

# CMI NEWS LETTER

*Vigilandum est semper; multae insidiae sunt bonis.*

No. 1 - January/April 2001

COMITE MARITIME INTERNATIONAL

## **This Issue Contains:**

### **News from the CMI**

- 37<sup>th</sup> International Conference, Singapore February 12<sup>th</sup>-16<sup>th</sup> 2001
- Issues of Transport Law - Letter to Presidents of National Associations
- Implementation and Interpretation of International Conventions - Report by the CMI to IMO
- Appointment by the Assembly of Benoit Goemans as Treasurer
- Appointment of Moore Stephens as Auditors of the CMI accounts
- CMI Management Functions

### **News from Intergovernmental and International Organizations**

#### News from IMO

- International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, by Patrick Griggs
- Adoption of amendments of the limitation amounts in the CLC 1992
- Adoption of amendments of the limits of compensation in the Fund Convention, 1992

#### News from the International Tribunal for the Law of the Sea

- New address

## **NEWS FROM THE CMI**

### **CMI 37<sup>TH</sup> INTERNATIONAL CONFERENCE SINGAPORE, FEBRUARY 12<sup>TH</sup>-16<sup>TH</sup> 2001**

First, a word of thanks to members of National Associations, Titulary Members, Representatives of Consultative Organisations and Observers who attended the Conference and helped to make it such a successful event both in the Conference halls and at the social functions. I also express my thanks to members of the Maritime Law Association of Singapore, representatives of Singapore Shippers Association and members of my Executive Council who served on the Organising Committee.

Secondly a word or two to introduce the Resolutions which were passed at the Plenary Session on the morning of Friday 16<sup>th</sup> February and endorsed by the CMI Assembly on the afternoon of that day.

The bare words of these resolutions cannot do full

justice to the work of the Conference on the topics which were on our Agenda. Full reports at each of the Sessions will be included in Yearbook 2001 - Singapore II. Until those reports are available the Resolutions represent a useful summary of where we stand with each of our projects and how they will develop in the immediate and long term future. I hope that all National Maritime Law Associations which have contributed to the preparatory work for the 37<sup>th</sup> International Conference will continue to follow the development of each project and will also continue to make their valuable contributions to the work of the CMI in general and to the work of its International Sub-Committees and International Working Groups in particular.

PATRICK GRIGGS

## RESOLUTIONS PASSED AT THE PLENARY SESSION

### *Issues of Transport Law*

The Plenary of the Comité Maritime International, TAKING DUE NOTE of the work done by the International Sub Committee on Issues of Transport Law and of the deliberations and conclusions set out in the Report of the Committee on Issues of Transport Law of the 37<sup>th</sup> International Conference of CMI:

REQUESTS the International Sub Committee to

- undertake further work on the basis of the draft of the instrument (CMI Yearbook 2000 – Singapore I, p.122) and the conclusions of the Conference,

and particularly to

- complete the Outline Instrument to include provisions able to facilitate the needs of electronic commerce, and to cover the possibility that it should apply also to other forms of carriage associated with the carriage by sea (“door to door transport”),

and to

- consult the Member Associations and the Consultative Members of CMI as well as sectors of the industries involved in international carriage of goods by sea or otherwise affected by the outline instrument,

and to

- revise the Outline Instrument upon collection of the replies,

AND FURTHER REQUESTS the Executive Council of the Comité Maritime International to report on the work of the Comité Maritime International to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) at an appropriate time and in appropriate form.

### *Marine Insurance*

The Plenary of the Comité Maritime International, TAKES DUE NOTE of the work done by the International Working Group on Certain Issues of Marine Insurance Law (IWG), and of the discussions during the sessions devoted to marine insurance at the 37<sup>th</sup> International Conference of the CMI;

CONSIDERS the current study by the IWG of the national laws of marine insurance to be an exercise worthy of continuing from both an academic and a practical perspective;

REQUESTS the IWG to continue its study of the national laws of marine insurance, in a fully consultative process, and in a manner which seeks to identify and evaluate areas of *difference* in the national laws of marine insurance (primarily drawn from those identified in CMI Yearbook 2000 – Singapore 1 page 326) where either

- a measure of harmonisation may be feasible and desirable and would better serve the marine

insurance industry; or

- the dissemination by the CMI of the products of the IWG's research would promote better knowledge and understanding of such differences.

REQUESTS the IWG in its continuing study to take into account

- the role which marine insurance should be playing in promoting the highest internationally accepted standards of safety at sea, with particular regard for the insistence upon and enhancement of safety of all marine personnel
- the current economic structures within which marine insurance is underwritten, taking into account *inter alia* regional co-operation, competition and regulation
  - the differences and similarities in the civilian and common law legal systems, in relation to the content of substantive law, to procedural issues, and to draftsmanship;

REQUESTS the IWG to report upon its endeavours periodically to the Executive Council of the CMI, and thereafter to the 38<sup>th</sup> International Conference of the CMI (with any draft discussion proposal as the IWG may then recommend for discussion in conference).

### *General Average*

The Plenary of the Comité Maritime International, TAKES DUE NOTE of the work done by the International Working Group on General Average and of the deliberations and conclusions of the meeting of Committee C which took place at Singapore on Tuesday 13<sup>th</sup> February 2001 at the 37<sup>th</sup> International Conference of CMI.

REQUESTS the International Working Group to continue further work and to consider what if any revision of the York Antwerp Rules should be made in the light of the deliberations and conclusions of Committee C, of the proposals made by, amongst others, IUMI, and of other matters.

### *Model National Law on Acts of Piracy and Maritime Violence*

The Plenary of the Comité Maritime International, TAKES NOTE of the work of the Joint International Working Group (JIWG) on Uniformity of Laws Concerning Acts of Piracy and Maritime Violence and of the Committee of the Conference considering the work of the JIWG, and RESOLVES as follows:

- That the Comité Maritime International approves and endorses the concept of the Model National Law as a valuable instrument of justice in combating the scourge of piracy and maritime violence, and

- That the CMI approves and endorses the structure and provisions of the Model National Law produced by the JIWG (CMI *Yearbook 2000 – Singapore I*, p. 418 *et seq.*), subject to consideration by the JIWG of the points raised in various interventions during the discussion of the proposed Model National Law that took place in the Conference Committee during its meetings on 15<sup>th</sup> February 2001, and
- That the CMI Secretariat transmit to the JIWG the Report of the Conference Committee (also to appear in the CMI *Yearbook 2001 – Singapore II*), for use in the JIWG’s preparation of a final draft of the Model National Law; and
- That the JIWG is requested to transmit its final draft of the Model National Law to the Executive Council of the CMI as well as to the other constituent organizations of the JIWG, and
- That the Executive Council review the final draft of the Model National Law at the earliest possible opportunity and, if it sees fit, approve the final draft and cause the Model National Law to be transmitted to all Member National Associations of Maritime Law and to all Provisional and Consultative Members of the CMI with the request that they apply their utmost efforts not only to bring the Model National Law to the attention of national governments, but to urge and assist governments to enact the Model National Law (or as much thereof as possible) into national legislation, and
- That the Executive Council upon its approval of the Model National Law cause the same to be transmitted to the Secretary-General of the International Maritime Organization with a request for endorsement of the Model National Law by the IMO Assembly, and
- That the Member National Associations of Maritime Law and all Provisional and Consultative Members of the CMI are requested to report the enactment of the Model Law (or any variation thereof) by any government to the CMI Secretariat, in order that a table of such enactments may be prepared and revised for publication on the CMI website and in subsequent editions of the *Yearbook*.

### ***Implementation of the 1976 LLMC Convention***

The Plenary of the Comité Maritime International, TAKES NOTE

- of the Draft Report on the Implementation of the 1976 LLMC Convention (as appears on pages 435 to 664 of the CMI *Yearbook 2000*);
- of the deliberations of Committee D on the Implementation and Interpretation of the 1976 LLMC Convention

APPROVES THE DRAFT REPORT

RESOLVES

- to send to IMO a copy of the Draft Report together with a summary of the deliberations of the Committee for consideration by the IMO Legal Committee;
- to inform IMO that the CMI will be pleased to co-operate with IMO with a view to finding all possible ways and means of ensuring the most satisfactory implementation and the uniform interpretation of the LLMC Convention as well as of other maritime conventions;

REQUESTS

the Working Group to continue its work on the possible measures which may be taken by CMI to promote the uniform implementation and interpretation of international conventions, such as:

- the establishment on the CMI website of a database of decisions by the courts of the states of member associations and of other states parties to the LLMC Convention on the interpretation of the LLMC Convention and of other international conventions;
- the transmission to Professor Berlingieri by Member National Maritime Law Associations of copies, in English if possible, of any decision of their courts concerning implementation and interpretation of international conventions;
- the development of standard clauses dealing with implementation and interpretation of international conventions as international instruments for inclusion in future conventions;
- the establishment of a CMI Consultation Service/Panel to provide services, whenever required in connection with the implementation of international conventions;
- the rendering of assistance to training organisations such as IMLI where the drafting of legislation to implement international conventions is a curriculum subject;
- the possible reference to the International Court of Justice, or to another international tribunal, for rulings on the interpretation of international conventions in the course of litigation.

### ***Athens Convention, 1974***

The Plenary of the Comité Maritime International, TAKES DUE NOTE of the papers delivered by Mr. B. Kroger and Mr. C. Haddon Cave regarding the rights of the passengers under the Athens Convention, 1974.

REQUESTS the Chairman of the session on the Athens Convention to prepare a report for submission to the Executive Council summarising the discussions at the meeting,

AND FURTHER REQUESTS the Executive Council to submit the report (with the papers attached) to the

IMO Legal Committee as a document to be utilised during preparation of the proposed Protocol to the Athens Convention 1974.

### **Work Programme**

The Plenary of the Comité Maritime International,

having taken due note of the Report of the CMI Planning Committee.

REQUESTS the Chairman of the Planning Committee, to invite the Executive Council to consider the Committee's report and implement its recommendations when the availability of time and funds makes this possible.

## **ISSUES OF TRANSPORT LAW**

### **LETTER TO PRESIDENTS OF NATIONAL ASSOCIATIONS**

25 April 2001

Dear President

#### ***Issues of Transport Law***

The UNCITRAL Secretariat will present a proposal to the Thirty-fourth Session in June this year that UNCITRAL commences work on this project in an intergovernmental working group. Assuming that this proposal is accepted, the work in UNCITRAL is likely to commence in 2002 with consideration of the draft Outline Instrument prepared by the CMI. This is a very encouraging development and means that the project is now moving to its next stage. It also means that the work programme which was in contemplation at Singapore will need to be accelerated.

As I said in my letter of February 2001, the Working Group is revising the Outline Instrument and a revised draft will be circulated for consultation (I hope in early June) to National Associations and international organisations. This will be in good time before the *meeting of the International Sub Committee which will be held in London on 16, 17 and 18 July 2001*. Three of the topics which it is proposed should have particular attention at this meeting are the right of control, the transfer of rights and how the Instrument should apply to door to door transport. These topics have not yet received the same degree of consideration by the International Sub Committee as the other topics covered by the Outline Instrument.

When the revised draft Outline Instrument is circulated, it will be accompanied by a Consultation Paper. This Paper will highlight a number of issues on which the comments of National Associations and international organisations are specifically sought. Responses to this Consultation Paper will be requested by the end of *September 2001*.

The Working Group will meet again in October to

analyse the responses to the Consultation Paper and to prepare a further draft of the Outline Instrument for consideration by the *International Sub Committee at a meeting in November*. It is envisaged that this draft will contain alternative provisions where no firm consensus has emerged and policy choices remain to be made. It will also be accompanied by some explanatory commentary.

After this meeting, and after the Working Group has made such further revisions as may be necessary, the draft Outline Instrument will be formally approved by the Executive Council for submission to UNCITRAL at a meeting scheduled to take place in early December.

Our aim is to submit to UNCITRAL by the end of this year a draft which outlines a regime which could prove generally acceptable and which the CMI considers to be a sound basis for further development in the intergovernmental working group.

This however will by no means be the end of CMI's close involvement in this project. It is envisaged that the International Sub Committee will remain in existence and that it will hold meetings which will be co-ordinated with meetings of the UNCITRAL intergovernmental working group. This will enable the CMI to continue throughout the UNCITRAL process to feed in suggestions from National Associations and international organisations.

I am writing to you now to outline the proposed work programme for the rest of this year in the hope that it may be helpful to your delegates who will attend the meetings of the International Sub Committee and that it may assist the forward planning of meetings of any relevant committee of your Association.

Yours sincerely,

Stuart Beare

Chairman of the International Sub Committee

# IMPLEMENTATION AND INTERPRETATION OF INTERNATIONAL CONVENTIONS

## REPORT BY THE COMITÉ MARITIME INTERNATIONAL TO IMO

**Executive Summary** The CMI at its Singapore Conference in February 2001 approved the report of its Working Group on the implementation and interpretation of the 1976 LLMC Convention. This paper summarises the decisions taken and areas of planned future action by the CMI, and invites comment from the members of the Legal Committee on the proposed areas of work.

**Action Required** See final paragraph.

Following the decision of the Legal Committee of the International Maritime Organisation at its 80<sup>th</sup> session in October 1999 to support the work of the CMI in researching the various methods adopted by governments for the implementation of the 1976 International Convention on Limitation of Liability for Maritime Claims (LLMC) together with the legal decisions of the courts of state parties in interpreting that convention, the CMI appointed a working Group consisting of Professor Francesco Berlingieri (Italy), Chairman, Dr Panayotis Sotiropoulos (Greece), and Mr Richard Shaw (UK) to study these topics.

At the 37<sup>th</sup> Conference of the CMI held in Singapore in February 2001, a draft report of the Working group was presented, debated, and adopted. This report highlighted the number of different ways in which states parties had applied the LLMC Convention in their own law, and the range of variations permitted by the Convention itself, either by permitting reservation of certain aspects, or by leaving specific issues to be decided by national law. While therefore the principal features of the LLMC Convention (increased limitation funds and a presumed right to limitation except in extreme cases) have been respected, there is still a considerable range of variation between states parties in the application of this convention.

The principal thrust of the debate at the CMI Conference was that, while the report (copy of which is enclosed) was considered to be useful in itself, it was not a wise use of the resources of the CMI to conduct a similar study of other international conventions on maritime private law at the present time, but that the CMI should concentrate on the practical aspects of this field of study.

The conference also resolved that the Working Group should continue its work, but with the emphasis on practical measures to collect relevant

information which might be of assistance to those governments which were able to use it in their programmes to develop legislation for the implementation of IMO-sponsored international conventions in a consistent and coherent manner. It was considered that the following measures (inter alia) should be investigated by the Working Group:

1. The establishment on the CMI website [www.comitemaritime.org](http://www.comitemaritime.org) of a database of decisions by the courts of states parties to the LLMC Convention, and to other international conventions, on the interpretation of those conventions. The database will be set up at the Headquarters of the CMI in Antwerp, but will be administered by Professor Berlingieri in Genoa, assisted by Mr Richard Shaw at the University of Southampton Institute of Maritime Law. It is hoped that this database will provide a useful resource for work by parties to litigation which involves issues concerning the interpretation of international conventions and, in appropriate cases, by the courts deciding such issues.
2. The development of standard clauses dealing with the interpretation of international conventions as international instruments. A typical example of such a clause is Article 3 of the Hamburg Rules.<sup>1</sup>
3. The possibility of establishing a CMI Consultation Service to provide services whenever required in connection with the implementation of international conventions. It is expected that a list will be prepared of individuals with relevant experience in the field of legislative drafting etc. whose advice can be made available on request by governments contemplating the implementation of maritime law conventions.
4. The rendering of assistance to training organisations such as the International Maritime Law Institute in Malta where the drafting of legislation to implement international conventions is a curriculum subject. It is hoped that a list of suitable lecturers willing to teach this subject can be built up from among the CMI member national maritime law associations.
5. The Working Group will also study possible means of referring issues concerning the interpretation of international conventions to an international tribunal such as the

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1. "In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity."

International Court of Justice or the International Tribunal for the Law of the Sea for an independent ruling. Research subsequent to the Singapore Conference has indicated that in view of the rules governing the jurisdictional competence of these bodies such a possibility is extremely remote. On the other hand a model for such a procedure may be found in the provisions governing reference by national courts to the European Court of Justice on issues of European Law.

The CMI at its Assembly held in Singapore on 16<sup>th</sup> February 2001 approved the resolution of the Conference on this topic and resolved to inform the IMO that it will be pleased to cooperate with the IMO with a view to finding all possible ways and means of ensuring the most satisfactory implementation and the uniform interpretation of the LLMC Convention as well as of other maritime conventions. In so far as the LLMC Convention is concerned, it was felt that an analysis of the provisions of the Convention, with comments on the meaning of the expressions used, also with the aid of the travaux préparatoires, could be of assistance in the satisfactory process of implementation of the Convention. Such analysis could, at the same time, be of assistance in the interpretation of the

Convention and foster uniform interpretation. It was also felt that suggestions could be given as to the need for supplementary legislation in connection with certain provisions and as to the manner in which the options granted in the Convention can be exercised.

Any proposal or request for the assistance of the CMI in connection with this project should be addressed in the first instance to the CMI Secretariat, Eiermarket Building, Sint Katelijnevest 54, boîte 15, B2000 Antwerp, Belgium; Email <admini@comitemaritime.org>. Professor Berlingieri may be contacted at 10 Via Roma, 16121 Genoa, Italy; Email [dirmar@village.it](mailto:dirmar@village.it) and Mr. Shaw at the Institute of Maritime Law, University of Southampton, Highfield, Southampton SO17 1BJ, UK; Email [Richard.Shaw@soton.ac.uk](mailto:Richard.Shaw@soton.ac.uk)

#### *Action Requested of the Legal Committee*

The CMI will be grateful for observations by the IMO Legal Committee on the proposed work programme set out above. The list of items 1 to 5 is not intended to exclude other projects if they meet the general criteria of relevance and practicability.

PATRICK GRIGGS

### **APPOINTMENT BY THE ASSEMBLY OF BENOIT GOEMANS AS TREASURER**

The Assembly of the CMI held in Singapore on 16th February 2001 have appointed Mr. Benoit Goemans as the new Treasurer of the CMI.

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Kegels & Co

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### **APPOINTMENT OF MOORE STEPHENS AS AUDITORS OF THE CMI ACCOUNTS**

As already indicated in CMI News Letter 4/2000, at its Toledo meeting on 17th September 2000 the Executive Council resolved to appoint Moore Stephens as official auditors to the CMI. This

appointment has now been ratified by the CMI Assembly held in Singapore on 16th February 2001. The partner of Moore Stephens in charge of the CMI accounts is Mr. Nicholas King.

### **CMI MANAGEMENT FUNCTIONS**

As part of the process of reviewing the way in which the CMI runs its affairs the Executive Council has been considering allocating management functions to members of the Executive.

Listed hereunder you will find all management functions with the indication of the names of the Executive Officers of the CMI responsible for each of them. You will note in particular that responsibility for member Associations has been divided amongst a group of members of the Executive Council. I would urge you to raise any problems which you may have with the member of the Executive Council responsible for your

geographical area with a copy to the Assistant Administrator in Antwerp.

On all other assigned management functions please contact the individual or individuals concerned direct but again with a copy of your communication to the Assistant Administrator in order to maintain continuity.

I hope that with the new management system in place we shall continue to be able to improve communication between the CMI and its affiliated member Associations.

PATRICK GRIGGS,  
*President*

**Audit Committee**

W. David ANGUS, *Chairman*  
Benoit GOEMANS  
Allan PHILIP  
Alexander VON ZIEGLER

**Charitable Trust**

Francesco BERLINGIERI  
Thomas BIRCH REYNARDSON  
Charles GOLDIE  
Patrick GRIGGS  
Allan PHILIP  
Alexander VON ZIEGLER  
*Trustees*

**CMI Publications and Funding**

Francesco BERLINGIERI  
Benoit GOEMANS  
John E. HARE  
Stuart HETHERINGTON  
Frank L. WISWALL, Jr.

**Conferences, Seminars, etc.**

Johanne GAUTHIER  
Patrick GRIGGS  
Alexander VON ZIEGLER  
Frank L. WISWALL, Jr.

**Constitution Committee**

Frank L. WISWALL, Jr., *Chairman*  
Benoit GOEMANS  
Allan PHILIP  
Alexander VON ZIEGLER  
*Members*

**E-Commerce**

Johanne GAUTHIER, *Chairman*  
Luis COVA ARRIA, *Deputy Chairman*

**Executive Council and Assembly meetings**

Benoit GOEMANS  
Patrick GRIGGS  
John E. HARE  
Pascale STERCKX  
Alexander VON ZIEGLER

**General Average (IWG)**

Bent NIELSEN, *Chairman*  
Richard SHAW, *Rapporteur*

**Implementation of Conventions**

Francesco BERLINGIERI, *Chairman*  
Li Qi FENG  
Gregory TIMAGENIS  
*Joint Deputy Chairmen*  
Richard SHAW, *Rapporteur*  
Panayotis SOTIROPOULOS

**Issues of Transport Law**

Stuart BEARE, *Chairman*  
Karl-Johan GOMBRII, *Deputy Chairman*  
Michael STURLEY, *Rapporteur*

**Liaison with International Bodies**

Patrick GRIGGS  
Alexander VON ZIEGLER

**Marine Insurance**

John E. HARE, *Chairman*  
Thomas REME'  
Jean-Serge ROHART  
*Joint Deputy Chairmen*  
Trine Lise WILHELMSEN, *Rapporteur*

**Mobile Equipment**

Thomas REME', *Chairman*  
Patrick GRIGGS, *Deputy Chairman*

**National Associations**

Luis Cova ARRIA,  
*South America & Caribbean*  
Li Qi FENG, Stuart HETHERINGTON,  
*Australasia & Far East*  
John E. HARE,  
*Africa, Middle East & Indian Subcontinent*  
Jean-Serge ROHART,  
*Europe & Africa, Middle East & Indian Subcontinent*  
Gregory TIMAGENIS, *Europe*  
Frank L. WISWALL, Jr., *North America*

**Nominating Committee**

Nigel FRAWLEY, *Chairman*  
Francesco BERLINGIERI  
Patrick GRIGGS  
Allan PHILIP  
Jan RAMBERG  
Zengjie ZHU  
*Members*

**Piracy**

Frank L. WISWALL, Jr., *Chairman*  
Samuel P. MENEFEY, *Rapporteur*

**Planning Committee**

Li Qi FENG  
Patrick GRIGGS  
Alexander VON ZIEGLER

**UNESCO - Underwater Cultural Heritage**

Eric JAPIKSE, *Chairman*  
Patrick GRIGGS, *Deputy Chairman*  
John KIMBALL, *Rapporteur*

**Young Lawyers Committee**

John E. HARE, *Chairman*  
Frank L. WISWALL, Jr., *Deputy Chairman*  
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# NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

## NEWS FROM IMO

### INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE, 2001

At a Diplomatic Conference held at IMO headquarters in London between Monday March 19<sup>th</sup> and Friday March 23<sup>rd</sup> the final text of a Bunker Pollution Convention was agreed and now awaits signature and ratification. Before the Convention can come into force internationally it will require ratification by 18 States including 5 States each with not less than 1,000,000 gross tons of registered ships. Once these entry into force criteria have been met the Convention will come into force internationally 12 months later (Article 14).

#### *Background*

At the time when the Civil Liability Convention of 1969 (CLC) was being drafted it was recognised that there was a gap in the pollution liability and compensation regime in that the CLC covered pollution from persistent oil carried as cargo but not persistent oil carried in the form of bunkers. There were good reasons for excluding bunkers from the CLC and the same reasoning was applied when it was decided to exclude bunkers from the 1996 HNS Convention.

Since 1996 the IMO Legal Committee has been refining the text of a Bunker Pollution Convention and the Diplomatic Conference had before it a final text prepared by the Legal Committee at its 82<sup>nd</sup> Session in October 2000.

This Convention therefore has to be seen as plugging a gap and not surprisingly it follows the CLC precedent in most respects. There are, however, a number of notable differences and this paper will seek to identify and explain those differences.

#### *Definitions*

For purposes of the Convention a “ship” is broadly defined as including “any seagoing vessel and seaborne craft, of any type whatsoever”. This may appear to be a broad definition and to cover a large number of floating objects other than traditional ships. However the Convention will not apply unless the vessel in question is carrying “bunker oil” which is defined as “hydrocarbon mineral oil, including lubricating oil used for the operation or propulsion of the ship, and any residues of such oil”.

It should be noted that in the CLC “shipowner” is defined as the “registered owner” thus

channelling all responsibility under the CLC to that person. On the face of it, it is therefore surprising to find that “shipowner” in the Bunker Convention embraces “the owner, including the registered owner, bareboat charterer, manager and operator of the ship” - a much more extensive group of persons. It follows that wherever else in the Convention a liability is imposed on the “shipowner” (see in particular Article 3) all those listed in the definition of shipowner are embraced. The only other definition that calls for particular comment is the definition of “pollution damage”. “Pollution damage” means “loss or damage ... by contamination resulting from the escape or discharge of bunker oil”. Compensation for impairment of the environment “other than loss of profit from such impairment” is limited to the cost of “reasonable measures of reinstatement”. This definition accords with the redefinition of pollution damage found in the CLC 1992.

The International Group of P&I Clubs in a submission to the Diplomatic Conference drew attention to the fact that when the 1992 Protocol to the CLC was drafted it was intended to exclude claims in respect of natural resource damage assessment i.e. claims that fell outside recovery in respect of restoration or reinstatement. It was right to seek to exclude these on the basis that such claims would be likely to be speculative in nature. Unfortunately the drafting of the 1992 Protocol is widely recognised as defective since Article III.4 could allow States to introduce domestic legislation permitting recovery in respect of matters which fall outside the definition of “pollution damage”. The International Group of P&I Clubs suggested that this defect should be put right in the context of the Bunker Convention. Unfortunately such was the pressure of time that the International Group was persuaded to withdraw this proposal. An opportunity unfortunately missed.

#### *Scope of application*

There are no surprises in Article 2. The Convention applies not only to the territory and territorial sea of a State Party but also to its exclusive economic zone (or equivalent if there is no EEZ but not exceeding 200 nautical miles). The Convention also applies to preventive measures taken to prevent or minimise damage in those areas.

### *Liability of shipowner*

By Article 3 the shipowner (which includes the range of persons listed in the definition) is liable unless it is established that the damage resulted from an act of war etc., was caused by the act or admission of a third party with intent to cause damage or was caused by the negligence or wrongful act of any government or other authority responsible for maintaining navigational aids. These limited exemptions from liability match the exemptions contained in the CLC. The shipowner may also be excused from liability where it is shown that the person who suffered the damage caused or contributed to it.

Article 3 also contains a provision to the effect that where more than one person is liable the liability shall be joint and several. Two further provisions of Article 3, which follow the CLC format, provide that claims for bunker pollution damage can only be brought against the shipowner under the Convention and not otherwise. But the right of the shipowner to recover from third parties is expressly preserved. The International Group of P&I Clubs, in a submission to the Diplomatic Conference, suggested that rather than leaving all those persons embraced by the wide definition of shipowner (Art 1) exposed to claims it would make sense to “channel” all claims initially to the registered owner. If, and only if, the shipowner failed to satisfy the claim would the bareboat charterer, manager or operator be exposed to claims. Again, time constraints prevented exploration of this practical proposal and it was withdrawn.

### *Exclusions*

The exclusions will come as no surprise to those familiar with the CLC Convention. The Bunker Convention does not apply to pollution damage covered by the CLC. Nor does it apply to warships or ships on Government non-commercial service unless a State Party decides otherwise. On the other hand where State owned vessels are used for commercial purposes the Convention applies including the jurisdiction provisions of Article 9.

### *Incidents involving two or more ships*

Article 5 provides that where an incident involving two ships occurs and it is not possible to determine from which ship the pollution came, both ships shall be jointly and severally liable.

### *Limitation of liability*

During initial discussions in the Legal Committee

a number of States were keen to see a separate free standing fund provided by shipowners to be exclusively available to satisfy bunker pollution claims. There was strong opposition to this proposal in particular from the shipowning and insurance sectors and it was finally agreed that bunker pollution claims would be subject to existing laws on limitation of liability. Thus, bunker pollution damage claimants will have to prove their claims against any available limitation fund alongside other property claims arising out of the same incident.

In a submission to the Diplomatic Conference the International Group of P&I Clubs (and the British Maritime Law Association in a separate submission to the UK Department of Transport and the Regions) pointed out that there was a widespread assumption that in States where the LLMC applies it accords a right of limitation for pollution damage caused by bunker spills. It was suggested that this might well be an erroneous assumption. The claims for which liability may be limited are set out in Article 2(1) of the LLMC and include claims for loss or damage to property and claims in respect of loss resulting from infringement of rights. It is strongly arguable that the LLMC may give no general right of limitation for bunker pollution claims which are not associated with damage to property or infringement of rights (for example economic loss arising from disruption to a business caused by an oil spill) because such claims cannot be brought within the existing wording of Article 2(1).

Because of pressure of time the International Group was persuaded to withdraw this submission. It is a matter of some disappointment that, the problem having been identified and a solution devised, it was not possible to add a few words to Article 6 which would have put the matter beyond doubt.

It should be noted that the Convention is accompanied by a Resolution which urges all States to ratify or accede to the 1996 Protocol to the LLMC 1976 thus increasing the fund available for all claims – including bunker pollution claims.

### *Compulsory insurance or financial security*

Compulsory insurance has become a feature of recent liability conventions (notably CLC and HNS) and is likely to feature in future liability instruments such as the proposed Protocol to the Athens Convention of 1974. Article 7 therefore deals in considerable detail with this requirement and the necessary administrative systems which will have to be put in place.

From the outset it has been recognised that requiring shipowners to insure their potential liability and also requiring each ship to carry a

certificate attesting that insurance or other financial security is available would place additional expense on shipowners and their insurers as well as a considerable additional administrative burden. The same goes for Flag State Parties.

Article 7 imposes the obligation to insure on the registered owners of ships having a gross tonnage greater than 1000. Not surprisingly shipowners and insurers were keen to set a high gross tonnage figure as a threshold at which the compulsory insurance requirement kicks in. The lower the tonnage threshold figure the greater the number of vessels which would require insurance and certification. On the other hand those States with vulnerable coast lines and few ships flying the flag of their State were keen to see the threshold figure as low as possible thus ensuring that as many potentially polluting vessels as possible come within the compulsory insurance requirement.

Throughout the week of the Diplomatic Conference, both in the conference hall and in the corridors, discussions and negotiations continued. In looking for a practical solution to the problem the secretariat of the IMO obtained and supplied delegates with statistics from Lloyds Register designed to prove that vessels below a particular tonnage do not operate on heavy bunker oil but are more likely to operate on the less polluting lighter oils such as diesel.

Ingenuous compromises were proposed but at the end of the day the threshold figure of 1000 gross tons was proposed by the Conference Chairman, Alfred Popp Q.C., as part of a package deal including entry into force criteria. It is certain that, like all compromises, it failed to satisfy. As indicated above the threshold argument became distinctly three dimensional when it became linked with the question of how many ratifications should be needed before the Convention comes into force and whether the number of States specified for entry into force should possess a certain minimum tonnage of registered vessels in order to trigger the entry into force requirements. As part of the overall debate on the need for compulsory insurance it was proposed, for the first time, at the Diplomatic Conference, that State Parties should be free to declare that registered owners should not be required to maintain insurance or other financial security to cover bunker pollution claims where their vessels were engaged exclusively on "domestic voyages". Debate developed as to whether domestic voyages should be defined simply as voyages starting and finishing within a State's territory or territorial seas or whether they should be extended to include voyages beginning and ending in the much wider area constituted by a State's EEZ. A number of States with complex island or

archipelagic waters (such as the Philippines and Indonesia) were keen to see the exclusion extended to the EEZ on the basis that many inter-island voyages go outside the 12 mile limit of the territorial sea. On the other hand a number of Mediterranean countries (Cyprus, Malta and Italy) were keen to restrict the exclusion to territorial seas on the basis that the EEZ of adjacent Mediterranean States overlap and quite substantial bunker pollution risks could attach to vessels belonging to neighbouring States operating within their EEZ.

In the event the Conference adopted a compromise proposal from the Chairman to the effect that exclusion would apply only to the territorial sea.

Article 7 provides explicit requirements for compulsory insurance and the production of evidence of the existence and quality of such insurance or financial security.

The registered owner is required to maintain insurance or other financial security in an amount equal to the limit of liability under the applicable national or international limitation regime applicable in the Flag State but not exceeding the limitation amounts contained in the LLMC 1976 as may be amended. (See reference above to Resolution relating to ratification of the 1996 Protocol to the LLMC 1976).

It should be noted that the obligation to obtain insurance rests upon the registered owner to the exclusion of the other persons who come within the definition of shipowner in Article 1 of the Convention. This may appear anomalous but it was clearly unsatisfactory for all those defined as shipowner to have to carry insurance in accordance with Article 7. It was therefore agreed that with one compulsory insurance in place the probability was that in practice all claimants would seek to recover from the registered owner or direct from his liability insurer (see hereafter under direct action) and ignore the other potential defendants except in extreme cases.

The certification requirement is extensively described in Article 7. It is clearly stated to be the Flag State's responsibility to issue ships with a certificate confirming that appropriate insurance or financial security is in place. This places an administrative burden on States which may not be particularly welcome. Since in most instances the insurance will be placed with P&I Clubs the Clubs will also be involved in further paper work. The extent of this additional work and the cost has not been calculated.

Article 7 goes so far as to list the information which must be contained in the certificate and a proforma certificate appears as an Annex to the Convention. It is worth noting that Article 7 provides that a State Party may authorise another

institution or organisation to issue the certificates. It will be interesting to see whether this power of delegation will be used in practice.

Certificates must be in either English, French or Spanish or, if in another language, must be translated into one of the three specified languages. The certificate has to be carried on board at all times and Article 7 specifies in some detail what form of insurance or financial security satisfies the requirements of the Article. Should these requirements not be met the certificate will be invalidated.

The Article contains detailed provisions regarding recognition of certificates and also provides for the holding of certificates in electronic format.

#### *Direct action*

Tucked away in Article 7 (10) is an important provision whereby a person claiming compensation for pollution damage may bring that claim directly against the insurer or other person providing financial security. If the insurer is sued his right to limit in accordance with Article 6 is assured even where the registered owner, whose liability he insures, has forfeited the right to limit by his conduct. The insurer may also rely upon any defences available to the shipowner and may avoid liability if he can establish that the damage resulted from the wilful misconduct of the shipowner. No other policy defences, which might in normal circumstances be available to the insurer, may be invoked in such a direct action.

Insurers are becoming used to the concept of the direct action even though it breaches old established concepts of indemnity insurance. The concept of direct action having been conceded in the CLC and in the HNS Convention it was not strongly opposed by the International Group of P&I Clubs in the context of the Bunker Convention.

#### *Time limits*

No particular surprises here. Claims are extinguished if an action is not brought within three years from the date when the damage occurred but in no circumstances shall an action be brought more than 6 years from the date of the incident which caused the damage. This double time provision allows for delay in the manifestation of a claim.

#### *Jurisdiction*

The question of jurisdiction has been the subject of extended debate throughout the passage of this instrument through the Legal Committee. It was clearly the desire of delegates to the Diplomatic

Conference to give claimants as many options as possible when it comes to the pursuit of claims for compensation. In the event no great choice is available, claimants may pursue claims before the courts of the States in which the pollution has occurred or where measures to prevent or minimise pollution have taken place. Where security for claims has been posted by the shipowner, insurer, or other person providing security action may be brought where that security has been provided.

#### *Recognition and enforcement*

Article 10 which deals with recognition and enforcement of judgements requires no particular comment, though a late intervention by Sweden on behalf of the European Union caused something of a stir (see hereafter).

#### *Supersession Clause*

This is a standard clause now found in all International Conventions. It gives the Convention precedence over any other existing Convention to the extent that there is a conflict between the two instruments.

#### *Signature ratification acceptance approval and accession.*

The Convention will be open for signature at IMO from October 1<sup>st</sup> 2001 until 30<sup>th</sup> September 2002. This is a formal requirement and whether or not the Convention attracts signatures during that year is of no great significance since it will remain open for accession following the expiry of the year. Otherwise Article 12 deals with the formal steps required in order to ratify or accede to the Convention.

#### *States with more than one system of law*

This provision was inserted at an early meeting of the Legal Committee at the express request of Hong Kong, China on the basis that Hong Kong, China is a separate territorial unit from China in which a different system of law applies. Article 13 enables a State to declare that the Convention shall extend to all or only some of its territorial units and may modify the application of the Convention to suit each individual unit.

#### *Entry into force*

Article 14 remained controversial down to the final day of the Conference when the Chairman put forward a compromise proposal whereby, as mentioned earlier, the Convention will enter into force one year following the date on which 18

States, including 5 States each with not less than 1 million gross tons of registered ships.

The background to this compromise lies in the fact that a substantial number of principally flag orientated States were anxious that the administrative burden in relation to certification of insurance cover should only need to be put in place following the emergence of substantial support for the Convention. The combination of the relatively high number of States of which 5 should be substantial ship operating States provides that comfort. On the other hand it does extend the likely period of time to elapse between agreement of this Convention and its entry into force.

*Denunciation, revision or amendment, depositary, transmission to United Nations and languages.*

Articles 15 to 19 deal with these traditional final provisions and require no particular comment.

#### *Responder Immunity*

A group of NGOs including ITOPI, CMI, Intertanko, IAPH, ICS, IG, ISU, OCIMF and BIMCO combined to submit a paper to the Diplomatic Conference calling for the insertion in the Convention of a provision for the legal protection of persons taking reasonable preventive measures (including salvage) in response to a bunker oil spill. The paper invited delegates to recognise that such legal protection would encourage prompt and effective response thereby minimising pollution damage.

Following the introduction of this paper a lengthy debate took place though the Chairman pointed out that this, so-called, responder immunity issue had been debated on a number of occasions within the Legal Committee and rejected.

In the event the proposal to include specific wording in the Convention was rejected and a compromise proposal put forward by Australia, Denmark, Indonesia, Ireland, Netherlands, Switzerland, the UK and Hong Kong was adopted. This involved a Conference Resolution to be attached to the Convention calling upon States Parties, when implementing the Bunker Oil Pollution Convention, to consider the need to introduce in their domestic legislation provisions for the protection of persons responding to a casualty and taking measures to prevent or minimise the effects of oil pollution. This Resolution was adopted and it follows that all States implementing the Convention may make their own domestic arrangements in relation to protection for salvors and other responders. Many States have already done this in the context of the CLC and are likely to extend that legislation to

cover claims against responders arising out of bunker spills.

#### *European Commission*

On the final morning of the Conference Sweden, which currently has the Presidency of the European Union, submitted a paper in which it drew attention to the fact that on December 22<sup>nd</sup> 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 submission, 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 in the submission that Articles 9 and 10 of the Bunkers Convention deal with jurisdiction and recognition and enforcement of judgements which, since the adoption of Regulation (EC) 44/2001, were outside the competence of member States. The submission proposed that a new Article 12 bis should be added to the Convention which would enable the European Community to become a party to the Convention thereby solving the lack of competence of member States.

A number of non-EU state delegations protested at the late submission of this proposal and were supported in this by the Chairman of the Conference. In particular it was pointed out that this was a highly political issue and delegates would not have time to seek instructions from their Governments in the limited time available.

In the event Sweden withdrew the proposal but this must leave some doubts in the minds of delegates from EU States as to their ability to ratify the Convention.

At one stage this proposal was interpreted as a bid by the European Commission to deprive individual member States of the right to ratify Conventions of this sort on the basis that only the Commission was competent to do so. In fact the submission appears to stop short of taking such an extreme position.

#### *Final Thoughts*

A successful Diplomatic Conference. This success was due as much to the skilled and patient chairmanship of Alfred Popp Q.C. as to the co-operative attitude of the delegates. The entry into force requirements are demanding but the feeling is that this Convention will come into force at a relatively early date.

PATRICK GRIGGS

## **ADOPTION OF AMENDMENTS OF THE LIMITATION AMOUNTS IN THE CLC 1992**

On 18 October 2000 by Resolution LEG.1(82) the IMO Legal Committee adopted, in accordance with article 15 of the CLC 1992, amendments to the limits of liability set out in article 5(1). Pursuant to the above resolution:

- the reference in article 5(1) to “3 million units of account” shall read: “4.510.000 units of account”;
- the reference to “420 units of account” shall read: “631 units of account”;
- the reference to “59.7 million units of account” shall read: “89.770.000 units of account”.

## **ADOPTION OF AMENDMENTS OF THE LIMITS OF COMPENSATION IN THE FUND CONVENTION 1992**

On 18 October 2000 by Resolution LEG.2(82) the IMO Legal Committee adopted, in accordance with article 33(4) of the Fund Convention 1992, amendments to the limits of the amount of compensation set out in paragraph 4 of article 4 of the Convention. Pursuant to the above resolution:

- the reference in paragraph 4(a) to “135 million units of account” shall read: “203.000.000 units of account”;
- the reference in paragraph 4(b) to “135 million units of account” shall read: “203.000.000 units of account”; and
- the reference in paragraph 4(c) to “200 million units of account” shall read: “300.740.000 units of account”.

## **NEWS FROM THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

The International Tribunal for the Law of the Sea moved to its new headquarters and the new address is the following:

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