

## COMITE MARITIME INTERNATIONAL

### Minutes of the Executive Council meeting held at the Marriott Plaza Hotel in Buenos Aires on Sunday, October 24, 2010

<b>Attending:</b>	President:	Karl-Johan Gombrii
	Vice-President	Stuart Hetherington
		Johanne Gauthier
	Immediate Past-President	Jean-Serge Rohart
	Councillors:	Giorgio Berlingieri
		Christopher Davis
		José Tomas Guzman
		Mans Jacobsson
		Henry Li
		Louis Mbanefo
		Andrew Taylor
	Secretary-General	Nigel Frawley
	Administrator:	Wim Fransen
Treasurer:	Benoît Goemans	

#### 1. Minutes

The minutes of the Executive Council meetings held by email conference during the weeks commencing March 15 and June 21, 2010 were discussed. The Secretary General moved for their approval, which was seconded by Chris Davis and the minutes were approved unanimously.

#### 2. Business Arising

Stuart Hetherington brought the Executive Council up to date on construction of the new website by Ben Slater and his assistants. He said that Pascale Sterckx is now capable of adding items to the new website. He said that they will be replacing the old website in the very near future. There was some discussion about including a schedule of ratifications by States to International Conventions. Johanne Gauthier suggested that all NMLAs should be invited to comment on the new website and that there should be a contact person in each member association for purposes of supplying information to the database on jurisprudence. She also suggested that Mr. Hetherington should liaise with Chris Giaschi of the Canadian MLA who is experienced in the construction of websites. On Mr. Hetherington's recommendation, the Executive Council agreed with paying 5,000 AUD for further website development by Ben Slater's company, Admission, in order to allow CMI to send communications directly to the members of all NMLAs. Where an NMLA, for privacy or other reasons, is unable to provide their members' contact details they will be asked to designate somebody to whom all CMI communications can be sent for on-forwarding to its members.

### **3. Management Committee Report of the Meeting Held at Singapore June 27, 2010**

The President reported that he, Mr. Hetherington, and Nigel Frawley were in attendance with Ms. Gauthier by telephone conference. He referred to the recommendation for a subscription holiday and pointed out that even with it there is still a large reserve remaining. Ms. Gauthier advised that she had read a Canadian government memorandum on non-profit companies with references to reserves being proportionate to the activity and would try to locate it and circulate it to the Executive Council. Benoît Goemans also reported about Belgian guidelines on the subject. Chris Davis suggested that a reserve sufficient to look after 2-3 years' expenses would be appropriate. He then remarked that a continued subscription holiday (beyond 2011) might cause problems in the future with respect to collecting subscriptions from NMLAs once current subscription levels are reinstated. Benoit Goemans referred to his report on the impact of the level of subscriptions on the reserves. Although the 2010 subscription level significantly reduces the income of the CMI, it does not appear that this level will erode the reserves significantly within the next few years. A 40% reduction of the 2010 subscription level along with a 20% early bird discount would visibly reduce the reserves, and necessitate to double the subscriptions once the reserves have reached a level that should not be further reduced, say around 2017. The question is whether the MLAs will then be able to amend their financial policy and be able to face a level of subscriptions that is twice the amount charged over the last years. To avoid this development and difficulties, a one time skip of the subscriptions in 2011 would enable to reduce the reserves visibly, while maintaining them on a level sufficient to cover several years of expenditures, to improve the cash position of the MLAs without them getting acquainted financially to a level of CMI subscriptions which covers only half of the needs of the CMI. Mans Jacobsson said that he prefers a reserve of 500,000 Euros and increasing our expenditures for worthwhile matters. He said the IOPC Funds had had a subscription holiday once with mixed experience. Mr. Davis recommended a vote at the Assembly either for a 100% subscription holiday or a 25% or 50% reduction.

The President thanked Councillors for their views and said he would take them all under advisement for the debate at the Assembly. The President then asked for guidance on use of the surplus by increased expenditures and referred the Executive Council to paragraph 2 of the Memorandum of the Singapore Management Committee meeting. Following a full and frank discussion there was general approval of the recommendations in paragraphs 2 a)-f), attached hereto as Annex "A". During the discussion, a suggestion was made to ask prominent Maritime Law Professors worldwide to get organised for video lectures to CMI Young Members and other interested persons.

The President then turned to the approaches that have been made in recent years by the IBA Maritime and Transport Law Committee for purposes of discussing joint activities. He was in favour of continuing contacts with the Committee and as has been suggested by them, to participate in each other's meetings in order to get to know each other better. It was pointed out by one of the councillors that we should be aware that the IBA is more of a networking organisation than the CMI. Mr. Rohart said that he had heard that there was an IBA Young Lawyers Association meeting in Istanbul. He will look into this and report. The President said that IBA had disclosed plans to organise a meeting of the Committee in Shanghai in the

spring of 2012. As this might interfere with a number of delegates registering for the CMI Conference in China October 2012, he had requested that they change the venue of their meeting if possible.

It was decided that the Management Committee will discuss the matter of expenditures and closer liaison with the IBA at their meeting later in the week.

#### **4. Finances**

- a) The Treasurer's report auditing the financial impact of reduced future subscriptions has already been circulated and discussed. It was decided that there was no need for further discussion at this time.
- b) Unpaid subscriptions: Mr. Davis and José Tomas Guzman then reported on their efforts to settle with those countries having outstanding contributions. Mr. Guzman reported that, as a general rule, the Presidents of the Maritime Law Associations have explained that they have encountered difficult times due to lack of maritime legal work in their countries, mainly because the termination of public subsidies has resulted in a loss of their merchant fleets. Some of these Maritime Law Associations have lost members and it has been difficult for them to collect contributions in order to face their own expenses. Notwithstanding this, the Presidents all agree that it is in their great interest to maintain the link with the CMI. He has been in contact with the Presidents of the MLAs of Brazil, Chile, Ecuador, Colombia, Peru and Uruguay. He has not received any reply from the Netherlands Antilles. In particular, the Executive Council thanked Mr. Guzman for his efforts in settling with a number of Latin American MLAs and encouraged him to continue his efforts in order to achieve even further agreements. The Executive Council thereupon ratified the settlements reached with Chile and Colombia and agreed settlements on the same basis with the MLAs of Peru and Uruguay.

#### **5. Members**

- a) The nominations of Henry Li, Robert Parrish, Marcello Maresca and Helen Noble for titular membership were discussed and approved.
- b) Consultative Members: The Executive Council approved a recommendation to the Assembly for admission of IVR as a Consultative Member. There was then discussion about various UN entities becoming Consultative Members. It was thought to be a good idea to explore making UNIDROIT a Consultative Member for a start. The President will ask Frank Wiswall to investigate this matter further and give recommendations with the reasoning behind them. He should avoid lobby organizations.
- c) New NMLAs: The President advised that discussions with Honduras, Malaysia, India and Poland are proceeding well. As to Indonesia, Mr. Hetherington said that they formed an Association and he had told them that they had to broaden their membership. As we have no indication that this has been done, their application for membership will not be put before the Assembly. It is important that they satisfy the requirements of the Constitution for a broadly based membership.
- d) Provisional Members: Mr. Goemans advised that he received an e-mail from Curacao in the Netherlands Antilles that they would like to organise a new NMLA and cancel the old. The President asked Mr. Goemans to continue discussions with the person in question and stress that they cannot simply avoid outstanding subscriptions by creating a new MLA and that efforts should be made to revive the existing member association.

- e) As to Portugal, Giorgio Berlingieri said that their MLA is no longer in existence and he told his contact in Lisbon that the CMI is open for an application from a new group of lawyers in that country. He will pursue this.
- f) Membership Consultation Process: Mr. Davis reported that replies to questionnaires are still being received. He said that either he or Ms. Gauthier will report to the Assembly on this. Apparently, the Singapore MLA has offered a CMI regional office in Singapore on a trial basis and locally funded. The President was asked to explore this kind offer and report back to the Executive Council and, eventually, the Assembly.
- g) It was suggested that an annual Newsletter from each country should be added to the website. As well, Singapore, Croatia and Germany have asked for links to the CMI website and this was agreed.

## **6. Nominations**

The Executive Council agreed with the Nominating Committee's nominations, which were for the re-election of Wim Fransen as Administrator, and the election of Song Dihuang, of the MLA of China, as a new Executive Councillor. As this was Henry Li's last meeting, the President congratulated him for his contributions and confirmed that he will continue to act as liaison between the Secretary General and the Beijing organising committee. Mr. Li replied that it had been a very positive experience for him. He recommended that the CMI focus more on Asia and involve more Asians on IWG's and ICS's.

Wim Fransen has been nominated for a second term. He thanked the Executive Council for the opportunity.

## **7. Work in Progress**

### **a) General Average Interest Rate**

The committee's recommendation of 4.25% in 2011 for the York Antwerp Rules 2004 was noted and will be passed on to the Assembly for a decision.

### **b) Piracy**

The President reported that Patrick Griggs will deliver a paper at the Colloquium which will be put on the website after the Colloquium is over.

### **c) Fair Treatment of Seafarers**

Mr. Berlingieri reported that the IWG, chaired by Kim Jefferies of Norway, was recently given its mandate by the Executive Council. In compliance with the mandate, the IWG made a submission a few weeks ago to the IMO Legal Committee. The submission addresses the need that the IMO guidelines (drafted initially by the CMI) adopted in 2006 be complied with and that Article 230 of UNCLOS also be complied with by member States. Notably, the submission was supported by other influential associations such as the International Group of P&I Clubs, ICS, ISF, BIMCO, Intertanko and ITF.

### **d) LLMC and Australian proposal at IMO to increase limits**

The document prepared by Patrick Griggs, Mr. Jacobsson and Richard Shaw on behalf of the CMI, attached hereto as Annex "B", was tabled and approved. (Note: This document had been originally approved by the Executive Council at its June 2010 meeting but, since then,

certain amendments had been made. It was submitted to the IMO Legal Committee for its meeting to be held in London November 15-19, 2010).

**e) Rotterdam Rules (UAE Conference, Bogota Conference)**

The Secretary General reported that Jean-Michel Morniere is organising a conference on the Rotterdam Rules on February 1, 2 and 3, 2011 in Abu Dhabi. He also indicated that a group of lawyers are interested in establishing an MLA and joining the CMI. Mr. Rohart will talk to Dr. Morniere. Mr. Hetherington said that he was interesting in going to Abu Dhabi to assist with setting up an MLA. Jean-Serge Rohart, Andrew Taylor and Stuart Hetherington will review any application and ensure that the membership be broadly based. The group was also encouraged to look into the history of the Gulf MLA, which was a member for 5 or 6 years but never paid any contribution or otherwise contributed to the work of the CMI and was subsequently expelled.

The Secretary General said that a successful conference in Bogota, Colombia had been held September 1-3, 2010 and that he was aware that Kate Lannan of UNCITRAL and Professor Michael Sturley had contributed to that conference by delivering papers on the Rotterdam Rules.

**f) Salvage, including appointment of new IWG member**

Stuart Hetherington reported on the meeting of the Salvage Convention IWG in London in May 2010 and the tension between the ISU on the one hand and the International P&I Group and ISC on the other. A representative of the Group recommended that Viggo Bondi, Head of the Legal Department, Norwegian Shipowners' Association and the new Chairman of the ICS Legal Committee, join the International Working Group. This was agreed. Mr. Hetherington said that there may be a need for an IWG meeting before the Beijing Conference. This is likely to be in May 2011. Following the Salvage Convention sessions at the Colloquium, the question will be where the CMI takes this matter from here. Any further discussion on this was deferred until after the Colloquium presentations.

**g) Judicial Sale of Ships**

Mr. Li confirmed that he had organised a meeting with members of his IWG to get their papers ready for the Assembly. The question will be whether there is a need to continue this topic. He said he would submit a report to the Executive Council following the IWG presentations at the Colloquium.

**h) Implementation and Interpretation of International Conventions**

Francesco Berlingieri's report was tabled and a brief discussion ensued.

**i) Marine insurance**

There was discussion on the Questionnaire relating to Mandatory Insurance. Mr. Davis suggested that the IWG consider identifying additional topics for study, including subjects that might have commercial and practical application. He reported that Charles Debattista had recently spoken at the Tulane University Maritime Law Center on the interrelationship between the contract of sale, contract of carriage and contract of insurance, utilizing the new

INCOTERMS 2010 as a point of reference. Mr. Davis said that this might be a worthwhile topic at the Beijing Conference.

**j) Cross border insolvencies**

Mr. Davis reported that the IWG on cross border insolvencies, the creation of which had been approved by the Executive Council at its March 2010 meeting, would comprise himself as chairman, Professor Sarah Derrington and William Sharpe. A preliminary meeting was scheduled to take place in Buenos Aires and he suggested that this subject might be a good topic for the Beijing Conference agenda.

**k) Limitation of Liability**

Gregory Timagenis then attended the meeting to report on this subject. He said that the mandate had been transformed so that the IWG is being replaced by an International Sub Committee which should not exclusively deal with procedural rules. The new role is:

- 1) to prepare a list of substantive issues of Limitation of Liability for study;
- 2) to finalize a Commentary on the Guidelines of Procedural Rules.

There was a meeting of the IS-C in London in February 2010 which clarified the new mandate. He said that a discussion ought to be taken further regarding the list of associations in order to have their input. He will hold a further IS-C meeting in the coming months and said that the identification of issues is in itself helpful both to practitioners and those in the process of implementing the convention into the national legislation of a ratifying state. The next step could be to discuss one or two issues in order to arrive at a recommended solution. In the long term, a Protocol might be a possibility. He confirmed that the IS-C would consult with the Executive Council regularly regarding future work and report on completed work. The Executive Council decided that the IS-C should continue with its work and report regularly to the Executive Council.

**l) Ratification of the Conventions on Arrest (1999) and Maritime Liens and Mortgages (1993)**

Mr. Berlingieri said that, at the Executive Council virtual meeting in March 2010, it was considered that the CMI should include an investigation on the reason why the 1993 MLM Convention and the 1999 Arrest Convention has achieved such little success. An International Working Group was appointed. The chairman is Professor John Hare of Cape Town and members are Professor Ignacio Arroyo Martinez and Giorgio Berlingieri. The IWG is presently considering the best way to proceed with this investigation, whether by way of a Questionnaire or otherwise. They will report to the Executive Council on their efforts in the next few months.

**8. Young Members, including consideration of the Essay Prize and alternatives**

Mr. Taylor and Mr. Frawley recommended that a Young Members programme be on the Beijing Conference agenda. Mr. Taylor said that he and others in U.K. will be organising a conference in London of European Young Members during this coming year. This will hopefully contribute to raising the profile of the CMI among younger lawyers. Frank Smeele has previously suggested that, as part of the Young Members' outreach efforts, maritime research students should be encouraged to network through the Young Members' section of the website. This, it was agreed, would be a very worthwhile endeavour. Frank Smeele has

also suggested the Young Members' section of the website could also be a repository for articles. Mr. Davis suggested that lectures that have already been given and recorded via video-link, be put on the website and that we should consider web podcasts for interactive studies. He will consult with Michael Sturley, John Hare and Martin Davies on this. Mr. Jacobsson reminded us that there must be quality control on matters going onto our website.

As to the Young Member Prize, it was considered that the concept ought to be reviewed, partly because today's Young Members are too busy to enter into such competitions unless they are academics and partly because contributions, if any, are time consuming and sometimes difficult to review. It was felt that other ideas should be explored such as sponsoring a student at some college or sponsoring participation in a CMI conference or the like rather than an Essay Prize. Mr. Taylor said it was best that Young Members come to us with their suggestions on the subject. Mr. Taylor will, if possible, consult with the Young Members at the Colloquium but, in any event, report back with ideas.

#### **9. Charitable Trust**

The report of Tom Birch Reynardson was noted, particularly the increase in assets from 371,000 GBP to 452,000 GBP.

The US MLA has asked for more transparency in dealings between the CMI and the Charitable Trust. Mr. Griggs prepared a note on the subject which will be produced at the Assembly. The President pointed out that the Charitable Trust does an excellent job in supporting IMLI in Malta and the WMU in Malmo, Sweden.

#### **10. Colloquium and Assembly – Buenos Aires**

The Secretary General reported that arrangements have been finalized and that all signs indicated that the Argentine MLA will be putting on an excellent Colloquium. He said that Jorge Radovich had been a pleasure to work with and that the Colloquium website was presently accepting papers for publication.

The Secretary General reported that all secretarial arrangements had been made by Ms. Sterckx and Ms. Canning. As Ms. Sterckx was unable to attend at Buenos Aires, Ms. Canning had kindly agreed to take her place and carry out her duties and responsibilities.

#### **11. Conference at Beijing October 2012**

Mr. Li said that he looked forward to continuing in the role of liaison between the CMI and the Chinese Organizing Committee. He also said that he would suggest Asian topics of interest. Mr. Hetherington said that one of the responses to the Questionnaire sent to NMLAs had suggested that we should consider transactional topics for presentations in seminar format at the conference (as we have been doing more over the last few years) particularly where the programme does not have sufficient traditional CMI working sessions.

## **12. Other Business**

### **a) IOPC Funds meeting of Governing Bodies-Marrakech, Morocco – Week of March 28, 2011**

The Executive Council approved asking Richard Shaw to proceed to the meeting in Marrakech as the CMI Observer.

### **b) Albert Lilar Prize**

Mr. Fransen said that the Foundation is revitalized and presently considering a new prize to be awarded. Frank Stevens of Antwerp was the last winner. He explained that the Foundation is an independent trust and that the deed provides that the Board of Trustees can have an appointee from the CMI, Mr. Fransen being the current CMI appointee. The capital sum is approximately 100,000 Euros which gives a 5,000 Euro prize from the interest accrued. Mr. Fransen confirmed that he has no personal liability as a director or trustee that could be passed on to him as the Administrator of the CMI or to the CMI directly.

### **c) CMI as Partner Institution with the International Foundation for the Law of the Sea (Summer Academy)**

Mr. Jacobsson reported that the CMI is now partnering with the International Foundation for the Law of the Sea. (Note: The Executive Council noted at its June 2010 meeting that the partnership would be with the Foundation). The partnership is useful in enabling an official CMI representative to lecture at the Summer Academy organized by the Foundation. It was noted that a number of CMI members had already lectured at the Academy but not as CMI representatives. He further said that a partner institution is in the nature of a consultative member. The CMI will not be making any financial commitment, nor is it expected to. He suggested that the CMI should draw the attention of Young Members to the Summer Academy to enable them to consider whether they would like to attend.

### **d) World Ocean Council**

Mr. Frawley said that he and the President thought it wise to receive mailings from this United Nations department which has been developed to look after the World's Oceans from ever increasing pollution. There is no financial commitment. The Executive Council approved that the CMI be on the mailing list.

### **e) Offshore Installations**

Mr. Frawley reported that Richard Shaw had sent an e-mail on October 14, 2010 about a proposal by Indonesia that the IMO Legal Committee should revisit the issue of liability and compensation for oil pollution damage resulting from offshore exploration and exploitation. He referred to an oil spill from an Australian Rig that had had transborder implications. Indonesia and Australia were both affected. Mr. Jacobsson pointed out that the preparation of an international instrument on the subject proposed by Indonesia was a controversial issue and a number of complex questions had to be addressed. He said that a regional convention covering the North Sea and the Baltic Sea adopted in 1977, the International Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources, in the drafting of which he as a representative of the Swedish Government had played an active role, had not been ratified by any State and had consequently not entered into force. After a discussion on the subject, a decision was made



to ask Mr. Shaw to monitor the Indonesian application and report to the President and Secretary General. He is to be invited to update his old report, as Chairman of the CMI IWG on Offshore Rigs, to the IMO if he thinks it important to do so.

**f) Iran Sanctions**

The Secretary General reported that Dieter Schwampe wanted the opportunity to speak on this issue to the Assembly. He has prepared two documents. The first is the impact of the United Nations sanctions on the shipping industry in Europe. The second is the impact of the sanctions upon the United States shipping industry. The Executive Council approved this initiative.

**13. Next Executive Council meeting**

The President said that the next meeting will be by e-mail conference in the spring of 2011. Mr. Goemans suggested the week of April 4, 2011. The President said that he would consider this. The next physical meeting of the Executive Council will be held in Oslo during the week commencing Monday, September 26, 2010, the actual date to be decided later. The meeting will be in conjunction with, not only the Assembly, but also a meeting organized by the Norwegian Maritime Law Association possibly in cooperation with Det Norske Veritas.

There was then a general discussion where the next Colloquium should be held. Several Councillors said that the next Colloquium should be held in Europe. It was noted that Ireland has offered to host a Colloquium in Dublin in 2016, and that Italy had also offered to host an event. No decision was made.

**14. Next Assembly**

The President reported that the next Assembly will be held in Oslo in late September 2011 on a date still to be chosen.

**15. Termination**

Following a vote of thanks to the Argentine MLA for the splendid luncheon during the meeting, the President terminated the proceedings at 4:00 pm.

## ANNEX "A"

- (a) Website – Annual maintenance. It is proposed that an experienced retired marine lawyer or professor knowledgeable in CMI matters be engaged for this purpose and paid an annual honorarium of, say, €10,000 to maintain and upgrade the website and instructing Pascale accordingly.
- (b) Meetings of the Management Committee – It is proposed that there be one physical meeting of the ExCo per year on the work program and other substantive matters, and two virtual meetings per annum to deal with administrative matters. It is also proposed that there be meetings of the President, both Vice Presidents and Secretary-General (to be known as the "Management Committee") on an as-needed basis. This will have the effect of increased travel expenses.
- (c) ExCo travel expenses to be increased in pursuance of the consultation process. It is necessary that we market the CMI in a more positive way.
- (d) ISC and IWG travel expenses – Article 22 of the Constitution provides for the expenses of the Chairman and Rapporteur to be paid. The expenses of the other members of the ISC and IWG are at the discretion of the ExCo. It is considered that such expenses are to be more generously applied to encourage attendance. This will have the effect of increasing travel expenses. However, there should be a control on this by keeping the number of members on IWGs at a relatively low number where possible.
- (e) Continuing education – It is proposed that the many distinguished academics we have within the CMI in the various regions of the world should be utilised in order to take quality maritime law teaching to less well-resourced NMLA's, possibly by way of video conferences. Such lecturing should also emphasize topics that are subject to work in progress within the CMI. The academics could also put up nominees for a prize (eg., a scholarship for Malmo). By way of example only, we could use: Africa - John Hare (Cape Town), North America - Martin Davis (Tulane) and Michael Sturley (University of Texas), South America - Diego Chami (Buenos Aires), Oceania - Sarah Derrington and Nick Gaskell (Brisbane) and Paul Myburgh (Auckland), Asia - Tomotaka Fujita (Tokyo) and Henry Li (Shenzhen), Europe - Charles Debattista and Richard Shaw (Southampton), Francis Rose (Bristol) and Francis Reynolds QC (Oxford).

We should consult with John Hare for ideas. He has experience from video teaching.

- (f) It is proposed that with the contemplated increase in proactive work, individual members of the CMI be protected by Directors and Officers' insurance, and Defamation cover. The cost of the premiums will result in an increase of our annual expenses.

# ANNEX "B"

Legal Committee  
97<sup>th</sup> Session  
Agenda Item 8.

LEG 97/  
29<sup>th</sup> September 2010

**Proposal to increase the limits under Article 6 of the LLMC 1976 as amended by the Protocol of 1996.**

**Submitted by CMI**

## **SUMMARY.**

*Executive summary:* This document considers and sets in its legal context the proposal from Australia to increase the limits of liability under the LLMC 1976/96.

*Action to be taken:* The CMI invites delegates to note the issues raised by this paper when considering the proposal.

*Related documents:* LEG 94/11/1, LEG 94/12, LEG 94/12/1 and LEG 96/6/2

### **1. The Pacific Adventurer.**

In LEG 96/12/1 Australia referred to an incident in March 2009 involving the general cargo ship Pacific Adventurer as the result of which approximately 270 tons of heavy fuel oil from her bunkers were lost into the sea. Much of this oil washed ashore in south-east Queensland causing severe environmental, ecological and socio-economic damage. Clean-up costs were substantial.

Australia is a party to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention) though it did not come into force in Australia until 16 June 2009. Art. 6 of the Bunkers Convention provides that in relation to bunker pollution claims the right to limit liability under the LLMC 1976, as amended, is preserved.

In LEG 96/12/1 the Government of Australia states that the claims arising out of the Pacific Adventurer incident substantially exceeded the property damage limits under Art. 6 of the LLMC 1976 even taking into account the increases introduced by the 1996 Protocol. Accordingly the Government of Australia has invited the Committee to consider amending the limits of liability under Art. 6 of the 1996 LLMC (using the Protocol Art.8 tacit amendment procedure) to "ensure that the limits will adequately cover clean-up costs and damages from incidents resulting in the release of substantial amounts of bunker oil". The Committee has agreed to do so.

### **2. The concept of Limitation.**

The concept of limitation can be traced back to 17<sup>th</sup> Century. Hugo Grotius, writing in 1625, claimed that the right of an owner to limit his liability was

necessary to encourage the development of the maritime industry. In more recent times Lord Denning, in the case of the *Bramley Moore* [1963]2 Lloyd's Rep. 429, stated that limitation "is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience."

It should be noted that the concept of limitation has frequently been attacked but it survives not only in the Limitation of Liability Conventions for general maritime claims but also in the liability and compensation conventions of recent years relating to claims arising from pollution caused by oil, bunkers, HNS and wreck removal.

It is a necessary consequence of this universal acceptance of the concept of limitation that there will be cases in which, when the courts of a State Party apply one of the conventions containing limitation provisions (as they are under a treaty obligation to do), the limit will prove insufficient to pay all claims in full. Indeed, if a review of claims over a period of time did not throw up occasional cases in which the limitation amount had been insufficient it might be concluded that the limits had been set too high.

In LEG 96/6/2 the International Group of P & I Associations (P & I Clubs) reported on an analysis of Group claims data which revealed that between 2000 and 2009 there were 595 incidents involving bunker oil pollution damage claims (excluding other types of property damage claims). Of these incidents only 8 (1.34%) involved pollution claims which exceeded the LLMC 1996 limits. It may be felt that if the concept of limitation is accepted this is, statistically, an outcome which suggests that limitation is operating as intended.

### **3. The structure of LLMC Art. 6-1976 and 1996 Protocol.**

Art 6 is in three interrelated sections. Art. 6 (1) (a) sets a limit of liability for loss of life and personal injury claims and Art. 6 (1) (b) sets a separate limit for claims other than for loss of life or personal injury (often referred to as the "property" fund). Under 6 (2) it is provided that if claims under 6 (1) (a) exceed the limitation amount available thereunder the excess may be claimed rateably against the amount available under 6 (1) (b).

Of possible significance in the context of the Australian request for review of the limitation amount for property damage is the fact that the limits for personal injury claims under 6 (1) (a) of the LLMC 1976 as amended by the 1996 Protocol are approximately twice those for property damage claims under 6 (1) (b). (At the minimum tonnage of 2,000 tons the limit for personal injury claims is 30 million SDR and for property damage claims it is 15 million SDR.)

Historically the ratio between the amount available for personal injury claims and the amount available for property damage claims has always favoured personal injury claims. Thus, in the UK Merchant Shipping Act 1862, £8 per ton was set aside for property damage claims and £15 for personal injuries. However, in the 1924 Limitation Convention £8 was provided for property damage claims and an additional £8 per ton if there were personal injuries involved as well. By the 1957 Limitation Convention the two/one ratio was restored with 1,000 Gold Francs for property damage claims and 3,100 Gold Francs (with Gold Francs 2,100 earmarked for personal injury claims) where there were both property damage and personal injury claims. In the 1976 Limitation Convention we find the current two separate limitation amounts with the "overspill" provision. As indicated above this ratio structure remains unchanged by the 1996 Protocol.

It has proved difficult to trace the reason for these ratios. The Travaux Préparatoires for the 1957 and 1976 Conventions simply reflect the evidently accepted public policy that personal injury claimants are to be given substantial preferential treatment.

It seems to follow from this research that if the limits under Art. 6 (1) (b) are to be increased it would be necessary also to increase the limits under Art. 6(1) (a) - in order to maintain the two/one ratio. This might make it necessary to consider whether third party personal injury claimants would be receiving more generous treatment than passengers under Art. 7 LLMC or under the Athens Convention 2002.

#### **4. Conclusions.**

This analysis is intended to enable the Committee to consider the Australian proposal in its proper historic context.