the Executive Council of the brief which some members of the Executive Council had received to overview the situation of the Maritime Law Associations within defined

regions. The Meeting revised the geographical spread of those assignments as follows:

- L. Cova Arria: Central & South America and the Caribbean
- J.S. Rohart: Europe (this mandate to be shared with Gregory Timagenis, who will take over that mandate from J.S. Rohart after the next Assembly)
- St. Hetherington: Australasia & Far East (including Singapore and Indonesia)
- J. Hare: Africa, Middle East and Indian Subcontinent

Various

(a) CMI Planning Committee

The feeling was expressed that at the current moment, CMI had sufficient projects on hand and that there is neither need nor necessity to handle new subjects at this stage.

(b) Blueprint for future conferences

Patrick Griggs and Stuart Hetherington have prepared a Blueprint for future CMI Conferences, which is intended to form a basis for the arrangements of future CMI Conferences. Some items were added during the discussion within the Council, in particular a reference to additional funding by sponsors (Government and Industry sponsorship) and relating to co-operation with publishers.

(c) Abandonment of Seafarers

Patrick Griggs reported that a set of guidelines had been produced by IMO/ILO and that he was in touch with Michael Marks Cohen (US) who had some proposals by aiding abandoned seafarers.

(d) Funding of CMI and Expenses

It was decided to put this important item together with the paper prepared by Stuart Hetherington on the Agenda of the next Executive Council Meeting, so that the Council will have sufficient time to discuss this important matter and take the right decisions. Benoît Goemans will prepare the financial data/budgets and analysis so that the Executive Council can discuss the proposals with the data in hand. It was decided that, meanwhile, the President could approach the major publication houses interested in Maritime Law to investigate their interest in advertising in CMI's Newsletter. He will use his contacts also to see what additional income could be generated by allowing publishers to advertise in our publications.

(e) List of those performing CMI management functions, members of International Working Groups, International Sub-Committees.

The list of managements functions was reviewed and amended.

The President declared the meeting of the Executive Council closed at 1 pm.

“.. the lawyer should hold the pen...the practical man should dictate the solutions”.

These are the words of the distinguished Belgian lawyer Louis Franck who was one of those responsible for creating the CMI in 1897. The mission of the CMI was then, and still is, the unification of international maritime law. Through 22 Brussels Conventions ranging from the Salvage and Collision Conventions of 1910 through the Hague/Hague-Visby Rules to the Arrest Convention of 1952 and the first drafts of numerous UN Conventions the CMI has tried to produce conventions and rules which serve the best interests of the shipping industry.

The CMI is supported by voluntary contributions from its affiliated National Maritime Law Associations established in 53 countries with a maritime tradition and deliberately avoids seeking funds from Governments. In this way we can be sure that we are free from political pressure and can concentrate on producing sensible, practical solutions to the problems which we tackle. The CMI has a small secretariat in Antwerp (only one paid employee) and is otherwise reliant upon the voluntary efforts of maritime lawyers and others in the shipping industry attached to National MLAs. In delivering the Donald O'May lecture on Maritime Law at the Institute of Maritime Law in Southampton in 1992 that distinguished lawyer and past Secretary General of the CMI, Professor Jan Ramberg suggested that when the history of the development of maritime law comes to be written the 20th century will be regarded as the period during which maritime law came closest to unification but that the 21st Century may well see a move away from uniformity and back to freedom of contract and all the consequences for the shipping industry which that would entail.

It is perhaps a fair test of this proposition to look at the work which is in the current work programme of the CMI.

Transport Law

For the past two years the CMI has, in conjunction with UNCITRAL focused on the creation of a new transport law instrument on Transport Law. This is aimed to replace the Hague/Hague Visby/Hamburg Rules and reintroduce a harmonised liability regime for the Carriage of Goods by Sea. The CMI drafted Outline Instrument extends beyond issues of liability and deals with numerous other aspects of transport law, including the period of the shipowners responsibility and the obligations of the carrier and of the shipper. It addresses the duties of the carrier to deliver the goods to the consignee and the consignee's obligation to accept delivery, rights of control during the carriers period of responsibility, the transfer of rights to take delivery of the goods and rights of suit. The Instrument also tackles the

current problems created by the development of electronic commerce. By popular demand the period of responsibility of the carrier extends beyond the sea leg to enable a door to door transport contract to be signed.

The final outline draft instrument was passed by CMI to UNCITRAL just before Christmas. UNCITRAL has already created a Transport Law Working Group which will meet for two weeks in April 2002 and one week in September to move this project forward. The CMI will continue to co-operate with UNCITRAL in the work to be undertaken on this instrument and representatives of CMI will attend next year's meetings of the UNCITRAL Working Group.

This initiative represents the best (and probably the last) chance of re-establishing a unified transportation law.

Marine Insurance Law

At the CMI 1997 Assembly meeting in Antwerp Lord Mustill urged the CMI to look at Maritime insurance. An International Working Group was set up by CMI to look at the Issues of marine Insurance law which are perceived to cause most problems around the world. This project started with a symposium in Oslo in 1988 when representatives of many National Maritime Law Associations affiliated with the CMI met to identify the issues currently causing most difficulty. A “shopping list” of 12 issues was produced and the CMI Executive Council directed that the International Working Group should study the following topics:

1. Non-disclosure
2. Good faith
3. Alteration of risk during the period of cover
4. Warranties
5. Special clauses having special consequences.

These issues have been the subject of a detailed Questionnaire to National Maritime Law Associations and the responses were analysed at the CMI's 37th International Conference in Singapore in February 2001.

The CMI has dismissed any thoughts of drafting an international convention and will concentrate on identifying the most common solutions to these problems under national laws and will produce a guide, based on this research, which may assist national governments contemplating changes in their law or insurers drafting new policy wordings.

Underwater Cultural Heritage

The CMI has taken a close interest in the development of the recently agreed UNESCO Convention on the Underwater Cultural Heritage. This is essentially a charter for the archaeological establishment which wishes (quite rightly) to protect wrecks of historic or cultural significance around the world. Unfortunately the Convention

in its current form, ignores the rights of salvors as enshrined in the 1910 and 1989 Salvage Conventions and is also in conflict with several articles in the United Nations Law of the Sea Convention. The CMI is keen to see the protection of underwater cultural heritage but it would like to see it done in the context of the Salvage Convention rather than by a self standing Convention.

General Average

The insurance market has for some time been concerned at the heavy financial burden cast upon cargo underwriters by general average incidents. There is a widespread feeling that cargo insurers are, in practice, subsidising less scrupulous shipowners.

A joint International Working Group has recently reported to the CMI Executive Council with a list of those provisions within the York/Antwerp Rules which the industry based Working Group considered should be the subject of review. The International Working Group will now draft amendments to the York/Antwerp Rules 1994. The principle issue for debate will be the extent to which cargo should be required to contribute to expenses incurred at a port of refuge.

Places of Refuge

Following recent headline hitting cases, including that of the *Castor*, the IMO has been looking at ways in which it might be possible to encourage national governments and maritime authorities around the world to offer a place of refuge to a ship in distress. There is a natural reluctance to accept ships in distress where the consequence may be pollution by oil or other substances. Nonetheless, there have been a number of cases where a potentially controllable situation is developed into a disaster due to the refusal of states to grant refuge to a ship in distress.

The CMI has been asked by the Legal Committee of IMO to conduct a review of national laws relating to access to places of refuge. On the basis of this data the IMO Legal Committee, together with the IMO Maritime Safety Committee, will be looking at possible solutions to this constantly recurring problem.

Piracy

Reported acts of piracy have increased by 57% in the past 12 months and this problem is once again receiving attention from IMO. For the past three years the CMI has been working on a draft model law on piracy which, it is hoped, might serve as a guide to any government, which has a piracy

problem but no adequate piracy law. The draft model law covers all the issues which any government seeking to legislate against piracy should cover in their legislation. The model law has now been finalised and will be made widely available.

Implementation of Conventions

The CMI and IMO have, for many years, been concerned at the problems of implementing and interpreting Conventions at a national level. In many instances, even though ratifying Governments are starting from the same basic Convention, the final result, following various approaches to implementation and interpretation, is anything but a unified law. The CMI has made several proposals in this connection and will, itself, be publishing on its website summaries of cases from around the world in which national courts have dealt with problems of implementation and interpretation of Conventions.

* * *

This is a pretty busy work programme bearing in mind that the CMI relies entirely on people giving freely of their time to progress these projects. We are proud of the fact that the principles which motivated our predecessors remain as strong today as they were at the beginning of the 20th century. There is certainly enough to keep us busy in the immediate future and our long term programme also looks pretty full. We remain available to respond to requests from United Nations bodies to help with projects which come into their work programmes. We believe that we are uniquely placed to produce solutions to maritime law problems based upon a thorough knowledge of national laws and upon important input from those within the shipping industry who work so diligently within our many national maritime law Associations.

Looking to the future, the CMI plans a symposium in early 2003 to look at the effect of electronic commerce on the transportation of goods by sea. This symposium will probably be held in France. In June 2004 the 38th International Conference of the CMI will be held, probably in Vancouver. At that International Conference we will hope to have progressed the projects discussed above to the point when we can make firm proposals all of which will be aimed at the harmonisation of international maritime law.

Documents prepared in connection with CMI projects can be found at the CMI website: www.comitemaritime.org

CORRIGENDUM

The list of the delegates who attended the Assembly on behalf of the Maritime Law Association of the United States published in CMI News Letter no. 2/2001 at page 4 was incomplete.

The following delegates also attended the Assembly: William Dorsey, Thomas S. Rue, Michael Marks Cohen, Michael Sturley and Allan Van Praag.

NEWS FROM THE NATIONAL ASSOCIATIONS

NEWS FROM THE MARITIME LAW ASSOCIATION OF SLOVENIA

On 25 October 2001 the Maritime Law Association of Slovenia has resolved to appoint Prof. Dr. David Joseph Attard as member *honoris causa* of the Association. Prof. Attard is the Director of the International Maritime Law

Institute of Malta. The CMI has very close links since many years with the Institute and with Prof. Attard personally and is happy to congratulate him on this appointment.

NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

NEWS FROM IMO

83RD SESSION OF THE IMO LEGAL COMMITTEE

The Legal Committee held its 83rd Session at IMO Headquarters from 8th to 12th October 2001 under the Chairmanship of Alfred Popp Q.C..

In his opening remarks the Secretary General, Bill O'Neil referred to the events in Washington and New York of 11th September 2001 and suggested that the IMO needed to consider measures to combat acts of violence and crime at sea. He invited the Legal Committee to review the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention) and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the SUA Protocol).

The Secretary General urged the Legal Committee to complete its work on a draft Protocol to the Athens Convention on passenger accident liability in preparation for a Diplomatic Conference to take place in the 2002/2003 biennium.

The Secretary General commended the Legal Committee for its flexible approach to its work programme and suggested that it might be necessary for the Committee to find time to consider the problem (highlighted by the *Castor* case) of finding places of refuge for disabled ships. Finally the Secretary General alerted the Legal Committee to the efforts being made by the International Oil Pollution Compensation Funds to establish a supplementary compensation fund to provide extra compensation in the event of major oil spills.

Provision of Financial Security/Protocol to the Athens Convention

Professor Rosaeg, leader of the Norwegian delegation, introduced document LEG 83/4/3

which summarised the intersessional work of the Correspondence Group. The Legal Committee then proceeded to consider the provisions within the draft Protocol which remained controversial.

1. Shipping and Non-shipping incidents – burden of proof

The current draft Protocol provides that where death of or personal injury to a passenger is caused by a “shipping incident” the carrier shall be strictly liable (subject to limits). However where the death or personal injury is not caused by a shipping incident the carrier is to be additionally liable up to a higher limit. The debate within the Legal Committee related to the burden of proof in these non-shipping incidents. A number of delegations felt that in order to give passenger proper protection the burden of proof should be upon the carrier to establish that the incident occurred without his fault.

However a clear majority of delegations preferred a burden of proof which required the claimant, (in the case of a non-shipping incident), to prove that the incident occurred through the fault or neglect of the carrier. In expressing this preference a number of factors were taken into account:

- (a) The principal objective in amending the Athens Convention was to increase the limits and introduce compulsory insurance. Changing the burden of proof in relation to non-shipping incidents would add complexity and might jeopardise the introduction of the desired amendments.
- (b) Retaining the burden of proof on the claimant in relation to non-shipping incidents would represent a “fair and balanced” solution. On the one hand there would be strict liability in

connection with shipping incidents up to a prescribed limit but a reverse burden of proof for claims exceeding that prescribed limit. The situation should be balanced by maintaining a fault-based system for non-shipping incidents.

- (c) Adequate additional protection was given to passengers by the provision of increased limits and compulsory insurance – reversing the burden of proof for non-shipping incidents would be a step too far.
- (d) The carrier might be faced with real evidential problems in seeking to disprove a presumption of fault for non-shipping incidents.
- (e) The combination of compulsory insurance and a reversed burden of proof would place the industry in the position of an insurer and encourage claims – fraudulent and otherwise.
- (f) Imposing strict liability for non-shipping incidents would place the carrier in worse position in comparison with shore based activities.
- (g) There was no justification for reversing the burden of proof in relation to non-shipping incidents. Passengers should not be treated any better than those using hotel and similar facilities on shore.
- (h) If the reversal of burden of proof for non-shipping incidents was coupled with an extended time bar (as proposed) this would place the carrier in an unacceptable situation.

In the final event it was agreed to amend draft article 4 (2) of the Protocol to provide that the carrier should be liable for the consequences of a non-shipping incident if it was caused by “the fault or neglect of the carrier”. The burden of proving such fault or neglect to lie with the claimant.

2. Defect in the ship

A “shipping incident” is currently defined as “shipwreck, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship”. A number of delegations suggested that there were doubts regarding the meaning of “defect in the ship” and that it should either be excluded or more accurately defined. After some debate a small drafting group was constituted to produce a definition. The group reported back with the following definition:

“Defect in the ship” means any malfunction or failure in any part of the ship or its equipment when used for passenger escape, embarkation and disembarkation, or used for propulsion, steering, safe navigation, mooring, anchoring, leaving a berth or anchorage, flood safety, stability, and the operation of emergency boat winches”.

A number of delegates expressed doubts about the usefulness of this definition and finally the Committee agreed the definition in principle but suggested that further work was needed on the draft text to ensure that the definition clearly

distinguishes between hotel type elements and the navigational elements of a ship.

3. Purely emotional stress and punitive damages

The observer delegation of the ISC in their submission document LEG 83/4/6 proposed wording designed to exclude “purely emotional distress in the absence of any physical injury” from the concept of “personal injury”. The wording also sort to exclude punitive or exemplary damages from the ambit of the Protocol. In the event it was decided that it would be wrong to seek to exclude these types of damages. Whether damages for purely emotional distress or which were punitive or exemplary could be awarded should be left to determination of national courts.

4. Luggage

There are no proposals to change the provisions in the Athens Convention in relation to liability for loss or damage to luggage.

5. Per carriage or per incident limitation

Article 7 of the Athens Convention provides the liability of the carrier shall in no case exceed 46,666 SDR (per carriage). The draft Protocol produced following intersessional work provides that the carrier shall be liable “to the extent that such loss in respect of that passenger on a distinct occasion does not exceed ...” SDR. This is said to align the Athens Convention with Article 7 of the 1976 LLMC. (The author of this Article doubts whether this is in fact so bearing in mind that Article 7 of the 1976 LLMC provides that the limit of the shipowner “shall be an amount of 46,666 SDR multiplied by the number of passengers which the ship is authorised to carry”. In other words limitation is based on a global fund per incident rather than one limit per passenger per incident).

6. Passenger or ship limit for purposes of compulsory insurance

The draft Protocol prepared following the intersessional work provides for a per passenger limit for purposes of insurance cover. The precise form used is as follows:

“The Compulsory Insurance or other financial security shall not be less than ... units of account per capita on each distinct occasion”.

A number of delegations and some observer delegations from the insurance market pointed out that this could present serious capacity problems for the insurance market. If the percapita limit was to be SDR 350,000 or up to SDR 500,000 the exposure of the market on a large passenger ship could well exceed the current insurance limit of 4 billion dollars. After considerable debate the Committee decided to retain the wording quoted above in the draft protocol regardless of the problems which this might represent for the insurance market.

7. Wilful misconduct exception

In the context of the compulsory insurance requirement provision is made to enable claimants to pursue their claims direct against insurers. Those liability insurers may invoke any defences which would have been available to the carrier. However there was serious disagreement as to whether the defendant insurer should be entitled to invoke the defence that the damage resulted from the wilful misconduct of the assured. Several delegations contended that the rights of the passenger were paramount and that insurers should not be able to rely on the wilful misconduct of the carrier as a defence to a claim. It was pointed out, however, by several delegations that the right of the insurer to reject a claim because of the wilful misconduct of the assured might well be a matter of public policy and the law in some jurisdictions prohibited insurers from covering wilful misconduct.

The observer delegation from the International Group of P&I Clubs stated that some clubs operated in jurisdictions where it was forbidden to provide insurance against wilful misconduct. It was also pointed out that Clubs would not wish to cover this risk since it would in effect, involve providing protection for substandard operators. In the event the Committee decided to preserve the insurers right to reject claims arising from the wilful misconduct of the assured.

8. Suspension of limitation period when the claimant is unaware of the damage

Article 16 of the Athens Convention provides that claims arising out of the death of or personal injury to a passenger shall be time barred after a period of two years. Article 16 further provides that the law of the court seized of the case shall govern the grounds for suspension and interruption of limitation periods. However in no case shall an action be brought after the expiration of the period of three years from the date of disembarkation of the passenger. The draft Protocol follows the same format but provides that in no case should an action be brought after the expiration of 10 years from the date of disembarkation. This is said to take care of the so-called delayed whiplash injury.

A number of delegations remained dissatisfied with this provision feeling that it placed the shipowner at an unfair disadvantage in defending a "state" action. In the event a "compromise" was agreed at 5 years.

9. The fifth jurisdiction

The draft Protocol produced by the Intersessional Correspondence Group proposed an amendment to Article 17 of the Athens Convention to add a fifth jurisdiction in which the claimant was entitled to bring proceedings. This fifth jurisdiction was a court of the state of the domicile or permanent

residence of the claimant if the carrier provided services for the carriage of passengers to or from that state. A representative of the European Commission opposed this fifth jurisdiction on the basis that it would create problems for members of the European Union because of EU rules relating to recognition and enforcement of judgements.

Whilst there was some support for this new provision most delegates felt that this represented an unnecessary extra jurisdictional option and it was therefore decided to retain Article 16 in its current form without the addition of a 5th jurisdiction.

10. Recognition and enforcement of judgements

On the final day of the Diplomatic Conference which produced the Bunkers Convention of 2001 a representative of the European Commission submitted a paper in which attention was drawn to the fact that on December 22nd 2000 the European Community adopted Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial matters. According to the Commission, by adopting common rules on these matters member states of the European Union had effectively transferred their national competence in this area to the Community. It was stated that the provisions in the Bunkers Convention which deal with jurisdiction and recognition and enforcement of judgments were subjects outside the competence of member states in view of regulation (EC) 44/2001. Due to the late presentation of this proposal and against opposition from non-EU states the proposal was withdrawn.

During the course of the debate on the Athens Protocol a representative from the EU submitted a Working Paper which made very much the same point in relation to the Athens Protocol and proposed that a special Article should be included in the Protocol to deal with the situation where responsibility for recognition and enforcement of judgements had been transferred to a Regional Economic Integration Organisations such as the European Union.

The Commission was again criticised for introducing this topic by way of a Working Paper during the course of the Committee meeting. In the event it was agreed that the matter could not be resolved through discussion within the Committee in view of the late presentation of the proposal and the lack of background material explaining its purpose and full consequences. The provision was, however, retained within square brackets in the Protocol and the European Commission was urged to "consult widely in advance of the (Diplomatic) Conference if it intended to pursue its proposal".

11. Limits of Liability

The observer delegation from the International Council of Cruise Lines drew attention to the

provision in the draft Protocol whereby it was proposed that any state party could fix its own national limit of liability provided that it was no lower than the figure specified in the Convention. In the view of ICCL the provision defeated the goal of establishing a uniform liability system and would affect the capacity of the insurance market to provide cover.

The observer delegation of ICS suggested that regional variations in limits would undoubtedly result in forum shopping. In the event these concerns were dismissed and the position in the draft Protocol remains that a state party may by specific provisions of national law prescribe a different (though higher) limit than that specified in Article 7 of the Convention.

12. Proposal to limit direct action

The United States in document Leg 83/4/9 proposed that the right of direct action by the claimant against the insurer should be restricted so that the passenger could only make a direct claim against the insurer when he had obtained a judgement against the carrier which could not be executed because of insolvency or where the carrier could not be located. This proposal was rejected.

One or two other detailed amendments were discussed which are of no great consequence. At the end of the period set aside for discussion of this draft instrument it was agreed that the Legal Committee should recommend to the Council that a Diplomatic should conference be organised in the next biennium to adopt the Protocol. The likely date for the Diplomatic Conference is the week beginning October 27th 2002.

Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers.

It will be recalled that when this matter was first raised at a Legal Committee meeting by the International Confederation of Free Trade Unions (ICFTU) it was agreed that it would be dealt with by an IMO/ILO Ad Hoc Expert Working Group. That Group has had several meetings and has chosen a two-stage approach. The first stage was to produce two draft Resolutions and related Guidelines designed to assist states when establishing their national requirements to identify the crucial issues relating to personal injury to and death and abandonment of seafarers. The Guidelines recommend steps to be taken by shipowners to ensure adequate and effective financial security systems to deal with personal injury, death and abandonment of seafarers. It would be for States to adapt the Guidelines to suit their own particular requirements. The operation of these Guidelines would be kept under review. The Chairman of the Expert Working Group stressed that since the Guidelines had to be adopted by the IMO and ILO governing bodies

meeting respectively in November and December 2001 there was no time to amend the text. The Chairman however indicated that the Group would welcome comments and observations from the Legal Committee.

One or two delegates commented upon the Resolutions and Guidelines. In particular the international group of P&I Clubs pointed out that under the proposals the shipowner was required to carry insurance meeting the recommended standards set out in the Guidelines. These included a requirement that the seafarers should receive prior notification if the insurance was to be cancelled and notification if insurance was not to be renewed for any reason. The International Group pointed out that this was an impossible task to impose on insurers who had no direct contact with seafarers.

Generally speaking delegates welcomed this initiative but hoped that the Guidelines might eventually be replaced by a binding instrument.

The Committee decided to recommend to the Council that the draft Resolutions and Guidelines, as approved by the Committee, be submitted to the IMO Assembly for adoption.

Draft Convention on Wreck Removal.

The delegation of the Netherlands continues to promote this draft instrument. As the topic of secondary interest discussed at the 83rd Session there was insufficient time available to examine the latest draft in detail. However, during the course of a brief debate the delegation from Malaysia referred to the *An Tai* incident which highlighted the problems faced by states which are compelled to pay the cost of removing a wreck which poses a hazard to navigation or to the marine environment. He urged delegates to embrace the terms of the draft and in particular insisted that it should contain both liability and compensation provisions. The representative of the International Group of P&I Clubs pointed out that all ships entered with P&I Clubs had cover against wreck removal expenses. He suggested that a better way of proceeding would be to follow the recently adopted IMO Guidelines on Shipowners responsibilities in respect of Maritime Claims (A. 898 (21)). These guidelines identified the type of cover which all shipowners should carry.

All delegations agreed that the matter should continue to be one of the Committee's priority items with the aim of being ready for a Diplomatic Conference in the 2004–2005 biennium.

In advance of a more detailed discussion at the next Session of the Legal Committee a list of areas of concern was prepared. It was stressed that any Convention must be consistent with UNCLOS, must contain a fair definition of "wreck", should identify the nature of the danger posed by a wreck and also tackle issues of financial security/financial responsibility.

Finally the delegation of the Netherlands agreed to

continue to sponsor this project and, before the 84th Session, to prepare a substantive document.

Monitoring implementation of the HNS Convention

At the 80th Session of the Legal Committee a Correspondence Group was set up to assist the Committee in monitoring the implementation of the HNS Convention. Various meetings have been held designed to address the problems associated with adoption of the HNS Convention. One issue which continued to cause difficulty was the need to identify the “contributing cargo”. The setting up of the machinery to identify such cargo has financial implications for states which are considering ratifying. Attention was drawn to LEG 83/INF.3 which includes the first attempt to draft an IMO Guide for Interested Parties on the Workings of the HNS Convention 1996. All delegates agreed that the Correspondence Group should continue in its worthwhile efforts to assist states contemplating ratification of the Convention by production of guidelines and other practical proposals.

Work programme and meeting dates for 2002

The 84th Session of the Legal Committee will run from 22nd to 26th April 2002 and the 85th Session from the 21st to 25th October 2002. The Diplomatic Conference to finalise the terms of the Protocol to the Athens Convention will follow immediately after the 85th Session of the Legal Committee and run from October 27th to 31st.

As regards the future work programme for 2002 this is as follows:

1. Consideration of a draft Convention on Wreck Removal
2. Consideration of the draft Protocol to amend the 1992 Fund Convention
3. Monitoring the Implementation of the HNS Convention
4. Provision of financial security: Seafarer Claims: IMO/ILO Working Group
5. Review of the 1988 SUA Convention and Protocol
6. Places of refuge
7. Matters arising from the work of the Council and the Assembly.

It was recognised that of the topics listed priority would need to be given to items 1 & 2.

Supplementary Compensation Fund

The Director of the International Oil Pollution Compensation Fund 1992 reported that an Intersessional Working Group had submitted a draft Protocol to the 1992 Convention for consideration by the Assembly of the Fund at its next meeting. Following approval by the Assembly the IOPC Fund would be requesting IMO to convene a Diplomatic Conference to consider the draft. It was accepted that the text would need to

be vetted by the Legal Committee before proceeding to the Diplomatic Conference. In view of the urgency of this matter, following a number of cases in which there have been shortfalls in available funds to compensate victims of oil spills, it was agreed that this would be treated as a priority item as and when referred from the IOPC Funds.

Draft Convention on Offshore Mobile Craft

A representative of the CMI observer delegation introduced document LEG 83/12 which summarised the work of the CMI International Working Group on a draft instrument designed to extend to offshore mobile craft the benefits of numerous existing maritime conventions.

While some delegations suggested that the subject should be maintained in the long term work programme of the Committee, most delegations favoured its exclusion on the basis that there was at present no compelling need to adopt a treaty on offshore mobile craft. The Committee thanked the CMI for the work which it had undertaken in connection with this project and it was subsequently removed from the work programme.

Implementation and Interpretation of International Conventions

A representative of the Observer delegation of the CMI introduced LEG 83/13/1 and informed the Committee that the CMI at its Singapore Conference in February 2001 had taken a number of decisions regarding its future work on this subject. He drew attention in particular to the 5 steps which the CMI felt that it might usefully take to assist governments in developing legislation for the implementation of IMO sponsored international conventions in a consistent and coherent manner. The efforts of the CMI in this connection were generally welcomed though one delegation questioned the relationship of the CMI activities with the IMO Technical Co-operation Programme. This delegation also inquired whether the CMI received any funding for its consultation services. In response the representative from the observer delegation of the CMI confirmed that its consultation work with the IMO Legal Committee and its support of IMLI came at no charge to those organisations.

The Committee expressed its gratitude for the work of CMI and noted the excellent co-operation that exists between that organisation and the Committee.

Implementation and Interpretation of the 1976 LLMC Convention

The representative of the CMI observer delegation introduced document LEG 83/13/2 which summarised the enquiries made by the CMI of National Associations regarding the method by which the 1976 LLMC had been implemented in to national law and interpreted in practice. It was confirmed that the full analysis of responses

received on this subject had been placed in the IMO library.

Places of Refuge

The Committee considered document LEG 83/13/3 on the legal issues relating to the difficulty of providing ships in distress with places of refuge. In his introduction the Secretary General had referred in particular to the Castor incident. The Committee decided to include the question of places of refuge in its work programme for the next biennium but recognised that any solution would have to be non-mandatory at least the initial stage. The Committee gave a mandate to the Secretariat to study the relevant legal issues and noted that the CMI had offered to collaborate with

the Secretariat in this project and would, as part of that exercise, consult its member Associations around the world.

Tribute to Professor Dr. Walter Muller

The Delegation of Malta paid tribute to the memory of Walter Muller who had made an outstanding contribution to the development of maritime law and also noted his important role in the adoption of international conventions prepared by the Committee. In particular note was made of the fact that Dr. Muller devoted much time and energy to the affairs of IMLI in Malta.

PATRICK GRIGGS

NEWS FROM IOPCF

AUTUMN MEETINGS – 15-19TH OCTOBER 2001

The Autumn meetings of the Governing bodies of the 1971 and 1992 IOPC Funds took place at the IMO Building in London during the week of 15-19 October 2001. There were three dominant matters which preoccupied the meetings:

1. The winding up of the 1971 Fund.

By October 2001 Membership of this Fund has declined to 27 States, and on 24th May 2002 the number will fall to 24. In September 2000 a Diplomatic Conference was held in London at which a Protocol to the 1971 Fund Convention was adopted, whereby the 1971 Fund Convention was amended so that the 1971 Fund will cease to be in force when the membership falls below 25, or when the total quantity of contributing oil falls below 100 million tonnes, whichever is the earlier. This Diplomatic Conference adopted a tacit amendment procedure for this Protocol, meaning that it would enter into force, unless more than one-third of those states who remained members of the 1971 Fund registered objection to it. No such objections were registered, and this Protocol entered into force on 27th June 2001.

Purists of Public International Law may assert that the tacit amendment procedure is not applicable to such an important measure, but there can be no doubt that it should produce a pragmatic solution to an otherwise insoluble dilemma. It is to be hoped that it will encourage all the remaining 1971 Fund member states to transfer their membership to the 1992 Fund without delay.

2. Increased Funds for payment of oil pollution claims.

The IMO Legal Committee at its meeting on 18th October 2000 adopted resolutions, again under the

tacit amendment procedure, which will have the effect of increasing the limits under the 1992 IOPC Fund Convention to 89,770,000SDR and 203,000,000 SDR respectively for the shipowner and the IOPC Fund. Assuming that there are no objections to these increases, they will take effect in 2003.

In the meantime, a Formal Working Group has developed a list of aspects of the 1969 and 1971 and 1992 Conventions which, in the view of the Working Group, merit review, and the Chairman of the Working Group reported to the Autumn meetings on these matters. This led to an animated debate with a substantial body of delegates speaking in favour of revision, although several cautioned against attempting too radical changes in a system which has been shown to work effectively. The CMI has pledged its support and assistance to the Working Group and to the Director of the Funds Secretariat in following up this work. This work will continue through the coming years.

3. Supplementary "Top-Up" Fund

The first and most important recommendation of the Working Group was the creation of a Supplementary Fund to provide additional compensation for very large claims, thus avoiding the regrettable necessity of paying only a percentage of such claims where the claims presented exceeded the 1992 Fund Limits. In several cases, such as the grounding of the *Braer* in the Shetland Islands in 1992, extravagant figures put forward by claimants in the early stages produced a total which exceeded the limit of the Fund's liability. This in turn made it essential for the Executive Committee of the 1971 and 1992 Funds to exercise caution in settling claims,

although at the end of the case all claims were actually settled in full. Membership of the proposed Supplementary Fund will be optional to those states who consider that they need the additional cover provided, and whose oil importers are prepared to bear the additional cost involved. The limit of the additional cover to be provided by the Supplementary Fund will be fixed by the Diplomatic Conference, but it is anticipated that it will be more than the 1000 million Euros (approximately £628 million) proposed by the Commission of the European Union for its COPE Fund. It is hoped that if the proposed Supplementary Fund achieves broad acceptance the European initiative will not need to be realised.

At the October 2001 meeting the text of a Protocol was approved and this will now be submitted to the IMO with a request that it convene a Diplomatic Conference as soon as possible. No doubt the text of the draft Protocol will be placed before the Legal Committee of the IMO for review, but since most delegates to the Legal Committee have already debated the draft in their capacity as representatives at the IOPC Fund meetings, it is to be hoped that the Legal Committee will speed the draft on its way with a minimum of formality.

4. *The Erika Casualty.*

This vessel, laden with 31,000 tonnes of heavy fuel oil, sank in heavy weather off the Brittany coast of France in December 1999. This casualty caused huge pollution of the west coast of France from Brest to La Rochelle. The claims from the French fishery, mariculture and tourist industries are expected to be very large, and will almost certainly exceed the 135m SDR limit of the 1992 Fund's liability. In July 2000 the French Government presented to a meeting of the Fund's Executive Committee a meticulously prepared study on the estimated claims of the tourist sector. A revised and refined report was presented to the October meeting, based on actual figures for the Summer 2000 season up to mid August, so far as it was possible to gather these in time to present the report. The Director reminded the Executive Committee of its duty to pay claims as generously and as quickly as possible, but also of the danger of encountering a situation, actually encountered in the case of the *Braer*, where over-generous payments were made in the early stages.

Removal of the oil from the wreck, using a new technique, was completed in September 2000 and proved surprisingly successful, but further pollution by oil coming ashore cannot be definitely excluded. In 2000 the Committee felt unable to increase the level of payment of admitted claims beyond the 50% approved in July, but by January 2001 sufficient data was available to justify an

increase to 60%. A further study was carried out in June 2001 by the French Ministry of Economy, Finance and Industry which indicated that the total of the tourism losses due to the *Erika* casualty would probably fall between £34 and £47 million. This study, a masterpiece of statistical analysis, relied on data from VAT declarations and even the quantities of garbage collected to give a realistic estimate. On the basis of this new evidence the IOPC Fund's Executive Committee agreed in July 2001 to increase the level of payments to 80% of approved claims.

5. *Other Matters*

Three other large cases which have been moving rather slowly towards finalisation saw some substantial progress reported at the meetings. The *Nakhodka* in Japan and Korea, the *Aegean Sea* in Spain and the *Nissos Amorgos* in Venezuela all share the common feature of a large number of fisheries claims presented in more than one forum, with consequent duplication (and a certain amount of exaggeration) of figures. In each case the Governmental Authorities concerned have intervened to bring all claimants round the same table, and the signs of a possible overall settlement of each case are beginning to look promising. It was reported to the October 2001 meeting that the Spanish government has accepted a formal offer from the Fund of an overall settlement of the *Aegean Sea* case, and that the additional consents of fishing interests are being actively sought. It was suggested on the margins of the meetings that a similar solution may be achieved in the case of the *Nissos Amorgos*.

The principal lesson to be learned here is that the 1992 increase in the maximum limit of liability of the IOPC Fund has proved insufficient fully to meet the claims arising out of a major pollution casualty, and that there is a real need to introduce higher figures as quickly as possible. The Protocol adopted in October goes some way to meet this, but it was clear from the debates in the Working Group that there is a perceived need to increase the limits still further in the reasonably near future. It is likely that the Supplementary Fund Protocol will indeed be adopted by a Diplomatic Conference, hopefully in 2003, but it will be very interesting to see which states then decide to join the Supplementary Fund.

Finally in the case of the *Braer* casualty it was reported to the October meeting that as a result of the dismissal of certain major claims by the Scottish Courts and the consequent withdrawal of others, it was now possible to pay in full all approved claims, welcome news indeed for such claimants who had hitherto only received 40%.

NEWS FROM BIMCO

APPOINTMENT OF NEW SECRETARY-GENERAL

Mr. Truls W. L'orange has been appointed new Secretary-General of BIMCO, such appointment becoming effective on 1st January 2002.

Mr. L'orange's involvement in BIMCO began when

he was elected to BIMCO's Documentary Committee as a Substitute in 1979. He was later appointed as a full member in 1991 and is currently serving as the Vice-Chairman of this Committee.

APPROVAL OF NEW CHARTER PARTIES AND OTHER CONTRACT FORMS

On Friday 16 November 2001, the Baltic and International Maritime Council's (BIMCO) Documentary Committee met in Copenhagen, Denmark, and approved the following five new charter parties:

"Barecon 2001"

In the twelve years since "Barecon 89" was introduced it has become the standard form used in the bareboat chartering sector, enjoying widespread use throughout the industry. In recent years BIMCO felt that "Barecon 89" would benefit from an update to reflect changes in modern bareboat chartering practice. The Documentary Committee approved "Barecon 2001" Standard Bareboat Charter which is the result of two year's work by a specialised sub-committee. The amended form introduces a number of new provisions covering areas such as termination and repossession. Many of the existing clauses have been revised to improve their clarity and to remove any potential ambiguity. Particular attention has been paid to the detailed provisions relating to inspection, maintenance, operation, insurance and repairs. "Barecon 2001" will also be among the first BIMCO standard forms to incorporate a mediation provision.

"Baltime 1939"

The "Baltime 1939" form is probably among BIMCO's best-known charter parties. Its provisions have undergone little change in recent years other than the introduction of a box layout in 1974. Last this year the Documentary Committee decided to carry out a minor technical update of the form to introduce the latest versions of standard clauses such as those relating to war risks and law and arbitration. Some of the more archaic terminology used in "Baltime" has also been revised or removed.

"Demolishcon 2001"

The Documentary Committee approved the revision of "Salescrap 87" code named "Demolishcon 2001" Standard Contract for the

Sale of Vessels for Demolition. The revision has been politically expedient following the launch of the Industry Code of Practice on Recycling earlier this year as a means of providing self-regulation in an industry that is subject to increasing scrutiny by governments and environmentalists. The "Salescrap 87" has been substantially revised taking into account current business practices in the highly specialised demolition trade.

BIMCO Standard Bunker Contract

The Documentary Committee also approved the BIMCO Standard Bunker Contract, which is a revision of the earlier "Fuelcon" Standard Marine Fuels Purchasing Contract. The revision has been developed with the assistance of the International Bunker Industry Association (IBIA). The new contract which parts with the "Fuelcon" box layout undertakes a balanced approach to a number of key issues in respect of the purchasing of marine fuels such as sampling, claims and risk and title.

FONASBA Standard Liner and General Agency Agreement

Another document passing approval was the FONASBA Standard Liner and General Agency Agreement. The revision, which is largely a technical update, amalgamates the 1993 editions of the General Agency Agreement (for Liner Services) and the Standard Liner Agency Agreement both adopted by BIMCO.

Standard Mediation Clause

In response to the increasing use of mediation in the shipping industry, BIMCO has developed a standard mediation clause for use in charter parties and other agreements. The Standard Mediation Clause is designed to form a new final part of the BIMCO Standard Law and Arbitration Clause 1998. Its provisions are incorporated into the chosen arbitration procedure to ensure that its use, if unsuccessful, does not cause any delay. The Mediation Clause is worded to reflect the consensual nature of the mediation process while

empowering the arbitrator to take the actions of a recalcitrant party into account when awarding costs, should the arbitrator feel that one party has acted unreasonably in declining to even attempt mediation. The London Maritime Arbitrators

Association (LMAA), the Society of Maritime Arbitrators, New York (SMA) and the Chambre Arbitrale Maritime de Paris (CAMP) have endorsed the BIMCO Standard Mediation Clause for use.

RATIFICATION AND DENUNCIATION OF INTERNATIONAL CONVENTIONS

INSTRUMENTS OF RATIFICATION OF AND ACCESSION TO THE FOLLOWING CONVENTIONS HAVE BEEN DEPOSITED WITH THE DEPOSITARY:

- **Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969**

Cambodia: 8 June 2001

Djibouti: 8 January 2001

Dominica: 31 August 2001

Papua New Guinea: 23 January 2001

Sierra Leone: 4 June 2001

Turkey: 17 August 2001

- **Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1991**

Cambodia: 8 June 2001

Djibouti: 8 January 2001

Dominica: 31 August 2001

Papua New Guinea: 23 January 2001

Sierra Leone: 4 June 2001

Turkey: 17 August 2001

- **Convention on Limitation of Liability for Maritime Claims, 1976**

Dominica: 31 August 2001

Sierra Leone: 26 July 2001

- **International Convention on Salvage, 1989**

Dominica: 31 August 2001

Estonia: 31 July 2001

France: 20 December 2001

Romania: 18 May 2001

Sierra Leone: 26 July 2001

- **International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990**

Bulgaria: 5 July 2001

Dominica: 31 August 2001

Ireland: 26 April 2001

Slovenia: 31 May 2001

– **International Convention on Maritime Liens and Mortgages, 1993**

Monaco: 28 March 1995

Russian Federation: 4 March 1999

Saint Vincent and the Grenadines: 11 March 1997

Tunisia: 2 February 1995

Vanuatu: 10 August 1999

– **International Convention on Arrest of Ships, 1999**

Bulgaria: 27 July 2000

Estonia: 11 May 2001

**INSTRUMENTS OF DENUNCIATION OF THE FOLLOWING CONVENTIONS
HAVE BEEN DEPOSITED WITH THE DEPOSITARY:***

– **Convention pour l'Unification de Certain Règles en Matière d'Assistance et Sauvetage Maritimes, 1910**

Germany: 8 October 2002

– **International Convention on Civil Liability for Oil Pollution Damage, 1969**

Antigua and Barbuda: 14 June 2001

Djibouti: 17 May 2002

Iceland: 10 February 2001

India: 21 June 2001

Kenya: 7 July 2001

Malta: 6 January 2001

Papua New Guinea: 23 January 2002

Russian Federation: 20 March 2001

Sierra Leone: 4 June 2002

Slovenia: 19 July 2001

– **International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971**

Antigua and Barbuda: 14 June 2001

Djibouti: 17 May 2002

Iceland: 10 February 2001

India: 21 June 2001

Kenya: 7 July 2001

Malta: 6 January 2001

Papua New Guinea: 23 January 2002

Russian Federation: 20 March 2001

Sierra Leone: 4 June 2002

Slovenia: 19 July 2001

United Arab Emirates: 24 May 2002

* The dates indicated are the dates when denunciation becomes effective.