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COMITÉ MARITIME INTERNATIONAL

CMI

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PART I

Organization of the CMI

Comité Maritime International

CONSTITUTION

2001[1]

PART I - GENERAL

Article 1
Name and Object

The name of this organization is "Comité Maritime International." It is a non-governmental not-for-profit international organization established in Antwerp in 1897, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects.

To this end it shall promote the establishment of national associations of maritime law and shall co-operate with other international organizations.

Article 2
Existence and Domicile

The juridical personality of the Comité Maritime International is established under the law of Belgium of 25th October 1919, as later amended. The Comité Maritime International is domiciled in the City of Antwerp, and its registered office is at Everdijstraat 43 B-2000 Antwerp. Its

[1] While meeting at Toledo, the Executive Council created on 17 October 2000 a committee in charge of drafting amendments to the Constitution, in order to comply with Belgian law so as to obtain juridical personality. This committee, chaired by Frank Wiswall and with the late Allan Philip, Alexander von Ziegler and Benoît Goemans as members, prepared the amendments which were sent to the National Member Associations on 15 December 2000. At Singapore the Assembly, after the adoption of two further amendments as per the suggestion of Patrice Rembauville-Nicolle speaking for the French delegation, unanimously approved the new Constitution. The Singapore Assembly also empowered the Executive Council to adopt any amendments to the approved text of the Constitution if required by the Belgian government. Exercising this authority, minor amendments were indeed adopted by the Executive Council, having no effect on the way in which the Comité Maritime International functions or is organised. As an example, Article 3.I.a has been slightly amended. Also Article 3.II has been expanded to embody in the Constitution itself the procedure governing the expulsion of Members rather than in rules adopted by the Assembly. By Decree of 9 November 2003 the King of Belgium granted juridical personality to the Comité Maritime International. By virtue of Article 50 of the Belgian Act of 27 June 1921, as incorporated by Article 41 of the Belgian Act of 2 May 2002, juridical personality was acquired at the date of the Decree, *i.e.*, 9 November 2003, which is also the date of entry into force of the present Constitution. Since 9 November 2003, the Comité Maritime International has existed as an International Not-for-Profit Association *(AISBL)* within the meaning of the Belgian Act of 27 June 1921.

Comité Maritime International

STATUTS

2001[1]

Ière PARTIE - DISPOSITIONS GENERALES

Article 1er
Nom et objet

Le nom de l'organisation, objet des présents statuts, est "Comité Maritime International". Le Comité Maritime International est une organisation non-gouvernementale internationale sans but lucratif, fondée à Anvers en 1897, et dont l'objet est de contribuer, par tous travaux et moyens appropriés, à l'unification du droit maritime sous tous ses aspects.

Il favorisera à cet effet la création d'associations nationales de droit maritime. Il collaborera avec d'autres organisations internationales.

Article 2
Existence et siège

Le Comité Maritime International a la personnalité morale selon la loi belge du 25 octobre 1919 telle que modifiée ultérieurement. Le Comité Maritime International a son siège 43 Everdijstraat à B-2000 Anvers. Le

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[1] Réuni à Tolède, le Conseil exécutif a constitué, le 17 octobre 2000, une commission chargée de la réforme des statuts, nécessaire pour obtenir la personnalité morale en Belgique. Cette commission, présidée par Frank Wiswall et composée en outre de feu Allan Philip, d'Alexander von Ziegler et de Benoît Goemans, a préparé les modifications et les a adressées aux Associations nationales le 15 décembre 2000. A Singapour, l'Assemblée générale a, à l'unanimité, approuvé le 16 février 2001, le projet de modification préparé par la commission sus-dite, après avoir apporté deux modifications sur proposition de Patrice Rembauville-Nicolle, de la délégation française. L'Assemblée générale a également accordé au Conseil exécutif le pouvoir d'apporter des modifications qu'imposerait le gouvernement belge en vue de l'obtention de la personnalité morale. En application de cette résolution, les statuts ont subis quelques petites modifications, sans effet sur le fonctionnement ni l'organisation du CMI. Ainsi par exemple, l'article 3 I a) a été légèrement modifié et, les règles régissant la procédure d'exclusion de membres, jusqu'alors un texte séparé, ont été incorporées dans les statuts (article 3.II). Par Arrêté du 9 novembre 2003 le Roi des belges a accordé au Comité Maritime International la personnalité morale. En application de l'article 50 de la Loi belge du 27 juin 1921, tel qu'inséré par l'article 41 de la Loi belge du 2 mai 2002, la personnalité morale fût acquise à la date de l'Arrêté, soit, le 9 novembre 2003, également la date d'entrée en vigueur des présents statuts. Le Comité Maritime International est depuis le 9 novembre 2003 une Association Internationale Sans But Lucratif au sens de la Loi belge du 27 juin 1921.

address may be changed by decision of the Executive Council, and such change shall be published in the *Annexes du Moniteur belge*.

Article 3
Membership and Liability
I

a) The voting Members of the Comité Maritime International are national (or multinational) Associations of Maritime Law elected to membership by the Assembly, the object of which Associations must conform to that of the Comité Maritime International and the membership of which must be fully open to persons (individuals or bodies having juridical personality in accordance with their national law and custom) who either are involved in maritime activities or are specialists in maritime law. Member Associations must be democratically constituted and governed, and must endeavour to present a balanced view of the interests represented in their Association.
   Where in a State there is no national Association of Maritime Law in existence, and an organization in that State applies for membership of the Comité Maritime International, the Assembly may accept such organization as a Member of the Comité Maritime International if it is satisfied that the object of such organization, or one of its objects, is the unification of maritime law in all its aspects. Whenever reference is made in this Constitution to Member Associations, it will be deemed to include any organization admitted as a Member pursuant to this Article.
   Only one organization in each State shall be eligible for membership, unless the Assembly otherwise decides. A multinational Association is eligible for membership only if there is no Member Association in any of its constituent States.
   The national (or multinational) Member Associations of the Comité Maritime International are identified in a list to be published annually.

b) Where a national (or multinational) Member Association does not possess juridical personality according to the law of the country where it is established, the members of such Member Association who are individuals or bodies having juridical personality in accordance with their national law and custom, acting together in accordance with their national law, shall be deemed to constitute that Member Association for purposes of its membership of the Comité Maritime International.

c) Individual members of Member Associations may be elected by the Assembly as Titulary Members of the Comité Maritime International upon the proposal of the Association concerned, endorsed by the Executive Council. Individual persons may also be elected by the Assembly as Titulary Members upon the proposal of the Executive Council. Titulary Membership is of an honorary nature and shall be decided having regard to the contributions of the candidates to the work of the Comité Maritime International and/or to their services rendered in legal or maritime affairs in furtherance of international uniformity of

siège peut être transféré dans tout autre lieu en Belgique par simple décision du Conseil exécutif publiée aux *Annexes du Moniteur belge*.

Article 3
Membres et responsabilité
I

a) Les Membres avec droit de vote du Comité Maritime International sont les Associations nationales (ou multinationales) de droit maritime, élues Membres par l'Assemblée, dont les objectifs sont conformes à ceux du Comité Maritime International et dont la qualité de Membre doit être accessible à toutes personnes (personnes physiques ou personnes morales légalement constituées selon les lois et usages de leur pays d'origine) qui, ou bien participent aux activités maritimes, ou bien sont des spécialistes du droit maritime. Chaque Association membre doit être constituée et gérée de façon démocratique et doit maintenir l'équilibre entre les divers intérêts dans son sein.
Si dans un pays il n'existe pas d'Association nationale et qu'une organisation de ce pays pose sa candidature pour devenir Membre du Comité Maritime International, l'Assemblée peut accepter une pareille organisation comme Membre du Comité Maritime International après s'être assurée que l'objectif, ou un des objectifs, poursuivis par cette organisation est l'unification du droit maritime sous tous ses aspects.
Toute référence dans les présents statuts à des Associations membres comprendra toute organisation qui aura été admise comme Membre conformément au présent article.
Une seule organisation par pays est éligible en qualité de Membre du Comité Maritime International, à moins que l'Assemblée n'en décide autrement. Une association multinationale n'est éligible en qualité de Membre que si aucun des Etats qui la composent ne possède d'Association membre. Une liste à publier annuellement énumèrera les Associations nationales (ou multinationales) membres du Comité Maritime International.

b) Lorsqu'une Association nationale (ou multinationale) Membre du Comité Maritime International n'a pas la personnalité morale selon le droit du pays où cette association est établie les membres (qui sont des personnes physiques ou des personnes morales légalement constituées selon les lois et usages de leur pays d'origine) de cette Association, agissent ensemble selon leur droit national et seront sensés constituer l'Association membre en ce qui concerne l' affiliation de celle-ci au Comité Maritime International.

c) Des membres individuels d'Associations Membres peuvent être élus Membres titulaires du Comité Maritime International par l'Assemblée sur proposition émanant de l'Association intéressée et ayant recueilli l'approbation du Conseil exécutif. Des personnes peuvent aussi, à titre individuel, être élues par l'Assemblée comme Membres titulaires sur proposition du Conseil exécutif. L'affiliation comme Membre titulaire aura un caractère honorifique et sera décidée en tenant compte des contributions apportées par les candidats à l'oeuvre du Comité Maritime

maritime law or related commercial practice. The Titulary Members of the Comité Maritime International are identified in a list to be published annually.

Titulary Members presently or formerly belonging to an association which is no longer a member of the Comité Maritime International may remain individual Titulary Members at large, pending the formation of a new Member Association in their State.

d) Nationals of States where there is no Member Association in existence and who have demonstrated an interest in the object of the Comité Maritime International may upon the proposal of the Executive Council be elected as Provisional Members. A primary objective of Provisional Membership is to facilitate the organization and establishment of new Member national or regional Associations of Maritime Law. Provisional Membership is not normally intended to be permanent, and the status of each Provisional Member will be reviewed at three-year intervals. However, individuals who have been Provisional Members for not less than five years may upon the proposal of the Executive Council be elected by the Assembly as Titulary Members, to the maximum number of three such Titulary Members from any one State. The Provisional Members of the Comité Maritime International are identified in a list to be published annually.

e) The Assembly may elect to Membership *honoris causa* any individual person who has rendered exceptional service to the Comité Maritime International or in the attainment of its object, with all of the rights and privileges of a Titulary Member but without payment of subscriptions. Members *honoris causa* may be designated as honorary officers of the Comité Maritime International if so proposed by the Executive Council. Members *honoris causa* shall not be attributed to any Member Association or State, but shall be individual members of the Comité Maritime International as a whole. The Members *honoris causa* of the Comité Maritime International are identified in a list to be published annually.

f) International organizations which are interested in the object of the Comité Maritime International may be elected as Consultative Members. The Consultative Members of the Comité Maritime International are identified in a list to be published annually.

II

a) Members may be expelled from the Comité Maritime International by reason:
   (i) of default in payment of subscriptions;
   (ii) of conduct obstructive to the object of the Comité as expressed in the Constitution; or
   (iii) of conduct likely to bring the Comité or its work into disrepute.

b) (i) A motion to expel a Member may be made:
   (A) by any Member Association or Titulary Member of the Comité;

International, et/ou des services qu'ils auront rendus dans le domaine du droit ou des affaires maritimes ou des pratiques commerciales qui y sont liées. Une liste à publier annuellement énumèrera les Membres titulaires du Comité Maritime International. Les Membres titulaires appartenant ou ayant appartenu à une Association qui n'est plus Membre du Comité Maritime International peuvent rester Membres titulaires individuels hors cadre, en attendant la constitution d'une nouvelle Association membre dans leur Etat.

d) Les nationaux des pays où il n'existe pas d'Association membre mais qui ont fait preuve d'intérêt pour les objectifs du Comité Maritime International peuvent, sur proposition du Conseil exécutif, être élus comme Membres Provisoires. L'un des objectifs essentiels du statut de Membre Provisoire est de favoriser la mise en place et l'organisation, au plan national ou régional, de nouvelles Associations de Droit Maritime affiliées au Comité Maritime International. Le statut de Membre Provisoire n'est pas normalement destiné à être permanent, et la situation de chaque Membre Provisoire sera examinée tous les trois ans. Cependant, les personnes physiques qui sont Membres Provisoires depuis cinq ans au moins peuvent, sur proposition du Conseil exécutif, être élues Membres titulaires par l'Assemblée, à concurrence d'un maximum de trois par pays. Une liste à publier annuellement énumèrera les Membres Provisoires du Comité Maritime International.

e) L'Assemblée peut élire Membre honoraire, jouissant des droits et privilèges d'un Membre titulaire mais dispensé du paiement des cotisations, toute personne physique ayant rendu des services exceptionnels au Comité Maritime International. Des membres honoraires peuvent, sur proposition du Conseil exécutif, être désignés comme Membres honoraires du Bureau, y compris comme Président honoraire ou Vice-Président honoraire, si ainsi proposé par le Conseil exécutif. Les membres honoraires ne relèvent d'aucune Association membre ni d'aucun Etat, mais sont à titre personnel membres du Comité Maritime International pour l'ensemble de ses activités.
Une liste à publier annuellement énumèrera les membres honoraires du Comité Maritime International.

f) Les organisations internationales qui s'intéressent aux objectifs du Comité Maritime International peuvent être élues membres consultatifs. Une liste à publier annuellement énumèrera les membres consultatifs du Comité Maritime International.

II

a) Des membres peuvent être exclus du Comité Maritime International en raison
   (i) de leur carence dans le paiement de leur contribution;
   (ii) de leur conduite faisant obstacle à l'objet du Comité tel qu'énoncé aux statuts;
   (iii) de leur conduite susceptible de discréditer le Comité ou son oeuvre.

b) (i) Une requête d'exclusion d'un Membre sera faite:
   (A) par toute Association Membre ou par un Membre titulaire;

or

(B) by the Executive Council.

(ii) Such motion shall be made in writing and shall set forth the reason(s) for the motion.

(iii) Such motion must be filed with the Secretary-General or Administrator, and shall be copied to the Member in question.

c) A motion to expel made under sub-paragraph II(b)(i)(A) of this Article shall be forwarded to the Executive Council for first consideration.

(i) If such motion is approved by the Executive Council, it shall be forwarded to the Assembly for consideration pursuant to Article 7(b).

(ii) If such motion is not approved by the Executive Council, the motion may nevertheless be laid before the Assembly at its meeting next following the meeting of the Executive Council at which the motion was considered.

d) A motion to expel shall not be debated in or acted upon by the Assembly until at least ninety (90) days have elapsed since the original motion was copied to the Member in question. If less than ninety (90) days have elapsed, consideration of the motion shall be deferred to the next succeeding Assembly.

e) (i) The Member in question may offer a written response to the motion to expel, and/or may address the Assembly for a reasonable period in debate upon the motion.

(ii) In the case of a motion to expel which is based upon default in payment under paragraph II(a)(i) of this Article, actual payment in full of all arrears currently owed by the Member in question shall constitute a complete defence to the motion, and upon acknowledgment of payment by the Treasurer the motion shall be deemed withdrawn.

f) (i) In the case of a motion to expel which is based upon default in payment under paragraph II(a) of this Article, expulsion shall require the affirmative vote of a simple majority of the Member Associations present, entitled to vote, and voting.

(ii) In the case of a motion to expel which is based upon paragraph II(a)(ii) and (iii) of this Article, expulsion shall require the affirmative vote of a two-thirds majority of the Member Associations present, entitled to vote, and voting.

g) Amendments to these provisions may be adopted in compliance with Article 6. Proposals of amendments shall be made in writing and shall be transmitted to all National Associations at least sixty (60) days prior to the annual meeting of the Assembly at which the proposed amendments will be considered.

III

The liability of Members for obligations of the Comité Maritime International shall be limited to the amounts of their subscriptions paid or currently due and payable to the Comité Maritime International.

(B) par le Conseil exécutif.

(ii) Une requête d'exclusion d'un Membre se fera par écrit et en exposera les motifs.

(iii) La requête d'exclusion doit être déposée chez le Secrétaire général ou chez l'Administrateur et sera transmise en copie au Membre en question.

c) Une requête d'exclusion faite en vertu de l'alinéa II (b) (i) (A) ci-dessus sera transmise pour examen au Conseil exécutif pour la prendre en considération.

(i) Si telle requête est approuvée par le Conseil exécutif, elle sera transmise à l'Assemblée pour délibération telle que prévue à l'article 7 b) des statuts.

(ii) Si la requête n'est pas approuvée par le Conseil exécutif, elle peut néanmoins être soumise à la réunion de l'Assemblée suivant immédiatement la réunion du Conseil exécutif où la requête a été examinée.

d) Une demande d'exclusion ne fera pas l'objet de délibération ou ne il n'en sera pas pris acte par l'Assemblée si au moins quatre-vingt-dix jours ne se sont pas écoulés depuis la communication de la copie de la requête d'exclusion au Membre visé. Si moins de quatre-vingt-dix jours se sont écoulés, la requête sera prise en considération à la prochaine réunion de l'Assemblée.

e) (i) Le Membre en question peut présenter une réplique écrite à la requête d'exclusion, et/ou peut prendre la parole à l'Assemblée pendant la délibération sur la requête.

(ii) Dans le cas d'une requête d'exclusion appuyée sur une carence de paiement, comme le prévoit l'article 3 II a) (i) ci-dessus, le paiement effectif de tous les arriérés dus par le Membre visé, constituera une défense suffisante et, pourvu que le Trésorier confirme le paiement, la requête sera présumée être retirée.

f) (i) Dans le cas d'une requête d'exclusion appuyée sur une carence de paiement prévue à l'alinéa II(a) ci-dessus, le Membre sera exclu à la majorité simple des suffrages exprimés par les Membres en droit de voter.

(ii) En cas de requête d'exclusion appuyée sur un motif prévu au II a) (ii) et (iii) ci-dessus, le Membre sera exclu par un vote des deux tiers des suffrages exprimés par les Membres en droit de voter.

g) Des modifications aux présentes dispositions peuvent être adoptées conformément à l'article 6 des statuts. Les propositions de modifications se feront par écrit et seront transmises à toutes les Associations Membres au plus tard soixante jours avant la réunion annuelle de l'Assemblée à laquelle les modifications proposées seront prises en considération.

III.

La responsabilité des Membres au titre des obligations du Comité Maritime International sera limitée au montant de leurs cotisations payées ou dues et exigibles par le Comité Maritime International.

PART II - ASSEMBLY

Article 4
Composition

The Assembly shall consist of all Members of the Comité Maritime International and the members of the Executive Council.

Each Member Association and each Consultative Member may be represented in the Assembly by not more than three delegates.

As approved by the Executive Council, the President may invite Observers to attend all or parts of the meetings of the Assembly.

Article 5
Meetings and Quorum

The Assembly shall meet annually on a date and at a place decided by the Executive Council. The Assembly shall also meet at any other time, for a specified purpose, if requested by the President, by ten of its Member Associations or by the Vice-Presidents. At least six weeks notice shall be given of such meetings.

At any meeting of the Assembly, the presence of not less than five Member Associations entitled to vote shall constitute a lawful quorum.

Article 6
Agenda and Voting

Matters to be dealt with by the Assembly, including election to vacant offices, shall be set out in the agenda accompanying the notice of the meeting. Decisions may be taken on matters not set out in the agenda, other than amendments to this Constitution, provided no Member Association represented in the Assembly objects to such procedure.

Members *honoris causa* and Titulary, Provisional and Consultative Members shall enjoy the rights of presence and voice, but only Member Associations in good standing shall have the right to vote.

Each Member Association present in the Assembly and entitled to vote shall have one vote. The right to vote cannot be delegated or exercised by proxy. The vote of a Member Association shall be cast by its president, or by another of its members duly authorized by that Association.

All decisions of the Assembly shall be taken by a simple majority of Member Associations present, entitled to vote, and voting. However, amendments to this Constitution or to any Rules adopted pursuant to Article 7(h) and (i) shall require the affirmative vote of a two-thirds majority of all Member Associations present, entitled to vote, and voting. The Administrator, or another person designated by the President, shall submit to the Belgian Ministry of Justice any amendments of this Constitution and shall secure their publication in the *Annexes du Moniteur belge*.

2ème PARTIE - ASSEMBLEE

Article 4
Composition

L'Assemblée est composée de tous les membres du Comité Maritime International et des membres du Conseil exécutif.

Toute Association membre et tout Membre consultatif peuvent être représentés à l'Assemblée par trois délégués au maximum.

Le Président peut, avec l'approbation du Conseil exécutif, inviter des observateurs à assister, totalement ou partiellement, aux réunions de l'Assemblée.

Article 5
Réunions et quorum

L'Assemblée se réunit chaque année à la date et au lieu fixés par le Conseil exécutif. L'Assemblée se réunit en outre à tout autre moment, avec un ordre du jour déterminé, à la demande du Président, de dix de ses Associations Membres, ou des Vice-Présidents. Le délai de convocation est de six semaines au moins.

A chaque réunion de l'Assemblée, la présence d'au moins cinq Associations membres avec droit de vote constituera un quorum de présence suffisant.

Article 6
Ordre du jour et votes

Les questions dont l'Assemblée devra traiter, y compris les élections à des charges vacantes, seront exposées dans l'ordre du jour accompagnant la convocation aux réunions. Des décisions peuvent être prises sur des questions non inscrites à l'ordre du jour, exception faite de modifications aux présents statuts, pourvu qu'aucune Association membre représentée à l'Assemblée ne s'oppose à cette façon de faire.

Chaque Association membre présente à l'Assemblée et jouissant du droit de vote dispose d'une voix. Le droit de vote ne peut pas être délégué ni exercé par procuration. La voix d'une Association membre sera émise par son Président, ou, par un autre membre mandaté à cet effet et ainsi certifié par écrit à l'Administrateur.

Toutes les décisions de l'Assemblée sont prises à la majorité simple des Associations membres présentes, jouissant du droit de vote et prenant part au vote. Toutefois, le vote positif d'une majorité des deux tiers de toutes les Associations membres présentes, jouissant du droit de vote et prenant part au vote sera nécessaire pour modifier les présents statuts ou des règles adoptées en application de l'Article 7 (h) et (i). L'Administrateur, ou une personne désignée par le Président, soumettra au Ministère de la Justice belge toute modification des statuts et veillera à sa publication aux *Annexes du Moniteur belge*.

Article 7
Functions

The functions of the Assembly are:

a) To elect the Officers of the Comité Maritime International;
b) To elect Members of and to suspend or expel Members from the Comité Maritime International;
c) To fix the amounts of subscriptions payable by Members to the Comité Maritime International;
d) To elect auditors;
e) To consider and, if thought fit, approve the accounts and the budget;
f) To consider reports of the Executive Council and to take decisions on the future activity of the Comité Maritime International;
g) To approve the convening and decide the agenda of, and ultimately approve resolutions adopted by, International Conferences;
h) To adopt rules governing the expulsion of Members;
i) To adopt rules of procedure not inconsistent with the provisions of this Constitution; and
j) To amend this Constitution.

PART III - OFFICERS

Article 8
Designation

The Officers of the Comité Maritime International shall be:

a) The President,
b) The Vice-Presidents,
c) The Secretary-General,
d) The Treasurer,
e) The Administrator (if an individual),
f) The Executive Councillors, and
g) The Immediate Past President.

Article 9
President

The President of the Comité Maritime International shall preside over the Assembly, the Executive Council, and the International Conferences convened by the Comité Maritime International. He shall be an ex-officio member of any Committee, International Sub-Committee or Working Group appointed by the Executive Council.

With the assistance of the Secretary-General and the Administrator he shall carry out the decisions of the Assembly and of the Executive Council, supervise the work of the International Sub-Committees and Working Groups, and represent the Comité Maritime International externally.

The President shall have authority to conclude and execute agreements on behalf of the Comité Maritime International, and to delegate this authority to other officers of the Comité Maritime International.

Article 7
Fonctions

Les fonctions de l'Assemblée consistent à:

a) élire les Membres du Bureau du Comité Maritime International;
b) élire des Membres du Comité Maritime International et en suspendre ou exclure;
c) fixer les montants des cotisations dues par les Membres au Comité Maritime International;
d) élire des réviseurs de comptes;
e) examiner et, le cas échéant, approuver les comptes et le budget;
f) étudier les rapports du Conseil exécutif et prendre des décisions concernant les activités futures du Comité Maritime International;
g) approuver la convocation et fixer l'ordre du jour de Conférences Internationales du Comité Maritime International, et approuver en dernière lecture les résolutions adoptées par elles;
h) adopter des règles régissant l'exclusion de Membres;
i) adopter des règles de procédure sous réserve qu'elles soient conformes aux présents statuts;
j) modifier les présents statuts.

3ème PARTIE- MEMBRES DU BUREAU

Article 8
Désignation

Les Membres du Bureau du Comité Maritime International sont:

a) le Président,
b) les Vice-Présidents,
c) le Secrétaire général,
d) le Trésorier,
e) l'Administrateur (s'il est une personne physique),
f) les Conseillers exécutifs, et
g) le Président précédant.

Article 9
Le Président

Le Président du Comité Maritime International préside l'Assemblée, le Conseil exécutif et les Conférences Internationales convoquées par le Comité Maritime International. Il est Membre de droit de tout comité, de toute commission internationale ou de tout groupe de travail désignés par le Conseil exécutif.

Avec le concours du Secrétaire général et de l'Administrateur il met à exécution les décisions de l'Assemblée et du Conseil exécutif, surveille les travaux des commissions internationales et des groupes de travail, et représente, à l'extérieur, le Comité Maritime International.

Le Président aura le pouvoir de conclure des contrats et de les exécuter au nom et pour le compte du Comité Maritime International, et de donner tel pouvoir à d'autres Membres du Bureau du Comité Maritime International.

The President shall have authority to institute legal action in the name and on behalf of the Comité Maritime International, and to delegate such authority to other officers of the Comité Maritime International. In case of the impeachment of the President or other circumstances in which the President is prevented from acting and urgent measures are required, five officers together may decide to institute such legal action provided notice is given to the other members of the Executive Council. The five officers taking such decision shall not take any further measures by themselves unless required by the urgency of the situation.

In general, the duty of the President shall be to ensure the continuity and the development of the work of the Comité Maritime International.

The President shall be elected for a term of three years and shall be eligible for re-election for one additional term.

Article 10

Vice-Presidents

There shall be two Vice-Presidents of the Comité Maritime International, whose principal duty shall be to advise the President and the Executive Council, and whose other duties shall be assigned by the Executive Council.

The Vice-Presidents, in order of their seniority as officers of the Comité Maritime International, shall substitute for the President when the President is absent or is unable to act.

Each Vice-President shall be elected for a term of three years, and shall be eligible for re-election for one additional term.

Article 11

Secretary-General

The Secretary-General shall have particular responsibility for organization of the non-administrative preparations for International Conferences, Seminars and Colloquia convened by the Comité Maritime International, and to maintain liaison with other international organizations. He shall have such other duties as may be assigned by the Executive Council or the President.

The Secretary-General shall be elected for a term of three years, and shall be eligible for re-election without limitation upon the number of terms.

Article 12

Treasurer

The Treasurer shall be responsible for the funds of the Comité Maritime International, and shall collect and disburse, or authorise disbursement of, funds as directed by the Executive Council.

The Treasurer shall maintain adequate accounting records. The Treasurer shall also prepare financial statements for the preceding calendar year in accordance with current International Accounting Standards, and shall prepare proposed budgets for the current and next succeeding calendar years.

The Treasurer shall submit the financial statements and the proposed

Le Président a le pouvoir d'agir en justice au nom et pour le compte de Comité Maritime International. Il peut donner tel pouvoir à d'autres Membres du Bureau du Comité Maritime International. En cas d'empêchement du Président, ou si pour quelque motif que ce soit celui-ci est dans l'impossibilité d'agir et que des mesures urgentes s'imposent, cinq Membres du Bureau, agissant ensemble, peuvent décider d'agir en justice, pourvu qu'ils en avisent les autres Membres du Bureau. Ceux-ci ne prendront d'autres mesures que celles dictées par l'urgence.

D'une manière générale, la mission du Président consiste à assurer la continuité et le développement de l'oeuvre du Comité Maritime International.

Le Président est élu pour un mandat de trois ans et il est rééligible une fois.

Article 10
Les Vice-Présidents

Le Comité Maritime International comprend deux Vice-Présidents, dont la mission principale est de conseiller le Président et le Conseil exécutif, et qui peuvent se voir confier d'autres missions par le Conseil exécutif.

Le Vice-Président le plus ancien comme Membre du Bureau du Comité Maritime International supplée le Président quand celui-ci est absent ou dans l'impossibilité d'exercer sa fonction.

Chacun des Vice-Présidents est élu pour un mandat de trois ans, renouvelable une fois.

Article 11
Le Secrétaire général

Le Secrétaire général a tout spécialement la responsabilité d'organiser les préparatifs, autres qu'administratifs, des Conférences Internationales, séminaires et colloques convoqués par le Comité Maritime International, et d'entretenir des rapports avec d'autres organisations internationales. D'autres missions peuvent lui être confiées par le Conseil exécutif et le Président.

Le Secrétaire Général est élu pour un mandat de trois ans, renouvelable sans limitation de durée. Le nombre de mandats successifs du Secrétaire Général est illimité.

Article 12
Le Trésorier

Le Trésorier répond des fonds du Comité Maritime International, il encaisse les fonds et en effectue ou en autorise le déboursement conformément aux instructions du Conseil exécutif.

Le Trésorier tient les livres comptables. Il prépare les bilans financiers de l'année civile précédente conformément aux normes comptables internationales, et prépare les budgets proposés pour l'année civile en cours et la suivante.

Le Trésorier soumet les bilans financiers et les budgets proposés pour révision par les réviseurs et le Comité de révision, désigné par le Conseil

budgets for review by the auditors and the Audit Committee appointed by the Executive Council, and following any revisions shall present them for review by the Executive Council and approval by the Assembly not later than the first meeting of the Executive Council in the calendar year next following the year to which the financial statements relate.

The Treasurer shall be elected for a term of three years, and shall be eligible for re-election without limitation upon the number of terms.

Article 13
Administrator

The functions of the Administrator are:

a) To give official notice of all meetings of the Assembly and the Executive Council, of International Conferences, Seminars and Colloquia, and of all meetings of Committees, International Sub-Committees and Working Groups;
b) To circulate the agendas, minutes and reports of such meetings;
c) To make all necessary administrative arrangements for such meetings;
d) To take such actions, either directly or by appropriate delegation, as are necessary to give effect to administrative decisions of the Assembly, the Executive Council, and the President;
e) To circulate such reports and/or documents as may be requested by the President, the Secretary-General or the Treasurer, or as may be approved by the Executive Council;
f) To keep current and to ensure annual publication of the lists of Members pursuant to Article 3; and
g) In general to carry out the day by day business of the secretariat of the Comité Maritime International.

The Administrator may be an individual or a body having juridical personality. If a body having juridical personality, the Administrator shall be represented on the Executive Council by one natural individual person. If an individual, the Administrator may also serve, if elected to that office, as Treasurer of the Comité Maritime International.

The Administrator, if an individual, shall be elected for a term of three years, and shall be eligible for re-election without limitation upon the number of terms. If a body having juridical personality, the Administrator shall be appointed by the Assembly upon the recommendation of the Executive Council, and shall serve until a successor is appointed.

Article 14
Executive Councillors

There shall be eight Executive Councillors of the Comité Maritime International, who shall have the functions described in Article 18.

The Executive Councillors shall be elected upon individual merit, also giving due regard to balanced representation of the legal systems and geographical areas of the world characterised by the Member Associations.

Each Executive Councillor shall be elected for a term of three years, and shall be eligible for re-election for one additional term.

exécutif; il les présente après correction au Conseil exécutif pour révision et à l'Assemblée pour approbation au plus tard à la première réunion du Conseil exécutif pendant l'année civile suivant l'année comptable en question.

Le Trésorier est élu pour un mandat de trois ans. Son mandat est renouvelable. Le nombre de mandats successifs du Trésorier est illimité.

Article 13
L'Administrateur

Les fonctions de l'Administrateur consistent à:

a) envoyer les convocations à toutes réunions de l'Assemblée et du Conseil exécutif, des conférences internationales, séminaires et colloques, ainsi qu'à toutes réunions de comités, de commissions internationales et de groupes de travail,
b distribuer les ordres du jour, procès-verbaux et rapports de ces réunions,
c) prendre toutes les dispositions administratives utiles en vue de ces réunions,
d) entreprendre toute action, de sa propre initiative ou par délégation, nécessaire pour donner plein effet aux décisions de nature administrative prises par l'Assemblée, le Conseil exécutif, et le Président,
e) assurer la distribution de rapports et documents demandées par le Président, le Secrétaire Général ou le Trésorier, ou approuvées par le Conseil exécutif,
f) maintenir à jour et assurer la publication annuelle des listes de Membres en application de l'article 3;
g) d'une manière générale accomplir la charge quotidienne du secrétariat du Comité Maritime International.

L'Administrateur peut être une personne physique ou une personne morale. Si l'Administrateur est une personne morale, elle sera représentée par une personne physique pour pouvoir siéger au Conseil exécutif. L'Administrateur personne physique peut également exercer la fonction de Trésorier du Comité Maritime International, s'il est élu à cette fonction.

L'Administrateur personne physique est élu pour un mandat de trois ans. Son mandat est renouvelable. Le nombre de mandats successifs de l'Administrateur est illimité. L'Administrateur personne morale est élu par l'Assemblée sur proposition du Conseil exécutif et reste en fonction jusqu'à l'élection d'un successeur.

Article 14
Les Conseillers exécutifs

Le Comité Maritime International compte huit Conseillers exécutifs, dont les fonctions sont décrites à l'article 18.

Les Conseillers exécutifs sont élus en fonction de leur mérite personnel, eu egard également à une représentation équilibrée des systèmes juridiques et des régions du monde auxquels les Association Membres appartiennent.

Chaque Conseiller exécutif est élu pour un mandat de trois ans, renouvelable une fois.

Article 15
Nominations

A Nominating Committee shall be established for the purpose of nominating individuals for election to any office of the Comité Maritime International.

The Nominating Committee shall consist of:

a) A chairman, who shall have a casting vote where the votes are otherwise equally divided, and who shall be elected by the Executive Council,
b) The President and past Presidents,
c) One member elected by the Vice-Presidents, and
d) One member elected by the Executive Councillors.

Notwithstanding the foregoing paragraph, no person who is a candidate for office may serve as a member of the Nominating Committee during consideration of nominations to the office for which he is a candidate.

On behalf of the Nominating Committee, the chairman shall first determine whether any officers eligible for re-election are available to serve for an additional term. He shall then solicit the views of the Member Associations concerning candidates for nomination. The Nominating Committee shall then make nominations, taking such views into account.

Following the decisions of the Nominating Committee, the chairman shall forward its nominations to the Administrator in ample time for distribution not less than ninety days before the annual meeting of the Assembly at which nominees are to be elected.

Member Associations may make nominations for election to any office independently of the Nominating Committee, provided such nominations are forwarded to the Administrator in writing not less than three working days before the annual meeting of the Assembly at which nominees are to be elected.

The Executive Council may make nominations for election to the offices of Secretary-General, Treasurer and/or Administrator. Such nominations shall be forwarded to the chairman of the Nominating Committee at least one-hundred twenty days before the annual meeting of the Assembly at which nominees are to be elected.

Article 16
Immediate Past President

The Immediate Past President of the Comité Maritime International shall have the option to attend all meetings of the Executive Council, and at his discretion shall advise the President and the Executive Council.

PART IV - EXECUTIVE COUNCIL

Article 17
Composition

The Executive Council shall consist of:

a) The President,
b) The Vice-Presidents,

Article 15
Présentations de candidatures

Un Comité de Présentation de candidatures est mis en place avec mission de présenter des personnes physiques en vue de leur élection à toute fonction au sein du Comité Maritime International.

Le Comité de Présentation de candidatures se compose de:

a) un président, qui a voix prépondérante en cas de partage des voix, et qui est élu par le Conseil exécutif;
b) le Président et les anciens Présidents;
c) un Membre élu par les Vice-Présidents;
d) un Membre élu par les Conseillers exécutifs.

Nonobstant les dispositions de l'alinéa qui précède, aucun candidat ne peut siéger au sein du Comité de Présentation pendant la discussion des présentations intéressant la fonction à laquelle il est candidat.

Agissant au nom du Comité de Présentation, son Président détermine tout d'abord s'il y a des Membres du Bureau qui, étant rééligibles, sont disponibles pour accomplir un nouveau mandat. Il demande ensuite l'avis des Associations membres au sujet des candidats à présenter. Tenant compte de ces avis, le Comité de Présentation formule alors des propositions.

Le président du Comité de Présentation transmet les propositions ainsi formulées à l'Administrateur suffisamment à l'avance pour qu'elles soient diffusés au plus tard quatre-vingt-dix jours avant l'Assemblée annuelle appelée à élire des candidats proposés.

Des Associations membres peuvent, indépendamment du Comité de Présentation, formuler des propositions d'élection pour toute fonction, pourvu que celles-ci soient transmises à l'Administrateur au plus tard trois jours ouvrables avant l'Assemblée annuelle appelée à élire des candidats proposés.

Le Comité Exécutif peut présenter des propositions d'élection aux fonctions de Secrétaire général, Trésorier, et/ou Administrateur. Telles propositions seront transmises au Président du Comité des Présentations au plus tard cent-vingt jours avant l'Assemblée annuelle appelée à élire des candidats proposés.

Article 16
Le Président sortant

Le Président sortant du Comité Maritime International a la faculté d'assister à toutes les réunions du Conseil exécutif, et peut, s'il le désire, conseiller le Président et le Conseil exécutif.

4ème PARTIE - CONSEIL EXÉCUTIF

Article 17
Composition

Le Conseil exécutif est composé:

a) du Président,
b) des Vice-Présidents,

c) The Secretary-General,
d) The Treasurer,
e) The Administrator (if an individual),
f) The Executive Councillors, and
g) The Immediate Past President.

Article 18
Functions

The functions of the Executive Council are:

a) To receive and review reports concerning contact with:
   (i) The Member Associations,
   (ii) The CMI Charitable Trust, and
   (iii) International organizations;
b) To review documents and/or studies intended for:
   (i) The Assembly,
   (ii) The Member Associations, relating to the work of the Comité Maritime International or otherwise advising them of developments, and
   (iii) International organizations, informing them of the views of the Comité Maritime International on relevant subjects;
c) To initiate new work within the object of the Comité Maritime International, to establish Standing Committees, International Sub-Committees and Working Groups to undertake such work, to appoint Chairmen, Deputy Chairmen and Rapporteurs for such bodies, and to supervise their work;
d) To initiate and to appoint persons to carry out by other methods any particular work appropriate to further the object of the Comité Maritime International;
e) To encourage and facilitate the recruitment of new members of the Comité Maritime International;
f) To oversee the finances of the Comité Maritime International and to appoint an Audit Committee;
g) To make interim appointments, if necessary, to the offices of Secretary-General, Treasurer and Administrator;
h) To nominate, for election by the Assembly, independent auditors of the annual financial statements prepared by the Treasurer and/or the accounts of the Comité Maritime International, and to make interim appointments of such auditors if necessary;
i) To review and approve proposals for publications of the Comité Maritime International;
j) To set the dates and places of its own meetings and, subject to Article 5, of the meetings of the Assembly, and of Seminars and Colloquia convened by the Comité Maritime International;
k) To propose the agenda of meetings of the Assembly and of International Conferences, and to decide its own agenda and those of Seminars and Colloquia convened by the Comité Maritime International;
l) To carry into effect the decisions of the Assembly;

c) du Secrétaire général,
d) du Trésorier,
e) de l'Administrateur, s'il est une personne physique,
f) des Conseillers exécutifs,
g) du Président sortant.

Article 18
Fonctions

Les fonctions du Conseil exécutif sont:

a) de recevoir et d'examiner des rapports concernant les relations avec:
   (i) les Associations membres,
   (ii) le Fonds de Charité du Comité Maritime International ("CMI Charitable Trust"), et
   (iii) les organisations internationales;
b) d'examiner les documents et études destinés:
   (i) à l'Assemblée,
   (ii) aux Associations membres, concernant l'oeuvre du Comité Maritime International, et en les avisant de tout développement utile,
   (iii) aux organisations internationales, pour les informer des points de vue du Comité Maritime International sur des sujets adéquats;
c) d'aborder l'étude de nouveaux travaux entrant dans le domaine du Comité Maritime International, de créer à cette fin des comités permanents, des commissions internationales et des groupes de travail, de désigner les Présidents, les Présidents Adjoints et les Rapporteurs de ces comités, commissions et groupes de travail, et de contrôler leur activité;
d) d'aborder toute autre étude que ce soit pourvu qu'elle s'inscrive dans la poursuite de l'objet du Comité Maritime International, et de nommer toutes personnes à cette fin;
e) d'encourager et de favoriser le recrutement de nouveaux Membres du Comité Maritime International;
f) de contrôler les finances du Comité Maritime International et de nommer un Comité de révision;
g) en cas de besoin, de pourvoir à titre provisoire à une vacance de la fonction de Secrétaire général, de Trésorier ou d'Administrateur;
h) de présenter pour élection par l'Assemblée des réviseurs indépendants chargés de réviser les comptes financiers annuels préparés par le Trésorier et/ou les comptes du Comité Maritime International, et, au besoin, de pourvoir à titre provisoire à une vacance de la fonction de réviseur;
i) d'examiner et d'approuver les propositions de publications du Comité Maritime International;
j) de fixer les dates et lieux de ses propres réunions et, sous réserve de l'article 5, des réunions de l'Assemblée, ainsi que des séminaires et colloques convoqués par le Comité Maritime International;
k) de proposer l'ordre du jour des réunions de l'Assemblée et des Conférences Internationales, et de fixer ses propres ordres du jour ainsi que ceux des Séminaires et Colloques convoqués par le Comité Maritime International;
l) d'exécuter les décisions de l'Assemblée;

m) To report to the Assembly on the work done and on the initiatives adopted.

The Executive Council may establish its own Committees and Working Groups, and delegate to them such portions of its work as it deems suitable. Reports of such Committees and Working Groups shall be submitted to the Executive Council and to no other body.

Article 19
Meetings and Quorum

The Executive Council shall meet not less often than twice annually; it may when necessary meet by electronic means, but shall meet in person at least once annually unless prevented by circumstances beyond its control. The Executive Council may, however, take decisions when circumstances so require without a meeting having been convened, provided that all its members are fully informed and a majority respond affirmatively in writing. Any actions taken without a meeting shall be ratified when the Executive Council next meets in person.

At any meeting of the Executive Council seven members, including the President or a Vice-President and at least three Executive Councillors, shall constitute a quorum. All decisions shall be taken by a simple majority vote. The President or, in his absence, the senior Vice-President in attendance shall have a casting vote where the votes are otherwise equally divided.

PART V - INTERNATIONAL CONFERENCES

Article 20
Composition and Voting

The Comité Maritime International shall meet in International Conference upon dates and at places approved by the Assembly, for the purpose of discussing and adopting resolutions upon subjects on an agenda likewise approved by the Assembly.

The International Conference shall be composed of all Members of the Comité Maritime International and such Observers as are approved by the Executive Council.

Each Member Association which has the right to vote may be represented by ten delegates and the Titulary Members who are members of that Association. Each Consultative Member may be represented by three delegates. Each Observer may be represented by one delegate only.

Each Member Association present and entitled to vote shall have one vote in the International Conference; no other Member and no Officer of the Comité Maritime International shall have the right to vote in such capacity.

The right to vote cannot be delegated or exercised by proxy.

The resolutions of International Conferences shall be adopted by a simple majority of the Member Associations present, entitled to vote, and voting.

m) de faire rapport à l'Assemblée sur le travail accompli et sur les initiatives adoptées.

Le Conseil exécutif peut créer ses propres comités et groupes de travail et leur déléguer telles parties de sa tâche qu'il juge convenables. Ces comités et groupes de travail feront rapport au seul Conseil exécutif.

Article 19
Réunions et quorum

Le Conseil exécutif se réunira au moins deux fois par an. Il peut se réunir par le biais de moyens électroniques. Mais une réunion en présence physique des Membres du Conseil exécutif se tiendra au moins une fois par an, sauf empêchement par des circonstances en dehors de la volonté du Conseil exécutif. Le Conseil exécutif peut toutefois, lorsque les circonstances l'exigent, prendre des décisions sans qu'une réunion ait été convoquée, pourvu que tous ses Membres aient été entièrement informés et qu'une majorité ait répondu affirmativement par écrit. Toute action prise sans réunion en présence physique des Membres du Conseil exécutif sera ratifiés à la prochaine réunion en présence des Membres du Conseil exécutif.

Lors de toute réunion du Conseil exécutif, celui-ci ne délibère valablement que si sept de ses Membres, comprenant le Président ou un Vice-Président et trois Conseillers exécutifs au moins, sont présents. Toute décision est prise à la majorité simple des votes émis. En cas de partage des voix, celle du Président ou, en son absence, celle du plus ancien Vice-Président présent, est prépondérante.

5ème PARTIE - CONFÉRENCES INTERNATIONALES

Article 20
Composition et Votes

Le Comité Maritime International se réunit en Conférence Internationale à des dates et lieux approuvés par l'Assemblée aux fins de délibérer et d'adopter des résolutions sur des sujets figurant à un ordre du jour également approuvé par l'Assemblée.

La Conférence Internationale est composée de tous les Membres du Comité Maritime International et d'observateurs dont la présence a été approuvée par le Conseil exécutif.

Chaque Association membre, ayant le droit de vote, peut se faire représenter par dix délégués et par les Membres titulaires, membres de leur Association. Chaque Membre consultatif peut se faire représenter par trois délégués. Chaque observateur peut se faire représenter par un délégué seulement.

Chaque Association membre présente et jouissant du droit de vote dispose d'une voix à la Conférence Internationale, à l'exclusion des autres Membres et à l'exclusion des Membres du Bureau du Comité Maritime International, en leur qualité de membre de ce Bureau.

Le droit de vote ne peut pas être délégué ni exercé par procuration.

Les résolutions des Conférences Internationales sont prises à la majorité simple des Associations membres présentes, jouissant du droit de vote et prenant part au vote.

PART VI - FINANCE AND GOVERNING LAW

Article 21
Arrears of Subscriptions

A Member Association remaining in arrears of payment of its subscription for more than one year from the end of the calendar year for which the subscription is due shall be in default and shall not be entitled to vote until such default is cured.

Members liable to pay subscriptions and who remain in arrears of payment for two or more years from the end of the calendar year for which the subscription is due shall, unless the Executive Council decides otherwise, receive no publications or other rights and benefits of membership until such default is cured.

Failure to make full payment of subscriptions owed for three or more calendar years shall be sufficient cause for expulsion of the Member in default. A Member expelled by the Assembly solely for failure to make payment of subscriptions may be reinstated by vote of the Executive Council following payment of arrears, subject to ratification by the Assembly. The Assembly may authorise the President and/or Treasurer to negotiate the amount and payment of arrears with Members in default, subject to approval of any such agreement by the Executive Council.

Subscriptions received from a Member in default shall, unless otherwise provided in a negotiated and approved agreement, be applied to reduce arrears in chronological order, beginning with the earliest calendar year of default.

Article 22
Financial Matters and Liability

The Administrator and the auditors shall receive compensation as determined by the Executive Council.

Members of the Executive Council and Chairmen of Standing Committees, Chairmen and Rapporteurs of International Sub-Committees and Working Groups, when travelling on behalf of the Comité Maritime International, shall be entitled to reimbursement of travelling expenses, as directed by the Executive Council.

The Executive Council may also authorise the reimbursement of other expenses incurred on behalf of the Comité Maritime International.

The Comité Maritime International shall not be liable for the acts or omissions of its Members. The liability of the Comité Maritime International shall be limited to its assets.

Article 23
Governing Law

Any issue not resolved by reference to this Constitution shall be resolved by reference to Belgian law, including the Act of 25th October 1919 (Moniteur belge of 5th November 1919), as subsequently amended, granting

6ème PARTIE - FINANCES

Article 21
Retards dans le paiement de Cotisations

Une Association membre qui demeure en retard de paiement de ses cotisations pendant plus d'un an à compter de la fin de l'année civile pendant laquelle la cotisation est due est considérée en défaut et ne jouit pas du droit de vote jusqu'à ce qu'il ait été remédié au défaut de paiement.

Les membres redevables de cotisations et qui demeurent en retard de paiement pendant deux ans au moins à compter de la fin de l'année civile pendant laquelle la cotisation est due ne bénéficient plus, sauf décision contraire du Conseil exécutif, de l'envoi des publications ni des autres droits et avantages appartenant aux membres, jusqu'à ce qu'il ait été remédié au défaut de paiement.

Une carence dans le paiement des cotisations dues pour trois ans au moins constitue un motif suffisant pour l'exclusion d'un Membre. Lorsqu'un Membre a été exclu par l'Assemblée au motif d'une omission dans le paiement de ses cotisations, le Conseil exécutif peut voter sa réintégration en cas de paiement des arriérés et sous réserve de ratification par l'Assemblée. L'Assemblée peut donner pouvoir au Président et/ou au Trésorier de négocier le montant et le paiement des arriérés avec le Membre qui est en retard, sous réserve d'approbation par le Conseil exécutif.

Les cotisations reçues d'un membre en défaut sont, sauf accord contraire approuvé, imputées par ordre chronologique, en commençant par l'année civile la plus ancienne du défaut de paiement.

Article 22
Questions financières et responsabilités

L'Administrateur et les réviseurs reçoivent une indemnisation fixée par le Conseil exécutif.

Les membres du Conseil exécutif et les Présidents des comités permanents, les Présidents et rapporteurs des commissions internationales et des groupes de travail ont droit au remboursement des frais de voyages accomplis pour le compte du Comité Maritime International, conformément aux instructions du Conseil exécutif.

Le Conseil exécutif peut également autoriser le remboursement d'autres frais exposés pour le compte du Comité Maritime International.

Le Comité Maritime International ne sera pas responsable des actes ou omissions de ses Membres. La responsabilité du Comité Maritime International est limité à ses avoirs.

Article 23
Loi applicable

Toute question non résolue par les présents statuts le sera par application du droit belge, notamment par la loi du 25 octobre 1919 (Moniteur belge 5 novembre 1919) accordant la personnalité civile aux associations

juridical personality to international organizations dedicated to philanthropic, religious, scientific, artistic or pedagogic objects, and to other laws of Belgium as necessary.

PART VII - ENTRY INTO FORCE AND DISSOLUTION

Article 24
Entry into Force [(2)]

This Constitution shall enter into force on the tenth day following its publication in the *Moniteur belge*. The Comité Maritime International established in Antwerp in 1897 shall thereupon become an international organization pursuant to the law of 25th October 1919, whereby international organizations having a philanthropic, religious, scientific, artistic or pedagogic object are granted juridical personality (*Moniteur belge* 5 November 1919). Notwithstanding the later acquisition of juridical personality, the date of establishment of the Comité Maritime International for all purposes permitted by Belgian law shall remain 6th June 1897.

Article 25
Dissolution and Procedure for Liquidation

The Assembly may, upon written motion received by the Administrator not less than one-hundred eighty days prior to a regular or extraordinary meeting, vote to dissolve the Comité Maritime International. At such meeting a quorum of not less than one-half of the Member Associations entitled to vote shall be required in order to take a vote on the proposed dissolution. Dissolution shall require the affirmative vote of a three-fourths majority of all Member Associations present, entitled to vote, and voting. Upon a vote in favour of dissolution, liquidation shall take place in accordance with the law of Belgium. Following the discharge of all outstanding liabilities and the payment of all reasonable expenses of liquidation, the net assets of the Comité Maritime International, if any, shall devolve to the Comité Maritime International Charitable Trust, a registered charity established under the law of the United Kingdom.

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[2] Article 24 provided for the entry into force the tenth day following its publication in the Moniteur belge. However, a statutory provision which entered into force after the voting of the Constitution by the Assembly at Singapore and prior to the publication of the Constitution in the Moniteur belge, amended the date of acquisition of the juridical personality, and consequently the date of entry into force of the Constitution, which could not be later than the date of the acquisition of the juridical personality. Reference is made to footnote 1 at page 8.

internationales poursuivant un but philanthropique, religieux, scientifique, artistique ou pédagogique telle que modifiée ou complétée ultérieurement et, au besoin, par d'autres dispositions de droit belge.

7ème PARTIE - ENTREE EN VIGUEUR ET DISSOLUTION

Article 24
Entrée en vigueur *(2)*

Les présents statuts entrent en vigueur le dixième jour après leur publication au Moniteur belge. Le Comité Maritime International établi à Anvers en 1897 sera alors une Association au sens de la loi belge du 25 octobre 1919 accordant la personnalité civile aux associations internationales poursuivant un but philanthropique, religieux, scientifique, artistique ou pédagogique et aura alors la personnalité morale. Par les présents statuts les Membres prennent acte de la date de fondation du Comité Maritime International, comme association de fait, à savoir le 6 juin 1897.

Article 25
Procédure de dissolution et de liquidation

L'Assemblée peut, sur requête adressée à l'Administrateur au plus tard cent quatre vingt jours avant une réunion ordinaire ou extraordinaire, voter la dissolution du Comité Maritime International. La dissolution requiert un quorum de présences d'au moins la moitié des Associations Membres en droit de voter et une majorité de trois quarts de votes des Associations Membres présentes, en droit de voter, et votant. En cas de vote en faveur d'une dissolution, la liquidation aura lieu conformément au droit belge. Après l'apurement de toutes les dettes et le paiement de toute dépense raisonnable relative à la liquidation, le solde des avoirs du Comité Maritime International, s'il y en a, reviendront au Fonds de Charité du Comité Maritime International ("CMI Charitable Trust"), une personne morale selon le droit du Royaume Uni.[2]

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[2] L'article 24 prévoyait l'entrée en vigueur le dixième jour suivant la publication des statuts au Moniteur belge. Toutefois, une disposition légale entrée en vigueur après le vote de la Constitution par l'Assemblée à Singapour et avant la publication des statuts, a modifié la date de l'acquisition de la personnalité morale, et ainsi la date de l'entrée en vigueur des statuts, qui ne pouvait être postérieure à la date de l'acquisition de la personnalité morale. Voir note 1 en bas de la page 9.

RULES OF PROCEDURE*

1996[1]

Rule 1
Right of Presence

In the Assembly, only Members of the CMI as defined in Article 3 (I) of the Constitution, members of the Executive Council as provided in Article 4 and Observers invited pursuant to Article 4 may be present as of right.

At International Conferences, only Members of the CMI as defined in Article 3 (I) of the Constitution (including non-delegate members of national Member Associations), Officers of the CMI as defined in Article 8 and Observers invited pursuant to Article 20 may be present as of right.

Observers may, however, be excluded during consideration of certain items of the agenda if the President so determines.

All other persons must seek the leave of the President in order to attend any part of the proceedings .

Rule 2
Right of Voice

Only Members of the CMI as defined in Article 3 (I) of the Constitution and members of the Executive Council may speak as of right; all others must seek the leave of the President before speaking. In the case of a Member Association, only a listed delegate may speak for that Member; with the leave of the President such delegate may yield the floor to another member of that Member Association for the purpose of addressing a particular and specified matter.

Rule 3
Points of Order

During the debate of any proposal or motion any Member or Officer of the CMI having the right of voice under Rule 2 may rise to a point of order and the point of order shall immediately be ruled upon by the President. No one rising to a point of order shall speak on the substance of the matter under discussion.

1. Adopted in Brussels, 13th April 1996.

All rulings of the President on matters of procedure shall be final unless immediately appealed and overruled by motion duly made, seconded and carried.

Rule 4
Voting

For the purpose of application of Article 6 of the Constitution, the phrase "Member Associations present, entitled to vote, and voting" shall mean Member Associations whose right to vote has not been suspended pursuant to Articles 7 or 21, whose voting delegate is present at the time the vote is taken, and whose delegate casts an affirmative or negative vote. Member Associations abstaining from voting or casting an invalid vote shall be considered as not voting.

Voting shall normally be by show of hands. However, the President may order or any Member Association present and entitled to vote may request a roll-call vote, which shall be taken in the alphabetical order of the names of the Member Associations as listed in the current CMI *Yearbook*.

If a vote is equally divided the proposal or motion shall be deemed rejected.

Notwithstanding the foregoing, all contested elections of Officers shall be decided by a secret written ballot in each category. Four ballots shall be taken if necessary. If the vote is equally divided on the fourth ballot, the election shall be decided by drawing lots.

If no nominations for an office are made in addition to the proposal of the Nominating Committee pursuant to Article 15, then the candidate(s) so proposed may be declared by the President to be elected to that office by acclamation.

Rule 5
Amendments to Proposals

An amendment shall be voted upon before the proposal to which it relates is put to the vote, and if the amendment is carried the proposal shall then be voted upon in its amended form.

If two or more amendments are moved to a proposal, the first vote shall be taken on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all amendments have been put to the vote.

Rule 6
Secretary and Minutes

The Secretary-General or, in his absence, an Officer of the CMI appointed by the President, shall act as secretary and shall take note of the proceedings and prepare the minutes of the meeting. Minutes of the

Assembly shall be published in the two official languages of the CMI, English and French, either in the *CMI Newsletter* or otherwise distributed in writing to the Member Associations.

Rule 7
Amendment of these Rules

Amendments to these Rules of Procedure may be adopted by the Assembly. Proposed amendments must be in writing and circulated to all Member Associations not less than 60 days before the annual meeting of the Assembly at which the proposed amendments will be considered.

Rule 8
Application and Prevailing Authority

These Rules shall apply not only to meetings of the Assembly and International Conferences, but shall also constitute, *mutatis mutandis*, the Rules of Procedure for meetings of the Executive Council, International Sub-Committees, or any other group convened by the CMI.

In the event of an apparent conflict between any of these Rules and any provision of the Constitution, the Constitutional provision shall prevail in accordance with Article 7(h). Any amendment to the Constitution having an effect upon the matters covered by these Rules shall be deemed as necessary to have amended these Rules *mutatis mutandis*, pending formal amendment of the Rules of Procedure in accordance with Rule 7.

GUIDELINES FOR PROPOSING THE ELECTION OF TITULARY AND PROVISIONAL MEMBERS

1999[1]

Titulary Members

No person shall be proposed for election as a Titulary Member of the Comité Maritime International without supporting documentation establishing in detail the qualifications of the candidate in accordance with Article 3 (I)(c) of the Constitution. The Administrator shall receive any proposals for Titulary Membership, with such documentation, not less than sixty (60) days prior to the meeting of the Assembly at which the proposal is to be considered.

Contributions to the work of the Comité may include active participation as a voting Delegate to two or more International Conferences or Assemblies of the CMI, service on a CMI Working Group or International Sub-Committee, delivery of a paper at a seminar or colloquium conducted by the CMI, or other comparable activity which has made a direct contribution to the CMI's work. Services rendered in furtherance of international uniformity may include those rendered primarily in or to another international organization, or published writing that tends to promote uniformity of maritime law or related commercial practice. Services otherwise rendered to or work within a Member Association must be clearly shown to have made a significant contribution to work undertaken by the Comité or to furtherance of international uniformity of maritime law or related commercial practice.

Provisional Members

Candidates for Provisional Membership must not merely express an interest in the object of the CMI, but must have *demonstrated* such interest by relevant published writings, by activity promoting uniformity of maritime law and/or related commercial practice, or by presenting a plan for the organization and establishment of a new Member Association.

Periodic Review

Every three years, not less than sixty (60) days prior to the meeting of the Assembly, each Provisional Member shall be required to submit a concise report to the Secretary-General of the CMI concerning the activities organized or undertaken by that Provisional Member during the reporting period in pursuance of the object of the Comité Maritime International.

1. Adopted in New York, 8th May 1999, pursuant to Article 3 (I)(c) and (d) of the Constitution.

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[2] Born 1944 in Västerås, Sweden. 1971: Bachelor of law, University of Uppsala, Sweden. 1971-1972: Lecturer, School of Economics, Gothenburg, Sweden. 1972: Associate, Mannheimer & Zetterlöf, Gothenburg, Sweden. 1973-1976: Legal officer, United Nations Commission on International Trade Law, United Nations Conference on Trade and Development, Geneva, Switzerland. 1977-1981: Research fellow, Scandinavian Institute of Maritime Law, Oslo, Norway. 1982-2010: Attorney at law, Northern Shipowners Defence Club, Oslo, Norway. 2012 : Partner, Arntzen de Besche, Oslo, Norway 1993-2000: President, Norwegian Maritime Law Association, Oslo, Norway. 1994: Executive Councillor, Comité Maritime International, Antwerp, Belgium. 1996: Chairman of the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and related subjects. 1998: Mediation Workshop, arranged by Professor Frank E.A. Sander, Harvard Law School. 1999: President of the Main Committee of the Diplomatic Conference on Arrest of Ships. 2001:Vice President, Comité Maritime International, Antwerp. Delegate of Norway to several IMO,UNCTAD and UNCITRAL meetings. Participated in the drafting of several BIMCO documents, such as BARECON 2001.

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[3] Justice Gauthier holds an LL.M. from London's School of Economics and an LL.L. from the University of Montreal. She was appointed to the Federal Court in December, 2002 and to the Court Martial Appeal Court of Canada in February, 2003.She became a judicial member of the Competition Tribunal in 2009 and was appointed to the Federal Court of Appeal in 2011. Before her appointment to the Federal Court, Justice Gauthier was a partner with the firm of Ogilvy Renault (now Norton Rose) in Montreal where she practiced as a litigator and was responsible for the firm's technology team between 1995 and 2001 and promoted technologies related to electronic commerce nationally and internationally for many years. Until her appointment she was the chair of the Board of the Electronic Commerce Institute of Quebec. Justice Gauthier had a practice in admiralty and shipping law where, in addition to being a litigator and an arbitrator, she acted as a commercial advisor in respect of various aspects of the industry including ship financing, purchase and sale of assets, charter-parties, and marine insurance. She was president of the Canadian Maritime Law Association in 1994 as well as chair of the Marine Advisory Board which advised the Commissioner of Coast Guards on matters of strategic policies including cost recovery and the Deputy Minister of Transport on policy reforms including, among other things, the privatization of ports. As vice-president of the St. Lawrence Economic Development Council (SODES), Justice Gauthier was very involved in promoting the economic development of the St. Lawrence River. She is vice-president of the Executive Committee of the Comité Maritime International (CMI).

[4] Advocate to the Supreme Court of Cassation, Senior Partner Studio Legale Berlingieri, Titulary Member Comité Maritime International, President Italian Maritime Law Association, associated editor of *Il Diritto Marittimo*, of *Lex Trasporti* and member of the Contributory Board of *Droit Maritime Français*.

[5] Nigel H. Frawley was educated at the Royal Military College in Kingston, Ontario, Canada and the Royal Naval College in Greenwich, England. He served for a number of years in the Royal Canadian Navy and the Royal Navy in several warships and submarines. He commanded a submarine and a minelayer. He then resigned his commission as a Lieutenant Commander and attended Law School at the University of Toronto from 1969 to 1972. He has practised marine and aviation law since that time in Toronto. He has written a number of papers and lectured extensively. He was Chairman of the Maritime Law Section of the Canadian Bar Association from 1993 to 1995 and President of the Canadian

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Maritime Law Association from 1996 to 1998.

[6] Wim Fransen was born on 26th July 1949. He became a Master of law at the University of Louvain in 1972. During his apprenticeship with the Brussels firms, Botson et Associés and Goffin & Tacquet, he obtained a '*licence en droit maritime et aérien*' at the Université Libre de Bruxelles. He started his own office as a maritime lawyer in Antwerp in 1979 and since then works almost exclusively on behalf of Owners, Carriers and P&I Clubs. He is the senior partner of Fransen Advocaten. He is often appointed as an Arbitrator in maritime and insurance disputes. Wim Fransen speaks Dutch, French, English, German and Spanish and reads Italian. President of the Belgian Maritime Law Association from 1998 to 2003. He became Administrator of the CMI in June 2002.

[7] Candidate in Law, (University of Louvain), 1984; Licentiate in Law, (University of Louvain), 1987; LL.M. in Admiralty, Tulane, 1989; Diploma Maritime and Transport Law, Antwerp, 1990; Member of the Antwerp bar since 1987; Professor of Maritime Law, University of Louvain; Professor of Marine Insurance, University of Hasselt; founding partner of Goemans, De Scheemaecker Advocaten; Member of the board of directors and of the board of editors of the Antwerp Maritime Law Reports ("Jurisprudence du Port d'Anvers"); publications in the field of Maritime Law in Dutch, French and English; Member of the Team of Experts to the preparation of the revision of the Belgian Maritime Code and Royal Commissioner to the revision of the Belgian Maritime Code.

[8] Born 24 January 1956 in Santiago, Chile. Tulane University School of Law, *Juis Doctor*, *cum laude*, 1979; University of Virginia, Bachelor of Arts, with distinction, 1976; Canal Zone College, Associate of Arts, with honors, 1974. Admitted to practice in 1979 and is a shareholder in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC and currently represents maritime, energy and insurance clients in litigation and arbitration matters. He has lectured and presented papers at professional seminars sponsored by various bar associations, shipowners, and marine and energy underwriters in Asia, Latin America and the United States. He is a member of the Advisory Board of the Tulane Maritime Law Journal, the New Orleans Board of Trade, and a former member of the Board of Directors of the Maritime Law Association of the United States. He became a Titulary Member of the CMI in 2000 and a member of the Executive Council in 2005.

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[9] Born 27 July 1964. Tomotaka Fujita is Professor of Law at Graduate Schools for Law and Politics, University of Tokyo (2004). LLB, University of Tokyo (1988); Research Assistant at University of Tokyo (1988-1991); Lecturer and Associate Professor of Law at Seikei University (1991-1998); Associate Professor of Law at Graduate Schools for Law and Politics, University of Tokyo (1998-2004). Professor Fujita is the Deputy Secretary General of Japanese Maritime Law Association, Titularly Member of CMI, Chairman of CMI's International Working Group on Rotterdam Rules. He was the Japanese Delegation to UNCITRAL, IMO and IOPC Fund. He was a Vice Chairman of theUNCITRAL 41st Session (2008) and First Vice Chairman of the 1992 IOPC Fund Assembly (2010). Author (with Michael Sturley and Gertjan van der Ziel) of *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*.

[10] Born 1939 in Malmö, Sweden. Studies at Princeton University (USA) 1957-58. Bachelor of Law, Lund University, Sweden, 1964. Served as a judge at district court and appellate court level in Sweden 1964-1970.. Legal advisor in the Department for International Civil Law of the Swedish Ministry of Justice 1970-1981 and Head of that Department 1982-1984; responsible for the preparation of legislation in various fields of civil law, mainly transport law, nuclear law and industrial property; represented Sweden in negotiations in a number of intergovernmental organisations, e.g. the International Maritime Organization (IMO). Served as arbitrator in Sweden. Appointed President of Division of the Stockholm Court of Appeal 1985. Director and Chief Executive Officer of the International Oil Pollution Compensation Funds 1985-2006. Member of the Board of Governors of the World Maritime University (WMU) in Malmö (Sweden). Visiting Professsor at the WMU and at the Maritime Universities in Dalian and Shanghai (People's Republic of China). Honorary Professor at the University of Notttingham (United Kingdom). Member of the Institute of International Shipping and Trade Law, Swansea University (United Kingdom). Visiting fellow at the IMO International Maritime Law Institute in Malta. Lecturer at the Summer Academy of the International Foundation for the Law of the Sea in Hamburg (Germany) and at universities in the United Kingdom and Sweden. Member of the Steering Committee of the London Shipping Law Centre - Maritime Business Forum. Associate Member of Quadrant Chambers, a set of leading barristers in London specialising in commercial law. Published (together with two co-authors) a book on patent law as well as numerous articles in various fields of law. Awarded the Honorary Degree of Doctor of Laws by the University of Southampton 2007. In 2010 awarded the King of Sweden's Gold Medal for significant achievements in the field of marine environment and shipping. Elected Executive Councillor 2007.

[11] Born in 1934 in Sebastopol; married; graduated from the Law School of the Institute of Foreign Trade in Moscow; 1961/62 schoo1 year in the University of Michigan, USA; in 1963 got the degree of candidate of legal sciences at the Moscow Institute of International Relations where now is a professor in the Private International and Civil Law Department; acted as arbitrator in about 600 international

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commercial and maritime cases in Russia and abroad, particularly in Stockholm, Warsaw, London, Beijing, Geneva, Zurich, Kiev; since 1972 the president of the Maritime Arbitration Commission also a member of the Presidium of the International Commercial Arbitration Court of the Russian Chamber of Commerce and Industry; Vice-President of the Russian Association of Maritime Law and International Law; participated as an expert in international organizations including UNCITRAL (since 1970), Council of Mutual Economic Assistance, International Council for Commercial Arbitration, UN Compensation Commission, Economic Commission for Europe, Hague Conference of Private International Law and at diplomatic conferences for adoption of conventions on sale of goods (1974, 1980, 1985), sea carriage (Hamburg, 1978), liability of transport terminals (Vienna, 1990), arbitration (1972, 1976, 1985, 1998) etc.; have books, articles and other publications on legal matters of international commerce, including many writings on arbitration and maritime law. Honours Jurist of the Russian Federation (1994); member of the Russian President's Council for Judicial Reforms (appointed in 1996, reappointed in 2000 and 2004); awarded Swedish Order "Polar Star" (2003).

[12] Born 1944 in Onitsha, Nigeria. Educated at Marlborough College, U.K; read law at Queens' College, Cambridge, U.K B.A.in 1967, LL.M 1968, M.A 1970. Called to the English Bar (Middle Temple) Nov.1968. Called to the Nigerian Bar in June 1973 and set up law partnership Mbanefo & Mbanefo in 1974. Currently he runs the law firm Louis Mbanefo & Co. in Lagos. Has appeared as counsel in many of the leading Nigerian shipping cases and was appointed a Senior Advocate of Nigeria (SAN) in May 1988. A founder member of the Nigerian Maritime Law Association, he is the current President. He has been Chairman of the Nigerian National Shipping Line and Chairman of a Ministerial Committee to review and update the Nigerian shipping laws. He is the author of the Nigerian Shipping Law series and was responsible for the preparation of the Admiralty Jurisdiction Act 1991 and the Merchant Shipping Act 2007 for the Nigerian Government. He has been involved with IMLI since its inception in 1988 and is currently on its Governing Board.

[13] He is a lawyer graduated from the School of Law and Social Sciences of the University of Buenos Aires in 1978. He was its Standard-bearer and he was also granted the GOLD MEDAL of the School of Law and Social Sciences of the University of Buenos Aires as Outstanding Graduate. He is Secretary-General of the Argentine MLA and Director of the Editing Committee of the Revista de Estudios Marítimos (Magazine of Maritime Studies), Vice-President for Argentina of the Instituto Iberoamericano de Derecho Maritimo, Full Professor of Maritime, Air and Spatial Law in the School of Juridic and Social Sciences of the Museo Social Argentino University. He writes and lectures frequently, both in Argentina and abroad, on maritime issues, especially the need for uniformity in both domestic and international maritime law in environmental aspects. He has written three books – two of them in cooperation with other authors – on maritime and marine insurance law and a great number of articles and commentaries. He has also been practicing in the maritime law field for 30 years, specializing on marine insurance, collision, salvage, shipbuilding and sale and purchase, and general average. He is presently Name Partner of the Law Firm Radovich & Porcelli, of Buenos Aires.

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[14] Born September 11, 1962. Education:1993-1994 LLM, University of Southampton 1979-1983 Bachelor of Science, Dalian Maritime University. Language: Mandarin and English. Employment History and Experiences: 09/2001 - now: Partner of Commerce & Finance Law Offices. 03/1997-08/2001: Henry & Co. Law Firm of Guangdong as Consultant. 08/1983-02/1997: China Council for the Promotion of International Trade (CCPIT); Two years experiences in average adjustment (from 1983 to 1985); Moved to China Maritime Arbitration Commission (CMAC) since 1985. Promoted as the Deputy Chief of the Secretariat of CMAC since 1990; 01/1993-10/1994: six months with Ince & Co. in London, three months with Sinclair Roche & Temperley and a number of P & I clubs in London; three months with LeGros Buchanan & Paul in Seattle and Galland Kharach in Washington DC; Mainly focused on shipping and international trade matters, including carriage of goods by sea, collision cases, commodity disputes; ship finance; general average; experienced in litigation and arbitration; Also involved in various arbitration cases in London, Singapore, Hong Kong and/or give evidence on PRC laws before the courts and/or arbitrators of various jurisdictions, including London, Singapore etc. Academic Society: Arbitrator of China Maritime Arbitration Commission and China International Economic and Trade Arbitration Commission; Deputy Secretary General of China Maritime Law Association; Secretary General of Maritime Law Committee under All-China Lawyers' Association Supporting member of London Maritime Arbitrators' Association. Arbitrator of Chambre Arbitrale de Paris

[15] Born in 1952, he was educated at Magdalen College School and Lincoln College Oxford (MA 1975). He joined Richards Butler (now Reed Smith Richards Butler LLP) 1977 and qualified as a solicitor in 1980. He was elected Partner in 1983 and became Chairman (Senior Partner) of Richards Butler from 2000-2005. He is the Secretary of the British Maritime Association and is a joint author of *Voyage Charters, 3rd Edition 2007* Informa and a contributor of *Legal issues relating to Time Charterparties* Informa 2008.

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PART II

The Work of the CMI

JUDICIAL SALES OF SHIPS

OPENING NOTE*

Henry Hai Li **

Distinguished delegates, ladies and gentlemen:

It is a great honor for me as the Chair of this session to welcome you all to attend this session on Recognition of Foreign Judicial Sales of Ships!

You would note that according to Conference Programme, if necessary, we may have almost three days, i.e. today, tomorrow, and the day after the Excursion to the Great Wall on 17 October, for discussion in details and in depth all issues in relation to international recognition of judicial sales of ships.

At the beginning of this session, please allow me to express my thanks to the following national MLAs for their making comments and amendment proposals relating to the 2nd Draft Instrument, namely, the MLA of Dominica, Norway, China, France, Malta, Ireland, Japan, USA, Croatia, and Britain. Then, please let me take this opportunity to thank the members of the IWG on JSS for their continuous participation and great contribution to this project, now with us sitting on the floor at this session are Jonathan Lux from UK, Andrew Robinson form South Africa, Frank Smeele from the Netherlands, those sitting in the audience are Frank Nolan from USA, Benoît Goemans from Belgium, Louis N. Mbanefo from Nigeria, and those who are unfortunately not able to come and join us today.

For this morning, we shall have 6 introductory speeches. The first two speakers, i.e. Jan-Erik Pötschke from Germany and Lawrence Teh from Singapore would give us a brief introduction of the law and practice in relation to judicial sales of ships in civil law and common law jurisdictions respectively. The second two speakers, i.e. William Sharpe from Canada and Frank Smeele from the Netherlands would address the issue of policy choices and/or considerations which would have to be taken into account when preparing a draft international instrument on this subject, needless to mention, one from common law prospective and the other from civil law prospective. The fifth speaker, i.e. James Zhengliang Hu from China, will tell us briefly the law and practice in relation to judicial sales of ships in China, in which the

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* To be used for the opening of the Session on JSS on 15 October 2012.

** Chairman of the CMI IWG on JSS.

Conference is now ongoing and the general attitude of China MLA towards the current draft instrument. The last but not the least speaker, i.e. Andrew Robinson will make on behalf of the IWG a presentation of the Summary and the Concise Analysis of the comments so far received from the national MLAs relating to the 2nd Draft Instrument. Thereafter, we shall spend some time for questions and answers before lunch.

In the afternoon, we shall start our discussions on the wording and provisions of the 2nd Draft Instrument from the beginning to the end article by article. The discussion will be chaired by me and Jonathan Lux, together with Andrew Robinson. It is hoped that at the end of the discussion consensus and/or agreement may be achieved on most if not all necessary amendments on the wording or provisions of the 2nd Draft Instrument. Thereafter, the IWG will try to formulate a revised draft and submit the same to the forthcoming CMI Assembly for their consideration and/or adoption.

Please kindly note that all papers and reference materials used or referred to during this session may be found and downloaded from the Conference Website, i.e. http://www.cmi2012beijing.org/dct/page/65642. If you have any problem in this aspect or need any further information or material in relation to this subject, please feel free to contact me at my following email address: henryhaili@henrylaw.cn.

Thank you for your attention.

CONCISE SUMMARY OF VARIOUS COMMENTARIES RECEIVED RELATING TO THE 2ND DRAFT INSTRUMENT

ANDREW ROBINSON*

1. Introduction

1.1 We refer to the collation of the comments on the 2nd Draft Instrument that was distributed earlier this month.

1.2 What follows is an attempt at summarising, as concisely as possible, the comments made.

1.3 Comments on the 2nd Draft Instrument were received from various Maritime Law Associations including those of the Dominican Republic, China, Croatia, France, Great Britain Ireland, Malta, Japan and U.S.A. and further comments were received from José Maria Alcántara, in his capacity as a Titulary Member, Spain and Camilla Braefelt of Nordisk Legal Services (Norway).

1.4 The comments range from suggesting simple grammatical changes, to the inclusions of an entirely new Article. We have sought to identify significant trends or suggestions and members are encouraged to refer, in each case, to the full submissions made.

2. General

2.1 It is clear from the comments made that those making the submissions understood, and generally supported, the purpose of the Draft Instrument: namely, to grant ship purchasers necessary and sufficient protection where they purchase a ship via a judicial sale.

2.2 **Croatia** points out that the Draft Instrument also extends the scope of application to all judicial sales, regardless of where the judicial sale occurs. It suggests that the Draft Instrument should distinguish between judicial sales performed in Contracting and Non-contracting States. The Draft Instrument should provide a dual regime whereby judicial sales performed in Contracting

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State would be automatically recognised whilst judicial sales performed in Non-contracting States would be recognised only if more detailed conditions were satisfied.

2.3 **Croatia's** further comments set out herein are made on the assumption that the Draft Instrument will apply to judicial sales in both Contracting and Non-contracting States.

2.4 **Mr Alcantara** raises concerns that the draft Instrument seeks to lead to an International Convention when initially the intention was understood to be the drawing up of a set of "common procedural rules" only.

3. Article 1: Definitions

3.1 In general, the comments on the definition clauses raise more grammatical than substantive concerns.

3.2 A common theme is that the use of capital letters throughout the Draft Instrument is inconsistent. **Norway** suggests that all terms defined in Article 1 should start with a capital letter throughout the Instrument.

3.3 **Mr Alcantara** is of the opinion that the entire definition section (in other words, Article 1 in its entirety) is unnecessary as the definitions should be determined by applicable law or international conventions.

3.4 The most contentious definitions appear to be the following:

(1) "Charge" in paragraph 2:

The **Dominican Republic** proposes that a mortgage or hypotheque be referred to as "performed" as opposed to "effected".

Great Britain points out that this definition may give rise to two distinct problems. Firstly, under English law, a mortgage on a ship registered in full in Part I or Part II of the Register under the 1995 Merchant Shipping Act may be registered with the Registrar of Shipping & Seaman. A mortgage on a ship registered under Part II or Part III (which pertains to simple registration and small ships respectively) cannot be registered with that Registrar. However, under the 2006 Companies Act, any mortgage granted on a ship by a limited company has to be registered with the Registrar of Companies within 21 days of its creation and if it is not so registered it is void as against creditors of the owner and any liquidator or administrator.

Great Britain therefore suggests that the wording could be altered to say *"registerable with the Registrar of Ships if there is provision for such registration";* and proposes the deletion of the words '*applicable in accordance with the private international law rules'* as they consider these words unhelpful.

Also **Great Britain** is concerned that this definition refers to charge in the "same nature as a mortgage" and in commercial terms mortgage and charge may be synonymous. However, under English law a mortgage transfers legal titles in the property to the mortgagee whereas a charge does not, although it gives the mortgagee a power of sale if the mortgagor defaults.

Great Britain puts forward that the validity of the "charge" should be determined by the lex situs as opposed to lex fori and accordingly they propose that the definition should read as follows:

'"Charge" means any mortgage, charge or hypotheque effected on a ship and recognised under the law of the State in which legal ownership of the ship is registered [or if the ship is not so registered under the law of the State of its home port.]'

(2) "Deficiency Amount" as defined in paragraph 5:

Great Britain seeks clarity on whether this amount will be determined by the court conducting the judicial sale and whether costs and interest will be included.

Japan proposes the deletion of this entire definition.

(3) "Judicial Sale of a ship" in paragraph 7:

Great Britain points out that this definition would include not only the enforcement of an in rem claim against the ship, but also any judgement requiring the sale of a ship in legal proceedings that have no connection whatsoever to the vessel. It is therefore suggested that this definition be limited to a sale of a ship to enforce an in rem claim as set out in the Arrest Convention.

Great Britain also proposes that the judicial sale should refer to a transfer of absolute legal and beneficial ownership of the ship free of all mortgages, hypotheques, charges, encumbrances, maritime and other liens, claims and debts whatsoever; as opposed to merely referring to "clean title".

France sets out that under French law, there is no legal definition of "Judicial Sale of a Ship". But such a sale is provided for by French Law by special and detailed provisions (Law n°67-5, January 3rd, 1967, article 70 and Decree n°67-967, October 27th, 1967, articles 31 to 58). This sale is similar with regard to the conditions and legal consequences of that of a judicial sale applied to real estate.

Nordisk suggests that the use of alternatives for "Judicial sale of a ship" such as "judicial sale" and "sale" should be avoided. The wording of the instrument would be clearer only one term is used throughout the document. The most correct term would be "Judicial Sale'.

(4) "Maritime Lien" in paragraph 8:

China raised the concern that this definition and that of "Mortgage" may give rise to potential conflicts due to the fact that according to the general rules of private international law, the lex fori shall apply to matters pertaining to maritime liens. **Great Britain** was of a similar opinion.

Dominican Republic proposes that the definition of Maritime lien be extended to include a claim recognized as a privileged credit on a ship.

(5) "Mortgage" in paragraph 9:

Great Britain points out that under English Law both registered and unregistered mortgages and charges are recognised. **Great Britain** suggests

that recognition of mortgages should be determined by the lex situs, namely the law of the State of registration or the State of home port.

(6) "State of Registration" in paragraph 15:

The common concern in this definition is the use of the word "permanent" before the words "registered at the time of its judicial sale".

China raises the concern that the State of Registration of a vessel may no longer be certain or unique. **China** puts forward Shanghai as an example in which a new shipping policy allows an owner of a ship to register the ship in two different ports.

Great Britain pointed out that in the event that a ship is not registered, this definition should refer to the home port of the ship.

Malta noted that in many registries, registration is first attained on a provisional basis, and permanent registration is only achieved at a later stage upon the satisfaction of certain requirements. By the insertion of the word "*permanently*", ships which only happen to be provisionally registered would fall outside the scope of the Instrument. **Malta** therefore suggested that a clause similar to that found in the 1993 Convention on Maritime Liens and Mortgages (MLM93) be inserted to take into account the possibility that a ship may be bareboat registered under another flag at the time of the Judicial Sale.

Nordisk noted that the basis that the registration of a vessel will rarely be permanent - it can be changed several times during the vessel's life. The purpose of introducing the word "permanent" is to exclude bareboat registration. This can be achieved by either explicitly exclude bareboat registration or replacing the word "ship" with "the Ship's ownership".

4. Article 2: Scope of Application

4.1 There is a common concern that this Article allows for a very wide application of the instrument. Accordingly, the common proposal is to limit the Instrument's application to the Contracting States only with the option of allowing those States to opt for a wider application.

4.2 The commentary provided by the CMI IWG, explains that the scope of application is limited by Article 9 which allows a State party to declare that it will only apply the Instrument to the recognition of a Judicial Sale made within the territory of a State party and further it may declare that the Instrument may be applicable in terms of a Judicial Sale made in the territory of a non- Party state on the basis of reciprocity.

4.3 **Nordisk** suggests that the Instrument should apply only to contracting parties, with the option to State parties to opt for a wider application as opposed to the limiting clause in Article 9.

4.4 **Mr. Alcantara** suggests that, in the event that the CMI approves the draft, the scope should be in line with that of the Mortgages and Maritime Liens Convention (MLM93).

5. Article 3 Notice of Judicial Sale

5.1 Article 3 is a reproduction of Article 11 of the MLM93. This was done purposely to avoid any conflicts.

5.2 Sub-paragraph 1:

(1) In the First Draft Instrument, an addition was made to the list on whom notice must be served being "the Embassy or Consulate of the Ship's Flag State to the State in which the Judicial Sale takes place." At an ISC meeting in Oslo, the majority view was that this clause needed to be deleted to avoid notice being held to be insufficient.

(2) **Croatia** notes that notice to a diplomatic or consular body of the Ship's Flag state is very important for communicating news of a Judicial Sale and that the reason given for its deletion is not valid. However, such notice may be sent to the Consulate or Embassy in terms of subsection (d), being the authority in charge of the ship's register in the State of Registration.

(3) Under **French** Law, a creditor who had a claim against a shipowner and wishes to sell the ship by Judicial Sale has to prove an enforceable title against the vessel. What this "enforceable title" entails is a topic of debate under French Law: whether it means a judgment or an award on the merits of the claim as opposed to provisional order or summary decision awarded in urgent matters.

(4) The **USA** suggests that notice to the public should be considered.

(5) **Ireland** proposes that the paragraph be amended to indicate that the Court *must* have received notice of all claims prior to issuing notice of the Judicial Sale.

(6) **Malta** also suggests that reference should be made to the owner of the Ship as opposed to the registered owner.

(7) **Norway** raises the issue that, according to the Instrument, the owner of the vessel need not disclose unregistered interests in the vessel. **Norway** accordingly suggests that the owner should be obliged to inform all lien holders, both registered and unregistered, so as to avoid Judicial Sales being conducted without notice to all lien holders. However, **USA** suggests that reliance should be placed on either filed liens of record or appearances resulting from actual notice in the media.

(8) The Draft Instrument does not require that the notice in terms of Article 3 contain information regarding the applicant or his claim. This is contrary to the Norwegian Enforcement Act, which requires such information to be disclosed on notice.

(9) The **USA** points out that under this Article, the Court has the obligation to ensure certain notices are given. In terms of the US Constitution this will not be accepted due to the 3 different branches of the constitutional system. Only the Congress may empower the Judiciary to act, not an international agreement entered into by the executive. To avoid this

problem, the USA puts forward the following suggestion as a substitute for the first two lines of paragraph 1:

"No State is required by this instrument to recognize a Judicial Sale in another State unless the party seeking recognition establishes that the following notices have been provided prior to such Judicial Sale either by the Court in such State or by one or more parties to the proceeding resulting in such Judicial Sale, in accordance with the laws of such State."

5.3 Sub-paragraph 2:

(1) **France** points out that the first part of a Judicial Sale, relating to service of summons to pay the claim amount and the notice that the claimant is willing to sell the ship before a competent court, is conducted purely by the creditor. Thereafter the claimant has to apply to a competent court for an order effecting such sale. Accordingly, a judge regulates the situation only after such notice is given.

(2) Notice must be given at least 30 days prior to the Judicial Sale. **Great Britain** suggests that provision needs to be made for a shortened notice period in cases where the sale is a matter of urgency. **Malta** raises concern as to the consequences flowing from non-compliance with the 30 day time notice. In particular, where such notice is given by registered mail: confirmation of unsuccessful delivery may only be received a few days prior to the Judicial Sale thereby forcing the claimant to reschedule the Judicial Sale accompanied with a new set of notices. Such process could impede the expeditious nature of a Judicial Sale which would be prejudicial to creditors.

(3) The **USA** points out that many ships may not have IMO numbers and this must be taken into account the clause requiring certain information to be contained in the notice.

5.4 Sub-paragraph 3:

Malta suggests that notice by courier should also be included as a method of issuing notice. The **USA** raises concerns as to what "press announcement" would entail as it is ambiguous in the current electronic age.

6. Article 4 Effect of Judicial Sale

6.1 A common concern raised is that the wording of this article it is not sufficiently clear.

6.2 **China** points out that this article could have the effect of going against the intention of protecting purchasers due to the conditional provision contained in this Article. **China** therefore suggests the amendment of the conditional "Subject to" in the Article to "*Unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument"*

6.3 **Great Britain** queries whether a vessel sailing through the territorial waters of a State will fall within the ambit of "*the ship being in the area of the*

jurisdiction of the State" and thereby subject to Judicial Sale. **Great Britain** therefore suggests the following be included in the provision:

(a) the ship is under the control or custody of the court which effects the Judicial Sale;

(b) the Judicial Sale has been conducted in accordance……

(c) under the law of the court effecting the Judicial Sale the property in the ship is transferred to the purchaser free from any encumbrances of whatsoever nature.

6.4 The words "*ownership of the shipowner*" as contained in the First Draft was replaced with "*all rights and interests in the ship"* as supported by a majority view at the ISC meeting in Oslo. **Mr. Alcantara** is of the view that these words are misleading because under national laws a "maritime lien" is a right vesting on the ship (Article 10.2 of the Spanish Civil Code, impliedly). The rights of ownership may be extinguished, while lien, encumbrances, charges or, indeed, contracts may always be assumable by the Purchaser.

6.5 A common concern relates to provision (b): "*in accordance with the law of the State in which the Sale is accomplished and the provisions of this Instrument"*.

6.6 **Croatia** proposes the deletion of this proviso as it creates a question as to what law is applicable and implies that the Judicial Sale will have the result of transferring title to the Purchaser only if the applicable law permits it.

6.7 **Great Britain** notes that different States have widely differing methods of sale; therefore this proviso should contain specific methods of acceptable sales.

6.8 **Norway** points out that the Instrument does not explicitly require that the purchase price be sufficient to cover all mortgages and liens. However, the Judicial Sale must be concluded "*in accordance with the law of the State in which the Sale is accomplished and the provisions of this Instrument"* and these laws presumably have requirements regarding purchase price and the position of mortgages and liens with better priority than the applicant.

7. Article 5 Issuance of a Certificate of Judicial Sale

7.1 A common consideration is that the certificate must reflect that ownership has passed to the purchaser, or that the purchaser has acquired such ownership.

7.2 **Croatia, Ireland** and **Nordisk** maintain that the certificate should contain some clause evidencing that ownership has passed to the Purchaser**. France** suggests that evidence of payment should be provided before such certificate will be issued, as such indicating a change of ownership.

7.3 Both **Mr. Alcantara** and the **USA** consider this Article redundant. **Mr Alcantara** is of the opinion that in many States a true/certified copy of the Sale Judgement is sufficient and is available to the Purchaser. The purpose of

the certificate would be fairly low due to the fact that it wouldn't contain any charges, liens etc. The **USA** points out that, currently, a Bill of Sale is used to evidence the change of ownership and that in terms of a Judicial Sale it would be no different. The **USA** submits that the Bill of Sale carries all the weight that this certificate would.

7.4 **Croatia** further suggests that Article 5 requires an additional clause setting out that the Judicial Sale is not subject to regular appeal in the State in which the Judicial Sale is accomplished, as such certificate cannot be issued while a participant to a Judicial Sale is able to appeal the sale. This is due to the fact that the certificate will be internationally recognised. Additionally, **Croatia** proposes that a form of such Certificate be annexed to the Instrument for the purposes of uniformity.

8. Article 6 Deregistration and Registration of the Ship

8.1 Comments received were particularly focused on sub-paragraph 4 of this article.

8.2 **China** notes that in practice, the buyer may be unable to register the ship if the original registry is reluctant or refuses to deregister the ship. **China** suggests that the obligation to deregister the ship should fall on the previous owner and that the buyer should not be prejudiced by the failure to fulfil this obligation. Therefore, where a Purchaser in a Judicial Sale evidences reluctance on behalf of an erstwhile owner to deregister the ship within a reasonable time, the Purchaser may register the ship based on the Certificate in terms of Article 5 alone.

8.3 **China** suggests that a temporary registration system should be considered to allow for the better protection of the rights of ship purchasers.

8.4 **China** further suggests that in order to avoid malicious claims by "Interested Parties" thereby delaying the process, Interested Parties should be required to provide sufficient security when challenging a Judicial Sale.

8.5 **China** also proposes that the registry is an administrative department and, as such, should not have the right to determine whether the Interested Party is genuine or if they possess the substantive rights in order to suspend the registration.

8.6 **Great Britain** raises the concern that where a ship sold is not registered or alternatively where it is registered under a system which does not provide for the registration of mortgages then there can be no deregistration of a mortgage even though this would be the effect of a Judicial Sale.

8.7 Both **Ireland** and **Malta** suggest rewording paragraph (4) in order clarify the position.

8.8 **Mr Alcantara** points out that a Purchaser will only be protected where the Sale Judgement has become final in that all prior challenges of ownership have been previously resolved in a full, final and non-appealable manner and where the sale is not subject to a revision plea.

8.9 The **USA** submits that this article may give rise to problems due to the fact that certain US law provisions prohibit the transfer, by sale or otherwise, of ships currently or most recently documented under the US flag to non-citizens without prior approval from US Maritime Administration.

9. Article 7 Recognition of Judicial Sale

9.1 There is a common concern that this Article is ambiguous and unnecessarily complicated and, in the view of **Great Britain**, needs to be revised.

9.2 **Nordisk** suggests that "State Party", as used in this Article, needs to be defined under Article 1.

9.3 **China** points out that the Article does not make it clear whether de-registration of a ship and its subsequent re-registration by the Purchaser is subject to the prior recognition of the Court. **China** questions the purpose of such recognition when the ship Purchaser could simply provide the Certificate as opposed to obtaining a court order.

9.4 The **USA** recommends a revised wording of Article 7(4) in order to bring the Article in line with the goal of drafting a treaty which resolves both title and registry and thereby avoid difficulties in reregistering ships flowing from a Judicial Sale, while ensuring that the purpose is not to deprive claimants of rights to claim damages collateral to the judicial foreclosure.

9.5 In terms of Article 7(4), **Mr Alcantara** points out that a "Competent Court" is always defined by domestic law and, as such, that Court should hear all actions in relation to a public sale. However, the competent Court might be the place of residence of the party <u>against</u> whom enforcement of a judicial sale order dictated in another EU State is sought. Such party may challenge the enforcement decision before the Court of that EU State having dictated the enforcement. The ground for such challenge by way of appeal would be that the enforcement would be manifestly contrary to public policy. It means that a challenge based upon public policy could be made before a Court other than the Court of the place in which the Judicial Sale took place.

10. Article 8 Circumstances in which Recognition may be Refused

10.1 A common concern raised is that this Article is not reconciled with provisions contained in Articles 6 and 7 or may be in conflict with national laws of State Parties.

10.2 In particular, **China** points out that sub paragraph (1) (b) is not reconciled with Article 7(4) and further notes that Article 8(1) (b) is not in line with the general purpose of the Instrument, being the protection of ship purchasers. Accordingly, **China** proposes the deletion Article 8(1) (b).

10.3 **Ireland** points out that the one year period contained in this Article conflicts with the provisions of Article 6(4) as this would entail the ship

registry having to wait for a full year to expire before deleting mortgages and/or deleting the previous registry. **Ireland** seeks a clearer separation between the two articles.

10.4 **Mr Alcantara** also indicates that the time limits for Judicial Sales may be regarded as a "minor defect" under the procedural rules of a determined applicable law system or may conflict with special time limits in national legislation.

10.5 In attempting to reconcile this Article with the preceding Articles**, Malta** proposes inserting a provision allowing for temporary refusal or suspension by a Court on presentation of proof by an Interested Party that an action challenging the Judicial Sale is pending as provided for in Article 7(3) until such time that a final judicial decision is made or withdrawn.

10.6 **Mr Alcantara** raises the potential conflict of this Article with that of domestic/national legislation of State Parties, in particular due to the fact that in the definition section contained in Article 1 it encompasses "*private international rules of the State in which the ship is sold by way Judicial Sale"*. The conflict of law rules may well direct the parties to the law of the flag or to the law of the contract (ship mortgage) or to the law of the place of the contract. The conflict of law rules may well not refer to an international instrument. Moreover, any law that is not substantive or material but procedural is never subject to conflict of law rules because it is reserved to the law of the Court in charge of the public sale. **Mr. Alcantara** suggests that the issue should be revised in order to avoid conflict with domestic laws, in particular whether or not the MLM 1993 is incorporated into national law.

10.7 Both **China** and **Japan** raise concerns relating to sub paragraph 2.

(1) **China** seeks clarification on the meaning of "Judicial Sale" because under Chinese legal practice, after conducting the sale, the court will deliver a "confirmation of sale"; and after the price is paid, the court will deliver another legal document called "confirmation of transfer of ship", both of these two documents are the proof of judicial sale and records issued dates on them. According to the current wording of the Instrument, it may be difficult to identify "the date of the Judicial Sale".

(2) **Japan** suggests a redrafting of the wording of this paragraph in order that the judgment, in the form of a foreign judicial sale, can be tested by the state in which it is being enforced. A judicial sale of a ship should not be recognized even when such a sale is based on a foreign judgment which cannot be recognized and enforced. **Japan** advised that it is hesitant to accept a scheme where a foreign judicial sale is automatically recognized without review of the procedure and the nature of the claim, noting that whilst the Second Draft followed the New York Convention, arbitration is based on the relevant parties' agreement to be bound, while the judicial sale does not have such basis.

(3) Similarly, **Mr. Alcantara** notes that the draft of Article 8 does not set out

whether the Court receiving the request for non-recognition would be a Court located in a country in which the sale is sought to be effected. Also, the international recognition and enforcement of Court Judgments (unlike an Arbitration Award) remins an issue.

11. Article 9 Restricted Recognition

11.1 The most noticeable comment raised under this Article, is that of **Malta**, which suggests the addition of a new Article 9 allowing for a temporary change of Flag, and pushing the current Article 9 becoming Article 10. This proposition is similar to that proposed by **China** under Article 6 in which they suggested amending the Draft Instrument to allow for a temporary registration system. **Malta** provides a draft wording for such additional Article.

11.2 **Croatia** proposes an amendment to the first sentence of Article 9 whereby the State signing, ratifying or acceding to the Instrument declare whether the Instrument will only apply to sales made in the territory of a State Party, or where the ship is flying the flag of the State Party.

11.3 Along with concerns raised in Article 2, being that the application of the Instrument is too wide, **Nordisk** suggests that this Article needs to be amended in light of the proposed amendments made to Article 2 in order for application to be limited to State Parties who may opt in this Article to widen its application.

12. Mr. Alcantara seeks clarification on the concept of "restricted recognition." Where a ship is sold lawfully by a foreign Court through final and non-appealable Court decision (a principle internationally admitted), then such decision may be only effective in a different country in accordance with the latter country's rules on recognition and enforcement of foreign judgments or otherwise pursuant to an International Convention, to which both States are party, which provides a specific system of recognition for certain foreign judgments. The recognition provisions contained in any particular International Convention do not easily override the domestic general rules and both live together.

JUDICIAL SALE OF SHIPS IN GERMANY AS AN EXAMPLE FOR A CIVIL LAW CONCEPT

JAN ERIK PÖTSCHKE*

Introduction

The following presentation is a brief summary of the Judicial Sale of Ships in Germany. All of us being advisors to the maritime industry in various aspects do face these days a rather difficult situation in the shipping industry. Depressed values of ships, low freight markets, overcapacity, lack of equity and banks withdrawing their engagement in ship finance do create a situation where shipowners may be forced into Judicial Sale of ships. The instrument on Recognition of Foreign Judicial Sale of Ships comes at a time where, even if many of our clients do not like the idea, the Judicial Sale of Ships is day-to-day business to various banks and maritime lawyers. We are talking about a current problem and the approach to unify the procedure and acceptance of Judicial Sale procedures.

The following issues are considered in order to outline the procedure of a Judicial Sale in Germany:

- Enforceable Title
- Valid Service
- Court Order of Enforcement
- Safe-custody of the Vessel
- Announcement of Auction
- Transfer of Title
- Distribution of the Proceeds.

As you all know, Germany follows the Civil Law Concept and therefore there are some substantial differences to the procedures in a Common Law Jurisdiction.

German Law has a specific Code dealing with the Judicial Sales of Ships, which is the ZVG (Enforcement Act). The Judicial Sale follows in general the same legal procedure as a Judicial Sale of immovable property. There are,

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however, a few specific provisions in the Enforcement Act with regard to the Judicial Sale of Ships which do apply in addition to the general provisions. This is stipulated in Sections 162-171 ZVG (Enforcement Act). I will come to this later.

1. Enforceable Title

a. Court Judgement and Arbitration Award

The condition precedent to start Judicial Sale proceedings in Germany is an enforceable title of the Creditor against the Owner of the vessel. If a German judgement is obtained and becomes final and binding there is no doubt that this would comply with the requirements of an enforceable title. Furthermore, there is no doubt that a judgement from an EU-member state being declared enforceable in Germany under the simplified procedure falls into this category as well. It becomes more interesting for judgement of Non-EU member states which have to go through an enforcement procedure in Germany. If they have been declared by a Court in Germany being enforceable they do also qualify to commence Judicial Sale proceedings.

The situation with regard to arbitration awards is similar and it depends if the arbitration award has been declared enforceable in Germany by a German Court. A settlement agreement is not an enforceable title. It could become, however, an enforceable title if there is an acknowledgement of debt included notarized by a German Notary Public or if the settlement agreement is made in Court and recorded by the Court reporter.

Excursus: "Acknowledgement of Debt"

German ship finance banks make use of this document. Part of the security documentation to be provided by the Shipowner is an acknowledgement of debt which is declared enforceable against the Shipowner and notarized by the Notary Public. The advantage for the bank is that they do not have to obtain a title in Court since this document serves as an enforceable title.

In most of the cases we are talking about a claim for money covered by the enforceable title. There is, however, also the situation that this title covers a claim for the surrender of a vessel but this would not lead to a Judicial Sale.

b. Ship Arrest

It should be noted that the ship arrest in Germany is possible for all kinds of monetary claims, not necessarily maritime claims. The concept of the arrest in Germany is to obtain an arrest order which shall secure the creditor. It is a preliminary security for the creditor to enforce a later title in the main proceedings. It is therefore that the arrest order which is enforced against the vessel and by which the vessel is detained, is not a title by which a Judicial Sale can be invoked. Otherwise, this would be a breach of the general principle that the main procedure cannot be anticipated by an arrest procedure. There is an

exemption to the general rule for those cases where the costs and expenses of safe custody become unproportional in relation to the value of the vessel.

While talking about an arrest in Germany, many of you may have made the experience that it is rather difficult to obtain such an arrest order. The problem rests with the requirements under German law to provide specific reasons for an arrest. Vessels trading on a regular basis and thereby calling German ports (liner service), for example, would be prevented from being arrested. The reason is that the Courts would consider this as sufficient asset within its jurisdiction. In addition, debtors located in the EU are also protected to a certain extent as the title in the main proceedings, which shall be protected by the arrest, would be enforceable in the EU, which by itself is –other than for non-EU-debtors –no sufficient reason for an arrest.

This, however, will change materially from next year on. With the introduction of our new German Maritime Code in 2013 there will be a change in the requirements for a ship arrest. The necessity of an arrest reason is then no longer required for arrests of seagoing vessels.

2. Valid Service

The enforceable title has to be served upon the Shipowner. Whether service of the title upon the Master instead of the Owner is sufficient is uncertain in some cases. In praxis it is agreed that the Master should have such authority. It is based on a legal power of representation in Section 527 HGB (Commercial Code) and Section 170, 171 ZPO (Civil Procedure Code). The new maritime law in Germany, very likely becoming effective during the first couple of months in 2013 will clarify this. The new law will provide for a legal authority of the master to accept service also in Judicial Sale proceedings (see new Section 619 HGB).

It should further be noted that the service procedure in Germany, other than in many other jurisdictions, cannot be substituted by service between the lawyers. The service needs to be carried out by the bailiff under supervision of the Courts.

Finally, there is the option for a creditor to commence a claim against the Master to accept a Judicial Sale of the vessel. In that scenario the Master would be the defendant and a judgement against the Master would be valid also against the Owner.

3. Court Order of Enforcement

The creditor of the enforceable title has to apply for a Court Order of Enforcement (Sections 165 and 15 ZVG). This Order has to be served upon the Owner as well. The Order of the Court will not only include the approval of Judicial Sale proceedings but also an Order to surveillance and custody of the vessel.

The Court will inform the ships register and the ships register will record the order (Sections 162 and 19 para. 1 ZVG) ("*Versteigerungsvermerk*").

With regard to the competent Court for the enforcement procedure this depends on the place where the vessel is located (Section 163, 1 ZGV), in other words: in the respective German port. Should the vessel be in the Hamburg ports it can be subject to Judicial Sale procedures in Hamburg (Section 171 ZVG).

Ships not being registered, however in German ownership, are subject to the enforcement procedure for movable property which does mean that the bailiff would take them into possession and will sell them in a Judicial Sale.

4. Safe-custody of the Vessel

With the Court Order of enforcement the safe-custody of the vessel is ordered. The Court will usually instruct a bailiff to carry out the necessary measures to prevent the vessel from sailing. The vessel is detained (Section 165 ZVG). This may include the taking away of the ship's papers, relocation of the vessel in another port area and hog-tie the vessel. The bailiff will use the services of the harbour police. Alternatively, the Court can order the safe-custody being carried out by a trustee in order to secure that the costs and expenses accruing during that period are covered and the necessary works and insurances are carried out.

The safe-custody will terminate either with withdrawal of the enforcement action or completion of the Judicial Sale.

The costs for safe-custody are part of the Judicial Sale procedure and will be settled from the proceeds of sale with first priority (Section 109 ZVG). The Court will ask the creditor for a retainer for these costs.

5. Announcement of Auction

The Judicial Sale will be carried out by the competent Court as described above. This Court is obliged to announce the auction. Such announcement must be served upon the participants ("*Beteiligte*") according to Section 41 ZVG. This group includes the creditor (of the title), the debtor (shipowner) and the registered mortgagees (if any) and the other creditors on record in the ships register (if any) (Section 9 ZVG). In addition, the announcement has to be made in specific shipping magazines. In Germany we would consider the "THB" (*Täglicher Hafenbericht*) or "Hansa" as such a magazine. The announcement has to include the entries on record of the ships register, *i.e.*name of the vessel, shipowner, mortgages, time and place where the Judicial Sale will take place, the declaration that this sale is carried out by way of enforcement of a title, the invitation that rights not being on record in the ships register such as maritime liens shall be declared by the creditors at the latest at the time of the Judicial Sale and the request to make a protest against

the Judicial Sale before completion of the Judicial Sale proceedings if any party believes the Judicial Sale is not justified. The announcement can also be made in electronic form, provided the vessel is under custody in its home port and procedures are carried out by the competent Court of the home port.

Parties who have informed the ships register about a maritime lien are protected because such information is deemed to be given to the competent Court of the Judicial Sale (Section 168 b ZVG) if such filing was done 6 months before announcement of the Judicial Sale.

If the German Court shall carry out a Judicial Sale of a vessel which does not fly the German flag, the German Court shall ("*soll*") –provided this does not delay the procedure –serve the Court Order by which the auction has been scheduled to the holders of maritime liens which can be identified from the ship's papers and inform the foreign ships register (Section 171, para. 3 ZVG). Although this provision contains some discretion ("*Ermessen*") of the Court, there is limited scope to avoid such notification.

6. Transfer of Title

The Judicial Sale procedure itself is made by way of a public auction. The party with the highest bid will obtain the award (Section 81 ZVG). The award is made by an order of the Court which is published in the auction or within one week after the auction took place. With this order the title is transferred to the party with the highest bid (Section 90 ZVG).

There are no requirements for a minimum offer. However, in a Judicial Sale of a German flagged vessel, the provisions of the "*geringste Gebot*" which could be translated to "lowest bid" have to be complied with. The "*geringste Gebot*" (Section 44 ZVG) means that the lowest offer must cover the costs of the Judicial Sale plus the claim amounts of creditors which are prior in ranking to the claim of the creditor having applied for the auction of the vessel. If, for example, a second-ranking mortgagee applies for a Judicial Sale of a German flagged vessel this lowest bid must cover the costs of the Judicial Sale procedure plus the amount of the first mortgagee. In praxis, this means that the bidder in the auction does auction a vessel with a mortgage attached thereto.

In case of a foreign-flagged vessel the situation is different. There is no provision for the "*geringste Gebot*". In consequence, all the securities recorded or maritime liens are deleted with the award.

Every bidder in an auction in Germany has to provide security in the amount of 10% of its bid. This is limited to the amount which has to be paid in cash and does not include securities which remain in place according to the lowest bid provisions (Sections 44, 52 ZVG).

Any party claiming against the proceeds of sale can apply with the Courts to take the vessel into safe-custody until the proceeds of sale have been paid to the Court by the highest bidder.

7. Distribution of the Proceeds

The distribution of the proceeds is stipulated in Sections 104 ff. ZVG. The Court will fix a date for distribution of the proceeds after the award was published by which the transfer of title is ordered. This date shall be published by the Court and submitted to the new Owner and the other parties claiming funds from the previous Owner. The Court may give all parties a 2-weeks-period to file their claims against the proceeds of the sale whereafter the Court will prepare a preliminary distribution plan for the proceeds. The general priority is as follows:

- The costs of the Judicial Sale procedure
- The secured claims, in particular maritime liens and mortgages;
- Other claims.

There is the possibility to object to the claims which creditors have filed against the proceeds (Section 115 ZVG). In general, the procedure is governed by the Court which in the end also arranges for the distribution of the proceeds to the approved creditors by way of bank remittance of the approved share.

8. Summary and Comment to the Draft Instrument on Recognition of Foreign Judicial Sale of Ships

After having briefly outlined the procedure in Germany and compared the procedure with the instrument on Recognition of Foreign Judicial Sale of Ships I can identify many similarities:

a. First of all, the definition of "Judicial Sale of a Ship" or "Judicial Sale" or "Sale" in the instrument is in compliance with German law. It is a public auction under the control of a Court. What is, however, different from German law is the option to have a sale in form of a private treaty included.

b. Article 3 deals with the notice of a Judicial Sale and specifies that the Court carrying out the Judicial Sale has to inform

(aa) the registered owner of the ship (same in Germany);

(bb) all holders of registered mortgages (same in Germany);

(cc) all holders of maritime liens provided that the Court conducting the Judicial Sale has received notice of their respective claims (same in Germany);

(dd) the authority in charge of the ships register in the State of registration (same in Germany with regard to German flagged vessels, but optional with regard to foreign-flagged vessels with some limited discretion).

c. Next to the procedural issues about a Judicial Sale which should be coped with by the respective jurisdictions, the recognition of the Judicial Sale is of utmost importance. Within the European Union we do not have this difficulty but once we go beyond our EU-borders, we do have problems

that the Judicial Sale orders are recognised and complied with. There are only general provisions in Germany referring to the principle of "*ordre public*" covering the acceptance of foreign (non-EU) enforcement actions.

I believe that the instrument of Recognition of Foreign Judicial Sale of Ships could develop to become a valuable instrument to uniform the standards of Judicial Sale Procedures and to safeguard the international acceptance of the Judicial Sale awards rendered under these standards.

Thank you for your attention.

JUDICIAL SALE OF VESSELS IN ASIA-PACIFIC COMMON LAW JURISDICTIONS*

LAWRENCE TEH**

This article studies the sale of vessels under court order in Asia-Pacific common law jurisdictions. The reference to "common law jurisdictions" in this article is to judicial courts which are part of a common law legal system and observe the common law traditions. This article demonstrates the writer's view that there is a general approach by the courts in Asia-Pacific common law jurisdictions when deciding applications for the sale of vessels and that the most common situations in which courts order that vessels be sold are where a claim is not contested by the owner of the vessel and where the vessel is regarded by the court to be a deteriorating asset or security. Hereafter, the sale of vessels under orders of court, as well as its associated processes, will be referred to as the "judicial sale" of vessels.

The common law legal system

A convenient starting point for the analysis of judicial sales of vessels in Asia-Pacific common law jurisdictions is to observe the law and legal system of England and Wales which was, and to a large extent continues to be, the generator of influential common law legislation and jurisprudence.

Common law jurisdictions are or are part of sovereign or self-governing states which are founded on a fundamental law, usually known as a "constitution". Most common law states observe the principle of *trias politica* or the doctrine of the separation of powers, where the state is comprised of three main branches of government, namely, the legislature, the executive and the judiciary. The legislature is usually known as "Parliament", one of whose essential functions is to propose, debate and pass laws. The laws passed by Parliament are usually referred to generically as "Acts of Parliament" and each Act of Parliament is usually referred to by a word or words forming its name

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followed by the word "Act". Sometimes the year in which the Act is passed is added as well. An example of an Act of Parliament would be the "Supreme Court Act 1981".

The judiciary in common law states is usually created by an Act of Parliament and their jurisdiction, that is to say, their ability to hear and determine particular types of cases, is also usually defined by Act of Parliament. Often, the Act of Parliament creating the judiciary also provides for the setting up of a committee of persons authorised to generate rules of procedure by which the court administers justice. The role of the judiciary is to interpret and apply the law and to provide a forum for the resolution of disputes.

Cases are brought to the court usually through the commencement of proceedings by a party seeking the court's judgment on its claim against another party or parties and the judge hearing a case would decide the parties' rights and liability according to the law applicable to the case and will apply any Acts of Parliament relevant to the case. Where an area of law or an issue is not regulated or completely regulated by Act of Parliament or where the Act of Parliament requires interpretation before it can be applied to the case before the judge, the judge can and does often also decide in accordance with previous decisions of the court. In this sense, it is often observed that judges in common law courts have an indirect, if not direct, ability to make law.

The legal structure of common law judicial sale

A full scale analysis of the path of English law from its ancient origins to the present day is beyond the scope of this article. Suffice it to say that Acts of Parliament and judgments of the courts have been a consistent feature of the English legal system, alongside any rules of procedure in force at that time.

In England, the legal basis on which the courts hear applications for the judicial sale of vessels is found in the Senior Courts Act of 1981 ("SCA 1981"), the Civil Procedure Rules and the leading case of *The Myrto* [1977] 2 Lloyd's Rep 243. Judicial sales of vessels usually occur in situations where the vessel has been arrested by a claimant pursuant to the maritime laws of England.

It will be seen from the text below that Section 33(1)(a) of the SCA 1981 gives the English court the power to make orders providing for the detention, custody and preservation of property which is or may become the matter of subsequent proceedings in the court or as to which any question may arise in such subsequent proceedings. The power of detention, custody or preservation is to be exercised in accordance with the circumstances prescribed by the rules of procedure.

"Section 33: Powers of High Court exercisable before commencement of action.

(1) On the application of any person in accordance with rules of court, the

High Court shall, **in such circumstances as may be specified in the rules**, have power to make an order providing for any one or more of the following matters, that is to say– .

(a) the inspection, photographing, **preservation, custody and detention of property**which appears to the court to be property which may become the **subject-matter of subsequent proceedings** in the High Court, **or** as **to which any question may arise** in any such proceedings"

[emphasis added]

There are two sets of rules of procedure relevant to the judicial sale of vessels. The first set of rules is found in the Civil Procedure Rules, Parts 61.9 and 61.10. Part 61.9 provides a procedure for the claimant to apply to the court for judgment on its maritime claim on the basis that there is no contest offered by the owner of the vessel and Part 61.10 allows a claimant to apply for the sale of a vessel at any stage of the maritime proceedings.

"Judgment in default

61.9

…

(3) An application for judgment in default –

(a) ...must be made by filing –

(i) an application notice as set out in Practice Direction 61;

(ii) a certificate proving service of the claim form; and

(iii) evidence proving the claim to the satisfaction of the court; and

(b) under paragraph (2) in any other claim must be made in accordance with Part 12 with any necessary modifications.

(4) An application notice seeking judgment in default and, unless the court orders otherwise, all evidence in support, must be served on all persons who have entered cautions against release on the Register.

…

61.10

(1) An application for an order for the survey, appraisement or sale of a ship may be made in a claim in rem at any stage by any party."

The second set of rules is found in the Civil Procedure Rules, Part 25.1, which provides that the court may order the sale of any property which is of a perishable nature or which for any other good reason it is desirable to sell quickly.

"Orders for interim remedies

25.1

(1) The court may grant the following interim remedies –

…

(c) an order –

(i) for the detention, custody or preservation of relevant property;

…

(v) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and

…

(i) restraining a party from removing from the jurisdiction assets located there; or

(ii) restraining a party from dealing with any assets whether located within the jurisdiction or not

…"

The predecessor rules to those of the Civil Procedure Rules cited above were Order 75 rule 21 and Order 29 rule 4, respectively, of the Rules of Supreme Court 1965, which carried similar terms. In deciding applications for judicial sale of vessels, the English courts have written judgments explaining their approach to such applications. The application of the court's jurisdiction to order a judicial sale of vessels is best expressed in the principles laid down by Mr. Justice Brandon in *The Myrto* [1977] 2 Lloyd's Rep 243, where the learned judge said that an English court is usually asked to order a sale of a ship in circumstances where the respondent/shipowner does not appear in the proceedings or appears but does not defend the claim. If the claim is defended and the respondent/shipowner opposes the making of a judicial sales order, the learned judge was of the view that the English court should not order the judicial sale of the vessel except if there is "good reason" for doing so. The learned judge went on to say that what would constitute a "good reason" would be the prospect of heavy and continuing costs of maintaining the vessel under arrest over a long period, with the consequence that there is reduction in the value of the plaintiff's security for its claim.

> "I accept that the Court should not make an order for the appraisement and sale of a ship *pendente lite* except for good reason, and this is whether the action is defended or not. I accept further that, where the action is defended and the defendants oppose the making of such an order, the Court should examine more critically than it would normally do in a default action the question of whether good reason for the making of the an order exists or not. I do not accept, however, the contention put forward for the owners, that the circumstances that, unless a sale is ordered, heavy and continuing costs of maintaining the arrest will be incurred over a long period, with consequent substantial diminution in the value of the plaintiffs' security for their claim, cannot, as a matter of law, constitute a good reason for ordering a sale. On the contrary I am of opinion that it can and often will do so."

If, for example, a vessel was arrested as security for a claim and the respondent/shipowner does not maintain the vessel while she is under arrest, the court will view the vessel as security that is gradually reducing in value because of the falling value of a vessel that is not maintained. If the court is

satisfied that it will take time before the court is able to give judgment on the claim and is satisfied that as a consequence, the gradual reduction in value of the vessel means that there is a significant reduction in the security for the claim, it can decide to order the judicial sale of the vessel.

Survey of Asia-Pacific Common Law Jurisdictions

From the survey of Asia Pacific common law jurisdictions below, the writer suggests that most, if not all, of these common law jurisdictions have the same or similar approach to the judicial sale of vessels. Each of these common law jurisdictions have an Act of Parliament or law empowering the courts to sell property and each of them also have rules of procedure relating to the exercise of those powers. Furthermore, the case of *The Myrto* appears to be a relevant if not persuasive judgment that guides the court in the exercise of its powers of judicial sale.

Singapore

The relevant Act of Parliament empowering the court to sell property is the Supreme Court of Judicature Act, Section 18 and Para 5 of the 1st Schedule, which provides:

Section 18: Powers of High Court

"18. – (1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.

(2) Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.

(3) The powers referred to in subsection (2) shall be exercised in accordance with any written law or Rules of Court relating to them.

…

First Schedule

Additional Powers of the High Court

…

Preservation of subject-matter, evidence and assets to satisfy judgment

5. Power before or after any proceedings are commenced to provide for –

(a) the interim preservation of property which is the subject-matter of the proceedings by sale or by injunction or the appointment of receiver or the registration of a caveat or a *lis pendens* or in any manner whatsoever;

(b) the preservation of evidence by seizure, detention, inspection, photographing, the taking of samples, the conduct of experiments or in any manner; and

(c) the preservation of assets for the satisfaction of any judgment which has been or may be made."

The relevant rules of court regulating the sale of vessels where the claim is not contested is 70 rule 20, of the Rules of Court Order which provides:

Order 70 Rule 20: Judgment by default

"20. - (1) Where a writ is served under Rule 7(5) on a party at whose instance a caveat against arrest was issued, then if –

(a) the sum claimed in the action begun by writ does not exceed the amount specified in the undertaking given by that party or his solicitor to procure the entry of the caveat; and

(b) that party or his solicitor does not within 14 days after service of the writ fulfil the undertaking given by him as aforesaid,

the plaintiff may, after filing an affidavit verifying the facts on which the action is based, apply to the Court for judgment by default.

(2) Judgment given under paragraph (1) may be enforced by the arrest of the property against which the action was brought and by committal of the party at whose instance the caveat with respect to that property was entered.

(3) Where a defendant to an action in rem fails to enter an appearance within the time limited for appearing, then ... the plaintiff may apply to the Court for judgment by default.

...

(4) Where a defendant to an action in rem fails to serve a defence on the plaintiff, then, after the expiration of the period fixed by these Rules for service of the defence ... the plaintiff may apply to the Court for judgment by default."

...

(7) An application to the Court under this Rule must be made by summons and if, on the hearing of the summons, the Court is satisfied that the applicant's claim is well-founded, it may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action or, as the case may be, counterclaim is brought to be appraised and sold and the proceeds to be paid into Court or may make such other order as it thinks just.

The relevant rule of court in respect of the sale of property on the ground that it is of a perishable nature is Order 29 rule 4, of the Rules of Court 2012, which provides:

Order 29 Rule 4: Sale of perishable property, etc.

"4. - (1) The Court may, on the application of any party to a cause or matter, make an order for the sale by such person, in such manner and on such terms (if any) as may be specified in the order of any movable property which is the subject-matter of the cause or matter or as to which any question arises therein and which is of a perishable nature or likely to deteriorate if kept or which for any other good reason it is desirable to sell forthwith."

The case of *The Myrto* is referred to in *The "H156"* [1999] 2 SLR(R) 419 and in *The "Opal 3" ex "Kuchino*" [1992] 2 SLR(R) 231.

Malaysia

The relevant Act of Parliament empowering the court to sell property is the Malaysian Courts of Judicature Act 1964, Section 25(2) and Para 6 of the 1st Schedule, which provides:

Section 25: Powers of the High Court

"(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule."

SCHEDULE: Additional Powers of the High Court

Para 6: Preservation of property

"Power to provide for the interim preservation of property the subject matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any other manner whatsoever."

The relevant rules of court regulating the sale of vessels where the claim is not contested is Order 70 rule 20 of the Rules of Court 2012 which provides:

Order 70 Rule 20: Judgment by default

"(1) Where a writ is served under rule 7(4) on a party at whose instance a caveat against arrest was issued, then if–

(a) the sum claimed in the action begun by writ does not exceed the amount specified in the undertaking given by that party or his solicitor to procure the entry of the caveat; and

(b) that party or his solicitor does not within fourteen days after service of the writ fulfill the undertaking given by him as aforesaid,

...

the plaintiff may, after filing an affidavit verifying the facts on which the action is based, apply to the Court for judgment by default.

(2) Judgment given under paragraph (1) may be enforced by the arrest of the property against which the action was brought and by committal of the party at whose instance the caveat with respect to that property was entered.

(3) Where a defendant to an action *in rem* fails to enter an appearance within the time limited for appearing, then ... the plaintiff may apply to the Court for judgment by default

..

(4) Where a defendant to an action *in rem* fails to serve a defence on the plaintiff, then after the expiration of the period fixed by or under these Rules for service of the defence ... the plaintiff may apply to the Court for judgment by default."

(7) An application to the Court under this rule shall be made by notice of

application and if, on the hearing of the notice of application, the Court is satisfied that the applicant's claim is well founded it may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action or, as the case may be, counterclaim is brought to be appraised and sold and the proceeds to be paid into Court or may make such order as it thinks just.

The relevant rule of court in respect of the sale of property on the ground that it is of a perishable nature is Order 29 rule 4, which provides:

Order 29 Rule 4 of the Rules of Court 2012: Sale of perishable property

"(1) The Court may, on the application of any party to a cause or matter, make an order for the sale by such person, in such manner and on such terms, if any, as may be specified in the order of any movable property which is the subject matter of the cause or matter or as to which any question arises therein and which is of a perishable nature or likely to deteriorate if kept or which for any other good reason it is desirable to sell forthwith."

The Myrto [1977] 2 Lloyd's Rep 243 has been referred to in 3 reported Malaysian High Court judgments: *United States of America v. The Owners of & Other Persons Interested in the Vessels "Jade Phoenix" & "Golden Phoenix" Of The Port Of Philadelphia* [1988] 2 CLJ 526, *Kingstar Shipping Ltd v. The Owners of the Ship or Vessel "Sino Glory"* [1997] 3 CLJ 731 and *Timberail Sdn Bhd v. The Owner and/or Other Persons Interested in the Vessel 'San Yang'* [1998] 6 MLJ 434.

Hong Kong

The relevant Act of Parliament empowering the court to sell property is the High Court Ordinance (Cap 4), Section 42, which provides:

Section 42: Extension of powers of Court of First Instance to order disclosure of documents, inspection of property, etc.

"...

(2) On the application, in accordance with rules of court, of a party to any such proceedings as are referred to in subsection (1), the Court of First Instance shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters-

(a) the inspection, photographing, preservation, custody and detention of property which is not the property of, or in the possession of, any party to the proceedings but which is the subject matter of the proceedings or as to which any question arises in the proceedings;"

The relevant rules of court regulating the sale of vessels where the claim is not

contested is Order 75 rule 21 of the Rules of the High Court Cap 4A, which provides:

Order 75 Rule 21: Judgment by default

"(1) Where a writ is served under rule 8(4) on a party at whose instance a caveat against arrest was issued, then if-

(a) the sum claimed in the action begun by the writ does not exceed the amount specified in the undertaking given by that party or his solicitor to procure the entry of that caveat, and

(b) that party or his solicitor does not within 14 days after service of the writ fulfil the undertaking given by him as aforesaid,

the plaintiff may, after filing an affidavit verifying the facts on which the action is based, apply to the Court for judgment by default.

...

(3) Where a defendant to an action *in rem* fails to acknowledge service of the writ within the time limited for doing so, then ... the plaintiff may apply to the Court for judgment by default.

...

(4) Where a defendant to an action *in rem* fails to serve a defence on the plaintiff, then, ... the plaintiff may apply to the Court for judgment by default."

(7) An application to the Court under this rule must be made by motion and if, on the hearing of the motion, the Court is satisfied that the applicant's claim is well founded it may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action or, as the case may be, counterclaim is brought to be appraised and sold and the proceeds to be paid into court or may make such other order as it thinks just.

The relevant rule of court in respect of the sale of property on the ground that it is of a perishable nature is Order 29 rule 4 of the Rules of the High Court Cap 4A, which provides:

Order 29 Rule 4: Sale of perishable property

"(1) The Court may, on the application of any party to a cause or matter, make an order for the sale by such person, in such manner and on such terms (if any) as may be specified in the order of any property (other than land) which is the subject-matter of the cause or matter or as to which any question arises therein and which is of a perishable nature or likely to deteriorate if kept or which for any other good reason it is desirable to sell forthwith.

In this paragraph "land" ( ) includes any interest in, or right over, land."

The case of *The Myrto* is referred to in *Dongnama Shipping Co Limited v Owners of the Ship or Vessel 'Alacrity'* [1994] HKCFI 214.

Brunei

The relevant Act of Parliament empowering the court to sell property is the Supreme Court Act (Chapter 5), Section 16(1), which provides:

Section 16: Civil Jurisdiction of High Court

"(1) The civil jurisdiction of the High Court shall consist of –

(a) original jurisdiction and authority of a like nature and extent to that held and exercised by the Chancery, Family and Queen's Bench Divisions of the High Court in England.

Rules of the Supreme Court 2001

Order 29 rule 2: Detention, preservation etc. of subject matter of cause or matter

(1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

(2) For the purpose of enabling any order under paragraph (1) to be carried out the Court may by the order authorise any person to enter upon any immovable property in the possession of any party to the cause or matter."

The relevant rules of court regulating the sale of vessels where the claim is not contested is Order 70 rule 20 of the Rules of the Supreme Court 2001, which provides:

Order 70 Rule 20: Judgment by default

"(1) Where a writ is served under Rule 7(4) on a party at whose instance a caveat against arrest was issued, then if –

(a)the sum claimed in the action begun by writ does not exceed the amount specified in the undertaking given by that party or his solicitor to procure the entry of the caveat; and

(b) that party or his solicitor does not within 14 days after service of the writ fulfil the undertaking given by him as aforesaid,

the plaintiff may, after filing an affidavit verifying the facts on which the action is based, apply to the Court for judgment by default.

(2) Judgment given under paragraph (1) may be enforced by the arrest of the property against which the action was brought and by committal of the party at whose instance the caveat with respect to that property was entered.

(3) Where a defendant to an action *in rem* fails to enter an appearance within the time limited for appearing, then ... the plaintiff may apply to the Court for judgment by default.

...

(4) Where a defendant to an action *in rem* fails to serve a defence on the

plaintiff, then, after the expiration of 14 days after service of the writ ... the plaintiff may apply to the Court for judgment by default."

(7) An application to the Court under this rule must be made by motion and if, on the hearing of the motion, the Court is satisfied that the applicant's claim is well founded it may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action or, as the case may be, counterclaim is brought to be appraised and sold and the proceeds to be paid into Court or may make such other order as it thinks just.

The relevant rule of court in respect of the sale of property on the ground that it is of a perishable nature is Order 29 rule 4, which provides:

Order 29 Rule 4 of the Rules of the Supreme Court 2001: Sale of perishable property, etc.

"(1) The Court may, on the application of any party to a cause or matter, make an order for the sale by such person, in such manner and on such terms (if any) as may be specified in the order of any movable property which is the subject-matter of the cause or matter or as to which any question arises therein and which is of a perishable nature or likely to deteriorate if kept or which for any other good reason it is desirable to sell forthwith."

India

The relevant central Act of Parliament empowering the high court to sell property is Section 122 of the Code of Civil Procedure 1908 (the "Code"), Order XXXIX rule 7 in The First Schedule and Section 94 of the Code, which provide:

Section 122: Power of certain High Courts to make rules

"High Courts established under the Indian High Courts Act 1861, and the Chief Courts of the Punjab and Lower Burma, may, from time to time after previous publication make rules regulating their own procedure and the procedure of the Civil Courts -subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule."

The Code of Civil Procedure 1908, The First Schedule

Order XXXIX: Temporary Injunctions and Interlocutory Orders

Interlocutory Orders

rule 7: Detention, preservation, inspection, etc., of subject matter of suit

"(1) The court may, on the application of any party to a suit and on such terms as it thinks fit,–

(a) make an Order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;

...

(2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this rule."

Section 94: Supplemental Proceedings

"In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, –

...

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of the property;"

The central Code applies where high court rules are absent. However, Admiralty Courts have their own high court rules, which are by and large similar, save for a few differences. For example in Mumbai, parties are governed by the Bombay High Court (Original Side) Rules and the relevant rules regulating the sale of vessels where the claim is not contested are rules 89, 937 and 938, which provide:

CHAPTER VII Written Statement, Set-Off And Counter-Claim

rule 89: In default of filing appearance or vakalatnama and written statement, suit may be set down on board as undefended

"If the defendant commits default in filing his appearance in person or a vakalatnama and Written Statement as provided in rule 74, the Judge in Chambers may, when the suit appears on board for directions, direct that the suit be set down on board for disposal as an undefended suit on the same day or on such other day as he may deem fit."

PART III: Admiralty Jurisdiction

Rules For Regulating The Procedure And Practice In Cases Brought Before The High Court Under The Colonial Courts Of Admiralty Act, 1890 (53-54 Victoria Ch.27)

rule 937: On default suit may proceed ex-parte

"After the expiration of three days from the filing of the plaint, if the party on whose behalf the Caveat has been entered shall not have given security in such sum or paid the same into the registry, the plaintiff may apply to the Prothonotary and Senior Master to set down the suit forthwith for hearing as an undefended suit: Provided that the Court may on good cause shown and on such terms as to payment of costs as it may impose extend the time for giving security or paying the money into the registry."

rule 938: Judgment or the claim and enforcement of payment

"When the suit comes before the Court, if the Court is satisfied that the claim is well founded, it may pronounce judgment for the amount which appears to be due, and may enforce the payment thereof by order and attachment against the party on whose behalf the Caveat has been entered, and by the arrest of the property if it then be or thereafter come within the jurisdiction of the Court."

The relevant rule of court in respect of the sale of property on the ground that it is of a perishable nature is Order XXXIX rule 6 of the Code, which provides:

The Code of Civil Procedure 1908, The First Schedule

Order XXXIX: Temporary Injunctions and Interlocutory Orders

Interlocutory Orders

rule 6: Power to order interim sale.

"The court may, on the application of any party to a suit, Order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once."

Although *The Myrto* has not been expressly recognised in any judgment of the Indian Courts, it is believed that the principle has been followed in an order dated 30 November 2011 in the case of *Sparebanken v/s Bos Angler* before the Bombay High Court (Appellate Side).

Australia

Australia's legislative powers are divided between the federal government (also known as the Commonwealth) and governments of six States and two self-governing Territories. The Commonwealth has a Federal Court in all capital cities in Australia and each State and Territory has its own hierarchical tier of courts with the State or Territory's Supreme Court at the apex.

There is no State or Territory admiralty legislation in Australia and the Commonwealth Admiralty Act 1988 (the "Act") and the Admiralty Rules 1988 (the "Rules) made under Section 41 of the Act applies to all ship arrest proceedings in Australia. The Act is all embracing throughout Australia and applies to invest State and Territory Supreme Courts with admiralty jurisdiction under the Act, which provides:

Section 10: Jurisdiction of superior courts in respect of Admiralty actions *in rem*

"Jurisdiction is conferred on the Federal Court and on the Supreme Courts of the Territories, and the Supreme Courts of the States are invested with federal jurisdiction, in respect of proceedings that may, under this Act, be commenced as actions *in rem*."

Increasingly, all arrests are made in the Federal Court and it is unusual for arrest to take place at State Supreme Courts, even in jurisdictions such as New South Wales and Victoria which still have Admiralty divisions in their Supreme Courts.

The relevant rules empowering the court to control and sell the ship are Rules 50 and 69(1) of the Rules, which provide:

Rule 50: Preservation, management and control powers

"The court may, at any stage of a proceeding, make appropriate orders with respect to the preservation, management or control of a ship or other property that is under arrest in the proceeding."

Rule 69: Orders for valuation and sale

"(1) The court may, on application by a party to a proceeding and either before or after final judgment in the proceeding, order that a ship or other property that is under arrest in the proceeding:

(a) be valued;

(b) be valued and sold; or

(c) be sold without valuation."

Neither the Act nor the Rules distinguish between defended and undefended (ie where no appearance was entered) judgments. Under Section 4(2)(c) of the Act, a judgment against a vessel *in rem* can be enforced as a proprietary maritime claim against the vessel:

Section 4: Maritime claims

"...

(2) A reference in this Act to a proprietary maritime claim is a reference to:

...

(c) a claim for the satisfaction or enforcement of a judgment given by a court (including a court of a foreign country) against a ship or other property in a proceeding *in rem* in the nature of a proceeding in Admiralty; ..."

The relevant rule of court in respect of the sale of property on the ground that it is of a perishable nature is Rule 69(5), which provides:

69 Orders for valuation and sale

"(5) If the ship or property is deteriorating in value, the court may, at any stage of the proceeding, either with or without application, order it to be sold."

The case of *The Myrto* is applied in *Marinis Ship Suppliers (Pty) Ltd v Ship Ionian Mariner* (1995) 59 FCR 245.

New Zealand

The relevant Act of Parliament empowering the court to sell property is the Judicature Act 1908, Section 51 and Rule 7.55 of the High Court Rules of Schedule 2, which provides:

Section 51: High Court Rules

"(1) Subject to subsections (2) to (4) and to sections 51A to 56C, the practice and procedure of the court in all civil proceedings shall be regulated by the High Court Rules.

Schedule 2: High Court Rules"
Rule 7.55: Preservation of property
"(1) A Judge may at any stage in a proceeding make orders, subject to any conditions specified by the Judge, for the detention, custody, or preservation of any property."

The relevant rules of court regulating the sale of vessels where the claim is not contested is Rule 25.33, of the High Court Rules which provides:

Part 25: Admiralty
Subpart 5 – Judgment by default
Rule 25.33 Judgment by default in action in rem
"(1) On being satisfied at the hearing that the applicant's claim in an action in rem is well founded, the court may–
(a) give judgment for the claim; and
(b) at the same time,–
(i) order the property against which the action, or, as the case may be, the counterclaim is brought to be appraised and sold and the proceeds to be paid into court; or
(ii) make any other orders it thinks just.
(2) Judgment given under subclause (1) may be enforced by–
(a) arrest of the property against which the action was brought:
(b) committal of the party at whose instance the caveat against that property was entered.
(3) The court may, on any terms it thinks just, set aside or vary any judgment by default entered in an action in rem."

The relevant rule of court in respect of the sale of property on the ground that it is of a perishable nature is Rule 7.56 of the High Court Rules, which provides:

Part 7: Case management, interlocutory applications, and interim relief
Subpart 3 – Interim relief
Rule 7.56: Sale of perishable property before hearing
"(1) A Judge may, on application, make an order authorising a person to sell property (other than land) in a manner and subject to any conditions stated in the order if–
(a) the proceeding concerns the property or raises, or may raise, questions about the property; and
(b) the property–
(i) is perishable or likely to deteriorate; or
(ii) should for any other reason be sold before the hearing."

The case of *The Myrto* is applied in *Uab Garant v 'Aleksandr Ksenefontov'* HC Ak Civ 2006 404 4167.

Associated orders and directions

It will be seen from the survey above that the courts in Asia Pacific common law legal systems are empowered and authorised to order the judicial sale of vessels. In the writer's experience, common law courts tend to issue numerous orders and directions when ordering the sale of the vessel in recognition of the commercial reality that the vessel is the centre of many commercial or potential commercial transactions and that guidance is needed for the judicial sale to be implemented in an efficient and assured manner.

Some of the typical or possible orders and directions are:-

(1) the vessel be appraised by an official of the court and the court official be authorised to be able to sell the vessel above its appraised value;
(2) any fuel, lubricants, bunkers or other consumables be appraised and sold separately to provide for claims by third parties to the bunkers;
(3) the court official advertises that sale of the vessel and invites bids (either by sealed bidding or by public auction);
(4) the court official is authorised to remove any moveable equipment on the vessel for safekeeping and to sell this equipment either with the vessel or separately;
(5) the court official is authorised to appoint ship agents to act on his behalf in attending to the vessel generally and preparing her for sale;
(6) the court official be authorised to pay and repatriate the crew on the basis that such payment be treated as expenses incurred in the judicial sale of the vessel;
(7) the court official be authorised to provide a skeleton crew and provisions to the skeleton crew or the vessel pending the judicial sale of the vessel;
(8) the that sale proceeds of the vessel be paid into court and invested to earn interest; and
(9) all maritime claims directed against the vessel are to be filed at court within a specified period of time after which the court will proceed to determine the priorities of such maritime claims.

Conclusion

It can be seen from this article that the Asia Pacific common law courts operate on the power given to them by legislature and in accordance to the rules of procedure when deciding to sell vessels. It can also be seen that the general approach taken by the Asia Pacific common law courts in deciding to sell vessels judicially is one based on logic and pragmatism.

If a ship owner does not contest the claim and judgment is entered, the vessel will be sold to satisfy the claim (subject to the priorities given to other maritime claims). If a vessel is not maintained under arrest and is thereby, or for other good reason, a gradually diminishing security, she will be sold to preserve the value of the security that the vessel represents in relation to the claim.

TOWARDS AN INTERNATIONAL INSTRUMENT FOR RECOGNITION OF JUDICIAL SALES OF SHIPS – POLICY ASPECTS

William M. Sharpe*

Introduction

This paper is a general overview of the policy justification for the adoption by the Comite Maritime International of a proposed international Instrument for recognition of judicial sales of ships. It will discuss how present day commercial challenges facing the shipping industry are increasing the number of judicial sales of ships and the legal uncertainties concerning judicial sale of ships in present domestic and international legal regimes. The paper will analyze some of the policy choices adopted by the International Working group in preparing the 2nd draft instrument. I hope that this paper will assist consideration of the Instrument by the national maritime law association representatives to the Comite Maritime International 2012 Beijing Conference and to help inform their decision whether to adopt the Instrument with recommendations for going forward[1].

Why an international instrument is needed

Why should the international marine community and its legal advisers concern themselves with international recognition of judicial sales of ships? Why should governments concern themselves with an international instrument to facilitate such recognition?

With the International Convention on Maritime Liens and Mortgages 1993 (the 1993 MLM Convention) now in force, the Working Group

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The analysis and conclusions in this paper are those of the author and do not necessarily reflect the views of the Canadian Maritime Law Association.

1 In this paper I will refer to the 2nd Draft of the Instrument on International Recognition of Foreign Judicial Sales of Ships as the "Instrument" and the CMI International Working Group on Recognition of Foreign Judicial Sales of Ships as the "Working Group". The CMI Questionnaire in respect of Recognition of Foreign Judicial Sales of Ships is referred to as the "Questionnaire".

Questionnaire asked reasonably is it still necessary and feasible to have a separate international instrument to deal with issues regarding the recognition of foreign judicial sales of ships? The national maritime law associations who responded to this question fall into four groups. Four said yes, seven said yes with reasons, four said no and six said said no with reasons. Two responding countries deferred commenting on this point. Significantly, onlytwo responses expresslycommented that the 1993 MLM Convention has addressed recognition of judicial sales adequately. Three of the national maritime law associations which expressed doubt as to the need for a new instrument also commented on the need to at least consider amendments to the 1993 MLM Convention. Therefore the significant preliminary consensus is that work is needed to facilitate recognition of judicial sales, whether as a standalone convention or a protocol to the 1993 MLM Convention.

Current shipping (dis)economics increase the number and financial risk of judicial sales

These are difficult economic times for international trade and the shipping industry which services it. The combination of a surge of newbuilt ships entering the market, the slower, if not negative growth in commodity trades and turmoil in the financial industries and markets have combined to drastically restrict many ship operators' cash flow and potential access to operating capital, whether through investment or borrowing[2]. Even if vessels can be chartered or cargoes found , shipowners face the challenge of charter rates lower than operating costs. With cargo interests such as commodity traders facing their own market challenges, ship operators face increased commercial risks of attempts to evade existing contractual obligations or less timely or reliable payment from cargo interests or others in the chartering chain.

While shipowners must carry certificates of financial responsibility for some types of risks, and most ship operators in international trades have some form of P & I coverage, credit risk insurance is rarely purchased by ship operators. Freight, demurrage & defense coverage, even when purchased, indemnifies only for legal expenses. Therefore ship operators have increasing exposure to uninsured claims such as those of mortgagees or suppliers. Where a claim is uninsured and the ship operator lacks operating capital, a letter of undertaking or other security in place of arrest will not be voluntarily supplied

[2] There has been extensive trade publication and even general media analysis of the financial challenges currently facing the shipping industry: "Shipping Industry Faces Economic Distress" http://www.naftrade.com/3/post/2012/08/shipping-industry-facing-economic-distress.html, "Handling the supply-side challenge remains top of the agenda" http://www.naftrade.com/3/post/2012/08/handling-the-supply-side-challenge-remains-top-of-the-agenda.html , Accessed September 2, 2012.

and creditors will then resort to actual arrest proceedings, As an indication of market conditions, the number of arrest warrants issued through the Supreme Court of Singapore almost doubled between the first quarter of 2011 and the first quarter of 2012.[3]

Without applicable insurance coverages, if the shipowner has no substantive defence or lacks sufficient cash reserves or potential for insolvency reorganization, an unopposed arrest will lead to judicial sale. The increased incidence of judicial sales puts into focus the need for a clear and consistent set of international rules for the legal consequences of judicial sale.

It is a sign of the times that the Managers of the North of England P & I Association have introduced an optional $1 million insurance facility underwritten through Lloyds for members entered for freight, demurrage and defence,

> .... To indemnify the Assured for financial losses incurred by them arising directly from a maritime lien claim being made on the declared vessel as a result of disputes, debts, etc. which originated prior to the Assured taking delivery of the vessel, and which were beyond the Assured's control.[4]

Uncertainty in the international recognition of judicial sales

This rationale for the Instrument was discussed in the response of Denmark to the questionnaire. It is generally expressed that courts ought to recognize the effect of judicial sales carried on by foreign courts of competent jurisdiction as a matter of comity. In the absence of any applicable statute or international convention, the recognition of foreign judgments is a matter of judicial discretion. Between that objective and its application lie many layers of potential legal and procedural uncertainty.

- Was the proceeding a judicial sale?
- Did the court conducting the sale have competent jurisdiction?
- Did the judicial sale process give interested persons effective means of protecting their interest?
- How ought the foreign judicial sale to be recognized?

The cumulative effect of these uncertainties was demonstrated in the 1994 decision of the United States Fifth Circuit Court of Appeals in *Crescent Towing & Salvage Inc. v. the M/V ANAX*[5]

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[3] "Asia Shipowners: Bunker Fuel Issues Escalate" July 11, 2012 www.platts.com/newsfeature/2012/asiashipping/index. Accessed September 2, 2012.\

[4] FD&D Cover for 5 MOA Risks, "Writ Search Facility" and Maritime Lien Insurance for Second-And Ships 2012-2013 Policy Year " Circular 2012-009 February 9, 2012 http://www.nepia.com/publications/clubcirculars/fdanddgeneral/1210/. Accessed September 2, 2012 .

[5] 6 4 F. 3d 744.

The United States District Court in this case was asked to recognize judgment of the Greek court which ordered the sale of a vessel registered in St. Vincent and the Grenadines pursuant to the foreclosure of a first preferred ship mortgage executed and recorded in St. Vincent and the Grenadines. These facts alone generate a plethora of confusing conflict problems. Additionally, Anax sought to use that Greek judgment to bar Crescent from enforcing the traditionally high ranking maritime lien for tug services, which directly benefitted the vessel and were furnished in US waters before both the recordation of the mortgage and the judicial sale. Further, Anax, a party claiming the benefit of the judicial sale purchased the vessel for $10 only the day after Norges, the mortgagee who precipitated the foreclosure, bought the vessel at auction.

The Court of Appeals remanded the case. The Court of Appeals did not consider there was sufficient evidence at first instance hearing to demonstrate that a foreign court of competent jurisdiction had ordered the sale, that the court conducted fair and regular proceedings, the sale was ordered pursuant to a validly entered judgment in a proceeding against the vessel and that the effect of the sale under the law of the foreign forum would be to extinguish all pre-existing maritime liens.

Other examples of difficulties encountered in the recognition of judicial sales of ships are described by the Chair of the Working Group, Prof. Henry Hai Li, in his paper " A Brief Discussion on Judicial Sale of Ships" published in the 2009 CMIYearbook[6] and in responses of various maritime law associations to the Questionnaire.[7]

Judicial comity does not meet the need for certainty

The responses by national maritime law associations to the Working Group questions on the domestic law of judicial sales show two significant commonalities.

First, domestic laws generally provide that a judicial sale is intended to permit transfer of a vessel free and clear of existing encumbrances. Second, none of the responses indicated that the purchaser of a vessel through judicial sale could operate it without first administratively applying for the registration of the vessel in the purchaser's name. While public and administrative law principles suggest courts ought to have the jurisdiction to compel a ship registry to give effect to a judicial sale[8] occurring in the same country as the

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[6] http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2009.pdf

[7] Synopsis of the Replies from maritime law associations, CMI Yearbook 2010 pp. 247-382.

[8] Subject always to the purchaser being qualified to own a vessel under the laws of that registry and any domestic laws requiring a ship registry to give effect to pre-existing rights.

registry, absent a multilateral convention, domestic courts cannot compel a foreign ship register to recognize the judicial sale.

Article 12.5 of the 1993 MLM Convention does provide that " [u]pon production of such certificate [attesting to the judicial sale being free of liens and encumbrances], the registrar shall be bound to delete all registered mortgages, "hypothèques" or charges except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of new registration, as the case may be". This wording of Article 12.5 of the 1993 MLM Convention follows closely on the wording of Article 11.3 of the 1967 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages. However, as the 1967 MLM Convention was ratified by only five countries and has never come into force[9], and the 1993 MLM Convention is relatively recent, there is no judicial interpretation of which I am aware whether this wording was intended to apply only to the ship registry of the country whose courts ordered the forced sale, or whether the wording would also operate to require a ship registry in any 1993 MLM convention state party to give effect to a certificate of forced sale issued in any other state party. The proposed Instrument is intended to address this gap.

Limited scope of 1993 Maritime Liens and 1999 Arrest Conventions to judicial sales.

Articles 11 and 12 of the 1993 MLM Convention provide for notice of forced sale of vessels in the context of enforcement of liens and mortgages and for the effect of such forced sales. Article 3.3 of the International Convention on the Arrest of Ships ("1999 Arrest Convention") refers to judicial sales in the context of a provision limiting rights of arrest of ships for claims for which the owner of the ship is not liable. The 1993 MLM Convention does not provide for any requirement of notice of sale of types of claims for which a vessel may be arrested other than the types of liens and mortgages covered by the Convention, or of the legal effect of the judicial sale upon pre-existing claims against the vessel other than those for such types of liens or mortgages. There is a significant range of types of maritime claims not covered by the 1993 MLM Convention including claims arising from ownership disputes, materials and services supplied to a ship and contracts of carriage. Therefore there is no existing international convention which extends to procedural requirements or the legal consequences of judicial sales of vessels for all commonly occurring types of maritime claims. The Instrument is intended to cover this gap.

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9 http://www.comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf

Unlikelihood of early broad acceptance of 1993 Maritime Liens Conventions

This rationale was referred to in the responses by Canada, Croatia and France to the Questionnaire.

While each of the 1993 MLM Convention and the 1999 Arrest Convention is in force, the only significant ship registry state parties to the 1993 MLM Convention are the Russian Federation, Spain, St. Vincent and the Grenadines and Vanuatu[10]. The only significant ship registry state parties to the 1999 Arrest Convention are Liberia and Spain[11]. The existing potential for increased international application of the Arrest Convention is diminished by the reservation of Spain to exclude the application of the Convention in the case of ships not flying the flag of a state party.

Accessions to both conventions have continued into 2011, but the pace of ratification of the 1993 MLM Convention has slowed in recent years after a number of accessions in 2003 and 2004. While the substantive provisions of the 1999 Arrest Convention are relatively uncontroversial, there is less apparent international consensus whether the limited permitted scope of domestic maritime liens under Article 6 of the 1993 MLM Convention[12] give remedies sufficiently useful as to make harmonization of domestic laws on maritime claims now inconsistent with the provisions of the Convention politically palatable to domestic maritime industry communities or lawmakers.[13]

Therefore I perceive, given the unlikelihood of early ratification of either convention bya significant proportion of fleet owning states[14], and the limited scope of application of the provisions of these conventions, the development and implementation of a standalone international instrument to clarify foreign recognition of judicial sale of ships is needed.

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[10] United Nations Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&lang=en. Accessed September 2, 2012. As of this date, the other state parties are Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia and the Syrian Arab Republic.

[11] United Nations Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XII-8&chapter=12&lang=en. Accessed September 2, 2012 As of this date, the other state parties are Albania, Benin, Ecuador, Estonia, Lithuania, Monaco, Nigeria, Peru, Serbia, St. Kitts and Nevis, Tunisia and Ukraine.

[12] Article 6 permits domestic legislation for types of maritime liens other than those permitted by Article 4, but such additional liens survive transfer of a vessel for only 60 days and rank in priority below the limited number of liens listed in Article 4 and below ship mortgages.

[13] Canada recently has enacted maritime lien rights for ship suppliers to foreign flagged vessels, to ease the competitive disadvantage formerly suffered by its chandlers in comparison to ship suppliers operating from the United States, which have had similar statutory necessaries lien rights for some decades. The suppliers's lien legislation of both countries is inconsistent with 1993 MLM Convention Article 6.

[14] For a list of the 35 countries with the largest owned fleets, see UNCTAD Review of Maritime Transport, 2011 pp. 43-44, http://unctad.org/en/docs/rmt2011_en.pdf

General principles

The Working Group has discussed several principles which guide the Instrument.

For the purpose of facilitating efficient recognition by a State Party of a foreign judicial sale of ship, certain necessary minimal requirements for conducting Judicial Sales should be laid down in this Instrument;

Some basic effects of Judicial Sales of Ships to be recognized by the State Party should be provided for in this Instrument;

Necessary and sufficient protection should be provided to Purchasers of ships by way of Judicial Sale so as to ensure that Judicial Sales of Ships may be maintained as an effective way of enforcement of maritime claims and enforcement of judgments or arbitral awards or other enforceable instruments against the owners of ships;

Effects of Judicial Sales of Ships as provided for by this Instrument should be recognized by all State Parties unless existence of one of the circumstances provided for by this Instrument in which recognition may be refused is proved by an Interested Person furnishing valid evidence;

As a general rule, once a ship is sold by way of Judicial Sale, the ship shall not be subject to arrest for any claim arising prior to its Judicial Sale;

Actions, if any, challenging a Judicial Sale should be allowed to be made by an Interested Person as defined by this Instrument only and before a competent court as provided for by this Instrument only;

Since the most convenient forum for assessing whether or not a Judicial Sale is regular or effective should be the court of the State in which the Sale took place, therefore it should be accepted that the competent court under this Instrument as having jurisdiction over actions challenging Judicial Sales should be a court of the State in which the Judicial Sale took place, including the court having conducted the Sale or its court of appeal which will be decided by the law of the State in which the Judicial Sale took place;

Conflicts with other international conventions, in particular the Maritime Lien & Mortgage Conventions of 1926/1967/193 and the Arrest Conventions of 1952/1999, should be avoided.

The instrument covers only judicial sales giving clear title

Some types of claims which can result in a forced or judicial sale of ships arise from special legislative rights or governmental operations, such as unpaid taxes and dues, wreck removal and pollution cleanup.[15] In the context of sale

[15] For a general comparative law overview of special legislative rights and sale remedies against ships see Tetley, W. *Maritime Liens and Claims*, 2nd ed. Ch. 2 1998.

of ships, under Canadian law for example these remedies include forfeiture of property used in the commission of criminal offenses or acquired as proceeds of crime, forfeiture for breach of customs laws, pollution offences and sale of ships for unpaid harbour or canal dues.[16] Few of these special legislative rights explicitly confer clear title upon the purchaser of ships which are the subject of governmental claims.

A ship can be judicially sold in the context of admiralty proceedings, in which the usually anticipated types of claims are those associated with the operation of the ship such as mortgages or hypothecs or maritime liens or privileges. However, because the ship is also a chattel or a movable, it typically is, along with any other property of the shipowner, potentially the subject of legal proceedings for the enforcement of any judgment or arbitral award against the shipowner in personam. In common law jurisdictions, where an asset is sold as part of the process of enforcement of a judgment in personam, usually the sheriff, or other judicial officer conducting the sale has power to transfer only the judgment debtor's interest in the goods[17]. This means any sale of a chattel to satisfy a judgment is subject to the claim of any prior creditor or person with an interest in the goods.

If the domestic judicial sale procedures do not give clean title, this does not induce commercial confidence either for persons having an interest in vessels subject of such procedures, such as ship mortgagees, or for potential purchasers[18]. However, to effectively give clear title means that interested parties must have effectual notice of judicial sale proceedings so they may intervene to protect their rights. The holders of ship mortgage or hypothecs can to a certain extent, protect themselves through contractual stipulations that the shipowner give the secured creditor notice of any judicial proceedings against the vessel. However, claimants only with delictual liens such as tort victims typically would not have any contractual rights to obtain notice from the shipowner.

Many types of judicial sale procedures are of general application and may apply to the enforcement of small claims against limited assets of a debtor. In these situations, the transactional expenses of advertisements for sale and other procedures to protect the rights of creditors and others who may have an interest in the property which is the subject of sale could be significant or greater than the amount of the judgment debt itself[19]. In such situations it

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[16] *Criminal Code* R.S.C. 1985, c C-46 as am. Part XII.1, *Customs Act* R.S.C., 1985, c. 1 (2nd Supp.) as am., s. 119.1. ss. *Migratory Birds Convention Act* S.C. 1994, c. 22, as am,, ss. 14, 17 *Canada Marine Act* S.C. 1998, c. 10, s. 117.

[17] For example, *Court Order Enforcement Act* , RSBC 1996 c. 78 s. 62.

[18] For a discussion of the legal uncertainties faced by lenders and purchasers, see Wood, P. *Comparative Law of Security Interests and Title Finance* 2007

[19] For example, in Canada, the cost of newspaper publication of a legal notice of judicial sale can be $3000 or more. In jurisdictions such as the United States, where the admiralty marshal takes possession of the arrested ship, custodial and insurance costs start at the tens of thousands of dollars: http://www.usmarshals.gov/district/wa-w/admiralty/pdf/admiralty.pdf.

would be uneconomic to apply an expenses laden procedure giving clear title through judgment enforcement procedures, to enforcement against low value property. Ships, by contrast, are relatively high-value movables whose realizable value generally justifies the cost of due process to give notice to other interested parties.

In the context of insolvency proceedings, the law of countries varies whether the administrator of the property of a bankrupt shipowner will give clear title in selling the assets for the benefit of creditors[20]. Where the business of an insolvent shipowner is being restructured under court supervision, it is a common practice for the court to issue a vesting order granting title to purchasers of assets sold as part of the restructuring title to the vessel[21]. The issue of foreign recognition of marine insolvencies is currently under consideration by the CMI working group on that subject.

If the Instrument is adopted with its presently proposed definition of judicial sale, the Instrument will not apply to any ship sale procedure which does not by the operation of domestic law, give clean title. The present definition of judicial sale in the Instrument permits its implementation without the necessity of any state party having to amend its domestic law to ensure that any form of remedy or process for the judicial sale of a ship available in that jurisdiction gives clean title. Such remedy or process giving clear title could be in the context of exercise of governmental rights, or private creditors' civil claims, or insolvency proceedings. In this aspect, the Instrument effectively is self implementing.

The reason for the clear title criterion - Effect not purpose

The clear title sale choice was the subject of considerable discussion during the meeting of the Working Group at Oslo in 2011with other national maritime law association representatives present. Lawyers in the common law tradition may wonder why the Instrument refers to judicial sales giving clean title as the triggering factor for application of the Instrument, rather than the existence of an action *in rem* being chosen as the qualifying criterion. Civil law jurisdictions do not recognize the concept of an action *in rem* in the sense it is understood at common law.[22] The remedy of conservatory attachment or *saisie*

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[20] This is a provisional inference from a review of the responses of several national maritime law associations to the Cross-Border Insolvency IWG questionnaire, received as of the September, 2012 time of preparation of this article.

[21] A recent example of such vesting order is that given in the *Companies Creditors Arrangement Act* proceedings *In Re Vanship Ltd. and Vanguard Shipping* CV-12-9655-00-00CL (Ontario S.C.J): http://documentcentre.eycan.com/eycm_library/Vanguard%20Shipping%5CEnglish%5CCourt%20Orders%5CApproval%20and%20Vesting%20Order%20%28Re_%20Purchased%20Assets%20of%20Vanship%29,%20Morawetz%20J.%20%28July%2025,%202012%29.pdf, Accessed September 15, 2012

[22] *Republic of India and Others v. India Steamship Company Ltd* [1997] UKHL 40; [1997] 4 All ER 380; [1997] 3 WLR 818, The *Indian Grace* [1998] 2 Lloyds Rep. 1.

conservatoire typically is available against other types of movables of the debtor as well as ships[23]. Because of the varying concepts in national legal systems as to the purpose of a judicial sale, such references to purpose found in the first draft of the Instrument have been deleted.

The common characteristic of a judicial ship sale after arrest in rem or through *saisie conservatoire* is that the sale is free and clear of encumbrances. The answers to the Questionnaire show a judicial sale of a vessel extinguishes mortgages, liens charges and encumbrances under the law of all responding countries except one[24]. Therefore that resulting characteristic was selected as the practical choice of triggering factor for the application of the Instrument.

Application of the instrument

The terms "Maritime lien" and "Mortgage or hypothèques" are both defined in the context of claims recognized by the law "applicable in accordance with the private international law rules of the State" in which the ship is sold by way of Judicial Sale. These definitions are more expansive than those found in Articles 4 and 5 of the 1993 MLM Convention. The definitions recognize the reality of different choice of law rules applied by different states in the recognition of foreign maritime claims[25]. This choice of wording is another example of the inherent flexibility of the Instrument as being largely self-implementing and avoiding the need for changes to domestic states parties law.

Articles 2 and 9 would give great flexibility to states considering acceding to a convention based on the Instrument. The ratifying state may either adopt Article 2 in which the Instrument would apply to the recognition of the Judicial Sale taking place in the territory of any State" or reserve its rights under Article 9 to apply the instrument only to recognition of judicial sales made in the territory of a state party of a ship flying the flag of the state party. Article 9 gives additional flexibility to states parties to apply the principles of the Instrument to nonstate parties on a reciprocal basis. These provisions would make ratification of a convention based on the Instrument even more attractive, again by avoiding the need for changes to domestic law.

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23 Tetley *Maritime Liens and Claims*, 2nd ed. 1998 pp. 962-971.

24 *CMI Yearbook* 2010 p. 222. Argentina, Brazil, Canada, China, Dominica, France, Italy, Malta, Nigeria, Singapore, South Africa, Sweden, USA and Venezuela stated yes without qualification. The responses of Belgium, Denmark, Germany and Norway indicated some procedural and one substantive qualifications. The one exception to the general rule was Spain.

25 The most prominent example are the differing principles expressed in the "*Ioannis Daskelelis*" [1974] S.C.R. 1248, [1974] 1 Lloyd's Rep. 174, 1973 AMC 176 in which foreign circumstances giving rise to a maritime lien are recognized in the forum it even if the facts underlying the claim would not give rise to a maritime lien by the law of the forum and the "*Halcyon Isle*" (*Bankers Trust International Limited* v. *Todd Shipyards Corporation*) [1981] A.C. 221, [1980] 2 Lloyd's Rep. 325, 1980 AMC 1221 (P.C.) in which the characterization of circumstances giving rise to a maritime claim is regarded always as being a matter for the law of the forum.

For a dualist state[26] intending to adopt the Instrument, the only significant amendments to domestic law required would be confirmation that its courts would recognize foreign judicial sales and permit or exclude challenges to foreign judicial sales in conformity with the Instrument and that its ship registry would act on certificates of judicial sale issued by other states parties. Such amendments are more likely to be perceived as being of an administrative or technical nature and less likely to attract political controversy, as distinct from changes to the law affecting the entitlement or priority of marine claimants to remedies under domestic law. For example, after decades of debate, the recent enactment in Canada of a maritime lien in favor of ship suppliers was accomplished only on the basis of a consensus reached through compromise between various industry groups that the lien would apply to foreign flag but not domestic flag vessels[27].

Protections given by the instrument

Notice to creditors

The price for a judicial sale giving clear title is notice to creditors. A judicial sale can be final if persons with an interest in or claims against the ship have a reasonable opportunity of participating in the legal proceeding in which the proceeds of sale of the ship are made available for creditors. The Working Group has proposed to largely track the wording of the notice requirements in Article 11 of the 1993 MLM Convention with some simplification having regard for current commercial practices[28]. As the Working Group member Benoit Goemans has commented "Rules of procedure are always the fruit of the difficult search for an equilibrium between on the one hand keeping the consumption of time and money as low as possible and then the other hand protecting the rights of whoever may be affected by the procedure".[29]

In considering the appropriate scope and procedure for notices, regard should be had for the relative power of self protection bypotential classes of creditors. Marine mortgagees can voluntarily manage risk by monitoring the credit worthiness of shipowners and the stipulating for notices and events of default in ship mortgage deeds of covenants. Suppliers of services and materials likewise have choices in their selection of customers and extensions of credit. Potentially more vulnerable classes of creditors against a ship are tort victims of damage caused by a ship who may not have had any commercial

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[26] Which is to say a state whose constitutional or public law principles require enactment of domestic legislation to give internal effect to international conventions adopted by that state.

[27] 28 S. 139, *Marine Liability Act* S.C. 2001 c. 6 as amended S.C. 2009, c. 21.

[28] Working Group Commentary on the 2nd Draft of the Instrument, 2012.

[29] Report on the key procedural elements of judicial sales of ships (second set of questions) *CMI Yearbook* 2010 p. 212.

dealings with the ship operator and existing or former crewmembers who may have wages or benefits in arrears.

The existing practice for the courts of many jurisdictions is to order an advertisement of the sale and pending priorities determination proceedings in the shipping trade press or other media outlets in areas where the arrested ship has operated. The administrators of insolvency reorganization proceedings in North America typically establish websites to publicize notices and orders in such proceedings. In this digital age[30], a general provision in any convention for recognition of foreign judicial sales of ships could include a generic requirement that the court or creditors under court supervision publicize appropriate notice of the sale proceedings through electronic media in a manner likely to come to the attention of persons having business with the ship or to the attention of persons affected by the operation of the ship. This concept tracks the criterion for court recognition of substitute service of legal process in North American jurisdictions.

Compulsory registration of judicial sales

The answers to the Questionnaire show that only about half of the responding countries would regard the buyer under a judicial sale as having an automatic right to register the purchased vessel under the flag of the country which conducted the judicial sale. None of the responding countries laws apply extraterritorially to permit automatic registration under the flag of a foreign country without the purchaser first having to apply administratively for re-registration under the same flag or obtaining the deletion of the former registry and applying for registration under an alternate flag.

Articles 6 and 7 of the Instrument require the registry of states parties to act upon a certificate of judicial sale given either by the courts of a domestic state party or the courts of any other state party. The registry receiving such certificate is bound to delete all registered mortgages, hypothèques or charges except those assumed by the purchaser and either to register the ship in the name of the Purchaser or to delete the ship from the register and issue a deletion certificate. This provision fills a significant gap in present international and domestic legal regimes.

Standing to challenge a judicial sale

As a further control on the scope of potential challenges to judicial sales, the Working Group has proposed for the wording of Article 7.5 of the

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[30] Webpages accessed by mobile devices used in developing country areas have at least doubled since the summer of 2011 with 484 million developing country mobile device subscriptions by 2011: http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats/b#mobilebroadband. Accessed September 15, 2012.

Instrument that only those claimants falling within the definition of "Interested persons" should have standing to intervene before the court conducting the judicial sale. The Instrument defines "Interested person" as "the owner of a ship prior to its Judicial Sale or the holder of the mortgage, hypothèques, charge, or maritime lien attached to the ship prior to its Judicial Sale."

Although the Instrument does not incorporate any of the provisions of the 1999 Arrest Convention or the 1993 MLM Convention by reference, one of the policy objectives identified by the Working Group is that conflicts with such conventions (and their predecessor conventions[31]) should be avoided. This raises the issue whether the class of Interested persons with rights have standing under the Instrument to challenge judicial sales should be interpreted as:

a) restricted to only those claimants holding types of liens, mortgages, hypothèques, or charges recognized under the 1993 MLM Convention; or
b) including claimants having any type of maritime claim which reasonably could be described as a mortgage, hypothèques, charge, or maritime lien under the law of the place in which the judicial sale is conducted.

If the interpretation described in subparagraph a) above is adopted, those having maritime lien rights inconsistent with Article 4 of the 1993 MLM Convention could be precluded from challenging judicial sales under the Instrument. More seriously, any creditor whose marine claim falls outside the application of the 1993 MLM Convention, like disputants over domestic lien or arrest rights given by contracts of carriage or vessel ownership, would be precluded from having standing to challenge a judicial sale under this narrower interpretation. Such interpretation is likely to make adoption of a convention based on the Instrument politically unattractive for any state which has not ratified the 1993 MLM Convention for the policy reasons that it considers the range of liens recognized under Article 4 of the 1993 MLM Convention too restrictive and also because such narrower interpretation would not protect the rights of types of marine creditors to which the 1993 MLM Convention does not apply.

Such interpretation would restrict the otherwise attractive self implementing characteristics of the Instrument, by creating unnecessary impediments to ratification by any countries whose laws recognize a broader range of maritime liens then does the 1993 MLM Convention. Such interpretation also would be inconsistent with the broad definition in the Instrument of Mortgages and Maritime liens as discussed above.

The proposed broader interpretation of Interested person would not be a direct operational conflict with the 1993 MLM Convention. If an Interested

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[31] That is, the 1952 Arrest Convention and the 1926 and 1967 MLM Conventions.

person brought an application to challenge a judicial sale conducted by a court of a country which had ratified the 1993 MLM Convention and also a convention based on the Instrument, it would be open to the court to exercise its discretion to refuse the challenge on the grounds that the Interested person did not have a claim of sufficient priority. Standing to claim and the exercise of discretion whether a remedy should be granted are distinct matters.

The Working Group also has identified a policy goal that the Instrument should have a wide scope of application. Because one of the fundamental reasons for the proposed Instrument is to meet the need to clarify the effect of judicial sales in the absence of broad ratification of the 1993 MLM Convention, in order to encourage broad and early adoption of a convention based on the Instrument, I encourage the national maritime law associations who will vote on the proposed Instrument to look favourably upon the broader interpretation which is described above in subparagraph (b).

Restrictions on challenges to judicial sales

The 1999 Arrest and 1993 MLM Conventions do not explicitly prohibit courts from assuming jurisdiction to consider an application challenging the validity of a judicial sale conducted in another country. While we can hope that courts would be mindful of not proceeding to rule upon the ownership of vessels unless there were appropriate connecting factors for assuming jurisdiction, courts typically allow standing to any person domiciled or regularly carrying on business within the courts' own jurisdiction. The ranking in priority claims against the ship generally is regarded as governed by the law of the forum[32]. Under present law, the way is open for a ship's creditor to choose not to attorn to a maritime law priorities hearing in a jurisdiction whose claim recognition or priority rules the creditor thinks are unfavorable to their interests but rather try to claim against the vessel after the judicial sale. The creditor may attempt to claim either in the creditor's own domicile or before the courts of a jurisdiction with priority rules more favorable to that creditor's claim.

Although civil law courts will consider issues of jurisdiction whether or not a party before the court raises such issue, common law courts are reluctant to raise jurisdiction of their own motion. The general procedural principle of the common law is that interested parties are responsible themselves to appear before the court and to choose what issues they wish to raise. Therefore the purchaser of a vessel through a judicial sale effectively is required to take the initiative and incur the expense in challenging later attacks by creditors on the validity of the judicial sale. A purchaser of a vessel through private sale can

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32 Tetley, *International Conflict of Laws*, p. 551.

at least contract for an indemnity against subsequent claims by those whose claims arose before the sale. It is very unlikely any governmental authority would compensate a purchaser under judicial sale for loss of commercial use of the vessel or the legal expenses of having to protect their title against subsequent claims which had arisen before the judicial sale[33].

Article 7.3 of the Instrument prohibits any challenge to a judicial sale except before the court through which the judicial sale is conducted. At least between states parties, forum shopping by creditors seeking the law of jurisdictions favorable to those creditors' interests is therefore prevented.

Article 7.3 gives further advantages. First, it encourages all persons with claims against the arrested vessel to intervene or prove their claims in the same court as where the judicial sale is being conducted. There is less risk of conflicting determinations from multiple proceedings. Second, once a creditor intervenes or proves its claim before the court conducting the judicial sale, under generally accepted principles of submission to jurisdiction, the creditor, having attorned to the court, is bound by that court's determinations as to the validity and priority of the creditor's claim[34]. This principle is further strengthened in the context of a judgment *in rem* which is regarded as binding internationally[35]. Foreign courts, and even those of the creditor's own domicile, are not likely to permit the creditor to pursue collateral legal challenges to a judicial sale in a proceeding in which the creditor participated.

The focusing of rights of recourse against the validity of judicial sales to only the courts of the country in which the sale was conducted is of fundamental importance and a significant improvement on the state of existing law.

Finally, Article 8.1 of the Instrument emphasizes that a request by an Interested person must be presented within one year of the date of the certificate of Judicial Sale, which " period shall not be subject to any suspension, interruption or extension whatsoever."

Conclusions

1. Present and foreseeable market conditions in the shipping industryhave and will increase the incidence of judicial sales of ships. Therefore the risk, expense and diseconomies of legal uncertainty associated with foreign recognition of judicial sales will increase also.

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[33] In the " Galaxias" the purchaser of a vessel under a Canadian judicial sale, when faced with a demand by the ship's foreign registry for payment of arrears of seafarers pension contributions before it would recognize the Canadian judicial sale, counterclaimed against the Deputy Marshal who had conducted the judicial sale for damages in failing to transfer the ship free and clear of encumbrances. The Federal Court dismissed the counterclaim *Canada v. Galaxias;* 1988 CarswellNat 144F; [1989] 1 C.F. 375, [1989] 1 F.C. 375, 20 F.T.R. 141.

[34] Keyes, M. *Jurisdiction in International Litigation* 2005.

[35] *Pattni v. Ali & Anor (Isle of Man (Staff of Government Division))* [2006] UKPC 51.

2. The national maritime law association responses to the questionnaire show a consensus that additional work is needed, either through a standalone instrument or amendments to the 1993 MLM Convention, to facilitate foreign recognition of judicial sales of ships.
3. The partial protection for judicial sales given by the 1993 MLM Convention is restricted by the very limited number of significant ship registry states which have adopted the Convention and the unlikelihood that the pace of ratifications will increase in the foreseeable future.
4. The present 1993 MLM Convention is not a sufficiently wide foundation for foreign recognition of judicial sales because it is silent on the legal effect of judicial sales to clear title for types of maritime claims which are not covered by that Convention.
5. The Instrument would have significantly greater potential for ratification then has the 1993 MLM Convention because of its effects based definition of judicial sale and because of the unlikelihood of inconsistency of its terms with existing domestic laws on maritime claims. It is largely self-implementing.
6. The Instrument confers significant advantages not widely available under existing international or domestic law in that:
   - the legal effect of judicial sales is a rule of general application
   - the legal effects of judicial sales are explicitly stated
   - reasonable procedural safeguards are given to interested parties
   - forum shopping by aggressive creditors seeking to challenge judicial sales is effectively precluded
   - the availability and scope of challenges to judicial sales is carefully circumscribed
   - within the scope of state parties, ship registers must give effect to foreign judicial sales
   - room is given for further reciprocal recognition of non state parties' judicial sales

In short, in these challenging times for the international shipping industry a standalone international convention on the foreign recognition of judicial sales of ships is needed.

TOWARDS UNIVERSAL RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS?

A CRITICAL ANALYSIS OF THE DRAFT CMI INSTRUMENT FROM THE PERSPECTIVE OF EU REGULATION 44/2011 ("BRUSSELS-I") ON THE RECOGNITION OF JUDGMENTS

Frank Smeele*

Introduction

1. In the absence of a mechanism for the worldwide recognition of foreign judicial decisions, the CMI Instrument, now in its second draft, aims at achieving the international recognition of Foreign Judicial Sales of Ships. At present, such recognition depends on the existence of bilateral treaties or multilateral instruments on recognition or enforcement of foreign judicial decisions between the state of origin where the judicial sale was held and the state where recognition of this judicial sale is asked. Failing such binding obligations under international law, courts may also use their discretion to recognize foreign judicial sales of ships also under the principle of comity in international relations, provided there is reciprocity.[1]

2. Nevertheless, the current situation leaves room for legal uncertainty and a purchaser of a ship at a judicial sale might very well be confronted later in other jurisdictions with a ship arrest from e.g. the dispossessed previous shipowner himself or from his creditors (still) pretending to exercise maritime liens over the ship. It goes without saying that uncertainty about the legal protection of the purchaser of a ship at a judicial sale in foreign jurisdictions will adversely affect the amount of sale proceeds that can be achieved for a ship at a judicial sale. Therefore to increase the international recognition of foreign judicial sales helps to maximize the realisation of the financial value represented by the ship at a judicial sale. Of course, this is not only in the interest of the purchaser at the judicial sale who has greater legal certainty,

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1 See Smeele, 'Recognition of the legal effects of foreign judicial sales of ships', *CMI Yearbook* 2010, p. 225-226.

but also of the creditors of the previous shipowners who will recover a larger proportion of their claim from the sale proceeds and ultimately also of the previous shipowner himself whose remaining debt total after the judicial sale will be decreased.

3. The above logic was not lost on the CMI International Working Group (IWG) under the presidency of Professor Henry Hai Li, as follows from the commentary on the 2nd draft of the new instrument.[2] The draft Instrument's main objective is to foster the legal protection of purchasers of ships at judicial sales by furthering the international recognition of foreign judicial sales.[3] In its work the IWG was guided by the following basic principles:

- a: certain necessary minimal requirements should be set for conducting judicial sales;[4]
- b: the object of recognition, i.e. some basic legal effects of judicial sales, should uniformly be provided for in the instrument[5];
- c: there should only be very limited grounds of refusal with the burden of proof on the party challenging recognition of the foreign judicial sale[6];
- d: the remedies available to challenge a foreign judicial sale should be curtailed[7];
- e: ships purchased at a judicial sale should be immune from arrest for claims arising earlier than the judicial sale[8];
- f: (exclusive) jurisdiction of the courts of the state where the judicial sale took place over any actions to challenge the regularity, validity or effectiveness of the judicial sale[9];
- g: conflicts with other international instruments[10] should be avoided.

Outline

4. In this paper, the approach of the CMI IWG in the draft instrument to further the international recognition of foreign judicial sales of ships will be analysed critically and compared and contrasted with that of the (as appendix 1 attached) European *Council Regulation (EC) no. 44/2001 of 22 December*

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2 CMI IWG, Commentary on the 2nd draft of the Instrument on international Recognition of Foreign Judicial Sales of Ships, 2012, p. 1.

3 CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 3.

4 CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 1.

5 CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 2.

6 CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 4.

7 CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 5-7.

8 CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 5.

9 CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1-2, No. 7.

10 In particular the Maritime Liens and Mortgages Conventions of 1926, 1967 and 1993 and the Arrest Conventions of 1952 and 1999, CMI IWG, *Commentary on the 2nd draft*, 2012, p. 2, No. 8.

2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels-I).[11] As this European regulation and its predecessors have proved remarkably successful in attaining the objective of free movement of judgments in civil and commercial matters within Europe, Brussels-I provides a useful example from which important lessons may be drawn for the subject project to promote the recognition of foreign judicial sales of ships worldwide.

5. To provide some background with regard to Brussels-I especially for non-European readers, below first its origins and general structure will briefly be described. Next the essential elements in the system for recognition of foreign judicial decisions in Brussels-I and in that for the recognition of foreign judicial sales under the draft instrument will be analysed and compared and the resulting differences will be submitted to a critical evaluation followed by a few concluding remarks.

Origins of Brussels-I

6. The Brussels-I Regulation 44/2001 is the most recent step in a development of over fifty years towards a multilateral system for jurisdiction and recognition and enforcement of judicial decisions in civil and commercial matters, which at present extends to 30 sovereign states in Europe.[12] It all started with the institution of a committee of experts in 1960 by the then six member states[13] of the European Economic Community (EEC). [14] The draft Convention completed in 1964 formed the basis for the Brussels Convention of 27 September 1968, which was revised following each subsequent enlargement of the membership of the European Community in 1978[15], 1982[16], 1989[17], 1996[18] and which also served as model for the 1988 Lugano Convention[19] between the European Community and the members of the European Free Trade Association

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[11] Official Journal (OJ) No. L 012, 16/01/2001, p. 1-23.

[12] Brussels-I applies to all 27 EU member states, although in the case of Denmark, this follows from a separate treaty (OJ 2005 L 299/62). The 2007 Lugano Convention which is based on the Brussels-I regulation applies in the relation between the 27 EU-member states and 3 non-EU member states, Iceland, Norway and Switzerland.

[13] I.e. Belgium, France, Germany, Italy, Luxemburg and The Netherlands.

[14] For further details see: Ulrich Magnus and Peter Mankowski (eds.), *Brussels I Regulation*, 2nd Revised Edition, European Commentaries on Private International law, Sellier, 2012, p. 14 ff.

[15] Accession Convention of 9 October 1978 to the Brussels Convention, following the accession of Denmark, Ireland and United Kingdom in 1973.

[16] Accession Convention of 25 October 1982, following the accession of Greece in 1981.

[17] Accession Convention of 26 May 1989, following the accession of Spain and Portugal in 1986.

[18] Accession Convention of 29 November 1996, following the accession of Austria, Finland and Sweden in 1995.

[19] Convention on jurisdiction and the enforcement of judgments. in civil and commercial matters, Lugano, 17 September 1998.

(EFTA), which in 2007 was revised to align it with the Brussels-I Regulation. As from a Protocol to the Brussels Convention of 1971, the European Court of Justice (ECJ) is charged with the task of giving its authentic interpretation of the Brussels Convention and its successors by answering preliminary questions raised by national courts in member states.

7. A serious drawback of the repeated revisions of the Brussels Convention of 1968 was that each of the accession treaties required ratification by an ever-increasing number of member states of the European Union (as it was now called), which created "troubling disharmony instead of the intended unification" [20]. Partly for this reason as from 2001 onwards the Brussels Convention was replaced by the directly applicable Brussels-I Regulation 44/2001. At present, a proposal of the European Commission is under consideration to review the Brussels-I regulation.[21]

General Structure of Brussels-I

8. Like other European Union Regulations, the text of Brussels-I starts with a long list of considerations (29 'recitals' in all) in which significant intentions of the legislator and fundamental principles or considerations behind the regulation are expressed. The recitals are followed by the main text of the Brussels-I regulation which is divided in eight chapters, of which the most relevant for our present purposes are: chapter I 'scope', chapter II 'Jurisdiction', chapter III 'Recognition and enforcement of judgments' and chapter IV 'Authentic Instruments and Court Settlements'.[22]

9. The basic structure of Brussels-I is that firstly it must be established whether the subject matter of a claim or a court judgment falls within the material scope of application of Brussels-I, i.e. "civil and commercial matters whatever the nature of the court or tribunal".[23] Second, if that is so, then for the application of chapter II on Jurisdiction a further formal scope requirement must be met, i.e. the defendant must be domiciled on the territory of an EU member state[24] or alternatively in case of an agreement to confer exclusive jurisdiction upon a court of a member state[25], at least one of the parties to the

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[20] Magnus and Mankowski (eds.), *Brussels-I Regulation*, 2nd ed., 2012, p. 14, § 16.

[21] European Commission, Proposal for a Regulation of the European parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final.

[22] The others are chapter I 'Scope', chapter V 'General provisions', chapter VI 'Transitional provisions, chapter VII 'Relations with other instruments' and chapter VIII 'Final Provisions'.

[23] Article 1 Brussels-I. Specifically excluded are (amongst others) "revenue, customs and administrative matters" (article 1-1), "bankruptcy" (article 1-2 (b) and "arbitration" (article 1-2(d) Brussels-I).

[24] Article 4 Brussels-I.

[25] Article 23 Brussels-I.

choice of jurisdiction must be domiciled on the territory of an EU member state. Third, if Brussels-I is applicable, then articles 2 to 30 inclusive Brussels-I provide a comprehensive system of jurisdiction to the exclusion of the domestic jurisdiction rules of the member states. The jurisdiction chapter in Brussels-I consists of various sets of jurisdiction grounds[26], rules on examination of jurisdiction[27], lis pendens and related actions[28] and provisional, including protective, measures.[29]

10. Fourth, Brussels-I provides a system of rules for the recognition[30] and enforcement[31] of judgments[32] of courts in EU member states and of authentic instruments and court settlements[33]. The basic idea is that judgments in civil and commercial matters originating from courts in EU member states should be recognized as easily[34] within another EU member state as if these had been given by a another court in the same member state. With regard to enforcement of foreign judgments and authentic instruments, the intervention of the local court is required before it can be enforced there.[35]

11. Recognition and enforcement of foreign judgments under Brussels-I is a more or less automatic process with only a small and exhaustive list of refusal grounds[36], a general prohibition to review the foreign judgment as to

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[26] Articles 2, 5 to 24 inclusive Brussels-I. These jurisdiction rules in Brussels-I are divided between jurisdiction grounds of general application (articles 2, 5, 6, 7, 23 and 24), jurisdiction rules for specific legal relations, i.e. insurance matters (articles 8 to 14 inclusive), consumer (articles 15 to 17 inclusive) and employment contracts (articles18 to 21 inclusive), and finally exclusive jurisdiction grounds (art. 22).

[27] Articles 25 and 26 Brussels-I.

[28] Articles 27 to 30 inclusive Brussels-I.

[29] Article 31 Brussels-I.

[30] Chapter III, Section 1, articles 33 to 37 inclusive and Section 3, articles 53 to 56 inclusive Brussels-I.

[31] Chapter III, Section 2, articles 38 to 52 inclusive and Section 3, articles 53 to 56 inclusive Brussels-I.

[32] Article 32 Brussels-I gives a wide definition of judgments capable of recognition and enforcement: "For the purposes of this Regulation, judgment means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.". See however articles 37 and 46 Brussels-I regarding the effect of an appeal being lodged or being open against the judgment.

[33] Chapter IV, articles 57 and 58 Brussels-I.

[34] Article 33 speaks of "without any special procedure being required".

[35] Articles 38 to 42 inclusive Brussels-I. This prohibition implies that the court addressed may not question the validity of the original decision, nor review the substantive or legal soundness of the conclusions drawn by the foreign court nor scrutinise whether the court of origin applied its conflict rules correctly to arrive at the applicable law nor whether it construed the applicable law correctly nor whether it applied its procedural rules correctly. See more extensively: Magnus and Mankowski, *Brussels-I Regulation*, 2nd ed., 2012, p. 722, § 6-8.

[36] See articles 34 and 35 Brussels-I. See also articles 41 and 45 Brussels-I from which it follows that in case of enforcement of a foreign judgment the refusal grounds may only be invoked in appeal once the foreign judgment has been declared enforceable.

its substance[37] and (with the exception of a violation of the exclusive jurisdiction grounds[38]) a prohibition to review the jurisdiction of the foreign court which gave the judgment.[39]

12. As it would go way beyond the scope of this contribution to go into a detailed article-by-article analysis of the 76 articles of the Brussels-I regulation, below on a theme-by-theme basis a selection of the abovementioned recitals and a selection of the provisions on recognition of foreign judgments from Brussels-I will be analysed and reviewed for their relevance to the CMI Draft Instrument.

Free movement of judgments

13. For the European Union (EU), Brussels-I is an important instrument to pursue its fundamental objective of "free movement of judgments" within the European Community. The EU is not merely a common market, but defines itself (also) as an area of freedom, security and justice in which the free movement of persons is ensured.[40] In such an area the recognition of e.g. a decision of the Tribunal de commerce of Rouen, France should in principle be recognized by the court of Rotterdam in The Netherlands as easily, as a judgment of say the court in Amsterdam. However, even under Brussels-I this is not a reality in Europe yet. National barriers of a procedural nature still exist between the European member states[41] (e.g. the requirement of "Exequatur" or declaration of enforceability referred to in Article 53 Brussels-I) and its predecessors was to lower and ultimately eliminate these barriers and to promote the recognition and enforcement of foreign judgments.

14. This presupposes of course that there exists mutual trust in the administration of justice between member states of the EU. [42] The European Court of Justice (ECJ) has stressed repeatedly that the principle of trust in each other's legal systems and judicial institutions underpins the Brussels-I regulation[43] and has refused to allow courts in one member state to issue anti-suit injunctions aimed at the termination of court proceedings in another member state. [44] Neither shall courts in EU member states review the substance of the decisions reached by courts in other member states.[45]

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37 Articles 36 and 45-2 Brussels-I.

38 Article 35-1 Brussels-I.

39 Article 35-3 Brussels-I.

40 See recital (1) to Brussels-I.

41 See e.g. the requirement in art. 38 Brussels-I to obtain a declaration that a foreign judgment is enforceable from the court or competent authority in the country of enforcement.

42 Recital (16) to Brussels-I.

43 *Gasser* (Case-116/02), ECR [2003] I-14693, § 72.

44 *Turner v. Grovit* (C-159/02), [2004] ECR I-3565, § 24 and *West Tankers* (C-185/07), § 30.

45 Article 36 Brussels-I states: "Under no circumstances may a foreign judgment be reviewed as to its substance."

15. If we turn now to the proposed CMI instrument it is probably far too ambitious to presume the existence of mutual trust in the administration of justice as the basis for world-wide recognition of foreign judicial sales of ships. That is not to say that courts in some countries may not have faith in courts from certain other countries, merely that it does not follow that they will trust every court in every state that in the hypothetical becomes party to the instrument in due course.

16. However another basis for such recognition might perhaps be found in the fact that legal systems and courts tend to be geared towards preservation of the status quo and generally require a good reason in law before allowing a party to effect a change in the status quo, e.g. a change of ownership as a result of a judicial sale of a ship. If a court in a foreign state has authorized a judicial sale of a ship, this creates a "fait accompli" which courts in other countries cannot simply ignore if later a party comes forward to arrest the ship and challenge the title to it of the purchaser at the judicial sale.

17. Furthermore, the courts involved both in the judicial sale and in the challenges to the purchaser's title to the ship tend to be maritime or commercial courts in whose area the port, a major maritime center or the ship's register is/are located. This may make it easier for the relevant courts to accept that the needs of the global maritime industry and ship finance simply dictate that maritime courts around the world should co-operate with similar courts in other parts of the world on the basis of mutual trust and reciprocity and recognize each other's judicial sales of ships at least in principle.

18. Clearly, this logic can be extended further to ship's registers whether or not these are kept by the (maritime) court or by a separate institution. If courts should recognize foreign judicial sales then ship's registers should also. After all, ship registration is not an end in itself but rather a means to the ends of facilitating ship finance and protecting the rights of owners, mortgagees and third-parties with an interest in the ship.

Legal effects of recognition

19. Although Brussels-I does not define the legal effects of recognition, it is sufficiently clear from the case law of the ECJ that "a foreign judgment which has been recognized … must in principle have the same effects in the state in which enforcement is sought as it does in the state in which the judgment was given." [46] This implies that as a result of recognition the legal effects that a foreign court judgment has in its country of origin are extended to the country of recognition.

20. In articles 4 to 8 the legal effects of recognition of a foreign judicial

[46] *Hoffman v. Krieg* (C-145/86) [1988] ECR 645, 666, § 10. See also Smeele, *CMI Yearbook* 2010, p. 226, footnote 11.

sale under the draft instrument are spelled out in detail for each of the groups of affected persons and institutions. Article 4 addresses the position of the parties with a property or security interest in the ship, article 5 is directed at the court under whose authority the judicial sale took place, article 6 is directed at the Registrar of the Ship's Registry where the ship was registered prior to the judicial sale and articles 7 and 8 address the court in the country of recognition. For these rules to apply, the judicial sale must have taken place in the presence of the ship and in accordance with the laws of the state where the sale is executed as well as with the provisions of the draft instrument. [47]

21. In article 4 the effect of a judicial sale under the draft instrument upon the position of the previous owner, his secured creditors and the purchaser of the ship is given. The objective of the drafters is clear, i.e. that the purchaser of a ship at a judicial sale shall acquire "clean title" to the ship[48] and that "all rights and interests in the ship existing prior to its judicial sale shall be extinguished and all mortgages, "hypothèques" or charges, except those assumed by the purchaser, all maritime and other liens, and all encumbrances of whatsoever nature shall cease to attach to the ship". Any obligations resting upon the previous shipowner *in personam* are not affected by the judicial sale.[49]

22. In order to facilitate the recognition of judicial sales of the ships in foreign countries by courts[50] and Ship Registries[51] alike, article 5 provides that the court under whose authority the judicial sale was executed, shall issue – at the purchaser's request – a certificate[52] confirming basically (a) the date of the judicial sale, (b) that all the requirements applicable to the judicial sale under the law of the court (*lex fori*) and the draft instrument have been met, (c) that the ship was sold to the purchaser free of all security rights[53] except those assumed by himself. Brussels-I imposes a similar obligation upon the court which gave the judgment. [54]

23. The most significant formal requirement imposed by the Draft Instrument itself is the requirement that the court under whose authority the judicial sale takes place[55] shall ensure that at least 30 days notice in writing[56]

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[47] Article 4 sub (a) and (b) Draft Instrument.

[48] Article 1-7 Draft Instrument.

[49] Article 4 Draft Instrument.

[50] See article 7-1 Draft Instrument.

[51] See article 6-1 Draft Instrument.

[52] Defined in art. 1-1 Draft Instrument as: "the original duly authorized certificate, or a certified copy thereof, provided in terms of article 5".

[53] Article 5 specifically mentions: "free of all mortgages, "hypothèques" or charges except those assumed by the purchaser, of all maritime and other liens and of all encumbrances of whatsoever nature".

[54] Article 54 Brussels-I.

[55] Article 3-1 Draft Instrument.

[56] Article 3-3 Draft Instrument.

of the judicial sale is given in advance to all interested parties.[57] Failure to observe this requirement implies, may bar[58] the purchaser from acquiring clean title to the ship, may also bar him from obtaining the certificate[59] but doesnot give rise to a refusal ground for recognition[60], although it may be invoked in order to challenge the judicial sale before the courts of the state where this sale was conducted.[61]

24. Very welcome is also the clarification in article 6 Draft Instrument of the position of the Ship's registrar, who upon presentation of the certificate or a duly certified copy (and/or duly certified translation thereof[62]) is bound to delete all entries with regard to the ship that antedate the judicial sale, who is obliged to obey the orders of the purchaser with regard to de- or reregistration of the ship, but who may suspend his obligations in this regard if he receives notice of court proceedings from an interested person[63] protesting the judicial sale of the ship.[64]

25. The most significant legal consequences of a judicial sale under the draft instrument are given in article 7 which is aimed at the court in the country of recognition. Article 7-1 repeats the legal consequences of article 4 which become binding upon the court of recognition after presentation of the certificate meant in article 5. From that moment onwards, the ship becomes immune from arrest for claims which arose prior to the judicial sale.[65] It is further regulated *who*[66] may challenge the judicial sale, *before* which courts[67], how the burden of proof in such an action is to be divided and what the applicable time-bar[68] (one year from the date of the judicial sale) is.

26. The exhaustive list of four grounds acknowledged in the draft instrument to justify the refusal of recognition of a foreign judicial sale, are stated in article 8 and include: (a) the physical absence of the ship that was sold

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57 Article 3-1 Draft Instrument.

58 Article 4 (b) Draft instrument makes the legal effects of a judicial sale conditional upon "the sale having been conducted in accordance with … the provisions of this instrument."

59 Also article 5 Draft Instrument makes the obligation of the court to issue a certificate conditional upon "the conditions required … by this Instrument … (having) been met".

60 See art. 8 Draft Instrument.

61 Article 7-3 and 7-4 Draft Instrument.

62 Article 6-2 Draft Instrument.

63 Defined in article 1-6 Draft Instrument as "the owner of a ship prior to its Judicial Sale or the holder of a mortgage, "hypothèque", charge or maritime lien attached to the ship prior to its Judicial Sale.".

64 Article 6-4 Draft Instrument.

65 Article 7-2 Draft Instrument.

66 I.e. an "interested person" as defined in article1-6, see article 7-5 Draft Instrument, to the exclusion of all other persons.

67 I.e. the competent courts in the state where the judicial sale took place, to the exclusion of the courts in all other countries, article 7-3 Draft Instrument and provided that the claimant is an Interested person in the sense of article 1-6, failing which no court shall have jurisdiction to hear the challenge of the judicial sale, article 7-5 Draft Instrument.

68 Article 8-1 second and third sentence Draft Instrument.

from the jurisdiction area of the court by whose authority the sale took place[69]; (b) the fact that a challenge of the judicial sale is underway before the courts of the state where the judicial sale took place[70]; (c) the fact that the certificate produced by the (subsequent) purchaser is not authentic[71]; and finally (d) if recognition of the foreign judicial sale is considered by the court to be contrary to the public policy of the State of recognition.[72]

Eliminating and curtailing refusal grounds

27. One of the key success factors of Brussels-I and its predecessors has been the elimination and curtailing of refusal grounds that otherwise might be invoked to deny recognition and enforcement to foreign judgments. Although the Draft Instrument allows only four refusal grounds, it will be shown below by the example of Brussels-I that further improvements can be made to ensure that the main objective of the draft instrument, i.e. the recognition of foreign judicial sales of ships, is not frustrated through a too wide interpretation of the few refusal grounds.

28. Brussels-I and its predecessors have succeeded in to a large extent eliminating 'lack of jurisdiction' as an important refusal ground with regard to the recognition of foreign court decisions. Except for a few cases[73], courts in member states are simply barred from reviewing the jurisdiction of the court of the Member state of origin.[74] Neither is it permitted to invoke lack of jurisdiction 'through the backdoor' as a (contributing) factor why recognition of the foreign decision would be "manifestly contrary to public policy".[75] This remarkable feat has been achieved thanks to the inclusion into the 1968 Brussels Convention and its successors of a comprehensive system of jurisdiction rules (see above in § 9).

Lack of Jurisdiction

29. In my view, there is no need in the subject draft instrument for a comprehensive, Brussels-I style, jurisdictional system. The draft instrument only wishes to apply to judicial sales taking place in the presence of the ship that is to be sold.[76] In that case it seems hard to argue that despite the ship's

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69 Article 8-1 (a) Draft Instrument.

70 Article 8-1 (a) jo 7-3 Draft Instrument.

71 Article 8-1 (c) jo article 5 Draft Instrument.

72 Article 8-2 Draft Instrument.

73 Article 35-3 jo 35-1 Brussels-I retains the possibility to deny recognition and enforcement to a judgment of a court which accepted jurisdiction in violation of the mandatory set of jurisdiction rules in sections 3, (insurance matters), 4 (consumer contracts), and 6 (exclusive jurisdiction) and the case of article 72 Brussels-I.

74 Article 35-3 Brussels-I.

75 Article 34-1 Brussels-I.

76 See article 8(a) Draft Instrument.

presence within its area of jurisdiction, the court was wrong to assume jurisdiction with regard to the judicial sale.

30. Nevertheless it seems advisable to include into the Draft Instrument, a provision similar to that in Brussels-I to the effect, (a) that the jurisdiction of the court under whose authority the judicial sale was conducted, may not be reviewed, and (b) that the public policy exception in art. 8-2 Draft Instrument may not be based on the (alleged lack of) jurisdiction of the court conducting the judicial sale.

31. Similarly it seems advisable to follow the example of Brussels-I and to expressly provide in the Draft Instrument that "under no circumstances may a foreign judicial sale be reviewed as to its substance." [77] That substance is the main object of recognition and the few refusal grounds which may be raised in order to resist recognition of the foreign judicial sale relate to certain procedural and formal safeguards[78] upon which recognition has been made conditional in the Draft Instrument.

Public policy exception

32. Finally, it seems advisable for the Draft Instrument to not forget "to close the back-door", i.e. to narrow down the public policy exception in article 8-2 Draft Instrument as much as possible in order to prevent courts in other states to use this open norm as a way to review the substance of the matter after all.

33. Again, the Brussels-I regulation provides a useful model by requiring in article 34-1 Brussels-I that "a judgment shall not be recognized: 1. If such recognition is *manifestly contrary* to public policy in the Member state in which recognition is sought" (with added stress-FS). In the interpretation of the ECJ the public policy exception of article 34-1 Brussels-I may only be invoked in case a "fundamental principle within the legal order" of the state of recognition is likely to be infringed if recognition or enforcement takes place.[79]

34. Furthermore the use of the word "manifestly" implies that the infringement upon the fundamental right must be substantial enough to justify the refusal of recognition of the foreign judgment. In a case where the court refused to hear the defence of an accused person who was not present at the hearing the ECJ held that this constitutes a manifest breach of a fundamental right".[80]

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[77] Compare article 36 Brussels-I.

[78] Article 8-1 Draft Instrument.

[79] ECJ 28 April 2009 (C-420/07), (2009) ECR I-3571, *Apostolides v. Orams*, § 61.

[80] ECJ 28 March 2000 (C-7/98), ECR I-1935, § 40 *Krombach v. Bamberski*. See also: ECJ 2 April 2009 (C-394/07), ECR I-2563, § 29 *Gambazzi*.

35. It is therefore submitted that the wording of article 8-2 Draft Instrument may be made more stringent by rephrasing it as follows: “recognition of a judicial sale may also be refused if such recognition is manifestly contrary to public policy in the state party where recognition is sought.”

COMMENTS AND AMENDMENT PROPOSALS ON THE SECOND WORKING DRAFT OF INSTRUMENT ON RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

JAMES ZHENGLIANG HU*

1. Introduction

This paper introduces the attitude of China Maritime Law Association (hereinafter referred to as "CMLA")towards the CMI's drafting of the Instrument on Recognition of Foreign Judicial Sales of Ships, expounds the basic principles which are proposed to be followed in the Instrument, comments and puts forward some specific amendment proposals on the Second Working Draft of the Instrument on Recognition of Foreign Judicial Sales of Ships (hereinafter referred to as "the Instrument").[1]

2. Attitude of CMLA towards the Instrument

CMLA believes that the adoption of uniform rules to govern the recognition of foreign judicial sales of ships will promote international harmonization and unification of the law in this area, in reducing or removing legal obstacles, effectively contribute to the economic and legal certainty and significantly safeguard the interests of the *bona fide* purchaser and other interested persons concerning judicial sale of ships, and improve the efficiency of such recognition.

China is one of the biggest shipping countries in the world. Since the establishment of the ten maritime courts in China in the 1980s, many merchant

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[1] http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html

ships, domestic or foreign, have been sold in judicial sales. At the same time, Chinese shipping companies or ship scrapping companies purchased ships in foreign judicial sales. No doubt, along with the economic and shipping development, judicial sales of ships in China and purchase of ships in foreign judicial sales by Chinese companies will continue.

Thus, CMLA is in favor of the making of the Instrument, appreciates the great efforts made by CMI so far, supports and actively participates in the CMI's drafting of the Instrument.

3. Basic principles to be followed in the Instrument

Needless to say, the realization of the purposes of this Instrument as illustrated above necessitates the adoption of appropriate basic principles. The following basic principles are proposed to be followed in the Instrument:

3.1 Facilitating the international harmonization and unification of law

An international instrument is in essence a compromise among the contracting States. Thus, the Instrument shall have its primary function to facilitate the international harmonization and unification of the law on the recognition of foreign judicial sales of ships and the issues related thereto on a basis of equality, equity, common interest and the well-being of all peoples. For this purpose, the Instrument shall contain as many fundamental and practicable provisions as may attract wide acceptance by the States, especially those States where judicial sale of ships or recognition of foreign judicial sales of ships happen more often. Thus, facing the discrepancies in the matters of civil, procedural or even administrative law[2] in this area in the various States, it is important to seek common ground while reserving discrepancies which are unable to achieve compromise. This being so, it may sometimes be appropriate or even necessary to expressly provide that certain issues shall be left to national law.

3.2 Protecting the interests of the bona fide purchaser

The Instrumentis intended to govern the recognition of foreign judicial sale of ships and the related issues of registration or deregistration of ships. The contents of the Instrument mainly involve the interests of three parties in a judicial sale of ship, i.e. the owner of a ship prior to judicial sale, the holder or holders of mortgage, "hypothèque", chargeor maritime lien attached to a ship prior to judicial sale, and the purchaser or subsequent purchaser of a ship from judicial sale.

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[2] In China, the registration and deregistration of merchant ships is in the charge of the institutions of Maritime Safety Administration (MSA) which are administrative organs mainly in accordance with *The Regulations governing Registration of Ship, 1994* which can be deemed as of the nature of administrative law.

From the point of interests and benefits which may be available in a judicial sale of ship, the previous owner is able to use the proceeds of sale for liquidation of his debts, the holders shall be entitled to get compensations for their credits from the proceeds of sale, and purchaser shall acquire clean title to the ship. The interests and benefits available to the previous owner and the holders are certain in most cases. It seems clear that, if the purchaser who has paid the price of ship in a judicial sale is unable to acquire a clean title to the ship or the title will be lost after judicial sale, the credibility of judicial sale shall be discounted or even significantly discounted and, as a result, not many persons will be willing to purchase ships from judicial sales which will in turn affect the interests and benefits available to the holders and also the previous owner.

As a matter of balancing the interests and benefits available to the previous owner, the holders of mortgage, "hypothèque", charge or maritime lien, and the purchaser or subsequent purchaser as a result of a judicial sale of ship, therefore, one basic principle to be followed in the Instrument is to provide necessary and sufficient protection to the *bona fide* purchaser or subsequent purchaser. As required by this principle, the provisions of this Instrument shall reflect the sufficient protection of the purchaser's interests with respect to the effect of judicial sale, registration of ship, recognition of judicial sale and action challenging judicial sale around providing him with clean title to the ship with legal certainty. This principle is proposed to be followed with priority, but seems not fully or sufficiently reflected in the Second Working Draft Instrument as analyzed below.

3.3 Protecting the interests of the interested persons

While protection of the interests of the *bona fide* purchaser in a judicial sale shall be of primary concern in the Instrument, protection of the interests of the holders of mortgage, "hypothèque", charge or maritime lien and the previous owner shall not be ignored. As abovementioned, the Instrument shall entitle the holders to get compensations for their credits from the proceeds of sale, and enable the previous owner to use the proceeds of sale for liquidation of his debts. It may happen that a judicial sale is not conducted pursuant to this Instrument in practice if the Instrument is put in force in the future. As legal relief, consequently, it is necessary to provide opportunity for the holders or the previous owner to raise action challenging a judicial sale or objection to registration of a ship in the name of purchaser who is not *bona fide*, in order to ensure their respective lawful interests. However, exercise of such rights shall be restricted in order to avoid misuse thereof and prejudice to the lawful interests of a *bona fide* purchaser or subsequent purchaser.

4. Specific comments and amendment proposals on the Instrument

4.1 Improvement of the definitions

Article 1 of the Instrument contains sixteen definitions. CMAL is of the view that these definitions be necessary and that some of them are appropriate, while the others need be improved.

4.1.1 "Certificate" (Definition 1)

In this definition, "Certificate" includes "*a certified copy thereof*", i.e. a certified copy of the original duly authorized certificate. This being so, the expression of "*or a copy thereof duly certified*" in Paragraphs 1 & 3 of Article 6, Paragraphs 2 & 4 of Article 7 is redundant and can be deleted. Alternatively, the expression of "*a certified copy thereof*" in this definition shall be deleted, and the expression of "*or a copy thereof duly certified*" in Paragraphs 1 & 3 of Article 6, Paragraphs 2 & 4 of Article 7 remain as it is.

4.1.2 "Court" (Definition 3)

This definition seems too complicated. It had better express the ordinary meaning of a court of law in the first place, and does not need to indicate every effect of judicial sale of ship. Thus, this definition may be amended to read as follows:

> *"Court" means any competent judicial body defined as a court by the law of the State in which the Judicial Sale takes place which is empowered under the law of the State to sell or order the sale of a ship and to deal with judicial issues in relation to recognition of Judicial Sales of Ships accomplished in any other State.*

4.1.3 "Judicial sale of a ship" or "judicial sale" or "sale" (Definition 7)

As provided for in Article 4, giving clean title to the ship to the purchaser pursuant to judicial sale is conditional. Thus, this definition may be simplified and does not need to indicate the effect of judicial sale of ship by deleting the expression of "*by which clean title to the ship is given to the Purchaser and the proceeds of sale are made available to the creditors*". Therefore, this definition may be amended to read as follows:

> *"Judicial sale of a ship" or "judicial sale" or "sale" means any sale of a ship accomplished by or under the control of a Court in a State by way of public auction or private treaty or any other appropriate ways provided for by the law of the State where the sale takes place.*

4.1.4 Owner" or "Shipowner" (Definition 10)

The current definition is limited to the registered owner only, but does not cover the situation where the ownership of a ship has not been registered. In practice, it may occur that the ownership of a ship is not registered at the time of judicial sale. Therefore, as a matter of scope of application, it need be

considered whether the Instrument shall be applicable to judicial sale of a ship the ownership of which has not been registered. In addition, it need be considered whether the Instrument shall be applicable to judicial sale of a state-owned ship engaged in commercial service. It is proposed that the Instrument be applicable to judicial sale of such a ship and that the definition of shipowner in 1992 CLC be adopted. Thus, this definition may be amended to read as follows:

> *"Owner" or "Shipowner" means the person or persons registered in the register of ships in the State of Registration as the owner of the Ship or, in the absence of registration, the person or persons owning the Ship. However, in the case of a Ship owned by a State and operated by a company which in that State is registered as the Ship's operator, "owner" or "Shipowner" shall mean such company.*

4.1.5 "Purchaser" (Definition 12)

This definition needs to express the ordinary meaning of a purchaser, i.e. a person who has paid the purchase price for something. A simple definition of "Purchaser" may be as follows:

> *"'Purchaser" means the person who has purchased a ship pursuant to a Judicial Sale.*

Noticeably, Article 4 sets forth conditions upon transfer of title to a ship to the purchaser. Therefore, the expression of "*who has acquired title to a ship pursuant to a Judicial Sale*" in this definition may literally cause misunderstanding that a purchaser shall unconditionally acquire title to a ship pursuant to a Judicial Sale. Therefore, as an alternative, this definition may be amended to read as follows:

> *"Purchaser" means the person who has purchased a ship and acquired title to the ship pursuant to a Judicial Sale under this Instrument.*

4.1.6 "Ship" (Definition 13)

It need be considered whether a ship under construction shall be expressly covered by this definition. A ship under construction is proposed to be covered, as mortgage is often established on a ship under construction as a means of financing. A ship under construction may be subject to possessory lien exercised by the shipbuilder where she is not owned by the shipbuilder as agreed upon in the shipbuilding contract and the shipbuilding price has not been paid in full. Thus, this definition may be amended to read as follows:

> *"Ship" means any ship including a ship under construction capable of being an object of a Judicial Sale under the law of the State in which the Sale takes place.*

4.1.7 "State of registration"(Definition 15)

Where a ship is under a bareboat charter, it may occur in practice that the ship is registered in the State where the bareboat charterer is located and

her permanent registration is suspended during the period of hire. In such a situation, it may need to indicate how to determine the State of registration. It is proposed that, if a ship is under bareboat charter which is registered in the State of the bareboat charterer besides her permanent registration, "State of registration" shall mean the State of her permanent registration.

This being so, this definition may be amended to read as follows:

"State of registration" means the State in whose register of Ships a ship is permanently registered at the time of its Judicial Sale. Where a Ship is under bareboat charter which is registered in the State of the bareboat charterer besides her permanent registration, "State of registration" shall mean the State in whose register of the Ship is permanently registered.

4.1.8 "Subsequent purchaser" (Definition 16)

Similar to the definition of "Purchaser", this definition needs to express the ordinary meaning of a subsequent purchaser and may be amended to read as follows:

"Subsequent purchaser" means the person who has purchased from a Purchaser or its sub-purchaser a ship which was sold pursuant to Judicial Sale and acquired title to the ship under this Instrument.

4.2 Notice of judicial sale

Article 3 of the Instrument contains provisions concerning notice of judicial sale of a ship to be provided by the court conducting judicial sale. Obviously, prior notice of judicial sale of a ship to her registered owner and the holders of the registered mortgages, "hypothèques" or charges etc. is important to enable them to exercise their respective statutory rights and thus to protect their respective lawful interests. Therefore, such notice is necessitated by the basic principle as illustrated in 3.3.

On the other hand, provision of such notice by the court conducting judicial sale proves not always easy in practice. It may occur that the court is unable or feel difficult to find out the specific mailing address or their electronic contacting detail of the registered shipowner or the holders of registered mortgages, "hypothèques" or charges, because these information sometimes are not clearly indicated in the ship's certificates, or can be easily obtained by the court conducting judicial sale where the registry of a ship is not located in the State where the court is located. A ship flying a flag of convenience may be registered in a State with which the State where the court is located has no diplomatic relation to enable service of notice via diplomatic way. However, if notice can be served onto the shipmaster onboard, the registered shipowner may easily know the information of the arrest and the consequential judicial sale via the shipmaster. At least in China, notice of judicial sale and the registration of credits prior to the judicial sale is given by press announcement, i.e. newspapers or other media. However, it seems doubtful that the shipowner or the holders of mortgages, "hypothèques" or

charges etc. actually know the information of judicial sale via press announcement.

As an issue of balance, therefore, while the court shall be obliged to provide notice of judicial sale, the convenience and ability of the court in providing such notice need be considered. For this purpose, it is advisable that a court be allowed to serve notice onto the shipmaster onboard. Where a foreign ship is to be sold in judicial sale and the ship's flag State has an embassy or consulate in the State in which the judicial sale shall takes place, notice can be given by the court to such embassy or consulate, because the embassy or consulate is easy to be notified by the court conducting judicial sale and to notify the authority in charge of the ship's registry of the flag State. Therefore, the court conducting judicial sale needs to notify either the authority in charge of the ship's registry of the flag State or its embassy or consulate. Such notification may make the information of judicial sale accessible to the registered shipowner and holders of registered mortgages, "hypothèques" or charges. Press announcement as supplementary means of notice may be maintained.

In view of the above, it is proposed that Sub-paragraphs (a), (c) & (d) of Paragraph 1 of Article 4 be amended to read as follows, unless the expression of "*In addition*" in Paragraph 3 is replaced by "*Alternatively*":

Sub-paragraph (a) shall be amended as "*The registered owner of the ship. A notice provided to the master onboard a ship shall be deemed as having provided to her registered owner*".

Sub-paragraphs (b) & (c) shall be put together and amended as "*All holders of registered mortgages, 'hypothèques' or charges, or maritime liens, provided that the Court conducting the Judicial Sale has received notice of their respective claims and contacting address or other contacting information*".

Sub-paragraph (d) shall be amended as "*The authority in charge of the ship's register in the State of Registration or the Embassy or Consulate of the ship's flag State to the State in which the Judicial Sale takes place, unless no such Embassy or Consulate is established in such State*".

Being so amended, Paragraph 1 shall read as follows: -

1. Prior to a Judicial Sale in a State, the Court in such State shall ensure that notice in accordance with this Article is provided to:

(a) The registered owner of the ship. A notice provided to the master onboard a ship shall be deemed as having provided to her registered owner;

(b) All holders of registered mortgages, 'hypothèques' or charges, or maritime liens, provided that the Court conducting the Judicial Sale has received notice of their respective claims and contacting addressor other contacting information; and

(c) The authority in charge of the ship's registry in the State of

Registration or the Embassy or Consulate of the ship's flag State to the State in which the Judicial Sale takes place, unless no such Embassy or Consulate is established in such State.

4.3 Effect of judicial sale

Article 4 of the Instrument contains provisions concerning the effect of judicial sale mainly for the purpose of giving clean title to the ship to the purchaser, provided that the judicial sale lawfully takes place. For this purpose, the ownership in the ship existing prior to her Judicial Sale shall be extinguished and all mortgagees, "hypothèques" or charges, maritime and other liens, and encumbrances shall cease to attach to the ship sold in judicial sale. Article 4 of the Instrument expresses such an effect.

As provided for in Article 4, such an effect is conditional upon that the ship was within the jurisdiction of the State in which the judicial sale was accomplished at the time of the sale and that the judicial sale was conducted in accordance with the law of the State in which the sale was accomplished and the provisions of the Instrument. These two conditions are appropriate. However, the question is who shall bear the onus of proof, i.e. shall the purchaser prove that the two conditions have been met or shall an interested person prove to the contrary?

To follow the basic principle to provide necessary and sufficient protection to the *bona fide* purchaser as illustrated in 3.2, it seems appropriate that the above effect of judicial sale shall be presumed and thus the onus of proof shall be on an interested person challenging the effect of judicial sale.

It is understood that the expression of "*all rights and interests*" in Paragraph 1 of Article 4 means or mainly means the ownership of the shipowner as provided for in the First Working Draft. Under the Chinese law, judicial sale shall extinguish the ownership of the previous shipowner. To avoid possible understanding of "*all rights and interests*" beyond the ownership of the shipowner existing prior to Judicial Sale, it seems advisable that the expression of "*all rights and interests*" be replaced by "w*ithout prejudice to the entitlement of the creditors to get compensation from the proceeds of Judicial Sale pursuant to the law of the State where Judicial Sale takes place, all proprietary rights and interests*".

In view of the above, it is proposed that Paragraph 1 of Article 4 be amended to read as follows:

Unless the Interested Person proves:

(a) That the ship was not in the area of the jurisdiction of the State in which the Judicial Sale was accomplished at the time of the judicial Sale, or

(b) That the judicial Sale was not conducted in accordance with the law of the State in which the judicial Sale was accomplished and the provisions of this Instrument,

without prejudice to the entitlement of the creditors to get compensation from the proceeds of Judicial Sale pursuant to the law of the State where Judicial Sale takes place, all proprietary rights and interests in the ship existing prior to its Judicial Sale shall be extinguished and all mortgagees, "hypothèques" or charges, except those assumed by the Purchaser, all maritime and other liens, and all encumbrances of whatsoever nature, shall cease to attach to the ship and title to the ship shall be transferred to the Purchaser in accordance with the law applicable.

4.4 Deregistration and registration of ship

Article 6 of the Instrument contains provisions concerning deregistration and registration of the ship sold in judicial sale. In normal course, a ship shall be deregistered in the previous ship's register and then registered in the new ship's register after she has been sold in judicial sale. Deregistration is a condition for new registration in the name of the purchaser under the widely adopted principle of not allowing dual registration of a ship. And new registration is a condition for the use of the ship by the purchaser. Therefore, it's of great importance to ensure deregistration for the purpose of new registration, as required by the basic principle to provide necessary and sufficient protection to the *bona fide* purchaser as illustrated in 3.2.

Generally speaking, however, it seems this principle is not well followed in this Article and that this Article 6 should be amended in favor of new registration in the name of purchaser in the following two aspects:

4.4.1 Obligation of previous owner to apply for deregistration & purchaser's entitlement to applying for new registration

It is advisable to amend Paragraph 1 of this Article and provide the obligation of the previous owner to apply to the registry for deregistration within certain days after the judicial sale. In addition, it may occur that the previous owner of the ship fails to apply or timely apply to the registry for deregistration after the Judicial Sale, or the registry fails to delete or timely delete the previous registration or to issue a certificate of deregistration as in the case of "*Galaxias*"[3]. As a result, the purchaser will be unable to register the ship in his name, which will cause prejudice to the interests of the purchaser.

[3] (1988) LMLN, No.240, p.2. The Greek registered ship "*Galaxias*" was arrested and sold according to the order of the Canadian court "free and clear of all encumbrances". The Minister of Greek Merchant Marine objected to the issuance of the Registration Deletion Certificate by the Greek Shipping Registry in Piraeus and made it contingent on the satisfaction of the claims raised against "*Galaxias*" by the Greek Seamen's Union.

Consequently, it seems necessary to provide that the purchaser should be entitled to apply for registration of the ship in his name.

Therefore, two paragraphs are proposed to be added. One paragraph as new Paragraph 1 of this Article shall provide the obligation of the previous owner to apply for deregistration. The other as new Paragraph 5 of this Article shall provide to the effect that failure of the previous owner in applying for deregistration or failure of the registry in deleting the registration or in issuing a certificate of deregistration upon application of either the previous owner or the purchaser shall not cause prejudice to the effect of judicial sale as provided for in Article 4 of the Instrument, nor to the registration of the ship by virtue of the law of the State where the registry or new registry is located upon application of the purchaser with production of a certificate of judicial sale provided for in Article 5 of the Instrument. That is, the issue whether a ship can be registered in the absence of a certificate of deregistration shall be left to the lawof the State where the purchaser seeks registration in his name, which is in conformity with the basic principle as illustrated in 3.1.

4.4.2 Registration in the name of purchaser not to be affected by challenge action or objection raised by an interested person

It may occur that, before the deletion of any registered mortgages, “hypothèques” and charges and the registration of the ship in the name of the purchaser or the issuance of a certificate of deregistration, an interested person brings an action challenging the judicial sale before the court conducting the judicial sale, based upon which the interested person raises an objection to the deletion or the registration or the issuance of certificate of deregistration. Paragraph 4 of Article 6 provides that, if the registrar receives such an objection supported by evidence proving such a challenging action, the registration of the ship in the name of the Purchaser will be suspended until a final judicial decision is rendered over the challenge, or the objection is withdrawn.

It can be anticipated that, however, if the registration of the ship in the name of the purchaser will be suspended until a final judicial decision is rendered over the challenge or the objection is withdrawn as stated in this Paragraph, the interests of the purchaser may be seriously prejudiced, because in that case the ship may not be registered in the name of the purchaser even for a couple of years during which the challenge action raised by an Interested Person will be pending and the purchaser will be unable to use the ship. It seems also doubtful that the registry of a ship shall be bound by such a challenge action or objection where a certificate of judicial sale provided for in Article 5 of the Instrument has been provided to the registry. For example, registration of a ship in China conducted by the Maritime Safety Administration (MSA)shall not be bound by such a challenge action or

objection where a Certificate provided for in Article 5 of this Instrument has been provided.[4]

Therefore, it is advisable to amend Paragraph 4 of Article 6 as new Paragraphs 6 & 7.

The new Paragraphs 6 of Article 6 shall provide to the effect that If, before the deletion of any registered mortgages, "hypothèques" and charges, and before the registration of the ship in the name of the purchaser or the issuance of a certificate of deregistration, as the case may be, the registrar receives an objection raised by an interested person to the deletion or the registration or the issuance and supported by evidence proving that an action challenging the judicial sale has been brought pursuant to Article 8 of the Instrument, the registration of ship in the name of purchaser and the issuance of certificate of deregistration shall not be affected by such challenge action or objection under the applicable national law. Thus, the issue of effect of such challenge action or objection on the registration of ship in the name of Purchaser or the issuance of certificate of deregistration shall be left to the national law of the State where such registration or issuance is sought in conformity with the basic principle as illustrated in 3.1.

The new Paragraphs 7 of Article 6 shall provide to the effect that, if the final decision of the challenge action finds that the purchaser or subsequent Purchaser was not *bona fide* and declares withdrawal of the certificate of judicial sale as provided for in Article 5 of the Instrument, the registrar shall not register the ship in the name of purchaser or issue the certificate of deregistration. If the ship has already been registered in the name of purchaser or the certificate of deregistration has been issued, the registrar shall withdraw the registration or the certificate of deregistration. Such a provision is in conformity with the basic principle as illustrated in 3.3.

Thus, it is proposed that this Article be amended to read as follows:

1. The previous owner shall apply to the Registrar of the Registry where the ship was registered prior to her Judicial Sale for deregistration within seven working days after the Judicial Sale.

2. Subject to the provisions of Paragraph 7 of this Article, upon application of the previous owner as provided for in the preceding Paragraph or upon production by a Purchaser of a Certificate provided for in Article 5 of this Instrument, the Registrar of the Registry where the ship was registered prior to its Judicial Sale shall be bound to delete all registered mortgages, "hypothèques" or charges except those assumed by the Purchaser, and either to register the Ship in the name of the Purchaser

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[4] The Regulations Governing Registration of Ships of 1994 provides in Article 13 of Chapter Two "Registration of ship's ownership" that, where a ship is acquired by way of enforced sale t pursuant to law or court's judgement, the legally effective document proving the acquirement of ship's ownership shall be provided for the application for registration of ship's ownership.

or to delete the Ship from the Register and to issue a certificate of deregistration for the purpose of new registration, as the case may be.

3. If the Certificate as provided for in Article 5 is not made in an official language of the State in which the abovementioned Registrar is located, the Registrar may request the Purchaser to submit a duly certified translation of the Certificate into such language.

4. The Registrar may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.

5. Failure of the previous owner in performing the obligation as provided for in Paragraph 1 of this Article or failure of the Registrar of the Registry where the ship was registered prior to its Judicial Sale in deleting the ship from the Register or issuing a certificate of deregistration upon application of either the previous owner or the Purchaser shall not cause prejudice to the effect of Judicial Sale and all registered mortgages, "hypothèques" or charges shall be deemed as deleted except those assumed by the purchaser, nor to the registration of the ship by virtue of the law of the State where the Registry is located upon application of the Purchaser with production of a Certificate provided for in Article 5 of this Instrument.

6. If, before the deletion of any registered mortgages, "hypothèques" and charges and the registration of the Ship in the name of the Purchaser or the issuance of a certificate of deregistration as the case may be, the Registrar receives an objection raised by an Interested Person to the deletion or the registration or the issuance and supported by evidence proving that an action challenging the Judicial Sale has been brought pursuant to Article 8 of this Instrument, the registration of Ship in the name of Purchaser or the issuance of a certificate of deregistration shall not be affected by such challenge action or objection by virtue of the law of the State wheresuch registration or issuance is sought.

7. Notwithstanding anything provided for in Paragraph 6, where, as a result of the challenge action referred to in Paragraph 6, the Court in which the challenge action has been brought or its court of appeal or appeals renders final decision that the Purchaser or a Subsequent Purchaser was not bona fide and declares withdrawal of the Certificate provided for in Article 5 of this Instrument, the Registrar shall not register the Ship in the name of Purchaser or issue the certificate of deregistration, or, if the ship has been registered in the name of Purchaser or the certificate of deregistration has been issued, shall withdraw the registration or the certificate.

4.5 Recognition of judicial sale

Article 7 of the Instrument is the provisions concerning recognition of judicial sale.

Paragraph 1 of this Article provides that the court of each State Party at the application of a purchaser or subsequent purchaser shall recognize a judicial sale taken place in any other State. However, it seems not easy to understand the significance of this Paragraph, because, unlike the case of recognition and enforcement of a foreign arbitration award or judgement, it seems unnecessary, at least in China, for a purchaser or subsequent purchaser to apply to a court to recognition of a foreign judicial sale for the purpose of registration of the ship in his name. Therefore, it seems that Paragraph 1 is redundant and may be deleted. In addition, it seems advisable for CMI to investigate, if necessary or helpful, in what jurisdictions and how often the issue of recognition of foreign judicial sale occurs. Based upon such investigation, possibly the title of the Instrument and the titles of Articles 7 & 8 need be reconsidered as regards the adoption of the word "*recognition*".

Paragraph 4 of Article 7 provides to the effect that, where an interested person brings an action challenging a judicial sale against the purchaser or subsequent purchaser or the ship, the court shall dismiss the action or reject the relevant claim upon production by the purchaser or subsequent purchaser of the certificate of judicial sale, unless the interested person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of the Instrument. Such wording appears to reflect the basic principle as illustrated in 3.2, but in fact it may be contrary to this basic principle.

It seems doubtful that an action challenging a judicial sale can be brought by an interested person against the purchaser or subsequent purchaser even if there exists any of the circumstances provided for in Article 8 of the Instrument, unless it proves that the purchaser or subsequent purchaser was not *bona fide* in the judicial sale. If an interested person wins in a challenging action, the legal relief available to him shall be basically the compensation from the proceeds of the ship in judicial sale, unless it proves that the purchaser or subsequent purchaser was not *bona fide* in the judicial sale. That is to say, by virtue of the theory of *bona fide* acquirement of ownership under civil law, even if there exists any of the circumstances provided for in Article 8 of the Instrument, the ownership of the ship of the purchaser or a subsequent purchaser who was *bona fide* and paid for the price in the judicial sale shall not be deprived. Therefore, to follow the basic principle as illustrated in 3.2, it is proposed that this Paragraph be amended to read as follows:

> *4. Where an action challenging a Judicial Sale is taken by an Interested Person against a Purchaser or a Subsequent Purchaser or a Ship before a competent Court, the Court shall dismiss the action or reject the relevant claim upon production by the Purchaser or Subsequent Purchaser of a Certificate which is provided for in Article 5 of this Instrument, unless the Interested Person furnishes proof evidencing that the Purchaser or a Subsequent Purchaser was not bona fide in the Judicial Sale.*

4.6 Circumstances in which recognition of judicial sale may be refused

Article 8 of this Instrument provides the circumstances in which recognition of judicial sale may be refused by court at the request of an interested person. An interested person, i.e. the owner of a ship prior to her judicial sale or the holder of a mortgage, "hypothèque", charge or maritime lien attached to the ship prior to her judicial sale is given the right to apply to a competent court for refusal of the recognition of judicial sale. Such a right reflects the basic principle as illustrated in 3.3. However, the necessity in reality for recognition of judicial sale seems doubtful as discussed in 4.5 *supra* and the necessity for refusal of recognition is based upon the necessity for recognition. Consequently, the necessity in reality for giving an interested person the right to apply for refusal of recognition of judicial sale seems also doubtful.

Paragraph 1 of Article 8 describes the three circumstances to be proven by an interested person under which a court may refuse recognition of a judicial sale. The word "*may*" in the first line literally appears to give discretion to the court. It seems appropriate that word "*may*" shall be replaced by "*shall*".

As regards the first circumstance described in Subparagraph (a), judicial sale of a ship is at least in most cases based upon arrest of a ship. And arrest of a ship is conditional upon the fact that the ship at the time of arrest is physically in the area of the jurisdiction of the State in which the court conducting judicial sale is located. In addition, the certificate of judicial sale provided for in Article 5 is issued by the court conducting the judicial sale. In practice, it occasionally happens that a ship under arrest escapes or otherwise departs from the jurisdiction of the State in which the court arrested the ship is located. However, if the ship under arrest is not physically in the area of the jurisdiction of such State anymore for whatever reasons, it seems difficult to imagine how the court which arrested the ship is able to conduct a judicial sale and issue the certificate provided for in Article 5. Therefore, such a circumstance does not logically happen in reality. Thus, it is proposed that the necessity for Subparagraph (a) be investigated and reconsidered.

As regards the second circumstance described in Subparagraph (b), if a court is allowed to refuse recognition of judicial sale merely due to the fact that an interested person has brought a challenging action, it may cause prejudice to the interests of the purchaser or subsequent purchaser and not be in conformity with the basic principle as illustrated in 3.2. In addition, Subparagraph (b) seems logically in conflict with Paragraph 4 of Article 7, because the expression in this Subparagraph of pending of an action challenging the judicial sale seems logically in conflict with the expression in Paragraph 4 of Article 7 of dismissal of a challenging action. That is, the existence of a challenging action itself cannot be taken as the ground for dismissal thereof. It seems clear that pending of an action challenging the judicial sale before a competent court may only necessitate pending of recognition of judicial sale. Thus, Subparagraph (b) is proposed to be deleted.

It is advisable to reconsider whether the content of Subparagraph (b) in the First Working Draft, i.e. the judicial sale was not accomplished in accordance with the law of the State in which judicial sale took place or the provisions of this Instrument, need be restored in this Instrument.

It is also advisable to reconsider whether the effect of non-recognition of judicial sale be expressly provided in the Instrument.

4.7 Restricted recognition of judicial sale

Article 9 of this Instrument contains provisions of restricted recognition of judicial sale. Noticeably, the Instrument mainly governs the so-called recognition of foreign judicial sale of a ship, but its content also covers some other issues relating to judicial sale, e.g. deletion of registration of ship and registration of ship in the name of purchaser after judicial sale. However, the content of this Article is literally limited to recognition of judicial sale. Consequently, it may happen that a court of a State which has made the stipulated declaration is not obliged to recognize a foreign judicial sale, but its register may still be obliged to follow the judicial sale and register the ship after judicial sale.

Thus, it seems advisable that the title of this Article be changed into "*Restricted Application*". And the expression of "*the recognition of a*" in the first sentence be deleted and, as a result, the expression in the first sentence shall be in line with that in the second sentence.

5 Conclusions

Based upon all the above analysis, the following conclusions may be drawn:

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5.1 CMLA believes that the adoption of this Instrument will promote international harmonization and unification of the law in the area of recognition of foreign judicial sales of ships, supports and actively participates in the CMI's drafting of the Instrument;

5.2 Three basic principles need be followed in the Instrument, i.e. facilitating the international harmonization and unification of the law, protecting the interests of the *bona fide* purchaser, and protecting the interests of the interested persons. Among these basic principles, the second one is of priority, but seems not well followed in the Second Working Draft;

5.3 The Second Working Draft has formed a good framework and contains the basic provisions of this international instrument. On the other side, besides logical amendments, improvements need be made on some of the provisions of the Draft, especially those of Article 6 regarding deregistration and registration of ship, in conformity with the three basic principles and the practical needs in reality.

REPORT OF THE CMI IWG ON RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

Chair: **Henry Hai Li**
Rapporteur: **Jonathan Lux - Andrew Robinson**

Prior to the 40th CMI Conference in Beijing during 14-19 October 2012 (the "Beijing Conference" or "Conference"), the Second Working Draft of the Instrument on Recognition of Foreign Judicial Sales of Ships (the "Second Draft") and the Commentary prepared by the International Working Group (the "IWG") had been circulated as an attachment to the CMI President's letter of 2 May 2012 to the national maritime law associations (the "NMLAs") for their consideration and preparation for the discussion at the Beijing Conference.

The session on Judicial Sales of Ships was openend by Henry Hai Li immediatley after the Opening Ceremony of the Beijing Conference on the morning of 15 October with introductory papers from six speakers. The first two speakers, Jan-Erik Pötschke from Germany and Lawrence Teh from Singapore, briefly introduced the law and practice in relation to judicial sales of ships in civil law and common law jurisdictions respectively. The second two speakers, William Sharpe from Canada and Frank Smeele from the Netherlands, addressed the issue of policy considerations, which should be taken into account when preparing an international instrument on this subject, one from common law perspective and one from civil law perspective**.** The fifth speaker, James Zhengliang Hu from China, introduced briefly the law and practice in relation to judicial sales of ships in China, the venue of this Conference. The last but not the least speaker, Andrew Robinson, on behalf of the IWG**,** presented a Summary and Concise Analysis of the comments received before the Conference from the NMLAs relating to the Second Working Draft. With these introductory speeches, the delegates were provided with a full picture of the background of this subject and acquired a better understanding of the importance of this project.

Over the ensuing two days, Henry Li, Jonathan Lux and Andrew Robinson led an article by article discussion of the Second Draft from the beginning to the end. Constructive comments were received from a number of representatives of the attending NMLAs, including the maritime law associations of Argentina, Australia, Belgium, Canada, China, Croatia,

Denmark, France, Germany, Greece, Ireland, Italy, Japan, Malta, the Netherlands, Nigeria, Norway, Russia, Singapore, South Africa, South Korea, Spain, Switzerland, Turkey, UK, USA. During the discussion, a number of proposals and/or amendments to the Second Draft were supported by the majority views. These included that a preamble be added to the draft summarizing the guiding principles and considerations of the drafters as an aid to the uniform interpretation of the draft or the future convention.

In the afternoon of 18 October, the members of the IWG, including Henry Li, Jonathan Lux, Andrew Robinson, Frank Smeele, William Sharpe, Lawrence Teh, Francis Nolan, Louis N. Mbanefo, and Benoit Goemans, met to consider and discuss the comments received at the sessions during the Conference and those written comments received prior to the Conference with an aim to produce a new draft of the instument for voting and adoption at the session the next morning before the Conference Plenary Session, which was sheduled to start immediately after. The IWG worked very hard until late at night and successfully worked out a document entitled "A Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships" (known as the "Beijing Draft"), taking into account the consensus expressed on the amendments to the Second Draft.

The Beijing Draft was presented to the delegates of the attending NMLAs for voting and adoption at the morning session on 19 October. Several NMLAs' delegates wished an opportunity to make further comments and a number of NMLAs' delegates indicated that they did not have the necessary mandate from their repective associations to vote on the newly produced document. Under such circumstances, the IWG, after a short private meeting, proposed to the delegates a report on the sessions on Judicial Sales of Ships to be presented to the Plenary Session of the Conference. The proposed short report by the IWG was approved by the delegates of the attending NMLAs as presented.

Accordingly, the following report was presented by Joanthan Lux on behalf of the IWG to the Plenary Session of the Conference:

"*The Sessions on Judicial Sales of Ships*

The Second Draft Instrument prepared by the IWG was carefully reviewed and commented on over three days. The IWG prepared a new version, after consideration of deliberations, known as the Beijing Draft. The IWG presented the Beijing Draft to the attending NMLAs on Friday 19 October and it was agreed, without objection, that:

1. The Beijing Draft is a substantially improved document.
2. The IWG will circulate a Commentary on the Beijing Draft to all NMLAs within the next six weeks.
3. Any NMLAs wishing to make written comments shall do so within three months after receiving the Commentary.

4. The IWG will prepare a Final Beijing Draft instrument to be circulated before the next CMI Assembly and to be voted on as presented by the IWG."

Save that it was agreed with the support of majority views at the Plenary Session to substitute the word "convention" for the word "instrument" in Paragragh 4, and that the stated aim was to attempt to finalise rather than necessarily finalise the "Beijing Draft" in Dublin in 2013, the report was otherwise approved.

It is hoped that after receiving the Commentary on the Beijing Draft, the NMLAs will send their comments on the Beijing Draft, if any, to the CMI or the IWG as early as possible so as to leave sufficient time to the IWG to consider and include their further amendments if widely supported into the final Beijing Draft, and that the delegates attending the Interantional Sub-Committee meeting on this subject to be held in Dublin in September/October 2013 will be given the necessary mandate by their respective associations to vote on the Beijing Draft.

COMITE MARITIME INTERNATIONAL

PRESIDENT

25 March 2013

All Presidents
National Maritime Law Associations

cc Titulary Members, Consultative Members, Executive Council

Dear President

Judicial Sales of Ships

I am **attaching**:

1. Commentary on the Beijing Draft Final Version
2. Beijing Draft Final Version
3. Report on the sessions on this topic at the Beijing Conference.

We are indebted to Henry Li and his colleagues on the International Working Group for the furth work that they have done on this topic since the Beijing Conference.

I would be grateful if you would forward it to your membership and forward any comments to me for on-forwarding to Henry Li.

It is proposed to have meetings of the International Sub-Committee on Saturday and Sunday, 2 and 29 September 2013 in Dublin. If you or any of your members are interested in attending those meetings, I would be grateful if you would let me know as soon as possible. It may assist i any such delegate is empowered by your Association to approve any final wording, which is produced, at the Assembly meeting.

In any event the International Working Group would be assisted if you would provide any comments on the attached materials by 31 July 2013.

Yours sincerely,

Stuart Hetherington

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A PROPOSED DRAFT INTERNATIONAL CONVENTION ON RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

(KNOWN AS THE "BEIJING DRAFT")*

CONSIDERING that the needs of the maritime industry and ship finance require that the Judicial Sale of Ships is maintained as an effective way of securing and enforcing of maritime claims and enforcement of judgments or arbitral awards or other enforceable documents against the Owners of Ships;

CONCERNED that uncertainty for the prospective Purchaser about the international Recognition of foreign Judicial Sales of Ships and transfer of registry may have an adverse effect upon the level of proceeds generated by a Ship sold at a Judicial Sale to the detriment of interested parties;

CONSIDERING that necessary and sufficient protection should be provided to Purchasers of Ships at Judicial Sales by channelling the remedies available to interested parties to challenge the validity of the Judicial Sale and any subsequent transfers of the ownership in the Ship;

CONSIDERING that in principle once a Ship is sold by way of a Judicial Sale, the Ship should no longer be subject to arrest for any claim arising prior to its Judicial Sale; and

CONSIDERING that the most convenient forum for assessing whether or not a Judicial Sale is regular or effective is the Court of the State in which the Judicial Sale took place, therefore only the competent Court in that State should have jurisdiction over actions challenging the Judicial Sale.

Article 1 Definitions

For the purposes of this Convention:

1. "Certificate" means the original duly authorized document, or a certified copy thereof, as provided for in Article 5.

2. "Charge" includes any charge, lien, *privilège*, encumbrance, claim, arrest, attachment, right of retention or notice of interest whatsoever and howsoever arising in relation to the Ship.

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* Done at Beijing on 19 October 2012.

3. "Clean Title" means free and clear of all Mortgages or Charges.

4. "Competent Authority" means any Person, Court or authority which is empowered under the laws of the State in which the Judicial Sale takes place to sell or transfer or order to be sold or transferred a Ship free and clear of any and all Mortgages or Charges, all Maritime Liens and other liens, and other encumbrances of whatsoever nature and howsoever arising.

5. "Court" means any judicial body established under the law of the State in which it is located and empowered to determine the matters covered under this Convention.

6. "Day" means any calendar day.

7. "Deficiency Amount" means any amount of a creditor's claim against any Person personally liable on an obligation which is secured by a Mortgage or Charge, which remains unpaid after application of such creditor's share of proceeds actually received following and as a result of a Judicial Sale.

8. "Interested Person" means the Owner of a Ship immediately prior to its Judicial Sale or the holder of a Mortgage or Registered Charge attached to the Ship immediately prior to its Judicial Sale.

9. "Judicial Sale" means any sale of a Ship accomplished by a Competent Authority or under the control of a Court in a State by way of public auction or private treaty or any other appropriate ways provided for by the law of the State where the Judicial Sale takes place by which Clean Title to the Ship is given to the Purchaser and the proceeds of sale are made available to the creditors.

10. "Maritime Lien" means any claim recognized as a maritime lien or *privilège maritime* on a Ship by the law applicable in accordance with the private international law rules of the State in which the Ship is sold by way of Judicial Sale.

11. "Mortgage" means any mortgage or "*hypothèque*" effected on a Ship and recognized as such by the law applicable in accordance with the private international law rules of the State in which the Ship is sold by way of Judicial Sale.

12. "Owner" means any Person registered in the register of ships of the State of Registration as the owner of the Ship.

13. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

14. "Purchaser" means any Person to whom the property in a Ship is transferred or is intended to be transferred pursuant to a Judicial Sale.

15. "Recognition" means that a Judicial Sale of a Ship has the same effect in the State in which Recognition is sought as it does in the State in which that Judicial Sale was accomplished.

16. "Registered Charge" means any Charge entered in the register of the Ship the subject of the Judicial Sale.

17. "Registrar" means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires.

18. "Ship" means any ship or other vessel capable of being an object of a Judicial Sale under the law of the State in which the Judicial Sale takes place.

19. "State" means any member State of the United Nations.

20. "State of Registration" means the State in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale.

21. "State of Bareboat Charter Registration" means the State which granted registration and the right to fly temporarily its flag to a ship bareboat chartered-in by a charterer in the said State for the period of that charter.

22. "Subsequent Purchaser" means any Person to whom property in a Ship has been transferred through a Purchaser.

Article 2 Scope of Application

This Convention shall apply to the Recognition in a State Party of a Judicial Sale taking place in the territory of another State Party.

Article 3 Notice of Judicial Sale

1. No State is required by this Convention to recognize a Judicial Sale accomplished in another State unless the party seeking Recognition establishes that the following notices, where applicable, have been provided prior to such Judicial Sale either by the Competent Authority in such State or by one or more parties to the proceedings resulting in such Judicial Sale, in accordance with the laws of such State, to:

(a) The authority in charge of the Ship's register in the State of Registration;

(b) All holders of registered Mortgages or Registered Charges;

(c) All holders of Maritime Liens, provided that the Competent Authority conducting the Judicial Sale has received notice of their respective claims; and

(d) The Owner of the Ship;

2. If the Ship subject to Judicial Sale is flying the flag of a State of Bareboat Charter Registration, the notice required by paragraph 1 of this Article shall also be provided to the authority in charge of the Ship's register in such State.

3. The notice required by paragraphs 1 and 2 of this Article shall be provided at least 30 days prior to the Judicial Sale and shall contain, as a minimum, the following information:

(a) The name of the Ship, the IMO number (if assigned) and the name of the Owner or the bareboat charterer, as appearing in the registry records (if any) in the State of Registration (if any) or the State of

Bareboat Charter Registration (if any).

(b) The time and place of the Judicial Sale; or if the time and place of the Judicial Sale cannot be determined with certainty, the approximate time and anticipated place of the Judicial Sale which shall be followed by additional notice of the actual time and place of the Judicial Sale when known but, in any event, not less than seven days prior to the Judicial Sale; and

(c) Such particulars concerning the Judicial Sale or the proceedings leading to the Judicial Sale as the Competent Authority conducting the proceedings shall determine are sufficient to protect the interests of Persons entitled to notice.

4. The notice specified in paragraph 3 of this Article shall be in writing, and either given by registered mail, or given by any electronic or other appropriate means [which provide confirmation of receipt][1], to the Persons as specified in paragraphs 1 and 2, if known. In addition, the notice shall be given by press announcement in the State in which the Judicial Sale is conducted and if deemed appropriate by the Competent Authority conducting the Judicial Sale, in other publications.

Article 4 Effect of Judicial Sale

Subject to:

(a) the Ship being physically within the jurisdiction of the State in which the Judicial Sale is accomplished, at the time of the Judicial Sale and

(b) the Judicial Sale having been conducted in accordance with the law of the State in which the Judicial Sale is accomplished and the provisions of this Convention

all rights, title and interests in the Ship existing prior to its Judicial Sale shall be extinguished and all Mortgages or Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances of whatsoever nature and howsoever arising, shall cease to attach to the Ship and title to the Ship shall be transferred to the Purchaser in accordance with the law applicable.

Notwithstanding the preceding provisions of this article, no Judicial Sale or deletion pursuant to paragraph 1 of Article 6 of this Convention shall extinguish any remedies including, without limitation, any claims for Deficiency Amounts, other than those enforceable against the Ship the subject of the Judicial Sale.

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[1] Notes: Unresolved issue, 1. Concern that any deviation of MLM could immediately put MLM-countries in breach / a point to be checked. 2. If lack of receipt invalidates the Judicial Sale, the purpose of this Convention is defeated.

Article 5 Issuance of a Certificate of Judicial Sale

When a Ship is sold by way of Judicial Sale and the conditions required by the law of the State where the Judicial Sale is made and by this Convention have been met, the Competent Authority shall, at the request of the Purchaser, issue a Certificate to the Purchaser containing the date of the Judicial Sale and recording that (1) the Ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Convention free of all Mortgages or Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances of whatsoever nature and howsoever arising, and (2) all rights, title and interests existing in the Ship prior to its Judicial Sale are extinguished.

Article 6 Deregistration and Registration of the Ship

1. Upon production by a Purchaser of a Certificate provided for in Article 5 of this Convention, the Registrar of the Ship's registry where the Ship was registered prior to its Judicial Sale shall be bound to delete all registered Mortgages or Registered Charges, except those assumed by the Purchaser, and either to register the Ship in the name of the Purchaser or to delete the Ship from the register and to issue a certificate of deregistration for the purpose of new registration, as the case may be.

2. If the Ship was flying the flag of a State of Bareboat Charter Registration at the time of the Judicial Sale, upon production by a Purchaser of a Certificate provided for in Article 5 of this Convention, the Registrar of the Ship's registry in such State shall be bound to delete the Ship from the register and to issue a certificate to the effect that the permission for the ship to register in and fly temporarily the flag of the State is withdrawn.

3. If the Certificate as provided for in Article 5 of this Convention is not made in an official language of the State in which the abovementioned Registrar is located, the Registrar may request the Purchaser to submit a duly certified translation of the Certificate into such language.

4. The Registrar may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.

Article 7 Recognition of Judicial Sale

1. Subject to the provisions of Article 8 of this Convention, the Court of each State Party on the application of a Purchaser or Subsequent Purchaser shall recognize a Judicial Sale conducted in any other State Party with a Certificate issued as provided for by Article 5 of this Convention, as having the effect:

(i) that the ownership of the Ship has been transferred to the Purchaser and all rights, title and interests in the Ship existing prior to its Judicial Sale have been extinguished; and

(ii) that the Ship has been sold free of all registered Mortgages and Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances and claims of whatsoever nature and howsoever arising.

2. Where a Ship which was sold by way of Judicial Sale is sought to be arrested or is arrested by order of a Court in a State Party for a claim arising prior to the Judicial Sale, the Court shall reject the application for arrest or release the Ship from arrest upon production by the Purchaser or Subsequent Purchaser of a Certificate as provided for in Article 5 of this Convention, unless the arresting party is an Interested Person and furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Convention.

3. Where a Ship is sold by way of Judicial Sale in a State Party, any legal proceeding challenging the Judicial Sale shall be brought only before a competent Court of the State Party in which the Judicial Sale took place and no Court other than a competent Court of the State Party in which the Judicial Sale took place shall have jurisdiction to entertain any action challenging the Judicial Sale.

4. No Person other than an Interested Person as defined by this Convention shall be entitled to take any action challenging a Judicial Sale before a competent Court, and no competent Court shall exercise its jurisdiction over any claim challenging a Judicial Sale unless it is made by an Interested Person as defined by this Convention. No remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any bona fide Purchaser of that Ship.

5. No claim challenging a Judicial Sale shall be admitted unless it is presented within three months of the date of the Judicial Sale as recorded in the Certificate. This three-month period shall not be subject to any suspension, interruption or extension whatsoever.

6. In the absence of proof that a circumstance exists under Article 8 of this Convention, a Certificate issued as provided for in Article 5 of this Convention shall constitute conclusive evidence that the Judicial Sale has taken place and has the effect provided for in Article 4 of this Convention, but shall not be conclusive evidence in any proceeding to establish the rights of any Person in any other respect.

Article 8 Circumstances in which Recognition may be Suspended or Refused

Recognition of a Judicial Sale may be suspended or refused only in the circumstances provided for in the following paragraphs:

1. Recognition of a Judicial Sale may be refused by a Court of the State Party, at the request of an Interested Person if that Interested Person furnishes to the Court proof that at the time of the Judicial Sale, the Ship was not

physically within the jurisdiction of the State in which the Competent Authority issuing the Certificate provided for in Article 5 is located.

2. Recognition of a Judicial Sale may be

(a) suspended by a Court of the State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that a legal proceeding pursuant to paragraph 3 of Article 7 has been commenced on notice to the Purchaser and the competent Court has suspended the legal effect of the Judicial Sale; and

(b) refused by a Court of the State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that the competent Court after suspension of the legal effect of the Judicial Sale in a judgment or similar judicial document no longer subject to appeal has subsequently nullified the Judicial Sale and its effects.

3. Recognition of a Judicial Sale may also be refused if the Court in a State Party in which Recognition is sought finds that Recognition of the Judicial Sale would be contrary to the public policy of that State Party.

Article 9 Relation with other International Instruments

Nothing in this Convention shall derogate from any other basis for the Recognition of Judicial Sales under any other bilateral or multilateral Convention, Instrument or agreement or principle of comity.

[Final clauses in respect of signature, ratification, acceptance, approval, accession, denunciation, coming into force, language, etc shall be drafted later and separately]

COMMENTARY ON THE BEIJING DRAFT A PROPOSED DRAFT INTERNATIONAL CONVENTION ON RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

By CMI IWG on Recognition of Foreign Judicial Sales of Ships

General Comments:

Integrated into this Commentary are individual comments made in the Commentary of the CMI International Working Group (the "IWG") on the Second Working Draft in relation to provisions which have remained materially unchanged in the 3rd Draft of the proposed draft convention, known as the "Beijing Draft". The integrated comments from the Second Working Draft are inverted and placed between brackets ([…]) in order to distinguish them from new comments first introduced in relation to the Beijing Draft.

During the discussions of the International Sub-Committee (the "ISC") and the meeting of the CMI IWG during the CMI Conference in Beijing in October 2012, it was decided to include a preamble in the Beijing Draft in which certain guiding principles and considerations of the drafters are expressed as an aid to the uniform interpretation of the draft or the future Convention by Courts, practitioners and legal scholars. Already in the Commentary on the Second Draft, p. 1-2, a total of eight principles or points were listed which had been borne in mind in the preparation of the Second Draft. In the Beijing Draft five of these have been (slightly) reformulated and elevated to the preamble of the Draft Convention.

Although not expressly mentioned among the considerations stated in the preamble, it may be added that the drafters were also concerned to avoid as much as possible conflicts with other international conventions, in particular the Maritime Lien & Mortgage Conventions (the "MLM") of 1926/1967/1993 and the Arrest Conventions of 1952/1999.

The text of the Beijing Draft, which is attached to this commentary, is based primarily on the deliberations during the Beijing Conference. Additional changes are proposed by the IWG in the interests of clarity and consistency.

Specific Comments:

Article 1 Definitions

1. The earlier proposed definition of "Charge" has been changed in order to make it as encompassing as possible with regard to any private law claims or rights in relation to the ship but with the exception of Mortgages (including *hypothèques*) which are defined elsewhere.

2. It was proposed and supported by the majority view during the discussion at the Beijing Conference that a definition on the term, clean title, should be included. The Beijing Draft made a definition on this term in Article 1, paragraph 3.

[*2. It is proposed that a definition on "Day" should be added to the list of definitions of the Draft, and the proposal is adopted and therefore a definition on "Day" is included in the 2nd Draft.*]

3. The earlier proposed definition of "Court" has been changed and a new definition of "Competent Authority" has been added in the Beijing Draft to reflect the fact that under the national laws of some countries, ship auctions and sales do not (necessarily) take place under the authority or direction of a Court or judicial body, but (also) under that of other Persons empowered to do so by the laws of the State where the ship auction/sale takes place.

[*3. As regards the definition of "Interested Person", for the purposes of reducing the categories and numbers of Interested Persons who are provided for by this Instrument to be entitled to challenge Judicial Sales and providing as much as possible protection to the Purchasers of ships by way of Judicial Sale, the 2nd Draft defines "Interested Person" to cover just a few categories of Persons, i.e. "the Owner of a ship prior to its Judicial Sale or the holder of a Mortgage, "hypothèque", Charge or Maritime Lien attached to the ship prior to its Judicial Sale." It is hoped that this definition may help to reduce the number of challenges on Judicial Sales.*]

4. In the Beijing Draft a further reduction of the categories of Interested Persons entitled to challenge Judicial Sales is achieved by replacing "holder of a …. Charge" with "holder of a … *Registered Charge*" (with added emphasis). The term "Registered Charge" is defined in Article 1, paragraph 16.

[As to the definition of "Judicial Sale of Ship" contained in the 1st Draft, it is proposed that reference to the three purposes of Judicial Sales should be avoided, since a number of jurisdictions would have problems with such reference. In the 2nd Draft, the three purposes are deleted but words to the effect that Clean Title to the ship is given to the Purchaser and the proceeds of sale are made available to the creditors are included in the definition.]

5. The earlier proposed definition of "Judicial Sale of Ship" has been

changed to "Judicial Sale" and an effort has been made to only use this term consistently throughout the Beijing Draft. The definition has also been extended in the Beijing Draft in order to include also Judicial Sales effected by a Competent Authority.

6. A definition of the key concept of "Recognition" has been added in order to clarify that it means the extension of the legal effects of a Judicial Sale from the State of origin to the State of Recognition.

[*5. Due to the fact that the words "sea-going" and "used in commercial trade" contained in the definition of ship in the 1st Draft may create unnecessary conflicting interpretations, the definition of ship in the 2nd Draft is revised to mean "any ship capable of being an object of a Judicial Sale under the law of the State in which the Sale takes place.*"] In the Beijing Draft the definition of "Ship" has been extended by the inclusion of the words "or vessel".

7. The earlier proposed definition of "State of Registration" has been changed in order to express more clearly that it refers to the State where the ship is entered in the *ownership register*, rather than that of any bareboat charter register in which the ship may also be entered. For this reason, definitions on State of Bareboat Charter Registration and Registrar are also made respectively in the Beijing Draft.

8. The earlier proposed definition of "Subsequent Purchaser" was deemed not to cover all possible situations and therefore it has been changed to: "any Person to whom property in a Ship has been transferred through a Purchaser."

Article 2 Scope of Application

[*8. As to the scope of application, it is proposed that the Instrument should have a wide rather than a narrow scope of application, on the other hand, it is also proposed that the Instrument should be applicable only if (1) the sale takes place in a State Party and (2) the ship is flying a flag of a State Party at the time of the sale. For these reasons, the 2nd Draft in Article 2 on Scope of Application provides for that "This Instrument shall apply to the Recognition of a Judicial Sale taking place in the territory of any State.*" *On the other hand, it is also made clear in Article 9 on Restricted Recognition that a State Party may declare that it will only apply the Instrument to the Recognition of a Judicial Sale made in the territory of a State Party and the Ship is flying the flag of a State Part; in addition it may declare that it will apply this Instrument to Judicial Sale made in the territory of a non-Party State on the basis of reciprocity.*]

9. The Beijing Draft in Article 2 clarifies that the proposed Convention applies to the Recognition *in States Party* of Judicial Sales that have taken place in another State Party (with added emphasis). Arguably this was already

implied in the wording of Article 2 of the Second Working Draft, but it was deemed to cause no harm to make the implied express. An extension of the scope of application of the proposed convention was achieved by the elimination of Article 9 Restricted Recognition in the Second Working Draft which in its first sentence allowed contracting States at the time of signing, ratifying or acceding the option to restrict Recognition of Judicial Sales to ships flying the flag of contracting States.

Article 3 Notice of Judicial Sale

[*9. Article 3 of the 1st Draft is a reproduction of Article 11 of the Maritime Lien and Mortgage Convention 1993. This is welcomed, as conflicts between conventions can be avoided.*

10. As to the list of addressees to whom a Notice of sale should be sent, in the 1st Draft "the Embassy or Consulate of the Ship's Flag State to the State in which the Judicial Sale takes place" is added to the list of addressees as contained in the Maritime Lien and Mortgage Convention 1993. Whereas, at the ISC meeting in Oslo, the majority view seems that this addition should be deleted, as the aim of this Instrument is to maximise the chances of the Judicial Sale being recognised, whilst the longer the list of addressees, the more chance of the notice being found to be sent insufficiently.

11. A brief enquiry/investigation shows that in many jurisdictions Mortgages and/or "hypothèques" are not classified or grouped into "being issued to bearer" and "having not been issued to bearer"; and even if in the jurisdictions with the concept of Mortgages and/or "hypothèques" being issued to bearer, such kind of Mortgages and/or "hypothèques" have not been seen in practice for many decades. Therefore, it seems safe to have the wording of item (b) and (c) of paragraph 1 of Article 3 simplified as "(b) All holders of registered Mortgages, "hypothèques" or Charges; (c) All holders of Maritime Liens, provided that the Court conducting the Judicial Sale has received notice of their respective claims; and"].

10. Although the objective to avoid conflict with the MLM 1993 was retained by the IWG, it was deemed necessary to change the addressee of the norm set in paragraph 1 of Article 3 that sufficient notice of the intended Judicial Sale of a Ship shall be given to the Interested Persons there listed. In Article 11 MLM 1993 and Article 3 paragraph 1 Second Working Draft this obligation is imposed upon the Competent Authority, respectively the Court in the State where the Judicial Sale is to take place. However, as the subject matter of the Beijing Draft is the Recognition of foreign Judicial Sales of Ships, it was thought to be more appropriate to clarify that there is an obligation on the part of contracting States to recognize foreign Judicial Sales only if the required notices have been given prior to the Judicial Sale. To this

end the wording of Article 3 paragraph 1 Beijing Draft was changed as follows: "No State is required by this Convention to recognize a Judicial Sale accomplished in another State unless the party seeking Recognition establishes that the following notices, where applicable, have been provided prior to such Judicial Sale either by the Competent Authority in such State or by one or more parties to the proceedings resulting in such Judicial Sale, in accordance with the laws of such State, to: …".

11. Furthermore, the order in which the Persons to whom notice must be given are listed in Article 3 paragraph 1 from (a) up to (d) inclusive as earlier proposed, was changed to bring it in conformity with that in paragraph 1 of Article 11 MLM 1993. Besides, as a vessel registered in one State when being bareboat chartered-in by a charterer in another State may be permitted to register in and fly temporarily the flag of the State the vessel is bareboat chartered-in, and it is believed that the notice of Judicial Sale should also be given to the Ship's registry in the State the vessel is bareboat chartered-in and flying its flag. For this purpose, a new paragraph to that effect is inserted into Article 3 of the Beijing Draft

12. An issue left unresolved in the Beijing Draft concerns the way in which notice in writing shall be provided pursuant to Article 3. Whereas paragraph 3 of Article 3 the Second Working Draft is identical with paragraph 3 of Article 11 MLM 1993, in Article 3 of the Beijing Draft the qualifying words "which provide confirmation of receipt" immediately after "by any electronic or other appropriate means" are placed between brackets. On the one hand there was concern that a removal of this qualification might put contracting States to MLM 1993 in breach of their obligations under the convention. On the other hand it was feared that if lack of receipt of the prior notice were to invalidate the (Recognition of) a foreign Judicial Sale, the purpose of the proposed convention might be defeated.

Article 4 Effect of Judicial Sale

[*12. It is proposed that the words, "the ownership of the shipowner" in the 1st Draft should be replaced by the words "all rights and interests in the ship". This proposal was supported by a majority view at the ISC meeting in Oslo. Thus, this article is revised to that effect.*

13. As regards the effect of Judicial Sales, it was correctly pointed out by some associations that a Judicial Sale should not have the effect of distinguishing any in personam claim for any Deficiency Amount as defined by this Instrument. As a result, a paragraph to that effect is added into Article 4.]

13. The exact meaning of the earlier proposed wording of Article 4 (a) in the Second Working Draft "the ship being *in the area of* the jurisdiction of the State …" (with added emphasis) was deemed somewhat obscure and therefore was replaced in the Beijing Draft by: "the ship being *physically within the*

jurisdiction of the State …" (with added emphasis). Furthermore it was deemed necessary to make the clarification in Article 4 last sentence more all-embracing by including also the "deletion pursuant to paragraph 1 of Article 6 of this Convention" and by using the words "any remedies including, without limitation, any claims for Deficiency Amounts, other than those enforceable against the Ship the subject of the Judicial Sale."

Article 5 Issuance of a Certificate of Judicial Sale

[*14. Again, the words "the ownership of the shipowner " in the 1st Draft are replaced by the words "all rights and interests in the ship" in the 2nd Draft.*]

14. Apart from a minor terminological adjustment ("Competent Authority" instead of "Court or Court officer"), the provision remained unchanged.

Article 6 Deregistration and Registration of the Ship

15. As mentioned above, a vessel under bareboat charter may be permitted to fly temporarily the flag of the State the vessel is bareboat chartered-in. It is believed that when such a vessel is sold by way of Judicial Sale, the permission for the vessel to register in and to fly temporarily the flag of that State should be withdrawn. For this purpose, a new paragraph to that effect is inserted into Article 6 of the Beijing Draft.

[*15. "It is suggested that only the Court of the State in which the Judicial Sale has been conducted should be competent to assess whether the sale has been regular and effective, and once the sale is completed, the purchase price paid and the sale documents enabling the Purchaser to register the ship have been issued, the right of the Purchaser to register the ship in his name cannot be challenged, Purchasers need protection and the failure to grant them such protection would adversely affect the possibility of conducting Judicial Sale successfully and obtaining in the interests of the creditors a price quasi in line with the market." This suggestion is supported by a majority view at the ISC meeting in Oslo. In light of this proposal, paragraph 5 of Article 6 of the 1st Draft is deleted and paragraph 4 of this Article is reworded in line with the proposal.*]

16. The earlier proposed paragraph 4 of Article 6 in the Second Working Draft was removed in the Beijing Draft in order to ensure that the objective recognized in the third and fifth recital of the preamble of the Beijing Draft is achieved that all remedies to challenge the validity of the Judicial Sale are channelled towards the competent Court in the State where the Judicial Sale took place.

Article 7 Recognition of Judicial Sale

[*16. In light of the abovementioned suggestion and a number of other proposals regarding Recognition, now Article 7 consists of 5 paragraphs, each deals with a specific rule which should be followed in Recognition of a foreign Judicial Sale.*

17. Paragraph 1 of Article 7 clarifies the specific effect that a Judicial Sale shall bring about, which may be briefed as (1) title to the ship is transferred to the Purchaser and all rights and interests of the previous Owners in the ship shall be extinguished, and (2) all registered Mortgages, "hypothèques" or Charges, maritime and other liens and of all encumbrances of whatsoever nature shall be extinguished.

18. Paragraph 2 of Article 7 affirms that as a general rule once a ship is sold by way of Judicial Sale, the ship shall not be subject to arrest for any claim arising prior to the Judicial Sale;

19. Paragraph 3 of Article 7 iterates the rule that only a Court of a State in which a Judicial Sale took place shall be accepted as a competent Court as having jurisdiction to entertain an action challenging the Judicial Sale.

20. Paragraph 4 of Article 7 restates the rule that any action challenging a Judicial Sale shall be dismissed upon production by a Purchaser or Subsequent Purchaser of a Certificate provided for in Article 5 of this Instrument or a duly certified copy thereof, unless existence of one of the circumstances provided for in Article 8 of this Instrument is proved.

21. Paragraph 5 of Article 7 emphasizes the rule that only an Interested Person as defined by this Instrument shall be entitled to take an action challenging a Judicial Sale before a competent Court and that no competent Court shall exercise its jurisdiction over any claim challenging a Judicial Sale unless it is made by an Interested Person as defined by this Instrument.]

17. Apart from some minor linguistic improvements and terminological adjustments the essence and tenor of paragraphs 1, 2 and 3 of Article 7 have remained unchanged in the Beijing Draft. In line with the clear provision in paragraph 3 of Article 7 in which all remedies against a Judicial Sale are channelled towards the competent Courts in the State where the Judicial Sale took place, not only paragraph 4 of Article 6, but also paragraph 4 of Article 7 in the Second Working Draft can be removed in the Beijing Draft.

18. After removal of paragraph 4 of Article 7 in the Second Draft, paragraph 5 of the Second Draft becomes paragraph 4 in the Beijing Draft. In addition, for the purpose of ensuring that necessary and sufficient protection are provided to *bona fide* Purchasers a sentence is added at the end of this paragraph with the following contents, i.e. "No remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any *bona fide* Purchaser of that Ship."

19. Based on the belief that claims if any challenging a Judicial Sale should be made as early as possible so as to avoid the purchaser's right and interest being jeopardized at a late stage, and that there is no need to put a time limit on the making of a request for suspension and refusal of Recognition, as such request would have to follow after an application for Recognition, so the provisions as regards the three-month time limit in paragraph 1 of Article 8 in the Second Draft with some necessary modification is moved into Article 7 of the Beijing Draft as paragraph 5.

20. Inserted a new paragraph 6 of Article 7, the Beijing Draft provides that a Certificate pursuant to Article 5 will have conclusive force of evidence that the Judicial Sale has taken place and has the legal effect provided in Article 4.

Article 8 Circumstances in which Recognition may be Refused or Suspended

[*22. It is correctly proposed that sub-paragraph (b) of paragraph 1 of Article 8 of the 1st Draft should be deleted, as it allows refusal of Recognition in case it is found the Judicial Sale was not accomplished in accordance with the law of the State in which the Judicial Sale took place or the provisions of this Instrument, which may be literally interpreted to mean even a very minor defect concerning the proceedings in relation to Judicial Sale may result in a full refusal of the Recognition. Bearing in mind the widely supported view that a Court of the State in which the Judicial Sale took place should be provided for by this Instrument to be the competent Court as having jurisdiction over any action challenging a Judicial Sale, now this sub-paragraph (b) is revised to be "(b) an action challenging the Judicial Sale is pending before a competent Court as provided for by paragraph 3 of Article 7.*

23. It is also proposed that it would be appropriate to prescribe a time limit in this Instrument for actions challenging Judicial Sales. For this reason, a subparagraph to that effect is inserted into paragraph 1 of Article 8, which provides for a one-year time limit not subject to any suspension, interruption or extension whatsoever.]

21. In the Beijing Draft significant changes in the title and contents of Article 8 were effected as compared with the Second Working Draft. Where previously Article 8 only knew of grounds for refusal, the new Article 8 creates the possibility of suspension of Recognition by a Court in a contracting State in the case where legal proceedings have been commenced to challenge a Judicial Sale before the competent Court in the State where the Judicial Sale occurred and that latter Court has suspended the legal effect of the Judicial Sale. Only after the competent Court in the State where the Judicial Sale took place has both initially suspended the effect of the Judicial Sale and subsequently nullified the Judicial Sale and its effects in a judgment or similar

judicial document no longer subject to appeal, Recognition in other Contracting States may be refused.

22. As correctly pointed out during the Beijing Conference that a non-authentic certificate means no certificate, the refusal ground (in Article 8 paragraph 1 (c) of Second Working Draft) based upon the non-authenticity of the Certificate produced by the (Subsequent) Purchaser is removed in Beijing Draft.

23. The other refusal grounds listed in Article 8 in the Second Working Draft, i.e. that at the time of the Judicial Sale the Ship was not physically within the jurisdiction of that State (Article 8 paragraph 1 (a)) and that Recognition of the Judicial Sale would be contrary to the public policy of that State Party (Article 8 paragraph 2) have remained but are now to be found in Article 8 paragraph 1, and paragraph 3 respectively.

Article 9 Relation with other International Instruments

24. As stated above already in the commentary in relation to Article 2, in an effort to somewhat extend the scope of application of the proposed convention, Article 9 on Restricted Recognition in the Second Working Draft was deleted. A new Article 9 Relation with other International Instruments was included in order to clarify that: "Nothing in the proposed convention shall derogate from any other basis for the Recognition of Judicial Sales under any bilateral or multilateral Convention, Instrument or agreement or principle of comity."

SALVAGE CONVENTION

REPORT ON DISCUSSIONS AND DECISIONS RELATED TO THE 1989 SALVAGE CONVENTION*

STUART HETHERINGTON** AND DIEGO CHAMI***

The meeting was presided over and introduced by Stuart Hetherington, Chairman of the International Working Group. Diego Chami from the Argentine NMLA was the rapporteur.

In his opening speech, Stuart Hetherington welcomed the representatives of the organisations that had consultative or observer status at the Conference, including Charles Hume representing the International Group of P&I Clubs, Kiran Khosla, representing the International Chamber of Shipping (ICS), Andreas Tsavliris, the President of the International Salvage Union (ISU) and Robert Wallis, the legal adviser to the ISU. He then referred to the history of the Review of the Salvage Convention which the CMI had undertaken at the request of the ISU in December 2008. He referred to the fact that there had been one International Sub-committee Meeting in 2010 and a Colloquium in Buenos Aires the same year when the issues which had been raised by the ISU had been debated. He also referred to the two questionnaires which had been sent to MLAs and the 26 responses which had been received to the first questionnaire.

Stuart Hetherington also referred to the fact that in 1995 the then Secretary-General of the IMO had written to Allan Philip, the then President of the CMI, shortly before the Salvage Convention came into force, in which the IMO had invited the CMI to study problems in the Convention that had been the subject of correspondence received by the IMO from Greenpeace International and the ISU. Those problems related to the definition of "damage to the environment" and its reference to "coastal or inland waters or areas adjacent thereto". As a result of the ambiguity as to what areas of waters were intended to be covered by that definition salvors were at that time being advised by the ISU to revert to using LOF80 where damaged and laden oil tankers were concerned. The second issue raised by that correspondence

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* 15th and 16th October 2012, Jade C Ballroom, Kempinski Hotel, Beijing

** Chairman, IWG

*** Rapporteur, IWG

related to the decisions of the courts in the United Kingdom in the "*Nagasaki Spirit*" relating to the definition of "fair rate" in Article 14. He then commented that somewhat prophetically, as some might say, the ISU, in writing to the IMO on 30 August 1995 said that those two issues "did not augur well for the new convention".

The Chairman also referred to the fact that those matters which had been raised by the IMO were discussed at the Centenary Conference of the CMI in 1997 and a preliminary report had been prepared by the late Eric Japikse. Reference was also made in his opening remarks to the fact that at least in so far as the Lloyds Open Form is concerned, Article 14 has become redundant and been replaced by the industry agreement known as SCOPIC. He referred to some recent changes which had been brought about by industry which goes some way to resolving a couple of the problems which the ISU has identified. They relate, firstly, to the publication of awards; clause 3 of LOF 2011 and clause 12 of the Lloyds Standard Salvage and Arbitration clause (LSSA) make it more likely that awards will be made public.

The second issue relates to container vessel cases. Clause 13 of the LSSA clauses now makes it possible for notices to be given to those who provide security in respect of cargo; where salvors reach agreement with 75% by value of salved cargo, that agreement is now binding on owners of all salved cargo (clause 14); and with the arbitrator's approval any salved cargo with a value below an agreed figure may be omitted from the salved fund where the costs of including such cargo is likely to be disproportionate to its liability for salvage (clause 15).

In his concluding remarks Stuart Hetherington referred to recent articles that had appeared in the shipping press reporting on the IUMI meeting in San Diego where speakers had referred to the fact that technology is overtaking the ability to salve, especially for container vessels and another speaker who proposed as a solution the requirement for specialist equipment to be available for wreck removal and salvage activities and that P&I Clubs invest in such equipment and position it across the globe for it to be chartered by salvors. The Chairman also referred to another speaker who had said that "the modern salvage industry is not geared to handle a big calamity".

Before the beginning of the discussions among the delegates, and in order to obtain the opinions of the shipowners, Protection and Indemnity Clubs and the salvors, the floor was given first to Robert Wallis, legal advisor of the ISU, then to Kiran Khosla from the ICS and finally to Charles Hume from the International Group of P & I Clubs.

Robert Wallis

Robert Wallis expressed his gratitude on behalf of the ISU to the CMI for having this review of the 1989 Salvage Convention on the agenda for this conference, to Stuart Hetherington for his thorough report on the International

Working Group's Review of the Convention and for allowing at least two days to have what, he hoped, would be a constructive debate on the ISU's proposals for change. He also thanked the Chinese delegation for hosting the 40th Conference in the splendid City of Beijing. He pointed out that also attending on behalf of the ISU was its President Andreas Tsavliris and Vice President Leendert Muller, who will take over as President in September 2013.

Mr. Wallis mentioned that the respective position papers of the ISU, International Group and ICS were all on their respective websites and on the CMI's website and that the Chairman would not wish them to be repeated in the 10 minute opening addresses.

He pointed out that there had also been a small avalanche of further papers published in the previous 10 days, but he wondered whether or not everyone had had the chance to read them.

He stated that he just wanted to make a few general points.

1. Motive for change?

He emphasized that the motive was not the greed of salvors just wanting more money, as it seemed to be inferred - which he stated was not helpful to the debate. He continued to state that salvage is a highly capital intensive business, so it is for ship owners/operators, and these are difficult times for most sectors of the shipping world.

However, Mr. Wallis pointed out that a salvor has a far more unpredictable revenue stream and, therefore, the question was posed as to how to plan its investment in equipment, much of which may never be used, but needs to be stored and maintained, which comes at a cost. He continued to say that the most successful companies tend to be those that have made money and put that back into their businesses. So, he continued to say, seeking to maximize revenue is not a crime. He asked whether everyone did not do this. Shipping, insurance and management companies, and even lawyers, do it as well.

He admitted to be stating the obvious, but he wished to forestall criticism of the salvage industry's motives.

2. Utilization of equipment

He continued stating that success in salvage is to maximize utilization of equipment and that this was clearly seen where SCOPIC in LOF cases was running over lengthy periods of time. However, he did not accept that fixed US$ tariff rates with a 25% uplift were necessarily generous and therefore profitable as had been said, unless there is lengthy utilization. The tariff rates were originally to be reviewed on an annual basis but have only been reviewed 3 times since 2000 when it was first introduced in LOF cases only. This has barely matched inflation over the last 12 years. Review is now to be every 3

years and a consumer price indexing will be produced at the next review in 2014. He welcomed this but said that it still applies only to equipment actually used and the period of utilization determines how profitable it really is.

He added that SCOPIC does not provide sufficient remuneration for the investment needed in the salvage industry and that it is a compensation regime only.

3. Operation of Articles 13 and 14.

He pointed out that the ISU did not believe that these had worked as intended by the authors of the 1989 Salvage Convention and certainly not since the "*Nagasaki Spirit*" decision in 1997. Following that decision and the subsequent agreement of SCOPIC in LOF cases, intended as an alternative, not a substitute, Article 14 in practice has shut down. The fear of high awards under Article 14 did not materialize before the "*Nagasaki Spirit*" case and the apparent problems in determining Article 14 claims after the "*Nagasaki Spirit*" were also greatly exaggerated.

If there is an effective shutting down of Article 14 claims, the only place under the Convention where a salvor's efforts in preventing or minimizing damage to the environment can be rewarded is under Article 13(1)(b), payable by ship and cargo underwriters, not by liability underwriters. This has created an imbalance for the last 12 years with property underwriters paying for liabilities they do not insure.

Therefore, the ISU was disappointed that property underwriters did not appear to be more supportive of their proposals and particularly disappointed by IUMI's recent decision to withdraw their earlier support for the ISU's proposals to remove Article 13(1)(b) and include that in a new Article 14 providing for an environmental award - payable by liability underwriters.

4. Priorities in salvage have changed.

Historically, these were to save and protect life, property and, maybe, the environment.

The priorities required of salvors have become life, then environment, followed by property. There is no question that environmental issues, often with coastal state intervention, increasingly dictate how salvage services are carried out, with the often unnecessary removal of bunkers.

5. LOF statistics.

LOF statistics continue to show the declining number of LOFs. The Conference meets to discuss the 1989 Salvage Convention, including the revenue stream intended under Articles 13 and 14 and who should be paying such revenue. Remuneration for salvage services should not be confused with remuneration from other sources such as SCOPIC, wreck removal and/or

pollution control. These are separate and often exceptional areas of remuneration but they do not arise from the Salvage Convention.

A salvor may well get a subsequent wreck removal case but this is not always the case, as such contracts invariably go out to what has become an extremely expensive tendering process for competing salvage companies and probably it is not a coincidence that the most successful salvage companies get the big wreck removal contracts.

He continued to state that the ISU is aware of the huge costs of wreck removal, sometimes made worse by coastal state intervention and environmental concerns (e.g. the "*Rena*" and "*Costa Concordia*") and that the sums paid by the International Group for these are creating concerns with the underwriters of their pool and reinsurance programmes. Adding potential environmental awards under a new Article 14 may not be attractive, but the imbalance created by the sole application of Article 13(1)(b) and the absence of Article 14 claims remains.

Tensions betweens the ISU and the International Group and ICS have become high and he hoped that those can be defused in Beijing. He stressed that after having made their way to this conference over the last 3 years, it would be a terribly wasted opportunity to do nothing with the '89 Convention.

He stated that we were 30 years on from the birth of this Convention and the ISU feels that it should be reformed. The ISU hopes everyone at the Conference will support its arguments for change as they had proposed or by appropriate compromise and amendment.

Finally, he mentioned that perhaps it would be helpful to quote Professor Selvig from his "Report on the Revisions of the Law and Salvage" when he stated:

"In the overall context of International Shipping, state organized machineries established at a national level cannot be regarded as a viable alternative to an internationally active private salvage industry".

Kiran Khosla

Kiran Khosla from the ICS addressed the floor and thanked the CMI for the opportunity to speak on the Salvage Convention review.

She began by saying that while the specific questions which would be addressed encompass the entire Salvage Convention, she would address the audience on the most significant ones. Those related to the proposals that the ISU had made for amendment of Articles 13 and 14, so as to allocate all liability for Environmental Salvage to shipowners and their liability underwriters.

She remembered having had the honour of addressing the CMI on the same subject in Buenos Aires in 2010 and those who attended such Seminar would have understood the strong opposition of shipowners to the proposals brought by the ISU. She referred to the history of the discussion which had

been going on for several years since 2006, through the Lloyds Salvage Group. Such discussions involved all four of the commercial parties concerned with salvage operations, shipowners, salvors, and property and liability insurers.

She described how, despite those extensive discussions, the parties had been unable to agree on a consensus. She pointed out that the primary problem being that the ISU had been unable to justify its proposal. The ISU had claimed that the new award:

1. Was necessary to properly finance the industry which had seen a reduction in salvage cases;
2. That it would improve salvage response; and
3. That it would result in costs savings to those paying for the salvage service.

She argued that actually, the first claim, that salvors were experiencing a loss of revenue was swiftly corrected by salvors themselves since this claim could not be supported when set against the actual amounts being earned. Furthermore, with regard to SCOPIC costs, cases in recent years, even aside from the much publicised "*Costa Concordia*", showed that SCOPIC liability often goes into the tens of millions of dollars. She also mentioned that as for Wreck Removal, recent cases such as the "*Napoli*", the "*Rena*", and others had seen costs going into the hundreds of millions of dollars. Healthy revenue streams to say the least, she added.

She continued, stating that the last of these direct meetings had taken place with ISU in mid-2009 but the information that was provided had been insufficient and did not answer all the questions raised by shipowners. She stated that the ICS had believed that the discussions in that forum would continue. Rather surprisingly, therefore, the next the ICS had heard was that ISU, having been unsuccessful in these direct discussions, had successfully approached the CMI with a request that it take the subject on.

So, she pointed out that we were at the CMI Conference, with a set of proposals for amendment of a very important Convention based on proposals largely from the ISU with little prior debate in this forum on the substance. She stressed that that was unfortunate since the fact of the proposals and the drafting exercise could lead one to believe that they are the result of careful debate and consensus and that all that was left to do is to consider the detail. She most emphatically pointed out that it was not the case.

She said that the proposals were far ranging and impacted on the very foundations of the Convention. They were not agreed by the shipowners and further, they were not supported by any party involved in salvage other than the salvors themselves.

On the substance of the proposal, she would just reiterate some fundamental points made in the ICS position paper:

The present Salvage Convention was agreed in 1989 with the primary and express objective of devising a means by which salvors would be

encouraged to come to the aid of casualties to also prevent damage to the environment as well as salving property. This was seen as necessary because the previous Salvage Convention of 1910 contained no such provision.

The initial drafting work incorporated the "Montreal Compromise" agreed at the CMI meeting in 1981. This was a package of carefully balanced and delicately negotiated measures, whereby shipowner and cargo interests agreed to increase their present liabilities for pollution prevention.

The 1989 Convention recognises the importance of salvage services undertaken for the protection of the environment. It then proceeds to accomplish this through establishing, first, in Article 8, a duty and liability on all parties to the salvage, i.e., owners, cargo and salvors to assist in and carry out the salvage with due care, and in so doing, to prevent or minimize damage to the environment.

Article 13 implements this intention:

- It provides for a reward which is modelled on the traditional salvage award;
- It is available only once the salvor has produced a useful result:
- It cannot exceed the salved value of the salved property;
- Its quantum is fixed with reference to the traditional list of factors; but to these traditional factors, Article 13(1)(b) adds "the skill and efforts of the salvors in preventing or minimizing damage to the environment", which courts must take into account as a criterion for enhancing, or decreasing the award.

The Article 13 award is paid by the property interests. This means that it is paid for by all property interests, cargo, freight and, significantly, the ship.

Article 14 on the other hand, signified a fundamental change to the traditional "no cure-no pay" salvage law principle in that:

- It provided for special compensation for providing services to prevent environmental damage but where the salvage award under Article 13 is inadequate to properly compensate;
- This compensation is based on salvors' expenses;
- The Special Compensation in Article 14 is paid by the liability insurers, in other words, on behalf of the ship *alone*.

SCOPIC

She continued to state that, as their position paper explained, after some years in operation, it became apparent that in practice the mechanism of Article 14 was cumbersome and contentious. These problems were resolved between the industry associations. The compromise that had emerged was the industry-agreed SCOPIC clause to be inserted in the LOF form and this had proved to be very popular with salvors.

- SCOPIC is an alternative mechanism to Article 14 for remunerating salvors for preventing or minimising damage to the environment;

- It is designed to be used in conjunction with LOF and can be invoked by the salvor at any time during the salvage operation;
- It contains agreed tariff rates, which are both profitable and purposely generous, for personnel, equipment and tugs;
- It did away with the geographic restriction that otherwise applies to the Convention.

The SCOPIC clause is rarely arbitrated. She believed that from the last set of statistics from ISU in 2010, there had only been about six or seven. That was a testament to its success, she added.

Article 13(1)(b) and Article 14 (amended contractually by SCOPIC) together represent the practical implementation of the overarching points of principle in Article 8, namely that all parties to the venture share an obligation towards avoiding environmental damage. Seen, in this context, they make perfect sense.

She continued stating that the ISU had commented on the alleged unfairness to property interests by reason of the salvage award having regard to environmental measures pursuant to Article 13(1)(b), and being paid for by all property interests even though it is not insured by them.

However, in fact, she stated that there were some very good, positive reasons for Article 13(1)(b) and why it had been accepted by the property underwriters and cargo interests in particular:

1. First, they recognised that some cargoes such as oil and dangerous goods carry a risk to the environment and there would be a cost benefit to them if their potential liability under the Fund Convention could be avoided, through salvors' efforts to avoid spillage;
2. They also recognised a benefit when salvors provide services which they would not or might not have undertaken or continued on "no cure no pay" terms. This is made very clear in an article by Mr Anthony Bessemer Clark who participated in the Salvage Convention discussions over 30 years ago. He notes that "in respect of all vessels, there was to be an obligation on the salvor to prevent/reduce pollution with the corresponding right to have such services regarded as salvage services for the purpose of an award. As for the cost of providing for the increased awards, the London market has agreed that these shall continue to be recoverable under the hull and cargo policies in the usual way, notwithstanding that they may have been increased to take account of the services rendered by the salvor in preventing the escape of oil from the vessel".
3. Especially in cases of laden oil tankers (and the same would be true for HNS), the cargo underwriters in particular benefit if the cargo is salved rather than ending up in the water/on the beach – that's why they accepted 13(1)(b).
4. It is therefore a somewhat simplistic argument that Article 13(1)(b) is for a liability that is not insured by the property underwriters and should rightly be paid by P&I only. The cargo property underwriters do benefit from the

salvors' efforts to prevent/minimise damage to the environment especially when a potentially polluting (and valuable) cargo is saved.

Finally, she added, the principle of shared responsibility reflects the same concepts in the public law Conventions of the CLC, the Fund Convention, and now the HNS Convention. These Conventions with their second tier of liability paid by cargo interests, recognise that all parties to the marine adventure share a responsibility for the environment.

So, what we have today is a system that rewards salvors for their efforts in saving property and provides an enhancement if they have taken steps to avoid damage to the environment.

Somewhat confusingly therefore, salvors also say that in today's marine and liability environment, they still need greater incentive to undertake salvage operations. The ISU has now therefore proposed that salvors should be entitled to an environmental salvage award, distinct from that which they earn for salving property, when they have carried out salvage operations in respect of a ship or cargo which has threatened damage to the environment. They have described this as a "merit-based" award for the steps they take to prevent damage to the environment.

Salvors, in their justification for the new award, have focused on the unfairness to the property underwriters in their obligation to pay for environmental measures through Article 13(1)(b), which they say should be transferred entirely to Article 14, to be paid by shipowners alone.

Shipowners have considered the proposal carefully and as far as they can see, the two proposals for Article 13(1)(b) and Article 14, would alter entirely the principles underlying the Salvage Convention as described earlier. The prime objective would no longer be to save property. The basis of the Article 14 award would be the amount of pollution that salvors prevented. This in itself would be based on a hypothetical assessment of the damage that has been prevented.

Salvors said that this assessment need be no different under what is already undertaken with the enhancement assessment under Article 13.

There is, however, a great difference between deciding the level of enhancement based on property which has a defined, ascertainable value, and the level of a wholly separate award based on what hypothetical outcome might have occurred if salvors had not taken preventative action. This would raise the bar significantly and the increased sums at stake would inevitably result in contentious expert evidence and speculative theorizing, much in the way that NRDA claims are assessed in the US.

In support of this view, the ICS had the benefit of a further authoritative opinion, which had been recently supplied to the CMI for distribution and she hoped that copies were available. This was the article, jointly written by Colin de La Rue and Charles Anderson, soon to be published in a legal journal. If there is any doubt that the proposals would not lead to increased salvage costs

through bigger awards and also lead to greater arbitration costs, the floor need only to refer to this article for an independent and authoritative counter-argument by legal experts familiar with pollution claims.

Finally, she thought the underwriters could make their own case should they wish to do so and in fact, the property underwriters confirmed, at the IUMI Conference last month, that they did not support the proposals because they feared this would lead to increased salvage expenditure.

Aside from these concerns, the ICS said that it was entirely right that property underwriters should contribute for measures taken to avoid damage to the environment, for the reasons she had already stated. Shipowners were strongly opposed to any proposal that would transfer all liability for the environment, even where this emanated from the nature of the cargo, to Owners, as was proposed.

What of SCOPIC in the new proposal?

The logic of pursuing Environmental Salvage is that Salvors ought to be willing to abandon the safety net that is SCOPIC in LOF, for a new reward system that requires them to demonstrate success. But it was not clear from the proposal as to whether salvors were also proposing that LOF should be amended to omit SCOPIC and replaced with the new Article 14 or whether they envisaged that both regimes could operate side by side for salvors to decide in each case which one best suited their purpose.

She stated that she could only say in that respect that SCOPIC was designed to address the difficulties in the present Article 14. If that was amended in the way proposed, it was likely that SCOPIC would be withdrawn from use, since it would serve no purpose in the new regime where salvors were given the opportunity to earn environmental salvage in addition to the Article 13 property award.

She concluded that salvors were unable to establish their case to shipowners and insurers in direct discussions during many meetings. Their decision to by-pass further debate, and to leap-frog to a proposal at CMI to amend the text of the Salvage Convention was unfortunate. She hoped that her presentation had illustrated exactly how much there was still to discuss before we could begin to commence a drafting exercise to implement proposals that would undermine the very heart of the Convention.

Charles Hume

Finally, Charles Hume from the International Group of P & I Clubs addressed the floor. He reminded the participants that we had been promised clarity and tangibility, improved casualty response and benefit for those paying; issues which, he stated, arise out of the minutes of a meeting between the industry players on 4 August 2008.

He continued saying that the ISU accepted at that meeting that if they could not deliver a proposal which would demonstrably improve casualty

response and confer benefit on those currently paying for casualty responses, then they saw no purpose in pursuing environmental salvage as an idea in any event.

After asking what was now proposed and whether they were kidding, he mentioned three quotes from the ISU position paper of the previous month:

"The ISU are not seeking a new or additional form of revenue...." "The amendments will not necessitate unravelling compromises agreed in the Convention...." "....the parties will not need to carry out any complicated analysis of the environmental damage avoided or minimised, or in respect of the benefits conferred"

He asked the floor, rhetorically, "Well really?" and stated that the motive indeed was more money and asked how this would square with the ISU's repeated refrain that the current regime provides them with only the 'bare minimum' and they must have more.

He also asked: How this would square with page 3 of their April paper and quoted: "The question arises should the Montreal compromise continue into the future? ISU would suggest that it should not do so for the following reasons..."

He also said that the ISU pointed to the opinion of Michael Howard QC in support. The previous Thursday the President of the ISU observed that we had not commented publicly on the opinion and he asked to be allowed to do so.

Michael Howard believed that it would be <u>possible</u> for experienced and competent arbitrators to reach an award but that would be qualified by a number of issues:

i) the arbitrator "is likely to have extensive evidence of potential cost and risk...";
ii) "It would require a whole new body of case law..." and
iii) "There would without a doubt normally be detailed evidence of risk evaluations of costs actually incurred and of the potential costs of clean up which were avoided".

Charles Hume continued, stating that anyone who had ever attempted to evaluate the effects of an oil spill on the marine ecosystem knows how difficult it is. Therefore, attempting to evaluate them when they have not in fact occurred, would no doubt involve the techniques which Michael Howard describes as "somewhat by guess and by God". Then he asked who wanted this and answered: only one industry player out of four but shipowners/property insurers/liability insurers opposed.

He identified the following which he considered were much better alternatives. He mentioned the SCOPIC clause, now having a 13 year track record of rewarding salvors with a 25% uplift on the tariff, and the Bunker Removal Clause (BRC) which addresses environmental and property underwriters' concerns. He wondered whether the 25% uplift of the SCOPIC

clause could really be described as a 'bare minimum' instead of on any view a healthy profit margin.

He informed the meeting that in the last two years $135 million was paid in SCOPIC alone and that the BRC was a new initiative still in gestation and he hoped that this clause would be reviewed positively by the ISU and adopted.

As regards the 1989 Salvage Convention he stated that Article 14 was flawed but industry had found a solution which works, i.e. the SCOPIC clause. He also stated that the ISU proposals would be even worse and that States had no interest in revision because the system worked for them.

He concluded that there was no public interest in revision because the current mechanisms work.

Discussion of ISU and Other Proposals for Reform of the Salvage Convention

Immediately after the opening speeches, the Chairman proposed that the meeting discuss the ISU amendments following the order of the 1989 Salvage Convention. Nevertheless, the French NMLA suggested beginning by the main topics, namely the proposed amendments of Articles 13 and 14 of the 1989 Salvage Convention. This proposal was supported by other delegations such as the Italian, the Dutch and Canadian NMLAs and therefore the agenda was modified and the discussions began with Articles 13 and 14.

1. *Salvage Convention - Articles 13 & 14:*

   Question: *Should Articles 13 and 14 be amended in accordance with the ISU's proposed amendments?*

   The amendment proposed by the ISU of Article 13 included the deletion of Article 13(1)(b) and consequential re-lettering of remaining subparagraphs and the addition of new Article 13 (1) (j) "any reward under the revised article 14".

   The proposed Article 14 read as follows:

   Article 14.1

   If the salvor has carried out salvage operations in respect of a vessel which by itself or its bunkers or its cargo threatened damage to the environment he shall in addition to the reward to which he may be entitled under article 13, be entitled to an environmental award. The environmental award shall be fixed with a view to encouraging the prevention and minimisation of damage to the environment whilst carrying out salvage operations, taking into account the following criteria without regard to the order in which they are presented below.

   (a) Any reward made under the revised article 13

   (b) The criteria set out in the revised article 13(1)(b) (c) (d) (e) (f) (g) (h) and (i)

   (c) The extent to which the salvor has prevented or minimised damage to

the environment and the resultant benefit conferred.

Article 14.2 - Any reward payable by the shipowner in respect of services to the environment, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed an amount equivalent to:

(a) in respect of a vessel of 20,000 gross tons or less, 'x' Special Drawing Rights

(b) for a vessel exceeding 20,000 gross tons, 'x' Special Drawing Rights, plus 'y' Special Drawing Rights for each ton in excess of 20,000, subject always to a maximum of 'z' Special Drawing Rights.

Article 14.3

For the avoidance of doubt, an environmental award shall be paid in addition to any liability the shipowner may have for damage caused to other parties.

Article 14.4

Any environmental award shall be paid by the shipowners.

Article 14.5

If the salvor has been negligent and has thereby failed to prevent or minimise damage to the environment, he may be deprived of the whole or part of any environmental award due under this article.

Article 14.6

Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

The French delegation mentioned that nowadays it is difficult to make the distinction between saving property from preventing damage to the environment. Salvage services start with the bunkers' removal, which not only saves the property but also prevents environmental damage and considers that in the 1981 Montreal Conference a very well balanced formula was achieved. The Italian delegation expressed the view that what is called "environmental salvage" can be found in the preventive measures that conventions such as the CLC 69/92 already have. In principle the Italian MLA was against the revision of Articles 13 and 14 because what is called "environmental salvage" would introduce changes that the 1989 Salvage Convention was not prepared for. Nevertheless, if a decision was made in order to amend those provisions, they were ready to discuss the wording of the new articles.

The Swedish delegation stated that the amendments to Articles 13 and 14 of the Salvage Convention proposed by the ISU would, if adopted, result in fundamental changes to very important provisions. That delegation drew attention to the fact that there were major differences of opinion between the industries concerned in respect of the issues in question. Reference was made to IMO Assembly Resolutions A.500(XII) and A.777(18) which stated that amendments to Conventions should only be considered if there was a clear and well-documented compelling need. In the view of that delegation it had not been demonstrated that these conditions were fulfilled as regards the

Salvage Convention. It was submitted that it was very unlikely that the IMO Legal Committee would accept to include a revision of the Salvage Convention on its work programme. For these reasons the Swedish delegation opposed any submission to IMO by CMI proposing a revision of the Salvage Convention. That delegation considered that the best way forward would be for the industries concerned to continue to work towards a practical solution to the issues raised by ISU in the form of a voluntary agreement acceptable to all of them. It was pointed out that the industries had in the past showed several times that they were able to find practical solutions to difficult problems, and reference was made to SCOPIC and STOPIA/TOPIA. As regards the suggestion made by the ISU that the proposed environmental award would be considered costs of preventive measures under the 1992 Civil Liability and Fund Conventions and therefore qualify for compensation under these Conventions, the Swedish delegation disagreed. That delegation pointed out that the concept of preventive measures in the 1992 Conventions only covered measures to prevent or minimize pollution damage as defined in the Conventions; since damage to the environment per se did not qualify for compensation under the Conventions, costs of measures to prevent such damage were not admissible for compensation either.

The Greek delegation stated that salvage covers saving goods and also preventing damage to the environment. Nevertheless, they were reluctant to use the 1989 Salvage Convention for preventing damage to the environment, an issue that should be addressed separately. The Australian & New Zealand MLA stated that their feeling was that the salvors are just requesting more money and that, if there was no empirical data to prove that an amendment of the 1989 Salvage Convention was needed (and that without such information) it was not wise to move forward and modify the Convention.

On the other hand, Malta was in favour of encouraging environmental salvage because of its geographical position in the middle of the Mediterranean, near the navigation routes and exposed to environmental damage; it therefore supported encouraging an amendment that would enable salvors to react in case of an emergency such as the amendments proposed to Articles 13 and 14 by the ISU. They continued saying that salvors were not happy with the present situation and it would be a shame to ignore their claim even beyond this Conference if the proposal was not approved. This position was shared by the Irish delegation. In a similar position, Brazil explained that they support the ISU proposal considering that while saving the vessel at the same time the shipowner s liability was prevented. Nevertheless, they also considered that the award might be borne by both the vessel and the other property saved.

The United Kingdom delegation agreed with the statement by the Swedish delegation that no compelling need was shown and since there was a lack of consensus they would not support the amendment.

The observer from the ISU (the President of the ISU) contested the allegation that salvors were seeking more money saying that that was not the issue at stake and that everybody in business, including the shipowners try to make as much money as possible. He stressed the need to replace equipment and stated that SCOPIC is not enough remuneration according to the 57 ISU members all over the world. He also informed that it was not possible to obtain figures about profits and such discussion was like trying to determine "how long is a piece of string". On the other hand, he stated that arbitrators were able to assess environmental salvage and that it was not accurate to say that it would be unfeasible or too expensive to do so. Salvors also mentioned that SCOPIC was just a compensation of expenses plus 25%, that was not enough profit considering the need to invest and to buy new equipment, tugs, etc.

The Canadian MLA asked if there was a need to introduce a change and they answered that they were not convinced of such need, and mentioned the difficulty in assessing the extent of the environmental damage prevented and therefore, the proposal was trying to assess something hypothetical, which was in their view not the way for going forward.

On the contrary, the South African delegation, although they were neither part of the CLC nor of the Fund conventions, stated that their country was exposed to serious pollution risks. They expressed the view that SCOPIC is not always available to be signed and they wished to support the amendment of Article 14.

The Dutch delegation mentioned that the salvors' situation was not clear and that if the situation was so bad they should not accept it and that discussions should continue within the industry without the CMI support, considering that there was no compelling need from governments for a change because the current system is working. The French delegation expressed the view that more data was needed and that with such figures to hand they would give their opinion.

The delegation of Japan stated that the proposal was subjective, complex and hypothetical and therefore, they did not support it.

The position of the German delegation was that as Articles 13 and 14 did not work, SCOPIC emerged as a compromise solution and a new compromise was needed before amending the convention.

The Finnish delegation was in favour of reaching a solution within the industry and the Norwegian delegation stated that as there was no consensus the amendment process should not continue.

Richard Shaw, as CMI delegate to the IMO's Legal Committee, mentioned that care for the environment is now a higher priority than in the 1980 s and that arbitrators will not have much difficulty in fixing the salvors environmental salvage. The "*Amoco Cadiz*" was a good example because had the captain signed an LOF without delay, the vessel would not have stranded

and millions in compensation would have been avoided. An arbitrator is capable of assessing such liability. Nevertheless, he mentioned that in salvage we face the same obstacles as were faced in Places of Refuge or in Off Shore Crafts and that we don t have the case of a compelling need for change. The delegation of Croatia was of the same position.

The moment of voting arrived and those against introducing changes were a clear majority (Australia & New Zealand, Canada, Finland, France, Germany, Greece, Italy, Netherlands, Norway, Turkey and Sweden) than those in favour (Belgium, Brazil, Malta, Ireland and South Africa).

At that point, the German delegation stated that as a majority of MLAs stated that there was no compelling need of change, the discussions of the rest of the amendments should not go forward. Other delegations such as the French and Irish delegations were in favour of continuing with the discussions and, therefore, the analysis of the rest of the agenda continued.

2. Salvage Convention - Article 20 Maritime Lien provides that:

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.

Question: *Should this provision be amended so that any proposal to introduce a new environmental salvage reward should be specifically referred to and identified as creating a maritime lien?*

Taking into account the decision taken regarding Articles 13 and 14, this issue was not proposed either for discussion or vote.

3. Salvage Convention – Article 1(d) Geographic scope of environmental damage. Article 1(d) of the Salvage Convention 1989 provides that:

Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

The main questions posed regarding the geographic scope in which the environmental damage should occur in order to be considered by the Convention were:

Questions:

(i) Do you consider that the words emphasized in the definition contained in Article 1 (d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

(ii) Alternatively, do you think words such as those used in the other Conventions which have been quoted (e.g. "wherever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1 (d) of the Salvage Convention?

A large majority of MLAs favoured the extension to territorial waters and to the exclusive economic zone in line with the existing international conventions, i.e. in territorial waters but also in the economic exclusive zone in accordance with the international law, or if a State has not established such a zone, in an area beyond and adjacent to the territorial sea of the State, determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breath of its territorial sea is measured.

The South African MLA supported the extension even to "wherever such may occur", which was also the ISU proposal. The Irish delegation suggested that a text such as the one in the HNS Convention should be adopted including the exclusive economic zone. According to Richard Shaw s view, Article 1(d) was ambiguous and drafted when UNCLOS had not been signed and adopted and was not in force and, therefore, Article 1(d) should be modified.

A first vote was in favor of deleting the present text (*in coastal or inland waters or areas adjacent thereto).* The MLAs of Argentina, Australia & New Zealand, Brazil, China, Finland, France, Ireland, Italy, Malta, South Africa and Turkey, voted in favor. The MLAs of Canada, Croatia, Greece, Japan, the Netherlands, Norway and Sweden, voted against.

The second vote regarding this issue had three options: i) the ISU proposal not to include any geographical limit, ii) to include *wherever such may occur* and iii) to limit it to the EEZ. The majority of MLAs (delegations of Canada, China, Finland, Germany, Greece, Ireland, Italy, Norway, and Sweden) voted for option iii) i.e. extending the geographical scope of environmental damage to the EEZ. Option i) was supported by the delegations of Australia & New Zealand, Belgium, Brazil, Denmark, France and Malta, and option ii) by the delegations of South Africa and Turkey.

The amendment which was approved reads as follows:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a Contracting State, and

(ii) in the exclusive economic zone *of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured."*

(iii) Should the word "substantial" in Article 1(d) be deleted or amended?

The delegation of Brazil mentioned that the word "substantial" was subjective and ambiguous and that it should be deleted. The Dutch delegation reminded the floor that the word "substantial" was included in the same

paragraph of Article 1(d), which included "major incidents".

On the other hand, the United Kingdom delegation expressed the opinion that there was no need to remove the word "substantial" and Richard Shaw mentioned that the oil from a drum leaking was not substantial or significant and should not be considered to trigger the special compensation of Article 14. The Swedish delegation also favored keeping the word substantial and the ISU proposed to replace it by the word significant. The large majority supported retaining the word "substantial". The delegations of Australia & New Zealand, Canada, Finland, France, Greece, Japan, Norway, United Kingdom voted in favour of retaining the word "substantial" while the delegations of Brazil and South Africa voted against.

(iv) Should the definition in Article 1(d) be extended to include as a major incident which gives rise to dangers to navigation, for example a loss of containers at sea?

The delegations of Ireland and Brazil expressed their view to consider the amendment but a large majority of MLAS voted against the amendment.

4. Salvage Convention – Article 5(3) Salvage by Public Authorities:

Article 5(3) in the Salvage Convention 1989 provides that:
"3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."

There were no views expressed that Article 5(3) should be subject to any change and that was the opinion of the floor.

5. Salvage Convention – 27. Article Publishing the awards:

Article 27 of the Salvage Convention 1989 provides that:
"States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases".
Question: *Should this provision be amended?*

Some MLA s, such as those of Denmark, Malta and Ireland, were in favour of encouraging the publication of awards unless there was opposition or a confidentiality clause. Ben Browne mentioned that the availability of awards in the Lloyd s website was based on subscription and were therefore not free. Finally a majority of MLA s (Canada, China, Croatia, France, Italy, Japan, Korea, the Netherlands, Norway, Sweden and Turkey) were in favour of introducing no change to Article 27. The delegations of Argentina, Brazil, Denmark, Germany, Greece, Ireland, Malta and South Africa voted in favour.

6. Salvage Convention - Article 16.2. Salvage of Persons:

Article 16(2) in the Salvage Convention 1989 provides that:
"(2) A salvor of human life who has taken part in the services rendered in the occasion of the accident giving rise to salvage is entitled

to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment."

Question*: Whether life salvage should be directed against the property rather than against the salvor and Article 16(2) amended in accordance with the ISU proposal:*

16.2. A salvor of human life, who has saved lives from a ship or property that was salved by another, shall be entitled to a fair reward, based on the criteria set out in article 13. Any such reward shall only be payable by the shipowner.

The delegations of Malta, Ireland, Brazil, Australia & New Zealand, Greece and Singapore among others, spoke in favor of the amendment. The delegations from the United Kingdom and the Netherlands expressed opposition to the proposal. The Canadian MLA stated that Article 13(1)(e) already includes "*the skill and efforts of the salvors in salving the vessel, other property and life*", as criteria for fixing the reward. Richard Shaw mentioned that it was not justified for the salvor of property to share with the salvor of life the award obtained for preventing or minimizing the damage to the environment as provided in Article 16(2). It was also stated that with the proposed amendment if lives are saved and the vessel lost, the life salvor might be entitled to a reward and the salvor of the vessel might not.

The delegation of Denmark pointed out that the present solution was to provide the life salvor a fair share of the salvage reward obtained by the property salvor.

Finally, the delegations of Japan, Croatia, Denmark, Canada, China, Netherlands, France, Finland, Norway, Korea, Turkey and Sweden were against introducing amendments to Article 16. The delegations of Brazil, Australia & New Zealand, Ireland, South Africa, Greece, Malta and Belgium voted in favour.

7. *Salvage Convention – Article 11. Cooperation:*

Article 11 of the Salvage Convention 1989 provides that:

"A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for cooperation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general".

Question: *Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003?*

Some MLAs, such as Ireland, were in favor of the amendment. On the

other hand, the delegations of Canada and Sweden stated that this would be changing Guidelines into hard law and therefore were against the amendment and Kiran Khosla reminded the floor that the European Union had passed a resolution on this issue. At the time of voting a large majority was against the amendment of Article 11.

10. Salvage Convention - Article 21. Duty to provide security

Article 21 of the Salvage Convention 1989 provides that:

1. Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.

2. Without prejudice to paragraph 1, the owner of the salved vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released. *If any such cargo is released without the cargo interest(s) having provided satisfactory security to the salvor, then the owner of the salved vessel shall be liable to provide such security to the salvor on behalf of the said cargo interest(s).*

3. The salved vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property.

Question: *Should this provision be amended in accordance with the ISU proposal (the italicised portion of Article 21 paragraph 2 above)?*

The Dutch and the Greek delegations expressed their opinion in favour of the amendment but, after a short discussion, the majority of the floor voted against the amendment proposal.

8. Salvage Convention: Article 13(2)

Article 13(2) of the Salvage Convention 1989 provides that:

"Payment of a reward fixed according to paragraph 1 should be made by all of the vessel and other property interests in proportion to their respective salved values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of the interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this Article shall prevent any right of defence."

Question: *Should this provision be amended to provide that in container ship cases the vessel only is responsible for the payment of claims (and therefore for the provision of security) subject to a right of recourse against the other interests for their respective shares?*

The Italian delegation expressed the view that this was a problem not only related to containership cases, but also to other large scale transport, and

therefore if the rule stated in Article 13(2) was to be changed, it should include other vessels such as ferries. It put forward a revised wording for consideration of the meeting.

Kiran Khosla from the ISC mentioned that even though she could understand the problem in containership cases, she was against the proposed change because all the parties should pay the reward in proportion to their respective salved values. Nevertheless, she mentioned that a commercial solution should be reached without disturbing the salvage principles and in addition she mentioned that an insurance policy covering this risk was available in the market.

It was also said that the present system should not be changed only because the salvor could not obtain security. Such change would increase the shipowner's exposure and that was considered to be unfair. It was asked why the shipowner should be liable for the salvage of the cargo, whose value he might not know and from whom he received no instructions. The Dutch MLA argued that the shipowner should be liable for the cargo only in case he did not use his best endeavours to ensure that the cargo provide satisfactory security according to Article 21(2). The Canadian MLA pointed out that the proposed amendment was not feasible, considering that there were separate liens over the vessel and the cargo, and that the vessel has no lien over the cargo in case the shipowner paid the cargo share of the salvage reward and therefore, that delegation was against the amendment. The Argentine delegation also expressed its view against the amendment of Article 13(2), considering that it would imply placing a heavy burden on shipowners, and this was supported by the Croatian MLA.

The Italian MLA, which made the amendment proposal, expressed the view that the objections were expected and that the argument that such a change would disrupt the salvage principles, was not necessarily true. This solution was enacted in some jurisdictions and moreover, the channelling of the salvage claim against one interest, was an option to State Parties as set forth in Article 13(2). There might be practical problems and the burden on shipowner might be heavier, but making the shipowner liable would be a solution in large containership cases.

After having heard some other opinions such as those of the US and the Turkish delegations, the issue was put to a vote and a large majority voted against it, with only the Italian delegation voting in its favour.

9. The Brice Protocol

Another issue put forward for debate by the Chairman was the salvage of underwater cultural heritage and the relationship between the Salvage Convention 1989 and the UNESCO Underwater Cultural Heritage Convention.

The Chairman referred to John Kimball's role for the CMI in monitoring

this Convention and the discussions at earlier CMI meetings where the Brice Protocol had been debated. (The late Geoffrey Brice QC had prepared a draft Protocol to the Salvage Convention which was discussed by CMI at its Conference in Singapore in 2001).

The Chairman referred to Article 4 of the UCH Convention which sets the following three requirements for the activity to be considered as salvage. The services should: i) be authorized by the competent authorities; ii) be carried out in full conformity with the UCH Convention and iii) ensure that any recovery of the underwater cultural heritage achieves its maximum protection.

In addition, he referred to Article 30(d) of the 1989 Salvage Convention which enables any State to reserve the right not to apply the provisions of the Convention when the property involved is maritime cultural property of prehistoric, archaeological or historical interest and is situated on the sea-bed.

The Brice Protocol included the following proposed amendments to the text of the 1989 Salvage Convention:

Article 1, sub-paragraph (a) is replaced by the following:

(a) Salvage operation means any act or activity to assist a vessel or any other property (including services to or involving historic wreck) in danger of navigable waters or in any other waters whatsoever.

The following text is added as subparagraphs (c)-1 and (c)-2 in Article 1 of the Convention:

(c)-1 <u>Historic wreck</u> means a vessel or cargo or artefacts relating thereto including any remains of the same (whether submerged or embedded or not) of prehistoric, archaeological, historic or other significant cultural interest.

(c)-2 <u>Damage to the cultural heritage</u> means damage to historic wreck including damage or destruction at the salvage site of any significant information relating to the wreck or in its historical and cultural context.

The following text is added as subparagraph (k) in Article 13 paragraph 1 of the Convention:

(k) in the case of historic wreck, the extent to which the salvor has:

protected the same and consulted with, co-operated with and complied with the reasonable requirements of the appropriate scientific, archaeological and historical bodies and organizations (including complying with any widely accepted code of practice notified to and generally available at the offices of the Organization);

complied with the reasonable and lawful requirements of the governmental authorities having a clear and valid interest (for prehistoric, archaeological, historic or other significant cultural reasons) in the salvage operations and in the protection of the historic wreck or any part thereof; and

avoided damage to the cultural heritage."

Article 18 of the Convention is replaced by the following text:

Article 18

Effect of the Salvor's Misconduct

A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct. In the case of historic wreck misconduct includes a failure to comply with the requirements set out in Article 13 paragraph (k) or causing damage to the cultural heritage.

Article 30, paragraph 1(d) of the Convention is replaced by the following text:

(d) when the property involved is historic wreck and is wholly or in part in the territorial sea (including on or in the seabed or shoreline) or wholly or in part in inland waters (including the seabed and shoreline thereof).

Question: *Should the Brice Protocol be adopted to form part of the Salvage Convention?*

The South African MLA stated that the protection of the underwater cultural heritage should prevail, but such protection could not be considered as salvage, and therefore they would not support the Brice Protocol.

The French delegation was of the same opinion. The Brazilian MLA stated that they did not ratify either the 1989 Salvage Convention, or the Nairobi Wreck Removal Convention. Nevertheless, their opinion was that the historical wreck is no longer a vessel and therefore, services rendered in relation to a historical wreck were not salvage and, therefore, there was no reason to include the issue in a salvage convention. The Croatian MLA supported the statement made by the Brazilian delegation and added that it is the State who should deal with UCH and that it was not salvage. The Canadian MLA expressed similar views.

The Italian MLA pointed out the inconsistency of including the provisions set forth on the criteria to fix the reward in Article 13(k) and considering non compliance with such requirements as misconduct in Article 18.

Finally, the Brice Protocol was unanimously rejected by the meeting.

Conclusion:

The last topic discussed was the course of action to be taken, i.e. forwarding a draft Protocol to the Salvage Convention to the IMO (considering the IMO Resolutions A500 (XII) and A777 (18), or forwarding a report to the IMO identifying the issues which had been discussed and the conclusions reached, or considering the amendment of the LOF or simply stating that no further action should be taken.

The Canadian MLA stated that in case a letter was sent to the IMO, the

discussions that took place should not be included since the decision was not to amend the 1989 Salvage Convention but only to amend Article 1(d) related to the geographical scope of application. The United States MLA was of the same opinion. The Danish delegation stated that it was irrelevant to inform the IMO since almost no amendment had been recommended and therefore suggested not sending a letter to the IMO.

The delegation of Malta expressed the view that the minimum step forward should be to send a letter to the IMO explaining the issues discussed and they considered it was a "shame" not to do so, even if the general feeling was against the amendments put forward. The French delegation supported the proposal to send a letter to the IMO.

Delegations then voted on whether a letter should be sent to the IMO informing the discussions held together with the decisions to amend Article 1(d) in order to include the Economic Exclusive Zone and to encourage the industry to carry out further discussions to the matters put forward by the ISU in due course.

The following delegations voted in favour of sending such a letter to the IMO: Argentina, Brazil, China, France, Greece, UK, Italy, Ireland, Malta. The following delegations voted against sending such letter: Canada, the Netherlands, Finland, Croatia, Germany, USA, Norway and Japan. Therefore, the resolution was approved.

Plenary session Friday 15th October:

At the Plenary session Stuart Hetherington addressed the floor and proposed the following resolution on the work of the Conference in the Review of the 1989 Salvage Convention:

1. The Executive Council to forward the report of the Conference, which was tabled, to the IMO Legal Committee.
2. The CMI encourage the industry - salvors, shipowners and their insurers - to seek resolution of the issues discussed at the Conference in relation to environmental salvage, the growing issues of Places of Refuge and security for containership casualties; as well as other matters which were debated.

It was proposed that the reference to "the growing issues of Places of Refuge" should be deleted from the resolution. This was agreed by the Plenary.

ISU OPENING ADDRESS AND CLOSING COMMENTS

ROBERT WALLIS*

Opening address of the ISU - 15th October 2012 Beijing

I would like to express my thanks on behalf of the ISU to the CMI for having this review of the 1989 Salvage Convention on the agenda for this conference, to Stuart Hetherington for his thorough report on the International Working Group's Review of the Convention and for allowing at least two days to have what we hope will be a constructive debate on the ISU's proposal's for change. Our thanks also to the Chinese delegation for hosting this 40th Conference in the splendid City of Beijing.

Also attending on behalf of the ISU are our President Andreas Tsavliris and Vice President Leendert Muller who will take over as President in September 2013.

It has been informally agreed that I on behalf of the ISU will speak first as we are seeking changes to the Convention, Charles Hume will speak second on behalf of the International Group of P&I Clubs and Kiran Khosla will speak last on behalf of the International Chamber of Shipping.

The respective position papers of the ISU, International Group and International Chamber are all on our respective websites and on the CMI's website and Stuart does not wish us to repeat them in our 10 minute addresses from this podium.

There has also been a small avalanche of further papers published in the last 10 days, but I do not know if everyone will have had the chance to read them.

I just want to make a few general points.

1. Motive for change?

The motive is not the greed of salvors just wanting more money, as seems to be inferred - which is not helpful to this debate.

Salvage is a highly capital intensive business and yes, so it is for ship

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owners/operators and these are difficult times for most sectors of the shipping world.

However, a salvor has a far more unpredictable revenue stream and therefore how to plan their investment in equipment, much of which may never be used, but needs to be stored and maintained, which comes at a cost.

The most successful companies tend to be those that have made money and put that back into their businesses. So seeking to maximise revenue is not a crime. Doesn't everyone do this? - Shipping, insurance and management companies and even lawyers do it to!

I know I am stating the obvious, but can we please hear no more disparaging criticisms of the salvage industries motives.

2. Utilisation of equipment

The success in salvage is to maximise utilisation of equipment. That is clearly seen where SCOPIC in LOF cases is running over lengthy periods of time. However, we do not accept that fixed US$ tariff rates with a 25% uplift are necessarily generous and therefore profitable as is said, unless there is lengthy utilisation. The tariff rates were originally to be reviewed on an annual basis but have only been reviewed 3 times since 2000 when it was first introduced in LOF cases only. This has barely matched inflation over the last 12 years. Review is now to be every 3 years and a consumer price indexing will be produced at the next review in 2014. This is welcome but it still applies only to equipment actually used and the period of utilisation determines how profitable it really is.

SCOPIC does not provide sufficient remuneration for the investment needed in the salvage industry. It is a compensation regime only.

3. Operation of Articles 13 and 14.

We do not believe these have worked as intended by the authors of the 89 Convention and certainly not since the "*Nagasaki Spirit*" decision in 1997. Following that decision and the subsequent agreement of SCOPIC in LOF cases, intended as an alternative, not a substitute, Article 14 in practice has shut down.

The fear of high awards under Article 14 did not materialise before the "*Nagasaki Spirit*" case and the apparent problems in determining Art. 14 claims after the "*Nagasaki Spirit*" were also greatly exaggerated.

If there is an effective shutting down of Article 14 claims, the only place under the Convention where a salvor's efforts in preventing or minimising damage to the environment can be rewarded is under Article 13.1(b) payable by ship and cargo underwriters, not by liability underwriters. This has created an imbalance for the last 12 years with property underwriters paying for liabilities they do not insure.

Hence we are disappointed property underwriters do not appear to be more supportive of our proposals and particularly disappointed by IUMI's

recent decision to withdraw their earlier support for the ISU's proposals to remove Article 13.1(b) and include that in a new Article 14 providing for an environmental award - payable by liability underwriters.

4. Priorities in salvage have changed.

Historically these were to save and protect life, property and maybe the environment.

The priorities required of salvors have become life, the environment followed by property. There is no question that environmental issues, often with coastal state intervention, increasingly dictate how salvage services are carried out and the often unnecessary removal of bunkers.

5. LOF statistics.

These continue to show the declining number of LOFs.

This conference is to discuss the '89 Convention, including the revenue stream intended under Articles 13 and 14 and who should be paying such revenue. Remuneration for salvage services should not be confused with remuneration from other sources such as SCOPIC, wreck removal and/or pollution control. These are separate and often exceptional areas of remuneration but they do not arise from the Salvage Convention.

A salvor may well get a subsequent wreck removal case but this is not always the case as such contracts invariably go out to what has become an extremely expensive tendering process for competing salvage companies and probably no coincidence that the most successful salvage companies get the big wreck removal contracts.

We are aware of the huge costs of wreck removal, sometimes made worse by coastal state intervention and environmental concerns (e.g. the "*Rena*" and "*Costa Concordia*") and that the sums paid by the International Group for these are creating concerns with the underwriters of their pool and reinsurance programmes. Adding potential environmental awards under a new Article 14 may not be attractive, but the imbalance created by the sole application of Article 13.1.(b) and absence of Article 14 claims remains.

Tensions betweens the ISU and the International Group and ICS have become high and we hope these can be defused here.

Having made our way to this conference over the last 3 years, it would be a terribly wasted opportunity to do nothing with the '89 Convention.

We are 30 years on from the birth of this Convention and we feel it should be reformed. We hope everyone here will support our arguments for change as we have proposed or by appropriate compromise and amendment.

(Perhaps it is helpful to quote Professor Selvig from his "Report on the Revisions of the Law and Salvage"

"In the overall context of International Shipping, state organised machineries established at a national level cannot be regarded as a viable alternative to an internationally active private salvage industry".)

Closing Comments 16th October 2012

This conference was to consider the salvage industries proposals to amend the 89 Convention but much has been said about the separate issues of LOF, SCOPIC and wreck removal revenues. We are disappointed with the outcome as the salvage industry exists to support the misfortunes of the shipowning industry-vessels, cargo and pollutants and to prevent and minimised damage to the environment.

The majority of our 59 members in 32 countries do not have the opportunity to use LOF, so the better working of the 89 Convention remains of great relevance to our industry.

It does not appear that our motives for change are still understood but there has been support expressed for our concerns, that they be taken seriously and encouragement to find solutions within the industry. We will seek to do so.

The ISU will now take stock of all the issues raised and consider our options but a Convention solution is still needed and this topic should remain on the agenda.

We do wish for an appropriate report or resolution to be forwarded by the CMI to IMO as has been proposed by Malta. There remain other issues of increasing concern such as Places of Refuge following the "*Flaminia*" salvage and the provision of salvage security in large container ship cases.

Finally, I would like to express our thanks to the IWG and to Stuart Hetherington and Diego Chami for their hard work in bringing this matter to the CMI Conference and to those MLA's that have supported our position.

SALVAGE CONVENTION REVIEW SALVORS' PROPOSALS FOR ENVIRONMENTAL SALVAGE AWARD

KIRAN KHOSLA*

Good morning ladies and Gentlemen, and my thanks to the CMI for the opportunity to speak to you on the Salvage Convention review.

While the Specific Questions which you will address today encompass the entire Salvage Convention, I will address you on the most significant of these. These relate to the proposals made by ISU for amendment of Articles 13 and 14 to so as to allocate all liability for Environmental Salvage to shipowners and their liability underwriters.

I actually had the honour of addressing the CMI on this same subject in Buenos Aires in 2010 and those of you who attended that will have understood the strong opposition of shipowners to the proposals brought by the ISU. I referred to the history of this discussion which had been going on for several years since 2006, through the Lloyds Salvage Group. These discussions involved all four of the commercial parties concerned with salvage operations, shipowners, salvors, and property and liability insurers.

I described how, despite these extensive discussions, the parties were unable to agree on a consensus. The primary problem being that the ISU was unable to justify its proposal. The ISU had claimed that the new award:

1. Was necessary to properly finance the Industry which had seen a reduction in salvage cases; and
2. That it would improve salvage response; and
3. That it would result in costs savings to those paying for the salvage service.

Actually, the first claim, that salvors were experiencing a loss of revenue was swiftly corrected by salvors themselves since this claim could not be supported when set against the actual amounts being earned. Furthermore, with regard to SCOPIC costs, cases in recent years, even aside from the much publicised Costa Concordia, show that SCOPIC liability often goes into the tens of millions of dollars. As for Wreck removal, recent cases such as the

* International Chamber of Shipping.

Napoli, the Rena, and others have seen costs going in to the hundreds of millions of dollars. Healthy revenue streams to say the least.

The last of these direct meetings took place with ISU in mid-2009 but the information as was provided was insufficient and did not answer all our questions. We had believed that the discussions in this forum would continue. Rather surprisingly, therefore, the next we heard was that ISU, having been unsuccessful in these direct discussions, had successfully approached the CMI with a request that they take the subject on.

So, here we are, with a set of proposals for amendment of a very important Convention based on proposals largely from the ISU with little prior debate in this forum on the substance. This is unfortunate since the fact of the proposals and the drafting exercise could lead one to believe that they are the result of careful debate and consensus and that all that is left to do is to consider the detail. This is most emphatically not the case.

The proposals are far ranging and impact on the very foundations of the Convention. They are NOT agreed by the shipowners and further, they are not supported by any party involved in salvage other than the salvors themselves.

On the substance of the proposal, I would just reiterate some fundamental points made in the ICS position paper:

The present Salvage Convention was agreed in 1989 with the primary and express objective of devising a means by which salvors would be encouraged to come to the aid of casualties to also prevent damage to the environment as well as salving property. This was seen as necessary because the previous Salvage Convention of 1910 made no such provision.

The initial drafting work incorporated the "Montreal Compromise" agreed at the CMI meeting in 1981. This was a package of carefully balanced and delicately negotiated measures, whereby shipowner and cargo interests agreed to increase their present liabilities for pollution prevention.

The 1989 Convention recognises the importance of salvage services undertaken for the protection of the environment. It then proceeds to then accomplish this through establishing first in:

Article 8

A duty and liability on all parties to the salvage, i.e., owners, cargo and salvors to assist in and carry out the salvage with due care, and in so doing, to prevent or minimise damage to the environment.

Article 13 implements this intention:

- It provides for a reward which is modelled on the traditional salvage award;
- It is available only once the salvor has produced a useful result;
- It cannot exceed the salved value of the saved property;
- Its quantum is fixed with reference to the traditional list of factors;

But to these traditional factors, Article 13(1)(b) adds "the skill and efforts of the salvors in preventing or minimizing damage to the environment", which courts must take into account as a criterion for enhancing, or decreasing the award.

The Article 13 award is paid by the property interests. This means that it is paid for by all property interests, cargo, freight and, significantly, the ship. Article 14 on the other hand, signified a fundamental change to the traditional "no cure-no pay" salvage law principle in that:

- It provided for special compensation for providing services to prevent environmental damage but where the salvage award under Article 13 is inadequate to properly compensate;
- This compensation is based on salvors' expenses;
- The Special Compensation in Article 14 is paid by the liability insurers, in other words, the ship *alone*.

SCOPIC

As our position paper explains, after some years in operation, it became apparent that in practice the mechanism of Article 14 was cumbersome and contentious. These problems were resolved between the industry associations. The compromise that emerged was the industry-agreed SCOPIC clause to be inserted in the LOF form and this has proved to be very popular with salvors.

- SCOPIC is an alternative mechanism to Article 14 for remunerating salvors for preventing or minimising damage to the environment;
- It is designed to be used in conjunction with LOF and can be invoked by the salvor at any time during the salvage operation;
- It contains agreed tariff rates, which are both profitable and purposely generous, for personnel, equipment and tugs;
- It did away with the geographic restriction that otherwise applies to the Convention.

The SCOPIC clause is rarely arbitrated, I think from the last set of statistics from ISU in 2010, only about 6 or seven times. This is a testament to its success.

Article 13 1. (b). and Article 14 (amended contractually by SCOPIC) together represent the practical implementation of the overarching points of principle in Article 8, namely that all parties to the venture share an obligation towards avoiding environmental damage. Seen, in this context, they make perfect sense.

The ISU has commented on the unfairness to property interests by reason of the property award having regard to environmental measures through Article 13. 1.(b), paid for by all property interests even though it is not insured by them.

<u>However, in fact, there were some very good, positive reasons for Article 13(1)(b) and why it was accepted by the property underwriters and cargo interests in particular:</u>

1. First, they recognised that some cargoes such as oil and dangerous goods carry a risk to the environment and there would be a cost benefit to them if their potential liability under the Fund Convention could be avoided, through salvors' efforts to avoid spillage;
2. They also recognised a benefit when salvors provide services which they would not or might not have undertaken or continued on "no cure no pay" terms. This is made very clear in an article by Mr Anthony Bessemer Clark who participated in the Salvage Convention discussions over 30 years ago. He notes that "in respect of all vessels, there was to be an obligation on the salvor to prevent/reduce pollution with the corresponding right to have such services regarded as salvage services for the purpose of an award" "... As for the cost of providing for the increased awards, the London market has agreed that these shall continue to be recoverable under the hull and cargo policies in the usual way, notwithstanding that they may have been increased to take account of the services rendered by the salvor in preventing the escape of oil from the vessel".
3. Especially in cases of laden oil tankers (and same would be true for HNS), the cargo u/ws in particular benefit if the cargo is salved rather than ending up in the water/on the beach – that's why they accepted 13(1)(b).
4. It is therefore a somewhat simplistic argument that Article 13(1)(b) is for a liability that is not insured by the property u/ws and should rightly be paid by P&I only. The cargo property u/ws do benefit from the salvors' efforts to prevent/minimise damage to the environment especially when a potentially polluting (and v valuable) cargo is saved.

Finally, the principle of shared responsibility reflects the same concepts in the public law Conventions of the CLC, the Fund Convention, and now the HNS Convention. These Conventions with their second tier of liability paid by cargo interests, recognise that all parties to the marine adventure share a responsibility for the environment.

So, what we have today is a system that rewards salvors for their efforts in saving property and provides an enhancement if they have taken steps to avoid damage to the environment.

Somewhat confusingly therefore, salvors also say that in today's marine and liability environment, they still need greater incentive to undertake salvage operations. The ISU has now therefore proposed that salvors should be entitled to an environmental salvage award, distinct from that which they earn for salving property, when they have carried out salvage operations in respect of a ship or cargo which has threatened damage to the environment. They have described this as a "merit-based" award for the steps they take to prevent damage to the environment.

Salvors, in their justification for the new award, have focused on the

unfairness to the property underwriters in their obligation to pay for environmental measures through article 13.1. (b), which they say should be transferred entirely to Article 14, to be paid by shipowners alone.

Shipowners have considered the proposal carefully and as far as we can see, the two proposals for Article 13. 1. b and Article 14., would alter entirely the principles underlying the Salvage Convention as described earlier. The prime objective would no longer be to save property. The basis of the Article 14 award would be the amount of pollution that salvors prevented. This in itself would be based on a hypothetical assessment of the damage that has been prevented.

Salvors say that this assessment need be no different under what is already undertaken with the enhancement assessment under Article 13.

There is however a great difference between deciding the level of enhancement based on property which has a defined, ascertainable value, and the level of a wholly separate award based on what hypothetical outcome might have occurred if salvors had not taken preventative action. This would raise the bar significantly and the increased sums at stake would inevitably result in contentious expert evidence and speculative theorising much in the way that NRDA claims are assessed in the US.

In support of this view, we now have the benefit of a further authoritative opinion, which has been recently supplied to the CMI for distribution and I hope that copies are available today. This is the article, jointly written by Colin de La Rue and Charles Anderson, soon to be published in a legal journal. If there is any doubt that the proposals would not lead to increased salvage costs through bigger awards and also lead to greater arbitration costs, you need only to refer to this article for an independent and authoritative counter-argument by legal experts familiar with pollution claims.

Finally, I think the underwriters can make their own case should they wish to do so and in fact, the property underwriters confirmed just last month at the IUMI Conference last month, that they do not support the proposals because they fear this will lead to increased salvage expenditure.

Aside from these concerns, we say that it is entirely right that property underwriters should contribute for measures taken to avoid damage to the environment, for the reasons already stated. Shipowners are strongly opposed to any proposal that would transfer all liability for the environment even where this emanated from the nature of the cargo, to Owners as is now being proposed.

What of SCOPIC in this new proposal?

The logic of pursuing Environmental Salvage is that Salvors ought to be willing to abandon the safety net that is SCOPIC in LOF, for a new reward system that requires them to demonstrate success. But it is not clear from the proposal as to whether salvors are also proposing that LOF should be amended

to omit SCOPIC and replaced with the new Article 14 or whether they envisage that both regimes can operate side by side for salvors to decide in each case which one best suits their purpose.

I can only say in this respect that SCOPIC was designed to address the difficulties in the present Article 14. If this is now amended in the way proposed, it is likely that SCOPIC will be withdrawn from use, since it would serve no purpose in the new regime where salvors are given the opportunity to earn ES in addition to the Article 13 property award.

Conclusion

Salvors were unable to establish their case to shipowners and insurers in direct discussions and during many meetings. Their decision to by-pass further debate, and to leap-frog to a proposal at CMI to amend the text of the Salvage Convention is unfortunate. I hope that this presentation has illustrated exactly how much there is still to discuss before we can begin to commence a drafting exercise to implement proposals that would undermine the very heart of the Convention.

ROTTERDAM RULES

THE ROTTERDAM RULES IN BEIJING*

Michael F. Sturley**

The 40th Conference of the Comité Maritime International (CMI), which was held in Beijing in October 2012, devoted a full day to the discussion of the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, popularly known as the "Rotterdam Rules."[1] After a short introduction to open the session, four panels conducted the day's work. Panel I updated the delegates on recent developments internationally, in various regions, and in specific countries. In Panel II, six speakers each presented a paper addressing a particular aspect of the Rotterdam Rules. Panel III focused on a dozen detailed questions presented by a complex hypothetical problem that has been prepared in advance and circulated to delegates. Finally, Panel IV answered a wide range of specific questions raised by the delegates.

Opening

The Rotterdam Rules session opened on Tuesday, 16 October, with a short welcome from CMI President Karl-Johan Gombrii. President Gombrii also read a message to the delegates from Renaud Sorieul, the Secretary of the United Nations Commission on International Trade Law (UNCITRAL). Mr. Sorieul noted that an UNCITRAL Working Group had drafted the Rotterdam Rules, based on the CMI's preliminary text, to harmonize and modernize the law of international carriage of goods by sea. He added that both developing and developed countries, as well as shipper and carrier nations, had indicated their acceptance of the convention, and he looked forward to further ratifications in the near future.

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* This paper was originally written for the *Droit Maritime Français* (*DMF*), which translated it into French and published it in *DMF* no. 744, February 2013, Special CMI-Beijing issue, p. 124.

** Fannie Coplin Regents Chair in Law, University of Texas at Austin. Prof. Sturley chaired the Rotterdam Rules session at the CMI's 40th Conference in Beijing.

1 General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (Dec. 11, 2008).

Panel I

The Panel I speakers updated delegates on recent developments concerning the Rotterdam Rules. Tomotaka Fujita (Japan) presented updated information on the international level. Six other speakers then reported developments in different countries or regions from around the world.

A. International Developments

The most significant international development involved two modest amendments to the text of the convention. After the U.N. General Assembly adopted the Rotterdam Rules in 2008, the UNCITRAL Secretariat discovered two editorial mistakes that had been made during the final drafting of articles 1(6) and 19(1)(b). Fortunately, article 79(2) of the Vienna Convention on the Law of Treaties provides a procedure to correct such mistakes. The Secretary-General of the United Nations invoked that procedure on 11 October 2012 (a few days before the Beijing Conference) to make the necessary corrections.[2]

Article 1(6) defines a "performing party" in part by reference to the types of activities that the person performs.[3] The UNCITRAL Working Group had intended to conform the article 1(6)(a) list of activities to the list of the carrier's obligations in article 13(1), which requires the carrier "properly and carefully" to "receive, load, handle, stow, carry, keep, care for, unload and deliver the goods." When that list was incorporated into article 1(6)(a), however, the word "keep" was accidentally overlooked. Article 1(6)(a) has therefore been corrected to recognize that a performing party includes someone "that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to" the "keeping" of the goods.[4]

Article 19 defines the liability of a "maritime performing party," such as a stevedore or terminal operator.[5] Under article 19(1)(b), the occurrence that causes the loss, damage, or delay must take place during what may be described as the maritime performing party's period of responsibility. The

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[2] See Proposal of Corrections to the Original Text of the Convention, doc. no. CN.563.2012.TREATIES-XI-D-8 (Depositary Notification) (Oct. 11, 2012) (available at http://treaties.un.org/pages/CNs.aspx).

[3] See generally, e.g., Michael F. STURLEY, Tomotaka FUJITA & Gertjan VAN DER ZIEL, *The Rotterdam Rules: The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* 133-134 (2010).

[4] The corrected text of article 1(6)(a) provides as follows:

"Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, **keeping,** care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

The new language is indicated by **bold** text.

[5] See generally, e.g., STURLEY, FUJITA & VAN DER ZIEL, *supra* note 3, at 142-143.

intention was to impose two requirements. First, the relevant occurrence must happen during the "maritime" period,[6] *i.e.*, "the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship."[7] Second, that occurrence must happen on the maritime performing party's watch. This could be either "while the maritime performing party had custody of the goods,"[8] or, even without custody, while it participated in the process.[9]

During the Secretariat's editorial revision of the draft that the Working Group considered at its final session, roman numerals were added to article 19(1)(b) "for improved drafting."[10] The unintended consequence of that addition was to turn the two separate requirements into a single requirement that could be satisfied in one of three ways. Under the original text, any maritime performing party could have been held liable if an occurrence happened during the maritime period, or while the maritime performing party in question had custody of the goods, or while it was participating in the process. In other words, article 19(1)(b) could have been read to impose liability on a stevedore that loaded a vessel in Asia if the goods were subsequently damaged by a different stevedore while unloading the vessel in Le Havre because the occurrence would have happened during the maritime period. Article 19(1)(b) has therefore been corrected to restore the original understanding.[11]

The Depositary Notification established a 90-day window during which a signatory state may object to the proposed changes.[12] If no objection is received by 9 January 2013 — and no one expects an objection — then the proposed changes will take effect.[13]

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[6] Because the Rotterdam Rules apply during the entire period covered by the contract of carriage, they will often apply during the inland portion of a multimodal door-to-door shipment. See generally, e.g., STURLEY, FUJITA & VAN DER ZIEL, *supra* note 3, at 59-61.

[7] Rotterdam Rules art. 19(1)(b)(i).

[8] Rotterdam Rules art. 19(1)(b)(ii).

[9] Rotterdam Rules art. 19(1)(b)(iii).

[10] Draft convention on the carriage of goods [wholly or partly] [by sea], doc. no. A/CN.9/WG.III/WP.101, at 19 n. 40 (Nov. 14, 2007).

[11] The corrected text of article 19(1)(b) provides as follows:

The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship **and either** (ii) while it had custody of the goods or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

The new language is indicated by **bold** text.

[12] See Proposal of Corrections, *supra* note 2.

[13] See Vienna Convention on the Law of Treaties art. 79(2)(a).

B. National and Regional Developments

Six speakers reported on national and regional developments: Song Dihuang (China) discussed the situation in China; Michael Sturley (U.S.A.) reported on the progress toward ratification in the United States; Stephen Girvin (Singapore) covered other countries in the Asia-Pacific region; Gertjan van der Ziel (Netherlands) updated the delegates on the convention's status in Europe; José Vicente Guzman (Colombia) addressed the status in Central and South America; and Kofi Mbiah (Ghana) explained the situation in Africa.

Many countries have adopted a "wait and see" attitude, meaning that they are studying the Rotterdam Rules but postponing a decision on ratification until major trading nations have ratified the convention. Many countries, in all parts of the world, are apparently waiting to see what the United States, in particular, will do.

Prof. Sturley assured the delegates that the U.S. government remains committed to ratification. Although the process has taken longer than many had hoped, that should be viewed simply as evidence of the care with which the State Department is conducting the process. The correction of the drafting mistake in article 19(1)(b)[14] resolves what may have been the last significant problem, so there may well be some visible progress after 9 January.

In Europe, a number of nations are "waiting and seeing," but Denmark, Norway, and the Netherlands have all taken the political decision to ratify the Rotterdam Rules. Denmark and Norway are particularly advanced in the process, although each may postpone formal ratification until either the United States or other major trading nations in Europe have ratified. Of course Spain, on 19 January 2011, was the first nation to ratify the convention.

In Africa, Togo on 17 July 2012 became the second nation to ratify the convention. Moreover, CEMAC (communauté économique et monétaire des Etats d'Afrique centrale), consisting of Cameroon, Congo, Gabon, Equatorial Guinea, the Central African Republic, and Chad, incorporated the Rotterdam Rules into their community code on 22 July 2012, and it is now in force.

Panel II

Panel II was a traditional panel in which each of six speakers briefly presented a paper addressing a particular aspect of the Rotterdam Rules. The final versions of the papers are also being published in the CMI Yearbook.[15] For the moment, therefore, it is sufficient to note the speakers and the titles of their papers.

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[14] See supra notes 5-11 and accompanying text.

[15] See *infra* at pages 273-331.

Alexander von Ziegler (Switzerland) addressed "The Rotterdam Rules and the Underlying Sales Contract."

Andrew Bardot (United Kingdom) delivered a paper titled "The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea — The 'Rotterdam Rules' — Practical Implications For Carriers."

Si Yuzhuo (China) presented "An Analysis and Assessment of the Rotterdam Rules in China's Marine Industry."

José Vicente Guzman (Colombia) spoke on "The Limitation of Liability of the Carrier from an Allocation of Risks Point of View."

Zhang Yongjian (China) delivered a paper titled "On the International Transport Laws' Uniformity, Which the Rotterdam Rules Aim for."

Kofi Mbiah (Ghana) concluded with a paper titled "Updating the Rules on International Carriage of Goods by Sea: The Rotterdam Rules."

Panel III

For Panel III, Song Dihuang (China) and his colleagues prepared a complex hypothetical problem that raised a range of different issues. That hypothetical problem was distributed to the delegates for their reference. A panel — consisting of Stuart Beare (United Kingdom), Tomotaka Fujita (Japan), Stephen Girvin (Singapore), Gertjan van der Ziel (Netherlands), and Song Dihuang (China) — then answered a dozen detailed questions based on the hypothetical problem.

The first questions involved the identification of the parties to the transaction. Mr. Beare, Prof. Fujita, and Prof. Girvin resolved some "identity of carrier" problems,[16] while Mr. Song, Prof. van der Ziel, and Mr. Beare explained the concept of the "documentary shipper"[17] in the context of an FOB shipment.

Prof. Girvin addressed the situation in which a shipper is liable for the shipment of goods that become dangerous.[18] He compared the results under the Rotterdam Rules with the results under other international conventions.

Mr. Beare discussed the carrier's liabilities for cargo damage in the context of a grounding (thus raising the navigational fault exception from the Hague and Hague-Visby Rules,[19] which was omitted from the Rotterdam Rules[20]) and improper repairs during the voyage (thus raising the continuing due diligence requirement under the new convention[21]).

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16 See Rotterdam Rules arts. 1(5), 36(2)(B), 37.
17 See Rotterdam Rules arts. 1(9), 33.
18 See Rotterdam Rules art. 32.
19 See Hague-Visby Rules art. 4(2)(a).
20 Cf. Rotterdam Rules art. 17.
21 See Rotterdam Rules art. 14.

Prof. Fujita and Prof. van der Ziel then addressed some of the issues other than liability that are covered by the Rotterdam Rules but not by the prior maritime conventions, including the right of control,[22] the carrier's right to request instructions,[23] and delivery of the cargo.[24]

Finally, Prof. Fujita explained the operation of the jurisdiction chapter[25] in the context of a choice-of-court clause that purports to grant exclusive jurisdiction to a different court than the one in which the cargo claimant seeks to recover for its losses.

Panel IV

The Rotterdam Rules session concluded with a panel — consisting of Tomotaka Fujita (Japan), Gertjan van der Ziel (Netherlands), Si Yuzhuo (China), and Alexander von Ziegler (Switzerland) — that answered whatever questions the delegates wished to ask. Some of the questions were very specific, raising detailed issues about particular aspects of the Rotterdam Rules. Others were very broad and raised fundamental issues about the nature of the Rotterdam Rules. As an example of the former, one delegate asked about the ratification process in the United States and how quickly a U.S. ratification would take effect. Prof. Sturley, speaking from the chair, clarified the U.S. process and noted that by its terms[26] the Rotterdam Rules enter into force (for those countries that have ratified) approximately one year after the 20th country deposits its instrument of ratification with the United Nations.[27]

As an example of a broad question raising fundamental issues, one delegate asked whether the Rotterdam Rules were pro-carrier (as many consider the Hague-Visby Rules to be) or pro-cargo (as many consider the Hamburg Rules to be). Prof. von Ziegler, Prof. van der Ziel, and Prof. Sturley all expressed their views on that question. They observed that the Rotterdam Rules do not represent a "zero sum" game. The most important aspects of the new convention benefit both shippers and carriers. The entire industry will benefit from having a more modern regime that addresses the needs of the 21st century rather than a regime that corrects the problems of the 19th century. Both shippers and carriers will benefit from having a single legal regime that covers the entire period governed by the contract of carriage (whatever that contract may provide). The entire

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22 See Rotterdam Rules ch. 10.

23 See Rotterdam Rules art. 55.

24 See Rotterdam Rules ch. 9.

25 See Rotterdam Rules ch. 14.

26 See Rotterdam Rules art. 94(1).

27 Several of the more specific questions raised in Panel IV addressed issues that had been discussed in Panel III. For example, two delegates asked "identity of carrier" questions and one delegate asked a question about documentary shippers. Cf. *supra* notes 16-17 and accompanying text.

industry will become more efficient with a legal regime that facilitates the development of electronic commerce. Uniformity, certainty, and predictability are important to everyone in the industry.

Looking at the nations that have already signed the Rotterdam Rules, the list offers overwhelming evidence that the new regime does not favor either carriers or cargo to the detriment of the other. Mr. Sorieul, the UNCITRAL Secretary, made exactly this point in his message to the delegates at the beginning of the session, and it is easily verified. Denmark and Greece were the two nations that most strongly and consistently supported carriers' interests during the UNCITRAL negotiation, and they both signed the convention on the first possible day. As a group, the African countries were consistently the strongest advocates of cargo interests during the negotiation, and seven of them signed the convention in Rotterdam. (Five more African countries have since signed, and Togo has already ratified.) This unprecedented support from across the spectrum demonstrates that the Rotterdam Rules are both pro-carrier and pro-cargo.

Conclusion

The Rotterdam Rules session at the CMI's Beijing Conference did not call for any action on the part of the delegates. As the CMI has already endorsed the new convention,[28] there was no need for any votes to be taken. The session was instead designed to further the CMI's mission of educating the maritime community about important new developments in maritime law. At the end of the day, each country will decide independently, based on its unique national interests, whether to ratify the Rotterdam Rules. The CMI can simply provide information that will help each country to make a rational decision, and will help those who will be subject to the new regime to understand it when it enters into force.

Education is particularly important in the context of the Rotterdam Rules. The convention covers much more material than prior carriage conventions, and thus there is much that may be unfamiliar — even to experienced maritime lawyers. Mastering so much new information is not an easy task. Moreover, there has been a great deal of misunderstanding about the Rotterdam Rules.

A one-day session is not sufficient to convey all the information that is necessary fully to understand the Rotterdam Rules, but the CMI session in Beijing was a part of the process. Other conferences are being held throughout the world, many of which examine the new convention in even greater detail. Published sources are also readily available, and can convey more information than any conference. Although much still remains to be done, important progress is being made and will continue.

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[28] See CMI Yearbook 2009, 315.

ROTTERDAM RULES AND THE UNDERLYING SALES CONTRACT

ALEXANDER VON ZIEGLER*

I. Introduction

The complex background of the Rotterdam Rules can best be understood if one understands the long path of evolution from the Hague to Rotterdam, via Hamburg. More than a century ago and under pressure from some national US legislation (Harter Act 1893), the international community rushed to put together a harmonizing instrument that would restore unification to the field of a maritime carriage and transportation law. The form of that harmonization was first planned in the form of the 1921 Hague Rules, an entirely private document, which was thought to be introduced by the market in the form of a model bill of lading. As it became quite clear that only an international convention would be able to restore uniformity, the Brussels conference, in 1924, enacted the so-called Hague Rules, which soon became the general scheme for selected issues on carriage liability in the field of maritime transportation, despite the fact that the legislatory method of the Hague Rules was not perfect (the Rules were drafted in the form of a model bill of lading and not in the form of international legislation) and despite the fact that they were wrongly conceived to be a product of the shipping industry and their insurers. It is, however, a fact that all interested industries were part of the process, and that the Convention was one of the greatest success in the field of international maritime law.

The Hague Rules were the subject of a revision on selected issues in the form of the Hague Visby Rules of 1968. The 1968 revision was, however, not deemed by everyone to be a sufficient modernization of the Hague Rules, and ten years later the Hamburg Rules were established as a "counter-offer" for an international harmonization in this field. What followed was almost a trench war between the Hague Rules and the Hamburg Rules, between the "Haguers" and the "Hamburgers". The result of this polarization was that governments

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became virtually stalled as they could not move in either direction without facing violent lobby groups. The positions between the two groups froze, as did the chances of any further positive development on an international level.

Unfortunately, the answers to this fiasco were national "solo runs" by national legislators and, in reaction to this, a forceful international opposition against such national or regional initiatives developed. By approximately 1990 it was realized (at the Comité Maritime International and also at UNCITRAL) that the strongly polarized positions had led to an impasse. As the subject of the carrier's maritime liability still was in effect a political issue (despite the fact that I really cannot see much political relevance in such a subject) a "*deus ex machina*" was needed to reopen the discussion.

A new opportunity arose in the context of electronic commerce: When UNCITRAL's work on electronic data interchange (EDI) encountered particular problems in trying to translate the mechanisms of international trade on the basis of bills of lading into the electronic environment, some delegations had asked UNCITRAL to attempt to harmonize the way such transport documents function. This was because it was clear that no existing international maritime instrument was effectively dealing with the issues of transfer of rights and with the role of the bill of lading as a document of title. All of the existing international instruments were concentrating on the carrier's liability, but none would actually assist the international community in defining the exact mechanism that was needed to translate trade realities into an electronic environment. As the basic starting point of the architecture of the electronic environment was based on the "functional equivalent" principle, it became necessary to translate the mechanism on the functioning of the bills of lading and other transport documents in trade. But, thus far, there had been a lack of uniformity, since most of those issues had been left to national law. And indeed, many national laws would differ on important issues in this context.

When embarking on this new challenge it was soon clear that there was a need for a broader perspective. There was a case for a harmonizing process that would clarify how trade and transport operate (and interrelate) in an electronic environment; here was an opportunity to clarify this for the benefit of trade, whether in a traditional or in an electronic environment.

As UNCITRAL had realized that this was a highly practical issue that required close cooperation with the industry, it asked the Comité Maritime International (CMI) to coordinate, with a number of international organizations, a study on those issues and to come up with some proposals. In course of this, CMI was asked to draft a possible instrument to cover those issues. The idea was not to prepare a revision of the Hague or Hamburg Rules, but rather to seek a comprehensive legislation, which would also include liability issues, and would be aimed at the regulation of the entire contract of carriage by sea and the mechanisms by which the documents generated by this contract would operate, not just for the purposes of transportation, but, more importantly, for the

purposes of international overseas trade. In the first phase of this exercise, the liability issues were not at the forefront; from a political, practical, and also legal perspective it soon became clear that, when dealing with contractual aspects of transportation, this would automatically raise issues of the responsibility of the parties and subsequently also of their liability, if their responsibilities were not met.

During all the phases of the project the industries were closely integrated into the process. As always, in such projects, it is not easy to find volunteers from those industries to actively participate. However, on several levels, including the CMI level, and its national associations (for their national market) and during the UNCITRAL project, the representatives of several interest groups in national trade and maritime transport were able to represent their interests and introduce the particular issues that they wished to be covered in a future instrument. The CMI draft that was prepared by its Sub-Committee and submitted in December 2001 to UNCITRAL was therefore already a product of consultation between the industries and the national associations, members of CMI. It therefore already contained many compromises that were based on in-depth discussions between several Committees and Conferences of CMI. This working method allowed the subsequent discussion at UNCITRAL to be much more focused on trade realities, and pre-identified the main issues that needed further discussion and possible compromise.

While an enormous amount of work on many levels has gone into the Convention, as we will see today, all this effort could not, unfortunately, guarantee the product being perfect. Those of us that have been part of an international harmonizing process know that the goal of achieving a perfect international legislation is practically an utopian ideal as at all stages compromises need to be made that are not necessarily sensible or in line with a general structure or strategy of the product itself. This creates here and there the odd provision that can only be understood if one knows the background of the legislation process. However, having said that, it is my personal view that those issues which are not "perfect" have been kept to a minimum as the UNCITRAL Working Group III has over the years benefited from a very professional working spirit and was supported throughout by a number of excellent delegations, covering all regions of the globe.

II. Main features of the Rotterdam Rules in the context of the underlying sales transaction

As was explained earlier, the starting point of the project was to place the contract of carriage into its proper context within trade transactions. The trade transactions are the "raison d'être" of the shipping industry. This seems to be so self-evident that one tends to forget the starting point. But it is at the same time the starting point for any definition of the scope and the nature of an international legislation covering contracts for the carriage of goods by sea. This is especially

true since the maritime transportation and the movements of goods have become – in turn – the backbone of international trade. While trade is setting the need, maritime transport is actually delivering the tools to achieve the goals of trade: Global economic interaction and prosperity.

The basics for any international trade transaction are found in the underlying sales contract. The geographical distance between the places where the goods are located at the time of the sale, and the place to which the goods will have to be moved for the buyer, creates the necessity for the movement of the goods. The purpose – the "raison d'être" – of the shipping industry is to overcome this distance. Therefore, the prime purpose of the contract of carriage is to arrange for the save moment of the goods as part of the performance of the sales contract. The sales contract will define whether it is the seller or the buyer who will enter into the contract of carriage with the carrier (seller-CIF/CIP or buyer-FOB / FCA).

In a perfect world, the seller would like to receive the purchase price once he has delivered the goods. As delivery of the goods in an overseas sale usually occurs at the time of loading the goods onto the ship (e.g. for CIF and for FOB shipments), the seller would expect to receive the purchase price at this point. However, the buyer would like – again in a perfect world – to pay only if the goods are delivered in conformity with the sales contract and only after he has, himself, received the goods at destination. The gap between those two moments in times (and, in fact, also the gap between the interests of the two parties) is bridged by letter of credit facilities offered by the banks. The key moment for the L/C transaction is again the moment of the delivery of the goods from the seller to the buyer, which again is the time of the delivery of the goods to the carrier for transportation (FOB / FCA / CIF / CIP, etc.).

The key document in this broader context is, therefore, the transport document, not merely in its role in relation to the contract of carriage (receipt of the goods, etc), but, more importantly, as the key document for the contract of sale and the contract under which the letter of credit will be set up. Such a document proves (to the buyer) that the sold goods were indeed delivered as requested under the sales contract at loading port. The transport document therefore plays a key role in the sales contract. Thanks to the negotiability of the bill of lading, the trade partners can tender this key document to trade finance banks for the financing of the letter of credit facilities.

As the risk passes from the seller to the buyer at the beginning of transportation, and because the goods are only of value to the buyer if and when they have safely arrived at destination, marine cargo insurance is put into place to cover the risks inherent in the transportation and storage of goods during transit. The insured parties are, as a rule, the parties, "interested in the cargo", i.e. the parties involved in the underlying trade transaction.

All industries involved in such a trade transaction (traders, carriers, freight forwarders, banks and insurers), must, therefore, be interested in the framework

under which transportation is carried out. Until recently, legislators focused mainly on those aspects which concern the safe transportation of the goods themselves (questions of responsibility and liability). However, the trading industry (and the legislators who have to safeguard its interests) must, likewise be interested in all aspects of carriage, affecting not only the trade contract, but also all the other contracts linked with it.

Those inter-disciplinary interactions and interfaces are reinforced, when, as is standard in the commodity trade, the trade transaction involves a number of sales transactions between several sellers and buyers. In such a string sale, the first seller might sell on F-terms to a F-terms buyer. This first buyer, in turn, will sell the goods (now that he has paid for the transportation) on C-terms to a new buyer, who, in turn, could sell the goods again on C-terms to any third party. Here, it is the very same contract of carriage, and the very same transport document (bill of lading), that serves a number of very different sales transactions. All the various sales contracts, often involving different terms and based on different laws, must rely on that single contract of carriage and on the same transport documents which this single contract of carriage (and its multiple trade participants) generated. This reliance on the different aspects of the contract of carriage is passed on to the banks, which establish a separate letter of credit loop for each sales contract.

While in a string sale there are a number of contracts of sale, each with their own letter of credit loop, there is just one single contract of carriage which serves all the various trade transactions. One single set of transport documents will be used throughout the string sale, and just one insurance certificate issued under the marine insurance policy covering this entire transaction during the entire time span will offer risk coverage for whoever is ultimately concerned.

As I have already mentioned, this might be pleonastic for lawyers involved in international trade and transportation. However, this "trade holistic" perspective sets a totally different level of expectation for a new international legislation on the contract of carriage: The law covering the contract of carriage must properly safeguard the smooth performance of this complicated and fragile transaction, not just once a day, but a thousand times a day, three hundred sixty five times a year, year after year, as a stand-alone transaction or in string sales!

This explains why the new Convention has chosen to take a contractual approach (as opposed to a documentary approach). The Convention must cover the entire contract of carriage and must therefore extend its scope from a liability Convention to a Convention on the contract of carriage. The legislation must recognize the particularities of the contract of carriage and the transport documents in the context of international trade and must be able to work in an electronic trade environment, as well as in a traditional document environment, as applied in international trade.

If one takes a contractual approach, bearing in mind the fact that a huge amount of world trade is conducted door to door (container transportation), it is

only logical that the scope of a new Convention for the international contract of carriage of goods by sea should include door-to-door cover and should, therefore, be applicable not just to the maritime leg between "tackle and tackle" or between the two ports (as with the Hague and Hamburg Rules) but rather for the entire duration of custody of the goods by the carrier. This door-to-door approach brings along an extension of the scope of application and might end up being in conflict with land transportation conventions such as the CMR and COTIF. However, the extension of the scope from a purely maritime one to an entire contract "time scope" is essential and reflects trade reality today. The UNCTAD/ICC Rules, as well as the widely used FIATA bills of lading, already reflect the commercial need (expressed by the shippers under their international sales contract) to issue door-to-door documentation. Thus, as an extension of the rules and private instruments attempting to artificially achieve such door-to-door cover, the new Rotterdam Rules can now also offer a harmonizing instrument giving reliability and security to documents issued in such a door-to-door environment.

III. Selected features and innovations of the Rotterdam Rules addressing the interests of the parties to the sales contract

1. The Scope of Application

In the context of modern transportation (e.g. by containers) an supply chain management a CIP / CIF seller needs to provide to its customer a contract of carriage to the final (named) place / destination, irrespective of what land-transport preceded or followed the sea-leg. As a consequence, the contract requested by the sales contract must be door – to door and the transport document (often to be supplied to the L/C banks for payment of the sales price) will have to cover the entire transport, beyond the mere maritime leg.

In line with the basic starting point of deciding to cover the entire period and scope of the contract of carriage rather than to limit the scope artificially to the purely maritime section or to the transportation phase, the scope of application is now triggered not merely by the "port triggers" as is the case in the Hague Rules and Hamburg Rules, but also by the places where the custody of the goods started (place of receipt) and where it ended (place of delivery).

Article 5 Rotterdam Rules therefore foresees four triggers, viz.:

(1) delivery of the goods from the shipper to the carrier for transportation (place of receipt),
(2) loading onto a vessel (which necessarily means a port),
(3) unloading the vessel (port of discharge)
(4) and finally the place of delivery at the end of the transportation undertaken by the carrier (place of delivery).

If any of those places is located in a contracting state of the Rotterdam Rules, the Convention will apply. This extended scope reflects the door-to-door scope of the new instrument.

2. Liability for on-Land Damages

Article 26 RR deals with the damages and losses that occur on land. Where loss or damages (or circumstances causing a delay) occur solely before loading the goods onto the ship or solely after their discharge from the ship, the Rotterdam Rules will not prevail over another International Instrument (e.g. the CMR), so long as such another Convention would have applied to those land operations if the shipper had made a separate and direct contract and to the extent that such another Convention provides for liability and a limitation in a mandatory manner. This limited network system goes further than many existing comparable system as here a fiction is introduced, namely that the regime applies as if the shipper had chosen a purely land-based form of transportation and not – as in reality – a single and uninterrupted door-to-door transport contract. The shipper thereby gains two advantages: firstly, contracting in his interest for a single transport contract and receiving a single transport document covering the entire transport chain, and then, at the same time, being able to rely on a possibly better liability system than if the shipper had contracted separate and different contracts (and received a number of different transport documents) for each leg – the "have your cake and eat it" idea.

I would like to dispute the assumption that such land Conventions are automatically better than the Rotterdam Rules. The reference to the difference between 3 and 8,66 SDR for the calculation of the limitation level is much too simplistic, and is wrong for most of the typical door-to-door forms of transportation for which Article 26 RR will apply: For most, the limitation level under the Rotterdam Rules will be much higher than the CMR levels, just because of the application of the per package limitation and the container clause!

It is clear that, based on the general rules and principles of the distribution of the burden of proof, the application of Article 26 and that of any land Convention will be on the party claiming that benefit, i.e. most of the time on the cargo claimant. However, as mentioned above, the privilege for shippers (fought for by shippers during the drafting of the Convention) may now favor carriers whenever the CMR kilogram limits are lower than the package limits of the Rotterdam Rules.

As Article RR 26 RR operates *ex lege*, Courts will have to apply the land-based limits whenever it becomes clear from the facts that the damage occurred on land – irrespective whether cargo interests plead such an application or not.

Depending on the legal position relating to the application of the CMR in door-to-door operations, this result is, however, inevitable due to the double mandatory nature of the CMR.

3. Liability of the Shipper

The Rotterdam Rules are a Convention on the contract of carriage. It is therefore only logical that they include rules on the obligations and liabilities of the shipper. It is, however, often forgotten that both the Hague and the Hamburg Rules also had strict rules for the liability of the shipper, and that much of today's

excitement about this Chapter of the Rotterdam Rules overlooks the fact that most of these principles have existed since long before the Rotterdam Rules.

The most important clarification made by the Rotterdam Rules are the provisions that state that the cargo interests (shippers and consignees) are responsible for delivering the cargo fit for its intended transportation (Article 27 RR) and for later subsequently accepting receipt of the goods at destination (Article 43 RR). Those obligations of the shipper are in line with the seller's obligation under CISG and INCOTERMS to deliver the goods fit for the intended transport (Article 35 (1) CISG and A9 F- and C- Clauses of INCOTERMS) as well as with the buyer's obligation to accept the goods sold to him pursuant to Article 53 / Article 60 CISG.

Furthermore, as a consequence of the cargo interest's duty to provide the goods fit for shipment, the shipper must also provide all important information relating to the handling and transportation of the goods (Article 29 RR), as well as for the establishment of transport documents (Article 31 RR). If those responsibilities are not properly carried out, the shippers will be liable (Article 30 RR). For any breach of the shippers' obligation to provide contract particulars the shippers will have to indemnify the carriers against loss or damage resulting from such breach.

The most important responsibilities of the shipper relate to the shipment of dangerous cargoes: Here, the shipper must provide the necessary information on the dangerous nature of the cargo and must ensure its proper marking. Any breach of such responsibilities will result in a strict liability and an indemnity.

Of greater interest is the fact that the documentary shipper (e.g. the FOB seller that requests that the bill of lading names him as shipper) will be treated as shipper for the purpose of this Chapter. Such an FOB-shipper will assume the same responsibilities as the contractual shipper (e.g. the FOB buyer) (Article 33 RR).

4. Transport Documents

The modernization of the law for the carriage of goods by sea brings along the necessity to adapt the law to the different variants of transport documents which the international trade has produced. It may be mentioned here that all of those variants respond to a need of the trade (i.e. the sales parties), a fact which underlines the interdependence of the sales and transport contract regimes.

For the purpose of the scope of this paper I will restrict myself to listing for you the major types of document that the Convention will now deal with:

– *Negotiable Transport Documents (the traditional Bills of Lading):* These form the core of the provisions that relate to transport documents, and also to the way they are used to control the goods in transit and to transfer rights.
– *Door to door Bills of Lading:* By the mere scope of application it is now clarified that such door-to-door B/L, very often used in the last 30 years in form of NVOCC-B/L, are proper bills of lading, eliminating any remaining doubts that may have existed regarding the legal nature of FIATA B/L or

similar documents (while the goods were on land).

– *Straight Bill of Lading:* Much uncertainty arose in the past around bills of lading that were issued in favor of a named consignee and were not marked "to order". Their function and value were judged differently depending on the jurisdiction in which they were treated. Now, at least some aspects of such documents have been clarified.
– *Non-Negotiable Transport Documents /Sea Waybills:* Despite their treatment by the CMI Sea Waybill Rules, Sea Waybills are now part of the documentary and liability system of the Convention, as are the
– *Electronic "documents",* that are generated within the scope of this Convention.

The innovation, however, is not so much the broadening of the scope of the different documents, but more the clarifications introduced in relation to the documents, notably their role in the supervision and delivery of goods and their value to third parties relying on their content. From those clarifications that figure in the chapter on Transport Documents (Chapter 8), let me list just three here:

– *Identity of Carrier:* Until now, it was very unsatisfactory that a carrier could state in its transport document that it was acting merely as an agent, basically leaving it up to the cargo claimant to find a proper defendant for its cargo claim, within the current short limitation period of one year. Now it has been made clear that whenever it is not obvious from the transport document who the carrier is, then the cargo claimant may sue the registered owner, who in turn will have to work out, among the different layers of contracts and charter parties, who should be made internally responsible for that cargo. For the shipper and the consignee, this will no longer be their problem (Article 37 RR). In addition, the fact that liability is vested with the registered ship-owner may well facilitate an arrest of the vessel as security for the cargo claim.
– Of course there are rules on the *evidentiary value of transport documents* (Article 41 RR). Now that all types of transport document are used, the rules on their evidentiary value are adapted to each of those documents:
    - B/L (conclusive evidence)
    - Sea waybills (*prima facie* evidence)
    - Straight B/L (conclusive evidence)

A minor issue that has been introduced is the clarification in the Rotterdam Rules that the effect of a *"Freight Prepaid"* Clause in a negotiable transport document is such that a third party may conclusively rely on the fact that the freight for the cargo has been fully paid (Article 42 RR).

5. Rights and Obligations of the Parties at Destination

The Rotterdam Rules – surprisingly – cover for the first time in the history of harmonization of international transport law the rights and obligations of both cargo interest and carrier at destination.

Often is said by critics of the Rotterdam Rules that this part is too complex, or should not have been included, or does not correspond to any given national law. Now, nobody should forget why this Chapter was added and what purpose the new Convention aims to fulfill. In a piece of legislation that has to cover the contract and its performance – as embedded in the greater context of international trade –, it is only logical that it should properly address the fulfillment of the contract at destination, and not only in a limited way, or limited to issues of liability, as are the existing transport Conventions. This Chapter of the Rotterdam Rules contains a number of very important principles, some of which mirror current trade practice, others of which attempt to solve some anomalies that the current trade practices have generated. These principles are based on trade usage, but of course may sometimes derive from principles of national law, or, in light of their position in trade, might require a solution that has not yet been offered by national legislation.

Here a list of the main issues covered by the Rotterdam Rules:

– *Consignee's right to request delivery of the goods*: The trade practice and the principle embodied in most national laws that one original copy of the bills of lading issued for the cargo must be produced and surrendered when requesting the delivery of goods is now stated in Article 47 (1) (c) RR. The negotiable transport document, therefore, enjoys its traditional role as the key to the cargo, a principle that is so important to trade and trade finance.
– *Carrier's right to request delivery by the consignee:* A carrier whose vessel arrives at destination must anticipate that the cargo will be taken by the receivers and not just left in the custody of the carrier. Enormous costs are involved for a vessel while it waits for the consignees to collect their cargo, an attitude of receivers that most of the time has nothing to do with the carrier, but rather with issues of cargo quality under the sales contract, rejection of goods under the sales contract, lack or loss of transport documents. Very much like Articles 53 and 60 CISG, which requires the buyer to accept the purchased goods, the Rotterdam Rules now require from the cargo interests to take over the cargo at destination (Article 42 RR). Not to do so is a breach of the contract, with all its consequences.
– *The rights of the carrier when the cargo cannot be delivered at destination:* Whenever the cargo cannot be duly delivered at destination, the carrier has a number of rights (but also responsibilities) to act and care for the cargo. Those rights are not new as such, as many national laws provide for them, but the pattern has now been harmonized internationally (Article 48 RR). Once the carrier has issued sufficient advanced notice, and where all other prerequisites have been met, the carrier may act to deal with the cargo, in extreme cases selling or destroying the goods pursuant to the law or regulations of the place where the goods are located at the time.
– *Delivery when Bills of Lading are not available:* Those of us who deal with shipping and trade recognize the issues associated with delivery of cargo

without the production of bills of lading. We know that, again and again, the carrier is trapped in an uncomfortable situation for which he is not in the least responsible. In a situation where the trade chain has somehow blocked or stopped the transfer of the bill of lading in time to the receiver, as the B/L is still lying somewhere on a bank's desk for security of their deferred payment trade finance instrument under an L/C, the trade expects the carrier to deliver without the production of the B/L; at the same time, however, it requests the law to elevate the B/L's status to that of an almost holy document that cannot be touched. The carrier will be requested to deliver, in violation of the law, and will in turn request the traders to issue a Letter of Indemnity (LoI) often signed by a bank. This is a situation that shows a common schizophrenic streak in trade: Relying on the strict application of a set of rules, but very quickly, and with great creativity, overriding those very rules, whenever obstacles arise as a result of the rules it has itself created. Be that as it may, this is not a problem of the contract of carriage, but of trade and the way it is financed; it is not a problem the carrier should suffer for, but one that should eventually be solved by trade itself and its L/C banks. This is why the Rotterdam Rules, in their attempt to embody the contract of carriage into the trade transaction – but only as far as necessary – make it an option for the contracting parties, the carrier and the shipper, to expressly state in the negotiable transport document that it is not necessary for the document to be surrendered at destination (Article 48 (2) RR). If this option is chosen, the bill of lading has effectively lost its role as the key to the cargo, at least for the issue of delivery of the goods at destination. In such cases the complex and strange LoI practice could be eliminated. However, we all – I am sure – remain quite sceptical about whether the L/C banks would be happy to accept such documents. We will see. But, to be fair, the L/C banks currently already rely – and this for some time now – on something that is – at least for some commodity trades (e.g. the oil trade) – practically never used according to the original intention of the bill of lading as a key to the cargo, but rather accept a solution based on LoIs. As far as the Rotterdam Rules are concerned, at least the Convention has left this to the trade partners to decide and left them the possibility to choose a solution which does not involve the carrier.

– *Right of Retention:* The last issue I will cover might look insignificant, particularly when considering the provision of the Rotterdam Rules. This is the reference to rights of retention that the carrier has against the shippers and consignees for their outstanding freights and costs. Since the Rotterdam Rules have chosen to specify that the carrier has a mandatory duty to deliver at destination, the right of the carrier to refuse delivery so long as the outstanding freight debts have not been paid must be safeguarded. The Rotterdam Rules have opted not to spell out the extent and operation of such retention rights, but rather to refer to national laws

that provide such rights, and they make it clear that nothing in the Convention shall affect such rights and their enforcement (Article 49 RR).

6. Right of Control

One of the major issues for the drafting of the Rotterdam Rules was the introduction of provisions relating to the mechanisms as well as the rights and obligations of the parties to control the goods during transit. The background to this issue has several aspects, the most important one being the cargo interest's desire to hold onto the goods, as a matter of the sales contract, until the purchase price has been paid. As we know, there are many interested parties in international (maritime) trade, and these will change pursuant to their financing scheme through the channels of the respective L/C loops for each trading portion of the transaction. As the carrier is entirely outside this loop, it is of utmost importance, especially in the maritime trade, to clarify the issues that arise when cargo parties would like to enforce their rights under the trade contracts by controlling the goods and instructing the carrier. Thus, the Rotterdam Rules must mirror the seller's right to control the goods in transit, a right under the Sales Contract that is often referred to as the "right of stoppage in transit", a principle which nowadays is embodied in the Vienna Sales Convention in Article 71 (2) CISG.

It is clear that the mechanisms will to a large extent depend on the type of transport document chosen by the parties to represent the contract of carriage. While the situation is very simple if no document has been issued or if Sea Waybills or other types of non-negotiable documents have been used, the situation totally changes whenever the carriers have issued negotiable documents. Here, the carrier cannot simply rely on his contractual partner for instructions; once the bills of lading have been handed over to the first holder (usually to the contractual shipper or to the FOB shipper), the instructions and the control must depend on the production of the full set of bills of lading. This is necessary in order to ensure that the real "owner" of the control over the goods – and only the real holder –, be it the unpaid shipper/ seller, the L/C banks, the intermediary buyer / on-seller (i.e. trader) or the ultimate receiver wanting to adapt the shipment terms to its logistical needs etc., is entitled to control the goods.

The Rotterdam Rules have now provided for such a system, one that fully mirrors the existing trade usage: the person wishing to control the goods vis à vis the carrier while the goods are in transit must present the full set of negotiable documents. It is surprising that such a provision has only now been introduced into the harmonized maritime law, and not earlier, given the critical importance of this principle for the performance and for the financing of the sales and trade contract! Many Transport Conventions for land or air transport have had provisions on this issue for much longer, despite the fact that such issues are much less important there than in the context of maritime trade.

The Rotterdam Rules have now established the rules for identifying the

party who will have the right of control; at the same time, the Rules differentiate between the rights of instruction that such a party has without the possibility of the carrier objecting, and others rights i.e. where the party is restricted to the right to negotiate different terms with the carrier.

The lacuna in my view is that the Convention limits its regulations to the negotiable documents and leaves the corresponding situation for non-negotiable documents up to national law; unfortunately, a compromise had to be made with the group representing delegations that wanted to keep the scope of the Convention as limited as possible and to leave many issues up to national law.

7. Transfer of Rights

When looking at this provision on transfer of rights in the new Convention one has to remember that it is exactly this issue that was the starting point of the UNCITRAL Project. Article 57 RR sets out the principle, quite familiar from our own national laws, for the mechanisms for the transfer of rights for the different types of negotiable transport document. Here again, the provisions were initially planned to be much more specific and were also to be used for non-negotiable documents. The Rotterdam Rules, as they stand today, have undergone the same restriction as with other issues covered by the Convention, and leave many issues to national law.

A provision that was successfully preserved is the important clarification that any holder that is not the shipper and that does not exercise any rights under the contract of carriage will not assume any liability under the contract of carriage, solely by virtue of being a holder (Article 58 (1) RR).

IV. How will the Rotterdam Rules affect international trade?

May I conclude by asking to what extent the Rotterdam Rules will or might affect international trade? The question of course must be answered by the relevant industries and market players. I think that such a discussion must cover at least two angles: First, a proper industry view (what is in it for us, what is bad for us?) and, second, what is our role in the mechanics of international trade and how will we have to adapt in order to improve the way matters are organized in future?

For all of us, once the 20 contracting states requested by the Convention have ratified the Rotterdam Rules, a time of adaptation will commence. There will be an “initial learning curve” (as with any other major development in legislation) and, at least for a period, a time of initial “co-existence” with the Hague Rules, the Hague Visby Rules and the different and various national and regional legislations that exist today. From an economical perspective this is a period of investment.

It is at this point that the drafters of the Rotterdam Rules will be tested. We will see then whether they have offered a workable and modernized liability system and have provided trade and its many different players with a system

based on which the different commercial activities can be undertaken with greater international clarity and predictability. To achieve a better solution than the Rotterdam Rules within the next century is a utopian idea. No clever national or regional legislator is capable of producing something that will really solve the issues on an international level. Contrary to the situation with land transportation, where regional solutions are realistically imaginable, the maritime door-to-door phenomenon is inherently international and global, and is undermined by any regional or national stand-alone solution. And here is the key point of the Rotterdam Rules: Not the deletion of error in navigation, not the volume contract and not the level of limitation, not the fact that the Rotterdam Rules could (or, in my view, must) replace the Hague Rules and its protocols, as well as the thousands of legislations existing today in this field, but rather that they successfully overcome the historical rivalry between Hague and Hamburg and prevent national interests or regional bodies from creating stand-alone solutions in the future. And believe me, nobody here, I am sure, would suggest that the process of such alternative national or regional legislation would guarantee a better legislation than the one created within the UN bodies in the form of the Rotterdam Rules.

To borrow from Shakespeare proverb, I would say that while it is true that the enemy of the good is the better, the situation today may look good for some, but the tendency towards national, regional or other alternative legislation will make the law deteriorate and atomize itself into different layers of competing and conflicting types of rules, legislation and court decision. Therefore, we need to accept the "good but not perfect" in order to not lose what is the most precious asset of international trade: International harmonization of the key issues, such as the contract of carriage with its vital functions in relation to the movement of goods and the production of vital documents that fuel the transaction and its financing. There is no alternative; it is not even a choice to remain passive: If we did, things would change anyway, arguably in directions none of us might take responsibility for.

ON THE INTERNATIONAL TRANSPORT LAWS' UNIFORMITY WHICH THE ROTTERDAM RULES AIMS FOR*

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Abstract: this article aims to show the deviation between what Rotterdam Rules aims for and what it actually achieves by reviewing different comments on it and concludes that the problems found with the Rules may prevent it from being implemented effectively and make it difficult to achieve the uniformity. The article recommends that the international society continue to explore means of achieving uniformed laws governing international carriage of goods, and also recommends that China should not consider to sign and accept the Rules at the moment.

Keywords: Rotterdam Rules; United Nations Convention on International Multimodal Transport of Goods, 1980; Uniformity of Transport Laws.

I. Preface

The carrier and the shipper are defined as two opposite yet dependent parties by laws for carriage of goods. On one hand, they are apparently contradictory due to differences in interests; on the other hand, they are dependent on each other for coexistance. The carrier's rights and obligations are different from the shipper's, but the carrier still cannot be totally independent on the shipper due to potential mutually beneficial opportunities. Studies of relevant laws and formulation of the laws shall aim for win-win situations for both parties instead of making their opposition look worse. The Rotterdam Rules, therefore, shall be viewed, analyzed and assessed with a non-bias angle.

China has almost participated in the whole formulation process of the Rotterdam Rules in order to achieve uniformed laws governing international

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carriage of goods. As one of the major nations in trading and shipping, China's attitude toward the convention may draw extensive attention from the world.

At present, discussions caused by the Rotterdam Rules are still ongoing. In general, academics said both good and bad things about it, whereas relevant industries care more about its consistency and clarity because both the carrier and the shipper are worried about all uncertainties that may occur. The results of present studies of the convention show that more practical experience shall be taken into consideration and combined into more profound and comprehensive research and studies. It's too early to estimate what impacts the Rotterdam Rules will bring to China's shipping and relevant trading industries in a complete and objective way. China should not consider to sign and accept the Rules at the moment. What's more essential and important to do is to keep maintaining, consolidating and improving China's current legal system.[1]

It is self-evident that all countries aim for maintaining national independence and seeking to maximize their vital interests when expressing their attitudes toward the convention. If we look at the Rotterdam rules from another point of view, that is to achieve uniformed laws governing international carriage of goods, all good and bad comments about the convention shall be respected, and experiences and lessons from formulation of the convention shall be discussed and debated for improvements.

II. Different Views on the Rotterdam Rules

The Rotterdam Rules, consisted of 18 chapters and 96 articles, are the richest, most comprehensive and complicated convention on international carriage of goods in the world. In order to cater to the development of international trade and transportation, the convention has made many innovative provisions, such as the application scope of the rules, electronic transport records, the rights of the controlling party, identification of the carrier, delivery of goods without bill of lading, volume contracts, re-allocation of the rights and obligations between shippers and carriers, new definition of some concepts, and so on. These new provisions have received extensive attention and hot discussions on the impacts that may be caused, such as possible impacts on relevant national laws, international trade, international carriage of goods, banking, insurance, ports, and other modes of transport in addition to maritime carriage.

Comments have been made on many aspects of the convention, such as legislative motive, purpose, innovative concepts, structure, logical relationships, operability, the presence of uncertainties, possible problems caused, possible impacts, and so on. Supporters express a positive attitude

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[1] See Zhang Yongjian, "Opinions on the Rotterdam Rules", [J].Journal of International Economic Law 2011 18 (4):15-34.

toward the convention and expect for uniformity and optimistic prospects in the field of maritime carriage. Adversaries are worried about the convention's uncertainties, operability, and new problems caused by the new concepts introduced. They are questioning if the goal of achieving uniformity and positive prospects of the industry could come true.

There are several articles about the Rotterdam Rules published expressing different attitudes toward the convention, for example, "Rational options for China's role in the development of international shipping market order at the Rotterdam Age"[2], "The entry of Rotterdam Rules should be practically considered"[3], "Cherishable opportunity for the unification of the law"[4], and "Joining the Rotterdam Rules as early as possible"[5].

Through further research and studies, the problems in "Rotterdam Rules" have been gradually discovered and revealed. Dissenting voices have been heard to question the purpose of the convention, that is the convention attempts to re-balance interests between different parties. Due to various uncertainties in the "Rotterdam Rules"[6], the initial common view is that most of the carriers are not optimistic about the convention. But now, the cargo owners as the transport service target, do not seem to be optimistic about the convention neither.[7] They even think that the convention would bring tremendous damage to their interests.[8] Port operators and non-maritime carriers, who are forced into the adjustment range of the convention, are prepared for nothing and relatively unfamiliar with all the obligations and responsibilities written in the convention.

It's apparent that we cannot neglect questions like what attitudes China will choose toward the "Rotterdam Rules" in the future, what measures will be taken to cope with the new situations and new problems caused by the convention, and how to keep accelerating the process of achieving uniformed laws for international carriage of goods. All questions, comments and suggestions received in the research and studies of the convention are valuable and shall be respected, discussed and debated.

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[2] See Mo Shijian, "Rational options for China's role in the development of international shipping market order at the Rotterdam Age", Annual of China Maritime Law, Mar. 2011, Vol.22 (No.1): 34-42.

[3] See Wang Xiaoqing, "The entry of Rotterdam Rules should be practically considered", Annual of China Maritime Law, Dec. 2011, Vol.22 (No.4): 1-10.

[4] See Li Hai, "Cherishable opportunity for the unification of the law", Annual of China Maritime Law, Mar. 2010, Vol.21 (No.1): 11-14.

[5] See Article report "Joining the Rotterdam Rules as early as possible" in Dalian Daily, 2011-3-7.

[6] See Zhu Zengjie, "Evaluation on the Rotterdam Rules", Annual of China Maritime Law, Jun. 2009, Vol.20 (No.1-2): 9-15.

[7] See Zhang Liying, "Comments on the Rotterdam Rules from the Perspective of Cargo Owners", [J]. Journal of International Economic Law 2011 18(4) 35-49.

[8] See Xia Qingsheng, "Effects on the Seller (Consignor) of the Rotterdam Rules", Annual of China Maritime Law, Jun. 2010, Vol. 21 (No.2): 30-44.

For example, some scholars have questioned the nature of the "Rotterdam Rules" and think that the convention seems to be comprehensive but indeed meaningless in some ways because it is trying to include every detail and becomes too complicated to be rational and operable in terms of logic and structure. The convention was written with obscure text and is full of terminology and cross-referencing between terms, so the execution of the convention would be much more difficult than predicted. The law maker shall be more explicit when defining problems and providing solutions, and concentrate on one problem at a time instead of trying to be as inclusive as possible. This may seem to be time-consuming, but may be more effective eventually.[9]

A scholar has concluded several reasons for China not to sign the "Rotterdam Rules", which includes the fact that inequivalent restrictions may occur between jurisdiction and the application of the convention, the fact that interests of ships, ports, and cargo are subject to varying degrees of damage, the fact that the convention itself is not completely convincing in terms of uniformity and advancement, and the fact that China will not adapt to the convention passively. All of these reasons are concerning China's national sovereignty, vital interests and legal logic, so it's hasty or even harmful to sign the Rotterdam Rules before we fully estimate all the good and the bad and sort out right solutions. In addition, like the "Hamburg Rules", the "Rotterdam Rules" are also assembled by the auspices of the United Nations. If the "Hamburg Rules" were generally accepted, then there would be no "Rotterdam Rules". In the new application of the convention, inapplicable cases are seen, for example, multimodal transport convention, terminal operator liability convention, civil jurisdiction and the foreign judgment convention draft. According to the convention, the volume contracts are failed to protect small to medium-sized shippers; increased responsibilities may not be accepted by the ship owners; the smallest network liability system can not be protected against domestic *jus cogens*. So it is difficult to see that why it can be more widely accepted than those less successful forerunners.[10]

An articles also suggest that China should not consider signing, ratifying, accepting the convention. This is because that balancing interests, seeking uniformity, adapting to the times, and stimulating development are not unique characteristics that only the Rotterdam Rules have, but are common characteristics of all kinds of conventions. In order to evaluate the convention in an objective manner, we have to understand the literal meaning of its

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[9] See Wu Huan-ning, "A Query on the Nature of the Rotterdam Rules", [J].Journal of International Economic Law 2011, 18(4): 1-14.

[10] See Guo Yu, "Several Reasons against China's Accession to the Rotterdam Rules", [J].Journal of International Economic Law, 2011, 18(4): 50-70.

provisions with theoretical analysis, and also analyze beneficial demands behind the text based on how the convention was formulated.[11]

In another article called "Comments on the 'Rotterdam Rules' from the perspective of Cargo Owners", the author has analyzed the reasons why both domestic and international shippers oppose the convention. It says that the convention not only increases the responsibility of the carrier, but also aggravates the burden of proof of cargo owners, which makes them not be able to be benefited. In addition, the attempt seems to be beneficial to cargo owners in the convention, such as delivery of goods without bill of Lading, documentary shipper, and transport of dangerous goods, are not welcomed by cargo owners. The article also brings up a question that is worth thinking about, that is "Is it substantially balanced in interests between ship owners and cargo owners when their interests are legally balanced?"[12]

Some scholars have also proposed "Right or wrong about the 'Rotterdam Rules'", and think that a 'Rotterdam Journey' full of maritime risks has been relentlessly started although it still takes time for the convention to enter into force.[13]

It's known that the Rotterdam Rules are problematic in several areas, for example, the application of the convention, basis of liability, period of time for suit, and so on. In the article "Particular Concerns with Regard to the Rotterdam Rules", there is a comment made on the convention saying "Uniformity is the goal of this convention but already it is apparent that it is in danger of further splintering maritime law across the globe." The article also suggests that each country shall think about all problems with the Rotterdam Rules and consider other potential alternatives, for example, meshing an existing international convention that works well across the globe together with the national law to formulate a uniformed law that can work well worldwide.[14]

Being innovative when making laws is to eliminate defects in current regime to solve existing problems and disputes more effectively. To judge if the innovative concepts are effective or not, we have to look at the end results that the new concepts will bring rather than the initiatives taken to create the new concepts. Being explicit and specific is crucial for the law to work well in

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[11] See Zhang Yongjian, "Opinions on the Rotterdam Rules", [J].Journal of International Economic Law, 2011, 18(4): 15-34.

[12] See Zhang Liying, "Comments on the Rotterdam Rules from the Perspective of Cargo Owners", [J]. Journal of International Economic Law 2011 18(4) 35-49.

[13] See Mo Shijian, "Right or wrong about the 'Rotterdam Rules", [J]. Journal of International Economic Law, 2012, 19(2): 223-254.

[14] The original text: "Uniformity is the goal of this convention but it is already apparent in danger of further splintering maritime Law across the globe…Article 94(1) provides that Rotterdam comes into force on the first day of the month one year after the 20th ratification, a day that the authors of this paper hope never comes."

different situations, however, how complicated the law looks is not that important or necessary. More studies and analysis, not abstract provisions written in the convention balancing the benefits, are needed to adjust and balance the interests and liabilities between carriers and shippers.

Compared with other maritime carriage conventions, the "Rotterdam Rules" have made major adjustments in the scope of application and in carriers' obligations and responsibilities. Besides, innovative provisions and breakthroughs have been made in other areas as well. We have to carefully study the way of how to comprehend and explain these new regulations, and how to discover and be aware of new problems associated with the innovative ideas and concepts.

The major problems of the Rotterdam Rules lie in its idealization: too extensive, comprehensive, and rigid. Defining so many stakeholders, it attempts to encompass the whole process and all links in the international multimodal transport, and makes itself impractical. The "innovations" introduced in this convention add uncertainties and potential risks to its implementation.

For example, the network liability system intended for non-maritime part excludes the application of domestic regulations and hampers the independent adjustment ability of the convention. It is not only helpless to the current dilemma incurred by the co-existing of various law systems, but also leaves regulatory void. Its special provisions on "volume contract" breach the fundamental principles of restraining the general use of the freedom of contract in transport conventions, and put its compulsoriness under challenge.

Besides, the general use of the freedom of contract may undermine the credit and security of transport documents such as bills of lading. We can see that the convention is self-contradictory. Its articles regarding "transport wholly by sea" are also too idealized. The carriers may be liable to obligations larger than their responsibilities. It also demands the controlling party to properly identify itself and the validity of its right, and complicates the goods delivery.

The introduction of broad "performing party" also extends the scope of parties beyond the shipper and consignee, and complicates the relationship among the stakeholders. Its reservation of the 14th and 15th chapters also leaves enforcement loopholes.

Besides, there are other controversies surrounding its prolonged content, intricate structure, and obscure wording of the convention. Its newly-coined terms need to be clearly defined and explained; the logic relationship between the chapters and articles need to be enhanced; and some ambiguous regulations demand further clarification.

These "innovations" actually leave room to controversy and increase the implementation difficulty. There are more problems. These problems, concerning the feasibility of the goal of "unification", demand serious analysis and tacking. However, we see no agreed answers to them so far.

All these facts alert us to the complexity, uncertainty, and difficulty of this convention, reminding us to be more reserved regarding its effect to improve the legal certainty and law unification. We should be critical to its "innovations", instead of embracing them without any analysis. We must be aware to its intrinsic complexity and uncertainty also.

III. Deviation Between Its Target and Likely Result

On 11th of December, 2008, the *United Nation passed Contracts for International Carriage of Goods Wholly or Partly by Sea* (Also known as Rotterdam Rules) on its 67th meeting, 63rd session. During this convention, the parties are "concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents", "noting that shippers and carries do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport", and "believing that the adoption of uniform rules to govern international contracts wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage"[15]. The preface of Rotterdam Rules reiterates the above statements. It acknowledges the significant contribution made by the Hague rules and Hamburg Rules, while strengthening the importance to further the progressive harmonization and unification of these two rules in the light of technology and commerce development.[16]

We can easily see that "unification" lies in the very core of the Rotterdam Rules. That's why it's highly expected. However, is this target achievable? Will its effect match the initial target? Motivation alone cannot guarantee the result. We need to check whether the target is rational, practical, and whether all its articles are so stipulated to serve this target faithfully.

When we assess the effect and impact of the Rotterdam Rules, we should pay equal attention to the effect of its articles in the light of the legal unification trend.

When we forecast its effect, we should check whether its content is the embodiment of its mission. We should assess the Rotterdam Rules not merely by its motivation, but more by its content and likely impact.

The legal unification requires us to bear in mind the limit acceptable to the international society in reality while devising a new legal regime. This limit also set what we can achieve in unification. Any target exceeding this

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[15] See The preface of United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

[16] See The preface of Rotterdam Rules.

limit will be doomed to failure. Long-term and overall targets are neither equal to, nor substitute to periodic targets.

As described above, unification is both the goal and the strongest motivation of the Rotterdam Rules. "However, behind all conventions, there are no exception lofty goals. The goal and result are not always the same"[17]. In reality, the maximum uniformity we can achieve is actually quite limited. Any task set towards this goal should be specific and concrete. A broad, generable, and abstract task will most likely deviate from the reality and miss its target.

The Rotterdam Rules has a seemly clear self-orientation and target. It stresses unification without clear delimitation of its scope. It expects to cover the whole process and all links in international multimodal transport, encompassing all relevant transportation means, participants, and stakeholders as its subjects of adjustment. Instead of being a solution to a specific transportation method, it is too extensive and elastic in its coverage and target. This will make it too lofty and abstract to be feasible.

"Generally speaking, to an international convention, the wider its coverage and the more detailed its provisions, the narrower its acceptance. Things would be even harder if it is compulsory". The Rotterdam Rules encompasses transport by sea, multimodal transport, and transport document all into its scope. This flawed design will undermine its success.[18]

In fact, an all-out strategy may lead to nowhere. We'd better focus our effect to tackle specific problems and move one step at a time. This may be eventually most and efficient.[19]

Due to the intrinsic illogic of the Rotterdam Rules, as the analysis goes on, we see more and more clearly on the deviation between its target and its possible effect. Compared with these negative impacts, warm comments such as "unification", "advanced nature", "direction of the future maritime carriage rules" are more or less overestimated.

Unification is what the international carriage laws pursue. Each endeavour towards this goal belongs to a specific phase in this process. Each periodic target should be in line with its environment and be both concrete and limited. There may be many elements to blame for the problems found in the Rotterdam Rules. However, the guideline behind these rules and its self-orientation may be the major ones. The goal is too lofty. That is, too extensive, compressive, and rigid to respect the periodic characteristics of the development; Too ambitious to be practical. These two defects will eventually undermine its target on unification.

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[17] See Guo Yu, "Several Reasons against China's Accession to the Rotterdam Rules", [J].Journal of International Economic Law, 2011, 18(4): 50-70.

[18] Same with the above 17.

[19] See Wu Huan-ning, "A Query on the Nature of the Rotterdam Rules", [J].Journal of International Economic Law 2011, 18(4): 1-14.

IV. Untimely Rotterdam Rules

Rotterdam Rules is another endeavour made by the international society to unify the transportation laws. This convention, after lengthy negotiation and drafting, however, was born in the tempest of the world financial crisis.

The pain incurred by the financial crisis on the global economy is still lingering. The international trade, as the backbone of the international shipping industry, is still staggering to its feet. Global shipping industry was badly hit too. All parties in this industry, from global carriers, consignees, to parties defined in the Rotterdam Rules, such as terminal operators, stevedoring companies, warehouses, container freight stations, road transport, railway transport, river transport, tugboat and barge companies non-contracted shippers, and consignees are all under great and mounting survival pressure. To make things even worse, trade protectionism rebounds and economy globalization suffers setback. A new convention introduced at such a time, attempting to change the established processes and practices, to re-establish new orders and laws on international carriage of goods, and to redistribute the obligations and rights of all stakeholders, is just not well-timed.

The United Nations Convention on International Multimodal Transport of Goods, 1980, (abbreviated as Multimodal Transport Convention) was introduced in an international environment much more favorable than the current one. At that time, both the world economy and trade were prosperous; the revolution in the international container transport spurred a booming door-to-door multimodal transport; the international society was anxious for a new law to further adjust the multimodal transport. However, the *Multimodal Transport Convention*, though many of its articles provide guidance to other laws, is tabled to today due to its infeasibility. Some people even project that it will never be put into effect.

The Rotterdam Rules makes no breakthrough from the Multimodal Transport Convention. On the contrary, when coming to the liability of the consignee, it deviates even farther away from the reality. Its network liability system completely excludes the application of any domestic laws. However, the international environment, compared against that of the *Multimodal Transport Convention*, is not substantively improved. Some aspects even deteriorate in the wake of the financial crisis. Only the door-to-door international carriage transport has established its process and regulation adjustment model. Appeals from different countries on the economy, politics, laws, and cultures are still varied. Some differences even enlarge along with the rising of the trade protectionism and the thirst to more resource and larger market share.

Projected against such a reality, this ambitious convention appears even more utopian.

V. Rotterdam Rules Will not End the Process of Uniformity

In contrast to the thriving international door-to-door shipment, no a uniformed law governing international marine transport and multimodal transport has ever been achieved worldwide, which is due to different laws chosen by different countries. This can be shown in the following situations:

1. significant differences can still be found in the laws used by different countries and regions, although they have the trend of converging to some extent;
2. there are differences for conventions and laws governing multimodal transports by water, air, land, and rail horizontally;
3. for each single mode of transport, there exists a lot of international conventions which are different for the same type of transport mode;
4. there are different attitudes towards transport conventions in different countries or regions;
5. different points of view are held towards the same transport convention and terms and conditions in it in different countries or regions;
6. internal laws ruling the same type of transport mode may be different from country to country.

Virtually all the existing goods transport conventions are focusing on a single specific transport mode. Even in a single transport mode, there are different laws that need to be integrated and uniformed. But we have several options of linking up the laws governing different transport modes in order to meet market requirements. In fact, even today, international multimodal transport is still involving laws of different transport modes which are independent from each other. And it is these independent laws which are combined to enable the international multimodal transport.

The above differences are caused by multiple factors including history, culture, politics, laws, economy, and well-being in different countries across the world. And such diversified and complex laws present a challenge to trade globalization and become the drivers of uniforming international goods transport laws.

The increasing practice of combining several transport modes into one process today means laws involving a single mode and in-between modes need to be combined, coordinated, and applied to create a uniformed international law framework step by step. This is not only a major subject for law studies but also the necessity of international goods transport industry.

However, the big challenge facing uniformity comes from paradoxical facts against uniformity and limitations imposed in the history.

Such paradox against uniformity can be seen in the following fact: while the international society has been seeking a solution to eliminating the law differences, more diversified laws are formulated due to different choices made by countries across the world toward the same transport convention.

The limitations for uniformity can be shown in the following fact: It is hard to imagine an international convention which covers everything and is accepted by the international society for a very long historical time, whether for a single transport mode or combination of transport modes. All the conventions are so far a kind of compromise for certain issues by international society in the historical times, namely a interim solution. And this situation will last for a very long time. The limitations for uniformity can also be seen in the fact where an unconditional agreement or unreserved acceptance cannot be made for conventions for which a limited compromise is reached. And deviation may also occur due to different interpretation and legal practice toward the same convention and terms and conditions in it in different countries. In addition, multiple sets of international conventions governing the same type of transport mode may be limited for their influence. All the transport conventions, especially marine conventions, currently have a gap between their vision and reality.

Experiences have shown virtually all current conventions are failing to achieve their goal. And it is not optimistic to have a uniformed law which is accepted by all the countries across the world even in the time far into the future. And this is well illustrated by the Multimodal Transport Convention which was passed by 84 UNCTAD members and what happened after its passing.

All this means the path to a uniformed international transport law will be a long, tough, and gradual one. The situation where there is no a uniformed international sea transport law will continue for a very long time.

All the problems found seem to tell us that the efforts of uniforming international sea transport laws by the international society will not be ended by the Rotterdam Rules.

VI. The Path to a Uniformed International Transport Law Still Needs to be Explored.

As one of the modern international trade practices, the door-to-door delivery means various transport modes need to be combined into one international good transport process. Compared to this international goods transport practice, the law making for international goods transport is no doubt lagging behind.

While traditional international goods transport laws are focusing on a single transport mode, our study of laws should from now on consider various transport modes as a whole. But this doesn't mean the traditional method of focusing on a single transport mode is no longer needed. No doubt it is required but we should also pay more attention to this study method of combining various transport modes.

After all these years, however, Rotterdam Rules, among others, seems to repeat the way of the Multimodal Transport Convention which tried to

formulate a large and complete set of laws. And Rotterdam Rules actually does very little to resolve its conflicts against other conventions.

While it is maybe not very difficult to predict what ultimate goal the international goods transport law is to achieve, it is not so easy to define a specific goal for a stage in this process. Rotterdam Rules should not be the only path to a uniformed international goods transport law in the next several decades of years. rational, effective, and actionable way needs to be explored by drawing lessons from Rotterdam Rules and Multimodal Transport Convention.

While uniformity is the ultimate goal of studying, integrating, and driving international goods transport law, one thing to recognize is that each country has its distinct laws and transport modes, at least in the current time. So we should not ignore and give up the efforts of achieving uniformed laws for a single transport mode because combing laws of different transport modes is an effective and actionable way and this cannot be replaced in a very long time in the future.

Further, it is not viable to create a set of laws that cover all the transport modes in the current condition. Even achieving a uniformed law for a certain part of them will be a great success. A practical and actionable way to achieve a uniformed international goods transport law is employing a Piloting and Rolling Out approach while protecting interests of different countries. This is the fundamental guideline of uniforming the laws of different transport modes. One another way to achieve a uniformed international goods transport law will be trying to integrate the laws governing individual transport modes with the help of local laws. Maybe this can be done initially by uniforming laws governing single transport modes.

By drawing lessons from the past, we can at least recognize the following fact: the efforts of achieving a united transport law should start from a partial uniformity while taking into account the existence of local laws. In addition, a widely recognized convention should not be an all-inclusive one and cover too much details and too rigid to be flexible. And such a convention should never attempt to cover everything and define everything.

All in all, the process of achieving an united transport law is gradual one and cannot skip required stages. And its each step should be accompanied by a fine-tuning and improving process. The York Antwerp Rules, although not an international convention, provides a model for the efforts of achieving a united law. That is, those laws that reach a consensus and meet current growth requirements and are ready for implementation can be uniformed first.

It is worth to note that achieving a united law needs the support of local laws. While participating in the initiatives of achieving a united law, a country needs to focus on strengthening and improving their local laws.

VII. Conclusion

A country needs to evaluate the balance between rights and obligations in the convention in the context of its own benefits. It is not the same thing for the complexity and operability of a convention. To determine a law is innovative or not, one needs to look at its possible effects and influence and should not focus on its innovative motive, vision, and assumptions.

Response of the outside world should not become the criteria against which a certain law is employed by a country. For any member of the international society, the criteria of choosing Rotterdam Rules is surely the benefits of its own country. You don't have to join it on an ASAP basis. The choice is yours.

The terms and conditions of Rotterdam Rules are complex and tedious and certain terms are not clear. It may bring more trouble than the problems it solves. Its implementation is too complex, uncertain, and difficult to be ignored. A too high score should be given to the convention and innovations in it. The introduction of Rotterdam Rules is making international maritime laws more complex. We will wait and see what the convention can bring to us because the gap between its vision and reality is still big.

The study of this convention, in my opinion, needs to be put in the context of relevant industries; needs to be deep in terms of its terms and conditions and strategies; and needs to be critical. Otherwise, it is hard for the study to be objective and intelligible.

In light of the situation at home and abroad, China will not consider to sign and join the convention for now. this will give us more flexibility and space. We will not lose anything. On the contrary, we can be more flexible.

"The life of law doesn't lie in logic, but experience"[20]. Paradox cannot deny the trend of uniformity. One most important thing we can learn from Rotterdam Rules is the initiatives of achieving a united international goods transport law should be adapted to and meet our growth needs. And, we cannot achieve this over one night and there is a long way to go to achieve this. We need to keep moving and exploring.

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[20] The Common Law (Chinese edition), by Oliver Wendell Holmes, Jr. Press of China University of Political Science and Law, 2006, p.1.

AN ANALYSIS AND ASSESSMENT ON THE ROTTERDAM RULES IN CHINA'S MARINE INDUSTRY

SI YUZHUO[1], ZHANG JINLEI[2]

In December 2008, the *UN Convention on the Contracts of International Carriage of Goods Wholly or Partly by Sea*, which is also known as the *Rotterdam Rules*, was adopted on the 67th session of the 63rd United Nations General Assembly. The Chinese delegation had been fully involved in the (whole) process of the deliberation of the Rotterdam Rules organized by the United Nations Commission on International Trade Law (UNCITRAL) and played a significant role. After the Rules was adopted, the Chinese Government conducted industrial assessment regarding the Rules promptly.[3] In general, attitudes on the Rules varies at present.

1. The conclusion of assessment in shipping industry

The shipping industry, represented by large state-owned shipping enterprises, considered that the Rules had revolutionized the responsibility system of carriers by deleting the error in navigation and fire fault exemption, extending the duty of seaworthiness through the whole voyage and increasing the limitation of liability greatly, and this would increase an unbearable risk and impose a huge burden onto China's shipping industry, which would count against the development of China's ocean merchant fleet and weaken her competitiveness in the international shipping market. Accordingly, the effect

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[2] Law School of Dalian Maritime University, Lecturer of maritime law, LLB (Dalian Maritime University), LLM, PhD (Swansea University).

[3] The Ministry of Transport organized the assessment of the effects on shipping industry, port industry and other relevant industry in China of the Rotterdam Rules; the Ministry of Commerce organized the assessment of the effects on international trade in China of the Rotterdam Rules.

of the Rules towards China's shipping industry may do more harms than good. Based on the above mentioned conclusions, they further believed that, the Government should take no action in pushing or accelerating the Rules coming into force neither shall we take the leading role in signing or acceding to the Rules and China should not be anxious to accede to the Rules, even after the Rules comes into force.[4]

Analysis of the assessment

1) The attitude of the shipping industry on the Rules was mainly reflected in the change of the basis of liability of carriers. In particular, it was the dissatisfaction with deleting the error in navigation and fire fault exemption which changed the basis of liability of the carrier from incomplete fault liability system to complete fault liability system. However, the change of the basis of liability is the most substantial change of the Rules. Under the new situation of the development of international shipping as well as science and technology, it is the year-long pursuit goal of the international society to readjust the allocation of the risk between ship and cargo, reject the outdated and unreasonable exemption clauses stipulated in the existing Hague Rules and seek the balance of interests between different parties.

In the early twentieth century, the international shipping was the market for ships. Naturally, the Hague Rules protected the interests of ships more and the basis of liability and the burdens of proof were against cargoes.[5] Since the middle and late twentieth century, the international shipping market turned to be the market for cargoes gradually. The Group of 77, representing the interests of cargoes, adopted the Hamburg Rules by an overwhelming majority whose feature was protecting the interests of cargoes. Compared with the Hague Rules, the basis of liability and the burdens of proof prescribed in the Hamburg Rules were unfavorable to the carrier. The process of drafting the Rotterdam Rules is more a result of balancing the interests of ships and cargoes than a game between the two parties. The large trading states and large shipping states are now highly coincided at present. In consideration of the impartible relevance between trade and shipping, more and more states have started to place great importance on the mutual development of trade and shipping. In modern mature economies [6], there are no pure shipping states or cargo owner

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[4] *Assessment report of the effects on China's Shipping industry of the Rotterdam Rules*, Rotterdam Rules Shipping Assessment Group, August 2010, at p 13; *The quantitative Assessment of the effects on China's Shipping industry of the Rotterdam Rules*, China Waterborne Transport Research Institute, August 2011, at pp 43-44.

[5] The amount of limitation of liability stipulated in the Hague-Visby Rules is different with that of the Hague Rules. However, the liability system under the Hague-Visby Rules still belongs to the Hague system. Accordingly, the Hague-Visby Rules is called the Hague Rules in this article.

[6] According to the statistical data from the WTO, in 2009, the countries ranking at top ten of the world trade are the United States, China, Germany, Japan, France, Holland, the UK, Italy,

states in existence. Under such circumstances, there is no practical significance to carry out any game between ships and cargoes. That is because, the states or regions who have the discourse power and more say-over during the drafting process of the Rules, such as the United States, EU, China, Japan, are all not solely representing the interests of cargoes or ships. On account of this, the Rotterdam Rules, which gives consideration to the interests of both ships and cargoes and adopts the basis of liability in the Hamburg Rules and the burdens of proof in the Hague Rules, is an embodiment of balance and compromise. Under the Chinese Maritime Code, the doctrine of liability fixation is the same as the doctrine prescribed in the Hague Rules and the burdens of proof is the same as in the Hamburg Rules, which could also be considered as a kind of balance and compromise. Therefore, regarding the basis of liability of carriers, the provisions of the Chinese Maritime Code are prescribed between the Hague Rules and the Hamburg Rules, but closer to the Hague Rules. The Rotterdam Rules is also stipulated between the Hague Rules and the Hamburg Rules, but closer to the Hamburg Rules. In another word, with regard to the basis of liability of carriers, there should be no greater obstacle for us to accept the Rotterdam Rules than the countries that are parties of the Hague Rules or Hague Visby Rules. Moreover, the basis of liability of carriers which determines the character of the convention is very the essence and core of the Rules.

2) The conclusion from the shipping industry assessment held the view that, "the abolition of the error in navigation would add an unbearable risk to the carriers". The researches made by scholars both at home and abroad showed that the abolition of the error in navigation would add 1% extra operating costs to the carriers.[7] In terms of law and economics, it could be analyzed that, raising the statutory standard of care is helpful to reduce human-factor accidents and increase the competitiveness.[8]

Belgium and South Korea. The data is published at the website http://www.wto.org/english/res-e/booksp-e/anrep-e/anrep09-e.pd. In 2010, the top ten countries/regions of fleet are Japan, Greece, Germany, China, the United States, Russia, Norway, Singapore, Holland and the UK. The data is published at the website http://www.mapsofworld.com/world-top-ten/largest-merchant-shipping-fleets.html. It could be concluded from the two rankings that, there is a big overlapping between large trading countries and large shipping countries and some countries are both large trading and shipping countries.

[7] Xinping Zhang, "The shipping cost will be increased 0.5%~1.0%, if the immunity of navigation error is abolished." *A new trend of Carriage of Goods by Sea Act and China Maritime Law Review* Taipei: Ministry of Justice, 1979:22; Joseph C. Sweeney, "The cost will be increased 1~2% if deleted the immunity of navigation error." *The UNCITRAL Draft Convention on Carriage of Goods by Sea* [J], Part I, 7 J. Mar. L. & Com. 69.(1975)

[8] Robert Cooter, Thomas Ulen, *Law and Economics*, Jun Zhang and others (translated), SDX Joint Publishing Company, Shanghai, (1994), at p 494. Once one party meets the statutory standard, he can extricate himself from the responsibility for the accident cost. Once his responsibility is extricated, there is no motivation for this party to take any preventive measures. This will lead to the situation that in order to divest himself of responsibility for accident cost, one

According to the quantitative assessment by research institutions of China, the Rotterdam Rules will have certain impact on China's shipping industry. In particular, it could cause an amount of 1.8-2.4 billion RMB operating costs to China's container liners which means the unit cost of full containers may increase by 3%-4%. By comparison, the unit cost of full containers of foreign leading shipping companies may just increase only half that rate of China,[9] due to their high level of management. However, the equivalent capacity and market share of such cost disparity merely amounts to the capacity gap of one container ship with 8000 TEU every year, which accounts to 0.1% of the total capacity of China's international container liners. Therefore, the Rotterdam Rules has little influence on the market competitiveness of China's shipping industry, particularly to large liner shipping companies.

3) It should also be mentioned that the strict liability system for the carrier has been applied in the China's coastal and inlandwaters shipping for many years, which means that carriers are not entitled to advocate any error in navigations except for wars and force majeure nor are they entitled to package (unit) limitation of liability. Moreover, compared with ocean shipping companies, most companies in China which engaged China's coastal and inlandwaters shipping are small and medium sized enterprises. The condition of the ships owned or operated by those companies and the quality of their crew members are no comparison to those of the vessels engaged in international transportation. Accordingly, it is far more difficult for them to obtain the P& I insurance covers than the ocean shipping companies. That is to say, their risk resistance capacity is much weaker than the latter. Notwithstanding, rather than being perished, the coastal and inlandwaters shipping in China has advanced briskly in past years. Therefore, this perspective indicates that some shipping companies in China might have been worried too much about the abolition of the error in navigation and the fire fault exemption.

4) In the long run, due to the abolition of the error in navigation and the fire fault exemption by the Rotterdam Rules and the extension of the duty of seaworthiness through the whole voyage, it is inevitable for carriers to reinforce management to their ships, crew and companies as well as accelerate

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party would meet the statutory standard exactly and shift the rest of responsibility for the accident cost onto the other party. In the circumstances of error in navigation exemption, the proportion of human-factor accidents in all marine accidents will be increasingly high. Under the complete fault liability system, the motivation of the carriers to reduce the human-factor accidents rate will be greatly increased. An assessment report from one company advocated that the error in navigation exemption should be maintained on the ground of the increasing rate of the human-factor accidents. However, being just opposite to this conclusion, from the perspective of law and economics, it is necessary to abolish the error in navigation exemption.

[9] *The quantitative Assessment of the effects on China's Shipping industry of the Rotterdam Rules*, China Waterborne Transport Research Institute, August 2011, at p 41.

the decommission of old ships and low tech ships in order to reduce the rate of accidents caused by fault. It is undoubtedly favorable to promote the development of China's shipping industry and change the current absurd situation faced by the industry that the China's shipping industry only has quantity rather than quality which results in the lack of capability in joining a high end market. This also compliances with the basic requirement of the government strategy to build China into world power in shipping. As some scholars pointed out, "the fleets of main modern shipping countries, such as the United States, France, Greece, Denmark and The Netherland, can bear the technical norms and the amount of limitation and the fleets of China have to bear it too. Otherwise, Chinese fleets would lose the qualification to compete with those fleets".[10]

2. The conclusion of assessment in cargo owners

The attitudes on the Rotterdam Rules of the other interested party, the cargo owners engaged in import and export trade, whose interests would be directly affected by the Rules, are rather complex. On the one hand, while the Rotterdam Rules increases the liabilities of carriers, it also weighs the burdens of proof on cargo owners. On the other hand, the export trade in China mainly focuses on FOB trade, but the interests of the consignor under FOB trade are not considered well enough under the Rules. Some stipulations are even regarded as the terms under which FOB sellers are put at a disadvantage. Some people even holds the opinion that, "China may become the largest victim under the Rotterdam Rules."[11] Therefore, the relevant party representing the interests of cargo owners criticized the Rotterdam Rules and they are not so sure about whether China should accede to the Rules.[12]

Analysis of the assessment

1) Issues regarding allocation of burdens of proof

Compared with the Hamburg Rules, the Rotterdam Rules does weight the burdens of proof on the cargo owners. According to the Hamburg Rules, the carrier is liable for loss resulting from loss of or damage to the goods, as well as

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[10] Shijian Mo, *Rational options for China's role in the development of international shipping market order at the Rotterdam Age*, Annual of China Maritime Law, 2011 (1), at p 40. Annual of China Maritime Law has been changed to quarterly publication since 2009 and renamed as Chinese Journal of Maritime Law from 2012.

[11] Qingsheng Xia, *Effects on the seller (consignor) of the Rotterdam Rules*, Annual of China Maritime Law, 2010(2), at p 43.

[12] The assessment of the effects on the cargo owners of the Rotterdam Rules was organized by China University of Political Science and Law Maritime Law Center, which was commissioned by Department of treaty and Law of Ministry of Commerce. There has not been assessment report published yet. The conclusions of the assessments were scattered in relevant articles.

from delay in delivery and it's presumed that the loss of or damage to the goods or delay in delivery was so caused unless he can prove that it was not due to his fault except for loss of or damage to the goods or delay in delivery caused by fire which should be proved by the claimants (Article 5). Under the Rotterdam Rules, 15 exemption perils are regulated by Paragraph 3 of Article 17. The claimants shall prove there are faults of the carriers and the carriers can only exercise their rights of exemption when the claimants failed to prove the carriers' faults. Such allocation of the burdens of proof is very similar as the Hague Rules where Paragraph 2 of Article 4 stipulated 17 exemptions among which the 17th exemption states that, the carrier is exempt from liabilities if loss of or damage to cargoes are not caused by the actual fault or privity of the carriers, however, the carriers should bear the burdens of proof if they wish to rely on such exemptions. It follows that, the carriers are free from proving the 1st to the 16th exemptions, while claimants should prove there are faults of the carriers.

The above allocation of burdens of proof stipulated by the Rotterdam Rules aims to balance the change of the basis of liability fixation for the carriers. In other words, the Rotterdam Rules is not the same as the Hamburg Rules which provided the presumed fault principle of liability fixation, that is to say, the carrier should bear all the burdens of proof except fire.

2) Issues regarding the protection of rights of FOB seller

During the process of drafting the convention, the Chinese delegation tried to seek particular protection for FOB seller but failed to obtain the supports from the majority of the delegates. The fundamental reason stated was that such request was beyond the scope adjusted by the law of transportation and the protection of rights of FOB sellers should be the issue stipulated under the trade law. Analyzing from the perspective of privy of contract theory, FOB sellers is not a party of the contract of carriage, so he does not have any right nor shoulder the obligation under the contract of the carriage. Therefore, it lacks legal ground to request the convention to protect those who are not parties of the contracts of carriage.

In consideration of the above concern raised by China and other relevant countries, the Rotterdam Rules forms the concept of documentary shipper. It is a big progress compared with the Hague Rules and Hague Visby Rules. As compared with the Hamburg Rules, the rights and obligations of the documentary shippers are much more explicit. According to the Rotterdam Rules, as long as FOB sellers raise their awareness of risks and add corresponding terms in the sales contracts to protect their own interests, the problems concerned by Chinese cargo owners are not inevitable.

3. The conclusion of assessment in port industry

Since the Rotterdam Rules forms the concept of "maritime performing party" under which the port operator who is engaged in receiving/delivering, loading/discharging, handling, stowing, keeping, caring for and other relevant

operations during the transportation of cargoes from port to port, under the supervision, control or requirement of carries, could be deemed as a maritime performing party,[13] the legal status of port operators is clear and definite. What is more, the port operators are also entitled to the rights of defense and limitation of liability stipulated by the Rules. Therefore, the reaction on the Rotterdam Rules from port industry in China is overwhelmingly favorable.[14]

Analysis of the assessment

1) Under the Hague Rules, the duties of carriers before loading and after discharging need to be agreed between the two parties since the Rules only regulates the carriage of goods by sea during the period between loading and discharging. The Hague Rules does not regulate obligations/rights of port operators and there is no concept of actual carrier under the Rules. The obligations/rights of the actual carrier who undertakes transportation in ocean shipping section are stipulated with carriers through the subject of ships. The Hamburg Rules solved the problems of the actual marine transportation which was not undertaken by the carrier but by the party who had been entrusted by the carrier. Such responsible party took the place of the ships under the Hague Rules. However, the Hamburg Rules is not clear as to whether the stipulations about the actual carriers could be applied to port operators. Accordingly, there are different understandings of actual carriers in our judicial practice. In some maritime courts decisions, it was held that port operators shall be subject to the Contract Law and the General Rules of Civil Law instead of the Chinese Maritime Code and they are not entitled to the limitation of liability.[15] In other judgments, it was held that port operators are subject to the Chinese Maritime Code and as the employee of carriers, the Himalaya clause should be applied and they are entitled to the limitation of liability.[16] The author's point of view is that,

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[13] In the liner shipping, regulated by the Rotterdam Rules, the port operators are engaged in substantial operations, such as the loading/discharging of containers, the handling/storage of containers/goods, the receiving and delivering of goods and etc. These operations are all assigned by the carriers.

[14] *Assessment of the effects on the shipping strategic policy for China ports of the Rotterdam Rules*, China Waterborne Transport Research Institute, July 2011, at p 21; *Assessment report of the effects on the port operator of the Rotterdam Rules*, Rotterdam Rules Port Assessment Group, October 2010.

[15] In *Bank of China Group Insurance Company Ltd. v. Shanghai Jiaoyun Container Dev Co. Ltd. (2001)*, in which the truck transportation in ports caused the damages of the containers, Shanghai Maritime Court held that the Chinese Maritime Code should not be applied. See Yuzhuo Si, *Maritime Law Monograph*, China Renmin University Press (2nd ed. September 2010), at p. 162.

[16] In *Shenyang mining machinery (Group) import and Export Corporation v. Hyundai Merchant Marine (2001)*, Dalian Maritime Court held that, Wantong Logistics Company, engaged in the storage operations in contain yards, was the employee of Hyundai Merchant Marine and was entitled to right of defense and limitation of liability of the carriers stipulated in the Chinese Maritime Code. See *Dalian Maritime Court Civil Judgment Commercial No. 246*, which was published at the website_http:www.ccmt.org.cn.

in accordance with the Chinese Maritime Code, port operators are actual carriers and they are not only entitled to passive rights, such as defense and limitation of liability, but also to active rights, such as right of claim, time for suit and etc.[17]

Based on the definition of actual carrier in the Hamburg Rule, the Rotterdam Rules further confirms and completes the system of actual carrier. Paragraph 7 of Article 1 of the Rotterdam Rules states, "Maritime performing party means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if performs or undertakes to perform its services exclusively within a port area." It has been clearly defined here that port operators belong to maritime performing party. The rights and obligations of a maritime performing party are stipulated under Article 19 of the Convention, which states that, "A Maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defenses and limits of liability as provided for in this Convention…"

2) The stipulation of maritime performing party under the Rotterdam Rules is a win-win method. For the claimants, the Convention provides another contact litigation subject apart from the carrier and such situation is in favour of their claims; for the port operators, their legal status has been cleared under the Rules and they are entitled to the carriers' defenses and limits of liability. Accordingly, there should be no obstacles for port operators to accept the Rotterdam Rules.

4. Attitude in academe

During the process of discussion and after the Rules was adopted, Chinese scholars have carried on a thorough and comprehensive research into the Rotterdam Rules. Generally speaking, there are mainly three different attitudes toward the Rules among Chinese scholars at present: some scholars assume their strong positive attitude and consider that the Rules helps to fulfill the government's strategic target to build China into world power in shipping, and the Rules is an advanced international convention that keeps abreast of the times, so China should accede to the Rules in a proper time;[18] some scholars

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[17] See Yuzhuo Si, *Maritime Law Monagraph*, China Renmin University Press (2nd ed. September 2010), at pp. 163-165.

[18] See Yuzhuo Si, *Evaluation and prospects of the Rotterdam Rules*, Annual of China Maritime Law, 2009 (1-2), at p 3; Yuzhuo Si, *A Century Convention for Goods Carriage By Sea-Again Comments on Rotterdam Rules*, Law Science Magazine, 2012 (6), Hai Li, *The Rotterdam Rules: a cherishable opportunity for the unification of the law*, Annual of China Maritime Law, 2010 (1), at p 11; Shijian Mo, *Rational options for China's role in the development of international shipping market order at the Rotterdam Age*, Annual of China Maritime Law, 2011 (1) at p 34.

adopt a hard-line stance against the Rules and think that it is very difficult for the Rules to be widely approved by international society and come into force so China should not accede to it;[19] there are also some scholars who strike a medium attitude, believing that the scope adjusted by the Rotterdam Rules is beyond those of the past international conventions on carriage of goods by sea and the Rules will bring a significant effect, in view of which China should pay close heed to the attitudes of other countries, carry out intensive researches and make a discreet decision on whether the Government should ratify the Rotterdam Rules basing on a comprehensive assessment and evaluation of it.[20]

Analysis of the assessment

It is natural to have different opinions as to the Convention. It takes a long process to understand such a complicated international convention, especially when there are strong different voices in China's marine industry, and it's impossible to require a unified attitude from all scholars. However, the following phenomenon is noteworthy:

There is no corresponding responses from international society as to the against voice about the Rotterdam Rules in China. For instance, among the strongest criticism, one is the dissatisfaction about the abolition of the error in navigation from the shipowners in China. However, no intense dissatisfaction about such change has been heard in the international shipping industry until present. Even people who are against the Rotterdam Rules consider that, "the only saving grace in the basis of liability is the deletion of the error in navigation defence which was long overdue given advances in technology."[21] The other one is the voice of disapproval from the cargo owners in China who believe that the Convention has not provided any effective protection for FOB seller. However, some maritime society who has always filed a strong dissent against the Convention, has never alleged such a reason to criticize the Convention.

5. Conclusions

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[19] Zengjie Zhu, *Evaluation on the Rotterdam Rules*, Annual of China Maritime Law, 2009 (1-2), at p 9; Zengjie Zhu, *Re-evaluation on the Rotterdam Rules*, Chinese Journal of Maritime Law (previously named as Annual of China Maritime Law), 2012(1), at p 7; Yongjian Zhang, *How to evaluate the Rotterdam Rules*, Annual of China Maritime Law, 2010(1), at p 15; Qingsheng Xia, *Effects on the seller (consignor) of the Rotterdam Rules*, Annual of China Maritime Law, 2010(2), at p. 30.

[20] Liying Zhang, *Effects on the cargo owners of the Rotterdam Rules—The attitude to the Rotterdam Rules of the Chinese cargo owners*, Assessment of the effects on the cargo owners of the Rotterdam Rules organized China University of Political Science and Law Maritime Law Center commissioned by Department of treaty and Law of Ministry of Commerce

[21] ose M. Alcantara, Barry Oland, Douglas G. Schmitt, Frazer Hunt, Kay Pysden, William Tetley C.M., Q.C., Svante O. Johansson, Professor Jan Ramberg and Julio Vidal: *"Particular concerns with regard to the Rotterdam Rules": "The only saving grace is the disappearance of the error in navigation defence which was long overdue for removal given advances in technology."*

Until present, the Chinese Government has not formed a unified and clear attitude towards the Rotterdam Rules, particularly on the delicate issue regarding whether China should accede to the Rules and when it might happen. Such situation is caused by the different attitudes in practice and academe.

Under such circumstances, it is logical for the Government to be cautious and responsible.

The main conclusions of mine are as follows,

Firstly, due to the limitations of the assessment made by industries and the complexity of the Convention contents, it is very difficult for practitioner to comprehend the essence of the Convention precisely. Therefore, all parties concerned should deepen their research on the Rules and make further assessment on the effect and incidence from the Rules in shipping, trade and other relevant industries on the basis of accurate understanding of the Convention and from the standpoint of a state. The decision of whether the Government should accede to the Rules should be made on the overall consideration of both advantages and disadvantages.

Secondly, we should pay close attention to the attitudes and actions of other countries, in particular those with developed shipping and/or trade industry and maintaining close economic ties with us, so as to take corresponding measures.

Thirdly, the Rotterdam Rules is the crystallization of ten-year hard work of the international society and it is a contemporary, modern and advanced international convention. Unifying the legal regime of international multi-modal transport of goods through such a century convention, will be undoubtedly a result worth anticipating, not only for the entire international society but also for China. None of the international conventions, of course, could reach the acme of perfection and the progressiveness of the Rules cannot be denied because of its defects or flaws. As predominant shipping and trade state, China should accede to the Rotterdam Rules in a proper time.

UPDATING THE RULES ON INTERNATIONAL CARRIAGE OF GOODS BY SEA: THE ROTTERDAM RULES

Kofi Mbiah*

Abstract

The philosophy of the Rotterdam Rules can be summed up in one word - practical. Practical because the Rotterdam Rules represent a rich alloy of the sentiments of various interest groups - carriers, shippers, freight forwarders, insurance companies and not least Governments who have interests in international trade and the carriage of that trade across various transport modes. The Rules bring currency to the existing international legal regimes on the trade related aspects of the international carriage of goods, seek to better allocate the risks and responsibilities of the shipper and the carrier as well as harmonize and modernize the law with a view to attaining uniformity so craved for by international commercial partners. It is expected that the improvements in the new Rules should lead to a reduction of overall transport costs, increase predictability and introduce greater commercial confidence for international business transactions.

The new international legal regime on the international carriage of goods wholly or partly by sea, builds on the strengths of the predecessor treaties and eliminates some of their weaknesses. Moreover, the Rotterdam Rules codify modern commercial practice and especially for common law jurisdictions, preserve the rich body of case law that has been built over the years as a result not only of the application of the Hague- Visby Rules, but other international instruments on the international carriage of goods.

This short paper takes a look at the attempt by the Rotterdam Rules to balance the interests of the protagonists in the international carriage of goods transaction. It examines some of the salient features of the Hague and Hague-Visby Rules as well as the Hamburg Rules, points out their perceived

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weaknesses from the view point of shippers and carriers and seeks to shed some light on the ways in which the Rotterdam Rules have attempted to address the concerns of the protagonists.

It is important to mention that within its mandatory character, sufficient flexibility is introduced in the Rotterdam Rules to provide a leeway for the carrier and create commercial convenience for both parties. The *travaux preparatoires* of the Rotterdam Rules is well documented and thus should serve as ready reference in the interpretation, adjudication and application of the Rules to commercial disputes that arise in the international carriage of goods wholly or partly by sea.

Introduction

For well over half a century, the Hague Rules (1924)[1] held sway. The Rules are now over eighty (80) years since they were first enunciated in Brussels. Some nations have argued and in particular maritime lawyers from many common law jurisdictions, (notably carrier interests) that the Rules are tried and tested and need to remain unchanged.

For a good number of developing countries, mostly consumers of shipping services, the rules which have held sway for so many years are unfair and work against the interest of the users of shipping services. The Hague Rules establish a mandatory legal regime in respect of carrier liability for loss of or damage to goods concluded under a contract evidenced by a bill of lading. Under the Rules, the period of responsibility of the carrier covers the period from when the goods are loaded on to the ship till they are discharged. (Tackle to tackle).

The Rules provide that the carrier is to be held liable for loss or damage to the goods resulting from his failure to exercise due diligence to make the ship seaworthy, to properly man equip and supply the ship or to make its storage areas fit and safe for the carriage of goods. The Rules also provide other responsibilities of the carrier.

One of the basic criticisms of The Hague – Visby Rules is the litany of exculpatory clauses commonly perceived by shipper interests to serve the interests of the carrier especially the so called Nautical Fault Exception. The Hague Rules has seen two amendments. The protocols of 1968 (Visby) and 1979 deal mainly with the limits of liability which to most shippers amounted to no more than “band-aid” improvements and did not go far enough in addressing the perceived weaknesses of the Rules.

Some countries ratified the protocol and hence became parties to the so called Hague-Visby Rules. Others did not ratify and thus remained parties only to the Hague Rules. For some countries, the protocol was not far reaching

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[1] [Convention for the Unification of certain Rules of Law Relating to Bills of Lading]

as it did not deal comprehensively with the issues of liability, the allocation of responsibilities and risks, as well as other modes of transport and hence they did not ratify.

The United Nations, through UNCTAD began discussions in the late 1960's to revise the Rules and come out with a uniform law on international transport of goods by sea. The objective of the work of UNCTAD was to remove the ambiguities and uncertainties and to establish a balanced allocation of responsibilities and risks between suppliers and users of shipping services. Acting upon a recommendation by an UNCTAD Working Group, the United Nations Commission on International Trade Law (UNCITRAL), was mandated to come out with a revision of the Rules. This work was concluded in 1973 and the Convention commonly referred to as the Hamburg Rules was adopted in 1978 with 20 ratifications by countries most of whom were not significant players in the international trade of the world. The major maritime nations which contribute almost two-thirds of the world's total trade did not ratify the Rules. In effect, even though the convention entered into force in November 1992, it was moribund at birth as its mother laboured in vain.

The major maritime nations with significant contribution to world trade, contended that the mandatory character of the liability rules with respect to the scope of application of the rules was too wide and the deletion of the exculpatory clauses make the liability floor too slippery as compared to the tackle to tackle regime under The Hague/Visby Rules which they were used to.

Carriers also complained about the restriction of the choice of jurisdiction and were not happy with the jettisoning of the Nautical Fault exception even though that came as a great relief to the user nations.

Some countries adopted the rules wholly while others, especially the Scandinavian countries, incorporated relevant provisions into their national law.

Thus the stage was set for the application of a multiplicity of rules for the international carriage of goods by sea. While some countries have denounced the Hague Rules and become parties to the Hamburg Rules, there are others who are party to Hague-Visby Rules and yet others who are party to only the Hague Rules (e.g. Ghana). There are some who have not denounced the Hague Rules but have ratified the Hamburg Rules. As indicated earlier, there are still some other countries who have incorporated bits and pieces of the various laws into their national law. Currently therefore, there is a hotch-potch of international rules for the carriage of goods by sea which has created a great deal of muddled confusion and uncertainty.

It is therefore widely recognized within the international community that there is an urgent need for uniformity in the international law on carriage of goods by sea.

UNCITRAL therefore took the bold attempt at unification of the international law on the carriage of goods by sea, and to modernize the entire

regime of international transport law through the elaboration of rules dealing not only with the carriage of goods by sea but also the carriage of goods under a "multimodal" (maritime plus) transport regime. This is indubitably a bold attempt when viewed against the backdrop of the difficulties and failures that have attended to the various international regimes where uniformity is concerned.

Indeed the original mandate of the UNCITRAL Working Group did not include multimodal transport.

This short paper in view of its limited purview will not deal with all the issues and complexities which are introduced by the Rotterdam Rules. Suffice it however to mention that the instrument covers various areas of existing mandatory liability regimes in the field of carriage of goods by sea akin to the provisions of the Hague, Hague –Visby and Hamburg Rules. It however goes further to modernise the existing legal regime in relation to current practice by covering areas such as freight, the transfer of rights, right of control and the right to sue.

There is no doubt that the Rules would be subject to interpretation by various legal systems and in various jurisdictions and as pointed out by Lord Macmillan in *Stag Line V Foscolo Mongo*[2], they should not be rigidly controlled by domestic precedents of antecedent date but be based on broad principles of general acceptation. Indeed any new regime for the international carriage of goods needed to take due cognisance of this and demonstrably indicate that it is in tune with current trends and has clear advantages over the existing legal regimes. This is what the Rotterdam Rules seeks to achieve. Whether it succeeds or not is yet to be seen.

It is worth pointing out that no attempt to balance the interests of carriers and cargo can come out with provisions or a regime that is entirely satisfactory. Like all compromises, no one leaves completely satisfied but all leave in the hope that they have taken something away. Those that argue in favour of the new Convention point to the deletion of the Nautical Fault Rule, the continuing obligation of due diligence and seaworthiness, the inclusion of provisions on delay, the higher limits of liability, the extension of the time for suit, the widening of the period of responsibility, the new provisions on Jurisdiction, (even though they must be agreed upon by an opt-in process), and the door-to – door possibilities that it offers.

Some salient features

The convention opens with some general provisions that define various terms used in the convention. Of key significance in the general provisions is Article 1(1) which defines a "contract of carriage" as: "a contract in which a

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2 [1932] AC 328.

carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transportation in addition to the sea carriage."

It is important to mention that while the Hague/Visby as well as the Hamburg Rules emphasis the production of a bill of lading as a basis for the contract, the Rotterdam Rules de-emphasis the bill of lading and instead refers to transport documents or electronic transport records. The Rotterdam Rules take this approach so as to deal with the increased use of various types of bills of lading that has become commonplace in a number of sea carriage transactions involving the use of transport documents such as sea waybills, straight bills of lading[3] and negotiable and non negotiable bills of lading. It is also worth mentioning that the Hague Rules only deal with outbound cargoes. This limitation is removed by the definition of the contract of carriage provided in the Rotterdam Rules.

The definition also takes cognizance of present practice where commercial partners sometimes arrange for the carriage of their cargoes by other modes of transport in addition to the sea-leg.

Scope of application

The Hague- Visby Rules scope of application was rather limited. This was improved upon by the Hamburg Rules to ensure that the application of the Rules is not only limited to outbound cargoes and contracts evidenced by a bill of lading. The Hamburg Rules widen the scope to which the Rules are applicable and extend the tackle to tackle obligations to port-to port. The Hamburg Rules are also applicable when the bill of lading or other document evidencing the contract is issued in a contracting state. Thus the Hamburg Rules widen the scope of application when compared with the Hague- Visby Rules.

The Rotterdam Rules expands further the scope of application and provides that the scope of application shall include the place of receipt, the port of loading, the place of delivery and the port of discharge. It is to be noted that the Rotterdam Rules refer to the place of receipt and delivery in accordance with this "multimodal" tenets - a "maritime plus" convention. The convention applies to contracts of a multimodal nature but with a sea-leg hence its name the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.[4]

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[3] See J.I. Mac William Co Inc. v Mediterranean Shipping CompanySA [2005] UK, HL 11.

[4] For an appreciation of how the Rotterdam Rules introduce the application of other international conventions governing the carriage of goods by other modes of transport, see Art. 82. And also Art. 26 dealing with carriage preceeding or subsequent to the sea carriage.

Period of responsibility

The period of responsibility of the carrier under the Hague/Visby Rules is what has commonly been referred to as "tackle to tackle" i.e. from the time when the goods are loaded till the time when the goods are discharged from the ship is the reference point for the period of responsibility of the carrier. The Hamburg Rules extend the period of responsibility of the carrier to "port to port". This has how being further extended by the Rotterdam Rules to cover "door-to-door" carriage transactions upon agreement by the parties.

Electronic transport record

In line with the desire of the drafters of the Rotterdam Rules to bring the rules of international transport law into the 21st century, the Rotterdam Rules has extensive provisions on the use of electronic transport records. It however needs be stated that where electronic transport records represent an evidence of the contract, its adoption must be with the consent of the shipper. By the time the Hamburg Rules were developed around the late 1970's there had already been calls for the recognition of electronic documents. The Hague-Visby and the Hamburg Rules do not create opportunities for the utilization of electronic transport documents. The Rotterdam Rules fill this gap.

The liability of the carrier

At the heart of most international transport conventions is the issue of the liability of the carrier. This is so because it represents to a very large extent the risk allocation and the balance of rights and responsibilities between the principal players – the shipper and the carrier.

The provisions on the basis of liability of the carrier are contained in article 17 of the convention. They follow the format of the Hague Visby Rules but are poles apart from the respective provisions in the Hamburg Rules[5].

The approach adopted by the Rotterdam Rules is still fault based but with a reversed burden of proof. It is worth pointing out that even though there is a reversal of the burden of proof, two significant changes in the Rules strive for mastery. The first is the deletion of the so called nautical fault exemption in the Hague- Visby Rules and the second is the continuing obligation of seaworthiness and due diligence.

Under the Hague/Visby Rules the carrier, his servants and agents are exonerated from liability where damage or loss is as a result of their negligence in the management of the ship[6]. This has now been done away with under the Rotterdam Rules.

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5 Article 5.

6 See the litany of exceptions in article iv r 2.

The Hague/Visby Rules also make the carrier responsible for the seaworthiness of his vessel only "before and the beginning of the voyage"[7]. Under the Rotterdam Rules the carrier's responsibility with respect to seaworthiness is now not only before and at the beginning but shall continue throughout the voyage. It is however worth mentioning that the other exculpatory clauses in the Hague- Visby Rules[8] have been maintained in the Rotterdam Rules with necessary modifications such as the strengthening of the fire exception and the deletion of the Nautical Fault Rule and changes in language with respect to some of the exculpatory clauses.

Delay

The Hague-Visby Rules has no provisions on delay. The Hamburg Rules provides for delay amd the carrier is liable for delay in delivery where he does not honour the time agreed upon in the contract. The Hamburg Rules go further to add that where no such agreement as to time of delivery is agreed upon by the parties then the test would be that of a diligent carrier in the particular circumstances[9]. The Rotterdam Rules also provide for liability of the carrier in instances of delay[10] when the period for delivery has been agreed upon but omits the test of a diligent carrier in particular circumstances. The Rotterdam Rules also allow for economic loss arising out of delay.

Deviation

The Hague-Visby Rules provide for deviation as a way of absolving the carrier from responsibility where the deviation was for purpose of saving life or property. The Hamburg Rules does not provide for deviation. The Rotterdam Rules leaves the issue of deviation to national law but still makes it possible for the carrier to enjoy the defenses of limitation under the Rules[11].

Deck cargo

Deck cargo or cargo which is carried on deck is not considered as goods within the Hague/Visby Rules if the carrier stipulates that the goods are to be carried on deck. Both the Hamburg Rules and Rotterdam Rules[12] have made significant changes in this respect. Under the Rotterdam Rules, the following circumstances are necessary for carriage on deck:

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7 See Maxine Footwear Company Ltd v Canadian Government Merchant Marine Ltd [1957] SCR 801.

8 Article iv r 2.

9 Article 5 (2).

10 Article 21.

11 Article 24.

12 Article 25.

a. Where such carriage is required by law
b. They are carried in or on containers or vehicles that are fit for deck carriage and the decks are specially fitted to carry such containers or vehicles; or
c. The carriage is on deck in accordance with the contract of carriage, or customs usages or practices of the trade in question.

These provisions have undoubtedly brought currency to the rules regarding carriage on deck especially as they now provide that the containers should be fit for deck carriage[13]. The decision of the Supreme Court of the Netherlands that in accordance with Article iii r 1 of the Hague- Visby Rules, containers supplied by the carrier should be cargoworthy has now been exemplified by the provisions of the Rotterdam Rules

Where by an agreement the carrier is not supposed to carry on deck but carries on deck and damage results then he is not entitled to the benefits of limitation of liability[14]. It however has to be shown that the damage was the result of the carriage on deck.

Obligations of the shipper

There are relatively speaking no obligations on the shipper with respect to the Hague/Visby Rules except for the fact that he shall not ship dangerous goods. The Hamburg Rules also make provision of some obligations of the shipper. Under the Hamburg Rules the Shipper is not to ship dangerous goods unless he has informed the carrier about the dangerous nature of the goods. The Rules also require the shipper to indemnify the carrier from losses occasioned by the carriage of such goods. Additionally the shipper is expected to guarantee the accuracy of information provided to the carrier in respect of labels and marks on the goods.[15] By far the most elaborate provisions on the obligations of the shipper are contained in the Rotterdam Rules. This serves to provide clarity with respect to obligations which the shipper is expected to undertake. A good number of these obligations represent a codification of practice. The three main areas where the shipper is expected to carry the obligation with respect to the provision of information to the carrier include: information to enable the carrier handle and carry the goods[16]; information to enable compliance with laws, regulations and requirements of public

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[13] 13 See the NDS Provider (SCN 1 February 2008, co6/082 HR).

[14] Article 25 (5) See also *Royden Machinery Co Ltd v The Anders Maersk* [1986] 1 Lloyds Rep.488. Also see the case of *Daewoo Heavy Industries Ltd v Klipriver Shipping Limited (The Kapitan Voivoda)* [2003] 2 Lloyds Rep 1.

[15] Article 17.

[16] Article 29 (1) (a).

Authorities as they apply during the carriage[17] and information for the compilation of the contract particulars.[18] The Rotterdam Rules make special provisions for the carriage of dangerous goods.[19] Where the shipper does not provide accurate information for the contract particulars or the dangerous nature of the goods, he is strictly liable to the carrier for any damage caused thereby. The shipper is also liable for the acts or omissions of his servants or agents as well as subcontractors but not to the performing party acting on behalf of the carrier to which the shipper has entrusted the performance of its obligations. Indeed the obligations of the shipper seem onerous in view of the fact that the shipper cannot limit his liability. It must however be stated that in all the predecessor conventions there is no limit of liability for the shipper. This may be due to the fact that the onerous requirements coupled with strict liability have public good implications. The detailed provisions of the obligations of the shipper in the Rotterdam Rules serve to bring clarity on the issues and requirements regarding the shipper's obligations and are not indeed detrimental to the interest of the shipper. The Rotterdam Rules also seem to have clarified the position taken by common law judges with respect to the dangerous character of goods.[20]

Limitation of liability

Lord Denning in his so called final word in The Bramely Moore had this to say: "I agree that there is not much justice in this rule, but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in his history and its justification in convenience"[21].

The Hague Visby Rules provide for a limit of liability of the carrier to the tune of 666.67 units of account while the Hamburg Rules provides for 835 units of account per package or 2 kilos of gross weight of the goods whichever is higher. The Rotterdam Rules provide for 875 units of account per package or 3 units of account per kilo of the gross weight of the goods, that are the subject of the claim or dispute, whichever is higher. Thus the Rotterdam Rules limit represent an improvement on limits when compared with the Hague Visby and Hamburg Rules.

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17 Article 29 (b).

18 Article 31.

19 Article 32.

20 See *The Giannis NK* [1994] 2 Lloyds Rep 171, [1998] 1 Lloyds Rep 337 HL and compare with *The Darya Radhe* [2009] EWHC 845.

21 [1963] 2 Lloyds Law Rep. 429.

Time for suit

The Hague/Visby Rules provide for one year time bar while the Hamburg Rules provide for two year limit and the Rotterdam Rules adopt the two year time limit[22].

Jurisdiction and Arbitration

There are no provisions in the Hague Visby Rules on Jurisdiction and Arbitration. It was the intention of the drafters that it should be left to the parties under the doctrine of freedom of contract.

The Hamburg Rules provide for jurisdiction and Arbitration and the Rotterdam Rules follow suit. It however needs to be mentioned that states that ratify the convention are expected to opt- in or opt- out of the application of the jurisdiction provisions. This is most unwelcome in the view of shippers and one can only expect that most states when they ratify, would opt in for the Jurisdiction and Arbitration provisions of the convention. It is of significance to developing economies who desire to found jurisdiction so that their courts can build a well-spring of jurisprudence in maritime law through judicial decision making.

Volume contracts

In the discussions leading to the development of the Rotterdam Rules issues of permissiveness with respect to freedom of contract came to the fore after a proposal submitted by the United States of America[23].

It is to be noted that the regime of the Hague/Visby Rules and the Hamburg Rules are "one way mandatory" implying that contracts for the carriage of goods by sea should not derogate from the convention to the detriment of the shipper, however derogations increasing the carrier's liability are permissible[24]. It is not intended to deal in any detail in this overview with the issues pertaining to the inclusion of Volume Contracts in the Rotterdam Rules. Within the Working Group there was protracted debate on its inclusion. The proponents of its inclusion argued that the predecessor mandatory regimes were developed in a commercial milieu which has now undergone tremendous metamorphosis and could not be strictly adhered to in addressing the practicalities of present day commerce.

Those who argued against its inclusion pointed out that inclusion of such a provision was tantamount to a victory for freedom of contract thus returning

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[22] Article 62.

[23] The proposal of the US was to the effect that Ocean Service Liner Agreement (OSLA) should be made non-mandatory – UN Doc A/CN.9/WG III/WP.34 at page 6-9.

[24] Articles III r 8 of the Hague/Visby Rules and articles 23 of the Hamburg Rules.

to the pre-Hague Visby era, at a time when the regulatory mechanisms ought to be further strengthened in the interest of small shippers.

In the end Volume Contracts found its way into the Rotterdam Rules but not without very significant caveats[25]. Within the context of the Rotterdam Rules Article 80 remains arguably the most controversial provision. The definition of Volume Contracts is fraught with uncertainty as there is no minimum quantity, period of time, frequency or number of shipments. Article 80 therefore sets out special provisions (super mandatory) to guide the conduct of transactions with respect to Volume Contracts and defines the purview within which a Volume Contract would be binding on the shipper. The special rules do provide some respite in respect of the concerns of shippers. It is however yet to be seen how the courts would apply the so called super mandatory provisions.

Entry into force

The convention is expected to enter into force one year after ratification by the 20th member state. As pointed our earlier, by April 2010, 21 states had signed the convention and it is expected that these states together with others yet to sign would take steps towards early ratification of the convention. As at October 2012 two states[26] have ratified the convention.

Conclusions

The above represents a snapshot of the salient features of the Rotterdam Rules and a brief comparison with the predecessor conventions on the carriage of goods by sea. While the Hague/Visby rules had 12 articles, the Hamburg had 34 articles, the Rotterdam, by far the most ambitious attempt to introduce modernity and uniformity, has 96 articles.

It is quite clear from the above that the Rotterdam Rules is a mixed bag. If the perception that the Hague/Visby Rules were largely drafted the shipowning interests and thus was skewed in their favour, the Hamburg Rules drafted largely by shipper interests and thus skewed in their favour is anything to go by, then the Rotterdam Rules, developed both by the CMI and UNCITRAL representing both sides of the "divide" should represent an accommodation of the interests of the major groupings. The Rules thus represent a compromise and like all compromises no one group leaves completely satisfied but all leave in the hope that they have taken something away. That is the spirit of the Rotterdam Rules which must be made to reflect in the judicial interpretation of the Rules.

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25 Article 80.

26 Spain and the Republic of Togo.

For shipper interests the deletion of the nautical fault rule, the continuing obligation of due diligence and seaworthiness, the inclusion of provisions on delay, jurisdiction and arbitration (albeit under an opt-in-opt-out) clause are indeed welcome.

In addition shippers should also find satisfaction and solace in the provisions on deck cargo, the extension of the time of suit, increased limitation amounts, the provisions on delivery, the widened scope of application and responsibility of the carrier not to mention the clarity of language in a number of provisions even if they suffer from verbosity.

For shipowners, the adoption of the format of the Hague/Visby Rules with respect to the basis of liability of the carrier, with the litany of exculpatory clauses, the reversed burden of proof on the claimant, the increased scope for limitation of liability, (breaches of its obligations) the flexibility of a network liability regime, the Himalaya protection (now clearly covering maritime performing parties) are indeed welcome.

Further to the above, shipowner interests have the benefit of flexibility in volume contracts, the provision of detailed rules on all documentary aspects, as well as the detailed provisions and obligations of the shipper, strict liability of the shipper with respect to dangerous goods etc. Indeed these are some of the underlying tenets of compromise reflected in the spirit of the rules.

The fact that the convention was arrived at after extensive consultations with major stakeholders and has largely represented modernity and codification of practice is welcome.

If judicial interpretation should be made within the spirit of the rules, then the overall objective of achieving international uniformity, commercial convenience and confidence as well as predictability and a reduction in transaction cost would have been realised. The legislative bargain is concluded. It is the turn of the judiciary.

THE LIMITATION OF LIABILITY OF THE CARRIER FROM AN ALLOCATION OF RISKS POINT OF VIEW

José Vicente Guzmán*

1. One of the main concerns in different countries about the ratification of the Rotterdam Rules, including Latin American countries as I mentioned in panel 1, resides in the carrier's limitation of liability provided for in this new convention.

2. My personal view is that the limitation of liability should not be merely seen as a matter of law, but rather as a tool for the allocation of the transportation risk's between the parties involved in the operation, from an economic point of view.

3. The limits of liability are an institution of the carrier's liability regulation present in all the international conventions governing contracts of carriage by any mode of transport.

4. Civil liability regimes for damage, loss or delay in delivery of goods in international transport are set out having regard to a policy of allocation of the transportation risks between the parties concerned, such as the carrier, the shipper of the goods, and the insurers (both cargo insures and carrier's civil liability insurers). Liability limits are one of the ways by which this allocation of risks is presented.

5. Even in air transport of passengers, being human life and integrity much higher values than the goods, the Montreal Convention of 1999 limits the carrier's liability and uses the IMF's SDR as the pattern to calculate the compensation in case of death and injury to passengers.

6. Liability limits are not exclusive of transportation. They are also present in work-related accidents in most international laws. Additionally, the same principle applies in relation to corporations and limited liability partnerships as a way of limiting the liability of their owners and shareholders.

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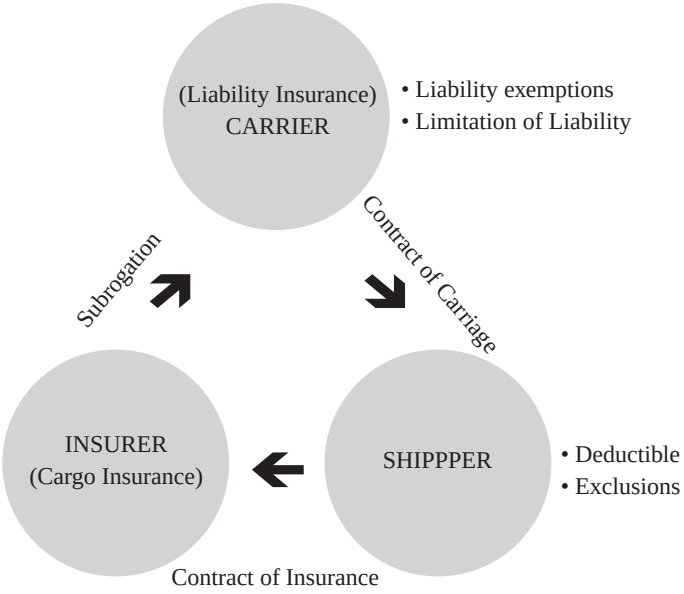
7. Back into the contract for the carriage of goods, the following figure shows the way in which the transportation risks are allocated between the shipper, the carrier and the cargo insurer:

Figure 1
Transport Risk's Allocation



8. In case of loss or damage to the cargo, the carrier's limitation of liability allows that every party with an economic interest in the transport operation retains a portion of the risk of such loss or damage. These economically interested parties are the shipper (or consignee), the carrier and the cargo insurer. With predictable limits of liability, the carrier is able to know beforehand how much he would have to pay in case of loss or damage to the goods; the cargo insurer will also be able to know how much he would have to pay – by virtue of the contract of insurance -, to either the shipper or the consignee and what value of it he will be able to recover (up to the limit of carrier's liability) from the carrier by way of subrogation. And finally, the shipper (or consignee) will also be able to know, in advance, how much money he would have to assume by application of the deductible of the insurance.

9. The retention of a portion of the transportation risks by each one of the parties with an economic interest in the transaction means that every one

of them will make their best efforts to avoid loss or damage to the cargo. Thus, the shipper will appropriately pack the goods and provide the carrier with complete and accurate information about its nature and care. The carrier will make his best effort to carry and custody the goods to avoid loss or damage to them. And the insurer will implement a good system of risk management with the shipper aimed at choosing diligent carriers.

The limits of liability in the Rotterdam Rules

10. The Rotterdam Rules proposes an increase rather than a reduction regarding applicable liability limits in the case of loss of or damage to the goods. This can be simply noted by making a comparison between the numbers provided for in the relevant provision of the "SDR" protocol, in which the liability limit was established for The Hague - Visby scheme (except in case of declared value of goods) in 666.67 SDR (Special Drawing Rights) per package or unit or 2 SDR per kilogram of gross weight of goods, whichever is higher, with the numbers as provided for in the Rotterdam Rules, namely, 875 SDR (208,33 SDR more than in the Hague – Visby Rules) per package or unit or 3 SDR (1 SDR more than in the Hague – Visby Rules) per kilogram of gross weight of the goods, whichever is higher. Therefore, one can clearly see that the limits under the new convention are higher than those set out by their predecessors.

11. On the other hand, with regard to the applicable liability limit for delay, it should be noted that this situation was not expressly regulated at all in The Hague or in The Hague - Visby Rules (on which it was not clear whether the carrier was liable for delay). In any case, the value set forth in the Rotterdam Rules for this event represents an increase in the amount provided for in the respective provision of the Hamburg Rules.

12. Regarding the calculation of compensation when the shipper has declared the value of the cargo, the new convention only reflects what its predecessors (Hague, Hague – Visby and Hamburg Rules) have previously stated. In fact, according to Article 59, the declared value will be the applicable limit in this case (Art. 59.1).

13. It is worth noting that the new convention was drafted having regard in this particular to maintain a "balance" between the interests of carriers and shippers[1] and to setting up a regime that provides certainty to the parties to the contract[2], reasons why consensus was reached to set limits on the amounts raised by the Convention.

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[1] Sturley, Michael. "Setting the Limitation Amounts for the UNCITRAL Transport Law Convention: The Fall 2007 Session of Working Group III" in Benedict's Maritime Bulletin, Vol. 5, No. 3/4, p. 165.

[2] See Ibid, p. 165.

14. In any case, from a predominantly empirical point of view, it must be borne in mind that only a few goods frequently transported by sea – having regard to their cost of production – will not be properly covered by the "per package" limitation as provided for in the Convention, that is approximately $ 1.350 USD per package or unit.

15. It is true that the Rotterdam Rules do not establish a limitation of liability for the shipper, as it does for the carrier's responsibility. However, no one can say that this is a disadvantage of the Rotterdam Rules in front of the Hague Rules, the Hague - Visby Rules or the Hamburg Rules, because all of these conventions neither provide for any limitation of liability of the shipper. So in this particular issue the Rotterdam Rules can not be accused of being in detriment of the legal position of the cargo interests, because they simply maintain the same line of the preceding conventions.

16. Endless arguments, both in favour and against the carrier's limitation of liability set forth in the Rotterdam Rules, can be raised, and have in fact been invoked, as an argument against the new convention. It is not possible to get a uniform position, but an overall approach could be useful.

17. For those countries that have ratified any of the existing conventions, I think that giving a step forward to ratify the Rotterdam Rules should be an easy decision, consistent with their present policy on this particular subject, since as it was seen, the Rotterdam Rules proposes an increase rather than a reduction regarding applicable liability limits in the case of loss of or damage to the goods.

18. Other countries that have not ratified any of the existing conventions have their domestic law drafted with a very similar scheme to that of The Hague or The Hague-Visby Rules. Some countries either have a carrier's limitation of liability in their domestic law or allow such limitation by contract. For these countries, in my view, it would also be a consistent decision to ratify the Rotterdam Rules.

19. Countries that definitively do not accept any limitation of liability in their carriage of goods by sea laws, and have a very strong position against it, face a more difficult decision as to the ratification of the Rotterdam Rules.

20. Since the carrier's limitation of liability provided for in the Rotterdam Rules has been a great concern in some countries, may be a strictly legal analysis is not the right path to make a decision, because the individual point of view of shippers, carriers and insurers is obviously different and contradictory. I think that discussions should be made from a broader perspective: I mean a commercial orientated point of view, whereby the interests of the industry and commerce in general are taken into account. An international uniform regime for the applicable law to the carriage of goods by sea will provide certainty to foreign trade.

21. If the majority of countries with whom a particular country maintains commercial relationships do ratify the Rotterdam Rules, the most reasonable

decision would be to ratify them as well. It is more beneficial for a country to get the economic growth brought by the increase of industry and commerce, than the existence of a limitation of liability that, in practice, will only affect a reduced number of goods carried, whose owners, in any case, will always be able to get the protection of cargo insurance.

22. Entrepreneurs, in general, are more interested in the growth of their business than in the recovery of the value of a loss or damage to their cargo. In addition, most of the transport operations end successfully and cargo arrives safely at its destination and only a small proportion suffers loss or damage.

23. The discussion around the convenience or inconvenience of the Rotterdam Rules should not be focused in a strictly legal discussion. Maybe a broader approach, having regard to all the economic interests involved, bearing in mind that the carrier's limitation of liability is a way of allocating the risks of transportation between the parties economically interested in the operation, and considering the commercial interests of the country as a whole, rather than those of specific groups, will be the best way to reach a better decision.

THE UN CONVENTION ON THE CONTRACTS OF INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA THE "ROTTERDAM RULES" PRACTICAL IMPLICATIONS FOR CARRIERS

ANDREW BARDOT*

1. Introduction

The provisions of the Convention, the "rules", extend and modernize the present international rules governing contracts of maritime carriage of goods. The objective is that the rules will replace The Hague rules, The Hague-Visby rules and the Hamburg rules, and that they will achieve uniformity of law in the field of maritime carriage and, hopefully, head off the ever present threats to all concerned interests, of a patchwork of disparate domestic and regional legislation relating to the carriage of goods by sea. A worthy objective, but of course one which self-evidently is entirely dependent upon significant and widespread support by states through the ratification process. Currently there are 24 signatory states but only 2 ratifications of the required 20 to bring the rules into force. Therein lies the real challenge.

This paper provides a necessarily brief overview, which does not permit for detailed consideration or analysis, but what in summary are the main implications, negative and positive, for carriers and their insurers?

2. Negative implications for carriers

These are of course well known and rehearsed, but lose no force from repetition.

Loss of the carriers "nautical fault" exception from liability.

In fairness, it may be said that this is an exception which has historically been of relatively infrequent and limited benefit of the carrier, but nonetheless

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it has provided a valuable exception for carriers in appropriate factual circumstances. Consequently, the loss of this exception is detrimental to the interests of carriers and their insurers.

More stringent seaworthiness obligations

The more stringent seaworthiness obligations, which are imposed on the carrier under Article 14 through the extension of pre-commencement of voyage due diligence requirements to the entire performance of the voyage, are a negative implication for carriers. It is considerably easier for a carrier to exercise the requisite due diligence before the vessel has embarked on the voyage than once the voyage has commenced, whereafter the carrier's ability to take such measures as may be required by the continuing obligation may, in practice, be considerably restricted. This could result in increased liability for the carrier and his liability insurers.

Increased package/unit of weight liability limits

It goes without saying that the significantly increased package/unit of weight liability limits contained in the rules will impose a greater financial burden on carriers and their liability insurers. The new limits will result in increases of approximately 31% per package and 50% per kilo.

The extension of time limits for commencing suit

Extending the current Hague/Hague-Visby time limits for commencement of suit could lead to prejudice to carriers' interests in achieving a fair and proper resolution of cargo claim disputes. There is an inevitable risk that the availability and value of evidence may diminish over time, and it is in the interest of all parties to the adventure that such disputes are promptly resolved whilst memories and recollections remain fresh and accurate.

Maritime Performing Parties

The introduction of the concept of a "maritime performing party" extends carriers' potential liabilities to parties other than the contracting carrier who may perform any part of the sea leg or services ancillary to the sea legs. Such parties will be subject to the same liabilities and responsibilities as the carrier, but the carrier nevertheless remains liable for the whole of the performance of the contract of carriage. This would not however extend to subcontractors performing non-maritime legs.

Dispute resolution forum choice

The increased flexibility in relation to dispute resolution forum choice contained in Articles 66 and 75 of the rules is also a negative factor from the carriers' perspective. Save in limited circumstances in relation to volume contracts, at the claimant's option suit, or where appropriate arbitration, may be commenced in the domicile of the carrier, at the place of receipt, delivery or

loading of the cargo. A single applicable forum for dispute resolution provides greater clarity and certainty of law and process for both contracting parties.

Club cover Ramifications

There may be negative implications for carriers in terms of their club cover which are more fully addressed later in the paper.

3. Positive implications for carriers

The prognosis for carriers is however by no means entirely negative, and there are a number of positive aspects of the rules which may, or will, work to the benefit of carriers.

A multi-modal convention

Unlike the Hague/Hague-Visby/Hamburg rules, the convention is not limited to port to port movements but extends to multi-modal contract of carriage, a "door to door" regime which should simplify addressing transport chain liabilities and promote uniformity and consistent application in the approach to assessment of carriers' liabilities.

Some beneficial aspects of existing Conventions and regimes retained.

The carrier's liability remains fault-based rather than strict which is welcome, even if the nautical fault exception will no longer be available under the rules, and the right to limit liability is preserved even if liability limits are increased. The due diligence test in relation to seaworthiness obligations is retained, as are the other what one might call "traditional exceptions" such as Act of God, perils of the sea, war and so on, save of course for the nautical fault exception mentioned earlier.

Shippers' obligations and liabilities in relation to cargo description and particulars and in relation to dangerous cargo.

The obligations imposed on shippers in Chapter 7 to provide information, instructions and documentation relating to the goods and the special rules on dangerous goods coupled with the shippers express liability to indemnify the carrier for loss or damage sustained by virtue of breach of such obligations is welcome from the carrier's perspective.

Deviation.

The preservation of the carrier's defences and limitations under the rules in cases of deviation constituting a breach of the carrier's obligations under applicable law is another positive feature.

Deck cargo application.

The extension of the provisions of the rules to cargo carried on deck in conformity with the liberty provisions contained in Article 25 of the rules, and

the exemption of carriers liability for loss or damage resulting from special risks involved in on deck carriage, are welcome developments from the carrier's perspective.

Liability for delay.

Whilst the inclusion of provisions imposing liability for delay were not as a concept viewed positively from the carriers perspective, the provisions restricting limitation of liability for delay to contracts where there is an agreed time for delivery rather than a "reasonable time" test is welcome.

Delivery of goods.

The provisions relating to delivery of cargo in Chapter 9 go some way to protecting the carrier against the risk of claims for delivery without surrender of the transport document, but still leave the carrier significantly exposed in such cases and will, in reality, provide limited comfort to a prudent carrier.

Greater freedom of contract in liner trades.

The flexibility for parties to "volume contracts" in the liner trade to derogate from the rules and giving greater freedom of contract (subject to the applicable criteria) is a valuable feature for carriers engaged in such trades.

Provisions for electronic commerce.

The provisions in the Convention giving electronic documents equivalence with the traditional paper transport document such as a bill of lading is welcome. The International Group is supportive of "paperless trading" and has been engaged with the development of a number of approved electronic trading systems which appear to be gaining increasing support from carriers.

4. P & I Club Cover

As currently drafted International Group Club rules preclude rights of recovery in respect of liabilities, costs and expenses which would not have been payable if the relevant contract or carriage document incorporated terms no less favourable to the carrier than the Hague Rules or Hague-Visby Rules. This restriction on the scope of cover is reflected in the International Group's claims pooling arrangements. The Group has already seen instances of carriage terms and conditions seeking to give contractual effect to the Rotterdam Rules which could bring into play the club rules exclusion from cover. Carriers are not encouraged to contract on such terms, or if they do are advised to take out difference in conditions cover to protect against the potential operation of the club rules cover exclusion. Whether or not clubs will decide to amend the relevant rules exclusion to permit cover to be extended to the scope of liabilities covered by the Rotterdam rules will depend upon the level of support and ratification of the rules over the coming years.

5. Summary

From both the carrier and the club perspective, widespread ratification and adoption of the rules would promote uniformity/consistency and help to head off threats of conflicting and disparate national and regional legislation and regulation of carriers rights and obligations. As an objective, this is desirable and welcomed.

There is general support for the rules from shipowner organisations including ICS, ECSA, BIMCO and WSC. Such support indicates that from the carrier's perspective, the rules are viewed positively notwithstanding the negative ramifications of certain aspects of the Rules.

Undoubtedly, application of the rules would increase the cost of claims to carriers and their P & I insurers, but this would be viewed as a price worth paying if widespread ratification promotes the cause of uniformity and consistency in the approach towards assessment of carriers' liabilities.

CORRECTIONS TO THE ORIGINAL TEXT OF THE ROTTERDAM RULES

The proposal has been made by Secretary General of the United Nations to correct certain errors in articles 1(6)(a) and 19(1)(b) of the Rotterdam Rules. The text of the communication and of its annex are reproduced below.

Reference: C.N.563.2012.TREATIES-XI.D.8 (Depositary Notification)

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA NEW YORK, 11 DECEMBER 2008

PROPOSAL OF CORRECTIONS TO THE ORIGINAL TEXT OF THE CONVENTION (ARABIC, CHINESE, ENGLISH, FRENCH, RUSSIAN AND SPANISH AUTHENTIC TEXTS) AND TO THE CERTIFIED TRUE COPIES

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The attention of the Secretary-General has been drawn to certain errors in articles 1 (6) (a) and 19 (1) (b) of the authentic text of the above-mentioned Convention and in the certified true copies circulated by depositary notification C.N.178.2009.TREATIES-2 of 8 April 2009.

The annex to this notification contains the text of the proposed corrections.*

In accordance with the established depositary practice, and unless there is an objection to effecting a particular correction from a signatory State or a Contracting State, the Secretary-General proposes to effect the proposed corrections in the authentic Arabic, Chinese, English, French, Russian and Spanish texts of the Convention. Such corrections would also apply to the certified true copies.

Any objection should be communicated to the Secretary-General within 90 days from the date of this notification, i.e., no later than 9 January 2013.

11 October 2012

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* The text of the proposed corrections is annexed in the six languages in which the Convention has been adopted but is reproduced here only in English and French.

CN.563.2012.TREATIES-XI-D-8 (Annex/Annexe)
Proposed corrections to United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) of 11 December 2008

Proposed corrections

1. Article 1(6) (a)

Insert the word "keeping"

"Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, **keeping**, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

2. Article 19 1(b)

Insert the words "and either" after requirement (i) in subparagraph (b)

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; **and either** (ii) while it had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

Corrections proposes

1. Article 1(6) (a)

Insertion des mots "la garde"

Le terme "partie exécutante" désigne une personne, autre que le transporteur, qui s'acquitte ou s'engage à s'acquitter de l'une quelconque des obligations incombant à ce dernier en vertu d'un contrat de transport concernant la réception, le chargement, la manutention, l'arrimage, le transport, **la garde**, les soins, le déchargement ou la livraison des marchandises, dans la mesure où elle agit, directement ou indirectement, à la demande du transporteur ou sous son contrôle.

2. Article 19 1(b)

Insertion des mots "et soit" avant le sous-alinéa ii) et remplacement du mot "ou" par le mot "soit" avant le sous-alinéa iii) de l'alinéa b)

b) L'événement qui a causé la perte, le dommage ou le retard a eu lieu: i) pendant la période comprise entre l'arrivée des marchandises au port de chargement du navire et leur départ du port de déchargement du navire; **et soit** ii) lorsqu'elle avait la garde des marchandises; **soit** iii) à tout autre moment dans la mesure où elle participait à l'exécution de l'une quelconque des opérations prévues par le contrat de transport.

After the lapse of the period for the notification of objections on 25 January 2014 the Secretary General of the United nations issued the notice quoted below together with the annex process-verbal.

Reference: C.N.105.2013.TREATIES-XI.D.8 (Depositary Notification)

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA NEW YORK, 11 DECEMBER 2008

CORRECTIONS TO THE ORIGINAL TEXT OF THE CONVENTION (ARABIC, CHINESE, ENGLISH, FRENCH, RUSSIAN AND SPANISH AUTHENTIC TEXTS) AND TO THE CERTIFIED TRUE COPIES

The Secretary-General of the United Nations, acting in his capacity as depositary, and with reference to depositary notification C.N.563.2012. TREATIES-XI.D.8 of 11 October 2012 by which corrections were proposed to the authentic text of the above-mentioned Convention, communicates the following:

By 9 January 2013, the date on which the period specified for the notification of objections to the proposed corrections expired, no objection had been notified to the Secretary-General.

Consequently, the Secretary-General has effected the required corrections to the Convention and to the Certified True Copies. The corresponding procès-verbal of rectification is transmitted herewith.

25 January 2013

UNITED NATIONS — NATIONS UNIES

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA, ADOPTED AT NEW YORK, ON 11 DECEMBER 2008

PROCÈS-VERBAL OF RECTIFICATION TO THE ORIGINAL TEXT OF THE CONVENTION AND TO THE CERTIFIED TRUE COPIES

THE SECRETARY-GENERAL OF THE UNITED NATIONS, acting in his capacity as depositary of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted at New York, on 11 December 2008 (Convention),

WHEREAS the authentic text of the Convention and to the Certified True Copies contains certain errors,

WHEREAS the corresponding proposal of corrections has been communicated to all interested States by depositary notification C.N.563.2012.TREATIES-XI.D.8 of 11 October 2012,

WHEREAS by 9 January 2013, the date on which the period specified for the notification of objections to the proposal of corrections expired, no objection had been notified,

HAS CAUSED the required corrections as indicated in the above notification to be effected to the authentic text of the Convention and to the Certified True Copies

IN WITNESS WHEREOF, I, Patricia O'Brien, The Legal Counsel, Under-Secretary-General for Legal Affairs, have signed this Procès-verbal.

Done at Headquarters, United Nations, New York, on 25 January 2013.

CONVENTION DES NATIONS UNIES SUR LE CONTRAT DE TRANSPORT EFFECTUÉ ENTIÈREMENT OU PARTIELLEMENT PAR MER, ADOPTÉ À NEW YORK, LE 11 DÉCEMBRE 2008

PROCÈS-VERBAL DE RECTIFICATION DU TEXTE ORIGINAL DE LA CONVENTION ET DES EXEMPLAIRES CERTIFIÉS CONFORMES

LE SECRÉTAIRE GÉNÉRAL DE L'ORGANISATION DES NATIONS UNIES, agissant en sa qualité de dépositaire de la Convention des Nations Unies sur le contrat de transport effectué entièrement ou partiellement par mer, adopté à New York le 11 décembre 2008 (Convention),

CONSIDÉRANT que le texte authentique de la Convention et aux exemplaires certifiés, contient certaines erreurs,

CONSIDÉRANT que la proposition de corrections correspondante a été communiquée à tous les États intéressés par la notification dépositaire C.N.563.2012.TREATIES-XI.D.8 en date du 11 octobre 2012,

CONSIDÉRANT qu'au 9 janvier 2013, date à laquelle la période spécifiée pour la notification d'objections aux corrections proposées a expiré, aucune objection n'a été notifiée,

A FAIT PROCÉDER aux corrections requises au texte authentique de la Convention et aux exemplaires certifiés conformes, comme indiquées dans la notification précitée.

EN FOI DE QUOI, Nous, Patricia O'Brien, Le Conseiller juridique, Secrétaire général adjoint aux affaires juridiques, avons signé le présent procès-verbal.

Fait au Siège de l'Organisation, Nations Unies, New York, le 25 janvier 2013.

Patricia O'Brien

YORK ANTWERP RULES

REPORT ON THE MEETINGS OF THE CMI AD HOC WORKING GROUP ON GENERAL AVERAGE

by Bent Nielsen* and Richard Shaw**

Meetings of the CMI Ad Hoc Working Group on General Average were held in Beijing on 16th and 18th October 2012 in the course of the Conference. The Report of International Working Group dated 21st July 2012 on the possible amendment of the York Antwerp Rules 2004, circulated to National Maritime Law Associations with the President's letter dated 25th July 2012, was discussed, together with the responses from certain National Maritime Law Associations and from the International Chamber of Shipping, and together with a synopsis prepared by the Rapporteur.

After careful consideration it was decided by the meeting that the proposed amendments put forward by the Working Group were not acceptable to the assembled delegates, and that they should not be put to the CMI Assembly for adoption.

Consideration was also given to a compromise proposal put forward by the British Maritime Law Association in their reply document whereby the text of Rules XIV(b), XX, XXI and XXIII of YAR 2004 would be incorporated into the 1994 York Antwerp Rules. The majority of delegates considered that these changes had been put forward too late to enable National Maritime Law Associations to enable their membership to consider these amendments, without this being understood as an objection to the substance of the changes suggested by the BMLA. It was therefore decided that these amendments could not be adopted at this Conference.

However the meeting recommended to the CMI Executive Council that it should appoint a new International Working Group on General Average, with a mandate to carry out a general review of the York Antwerp Rules on General Average, and, noting that the York Antwerp Rules 2004 had not found acceptance in the ship-owning community, to draft a new set of York Antwerp Rules which met the requirements of the ship and cargo owners and their respective insurers, with a view to their adoption at the 2016 CMI Conference.

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* Chairman

** Rapporteur

Without limiting the scope of such a review, it was considered by the meeting that the following topics might be included in its work:

– whether the York Antwerp Rules need special provisions to deal with larger multi cargo and container ships, following the example set by the 2011 revision of Lloyds Form of Salvage Agreement covering unresponsive and unrepresented cargo interests;
– whether aspects of substituted expenses need to be reviewed;
– whether more detailed provisions are required to deal with situations where the voyage is, or may be, frustrated;
– whether anticipated changes in international conventions, such as the Rotterdam Rules, will require changes to the way general average works in practice;
– whether new developments, such as special insurances covering cargo's GA liabilities, can be assisted by changes in the York Antwerp Rules.

Such a review would also provide an opportunity for interested parties to propose the further consideration of a revision of the Rules governing Salvage and Crew's Wages at a Port of Refuge, after more consultation and discussions between the various interests. All MLA's and observers are invited to identify any further topics to be included in the work, once they have had the opportunity to consider the matter. This should, however, be done as soon as possible.

REGULATION OF OFFSHORE ACTIVITY POLLUTION LIABILITY AND OTHER ASPECTS

AN INTERNATIONAL CONVENTION ON OFF-SHORE HYDROCARBON LEAKS?*

STEVEN RARES**

1. As the world's known resources of hydrocarbons are diminishing, there has been an increase in the search for and attempted recovery of oil and gas from off-shore wells. Some estimates suggest that there are currently over 1,500 off-shore oil and gas installations worldwide[1]. And on 2 May 2012, Steven Chu, the United States Secretary for Energy, announced the success of a proof of concept test for the extraction of natural gas from frozen methane hydrate. Most of the world's enormous reserves of frozen methane hydrate are found on off-shore continental shelves around the world at water depths between 300 and 500 metres . I should emphasise that the views I express in this paper are my own, alone, as a person with personal and professional interests in the marine environment and in Admiralty and maritime law.

2. My interest in the topic of this paper was stimulated in two ways. The first arose from work over the last three years involving judges of the Supreme People's Court of the People's Republic of China and the Federal Court of Australia. This involved us co-operatively considering the operation of various international conventions that dealt with oil pollution from ships.

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* A paper presented at the CMI Conference 2012, Beijing, 14-19 October 2012. This is a slightly revised version of a paper presented at the 2011 Fall Meeting of The Maritime Law Associations of the United States, Canada and Australia & New Zealand in Hawaii on 2-5 December 2011. An earlier version of this paper was presented at the International Conference on Liability and Compensation Regime for Transboundary Oil Damage resulting from Offshore Exploration and Exploitation Activities, hosted by the Government of the Republic of Indonesia in Bali on 21-23 September 2011. The author is grateful for a number of suggestions and a deal of information provided by Prof Gunther Handl, Eberhard Deutsch Professor of Public Law of Tulane University School of Law. Another earlier version of this paper was presented at the 2011 Biennial Mini Conference of the Maritime Law Association of Australia and New Zealand (NSW Branch); Lilianfels, Katoomba on 11 March 2011 and is published at [2011] LMCLQ 361.

** A judge of the Federal Court of Australia and an additional judge of the Supreme Court of the Australian Capital Territory. The author acknowledges the assistance of his associates, Andrew Low and Hannah Bellwood, Prof Nick Gaskell of the University of Queensland (who commented on a draft) and Assoc Prof Robin Warner of the University of Wollongong in the preparation of earlier drafts of this paper. The errors are the author's alone.

[1] Attributed to the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP).

Coincidentally, as we were working on this in Guangzhou in April 2010, the bulk carrier, *Shen Neng 1* grounded on the Great Barrier Reef discharging bunker oil. Last year the Supreme People's Court published a judicial interpretation that provides authoritative directions to all courts in the People's Republic of China in respect of claims for compensation for marine oil pollution damage that have no international elements[2].

3. My second stimulus for this paper was as an observer of the unfolding of events following two recent catastrophes. These were two major spills from off-shore wells that occurred, one off the North-West shelf of Western Australia from the *Montara* platform, the other off the Gulf of Mexico from the *Deepwater Horizon* rig. The *Montara* rig leaked in 2009 for 74 days. It was located in waters about 77 metres deep and drilling at a vertical depth of over 2,500 metres in the Timor Sea about 250 km off the north-west coast of Australia, south-east of Timor-Leste (East Timor) and east of Indonesia. The *Deepwater Horizon* leak in 2010 lasted for 87 days. It was drilling in water of a depth of about 1,500 metres and at a drill depth of about 2,700 metres below the ocean surface, 66 km off the coast of Louisana. Both leaks occurred because of blowouts.

4. Pollution from those spills affected the waters and coastlines of both the States that authorised the drilling as well as those of neighbouring States. The costs of cleaning up each spill were considerable. And, particularly in the *Deepwater Horizon* case, many persons, such as fishermen and those with businesses in littoral towns, claimed to have suffered economic loss.

5. In the United States of America there was an outcry when it was suggested that BP, the multinational oil company, one of the joint venturers operating the *Deepwater Horizon* rig, might seek to limit its liability under US law for compensating those who had suffered loss, including government agencies. This highlighted the absence of any internationally agreed regime to deal with such spills.

6. Subsequently, the Government of the Republic of Indonesia promoted discussion of a convention within the International Maritime Organisation (the IMO) and by holding the International Conference on Liability and Compensation Regime for Transboundary Oil Damage resulting from Offshore Exploration and Exploitation Activities in Bali in September 2011. However, there has been some resistance in the IMO itself to pursuing this objective.

7. Thus, it is timely to consider the need for an international convention to regulate the liabilities of those involved, or otherwise relevantly concerned in

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[2] *Provisions on Several Issues Concerning the Hearing of Cases Involving Marine Oil Pollution Damage Compensation Disputes*: adopted by the Judicial Committee of the Supreme People's Court of the Republic of China in its 1509th meeting on 10 January 2011.

developing, owning, controlling or operating off-shore hydrocarbon exploration and extraction (whom I will call the rig controllers) and the rights of States and persons to compensation against those persons[3].

Policy Questions

8. At the outset, a number of significant policy considerations arise. Without intending to be exhaustive, those include:

(a) the desirability of an internationally agreed convention or other regime;
(b) how can a new convention be achieved?;
(c) the possible frameworks or guidance that may be gained from current conventions;
(d) who should be liable and the basis of liability;
(e) identifying an effective means to ensure that insurance or other third party recourse will be available to cover losses;
(f) whether there should be a right of direct recourse against the insurer or third party;
(g) the loss for which compensation would be payable;
(h) the persons, including States, who can make claims for compensation and how liabilities should be enforced, especially in cases involving damage in more than one State;
(i) whether States should have their rights governed and limited by such mechanisms;
(j) whether liability should be limited;
(k) whether some further protective measure should exist, such as an international fund to meet the uncovered costs of a disaster, especially a major one, that may have exhausted the assets and insurance of all persons who were liable.

(a) The need for a convention

9. Off-shore exploration for and exploitation of oil and gas reserves will continue to occur while most of the world is dependent on these hydrocarbons as a source of energy and lubrication. That activity carries an inherent, present and real risk of catastrophic spills or leakages.

10. When wellheads are at great depths, sometimes over 1,000 metres, it is

[3] This topic was addressed at the Federal Court of Australia's second *International Law, Litigation and Arbitration Conference* on 6 May 2011 by the distinguished maritime scholars Prof Nick Gaskell, Professor of Maritime and Commercial Law, Marine and Shipping Unit, The University of Queensland and Dr Michael White QC, Adjunct Professor, The University of Queensland and two prominent commentators, Tom Howe QC, Chief Counsel Litigation, Australian Government Solicitor and Gavin Vallely, partner, Holman Fenwick Willan: published in KE Lindgren and N Perram (eds), *International Commercial Law, Litigation and Arbitration* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2011).

physically very difficult to plug a leak. The well publicised attempts to contain the *Deepwater Horizon* leak, over many weeks, showed that there is no exact or precise science to this task. And, of course, the deeper the source of the leak, the more difficult it is to effect repairs from the very remote surface.

11. No matter how carefully the rig may have been constructed or operated, disasters may occur through human error or, naturally, through events such as extreme weather or earthquakes. So the potential for large scale, widespread pollution damage exists with every off-shore hydrocarbon drilling activity.

12. In my opinion there is an imperative need for an international convention to regulate the risks and consequences of existing and future off-shore drilling activities. Those activities are conducted, generally, at great cost. Governments at the moment have been able to regulate, to some degree, off-shore activities on their State's territory, territorial seas or exclusive economic zones. However, ingenuity and economic imperatives are likely to make it feasible at some future time for hydrocarbons to be discoverable and recoverable in international waters. What will happen then? Which State or States will have the power to control or regulate that activity if the Authority proves ineffective? And, how will any liability be imposed on the controllers of a rig, located in international waters, that leaks?

13. These concerns should be addressed now so as to provide certainty, about the rights and obligations that ought be established, to littoral States, the world community, those who want to invest in the off-shore activities and others who may be affected.

(b) How can a new convention be achieved?

14. There are two possible avenues to achieve a new convention that are worth considering. First, the provisions of the 1982 *United Nations Convention on the Law of the Sea* (**UNCLOS**)[4] and, secondly, through the IMO.

Possible framework provided by the provisions of UNCLOS

15. Article 235 of the UNCLOS creates a framework under which a new convention on this topic may be progressed. It provides:

Article 235

Responsibility and liability

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief

[4] [1994] ATS 31. This entered into force generally and for Australia on 16 November 1994.

in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

16. The significance of UNCLOS was emphasised in the advisory opinion given on 1 February 2011 by the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*. I will refer to this as the "*State Responsibilities and Obligations Case*".

17. In UNCLOS, the "Area" means the sea-bed, ocean floor and its subsoil that are beyond the limits of national jurisdiction[5]. Part XI of UNCLOS deals with the Area, including exploration for and exploitation of all its solid, liquid and gaseous resources. Any such resources recovered from the Area are termed "minerals" [6]. Importantly, Art 136 states that: "The Area and its resources are the common heritage of mankind". And, Art 138 requires, relevantly, that the general conduct of States Parties in relation to the Area shall be in accordance with Pt XI of UNCLOS. Control of these activities is vested in the International Sea-Bed Authority by Art 153[7].

18. A State Party to UNCLOS has responsibility to ensure that activities in the Area that it carries out, or sponsors others to carry out, are carried out in conformity with Pt XI[8]. The *State Responsibilities and Obligations Case* dealt with Art 139 par 2 among other provisions. This provides, in substance, that damage caused by the failure of a State Party to carry out its responsibilities

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[5] Art 1.1(1).

[6] Art 1.1(3), 133(a) and (b), 134.

[7] 7 Art 153 par 3 provides that activities in the Area should be carried out in accordance with a formal plan of work, approved by the Authority, in the form of a contract. That contract must incorporate the relevant rules, regulations and procedures set out in the Authority's "mining code". At the moment, the "mining code" consists only of regulations relating to prospecting and exploration for polymetallic nodules and polymetallic sulphides. The regulations define polymetallic nodules as any deposit or accretion of nodules, on or just below the surface of the deep seabed, which contain manganese, nickel, cobalt and copper. Polymetallic sulphides are defined as certain deposits of sulphides and mineral resources which contain concentrations of metals including copper, lead, zinc, gold and silver. Thus, at present, the Authority has not made any regulations for off-shore exploration and exploitation of hydrocarbons.

[8] Art 139(1).

under Pt XI entails liability. If more than one State Party had responsibility then all will be jointly and severally liable. However, a State Party will not be liable for a person it had sponsored to the Authority under Art 153 par 2(b) as a person who could carry on activities in the Area if it had taken all necessary and appropriate measures to secure effective compliance by that person with its obligations under Art 138.

19. Pertinently, Pt XII of UNCLOS deals with the responsibilities and obligations of States Parties to protect and preserve the marine environment[9]. Article 235 is the critical provision in Pt XII. Nonetheless, there are real and practical issues about how effective the control of the Authority and the Sea-Bed Disputes Chamber of the Tribunal will be and what protection this will afford to littoral States. In July 2011, the Secretary-General of the Authority[10] said that there is:

> "… a renewed commercial interest in deep seabed mining as an alternative source for the minerals that are needed to fuel economic development in many parts of the world… It remains the case, however, that investments that originate from the private sector will inevitably be guided largely by financial considerations, including the impacts of national taxation, payments to the Authority and debt financing. The responsibility of the Authority in these circumstances is to begin the process to develop fair and equitable policies and regulations for exploitation of marine minerals. This is a matter which needs to be addressed sooner rather than later."

20. The advisory opinion in the *States Responsibilities and Obligations Case* suggested that a State sponsoring activities in the Area may be held liable to pay compensation if it fails to carry out its responsibilities under UNCLOS with due diligence and a third party suffers damage as a result[11]. The Chamber concluded that when a State Party sponsored a person to engage in activity in the Area, the State had the responsibility to provide a means for persons, who might be injured as a result of such activity, to seek and receive compensation[12]. However, this advice gave no certainty about the amount or sufficiency of compensation. Nor did it require that an insurer or financially secure person be in a position pay that compensation if the person primarily liable could, or did, not. Nor does an obligation of a State to exercise "due diligence" matter much if the State itself is impoverished and unable to make a meaningful payment of a shortfall in compensation in the event that it breaches this obligation.

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[9] Art 192.

[10] Nii Allotey Odunton (Ghana): He spoke at the seventeenth session of the Authority held in Kingston, Jamaica, from 11 to 22 July 2011.

[11] See Question 2 at [242].

[12] See [139]-140] and Art 235 par 2.

21. In addition, the Chamber advised that a State had to approach sponsoring or engaging in activity in the Area in accordance with principle 15 of the 1992 *Rio Declaration on Environment and Development*[13]. The latter is known as the "*Precautionary Principle*". It obliges States to apply a precautionary approach to allowing development in order to protect the environment from degradation where there is a threat of serious or irreversible damage, even without full scientific certainty that such damage would occur, if the development proceeded.

Role of the International Maritime Organisation

22. Article 1(a) of the *Convention on the International Maritime Organisation*[14] provides that a purpose of the Organisation is:

(a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article. (emphasis added)

23. The IMO is uniquely well placed to formulate a convention to address the consequences of off-shore leaks from oil and gas drilling installations. The IMO has been able to achieve its success to date by involving the insurance market, and in particular P&I Clubs, to offer insurance or cover for these types of risks.

24. It is entirely appropriate that the IMO should be interesting itself in this area because of its vast experience propounding international conventions that deal with the consequences and containment of oil pollution from ships and off-shore installations. The IMO has also been responsible for at least two significant international conventions dealing expressly with hydrocarbon pollution from off-shore rigs. First, it promoted the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*[15] as amended by the *Protocol of 2005 to that Protocol* (the SUA Protocols) [16]. These protocols were seen, rightly, as a natural

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[13] See [125]-[135], [242].

[14] Done at Geneva on 6 March 1948.

[15] Done at Rome on 10 March 1988.

[16] Done at London on 14 October 2005. Under these Protocols, States Parties have an obligation to take such measures as may be necessary to establish its jurisdiction over certain offences (set out in articles 2, 2*bis* and 2*ter*) when the offence is committed against or on board a fixed platform which is located on the continental shelf (Art 3 par 1). A relevant offence is to place or cause to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety (Art 2 par 1(d)). 146 countries are party to the 1988 Protocol and 27 countries are party to the 2005 Protocol to amend the 1988 Protocol (IMO website, *Status of Conventions Summary*). Australia is not a party.

extension of the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*[17].

25. Secondly, the IMO has been directly responsible for significant provisions governing oil pollution from off-shore oil and gas rigs in the 1990 *International Convention on Oil Pollution Preparedness, Response and Co-operation* (the OPRC Convention)[18]. In 2000, the IMO extended the reach of this Convention to substances other than oil in the *Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances*[19] (the 2000 Protocol).

26. Article 3(2) of the OPRC Convention provided that States Party must require operators of any fixed or floating off-shore installation or structure engaged in oil or gas exploration, exploitation or production activities, or loading or unloading of oil under the jurisdiction of the State Party to have emergency plans that are co-ordinated with the national system established under Art 6. Article 4 provided for the persons having charge of off-shore rigs to report to the State, in whose jurisdiction the rig was, any actual or probable discharge of oil or any observed event involving such occurrences without delay. Article 6 required each State Party to develop both a national and regional system to respond to pollution incidents from off-shore installations. And, the OPRC Convention made a number of other provisions for international co-operation in responding to such events. The 2000 Protocol recited that, pursuant to resolution 10 of the 1990 Conference for the OPRC Convention:

> "… the International Maritime Organization has intensified its work, in collaboration with all interested international organizations, on all aspects of preparedness, response and co-operation to pollution incidents by hazardous and noxious substances,…"

27. That resolution would appear to invite the continuation of the IMO's leading role in promoting safety at sea and protecting the marine environment by involving itself in the formulation of a convention to deal more generally with off-shore hydrocarbon leaks. The impact of an oil or gas leak from an off-shore platform or rig, can interrupt international shipping lanes, interfere in international trade by sea, affect maritime safety and the efficiency of navigation. The IMO has recognised the significance of its role in this regard in the SUA Protocols, the OPRC Convention and 2000 Protocol.

28. At the meeting of the Legal Committee of the IMO held in November 2010[20], the Government of Indonesia proposed a work program to develop an

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[17] Done at Rome on 10 March 1988: [1993] ATS 10 which entered into force for Australia on 20 May 1993.

[18] Done at London on 30 November 1990: [1995] ATS 12 which entered into force on 13 May 1995.

[19] Done at London on 15 March 2000: [2007] ATS 41 which entered into force on 14 June 2007.

[20] 97th Session of the Legal Committee held on 15-19 November 2010.

international regime addressing liability and compensation for trans-boundary oil pollution damage caused by off-shore exploration and exploitation activities. This was in the wake of the *Montara* blowout. The Indonesian proposal also raised the issue of immoveable oil storage units that were outside the scope of the *International Convention on Civil Liability for Oil Pollution Damage 1969* as amended by the *Protocol of 1992*, known as CLC 1992 or simply CLC[21] and funds established under the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*[22], now known as the 1992 Fund Convention supplemented by the Protocol of 2003 to that Convention, which is not yet in force in Australia (the 2003 Protocol)[23]. The current fund is known as the 1992 Fund and the fund established by the 2003 Protocol is known as the Supplementary Fund.

29. The minutes of the meeting of the IMO Legal Committee contained the telling point that oil pollution knows no borders and, accordingly, it was important to have a mechanism in place to compensate victims. However, there were concerns at the meeting as to whether the IMO was the proper organisation to deal with this issue.

30. As a result of these discussions, the IMO Secretariat prepared a note on the existing international instruments relevant to this subject[24]. The note referred to Arts 192, 208, 214 and 235 of UNCLOS but observed that these and other provisions did not create an international liability and compensation regime[25]. It also referred to a number of other international instruments including the convention between European countries with oil and gas reserves in the North Sea[26].

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[21] This is given force of law in Australia by the *Protection of the Sea (Civil Liability) Act 1981* (Cth).

[22] *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, done at Brussels 18 December 1971 [1995] ATS 2; *Protocol to the International Convention on the Establishment of the International Fund for Compensation for Oil Pollution Damage of 18 December 1971*, done at London 19 November 1976 [1995] ATS 3; *Amendments to the Limits of Compensation in the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971* done at London 18 October 2000 [2004] ATS 28.

[23] *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992*, done at London 16 May 2003 [2003] ATNIF 21. The 2003 Protocol established the International Oil Pollution Compensation Supplementary Fund.

[24] International Maritime Organisation Legal Committee, *Note by the Secretariat – Information relating to Liability and Compensation for Oil Pollution Damage resulting from Offshore Oil Exploration and Exploitation*, 18 February 2011.

[25] For example the *International Convention for the Prevention of Pollution from Ships* (MARPOL 73/78) excludes from its ambit release of harmful substances from exploration, exploitation and associated off-shore processing of seabed mineral resources: Art 2(3)(b).

[26] The *Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources*, adopted at London on 1 May 1977. The States Parties to this Convention are the United Kingdom, Germany, Ireland, the Netherlands, Norway and Sweden.

31. The North Sea Convention provided that the operator designated by the State in whose territory the rig was, or who was in overall control of it, would be strictly liable for any pollution damage resulting from any incident[27]. There were limited exceptions such as in cases of acts of war and a natural phenomenon of an exceptional, inevitable and irresistible character[28]. An operator would be liable for a maximum amount which was initially fixed at 30 million Special Drawing Rights (SDRs) for the first five years after that Convention was opened for signature and, then increasing to 40 million SDRs[29]. The operator had to insure for at least 22 million SDRs for the first five years, increasing to at least 35 million SDRs thereafter[30]. The minimum and maximum amounts could be varied by the States Parties. That Convention also provided for an operator to limit its liability in respect of each distinct incident giving rise to liability by establishing a limitation fund to meet any, and all, claims[31].

Are off-shore rigs vessels?

32. It is worthwhile remembering that many off-shore rigs are vessels in their own right. Judge Barbier, the docket judge for all claims arising out of the *Deepwater Horizon* incident recently delivered an illuminating judgment in which he held that that rig was a vessel in navigation[32]. He described *Deepwater Horizon* as a "mobile offshore drilling unit". This makes sense, since its only physical attachment to the sea-bed was through a 5,000 foot or 1,500 metre "string of drill pipe". Thus, the drilling unit had to float on the sea surface at all times.

33. Earlier, in 1959, the Fifth Circuit United States Court of Appeals, had held in *Offshore Co v Robison*[33] that a mobile drilling platform that had been towed to a location in the Gulf of Mexico and had its retractable legs lowered and planted on the sea-bed was a vessel. The platform had no engines but had a hull and was towed to its drilling positions. Judge Wisdom opened his opinion by saying: "This case propounds a riddle: when is a roughneck a seaman?" [34] Apparently, a "roughneck", in 1959 at least, was an oil field worker. The answer to the riddle, subsequently approved by O'Connor J for a unanimous Supreme Court of the United States in *McDermott International Inc v Wilander*[35] was: when the person's duties contribute to the function of the

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[27] Art 3(1).

[28] Art 3(3).

[29] Art 6(1).

[30] Art 8(1).

[31] Art 6, 7 and 8. Under Art 8, a State could exempt an operator from insuring at all to cover liability for pollution damage wholly caused by an act of sabotage or terrorism.

[32] *In re Oil Spill by The Oil Rig "Deepwater Horizon" in the Gulf of Mexico* 808 F. Supp. 2d 943 (2011) (E.D. La.).

[33] 266 F 2d 769 at 779 (CA 1959) per Rives and Wisdom JJ, Cameron J dissenting.

[34] 266 F 2d at 771.

[35] 498 US 337 at 354-355 (1991).

vessel or to the accomplishment of its mission, such as working as a member of a drilling crew on a vessel or off-shore rig.

34. As Judge Barbier noted, the Supreme Court of the United States decided in 2005[36] that "a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment" for the purposes of the *Longshore and Harbor Workers' Compensation Act*. It is likely that other nations will have similar legislation providing for the special position of persons who work on off-shore oil and gas rigs.

35. In contrast, the *Montara* rig or "well head platform", was a jack-up structure that had a more substantial physical connection to the sea-bed. It was located on Australia's continental shelf and so was in an area over which the IMO has already accepted a supervisory role in formulating international law. Like the *Montara* rig, many modern-day jack-up rigs are floating barges fitted with long support legs that can be raised or lowered. They are vessels. So too are floating off-shore storage units which are often converted oil tankers or purpose built vessels. All of these are ships. *Prima* facie, these ships and their off-shore activities appear to be proper subjects for the IMO to regulate. However, the IMO is currently blowing more cold than hot on this issue. That is regrettable.

36. Thus, international regulation of the safe construction and operation of, as well as the consequences of pollution from, these installations, under the auspices of the IMO, is both practicable and sensible.

(c) A possible framework

37. Some helpful guidance about the potential nature of an international consensus can be gained from the provisions of the most recent instrument governing liability for oil pollution from ships, namely, the *International Convention on Civil Liability for Bunker Oil Pollution Damage*, done at London on 23 March 2001 (the Bunker Oil Convention)[37]. I want to suggest a combination of a regime of that kind supplemented by another layer or layers of protection along the lines of the 1992 Fund Convention.

38. The Bunker Oil Convention has the following relevant features:

- a wide definition of "shipowner" so as to include the owner, registered owner, bareboat charterer, manager and operator of the ship (Art 1(3));

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[36] *Stewart v Dutra Construction Co* 543 US 481 (2005) at 497 per Thomas J for a unanimous court.

[37] This entered into force internationally on 21 November 2008 and has been given the force of law in Australia, subject to minor amendments, by the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth). The Bunker Oil Convention followed the model in CLC 1992 closely, but not precisely.

- strict liability of the shipowner at the time of an incident, with very limited exceptions (Art 3);
- a prohibition on claims being made against the shipowner for pollution damage otherwise than under the Convention (Art 3(5));
- liability for any pollution damage caused outside the ship by contamination resulting from the escape or discharge of its bunker oil, with the proviso that compensation for impairment of the environment, other than loss of profit from that impairment, is limited to the actual or proposed cost of reasonable measures to reinstate, the costs of preventative measures to prevent or minimise such damage and of further loss caused by those measures (Arts 1(9), 2(b), 3);
- the right of the shipowner, his insurers or those providing financial security to him, to limit liability under any applicable national or international regime, including the *Convention on Limitation of Liability for Maritime Claims 1976*[38], done at London on 19 November 1976 as affected by the 1996 Protocol to amend that Convention (**the LLMC 1976**) (Art 6);
- a requirement that the shipowner effect insurance or provide financial security, such as a bank guarantee, in an amount equal to the maximum amount for which he can limit his liability (Art 7(1));
- a right for an injured party to proceed directly against the insurer or security provider (Art 7(10));
- a time bar, generally, three years after the date when the damage was done (Art 8);
- the conferral of jurisdiction on the Courts of any State Party in which pollution damage occurred, including where such damage was also suffered in the territory of one or more other States Parties (Art 9);
- a requirement that all States Parties recognise and enforce such a judgment, except where the judgment was obtained by fraud or the defendant was denied natural justice (Art 10).

(d) Who should be liable and on what basis?

39. The commercial relationships that exist between rig controllers will vary considerably. The same considerations apply to immoveable off-shore storage units and other similar equipment. For simplicity I will refer to all these as included in the expression “rigs”. How should liability be imposed? Should it be on everyone involved or concerned in developing, owning, controlling and operating a rig, however minor a role such a person played in relation to the casualty? Should the liability be strict or fault based? The answers to these

[38] This is given the force of law in Australia by the *Limitation of Liability for Maritime Claims Act 1989* (Cth). 15.

questions can only be worked out on the basis of policy choices by the States who negotiate any convention.

40. Because an off-shore casualty involving leakage of hydrocarbons is likely to be protracted, affect a considerable area and involve complex issues, there is much to be said for a regime that imposes strict liability. That would avoid argument about whether some other criterion of responsibility, such as negligence or other fault, has occurred before someone is required to pay compensation.

41. Generally, the shipping industry operates with strict liability as the standard in international conventions, such as the Bunker Oil Convention and the earlier CLC 1992. Strict liability offers certainty both in fixing immediate responsibility on an identified person to pay compensation as soon as a casualty occurs and, generally, in identifying what is payable. These identifiable risks are able to be covered by insurance or protection and indemnity (P&I) club arrangements. The shipping conventions ascertain the maximum quantum of a shipowner's liability based on the ship's tonnage. That is obviously not a suitable criterion to use in fixing a maximum liability for off-shore rig leaks.

42. There does not seem to be any difference, at least to me, as a lay person, in the potential extensive pollution damage from a leak caused by an exploratory drill, on the one hand, and by an established rig, on the other. Of course, a leak can be caused by either exploration or an established means of exploitation on a commercially operating rig. Once something goes wrong and a leak commences at or near the seabed, hundreds or more metres below the surface, the nature of the antecedent surface activity would not appear to matter. Action has to be taken immediately and continuously to stop the leak.

43. Thus, the maximum liability should be fixed by reference to a sum that, based on international experience, will meet the likely clean up, preventative and restorative costs, as well as making a sufficient allowance for physical damage and economic loss suffered by States, businesses and other persons as a consequence of any substantial and sustained leak. That maximum liability will also need to be fixed to take account of contingencies. It should also be sufficient for costs and losses caused by a leak from an installation that may be far out to sea, and so have a wide area of potential impact. And, some formula for automatic indexation of the maximum ought to be included in the convention.

44. The process of arriving at such a maximum liability will not be easy. No doubt, it will need to strike a balance between what quantum should be available, from insurance or indemnity, to be provided by the rig operator to cover potential damages and what the off-shore hydrocarbon industry can afford, or will be prepared, to pay for that quantum. The insurance market will have to participate in this process in order to achieve a commercially feasible solution. Inevitably, there will be a shortfall; hence my proposal for a second tier or tiers along the lines of the 1992 Fund Convention and the 2003 Protocol.

45. There are significant costs and risks of conducting operations off-shore to explore for or exploit hydrocarbons, including establishing and operating the means of exploitation of any economically recoverable resource. Such operations are likely to involve a number of persons with an economic interest in the success of the ventures. The scheme of the Bunker Oil Convention that makes a number of persons fall within the definition of "shipowner" who will be jointly and severally liable up to the maximum amount, has a practical appeal in this area too.

(e) The source of insurance or compensation

46. The real problem in developing a convention is the diversity of interests among those who are or may be involved in the off-shore exploration and exploitation of oil and gas resources. Historically, the risks of the international shipping industry have been covered effectively by the 13 large P&I Clubs. The P&I Clubs had an incentive to establish, and update, oil pollution and limitation conventions so that they would have certainty about the likely maximum risks that they may be called upon to meet arising out of the activities from ships they covered.

47. There is no similar concentration of interests, coverage or risk for off-shore oil and gas exploration and exploitation. However, an effective international convention that requires an acceptable, yet commercially feasible, level of insurance cover is likely to generate interest in the insurance market to provide such cover. The P&I Clubs have had considerable expertise and experience in dealing with risks and casualties involving oil and gas at sea. It may be that P&I Clubs will also be prepared to facilitate the creation of this new market. The *States Responsibilities and Obligations Case* suggests that the State that authorises exploration or exploitation of oil and gas reserves in its territory should be liable for damage when it has failed to exercise due diligence in approving and regulating that activity. If States Parties were also required to ensure that operators had substantive insurance cover this would be another basis for establishing a viable insurance market to address these risks.

(f) Insurers and direct recourse

48. There will always be a risk that insurance arrangements, bank guarantees, or protection and indemnity arrangements may fail to respond, due to the insolvency of the person with the obligation to indemnify the controller. Thus, a wider range of persons involved in the ownership, operation or control of an off-shore rig should be made responsible. This will offer greater chances of recovery in the event that one or more persons who have an immediate economic interest in the venture fails to meet its or their liability, or third parties such as insurers or P&I Clubs fail to honour their obligations or responsibilities to indemnify the controller. At the moment, P&I Clubs generally exclude liability for off-shore exploration and exploitation activities.

49. The convention should also allow the State Party in whose territory or exclusive economic zone the off-shore facility is located to approve any insurer

or other source of indemnity as a condition of permitting the activity. This would offer some protection against the risk that any proffered insurance or indemnity may be chimerical or insubstantial. Again, issues of sovereignty may come to bear on the question of one State Party being entitled to reject an insurer approved by another State Party.

50. It would be important to provide that the insurer or indemnity provider be jointly and severally liable as a principal with a rig controller. Any insurance or indemnity arrangement for a rig controller should contain provisions requiring the provider to submit to the jurisdiction of the Courts of the State Party in which pollution damage occurs and to consent to registration of any judgment in the provider's home jurisdiction.

(g) The loss for which compensation would be payable

51. The experience with CLC 1992 and from the recent *Montara* and *Deepwater Horizon* blowouts suggests that governments or their agencies will need to expend very significant sums in containing and cleaning up leaks, as well as taking measures to prevent further damage. Next, they will have a substantial potential cost to restore, to the extent that it is possible, damage to the marine and littoral environments. Depending on the location of the rig, more than one State's territory may be affected, particularly where the incident takes place in international waters. There is a likelihood that a number of States will wish or need to take action to contain and prevent the further spread of pollutants.

52. In addition, a number of marine based industries will be likely to be affected, including fishing, tourism and possibly shipping. Physical damage is likely to be occasioned to shore installations. The experience of the 1992 Fund and its predecessors has covered a wide range of pollution damage suffered from catastrophic shipping events that exceeded the liabilities of shipowners under CLC 1992.

53. The 1992 Fund's Claim Manual[39] provides a broad spectrum of the types of claims for compensation that have been made. I am not aware of any policy reason why, as a minimum, the concept of pollution damage in the CLC 1992 and Bunker Oil Convention would not be appropriate to apply in the case of leaks from off-shore installations. There will, of course, remain questions of whether a particular claim of damage is too remote. This will be an issue especially in cases of pure economic loss to a person whose business is indirectly affected by pollution damage[40].

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[39] December 2008 edition.

[40] For example, a producer of smolt from salmon eggs could not claim, from the predecessor of the 1992 Fund, for damage suffered from indirect loss, such as potential supply contracts with new customers or larger renewed contracts with existing ones or a drop in market price for smolt: *Landcatch Ltd International Oil Pollution Compensation Fund* [1999] 2 Lloyd's Rep 316 (Inner House Court of Session). (I am indebted to Prof Richard Shaw and my associate Abbey Burke for this suggestion).

54. However, there are other policy considerations which those engaged in formulating an international convention in this area may bring to bear on the process. For example, the environmental movement has criticised the definitions of pollution damage in CLC 1992 and the Bunker Oil Convention as too narrow.

55. The pace of remedial work in both the *Montara* and *Deepwater Horizon* disasters led to a considerable amount of public frustration. Regulators may wish to insist that a condition of allowing any off-shore drilling be that the rig controllers have in place irrevocable contracts with approved fast response providers of the types of services relevant to plugging leaks, cleaning up pollution or preventing or containing its spread.

(h) Who should be able to make claims for compensation and how can claims be enforced?

56. If an international convention is to have broad acceptance, it must allow the widest number of persons and States that may be affected by pollution damage from off-shore hydrocarbon leaks to make claims for compensation.

57. There does not seem to be any reason why the class of financial claimants should be limited, provided that each has a claim for pollution damage as defined in the convention.

58. Proceedings should be able to be brought directly against insurers or indemnifiers of any rig controller, as under the Bunker Oil Convention.

59. The model adopted in the Bunker Oil Convention and CLC 1992 conferred jurisdiction on the Courts of any State Party in which the damage occurred and required any judgments given by that Court to be recognised by the Courts of other States Parties, with limited exceptions for fraud and denial of natural justice. That appears to be a very practical and appropriate mechanism.

60. Consideration might also be given to imposing requirements that:

- if proceedings are commenced in a court of one State Party with jurisdiction, all persons falling within the description "the rig controller" (including insurers and indemnifiers) must pay into that court or provide security for the maximum amount of its liability, or a lesser sum sufficient to cover its then apprehended liability;
- all States Parties with claims should bring proceedings in the court of the State Party first seized of the matter, though there are issues of national sovereignty and co-ordinate jurisdiction that may make such a mechanism undesirable. Nonetheless, there is obvious utility in a mechanism that enables one Court to deal with all matters. This is particularly so where the available insurance or other security would be likely to be insufficient to cover the total value of the claims so that it will be necessary to apportion the fund between the various persons entitled to compensation.

(i) Should States have their rights governed and limited by the claims mechanisms?

61. If a convention is to work, it is important that the international community accepts that States Parties must be bound by its terms. There has been an unfortunate tendency in the United States of America to refuse to give legal effect to such conventions and, indeed, for it to advocate breaking of limitations of liability. As Prof Edgar Gold QC commented after the 1989 *Exxon Valdez* disaster:

> "In the ship-source marine pollution area the United States has today manoeuvred itself into a very difficult position, both nationally as well as internationally, through the actions of a rather strange combination of bedfellows – the environmental movement and a group of federal politicians interested in protecting state rights. As a result, the United States, always at the forefront of developing new principles of international behaviour, but also often very reluctant to implement such principles, has, once again, turned its back on the international community on a rather crucial issue."[41]

62. However, the United States of America is not alone. The State of Queensland recently acted in this politically expedient way in respect of the 2009 *Pacific Adventurer* casualty.

63. The purpose of a convention of this kind is to provide internationally accepted and recognised norms of responsibility and provide a measure of protection that is known, certain, and insurable. If States Parties are at liberty to ignore the international norms when it suits their own domestic situation, the position may be reached where persons who are supposed to obtain insurance or security to meet liabilities imposed under a convention may also choose to ignore that.

64. Moreover, I am proposing that there be a further international fund available in cases of significant catastrophes of the scale of the *Exxon Valdez* or *Deepwater Horizon* disasters. This would ensure the availability of a further measure of protection for persons who suffer loss and possibly States Parties as well.

65. Accordingly, in developing the terms of a convention, some consideration should be given to providing that States Parties' rights be governed and limited by its provisions. That would give rig operators certainty as to their maximum liability and allow them to rely upon the terms of the convention to limit demands that States Parties may seek to make on them beyond the maximum liability imposed.

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[41] E Gold: *Marine Pollution Liability "Exxon Valdez": the U.S. "All-Or-Nothing" Lottery!* (1991) 22 J. Mar. L. & Com. 423 at 424.

(j) Limitations of liability

66. The history of the law maritime has recognised that those involved in international trade by sea should be entitled to enjoy limitation of liability. I traced some of the history and discussed these matters in *Strong Wise Limited v Esso Australia Resources Pty Limited* (*APL Sydney)* [42]. The conventions that have allowed shipowners to limit their liability involved compromise. First, the shipowners had to accept that their liability would be limited by a pre-casualty value of the ship calculated by reference to her tonnage. This has been the position since the *International Convention for Unification of Certain Rules relating to Limitation of Liability of Owners of Seagoing Vessels 1924*[43].

67. In exchange for this obligation, the shipowners' right to limit liability evolved to be "virtually unbreakable", as in the LLMC 1976. This important qualification has had the consequence that insurers and P&I clubs can offer insurance or indemnity arrangements to shipowners knowing the amount of their maximum risk and so, making the system of providing insurance or indemnity commercially workable and affordable.

68. In the case of off-shore hydrocarbon exploration and exploitation, a trade off will also have to be made. There is little point in having unlimited liability for a rig controller whose only asset is the rig that is destroyed in a casualty causing massive damage and who is uninsured. And, if liability of a rig controller is unlimited, it will be uninsurable. This entails that a convention must be based on accepting a commercially realistic limitation of the amount recoverable against rig controllers. If that is accepted then some measure of third party insurance or indemnity will be available to meet some, if not all, of the damage bill caused by a casualty.

69. In addition, States negotiating such a convention will need to strike a balance that recognises the desirability of entrepreneurs continuing to search for and exploit hydrocarbon resources for which there is still a demand, and sometimes a requirement. The likely maximum loss and damage caused by any one spill is a matter than can be calculated. It will probably be similar in most cases, unless there is something about the scale of the operation or the particular resource that affects the degree of risk of a leak or the potential pollution damage which it might cause.

70. Therefore, it should be possible to standardise the maximum sum for which a rig controller can be made liable. That will enable that risk to be insured against or provided for by P&I arrangements. Perhaps those involved in the hydrocarbon industry, oil companies and explorers, will establish P&I arrangements to cover these risks.

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[42] (2010) 185 FCR 149; [2010] 2 Lloyd's Rep 555.

[43] Done at Brussels on 25 August 1924. That methodology followed the provisions of the *Merchant Shipping Acts* of the United Kingdom of the 19th century.

(k) Should there be a further fund for uncovered costs?

71. In 1969 the *Tanker Owner's Voluntary Agreement Concerning Liability for Oil Pollution 1969* (TOVALOP) was set up by shipowners and P&I Clubs in anticipation of the original CLC 1969. In 1971 a further voluntary scheme was established called the *Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution* (CRISTAL). The oil companies paid money into a fund under CRISTAL to supplement the 1969 Fund Convention. Both TOVALOP and CRISTAL ceased to accept claims in February 1997[44]. CRISTAL sought to ensure that sufficient compensation would be available to persons who suffered oil pollution damage that exceeded the maximum provided for under CLC 1969 and its predecessors. The 1992 Fund shifted the cost of excess damage from shipowners to the companies and States that import or export the oil by imposing levies on imports into receiving States.

72. The 1992 Fund is an inter-governmental organisation set up and governed by States. It has an executive committee comprised of 15 member States, elected by an assembly composed of representatives of the governments of member States. The committee's main function is to approve claims, although the executive director of the fund has substantial authority to pay claims. Essentially, the 1992 Fund Convention intended that the 1992 Fund would make additional compensation available to claimants who did not obtain full compensation under CLC 1992. The maximum compensation payable by the 1992 Fund for any one incident occurring after 1 November 2003 is 203 million SDRs. As the 1992 Funds' Claims Manual identifies, compensation from the Fund will be payable in cases where:

- the damage exceeds the limit of the shipowner's liability under CLC 1992;
- the shipowner is not liable under CLC 1992 because the damage was caused by a grave natural disaster, or wholly caused intentionally by a third party or as the result of negligence of public authorities to maintain lights or other navigational aids; or
- the shipowner was financially incapable of meeting his obligations under CLC 1992 in full and insurance was insufficient to pay valid compensation claims[45].

73. Under the 1992 Fund Convention, persons who receive particular quantities of oil, such as importers and major oil companies, are required to pay contributions to the 1992 Fund. The Supplementary Fund makes additional compensation available to victims of oil pollution in those States that have acceded to the 2003 Protocol. States Parties to the 1992 Fund have the option of becoming a member of the Supplementary Fund or of remaining

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44 See RS French: *Compensation for Marine Pollution* (2008) 82 ALJ 527 at 528-529.

45 See Claims Manual (December 2008 ed) [1.1.6].

a member of only the 1992 Fund. The Supplementary Fund provides compensation only to those persons who are unable to obtain full and adequate compensation for an established claim for pollution damage under the terms of the 1992 Fund Convention. The 2003 Protocol applies to pollution damage caused in the territory, including the territorial sea, of a State Party. An annual levy to finance the Supplementary Fund is imposed by States Parties to the 2003 Protocol on oil receivers who receive in total quantities exceeding 150,000 tonnes of oil.

74. A similar requirement could be imposed for importers of hydrocarbons sourced from off-shore rigs. In addition or as an alternative, it may be necessary to impose a requirement that all rig controllers pay a levy into a fund based on the volume of production from each off-shore rig. This would increase the burden imposed on importers or receivers of hydrocarbons. However, that result is appropriate since the dual risks exist of pollution, first, from the oil or LNG tankers that carry those hydrocarbons (which are already subject to the 1992 Fund contribution requirement) and, secondly, from the fact that the source of some of those cargoes will be off-shore rigs.

Conclusion

75. The need for some international regime is, I think, patent and urgent. While the leak continued from the *Deepwater Horizon* rig, there was almost daily news of attempts to stop it and the devastating effect it was having on the environment, not just in the United States but also the other littoral States around the Gulf of Mexico. In that case, BP accepted responsibility to make full compensation. However, not all such off-shore rigs will be owned, operated or controlled by a solvent or substantial multi-national oil company. And, the potential for a disaster of the scale of the *Deepwater Horizon* will remain. Hopefully, the international community will begin debating how best to formulate and move towards agreeing a convention to cover these risks.

76. This idea is very much prospective and perhaps unduly idealistic. Undoubtedly, there will be difficulties in getting agreement from the United States and possibly also the European Union, which has its own arrangements. In addition, the off-shore industry is unlike the shipping industry. There, the P&I clubs had an incentive to bring about a workable regime, since ships can be still arrested, if they are not lost, after leaks. Leaking off-shore rigs are not in the same category. Their value may be negligible in cases of a tragic disaster such as occurred with the *Deepwater Horizon* blowout.

77. The interests of the international community are poorly served by the current lack of an appropriate convention to address the significant risks from off-shore hydrocarbon exploration and exploitation. Inaction, however, is not an option.

FAIR TREATMENT OF SEAFARERS

A REPORT ON THE SESSION AT BEIJING ON FAIR TREATMENT OF SEAFARERS

Giorgio Berlingieri*

This topic was addressed at the Beijing Conference as the CMI has been involved in raising awareness of the issue for quite some time. In fact, an IWG was established in 2004 which was invited to participate in the joint IMO-ILO Working Group in the preparation of an instrument to ensure that rights of seafarers following a maritime incident are recognized and duly respected.

The presentation of Giorgio Berlingieri consisted of a summary of an article of Olivia Murray, who is chairing the IWG, which may be found at page 312 of the 2011-2012 CMI Beijing I Yearbook and at page 46 in the Conference Proceedings.

The presentation, titled "Pollution and Criminalization of Seafarers – Learning From The Past To Improve The Future" was supported with slides which started focusing on the CMI IWG, on its mandate and on a number of high-profile maritime accidents which caused criminal charges against Masters, including that relating to m/t *Erika* in 1999. This major oil spill opened the door to legislative improvements, i.e. the three Erika safety packages which include Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector.

There it is said (Recital no. 9): "*(…) (Seafarers) humans rights and dignity should be preserved at all times and all safety investigations should be conducted in a fair and expeditious manner (…)*". In art. 18 mention is made of the IMO Guidelines and member States are asked to take into account their relevant provisions.

This matches with Resolution MSC.255(84) of the IMO Maritime Safety Committee of 16 May 2008 on the adoption of the Code of International Standards and recommended practices for a safety investigation into a maritime casualty or marine incident, i.e. the Casualty Investigation Code. Chapter 12 of the Code provides mandatory standards in obtaining evidence from seafarers which should be taken at the earliest practical opportunity.

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Seafarers should then be allowed to return to their ship or be repatriated at the earliest possible opportunity with their human rights upheld at all times. They should also be informed of the nature and basis of the marine safety investigation and be allowed access to legal advice regarding risk that they may incriminate themselves in any proceedings subsequent to the marine safety investigation and that they have the right not to self-incriminate or to remain silent.

Reference was then made to the various maritime labour instruments on this subject including the 2006 Maritime Labour Convention, often described as the "seafarers' bill of rights", and which recently received the 30th ratification, thus fulfilling the last condition to enable its entry into force, which takes place on 20 August 2013.

The Convention aims to achieve both decent work for seafarers and secure their economic interests. It establishes a strong compliance and enforcement regime based on flag state inspection of the working and living conditions on board.

However, it also contains safeguards of seafarers in a foreign port. Guideline B4.4.6 in fact provides that measures should be taken to facilitate their access to the Consulates of the State of nationality or of residence and an effective cooperation between the Consulates and the local or national authorities.

Attention is then drawn to seafarers detained in a foreign port and it is said that they should be dealt with promptly under due process of law and with appropriate consular protection. When detained for any reason in the territory of a member State, seafarers who so request should obtain that the competent authority immediately inform the flag State and the State of their nationality.

Joseph Rebano of the Philippines MLA then followed with a presentation titled "Caring For The Injured And Ill Seafarer: The POEA contract". There he discussed the safeguards and rights within the Philippine Overseas Employment Administration (POEA) standard employment contract, which is the minimum contract for Filipino seafarers who comprise a significant portion of the international pool of seafarers. His presentation was supported with slides summarizing the governing law of the Philippines on seafarers, the employers' duties, the pre-deployment safeguards, the medical benefits and the general exclusions under the POEA contract.

PIRACY

PIRACY TODAY – AN UPDATE

ANDREW TAYLOR*

At the Colloquium in Buenos Aires in October 2010, former President Patrick Griggs delivered an illuminating paper on piracy. The real scale of the issue had not perhaps been appreciated by all at that time. Piracy remains a major issue and I would like to bring delegates up to date.

The thesis of Patrick Griggs's paper was that, although there were legal mechanisms for combating piracy, in principle, they were difficult to apply in practice for legal, practical and political reasons.

The nature of the problem

In International law the starting place is Part VII of UNCLOS. It is titled High Seas and includes provisions relating to piracy. Article 101 defines piracy as "*any illegal acts of violence or detention, or any act of depredation*" committed on the high seas for private ends against another vessel or persons or property on board. Arts. 105, 106, 107, 110 and 111 allow warships and other authorised ships to stop, search and seize any vessel on the high seas that they have reasonable grounds for suspecting to be engaged in piracy.

UNCLOS defines the high seas, for the purposes of acts of piracy, as those waters which lie beyond the seaward limit (generally 12 miles) of the territorial sea. Acts within the territorial sea which would be regarded as piracy if committed on the high sea are treated as '*armed robbery at sea*' and are subject to the primary jurisdiction of the coastal state in which the acts take place.

As I say, the provisions on piracy apply only on the high seas and not within territorial waters where '*armed robbery at sea*' is exclusively subject to the jurisdiction of the courts of the coastal state. UNCLOS does not permit seizure of a pirate ship and arrest of the pirates in the territorial sea unless the ship flies the flag of that state. The theory is that the power to seize ships and pirates only on the high seas, now enshrined in UNCLOS, ensures that coastal states, which have exclusive jurisdiction within their own territorial waters, will be able effectively to control unlawful acts within those waters. This is

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not always the case. Somalia itself is an example. This problem has been partly solved in the case of Somalia by UN Resolutions which, in broad terms, allow States to treat acts of piracy committed within Somali territorial waters as though they were committed on the high seas.

Whilst rights to board, search and seize foreign ships and persons on board exist under international law under UNCLOS, the prosecution of pirates is subject to national law. It is therefore essential that the rights given under international law are implemented by national legislation so that national courts are able to deal efficiently with those arrested and accused of crimes at sea. Art. 100 places a duty on States to cooperate in the repression of piracy which would involve States making arrangements to transfer suspected pirates from the arresting ship to another State for prosecution. Very few States have accepted the UNCLOS mandate and legislated specifically against piracy. In this context I should mention that in August 2007 CMI submitted to the IMO Legal Committee a paper entitled 'Maritime Criminal Acts-draft Guidelines for National Legislation'. (LEG 93/12/1). It was suggested by CMI that States with an inadequate national law on maritime criminal acts including piracy might, when carrying out a review of their national legislation, find the guidelines a useful "toolkit" from which to draft their new legislation. The Legal Committee decided to note the terms of the CMI submission but not to take the matter any further at that time.

The reasons for the reluctance of States to embrace the rights created by UNCLOS to exercise extra-territorial jurisdiction over pirates are essentially political but also economic. An example is Kenya which for a period was willing to accept the rendition of pirates and to prosecute them. But without international funding, its willingness to devote its own resources to the project soon ended. With some exceptions, other States have shown no particular enthusiasm to step into the breach. However, as we shall see later, it would not be right to assume that pirates are not being prosecuted.

Piracy is a crime of universal jurisdiction and pirates are criminals. However, they are not necessarily 'individuals taking a direct part in hostilities' in an armed conflict. This means that they cannot be targeted with lethal force. Nor are pirates necessarily terrorists.

How do matters stand today?

It is against this rather gloomy background that I would like to review the legal, practical and political response since October 2010. Piracy remains a pressing problem. To illustrate the scale of the issue, some statistics:

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[1] ICC International Maritime Bureau Piracy and Armed Robbery Against Ships Report for the period of 1 January - 30 June 2012. This is the most current IMB report published and available at the time of writing on 8 October 2012.

a) According to the International Maritime Bureau (IMB) quarterly report, as of 30 June 2012[1] Somali pirates are currently holding 11 vessels with 188 hostages captive. Despite the noticeable decline in Somali piracy this year[2], the IMB has stated that Somali piracy remains a serious threat.
b) 439 attacks were reported to the IMB in 2011 of which 275 took place off Somalia on the east coast and in the Gulf of Guinea on the west coast of Africa. This was a slight drop, compared to the 445 recorded incidents of piracy and armed robbery in 2010[3]. Ransoms of US$160m were paid in 2011 to release 31 hijacked ships[4].
c) Piracy cost the shipping industry and governments between US$ 6.6bn and US$6.9bn last year, including US$2.7bn in extra fuel and US$1.3bn on military operations[5]. As I have said, the shipping industry paid Somali pirates US$160m in ransoms last year, with the average ransom being US$5m[6].
d) Although the number of seafarers taken hostage in 2011 was down to 555 from 645 in 2010, captives were held for 50% longer in 2011 (an average of eight months) and the violence faced by seafarers has not subsided[7]. All hostages were subject to deprivation and unacceptable conditions when held by Somali pirates; 149 hostages have been held for more than a year and 35 victims have died at the hands of pirates last year[8].
e) The IMB has also recently reported that there has been a worrying increase in piracy attacks in the Gulf of Guinea: 40 incidents (including ten hijackings) have so far been reported in 2012, compared to 25 in 2011.[9]

Recent press reports might have given the impression that the level of piracy is decreasing. Certainly it seems that attacks have shown a decrease in 2012. Experts suggest that the poor cashflow is limiting pirate activity but there are other contributing factors I shall return to later. Cash flow is certainly a significant issue and may explain why one gang executed a hostage from the "*Orna*" which was hijacked on 20 December 2010. Pirates have often threatened to kill crew members and a number of crew members have died in captivity but this is the first time since 2007 that a murder has been used as a negotiating tactic by pirates.

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2 Incidents of Somali piracy activity dropped from 163 in the first six months of 2011 to 69 in 2012 - IMB Piracy Reporting Centre

3 IMB figures according to IMB Annual Report of 2011. IMO's figures diverge from these.

4 One Earth Future Foundation Report - The Economic Cost of Somali Piracy 2011.

5 One Earth Future Foundation Report - The Economic Cost of Somali Piracy 2011.

6 Oceans Beyond Piracy - The Economic Cost of Somali Piracy 2011.

7 Oceans Beyond Piracy – The Human Cost of Piracy 2011.

8 Oceans Beyond Piracy – The Human Cost of Piracy 2011.

9 ICC International Maritime Bureau Piracy and Armed Robbery Against Ships Report for the period of 1 January-30 June 2012.

Certainly for the past three months pirate activity in the Indian Ocean has been at an all-time low. In August and September not a single commercial vessel was attacked, while only two fishing dhows were attacked in August and just one last month.

However the International Chamber of Shipping (ICS) has said the capability of the pirates worldwide is actually greater than it has ever been. Public perception that piracy is exclusively a Somali problem is certainly not accurate. There has been a noticeable and worrying increase in attacks off the West coast of Africa. Additionally, some attacks by Somali pirates have taken place closer to India than to Somalia. The use of "mother" ships has meant that Somali pirates have a large area of operations to include waters off Kenya, the Seychelles, Madagascar, the Maldives, Oman, the Red Sea and the Gulf of Aden. The IMB current Bulletin identifies as places where piracy is a risk: Bangladesh, Indonesia, Malacca Straits, Singapore Straits, South China Sea, Nigeria, Benin, Gulf of Aden/Red Sea, Somalia and Ecuador.

Some recent piracy cases include:

a) "*Free Goddess*" was hijacked by Somali pirates off the coast of Oman on 8 February 2012 and was still listed as a casualty on 8 October.
b) "*Royal Grace*" was hijacked by pirates off the coast of Oman on 2 March 2012 and was still being held by pirates as at 8 October 2012.
c) "*BW Rhine*" was hijacked off the coast of Togo after its automatic identification system was switched off on 28 April 2012. The vessel was released by 4 May 2012 but the pirates stole some of the vessel's cargo of gasoline.
d) "*Jascon 33*" was attacked off the coast of Nigeria on 4 August 2012. Two naval guards were killed and four foreign nationals were kidnapped and released on 24 August 2012. Two other security guards onboard were injured during the attack and taken to Port Harcourt for treatment.
e) The "*Anuket Emerald*", "*Energy Centurion*" and "*Abu Dhabi Star*" were all hijacked by pirates seeking to steal the vessel's oil in the Gulf of Guinea during August and September 2012. The crew on board the "*Energy Centurion*" and the "*Anuket Emerald*" were released after the cargo was removed. A Nigerian naval vessel intercepted "*Abu Dhabi Star*" and the pirates jumped ship.

The International response

At the public international level States have continued with practical efforts to respond to the threat. Much of these are well known, for example the Maritime Security Centre – Horn of Africa (MSCHOA, established by EUNAVFOR), the 490 miles Internationally Recognised Transit Corridor (IRTC) operated by independent navies from countries such as Russia, China, India and Japan or the group transit system operated by EUNAVFOR.

Three anti-piracy task forces have been assembled:

1. EUNAVFOR Somalia ("Operation Atalanta")
   - Established by the European Union in November 2008[10], which became operational in December 2008.
   - Mandate renewed by Council Decision 210/766/CFSP until 12 December 2012. Member States have indicated their willingness to extend it further, to December 2014.
   - Patrols an area extending from the Gulf of Aden and coast of Somalia to South of the Red Sea and into the Western Indian Ocean - an area of 2 million square nautical miles.
   - On average, the force consists of 5-10 surface combat vessels, 1-2 auxiliary ships, 2-4 patrol and reconnaissance aircraft and 1500 military personnel.
2. NATO's "Operation Ocean Shield"
   - Deterrence patrols and escorts provided by NATO pursuant to the UN Security Council Resolutions.
   - Replaced "Operation Allied Provider" (commenced October 2008) and "Operation Allied Protector" (commenced March 2009) in August 2009.
   - At-sea counter piracy operations and escorts off the Horn of Africa and in the Gulf of Aden.
   - Assists regional states, on their request, to develop their own counter-piracy abilities and activities.
   - EUNAVFOR and Operation Ocean Shield operate from the same headquarters in Northwood, UK.
   - Participants include Italy, the USA and Portugal.
3. Combined Maritime Forces (CMF)
   - Formerly the Maritime Coalition.
   - A multi-national naval coalition formed under the auspices of the UN Security Council Resolutions.
   - Up to 36 ships available from 25 Member States (but not all necessarily deployed at the same time).
   - Patrol an area of more than 2.5m square nautical miles, from the Strait of Hormuz to the Suez Canal, and from Pakistan to Kenya.
   - Member States include Canada, the UK, Germany, France, Korea, the USA, Italy and Spain.
   - In addition individual states, for example China, India and Russia, may also send military vessels without coming within one of these larger organisations.

One of the reasons that the IMB believes there has been a reduced num-

[10] Council Joint Action 2008/851/CFSP.

ber of successful Somali hijackings is the efforts and actions of the naval forces, which have harassed the mother vessels and pirate action groups.

At the same time, in cooperation with States the shipping industry has developed Best Management Practice guidelines (latest version BMP4) to minimise the risk of pirate attack.

The Political response

Turning now from practical to political measures:

On 21 February 2012, the Foreign Secretary announced that the UK would be establishing a Regional Anti-Piracy Prosecution & Intelligence Co-ordination Centre (RAPPICC) in the Seychelles. The centre will target the "kingpins" of piracy creating evidence packages that can be used to prosecute them in the region. This unique function will support the regional capacity to tackle serious organised crime in Somalia. A number of states expressed an interest in being involved, including the Seychelles, the US, the Netherlands, INTERPOL, Mauritius, Norway, Tanzania, Australia, the UAE and EUNAVFOR. The construction work began on 13 August 2012 and the centre is due to open in January 2013.

On 23rd February 2012 the UK hosted a one day meeting with leaders from more than 50 countries and international organizations which focused on a range of actions in relation to security but also dealt with the issue of piracy. Some of the main points agreed in relation to piracy were:

- A Memorandum of Understanding between the UK and Tanzania to transfer suspected pirates to Tanzania for prosecution (the UK wants other states in the region to sign up to similar agreements).
- Somaliland signed an agreement with the Seychelles to transfer convicted pirates to prisons in Somaliland. The plan – supported by the British government – is to set up a "conveyor belt", where pirates are tried in the Seychelles judicial system before being sent to a UN-backed prison in Somalia.
- The UK announced the creation of an international task force – the Ransom Task Force (RTF) - (made up of 14 countries representing a range of Flag States) on pirate ransoms to understand better the ransom business cycle and how to break it.

The RTF met for the first time on 30 May 2012 to discuss issues relating to preventing ransoms and on 12 September 2012 to discuss avoiding the payment of ransoms/alternative strategies to paying ransoms. The final meeting will look at other options for reducing the size/frequency of ransom payments. It is understood that the RTF will then agree and announce a final series of recommendations for the international community. It expects to complete its work by year end.

The report is likely to focus particularly on a proposal to ban the payment of ransoms to pirates. This has been criticised by both the British Chamber of

Shipping and the trade union Nautilus, who have lobbied the UK government to allow commercial organizations to pay ransoms at their own discretion. According to the British Chamber of Shipping, banning ransoms will not stop people paying them and the concept of letting seafarers die to deter pirates is both unrealistic and unacceptable given lives are at stake.

Whilst all this activity is going on ransoms continue to be paid - in fact the average ransom payment increased from US$4m in 2010 to US$5m in 2011[11]. The ICS has also discouraged any further idea of prohibiting or criminalizing ransom payments since the primary concern of the industry was to the crews and their families. Further, the criminalising or prohibiting payments could lead many in the industry to refuse to sail in the affected danger area which could have significant implications for a large portion of world trade. 40% of world oil shipments for example, are transported via the Western Indian Ocean. Although a US Presidential Executive Order of 13th April 2010 made it an offence to pay a ransom to certain specific groups of pirates, this approach has not been followed by other states. In England, the payment of a ransom has been held not to be contrary to public policy (*Masefield AG v. Amlin Corporate Member Ltd., The Bunga Melati Dua [2011] EWCA Civ 24*), thereby easing any difficulties in making claims under policies of insurance subject to English law.

In another very interesting development, a request was submitted by Ukraine to the IMO (LEG99/7/1) at the 99th session of the Legal Committee on 16-20th April 2012 for information on the apprehension of pirates which operate in the Gulf of Aden, the Arabian Sea and the Northern Indian Ocean. The request was made on the basis that the prosecution of pirates had long been viewed as a complicated problem. The data provided would enable the IMO Legal Committee to make an informed decision on further steps to improve the legislative framework to combat piracy and armed robbery. The IMO response from data obtained from a report of the United Nations Secretary-General (S/2012/50) was that 20 States were prosecuting acts of piracy off the coast of Somalia, and the total number of prosecutions which had taken place so far was 1,063. Interestingly, the UK has not prosecuted any of the pirates detained by naval vessels. Meanwhile, Kenya has held 143, convicting 50; and the USA has held 28, convicting 17.

The IMO is planning to undertake a study to consolidate information regarding court decisions resulting from piracy prosecutions so that it is publicly available on the IMO website.

The second UAE Marine Counter-Piracy Conference took place in Dubai in June 2012. The Conference welcomed the significant progress made in combating piracy on land and in the waters off the coast of Somalia in the

[11] One Earth Future Foundation Report - The Economic Cost of Somali Piracy 2011.

year since the inaugural conference in April 2011. The Conference reaffirmed its commitment to strengthening public-private partnerships in the search for a sustainable solution to the violence. The Conference also emphasized the importance of state building and harmonization with local governments and other agencies to counter the destabilizing impact of piracy. A declaration was adopted by foreign ministers and senior government officials from 41 countries, as well as representatives from UN agencies, including the IMO, and top executives from 73 leading maritime companies and organisations. The Conference expressed backing for a UAE proposal to make the UN Trust Fund to Support Initiatives of States to Counter Piracy off the Coast of Somalia (affiliated to the Contact Group on Piracy off the Coast of Somalia) the central manager for new funds donated towards the development of Somalia's maritime security capacity. The UAE also made an initial pledge of US$1m towards this new initiative within the Trust Fund.

Apart from this diplomatic activity, there have been other relevant political developments. The UK government formally endorsed the use of armed guards on 30 October 2011, when the Prime Minister announced ships sailing under the British flag would be allowed to carry armed guards to protect themselves from pirates. The announcement was in direct contrast with previous government policy, which strongly discouraged the use of armed guards. However, the Prime Minister stressed that the placing of armed guards on board commercial vessels was only a short-term measure and not a long-term solution to the piracy problem. I shall return to the issue of armed guards later.

I should also mention that in June 2012, the Cypriot House of Representatives approved a new counter-piracy Bill, which makes Cyprus one of the first EU countries specifically to authorize the use of force. The new laws underline the authority of the master and forbid armed guards to use their weapons without the explicit order or permission of the master. It also regulates the licensing of Private Maritime Security Contractors (PMSCs).

Industry response – Civil law

I would like now to look at the industry response. Despite all this activity, there remains an uneasy feeling that enough is still not being done to rein in the problem of piracy. Many Owners are resorting to hiring PMSCs to deploy armed guards on board their vessels. The use of PMSCs has increased as a response to the fact that the task forces have not to date proved to be entirely successful. The reality is that there are too few ships covering too large an area. More importantly some vessels remain uniquely vulnerable to pirate attacks: those with a low freeboard, low speed, small crew, poor manoeuvrability. Further, the cost of piracy is rising in terms of ransom payments, the economic cost of the time during which a vessel is held and insurance costs. Last but most important is the humanitarian cost of piracy is becoming more prominent and Owners want to protect their crew.

The International Union of Marine Insurance (IUMI) spoke out publicly at its annual conference in September 2011 in support of armed guards. The major reason for doing so was that no vessel with armed guards has been hijacked. It came to light in Lloyd's List (after the IUMI gave its seal of approval) that insurers were offering a 35% discount for transits in the "High Risk Area" (this areas includes the Gulf of Aden and the Arabian Sea around the Somali coast) that were carrying armed guards. As already noted, the UK Government also followed this lead with its measured endorsement of the use of armed guards. Now Belgium, Italy and Germany are all making legislative moves to approve armed guards. From the most recent quarterly report of the IMB there is some evidence that the preventative measures taken by merchant vessels, including the use of citadels and employment of armed guards and PMSCs, has also been a factor in the recent reduction of successful hijackings off Somalia.

The extent to which PMSCs armed or unarmed had been used prior to 2011 is unclear. However, it is perhaps fair to say that the use of passive measures was the norm. These included: Water Cannon; Sonic Devices (Long Range Acoustic Device LRAD)[12]; trailing lines; barbed / razor Wire: recommended by BMP along with placing dummy lookouts; Citadels / Safe Rooms[13]. The problem with passive measures is illustrated clearly in the case of the "*Biscaglia*" in November 2008: an unarmed 3 man security team could not repel a hijack by pirates with the use of water cannons and a LRAD.

The Shipping industry has recognised that an increasing number of Owners and Operators wish to deploy armed guards on board their vessels but made clear that deployment of armed guards is a matter for each individual Owner:

- IMO: "*a decision for the individual shipowner after a thorough risk assessment and after ensuring all other practical means of self protection have been employed*".
- BMP4: "*a matter for individual shipowners to decide following their own voyage risk assessment and approval of respective Flag States*".

BMP4 does not contain a specific endorsement of their use: "*this advice does not constitute a recommendation or an endorsement of the general use of armed Private Maritime Security Contractors*".

However, the use of armed guards and PMSCs raises its own issues. Obviously, there are practical questions such as having appropriate licenses for

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[12] This was used by "*Seabourn Spirit*" to repel pirates in November 2005, although the actual effectiveness of the LRAD was unknown.

[13] The "*Montecristo*" crew barricaded themselves into their citadel when attacked by pirates in October 2011 until being rescued by the Navy. Imabari Shipbuilding in Japan recently unveiled a new ship design which incorporates a citadel facility protected by security doors, bullet-proof windows and water canons.

weapons on board from the flag state and ports at which the ship calls. At the heart of the issue is the use of force. The rules that will be applied to when weapons can be used will depend on among other possible laws, the law of the flag state, the law of the state where the Owners are incorporated or have their commercial seat, and the law of the states where the vessel will call. In the UK, lethal force is only allowed where there is a serious and imminent threat to life. The decision to use lethal force must be reasonable and the force used must be proportionate. The dangers are all too obvious. On 15 February 2012, two Italian marines on the "*Enrica Lexie*" shot dead two Indian fishermen, whom they believed were pirates. The two armed guards are currently being held by Kochi City Police, India. Italy has agreed to pay US$ 192,000 in compensation to the families of the two fishermen (these payments will not affect the pending legal action against the two guards who have been charged with murder).

At the moment PMSCs sign up to the International Code of Conduct (ICOC) and other accreditation or vetting procedures on a purely voluntary basis. However, the intention is to take the guidelines from the ICOC and use them to produce a more formal oversight for PMSCs.

In the meantime, however, BIMCO has created Guardcon, a standard contract for employing security guards on vessels. This was launched in March 2012, to take the lead in giving shipowners and PMSCs guidance on the employment and use of security guards, with or without firearms, on merchant vessels. It seeks to set an industry standard for governing relationships between the shipowner and the PMSCs as well as the master and on-board security guards. Although it is not a cure-all and should not be seen as the long-term solution, it does offer clarity on certain issues. For example, BIMCO has also published guidance on the use of force to accompany Guardcon. The desired template is for providing a layered defence, with lethal force being a last resort to be used in exceptional circumstances. The Master has overall authority and has the right to order a cease fire. This reaffirms the SOLAS position that the Master has absolute authority as to the safety of the vessel, her cargo, and her crew. However, certain issues do arise as to the authority of the Master where armed guards are deployed:

- The decision to open fire, according to Guardcon, is given to the PMSC team leader. Therefore, the Master can only decide to stop the firing – by which point the damage may have been done.
- In reality, the Master may not have authority because if there is an exchange of fire and the Master is in the citadel, he may not be in a position to control the situation.
- In September 2012, INTERTANKO endorsed Guardcon as a model contract and it seems Guardcon can move towards becoming an industry standard.

I should note here that in May 2012, at the 90th session of the IMO Mar-

itime Safety Committee (MSC) in London, between 16 and 20 May 2012, the MSC agreed on interim guidance on PMSCs including, but without endorsing this, the use of armed guards. Additionally, interim guidance for flag states was also approved, which provides measures to prevent and mitigate Somalia-based piracy; listing recommended practices that flag states are encouraged to apply, taking into account national laws of flag states, to maximize efforts on counter-piracy measures being implemented.

Finally, I should mention the Convoy Escort Programme (CEP). The CEP is a plan by London market insurers to set up a private fleet of armed patrol boats in the Gulf of Aden to provide protection for vessels, whilst also reducing the costs of insuring vessels, cargo and crews against the risk of attacks by pirates. The CEP Package includes an escort service, insurance cover and an audit of the vessel's BMP4. Under the plan, the CEP would control a fleet of vessels with fixed gun positions and armed crews authorized to engage the pirates. It is currently in the process of raising finance from investors. However, it has courted much controversy within the shipping industry because it is seen by many as a private army for hire.

Closing remarks

I hope this review has been helpful. I should add that it is not intended to be exhaustive. Although there have been continuous political efforts through IMO and by States to tackle piracy, these remain of uncertain effect. The most significant development has been the growing tacit or overt support for PMSCs and armed response. According to IMO, anecdotal evidence suggests that up to 25% of ships are carrying firearms when transiting the Gulf of Aden. This development and the efforts of the various naval detachments do appear finally to have had some impact on the frequency of attacks off Somalia. However, the long term effect on the incidence of piracy of the presence of armed PMSCs cannot be known. Armed guards can only be a supplementary measure to protect seafarers, vessels and cargoes. They do not solve the underlying problems that create piracy. Furthermore, many other practical and legal issues arise such as the wrongful use of force, the authority of the Master and insurance cover. The key to winning the battle is breaking the financial chain to financiers investing in piracy, successfully prosecuting pirates captured by the naval task forces, and greater political will and stability in the regions affected, particularly in Somalia. The report in July that a pirate "war lord" had been provided with diplomatic immunity by the President of Somalia emphasizes the scale of the task ahead.

MARINE INSURANCE

MANDATORY INSURANCES IN INTERNATIONAL CONVENTIONS*

by DIETER SCHWAMPE** AND PENGNAN WANG ***

Mr. President, distinguished Members of the Executive Council and the Organizing Committee of the Chinese MLA, Ladies and Gentlemen, I am honored that I have been asked to present, together with Prof. Wang Pengnan, my fellow member of the International Working Group on Marine Insurance, an overview over the replies to the Questionnaire sent out in 2010. But before I start let me express my great respect for the very well organized conference. The Chinese MLA has successfully made all efforts to make this conference the memorable event. And apart from all the interesting presentations in discussions over this week I am sure that all attendants really look forward to tomorrow's excursion to the Great Wall.

Then let me thank the members of the IWG for Marine Insurance for the great participation and painstaking involvement in the survey regarding the questionnaire. On the screen you see all members of the Working Group shown in the order of their countries: Dr. Sarah Derrington from Australia, Prof. Marc Huybrechts from Belgium, José Tomas Guzman from Chile, Prof. Pengnan Wang from China, who will share this presentation with me, Jiro Kubo from Japan, Prof. Rhidian Thomas from the United Kingdom and last but not least Joe Grasso from the United States. With us at this conference are Sarah Derrington, Jiro Kubo, Pengnan Wang and myself.

As you will be aware, the task assigned to the International Working Group by the Executive Council was

> *"to consider mandatory insurance provisions in international Conventions and give recommendations on whether Guidelines for national governments should be drafted to assist in the formulation and proper implementation of national law giving effect and providing a legal framework for them".*

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* Presentation during CMI Conference Beijing, October 2012.

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*** Senior partner of Wang Pengnan & Co., visiting professor of Dalian Maritime University.

The international Conventions at which the working Group look at were CLC 1992, HNS, the Wreck Removal Convention, the Bunker Convention and the Athens Protocol. I am sure you are familiar with the features of those Conventions, which all provide for a particular liability, as regards insurance. The Conventions provide for mandatory insurance for such liability, but only within certain limits; there is a direct action against the insurer; the insurer only has limited defences against such direct action. And the member states to the convention issue certificates as proof of existence of such insurance.

When you go through the Conventions you will note that they do not really contain particular rules on the mechanics of either the direct action or the certification. In order to establish what practices and procedures exist in the various countries, the Working Group has produced a comprehensive Questionnaire which was sent out to all national MLAs. After a reminder for replies by our Secretary General Nigel Frawley, finally 14 Associations handed in replies:

Argentina, Australia/New Zealand, Belgium, Canada, China, Croatia, Germany, Italy, Japan, The Netherlands, Norway, Sweden, Switzerland, United States.

We are grateful that those associations took the burden of going through the questionnaire, which was rather long with no less than 55 questions. The MLA of the United States had a special position in this survey. Although the US have not ratified any of the Conventions, the US MLA gave detailed and very interesting replies, setting out the principles of direct action on basis of state law in the US. Though not directly applicable to the Conventions, for us this was very helpful because it broadened our views on what practices and procedures might be available.

The 55 questions of the Questionnaire were grouped into different categories, dealing with licensing, certification, statutory law, jurisdiction and proceedings, particulars of direct action and state liability.

What Prof. Wang and myself will try to do now, is giving you an impression of the great diversity of answers which makes it hard to find a basis for a guidelines, which ultimately is our task. Since even “yes” and “no” answers often had to be appended by a “but“, a uniformity in answers is rarely to be found. In result it may appear that only very few aspects might be suitable for the intended draft. The complete answers of all MLAs are available on the Website of the Working Group at http://comitemaritime.org/Marine-Insurance/0,2751,15132,00.html.

Let me start with the first range of questions regarding the *licensing*.

It can be stated that there has been *almost* uniformity that a license is required, if the Insurer is conducting insurance business in the country concerned and if an Insurer wants to insure the risk under the Conventions. This appears to be part of the respective insurance supervision regulations. Foreign licenses may mostly be approved. Many countries have stated that

cover with a member club of the International Group of P&I Associations is sufficient without any further investigation into licenses.

Apart from that, it appears that only Canada and New Zealand/Australia do not inquire the existence of a license. In China there is no license needed, but the Chinese authorities maintain a list of approved insurers which appears to come close to the need of a license.

Regarding the consequences where an insurer issues a policy without the respective license there appear to be three different concepts. Italy has stated such policies are void and do not provide any protection. Also Argentina has reported that the contract as such is void, but that the insurer nevertheless has to provide cover. Other countries like Germany and the Netherlands treat the contract valid despite the lack of a license. Many countries have stated that an insurer doing business without a licensing may be subject to administrative or even criminal sanctions, and a majority has stated that their administration would not issue a certificate under the relevant convention in case of an unlicensed insurer.

All MLAs have reported that there is no obligation of a licensed insurer to accept business, but that a licensed insurer is free to reject business.

Turning to *certification*, all countries have confirmed that a certificate issued by a convention state generally will be recognized by them.

Regarding the complex of possible investigations before issuing a certificate, almost all countries investigate the insurance conditions before issuing the certificate and most of them also investigate the financial standing of the insurer, having a few States also investigating the license of the insurer.

Taking a closer look on the answer reveals the following:

In Belgium, Canada, possibly China (where the insurance policy must be shown), Croatia, Germany and Switzerland a certificate issued by a convention state may be subject to investigation of the validity of the insurance contract and the solvency of the insurer.

A very interesting subject is what consequences it has if investigations, when carried out, reveal that there is either no valid insurance contract at all, or that the contract does not satisfy the convention requirements. Four countries – Italy, Japan, the Netherlands and Norway – have replied that there are no consequences. This may be somewhat surprising, as it means that such countries will allow respective ships to trade in their waters despite the fact that there is no valid or sufficient insurance. All other countries have replied, some under certain conditions, that in such a situation a foreign certificate could be rejected. From a security point of view this is fully understandable, as the Conventions just aim at providing a solvent debtor for the damage caused. But those answers may be considered equally surprising, bearing in mind that the Conventions do not deal with the situation at all, so that one may well question, whether convention states have means at all to reject a respective certificate – a point which, for example, Japan and Norway made. Against that Switzerland

concludes *e contrario* from Art. VII (/) CLC 1992 (and similar provisions in other Conventions) that member states may indeed reject certificates. It appears, thus, that in this important point there is no uniform view.

Turning to certificates issued in the reporting countries themselves, in almost all countries the authority in charge investigates the insurance conditions before issuing the certificate. Exceptions are only Norway and Germany, which have reported that no such investigation takes place but that only the so-called *blue card* will be inspected. Canada does not investigate the insurance conditions, but requests an undertaking from the insurer that the cover meets the convention requirements.

As regards an investigation into the financial standing of an insurer, we find a similarly divided picture- but the dividing line is different from the one before. Some states do investigate the insurance conditions, but not the financial standing, others do not care for the content of the insurance contract but check the solvency.

If you combine this with the aforementioned recognition of foreign certificates, you may end up in situations, in which the state, which has issued the certificate, has not investigated whether the insurance policy meets the convention requirements, but that such certificates in certain states must nevertheless be accepted. Situations may arise, thus, where there are certificates allowing to trade vessels in certain countries without proper insurances backing such certificates.

We will come back to this aspect when addressing state liability for failure to adhere to the Conventions.

Finally we must admit that despite the great complexity of our Questionnaire there is one area which we did not address, but which recently has proved to be of considerable practical relevance. It is the question how the authorities react, if the insurer notifies the termination of the insurance contract. The Conventions themselves provide that the cover must not end but before three months after notification to the respective authority. But what happens after those three months? Practical experience shows that there are administrations which simply file the notice of the insurers – and show no other reaction. Vessels certified by such an administration, thus, might still call ports and produce the certificate, as the authority has not requested it back. This certainly is an area worth of looking into in more detail. Surely we will do so.

Let us now go on to questions of *Statutory Law.*

In view of the few provisions in the Conventions dealing with matters of insurance and direct actions, the Working Group raised the question whether there exist national statutory provisions which are applicable on insurance contracts under such Conventions and on the direct action, and if so, what those provisions stipulate. The answer is actually unanimous: no, there are no such national statutory provisions in place. We are left, thus, with what the

Conventions provide. Aspects not covered by the Conventions are not dealt with in the national statutory laws.

Next we have addressed some questions on conflict of laws rules. If you are a practicing lawyer you will know the importance of what law will be applied by a court to a dispute. In particular we asked whether the nationality of the claimant and/or the insurer has any relevance for the applicable law. Only few answers were received, and no general pattern can be taken from them. Germany and Japan have simply stated that the nationality of the parties to the dispute is irrelevant. Argentina, Italy and Norway have reported that their courts would apply the law at the domicile of the insurer, whilst China and Switzerland refer to the law in force at the place, where the wrong was done. Australia/New Zealand, Canada, Croatia and Sweden have reported that their courts would respect a choice of law clause in the insurance contract. Some European MLAs have referred to the Rome-II-Regulation, but I submit that this does not contain any particular provisions on direct action. All it contains is Art. 18, which does not state which law applies to a direct action, but only provides that a direct action is available, if it so is under the law governing the wrong. We do not need such a provision in the convention context, because the availability of a direct action is expressly provided for in the Conventions. All other MLAs have remained silent on the point. There is no uniformity at all and there for none on the aspect of which law courts use to determine on questions of direct claims.

The next set of questions dealt with aspects of *Jurisdiction and Proceedings*. Our first question was whether there exist any special rules on jurisdiction in respect of direct actions, in particular direct actions under the Conventions. The answers were almost evenly split between “yes” and “no”.

Going over to the set of questions regarding *Jurisdiction and Proceedings* we can state that in most national laws of the surveyed states direct claims against insurers are acknowledged. Only in Belgium and Argentina the national law does not contain provisions on jurisdiction of courts for direct claims against Insurers.

As regards arbitration, most of the countries have stated that their national law presumably allows the direct claim against an insurer being subject to arbitration. Only the Netherlands has answered in the negative. Japan has stated that arbitration is generally permissible, unless a direct action is brought in a Japanese court. But most countries observe that arbitration clauses in the insurance contract do not bind the third party claimants, as they are not participating in the insurance contract. Arbitration, if at all, thus only plays a role if the claimants agree on arbitration with the insurer after the incident.

Now we are getting somewhat technical, when reaching the question, whether a judgment rendered against the liable party alone binds the direct insurer. This is a very important aspect, because a binding effect could deprive the insurer of all possibilities of defending the case.

It seems that the topics of these questions are in quite a few countries possibly a somewhat unexplored area, since in the answers given you will find rather often phrases like "we think", "we are not sure" and "it has not been decided yet".

Nonetheless we can summarize that there were three different answers given.

In Australia/New Zealand, China and Italy the judgment against the liable party alone is binding for the insurer. And this then applies even for a judgment in default.

Not binding is the judgment against the liable party for a court in a direct action against an insurer in Belgium, Croatia, the Netherlands, Norway and Sweden.

And then there are countries like Japan and Switzerland where the judgment is binding if the insurer was brought into the proceeding or at least if he was given notice to give him opportunity to become part of the proceeding. Canada and Japan, finally, have stated that their countries allow the insurer to re-litigate in cases of fraud and collusion between the claimant and the ship owner – a feature which most likely may be available in other countries as well.

There is uniformity in respect of the question whether the liable party, the ship owner, and his insurer can be sued as joint debtors in the same proceedings: they can. There are, however, differences in respect of domicile requirements. Canada, Croatia, Italy, Norway and Switzerland have stated as the only requirement that the court must have jurisdiction. In Belgium and Germany one party must be domiciled in the country itself. In China, Japan, the Netherlands and Sweden there seem to be no further requirements.

With this we come to the penultimate area, namely *Particulars of the Direct Action.*

There is uniformity on two aspects, namely that the procedural laws in all countries contain no particularities in respect of special requirements, which a direct claimant has to fulfill, or in respect of burden of proof. The national laws do unanimously also not contain provisions on burden and measure of proof.

As regards defenses available to an insurer it does not come as a surprise that practically all MLAs referred to the defenses available under the respective Conventions. More interesting is what some associations stated further and above. Sweden, for example, referred to its national law, under which an insurer may, in a direct action against him, rely on all defenses of the insurance contract. We will discuss this further with our Swedish colleagues whether we might have misunderstood them, because this appears to be contrary to what the Conventions themselves state. The national laws of Australia/New Zealand, Canada, Croatia, the Netherlands allow only Convention defenses, which would be limitation of liability, all owner's

defenses against the injured party and willful misconduct. Germany, in turn, allows contributory negligence of the injured party as a defense of the insurer.

Very different rules govern time limits for direct actions and their protection. Whilst some countries have referred to the time limits applicable for the claims against the liable party (China, Croatia, the Netherlands, Norway), there are differing time limits in other countries: 3 years in Belgium, Canada and Germany and 6 years in Australia/New Zealand.

Proceedings protect the time limit in all countries, in most countries – except China, Croatia, Italy and Sweden – the time limit can be extended. The Netherlands have mentioned correctly that the Conventions are silent on the point, so that they wonder whether national law may allow it. In Norway it is unclear whether an extension is possible. German law provides for a variety of other means. Most notably, negotiations between the parties prevent a time limit from running.

Rules are split when it comes to joint liability between the liable party and its insurer. Belgium, Croatia, Germany, Italy, Norway, Sweden and Switzerland have confirmed this, Argentina, Australia/New Zealand, Canada and Japan have denied it.

In Belgium, Italy, the Netherlands and Sweden the insurer may also file cross actions against his insured in the same proceeding. In these states the court is also giving effect to a jurisdiction or arbitration clause in the insurance policy.

In most countries surveyed it is allowed that the claimant assigns his direct claim to a third party, except for Italy being uncertain and Sweden, where an assignment of claim is not permitted. The validity of the assignment requires a written form as well as notice to the debtor, whereas in Germany the assignment not necessarily needs to be made in writing. In China, the assignee has to prove the notice to the debtor (the insurer).

Of much importance were the definitions, which the various MLAs offered under their law for the term "willful misconduct". This term is of particular relevance, because an insurer may defend a direct action under the Conventions with the argument of willful misconduct on the part of the liable party. At the top end you find the statement that this requires intent. This is the case for Argentina, Belgium, China, Germany and Switzerland. Actually, Germany has published the Conventions ratified in the Federal Gazette with a German translation, which uses the word *Vorsatz*, which means intent, for *willful misconduct*. We find a broader meaning in Australia/New Zealand, Croatia, and Japan, where the term includes recklessness. Even broader is Canada, which appears to allow a serious wrongdoing, and Italy, which only requires more than gross negligence. The broadest understanding can be found in Norway: it includes gross negligence, if there is also knowledge that damage will probably result.

With this we come to the last area, namely *State Liability.*

For this we revert to what we have reported in respect of investigations made by the relevant authorities in respect of the financial standing of the insurer as well as the insurance conditions. You will recall that there can be situations in which no such investigations were made, and there are countries which nevertheless do accept respective certificates. The result may be that in an incident there exists a certificate, but there is for practical purposes no insurance cover available.

Bearing this in mind, one may find it remarkable that only under the national laws of Belgium, Germany and presumably the Netherlands the state might be liable in case of the appropriate authority issuing a certificate under the Convention and turning out that there is no insurance contract at all or not consistent with the provisions of the Conventions or not enough financial security. This is a very big issue, but fortunately it is not peculiar to the mandatory insurances in International Conventions.

This brings our presentation to an end. The work of the Working Group will continue. During the next weeks we will discuss, if and to what extent we will propose to the Executive Council proposals for Guidelines for national governments. Obviously there will be much more uncertainty and diversity out there, bearing in mind that we could evaluate only 14 replies to the Questionnaire. Uniformity in those countries does not necessarily mean real uniformity, so that Guidelines reflecting those uniformities may serve a useful purpose. But in other areas the views appear to be so far apart that one may wonder whether Guidelines would be meaningful.

Thank you very much for your attention.

THE WESTERN AND EASTERN CULTURAL INFLUENCE ON MARITIME ARBITRATION AND ITS RECENT DEVELOPMENT IN ASIA

IMPACT OF EASTERN AND WESTERN CULTURE ON ARBITRATION AND LATEST DEVELOPMENT OF ARBITRATION IN CHINA

YU JIANLONG

Arbitration rules of main international arbitration institutions are tending to be the same along with the amalgamation of global economy, which may push forward the development of arbitration globally while parties and legal professionals enjoy more convenience. However, arbitration institutions of different countries need to strengthen communication and deepen understanding since they rely on different legal systems and social cultures for establishment and development while eastern and western arbitration cultures and ideas still vary in certain aspects. I'm explaining eastern culture's impact on arbitration in China in the following aspects.

I. The rule of law idea formed in the several thousand year feudal society causes Chinese prefer arrangement by an administrative institution.

Only institutional arbitration is accepted in China not only because the P.R.C. Arbitration Law only recognizes institutional arbitration but also because law, as emperors' tool of controlling people, served for the centralized feudal despotism in ancient China. Law was closely connected with public power in the several thousand feudal society, emphasizing public order instead of individuals' role, while the western rule of law idea is based on releasing individuals' potential and realizing individual value to the maximum. Aristotal proposed that '[T]he rule of law is therefore preferable to that of a single citizen' under which the rule of law counters the rule of political powers. Eastern and western parties, due to different cognition of law, prefer different ways of dispute settlement. Chinese parties prefer acceptance of arrangement by administrative institutions while western people tend to submit disputes to ad hoc arbitration whose process may be co-decided by the parties through negotiation under the tribunal's guidance.

Chinese parties rely more on the impartiality of arbitration institutions which play important roles by participating in arbitration process with their case administration systems. For example, secretariats of arbitration

institutions are responsible for all document exchange in Chinese arbitration process while parties deliver documents to tribunals directly in western arbitration process. For one Chinese arbitration case, all communication between the tribunal and the parties need to be carried out through the secretariat since no private discussion is allowed during the hearing while the parties are informed of the oral hearing date by the secretariat after the tribunal fixes the date through negotiating with the secretariat. The oral hearing place and facilities are offered and coordinated by the secretariat as well. The arbitration committee makes decision on parties' jurisdiction objection unless an oral hearing is necessary for decision making, the committee will authorize the tribunal to make the decision.

Institutional arbitration, compared to ad hoc arbitration, is more efficient in procedural administration. The tribunal, with the secretariat's assistance in case administration, can focus on substantial issues while centralized administration cuts arbitration cost.

Another advantage of institutions' participation in case administration is the standardization and certainty of arbitration process. First, parties may be aware of their arbitration cost before submitting disputes to arbitration institutions since they need to prepay full amount of arbitration fees while no more charge will occur even the complication of a case causes the tribunal spend more time than normal. Furthermore, parties may have better understanding and expectation on arbitration process through specific stipulations in arbitration rules. CIETAC(China International Economic and Trade Arbitration Commission) and CMAC(China Maritime Arbitration Commission)'s rules both set strict time limit on arbitration process to ensure efficiency. A tribunal is normally formed within one month after a case is accepted by the institution while the first oral hearing is arranged within two or three months after the tribunal is formed. Awards for foreign related cases must be made within six months after the tribunal is formed. In fact, most CIETAC and CMAC cases are awarded within six months. Awards for many CMAC summary procedure cases are made within one month after oral hearing. It's common for western arbitration institutions to extend the time limit for making award as stipulated in their rules. Ad hoc arbitration may have even longer process. No one can accelerate an ad hoc arbitration process if the tribunal delays it since most procedural issues need to be determined by parties under the tribunal's arrangement. Many Chinese parties complain about the long arbitration process of LMAA (London Maritime Arbitrators' Association). Arbitrators hearing too many cases at the same time will surely cause delay in process. Besides, it's unrealistic to expect parties of most cases to negotiate procedural arrangement peacefully. In traditional Chinese culture, 'no litigation' idea is highly appreciated. It's taken as a virtue to avoid litigation while it's a shame to be involved therein. No litigation turns to be an ideal social aim. Many arbitration case parties would never submit disputes to

arbitration if they can have any negotiation. Therefore, many parties would prefer causing the other parties' trouble instead of reaching agreement therewith, which may influence arbitration process.

II. The med-arb idea, showing Chinese life attitude of pursuing harmony, is a feature of arbitration in China and taken as an eastern experience.

Eastern culture, represented by Chinese culture, emphasizes that 'harmony is the most precious' which comes from 'harmony is the essential part of ritual applications' in the Analects of Confucius and means that the main function of ritual is to reach harmony while people can get along with each other if they abide by ritual. The traditional Chinese legal culture takes harmony as the highest value with the aim of reaching harmony between human and nature and among people. Western people regard settling disputes through legal ways as normal. Sometimes tribunals' role is assisting parties make judgment and decision on issues they cannot reach agreement by themselves while the parties' relationship and future trade will not be influenced by submitting disputes to arbitration. However, Chinese parties, once initiate arbitration or litigation process, may have turned into enemies already. It would be beneficial for parties' future business cooperation if they can reach amicable settlement before such initiation. Therefore, mediation in arbitration process is widely accepted by Chinese parties who may even have high expectation thereon.

Med-arb is adopted in Chinese legislation and practice to meet parties' demand under which arbitrators may act as mediators per parties' request in arbitration process. This is quite different from the traditional western way of separating arbitration from mediation. Some western arbitrators and scholars deem that arbitration and mediation are two totally different procedures while arbitrators and mediators have different functions in nature. The role of mediators is to help parties reach settlement agreement. Mixture of arbitrators and mediators' functions through combination of the two different procedures may damage the validity of settlement agreements and independence of arbitral awards. Once concern is arbitrators acting as mediators in arbitration process may be influenced by parties' words instead of evidence and make awards based on facts known by one party only. A bigger concern is arbitrators, after getting one-party information or knowing parties' base lines in mediation, may favor one party perceptually or actually.

China's med-arb system originates from foreign-related arbitration in 1950's. The Foreign-related Trade Arbitration Commission (former name of CIETAC) was established under CCPIT (China Council for the Promotion of International Trade) /CCOIC (China Chamber of International Commerce) in 1956 and adopted the Provisional Rules under which no specific stipulation was made on mediation. But CIETAC, since its establishment, has adopted

the practice of mediating before arbitrating. CMAC was established under CCPIT in 1959 and adopted its Provisional Rules of which Article 19 clearly states that CMAC may mediate its cases. Above all, China has adopted med-arb since its establishment of arbitration system in 1950's. The amended CIETAC and CMAC Rules in 1988 both clearly state that the arbitration commission and tribunals may mediate disputes. Article 37 of 1988 CIETAC rules 7 states that the arbitration commission or the tribunal may conciliate a case during the process of arbitration. Where a settlement agreement is reached through conciliation, the tribunal may render an award in accordance with the settlement agreement. CIETAC and CMAC Rules, after various amendments thereafter, contain med-arb stipulations. China promulgated the Arbitration Law in 1994, confirming the legal force of med-arb. Article 51 of the Law stipulates that '[B]efore giving an award, an arbitration tribunal may first attempt to conciliate. If the parties apply for conciliation voluntarily, the arbitration tribunal shall conciliate. If conciliation is unsuccessful, an award shall be made promptly'. CIETAC, in its Rules amended thereafter, not only keeps the med-arb related stipulation but also substantiates the content. Article 45 of the latest 2012 version of CIETAC Rules makes specific procedural arrangement for med-arb which fully respects party autonomy. It states that Where both parties wish to conciliate, or where one party wishes to conciliate and the other party's consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceedings. During the process of conciliation, the arbitral tribunal shall terminate the conciliation proceedings if either party so requests or if the arbitral tribunal believes that further conciliation efforts shall be futile. Where conciliation fails, the arbitral tribunal shall resume the arbitration proceedings and render an arbitral award. Where conciliation fails, any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation, shall not be invoked by either party as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings, or any other proceedings.

It's proved through practice that med-arb is quite advantageous and effective in China. First, parties can enjoy benefits of arbitration and conciliation, saving time and cost, without initiating two procedures separately. Secondly, it's easier for parties to reach settlement agreement under conciliation by arbitral tribunals since such settlement is backed up by arbitration. Thirdly, tribunals' awards based on parties settlement agreement may be recognized and enforced by courts. Fourthly, parties may save time and cost for enforcement due to high feasibility of execution of settlement agreements. Fifthly, med-arb may help dispute parties maintain and ever improve business cooperation. Cases in which disputes are solved through conciliation count for 30% of all CIETAC cases.

Professor Shen Sibao, a senior CIETAC arbitrator, has solved many disputes through conciliation, especially when he acts as the presiding arbitrator co-appointed by both parties. Parties are satisfied about the settlement and normally execute settlement agreements out of their own will. He made an excellent speech to both parties and their agents when conciliating a case for which he was appointed as the presiding arbitrator as follows.

'One witness from the Claimant of this case is an American entrepreneur who is client of both parties in American market. What he said is quite sincere and touching. He wishes both parties finish current status of no confidence in each other and fix their broken friendship for the mutual maximum benefit. This witness is different from the parties' lawyers who get bolder with the 'fighting', using sharp words and turning more and more excited. The oral hearing has lasted for one and a half day while the parties' claims and counterclaims has been amended to bigger and bigger amounts, which turn this arbitration into a war zone. Of course we can understand these Chinese and foreign lawyers who are working seriously and responsibly. However, it's the parties instead of the lawyers who initiate this arbitration. As proved in history, soldiers fighting in battlefront always focus on win or lose of the battle they are facing while forgetting the strategic interest of the whole war, i.e., the actual target of the war. Only the parties, as initiators of the war, can be assured of the strategic benefit of their claims and counterclaims. The oral hearing may last longer as pushed forward by the lawyers.

Both parties have Chinese lawyers as their main agents while retaining first rank chartered barristers from UK with their foreign assistants who are all paid by hours. The hourly charge for one barrister with his assistants is surely beyond one thousand dollars. Those Chinese lawyers, judging from their experience, may charge over three hundred dollars per hour. The total expense for both parties' over ten Chinese lawyers may be four to five thousand dollars per hour. So the hourly agent charge for this case amounts to about seven thousand while the arbitrators' fees and expenses has not been counted yet. One hundred thousand dollars has been spent on this thirty hour oral hearing not including your expense on first class or business class flight from far away, accommodation and preparation for this case. The hearing may not be finished till midnight if we examine the evidence one by one since both parties have submitted big bundles of documents, which may cause big increase in both parties' agent fee. More oral hearing may be arranged for this case with no less than one million dollar expense. What kind of result are you expecting? The tribunal, in pre-hearing discussion, deems that neither party may get a happy ending for loss in this dispute. It's quite possible that each party shall bear damages by itself. If so, why are you spare no effort to pushing forward this war?

Both parties operate well in business and have certain potentiality which is gained uneasily through struggling saving phase, cruel business risks and

competition, and difficult financing, etc. Why are you spending big money on this arbitration? Friendship and cooperation turn to be more important for businessmen, especially those of the same trade, along with the globalization of economy. The two parties shall forgive and forget, go to the market hand in hand to make money together instead of trying to dig money out of each other's pocket.

I sincerely wish both parties talk privately after lunch, trying to continue your cooperation instead of fighting against each other. Don't be swayed by your emotion. There is one Chinese old saying 'back a step of boundless'. After the disappearance of your anger, you may find the future is bright, the cooperation is essential, and the life is glorious.

I have several words for the agents as well. Both parties' agents are responsible for your clients and have shown high professional level. However, you have one shortcoming of being too aggressive. As an experienced old lawyer, I have one sentence for you summing up from lessons I've learned, i.e., give ground even you have a good base. Giving no ground with good reason is quite common, but lawyers, starting from the basic benefit of clients, should give ground instead. We may facilitate settlement by creating friendly atmosphere and favorable condition together. You don't need to raise your voice when you have good reason while you may give ground even with a solid base. You may achieve more stable and lasting relation with clients, making more friends, gaining wider social connection, advancing career by doing so.'

Miracle occurred with the joint effort of the tribunal and both parties' agents. The parties negotiated privately and efficiently after lunch. An agreement was reached on fundamental issues of the dispute settlement two hours later. Then, the two parties' agents assisted the parties to draft a settlement agreement acceptable to both parties. The tribunal, per the parties' request, made settlement award accordingly. Thereafter, the parties shook hands with arbitrators kindly and gratefully. Professor Shen said he felt the happiest at that moment as the presiding arbitrator.

The 'back a step of boundless' and 'give ground even you have a good base' mentioned by Professor Shen in his speech are the principles of life recommended in Chinese society, which mean that one party of a dispute, even with good reason, need to step backward, giving the other party an out to avoid acting on impulse so that the dispute may be solved peacefully without influencing their future cooperation. Professor Shen persuaded western parties and lawyers with eastern way of dispute settlement, which proves that western and eastern people take the same stand of pursuing harmony and solving dispute friendly while we have different cultures and legal systems.

Professor Tang Houzhi, the promoter of med-arb in China, holds that both arbitration and conciliation are private matters with party autonomy as fundamental. Parties' freedom of appointing the same person for both conciliation and arbitration should be respected.

A professor from SOAS University mentioned in his speech on 'The Ins and Outs of CIETAC Arbitration' Seminar co-held by CIETAC and British Institute of International and Comparative Law in 2011 that China, as such a big country with its special cultural and legal background, shall be entitled to develop arbitration mode suitable for itself, which impresses me much and makes me feel recognition of eastern mode by western legal professionals. I am looking forward to more opportunities of sharing experience in western and eastern arbitration.

Thirdly, Chinese parties, influenced by the idea of emphasizing harmony in Chinese culture, worry too much about keeping good relation with business partners while ignore matters of principle, which may result in disadvantageous position in arbitration due to omission of key evidence.

Document evidence bears higher evidence effect for cases heard in China, which is different from western arbitration way of attaching importance to testimony. Therefore, parties need to keep evidence well in business transactions. But Chinese parties, being afraid that emotionless written form or lawyers' letter may damage good relationship, often communicate on phone for issues which should be solved through exchange of letters. The disadvantage is no written evidence can be submitted for tribunal's understanding of the fact when parties have different opinions after disputes occur. LMAA arbitrators mentioned, when my colleagues visited LMAA earlier this year, that the high ratio of Chinese ship manufacturers' losing in LMAA cases is because many small Chinese factories pay no attention to evidence preservation. Tribunals could not accept their simple evidence for proof of fact. Many Chinese factories only realized the importance of evidence after losing several arbitration cases. But it's quite a pity that they've already paid high price for such experience.

IV. Latest development of arbitration in China

CIETAC and CMAC have developed well in recent years. CIETAC's caseload has been increased continuously in the last five years which is 1,118 cases, 1,230 cases, 1,482 cases and 1,119 cases for year 2007, 2008, 2009, 2010 and 2011 respectively. CMAC's caseload has increased abruptly since 2008, reaching 70 cases per year compared with 20 cases before.

CIETAC and CMAC attach much importance to learning from western arbitration. The Secretariats may make special procedural arrangements after consulting tribunals in some international cases with large dispute amount and complicated factual and legal issues, such as holding pre-hearing meetings with parties for determination of procedural arrangement, issuing procedural orders after parties and their agents reach agreement thereon, sending tribunals' question lists to parties and making evaluation by experts, etc. so that western lawyers may adapt better for arbitration processes in China. CIETAC's newly amended Rules, compared with the old version, is more in line with rules of other international arbitration institutions.

We heartily welcome CMI's holding of this Conference in Beijing. It's a good opportunity for Chinese maritime law and arbitration professionals to attend such large-scale international conference here, discussing latest legal issues with first class maritime lawyers from all over the world while foreign professionals may understand China's social features, humanity, history, world outlook and life idea more directly to get a better understanding of the cultural and social background of Chinese laws. I believe that Chinese and foreign professionals may understand each other's acts and words better in arbitration with such deeper mutual understanding which can diminish misunderstanding caused by cultural difference. This will be a precious gift we get from this Conference.

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THE EASTERN AND WESTERN CULTURAL INFLUENCES ON MARITIME ARBITRATION AND ITS RECENT DEVELOPMENT IN ASIA*

PHILIP YANG**

Introduction

I have little doubt that cultural difference remains to be the most important problem in international arbitration of which maritime arbitration is a major part of it. The effect of it, I suggest, can arguably be seen in the large number of recent London arbitration cases in which the Chinese shipbuilders failed completely against buyers (or shipowners), many of whom were from European countries. As a matter of fact, I was not aware of one single successful case. I appreciate the facts of each and every case differ and they are hard to generalize. But still, in light of the massive failure, there may be a common reason behind.

First of all, there were a lot of London arbitration cases involving Chinese shipbuilding contracts since the 2008 financial tsunami. I only need to cite two incidents to suppor that. One was a seminar at Kuala Lumpur about one and a half years ago. It was a seminar organized by the Malaysia Supreme Court to coincide with the occasion in the establishment of a special maritime court. One of the invited speakers was Lord Clarke. Lord Clarke referred to the phenomenon of a large number of Chinese shipbuilding cases in London in recent years as a "bonanza of a lifetime". Another incident was my knowledge from my London contacts. Many barrister friends in leading maritime or commercial chambers told me that they had each a dozen or two cases acting as either counsel or arbitrator at any given time. Even for me, I have in the past 2-3 years consistently been sitting in some 30-40 cases as arbitrator at any given time.

To sum up, I have been wondering why the Chinese shipbuilders (and to a smaller extent, other Asian shipbuilders such as Vietnam) failed so miserably. On the face, all the odds should be in favour of the Chinese or Asian shipbuilders.

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* October 18, 2012, CMI Conference at Beijing.

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Such as, *firstly*, it is difficult under English law (which is invariably the governing law) for parties (buyers in shipbuilding cases) to get out of contracts and transfer the adverse "market risk" to the sellers or shipbuilders. *Secondly*, with experienced arbitrators equipped with English law concepts, one would expect they should have a lot of sympathy with the Chinese or Asian shipbuilders in fact-finding or deciding what is "reasonable" under the circumstances by reason of the nature of cases. *Thirdly*, the shipbuilding contracts are almost always based on SAJ form, which is reputed to be in favour of shipbuilders. Hence BIMCO has created the Newbuildcon for the purpose of making shipbuilding contracts more balanced. So one cannot say the massive failure of Chinese shipbuilders was due to them having entered into suicidal contracts and "signed their lives away".

I have heard that there is currently a common perception amongst the Chinese shipbuilders of unfair treatment in London arbitration. In a way, it is a common feeling of most parties failing in any arbitration, at least in the short term. But I suggest that there should be more effective reason which has resulted in such a massive failure of the Chinese shipbuilders.

I have actually raised this question from the floor at the International Congress of Maritime Arbitrators ("ICMA") held in Vancouver in May 2012. I did not get a direct response from many of the leading London maritime arbitrators who were attending and were actually presented. Only Mr. Ian Gaunt, the Hon. Sec. of the London Maritime Arbitrators Association ("LMAA") had given his view openly in that many Chinese shipbuilders were "*the victims of their own generosity*".

In private conversations, I was told by others of a few more reasons such as, the quality of legal representation, the lack of or poor quality of evidence in all forms, etc. These reasons match with my own experience. I can sum up in saying that some of these reasons may have to do with the problem of "cultural differences".

For instance, in terms of quality of oral evidence, very rarely a Chinese factual witness can perform satisfactorily in cross-examination and gain the trust of the English arbitrators. As a sitting arbitrator in many occasions with English co-arbitrators, I can also say that the problem is mutual. Namely, some of my co-arbitrators equally lack the understanding of the Chinese factual witnesses in how they speak, how they write, how they react, their limitations and so forth. There were times I accepted the evidence of a Chinese or Asian witness, but not my western co-arbitrators. I am confident that I was deciding in good-faith. It is therefore a mutual problem of lack of understanding and/or mistrust on both sides. So unless the cultural differences can be bridged or narrowed on both sides (Asian parties and western arbitrators), I believe maritime arbitration, like investment arbitration, will not get rid of its perceived image of a general and/or imputed bias from some developing countries like China.

The main effect of cultural influences in arbitration

In any arbitration (including maritime arbitration), there are always two issues or aspects in dispute between the parties. They are the issues of fact and the issues of law.

Issues of law

In maritime contracts, the working language is English. As to the governing law, if the parties think of it during negotiation or a popular standard form of contract is being used (such as, BIMCO contracts), English law will invariably be adopted. The reason behind is common knowledge. English law contracts are endowed with a wealth of settled meanings, definitions of parties' rights and obligations, rules of interpretation or construction and possible answers to every conceivable question. This in turn gives English maritime and commercial law the reputation of predictability, certainty, expertise, comprehensiveness, reasonableness and fairness. It is a reputation no other countries or jurisdictions can have because the opportunity to build up and perfect a similar system over hundreds of years is no longer there.

Cultural influences do not normally have any impact when it comes to a decision concerning the law. In rare occasions, I find the Chinese parties insisted to arbitrate in London with the governing law stated to be the PRC law. In Hong Kong, I regularly see an arbitration (and governing law) clause providing for "*Arbitration in Hong Kong. PRC law to govern*". I suspect part of the motive behind has to do with the perceived advantage in that the PRC law would tilt towards the Chinese parties when it comes to cultural differences. But I think this is a misconception.

Issues of fact

It is the issues of fact (past or future) which will suffer most prominently when it comes to the problem of cultural influences. In practice, many cases are facts sensitive (such as, shipbuilding disputes) and the outcome of the arbitration relies mainly or solely on the finding of facts. Finding of facts or truth[1] by an arbitrator must be based on evidence. Factual evidence comes in the form of documentary or oral. Documents, if adequately and accurately kept and presented are by far better and more reliable evidence. Furthermore, this form of evidence will normally be less affected by cultural influences in an arbitration.

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[1] The late Lord Bingham said in the foreword to the 2nd edition of *Disclosure*: "*It is sometimes asserted that in civil proceedings the task of a common law court is not to establish the truth but simply to resolve whether the claimant has discharged the burden of proof lying upon him. In a formal sense this is true. In reality it is not: the mills of adversarial litigation grind so exceeding small that by the end of a contested action the judge is usually in as good a position as anyone could be to decide exactly what happened and why*." Under the civil law system, the duty of the court or the arbitral tribunal to establish the truth is even more obvious by reason of the inquisitorial powers given to the tribunal.

In many documents-only maritime arbitration cases, I am confident that the problem of cultural differences is much less profound. It is fortunate that a lot of maritime arbitrations (mainly charter-party disputes) are conducted only on the basis of documentary evidence. The latest statistic provided by the LMAA shows for the year of 2011, the total number of awards being published by its full members is 592. Out of this figure, only 143 awards involved an oral hearing. Therefore, around 75% of LMAA awards are decided based on documents-only.

Problems of documentary evidence

But the cultures in most Asian countries do not favour recording facts in writing. This is a well-known practice in China but also in many other Asian countries. For example, I recall some years ago in an international arbitration conference held at Kuala Lumpur, one well-known Malaysian lawyer addressed a question (or more correctly, a complaint) to Lord Mustill from the floor. He said in Malaysia, it was difficult to put things down in writing because if you write to the governmental authorities (as one example), you would never get a reply. More recently, I saw in the newspapers that many Japanese companies seeking to be listed in the Hong Kong Stock Exchange were faced with a problem. Namely, they kept very little documentary evidence internally.

I do not think there is a solution to this kind of practice until and unless the Asian cultures change for the better in becoming accustomed to keep complete, proper and at times self-serving written records, both to support future disputes or for better management in the company. As far as the arbitrators are concerned, there is little they can do because they must have evidence to make a finding of fact under English law. But cultural influences can still play a minor part. For instance, an Asian party not being able to disclose or produce a specific document may invite adverse inference from a western arbitrator who is used to the practice of western companies and does not apprehend why a particular document has not been kept. If there are documents disclosed or produced by the Asian parties, cultural influences can again play a part in what weight would be given to that evidence. It is for the arbitrator to appreciate how Asian people write, which can be very different from the western counterparts. For instance, it is not the habit of Asian people to write directly and/or bluntly, even faced with an adversarial allegation. So if an allegation by a western party is faced with a written response from the Asian party which is polite, mild, indirect and/or seemingly evasive, the arbitrator should be careful to take it as a sign of weakness, or worse still, as an admission of fault.

Problems of oral evidence

The lack or inadequate documentary evidence by the Asian parties often leads to the need to adduce oral evidence. It is the only factual evidence left to support an allegation of fact. Oral evidence must invariably involve a hearing. The normal process to go through is firstly, the evidence-in-chief (which is often substituted by written witness statement exchanged before-hand), followed by

cross-examination by the opponent's counsel or advocate (with the usual intention to discredit the witness) and then re-examination. Hearing is a very important (and an expensive) step in arbitration and the finding of facts by the arbitrator often dictates the outcome of the exercise. This is the stage which I believe the problem of cultural influences (or differences) is at its peak. One can readily appreciate that a factual witness will speak or react in a certain way, but the arbitrators of a different background or culture may hear or receive the evidence in a slightly or vastly different way. It is basic common-sense to appreciate that a mother, as an example, will be inclined to receive the "evidence" of her boy than that of the neighbour's boy when there is an argument as to who started the fight. The mother may well be versed with the fundamental principle of due process and/or natural justice, and is determined to do justice between the two boys. But we know for certain that she will not be accepted to be the *arbiter* because of the danger of imputed bias.

Expanding the above to international arbitration, it is obviously unacceptable to allow the arbitrator having pecuniary or other close non-pecuniary (family, occupation, etc) connections with one of the parties. It is sensitive to go further than that in practice. But common-sense tells connections alone, if any, are far from being adequate to avoid imputed bias. Equally if not more important factor is whether or not a party or factual witness shares the arbitrator's culture, genes, practice and/or common goal interest[2]. But this is a factor which is very rarely focused on in international arbitration. For example, most standard or model arbitration clauses or institutional rules do not touch it (other than the nationality issue, which I shall deal with later). It is only appearing in rare occasions in one-off arbitration clauses[3].

Examples of cultural differences

There are numerous examples of cultural differences. I will only give a few of them just to illustrate the point.

First, I cite an example given by Mr Christopher Tahbaz. Litigation partner of Debevoise & Plimpton, HK in a paper published in *Asian Dispute Review*, April 2012. It was a cross-examination of an Asian witness and the following exchange took place:

Counsel - You understood that, under the agreement, our client had the right to terminate if you did not provide proof of financing by the deadline?

Witness – On the contract, that was written. However, in a contract as big as this, for such a huge contract, slight changes to date, as far as I understood it, was international practice.

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[2] "Common goal interest" was the issue in the House of Lords' decision and retrial in Ex p Pinochet (No.2) (1999) 1 All ER 577.

[3] See the Supreme Court's decision in *Jivraj* v. *Hashwani* (2011) UKSC 40.

Counsel – My client had the right to terminate the agreement on July 1, did it not?

Witness – In a business deal, law does not govern everything.

The problem is, as Mr. Tahbaz said, from a western perspective, law *does* govern everything. If the arbitrators are from the west, as it often is the case, the Asian witness will be in trouble. So what will be the difference if an arbitrator knowing both the Asian and the Western cultures is involved? I suspect he or she will still adhere to the basic notion in the west in that "law governs everything". But he or she will pay less attention to the misconception of the witness, knowing that it is a very general perception amongst many Asian people (e.g. law does not govern everything). The arbitrator will probably pay a lot more attention to other issues or facts based on evidence recording what actually has happened. For example and just out-of-blue, issues or facts such as: Did the Asian party provide *some limited* proof of finance? Was it sufficient? Could issues like waiver, estoppels or prevention principle be relevant and established? Etc.

Second, I can cite an example of mine sitting in London arbitration with two retired English judges. One of the factual issues concerned a delegation from China to a European country and signed a document (pro-forma contract) during its stay. The dispute was: did the parties reach an agreement over the sale of say, 6 newly-built bulk carriers. Subsequent to the trip, the price of the vessels involved increased sharply. Inevitably, the European party insisted that both parties had reached an agreement by signing the document. Common-sense suggests the European party must be right. During cross-examination, the explanation or answer given by the Chinese witness was: "*I have to sign something in order to justify the delegation's expensive trip to Europe to my superior and the State authorities*". It was an answer wholly unacceptable to my co-arbitrators, but I could appreciate. The Chinese witness further explained his signature was with a brief qualification, even though the qualification was hardly comprehensible. Again I could appreciate but not my co-arbitrators. Last but not the least, the Chinese witness alleged both parties agreed at the meeting that the signing of the pro-forma contract did not signify a final agreement, as the Chinese delegates must still negotiate further on a few outstanding issues and to complete certain formalities including the approval of the higher authority.

What struck me was the more reliable and trustworthy correspondence and contemporaneous documents subsequent to the trip. For instance, the documents showed a clear record of continuous negotiations over the few outstanding issues, as alleged by the Chinese witness. The European witness alleged it was an attempt of the Chinese parties to open-up and re-negotiate *after* an agreement had been reached. But the content of the documents and their timings did not persuade me. The Chairman of the tribunal came up with an initial draft award finding against the Chinese party (or shipyard). But after deliberations, the three member of the tribunal reached a unanimous decision that the Chinese party prevailed in that no agreement was reached.

Nationality of the arbitrators

One of the most well-known attempt to bridge or narrow cultural influences (or differences) in international arbitration is on the issue of nationality.

This issue is in most of the arbitration rules, particularly in the rules of leading arbitral institutions. In "UNCITRAL Arbitration Rules", for example, it is in Article 6(4) stating:

"*In making the appointment, the appointing authority* shall have regard to … the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties*". (*The Permanent Court of Arbitration at The Hague)

In the "Arbitration and ADR Rules 2011" of the ICC Court of Arbitration, Article 13(5) states:

"*The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties…*"

The "Arbitration Rules 1998"of the London Court of International Arbitration has a very comprehensive clause dealing with this issue in Article 6, stating, *inter alia*:

"*6.1. Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party ….*

6.2 The nationality of parties shall be understood to include that of controlling shareholders or interests.

6.3 For the purpose of this Article, a person who is a citizen of two or more states shall be treated as a national of each state; …"

Last but not the least, the "Administered Arbitration Rules" of the Hong Kong International Arbitration Centre, in Article 11.2, it says: 7

"*Where the parties to an arbitration under these Rules are of different nationalities, a sole arbitrator and the chairman of a three-member arbitral tribunal shall not have the same nationality as any party …*" In practice, it is an issue a lot of attention is directed to in making sure the appointment of an arbitrator with the right nationality. But as I see it, this attention is wholly misguided. Nationality of the arbitrators and the parties is never the real issue. For example, I hold a British passport for a very long time as I have grown up in Hong Kong during the colonial days. I have never held a Chinese passport. Indeed, I do not hold a Hong Kong SAR passport. But I doubt I will be nominated by any arbitral institutions to be an arbitrator involving Chinese party or a company (such as a BVI one) with Chinese interests behind. I doubt I can get away by claiming my nationality is different from the Chinese party. Therefore, unless and until the attention is rightly focused on the real issue or issues, I cannot see how the problem go away.

Parties' attempts

As the leading arbitral institutions cannot do much to reduce the problem of cultural differences or influences, it is perhaps a sign to show some of the sporadic attempts mede by the parties themselves.

One attempt is what I have mentioned earlier, which is to insist in a governing law other than English law. I have said this attempt is misconceived as the issue of law (e.g. English law) will not normally be affected by cultural influences. But I have heard once from a Chinese party that a clause of "*Arbitration in Hong Kong. PRC law to govern*" will have a higher chance for the Hong Kong International Arbitration Centre (HKIAC) appointing a sole arbitrator[4] who understands Chinese culture by reason of the governing law of the contract is the PRC law.

Another similar attempt is to expressly agree in the arbitration clause that the arbitral language shall be "English/Chinese" (or English and another language). On the face, it may have to do with saving of costs in translation of documents and/or interpretation of oral evidence. But I have also heard that this specific requirement in the arbitration agreement gives rise to a higher chance to appoint an arbitrator who knows both languages[5] and it follows quite naturally, both cultures.

Arguably, the proliferation of arbitration seats in recent years may also have something to do with the cultural differences or influences. The demand is there because parties from developing countries want to have "home-town justice" and to shy away from traditional arbitral seats in the west. For instance, some of the Chinese shipyards I encountered have determined to arbitrate future disputes in the Mainland, or as a second choice, Singapore or Hong Kong. Whether they can achieve their wishes in the present shipping market is another matter. But many of them do believe they would have a more sympathetic hearing than in London.

Cultural differences and the lawyers

If the reality that an ideal arbitral tribunal knowing the cultures of both parties is hard to come by, the lawyers, especially acting for Asian parties,

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[4] The Hong Kong Arbitration Ordinance Cap.609 said in s.23 that the number of arbitrators shall be decided by the HKIAC if it has not been determined by the parties. In s.24, it further said that the HKIAC shall appoint the arbitrator, particularly the sole arbitrator if the parties cannot agree.

[5] I know of no law requiring the arbitrator to know the arbitral language(s) agreed by the parties. But in the IBA Rules of Ethics for International Arbitrators, r.2.2 provided for: "*A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is competent to determine the issue in dispute, and has adequate knowledge of the language of the arbitration.*" A party who appoints an arbitrator without the knowledge of arbitral language(s) agreed upon may also face costs sanction.

become crucial. A good and competent lawyer must know Asian and western cultures in handling an international arbitration for Asian party.

Cultural influences become particularly important when a lawyer is preparing the Asian client for a hearing before western arbitrators. Effective advocacy, as it is often said, is the ability to present a good and persuasive story to the right audience, the arbitrators in the case of an arbitration.

For most Asian or Chinese factual witness, encountering for the first time an adversarial-style cross-examination is a daunting experience. If he or she is not educated or prepared in advance, it is rare that the witness will perform satisfactorily. Sometimes a seemingly good case on documents can be destroyed by a poor witness. It is not short of horrifying stories concerning Asian witnesses behaving badly, such as running away halfway during a protracted cross-examination, or having a heart-attack, or bursting into quarrel with the opponent's counsel or even the arbitrator, etc. I have even heard of a case that an angry Asian witness physically attacking the opposite party and its counsel, and the police had to be called.

So in a case of having a few witnesses to choose from to testify on the same issue, it is preferable for the lawyer to pick one who is willing and has the time to be educated, who can communicate well (the language or English capability is not crucial, as interpreters are readily available) and listen well. It may well not be the top person in the hierarchy but it does not really matter.

In educating or preparing the factual witness, it can take different forms or shapes. It may be a lecture on the law of evidence or a mock arbitration to allow the Asian or Chinese witness to get familiar with testifying before an arbitral tribunal in a well structured manner.

Mock arbitration is no longer a stranger in international arbitration. When it comes to cases where 'stakes are high', a mock arbitration may resemble the real exercise, plays out over several days, in order to prepare the witnesses and the lawyers. That means a "shadow tribunal" will be picked up from people who are as close as possible to the experience, area of practice, character, demographic, general attitude and culture of the real sitting arbitrators. Both sides of the case are argued by teams of lawyers from the same firm. Factual witnesses will be called and cross-examined from a full list of difficult questions likely to be imposed by the opponent's counsel in the real hearing. The arbitral tribunal is invited to be critical in the performance of the factual witness. The whole exercise involves a lot of work and is very expensive. But the benefit of thoroughly educating the factual witness is obvious. Furthermore, it can be hidden under privilege. Mock arbitration or mock litigation is common in the US. High level contacts between US attorney or counsel and witnesses, even training of witnesses, are commonplace. Ethical US attorney will of course follow the limitations in place, such as, in the American Bar Association's Model Rules of Professional Conduct in relation to the false testimony of witnesses, in Rule 3(4)(b): "*A lawyer shall not … falsify evidence, counsel or assist a witness*

to testify falsely, or offer an inducement to a witness that is prohibited by law." (Model Rules of Professional Conduct 2010). But to get the factual witness to be familiar with the exercise and to suggest the right way to answer are clearly within the bounds of US law. In England, it seems to be a lot stricter and under the Code of Conduct of the Bar of England and Wales, "*a barrister must not rehearse, practice or coach a witness in relation to his evidence*". English lawyers are restricted only to "witness familiarization". But this is for court litigation and to what extent it applies to arbitration, especially international arbitration with seats other than London or other British cities, one cannot tell. By contrast, countries such as France and Switzerland have laws prohibiting all contact between lawyers and witnesses in court cases.

To sum up, different jurisdictions differ widely in practice and it is an issue remains unsettled in international arbitration. The arbitral institutions[6] or arbitral tribunals rarely or do not address this issue. It may well be, pre-hearing education or mock arbitration for Asian or Chinese factual witnesses in international arbitration ought to be allowed and/or encouraged to ensure level playing-field.

Conclusion

I conclude by saying that the problem of cultural differences or influences in facts sensitive arbitration cases (and many of them are) must be satisfactorily overcome or minimized, failing which we cannot create a genuinely level playing-field, fair and equitable system of international arbitration (maritime arbitration included) to serve this globalized world.

In my paper, I hope I have come up with some modest proposals such as: the need for arbitral institutions to target at the real issue of cultural differences rather than nationality in the constitution of the tribunal; better arbitration clause or argeement *and* legal representatives should be allowed or even encouraged to better prepare their factual witnesses in international arbitration.

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[6] For example, LCIA Arbitration Rules 1998 in Rule 20(6) provided for: "*… subject to the mandatory provisions of any applicable law, it shall not be improper for any party or its legal representatives to interview any witness or potential witness for the purpose of presenting his testimony in written form or producing him as an oral witness*." Please also take note of a broader provision in IBA Rules on the Taking of Evidence in International Arbitration 2010, Article 4(3): "*… it shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and* **to discuss their prospective testimony with them**." (bold letters are my emphasis).

In my paper, I hope I have come up with some modest proposals such as: the need for arbitral institutions to target at the real issue of cultural differences rather than nationality in the constitution of the tribunal; better arbitration clause or agreement and legal representatives should be allowed or even encouraged to better prepare their factual witnesses in internationl arbitration.

ARCTIC/ANTARCTIC LEGAL ISSUES

REGULATORY CHALLENGES FOR INTERNATIONAL ARCTIC NAVIGATION AND SHIPPING IN AN EVOLVING GOVERNANCE ENVIRONMENT*

ALDO CHIRCOP**

Introduction

In September 2012 the National Snow and Ice Data Centre in the United States reported that in the middle of that month the Arctic region recorded the lowest summer sea ice cover on record.[1] Satellite sea ice tracking started in the 1970s and at that time sea ice typically covered 50 percent of the surface of the Arctic Ocean in the summer.[2] On 16 September seasonal sea ice extent covered only 24 percent of the surface of the Arctic Ocean.[3] The previous seasonal record was 29 percent cover and was registered in September 2007.[4] This trend appears to be continuing. Having completed a major research cruise, on 12 October 2012 scientists on board the German research vessel "Polarstern" reported that they discovered a large decline of thick multiyear sea ice in a 3,500 square kilometre area under study.[5] The Siberian shelves including the Laptev Sea were ice-free. In 2011 there was still multiyear ice in this region. Also, the fresh water content of the sea surface has increased

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1 "Ending Its Summer Melt, Arctic Sea Ice Sets a New Low That Leads to Warnings," *New York Times*, 19 September 2012, online: http://www.nytimes.com/2012/09/20/science/earth/-arctic-sea-ice-stops-melting-but-new-record-low-is-set.html?_r=0.

2 Ibid.

3 Ibid.

4 Ibid.

5 "Arctic Research Ship Scientists on Thin Ice," Alfred Wegener Institute Press Release, MarinePropulsion.com, 12 October 2012, online: http://maritimepropulsion.com/news/arctic-research-ship-scientists-on-thin-ice-363.

accordingly.[6] The accelerated rate of sea ice loss, perhaps eventual loss by as much as 60%, was noted by the Intergovernmental Panel on Climate Change (IPCC) in 2007.[7] Estimates of an ice-free summer vary substantially. Forecasts for decrease of summer sea ice vary wildly, but the general view is that the trend will continue.[8]

These developments have led to increased international navigation and shipping in the region within a relatively short period, posing challenges for national and international regulators. While it may be initially queried whether international navigation and shipping in the Arctic should be treated differently from other maritime trading regions, there is a growing realization that the Arctic is different in a number of ways so as to affect how international rules and standards should be made and applied. One significant difference is a special power that Arctic coastal States enjoy under the United Nations Convention on the Law of the Sea, 1982 (LOS Convention).[9] They have additional legislative and enforcement jurisdiction over international shipping in ice-covered waters for vessel-source pollution purposes. It is unclear how this power relates to the functions of the competent international organization, i.e., the International Maritime Organization (IMO), for the establishment of international rules and standards for maritime safety, marine environment protection from shipping and maritime security. Accompanying this concern is the extent to which standards and rules set out in existing international maritime law conventions can be assumed to apply in their entirety and as effectively as in other regions. In addition to the powers enjoyed by coastal States and the IMO functions, the Arctic Council, the leading regional body concerned with governance in the region, is becoming increasingly active on shipping matters. A key concern of this paper is the need for greater coherency in the efforts of multiple levels of governance and to maintain a "big picture"

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6 Ibid.

7 IPCC, Working Group II: Impacts, Adaptation and Vulnerability, Executive Summary, online: http://www.ipcc.ch/ipccreports/tar/wg2/index.php?idp=593.

8 "When Will the Arctic Be Ice-free in the Summer? Maybe four years. Or 40," Washington Post, 20 September 2012, online: http://www.washingtonpost.com/blogs/wonkblog-/wp/2012/09/20/when-will-the-arctic-be-ice-free-maybe-four-years-or-40/.

9 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122, 7 October 1982 [hereafter LOS Convention], Art. 234: "Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence."

approach in responding to the regulatory needs of increased international navigation and shipping in the region.

Prospects for international navigation and shipping

The significance of decreasing summer sea ice is evident from growing commercial operations. In 2009 two heavy lift vessels carrying power plant equipment from South Korea to Rotterdam transited through the Russian Northern Sea Route without the need of assistance from icebreakers.[10] In 2010 a bulk carrier carried a cargo of iron ore from Kirkenes in Northern Norway to China, saving $180,000 in fuel on a comparable voyage via Suez.[11] That year a large tanker, in excess of 100,000 tons carried a cargo of gas condensates from Murmansk to China.[12] In 2011 there were 34 transits from Europe to Asia carrying 820,000 tons of cargo, with transit times varying between 9-11 days.[13] The sailing season was a month longer than the previous year. The 2011 transits consisted of 15 vessels carrying liquid cargoes, 10 vessels were on ballast voyages, four carried refrigerated cargo, three carried bulk cargo and two general cargo. One vessel in particular, the "Vladimir Tikhonov", a 163,000 dwt tanker, not only discovered a new high-latitude route within the Northern Sea Route, but also became the largest vessel ever to navigate in the region.[14] Unlike previous seasons, the 2012 navigation season saw vessels grouped in convoys with icebreaker support.[15]

Although 2012 saw a late start to the navigation season, it broke the previous year's record. Forty-six vessels transited the route, carrying a total cargo of 1,261,545 tons.[16] Twenty-five sailed eastbound while 21 sailed westbound.[17] The cargo was mostly bulk, including hydrocarbons (to China and South Korea) and iron ore (to China).[18] The navigation season lasted until November, although final transits by icebreakers were completed in December. In 2011 the last

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[10] "Beluga Shipping Completes First Northeast-Passage Commercial Transit," 2 October 2009, online: http://www.logisticsmanager.com/Articles/12410/Beluga+Shipping+completes+first+Northeast-Passage+commercial.html.

[11] "Northern Sea Route: Open for Business," Lloyd's Shipping Economist, September 2010, online: http://www.lloydslist.com/ll/sector/markets/lloyds-shipping-economist/lse-pdf/article345258.ece/BINARY/LSE-01_SEPTEMBER_2010.pdf.

[12] Aldo Chircop, "The Emergence of China as a Polar Capable State," 7(1) *Canadian Naval Review* 9-14 (2011), 11.

[13] "Slow Start on Northern Sea Route," Barents Observer, 27 August 2012, online: http://barentsobserver.com/en/arctic/slow-start-northern-sea-route-27-08.

[14] "Northern Sea Route Record Transit by Gazprom Tankship," Press Release, Thursday, 2 October 2012, online: http://www.marinelink.com/news/northern-transit-gazprom348195.aspx.

[15] "Slow Start on Northern Sea Route," supra note 13.

[16] "46 Vessels through Northern Sea Route," Barents Observer, 23 November 2012, online: barentsobserver.com/en/arctic/2012/11/46-vessels-through-nothern-sea-route-23-11.

[17] Ibid.

[18] Ibid.

passage was just after mid-November. The transits are fast. The passage of the "SCF Amur" took seven days.[19] If decreasing sea ice trends continue, such transits can be expected to increase, especially as the infrastructure and actuarial practices for insurance improve. Scientists are already predicting that in 2013 the route might be open all year.[20] The Russian Federation anticipates needing a fleet of 45 icebreakers by 2030, compared to the 32 vessels at this time, many of which will need to be decommissioned.[21] New vessels are being planned that will enable operations also in the winter. Even with a thawing Arctic, there is ice variability that requires flexible ice breaker support.

There is growing interest in new transportation routes that combine benefits of shorter distances, cost-effective transits and routes not troubled by maritime security concerns. The Northwest Passage offers a package of routes through Canadian maritime zones (especially internal waters of the Canadian Arctic archipelago), Beaufort Sea, Baffin Bay, Davis Strait and Labrador Sea. Offering preponderantly summer navigation, it is 9,000 km shorter than the Panama Canal route and 17,000 km shorter than the Cape Horn route.[22] The Northern Sea Route shortens a Hamburg-Yokohama voyage by 4,800 miles, in comparison to the Suez Canal route.[23] The transpolar route, if it materializes with an ice-free Central Arctic Ocean route, would shorten distances even further.[24]

The transits suggest commercial feasibility for the particular cargos carried. Polar class vessels are more expensive to build and operate. For example a very large crude carrier (VLCC) polar class 1A will use 16% more extra steel.[25] Polar experienced crews cost more as does the insurance.[26] However, the resulting savings from shorter distances, assuming little or no

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[19] "Northern Sea Route Record Transit by Gazprom Tankship," supra note 14.

[20] "Arctic Sea Route to Open Year-Round in 2013 - Scientists," Ria Novosti, 17 October 2012, online: http://en.rian.ru/business/20121017/176696586.html.

[21] "Cutting a Path in the Ice," Portnews, 6 October 2012, online: http://en.portnews.ru/comments/1491/?searchref=%2Fsearch%2F%3Faction%3Dcontent%26page%3D14%26text%3Dicebreaker.

[22] K.J. Wilson et al., "Shipping in the Canadian Arctic: Other Possible Climate Change Scenarios," in Geoscience and Remote Sensing Symposium, IGARSS '04, 20–24 September 2004, Anchorage, Alaska, Proceedings, vol. 3, 1853–1856 (New York: IEEE International, 2004).

[23] W. Østreng, "The International Northern Sea Route Programme (INSROP): Applicable Lessons Learned," 42 *Polar Record* 71–88 (2006), 80.

[24] T.E. Jakobsson, 'Climate Change and the Northern Sea Route: An Icelandic Perspective,' in M.H. Nordquist, J. Norton Moore and A.S. Skaridov (eds.), *International Energy Policy, the Arctic and the Law of the Sea* (Nijhoff , Leiden, 2005), 285–301 at 295–297. But see the sobering comments of Willy Østreng, "The Trans Polar Passage," posted on Arctis, online: http://www.arctis-search.com/The+Trans+Polar+Passage+2.

[25] "Arctic Route Helps Owners Slash Fuel Costs," MarineLink.com, Thursday, June 14, 2012, online: http://www.marinelink.com/news/arctic-owners-helps345491.aspx.

[26] For example insurers of international shipping in the Northern Sea Route seek additional premium and impose conditions to be met. John Flaherty and Tom Gorrard-Smith, "Sailing on Thin Ice: The Future of Arctic Shipping," Clyde & Co, 29 March 2012, online: http://www.clydeco.com/insight/articles/sailing-on-thin-ice-the-future-of-arctic-shipping.

delay, are substantial both in terms of fuel costs and emissions. One calculation that took into consideration the reduction of a voyage from 40 to 22.5 days produced a saving of 28.2MT of fuel per day for 17.5 days, amounting to a saving of circa $300,000.[27] A consequential benefit was reduction of emissions of nitrous oxide (NOx) by 50 tons, carbon dioxide (CO2) by 1,557 tons and sulphur oxides (SOx) by 35 tons.[28] Carrying a cargo of iron, the "Nordic Barents" transported the cargo from northern Norway to Qingdao, China, in 21 days, compared to a 40 day journey throught he Suez Canal.[29] Some 1,000 tons of fuel were saved at a value of $650,000.[30] However, one study found that charges for services on the Northern Sea Route may be higher than the Suez Canal fee.[31]

Inter-continental traffic aside, the Arctic region has substantial intra-regional traffic, mainly to supply northern communities and transport natural resources extracted from the region. The increased access to resources will entail further growth of intra-regional traffic. The Barents Sea promises to become a major production region with markets in Europe and Asia. In the Russian sector there are major projects for the development of hydrocarbons, including gas condensate from the Shtokman field, the Prirazlomnoye oil field, and LNG gas production from the Yamal peninusula.[32] The Yamal project needs a new fleet of polar class LNG carriers with 170,000 cubic metre capacity to carry an estimated 200 loads a year, possibly to be operated on 20-year time charters.[33] The Norwegian offshore also holds promise. Recently it was reported that Statoil has planned a $16 billion investment that includes a 280 kilometre pipeline and production unit in the Barents Sea, to be completed by 2018 and timed with first oil produced from the Skrugard field north of the Arctic Circle.[34] Seventy-two out of 86 offshore blocks recently launched by the Norwegian Government in the 22nd licensing round were in the Barents.[35] Oil

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[27] "Arctic Route Helps Owners Slash Fuel Costs," supra note 25.

[28] Greg Trauthwein, "Arctic: Economic Promise or Environmental Peril," MarineLink.com, 24 May 2012, online: http://www.marinelink.com/news/environmental-economic344971.aspx.

[29] "Shipping Magnate Creates History," South China Morning Post, 27 May 2011, online: http://www.scmp.com/article/968865/shipping-magnate-creates-history.

[30] "Northern Route Transits to Hit High," Bloomberg, 14 June 2012, online: http://www.marinelink.com/news/northern-transits-route345488.aspx.

[31] J. Verny & C. Grigentin, "Container Shipping on the Northern Sea Route" 122 *International Journal of Production Economics* 107-117 (2009).

[32] "Cutting a Path in the Ice," supra note 21.

[33] "New Ships Planned for Russia's Yamal LNG Export Project," Lloyd's List, 5 October 2012.

[34] "Statoil Targets Arctic with up to $16bn of Investment," Financial Times, 16 February 2013.

[35] "Norwegian Offshore Oil Rush Forces Rig Rates Higher," Press Release, MarineLink.com, 9 August 2012, online: http://www.marinelink.com/news/norwegian-offshore-forces346853.aspx

production in the Barents could reach between 400-500,000 barrels of oil equivalent per day by 2020.[36] Norway also produces iron ore in Kirkenes. In the US Arctic, there continues to be oil production in Northern Alaska near Prudhoe Bay, accounting for more than half of the oil produced in the Arctic.[37] In other areas US licensee Shell's plans for drilling in the Chukchi and Beaufort Seas is for ten wells within two years, assuming environmental concerns are addressed.[38] Shell has experienced some delay from difficult ice conditions and delayed permits. Ironically, it has encountered ice in the two areas which is thicker than experienced in the last 20 years. One of its drill ships dragged anchor and drifted very close to the coast.[39] Offshore exploration leases have also been granted in the Canadian sector of the Beaufort Sea. At least one billion barrels of oil and nine trillion cubic feet of natural gas have been discovered, but the estimated potential is even higher at 5.4 million barrels for oil and 53 trillion cubic feet for gas.[40] The significance of these developments for shipping is the corollary domestic and international marine transportation of production.

Also of relevance to international navigation and shipping in the region is the growing venture tourism and cruise shipping in the region. These vessels regularly navigate the Canadian and Greenland Arctic in the summer season.[41] There is similar activity in other parts of the Arctic. In addition to cruise ships, Russia's nuclear powered ice-breakers get 70-80 days of work carrying tourists and until June 2012 they had done so 67 times.[42] There is also a discernible increase in fishing and marine scientific and climate research vessels operating in the region.[43] Growing accessibility of the region has not been limited to large commercial vessels. In 2007 the Canadian Department of the Environment reported that there was a five week period in the Parry Channel in the Northwest Passage where small ships, and possibly also sailboats could

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36 "Poll: Arctic Oil Exploration to Reverse Decline in Norwegian Production," Press Release, MarineLink.com, 29 August 2012, online: http://www.marinelink.com/news/production-norwegian347294.aspx.

37 Trauthwein, supra note 28.

38 "Arctic Well Drills by Shell to Increase Due to Delays," Fox Business News, MarineLink.com, 3 August 2012, online: http://www.marinelink.com/news/increase-drills-arctic346747.aspx

39 "Shell Arctic Drillship's Close Shave," Royal Dutch Shell, MarineLink.com, 16 July 2012, online: http://www.marinelink.com/news/drillships-arctic-shell346257.aspx.

40 "Low-ball Arctic Oil Lease Earns Opposition Scorn," Canadian Press, 20 September 2012, online: http://www.cbc.ca/news/business/story/2012/09/20/beaufort-franklin-ndp.html.

41 "Arctic Tourism Heating Up as Northwest Passage Melts," CBC News, 24 August 2012, online: http://www.cbc.ca/news/canada/north/story/2012/08/23/north-arctic-tourism.html.

42 Tourists reportedly pay €19,800 for a ten day trip. "Nuclear Icebreaker Cruises," Ria Novosti, MarineLink.com, 8 June 2012, online: http://www.marinelink.com/news/icebreaker-nuclear345331.aspx.

43 *Arctic Marine Shipping Assessment 2009 Report*, Arctic Council (PAME), online: http://www.pame.is/amsa-2009-report [hereafter AMSA Report], 77-81.

have navigated waters not normally ice-free, and that some 100 vessels navigated the area.[44] In August 2012 a four-person rowing team completed a non-stop and unsupported row of over 1,000 miles from Inuvik, Canada to Point Hope, Alaska, crossing the Beaufort and Chukchi Seas over a period of 41 days.[45]

The increasing traffic described in this paper so far should be considered with caution. The increase in the various types of shipping in the Arctic does not necessarily mean that navigation is comparable to other more frequently navigated routes. There is less ice, but passage is still hazardous. There can be poor weather with reduced visibility (fog), possibly with ice build-up due to freezing of rain and sea spray. Passage is not necessarily always ice free, and indeed multi-year ice may be present. Navigation is largely limited to the summer season (June-October) for the vast majority of vessels and at this time still likely assisted by some ice-breaking capacity in one or more areas. The beginning of the navigation season may vary from year to year. For example in 2012 there was a late start to traffic on the Northern Sea Route and for the first two months while passage from the Kara Gate to the New Siberian Islands was in clear water, in the East Siberian Sea the ice was more difficult than the previous year.[46] The season then lasted for longer in the year.[47] In another area there was a late start to oil drilling in the Chukchi Sea by Shell because there was more ice cover than expected in the early summer.[48] Later in the summer, although passive microwave data indicated a sea that was nearly ice free, there were small ice floes that threatened the drilling platform to the point where operations were temporarily suspended.[49] In addition to natural hazards, there is a shortage of up to date charts and sufficient charting for navigable areas, although the situation may be better in Russian than in Canadian waters.[50] The areas are remote and there is little infrastructure to support ships in transit (e.g., navigation aids, ports & repair facilities, search and rescue, salvage, pollution response), although again there is better support for navigation in Russian waters.[51]

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44 "Canada`s Top Weather Stories for 2007: Vanishing Ice at the Top of the World," Environment Canada, online: http://www.ec.gc.ca/meteo-weather/default.asp?lang=En&n=14D00DAA-1.

45 "Arctic 1,000-mile Rowing Boat Trip Ends," MarineLink.com, 30 August 2012.

46 "Slow Start on Northern Sea Route," supra note 13.

47 "46 Vessels through Northern Sea Route," supra note 16.

48 "Arctic Well Drills by Shell to Increase Due to Delays," Fox Business News, MarineLink.com, 3 August 2012, online: http://www.marinelink.com/news/increase-drills-arctic346747.aspx.

49 "Northern Sea Route Partly Blocked Although Sea Ice Near Minimum," Press Release, MarineLink.com, 19 September 2012, online: http://www.marinelink.com/news/northern-although-blocked347788.aspx.

50 AMSA Report, supra note 43, 156-159.

51 Ibid., 154-181.

The demand for high safety and environmental standards

Given the increase in regional and international navigation and shipping in the region, it is therefore not surprising that in recent years Arctic States and international bodies have focused on the needs of enhanced safety and environmental standards for polar shipping. In addition to dedicated domestic polar shipping regulation, primarily in Canada and the Russian Federation, the Arctic Council and International Maritime Organization (IMO) have launched important initiatives.

Arctic Council initiatives

At the outset, it should be highlighted that the Arctic Council, a regional body established by the Ottawa Declaration in 1996,[52] is essentially a political and not a regulatory body. Its objective is to "[P]romote cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues (non-military security), in particular issues of sustainable development and environmental protection in the Arctic" with particular consideration of the interests and well-being of the region's indigenous peoples.[53] The Council functions through a system of six working groups: Arctic Contaminants Action Program (ACAP); Arctic Monitoring and Assessment Programme (AMAP); Conservation of Arctic Flora and Fauna (CAFF); Emergency Prevention, Preparedness and Response (EPPR); Protection of the Arctic Marine Environment (PAME); and Sustainable Development Working Group.[54] It is not a regional organization and is not similar to regional sea organizations established elsewhere by treaty.[55] However, as of 2013 the Council has a permanent secretariat based in Trømso,

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[52] Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996, adopted by Canada, Denmark (for Greenland), Finland, Iceland, Norway, Russian Federation, Sweden and United States. Online: http://www.arctic-council.org/index.php/en/about/documents/category/5-declarations. These States are known as the "Arctic Eight." In addition to the Arctic Eight, the Council includes permanent participation from six associations of Arctic indigenous peoples, known as the Permanent Participants.

[53] Ottawa Declaration, ibid. In the accompanying communique, the "Ministers viewed the establishment of this new intergovernmental forum as an important milestone in their commitment to enhance cooperation in the circumpolar North. The Council will provide a mechanism for addressing the common concerns and challenges faced by their governments and the people of the Arctic. To this end, Ministers referred particularly to the protection of the Arctic environment and sustainable development as a means of improving the economic, social and cultural well-being in the North." Joint Communique of the Governments of the Arctic Countries on the Establishment of the Arctic Council, 19 September 1996, online: http://www.arctic-council.org/index.php/en/about/documents/category/5-declarations.

[54] Arctic Council, online: http://www.arctic-council.org/index.php/en/about-us/working-groups.

[55] For example, among others, the Baltic, Black Sea, Caribbean, Mediterranean and North Sea regions.

Norway. The preference of the Arctic Eight at this time appears to maintain the Council as a "soft" political body with the key function of facilitating cooperation among them and including with invited participation of other States as they deem appropriate. Past calls for the development of a new comprehensive international legal regime for the Arctic Ocean have been dismissed by Arctic States.[56]

The Arctic Environment Protection Strategy, which preceded the establishment of the Arctic Council, anticipated the need for protection of the fragile environment from shipping activities.[57] After its establishment, the Council tasked the PAME Working Group to consider the impact of shipping on the Arctic marine environment. PAME eventually launched the Arctic Marine Shipping Assessment (AMSA) study under the leadership of Canada, Finland and the United States and a final report was presented to the Arctic Ministers at the Trømso meeting in 2009.[58] AMSA constitutes a recent comprehensive treatment of issues facing the future of shipping in the region at a time of change. Among other, the Report identifies gaps and issues in the existing governance and legal framework for international navigation and shipping and including infrastructure. The report is effectively a roadmap for the development of a suitable legal framework for safer shipping in the region taking into account the sensitive marine environment and interests of indigenous peoples. Several recommendations are worth highlighting. IMO safety and pollution prevention conventions with mandatory requirements need to be augmented, *inter alia* for ship design, equipment and operations aimed at the safety and protection of the marine environment.[59] Arctic States are also urged to explore harmonization of national regulatory regimes and in view of achieving uniform standards.[60] At this time some Arctic coastal States, empowered by a special provision in the LOS Convention[61] have developed their own regime for shipping in Arctic waters within national jurisdiction. These initiatives, although empowered by the LOS Convention, have resulted in differences in safety and environmental rules and standards applicable in the region, depending on whether a ship is navigating in one national maritime zone or another or even on the high seas.

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[56] See the Illulissat Declaration, 28 May 2008, by the Arctic 5, online: http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf. Although stopping short of advocating a new regional agreement, the EU favours "the further development of a cooperative Arctic governance system based on the UNCLOS." See Communication from the European Commission to the European Parliament and the Council, The European Union and the Arctic Region, COM(2008) 763 final, 20 November 2008, at 10.

[57] Arctic Environment Protection Strategy, 14 June 1991, adopted by the Arctic 8, online: http://www.arctic-council.org/~arctikar/index.php/en/about/documents/category/4-founding-documents, at 35.

[58] AMSA 2009 Report, supra note 43.

[59] Ibid., 6.

[60] Ibid.

[61] LOS Convention, supra note 9, Art. 234.

Given its sensitivities, it is remarkable, although not surprising given the relative low international maritime traffic levels until recently, that the Arctic Ocean receives the lowest level of protection under the Convention on the Prevention of Pollution from Ships, 1973-78 (MARPOL).[62] The AMSA Report thus recommended designation of MARPOL special areas under the various convention annexes.[63] The need to reduce harmful air emissions was also considered. The AMSA Report went on to recommend the identification of areas of heightened ecological and cultural significance and protecting them from shipping impacts.[64] Arctic coastal and marine ecosystems are some of the most sensitive and there are many species of terrestrial and marine mammals that could potentially be affected by increased traffic.[65] The Report continued that in some areas particularly sensitive sea areas ought to be considered for designation.[66] There are many areas of heightened ecological and cultural significance that should received protection from navigation and shipping activities.[67] Another recommendation addressed the threat of ship strikes, noise and disturbance of marine mammals and urged consideration of working with the IMO to develop and implement mitigation strategies.[68] In this regard, the IMO would consider proposals for routeing measures submitted for this purpose, as it has done elsewhere. Ballast waters were also addressed and the Report urged an assessment of the risks posed by ballast water carried invasive (exotic) species and the taking of measures within national jurisdiction.[69] Along this vein was the prevention of oil spills and development of a circumpolar response capacity.[70] Responding to spills in very cold water environments and in the presence of ice flows is a notoriously challenging exercise. Perhaps one of the most far reaching recommendations for the future of safe and environmentally acceptable Arctic shipping is with regard to the building of new and strengthening of existing infrastructure to support both domestic and international shipping.[71] This includes ports and related reception facilities for wastes, search and rescue capability, salvage capacity and consideration of places of refuge for ships in need of assistance.

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[62] International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, London, 17 February 1978, 1340 UNTS 62-265 (1983) [hereafter MARPOL].

[63] AMSA 2009 Report, supra note 43, 7.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] See IUCN/NRDC Workshop to Identify Areas of Ecological and Biological Significance or Vulnerability in the Arctic Marine Environment, Workshop Report prepared by Lisa Speer and Thomas L. Laughlin, 2-4 November 2010, La Jolla, CA. The report includes recommendations relevant for shipping at 37.

[68] AMSA 2009 Report supra note 43, 7.

[69] Ibid.

[70] Ibid.

[71] Ibid.

The AMSA roadmap has already led to tangible instances of regional cooperation in implementing recommendations, including through the adoption of new legal arrangements. The first such legal agreement is the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, adopted in 2011,[72] pursuant to the International Convention on Maritime Search and Rescue, 1979[73] and the Chicago Convention on International Civil Aviation, 1944.[74] The objective of this Agreement is "to strengthen aeronautical and maritime search and rescue cooperation and coordination in the Arctic."[75] Each of the Arctic Eight States undertook to "promote the establishment, operation and maintenance of an adequate and effective search and rescue capability within its area."[76] The first joint exercise by the Parties, named SAREX, took place off the east coast of Greenland in 2012.[77] Given the region's remoteness, a useful aspect of this agreement is a framework to enable aircraft engaged in SAR operations to refuel in another jurisdiction on a permitting basis.[78]

A second legal agreement concerning marine oil pollution preparedness and response cooperation is expected to be adopted in May 2013 as an output of the EPPR Working Group.[79] It will be an instrument that will be inspired in part by the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (OPPRC).[80] The Working Group does not operate as a response agency. It has worked to: "plan and prepare for response to accidents; develop strategies and tasks to prevent accidents; enhance best practices; facilitate exchange of information; and focus on the environmental implications of emergencies involving oil, hazardous and noxious substances (HNS), radiation, and natural disasters in the Arctic."[81] The work to date

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[72] Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, Nuuk, 2 May 2011, online: Arctic_SAR_Agreement_EN_FINAL_for_signature_21-Apr-2011.pdf [hereafter Nuuk SAR Agreement].

[73] International Convention on Maritime Search and Rescue, London, 27 April 1979, 1405 UNTS 97.

[74] Convention on International Civil Aviation, Chicago, 7 December 1944, online: http://www.icao.int/publications/pages/doc7300.aspx.

[75] Nuuk SAR Agreement, supra note 72, Art. 2.

[76] Ibid., Art. 3.

[77] First Live Arctic Search and Rescue Exercise – SAREX 2012, online: http://www.arctic-council.org/index.php/en/oceans/search-and-rescue/620-first-arctic-search-and-rescue-exercise-sarex-2012.

[78] NUUK SAR Agreement, supra note 72, Art. 8.

[79] "Negotiations in Helsinki on New Arctic Agreement on Marine Oil Pollution Response," Arctic Council, online: http://www.arctic-council.org/index.php/en/oceans/emergency-preparedness/570-negotiations-in-helsinki-on-new-arctic-agreement-on-marine-oil-pollution-response.

[80] International Convention on Oil Pollution Preparedness, Response and Cooperation, London, 30 November 1990, 30 ILM 733.

[81] Emergency Prevention, Preparedness, Response (EPPR) Progress Report to the Senior Arctic Officials, March 2012, Arctic Council, online: http://www.arctic-council.org.

includes the development of an Arctic Region Oil Spill Response and Logistic Guide (Arctic ERMA) and contribution of an Arctic component to an IMO project on In Situ Burn (ISB) of Oil Spills on Water and Broken and Solid Ice Conditions.[82]

The Arctic Council's role with regard to international shipping is likely to continue to be facilitative and to follow-up on AMSA recommendations through reporting from its member States. Even if it were to achieve a common understanding and approach to desired standards for international shipping in the region, the Arctic Council's ability to consider international shipping matters is constrained by its small membership, limitations on observers and the global nature of the shipping industry. After all, the competent international organization for the establishment of international standards and regulations for international shipping is the IMO.

Initiatives in the IMO

The development of international rules and standards for global navigation and shipping occurs through the IMO. Insofar as the Arctic region is concerned, in recent years the IMO has launched several initiatives. There has been a major update to the system of navigational areas (NAVAREAS) and meteorological areas (METAREAS) in the Arctic to better reflect the need for information services for safe navigation and identifying responsibilities of coastal State providers in the region. In 2007 the Maritime safety Committee (MSC) endorsed the Sub-Committee on Communications and Search and Rescue (COMSAR)'s work leading to the creation of new NAVAREAs up to 90 degrees north.[83] The IMO has also adopted important guidelines for vessels operating in remote areas. The two sets of guidelines most directly relevant are the 2006 Guide for Cold Water Survival[84] and the 2007 Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas.[85]

The 2010 Manila Amendments to the Convention on Standards for Training Certification and Watchkeeping, 1978 (STCW) have paved the way for future standards and rules for polar seafaring.[86] They provide for new training guidance for personnel serving on board ships operating in polar waters including with regard to: ice characteristics and ice areas; ship

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82 Ibid.

83 IMO Sub-Committee on Radio Communications and Search and Rescue, 11th Session, COMSAR 11/18; Report of the Maritime Safety Committee at its Eighty-Third Session, MSC 83/28, 26 October 2007.

84 Guide to Cold Water Survival, IMO Doc. MSC.1/Circ.1185, 2006.

85 Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas. IMO Doc. A 25/Res.999, 3 January 2008.

86 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, London, 7 July 1978, 1361 UNTS 2, as amended by the Manila Amendments, Final Act of the Conference of the Parties, IMO Doc. STCW/CONF.2/33, 1 July 2010.

performance in ice and cold climate; voyage and passage planning; operating and handling a ship in ice; knowledge of local regulations and requirements; equipment limitations; safety precautions and emergency procedures; and environmental considerations.[87] The Manila Amendments constitute a first step in strengthening standards for polar seafaring and the STCW will need to be revisited after the expected mandatory polar code is concluded and adopted. A matter to be considered is what training standards ought to be left for the polar code rather than STCW.

Probably the most important initiative for the development of appropriate safety and environmental regulation for Arctic shipping is consideration of a mandatory polar code. Early consideration commenced in the 1990s, eventually leading to the voluntary 2002 Guidelines for Arctic Shipping. In 2010 the Guidelines were amended, also to include the Antarctic, and are now known as the Polar Guidelines.[88] In 2009 Denmark, Norway and the US proposed to mandate the IMO's Ship Design, Construction and Equipping (DE) Sub-Committee to commence work on a mandatory code.[89] Work was started in 2010 with intended completion in 2012, but this ambitious target was not feasible given the range of complex issues and interrelatedness to existing instruments. It was recognized that differences between the two polar regions ought to be reflected in the code. The code would initially apply to the Convention on the Safety of Life at Sea, 1974 (SOLAS)[90] passenger and cargo ships and eventually attention would be given to non-SOLAS ships, such as fishing vessels.[91] A pragmatic consideration was that the provisions would likely have to be a mixture of mandatory and recommendatory requirements. An important perspective, given the hazards of Arctic navigation, is the emphasis on hazard identification, risk analysis and risk control options. Overall, the work on the code is guided by a goal based approach with outcomes set out as targets to be achieved. The actors actually involved in the designing, building, equipping, owning, managing and operating polar class vessels would be expected to apply their knowledge and skills to meet those standards. This expectation demonstrates the critical role played by industry associations, such as the International Association of Classification Societies

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[87] Resolution 2, Section B-V/g, online: http://www.imo.org/OurWork/HumanElement/TrainingCertification/Documents/34.pdf

[88] Guidelines for Ships Operating in Polar Waters, Resolution A.1024(26) adopted on 2 December 2009, IMO Doc. A 26/Res.1024, 18 January 2010.

[89] Mandatory Application of the Polar Guidelines, submitted by Denmark, Norway and the United States, IMO Doc. MSC 86/23/9, 24 February 2009.

[90] International Convention for the Safety of Life at Sea, London, 1 November 1974, 1184 UNTS 2.

[91] A decision made at the 55th Session of the DE Sub-Committee, 21-25 March 2011. Making the Polar Code Mandatory, A Note by the Secretariat, IMO Doc. MSC91/8, 7 August 2012.

(IACS) through their Unified Requirements (UR),[92] in scoping out the issues, developing a framework for polar shipping standards and eventually applying those standards.

The work on the mandatory polar code is increasingly showing how much there is need for an integrated approach to the regulation of international navigation and shipping in the Arctic. The work on the code addresses: ship design, construction and equipment; operational and training concerns; search and rescue; and the protection of polar marine environments. Polar geography apart, these are themes already addressed in several different safety and environmental instruments. SOLAS, MARPOL and STCW are cases in point, and they are not the only relevant instruments.[93] The mandatory polar code is effectively another perspective or layer on aspects of those instruments insofar as Arctic shipping is concerned. Accordingly, it is not surprising that the question has arisen whether certain aspects of the proposed code (e.g., environmental protection) are better placed under an existing instrument rather than be re-created in a separate instrument.[94] The approach endorsed is that the polar code should be made mandatory through the adoption of amendments to particular instruments, while being aware that there could be issues of common definitions across instruments and entry into force dates under different instruments, possibly risking fragmentation.[95] The technical work done to date has necessitated reference to and feedback from other IMO sub-committees such as for Radiocommunications, Search and Rescue (COMSAR), Fire Protection (FP), Safety of Navigation (NAV), Stability, Load Lines and Fishing Vessel Safety (SLF), and Training and Watchkeeping (STW).

In addition to the polar code, more initiatives with regard to existing legal instruments can be expected in the future. Among these instruments MARPOL stands out with reference to an AMSA recommendation to consider special area designation for the Arctic Ocean under some of the Annexes mentioned earlier. Canada and the Russian Federation have legislated "zero" discharge rules for most ship-generated wastes (e.g., for oily waste under Annex I).[96] This national standard is higher than the MARPOL standard currently applicable in Arctic waters.[97] Another potential issue to be considered is

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[92] International Association of Classification Societies, Requirements Concerning Polar Class, IACS Req. 2011, online: http://www.iacs.org.uk/document/public/Publications/Unified_requirements/PDF/UR_I_pdf410.pdf.

[93] For example the ballast waters and anti-fouling conventions are also affected. See Note by the Secretariat, supra note 91.

[94] Ibid.

[95] Ibid.

[96] David VanderZwaag and Aldo Chircop et al., Governance of Arctic Marine Shipping, Marine & Environmental Law Institute, Dalhousie University, 10 October 2008, online: http://library.arcticportal.org/391/1/AMSA-Shipping-Governance-Final-Report—-Revised-November-2008.pdf.

[97] Ibid.

whether "nearest land" for permitted discharge purposes, if any, needs to be re-defined to take into consideration areas where the coast is buffeted by permanent ice or where there is ice-packing. As in other marine regions, MARPOL special area designations will likely be accompanied by an expectation for the establishment of port reception facilities and port inspections. The issue of port reception facilities in a region with very few ports and areas where waste can be properly recycled or disposed of will need to be considered. It is only upon actual availability of appropriate reception facilities, as reported upon to the IMO by regional States, that special area status becomes effective under MARPOL.[98]

Although discussions on the polar code have addressed load line issues for stability of fishing vessels because of ice build-up, broader consideration of load lines for a wider variety of vessels may also become necessary.[99] The need for prescribed load lines adapted to individual marine regions and navigation seasons around the world has long been recognized in the Load Lines Convention, 1968 (LL Convention)'s annexes.[100] At this time there is no Arctic annex and the North Atlantic winter load lines appear to be in use for Arctic shipping.

Although at this time Arctic navigation is miniscule in comparison to traffic in established navigation routes, a further question to be broached is whether the Collision Avoidance Regulations (COLREGS)[101] could be usefully re-visited as polar traffic increases. The COLREGS were largely developed with certain assumptions in mind, such as navigation in open waters permitting certain actions and course directions. A vessel navigating through an ice field might be constrained by its ability to manoeuvre, but this concept under COLREGS applies to a vessel undertaking a particular operation.[102] Ice navigation is not necessarily linear and course changes could be constrained, or perhaps even required because of anticipated ice. The safe action to be taken with regard to vessels in the vicinity when there is also multi-year ice in the area bears thinking.[103] An understanding of what is safe speed in an ice field taking into consideration vessel and environmental

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[98] Ibid.

[99] Recent science may provide a pointer in this direction, for example the recent findings by German scientists regarding increase of surficial fresh water in the region alluded to earlier. See "Arctic Research Ship Scientists on Thin Ice," supra note 5.

[100] International Convention on Load Lines, London, 5 April 1966, ATS 1968 no. 23.

[101] Convention on the International Regulations for Preventing Collisions at Sea, London, 20 October 1972, 1050 UNTS 16.

[102] See for instance Regulation 3, ibid., definition of a vessel restricted in its ability to manoeuvre, which could be read to include a vessel navigating through ice or ice-breaking. But this rule is premised on vessels in the area not being similarly constrained so as to take the necessary action regarding course.

[103] For example Regulation 8, ibid., regarding the action to be taken to avoid a collision. Such a manoeuvre may not be possible if there is ice, especially multi-year ice, in the vicinity.

factors could be useful.[104] COLREGS do not have a specific rule on convoys, now an operational practice in the provision of icebreaking services in the Northern Sea Route.[105]

Law of the sea framework for national regulation

A discussion on the governance challenges for international shipping in the Arctic would not be complete without some reference to jurisdictional and regulatory issues at the national level. The region is undergoing jurisdictional change as a result of regional coastal States' ability to exercise sovereign rights over extended continental shelves in most of the Arctic Ocean, as legitimated by the LOS Convention.[106] Rights over extended continental shelves, although exclusive, do not affect the legal status of superjacent waters, including international navigation.[107] The maritime zones that affect international navigation and shipping are internal waters, territorial seas and exclusive economic zones (EEZs). Internal waters and territorial seas fall under coastal State sovereignty.[108] However, there remains the international right of innocent passage in the territorial sea.[109] The freedom of navigation applies to the EEZ,[110] subject to a special coastal State power to regulate international navigation for the purposes of vessel source pollution discussed below.[111] The legal concern is the extent and content of coastal State regulation of international shipping with regard to innocent passage in the territorial sea and transit passage through straits used for international navigation. Fees may only be charged for services rendered and not merely for passage.[112] The subject is complex because the legal status of large areas of waters in Canadian and Russian areas, which are prime candidates for new trade routes, is contested. Canada and the Russian Federation claim waters enclosed by straight baselines as historic internal waters and subject to national sovereignty, effectively placing those areas beyond any right of international navigation.[113]

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[104] For example in Regulation 6, ibid., presence of ice could be included as a factor to be considered by all vessels in determining safe speed. The Canadian modification of this rule used to include "ice conditions" as factors to be considered by all vessels, but was repealed in 2008 (SOR/2008-272, s. 10). Ice as a factor is now limited to vessels with operational radar. Mariners are cautioned that ice might not be detected by radar. Collision Regulations (Canada Shipping Act), C.R.C., c. 1416.

[105] Commencing in the 2012 navigation season.

[106] "Slow Start on Northern sea Route," supra note 13

[107] LOS Convention, supra note 9, Art. 78.

[108] Ibid., Art. 2.

[109] Ibid. Art. 17.

[110] Ibid., Art. 58.

[111] Ibid., Art. 234.

[112] Ibid., Art. 26.

[113] Statement by Joe Clarke, Secretary of State for External Affairs, House of Commons, H.C. Debates, 10 September 1985, at 6461. The Arctic Archipelago was enclosed by straight

However, some States claim that those waters include straits used for international navigation and as a result they are subject to the international regime of transit passage.[114] The latter characterization potentially constrains the two coastal States in regulating international navigation.[115] It is not realistic to expect either Canada or the Russian Federation to withdraw from their positions on the legal status of those waters. The more likely scenario is for States to continue to agree to disagree and for the Arctic States in question to develop practical frameworks and arrangements to facilitate international navigation through those waters to promote development of their northern regions. This appears to be the contemporary policy and practice with regard to the Northern Sea Route.

The LOS Convention provides another dimension to coastal State power to regulate international shipping in the Arctic. In Article 234, a provision mostly negotiated between Canada, the former Soviet Union and the US, coastal States enjoy more far-reaching power to regulate international navigation within their EEZs than in any other marine region.[116] They are in a position to adopt higher standards than those generally adopted through the IMO and without the requirement to do so through the IMO.[117] They have in fact done so. The rule is accompanied by conditions and possibly uncertainties. There have to be hazards to navigation, such as severe climatic conditions and ice cover for most of the year such as to create obstructions.[118] Although the forecast is for an ice free Arctic in the summer, the winter season is longer, effectively making sure that Article 234 powers can be exercised all year round. Another criterion is that irreversible damage could be caused to the environment, which is satisfied by the sensitive Arctic environment where the ability to combat spills is limited, either because ice is present or a spill occurs

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baselines by Territorial Sea Geographical Coordinates (Area 7) Order, SOR/85-872. Decree of the Presidium of the Central Executive Committee of the U.S.S.R. of 15 April 1926, On the Proclamation of Lands and Islands Located in the Northern Arctic Ocean as Territory of the USSR, 32 Sobranie Uzakonenii i Rasporiazhenii Raboche-Krest'ianskogo Pravitel'stva S.S.S.R., 203 (1926).

[114] In particular the United States and some EU member States. See US department of State, Limits in the Seas No. 112: United States Responses to Excessive National Maritime Claims, 9 March 1992, online: http://www.state.gov/documents/organization/58381.pdf, at 29-30.

[115] For example transit passage, unlike innocent passage, may not be suspended. LOS Convention, supra note 9, Arts 44 &. 45. Also, if those waters are not internal, coastal States are constrained in the types of fees they can levy. Only fees for service could be levied. Further, strait States and transit States are expected to cooperate on navigation and safety aids in straits subject to transit passage. Ibid., Art. 43.

[116] LOS Convention, supra note 9. For a commentary on the negotiation history, see M.H. Nordquist et al., eds., *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol. IV (Dordrecht: Martinus Nijhoff Publishers, 1991), 392-398.

[117] Ibid. See also Aldo Chircop, "Climate Change and the Prospects of Increased Navigation in the Canadian Arctic," 6 *World Maritime University Journal* 193-205 (2007), at 201.

[118] LOS Convention, supra note 9, Art. 234.

in a remote area where timely response is not possible. The rule also refers to powers to be exercised within the EEZ, and it is not clear if this is also intended to include the territorial sea.[119] The laws and regulations to be adopted must be non-discriminatory, and have due regard to navigation. The rules must be based on the best scientific evidence, i.e., they cannot be arbitrary as otherwise they may be challenged. Article 234 is intended for the purposes of regulation of vessel source pollution. A question that arises is whether Article 234 provides merely an extended pollution jurisdiction in the Arctic (after all it is situated in Part XII of the LOS Convention concerning the protection and preservation of the marine environment) or can also include safety regulation.[120] A further question is whether this power includes regulating other non-pollution shipping impacts on the marine environment, such as routeing to avoid whale strikes. Arguably, broader marine environmental regulatory power over international navigation is included in the EEZ's environmental jurisdiction, but any requirements imposed on international shipping would require cooperation through the IMO. In some instances the safety and pollution jurisdictions are intertwined, especially in the Arctic, but there can also be safety matters that are unrelated to pollution, such as rules regarding life saving equipment. If Article 234 is interpreted restrictively for environmental purposes, Arctic coastal States would need to find a complementary balance between domestic environmental regulation and maritime safety regulation through the IMO. This is a difficult provision to administer. This became evident recently in the context of Canada's 2010 Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) establishing mandatory reporting requirements for vessels of 300 gross tonnage or more, vessels engaged in towing and vessels carrying pollutants or dangerous goods entering or leaving Canadian Arctic waters.[121] A communication from the United States to the Canadian Department of Transport in 2010 questioned the consistency of the NORDREG regulations with international law, including Article 234 requirements.[122]

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[119] D. Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit," 38 *Ocean Development and International Law* 3-69 (2007), at 47.

[120] Aldo Chircop, "The Growth of International Shipping in the Arctic: Is a Regulatory Review Timely?" 24 *International Journal of Marine and Coastal Law* 355-380 (2009), at 371.

[121] Northern Canada Vessel Traffic Services Zone Regulations, SOR/2010-127.

[122] The requirement of Canadian permission by foreign vessels to enter and transit Canadian Arctic waters, and failure of compliance with which would entail prosecution "would be a sweeping infringement of freedom of navigation within the exclusive economic zone and the right of innocent passage within the territorial sea …" The position of the United States is that "requiring permission to transit these areas" does not meet the Article 234 obligation "having due regard to navigation." Among other, the communication also questioned the scientific basis for the regulations and the possible application to areas that are not necessarily ice-covered for most of the year. The view was advanced that any ship reporting and routeing measures which

Conclusion

It is interesting to observe how the work on the future mandatory polar code requires cross-referencing to a range of IMO legal instruments on several issues. Although much of the edifice of international maritime law under the auspices of the IMO has been developed issue by issue, the future of Arctic shipping requires a big picture approach. While much of the focus at this time is on the needs of the polar code, this approach will eventually require a broader view of other international rules and standards that bear on shipping activities in the Arctic than are currently being addressed. As I have had opportunity to comment elsewhere, I believe that "a comprehensive assessment of the international maritime rules, regulations and standards to determine their near- and long-term practical application in the Arctic environment" is needed.[123] For example the application of the private international maritime law conventions also needs to be examined, for instance with regard to the requirements for seaworthiness in contracts of carriage. A broader legislative programme than currently under way will be necessary. The advantage would be that the regulatory needs of Arctic shipping are approached in a systemic and coordinated manner and maritime contracting would be greatly facilitated.

The Arctic Council is playing an important role in developing a better understanding of the need for safety and environment protection in the Arctic and with due regard to the interests of indigenous peoples. It is also a forum where political consensus for future regulatory roadmaps may develop, as is the case with AMSA. However, the building of consensus and garnering support for safe and environmentally acceptable shipping in the region cannot be fully possible without a more inclusive process for participation in Arctic Council activities. The fact is the Council has limited membership and recently the rules for observers have been tightened to the point of being restrictive.[124] It is in the interest of the Arctic States to build a broader basis of support for the protection of the region by encouraging rather than discouraging other maritime States from participating effectively in regional governance. The bulk of international shipping in the Arctic is flagged in non-Arctic States. The cooperation of all maritime States (i.e., flag States) is needed to ensure

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appropriately fall under SOLAS should be requested and adopted through the IMO. Finally, in reiterating its view that "the Northwest Passage constitutes a strait used for international navigation … [A]t a minimum, a measure such as the NORDREG Zone Regulations for an international strait would need to be proposed and adopted at the IMO." Letter to Robert Turner, Department of Transport, Ottawa from Eric Benjaminson, Minister-Counsellor, Economic Energy and Environmental Affairs, Embassy of the United States, 19 March 2010, online: http://www.state.gov/documents/organization/179286.pdf.

[123] Chircop, "Growth of International Shipping," supra note 120, at 379.

[124] Aldo Chircop, "Should Observer Participation in Arctic Ocean Governance be Enhanced?" Editorial, 7 *Canadian Naval Review* 2-3 (2012).

that high standards are applied to all tonnage trading in the region. Finally, Arctic States should consider cooperation with regard to Article 234, i.e., work together to achieve the higher standards they wish to legislate and enforce for Arctic shipping, and in doing so work more closely with the IMO. At the same time, common sense ought to prevail over the need for high standards, including mandatory reporting, which serves the interests of maritime safety and effective search and rescue.

LEGAL CHALLENGES FOR MARITIME OPERATIONS IN THE SOUTHERN OCEAN*

DONALD R. ROTHWELL**

1. Introduction

There has been a renewed focus on the polar oceans early in the Twenty-First century.[1] This has been partly driven by the attention generated by claims to an outer continental shelf made in both the Arctic Ocean and Southern Ocean by a number of countries. These claims have been the subject of review by the Commission on the Limits of the Continental Shelf (CLCS) and that process remains ongoing.[2] It has also been driven by renewed interest in the polar regions as a result of the impact of climate change making both regions more accessible to a range of activities, including commercial shipping, fishing operations, and seabed exploration and development. The polar oceans have also been the scene of clashes over contentious environmental issues such as whaling, which in the Southern Ocean has resulted in Australia commencing a case before the International Court of Justice over the legitimacy of Japan's scientific whaling program.[3] While the polar oceans are governed by a legal regime founded upon the 1982 United Nations Convention on the Law of the Sea (LOSC),[4] different regional approaches apply. In Antarctica large parts of the Southern Ocean are subject to the Antarctic Treaty

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1 For the author's views on this general issue see Donald R. Rothwell "Polar Oceans Governance in the 21st Century" (2012) 26 *Ocean Yearbook* 343-360.

2 See discussion in Donald R. Rothwell "The Commission on the Limits of the Continental Shelf: Its Establishment and Subsequent Practices" presented at International Seminar *The Thirtieth Anniversary of the UNCLOS from the Perspective of the Commission on the Limits of the Continental Shelf as its Organ*, Ocean Policy Research Foundation, Tokyo, Japan, 11 July 2012 available at http://www.sof.or.jp/en/topics/pdf/02-3.pdf (28 August 2012).

3 *Whaling in the Antarctic* (Australia v Japan), Application instituting proceedings (31 May 2010) available at www.icj-cij.org/docket/.

4 1833 UNTS 397.

and associated international legal instruments that regulate fisheries and marine environmental protection. In the Arctic there is no equivalent regional legal regime, though the Arctic Council is increasingly paying attention to Arctic Ocean.[5]

This paper seeks to review these issues particularly in the context of the Southern Ocean using the law of the sea under the LOSC as the lens for the analysis. The law of the sea and the polar regions remain in a dynamic state of interaction and is perhaps one of the most significant global examples of interaction between global and regional regimes. For Antarctica this interaction has been present since adoption of the 1959 Antarctic Treaty[6] which made direct reference in Article VI to the high seas. Since that time, with the evolution of the law of the sea and especially the expansion of maritime zones as reflected in the LOSC,[7] that dynamic has emerged as a tension between the rights and interests of the seven Antarctic territorial claimants,[8] the non-claimant Antarctic Treaty Consultative Parties,[9] and the other members of the international community.[10] In particular, reactions to CLCS submissions have highlighted that notwithstanding the success of the Antarctic Treaty in suppressing simmering territorial tensions during the 1950s,[11] those tensions remain and can be brought to the surface through law of the sea related actions. With that context, this paper seeks to assess particular issues associated with the legal challenges that arise for maritime operations in the Southern Ocean given the nature of the law of the sea, the Antarctic Treaty System (ATS), and the range of additional legal instruments that also apply in the Southern Ocean. To begin, a brief assessment will be undertaken of the law of the sea and the polar regions, followed by a consideration of Southern Ocean governance.

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5 For details on the Arctic Council see www.arctic-council.org/; see also Timo Koivurova and David L. VanderZwaag "The Arctic Council at 10 years: retrospect and prospects" (2007) 40 *University of British Columbia Law Review* 121-194.

6 402 UNTS 71.

7 Those being the territorial sea (12 nautical miles), contiguous zone (24 nautical miles), exclusive economic zone (200 nautical miles), and continental shelf (minimum of 200 nautical miles).

8 Those states are Argentina, Australia, Chile, France, New Zealand, Norway, and United Kingdom.

9 There are currently 28 states with status as ATCPs, of which 7 are claimant states, making 21 non-claimant ATCPs.

10 The United Nations currently has a total membership of 193, of which 50 UN member states are parties to the Antarctic Treaty, making 143 states in the international community who are not parties to the Antarctic Treaty.

11 This was particularly highlighted following the Australian CLCS submission in 2004, see Andrew Serdy, "Towards Certainty of Seabed Jurisdiction Beyond 200 Nautical Miles from the Territorial Sea Baseline: Australia's Submission to the Commission on the Limits of the Continental Shelf" (2005) 36 *Ocean Development and International Law* 201-217; which resulted in Germany, India, Japan, Netherlands, Russian Federation, USA all directly commenting on the Australian submission with respect to continental shelf data associated with the Australian Antarctic Territory.

2. The law of the sea, maritime law and the polar regions[12]

The LOSC is the most significant international law instrument dealing with the oceans and is often referred to as a "constitution for the oceans". It has been supplemented by additional instruments over the past 30 years dealing with deep seabed mining, and straddling and highly migratory fish stocks, in addition to a raft of regional and bilateral instruments which complement and expand aspects of the LOSC's operations. However, there are two areas which by general consensus the LOSC specifically did not address in any level of detail. The first is military operations at sea, and the second is Antarctica.[13] This is significant as it suggests that these issues were just too sensitive at the time to be placed on the law of the sea agenda. While that is most likely the case with respect to military operations, in the case of Antarctica it more than likely is a result of a sense that the Antarctic Treaty had in effect "covered the field" with respect to Antarctic affairs, and accordingly the law of the sea had no clear field of operation. 4 This has resulted in some ongoing debate as to whether the law of the sea – as represented by the LOSC – applied to the Southern Ocean. That the ATS predated the LOSC raised issues as to whether it created a *lex specialis* which is so comprehensive and distinctive that all other international law is excluded. However, the fact that the Antarctic Treaty made express reference to the "high seas"[14] at a minimum suggested that the two regimes – that dealing with Antarctica up to the limits of 60°S and that dealing with the sea – did apply within the Antarctic Treaty area.

Nevertheless, that the LOSC made so little allowance for the Southern Ocean had consequences as the "new" law of the sea was implemented.[15] One is that some of the Antarctic claimants have sought to assert maritime claims, consistent with their status as "coastal States" under the law of the sea. Yet doubt remains as to whether there exists "coastal States" in Antarctica, given that each of the seven territorial claims to the continent remain contested and in any event the active assertion of claims has been effectively suspended

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[12] See generally Donald R. Rothwell and Christopher C. Joyner "The Polar Oceans and the Law of the Sea" in Alex G. Oude Elferink and Donald R. Rothwell (eds) *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff, The Hague: 2001) 1-22; Donald R. Rothwell and Stuart Kaye, "Law of the Sea and the Polar Regions: Reconsidering the Traditional Norms" (1994) *Marine Policy* 41-58; Christopher C. Joyner, *Antarctica and the Law of the Sea* (Martinus Nijhoff, The Hague: 1992).

[13] By way of contrast, it is considered that the LOSC, Art 234, specifically addressed issues in the marine Arctic: see Rob Huebert, "Article 234 and Marine Pollution Jurisdiction in the Arctic" in Alex G. Oude Elferink and Donald R. Rothwell (eds) *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff, The Hague: 2001) 249-267.

[14] Antarctic Treaty, Article VI.

[15] This being a reference to the law of the sea as found in the LOSC, as opposed to that developed within the framework of the four 1958 Geneva Conventions.

during the life of the Antarctic Treaty. Nevertheless, some of the Antarctic claimants have continued to assert some semblance of traditional maritime claims.[16] For example, Australia's claim to a 200 nm "Australian Whale Sanctuary" offshore the Australian Antarctic Territory has been under the spotlight as a result of the conduct of Japanese "special permit" whaling in those waters.[17]

Closely associated with the law of the sea, maritime law also has application within the Southern Ocean in the same way in which it applies globally. MARPOL has particular application in the Southern Ocean, as do the associated 2010 IMO Guidelines for Ships Operating in Polar Waters,[18] which are discussed in more detail below. Likewise, with respect to safety of life at sea, the 1974 International Convention on the Safety of Life at Sea (SOLAS),[19] and the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)[20] are crucial given remote and extreme conditions in the Southern Ocean. The law of the sea as reflected in the LOSC and general maritime law is therefore central to an understanding of the regulation and management of Southern Ocean activities, as is the case for all of the world's oceans and seas. Nevertheless, the ambiguity regarding the existence of coastal states in the Southern Ocean raises some very particular issues which are not replicated elsewhere, and is a particular issue in the Southern Ocean where flag state jurisdiction predominates more than coastal state jurisdiction. The particular governance framework created under the Antarctic Treaty is also relevant, and that shall now be considered.

3. Southern Ocean Governance

Following a period of rising tension over territorial claims and increased scientific interest in Antarctica, states with an interest in the future of the continent gathered in Washington in 1959 to negotiate the Antarctic Treaty. The Treaty provided the foundation for the development of the ATS which now includes a framework of additional conventions and instruments in

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[16] See the discussion in Stuart B. Kaye and Donald R. Rothwell "Southern Ocean Boundaries and Maritime Claims: Another Antarctic Challenge for the Law of the Sea?" (2002) 33 *Ocean Development and International Law* 359-389.

[17] See Donald K. Anton, "Australian Jurisdiction and Whales in Antarctica: Why the Australian Whale Sanctuary in Antarctic Waters Does Not Pass International Legal Muster and is also a Bad Idea as Applied to Non-Nationals", (2008) 11 *Asia Pacific Journal of Environmental Law* 159-192; Joanna Mossop, "Opposing Japanese Whaling in the Southern Ocean: the International Law Implications of Contrasting Approaches", (2008) 11 *Asia Pacific Journal of Environmental Law* 221 – 234.

[18] International Maritime Organization, *2010 IMO Guidelines for Ships Operating in Polar Waters* (IMO, London: 2010).

[19] 1184 UNTS 278.

[20] 1361 UNTS 190.

addition to the decisions, recommendations and measures adopted at Antarctic Treaty Consultative Meetings (ATCMs). Those instruments include:

- 1972 Convention for the Conservation of Antarctic Seals (CCAS);[21]
- 1980 Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR);[22] and the
- 1991 Madrid Protocol on Environmental Protection (Madrid Protocol).[23]

A feature of these additional instruments is that they have all had a focus on the Southern Ocean, with both CCAS and CCAMLR being predicated on the regulation of marine living resources.

The Antarctic Treaty focussed on the critical issues of Antarctica's management as identified at the time. Provisions dealing with demilitarisation,[24] the importance of science,[25] and the resolution of sovereignty claims[26] in particular stand out. Nevertheless, the Treaty contained limited provisions dealing with environmental and resource management. This is where the subsequent development of the ATS, and especially CCAS, CCAMLR and the Madrid Protocol has helped to fill in some of these gaps. [27] Article IV of the Treaty and its provisions dealing with sovereignty are remarkable. Article IV (1) provides that nothing in the Treaty shall be a basis for an interpretation supporting a renunciation or diminution of previously asserted, or existing, or even potential claims to Antarctica, and in particular as not prejudicing the position of those States who had a possible basis of claim which had not yet been asserted. This provision thereby sought to deal with the position concerning the existing territorial claims, and potential claims that could be made in Antarctica and in doing so deals with the interests of a variety of States. These include the seven territorial claimants, those territorial claimants who may be in dispute with other claimants over the validity of their claims,[28] and others such as the United States or Russian Federation (as the successor to the USSR) that may wish to assert a claim in the future. The formula provided is therefore such that all of the principal parties in Antarctic affairs could come together under the control of a single regime without compromising their position on the status of sovereignty

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[21] 1080 UNTS 175.

[22] 1329 UNTS 47.

[23] (1991) 30 ILM 1461.

[24] Antarctic Treaty, Article I.

[25] Antarctic Treaty, Article II.

[26] Antarctic Treaty, Article IV.

[27] See the essays in Davor Vidas (ed), *Implementing the Environmental Protection Regime for the Antarctic* (Cambridge University Press, Cambridge: 2000).

[28] The claims made by Argentina, Chile and the UK to parts of the Antarctic Peninsula overlap.

claims, or potential sovereignty claims.[29] In addition, Article IV (2) provides that "no acts or activities taking place while the present Treaty is in force" shall be a basis for "asserting, supporting or denying a claim" to sovereignty in Antarctica. The effect of this is therefore that all claims, bases of claims, or potential claims were in effect suspended as of the entry into force of the Treaty in 1961 and nothing which occurs while the Treaty is in force will affect the pre-existing position of all of the interested parties – both the claimants and the non-claimants.[30]

4. Southern Ocean Shipping

The Southern Ocean has a long maritime history and since Captain James Cook's first circumnavigation of Antarctica in 1772-1775, discovery, science and development in Antarctica and the Southern Ocean have been closely linked with mariners and shipping.[31] There have been various phases as part of that history, with explorers, sealers and whalers all having a prominent role up until the 1950s. Since that time, and with increased regulation of both sealing and whaling, much Southern Ocean shipping is now undertaken in support of Antarctic research bases and stations scattered all throughout the continent including along parts of the warmer and ice free coastal fringe, or in the pursuit of fishing activities, or by way of commercial or private tourism ventures.

Shipping undertaken in support of Antarctic scientific activities is limited to the summer and is principally focussed on the re-supply of existing scientific bases via major "gateway" ports such as Hobart (Tasmania, Australia) and Lyttelton (New Zealand). Fishing activities, which are closely regulated under CCAMLR, are strictly controlled and limits are placed upon the number of fishing vessels which have access to the CCAMLR area in the Southern Ocean. For example, in 2011/12 a total of 44 CCAMLR registered fishing vessels were engaged in exploratory longline krill fishing.[32] In the

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[29] Arthur D. Watts, *International Law and the Antarctic Treaty System* (Cambridge University Press, Cambridge: 1992) 127-129.

[30] F.M. Auburn, *Antarctic Law and Politics* (C. Hurst & Co, London: 1982) 104-110; Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (Legal Books, Sydney: 1986) 137-150. There has been some consideration as to whether consistent with Article IV of the Antarctic Treaty, outer continental shelf claims can be asserted in the Southern Ocean consistent with the LOSC; see Alan D. Hemmings and Tim Stephens "The extended continental shelves of sub-Antarctic Islands: implications for Antarctic governance" (2010) 46 (239) *Polar Record* 312-327; Mel Weber, "Delimitation of the continental shelves in the Antarctic Treaty area: Lessons for regime, resource and environmental Security" in Alan D. Hemmings, Donald R. Rothwell and Karen N. Scott (eds), *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* (Routledge, Abingdon: 2012) 172-196.

[31] See generally David Day, *Antarctica: A Biography* (Random House, Melbourne: 2012).

[32] Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Thirtieth Meeting of the Commission* (Hobart, Australia : 24 October – 4 November 2011) 54, Table 1.

case of cruise ship operations, in 2011/12 a total of 43 ships registered with the International Association of Antarctic Tour Operators (IAATO) visited Antarctica, undertaking a total of 236 voyages to and from the region and carrying over 43,000 persons of which 60 per cent were passengers on tourist visits.[33] In addition, there has also been an upward trend in yacht visits to Antarctica, with 37 recorded during the 2011-12 season.[34] While Southern Ocean shipping numbers do not equate with that of more temperate oceans, the composition of the Southern Ocean "fleet" is broadly comparable to that which would be found elsewhere.[35]

With the growth in Antarctic shipping in the past decade, especially in cruise ships, there has been an upward trend in significant maritime incidents. In the period 2006-2009 it was reported that eight major maritime incidents occurred in the Southern Ocean, including four groundings, the loss of the *M/S Explorer* in November 2007 following it being holed by ice, and an explosion and fire abroad the Japanese whaler *Nisshin Maru* in February 2007 which resulted in the loss of one life.[36] Since that time the Sea Shepherd Conservation Society protest vessel, *Ady Gil*, was scuttled following a collision with the *Shonan Maru No 2* in January 2010 north of Adelie Land,[37] and in December 2010 the Korean-flagged fishing vessel *Insung No 1* sank in the Ross Sea, with the loss of 22 crew.[38]

These developments have highlighted some growing trends with respect to Southern Ocean shipping. The first is that climate change will result in a general warming trend across Antarctica impacting upon both the continent

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[33] 33IAATO "2011-2012 Summary of Seaborne, Airborne, and Land-Based Antarctic Tourism" (28/08/2012) available at www.iaato.org (27 September 2012).

[34] United Kingdom/IAATO, "Data Collection and Reporting on Yachting Activity in Antarctica in 2011-12" Antarctic Treaty Consultative Meeting XXXV (Hobart 2012) Information Paper 42; the increased number of yachts visiting the Southern Ocean has raised concerns given they are not subject to SOLAS; see Germany, Australia, Norway, United Kingdom, United States, "Yacht guidelines to complement safety standards of ship traffic around Antarctica" (XXXIV Antarctic Treaty Consultative Meeting, Buenos Aires, 2011) Working Paper 37.

[35] See generally Antarctic and Southern Ocean Coalition (ASOC), "Antarctic Shipping", Information Paper 58, XXXI Antarctic Treaty Consultative Meeting, 2008; there has to date been no comprehensive survey undertaken of Southern Ocean shipping, which is in contrast to the 2009 published study of Arctic shipping: see Arctic Council, *Arctic Marine Shipping Assessment 2009 Report* (Arctic Council, Tromsø: 2009).

[36] ASOC "Antarctic Ship-borne Tourism: Perspectives on Shipping Management" Antarctic Treaty Meeting of Experts (9-11 December 2009, Wellington, New Zealand), Annex 1.

[37] Australian Maritime Safety Authority, "Fact finding report into the reported collision involving the New Zealand registered craft Ady Gil and the Japan registered whaling ship Shonan Maru No 2 in the Southern Ocean on 6 January 2010", undated, available online at www.amsa.gov.au.

[38] See "South Korean trawler sinks in Antarctic" *The Guardian* (13 December 2010) available at www.guardian.co.uk/world/2010/dec/13/south-korea-fishing-ship-sink; see also Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Thirtieth Meeting of the Commission* (Hobart, Australia : 24 October - 4 November 2011) 2.11.

and Southern Ocean. Parts of Antarctica may therefore become more ice free, and parts of the Southern Ocean may become more navigable on a year round or seasonable basis as the sea ice cover retreats. While the impact of these developments upon shipping are difficult to quantify, it would seem clear that the Southern Ocean will become more accessible to shipping which may result in more merchant shipping in the Southern Ocean.[39] There will be inevitable limits to any upsurge in Southern Ocean navigation due to its relative remoteness from major economies and trade routes, and the fact that unlike the Arctic, new trans-Antarctic shipping routes have never been seriously contemplated. This is not to suggest that the Southern Ocean will not continue to experience an increase in shipping, rather any surge will more than likely be modest, and may principally arise through increased visitations by tourist cruise ships.

Second is the increasing importance of maritime search and rescue capability throughout the Southern Ocean. A number of high profile incidents over the past decade involving cruise ships,[40] protest vessels,[41] and fishing vessels,[42] have highlighted the limited response capability of states with responsibility for Southern Ocean maritime search and rescue under SOLAS. Australia, for example, has a SOLAS designated "Search and Rescue Region" (SRR) of 52.8 million km2,[43] which is one tenth of the earth' surface and sees Australia assume responsibility for all of the maritime domain in the Southern Ocean between 75°E and 163°E.[44] This encompasses much of the waters offshore the Australian Antarctic Territory, Adelie Land (France), waters adjacent to Heard and McDonald Islands, and Macquarie Island. Despite this

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[39] See generally Julia Jabour "Maritime Security: Investing in Safe Shipping Operations to help prevent Marine Pollution" in Alan D. Hemmings, Donald R. Rothwell and Karen N. Scott (eds), *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* (Routledge, London: 2012) 238-256.

[40] The *MS Explorer* sank in the Southern Ocean in 2007 after striking submerged ice; all passengers and crew were safety evacuated: "MS Explorer sinks" *The Guardian* (23 November 2007) www.guardian.co.uk/world/gallery/2007/nov/23/antarctica.

[41] The Sea Shepherd Conservation Society vessel *Ady Gil* collided with the Japanese whaler *Shonan Maru No 2* on 6 January 2012 in the Southern Ocean offshore Adelie Land (France) but within the Australian SRR; the *Ady Gil* was scuttled within 48 hours without loss of life.

[42] In December 2010, the South Korean trawler *Insung No 1* sank in the Southern Ocean half way between New Zealand and Antarctica: "South Korean trawler sinks in Antarctic" *The Guardian* (13 December 2010) available at www.guardian.co.uk/world/2010/dec/13/south-korea-fishing-ship-sink.

[43] Australian Maritime Safety Authority (Australia) "Search and Rescue Arrangements in Australia" at www.amsa.gov.au/Search_and_Rescue/Search_and_Rescue_in_Australia/Arrangements_in_Australia.asp (17 September 2012).

[44] Australian Maritime Safety Authority (Australia), "AUSREP: Ship reporting instructions for the Australian area 2012 edition" 5.2 AUSREP Coverage Area at www.amsa.gov.au/publications/AUSREP_Book.pdf.

responsibility, Australia has no permanent search and rescue assets stationed in the area and has indicated in the past that it has little capacity to respond to major maritime incidents that occur in the Southern Ocean.[45] While there has been some attempt to address this gap in the search and rescue regime,[46] there is clearly more that could be done in the Southern Ocean to better align the global regime with the general rights and responsibilities assumed by ATS states including the territorial claimants which under the global international legal framework bear particular responsibility as recognised coastal states.

5. Contemporary Southern Ocean Shipping Issues

5.1 Marine Pollution and Shipping

With increased shipping activity in the Southern Ocean, there has also been increased attention given to the regulation of ship-sourced marine pollution. There have been a number of developments here at the global and regional level. The IMO has taken an interest in the development of a Polar Code for shipping in the polar oceans.[47] The Code has experienced difficulties in its development, partly due to ATS concerns as to the ability of the IMO to adopt special measures that have application in the Southern Ocean. Development of the Code remains ongoing and there is an expectation that agreement will be reached on a text within the next 3 years. For the time being, the IMO has responded to the particular circumstances of the polar oceans through instruments such as MARPOL.[48] The Southern Ocean is listed as a "Special Area" under MARPOL, Annex I, II, and V. While MARPOL has given increasing attention to coastal and port state implementation, with the exception of the Southern Ocean's sub-Antarctic islands, coastal states in the Southern Ocean are not recognised as having sovereignty or jurisdiction and are therefore unable to exercise traditional coastal state jurisdiction with respect to marine pollution. Likewise, Southern Ocean port states may be some considerable distance from areas where a pollution incident has occurred, which due to its isolation may never have been identified in the first instance. Issues arise here also with respect to the potential for port state jurisdiction to also be effective. While Annex IV of the Madrid Protocol seeks to address

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[45] See Australia, Netherlands, New Zealand, United States "Joint statement on whaling and safety at sea" (14 December 2011), available at www.foreignminister.gov.au/releases/2011/kr_mr_111214.html (28 September 2012).

[46] See International Maritime Organization "Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from SAR Facilities" 2006,MSC.1/Circ.1184, 31 May 2006.

[47] See Jabour, note 39, 251-254.

[48] International Convention for the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 Relating Thereto, 1340 UNTS 62.

some of these issues, there has to date been no comprehensive legal response. These factors suggest the need for MARPOL to be modified to reflect the particular issues that arise in regard to marine pollution in the Southern Ocean.

It can therefore be observed that a significant issue exists with respect to the regulation of shipping within the region because it is almost exclusively dependent upon flag state regulation and enforcement. As a result of the provisions of the Antarctic Treaty, and the widespread lack of recognition of coastal states in Antarctica other than in the instance of the sub-Antarctic islands,[49] the capacity to enforce traditional marine pollution laws and regulations is significantly compromised. This results in a law enforcement challenge in that within the Southern Ocean, it is flag state measures and flag state enforcement that predominantly regulates Southern Ocean shipping. This is a significant variation from the dominant paradigm in the law of the sea, which is dominated by the presence and actions of coastal states, and also MARPOL. Similar issues of enforcement arise in the context of relevant provisions of the Madrid Protocol dedicated to the prevention of marine pollution which likewise rely upon flag state enforcement, though Annex IV does extend to other ships engaged in supporting the "Antarctic operations" of the state parties.[50] A Polar Shipping Code will be an important step in this area and go some way to raising the standards of vessels operating in the Southern Ocean and, in the process, address concerns about the implementation and enforcement of marine pollution standards.[51] The Code will still very much depend upon flag state implementation and enforcement, through there does remain the potential for seeking to enhance port state controls through so-called "gateway" ports which provide access to Antarctica.[52] Nevertheless, in the absence of traditional coastal state jurisdiction capable of being enforced against delinquent shipping, environmental security in Antarctica remains compromised because of the limitations upon the enforcement regime.

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[49] These islands include Amsterdam Island (France), Auckland Island (New Zealand), Bouvetøya (Norway), Campbell Island (New Zealand), Crozet Archipelago (France), Heard and McDonald Islands (Australia), Kerguelen (France), Macquarie Island (Australia), Marion and Prince Edward Islands (South Africa), Saint Paul (France), and South Georgia and South Sandwich Islands (UK); see discussion in Andrew Jackson, "International Instruments and Arrangements in the Sub-Antarctic" (2007) 141 (1) *Papers and Proceedings of the Royal Society of Tasmania* 141, 143.

[50] Madrid Protocol, Annex IV, Article 2.

[51] See Julia Jabour, "'Safe Ships and Clean Seas': Evading a Mandatory Shipping Code for Antarctic Waters" (2008) 6 *New Zealand Yearbook of International Law* 93-110.

[52] See Resolution 7 (2010) ATCM XXXIII "Enhancement of port State control for passenger vessels bound for the Antarctic Treaty area"; and New Zealand, "The Enhancement of Port State Control for Passenger Ships Departing to Antarctica" (XXXIII Antarctic Treaty Consultative Meeting, 2010) Working Paper 37.

5.2 IUU Fishing

Maritime regulation and law enforcement against IUU fishing has been a major issue in the Southern Ocean since the late 1990s, raising multiple issues for the CCAMLR regime and states with sub-Antarctic territories around which national law enforcement can be undertaken. A range of ongoing measures have been adopted to monitor fishing vessels in the Southern Ocean, including more recently automated satellite-linked vessel monitoring systems.[53] In addition, there have been a number of high profile arrests and prosecutions of Southern Ocean IUU fishers arising from determined efforts within CCAMLR and amongst key Antarctic Treaty parties to combat the problem.[54]

A number of these cases have been contentious and found their way into the courts. The most high profile of these cases was that of the *Volga*,[55] a Russian flagged long-line fishing vessel that was apprehended in the Australian Fishing Zone offshore Heard Island in 2002 and arrested for illegal fishing. The maritime operation involved the Australian navy frigate HMAS *Canberra* and a boarding party dispatched by helicopter. After the arrest the *Volga* was escorted over the high seas back to the Australian port of Fremantle; a journey of approximately 2,500 nm. It was at that point that a number of legal issues arose concerning the nature of the arrest, whether a hot pursuit of the vessel had been properly undertaken and whether Australia was under an obligation of "prompt release" with respect to the vessel and its crew.[56] The International Tribunal for the Law of the Sea (ITLOS) decision, which ultimately found in favour of the Russian argument for prompt release and that the Australian fisheries law was contrary to LOSC regarding the setting of a reasonable bond,[57] highlighted some of the law enforcement challenges in dealing with IUU fishing in the Southern Ocean even for those states whose sovereignty in the region is not contested.

An issue that was raised but ultimately not considered by the Tribunal in the *Volga* was hot pursuit. However, there have been two other prominent examples of Southern Ocean hot pursuit that highlight some of the challenges associated with Southern Ocean maritime law enforcement. In 2001 the Togo-registered *South Tomi* was pursued from within the Australian EEZ adjacent

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[53] See CCAMLR Conservation Measure 10-04 (2011).

[54] See Marcus Haward, "Marine resources management, security and the Antarctic Treaty System" in Alan D. Hemmings, Donald R. Rothwell and Karen N. Scott (eds), *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* (Routledge, Abingdon: 2012) 215, 228-230.

[55] *Volga* (Russian Federation v Australia) (prompt release) (22 December 2002), 42 ILM 159 (hereinafter "Volga").

[56] See the discussion in Tim Stephens and Donald R. Rothwell, "Case Note: Law of the Sea – *The Volga (Russian Federation v. Australia)* I.T.L.O.S. No. 11 (23 December 2002)" (2004) 35 *Journal of Maritime Law and Commerce* 283-291.

[57] See *Volga*, note 55, [60]-[89] discussing the consistency of the *Fisheries Management Act* 1991 (Australia) with the LOSC, Article 73.

Heard Island by the Australian-flagged *Southern Supporter* for a total of 14 days over 3,300 nm until two South African naval vessels with Australian personnel aboard were eventually able to effect an arrest 320 nm south of Cape Town. In the 2003 case of the Uruguayan-flagged *Viarsa I*, that vessel was also pursued by the *Southern Supporter* for 21 days over a total of 3,900 nm until the pursuit was brought to an end with the aid of South African and United Kingdom flagged vessels.[58] Whilst the LOSC is silent as to the capacity of third states to join in to assist with a hot pursuit,[59] no protests were lodged by either Togo or Uruguay following the Southern Ocean pursuits and, as the final arrest in each instance was effected by Australia officials, the principle of coastal state enforcement of its laws and regulations was maintained.[60] Like the *Volga*, the arrests of the *South Tomi* and the *Viarsa I* also raised issues with respect to the escort of the detained vessel and crew back to Australia for the commencement of legal proceedings; a law enforcement scenario that rarely exists in the terrestrial domain.

The challenges posed for law enforcement by Southern Ocean IUU fishing have prompted states to adopt novel approaches as is illustrated by the 2003 Australia-France Treaty.[61] The treaty, which only applies in the territorial sea and EEZ of the Australian and French sub-Antarctic territories in the Southern Ocean,[62] allows each state to request assistance from the other when engaged in a hot pursuit,[63] and also for hot pursuit to continue through the territorial sea of the other state provided they are informed and no physical law enforcement or other coercive action is taken against the pursued vessel whilst in those waters.[64] The 2003 Australia-France Treaty has been further amplified by a 2007 Agreement on cooperative fisheries enforcement between Australia and France in the Southern Ocean,[65] which permits further bilateral

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[58] Erik J. Molenaar, "Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa I and South Tomi" (2004) 19 *International Journal of Marine and Coastal Law* 19-42.

[59] Molenaar refers to this as "multilateral hot pursuit": Ibid.

[60] Ibid, 19-23.

[61] 2003 Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands [2005] AustTS 6 (hereinafter "2003 Australia France Treaty").

[62] Excepting Australia's Macquarie Island that lies to the north of the CCAMLR area. See the 2003 Australia France Treaty, Article 1, which makes clear that the Treaty applies to the territorial sea and EEZ of the Heard and McDonald Islands (Australia), and the French territories of Kerguelen Islands, Crozet Island, Saint-Paul Island, and Amsterdam Island.

[63] 2003 Australia France Treaty, Article 3 (3).

[64] 2003 Australia France Treaty, Article 4.

[65] 2007 Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Islands and McDonald Islands[2011] AustTS 1.

cooperation with respect to hot pursuit, jurisdiction, apprehension and enforcement. These types of cooperative maritime enforcement arrangements have particular application in remote regions where there are vast oceans to patrol and limited capacity to do so.[66]

5.3 Criminal and Civil Law Enforcement

As discussed above, the inherent limitations of the ATS make it difficult to enforce criminal and civil law against anyone other than nationals, or in the case of CCAMLR fisheries enforcement, non-nationals operating within proclaimed and recognised EEZ's north of 60°S. In some instances, the limitations of the Antarctic Treaty may be circumvented because of another jurisdictional link. This was the case with the litigation arising from the 1979 Air New Zealand Mt Erebus incident, which resulted in the deaths of all 257 persons aboard the aircraft. In that instance, the aircraft and its operator were all registered in New Zealand and so jurisdiction over the matter, including legal liability, was clear.[67] On the other hand law enforcement gaps have been highlighted in other ways in recent years, including attempts to apply Australian law to prohibit Japanese whaling in the Southern Ocean, and matters which arose following clashes between the Japanese whaling fleet and environmental protestors in January 2010.[68]

In recent decades Australia, along with Chile, New Zealand and the United Kingdom, have adopted a strong pro-conservation and anti-whaling stand in the International Whaling Commission, the international organisation with oversight of the 1946 International Convention for the Regulation of Whaling.[69] These developments have been reflected in Australian law with the adoption of the Whale Protection Act 1980 and, subsequently, the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). A feature of both Acts is the purported application of Australian law offshore the AAT, with the effect that any whaling activity within the Australian Fishing Zone, the Exclusive Economic Zone[70] and now within the Australian Whale Sanctuary offshore the AAT, is prohibited. However, unlike much law which is applied in Antarctica, the EPBC Act purports to apply not only to

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[66] See comment in Warwick Gullett and Clive Schofield, "Pushing the Limits of the Law of the Sea Convention: Australia and French Cooperative Surveillance and Enforcement in the Southern Ocean" (2007) 22 *International Journal of Marine and Coastal Law* 545-584.

[67] *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618.

[68] See Joanna Mossop, "The security challenge posed by scientific permit whaling and its opponents in the Southern Ocean" in Alan D. Hemmings, Donald R. Rothwell and Karen N. Scott (eds), *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* (Routledge, Abingdon: 2012) 307, 314-5.

[69] 1946 International Convention for the Regulation of Whaling, 161 UNTS 72.

[70] See Whale Protection Act 1980 (Australia), as amended by the Maritime Legislation Amendment Act 1994 (Australia).

Australian nationals and Australian flagged vessels but to all persons and vessels.[71]

Notwithstanding these provisions, Japan has been regularly conducting whaling activities offshore the AAT for nearly 20 years[72] as part of various scientific research programs which Japan undertakes in reliance upon Article VIII of the International Convention for the Regulation of Whaling. Japan's whaling activities offshore the AAT have gradually gained greater attention in recent years. However, the position taken by various Australian governments is that notwithstanding the provisions of Australian law considerable difficulties would be faced by any active enforcement of that law.[73] Nevertheless, in 2004 a non-governmental organisation, Humane Society International (HSI), contested this view and commenced proceedings in the Australian courts arguing that Japanese whaling activity was contrary to the EPBC Act. In a series of proceedings before the Federal Court from 2004-2008,[74] declaratory and injunctive relief was sought concerning whaling alleged to have been carried out by Kyodo Senpaku Kaisha, a corporation holding a licence from the Japanese government to conduct "special permit" whaling in the Australian Whale Sanctuary offshore the AAT. Following a series of legal proceedings,[75] the Federal Court of Australia in January 2008 delivered its final judgment in the matter.[76] Satisfied that a "significant number of whales were taken inside the Australian Whale Sanctuary",[77] the court concluded that Kyodo had contravened a number of relevant provisions of the EPBC Act in relation to both minke whales and fin whales and issued orders that they be restrained from engaging in any such further acts.[78] HSI arranged for the Federal Court's judgment to be served upon Kyodo in Japan in late January 2008,[79] however, this did not deter Kyodo from continuing with its whaling program during the 2007/2008 season. Since that time, the Japanese government and Kyodo have continued their whaling activities, effectively ignoring the decision of the Australian courts.

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71 Protection and Biodiversity Conservation Act 1999 (Australia), s. 229.

72 See James Shevlin, "Japanese Whaling Activity Observed" (1992) 69 *ANARE News*18.

73 Ian Campbell, "It's not research – Japan's whale slaughter is commercial", *The Australian* (Sydney),23 May 2005, p15.

74 Commencing with *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510.

75 See discussion in T. Stephens and D.R. Rothwell, "Japanese Whaling in Antarctica: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd"* (2007) 16 *Review of European Community and International Environmental Law* 243-246

76 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

77 Ibid, [39].

78 Ibid, [55].

79 P. Alford, "Aussie judgment served on whalers", *The Australian* (Sydney), 24 January 2008, p 7.

A related matter occurred in January 2010 following a collision offshore the French territory of Adelie Land between the Japanese whaler *Shonan Mauru No 2* and the New Zealand registered trimaran *Ady Gil*, a lightweight carbon fibre vessel engaged in part of the Sea Shepherd Conservation Society's anti-whaling protest activities. The *Ady Gil* was significantly damaged by the incident and was eventually scuttled. Notwithstanding enquiries into the incident by both Australian and New Zealand maritime authorities,[80] no criminal or civil proceedings have arisen. A particular feature of the incident was that Japanese maritime authorities and the Master and crew of the *Shonan Mauru No 2*. refused to cooperate with the enquiries into the *Ady Gil* sinking.

5.4 Maritime Security

The incidents noted above arising from clashes between protestors and Japanese whalers, has shone the spotlight upon maritime security in the Southern Ocean. For the foreseeable future, there is every likelihood there will be ongoing confrontation in the Southern Ocean over Japanese whaling, while there is also the possibility that Antarctic cruise ships may be vulnerable to attack by either terrorists or pirates.[81] The legal and enforcement issues potentially associated with terrorist or pirate attacks have been highlighted by recent clashes between the Japanese whaling fleet and the Sea Shepherd Conservation Society (SSCS). In January 2008, two SSCS members boarded the Japanese whaler *Yushin Maru No. 2* without invitation and were detained onboard for three days.[82] The environmental protestors were eventually handed over to the Australian customs vessel *Oceanic Viking* pending their transfer back to the SSCS vessel *Steve Irwin*.[83] In February 2010 a similar incident occurred when a SSCS member, Pete Bethune, boarded the Japanese whaler *Shonan Maru No 2*, in order to present the master of that vessel with a claim

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[80] See Maritime New Zealand, *Investigation Report: Ady Gil and Shonan Maru No. 2* (Maritime New Zealand, Wellington: 2010); Australian Maritime Safety Authority, "Fact finding report into the reported collision involving the New Zealand registered craft Ady Gil and the Japan registered whaling ship Shonan Maru No 2 in the Southern Ocean on 6 January 2010", undated, available online at www.amsa.gov.au.

[81] For the purposes of the current discussion it will be assumed that given the remoteness of Antarctic scientific bases, and the controlled access to those bases, they are relatively secure from a terrorist attack.

[82] Andrew Darby, "Whale war showdown", *Sydney Morning Herald* (Sydney), 16 January 2008, p1.

[83] A. Fraser, "Police left with whales of a mess", *The Canberra Times* (Canberra) 19 January 2008, p1, 2; SSCS asserted that they sought to board the *Yushin Maru No .2* to present the Captain of the vessel with a letter "advising him that his company's activities in the Australian whale sanctuary were in violation of international conservation law and of … [the] Federal Court ruling that outlawed whaling in the area": J. Madden and P. Alford, "Skippers" standoff on pair's release", *The Australian* (Sydney), 17 January 2008, 3.

arising from the damage that had occurred a month earlier to the *Ady Gil*.[84] Bethune was detained on board the *Shonan Maru No 2* and taken back to Japan where he was placed on trial for a number of minor criminal charges. Bethune was eventually given a two-year suspended sentence after making certain admissions, following which he was deported.[85]

The SSCS incidents in 2008 and 2010 once again highlight the difficulty associated with Southern Ocean law enforcement which would also arise following a terrorist or pirate attack. In the 2008 incident the Japanese whaler effectively had no choice but to hand the two protestors over to the Australian authorities aboard the *Oceanic Viking* as there were no Japanese law enforcement assets in place which could have arrested the protestors and returned them to Japan for trial. Though the *Yushin Maru No. 2* could have exercised the option of concluding its whaling operations for the season, that action would have resulted in a significant disruption of its planned operations and come at a considerable commercial cost. In 2010 the master of the *Shonan Maru No 2* was able to exercise the option of detaining Bethune on board his vessel and retuning him to Japan because not only was the ship better equipped for that purpose, but also the incident arose towards the end of the Japanese whaling season and so did not prove to be commercially disruptive.

If a terrorist attack was to take place in Antarctica, setting aside the response to such an event, how would law be enforced? To begin with there is no Antarctic police force, nor are there police forces stationed at any of the Antarctic bases. While many Antarctic base managers have a role in maintaining discipline, that is a very distinctive role from the detention and arrest of a terrorist. Issues therefore arise as to both legal capacity and ability to undertake enforcement action following a terrorist act in Antarctica. Beyond that, the actual application of law to an Antarctic terrorist act would be problematic depending on where it took place. If the act occurred on the continent, then the provisions of the Antarctic Treaty would have clear application. If the perpetrators of the terrorist act were nationals of non-Antarctic Treaty parties a legal question may arise as to whether universal jurisdiction could be exercised over these persons so as to allow for a criminal prosecution. In the alternative, could terrorists be detained and handed over to their state of nationality? If a maritime act of terrorism occurred, similar issues would arise although in that instance the laws of the flag state of any vessel the subject of such an attack may be capable of application. However, again a

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[84] See discussion in Don Anton, "Protecting Whales by Hue and Cry: Is There a Role for Non-State Actors in the Enforcement of International Law?" (2011) 14 *Journal of International Wildlife Law and Policy* 137-145.

[85] K. Newton, "Bethune's Secret Deal" *Dominion Post* (Wellington), 8 July 2010, p1. For further details see Trevor Ryan, "Sea Shepherd v Greenpeace? Comparing Anti-Whaling Strategies in Japanese Courts" (2009) 7 *New Zealand Yearbook of International Law* 131-168.

question would arise with respect to enforcement. In this regard, while the provisions of the amended Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) would be applicable,[86] the convention still relies upon national law enforcement mechanisms for its effectiveness. In this respect some of the difficulties that would arise with respect to law enforcement and prosecutions following a terrorist incident at sea in Antarctica are not dissimilar to the challenges that have been confronted in addressing pirate attacks off the coast of Somalia between 2008-2011 when the naval forces undertaking the counter-piracy operations are constrained from prosecuting the pirates for a variety of legal reasons.[87]

6. Concluding Remarks

Legal issues associated with Southern Ocean shipping are rapidly emerging. While the Southern Ocean is not *sui generis* and remains subject to the same laws of the sea and maritime law that apply elsewhere, there are a range of unique issues that arise in the Southern Ocean. The first is the absence of recognised coastal states with capacity to exercise both proscriptive and enforcement jurisdiction off the Antarctic coast. The second, arising from the first, is the predominant reliance upon flag state jurisdiction. The third is the particular issues arising from undertaking maritime regulation and enforcement in one of the world's most remote oceans and associated maritime safety and security issues. A possible response to these issues is the need for greater attention to be given to emergency prevention, preparedness and response (EPPR). The Southern Ocean is remote from emergency response facilities. Antarctica scientific bases along the continent have limited capacity and infrastructure to provide EPPR, and similar issues arise in the sub-Antarctic where islands are either uninhabited or have minimal infrastructure. These issues have been highlighted in the Southern Ocean by recent maritime incidents. The November 2007 sinking of the *MV Explorer* in the Bransfield Strait off King George Island resulted in a response from the Chilean mainland. An Action Group on Antarctic Fuel Spills (AGAFS) was formed following this incident. This is notwithstanding that EPPR is addressed under Article 15 of the Madrid Protocol under which the parties agree to provide response to environmental emergencies and cooperate in the formulation of contingency plans. However no more detailed mechanisms have been established by the Council of Managers of National Antarctic Programs

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[86] 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 UNTS 222.

[87] J.A. Roach, "Countering Piracy off Somalia: International Law and International Institutions" (2010) 104 *American Journal of International* 397-416.

(COMNAP). More attention needs to be given to the legal framework associated with shipping issues in the Southern Ocean addressing not only matters directly associated with the protection and management of the marine environment, but day-to-day shipping operations, which in the Southern Oceans' current legal and environment extremes may be tested to breaking point.

THE SHIPBUILDING INDUSTRY IN ASIA

TRADE FINANCING LAWS AND PRACTICES OF CHINA

Saibo Jin*

I. Origin – China's Statues on Trade Financing

1. Distinction Between International Trade and Domestic Trade

China-related trade and trade financing mainly refer to international trade and trade financing, the Chinese laws and administrative rules previously or currently in force usually classify trade and trade financing into international and domestic trade and trade financing. This key distinction must first be noted by overseas parties engaging in trade and financial transactions with Chinese enterprises and banks, which should also be the very first legal distinction worthy of attention when any disputes that may arise must be dealt with by the courts of China.

To date, international trade and financial transactions in China has moved towards internationalization and globalization to a considerable degree, but in terms of the business in relation to trade and financial transactions, the distinction between international trade and domestic trade is still rigid, so does the law. It is worthy of our special attention that China usually regards the transactions between the Mainland China and Hong Kong, Macau as well as

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Taiwan as overseas transactions. As such, when any dispute over such transactions arises, it is not likely for the court to apply the legal provision on so-called "domestic transactions" unless otherwise agreed by the parties in advance. Hence, in trade and legal practices, it must first be noted that letters of credit are categorized into international letters of credit and domestic letters of credit, while bank demand guarantees may also be classified into bank demand guarantees in international trade and domestic bank demand guarantees. Their differentiation will be analyzed below.

2. Development of Trade and Trade Financing in China

At present, China has become one of the renowned international trade powerhouses all over the world and the nation's foreign-exchange reserves accumulated over many years of international trade have come close to or exceeded US$3 trillion, without any sign of cease of growth. If the 12th five-year plan of China can be smoothly carried out as planned on an ongoing basis, especially if the Mainland China further promotes and encourages the growth of domestic consumption, the amount of international trade transactions may become increasingly large.

The rapid development in trade will inevitably require the provision of financing convenience by international and domestic financial institutions, and the provision of such convenience as well as the degree of speediness in terms of the method of provision also bring about huge benefits to financial institutions.

The trade financing business among countries and economic entities has reached a fairly mature stage. Complete legal rules and well accepted customs have been established in European countries, United States and Japan in particular. Examples include the *Uniform Commercial Code of United States* that comprises the essence of all U.S. legislation, and the *Commercial Codes* of France, Germany and Japan, as well as judicial precedents from the past tens or even hundreds of years; there are also a number of practicing rules in the commercial and financial sectors prevailing internationally that were accumulated over the past tens of years, among which, the *International Commercial Terms (INCOTERM) of International Chamber of Commerce (ICC)* and the *Uniform Customs and Practice for Documentary Credits* (UCP) could illustrate this point.

Looking back China, the policy of "reform and opening up" indicates the development of international trade, because it may promote the development of a country's economy, which is the foundation for the improvement of national well-being. However, the development of International trade cannot be separated from the promotion of trade financing, it is therefore necessary to learn, understand and comply with the "rules of game" of international commerce and financial transactions in relation to trade financing. The support to the establishment of the legal system including

legislation and judiciary would rely on the grasping and application of these rules. So far, China has made remarkable achievement in the development of this area, yet it should also be noted that some issues require further study.

It requires special attention that there is a huge volume of trade between Mainland China and Taiwan and, the number of cases concerning letters of credit among the dispute cases before the courts are increasing in recent years. In particular, the cases under the background of financial crisis in recent years originated mainly from the disputes concerning trade financing between Mainland and Taiwan enterprises and financial institutions. Given that Mainland and Taiwan banks have respectively set up branches in the places of each other since last year, there is a great room for development of the trade financing business between the two places. In view of this, improvement of the dispute resolution mechanism and mutual understanding of trade financing laws by the industry of the two sides are necessary.

Trade, trade financing and law (including legislation and judicial practices) have showed an intensifying relationship with clear interconnection. That is, trade development usually leads the change, while the financial institutions slowly arranges financial systems including all kinds of financing products to adapt such changes in a conservative and traditional way, and the improvement of legal (including legislative and judicial) system, which is usually slightly lagging behind and often timely follow up in the wake of such development and change.

3. Legislation of National People's Congress and Judicial Interpretation of Supreme People's Court in Trade Financing Domain

Up to now, legislation from the National People's Congress in China's trade financing domain mainly focuses on three areas: (1) Letter of Credit, (2) Demand Guarantee; (3) other financing methods deriving from the two fields.

The National People's Congress does not make any special legislation on Letter of Credit, and the statute designated for Letter of Credit is the "Fraud Crimes on Letter of Credit" as provided in Article 195 of the *Criminal Law*[1].

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[1] *The Criminal Law of People's Republic of China*, adopted at the 2nd session of the 5th National People's Congress on July 1, 1979 and revised at the 5th session of the 8th National People's Congress on March 14, 1997. Amended in accordance with the Amendment to the Criminal Law of the People's Republic of China (adopted at the 13th session of the 9th Standing Committee of the National People's Congress on December 25, 1999; amended in accordance with the Amendment II to the Criminal Law of the People's Republic of China (adopted at the 23rd session of the 9th Standing Committee of the National People's Congress on August 31, 2001); amended in accordance with the Amendment III to the Criminal Law of the People's Republic of China (adopted at the 25th session of the 9th Standing Committee of the National People's Congress on December 29, 2001); amended in accordance with the Amendment IV to the Criminal Law of the People's Republic of China (adopted at the 31st session of the 9th Standing Committee of the National People's Congress on December 28, 2002; amended in accordance with the Amendment

Since Letter of Credit is a brand-new commercial field, Chinese civil and commercial laws in the early stage do not provide for any basis for statute law concerning Letter of Credit, while criminal cases concerning fraud crimes on Letter of Credit are numerous, as a result, the legislative provisions of Criminal Law on Letter of Credit are in place before the issue of the judicial interpretation on the trial of commercial dispute cases concerning Letter of Credit by the Supreme People's Court. This clause is specified as follows: "*Whoever commits fraud by means of a Letter of Credit in any of the following ways shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention and shall also be fined not less than 20,000 yuan but not more than 200,000 yuan; if the amount involved is huge, or if there are other serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years and shall also be fined not less than 50,000 yuan but not more than 500,000 yuan; if the amount involved is especially huge, or if there are other especially serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment and shall also be fined not less than 50,000 yuan but not more than 500,000 yuan or be sentenced to confiscation of property: (1) using a forged or altered Letter of Credit or any of its attached bills or documents; (2) using an invalidated Letter of Credit; (3) fraudulently obtaining a Letter of Credit; or (4) in any other ways*" Article 199 of the Criminal Law provides for sentencing.[2] At present, the defendant of the Letter of Credit fraud cases tried by the courts of China shall be subject to severe sentencing for a term of imprisonment of no more than 10 years or even longer than that if the loss is significant.

V to the Criminal Law of the People's Republic of China (adopted at the 14th session of the 10th Standing Committee of the National People's Congress on February 28, 2005); amended in accordance with the Amendment VI to the Criminal Law of the People's Republic of China (adopted at the 22nd session of the 10th Standing Committee of the National People's Congress on June 29, 2006); amended in accordance with the Amendment VII to the Criminal Law of the People's Republic of China (adopted at the 7th session of the 11th Standing Committee of the National People's Congress on February 28, 2009); amended in accordance with the Amendment VIII to the Criminal Law of the People's Republic of China (adopted at the 19th session of the 11th Standing Committee of the National People's Congress on February 25, 2011) (amended in accordance with the Decision of the Standing Committee of the National People's Congress on Revision to Certain Laws).

[2] Article 199 provides that "anyone that commits the crime provided in Article 192, 194 or 195 shall, if the amount involved is extremely large and exceptionally huge losses are caused to the interests of the State and the people, be sentenced to life imprisonment or death penalty and property shall be confiscated." Article 200 provides as follows: "where an entity commits the crime as provided in Article 192, 194 or 195 hereof, it shall be fined, and the personnel directly in charge and other directly responsible personnel shall be sentenced to fixed-term imprisonment of not more than five years or penal servitude; in case that the amount involved is large or in case of other severe circumstances, he shall be sentenced to fixed-term imprisonment of not less than five years but not more than ten years; where the involved amount is extremely large or in case of other extremely severe circumstances, he shall be sentenced to fixed-term imprisonment of

The legislative basis for bank demand guarantee is commonly considered to be a presumption clause subordinate to Paragraph 1 of Article 5 of the Security Law[3], however, Paragraph 2 thereof expressly provides that "*unless otherwise agreed by the parties, such agreement shall be followed*", that is, where the parties otherwise agree that such security is independent in nature and will not be void irrespective of the validity of the main contract. In this case, the problem would be that the courts of China will usually respect the agreement of the parties for the interpretation of this provision and this is the only provision of a special legal basis in relation to independent security in China at present, which makes it difficult to handle complicated disputes. In the face of surging dispute cases concerning demand guarantee of huge amount due to the recent international financial crisis and the Libya war, the Supreme People's Court has commenced pertinent investigation and research, which may be reckoned that the corresponding judicial interpretation will be released in the near future.

4. Provisions of the Supreme People's Court on Whether People's Courts may Adopt Measures to Freeze and Deduct Deposits for Issuance of Letter of Credit[4]

Another important judicial interpretation concerning Letter of Credit would be the *Several Provisions on Issues Concerning the Freeze and Deduction of Deposits under Letters of Credit*, which explicitly state two issues, one is the nature of the deposit for Letter of Credit, that is "*the deposit for issuance of Letter of Credit is the fund provided for security payment by the enterprises with import and export rights when applying to banks for issuance of Letter of Credits to overseas (foreign) parties.*" The other is the issue of whether such deposit of Letter of Credit may be deducted, "*During the trial or enforcement procedure, people's courts may adopt measures to freeze deposit for issuance of Letter of Credit, but may not deduct such deposit. Where the parties concerned believe certain funds frozen and deducted by the people's court fall into the scope of deposit for security of Letter of Credit, they shall*

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not less than ten years or life imprisonment. "Article 200 also provides that "large amount" refers to the case that an individual commits a letter of credit fraud crime, the amount involved is more than RMB100,000, and where an entity commits a letter of credit fraud crime, the amount involved is more than RMB500,000; "extremely large amount" refers to the case that an individual commits a letter of credit fraud crime, the amount involved is more than RMB500,000, and in case an entity commits a letter of credit fraud crime, the amount involved is more than RMB2,500,000."Severe circumstances" and "extremely severe circumstances" shall be specifically analyzed and determined with reference to the means used by criminals, the direct economic losses arising therefrom and the degree of harm to the reputation of the bank."

[3] The Security Law adopted at the 14th session of the Standing Committee of the 8th National People's Congress of the People's Republic of China on June 30, 1995, was hereby promulgated and came into force on October 1, 1995.

[4] The judicial interpretation of the Supreme People's Court was promulgated on September 3, 1997 and came into force on the same day.

provide relevant evidence to substantiate. Upon review and examination, the people's court may handle the case based on the following principles: where such fund is indeed the deposit for issuance of Letter of Credit, no deduction measures shall be adopted; and if the issuing bank has performed the obligation for overseas payment, the people's court shall, based on the application made by such bank, immediately revoke the measures to freeze the corresponding part of the deposit for issuance of Letter of Credit; where the deposit for issuance provided by the issuer is foreign currency and the parties concerned can prove that the documents provided by the beneficiary of the Letter of Credit are consistent with the clauses of the Letter of Credit, the people's court shall immediately revoke such measures." Where the payment obligation under the Letter of Credit of the issuing bank is discharged or completed, such deposit for issuance may then be frozen and deducted.

This judicial interpretation on deposit of Letter of Credit was in place earlier than the judicial interpretation on Letter of Credit, it was because people's courts in China did not fully understood the rules of Letter of Credit, especially for those cases concerning judicial injunction on Letter of Credit, therefore they mistakenly treated the deposit under Letter of Credit as the fund under Letter of Credit and froze or deducted such fund. In fact, the deposit of Letter of Credit is the fund provided to banks as the security for payment to bank by the applicant of Letter of Credit, which belongs to the applicant, However, the independent payment security made to the beneficiary of the Letter of Credit by the issuing bank is merely relied on the credit of the bank. Given that Letter of Credit is of an independent and abstract nature, the issuance of Letter of Credit by bank means the issuing bank, instead of applicant, independently undertake the liability for payment to the beneficiary. The beneficiary mainly relies on the payment security of the issuing bank instead of that of the applicant. Therefore, when a people's court in China freezes the Letter of Credit, it should be the payment under the Letter of Credit made by the issuing bank to be frozen, instead of the deposit of the Letter of Credit. This judicial interpretation helps to clarify this problem to a great extent. Up to now, this is the only specific judicial interpretation on freezing and deduction of deposits to all types of banks (including the deposit for bill of exchange) by the people's courts, as to other types of deposit, there is still ambiguity.

5. Provisions of the Supreme People's Court on Several Issues Concerning Trial of Letter of Credit Dispute Cases[5]

Since 1997, the Supreme People's Court has drafted a judicial interpretation relating to Letter of Credit at the strong request of the People's

[5] Such Provisions, Fa Shi [2005] No.13, were adopted at the 1,368th executive meeting of the Trial Committee of the Supreme People's Court on October 24, 2005, which came into force on January 1, 2006.

Bank of China and other domestic commercial banks so as to standardize and regulate the trial of Letter of Credit dispute cases by people's courts in China, especially for the trial practices pertinent to the cases concerning injunctions of Letter of Credit[6]. The background for the issue of this judicial interpretation is that the international reputation of Letters of Credit issued by domestic banks of China was severely harmed due to the inadequacy of the criteria and discretion of local people's courts in China in their trial of the Letter of Credit dispute cases arising out of lack of understanding of the international "Rules of Game" in the area of Letter of Credit. The Supreme People's Court has spent almost 8 years in the drafting and revision of the said judicial interpretation, during which it has sought opinions of the commercial, financial and legal sectors, and the said judicial interpretation was promulgated in 2005 and came into force in 2006. It should be mentioned that the said judicial interpretation has maintained the reputation of the people's courts of China on the international front, enhanced the reputation of the banking industry of China and is actually playing a role in the settlement of disputes[7].

II. Dispute Cases and Court Precedents Concerning Letter of Credit and Bank Demand Guarantee

1. Development of international Letter of Credit and trial of dispute cases

Over the past twenty years, the courts of China have tried a great number of dispute cases concerning international Letter of Credit. From our partial statistics, there are more than 500 court judgments of dispute cases on international Letter of Credit or in relation to Letter of Credit transactions[8]. However, the actual number of cases involved in such judgments that are purely related to Letter of Credit transactions, such as discrepancy, advice, negotiation, confirmation, transfer and assignment of Letter of Credit, is of a very small percentage, while most of the cases are in fact disputes in connection with financing between the issuing bank and the applicant or

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[6] Please find the draft versions of the said judicial interpretation for different periods in the blog of Attorney Jin Saibo, http://blog.sina.com.cn/jinsaibo.

[7] During the financial crisis, the Supreme People's Court has published a study report after the issuance and effectiveness of a letter of credit judicial interpretation, see the study report "Proper Trial of Cases concerning Credit of Letter and Addressing International Financial Crisis—Study Report on Issues Faced by the People's Court for Trial of Cases concerning Letter of Credit under the Current International Financial Crisis and the Counter-measures" on the issues in cases concerning letter of credit and the counter-measures, which was published in People's Court Daily on May 28, 2009 and the author is the fourth civil tribunal of the Supreme People's Court.

[8] See relevant cases at the Laws, Cases and Materials of Letter of Credit and Trade Financing in China, author Jin Saibo, Law Press China, 2005, and the Commentary on Laws and Important Cases of Letter of Credit in China (2001) prepared by Jin Saibo, published in 2003 by the University of International Business and Economic Press. The latest cases are still under preparation for publication later.

security between the issuing bank and the guarantor involved in Letter of Credit transactions. Surely, there are a considerable number of cases concerning the determination of Letter of Credit frauds and whether the people's courts of China will grant judicial remedy under the laws of China.

2. Domestic Letter of Credit Dispute Cases

It is surprising that there has been a big growth of domestic Letter of Credit business in recent years with a total business value of over hundreds of billions in 2010. However, the transaction of domestic Letter of Credit was of a very small amount three to four years ago due to many operational problems and inappropriate provisions of *the Measures for Settlement of Domestic Letter of Credit*[9] formulated and promulgated by the People's Bank of China, which impedes the launch of the domestic Letter of Credit settlement business. As affected by the recent international financial crisis, the Chinese courts have accepted quite a number of domestic Letter of Credit dispute cases, which involve certain special banking operational practices and legal issues. However, due to inflation over the year, the People's Bank of China has tightened the fund liquidity position which gives rise to the situation that commercial banks are unable to provide loans to enterprises and individuals despite the funds they have, therefore the domestic Letter of Credit settlement business, which acts as off-balance sheet business and is not limited by position on loan limit, is prevailing to the contrary and becomes an "efficient instrument" widely welcomed by banks since banks may provide financing convenience and obtain intermediary business revenue therefrom. The Chinese branches or subsidiaries of foreign-funded banks are also very interested in that.

An interesting legal problem is whether the said judicial interpretation on Letter of Credit by the Supreme People's Court may be applied in the domestic Letter of Credit dispute cases. For example, points of view of a totally different nature can be seen from judgments on cases of the same type in some local people's courts. Specifically speaking, a judgment rendered in a case tried by local court indicated that such judicial interpretation may not apply[10]; however, another local court held in a different case that such judicial

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[9] Promulgated by China's people's court on July 16, 1997, and implemented on August 1, 1997.

[10] Judgment of the second instance of the Higher People's Court of Shandong Province on the Case concerning Letter of Credit Dispute Between the Laiwu Branch, Bank of China and the Shandong Daiyin Textile Group Co., Ltd. (ruled on April 2, 2009). During the second instance of this case, Higher People's Court of Shandong Province had asked for instructions from the Supreme People's Court—-Reply of the Supreme People's Court for Instructions on Case concerning the Letter of Credit Dispute Between the Laiwu Branch, Bank of China and the Shandong Daiyin Textile Group Co., Ltd. (March 20, 2009, [2009] Min Si Ta Zi No. 9).

interpretation may apply[11]; whereas the Supreme People's Court did not take its stand on this[12]. In particular, the courts in Changshu, Jiangsu Province and Ningbo, Zhejiang Province have recently accepted several domestic Letter of Credit cases related to Taiwan-funded enterprises, which increase the difficulty in making judgment thereupon.

3. International Bank Demand Guarantee Dispute Cases

The dispute cases concerning bank demand guarantee have risen sharply in recent years. The main reason thereof lies in the disputes arising out of the impossibility of performance or failure of performance of all kinds of commercial transactions resulting from the global financial crisis not long ago and the political upheaval factors such as the Libya war. There are mainly three types of transactions.

The first type of transaction relates to the long-term agreement in international trade, where a party thereto failed to continue to perform such agreement due to the financial crisis, and the other party made claims for the payment under the Performance Guarantee. The second type of transaction relates to disputes concerning recourse of payment under the Refund Guarantee as a result of the fact that the European and United States shipowners in the China shipbuilding industry have abandoned their ships concerned in view of the sharp fall of ship prices due to the financial crisis.

The third type of transaction relates to disputes concerning large guarantee issued to Libya business owners by banks in China between Libya banks and banks in China that issued the counter guarantee, such dispute arises after Chinese engineering contractors in Libya withdraw all engineering personnel due to the Libya war. Recently, the claim on this type of dispute and the amount demanded for extension have reached US$500,000,000, while it is said that the guarantee amount in Libya involving Chinese-funded enterprises has reached US$10,000,000,000.

It is heard that the Supreme People's Court seems to have determined that cases concerning disputes related to bank demand guarantee may not be

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[11] Civil verdict of second instance by the Higher People's Court of Zhejiang Province on Case concerning Letter of Credit Fraud Dispute between the Review Applicant Ningbo Branch of China Minsheng Bank and the Review Respondent Zhejiang Huamao International Trading Co., Ltd. (rendered on February 23, 2009).

[12] During the financial crisis, the Supreme People's Court has published a study report after the issuance and effectiveness of a letter of credit judicial interpretation, see the study report "Proper Trial of Cases concerning Credit of Letter and Addressing International Financial Crisis—Study Report on Issues Faced by the People's Court for Trial of Cases concerning Letter of Credit under the Current International Financial Crisis and the Counter-measures", which was published in People's Court Daily on May 28, 2009 and the author is the fourth civil tribunal of the Supreme People's Court. For legal and practicing issues in relation to the domestic letter of credit business, see the article of Attorney Jin Saibo titled "Risks and Safeguards against the Settlement Business of Domestic Letter of Credit" in his blog, http://sina.com.cn/s/blog_540752bd0100u5zt.html.

applicable to the said judicial interpretation on Letter of Credit, even though dispute cases may involve standby Letter of Credit, such judicial interpretations may not apply, the reason thereof may be that the standby Letter of Credit is called Letter of Credit, its obvious objective is to be issued for guarantee. The clear stand of the Supreme People's Court for the present is that resolution related to demand guarantee must be solved within the framework of the Guarantee Law. However, the problems in relation to demand guarantee are still under study by the Supreme People's Court, there might be changes afterwards, hence, no absolute conclusion can be made to the applicability of law for issues concerning demand guarantee.

The large-amount claim of hundreds of million dollars made by local Libya guarantee banks against the counter guarantee banks within the territory of China due to the Libya war in recent months has come to the close attention of the Supreme People's Court. As the Supreme People's Court has no guiding case and practical experience in trial of cases as of today, how to solve this Libya guarantee claim crisis from the perspective of legal system formulation may be a good opportunity and driving force for the Supreme People's Court to formulate judicial interpretations concerning demand guarantee. However, it should be noted that the problem here would be that no case has been brought to court due to disputes arising out of demand guarantee between enterprises or banks of Mainland and those of Taiwan.

4. Domestic Demand Individual Guarantee Dispute Cases

What is incomprehensible to the banking community in China is the denial of the independent nature of agreement of individual guarantee in "domestic economic transaction" by the Supreme People's Court. Several precedents of the Supreme People's Court have explicitly denied the independent nature of individual guarantee in the "domestic economic transaction" or "domestic commercial transaction", and changed individual guarantee to guarantee of joint and several liability on a mandatory basis which violates the agreement between the parties in addition to denial of the independent nature of domestic individual guarantee.[13]

The more catastrophic consequence resulted from this practice that violates the agreement of the parties and therefore violates the principle of autonomy of will is that the Supreme People's Court fails to provide clear

[13] An earlier judgment would be the Judgment for Second Instance of the "Case concerning the Agency Import Contract Dispute Among Hunan Machinery Import and Export Corporation, Hainan International Leasing Co., Ltd. and Ningbo Oriental Investment Co., Ltd." (ruled on December 31, 1999), a later judgment would be the Judgment for Second Instance of the "Case concerning the Loan Guarantee Contract Dispute Between the Appellant Hunan Dongting Aquaculture Co., Ltd and the Appellees Changsha Huashun Branch of the China Everbright Bank, Hunan Genuine New Material Group Co., Ltd and Changsha New Zhensheng Group Co.,Ltd." (ruled on December 26, 2007).

guidelines for defining domestic economic transactions/domestic commercial transactions and international economic transactions, as well as their distinctions from the legal perspective when it denies the validity of individual guarantee in "domestic economic transaction". In actual, complicated and globalized commercial activities, certain commercial transactions would certainly and obviously be international economic transactions or domestic economic transactions; however, many commercial transactions took place in a complicated legal relationship both internationally and domestically. For example, a basic transaction is indeed transnational or international, the guarantee transaction in relation to the basic transaction is possibly arranged within the territory of China due to financing convenience; or the basic transaction is obviously a domestic economic transaction, but the guarantee transaction is possibly perceived to be an international economic transaction due to the convenience in arrangement and funding; or in a complicated commercial transaction, the guarantee transaction is an international economic transaction, the counter guarantee transaction is the domestic counter guarantee of domestic guarantee bank provided for such international economic transaction by domestic parties, and from the last part, it is purely a domestic economic transaction. The error in the trial of the Supreme People's Court inevitably gives rise to the chaos in banking and commercial practices in the area of bank demand guarantee and therefore subject to criticism by practitioners.

The dispute cases occurred recently show that the aforesaid standpoint of the Supreme People's Court in relation to the domestic individual guarantee will give rise to a series of more severe and nightmarish "after-effect". There are at least two obvious catastrophic after-effects. One "after-effect" would be the so-called "nightmare of owners", that is, in China, false bank demand guarantee is available everywhere, the so-called unconditional individual guarantee issued by domestic banks and paid by domestic owners on demand are all "false" in law in accordance with the precedents and trial practices of the Supreme People's Court. Once the contractor fails to perform the agreement, the beneficiary of such guarantee, the engineering project owner will find out that the commercial banks that issue such guarantee would "break their promises" and refuse to make payment without any reason or request the parties concerned to first settle the dispute under the basic transaction to determine the amount of main credits before make claims to guarantee banks for payment. Such act of domestic commercial banks totally violates its undertakings made in the demand guarantee. Some real cases have showed the characteristics of some domestic commercial banks' by disregarding their own reputation and "breaking promises to obtain benefits". The other "after-effect" is the so-called "nightmare of main contractor", that is, for the main contractor that applies to domestic bank to issue guarantee in international economic activity and therefore assumes liability for payment of valid demand

guarantee to overseas owners, where the sub-contractor fails to strictly perform the sub-contracting agreement and therefore in default, the guarantee bank of main contractor will be liable to the claims from the project owner, i.e. guarantee beneficiary. But when it turns to the domestic bank that provides guarantee for subcontractor to make claim for the payment under demand guarantee provided by the main contractor, the claim will be denied for payment. The recent cases of guarantee claim disputes arising from the Libya guarantee claim cases have confirmed that point once again. This reveals that the Supreme People's Court is required to strengthen investigation and research in this field, and the necessity in formulating the relevant judicial interpretations as soon as possible.

5. International Collection Disputes and Cases

The number of international collection transactions in China is huge but the number of dispute cases resulting from such transactions is small[14]. So far, not more than 20 cases related to collection disputes were brought to the people's courts of China and the amounts under dispute are not large. However, once there is any dispute, the legal issues involved would be relatively complicated. A problem frequently comes up in international collection cases is applicability of law. Specifically speaking, where the parties to international collection do not agree to apply the Uniform Rules of Collection (URC) of the International Chamber of Commerce, the judgments of people's courts of China on whether to apply the laws of the place of issue of instruments for collection or to first determine the nature of the case as international collection before making reference to and applying the said URC would usually be inconsistent.

6. Factoring and Forfeiting Dispute Cases

In China, the so-called "Factoring" and "Forfeiting" cases in relation to the purchase and sale of receivables are very rare. These two types of cases mainly involve the purchase and sale and pledge of receivables in trade. The so-called "Factoring" is the abbreviation for "del credere agency", that is when a bank, at the request of a client, purchases the receivables from a third party under one or more transactions or the documents under transaction, the bank may provide a financing service to such client by purchasing such receivables and making undertaking for guarantee payment to the beneficiary or by directly purchasing receivables and collecting payment from a third party, or the bank acts on behalf of the client to collect such receivables from such third party, from which the bank may collect financing charge and service fee from

[14] Only eight cases are under author's current collection which are all published in the blog of Jin Saibo at http://blog.sina.com.cn/jinsaibo.

the financing it provided. Forfeiting business also follows similar rules, except that there is no recourse or only limited recourse for the payment of the receivables purchased by the bank from the applicant (client) after payment to the applicant. Among the cases collected by the author, there is only one factoring case[15] and only a few forfeiting dispute cases. Despite that, the percentage of factoring and forfeiting business in banking trade financing rises rapidly, and in practice, several cases concerning disputes over factoring and forfeiting transactions between Mainland enterprises and Taiwan enterprises have already been in place.

7. Binding Precedents of Court Judgments

For a long time, there is no statutory provision on whether China recognizes the binding precedents of court judgments, that is whether the final judgment of courts has any binding effect on the future cases of such court and lower level courts. In this regard, the Supreme People's Court has made the Provisions on Precedent Guiding Work[16] in 2010. Article 2 of such judicial interpretation provides that where a judgment is already legally binding and a case that meets the following conditions "shall" be "referred to" by courts at all levels at the trial of similar cases: (1) with wide public concern; (2) where the law requires comparison of principles; (3) of a typical nature; (4) complicated or of new type; and (5) other cases with guiding functions. Once such case is published by the Supreme People's Court as the "guiding case", in accordance with the provision of Article 7 of such judicial interpretation, "the guiding cases published by the Supreme People's Court shall be referred to by people's courts at all level at the trial of similar cases.

III. Issues Concerning Application of International Practices and Domestic Laws and Foreign Laws

1. Attitude of People's Courts of China towards International Practices and Issues concerning Application Thereof

At the initial stage of reform and opening up, there were lots of problems in the trial of cases concerning Letter of Credit by people's courts of China, but experience has been accumulated for trial of such cases with the lapse of time and the increase in the number of cases. So to speak, the people's courts in China, just like their counterparts all over the world, will occasionally make mistakes in individual cases in the trial of cases concerning disputes arising from Letter of Credit, their overall level is on the rise.

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[15] Forfeiting Practice Operation and Risk Management, by Cha Zhongming & Jin Saibo, Law Press China, 2005. See the appendices for relevant cases.

[16] Document of the Supreme People's Court: Fa Fa [2010] No. 51, came into force on November 26, 2010.

Firstly, the judicial interpretation on Letter of Credit formulated and promulgated by the Supreme People's Court surprisingly becomes the ready-made teaching material for judges in the people's courts of China who do not have profound understanding in this specialized field to study Letter of Credit related trial; secondly, such judicial interpretation explicitly requires people's courts in China to "refer to" international practices like UCP and comply with the International Standard Banking Practice (ISBP), and from the judgments of Letter of Credit cases tried by the people's courts of China in recent years, people's courts of China are able to accurately apply the UCP in their trial of cases concerning Letter of Credit disputes in which UCP 600 is explicitly applicable; and in cases concerning the discrepancy disputes arising from Letter of Credit tried by the people's courts of China, over ten cases have applied the so-called "International Standard Banking Practice (ISBP)".

The biggest progress made by the people's courts of China in the trial of cases concerning disputes arising from Letter of Credit includes the enhancement of standards for application and when the courts are required to cease payment of Letter of Credit, which makes it difficult to obtain judicial injunction from the people's courts of China, and the standardization of the conditions and operating procedures for people's courts of China to issue judicial injunction. So to speak, after the issue of such judicial interpretation on Letter of Credit, cases concerning judicial injunction of Letter of Credit are rare. This obviously enhances the certainty of law of the payment of Letter of Credit, thereby enhancing the commercial reputation of Letter of Credit issued by the banking industry in China all over the world.

In those cases concerning demand guarantee tried by the people's courts of China, where the parties agree to apply the Uniform Rules of Demand Guarantee (URDG, Publication No.:458 or its latest version: URDG758) of the International Chamber of Commerce, the people's courts in China will respect the agreement in such guarantee and URDG will automatically apply[17]. However, if there is no agreed applicable governing law or practicing rule in the guarantee, the judgment of courts in this respect may be inconsistent. For example, in a case first tried by the Higher People's Court of Jiangsu Province

[17] Judgment of Second Instance by Higher People's Court of Shandong Province on the "Case concerning Guarantee Fraud Dispute Between the Appellant BHP Billiton Sales Company and the Appellee Longkou Donghai Trade Co.,Ltd. and the Third Party of First Instance Jinan Branch of Shanghai Pudong Development Bank (ruled on May 26, 2008).The judgment of this case is the Civil Judgment of First Instance on "Case concerning Guarantee Fraud Dispute Between the Plaintiff BHP Billiton Sales Company and the Defendant Longkou Donghai Trade Co.,Ltd. and the Third Party Jinan Branch of Shanghai Pudong Development Bank (ruled on December 13, 2007). The guarantee involved in this case explicitly agrees that according to URDG58, for the issue of letter of credit, the people's court directly applied URDG458, however, for the fraud and judicial remedy involved in this case, due to the absence of provision in URDG458, the people's court applied the law of forum, i.e. China laws.

and finally ruled by the Supreme People's Court, URDG458 was determined as international practice, even though the guarantee concerned does not rely on this practice, the court may still apply.[18] In contrast, in a demand guarantee case tried by the Higher People's Court of Beijing, the judgment ruled that URDG458 shall be insufficient to be regarded as an "international practice", because URDG is not generally accepted by and repeatedly used by the banking industry around the world like UCP.[19]

2. Agreed Application of Foreign Laws and Application of China Laws

It is rare that the clauses contained in a Letter of Credit will contain agreement to apply foreign laws, while it is quite common for standby Letter of Credit and demand guarantee to contain agreement to apply the laws of a designated country. The attitude of the people's courts in China is as follows: where the parties explicitly agree in the standby Letter of Credit and demand guarantee to apply the laws of a designated country, the court will respect the agreement of the parties; where the parties made no agreement thereon, the law of forum, the China laws, will apply.[20]

As for the application of foreign laws, an issue to be noted is to apply merely the substantial rules in foreign laws without application of the procedural rules in foreign laws. When it comes to the application of China laws, it should be noted that where it is otherwise provided by the UCP or

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[18] Judgment of second instance of the Supreme People's Court on Case concerning Dispute Arising out of Failure to Make Delivery under Purchase and Sale Contract between Appellant Commercial Bank of Italy and the Appellees Jiangshu Liyang Shafeite Non-woven Co., Ltd. and Italy Feiertegao Corporation (ruled on October 31, 2000). As to another case tried by the Intermediary People's Court of Shenyang, Liaoning, with the judgment of first instance by the Intermediary People's Court of Shenyang, Liaoning on Case concerning Demand Guarantee between the Plaintiff Malaysia KUB Power Sdn. Bhd. and the Defendant Shenyang Branch of China Everbright Bank (ruled on November 28, 2004), there is no appeal of that case. The guarantee involved in that case does not contain any agreement to apply URDG, and the intermediary People's Court finally and directly applied URDG458, and the judgment states that URDG of International Chamber of Commerce is an international practice.

[19] Judgment of second instance of the Higher People's Court of Beijing on Case concerning Other Guarantee Contract Dispute between the Appellant Dawning Information Technology Co., Ltd. and Datum Data Co., Ltd. and the Appellee Export and Import Bank of China (ruled on April 28, 2007), and the judgment of first instance of the Second Intermediary People's Court of Beijing on Case concerning Individual Guarantee Between the Plaintiff Export and Import Bank of China and the Defendants Dawning Information Technology Co., Ltd. and Datum Data Co., Ltd. (ruled on September 16, 2005). URDG finally applied to this case for the reason that the parties have both referred to URDG, by which the court deems that the parties have reached new agreement for application of law, therefore the rules for application of law agreed by the parties thereafter shall apply to the case. See the full text of the cases at Jin Saibo's blog at: http://blog.sina.com.cn/s/blog_540752bd01017qt8.html.

[20] In a case tried by the First Intermediary People's Court of Tianjin represented by the author, the counter guarantee contains agreement to apply Singaporean laws, but the Plaintiff claims that the case shall apply China laws, because it is related to guarantee fraud infringement, therefore the law of the place of infringement activity shall apply instead of the applicable law as agreed in the guarantee contract. This case is currently under the first instance process.

URDG, such provision shall apply; otherwise, the relevant provisions of shall apply. In this regard, for instance, International Chamber of Commerce deems that issues such as recognition of Letter of Credit fraud and whether to provide judicial remedy are not problems falling into the scope of the provisions of UCP and URDG, therefore such issues will automatically be applicable to the relevant recognition on fraud by Chinese laws and be handled in accordance with the corresponding judicial remedy as provided by Chinese laws[21].

It should also be noted that because the judicial interpretation on Letter of Credit does not apply to the trial of cases concerning demand guarantee disputes, therefore the provisions that may be applicable to the Letter of Credit fraud and its judicial remedy in the judicial interpretation on Letter of Credit would be unable to be used in cases concerning demand guarantee, for example, the judicial remedy for ruling of suspension of payment of Letter of Credit and judgment on termination of payment of Letter of Credit. However, the people's courts of China may still rule to freeze the payment under Letter of Credit in accordance with the system of preservation in litigation as provided in the Civil Procedure Law, and finally may rule to terminate the payment under the Letter of Credit because there is no substantial distinction between such suspension and termination and the basis for formulation of judicial injunction of Letter of Credit system in Civil Procedure Law is the system of "Preservation in Litigation".[22]

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[21] Judgment of Second Instance by Higher People's Court of Shandong Province on the "Case concerning Guarantee Fraud Dispute Between the Appellant BHP Billiton Sales Company and the Appellee Longkou Donghai Trade Co.,Ltd. and the Third Party of First Instance Jinan Branch of Shanghai Pudong Development Bank (ruled on May 26, 2008).The Judgment of this case is the Civil Judgment of First Instance on "Case concerning Guarantee Fraud Dispute Between the Plaintiff BHP Billiton Sales Company and the Defendant Longkou Donghai Trade Co.,Ltd. and the Third Party Jinan Branch of Shanghai Pudong Development Bank (ruled on December 13, 2007).The guarantee involved in this case explicitly agrees that according to URDG458, for the issue of letter of credit, the people's court directly applied to URDG458, however, for the fraud and judicial remedy involved in this case, due to absence of provision in URDG458, the people's court applied to the law of forum, i.e. China laws. Another case to which China laws apply in terms of fraud and remedy may be found in the Civil Judgment of first instance of the Intermediary People's Court of Shenyang, Liaoning on the Case concerning Guarantee Fraud Dispute Between the Plaintiff Shenyang Mining Machinery Import and Export Corporation and the Defendant Blectrotherm (India) Limited and Third Person Shenyang Branch, China CITIC Bank Corporation Limited (ruled on February 3, 2008). After the announcement of the judgment for first instance, the parties concerned made no appeal and therefore the judgment of first instance came into effect.

[22] As to the relationship between the letter of credit injunction system provided in the letter of credit judicial interpretation and the system of preservation in litigation in the Civil Procedure Law, see the Provisions and Instructions on Several Issues concerning Trial of Letter of Credit Dispute Cases issued by the Supreme People's Court, which may be found in the blog of Jin Saibo at http://blog.sina.com.cn/s/blog_540752bd010007c7.html, but the relevant provisions as provided in the letter of credit judicial interpretations are different from the injunction which must be subject to application for review procedure to the superior court and review of the preservation in litigation by court.

3. Recognition of Application of Taiwan Laws by People's Courts

The Trial Committee of the Supreme People's Court has adopted the *Provisions on Application of Laws in the Trial of Taiwan-related Civil and Commercial Cases* on April 26, 2010. There are three provisions in this latest judicial interpretation of the Supreme People's Court which came into force on January 1, 2011. "Article 1 People's courts shall apply the relevant provisions of the laws and judicial interpretations at the trial of Taiwan-related civil and commercial cases. Where the civil laws of Taiwan are determined to apply according to the rules concerning the choice of law as provided in the laws and judicial interpretations, the people's courts shall apply accordingly. Article 2 When participating in the civil litigation held in people's courts, the Taiwan parties shall have the same litigation rights and obligations as those of the Mainland parties, and their legitimate rights and interests shall be equally protected by law. Article 3 Where the relevant laws determined to be applied in accordance with these Regulations violate the fundamental principles of national laws or social and public interests, such laws may not apply." The most important provision is Paragraph 2 of Article 1, that is "Where the civil laws of Taiwan are determined to apply according to the rules concerning the choice of law as provided in the laws and judicial interpretations, the people's courts shall apply accordingly." This provision illustrates that Chinese courts recognize the civil laws of Taiwan in judicial interpretations in history.

4. Mutual Independence Between the Application of Law of Basic Contract and the Application of Law of Letter of Credit and Guarantee

The Supreme People's Court has clearly expressed in its two precedents concerning Letter of Credit dispute cases that in the mutually independent transactions between Letter of Credit and bank guarantee and basic contracts, even if the fundamental contract has provided for the applicable governing laws, the governing laws applicable to Letter of Credit and bank guarantee may not be affected by that. Unless the parties agreed otherwise in advance, the laws that shall be applicable to the Letter of Credit and bank guarantee shall be the laws of forum, i.e. Chinese laws[23].

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[23] Verdict of second instance of the Supreme People's Court on Case concerning Letter of Credit Dispute Between the Sealant Co., Ltd. and the Genius Co., Ltd. (rendered on August 31, 2004). The basic contract of that letter of credit dispute case is about the goods purchase and sale between the China company and Japan company, and it is provided in the dispute resolution clause of such purchase and sale contract that once there is any dispute, the parties agree to submit the dispute case to the "International Court of International Chamber of Commerce" for arbitration. The second instance of the Supreme People's Court ruled that people's courts of China have no jurisdiction over the basic contract, but have jurisdiction over letter of credit dispute case, because the letter of credit and basic purchase and sale contract are mutually independent.

5. Application of Laws for Other Contractual and Guarantee Transaction Relationship in Relation to Letter of Credit and Bank Guarantee

To be precise, most dispute cases concerning Letter of Credit are not pure Letter of Credit dispute cases relevant to issuing bank, beneficiary and intermediary bank. For example, the repayment dispute between the issuing bank and the applicant for issue of Letter of Credit, and the dispute concerning guarantee for issue of Letter of Credit between guarantor for issue of Letter of Credit and the issuing bank. These transactions are not typical Letter of Credit dispute cases, therefore, once these disputes involve relations between the domestic parties, the Contract Law and Guarantee Law of China[24] shall apply in accordance with their respective legal relationships.

IV. Jurisdiction

1. Independence of Jurisdiction over Underlying Contract, Letter of Credit and Letter of Guarantee

As said before, in accordance with the independence principle of Letter of Credit and demand guarantee, where the underlying contract explicitly specifies arbitration clause and jurisdiction clause, the people's courts of China will respect the agreement of the parties concerned at the trial of the disputes arising from the contract. However, there is usually no agreement on jurisdiction in the Letter of Credit clause(s), whereas the standby Letter of Credit and demand guarantee clauses will usually include jurisdiction clause. In that case, a problem will usually come up, that is when there is explicit and valid jurisdiction clause in the underlying contract while the Letter of Credit does not contain such clause, whether the jurisdiction clause under the underlying contract shall automatically apply to the cases concerning disputes arising from Letter of Credit in relation to the underlying contract, or in case of any discrepancy between the jurisdiction clause of fundamental contract and that as agreed in the standby Letter of Credit or demand guarantee, how to decide the jurisdiction of courts of China?

An authoritative precedent of the Supreme People's Court has specified the independence on the relevant jurisdiction consideration between these independent legal relationships. That is the agreement on jurisdiction of the parties concerned under the underlying contract or in case of no such agreement,

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[24] See Article 4 of the Provisions on Several Issues concerning Trial of Letter of Credit Dispute Cases, which provides that arrears dispute arising from application for issue of letter of credit, dispute concerning entrustment for issue of letter of credit and the guarantee dispute resulting therefrom and the disputes arising from financing under the letter of credit shall apply relevant laws of the People's Republic of China, unless the parities to the contract involving foreign interests otherwise agreed."

the consideration of court on deciding the jurisdiction over underlying contractual relationship shall not prejudice the consideration on jurisdiction related to the Letter of Credit legal relationship. In an appeal case to the Supreme People's Court where the first judgment rendered by the High People's Court of Tianjin ruled in favor of jurisdiction, the Supreme People's Court explicitly held that[25]: because the underlying contract explicitly contains an agreement of a valid arbitration clause with arbitration venue in Tokyo, the people's courts in China has no jurisdiction on the underlying contract relationship. However, due to the fact that there is no jurisdiction clause in the Letter of Credit and the Letter of Credit relationship and the underlying contract relationship are independent, therefore the consideration in relation to the jurisdiction over Letter of Credit relation shall be made separately. Eventually the Supreme People's Court ruled that the Higher People's Court of Tianjin has jurisdiction on the case concerning disputes arising from such Letter of Credit relationship, which will not prejudice the arbitration clause with arbitration venue in Tokyo that is validly agreed in basic contract. Therefore it could be inferred that the Supreme People's Court shall take similar stand on issues concerning jurisdiction over cases on standby Letter of Credit and demand guarantee.[26]

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[25] Verdict of second instance of the Supreme People's Court on Case concerning Letter of Credit Dispute Between the Sealant Co., Ltd. and the Genius Co., Ltd. (rendered on August 31, 2004). The basic contract of that letter of credit dispute case relates to the goods purchase and sale between the China company and Japan company, and it is provided in the dispute resolution clause of such purchase and sale contract that once there is any dispute, the parties agree to submit the dispute case to the "International Court of International Chamber of Commerce" for arbitration. The second instance of the Supreme People's Court ruled that people's courts of China have no jurisdiction over the basic contract, but have jurisdiction over letter of credit dispute case, because the letter of credit and basic purchase and sale contract are mutually independent.

[26] Judgment of Second Instance by Higher People's Court of Shandong Province on the "Case concerning Guarantee Fraud Dispute Between the Appellant BHP Billiton Sales Company and the Appellee Longkou Donghai Trade Co., Ltd. and the Third Party of First Instance Jinan Branch of Shanghai Pudong Development Bank (ruled on May 26, 2008). The Judgment of this case is the Civil Judgment of First Instance on "Case concerning Guarantee Fraud Dispute Between the Plaintiff BHP Billiton Sales Company and the Defendant Longkou Donghai Trade Co., Ltd. and the Third Party Jinan Branch of Shanghai Pudong Development Bank (ruled on December 13, 2007). The basic contract of that case provides that once there is any dispute, it shall be submitted to the London Court of International Arbitration (LCIA) to conduct arbitration, but the guarantee provides for the application of URDG 458, and Article 28 of the URDG458 provides that the court at the business place of the guarantor of guarantee shall have exclusive jurisdiction. Eventually, the parties to the basic contract, i.e. the purchase and sale contract, have gone to the LCIA for arbitration, while the guarantee case was under litigation at the Intermediary People's Court of Yantai, Shandong Province. For verdict and review verdict on the jurisdiction by the Intermediary People's Court of Yantai and the Higher People's Court of Shandong Province, see the civil judgment of the Intermediary People's Court of Yantai, Shandong Province on Case concerning Individual Guarantee Dispute Between the Applicant Longkou Donghai Trade Co., Ltd. and the Respondents BHP Billiton Sales Company and Jinan Branch of Shanghai Pudong Development Bank (ruled on January 30, 2007) and for the verdict rendered by the court of second instance, see the Civil Judgment of second instance of the Higher People's Court on Case concerning the Objection Appeal for Jurisdiction over Demand Guarantee Dispute between BHP Billiton Sales Company and Longkou Donghai Trade Co., Ltd. and Third Party Jinan Branch of Shanghai Pudong Development Bank. (ruled on August 14, 2007).

2. Jurisdiction over Cases Involving Foreign Interests

The Supreme People's Court has adopted the judicial interpretation of the *Provisions on Several Issues concerning Contentious Jurisdiction over Foreign Civil and Commercial Cases ("the Provisions")* on December 25, 2001, which came into force on March 1, 2002. According to the Provisions, cases concerning foreign civil and commercial disputes shall be governed by courts with jurisdiction over foreign cases. Up to the end of 2010, in addition to the higher people's courts of municipalities directly under central government and all provinces and autonomous regions, courts that may try foreign civil and commercial cases have been expanded from the intermediary people's courts of the cities where the provincial capital situates to 167 intermediary people's courts and 57 basic people's courts all over the country, and there are approximately 3,000 professional and highly qualified judges in the national court system to engage in the trial of foreign civil and commercial cases.[27]

Article 3 of this the Provisions that "These Provisions shall be applicable to the following cases: (1) Contract cases and infringement dispute cases involving foreign elements; (2) Letter of credit dispute cases; (3) Cases of application for cancellation, recognition or enforcement of international arbitration awards; (4) Cases of examining the validity of civil or commercial arbitration clauses involving foreign elements; and (5) Cases of application for recognition and compulsory enforcement of civil or commercial judgments or rulings rendered by a foreign court."

As such, the Provisions shall apply to cases concerning disputes related to Letter of Credit, demand guarantee and foreign engineering project contract that involve foreign elements. Besides, Article 5 of such judicial interpretation provides that the jurisdiction over cases concerning civil and commercial disputes involving parties from Hong Kong, Macau and Taiwan shall be handled with reference to this Interpretation. Therefore, any dispute between the parties and enterprises or financial institutions of Mainland China and Taiwan, unless otherwise agreed by the parties in advance, the people's court in China may exercise jurisdiction accordingly.

3. Long-arm Jurisdiction of People's Courts in China

The long-arm jurisdiction of the people's courts in China is a problem of particular interest to foreign parties. Two issues should be raised before discussion of this problem. Firstly, according to the provisions of the Civil

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[27] See the article "The Supreme People's Court's Adjustment to Structure of Concentrated Jurisdiction of Foreign Civil and Commercial Cases" on the Legal Daily of January 11, 2011, which may also be found in the blog of Jin Saibo at http://blog.sina.com.cn/s/blog_540752bd0100t66d.html.

Procedure Law, where a party to the Letter of Credit transaction (e.g. issuing bank, negotiating bank, confirming bank or notifying bank or transfer bank or other parties) locates in a foreign country, to the extent such institution has branch(es) in China, and when the Chinese party (e.g. beneficiary) intends to sue the foreign counterparty to the extent that such foreign party has any executable assets in China, for example its branch or representative office, then the people's courts in China may exercise jurisdiction based thereupon and service relevant litigation documents to such branch or representative office[28].

Secondly, where a Letter of Credit dispute case has been accepted by a foreign court or even such foreign court has issued a judicial injunction over Letter of Credit, the people's courts of China may still exercise jurisdiction over such case regardless of such acceptance and judicial injunction, as indicated in the judgments of cases tried by the Higher People's Court of Tianjin and the Higher Peoples' Court of Beijing[29].

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[28] Civil judgment of first instance of the Second Intermediary People's Court of Beijing on Case concerning Letter of Credit Negotiation Dispute between the Plaintiff Lianyungang Nantian International Economy and Trade Co., Ltd. and the Defendant Co AG BRUSSELS BRANCH" (ruled on December 15, 2008). The issuing bank involved in that case is the COMMERZBANK AG BRUSSELS BRANCH, but the Intermediary People's Court of Lianyungang that accepted that case transferred the same to the Second Intermediary People's Court of Beijing for trial, because such bank has a branch in Beijing. The parties concerned made no appeal after judgment of first instance. Civil judgment of second instance of the Higher People's Court of Shanghai on Case concerning Letter of Credit Dispute between the Appellants French-based Calyon Bank in Sana'a and Calyon Bank Shanghai Branch and the Appellee Sichuan Investment Import and Export Co., Ltd. (ruled on December 10, 2007). Civil judgment of first instance of the First Intermediary People's Court of Shanghai on Case concerning Letter of Credit Dispute between the Plaintiff Sichuan Investment Import and Export Co., Ltd. and the Defendents French-based Calyon Bank in Sana'a and Calyon Bank Shanghai Branch (ruled on November 13, 2006). The issuing bank involved in that case the Calyon Yemen branch, but the Chinese plaintiff brought the lawsuit before Shanghai courts, because Calyon has branch in Shanghai. Another case is the verdict of second instance of the Higher People's Court of Shandong province on Case concerning the Letter of Credit Dispute between the Plaintiff Korea Exchange Bank and the Defendant Sanyang Textile Co.,Ltd. (rendered on December 15, 2006). This case was ruled by the court of second instance to remand for trial due to the fact that the court of first instance failed to serve the legal process to Beijing Office of the Appellant, Korea Exchange Bank.

[29] Civil judgment of second instance of the Higher People's Court of the Jiangsu Province on the Case concerning the Letter of Credit Acceptance Dispute between the Plaintiff Huaiyin Foreign Trade Corporation and the Defendant Nedbank Ltd. (ruled on March 28, 2001). For another judgment please see the civil judgment of second instance of the Higher People's Court of Beijing on the Case concerning the Letter of Credit Acceptance Dispute between the Appellate Woori Bank Co., Ltd and the Respondent Beijing Xuanlian Food Co., Ltd. and the Defendant in the first instance Bank of China, Beijing Branch (ruled on October 28, 2008), the letter of credit in which .has been adjudicated by a Korean court to suspend payment in advance. Civil judgment of second instance of the Higher People's Court of Tianjin on the Case concerning the Letter of Credit Acceptance Dispute between the Appellate Industrial Bank of Korea and the Respondent Hebei Baoding Import and Export Corporation (ruled on November 28, 2003). This case is also decided by a Chinese court after trial when a Korean court suspended payment of the Letter of Credit issued by the Industrial Bank of Korea.

4. Long-arm Jurisdiction of Hong Kong Courts and Inconvenient Forum Jurisdiction of Mainland Courts

The problem concerning long-arm jurisdiction of Hong Kong courts that causes the anxiety of domestic financial institutions in recent times is brought about by a precedent of the High Court of Hong Kong.[30] An issuing bank in Xiamen has issued a Letter of Credit for the benefit of a Singapore company in accordance with the application of a Xiamen client and on the basis of the goods purchase and sale contract by and between such Xiamen company and the Singapore company, and thereafter a dispute arose due to discrepancy and basic contract performance problem, but the Singapore company directly brought a lawsuit against such issuing bank in Xiamen before the court in Hong Kong as the issuing bank is listed on the Hong Kong securities market. The issuing bank in Xiamen made jurisdictional objection by reason of inconvenient forum if the case is heard by Hong Kong court, provided that the High Court of Hong Kong in its first judgment determined it has jurisdiction on such case. After that case was tried by the court of second instance, though the appeal court overruled the first judgment in terms of substantial issues, there is no denial opinion on the jurisdiction of Hong Kong courts. Considering that there are a considerable number of commercial banks in Mainland, China that are listed in Hong Kong or have listed in both Hong Kong and Mainland securities markets, the potential influence of this problem could be very great.

Inconvenient jurisdiction of Mainland courts. People's courts in Beijing[31] and Guangdong[32] have encountered a situation like this where two Hong Kong

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[30] Swiss Singapore Overseas Enterprises Pte Ltd vs China Citic Bank Corporation Limited The High Court Of The Hong Kong Special Administrative Region Court of First Instance Commercial Action no. 11 of 2009. Before: Hon Reyes J in Chambers, Date of Hearing: 3 May 2010, Date of Judgment: 3 May 2010. For Judgment of second instance, please find Swiss Singapore Overseas Enterprises Pte Ltd and China Citic Bank Corporation Limited, Xiamen Branch, Before: Hon Rogers VP, Le Pichon JA and Wright J in Court, Date of Hearing: 26 November 2010, Date of Handing Down Judgment: 7 December 2010.It is said that the parties concerned have made appeal to the Court of Final Appeal of the SAR. See the full texts of judgments in first and second instances at Jin Saibo's blog at http://blog.sina.com.cn/s/blog_540752bd0100saon.html. See the commentary on the case in the article "Jurisdiction of Hong Kong Courts Not to be Overlooked" at Jin Saibo's blog http://blog.sina.com.cn/s/blog_540752bd0100nod1.html.

[31] "Civil Verdict (2001) Ming Si Zhong Zi No.12 of the Supreme People's Court of China on the Case concerning the Loan Contract Dispute between the Appellate China International Iron & Steel Investment Corporation and the Respondent the Dai-Ichi Kangyo Bank, Limited Shanghai Branch, Industrial Bank of Japan Beijing Branch, Sanwa Bank Co., Ltd. Shanghai Branch and Yamaguchi Bank, Ltd. Qingdao Branch on May 21, 2001. Fa Gong Bu (2001) No. 45. Refer to the Civil Verdict (2000) Ming Jing Chu Zi No. 539 of Beijing Higher People's Court for the first instance.

[32] The Case concerning Letter of Credit Dispute between the Plaintiff Dongpeng Trade Co.,Ltd. and the Defendant Bank of East Asia tried by the Higher People's Court of Guangdong Province in 1993. According to the report made by the journalists Ren Chunying and Liu Nianfu

parties engage in transactions in the territory of China with the subject of transaction or dispute in Hong Kong and the contracts for such transactions were signed in China, and a dispute arises, a party brought a lawsuit to the people's court in Mainland China, in such case, the people's court in Mainland China has to consider whether the acceptance of such case constitutes an issue on inconvenient jurisdiction. In this regard, the Supreme People's Court has published on the web as to how to understand and grasp "inconvenient court principles" in the Reply to Problems concerning Commercial and Maritime Trial Practice Involving Foreign Interests (Draft for Discussion). The Supreme People's Court said that there is no provision on inconvenient court principle in the Civil Procedure Law of the People's Republic of China. In trial practice, where a party brings a lawsuit before the people's court in respect of its dispute, the other party usually demands the people's courts in China not exercise the jurisdiction by reason of inconvenient court. Where the people's courts in China have jurisdiction over certain commercial cases involving foreign interests in accordance with the provisions of the laws of China, but the parties concerned are both foreigners or foreign companies and the major facts of the case have nothing to do with our country and the people's courts will encounter great difficulty in determining the facts of case and application of laws and the judgment is required to be applied for implementation in foreign countries, the people's courts may not exercise jurisdiction and may apply the "inconvenient court principle" to waive jurisdiction. For application of "inconvenient court principle", the people's court should not apply on a proactive basis but on basis of the application of either party[33], but recently the number of cases accepted by people's courts of China involved inconvenient jurisdiction has increased.

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of the People's Court Daily on April 24, 2001, *Creating Fair and Reasonable Investment Environment: Review on the Foreign-, Hong Kong-, Macau- and Taiwan-related Economic Trials by People's Courts in Guangdong.*

[33] *Circular of Fourth Civil Tribunal of the Supreme People's Court on Opinions for Reply to Problems concerning Commercial and Maritime Trial Practice Involving Foreign Interests* (Draft for Comments) on November 18, 2002. It is our original intention to prepare the Reply to Problems to study and resolve all kinds of problems occurred in the trial of cases from the perspective of trial practice, provide guidance on trial work and reach an understanding. The Reply to Problems in Foreign-related Commercial Trial Practice and Reply to Problems in Maritime Trial Practice have incorporated the preliminary opinions from courts at all levels that have engaged in foreign commercial trials and maritime trials. The Reply to Problems (Draft for Comments) was published on the http://www.ccmt.org.cn/, to seek opinions from the practitioners, legal circle and theoretical circle engaging in commercial and maritime work and from all walks of life that support and care about foreign-related commercial and maritime trials in China. The process of opinion solicitation for the Reply to Problems in Foreign-related Commercial Trial Practice and Reply to Problems in Maritime Trial Practice (Draft for Comments) was closed on December 20, 2002. The revision opinions may directly be raised online, and may be sent to the Civil Tribunal of the Supreme People's Court.

5. Acts Governing Relations between the People of the Taiwan Area and the Mainland Area and Relevant Judicial Interpretation Thereof by the Supreme People's Court

Taiwan has promulgated the Act Governing Relations between the People of the Taiwan Area and the Mainland Area[34] and while the Supreme People's Court's Provisions on People's Courts' Recognition of the Civil Judgment of Courts of Taiwan came into force on May 26, 1998 and the Supplementary Interpretation thereof came into force on May 14, 2009. The aforesaid legal documents between Taiwan and Mainland China will facilitate the communication in the areas of trade, finance and judiciary between Taiwan and Mainland China.

VI. Conclusions and Recommendations

1. The economic and trade links between Mainland China and Taiwan are getting closer, and practitioners and legal professional must be familiar with the trade and trade financing systems of each other and the relevant legal practice. Both sides must enhance communication, study, training and research, which is the top priority at the moment.

2. The trade and financing practice in China becomes more internationalized, and the judiciary practice has paid higher respect to the rules of games of international commerce. The economy of Mainland has grown from a totally different economic mode into the market economy over dozens of years reform and opening-up, from weak to strong, a small beginning to a mighty force, which is an arduous process of the gradual stepping into the international commercial environment. Any mistake or deviation from the course of transformation, especially any mistake in individual case, is inevitable. On the whole, the trade and financing practices in China are developing in a proactive way, which is witnessed by the international society.

3. One may find the historical trace for economic and legal developments in the past in trade, financing and judicial practices in China, for example, distinction between international and domestic territories, distinction between settlement in RMB and settlement in foreign currency and distinction between capital item and recurrent item; enterprises and financial institutions, especially the legal professionals of Taiwan must note these unique issues and distinction in practices in China.

4. If Mainland China and Taiwan planned to make great efforts in developing the economic and trade and financing areas to the great benefit of

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[34] Yi Zi No.3166 Order, published on July 31, 1992. Executive Yuan Tai 81 Fa Zi No.3166 Order, which came into force on September 18, 1992. After several revisions, the latest version, Yuan Tai Lu Zi No.0980091471 Order, was published on August 11, 2009 by the Executive Yuan, which came into force on August 14, 2009.

the people living at both sides in the future, the relevant judicial arrangement on trade and financing would be inevitable. The segmentation in the communication of the judicial circles of both sides caused by historical reason is gradually diminishing, and the communication of the judicial circles of both sides will be highly conducive to communication in trade and finance.

STANDBY LETTERS OF CREDIT IN CHINA: LAW AND CASES REVIEW

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1. The Nature of Standby Letters of Credit under the PRC Law

1.1 The Nature of Standbys under the PRC Law: Credit or Guarantee?

The Supreme People's Court of the PRC (hereinafter the "Supreme Court") promulgated *The Provisions on Several Issues Concerning the Trial of Disputes over Letters of Credit* in 2005 (hereinafter the "*LC Rules*"), effective as of January 1, 2006, was only applicable to the disputes in connection with Letters of Credit[1]. Nevertheless, some judgments rendered by the high courts of Zhejiang and Shandong provinces of China held the opposite opinions that the *LC Rules* were also applicable to Letters of Credit in domestic transactions, which contradicted to the opinions held by the overwhelming majority of Chinese courts that they only govern Letters of Credit in transnational transactions.[2] As to whether the disputes arising out of the Standby Letters of Credit (the "SBLCs") shall also be subject to the *LC Rules*, the context and the explanation thereof do not have explicit provisions.[3]

The key issue is the nature of SBLCs under the PRC Law: a credit, as showed by its name, or a guarantee, for it, judged from its context and wording, is usually issued for the purpose of guarantee. The judges of the Supreme Court may hold different opinions, let alone the local courts. Therefore, one way to mitigate the uncertainty thereof is, among others, to provide in the SBLC that the jurisdictions and laws other than that of the PRC shall govern the disputes arising out of the Standby.

The Supreme Court used to acknowledge that it needed to be further studied, but until now, there is no conclusion yet. In a published report of the

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[1] The preamble of *the LC Rules* and Article 1 provides that: "These provisions are hereby formulated to provide guidance on issues in the adjudication of letter-of-credit-related (L/C-related) cases in accordance with the General Principles of the Civil Law of the People's Republic of China, Contract Law of the People's Republic of China, Guarantee Law of the People's Republic of China and Civil Procedural Law of the People's Republic of China, as well as by referring to relevant international practices, particularly those as reflected in the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce, and in consideration of the adjudicative practices in China. Article 1 The L/C-related cases as referred to in these provisions are those involving disputes arising in such letter of credit(L/C) transactions as L/C issuance, advice, amendment, revocation, confirmation, negotiation, reimbursement and etc."

[2] See the Reply of the Supreme Court to the Inquiry regarding *Laiwu Branch of Bank of China v. Shandong Daiyin Textile Group Corp. Ltd* (the dispute over domestic Letter of Credit), [2009]Min Si Ta Zi No. 9, March 20, 2009, at Jin Saibo's blog http://blog.sina.com.cn/s/blog_540752bd01017r26.html; and the appeal judgment of Shandong Higher People's Court, April 2, 2009 at Jin Saibo's blog http://blog.sina.com.cn/s/blog_540752bd01017r25.html. See also Zhejiang Ningbo Intermediate Court, Zhejiang Yuanda Import-export Ltd v. Changshu Kehon Material Technology Ltd (the dispute over the sales contract, and L/C fraud), the trial judgment dated July 3, 2009, at Jin Saibo's Blog http://blog.sina.com.cn/s/blog_540752bd01017r27.html. The appeal judgment was not published.

[3] *Explanations of the Supreme Court on the Provisions on Several Issues Concerning the Trial of Letter of Credit Dispute Cases*, please refer to Jin Saibo's blog, http://blog.sina.com.cn/s/blog_540752bd010007c7.html.

Supreme Court, which represents the opinions of it with respect to the application of the *LC Rules* to the SBLCs case to certain extent, the Supreme Court states that:

> "*Standby Letter of Credit is a proof of the obligation undertaken by the issuing bank to the beneficiary, within which, the issuing bank undertakes that when the applicant fails to perform its obligation, so long as the beneficiary draws a draft in accordance with the Standby on the issuing bank, and presents a statement of default or other certificate as required by the Standby, the issuing bank shall effect the payment. The Standby by its nature is a type of special clean Letter of Credit. Standby is usually used in bid, performance of contract, refund, advance payment, credit sales, etc. By a Standby, the beneficiary can be compensated when the applicant defaults on the contract, provided that the applicant timely performs its contractual obligations, the beneficiary needs not to demand for payment or compensation under Standby from the issuing bank. From the concept, Standby embraces all the elements of a documentary Letter of Credit, however, in light of its subordination and its function, Standby is the same as a bank guarantee. In the past, Standby is rarely used in China, but nowadays it is more and more frequent to be used, and some local courts have heard the Standby cases. At present, the two types of the disputes have been brought before the courts, which show a tendency to increase; we have to further investigate that whether the LC Rules are applicable and under what circumstances they are applicable.*" [4]

However, the Fourth Division of the Supreme Court has not yet provided a clear official opinion on the issue up to now.

1.2 The Uncertainty of the Applicable Law: the LC Rules or the Surety Law?

Due to the uncertain nature of the SBLCs under the PRC Law, the applicable law is uncertain: which law would courts of the PRC apply to Standby cases, *the LC rules* or *the Surety Law*? Further, whether the law and rules of independent guarantee or ancillary guarantee shall be applied? Likewise, in order to avoid the uncertainty, one of the solutions is to agree on a governing law other than that of the PRC, for instance, the law of a country which provides for a definite nature of the Standby, such as England, Singapore and the USA.

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[4] *Trial of Letter of Credit Cases in Response to the International Financial Crisis—Study Report on the Problems Encountered by People's Courts in the Trial of Letter of Credit Cases under the Current International Financial Crisis and the Measures in Response Thereto* (By the Fourth Civil Division of the Supreme People's Court), published on *People's Court Daily* on May 28,2009. For the full text of the report, please refer to Jin Saibo's blog at http://blog.sina.com.cn/s/blog_540752bd0102dtr3.html.

1.3 How does the Judicial Interpretations on Demand Guarantees drafted by the Fourth Division of the Supreme Court affect the nature and the applicable law of the Standby?

The Supreme Court is researching on the rules for Demand Bank Guarantees, and preparing for the draft of judicial interpretation, which might provides for answers to the two issues addressed in Section 2.1 and 2.2. Before the legal nature and applicable law have been clarified by the Supreme Court, even though some local courts made judgments according to their understanding of law, and the positions to be adopted by other local courts cannot be predicted.

1.4 The Judgments on Standby Cases Rendered by Courts of the PRC.

The Supreme Court published a research report during the financial crisis, which mentioned that some Standby cases had been brought before courts of the PRC. [5] However, based on the materials collected by the author, until today, the actions in connection with the Standby that had been brought in front of courts of PRC were not based on the cause of Standby legal relationship[6], instead, they were the disputes arising out when the Standby had been honoured by the issuers, and the issuers demanded for reimbursement by the counter-guarantor[7] or the applicant[8].

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[5] *Trial of Letter of Credit Cases in Response to the International Financial Crisis—Study Report on the Problems Encountered by People's Courts in the Trial of Letter of Credit Cases under the Current International Financial Crisis and the Measures in Response Thereto*: "*…[i]t calls for clarification that whether disputes over Domestic Letter of Credit, Standby Letter of Credit are subject to the LC Rules*…At present, the two types of the disputes have been brought before the courts, which show a tendency to increase; we have to further investigate that whether the LC Rules can apply thereto and under what circumstances they are applicable.

[6] For instance, Jiangsu High People's Court, *Jichuang Technology (Wuxi) Co., Ltd v. Jichuang Technology Corp. Ltd* (Dispute over surety contract), the appeal judgment dated June 20, 2005. The SBLC was issued for the purpose of guarantee for finance, but the joint guarantor has undertaken the guarantee obligation, and the guarantor asked for reimbursement from the applicant. The SBLC in the case was not claimed, but the SBLC was used in on-shore loan against off-shore financing guarantee. For the appeal judgment, please refer to Jin Saibo's blog at http://blog.sina.com.cn/s/blog_540752bd0102dwcb.html.

[7] The Demand Guarantee Case heard by Anhui Hefei Intermediate Court. The case is in the trail, and has not been published, I have been asking the court for the court ruling of suspending the payment under the Demand Guarantee. An article issued on the official website of Hefei Intermediate court, *Top Ten Light Spots and Top Ten Cases in 2011 of Our Court*, one can infer that the case is named *Hefei Cement Design Institute v. Lafarge Cement of Indonesia Co., Ltd, Jakarta Branch of Standard Chartered Bank* (dispute over payment suspension under Demand Guarantee), see http://220.178.52.75/fwzn/xwtt/2011/12/31152305815.html.

[8] Jiangsu Higher People's Court, *Shanghai Branch of ING v. Shell Gas Co., Ltd* (Dispute over reimbursement of guarantee contract), the trial judgment dated September 6, 2000, please refer to Jin Saibo's blog, http://blog.sina.com.cn/s/blog_540752bd0102dw66.html. It is not clear that whether it has been appealed to the Supreme Court. Another case involving Domestic Loan and Foreign Guarantee is Shenzhen Intermediate Court, *China Merchants Bank v. CMM Group Co., Ltd, Zhongqiao Industry Co., Ltd* (dispute over line of credit contract), the trial judgment dated May 6, 2011. For the full text, please refer to Jin Saibo's Blog at http://blog.sina.com.cn/s/blog_540752bd0102dwb8.html.

Only one ruling made by a PRC court has been published, which was in connection with a dispute between the financing bank in Hong Kong and the issuing bank in China. In accordance with the jurisdiction clause in the Standby, the Hong Kong Company which provided the bridge financing, brought an action in a Hong Kong court against the issuer. After losing the case, the issuer suited in a court of the PRC, and the financing bank in Hong Kong challenged the jurisdiction of the court, Guangdong Higher People's Court, which ruled that it had the jurisdiction; and the Hong Kong bank appealed to the Supreme Court, which ruled that court of PRC shall not exercise jurisdiction over the Standby.[9]

2. Reviews on the Standby Cases of China

To my knowledge, it is difficult to estimate that how many Standby Letters of Credit have been claimed in the past few years. Based on over 500 judgments in relation to the cases of Letters of Credit, Letters of Guarantee, and SBLCs collected by myself, there are some SBLCs that have been claimed by beneficiaries, or the issuer claiming for reimbursement, which led to actions in courts. Besides those which were involved in the lawsuits, the number of those have been claimed by beneficiaries should not be very small.

2.1 The Only Standby Lawsuit: Sumitomo Bank v. Guangdong Development Bank[10]

To my knowledge, until now, only one dispute between the beneficiary of a Standby and the issuing bank has been brought before a court of PRC. In the case, the Japanese funded Sumitomo Mitsui Bank provided a bridge loan to Hong Kong Xinhua Co., Ltd ("Xinhua") which was invested by capital from

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[9] The Supreme Court, Sumitomo Bank (former name of Sumitomo Mitsui Bank, Appellant), Sumitomo Banking Corporation (former name of Sumitomo Mitsui Banking Corporation, Appellee) v. Guangdong Development Bank, (the Plaintiff in the trial), the appeal ruling dated November 15, 2002. For the full text of the ruling, please refer to Jin Saibo's Blog: http://blog.sina.com.cn/s/blog_540752bd0102dwcg.html; the Statement of the Case submitted by the attorney of the Appellant, please refer to Final Submission of the Default Damage Case between Sumitomo Mitsui Bank and Guangdong Development Bank, which enclosed the court ruling of the jurisdiction rendered by the Supreme Court at http://www.fsou.com/html/text/cou/8220835/822083594.html.

[10] The Supreme Court, Sumitomo Bank (former name of Sumitomo Mitsui Bank, Appellant), Sumitomo Banking Corporation (former name of Sumitomo Mitsui Banking Corporation, Appellee) v. Guangdong Development Bank, (the Plaintiff in the trial), the appeal ruling dated November 15, 2002. For the full text of the ruling, please refer to Jin Saibo's Blog: http://blog.sina.com.cn/s/blog_540752bd0102dwcg.html; the Statement of the Case submitted by the attorney of the Appellant, please refer to Final Submission of the Default Damage Case between Sumitomo Mitsui Bank and Guangdong Development Bank, which enclosed the court ruling of the jurisdiction rendered by the Supreme Court at http://www.fsou.com/html/text/cou/8220835/822083594.html.

China in amount of over RMB 28 million, as the guarantee thereto, Xinhua applied to Guangdong Development Bank for the issuance of a Standby in amount of RMB 28 million. Sumitomo Mitsui Bank granted the loan but Xinhua failed to repay the loan, so Sumitomo Mitsui Bank claimed for payment from Guangdong Development Bank under the Standby, which was rejected. Thus, Sumitomo Mitsui Bank brought an action in a court of Hong Kong, and obtained a favorable judgment. Afterwards, Guangdong Development Bank brought another action in Guangdong High Court on the ground that Sumitomo Mitsui Bank and Sumitomo Mitsui Banking Corporation defaulted on the three written commitment letters, and claimed for damages. Sumitomo Mitsui Bank and Sumitomo Mitsui Banking Corporation raised an objection to the jurisdiction, which overruled by Guangdong High Court, since the court accepted that Sumitomo Mitsui Banking Corporation had a branch in Guangdong with enforceable property, and that the court may exercise jurisdiction. However, in the appeal, the Supreme Court did not recognize the reasoning, and set aside the jurisdiction ruling of Guangdong High Court. Therefore, the case did not enter into the substantive hearing in PRC court.

2.2 Issuing Banks Demanding for Reimbursement after Making Payment: Two Court Cases

Another two cases are about the issuing banks of Standby demanding for reimbursement after they have paid to beneficiaries: one was heard by a court of Jiangsu province, which was about a financial Standby. Agriculture Bank of China, Jiangsu Branch (hereinafter "Jiangsu ABC") granted a loan to a company of Suzhou, and the loan was guaranteed by a Standby issued by a foreign funded bank in favor of Agriculture Bank of China, Suzhou Branch (hereinafter "Suzhou ABC"). Upon the failure of repayment by the obligor, Suzhou ABC claimed for payment under the Standby from the issuing bank, which paid accordingly, and asked for reimbursement from the obligor but was rejected, so the issuing bank brought a law suit against the obligor afterwards[11].

Another case is heard by Anhui Hefei Intermediate Court, and the Standby was issued for the purpose of guarantee in an international project contracting, after the issuer paid the beneficiary, it demanded for reimbursement from the counter-guarantor under a Demand Guarantee, where the court issued a suspension order which suspended the payment under the

[11] Jiangsu Higher People's Court, *Shanghai Branch of ING v. Shell Gas Co., Ltd* (Dispute over reimbursement of guarantee contract), the trial judgment dated September 6, 2000, please refer to Jin Saibo's blog, http://blog.sina.com.cn/s/blog_540752bd0102dw66.html. It is not clear that whether it has been appealed to the Supreme Court.

Demand Guarantee upon the application by the contractor. The underlying contract was not a sales of goods contract.[12]

The cases out of a number of cases collected by me involved the disputes in connection with financial SBLCs, but the cases were both about the issuing banks demanding for reimbursement from the applicant after they had made payment according to the claims of the beneficiaries. As a matter of fact, the SBLCs were not disputed, the cause of action was the demand for reimbursement after the payment under the SBLCs . The case before a Jiangsu court was arising out of on-shore loan against off-shore guarantee, and the other case before Shenzhen court was arising out of off-shore loan against on-shore guarantee.[13]

2.3 Unpublished Cases or Disputes that Did not Enter into a Court

I have acted in a case where a Philippine bank issued an SBLCs and paid upon the claim of the beneficiary. The bank then claimed for recovery from the counter-guarantor, which was a Chinese bank, under a counter-guarantee. But

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[12] The Demand Guarantee Case heard by Anhui Hefei Intermediate Court. The case is in the trail, and has not been published. An article issued on the official website of Hefei Intermediate court, *Top Ten Light Spots and Top Ten Cases in 2011 of Our Court*, one can infer that the case is named *Hefei Cement Design Institute v. Lafarge Cement of Indonesia Co., Ltd, Jakarta Branch of Standard Chartered Bank* (dispute over payment suspension under Demand Guarantee), see http://220.178.52.75/fwzn/xwtt/2011/12/31152305815.html. Another article briefly overview the case: "[Facts] In 2006, Hefei Cement Design Institute signed a contract with Lafarge Cement of Indonesia Co., Ltd, and agreed to provide service in relation to the cement production to Lafage, and Hefei Cement Design Institute applied for a Demand Guarantee to Bank of Communications, Anhui Branch according to the contract. Anhui Branch of Bank of Communications entrusted Jakarta Branch of Standard Chartered Bank to issue the guarantee in favor of Lafarge, in amount of USD3,756,268. On March 17, 2011, Hefei Cement Design Institute received the Demand for Payment and Statement of Default from Lafarge. On April 2, Hefei Cement Design Institute replied through email, and rejected the claim. Lafarge acknowledged the receipt of the reply, but denied of the substance of the rejection, and demanded for payment from the bank. Hefei Cement Design Institute alleged that Lafarge fraudulently demanded for payment, and filed an application to Hefei court to stop to payment under the guarantee. [Analysis] In Recent years, Hefei court have received numbers of commercial disputes with foreign elements, and enhanced the accuracy in applying of laws in the civil and commercial cases with foreign element, dealt with every cases, and protected the legitimate interests of Chinese and foreign enterprises equally. See *Spotlight of the Year, Striking the Crime Jeopardising the Public Security,* at http://roll.sohu.com/20111229/n330662965.shtml, dated December 29, 2011. And the article from Anhui Court Web, at http://www.ahcourt.gov.cn/gb/ahgy_2004/fczs/sy/userobject1ai31214.html.

[13] Jiangsu High People's Court, *Shanghai Branch of ING v. Shell Gas Co., Ltd* (Dispute over reimbursement of guarantee contract), the trial judgment dated September 6, 2000, please refer to Jin Saibo's blog, http://blog.sina.com.cn/s/blog_540752bd0102dw66.html. It is not clear that whether it has been appealed to the Supreme Court. Another case involving Domestic Loan and Foreign Guarantee is Shenzhen Intermediate Court, *China Merchants Bank v. CMM Group Co., Ltd, Zhongqiao Industry Co., Ltd* (dispute over line of credit contract), the trial judgment dated May 6, 2011. For the full text, please refer to Jin Saibo's Blog at http://blog.sina.com.cn/s/blog_540752bd0102dwb8.html .

it was rejected probably by the reason of the expiration of the statutes of limitation. Therefore, the Philippine bank could not bring any lawsuit in a court of PRC. The Standby under this case was issued to guarantee the project contracting in Philippine by a Chinese company.[14]

Another Standby case which I participated was between an issuer in Mainland China and a beneficiary in Hong Kong, where the beneficiary demanded for payment. But finally the Chinese issuing bank extended the expiry date and settled the case. The Standby in the case was to guarantee the payment under the purchase of electrical power from a Chinese-foreign joint venture.

3. Attentions should be Attached to when SBLCs in China are involved

3.1 Can We Predict Any Risk based on Previous Court Cases?

Firstly, viewed from the previous cases, the first predictable risk is that when a foreign bank issued a SBLC in favor of a Chinese beneficiary upon the request of a Chinese bank, and the foreign bank paid at the demand of the beneficiary against complying presentation and requested for reimbursement from the Chinese bank, the Chinese bank might refuse to pay. For instance, the Philippine bank has encountered the problem, and in the case of Hong Kong court stated in Section 2.3 the beneficiary/loan bank was rejected reimbursement by the Chinese issuing bank. However, in the case of Jiangsu claim, the issuing bank of a SBLC generally would undertake the obligation to pay, because the right and obligation thereunder were indubitably clear.

Secondly, there is a risk of suspension order being applied by the client of Chinese bank and applicant of SLBC, such as the case heard in Anhui, despite that the suspension order might be issued groundlessly.

Thirdly, when the presentation, such as the demand for payment and other required document, does not comply with terms and conditions of the SLBC, risk also lies in the refusal to honour on the ground of discrepancies.

Fourthly, the risk exists due to the uncertainty brought about by the inconclusive nature and applicable law under the PRC Law.

Last but not least, attentions should also be drawn to the risk arising out of false underlying contract and the fake documents. On one hand, the issuing bank may be involved in the case due to the false underlying contract; on the

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[14] Since the case has not been published, upon the request of the party, we are not going to disclose the names of the parties. One issue of the case lies in the statutes of limitation applicable to Demand Guarantee under law of PRC, two years or four years. See the article in this regard by me at Jin Sabo's blog: http://blog.sina.com.cn/s/blog_540752bd0102dw67.html, *Issues Regarding Statute Of Limitations In Letters Of Credit And Demand Guarantees Under Chinese Law: Review On Laws And Cases.*

other hand, the Standby issued by a bank within PRC jurisdiction may also be suspended by a PRC court.

3.2 How to mitigate the risks?

As I have stated previously, two ways to mitigate the risks are suggested, i.e. to agree on the governing court and rules other than that of the PRC. Besides, the following measures shall also be taken to mitigate the risks:

Firstly, to select the counter guarantee bank with caution, the place where the counter guarantee bank located shall be given weigh to. In some areas of China, the banks have close relationship with their clients, and are likely to be involved in the lawsuit, which may also drag the issuing bank of a SLBC into the lawsuit.

Secondly, to get more knowledge of the underlying transaction as well as the underlying contract, especially to examine the information of parties. At present, some transactions are among the affiliate entities, or more often, they are the so-called "arbitrage trade". Chinese domestic enterprises are short of fund currently, so they tend to obtain money by Letters of Credit or SLBCs, in order to overcome the financial difficulties at the moment. These SLBCs are not based on real transactions, or even issued against totally false transactions, where the documents thereunder are faked, which may result in civil dispute or even constitute crime, and the financing bank and/or the guarantee bank may be involved in the litigation. Special attention should be paid, when the bank examines the trade background, one should strictly abide by the internal examination standard and laws, and reserve all the relating documents, in case the dispute arises, they can prove that the bank has no knowledge of the fraud in underlying transaction and documents, and has been acting in good faith. It goes without saying that the bank must not actively participate in the transaction.

Thirdly, to set up clear terms and conditions of the SLBCs. It is necessary to incorporate clear provision on documents requirements and demand conditions, but too many complicated terms and conditions might create cages for the bank. Therefore, SLBCs shall contain concise wording and practical demand condition, as well as the sample demand statement.

Fourthly, pay attention to the requirement of pre-scrutiny and approval of SLBCs by State Administration of Foreign Exchange of China. The financial guarantee with foreign element is now subject to the approval of State Administration of Foreign Exchange, therefore it shall be confirmed with the issuing bank in China that the approval has been duly obtained.

3.3 Can a court issue a suspension order against a letter of credit in an arbitration proceeding?

It is feasible to incorporate an arbitration clause designed carefully into a SLBC and the arbitration clause is better to provide for an arbitration in the country which is a contracting party to *1985 New York Convention*, and the

arbitral award can be sought for recognition and enforcement in the PRC in accordance with the Convention. Chinese banks generally acknowledge and respect the effect of arbitral award. However, Chinese issuing bank may be reluctant to accept such a clause providing for foreign arbitration incorporated in the SLBC.

Alternatively, to add a clause of arbitration in a PRC arbitration body such as China International Economic and Trade Arbitration Commission is also a good option, but problems may arise due to lack of experts on SLBC law and practice in the arbitrator panellist.

Based on my experience of practices over the past 15 years, in arbitrations involved SLBCs dispute, I have never seen a PRC court render a ruling to suspend payment under the SLBCs. However, I have seen at least two cases in which the courts granted stop orders to Letters of Credit which were under dispute in arbitration proceedings,[15] nevertheless, the two cases are rare; the courts which granted such ruling may misunderstand the Letter of Credit legal system. *The LC Rules* by its purpose is to forbid and regulate such stop orders as used to be randomly issued.

3.4 Applicable rules of SBLCs: the Surety Law, UCP600 or ISP98?

It is not recommended to apply Surety Law of the PRC. China does not have complete law and rules on the SLBCs and Demand Guarantees, which is acknowledged by a public document issued by the Supreme Court. Another important reason for not applying Surety Law of the PRC is that the law is designed for the ancillary suretyship, including all the rules and the whole system. The judges of PRC courts also think in the way of ancillary suretyship.

It is recommended to apply UCP600. The promulgation of *the LC Rules* made judges of PRC court familiar with the *Uniform Commercial Practice of Documentary Credit* (UCP). UCP is also applicable to the SLBCs. PRC Courts are familiar and follow the basic principles of the Letters of Credit, such as principles of independence, documentary transactions, strict compliance.

International Standby Practices (ISP98) is also recommended. PRC courts are not familiar with the rules of the SLBCs, and ISP98 has not been applied in any of the past court cases. In the disputes over Demand Guarantees before Anhui Hefei Intermediate Court in 3.1.1(14), the SLBC issued by the Indonesian issuing bank in favor of the Indonesian beneficiary was said to be subject to ISP98. Now the case is in trial, and the application of ISP98 might be excluded by the governing law clause.

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[15] The Letter of Credit case was trialed by Wuhan Intermediate Court and the other one is trialed by Beihai Intermediate Court. In the case of Wuhan court, the underlying dispute was accepted by China International Economic and Trade Arbitration Commission, but the party applied for injunction to suspend the payment under the Letter of Credit issued by China Everbright Bank, Wuhan Branch. The one before Beihai Court was not published, we are under the duty of not disclosing the names of the parties.

It is not recommended to apply URDG758 or other rules on Demand Guarantees. A Standby should not be subject to URDG758, not only because the rules are applicable to Demand Guarantees, but also because the jurisdiction and applicable law rules may lead to the application of the PRC Law and the exclusive jurisdiction exercised by PRC courts.

4. Conclusion: SBLCs are better than demand guarantees in certainty of getting payment

Based on the court report in relation to the bank guarantee cases collected by us, there are quite a few guarantee cases in default before courts, and there are also quite a few cases in relation to suspending the payment under bank guarantees. As to the difference between the SLBCs and the bank guarantees, previous sections have distinguished the two. In sum, compared with bank guarantee cases, SLBC cases are smaller in number, which also indicates that a SLBC is better than a Demand Guarantee as a guarantee instrument in respect of the certainty of getting payment. If the guarantee to a financing transaction is a SLBC issued by a Chinese bank upon the application of its client, with concise terms and conditions especially those for the demand documents requirement, when the obligor defaults, the result of demand for payment under SLBC is predictable. It can be evidenced by the small number of Standby disputes before PRC courts. Therefore, the comparatively larger number of bank demand guarantee cases showed that the a Standby is a better instrument as counter guarantee for the finance.

There are mainly two reasons for that: first, from the perspective of banking practices, Chinese banks treat the SLBC as a letter of credit rather than a demand guarantee, which in turn makes the responsibility of payment more explicit; second, the SLBC involves little with the PRC Surety Law which was framed by the ancillary guarantee or typical dependent guarantee, which in turn leads to fewer refusal or reasons and grounds of applying stop order raised by the Chinese counter guarantee bank or issuing bank when honoring the letter of credit.

SECURITY RISKS ARISING FROM SALE OF SHIPS (COMPLETED AND UNDER CONSTRUCTION)

PETER S. K. KOH*

Sale of a ship

General principles

A ship is a chattel and it is also considered as part of goods.[1] Hence, the principal legislations such as the Sale of Goods Act 1979, the Supply of Goods (Implied Terms) Act 1973 and the Sale and Supply of Goods Act 1994 will be the applicable English laws.

The sale and the transfer of title in the chattel is completed these days by some standard forms, such as the Norwegian, Nippon and more recently, the Singapore Ship Sale Form 2011.[2] The general principles of the law of contract plus the relevant provisions of the three legislations will be useful in negotiating, drafting and concluding any sale pertaining to the sale of a ship. Other pertinent legislations include the Misrepresentation Act 1967 and the Unfair Contracts Act 1977.

A ship under construction or to be built in a shipyard is governed by s 18 r 5(1) of the Sale of Goods Act 1979 and it is considered as part of the sale of future goods. The shipbuilding contract cannot pass any property at the time of execution of the shipbuilding contract as there is no chattel to pass.

The other relevant provisions under the Sale of Goods Act 1979 include the following implied warranties under s 12 (2):

(a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made; and

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1 S 61, Sale of Goods Act 1979. See *Behnke v. Bede Shipping Co* [1927] 1 KB 640.

2 Singapore is now the leading Asian venue for maritime and commercial arbitrations.

(b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance or disclosed or known.

Other directly relevant provisions under the Sale of Goods Act include s 13 which deals with sale by description and s 14 which governs implied terms about quality or fitness. S 14 (2B) is directly useful to any buyer of a completed vessel. Sub-section (2B) covers as follows:

….the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods:

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied;

(b) appearance and finish;

(c) freedom from minor defects;

(d) safety; and

(e) durability.

Due to the nature of its transaction, sale of ships is often described as lying in between sale of goods and conveyance of real properties under the Torrens system.

There is a statutory definition of a ship in s 742 of the Merchant Shipping Act as follows:

"Vessel: includes any ship or boat or other description of vessel used in navigation.

A contract for sale of ship is defined as an agreement on the part of the seller to transfer the title in a ship to a buyer for a consideration called the price, which is the money consideration.[3] Property passes at the conclusion of the contract of the sale. In an agreement to sell, property passes sometime in the future and will be contingent upon satisfaction of some conditions. Agreements involving sale of ships can be both.

Sometimes, a contract for sale of ship can be contained and evidenced by exchange of correspondence, telexes, faxes and emailed attachments. In *The Merak*, the court held that there was a binding contract as parties had agreed on the price and all salient points of a normal contract of sale other than an inspection to be conducted by the buyer. [4] The Norwegian Sale Form was to be used. The market for ships became more bullish and the sellers contended that there was no binding contract. The Court held that there was a binding contract based on the Norwegian Sale Form and ordered the parties to refer the dispute over the breach of a binding contract to be resolved by arbitration. Failure to arrange a suitable date and venue for an inspection by the sellers was held to be a breach of the contract.

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[3] S 2, Sale of Goods Act 1979.

[4] [1979] 2 Lloyd's Rep. 250.

In another English case, the Court held that there was a binding contract notwithstanding the presence of some terms in protracted correspondence between sellers and buyers such as "continuous machinery survey up to the date of delivery" and "class maintained free of recommendations, free of average damages….".[5] In this case, the contract was also based on the Norwegian Sale Form.[6]

Passing of property

In England and other Common law jurisdictions, the passing of the property is provided and contained in a document called the bill of sale.[7] If the buyer is foreign, the document is usually executed before a Notary Public and legalized by the Consular office of the buyer's embassy. The effect of a bill of sale as a document is to give to the holder a legal or equitable right to the property and enable the person to take possession.[8]

Preliminary Enquiries

The first issue to enquire relates to the reputation and financial reliability of the ship-owners and the particulars of the vessel.

If the vessel is entered with a protection and indemnity association that is part of the international group, one can assume that the owner of the vessel is of reasonable reputation and its vessels are properly classed.

Next, a buyer can find out more about the particulars of the vessel based on searches conducted from Lloyd's Register of ships or from the registries of major classification societies, such as Bureau Veritas and American Bureau of Shipping.

The vessel has to be kept in her class and a prospective buyer has to know whether the survey requirements imposed by the classification society have been complied with. Maintenance of class is equivalent to the maintenance of a building. A prospective buyer has to conduct a survey on the vessel even before any draft sale form is given to him.

The prospective buyer will have to negotiate for the price and delivery of the vessel. The date and venue of delivery of the vessel are relevant. A ship is a floating asset and the buyer may want to conduct a survey on her. The date of delivery is important to both buyer and seller. It gives the seller the opportunity to effect necessary repairs to ensure compliance with class, and gives the buyer the option to rescind the agreement to purchase if there is no delivery within a reasonable time.

It is rare and expensive for a second hand vessel to be placed in a dry

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5 *The Buena Trader* [1977] 2 Lloyd's Rep. 27.

6 *Ibid.*

7 S 24. Merchant Shipping Act 1894.

8 See *Diamond* on Hire *Purchase Agreements as Bills of Sale* (1960) 23 MLR 399, 402.

dock for the purpose of examining its underwater parts such as the tail and shaft. This expense of placing a vessel in a dry dock has to be borne by the buyer unless the tail-end shaft is damaged and requires repairs in order to have her classification maintained. The cost of sending the vessel from her last trading destination to the dry dock will be the seller's account.

Apart from the particulars of the vessel and her registered ownership, the sale agreement will state the price. 10% of the price will be paid upon the signing of the contract and this is usually placed on an interest earning joint account of the seller and buyer. This deposit will be released together with the balance in accordance with the sale agreement. The 10% deposit is not a pre-payment of the purchase price under the Memorandum of Agreement. [9]

The Sale Forms

The Norwegian Sale Form is the most widely used sale form for the sale of ships in the world. It was adopted by the Baltic and International Maritime Council ("BIMCO") in 1956 and has since been amended several times, the most recent amendment being in 1993.

Although it is used mainly for completed ships whether new or second hand, it can also be used for ships under construction.

Payment of the deposit can be made to the buyer's nominated bank under clause 2. Under clause 3, payment of the balance of the 90% of the purchase price can be made to the buyer's nominated bank within 3 banking days after the vessel is in every aspect physically ready for delivery. The buyer can have different nominated banks for the purposes of clauses 2 and 3.[10]

Clause 4 provides specifically for the inspection by the buyer before the sale in exchange for his undertaking not to cause any delay. Compensation has to be paid to the seller if there is delay due to inspection on the part of the buyer.

Some salient clauses in the Norwegian Sale Form have been the subject of judicial interpretations. For example, clause 11 deals with the delivery of the vessel "in class and free of recommendations". This means that the vessel's class is being maintained or she has satisfied the requirements of a major classification society.[11]

Clause 8 deals mainly with documentation. It provides for the seller to hand over to the buyer an exhaustive list of documents at the time of closing. Clause 8 (f) deals with "any such additional documents as may reasonably be required by the competent authorities or the purpose of registering the vessel". In the Singapore Court of Appeal's decision in *Zalco Marine Services Pte Ltd*

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[9] See *The Selene G* [1981] 2 Lloyd's Rep. 180.

[10] *PT Berlian Laju Tanker TBK v Nuse Shipping Ltd (The Aktor*) [2008] 2 Lloyd's Rep. 246.

[11] See *The Buena Trader* [1978] 2 Lloyd's Rep. 325, CA.

v Humboldt Shipping Co Ltd[12], it was decided that any subsequent negotiation on the type of documents after the conclusion of the contract was to give effect to the parties' agreement. Clause 11also deals with documentation. It provides that "the vessel shall be delivered with….her national/international trading certificates, as well as all other certificates the vessel had at the time of her inspection".

Seller's default is covered by clause 14. If there is a failure on the part of seller either to give a Notice of Readiness or a legal transfer, the buyer will be given the option of cancellation. Clause 14 also provides that if a Notice of Readiness has been given, but before the buyer has taken delivery, the vessel ceases to be physically ready for delivery, .the buyer has the option of cancelling the agreement and he is also entitled to a return of the deposit together with any interest earned.

Polestar Maritime Ltd v YHM Shipping Co Ltd.[13]

In this case, the seller complied with clause 11.However, after the vessel was inspected and before delivery, a new requirement under the International Convention on the Prevention of Pollution from Ships came into existence. Vessels were required to have an International Sewage Pollution Prevention certificate ("ISPP"). At the time of the delivery in Hong Kong the vessel did not have such a certificate on board and was detained. The seller managed to secure an exemption and she was released within 24 hours from the time of detention. The Court of Appeal ruled in favour of the seller as clause 11 was not linked to "certificates required for trading in the future" and the seller complied with clause 14 which required him to lift the detention and deliver the vessel together with the bill of sale within three banking days.[14]

The other important clauses in the Norwegian Sale Form pertain to dry-docking and underwater survey (clause 6), spares and bunker on board the vessel at the time of the inspection belonging to the buyer (clause 7) and payment within 3 banking days when the vessel is physically ready for delivery in accordance with the terms and conditions of the agreement.

The Toll Park,[15]

In this case, an issue of interpretation arose over the phrase "built in 1970". There was a Memorandum of Agreement based on the Norwegian Sale Form. The vessel was substantially built in 1970 but delivered in January 1971. The parties referred this matter to arbitration before a very experienced and

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12 [1998] 2 SLR 195.
13 [2012] EWCA Civ 153.
14 *Ibid.*
15 [1988] 1 Lloyd's Rep. 55.

competent arbitrator who ruled that "built in 1970" could be interpreted as "building completed in 1971". There was an appeal to the court on a point of law, but the judge concurred with the arbitrator's ruling.

Leave to appeal was rejected. Lord Justice Parker provided the following rationale:

> *First, it is a perfectly ordinary English word. Secondly, it appears to me there is no material upon which it could be given any special meaning unless it is regarded as being a special meaning that "built" inevitably has to be construed as building completed.*[16]

Based on plain and natural English, there should be no other interpretation and the appeal to a judge on such a point of law is otiose. Only a construction of statute ought to be based on a question of law and not over a specific English word.[17]

Apart from the Norwegian Sale Form, the Nippon Sale Form is also widely used. The Singapore Ship Sale Form made its debut in 2010. This Singapore format incorporates all the salient aspects of the Norwegian Sale Form and is drafted with input from both the commercial persons and admiralty lawyers. There is an exhaustive list of documents to be exchanged between sellers and buyers in comparison to the Norwegian Sale Form which allows for "any such additional documents as may reasonably be required..."

Clause 9 of the Norwegian Sale Form, which deals with encumbrances, is contained as part of the sellers' documents under the Singapore Sale Form. Clause 8 (b) (x) provides as follows:

> *Letter from the Sellers confirming at the time of the delivery that the vessel is free from encumbrances, charters, mortgages, maritime liens, writs (saved where security has been furnished), port state and other administrative detentions, stowaways, trading commitments and any other debts whatsoever, and undertaking to indemnify fully buyers against all consequences of any claims against the buyers that may arise due to claims against the vessel originating prior to the time of the vessel's delivery to the buyers.*

Delivery of the vessel coupled with the signing of the protocol of delivery and acceptance did not preclude a claim for damages for breach of speed warranty. In the case of *Riva Bella SA v Tamsen Yacht GmbH*, the court held that there was a failure on the part of the seller to discharge the burden of showing a breach of speed warranty and it did not absolve the seller from any claim for damages despite the acceptance of the vessel and the signing of the protocol of delivery and acceptance.[18]

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16 1988 WL 624450 at p 2.

17 *Cozens v. Brutus* [1973] AC 854, per Lord Reid at p 651.

18 [2011] EWHC 1434 (Comm).

It is trite law that a contract is concluded when there is a positive offer and a positive acceptance. Often, in a purchase of a ship, parties do conclude a legally binding agreement if they have agreed on most of the basic and major issues covered under the sale form. Annotations such as "sub details" and "subject to details" have a recognised meaning when used in the context of sale of ships. They mean that there is no binding contract until all the details of the proposed formal agreement have been negotiated and agreed by the parties.[19] In *The Merak*, the court held that there was a binding contract as the parties had agreed on the price and all the salient points other than the venue and date of inspection.[20] Ship brokers play a key role in international transactions involving sale of ships and they are usually entitled to reasonable commissions of 2.5%.[21]

Seller's exclusion of liability

A seller of a motor vehicle or any chattel may exclude his liability with precise wording in the agreement such as "as is, where is" and "with all the faults". The situation is the same for a ship-owner. There is, however, one caveat. The description of the vessel must be accurate and adhered to by the seller. For example, the seller will not get away from selling a single hull tanker when she is described as a double hull vessel.[22]

Exclusion of implied terms under ss 12, 13 and 14 of the Sale of Goods Act would previously be disallowed in the case of a consumer sale, involving for example, the sale of a private boat or yacht.[23]

Vessel is subjected to charter-party

Sale of a completed house may be subjected to tenancy or a long lease or conveyance of a piece of land with restrictive covenants. Sometimes, a seller of ship may sell his ship together with the residue of a charter party. A ship may be under a charter party and regardless of whether it is a time or voyage charter, the buyer has to allow the charterer to complete it. A charterer can take out an injunction to restrain the buyer from acting in violation of the charter-party.

Lord Strathcona SS Co Ltd v. Dominion Coal Limited.[24]

This Privy Council case was a Canadian appeal from the Supreme Court of Nova Scotia. In this case, there was a long charter between the owners of

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[19] *See Thoresen & Co (Bangkok) Ltd v Fathom Marine Co Ltd* [2004] 1 Lloyd's Rep. 622 and *The Junior K* [1988] 2 Lloyd's Rep. 583.

[20] [1976] 2 Lloyd's Rep. 250, CA. Also see *The Buena Trader* [1977] 2 Lloyd's Rep. 27.

[21] See *Berzovsky v Edmiston & Co Ltd* [2011] EWCA Civ 431.

[22] See *Taylor v Bulen* (1850) 5 Ex 779.

[23] S 4 of the Sale of Goods (Implied Terms) Act 1983 is repealed by Sale of Goods Act 1979, s 63, Sch 3.

[24] [1926] AC 108.

the steamship Lord Strathcona and the Respondents for use in the Saint Lawrence River in 1914. The charter also provided the Respondents with two options to renew it. She was requisitioned by the British government for the purposes of war from 1916 to 1919. During this period, ownership of the vessel also changed a few times. The charterers successfully obtained an injunction against the present owners for not performing the terms of the charter party and this decision of the Supreme Court of Nova Scotia was affirmed by its appellate Court. The appeal before the Privy Council dealt with the issue of frustration as a result of the requisition and the rights of the charterers against the current owners.

Their lordships decided that there was no frustration as the parties did resume the performance of the charter party as owners and charterers, the business character remained the same and the operations of the vessel were not impaired. They also upheld the Order of injunction against the present owners as they acquired the ship with notice of the charter party.

Lord Shaw explained the rationale for the injunction:

> *An obligation affecting the user of the subject of sale, namely a ship, can be ignored by the purchaser so as to enable that purchaser who has bought a ship notified to be not a free ship but under charter, to wipe the condition of purchase and use the ship as a free ship. It was not bought or paid as a free ship, but it is maintained that the buyer can thus extinguish the charterer's rights in the vessel, of which he had notice, and the charterer has no means , legal or equitable , of preventing this in law.*[25]

Seller's rights and obligations

The seller has a basic duty to deliver the ship at a particular port and date if they are specifically included in the Memorandum of Agreement.

The Sale of Goods Act 1979 provides remedies to an unpaid seller. He can exercise possessory lien over the vessel as he is still in his possession. In maritime law, a possessory lien has a higher priority than a maritime lien in the determination of priorities in the event of a judicial sale.

An unpaid seller can also sell the same vessel to a *bona fide* buyer who will acquire a good title.

If the bill of sale has been executed and transfer registered in the name of the buyer who has not remitted payment, there may be some complications.

The Bineta[26]

The ship was sold by the seller to the buyer who did not pay the purchase price even though he registered him as the new owner. The seller managed to

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[25] *Ibid*, at p 117.

[26] [1966] 2 Lloyd's Rep.419.

sell the vessel to a third party who successfully sought a court declaration that he was the rightful owner. In this case, Brandon J held that the Court had jurisdiction under s 20(2) (a) of the then Administration of Justice Act.[27]

The seller can sue for the difference in market value and sale price if buyer refuses to take delivery and make payment.[28] Under appropriate circumstances, a buyer may restrain the seller from selling to a third party if he has fulfilled the terms of the contract.[29]

Buyer's rights and obligations

Under s 28 of the Sale of Goods Act 1979, payment by the buyer and delivery have to take place at the same time unless the parties agree otherwise. Like purchase of a house in conveyance, the first obligation of the buyer is to make payment for the ship which he has contracted to buy.

If the seller refuses to sell and deliver the ship, the buyer can claim damages in the form of a price difference between the sale price and the market price which he has paid for a substitute vessel.[30] S 51(3) of the Sale of Goods Act 1979 states:

> *Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted*

Also, the buyer has a duty to mitigate his damages at all material times by acting in a reasonable manner.[31]

The other remedy available to the buyer is to apply to the court for specific performance. In an international sale involving vessels, the court is often reluctant to grant such a remedy as damages may be more appropriate.[32] A specific performance was granted by the court in a sale involving an old vessel in the following case.

Behnke v. Bede Shipping Company, Ltd[33]

It was a sale of a very old ship, but refitted with new boilers and an engine to comply with German regulations. The sale was confirmed with a telegraphic acceptance by the sellers' brokers. The sellers tried to sell the vessel to other interested parties, but their revocation came after acceptance. The seller refused to provide instructions regarding the payment of deposit and repudiated the contract with the buyer.

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27 Presently part of Senior Court Act 1981.

28 See *The Buena Trader* [1977] 2 Lloyd's Rep. 27.

29 See *Neptune Navigation Corporation v. Ishikawajima-Harima Heavy Industries Company Limited* [1987] 1 Lloyd's Rep.24, CA.

30 *The Ile Aux Moines* [1974] 2 Lloyd's Rep.502

31 See *The Solholt* [1981] 2 Lloyd's Rep.574.

32 *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep.403, HL.

33 [1927] 1 K.B. 649.

The German buyers brought an action against the sellers, seeking a court declaration that there was a binding contract and a Court order for a specific performance of the contract.

The Court held that the contract was enforceable and ordered a specific performance.

As to the remedy of specific performance, Wright J said in the same case:

S 52 of the Sale of Goods Act gives the Court a discretion, if it think fit, in any action for breach of contract to deliver specific or ascertained goods, to direct that the contract shall be performed specifically. I think a ship is a specific chattel within the Act. The plaintiff wants the ship for immediate use and I do not think damages would be an adequate compensation. I think he is entitled to the ship and a decree of specific performance in order that justice may be done.[34]

A buyer can also consider obtaining a freezing injunction on the assets of the seller to recover damages for late delivery provided there is full disclosure of all material facts. Any application for an injunction is made *ex parte* in England.[35]

Ship under construction

For a ship under construction, the main contract is the shipbuilding contract. It is executed between the shipyard ("the shipbuilder") and the buyer. There is provision for progress payments at various stages of construction. Upon full completion of the entire hull, the vessel is then launched and a bill of sale is issued and given by the shipbuilder to the buyer. Property in the entire vessel is passed to the buyer.

Materials delivered and approved by the buyer are not part of the hull of the ship. The hull at the shipyard is referred as the incomplete vessel under construction. Materials may be earmarked for the specific building project and will be part of the shipbuilding contract if they are appropriated to the hull of the ship.

The law on this is clear and it will be difficult for parties to circumvent this by stating in the shipbuilding agreement that materials and equipment earmarked for the shipbuilding project will pass to the buyer at specific times. This is due to the fact that any shipbuilding contract pertains to a sale of future goods.[36]

Building materials and equipment specifically earmarked for a specific hull in the shipyard do not form part of the incomplete ship. Even in the event

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[34] *Ibid*, at para [661].

[35] See *The Capaz Duckling* [2008] 1 Lloyd's Rep.54 and *The Veracruz* [1992] 1 Lloyd's Rep. 353.

[36] See Sale of Goods Act 1979, s 18 rule 5 (1).

of a shipyard placed under receivership or subject or a winding up, such materials do not belong to the buyers. They belong to the liquidators. This is trite law dating back more than 100 years ago to decisions of the House of Lords. Lord Halsbury L.C said this in *Reid v Macbeth & Gray*

There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is that materials provided by the shipbuilder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract cannot be regarded as appropriated to the contract or as "sold" unless they have been affixed to or in a reasonable sense made part of the corpus.[37]

In *Reid v Macbeth & Gray*[38], the steel plates were approved by Lloyd's surveyor at the manufacturers' yard and they were marked with the number of the hull. The steel plates were not lying at the shipyard but in various railway stations. However, the proceeds realised from the sale of the steel plates belonged to the liquidators and not the ship-owners despite the shipbuilding contract containing a provision that "all materials from time to time intended for her….shall immediately as the same proceeds became the property of the purchasers".

In *Re Blyth Shipbuilding and Dry docks Co Ltd*, certain building were brought to the shipyard and approved by the buyers' surveyors.[39] There were also materials not approved by the buyers' surveyor. In either case, building materials did not belong to the owners unless "they were inextricably part of the vessel as to be "appropriated to her". [40] Pollock M.R provided the ogent standard:

> *These worked materials, although worked up and suitable for placing into the vessel at the appropriate time and accepted, it may be, by the surveyor, have yet taken their place and become so inextricably a part of the vessel as to have satisfied the meaning of the word "appropriated".*[41]

The situation may be very different if both buyer and shipyard state in their shipbuilding contract that the property in the materials shall pass to the buyer with precise, clear and unambiguous wording.[42]

Refund Guarantee

A refund guarantee is provided by the shipbuilder and it is issued by a commercial bank or an insurance company acceptable to both the shipbuilder

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[37] [1904] AC 223 at p 230. Also see *Re Blyth Shipbuilding & Dry Docks Co Ltd* (1926) 24 LlL Rep. 139, CA. See also *Seath & Co v. Moore* (1886) App 350 HL.

[38] [1904] AC 223.

[39] (1926) 24 LlL Rep. 139.

[40] S 18, Sale of Goods Act 1979.

[41] (1926) Ch. 494 [515].

[42] *Hill* on *Maritime Law* (3rd Edition) p 71.

and the ship-owner. Sometimes, it is also referred to as an advance payment bond or an advance payment guarantee. A corporate bond in the manner of a performance bond can also be provided by the holding company of the shipyard if it is credit worthy and reputable.

The purpose of the refund guarantee is to give recourse to the ship-owner to claim back the instalment payments made by him to the shipyard in the event of a liquidation.

The ship-owner can also terminate the shipbuilding contract due to a major default, such as an unreasonable delay in completion and delivery by the shipyard.

Insolvency of the builder may be the pinnacle of factors which will trigger a claim under the refund guarantee. Sir Simon Tuckey said this in *Kookmin Bank v Rainy Sky SA*:

> *Insolvency of the shipbuilder was the situation for which the security of an advance payment bond was most likely to be needed. The importance attached in these contracts for the obligation to refund in the event of insolvency can be seen from the fact that they required the refund to be made immediately.*[43]

In *Kookmin Bank v Rainy Sky SA*, seven identical shipbuilding contracts were made with the claimants who were either the buyers or assignee of a claimant's rights under the contract. Under the terms of each shipbuilding contract, the shipbuilder would be obliged to make a full refund of all the advance payments made in the event of the shipbuilder's insolvency. There can also be a full refund due to rejection of the vessel or termination, cancellation and rescission of the contract by the buyer in accordance with the terms of the contract. The advance payment guarantee issued by the Korean bank was a mirror reflection of all these terms and expressions in the shipbuilding contract other than the issue of insolvency. The bank refused to make a refund of the advance payments due to insolvency of the shipbuilder. The Court of Appeal unanimously allowed the appeal of the bank. Sir Tuckey said as follows:

There may be any number of reasons why the Builder was unable or unwilling to provide bank cover in the event of its insolvency and why the buyer was prepared to take the risk.[44]

In order to make a claim from the guarantor, the ship-owner will have to lodge a notice of claim and in certain cases, present documents. Depending on the wording of the refund guarantee, payment can be based on a notice of claim without any supporting document. It can also be complicated and no payment can be made unless the notice of claim is supported by a court

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43 [2010] EWCA Civ 582 [30].

44 *Ibid*, [51].

judgment or an arbitral award. A more common practice is a notice of claim supported by a statement of default by the beneficiary or a certificate by an independent surveyor or qualified professional.[45]

It was decided more than a century ago by the Privy Council in *Commercial Bank of Tasmania v Jones*[46] that once the principal debtor was substituted by a third party after the date of the guarantee and with the agreement of the beneficiary, the guarantor was not bound to make payment to the beneficiary. There was a complete novation of the debt in this case which operated as a complete release of the original debtor.

Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV[47]

In this 2011 Court of Appeal's decision, the main issue before the Court was whether the provider of the refund guarantee was liable to make payment of all the advance payments to the beneficiary despite a novation of the shipbuilding contracts for the construction of dredgers from the original company H to another company C. The original shipyard company H was dissolved and, under Korean law, all the rights and obligations under the shipbuilding contracts were transferred to company C. The Court of Appeal decided that the guarantors were liable as the owners' demand for refund was made in conformity with the contract and that the shipbuilder had failed to make the refund.

Lord Justice Longmore provided the rationale for his judgment:

> *It might be that in the light of the novation, H was not liable to make the refund, but C was and it might be that in the light of the fact that H had been dissolved, it could not make the refund. But neither of those facts mattered….Questions whether the debtor was liable under the underlying contract were irrelevant to guarantees such as those in issue where payment was to be made against documents, whether certificates or awards or other documents.*[48]

Novation and Resale

In conveyancing, an option given to a purchaser can change hands several times when the property market is bullish. The same can happen to shipbuilding contracts. A ship-owner with a vessel under construction can sell his vessel to a third party for a higher price. He can do this with a direct sale using a Memorandum of Sale under the Norwegian sale Form or he can transfer all his rights and obligations in the shipbuilding contract through the process of novation. He needs to have the consent of the ship builder as the

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45 Art 20 of the ICC Rules.
46 [1893] AC 313.
47 [2011] 2 Lloyd's Rep. 379.
48 *Ibid*, at paras 26 and 27.

new buyer is stepping into the shoes of the ship-owner. Apart from reimbursing the seller for all the advance payments made to the shipyard and the profit margin made by the seller, the new buyer has to bear the costs of supervising the balance of the new building contract.[49]

Remedies and rights of the shipbuilder

The shipbuilder is in the same position as a builder of homes and houses. As long as the shipbuilder builds in full compliance with the design and specifications, he is under no legal liability to the ship-owner. He needs to satisfy the basic requirements under the Sale of Goods Act 1979 that the materials used are fit for the purpose of the ship construction.[50] The shipbuilder has to exercise the general standard of skills expected of him and he has to comply with the statutory requirements of safety.[51]

Remedies of the shipyard are mainly due to factors like non payment or refusal to take delivery by the ship-owner due to sudden financial downswing. The most effective remedy for the shipbuilder is to exercise a possessory lien over the completed vessel and to sell the vessel to recover its losses. Under maritime law, the holder of a possessory lien ranks higher than that of a maritime lien in the determination of sale proceeds arising from a judicial sale. The shipyard can also sue for the price and can exercise a stoppage in transit.[52] It is almost certain that such measures are unlikely to be exercised by the shipyard if there is receipt of progress payments arising from the shipbuilding contract. A shipbuilder will risk the loss of the possessory lien if the completed vessel leaves the premises of the shipyard.

The shipyard can also have recourse to a bank guarantee or performance bond provided by the ship-owner in the event of a major default under the shipbuilding contract. It is difficult although not impossible for a shipyard to obtain a banker's performance bond to ensure progress payments by a buyer .This may be a prudent measure if the buyer does not have financing from a commercial bank. There were some reported cases involving guarantees involving Korean shipyards during the period of the late 1970's when the world was in financial turmoil arising from the oil crisis. It is always a prudent measure on the part of the shipbuilder during a global financial crisis or when the shipping industry is in doldrums to obtain a guarantee from a reputable financial institution in order to ensure prompt remittance of progress payments under the shipbuilding contract by the ship-owner.

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49 *Inta Navigation Ltd & Anor v Ranch Investments Ltd & Anor* [2010] Lloyd's Rep.74

50 S 14 of the Sale of Goods Act 1979.

51 Merchant Shipping Acts 1949, 1964 and 1974.

52 S 44 to s 46, Sale of Goods Act 1979.

Hyundai Heavy Industries Co Ltd v Papadopoulos and others[53]

A letter of guarantee was jointly and severally provided by three Greek individuals to the Korean shipbuilders to guarantee payment by a Liberian ship-owner for the construction of a ship. The letter stated that the guarantors would "irrevocably guarantee the payment in accordance with the terms of the shipbuilding contract all sums due or become due by the ship-owner to the shipyard.

Under the terms of the shipbuilding contract, the shipbuilders could cancel the contract, retain money already paid and to claim for damages in the event of a default in the payment of the second instalment. There was such a default and the shipbuilders cancelled the contract in accordance with the shipbuilding contract.

On appeal to the House of Lords, the guarantors contended that the effect of the cancellation of the contract by the shipbuilders destroyed their rights to recover under the second instalment payment and replaced it with a remedy in damages.

The House of Lord was not persuaded and held that the notice of cancellation of the contract by the shipbuilders did not affect the ship-owner's liability for payment of the second instalment as it was a liability arising before the rescission. Hence, the guarantors remained liable to pay the second instalment under the guarantee for the ship-owners' default in payment that instalment.

Failure to take delivery by the ship-owners usually takes place when the shipping market is sluggish. It was during the oil crisis of the 1970's that tanker owners and charterers tried to capitalise on technicalities and refuse delivery. Fortunately for the shipbuilders, the Commercial court and the Court of Appeal in England did give efficacy to commercial factors. Two cases involving Japanese shipyards and Japanese tanker owners and charterers surfaced during this period. Refusal to accept delivery will entitle the shipbuilders to claim for the usual damages and retention of all the progress payments and deposit under the shipbuilding contract.

The Diana Prosperity[54]

A Japanese tanker company planned to build 50 tankers of 80,000 tons each, to be delivered from 1975, and to obtain financing for the construction, it granted time charter for the first vessel to the defendant company. The vessel was sub-chartered to the plaintiff company.

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[53] [1980] 2 All ER 29. Also see *Hyundai Shipbuilding and Heavy Industries Ltd v Pournaras* [1978] 2 Lloyd's Rep.502.

[54] [1976] 2 Lloyd's Rep.60, CA. Also see *Sanko Steamship Co Ltd v Ksno Trading Ltd* [1978] 1 Lloyd's Rep.156, CA.

The relevant charter contained the following clause:

. . . to be built by Osaka Shipbuilding Co. Ltd. and known as Hull no. 354 until named and shall have a deadweight of about 87,600 tons.

The vessel was actually constructed in another yard at Oshima and not in Osaka as the shipbuilders could not handle vessels above 45,000 tonnes. The Oshima yard was 50% owned by the Osaka shipbuilders.

The vessel Diana Prosperity was due to be delivered on Apr. 1, 1976, but the plaintiff company refused to accept delivery on the ground that the vessel they had chartered had been built by a different company.

At the Commercial court, Mocatta J., who used to be a competent admiralty lawyer decided that the plaintiff company and the tanker owners were not entitled to refuse delivery. His decision was upheld by the Court of Appeal. Lord Denning, MR, said:

….the description "built by the Osaka CO. Hull No. 354" could not be regarded as a strict condition precedent which was to be exactly fulfilled and it was sufficient that the vessel to be delivered would be in substance the vessel described in the charters.[55]

Mortgagee interest insurance policy protects the financial institution which provides financing for purchase of a completed ship in the event of financial insolvency or bankruptcy of the ship- owner. It may be a useful avenue to explore with insurance broker as to whether a shipbuilder can be named as one of the assureds in addition to the mortgagee.

Remedies and rights of ship-owner

A ship-owner or buyer can sue for specific performance if there is non-delivery.

He can also claim damages for non-delivery. A shipbuilding contract will specify construction of the vessel in accordance with specifications. If this is not done, the ship-owner can reject her notwithstanding that the shipbuilding contract has provisions for the property to be passed in stages.

In the case of Admiralty *commissioners v. Cox and King*[56], there was a successful claim for return of contract price as the engine speed guaranteed by the shipbuilders was not fulfilled.

S.34 of the Sale of Goods Act provides for examination before delivery. If a ship-owner has commissioned his maritime superintendent or surveyor to inspect the vessel and her equipment, then the ship-owner can only claim for damages with no right of rejection.

The venue for delivery and sea trials are usually at the same place. There is a considerable saving of costs and time if they take place at the same venue.

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55 *Ibid*, p 72.

56 [1927] L1L.Rep.223.

It is customary for the ship-owner to pay for the sea trials and he is usually accompanied by his team of marine engineers and superintendent.

The time for delivery is a condition of the contract. If time for delivery has lapsed after a given grace period, then there can be rescission and a return of the deposit.[57]

Insurable interests of shipbuilder and ship-owner

Unless it is for the construction of a small supply vessel, a barge or a tug boat, it is inevitable for the ship-owner to seek financing from a banking institution. This form of asset financing is called project financing.

A prudent financier will always ask for copies of the shipbuilder's insurance policies to know the nature and scope of its insurable risks and value.

The shipbuilder and ship-owner will always obtain the services of insurance brokers to get insurance cover for all the risks associated with the construction of his vessel in the ship-yard. The financier as the mortgagee can be named as one of the assured or an assignee of the insurance policies. The policies will include the Institute Clauses for Builders' Risks, Institute War Clauses Builders' Risks, Institute Strikes Clauses Builders Risks and the Institute Deductible Clause Builders Risks.

In some non Common law jurisdictions, such as China, an incomplete hull in the ship-yard can be the subject of a mortgage by the shipyard and in some cases, by the ship-owner. In view of the negative outlook of the shipping industry, a prudent financier for ship-owner's new project may consider the mortgagees' interest as well. In the event of bankruptcy, the financier can still make use of the insurance policy to complete the payment of progress payments to the shipyard and complete the construction of the vessel.

The main insurance cover for the ship-owner will be the Institute Clauses for Builders' Risks. Attachment of the risks takes place upon either allocation of the hull and machinery to the vessel or delivery of the allocated items to the shipyard.

The perils are like all risks covered in the course of the ship construction. Clause 5.1 has the following proviso:

> *….this insurance is against all risks of loss or damage to the subject matter insured, caused or discovered during the period of this insurance including the cost or repairing, replacing or renewing any defective part….*

Although the Institute Clauses for Builders' Risks does not cover damage or loss due to an earthquake or volcanic eruption, the policy does cover loss or damage due to the prevention or mitigation of a pollution hazard caused by

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[57] *Vosper Thornycroft Ltd v Ministry of Defence* [1978] 1 Lloyd's Rep. 58.

governmental authority and faulty design. It also provides cover for sea trials and for delivery within a distance of 250 nautical miles.

Clause 15 takes care of a change of interest due to a novation of the shipbuilding contract. It states specifically that “any change of interest in the subject matter shall not affect the validity of this insurance”.

Shipbuilding industry is labour intensive. It is not uncommon to find strikes or labour unrest associated with workers in shipyards. It erupted in Poland years ago to bring about the collapse of the Warsaw Pact. Industrial unrest and strikes are also on the rise in China. The perils covered by clause 1 of Institute Strikes Clauses covers “ loss of or damage to the subject matter insured caused by strikes, locked-out workmen or persons taking part in labour disturbances, riots or civil commotions”.

THE FUTURE OF THE CMI IN THE DECADES TO COME

THE FUTURE OF CMI*

Stuart Hetherington**

This session was opened by the President, Karl Gombrii, in which he identified the following topics which delegates might like to direct their remarks to, but he was not seeking thereby to place any restrictions on the ambit of discussion. He confirmed that the CMI Executive wanted to hear from the delegates and would not, as far as possible, engage in debate, except to answer specific questions. Topics identified were:

- Governance
- Work Projects
- Membership
- Website and technology
- Young members
- Future conferences
- Relationship with consultative members
- Publications

The first person to speak from the audience was José M. Apolo, the delegate from the Ecuador MLA who was disappointed that the role of titulary members has been undermined by not requiring them to pay a subscription.

The President of the French MLA, Philippe Boisson, then made the following comments:

"1. The positioning of the CMI: the CMI for doing what?

The CMI was in the past the main promoter of the international maritime law conventions. Since the creation of the IMO Legal Committee in 1967, this role has been progressively reduced: today the main legal instruments are elaborated under the auspices of intergovernmental organisations, mainly IMO and UNCITRAL. Within the IMO, CMI is a NGO, giving it the possibility due to its consultative status to participate actively to the Legal Committee meeting.

The first question is: has the CMI been satisfied with this situation, the situation of a subcontractor of IMO? Or can it have another raison d'etre?

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* Beijing Conference - 19 October 2012 at the Kempinski Hotel, Beijing

** President

(a) The normative function of CMI

French MLA is sceptical about the convention drafting role of CMI. Today, it is the role of intergovernmental organisations to facilitate the adoption of conventions by the States. However there are other ways to reach uniformity at the international level such as Memoranda of Understanding (MoUs) to be adopted by States, model agreements on a regional basis etc.

If CMI wants to be helpful in that area, it is in the formulation of "soft law rules". Provisions of international conventions are rarely sufficient. They need to be supplemented by additional more flexible rules which will facilitate their implementation by the professionals.

Our Association has recognised unanimously the usefulness ("*la raison d'ètre du CMI*"), in the formulation of model laws, guidelines, recommendations, and principles of conduct for the various actors of the maritime community. The main question for CMI is to identify and to detect the needs of the industry in legal matters without encroaching upon territories/competences of other NGOs.

In its drafting role, it is of the utmost importance for CMI to have a good communication and coordination with the other NGOs representing the shipping industries (ICS, BIMCO, INTERTANKO, INTERCARGO, IUMI, International Group of P&I, OCIMF, ISU, IAPH) and also with the offshore industry for offshore legal instruments.

b) Monitoring function

Another important function is to monitor and disseminate information concerning the implementation and interpretation by national courts of international conventions.

The work started by CMI and ICS in this field is an excellent initiative and should be developed in close cooperation with national MLAs. France is a candidate to be involved in this process and to liaise with French Shipowner Association and French Administration.

The work done by Francesco Berlingieri up to now is considerable, but CMI should go further: CMI should appoint a person in charge of collecting and publishing information about the implementation and interpretation of international maritime conventions on a national level. The database of decisions by national Courts on the interpretation of maritime conventions established on the CMI website is a good inititiative but all the maritime conventions are not listed and the database needs to be regularly updated.

c) Keeping the spirit of the origin

For the French MLA, it is of great importance that CMI keeps its soul and the spirit of its origins. CMI has always been a "club" of gentlemen, gathering legal experts of good will, keen to promote harmonisation of maritime law worldwide. CMI is neither a lobby group for a part of the industry nor a political forum.

2. Organisation of the CMI

The French MLA is convinced that the Secretariat of CMI should be reinforced to cope with its missions and new duties and to be concentrated under the responsibilities of one person in charge of administrative and financial matters as well as the regulatory and legislative monitoring.

From this point of view, we are not sure that the substantial reduction in subscriptions will give to the CMI the resources it needs to fulfil these ambitions."

Gregory Timagenis, of the Greek MLA, then congratulated the Executive Council on a job well done. He noted that the role of the CMI, as it had existed from its inception, has passed to the IMO and other United Nations bodies, but the role of harmonisation and unification of maritime law still exists. The CMI can, and does, prepare the first draft of what could be an international convention, as it did for the Rotterdam Rules, and then present it to one of those bodies. He then described the role of the CMI once a convention has been agreed as being able to seek to have such conventions applied in a unified way. He gave an example of the work on limitation of liability and procedural rules which the CMI, under his chairmanship had produced. He then questioned whether the CMI should not consider introduction of a new class of members, that is individuals who would pay a smaller fee but not have any vote.

He then turned his focus on Young CMI which he noted had developed from a social organisation to a scientific one and queried whether a seat on the Executive Council should not be made available for a young member.

José Goni of the Spanish MLA then suggested that CMI needed to pay more attention to the IIDM which meets every year and is producing a new generation of young lawyers.

Bob Parrish, the President of the United States Maritime Law Association, then spoke and once again thanked the CMI Executive Council for its work. He addressed the topic of finances from a US perspective. His association, he said, has 3,000 members and a 90 member board. It has a primary function as a member of the CMI. It holds four meetings a year, the next being on 8 November. Positions are taken on issues which come before the CMI by the US MLA after discussion with its membership. He was complimentary about the recent processes whereby the CMI has substantially reduced subscriptions but queried whether the United States, should be paying as much as it does, in the state of its economy compared with that which existed over 50 years ago. He also echoed the comments made by Gregory Timagenis and then made some philosophical comments for the consideration of the CMI. He invited the Executive Council to consider, whenever it plans to "open an office or spend a dime", to ask itself "to what end?". He noted that the public sector has become the dominant sector and private organisations have limited influence. A detailed examination of the role of the CMI is needed

immediately and he suggested that a small group should consider this issue, such a group being outside the current leadership of the CMI.

Wang Pengnan of the Chinese Maritime Law Association suggested that CMI should collect the national laws on transportation from all countries and for a booklet to be prepared in that regard.

Karel Stes of the Belgian Maritime Law Association then reflected on the cornerstones of the CMI, as perceived by the spiritual fathers of CMI. He commented that the future depends on the contribution of members, both financially and individually. He identified those cornerstones as:

- Firstly, independence which he regarded as vital, from both government and non-government bodies
- Secondly, the regional differences, being different cultures, different laws, which the organisation and management needs to reflect
- Thirdly, acknowledgement that the mission of uniformity has not been accomplished, and
- Fourthly, consultation with all parties, including shipowners, ship builders, financiers, P&I Clubs, insurers, and adjusters. This does not compete with the independence of the CMI.

Francesco Siccardi, of Italy, confirmed that the role of the CMI needed to be reconsidered. Despite the hard work which had been done in some sessions of the conference, including Salvage and York Antwerp Rules, no result had been achieved and in some cases there had been insufficient time to consult. He noted that individual members of maritime law associations needed to come to conferences after considerable preparation and some MLAs needed to consider this problem.

An Rui of the Chinese Maritime Law Association suggested that drafting International Conventions is still one of the main tasks of the CMI and CMI needs to liaise effectively with IMO and other inter-governmental bodies.

Judge Chen Yanzhong of the Chinese Maritime Law Association then identified the need to consider CMI's role as its role was restricted due to the inherent nature of non-governmental bodies. He referred to the Judicial Sales topic which, if finalised, may not result in a convention. He referred to the meeting of judges which had taken place and the proposal by Justice Rares of the Australian Federal Court that it was desirable and feasible for common interpretation and that the application of the Vienna Convention on the Law of Treaties could lead to better results. He highlighted the need for a database of all relevant case law and the application and interpretation of conventions to be available.

Liz Burrell of the US MLA then referred to the CMI's Constitution and in particular Article 1 in which it identifies the objections of the CMI being "To contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of National Associations of Maritime Law and shall co-operate with other

international organisations. She stressed the words "promote" and "co-operate". The Constitution, she continued, therefore anticipates other ways to achieve uniformity and urged that significant attention be paid to fulfil the objectives of the CMI, outside the habitual mindset.

Taco Van Der Valk of the Netherlands Maritime Law Association did not support the suggestion of Greece that the CMI give consideration to introducing a category of membership for individuals. In response to Ecuador's concerns about titulary membership he emphasised that such membership recognises individuals. He urged that better use be made of electronic communications and referred to both Facebook and LinkedIn and suggested that groups be set up. He said that documents could be put on the internet and views sought on them. He agreed with the Chinese Judge and referred to the database which had been commenced by Francesco Berlingieri and recognised that there were problems with people failing to send in judgments and transactions, probably because it was too time consuming. He thought there was more that could be done perhaps by setting up an editorial board to investigate. He thought the interpretation of conventions may be a better source of work for CMI than trying to formulate rules.

Dieter Schwampe of the German MLA stressed that the CMI has no future without people. the CMI, he said, needed to take care of young CMI, essentially through National Maritime Law Associations, some of which are extremely successful. He then referred to the five Western European countries that had joined together and put on regional young maritime lawyers meetings on a rotational basis. He referred to the French, Belgian, UK and Netherlands regional meetings for young lawyers which had been meeting for the last six years extremely successfully. The next meeting is to take place in Rotterdam this year. It can be done in other regions and helps to bring young lawyers together.

The President, Karl Gombrii, then intervened and raised the issue concerning interaction between National Maritime Law Associations and State Governments. Vice President Johanne Gauthier then commented on the Canadian, US and French MLAs which included delegates from government in working committees of their national associations. She referred to the fact that the Canadian MLA had for many years had an annual meeting with government bodies. The guidelines for new MLAs stressed the need for such interaction with government bodies. MLAs, she said, should ask themselves "what can we do better?".

In relation to the collection of jurisprudence, Benoit Goemans identified the concept which he had put before the CMI Executive, and which it was considering, to improve the database. It was pointed out that Francesco Berlingieri had for a long time complained that he was not receiving decisions from NLMAs. Although NLMAs were accustomed to reply to questionnaires they were not accustomed to sending, unprompted, decisions in their

jurisdiction. It was pointed out that Francesco Berlingieri also sought a summary of such decisions and translations, from national maritime law associations.

Chris Giaschi of the Canadian Law Association said that he had set up a website with such material from his own firm as well as the Canadian MLA. He said it was very difficult to ask one person to set up such a database. It would take hundreds of hours of time. He suggested it would be better to subcontract to the National Maritime Law Associations the task of submitting material direct to the website and one person having the supervisory role within the CMI who could then vet material before it went live on to the website. He suggested that National Maritime Law Associations be given the opportunity to upload information by provision of a form which could provide a link to a decision which was searchable.

Karl Gombrii then invited delegates to look at the Canadian MLA website.

Stuart Hetherington then commented that work was underway to seek to have international conventions more widely ratified in a joint exercise with the IMO Legal Committee and the International Chamber of Shipping, which would hopefully generate greater communication and co-operation between NMLAs and their relevant government officials.

Johanne Gauthier then commented in relation to young lawyers that there was no need for separate membership for young lawyers but it was important that they be welcomed into the CMI and provided with education and the opportunity to develop their skills.

Liz Burrell of the United States MLA then referred to regional meetings and the benefit that they provide in increasing friendships and contacts and helping to understand structures and the role of government. Lowering the barriers to participation with regional meetings and developing the website should be encouraged. The US and Canadian MLAs have regular joint meetings.

Patrice Rembauville-Nicolle of the French Maritime Law Association said that it did not make any separation between young and old members of its association but promoted young lawyers within the Association. They were encouraged to push the older members out and show that they were able to manage the Association and become titulary members. He stressed that the CMI had two official languages, English and French. The rules of procedure are in English and there are significant differences between the civil and common law systems. The French language should not be overlooked.

Karl Gombrii concluded the meeting by inviting delegates to send in further submissions to the CMI.

YOUNG CMI

ARREST OF SHIPS AND JUDICIAL SALES OF VESSELS SOUTH AFRICA

PATRICK HOLLOWAY*

CONTENTS:

1. Introduction to the South African admiralty jurisdiction

1.1 South African admiralty jurisdiction is governed by the Admiralty Jurisdiction Regulation Act, No. 105 of 1983 (as amended) ("the Act"), which vests the powers of the admiralty courts on the various divisions of the High Court of South Africa for the determination of maritime claims.

1.2 The Act defines the concept of a "*maritime claim*" very broadly, including a range of claims that were not previously part of traditional admiralty jurisdiction.

1.3 The Act significantly extends the scope of proceedings *in rem* by providing for the arrest of ships other than the ship concerned (the associated ship provisions) and further by allowing for the arrest of property (*in rem*) to obtain security in respect of proceedings either before a South African court, or elsewhere.

1.4 The Act also extends the scope of actions (*in personam*) by extending the associated ship provisions to allow for the attachment of associated ships to found jurisdiction for the prosecution of claims *in personam*, ie, against the owner of the "guilty ship" or debtor.

2. The Action In Rem

2.1 The Act allows maritime claims to be enforced by way of an action *in rem* instituted by the arrest of certain categories of property against, or in respect of which, the claim arose.

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2.2 It is possible to commence proceedings *in rem* against:
2.2.1 a ship;
2.2.2 equipment, furniture, stores or bunkers;
2.2.3 cargo;
2.2.4 freight; or
2.2.5 a fund.
2.3 A claim may be enforced *in rem*:
2.3.1 If the claimant has a maritime lien over the property to be arrested (Traditional maritime liens: salvage, damage caused by a ship, seaman's wages, master's wages, master's disbursements and bottomry bonds and *respondentia*); or
2.3.2 If the owner of the property to be arrested would be liable to the claimant (*in personam*), in respect of the cause of action concerned.
2.3.2.1 The ability to proceed *in rem* based on the *in personam* liability of an owner is significantly extended by a deeming provision in section 1(3) of the Act, which provides:
2.3.2.2 "For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise."
2.4 In order to advance an action *in rem* a claimant needs to show, on a balance of probabilities, that:
2.4.1 The claim is a maritime claim;
2.4.2 The property to be arrested is maritime property;
2.4.3 The property to be arrested is situated in, or is likely to come within, the jurisdiction of the court;
2.4.4 The property to be arrested is the property against which the claim lies, or is an associated ship of the ship concerned; and
2.4.5 The claimant has insufficient or no security for the claim.
2.5 Finally, a claimant must show that it has a *prima facie* case on the merits of the underlying claim based upon facts which, if proved, would give rise to that cause of action.
2.6 An action *in rem* is commenced by the issue of a writ of summons and a request to the registrar of the court for the issuing of a warrant of arrest. The request for a warrant must be accompanied by a certificate in terms of Admiralty Rule 4(3), confirming (a) the jurisdiction of the court (b) the link between the claim and the property to be arrested (c) whether or not any security or undertaking has previously been given in respect of the claim.

3. Security Arrests

3.1 Section 5(3)(a) of the Act empowers the admiralty court to order:
"*the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or*

elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned, or an action in rem against such property, or which would be so enforceable but for such arbitration or proceedings".

3.2 Significantly, the ability to arrest property in terms of section 5(3)(a) of the Act is not limited to the maritime property referred to in section 3(5). It is therefore possible to arrest incorporeal property in terms of section 5(3), provided such property has a reasonably substantial value and is located within the area of jurisdiction of the court.

3.3 Unlike a simple arrest *in rem*, a security arrest is sought by application supported by detailed affidavits, that must disclose all relevant facts. Applications are frequently moved in chambers as a matter of secrecy and without notice to the respondent.

3.4 The applicant for a security arrest must demonstrate that it has:

3.4.1 a claim enforceable by an action *in personam* against the owner of the property concerned, or an action *in rem* against such property, or against a ship, which is an associated ship of the ship concerned;

3.4.2 a *prima facie* case in respect of such claim, which is *prima facie* enforceable in the nominated forum; and

3.4.3 a genuine and reasonable need for security in respect of the claim.

3.5 The requirements in 3.4.1 and 3.4.3 must be established on the ordinary standard of proof, namely on a balance of probabilities.

3.6 In the matter of *Adriatic Shipping Services Inc. vs Elgina Marine Company Limited 2009 (1) SA 246 (SCA) (the mv "Orient Stride")*, Scott JA made the following comment in relation to the requirement in 3.4.3:

> *"It is important to observe, however, that the requirement does not mean that in every case it must be proved that the party whose property is arrested has or will have insufficient assets to meet a judgment granted against it in the main proceedings. Indeed, more often than not the asset arrested is a ship which has a value far in excess of the claim. What, I think, must be established is a genuine and reasonable apprehension that the party whose property is arrested* will *not satisfy a judgment or award made in favour of the arresting party.*
>
> *That apprehension may be founded upon actual knowledge of the extent of the assets of the party whose property has been arrested, or, as would more likely be the case, it may be founded on factors giving rise to an inference either that the party in question will be unable to meet the judgment or that it will seek to conceal its assets or otherwise prevent the judgment from being satisfied. The circumstances may also be such, whether for geographic reasons or otherwise, that it would be extremely difficult for the successful party to enforce the judgment. Different considerations will also arise where the party seeking security already*

has security but arrests property to increase its security (Bocimar NV v Kotor Overseas Shipping Ltd, supra). Whether a need for security has been shown to exist or not will depend therefore upon a consideration of the particular facts of each case."

3.7 In the case of the "Orient Stride" an application was made to set aside the arrest of the bunkers aboard the ship on the basis that there was no genuine and reasonable need for security. The owners made the bald assertion that they were able to satisfy any claim brought against them. The court found that the claimant had established a reasonable apprehension that the owners of the ship, whose bunkers had been arrested, would not satisfy a successful claim. The reticence of the owners to make a reasonable declaration of their assets gave rise to a reasonable apprehension that they would not be able to satisfy an award made against them.

3.8 It is incumbent on the applicant to deal in the application with the nominated forum to which the applicant asks the court to relate its claim.

3.9 It is essential that there is full disclosure of all relevant facts which may be material in determining whether or not there have been pre-arrest negotiations regarding the tender or rejection of security and if there has been a rejection of security, what the reasons for that rejection have been.

3.10 As stated previously, applications for a security arrest in terms of section 5(3)(a) of the Act are typically made pursuant to an *ex parte* application (without notice to the respondent). Uniform Rule 6(12)(c) provides that where an order is obtained without notice, an interested party may set the matter down for reconsideration on the same papers. This remedy is distinct from the further right of a respondent, or other interested party, to launch an application to set aside the order.

3.11 Orders granted by the court on an *ex parte* basis are inevitably in the form of a *rule nisi* and are provisional in nature. Such orders provide the respondent with an opportunity to oppose the confirmation of the order on, or ahead of, a stipulated return date.

3.12 If a respondent makes an application to set aside the order within a reasonable time, the court may also reconsider, vary or rescind the order, provided good cause is shown. Thus, an application to set aside an arrest order may be entertained, notwithstanding the lapse of the time limit in the original order.

4. Counter Security

4.1 The court has a discretion to order that counter-security be established, for any claim or legal costs (section 5(2)).

4.1.1In the case of the mv "Wisdom C" *United Enterprises Corporation v STX Pan Ocean Co Ltd 2008 (3) SA 585 (SCA)*, the court held that a counterclaimant must meet the same requirements as an applicant for a security arrest, and must demonstrate a "genuine and reasonable need for security".

4.1.2 The owners of the ship instituted a claim in London against the charterers. The charterers instituted a counterclaim. The charterers obtained security for their counterclaim by way of an arrest in Italy. The arrest was revoked and when the vessel arrived in Cape Town it was arrested and the owners applied to set aside the arrest.

4.1.3 The charterers were a substantial company with a large fleet. The only basis for requesting counter-security was that it could take up to 3 years to enforce an award in Korea.

4.1.4 Up until the time that this matter was heard, there had been a difference of opinion between the judges in the Natal and Cape courts. The former having held in a line of decisions that the requirements for counter security were not as stringent as those for primary security and therefore it was not necessary to show a genuine and reasonable need for security. The Cape judges had held that the requirements were the same for security and counter-security.

4.1.5 The Supreme Court of Appeal clarified the position, holding that security was security and would only be ordered if there was a genuine and reasonable need, which did not exist in this case. Mere considerations of convenience will not suffice.

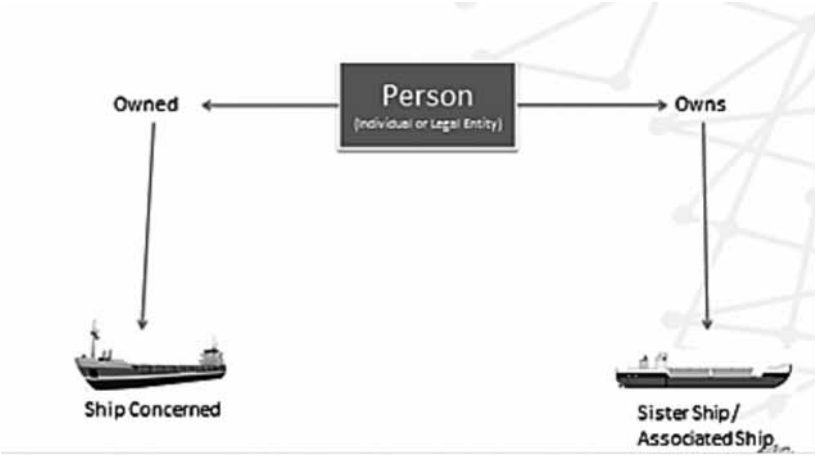
5. Associated Ship Provisions

5.1 Section 3(6) of the Act provides that an action *in rem* may be brought by the arrest of an associated ship, instead of the ship in respect of which the maritime claim, arose.

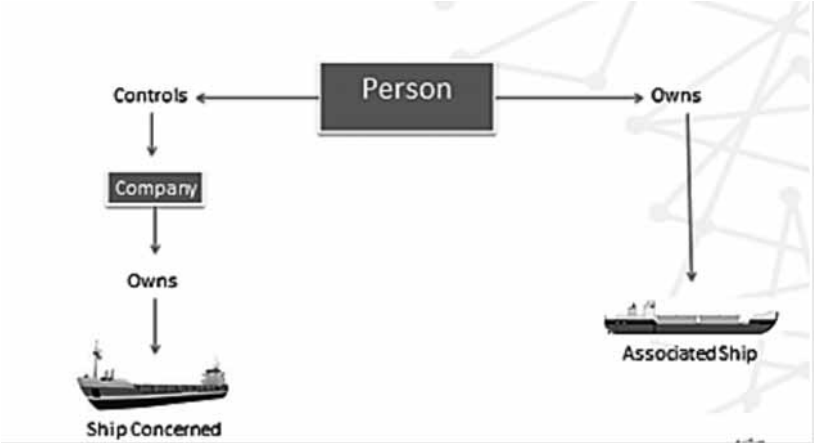
5.2 The associated ship provisions of the Act therefore provide an important additional means for the enforcement of maritime claims, by affording creditors an action against a different defendant to the ship concerned, namely an associated ship. By so doing, the Act has made it more difficult for ship owners to limit their liability to single ship owning companies, providing for a statutory lifting of the corporate veil in certain circumstances. It has also allowed an owner to arrest a ship belonging to a party to whom it chartered a ship, on the basis that the charterer is deemed to be the owner of the chartered ship in respect of any maritime claim for which the charterer or sub-charterer, and not the owner, is alleged to be liable. Furthermore, this has allowed a charterer to arrest an associated ship owned by a head or sub-charterer.

5.3 There are a number of different basis upon which a ship will be regarded as an "associated ship" in terms of the Act:

5.3.1 Firstly, section 3(7)(a)(i) of the Act defines an "*associated ship*" as a ship, other than the ship in respect of which the maritime claim arose, which is owned, at the time when the action is commenced, by the person who was the owner of the ship concerned, at the time when the maritime claim arose.

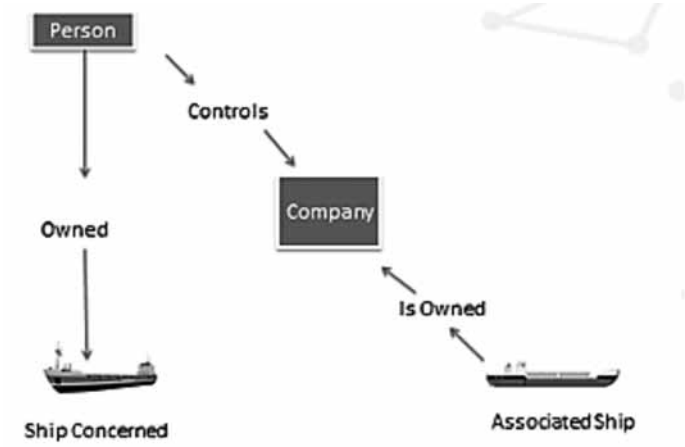


5.3.2 Secondly, section 3(7)(a)(ii) of the Act stipulates that a ship, other than the ship in respect of which the maritime claim arose, which is owned, at the time when the action is commenced, by a person who controlled the company, which owned the ship concerned when the maritime claim arose is an associated ship.

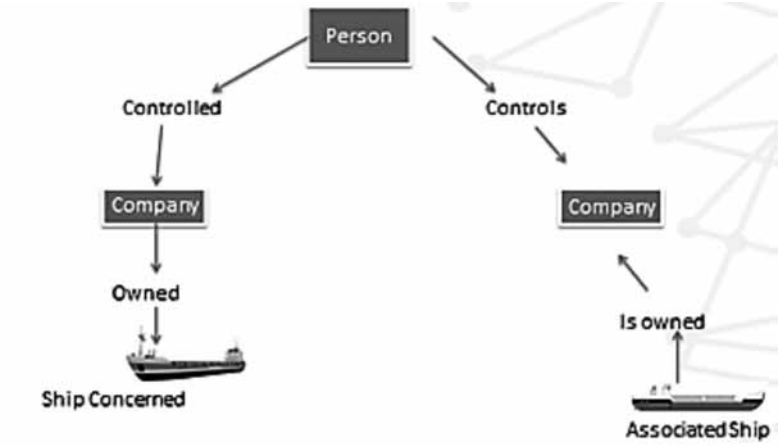


5.3.3. Finally, section 3(7)(a)(iii) of the Act provides that a ship, other than the ship in respect of which the maritime claim arose, which is owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose will be regarded as an associated ship.

section 3(7) (a) (iii) - scenario 1



section 3(7) (a) (iii) - scenario 2



5.4. In terms of the associated ship provisions, ownership and control in relation to the guilty ship (the ship concerned) needs to be proved at the time that the claim arose (but not thereafter), whilst the ownership and control of the associated ship must be proved at the time of the arrest (but not before).

Accordingly, it is possible to arrest associated ships, being ships owned by a legal entity which is not the debtor, but is controlled by the same person or persons who controlled the debtor, despite the debtor having been placed in liquidation.

5.5 Section 3(7)(b) of the Act provides that, for the purposes of the associated ship provisions:

5.5.1 ships shall be deemed to be owned by the same persons, if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons (section 3(7)(b)(i));

5.5.2 a person shall be deemed to control a company if he has power, directly or indirectly, to control the company (section 3(7)(b)(ii)); and

5.5.3 a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares (section 3(7)(b)(iii)).

5.6 Section 3(7)(b)(ii) of the Act expresses the concept of "*control*" of a company in terms of direct or indirect "*power*" to control the company.

5.6.1 The power referred to in the Act is the power to determine the direction, fate and destiny of the company, as opposed to the day-to-day power to manage the operations of the company.

5.6.2 It is the members of a company that exercise the ultimate direct control over a company's affairs through voting rights exercised in general meeting. The immediate control that directors have in relation to a company is ultimately answerable to the company's members in general meeting, who are regarded as having the real power.

5.7 The distinction between direct and indirect power to control a company was considered by the Supreme Court of Appeal in the case of the "*Heavy Metal" (Belfry Marine Ltd v Palm Base Maritime 1999 (3) SA 1083 (SCA))*, where the majority judgment held that direct power refers to the *de jure* authority of a person who controls the shareholding and direction of a company according to the register of the company as seen by the outside world. Indirect power refers to the person who *de facto* wields power through and over the person who is the repository of the *de jure* authority.

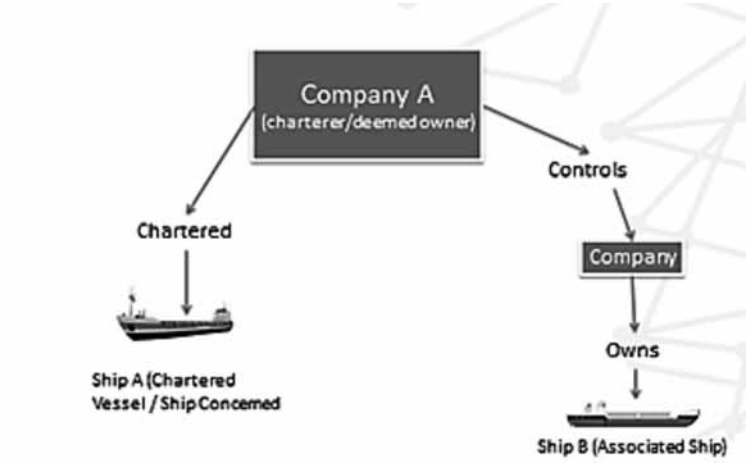
5.8 It is of course possible for *de facto* and *de jure* power to be exercised by the same person or entity.

5.9 Section 3(7)(c) of the Act provides:

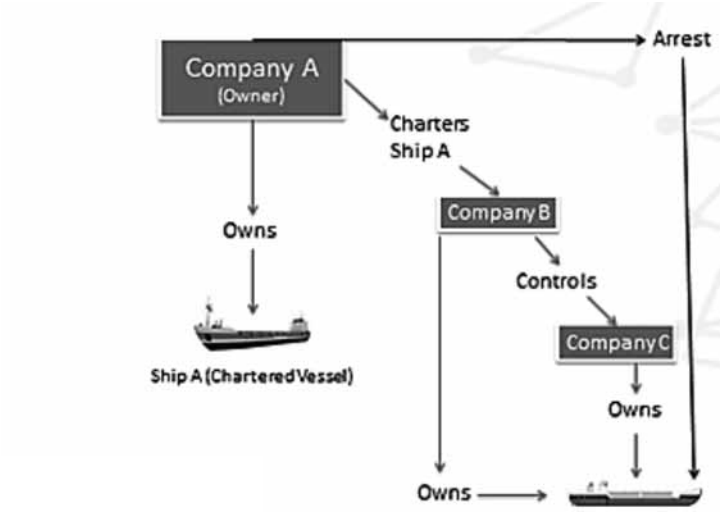
"*If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable*."

5.10 The provisions of section 3(7) have been used to great effect in order to secure claims arising out of charter party disputes.

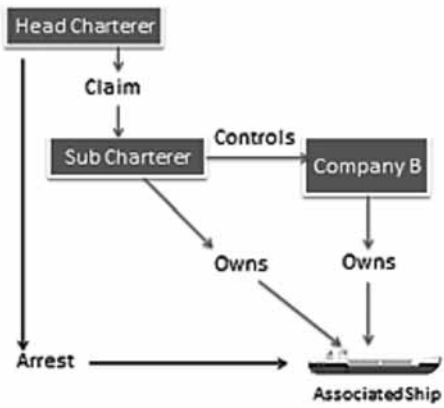
section 3(7) (c)



section 3(7) (c)
Claim by Owner against Charterer



section 3(7) (c)
Claim by a head charterer against a sub-charterer



5.11 A claimant seeking to arrest an associated ship in terms of section 3(7) of the Act bears the onus to establish that the ship is an associated ship on a balance of probabilities *(Bocimar NV v Kotor Overseas Shipping Ltd 1994 (2) 563 (A) at 581 B-D).*

5.12 An applicant seeking to establish the existence of an association will frequently have to rely on inferences from the proved facts in order to satisfy the onus. In *Hulse-Reutter v Godde* 2001(4) SA 1336 (A) Scott JA observed that:

> "*What is clear is that the "evidence" on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. The enquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones. If the position were otherwise the requirement of a prima facie case would be rendered all but nugatory*." (At 1344 C-E)

6. Attachment In Personam

6.1 The Act also provides for the possibility of the attachment of maritime property to found and / or confirm jurisdiction of the court for an action *in personam* against a debtor.

6.2 The applicant in attachment proceedings will have to demonstrate that:
6.2.1 It has a *prima facie* case on the merits of the underlying claim in respect of which that attachment is sought, based upon facts, which if proved, would give rise to that cause of action;
6.2.2 The claim is a maritime claim, as defined by the Act and the court has, or will have, jurisdiction upon attachment;
6.2.3 The property to be attached is owned by the defendant and is situated in, or likely to come within, the jurisdiction of the court;
6.2.4 That the applicant has no security, or insufficient security and there is a genuine and reasonable need for security for its claim.

7. Judicial Sales

7.1 The Act provides that a court may in the exercise of its admiralty jurisdiction, at any time, order that any property which has been arrested in terms of the Act be sold [*Section 9(1)*]. Accordingly it is possible to apply for the sale of property *pendite lite* (before judgment is granted), however, the court has a discretion whether or not to grant an order in these circumstances.
7.2 The proceeds of the property sold shall constitute a fund to be held in court or to be otherwise dealt with, as may be provided by the rules or by any order of court [*Section 9(2)*].
7.3 Any sale in terms of any order of court shall not be subject to any mortgage, lien, hypothecation, or any other charge of any nature whatsoever [*Section 9(3)*]. Persons who previously had claims against the property must pursue their claims against the fund, which takes the place of the property.
7.4 In terms of Rule 21 of the Admiralty Rules:
7.4.1 Any property arrested or attached shall be kept in the custody of the sheriff, who may take all such steps as the court may order, or as appear to the sheriff to be appropriate for the custody and preservation of the property. In so acting the sheriff shall consult any persons/s who caused the arrest or attachment to be effected and shall act in accordance with any order of court.
7.4.2In terms of section 9 of the Act a court may, at the instance of any interested party, order that arrested or attached property be sold on such terms and in such manner as the court may deem fit. More particularly it may order that:
7.4.2.1 the property be sold by public auction, private tender or treaty, or in such other manner as the court may deem appropriate under the circumstances;
7.4.2.2 the property be sold without a reserve to the highest bidder, or subject to a reserve price determined by an appraiser;
7.4.2.3 the sheriff take such steps as the court may direct for the preservation of the property pending the sale;
7.4.2.4 the order be served and published;
7.4.2.5 the proceeds of the sale be dealt with;
7.4.2.6 a referee be appointed and what his duties and powers shall be and that of the court;

7.4.2.7 the sale be on such conditions; and
7.4.2.8 the costs of the applicant and any other interested party be dealt with – all in the manner stated or as provided, in the order.
7.5 Any claims, notices or documents involving the fund are served on the registrar of the High Court or, once appointed, the court appointed referee, who is invariably an attorney or advocate.
7.6 Claims against a fund are filed on affidavit supported with annexed copies of all relevant documents setting out full details of the claim; when it arose; how it is made up; the interest claimed and how it is calculated etc.
7.7 Only maritime claims can participate in the distribution of a fund.
7.8 The legal costs of proceedings instituted prior to the establishment of the fund and which are stayed by its establishment, are added to the claim against the fund.
7.9 Once the referee's report has been filed with the court, with its recommendations, including which claims are approved and their ranking, in terms of the absolute statutory scheme of priorities, any interested party may move an application for an order confirming the report and for the distribution of the fund, or for payment out from the fund of one or more of the claims.

The court is not bound by the referee's recommendations and any interested party may apply for an order varying the recommendations, or may oppose an application for its confirmation.

Where a claim has been disallowed by the referee, the claimant has to prove its claim either by leading oral evidence if so ordered by the court, or by instituting an action against the fund and going to trial.
7.10 The ranking of claims is considered to be a matter of procedure and hence governed by the *lex fori*.
7.11 The order in which claims will rank is prescribed by section 11 of the Act.
7.12 In summary, the ranking is as follows –
7.12.1 A claim in respect of costs and expenses incurred to preserve the property in question, or to procure its sale and in respect of the distribution of the proceeds of the sale;
7.12.2 A claim in respect of salvage of a ship, removal of wreck, any contribution in respect of a general average act or sacrifice in connection with a ship, whether or not arising within the period of one year before the commencement of proceedings to enforce it or the submission of proof of the claim;
7.12.3 A claim to a preference based on possession of the property in question whether by way of a right of retention or otherwise, provided such claim arose before any of the claims referred to below;
7.12.4 A claim which arose not earlier than one year before the commencement of proceedings to enforce it, or before the submission of proof thereof and which is a claim;

7.12.4.1 in respect of the employment of any master, officer or seaman of a ship with or in connection with a ship, including the remuneration of any such person; contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman;
7.12.4.2 in respect of port, canal, other waterways or pilotage dues, and any charge, levy or penalty imposed under the South African Maritime Safety Authority Act or the SAMSA Levies Act, both of 1998;
7.12.4.3 in respect of losses of life or personal injury, whether occurring on land or on water, directly resulting from employment of the ship;
7.12.4.4 in respect of loss or damage to property, whether occurring on land or on water resulting from delict, and not giving rise to a cause of action based on contract, and directly resulting from the operation of the ship;
7.12.4.5 in respect of the repair of the ship, or the supply of goods or the rendering of services to or in relation to a ship for the employment, maintenance, protection or preservation thereof;
7.12.4.6 in respect of premiums owing under any policy of marine insurance with regard to a ship or the liability of any person arising from the operation thereof;
7.12.4.7 in respect of premiums owing under any policy of marine insurance with regard to a ship or the liability of any person arising from the operation thereof; or
7.12.4.8 by any body of persons for contributions with regard to the protection and indemnity of its members against the liability of any person arising from the operation of the ship;
7.12.5 A claim in respect of any mortgage, hypothecation or right of retention of, and any other charge on the ship, effected or valid in accordance with the law of the flag of the ship, and in respect of any lien for payments or disbursements by a master, shipper, charterer, agent or any other person for or on behalf of or on account of a ship or the owner or charterer of a ship;
7.12.5.1 A claim in respect of a maritime lien on the ship not mentioned in any of the claims referred to above;
7.12.5.2 Any other maritime claim.
7.13 A claim "arises" when it comes into existence, not when it becomes due and payable.
7.14 In terms of section 11(8) of the Act-

A person who has paid any claim, or part of it, is entitled to all the rights, privileges and preferences to which the person paid would have been entitled, if the claim had not been paid.
7.15 In terms of section 11(9) of the Act –
7.15.1 A judgment or arbitration award ranks in accordance with the claim in respect of which it was given or made.
7.16 The ranking of claims according to the above order shall apply –

7.16.1 firstly, in respect of claims directly against the ship giving rise to the fund;

7.16.2 thereafter a second 'queue', being in respect of claims which arose against the ship giving rise to the fund, as an associated ship of the ship in respect of which the claims arose, where the association is based on common ownership, that is a "sister ship";

7.16.3 thereafter, a third queue, in respect of claims, which arose against the ship as an associated ship of the ship in respect of which the claims arose, based on common control;

7.17 finally, there is a fourth queue, in respect of "any other maritime claim".

8. Conclusion

8.1 South Africa remains an efficient and friendly arrest jurisdiction, with the broadest range of procedural remedies available to claimants to enforce their rights, obtain security for claims and enforce judgments, awards and mortgages.

LAWS AND PRACTICE OF SHIP ARREST IN PRC MARITIME COURTS

Margot C. R. Luo*

Ship arrest is always an interesting topic in maritime fields, as it may bring certain special effects to a maritime dispute, such as obtaining security for the maritime claims, making forum shopping, forcing the owner to appear to solve the dispute. This article is going to outline the Chinese laws and the recent practice of ship arrest before Chinese maritime courts.

I. Ship arrest can only be applied for maritime claims

In order to arrest a vessel in China, firstly the applicant shall have to make sure that his claims involved are defined as maritime claims under the PRC Maritime Procedure Laws. A claimant of non-maritime claims cannot apply to arrest a ship. There is only one exception. The claimant of a non-maritime claim is able to apply to arrest a vessel owned by the defendants, so as to enforce the enforceable legal documents.

What are maritime claims? Article 21 of PRC MPL expressly listed 22 kinds of claims. They are similar to what are defined as maritime claims in 1999 Arrest Convention. A claim regarding FFA dispute is not a maritime claim, which was confirmed by a case recently tried by Shanghai Maritime Court. Dispute regarding ship's main engine supply contract was once decided by the PRC Supreme Court as a non-maritime claim. However, there were many other cases regarding similar disputes were tried in maritime courts.

II. When a ship arrest can be applied before the court

A ship arrest could be applied either before or after a lawsuit or an arbitration is commenced. If a ship arrest is applied before a lawsuit or an arbitration commences, it shall apply to the maritime court of the place where the ship is, and the lawsuit or arbitration shall be commenced within 30 days from the ship arrest. Otherwise, the court will have the power to release the ship arrest, or return the security to the respondent. This is because under PRC

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laws, ship arrest is not an action *in rem*, but only an interim action taken to preserve the property of the responsible party. If there is no actions *in personam* filed timely after the ship arrest, the arrest of the vessel cannot stand as an action by itself.

It is worth mentioning, if the proceeding of a lawsuit or an arbitration regarding a maritime claim is to commence or has already commenced in a foreign jurisdiction and the ship is in China, ship arrest could be applied before Chinese maritime court so as to obtain security for that claim. Of course, whether the judgment or the arbitral award can be finally enforced against the security obtained by way of the ship arrest will still be subject to the PRC laws and regulations on recognition and enforcement of a foreign judgment and an arbitral award.

Similar laws and regulations can not be found in PRC Civil Procedure Laws, which means for a non-maritime claims no one could apply to freeze the responsible party's property in China for a claim which is still under the foreign lawsuit or arbitration.

III. Which ship can be arrested

Not any vessel involved in a maritime claim could be arrested. Article 23 of PRC MPL provides certain conditions to arrest a ship which is the subject matter of the dispute and to arrest a ship which is not the subject matter of the dispute. These provisions are similar to Article 3.1 and 3.2 of 1999 Arrest Convention. But PRC laws do not have Article 3.3 of 1999 Arrest Convention, which is about action *in rem* against a vessel.

The writer believe the provisions of Article 23 of PRC MPL are also similar to those in most of the other jurisdictions. The writer therefore will not go in detail of it.

Next, let's look at the procedure of applying the ship arrest before the court.

IV. The application of ship arrest before the PRC maritime court

When an application of ship arrest is submitted to the court, the court will only make a prima facie examination of the documents, the court will not decide on any substantive issues. If the application form and its supporting documents can, prima facie, prove that the applicant has a maritime claim against the respondent and the respondent is the owner or the bareboat charterer of the vessel, as the case may be, normally, it will be sufficient enough for the purpose of ship arrest.

In ordinary case, the court will require that the application form, Power of Attorney are in the executed original form. When the applicant is a foreign party, the court will require the Power of Attorney is notarized and legalized. But in emergent cases, if a foreign vessel is to leave the Chinese port within

short time, sometimes the court may accept that the above mentioned documents are submitted by fax or only in copy. But the original forms of them shall be provided to the court after the ship arrest within required time limit. Evidences normally can be submitted in its copy form.

The PRC MPL provides that the court shall make their decision on whether to grant the application within 48 hours since the court accepts the application. Obviously, the 48 hours does not run from the time when the court receives the application documents. In practice, the court may require the applicant to supplement application documents if they think necessary. If the court notifies the applicant to pay court fee and put certain amount of counter-security, it normally indicates that the court will issue the arrest order soon after the applicant pays the court fee and puts forward the counter-security to the satisfaction of the court.

Most of the Chinese lawyers may have the experience that the arrangement of the counter-security is the most time consuming task in ship arrest.

V. The provision of the counter-security

The laws provide that the court may require the applicant to provide counter security when applying to arrest a vessel. Invariably, in all the cases, the court requires it. The maritime court has the discretion to decide the form and the amount of the counter security.

In judicial practice, the acceptable form of the counter security is the cash deposit, a guarantee from a Chinese bank, or from a Chinese branch of a foreign bank, or from a Chinese insurance company such as China Reinsurance, CPI, or a guarantee from a large state owned enterprise such as COSCO or China Shipping.

A guarantee from a foreign bank, foreign insurance company, foreign P&I clubs, no matter how famous and financially good they are, the Chinese court will not accept it, due to the potential difficulties in enforcing the guarantee in the future.

The amount of the counter security is also at the discretion of the court. Different courts in different cases have different practice. In most cases, the amount of the counter-security is 30-day's hire loss of the ship, if the period of arrest will be more than 30 days, the court will require the applicant to supplement the counter-security. And in some cases, the court may ask for 30% of the disputed amount as the counter-security.

The return of the counter security will have to be waited until the principal dispute is solved and subject to the agreement of the respondent, to make sure that he has no claims of wrongful arrest. If wrongful arrest claims is filed, the counter-security will have to be kept in the court until the wrongful arrest claim is solved.

VI. The arrest of the vessel

The court will serve the ship arrest order to the master to arrest the ship. Notification for ship arrest will be sent to the port authority, MSA authority, and boarder authority, without further notification of releasing the vessel from the court, these authorities will not issue their administrative documents to let the vessel leave the port.

Active arrest

There is one form of ship arrest, which probably only exists under PRC laws. It is normally called "active arrest". For vessels with PRC nationality and only trade in domestic sea transportation, after the ship is physically arrested, when the respondent is not able to provide the required security, if the applicant agrees, the ship can be released to operate so as to complete the current voyage without providing the required security. Arrest notice will be sent to ship's registration authority, the local MSA, to forbid the transfer of the ownership of the vessel or set mortgage on the vessel. In practice, the vessel may be allowed to operate more than one voyage, as some judges think the PRC Civil Procedures Laws permit such judicial practice, which the writer do not think so.

The idea behind such laws and practice is to expect that the respondent's financial status will be improved by way of operating the vessel. However, the writer would not totally agree with it and the writer could only see the advantage of it only when the value of the vessel itself is far less than the claim amount.

On the contrary, the disadvantage of the "active arrest" is quite obvious. Allowing the vessel to operate will expose the vessel to much more risks such as total loss or partial loss, and maritime lien may attach to the vessel during the period of the operation.

More than one party apply for the ship arrest

Where there is more than one applicant apply to arrest one vessel or after a vessel is arrested, other applicant comes up to apply for the arrest of the vessel, the rule applied before Chinese courts is that "first come, first arrest." Those come afterwards will submit all the required documents and counter-security, the actual ship arrest will be triggered when the previous arrest is lifted.

VII. The objection to the ship arrest

After a ship is arrested, either the respondent or a party having interest in the vessel could file objection to the ship arrest.

1. The objection filed by the respondent of the ship arrest

The respondent is required to file his objection to the ship arrest within

5 days since the ship arrest. And the court is required by the law to make their decision against such an objection within 5 days. During the proceeding of the objection, the ship arrest will be remained.

It is not easy for such an objection to succeed. If the court thinks that the claim involved is a maritime claim, the respondent is the owner or the bareboat charterer of the arrested vessel according to Article 23 of PRC MPL, and the counter-security is put at a sufficient amount and in a satisfied form, the ship arrest can not be lifted by any arguments on substantive issues such as the respondent shall not be liable for the claims, the amount of the claims are excessive.

2. The objection filed by the interested parties

Those parties who have interest in the vessel could raise their objection to the ship arrest. In most cases, the interested parties are the owner or bareboat charterer of the vessel, who is not the respondent of the ship arrest. For example, the applicant applies to arrest a vessel for his claim against the time charterer, the owner or the bareboat charterer could file objection to it, as it is obviously a wrongful ship arrest.

The PRC laws do not regulate within what time limit the interested party shall file their objection against the ship arrest. As the interested party is not to be served the court documents for the ship arrest, they are not supposed to know about the ship arrest immediately. For practical reasons, the objection shall be filed by the interested party as soon as possible. In the mean time, unfortunately, the PRC laws do not regulate in what time limit the court shall make their decision on the interested party's objection, it could take long time in practice.

VIII. Provision of security by the respondent to release the vessel

1. File objection or provide security firstly?

In order to release the arrested ship, the quickest way is to provide security as the applicant requests. As it has been mentioned before, the possibility to lift the ship arrest by the objection of the respondent or the interested party is not high in practice, and the procedures of objection take time. Even if there are good reasons to lift the ship arrest by filing objection, the writer would still recommend the respondent to provide the security firstly and at the same time to file objection. If in the later stage, the respondent or the interested party succeeds in the objection, the court will return the security to the respondent.

2. The provision of the security to release the vessel

The security provided by the respondent shall be at the amount as requested by the applicant, which normally is not arguable, unless it is obviously excessive to the claim amount.

As regarding to the form of the security, according to PRC laws, it shall

be negotiated and agreed between the applicant and the respondent. If the applicant accepts, a foreign P&I club's guarantee is fine for releasing the vessel. However, in practice, few applicants will accept a foreign P&I club's guarantee in fear of the difficulties in enforcing it in the future. If the agreement on the form of the security can not be reached between the applicant and the respondent, such as the applicant insists on a cash deposit must be provided, or the applicant would like to put hash wording in the guarantee which is not acceptable to the respondent or the guarantor, the respondent can put forward the security directly to the court and request the court to decide whether to release the vessel upon the security provided by them. The form of the security the court will accept is similar to that of the counter-security.

Besides the security, before the vessel can leave, normally the respondent shall have to pay off the guardian's fee which is charged by PRC boarder authority.

IX. Wrongful ship arrest

1. What is a wrongful arrest?

Under PRC laws, the applicant shall be responsible for the wrongful ship arrest. However, the PRC laws did not expressly provide on what is wrongful arrest. In practice, there were two types of wrongful arrest. One is that the ship arrest does not comply with procedural regulations, such as the respondent of the ship arrest is the time charterer of the arrested vessel. The other is that the ship arrest itself complies with the procedural regulations, however in the end the applicant loses its case in substantive issues.

2. Compensation

The admissible damages of the wrongful ship arrest normally are the maintenance expenses, earning losses occurred during the ship arrest period and the expenses for providing security to release the ship. When deciding the extent of the damage, the court will take into consideration of whether the respondent has acted reasonably to mitigate the damage by providing the security to release the vessel as soon as reasonably possible. Normally the court will think 30 days is a reasonable period. For the period far beyond the reasonable period for arranging a security, the court may not be willing to support the respondent's claims for the alleged damages beyond the reasonable period.

X. Judicial sale of the arrested ship

If the respondent is not able to provide the requested security, the next step will be judicial sale of the arrested ship.

One basic issue seems not clear under Chinese laws is whether the vessel could be judicially sold for the claims against the bareboat charterers, if such

claims are not secured by maritime lien or ship mortgage. Though some judges have given their positive reply over this question, there are still a lot of maritime practitioners holding opposite opinions, as the judicial sale of bareboat chartered vessel is prejudicing the right of the registered ship owner, which is against the PRC Civil Law and Real Right Law.

In addition, PRC laws and regulations on judicial sale only deal with the relevant procedures and their legal effects when the judicial sale takes place in China. There are no express regulations under Chinese law on whether a judicial sale taking place in a foreign jurisdiction will be recognized by Chinese laws.

1. The application for judicial sale of the arrested ship

According to PRC MPL, either the applicant or the respondent of the ship arrest may apply to the court for judicial sale of the arrested vessel.

If the respondent does not provide the required security within 30 days, the applicant can apply for the judicial sale. If the applicant does not apply for judicial sale after he commences lawsuit or arbitration against the respondent, the respondent may also be entitled to apply for the judicial sale.

2. Notification and publication of the judicial sale

If the court decides to accept the application for judicial sale, 30 days prior to the scheduled auction, the court will notify the ship's registration authority, the ship owner, and the maritime lien holders, mortgagee, who are known to the respondent. At the same time, the court will make a publication 30 days before the scheduled auction about the judicial sale via newspaper and the website. If the ship is of a foreign nationality, the court will make the publication on the newspaper for overseas distribution as well.

Bidders shall register with the auction committee appointed by the court within the period prescribed in the publication and put forward the required amount of bidding deposit.

The judicial sale will follow the procedure of auction and be subject to the PRC Auction Laws in order to make sure that the ship is sold at a possibly best price.

3. Registration of the maritime claims

As for those claimants who have maritime claims related to that vessel, they shall register their claims before the courts within the prescribed period in the court's publication. If the claimants fail to register the claims before the court, the unfavorable outcome will be that the claimants cannot participate in the distribution of the sales proceeds.

4. Ranking of the claims when distributing the proceeds of the judicial sale

The distribution of the sales proceeds can be made by way of amicable settlement agreement among the claimants. When such amicable settlement

can not be reached, the court will decide how to distribute the proceeds according to the legal rankings of the claims.

The court fee, expenses for maintaining the ship, expenses for auction and distribution of the proceeds shall be firstly paid off. After that it will be the turn for the claimants to be distributed the balance of the proceeds. The ranking of the claims are:

(1) maritime lien (crew's salary, personal injury, port dues/pilotage, salvage, claims in tort);
(2) possessory lien;
(3) mortgage;
(4) other maritime claims.

A GROWING NEED FOR SUPPLY VESSELS IN THE OFFSHORE INDUSTRY IN SOUTH AMERICAN COUNTRIES: THE "KNOCK-FOR-KNOCK" LIABILITY REGIME, IS IT THE ANSWER?

JAVIER FRANCO-ZÁRATE*

Logistics have become important in almost every single human enterprise. Nowadays, oceans are being explored for resources that are becoming sometimes not so common to find at land. Indeed, offshore units/platforms are being commonly deployed into oceans to carry out exploring (i.e. drilling) tasks in search for different types of resources at sea. However, said tasks, complex in nature, usually require different "support" vessels to be present during the operation. These vessels could have various responsibilities such as to carry the platform from a port to the "exploration area" or, once there, to assist the platform itself, its equipment and machinery (or even the employees thereby working), with their logistic needs. Thus, special contracts are required to govern the relations between those who provide the vessel and those who have it at their disposal to carry out the required "services". The BIMCO's SUPPLYTIME form is regarded as the industry's response to that need. However, given some of its particularities, some doubts have emerged as to whether some of its clauses could be deemed valid in some civil-law jurisdictions, particularly regarding the so called "*knock-for-knock*" liability regime thereby included. Then, the aim of this note is to briefly comment on the main characteristics of the form – also highlighting some of its key advantages -, and to discuss on whether a "*knock-for-knock*" liability regime (as the one contained in clause 14 of the form) could be considered valid (or not) as a matter of Colombian law.

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1. BIMCO's SUPPLYTIME 2005 form, the model contract for "offshore services"

As a response to this growing demand of offshore services, the industry has introduced a form highly used in the market of the so-called "supply vessels". This form, known as the BIMCO "SUPPLYTIME 2005", has evolved from its original version produced in 1975[1], and it is now the standard contract to which both owners and charterers usually turn to provide certainty to their commercial agreements when support vessels are required to offshore operations.

2. Most relevant features of the BIMCO's SUPPLYTIME 2005 form

A complete revision of the form is outside the scope of the present document. However, the following points could be highlighted (being some of them real advantages of the form):

- The contract is basically drafted as a species of a time charter[2]. Therefore, the charterer will have the vessel to his disposal to use it within the limits of the contract, for an agreed period of time, in exchange of payment of hire[3].
- A concept of "*offshore unit*" is provided by the form. In fact, it is defined as "(…) *any vessel, offshore installation, structure and/or mobile unit used in offshore exploration, construction, pipelaying or repair, exploitation or production*".
- The form states that the vessel is to be employed in lawful "*offshore activities*", and restricted to the services agreed in the contract[4].
- Owners are supposed to pay for "*provisions, crew wages, repairs and maintenance (…)*" as well as some other charges referred to the "*operational management of the ship*"[5] , whereas charterers are requested to pay "*fuel, lubricants, water, port charges and pilotage*"[6].
- Perhaps the core of the form is the "*knock-for-knock*" liability provision contained in clause 14. According to it, as a general formula[7], each party is supposed to bear (and consequently, to hold its counterparty "harmless") for any loss of or damage to its own

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1 Rainey, Simon. *The Law of the Tug and Tow and Offshore contracts*, Informa, London, 2011, p. 225.

2 Rainey, Simon. Op. Cit., p. 226.

3 Wilson, John. *Carriage of Goods by Sea*, Pearson Longman, 2008, Dorchester, p. 83.

4 Clause 6, Supplytime 2005 form.

5 BIMCO, Explanatory Notes, Supplytime 2005, p. 6.

6 Ib., p. 7.

7 However, there are some exceptions. As the BIMCO Explanatory Notes states "*Clause 14 (a) and (b) sets out the Owners' and the Charterer's liability in a knock-for-knock liability regime. This means that each party pays the claims of its own group following an accident*" p. 14.

property and that of its "group" members, or for personal injury or death of any member of its "group", "*arising or in any way connected"* with the performance of the charter[8]. That is supposed to be the case even if the cause of the said loss to or damage of, injury or death, is the "*act, neglect, or default*" of its counterparty[9].

- Required modifications of the vessel for the service(s) to be rendered under the contract (i.e. structural alterations or additional equipment) are supposed to be allowed to the charterer, but such modifications must be removed before the vessel is returned to the owner at the end of the contract period[10].

3. "Knock-for-Knock" provisions – Validity in South American "civil-law" jurisdictions like the Republic of Colombia?

The so-called "*knock-for-knock*" provision on liability was supposed to be the most important change from its predecessor, namely, the "SUPPLYTIME 89", and it was adopted following the path set forth by the "Towcon" and "Towhire" forms[11]. As commented briefly above, according to clause 14 (b) (i) charterers are not to be responsible (some events excluded) for loss of or damage to property of any member of the "Owners' Group" (as well as for personal injury or death of any member of said group) arising out "*or in any way connected"* to the service performed under the contract, regardless of whether an "*act, neglect or default*" (emphasis added) on the part of the Charterers' Group could have been deemed to be the cause of said damage, loss, injury or death[12].

Equivalently, under clause 14 (b) (ii) of the form, the Owners' Group is not to be held responsible for loss of, damage to, "*or any liability arising out of anything towed by the Vessel, any cargo laden upon or carried by the Vessel or her tow"*, as well as to Charterers' property ("*whether owned or chartered"*), including "*offshore units"*, as well as regarding injury or death of any member of the Charterer's Group, even if such is the result of the "*act, neglect or default*" (emphasis added) of the Owners' Group[13].

It is worth mentioning that the "Owners' Group" and the "Charterers' Group" concepts were amended in the 2005 version to clearly include several type of contractors and subcontractors usually involved in this type of

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8 Clause 14, Supplytime 2005 form.

9 Ib.

10 Clause 4, Supplytime 2005 form.

11 Rainey, Simon. *The Law of the Tug and Tow and Offshore contracts*, Informa, London, 2011, p. 225.

12 See Clause 14 (b) (i), Supplytime 2005 form.

13 See Clause 14 (b) (ii), Supplytime 2005 form.

operations[14]. Thus, now the "Charterers' Group" is deemed to cover "*co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the vessel is employed)*"[15].

Although Courts in some Common Law jurisdictions seems to recognize the validity of the "*knock-for-knock*" scheme even in cases of "deliberate" or "radical" breaches, as Simon Rainey QC comments in the light of decisions such as the one of Mr. Justice Flaux in *AztraZeneca UK Ltd. v. Albemarle International Corp. (AstraZeneca)*[16], it is uncertain as to whether said apportionment of liabilities would be deemed as valid in some civil-law (i.e. South American) jurisdictions like Colombia, at least regarding such type of "deliberate" breaches.

Indeed, in many civil-law jurisdictions it is admitted that the so-called contractual liability of a debtor could be modified by the parties by means of an agreement intended to do so[17].

Classic civil-law authors have traditionally recognized this possibility, clarifying however that such an exemption provision could not go as to allow the debtor to intentionally breach the contract[18]. In fact, those classic authors have commented that such an agreement will not be authorized by law since it will be deemed to go against "good customs"[19], and as a consequence, it would not be valid.

Following this classic doctrine, allowance of "intentional" breaches of the parties' obligations under a contract (i.e. by means of wilful misconduct of a party) is considered in Colombian law – in general - to be null and void[20]. Thus, it seems that - at least in some civil-law jurisdictions like Colombia - it is still to a certain extent doubtful whether provisions such as the "*knock-for-knock*" liability regime contained in clause 14 of the SUPPLYTIME 2005 form would be valid (i.e. in case of a deliberate breach of one party to the contract) to a local Court/arbitrator. In fact, it is worth noting that the clause states that each group is supposed to bear its damages to or losses of, even if said event

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14 Rainey, Simon, Op. Cit., p. 260.

15 Ib.

16 Rainey, Simon. *Turning Turtle on Knock-for-Knock?,* in Standard Bulletin, The Standard, 2011, p. 13. Document available at http://www.standard-club.com/docs/16180Standard_OffshoreBulletin_10.11_AW_PF10.pdf, visited in September 2012.

17 In Colombia, this would be valid due to Art. 1604 Colombian Civil Code.

18 Joserand, Louis. *Teoría General de las Obligaciones,* Tome II, Vol. I, Ed. Jurídicas Europa – América, Bosch y Cía, 1950, p. 502, 503.

19 Enneccerus, Ludwig; Kipp, Theodor; Wolff, Martin. *Derecho de Obligaciones,* Tome II, Vol. I, Bosch, 1933, P. 223. It should be borne in mind that in civil-law countries both "public order" and "good customs" are supposed to be the limits of the autonomy parties are granted when drafting the contract.

20 Art. 1522 Colombian Civil Code.

arises of the "act" (without any qualification) of its counterparty. Thus, since the clause is purporting to present an apportionment of liability between the parties – before that actually occurs – and it could arguably go as to include damages or losses caused as result of "deliberate" breaches, it seems that a Colombian Court/arbitrator could discard such a provision in a given case in which he finds that it could be allowing a debtor to "intentionally" not to fulfil his obligations under the contract. Moreover, since the concept of "gross negligence" is locally assimilated by the law to the one of "wilful misconduct"[21], it could be that a local Court/arbitrator could also reach a similar conclusion, not only in cases of "deliberate breaches", but also if he finds that the conduct of the party involved was such as to be deemed as a negligence that even a careless person would have in their own business[22].

Final Remarks

Legal developments in the field of the offshore industry are yet to come, particularly in many South American jurisdictions like Colombia. It is to see then what would be the outcome in cases in which local Courts/arbitrators could be required to deal with this type of agreements. In fact, it is still to be seen what could be the outcome since the *"knock-for-knock"* scheme could be deemed to allow one party to intentionally or deliberately (or at least, grossly negligently) cause a damage to its counterparty, situation that should not be allowed under local law in some civil-law jurisdictions, like it seems to be the case of Colombia.

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21 Art. 64 Colombian Civil Code.

22 Ib.

OFFSHORE ACTIVITY – NEW REGULATIONS

VIOLETA S. RADOVICH*

I. New Regulations after the Montara and Deepwater Horizon incidents

I.i. The turning point — the first legal instrument devoted on its totality to Offshore Units entries into force

On March 24th 2011 the Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil[1] entered into force. It had been adopted on 14 October 1994, but only entered into force in 2011, undoubtedly as a consequence of the awareness caused by the Montara and Deepwater Horizon incidents. It shall be noted that as indicated by its name, this Protocol is only applicable within the Mediterranean Sea.

The author believes that the adoption of this Protocol is a turning point in the regulation of offshore units since it is the first instrument devoted on its totally to these units that has finally entered into force.

General Undertaking

The general undertaking under this Protocol established in Article 3 states that the best available techniques, environmentally effective and economically appropriate shall be used to prevent, abate, combat and control pollution.

Authorization System

The Protocol establishes an Authorization system. The general principle states that all activities shall be subject to prior written authorization. Installations shall be built according to international standards and practice and operators shall have technical competence and financial capacity to carry out the activities required from them.

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[1] Document available at http://195.97.36.231/dbases/webdocs/BCP/ProtocolOffshore94_eng.pdf, visited October 2012.

Authorization, however, shall be refused under the Protocol if there are indications that the proposed activities are likely to cause significant adverse effects on the environment. The authorization may impose conditions regarding measures to reduce to the minimum risks of and damage due to pollution.

Furthermore, the Protocol establishes that when considering approval of the sitting of the installation, the Contracting Party shall ensure that no detrimental effects will be caused to existing facilities, in particular to pipelines and cables.

An application for authorization shall include:

(a) A survey concerning the effects of the proposed activities on the environment. An environmental impact assessment might be required to be prepared;

(b) The precise definition of the geographical areas where the activity is envisaged, including safety zones;

(c) Particulars of the professional and technical qualifications of the candidate operator and personnel on the installation, as well as of the composition of the crew;

(d) The safety measures;

These shall be taken with regard to:

- Design,
- Construction,
- Placement,
- Equipment,
- Marking,
- Operation, and
- Maintenance of installations.

The competent authority shall require a certificate of safety and fitness issued by a recognized body in respect of production platforms, mobile offshore drilling units, offshore storage facilities, offshore loading systems and pipelines.

(e) The operator's contingency plan;

It shall be made in accordance with guidelines adopted by the competent international organization to combat accidental pollution.

Any event on the installations causing or likely to cause pollution shall be notified by operators in charge of installations.

(f) The monitoring procedures;

The operator shall be required to measure effects of the activities on the environment and to report on them periodically or upon request by the competent authority.

The competent authority shall establish, where appropriate, a national monitoring system.

(g) The plans for removal of installations;

Any installation which is abandoned or disused shall be removed, in order to ensure safety of navigation, taking into account the guidelines and standards adopted by the competent international organization. Such removal shall also have due regard to other legitimate uses of the sea, in particular fishing, the protection of the marine environment and the rights and duties of other Contracting Parties. All necessary measures shall be taken to prevent spillage or leakage from the site of the activities.

The competent authority shall require the operator to remove abandoned or disused pipelines or to clean them inside and abandon them or to clean them inside and bury them. Appropriate publicity shall be given to the depth, position and dimensions of any buried pipeline.

Where the operator fails to comply with these requirements, the competent authority shall undertake, at the operator's expense, such action or actions as may be necessary to remedy the operator's failure to act.

(h) Precautions for specially protected areas;

In addition to the measures referred to in the Protocol concerning Mediterranean Specially Protected Areas, the measures may include, inter alia:

(a) Special restrictions or conditions when granting authorizations for such areas:
   (i) The preparation and evaluation of environmental impact assessments;
   (ii)) The elaboration of special provisions in such areas concerning monitoring, removal of installations and prohibition of any discharge.

(b) Intensified exchange of information among the parties.
   (i) The insurance or other financial security to cover liability.

Meanwhile the Parties formulate appropriate rules, liability for damage caused by activities is imposed on operators, who shall be required to pay prompt and adequate compensation. Operators shall have insurance cover in order to ensure compensation.

Aims of the Protocol

Under Section V of the Protocol, entitled Cooperation, the Parties undertake to formulate and elaborate international rules, standards, recommended practices and procedures for achieving the aims of this Protocol.

Trans-boundary pollution

Moreover, a general obligation is established in order to avoid trans-boundary pollution. Equal access to and treatment in administrative proceedings shall be granted to persons in other States who may be affected by pollution or other adverse effects resulting from proposed or existing operations.

Interexchange of information

Finally, the Parties shall interexchange information regarding measures taken, results achieved or difficulties encountered in the application of the Protocol.

Wastes and Harmful or noxious substances

Section III of the Protocol is devoted to wastes and harmful or noxious substances and materials, and distinguishes among oil and oily mixtures and drilling fluids and cuttings, sewage and garbage. The disposal of some substances is prohibited and others require a special permit. This constitutes an advance, since MARPOL does not apply to marine pollution directly resulting from offshore operations, ex. in connection with the use of oil-based drilling muds or leakage of oil during well testing, and water production.

I.ii. The European Commission Proposal

The Proposal[2] was delivered on October 27th 2011. The explanatory memorandum describing the grounds and objectives of the Proposal said that recent offshore oil and gas accidents and 'near misses'[3] reported worldwide, demand action. It is added that these accidents expose the disparity between the increasing complexity of operations and the inadequacies in the current risk-management practices. Moreover, it is stated that the incidents have highlighted the challenges that the regulators face in ensuring adequate oversight of offshore activities, and a lack of transparency and data sharing regarding the safety performance of the offshore industry.

Studies, stakeholder consultations and risk analysis conducted since 2010 have identified the main problems for the Union as:

1. The risk of a major offshore oil or gas accident occurring in Union waters is significant since most oil and gas is produced offshore, and the existing fragmented legislation and diverse regulatory and industry practices do not provide for all achievable reductions in the risks throughout the Union.

2. The existing regulatory framework and operating arrangements do not provide for the most effective emergency response to accidents whereby they occur in union waters, and the liabilities for clean-up and conventional damages are not fully clear.

Therefore, the general objectives of the proposal are to (i) reduce the risks

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[2] Document available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0688:FIN:EN:PDF, last visited October 2012.

[3] Such as oil and gas leaks, failures of production process safety and drilling well control; failure due to invalid design change; high number of maintenance backlogs of safety critical element. Recent incidents examples: Gullfaks C in May 2010, Gannet F, 2011; both in the North Sea.

of a major incident in Union waters, and (ii) to limit the consequences should such an accident nonetheless occur.

The instrument is consistent with the Energy Strategy for 2020 and is coherent with marine policy, notably the goal of achieving by 2020 the Good Environmental Status of the marine environment (Marine Strategy Framework Directive 2008/56/EC).

On-line public consultation

An on-line public consultation was carried out between 16 March and 20 May 2011 to ascertain the views of interested parties on the need for Union action in various policy fields.

Best Practice

The European Union proposes to adopt the "Union Best Practice" which implies a holistic risk assessment for safety and environment, by which the level of risk management and emergency preparedness in the offshore industry will be raised.

A Union-wide Offshore Authorities Group will be created and the Licensing and the Environmental Liability Directives (LED) reinforced by regulation. This option provides for greater transparency of industry and regulator performance.

In comparison to the previously studied Protocol, we may say that the main addition made in this Regulation is that public participation is established in licensing procedures.

II. Compensation for Oil Pollution Damage Arising from Offshore Exploration and Exploitation

The Montara incident has highlighted the fact that there is no international convention in force governing compensation for oil pollution damage in such circumstances since the 1969 Civil Liability Convention for Oil Pollution Damage (CLC) and the 1992 Civil Liability and Fund Conventions do not apply to fixed offshore installations or to oil tankers that were converted into production platforms, these instruments only apply where there is transport of oil to be loaded in another place. In this incident, prompt action by the Australian authorities prevented any of the leaking oil from coming ashore on the costs of Australia, but the Government of Indonesia reported to have claimed $2.5 billion for pollution damage suffered in its territory.

In relation to the Deepwater Horizon incident, claims in respect of trans-boundary damage have been filed in the US Federal Courts against BP and other defendants by three states of Mexico, claiming damages to fisheries and tourism, those claims have yet to be heard.

In this regard, we shall mention the **UN/ECE Espoo Convention on EIA**

in a trans-boundary context, which is relevant as regards the assessment of projects likely to have trans-boundary effects. Its application is however, discretionary for some drilling operations.

Bali Conference

The Government of Indonesia held a Conference in Bali on 21st to 23rd September 2011 to discuss whether an international compensation convention is needed regarding trans-boundary oil pollution damage arising from exploration and exploitation of offshore oil.

Richard Shaw[4] commented in the Conference that perhaps the **Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Sea Bed Mineral Resources** adopted in 1976 (the CLEE Convention) has never entered into force because it contains alternative options for limited and unlimited liability.

Another reason may be the existence of a private agreement between certain European Governments and the major participants in the offshore industries called **"OPOL"** which provides for compensation now up to a maximum of US$ 250 million[5], to be payable by the operator of the rig causing pollution damage, with payment guaranteed by other participating companies. Of that sum, $125 million is payable for remedial measures and $125 million for pollution damage. This agreement only applies to the states the governments are parties to it, all of whom are in Europe, and does not apply in the Baltic or the Mediterranean Seas.

The perspective from the United States was provided by Professor Guether Handl[6] from Tulane University, he said that one of the questions raised by the proposal of this Convention is whether the damage compensable will be limited to pure economic loss or to pure environmental loss, which may lead to difficulties with insurance coverage (limited or unlimited); subsidiary state liability (the state's role a insurer of last resort); and claims processing.

He maintained that there was room for residual legal liability on the state in whose territory or EEZ the accident occurred. The decision in the advisory opinion of ITLOS dated 1st February 2011 rejected such liability as a principle of present general international law, but clearly left the door open for the law to develop in this direction. Handl emphasised that the state was likely to be an insurer of last resort in cases where the damages suffered exceeded either the available insurance coverage of the operator, or indeed the legal limit of

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4 See CMI News Letter No.3. Richard Shaw, "Trans-boundary oil pollution damage arising from exploration and exploitation of offshore oil. Do we need an international compensation convention? Document available at http://www.comitemaritime.org/Uploads/Newsletters/CMI%20News%202011-3.pdf, visited October 2012, p.20.

5 As amended 1st October 2010. See www.opol.org.uk.

6 Ibid., p. 20.

liability is applicable. He said that in the "Deepwater Horizon" case in New Orleans the judge had held that the "Deepwater Horizon" was a ship at all material times for the purpose of maritime law.

Handl also referred to the **UNEP Guidelines on Environmental Damage**[7], which include a duty on states to develop methods of compensation for environmental damage, and urged that this should be part of a global offshore regime. These guidelines have already accepted internationally the compensability of pure environmental loss and the principle of "unlimited liability-but limited financial guarantee".

Justice Steven Rares, Judge of the Federal Court of Australia, delivered a paper on the essential element which the proposed international convention should contain. He said that limitation of liability is a fact of business life, and was essential in order to obtain the support of the insurance community to the proposed instrument. In most cases involving the merchant ships this was the P&I Clubs, but in the case of offshore craft the markets are probably different. He added that liability insurers shall submit to the same jurisdiction.

The International Association of Oil and Gas Producers view

The delegate of Norway, supported by the representative of the International Association of Oil and Gas Producers, argued that there was no need for an international convention on this subject, since oil exploration is essentially local, and subject to local law. He said that the Norwegian legislation on offshore exploration (the Petroleum Act) provides for strict and unlimited liability on the operator, and contains very extensive rules regarding environmental impact, which have not seemed to have deterred the major players from undertaking oil exploration in Norwegian Waters. Norway was, he said, committed to high safety standards, but it sees oil exploration and exploitation as different from shipping, and more logically suited to national jurisdiction. He acknowledged, however, that without common safety standards, there might be a problem in getting countries to pay for high safety cover in parts of the world where standards are not so high. He concluded that Norway could agree to bring this subject to the IMO to start a discussion. That is clearly the first and important step. However, we must point out here that the IMO Council has maintained that offshore issues were outside the objects of the IMO according to its governing Convention and therefore the topic was not put on its work programme by the Legal Committee, which failed to treat the report presented by the CMI Sub-Committee on Offshore Units.

Shaw's conclusion is that it is preferable for there to be in place an

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[7] Guidelines for the Development of National Legislation on Environmental Liability, Response Action and Compensation for Damage caused by Activities Dangerous to the Environment.

international instrument setting minimum standards of best practice which can apply wherever in the world, as the two instruments we have previously studied. He says that the need for a compensation scheme for the victims of oil pollution from offshore activity is more debatable since major incidents in the industry are fortunately few and to date the victims' claims have generally been met. However he doubts whether the OPOL scheme could be adapted for a world-wide basis. The 16 companies which are member of OPOL guarantee each others' potential liabilities for pollution damage and clean-up costs. To apply comparable criteria on a world-wide basis would undoubtedly pose financial and diplomatic problems.

III. Considerations about salvage – a relevant gap

However, we believe that an important gap as regards offshore units is that the 1989 Salvage Convention only applies to mobile offshore drilling units when they are being transported, awaiting for instructions and being repaired or supplied. Therefore the Convention does not apply where such platforms or units are on location engaged in the exploration, exploitation or production of sea-bed mineral resources (art.3).

The author considers that as the possible amendments to this Convention analyzed by the CMI Sub-Committee on Salvage did not include the enlargement of the scope of application regarding offshore platforms, this point should be included by a convention devoted to offshore platforms.

IV. Conclusion

To sum up, as regards the Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, the author believes that it complies with UNCLOS Articles 194 (1) and 208 (5) and constitutes and advancement in the main areas that we have highlighted in our previously cited article as main environmental concerns[8]. Namely, that an integrated and sustainable regime on offshore structures was necessary, that fixed platforms and rig structures shall also be taken into account, that all the activities, including erection of installations, shall be subject to prior written authorization after proving that constructions have been performed according to international standards and that the operator has the technical competence and the financial capacity to carry out the activities.

We believe that now that a Protocol to a regional Convention has entered into force, the next necessary step is to approve a similar International

[8] See Radovich, Violeta. Op. Cit., p. IV. "Conclusions".

Convention setting minimum standards of best practice such as those established in the European Commission Proposal.

As regards the need of a compensation scheme for the victims of oil pollution from offshore activity, the author believes that if the OPOL scheme may not be adapted for a world-wide basis, a regional or international convention shall be enacted.

ENFORCEMENT ON SHIPPING COMPANIES BY CREDITORS*

YIANNIS TIMAGENIS**

1. Importance of Enforcement under the Current Market Conditions

The Shipping industry in all its three major segments i.e. dry bulk carriers, tankers and containerships is undergoing one of its major historical downturns. In fact, we are on the fifth year of the downturn and although market participants always have the best intentions to cooperate and find agreed and mutually beneficial solutions, in a large number of cases borrowers and lenders have started to take more radical measures.

The challenges in shipping have been known to shipping creditors which include primarily financiers but also shipping suppliers and other trade creditors, as well as to the owners and the other market participants for quite some time. However, the current issues in the shipping industry as well as in the global economic environment seem to be more acute.

The over-supply of vessels is becoming increasingly evident due to the fact that owners, yards and banks have been delaying vessel delivery dates (e.g. dates originally set for 2009-2010 have moved to 2011-2014). In instances where owners do not take delivery, it is often the case that the yard is able to find another buyer. In any given case, the result of this is that an increasing number of vessels are, (and will be) nonetheless trading thereby further increasing supply. Consequently, vessel earnings have decreased –in many cases at operating costs levels– and decreasing market values do not show signs of recovery any time soon. In addition, many owners and operators are heavily overleveraged in a European and global economy downturn.

Indeed, on a global scale European banks are facing a number of challenges. The Eurozone crisis is set to continue and the chances of recovery any time soon seem remote. Sovereign debt in Eurozone threatens the already

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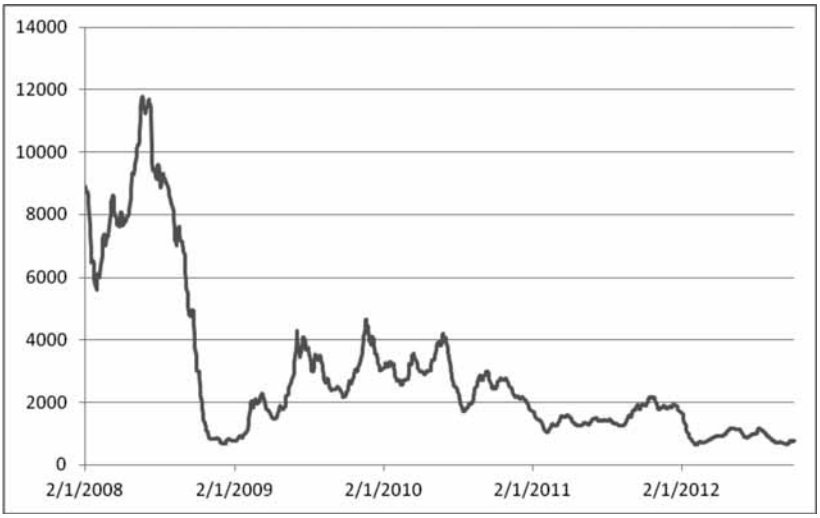
exposed European banking system which has also seen heavy losses on their holdings of Greek bonds (and facing possibly more losses from holding other Eurozone sovereign debt). Banks are becoming more and more impatient with their clients. These are worrying signs for all shipping creditors and primarily the lenders who can only be patient and agree to waive covenant breaches and postpone repayment dates for so long, whilst watching the value of the underlying assets shrinking.

By underlying assets we mean both the vessel itself and the income generated by such vessel. By way of illustration, the extent of the plunge in vessel prices and freight rates (and taking the dry bulk sector of the industry as an example), we may only need to look at the movement of the Baltic Dry Index (BDI)[1] published by the Baltic Exchange[2]. Indeed, the current market status is clearly reflected on Table 1 below as officially published by the Baltic Exchange:

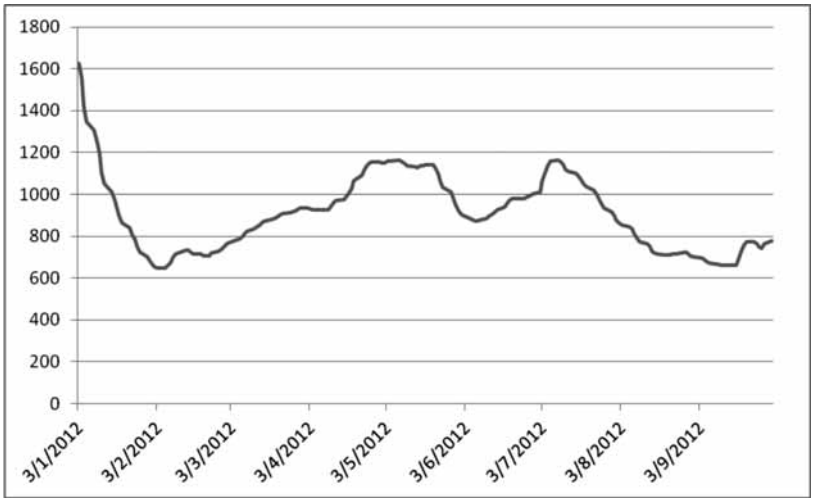


[*Table 1: BDI movement chart from January 2008 to October 2012*]

[1] The Baltic Dry Index is one of the seven indices published by the Baltic Exchange. According to the Baltic Exchange, "The Baltic indices are an assessment of the price of moving the major raw materials by sea. The indices are based on assessments of the cost of transporting various bulk cargoes, both wet (e.g. crude oil and oil products) and dry (e.g. coal and iron ore), made by leading shipbroking houses located around the world on a per tonne and daily hire basis." (see *www.balticexchange.com* [Accessed 1 October, 2012])

[2] As stated by the Baltic Exchange on www.balticexchange.com "The Baltic Exchange is the world's only independent source of maritime market information for the trading and settlement of physical and derivative contracts".

From the above it is clear that since 2008 where the market was at its peak i.e. close to 11.700 points, with the exception of certain periods where there had been some signs of recovery, the industry has suffered an unprecedented downturn. Even during 2012 the market has fallen dramatically i.e. from 1.624 points in January 2012, to 700 points in October 2012:



[*Table 2: BDI movement chart from January 2012 to October 2012*]

In the light of the above, it is evident that although there had always been problem loans and distressed shipping companies, this time, the current market status has made enforcement one of the most important practice areas of shipping law; and it is important not only for the banks who have to examine carefully their enforcement options as lenders, but also for the owners who would have to carefully consider creditor protection options as borrowers.

2. The Basis of Enforcement

The basis of enforcement by creditors is debt. In shipping, debt can take many forms but this paper shall deal only with enforcement on debt created by way of ship finance by financial institutions (and/or hedge funds when acting in their capacity as shipping lenders). The reason this paper will not deal with other common forms of shipping creditors such as suppliers, crew etc. is threefold: (a) usually the debt owed to a bank is by far larger than the debt to any other creditor or in some cases to all other creditors of a shipping company combined; (b) bank loans are secured by sophisticated security documentation and (c) enforcement of debt owed to other forms of shipping creditors would in any event merit a separate paper.

With the above in mind, shipping debt by way of ship finance by itself can take many forms: it could be from a plain vanilla bilateral single currency term loan agreement to a syndicated multi currency term and revolving facility agreement with multiple borrowers, with hedging arrangements in conjunction with mezzanine finance usually provided by hedge funds and in all these cases with a series of documents relating to the security the borrower may be granting in favour of the lenders (also commonly known as security documents). The common place in all forms of shipping debt or ship finance are the terms and documents under which such debt is created or, viewing the matter from another angle, the terms and documents subject to which a lender makes available to a borrower ship financing. Such terms and documents are a significant factor in deciding the preferred method of enforcement.

2.1 Loan Agreement

In any typical ship finance structure, there is always a form of a loan agreement which contains several critical terms which the creditor and its legal advisors must review when conducting pre-enforcement due diligence and/or assessing enforcement options. More specifically, some of the main terms which should be reviewed are the following:

(a) Events of Default. From the point of view of enforcement, this is one of the most important sections in any financing document and sets out the circumstances or events that, if they occur, give the lender the right to terminate the agreement and accelerate the loan (i.e. demand that the principal and interest is prepaid in full -before the scheduled repayment date(s)). An event of default does not necessarily have to be a breach of contract. In fact, it is a broader concept than the concept of a breach of contract i.e. it may be that a non-breach of contract constitutes an event of default. The major events of default in a shipping loan include (i) non-payment of any sum payable when due; (ii) breach of covenants or undertakings, particularly insurance covenants, operational covenants and other financial covenants (these are set out in other sections of the loan agreement)[3]; incidentally, an important and very usual covenant is an undertaking that the value of security/assets e.g. in case security includes a ship mortgage, the vessel value, or in case of a share pledge, the value of the shares (security value), is more than a certain percentage of the loan (security requirement) - usually it should be about 120% to 160% -this covenant is also commonly referred to as “asset cover ratio”. Similarly, there is usually a requirement that the vessel is insured for a higher value, at about 120% to 160% of its actual market value; the idea in all these cases is to cover

[3] An extensive analysis of the various types of covenants encountered in a loan agreement is outside the scope of this paper. However, for more information the reader may refer to specialists’ works (see *inter alios* Alastair Hudson, The Law of Finance, First Edition, 2009, pp. 869-875)

enforcement expenses and interest. In those cases, if the borrower is unable to cover the shortfall (either by prepayment or by granting additional security) then this is a typical event of default which enables the lender to begin enforcement. Other important events of default include: (iii) misrepresentation which in effect elevates the importance of the representations and warranties clause[4]; and (iv) cross default which is an equally important event of default and heavily debated between the parties. In effect, this is the prime example of a clause which is not a breach of the agreement, but it allows the lender to commence enforcement on the basis of a breach in another financial agreement (usually non-payment). There are several other events of default which are typically included such as (v) unlawfulness/impossibility (i.e. if it becomes impossible or unlawful for the borrower to fulfill its obligations or for the bank to continue the financing and/or exercise its rights) and (vi) material adverse change of circumstances (the clause exists in practically every loan agreement but its use is recommended only in rare cases)[5].

From the foregoing it is evident that the Events of Default clause is central and goes to the heart of any loan agreement for enforcement purposes and for the pre-enforcement assessment. Indeed, save for the non-payment event of default, many if not the majority of the events of default serve as early warning signs (e.g. cross default, security requirement etc.) which will allow the lender to assess the situation as early as possible.

(b) Set-Off. The clause allows the lender/bank to apply any credit balance of any bank accounts of the borrower towards satisfaction of any sum due and payable by the borrower.

(c) Notices. The function of this clause is particularly important in enforcement proceedings and it is aimed at ensuring that all notices, demands and letters are sent to the right person through a pre-agreed method of communication and at the right time so that there is limited room for dispute.

(d) Governing law and Jurisdiction. Last but certainly not least this clause for obvious reasons is central to any contemplated enforcement action. Regarding the governing law, the majority of the shipping loan agreements are governed by English law. However, in recent years there has been a tendency in the broader area of finance (similar to that in other areas of law) to see other laws to be governing loan agreements, such as German law or French law[6]. It is also not uncommon in large shipping jurisdictions to see

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[4] The Representations and Warranties clause consists of statements of the borrower about itself, its condition and the circumstances of the loan. A practical basic analysis may be found at Colin Paul and Gerald Montagu, Banking and Capital Markets Companion, Fifth Edition, 2011, pp.169-170.

[5] A list of the major events of default may be found in Colin Paul, op cit, pp. 180-184 and a more academic analysis in Alastair Hudson, Op Cit, pp. 897-899.

[6] For example, the loan market association (LMA) has published standard facility agreements under German and French law (see www.lma.eu.com).

local law to be applicable[7]. Other security documents may be governed by other laws. A ship mortgage for example is always governed by the law of the flag of the vessel.

As for the jurisdiction, it is generally advisable that both governing law and jurisdiction are the same, mainly for practical reasons; however, this is not mandatory. Hence, similarly with the governing law, the large majority of shipping loans are also subject to the jurisdiction of the English courts. In such a case two things need to be noted: first, in case the lender wishes to issue proceedings before the English courts against a foreign borrower the parties and particularly the borrower is required to designate a process agent who will accept service of process in England[8]. The second aspect of a typical English jurisdiction clause is that it is for the benefit of the lender[9]. This in practice means that the lender may initiate proceedings against the borrower in any competent jurisdiction, but restricts the borrower from bringing proceedings anywhere else other than in the one jurisdiction agreed (that is English courts). This has significant implications from enforcement point of view particularly when contracting with a party domiciled in an EU member state[10] or a 2007 Lugano Convention country[11]. In such cases the lender should perform careful due diligence on the optimal forum in which it may enforce its claim.

2.2 Security Documents

A lender can also achieve enforcement of its claim through (and the method of such enforcement depends on) the type of security a lender holds. Security documents may be divided into two types: (a) security over the ship; (b) other types of security. In terms of importance, the mortgage certainly has primacy.

2.2.1 The Mortgage

The Mortgage over a ship is one of the central securities a lender can take to secure the repayment of the loan. Every commentary about ship mortgages

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7 This is certainly the case for example (to name a few) in Greece, Germany and Norway.

8 In the alternative the lender would have to effect service of proceedings outside the jurisdiction with the permission of the English court.

9 The so called "for the benefit of" clauses are very often encountered in loan agreements (a typical example may be found in the standard LMA Multicurrency Term and Revolving Facilities Agreement at www.lma.eu.com)

10 Where applicable is Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as Brussels I Regulation) and published in the Official Journal on 16 January 2001, (*L12/1*) replacing the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

11 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 and published in the Official Journal on 21 December 2007, (*L339/3*) replacing the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters. Today only three countries are members, namely Iceland, Switzerland and Norway.

usually involves a definition of what is a "ship". For the purposes of this paper, suffice it to say that different jurisdictions have taken varying approaches as to what they consider a "ship"; however, common place is that although the ship is a movable asset it can be mortgaged[12] and as such, it has to be properly registered in accordance with the formal requirements of the law of the flag of the ship.

Two types of mortgages are generally encountered which also affect the method of subsequent enforcement and particularly the place of enforcement and, to the extent possible, the governing law. First, it is the English-style mortgage which is adopted in the majority of the English based legal systems (that would include Cyprus, Singapore, Malta, Bahamas, Bermuda etc.). This type of mortgage is typically one pre printed sheet of paper which describes the details of the mortgagee, the ship and the amounts and obligations secured. This type of mortgage is usually accompanied by a separate document called "deed of covenants" which contains various terms that the mortgagor has to comply with, primarily the insurance and operational covenants[13]. The other type of mortgage is encountered in non-English based jurisdictions (main examples include Liberia, Panama, Greece etc.) where the mortgage is one single (longer) document which also includes all the covenants referred to above.

From an enforcement perspective, the type of mortgage is important. For instance, in the case of the English-style mortgage, while the mortgage itself may in most cases be governed by the law of the flag of the ship, the deed of covenants may be governed by a different law. As far as jurisdiction is concerned, in case of ships trading worldwide, no one can predict at the stage of drafting the document which jurisdiction will be called to enforce the terms of the mortgage and which governing law such jurisdiction will apply. Therefore, if a ship is arrested in a jurisdiction with a comparatively less developed shipping law system and jurisprudence then the deed of covenants, as a separate agreement, may be enforced, if needs be, in the jurisdiction and under the governing law of the parties' choice.

2.2.2 Other Security Documents

Other security documents typically encountered in ship finance transactions which may be a basis for the enforcement of the lender's rights against the borrower include, but are not limited to, the following:

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[12] An interesting debate is whether a ship under construction can be mortgaged. Assuming that the borrower owns the ship, under English law, it will be subject to a charge. In other jurisdictions such as Scandinavian jurisdictions, Germany and Greece for instance, a ship under construction may, subject to certain requirements, be registered in the ship registry or a separate registry for ships under construction and subsequently be mortgaged.

[13] These are also included in the loan agreement but their "natural" place is to be included in the mortgage.

(a) Assignments. An assignment is generally an agreement by which the rights/claims of a party are transferred to another party. In this way a situation is created where one party (in this case the lender) may enforce the rights of a third party (in this case the borrower) arising from a separate contractual relationship. The first point to be made is that under that contractual relationship the rights of the borrower must be assignable. As a matter of practice in the shipping industry such contracts are assignable but it is generally prudent for the lender to confirm it in advance as the absence of assignability in an enforcement scenario will render such security useless. Another point to be made is that most of the jurisdictions usually require the assignee or (preferably) the assignor (i.e. the borrower) to send a notice of assignment to the third party, i.e. the obligor of the assigned right. It may not be the case that an acknowledgement is required; however, it is always good practice for the lender to get one as it would significantly facilitate enforcement of the security from the point of view of evidence. Depending on the rights assigned, a bank may take an assignment of earnings, an assignment of insurances and pre-delivery assignments.

(i) Assignment of Earnings. The essence of the assignment of earnings is that in case of a default of the borrower, the bank would be entitled to the monies payable to the borrower as a result of the employment of the financed ship. A bank will usually takes both a general assignment of earnings and a specific assignment of earnings, where a specific (usually long term) charter is in place in respect of the financed vessel.

(ii) Assignment of Insurances. The essence of the assignment of insurances is that in case of a default (including total loss of the ship) all monies payable to the borrower as insured party will be payable to the bank up to the amount of the outstanding balance of the Loan[14]. The lender should ensure that all formalities are complied with including the transmission of the proper notice of assignment which is attached to the insurance policy and the so called "loss payable clause"[15] is attached to the insurance policy as well.

(iii) Pre-delivery Assignments. These are securities taken by the bank at the stage of construction of a ship and consist mainly of the assignment of the borrower's rights under the shipbuilding contract and any refund guarantees thereby securing the pre-delivery installments paid by the bank to the borrower to finance the construction of the ship.

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[14] Of course this does not apply to certain small amounts which are paid directly to the borrower so that it may have a chance to repair damages to the ship and carry on its ordinary course of business. For this reason special provisions are included in the loan agreement and the assignment.

[15] This is an instruction to the insurers as to the method of payment of the insurance money.

(b) Guarantees[16]. This is another important security, provided of course that at the time of enforcement the guarantor has assets on which to enforce. In some cases the guarantee may be included in the loan agreement or in a separate document (which is common in practice). Depending on who is providing the guarantee, guarantees can be corporate (usually the ship owning company if it is not the borrower and/or the holding (parent) company) or personal (usually the ultimate beneficial owner). From the borrower's point of view personal guarantees should generally be avoided because they allow the lender to enforce against the personal guarantor's assets worldwide. Of course, from the lender's perspective, the lender should always check prior to obtaining such security that the intended person does actually have assets.

Regardless of the type (corporate or personal) of a guarantee, its function is or should be that in case of a default it allows the lender (a) to enforce directly against the guarantor without having to demand or try to get payment by the borrower first (that is why a guarantee should be drafted in such a way that it creates primary and not secondary obligations); (b) to have comfort that the guarantee is valid and enforceable under its governing law throughout the life of the loan agreement; most jurisdictions provide for several defences in favour of the guarantor that can be put forward and events that allow a guarantor to be discharged from its obligations[17] but most of these defences may be waived in advance. One of the most important defence is an amendment to the underlying (secured by the guarantee) contract i.e. the loan agreement. For this reason any amendment of the loan agreement should always be made with the consent of the guarantor.

(c) Charge over Bank Account or Bank Account Pledge. This is another security that may be taken by a bank on several occasions; it may be taken on the operating accounts of the borrower (e.g. earnings account) and be activated only in case of a default; it may also be taken as a separate security by way of cash collateral (which is given in the form of an account charge or pledge); similarly in case there is a need for the borrower to cover a security shortfall, the borrower may opt to provide cash by way of cash collateral. In all these cases what should be pointed out is that this type of security should always be subject to the law of the place where the account is situated.

(d) Charge over Shares or Pledge. Sometimes the borrower is required to procure its shareholders to grant in favour of the lender the right to acquire its shares and effectively take over the company. This is not a particularly strong security because it largely depends on the assets of the acquired company. It is

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[16] For a brief introduction on the function and use of guarantees as a form of security under English law see Richard Calnan, Taking Security, Law and Practice, 2006, pp. 387-425.

[17] The reason for this is that as a general rule the guarantor is becoming liable for third party obligations and almost all jurisdictions, recognising this, are generally pro-guarantor.

common practice in shipping industry to see single-ship owing companies which means that without the ship, acquiring the company is useless. Also, this is somehow similar to the rights of the mortgagee to take over the ship and/or its management and, for reasons set out in 4(e) below, it might not be advisable.

3. Pre-Enforcement Considerations

Having examined above the main elements of the structure of a ship finance transaction with particular focus on the enforcement aspects of the documents, we will now consider what might happen if things go wrong.

Before considering, however, the steps that both a borrower and a lender should take in such a situation, it is worth pointing out that whether and how the bank will enforce its rights against a borrower will largely depend upon the relationship between the bank and the borrower. For instance an honest and straightforward borrower is likely to be treated more leniently and it is possible that the bank may adopt a more helpful approach than with a more obscure borrower that refuses to provide information or even tries to hide its true financial condition. Of course, both the bank and the borrower should be aware that if the market is as bad as it is these days then possibly there is not much room for a bank to be helpful.

Turning to the pre-enforcement considerations, a lender (and a borrower for that matter) should at first be able to recognise the signs of a problematic loan so that it has notice of the situation early on. These include the degree of compliance with financial covenants, the assessment of the information provided pursuant to the information covenants (e.g. financial statements, cash flow projections, vessel employment etc. -this type of information is more readily accessible in the case of listed companies), status of financial ratios such as the asset cover ratio described above (value of the asset lower than the agreed percentage of the loan). In such a case, valuation of the financed ship(s) is particularly important. For example, at the moment the values of the ships have hit a historical low thereby making the majority of the loans problematic.

Apart from the above early indicators of a failing borrower, the lender should also look out for other signs such as arrests (not only of the ship in question but other ships of the same group), serious breaches in charter parties (especially if they are long term time charters), delays or deferrals of payments to trade creditors, insurers and other suppliers. All the above sign seen individually might not be a big source of concern; however, if more than one signs is noted then a prudent bank should start preparations for restructuring of the loan (to help the borrower to survive) or for enforcement with a view to recovering as much as possible from its loan.

4. Considerations When Examining Enforcement Options

Having established that a loan has become problematic or a bad debt,

then a lender should as soon as possible start preparing for the worst case scenario.

(a) Due diligence on security. At first it should perform due diligence on the security that is in place. This has been dealt with in the first part of this paper i.e. review of the loan agreement, the securities, including proper registration of the mortgages, the proper transmission of notices of assignment etc. Once the lender and/or its lawyers are satisfied that all the documentation is in place, the security is still valid and enforceable and all formal requirements have been complied with, only then may it consider further enforcement steps.

(b) Out-of court restructuring. Of course, right before initiating any enforcement proceedings the lender should consider any possible way to work out the issues of the borrower. If, for instance, the bank has identified the reasons of the borrower's fall out it may deem appropriate, before any enforcement action, to give the borrower the chance to recover. Of course, as discussed above, this largely depends on the relationship of the two parties. However, it is not uncommon, even under the current market conditions, to see formal waivers and deferrals of the repayment installments, restructurings, further financing (usually on more onerous terms), agreements with the borrower to sale certain assets etc.

(c) Calling a Default. If the above do not prove fruitful or do not lead to a constructive result and the only option is enforcement by foreclosure then the lender must ensure that the proper notices of default and demands are served properly and timely (the notices and the service of process provisions referred to above are of particular importance). One point to note is that it should be ensured that the default is clear and not subject to any objection. As discussed above the most obvious and common event of default is non-payment of principal and interest.

(d) Place of Enforcement. Once a lender calls a default then the place of enforcement is possibly the next most important aspect of any enforcement proceedings. Shipping is by definition a multi jurisdictional activity. By way of illustration, in a typical shipping/ship finance structure we may have, for example, a Marshall Islands holding company, listed or not in a US exchange, wholly owning Liberian companies each owning a vessel under the same or different flag, financed by a Dutch bank, chartered to a French or a German operator, trading worldwide, with its finance and commercial relationships governed by English law documents and subject to English jurisdiction (usually as discussed at the lender's option) and managed by a Liberian company with an established office or branch in Greece. In such a case, the financier would have to evaluate which is the most favourable jurisdiction in the light of the specific circumstances of each case. More specifically, in deciding where it may launch enforcement proceedings the lender should take into account several factors; some of them have been discussed earlier and

include amongst others the documentation governing their relationship with the borrower, the type of security obtained, the governing law and jurisdiction clauses of those documents and the value of the assets (it could be, apart from the vessels, the assets of any guarantor, shares in the borrower etc.). Of course, the governing law and jurisdiction is not always within the lender's control i.e. despite the agreed governing law and jurisdiction, the location of the assets is critical (in many cases the place of incorporation of the security parties is also important). The other factors are examined below in conjunction with the specific enforcement measure chosen by the lender.

(e) Place of Arrest and Judicial Sale of a Ship. The most obvious recourse that a lender/mortgagee has is against the ship. The choice of the place of arrest and judicial sale of a vessel is paramount[18]. Although, it is out of the scope of this paper to examine in detail this topic, it should be noted very briefly that the review of the procedures, costs of process, quality of correspondents, timing, priorities and even the effect of the existence of cargo on board is an important exercise for both the lender and the borrower. As to the priorities, it is worth noting that in general all jurisdictions accept that few categories of claims (maritime liens) rank before the mortgage (hence the mortgage is possibly the most effective security a lender can get in connection with ship financing). The question of what law will be applied by the court of enforcement in determining what a maritime lien is and what priority it will have in the context of enforcement can easily be the subject of an independent thesis[19]. Without getting into any detail, some courts will apply the law of the flag, some will apply the law of forum and some will apply both (Greece) i.e. for a claim to qualify as a maritime lien running in priority over the mortgage it should be recognised as such both by the law of the flag and the law of the forum. In any event, as a general rule, the fees and expenses of the enforcement process are usually ranked first, then any port or harbor charges, then the maritime liens (usually include crew wages, collision and salvage liens) and then the mortgages which as between themselves are ranked by the date of registration (and not the date of execution). Therefore, careful planning in advance is critical and a sound understanding of both the arrest jurisdiction and the mortgage jurisdiction is essential: it may well be for example that some jurisdictions are more favourable than others when it comes to arresting a vessel or enforcing a mortgage[20] or it

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[18] This is one of the main topics of the 40th CMI Conference in the framework of which four legal systems had been presented with respect to arrest of vessels and the judicial sales of ships and therefore reference is made to the Yearbook of the CMI due to be published.

[19] So far three international conventions have attempted to harmonise this issue (in 1926, 1967 and 1993).

[20] For instance, in a jurisdiction which takes a restrictive approach as to what constitutes a maritime lien, there are fewer claims ranking in priority over the mortgage and therefore the position of the mortgagee is better.

may be quicker or more effective to enforce against the guarantor's assets. Of course, the single most important factor is the place where the ship or other assets are located at the time of the enforcement.

(e) Powers of the Mortgagee: Management of the Ship and Private Sale. Apart from the enforcement by arrest and the judicial sale of a ship which is possibly the most common method of enforcement, in most cases the lender as mortgagee has several other options, including the assumption of the management of the ship and/or the power to sell it in a private sale. As to the former, quite apart from the practical difficulties of the task, it is also doubtful from legal perspective whether a lender would want to be in the shoes of an already failing borrower and assume all the liabilities that such task entails. The only real advantage in such a case is to direct the ship in a jurisdiction with a developed legal framework allowing the lender to enforce more effectively the mortgage and perform all the actions outlined above. As to the private sale, there are indeed some advantages, but also some disadvantages. The main disadvantage compared to a judicial sale is that the prior claims in rem are not extinguished (including other mortgages) and, consequently, the old maritime lien creditors and in some jurisdictions other creditors as well may lawfully arrest the vessel even though it is under new ownership[21]. In addition, the borrower (previous owner) may allege that the lender did not sell the vessel at an appropriate price and in this way the borrower suffered damage. Of course with the appropriate preparatory work and documentation it may be possible even for a private sale to proceed safely and quickly.

5. Bankruptcy

Apart from enforcement by foreclosure, a lender may consider as a realistic alternative to initiate liquidation or formal restructuring proceedings before a bankruptcy court. Similarly, for a heavily indebted borrower that is unable, on any reasonable basis, to service its debts, its only option would be to resort to bankruptcy or creditor protection.

Regardless of the view point from which the issue is considered e.g. whether it is the lender's or the borrower's perspective, the choice of forum is central in insolvency matters as well. Indeed, while there have been several efforts to harmonise and coordinate insolvency proceedings such as the EU Insolvency Regulation[22], the UNCITRAL Model Law on Cross-Border Insolvency etc. there are still jurisdictions which have a more developed and

[21] In some jurisdictions, however, very few claims may also survive a judicial sale. For instance, in Greece in case of judicial sale of a Greek flag vessel, the claims of the seamen's pension fund survive.

[22] Council Regulation (EC) 1346/2000 on insolvency proceedings (OJ 2000 L 160/1). This regulation openly intends to prevent forum shopping within the EU.

sophisticated insolvency legal framework and/or with a seemingly pro-insolvent debtor regime than others and, therefore, parties may choose to resort to the forum which serves them better. It is interesting to note that there have been arguments that for a US Court to accept jurisdiction in respect of a bankruptcy protection filing (Chapter 11) a simple deposit e.g. in a client account of a US law firm could suffice[23]. However, it must also be mentioned that Chapter 11 proceedings are effective restructuring proceedings from the point of view of preserving the going-concern value of a business that should allow creditors to recover as much, or more, than they would recover in ordinary liquidation proceedings[24]. Whilst there are several other reasons in choosing the insolvency regime of one jurisdiction over another, in respect of a multi-jurisdictional business activity such as shipping, it is the recognition (legally or de facto) of the effects of bankruptcy in other jurisdictions which is a deciding factor. By way of illustration in the US legal framework, upon filing of a Chapter 11 petition, the debtor automatically has the benefit of an extensive moratorium or automatic stay of all creditor actions affecting the debtor's property. Although, similar provisions exist in several European jurisdictions as well, the world-wide effect of such automatic stay is more theoretical. If a US court on the other hand grants a Chapter 11 petition, major lenders, particularly those with US branches and activities would in practice be generally unwilling not to respect the moratorium[25].

6. Conclusion

In this paper a brief review was attempted of the securities which a lender in ship financing may enforce with particular emphasis on the clauses which are relevant to enforcement.

Subsequently, pre-enforcement considerations as well as options and steps of enforcement were presented and finally a brief review of bankruptcy followed as a means of collective enforcement or of protection of the debtor from its creditors which is used recently in shipping.

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[23] A broad approach is followed when interpreting what "property in the United States" is in accordance with section 109 of the US Bankruptcy Code. This is in sharp contrast to what the EU Insolvency Regulation provides i.e. that the debtor should commence its (main) insolvency proceedings where he has its centre of main interests (which is the place where "the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties" and "In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary").

[24] The emphasis is on giving the debtor the chance to reorganize its business uninterrupted even in cases where the creditors would rather enforce their rights by foreclosure or liquidation of its assets.

[25] In fact any enforcement action taken in another jurisdiction by a creditor would be deemed by the US Bankruptcy Court a contempt of court.

The area of enforcement of shipping lenders' rights is by its nature multi-jurisdictional and at the same time a continuingly and rapidly developing legal area, particularly within the current market conditions, so what has been discussed is just a glimpse of what enforcement against shipping companies may involve both from the lender's and the borrower's point of view. Hopefully, this paper gave a brief overview and certain points to be aware of both when drafting finance documents and when considering enforcement actions.

SHIP ARREST IN GERMANY

Olaf Hartenstein*

I. Introduction

Germany is not generally known as an ”arrest paradise“ for creditors who wish to enforce their rights. However, arrests are of couse well possible and can be successful if well prepared. The reform of German maritime law which is expected to come into force in 2013 intends to render vessel arrests easier.[1]

1. Relevant legal provisions

Germany is a member of the Arrest Convention of 1952, but not of the 1999 convention.

Under German domestic law, there is only one special rule for the arrest of ships: Sec. 482 of the German Commercial Code („Handelsgesetzbuch”, “HGB“) prohibits the arrest of a vessel during a voyage. The reform will transfer this rule in the Code of Civili Procedure. Other than that, the general rules for conservatory measures of the German Code of Civil Procedure also apply for the arrest of vessels (sec. 916 ZPO et seq.); there is no special regime for vessel arrests.

2. Purpose and nature of the arrest

Under general German civil procedure law, the assets of a debtor can be attached only when the creditor has obtained a legal title (e.g. an enforceable judgement or arbitration award). The arrest is an exception to this rule – for conservatory purposes only.

Arrest proceedings are always *in personam*, never *in rem*. Even in the case of a maritime lien (under the applicable lex causae), the proceedings are formally against the owner, not against the vessel.

The creditor who wishes to arrest an asset, namely a vessel, must bring prima facie evidence that (1) he has a claim against the owner of the vessel, and (2) that there are reasons to justify a conservatory measure instead of simply suing the debtor. For vessels this will change with the reform.

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[1] The reform was not in force when this article was drafted, but now entered into force with effect of 25 April 2013.

II. The claim underlying the arrest application

Outside the Arrest Convention 1952, under German domestic law, any claim for money (due or to become due) or any claim that may turn into a claim for money may justify an arrest of the debtor's assets. However, if the Arrest Convention 1952 applies, only the maritime claims listed in its article 1 sec. 1 may justify the arrest of a vessel.

III. The grounds for an arrest

The decisive provision is sec. 917 ZPO which reads as follows: "*(1) The arrest of assets is allowed if there is a risk that without granting the arrest the enforcement of a judgement is rendered impossible or substantially more difficult. (2) It is considered to be a sufficient ground for an arrest, if the judgement has to be enforced abroad and if reciprocity is not granted.*"

This is one of the difficulties which render arrests in Germany somewhat complicated. It is, therefore, important to note that the upcoming reform of the German maritime law will amend this rule of the Code of Civil Procedure and add that there is no need for any ground for arrest if the purpose of the arrest is to secure enforcement via a vessel. But as of today (October 2012) such amendment is not yet in force.

1. SEC. 917 PAR. 1 ZPO

Under the currently (i.e. October 2012) applicable version of the Code of Civil Procedure, in order to grant an arrest, there must be a risk that without granting the arrest the enforcement of a later judgment is rendered impossible or substantially more difficult. The applicant for an arrest must bring prima facie evidence for that.

It is, for example, sufficient if it can be shown that the debtor deliberately transfers major parts of his assets in bad faith in order to make a future execution of a judgment impossible, or if it can be shown that the debtor damages the assets of the creditor deliberately by way of a criminal offence (e.g. fraud). But it is never a sufficient ground for an arrest if it is merely shown that the debtor is in financial difficulties or that insolvency is expected.

With respect to vessel arrests it is considered sufficient if it can be shown that the owner of the vessel is a single ship company.

On the other hand, sufficient assets in the country may be considered to exist if the debtor operates a liner service with own ships regularly calling at German ports or if he is in permanent business relationships with German agents/brokers who regularly collect freight on his behalf and for his account.

2. SEC. 917 PAR. 2 ZPO

As pointed out above, it is "considered to be a sufficient ground for an arrest, if the judgment has to be enforced abroad and if reciprocity is not

granted." This (irrebuttable) presumption is, however, not valid within the European Union.

IV. Possible object of an arrest

In general, only objects legally (not "beneficially"!) owned by the debtor can be arrested. This is not limited to vessels; *any* movable thing can be arrested. For vessel arrests in particular, the more detailed position under German law is as follows:

1. Ships and other assets

As the rules applicable to a ship arrest are the general rules for arrest, any assets owned by the debtor can be object of the arrest, be it a vessel, a bank account or anything else. What is important is that the object is legally owned by the debtor.

As for ships (including floating cranes, lighters, ships under construction etc.), it is important to note that they must be in port and not sailing .

2. Sisterships

In principle any assets of the debtor can be arrested. Therefore, if the debtor is a ship owner and legally owns a fleet of ships, then all these ships are sisterships and can be the object of an arrest. However, such ownership is a formal requirement. An arrest is not possible if the sistership is only beneficially owned by the same person.

The requirements to pierce the corporate veil are very high. A holding company may be liable for debts of its subsidiary company if both companies are linked by an express controlling agreement according to which the income of the subsidiary company is to be transferred to the holding company. These are rather exceptional cases in the practice of vessel arrests.

3. Maritime liens

Maritime liens justify an exception to the general rule that the object of the arrest must be owned by the debtor of the claim underlying the arrest. If the creditor has a claim against a ship owner which gives rise to a maritime lien, and the ship owner then sells the vessel and transfers title, an arrest is nevertheless possible if the claim gives rise to a maritime lien as listed in sec. 754 par. 1 German commercial code: (1) wages of the master and the crew, (2) public shipping and harbour dues as well as pilotage fees, (3) damages for loss of life or personal injury and for loss of or damage to property if such claims arose from the operation of the vessel, but excluding claims for loss of or damage to property which are or may be based on contract, (4) salvage claims, general average, and wreck removal, (5) social security insurance.

4. Bareboat/Demise charterer as debtor

Another exception to the general rule that the debtor must be the formal owner of the vessel is the situation in which the ship is under bareboat/demise charter and a claim arises against the bareboat/demise charterer. Under German law, the bareboat/demise charterer is by law regarded as the owner of the vessel (sec. 510 HGB). An arrest of the vessel for claims against the bareboat/demise charterer is thus possible. It is to be noted that the same is not the case for a simple time charterer; this is important for ship suppliers and bunker sellers, as a claim against the time charterer does not justify an arrest of the vessel.

V. Arrest proceedings and opponent's rights

1. Jurisdiction/Competent Court

The arrest application can be filed either (1) in the court which has jurisdiction for the main proceedings in the merits, or (2) in the local court ("Amtsgericht") in the district in which the vessel is located. The court of the main proceedings is often abroad or there may even be an arbitration clause. In practice it is, therefore, more common to submit the application to the local court; another advantage is that it is convenient for the execution of the arrest if the vessel is nearby. However, such local courts are in no way specialized and often not even experienced in vessel arrest matters or indeed any maritime matters at all; these courts usually have jurisdiction for general (!) claims up to EUR 5,000 only. The amounts at stake in vessel arrest matters usually being considerably higher, such courts tend to become very cautious.

Outside the Arrest Convention, the arrest does not by itself create jurisdiction for the arrest court for the proceedings in the merits. However, German jurisdiction can be established where the debtor has assets in the country (sec. 23 ZPO), if such debtor is seated outside the European Union and if there is no exclusive choice of jurisdiction clause for another forum.

2. The arrest application

The application must substantiate the arrest claim and – until the reform enters into force – the grounds for the arrest. The claim and the grounds must be supported by a sort of prima facie evidence. The means of evidence are those usually permitted by German procedural rules (e.g. documents, witnesses, expert opinion etc.) – plus and in particular a sworn affirmation stating that the contents of the facts submitted in the arrest application are true. It is very important to prepare the application very diligently in order to avoid too many questions by the court – and to avoid too oral hearing.

3. Procedure and decision

The court will decide at its own discretion whether or not an oral hearing will take place (sec. 922 ZPO). In principle, the arrest proceedings are ex parte,

and no oral hearing takes place; the court will render the relevant "arrest order". However, if the court deems it necessary, an oral hearing can be fixed and the decision will be in the form of a judgment.

4. Security by applicant

It is for the discretion of the court to decide if and up to what amount the applicant has to put up ("counter") security. In theory, the better the evidence of the case the less likely the court will order such security (sec. 921 ZPO). In practice, however, courts nowadays almost always ask for such security. It has been argued that this will (have to) change after the reform; that remains to be seen.

The purpose of the security is to safeguard the rights of the vessel owner in case of a wrongful arrest. Its amount should, therefore, be calculated on the basis of possible damages which may occur because of the arrest (plus interests and costs). In practice, however, it may be that a judge calculates it on the basis of the claim for which the arrest is applied for.

The security can either be paid in cash (which does not happen often) or be transferred to the account of the court (which requires very quick and responsive applicants and banks if the transfer comes from abroad) – or the security may also be provided by an irrevocable and unconditional bank guarantee from a first class bank with a good reputation.

5. Security by defendant

The arrest decision must fix an amount which, if provided as a security by the defendant, enables him to have the arrest lifted (sec. 923 ZPO). The security can either be provided in cash or transferred to the account of the court or be in the form of a bank guarantee. Any other kind of security (e.g. letter of undertaking etc.) is at the discretion of the court or has to be approved by the arrest applicant (sec. 108 ZPO). This security serves to safeguard the applicant's rights; its amount should thus cover the claim plus interests and costs.

6. Objection and appeal

If an arrest order is granted ex parte, the opponent may file an objection against the validity of the arrest. The objection is not subject to a statutory time limit. The court must then fix an oral hearing and render its judgment – which is subject to appeal.

If the arrest is granted or denied after an oral hearing by way of judgment, the losing party may lodge an appeal within one month after the service of the judgment.

7. Further remedies

The defendant may apply to the court for an order for a time limit for commencing main proceedings, failing which the arrest will be set aside upon application by the defendant (sec. 926 ZPO). Even if the arrest is upheld, the

defendant may apply to the court to set aside the arrest if the arrest claim has ceased to exist and/or adequate security has been provided (sec. 927 ZPO).

VI. Execution of the arrest

1. Execution of the arrest decision

The arrest order is executed at the request of the arrest applicant by the competent bailiff who takes possession of the ship. The execution of the arrest order must take place within one month from its date of issue, irrespective of whether the arrest order has already been served upon the debtor. In addition, the arrest must be served.

2. Service of the arrest decision

The arrest decision must be served within one week after its execution (sec. 929 par. 3 ZPO), otherwise the opponent is entitled to apply to have the arrest set aside. The required method of service depends on whether an arrest order (ex parte) or an arrest judgment (after a hearing) was granted:

If an arrest judgment was granted (after an oral hearing), the arrest will be served by the court ex officio.

If, as is usual in practice, an arrest order was granted (ex parte), the arresting party must take the necessary steps to arrange for service on the opponent (sec. 922 par. 2 ZPO). Normally, a bailiff is instructed to serve the original of the arrest order upon an opponent in the country. If the opponent is domiciled abroad, an application can be made to the court to effect service through diplomatic channels. Within the European Union, diplomatic channels are no longer necessary, as the service of documents is much easier due to the 2007 Regulation. It is disputed whether it is sufficient to have the arrest order served on the captain of the vessel. The reform of German maritime law will clarify this and render service easier: it will explicitly provide for the possibility of having the arrest served on the captain.

3. Request for down payment by the bailiff

The bailiff is obliged by law to take the appropriate steps to guard and maintain the ship. He is entitled to ask the arrest applicant for an appropriate down payment in respect of the anticipated costs. In practice he will always do so. If the requested advance payment is not made by the applicant, the bailiff is entitled to refuse to arrest the vessel or to lift the arrest.

4. Judicial sale in the arrest proceedings

Upon application the court may, at its discretion, order the judicial sale of the ship if there is the risk of a considerable reduction in value of the ship or if the costs of the custody are disproportionately high compared to the value of the ship. In practice, however, the courts tend to be very reluctant to order a judicial sale in arrest proceedings.

5. Priority of claims

Auction sale proceeds are distributed as follows: 1st rank: costs of the arrest (including maintenance of the ship), 2nd rank: maritime liens (sec. 761 HGB), 3rd rank: mortgages, 4th rank: arrest liens (in accordance with the time in which the arrest was executed), and 5th rank: any other unsecured claims. It is disputed, however, whether maritime liens which came into force under foreign law and are unknown under German law are also second rank or rather fifth rank.

VII. Unjustified arrest

There is strict liability of the arrest applicants for all damage suffered by the vessel owner because of the arrest if it turns out that the arrest was unjustified or if the time fixed by the court to start main proceedings expired. No negligence or "mala fides" is required on the part of the applicant. Under current German case law, it may even be that the arrest applicant has a claim against the vessel owner: if it later turns out that there was no ground for an arrest ("no matter of urgency"), then there is strict liability; this may happen when the opinion of the judges in the appeal instance differs from that of the judge who granted the arrest.

As explained above, the reform of German maritime law will abolish the requirement of grounds for the arrest in the case of vessel arrests. Of course, if no grounds are required in the first place, then there is no claim for damages if it later turns out that no considerably less risky.

Final Remarks

Germany may not be known as an "arrest paradise" for the applicant, as local courts and bailiffs are not specialized and usually deal with small claims, so that they have a tendency to be rather cautious with vessel arrests. But arrests are certainly possible in Germany and the maritime law reform will make vessel arrests even easier and less risky. The diligent preparation of the arrest application with supporting evidence is and will remain of paramount importance; the better the arrest claim (and, until the reform enters into force, the arrest grounds) is put forward, the lower the risk that the arrest will not be granted. If well prepared, it is possible to get an arrest order within a few hours after the application is lodged with the court. The arrest can be executed immediately thereafter by the bailiff.

REPORT ON YOUNG CMI EVENTS AT THE BEIJING CONFERENCE*

YINGYING ZOU and YIANNIS TIMAGENIS**

The Young CMI events during the 40th CMI conference consisted of two parts: the social event on the evening of 15th Oct. and the academic seminar on the afternoon of 19th Oct.

In addition to the organizers, Violeta Radovich, Yingying Zou and Yiannis Timagenis, a number of Chinese colleagues, including Ms. Qi Ji from CMLA, Mr. Sun Jinsheng from COSCO and Ms. Zhai Juan from Sinotrans also contributed a lot to the on-site arrangements of the events.

I. Social Event

The social event was held at the open terrace of a Bar named WATER ('Zi Shui' in Chinese). WATER is located at Solana Lifestyle Shopping Park of Beijing, about 20-minute walking distance from the conference venue. By the beautiful Chao Yang Lake, the Bar enjoys wonderful environment. The organizers made meticulous arrangement for food, drinks and band performances. About 60 delegates joined the party. In the delightful and relaxing atmosphere, the young participants soon got to know each other and exchanged opinions on various topics. The party made them familiar with each other on the very first day of the conference, and was of great help for the further communication and cooperation in the coming days.

II. Academic Event[1]

The seminar included two parts. The topics were not only of major concern, but also closely related to the issues of the whole conference.

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* October 14-19, 2012

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1 The Papers presented at Beijing and referred to in this Report may all be found in this Yearbook.

Yingying Zou and Yiannis Timagenis co-chaired the seminar. Each speaker had a maximum of 25 minutes for presentation, and about 30 minutes were allocated for a Q&A session. More than 40 delegates (not only young members) attended the seminar. The delegates attended the presentations and raised questions to the speakers.

After the seminar, the majority of the participants expressed their intense interests in the topics and thought highly of the presentations as both valuable and inspiring.

II.1 Part A: Ship Arrest and Judicial Sales of vessels

The presentations in Part A dealt with the legal systems and practices of ship arrest and judicial sales in different jurisdictions. Congrui Luo, attorney-at-law and partner of Rolmax Law Office Shanghai, presented an overall picture of the system and practice of ship arrest in China including a reference to "active arrest" under Chinese law. On the judicial sales in China, besides the introduction of the procedural system, she also analyzed the situation whether a vessel can be judicially sold when the claims are against a bareboat charterer and also discussed China's attitude to judicial sale which takes place in foreign jurisdictions.

Dr. Olaf Hartenstein, attorney-at-law and partner of Dabelstein & Passehl law firm in Hamburg, after an overview of the relevant legal provisions, summarised clearly the underlying claims, grounds for the ship arrest as well as possible object of an arrest, arrest proceedings and opponent' right of ship arrest. In addition, he provided updated information on the reform of the ship arrest system in Germany.

From the angle of the enforcement of mortgage of ship in Panama, Remy Francisco Carreira-Franceschi, Associate Attorney of Carreira Pitti P.C. Abogados delved into the jurisdiction for maritime claims, securities, he compared legislations and practices of ship arrest, 'flag arrest' and judicial sales in Panama, the country which takes a unique position in the maritime circle.

Patrick Holloway, a senior partner of Webber Wentzel law firm, gave a concise but comprehensive introduction to the systems of the ship arrest and judicial sales in South Africa, including the action *in rem*, the attachment of action *in personam*, the security arrest, counter security and judicial sales. Particularly, by a series of clear diagrams and case illustration, Mr. Holloway analyzed the criteria of 'associated ships' under South African law, a topic that most foreign lawyers are interested in cases of arrest of ships in South Africa.

From these presentations, the delegates had the chance to look into both the similarities and differences of the systems and practices of ship arrest and judicial sales of vessels in different jurisdictions, and review them under both civil law and common law regimes. It was a good opportunity for young lawyers, scholars and practitioners to better understand the systems of other

countries. In addition, a further unification of the systems of the ship arrest and judicial sales might also draw more due attention.

II.2 Part B: Off-Shore Activities & Enforcement on Shipping Companies by Creditors

The paper *Off-Shore Activity - New Regulations and Contracts* was co-written by Violeta Radovich and Javier Franco-Zárate. On behalf of Violeta, Javier Franco-Zárate, lecturer in Externado University and senior Associate of Guzman Escober & Asociados in Colombia, first gave the overview of the new *Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil* as well as the European Commission Proposal, the new regulations which were enacted as a result of the awareness caused by the Montara and DeepWater Horizon incidents. In addition, reference was made to compensation for oil pollution damage arising from offshore exploration and exploitation and to salvage in relation to offshore units.

The second part of the presentation focused on BIMCO's SUPPLYTIME 2005 form as a model contract of off-shore service. After briefly commenting on the features of the Form, the speaker analyzed Clause 14 in detail and questioned the validity of "knock-for-knock" liability regime under Colombia Law.

Yiannis Timagenis, of Timagenis Law Firm in Greece, first pointed out the importance of enforcement under the current market conditions (with updated market data). Then, a brief review of the securities which a lender in ship financing may enforce was given with particular emphasis on the clauses which are relevant to enforcement. Subsequently, the speaker discussed some pre-enforcement considerations as well as options and steps of enforcement and finally provided a brief review of bankruptcy as a means of collective enforcement or of protection of the debtor from its creditors.

The off-shore activities and cross- border insolvencies and enforcement against shipping companies are now the global subjects. Understanding of the systems and practices of different regimes will be important for solving certain disputes and the cross-border cooperation will also be desired to a certain extent.

III. Pushing the Young CMI ahead further

For a clearer understanding of Young CMI and a boost of its attractiveness, Yiannis Timagenis introduced, before the presentation series, the Young CMI's objectives, structures and approaches. After that, Olaf Hartenstein made an account of the Young Lawyers' activities in Europe and Yingying Zou called for a more active participation of the young members and suggested founding a region based (e.g Europe, Asia or Asia-pacific) inter-

activities and forums which might serve to enhance the function and influence of Young CMI. During the seminar, Professor Frank Smeele delivered a special presentation on the annual young maritime lawyers event in North-West Europe, which hopefully would guide Young CMI to a similar way and push it further ahead.

IV. Conclusion

In summary, the young CMI events during the 40th conference in Beijing were successful. However, with a view of marking the Young CMI events more attractive and in order to accelerate the development of the young participants in Maritime circles, in accordance with some suggestions by delegates during and out of the conference, we are of the opinion that there are still many more actions we can take in the future, e.g. making even more detailed introduction about Young CMI through the CMI website and other channels to let the young participants know more about this section of the CMI and its functions; establishing some communication platforms for the young members; introducing young members to certain working groups of the CMI or its conferences; making some regional groups for the communications, discussions and cooperation among the young maritime lawyers, scholars and other practitioners. Such kind of development needs the active involvement and the ideas of all the members and the approaches and mechanisms for achieving such goals will depend on further discussions and efforts.

SHANGHAI ADD-ON

BRIEF REFLECTIONS OF ALMOST 20 YEARS IN SHANGHAI

Peter Murray*

20 years is a blink of an eye in terms of Chinese history but fair to say that the last 20 years, just about my time in Shanghai, have seen some profound changes and not just so called "skyline changes", although there are have been plenty of those!

When I arrived from Hong Kong in 1993, it could take you two hours from the airport to downtown Shanghai. Not only were there many more bicycles (most of the pedal type), there was a level crossing for trains not far from the airport. Now you have overhead roads all the way from the airport and not only that, we have two airports!

Of course it is the hardware, the buildings, the infrastructure and I hasten to add the many new parks in Shanghai that catch the eye and so they should because it is the urbanization of China that drives all before it.

According to a well known Australian economist, urbanisation only really took off in 2006 when the average annual GDP in China passed USD2,000. And it will maintain the same pace until 2030 according to McKinsey when by that time, one billion people will be living in an urban environment.

We have seen not only new hardware to house people and move them about but also to educate and care for them. We are fortunate today to be in the relatively new Shanghai Maritime Court.

Buildings like this are replicated up and down the coast in the 10 major ports with branch maritime courts in no less than 35 other ports. Surely the largest maritime court structure in the world and accompanied by all the arbitration and mediation commissions both national and provincial. And I have to mention the two maritime universities in Shanghai and Dalian. Visit the new SMU campus if you have the time.

It is not just the hardware that has developed in the past 20 years, the Maritime Code is also 20 years old next year and followed by other supplementary pronouncements from the Supreme Court in Beijing.

The courts have been very busy, I hasten to add mostly with domestic

* Ince & Co, Shanghai.

maritime cases with no overseas party involved. And now there are the cases where there are no PRC parties involved, what I like to call the "double foreign cases". The frequency of vessel callings at Chinese ports makes sure of that. And all the issues that can be of concern including home team advantage and consistency are just as relevant in domestic cases as in foreign related cases.

Everybody wants consistency, otherwise with so many courts you could end up with chaos. Being a civil law jurisdiction, there is no strict precedent system but the Supreme Court in Beijing has adopted its own means to apply consistency by making pronouncements from time to time.

In fact, the courts at first instance try very hard to have the parties resolve cases in a mediated way. A PRC maritime judge has a duty to play a mediating role and that is where the future of dispute resolution in China might lie or in fact where it has always been.

I recall a colleague who worked with me in Shanghai saying that he had decided to return to Hong Kong where he could practise black and white law! Of course the implication was that in Shanghai we practised law which was shades of black and white!

To a young litigator from London, there was nothing better than a bitter dispute to get the adrenalin running. However, is English law as black and white as it used to be? Some would say that English law has now become less black and white with the "Rainy Sky" and related decisions. Perhaps a step towards the civil law way of looking at contracts?

Of the developments which have taken place over the past 20 years, I have kept the most important and the best for last. Buildings and the laws for that matter are just a stage set without the people to build and maintain true institutions.

The only statistic I will mention is the number of judges in this court, now more than 50 judges! If the Shanghai Maritime Court were to be converted to a law firm, it would be the largest maritime law firm in the city!

Next to mention are the maritime lawyers. Most of the lawyers who were practising when I arrived in Shanghai, continue to practise today.

Again the maritime legal profession is represented up and down the coast which I believe gives a consistency in the standard of practice, thanks not only to the universities in China but also Southampton and Tulane Universities which have broadened the horizons of many graduates.

I could mention many young students of the late 1990s who have excelled in the profession but to mention four who qualified in England, one who now has his own firm in Shanghai amongst many other activities, the second a partner in Stephenson Harwood in Hong Kong, the third a partner in Allen & Overy in Beijing and the fourth recently qualified now with Berwin Leighton in London.

Many years ago I recall giving a talk at a conference in Beijing to a very friendly and receptive overseas audience and I invited them to look for

opportunities to employ for even a short time, a student from China. This has happened.

The time has come to think about doing the reverse, that is sending young students to China to work in the courts, the arbitration commissions, the law firms and of course the universities to get a first hand taste of what is happening in China. People might be concerned about language barriers, but that's never held me back!

For the future I see tremendous opportunities. In our business China has it all, the court and arbitration systems, modern laws, the lawyers and most importantly the cases. Even a small selection of those cases could provide a body of jurisprudence which can be of international significance.

Will there be new ways of solving disputes which have arisen as a result of external factors? This must happen and if it is going to happen anywhere, it will happen in China. Resolving disputes may in fact be avoidance whereby market driven "disputes" are dealt with by price adjustment clauses. The risks of the market are dealt with upfront rather than later on when the dispute has arisen.

International economic and financial crises which would put the 2008 GFC into the shade may be ahead of us and no doubt could have a severe impact on PRC trade. The euro zone may have averted a disaster but now there is talk of the impending "fiscal cliff" in the United States in early 2013. The courts and the law will have to be ready for those. A taste of the law that could be applied was brought into force in 2009 in the PRC providing as follows:

> *In the event of significant changes after conclusion of a contract, which are not foreseeable by the contracting parties at the time of entering into the contract, not attributable to force majeure and not considered as commercial risks, and further performance of the contract will cause obvious unfairness to one party or will cause the purpose of the contract to be impracticable, the courts are entitled, if one party so requests, to rule on changing or terminating the contract based on principles of fairness and the actual circumstances of the case.*

The lawyers from civil law jurisdictions will be familiar with this approach since the concept is a part of many continental laws and is being considered for adoption into French law. How it is to be implemented is anybody's guess and a computer algorithm may have to be developed in the same way as eBay disputes are now dealt with online.

Could the courts and arbitration commissions of China find new ways to resolve disputes where both parties are "innocent"? Are there solutions around the corner which do not involve a win or lose result, where a draw can be called? China could well be the jurisdiction where those solutions are formulated, particularly with mediation coming into play.

So for the future, many opportunities lie ahead. Most of our overseas clients have worked out long ago that you cannot afford not to be in China.

Their ships are built and trade here, sometimes crewed from here and on occasion those clients make use of the jurisdiction.

In China as elsewhere, the rule of law is good for business; I firmly believe this is well understood in China. There are challenges in implementation but this is also recognized and there are steps being taken forward, particularly when so many of the risks involved in maritime activities are laid off to underwriters.

So I remain optimistic for the future of maritime law in China and not just optimistic, I believe all those involved in the administration of maritime law in China have a tremendous opportunity to develop a world class jurisdiction and the benefits of doing so will spill over into related areas of commercial activity not only in China but around the world.

Thank you!

SPEECH AT THE 40TH INTERNATIONAL CONFERENCE OF THE CMI

Xie Zhenxian*

Distinguished guests, ladies and gentlemen Good afternoon

Today, the seminar of 40th International Conference of the CMI Shanghai Add-On Program is held in our Shanghai Maritime Court. As a maritime judge in China, I am delighted to have the opportunity to introduce the maritime judicial status in China to the maritime experts and the persons in the filed of shipping practice from all over the world. According to the advice previous given by China Maritime Law Association, the main contents introduced to you all by me today is the abstract of maritime judicial system in China and the basic situation of the maritime cases engaged and solved by the maritime court in China, among which the relevant status of our Shanghai Maritime Court would more be introduced. In addition, as regards the issues to which you may pay more attention, such as the judicial examination of the maritime arbitral award, the trial of the foreign maritime cases and the judicial arrest and sale of the vessel, I would also make an introduction on them.

(I)

The maritime judicial system in China shall firstly be introduced. The court system in China consists of the Supreme People's Court, the local people's court at different level and the special people's court.

The Supreme People's Court is the highest trial organization, which is located in Beijing.

The local people's court at different level consists of the high people's court, the intermediate people's court and the district people's court.

The special people's court is in charge of the trial on special cases stipulated by law, the maritime court belongs to special people's court. The level of the maritime court is equivalent to the intermediate people's court, but no subordinate court is established under it, so the case engaged by the maritime court is the case of the first instance. If a party refuses to accept a

* Chief Judge of Maritime Tort Tribunal of Shanghai Maritime Court.

judgment of first instance of a maritime court, he shall have the right to file an appeal with the high people's court in which the maritime court is located.

According to my knowledge, among the countries around the world, there is not many countries establishing the special maritime courts, China is one of them. The maritime courts in China were early established in 1984, the establishment for them is to meet the need for rapid development of the foreign trade and sea transportation after the reform and open-up of China. The first six maritime courts established in 1984 are Dalian, Tianjin, Qingdao, Shanghai, Guangzhou and Wuhan maritime courts, and then Xiamen, Haikou, Ningbo and Beihai maritime courts are established continually. Now there are totally 10 maritime courts in China. These maritime courts spread on the east coast of China and the waterway of the Yangtze River. The scope of jurisdiction of different maritime courts is divided according to the waterfront and water area, which would not be strictly in accordance with the administrative district, such as the scope of jurisdiction of Shanghai Maritime Court shall not only include the coastal water area in Shanghai, but also the coastal water area in Jiangsu. For the reason that no subordinate court is established under the maritime court and the scope of jurisdiction is in a wide range, all maritime courts have set up the detached tribunals within their own jurisdictional scope. The detached tribunal is not a subordinated court, the cases engaged and judged by them shall be made in the name of the maritime court to which it belongs. At present, 35 detached tribunals have been set up by the 10 maritime courts.

The disputed cases engaged by a maritime court shall include three categories. The first one is the disputes over maritime contracts, such as the dispute over the contract of carriage of goods by sea, the dispute over the contract of marine insurance, the dispute over the charterparty, the dispute over the contract of the sale and purchase (construction, repair and mortgage) of the vessel, the dispute over the ship agent, the dispute over the contract of freight or warder, the dispute over the contract of crew labor, etc. The second one is the disputes over maritime tort, such as the dispute over damage compensation on collisions of ships, the dispute over damage compensation on personal injury, the dispute over damage compensation on sea pollution, the dispute over sea fishing and catching practice, etc. The third one is the special maritime procedure cases, such as application for constitution of limitation fund for maritime claims, application for arrest (auction) of vessel, application for maritime injunction, etc. A maritime court has the sole jurisdiction over the above-mentioned cases. In addition, the application for the enforcement on the judgment made by the maritime court, and the application for the enforcement on the arbitral award made by the arbitration organ, may also engaged by the maritime court. It should be explained that the maritime cases engaged by the maritime court in China are in the nature of civil and commercial cases, the administrative case in which the defendant is

government department and the criminal cases taking place on the sea would not be accepted by the maritime court.

Shanghai Maritime Court is one of the six maritime courts firstly established in 1984. The scope of jurisdiction of Shanghai Maritime Court is the coastal area of Jiangsu and Shanghai (including Yangshan deepwater port and the around sea area), the water area under the Liuhekou of Yangtze River connecting the sea. The length of coastline of the jurisdictional area is around 1,100km. Except the maritime contract tribunal and the maritime tort tribunal internally set up in Shanghai Maritime Court, there are three detached tribunals, which are Lianyungang Port detached tribunal in the north of Jiangsu, Yangkou Port detached tribunal in the middle of Jiangsu and Yangshan Port detached tribunal in Yangshan deepwater port.

(II)

On the basis that you all have the basic knowledge on the maritime judicial system, the situation on the cases engaged and solved by the maritime court in China would be introduced.

Although the legislation of maritime law in China does not have a long history, it has been developing rapidly and has already formed a systematic and complete maritime law system. As regards the substantive law, the Maritime Code of the People's Republic of China effective in 1993 is based on the China's actual conditions and also using Hague Rule, Hague Visby Rule and the mature legislation experience of other countries for reference, so it is a quite comprehensive maritime code which is complete and in line with international practice. As regards the procedure law, the Special Maritime Procedure Law of the People's Republic of China effective in 2000 provides a set of special procedure rule on maritime judicial practice. In addition, in other substantive law such as General Principle of Civil Law, the Real Right Law, the Contract Law, the Tort Liability Law, the Guaranty Law and the Insurance Law, and in the Civil Procedure Law, the applicable law on foreign civil legal relations, there are many general rules which shall apply in maritime judicial practice. These laws jointly constitute the legal basis of the trial of maritime cases by the maritime court.

During 28 years after the establishment of the maritime courts in China, according to the penetration of practice, the numbers of maritime cases reach a quite large scale. From 2009 to 2011, the maritime cases engaged by 10 maritime courts are more than 39,000, namely the annual average engaged cases are around13,000. The total accumulative target amount of three years is Renminbi 63 billion. Around 40% of these cases have concluded by way of court judgment, 60% have been concluded by way of mediation or withdrawal of the claim by the plaintiff. In addition, during these three years, 10 maritime courts have handled around 8,000 cases on the enforcement of an effective judgment.

The annual cases engaged by Shanghai Maritime Court at the beginning of the establishment were less than one hundred. During the entrance of the new century especially from 2005, there is a rapid increase on the number of cases engaged. In the past year, the cases engaged by Shanghai Maritime Court for the whole year were 1,981, the cases concluded were 2,002, the target amount is Renminbi 1.75 billion.The cases covered all kinds of admiralty and maritime disputes, the cases were largely focus on the dispute over the contract of carriage of goods by sea and the contract of freight forwarding, which is around 70%. The disputes over marine insurance contract, the sale and purchase of vessel, the charterparty, the ship construction, repair and mortgagee are in a relatively small proportion, but the increasing tendency is quite obvious.

Among the cases engaged by Shanghai Maritime Court, the cases concerning foreign countries, Hong Kong, Macau and Taiwan are around 25% of the total cases, concerning more than 70 countries and regions including the big shipping countries over the world. This percentage is only calculated according to the identity of the parties concerning foreign countries, Hong Kong, Macau and Taiwan. If other factor concerning foreign countries, Hong Kong, Macau and Taiwan was calculated, the percentage would around 50%-60%. During the trial of these cases, we always respect the freedom of contract, the freedom of jurisdictional agreement and freedom of choice of law, comply with international common practice and general rule, and protect the domestic and foreign parties legally and equally. According to the outcome of the statistic data, the winning proportion of the domestic party and foreign party is nearly the same.

(III)

The issue on recognition and enforcement of foreign arbitral award.

In 1958, the United Nations adopted the Recognition and Enforcement of Foreign Arbitral Awards, usually called New York Convention. China is the member state of New York Convention. In practice, the Chinese court including the maritime court strictly comply with the Convention and relevant procedure for the recognition and enforcement of foreign arbitral award. The Supreme People's Court specially promulgate the judicial documents including Notice on Relevant Issues on Arbitration Concerning Foreign Matter and Foreign Arbitration Handled by People's Court, and require the people's court at different level shall report to the Supreme People's Court for examination and decision level by level if they refuse to recognize and enforce the foreign arbitral award. Such arrangement not only shows the China's respect and performance of international treaty but also helps the unification on the judging standard on arbitral judicial examination of each maritime court. Taking Shanghai Maritime Court for example, from 2001 to 2011, the number of the received application on recognition and enforcement on foreign arbitral

award is 10. No award has been refused to recognize and enforce after legal examination.

(IV)

The issue on the judicial arrest and sale of the vessel

The Special Maritime Procedure Law of the People's Republic of China using the Arrest Convention 1999 for reference, stipulates 22 items of maritime claims as the legal reasons for the arrest of vessel, such as loss of or damage to property caused by ship operation, loss of life or personal injury in direct connection with ship operation, salvage at sea, damage caused by ship to environment, agreement in respect of chartering of a ship, carriage of goods or passengers, crew's wages, ship mortgage, ship purchase and sale. During the two years between 2010 and 2011, Shanghai Maritime Court totally arrested50 vessels, among which the number of foreign vessel is 16. During the process of arrest, we insist the principle "to arrest rapidly, to release timely, to manage carefully, to auction cautiously". The vessel would be released timely after sufficient guarantee is provided. If the vessel cannot be released, the vessel would be properly managed and daily maintained, and the substantive trial of the case would be speeded up. The court would try to avoid selling the vessel by judicial auction if other property can be realized into cash under certain condition, in order to reduce the negative effect on the shipping companies and interested parties caused by the auction. It can be proved by practice that many disputes can be solved at the time of or soon after the arrest of vessel. Until the end of 2011, only 4 vessels among the above-mentioned arrested vessels came into the auction procedure. It should be emphasized that in 2012 under the effect on the change of international economy, the shipping industry suffer seriously attack, the disputes over unpaid crew's wages, ship building and repair contract which arise from loss or difficulty in cash turnover of shipping companies occur more often, the cases on arrest of vessel caused in this regards obviously increase, the number of vessel come into auction procedure also increase. In this year up to now, 6 vessels have been legally sold by auction.

Distinguished guests, ladies and gentlemen, due to the time limit, the contents above-mentioned are only a brief introduction. I hope you all may have a preliminary understanding on the maritime justice in China and Shanghai Maritime Court, also hope to have more opportunities to make further communications with the colleagues from all over the world in the future. My introduction has ended here. Thank you.

PRACTISING MARITIME LAW FROM THE PERSPECTIVE OF A CHINESE LAWYER

WANG HONGYU

Distinguished CMI guests, heads and Judges from the Supreme People's Court and Shanghai Maritime Court, and my colleagues,

Today, I would like to share with all of you some of my thoughts and experiences on the changes and development of Chinese maritime judicial environment and maritime lawyer market in the past two decades from the perspective of my working experience.

I worked for PICC for years after my graduation from university in 1989, and I left PICC and joined private practice since 1995 when I was admitted to Chinese bar and became a licensed lawyer in 1997.

When I worked in PICC as a correspondent of various major P&I clubs, I started to coordinate/handle maritime and shipping matters. At that time, there was very few maritime legislation in China. When adjudicating maritime cases, the courts could rely on nothing butthe1986 General Principles of Civil Law of the PRC, and might, in certain circumstances, readily accept some international customs/rules such as Hague-Visby Rules. Several years later, the Chinese Maritime Code of the PRC promulgated and came into effect as from1993 and the Special Maritime Procedure Law of the PRC promulgated in 2000 filled up the gap in Chinese admiralty and maritime legislation. I will introduce these two laws in the latter part regarding changes of so-called "software". Now I would like to start my speech with the changes and development in "hardware", say, Chinese maritime courts, arbitration commissions, maritime lawyers in recent 20 years.

I. Changes of hardware

1. Maritime courts

In June 1984, the first six maritime courts were set up in Dalian, Tianjin, Qingdao, Shanghai, Guangzhou and Wuhan. And now, there are10 maritime courts all over China, making China a country having the most maritime courts in the world.

Turning to the number of cases adjudicated by maritime courts, as far as I know, the maritime courts had very limited number of cases at the time when

they were set up. But now, the maritime courts all over China have thousands upon thousands of cases every year. According to statistics the ten Chinese maritime courts, as the first instance courts, had received over 39,000 admiralty and maritime cases relating to various disputes from 2009 to 2011. China has become the country adjudicating the greatest number of admiralty and maritime cases throughout the world.

Turning to the Judges, at first, the Judges of the Chinese maritime courts came from local courts, port authorities, shipping companies, etc. with diversified backgrounds. Now in Chinese courts there have been more and more young Judges who have well received legal education and have good knowledge of both law and shipping matters.

2. Maritime arbitration commissions

When I started my career, China Maritime Arbitration Commission (CMAC), which is the institution set up in 1959 to resolve maritime disputes by way of arbitration, and as an alternative to maritime courts in China, it only had its head quarter in Beijing. Now CMAC has established Shanghai Sub-Commission, and set up liaison offices in major domestic port cities, Guangzhou, Dalian, Tianjin, Ningbo and Qingdao. Besides, as I know, CMAC Shanghai Sub-Commission also maintains a good relationship with Shanghai Maritime Court and may, at the request of the court, assist the Court to mediate maritime disputes as necessary.

3. Maritime lawyers

Turning to maritime lawyers, in my early working years, the Chinese maritime lawyers as a profession was also brand new, and the choice of a competent shipping lawyer by clients were also quite limited. Since I joined the private practice, shipping industry in China has witnessed a major development of Chinese maritime legal profession, and particularly in Shanghai, I had the honor to know many professional maritime lawyers, including Mr. Ni Zhiqiang, Mr. Huang Shungang, Ms. Lu Min, and Mr. Hu Zhengliang, and to see establishment and development of many law firms specializing in handling admiralty and maritime cases including Sloma, Rolmax, and Wang Jing & Co., just to name a few. Now, as far as I know, there are about more than 20 law firms in Shanghai specializing in admiralty and maritime cases or having admiralty and maritime law departments. In my humble opinion, the growth of Chinese maritime lawyers has set up a bridge between the foreign parties and Chinese maritime courts and relevant administrative authorities, promoting Chinese maritime law and judicial practice to become more international and professional.

II. Changes of Software–the improvements in maritime legislation

Back to late 1980s and early 1990s, China had very few maritime legislation. When hearing maritime disputes, the Chinese courts could only rely on the relevant provisions of the General Principles of Civil Law of the PRC or make reference to international customs/rules, say, the Hague-Visby Rules in handling bill of lading disputes. The promulgation of the Maritime Code of the PRC in 1993 and the Special Maritime Procedure Law of the PRC in 2000 broke the embarrassment that there were no comprehensive maritime procedural and substantive laws to go by for courts to handle admiralty and maritime cases.

The Maritime Code of the PRC is a comprehensive law covering various aspects of maritime law including carriage of goods/passengers by sea, charterparties, ship collision, salvage, towing, general average, tonnage limitation, marine insurance, and conflict of law issues. On the other hand, as the academic research on maritime law and maritime judicial practice started quite late in China, the legislators made reference to the international conventions when drafting the Maritime Code. As a consequence, the Chinese Maritime Code, as a domestic law, was there in line with international rules and generally-accepted international practices at the outset when it was promulgated. In this connection, I personally believe that the Maritime Code is not only a comprehensive law but also a modern law.

In terms of court procedures, the Special Maritime Procedure Law of the PRC is a useful guide both for maritime courts in handling relevant procedural matters and for maritime lawyers to answer clients' enquiries regarding ship arrest, cargo attachment, evidence preservation and other court-procedural issues.

Furthermore, to ensure the correct interpretation of the Maritime Code and the Special Maritime Procedure Law by various lower courts, and to resolve the practical problems in maritime judicial practice, the Supreme Court has, from time to time, promulgated judicial interpretations relating to the Maritime Code, and notably those important one sat a speed of almost one regulation every year since 2006. The important interpretations include those on marine insurance in 2006, ship collision in 2008,deliveryof cargo without collecting the original bill of lading in 2009, limitation of liabilities for maritime claims in 2010, oil pollution in 2011, and in this year 2012, a new judicial interpretation was released in respect of maritime freight forwarder. Undoubtedly, all these Supreme Court's judicial interpretations are important supplement to the Maritime Code of the PRC and the Special Maritime Procedure Law of the PRC and have filled up the gap of Chinese maritime legislations in a timely manner.

III. Wishlist

In the past 20 years, Chinese maritime law, starting from scratch, has reached an outstanding achievement, while Chinese maritime lawyers have been developing rapidly by continuously learning from advanced experience overseas. Having been encouraged by such great achievements, I would still like to take this opportunity to make my wishes and give some suggestions as far as what concerns my clients most:

1. Predictability of judgments

Since the Mainland China is a code-law country, case precedents made by a higher court are not binding upon lower courts, which makes it difficult for Chinese lawyers to give advice with certainty to their clients. In the meantime, since there are 10 maritime courts in China which may have different views on the same legal issue, there may be inconsistent or even contradictory judgments in similar matters. In view of this, the Supreme Court has made continuous attempts, by way of judicial interpretations or otherwise, to unify the application of PRC laws for many issues to a great extent. However, we note that local maritime courts may still take different views when applying the Supreme Court's judicial interpretations to individual cases. In this connection, we are delighted to note that the Supreme Court has published guiding cases for non-maritime matters. We expect that the Supreme Court will also publish guiding cases for shipping and maritime matters with a view to unifying the standard of applying judicial interpretations and improving predictability of court judgments.

2. Notarization and legalization of evidence

This is a procedural matter that foreign clients frequently complained about. In practice, the notarization and legalization of evidence does increase the burden on the foreign clients. Whilst the Nanjing Minutes attempted to resolve this issue, we suggest making clear what evidence must be notarized and legalized, and what evidence may not be notarized and legalized by way of a formal judicial interpretation.

3. "Flag discrimination" issue

In case of a collision between a foreign ship and a domestic ship, the domestic ship should not have lower limitation than the foreign ship. If the Ministry of Communications has not made clear its position or attitude toward this issue, we hope the Supreme Court could make clear the issue by way of judicial interpretation or guiding case.

As a closing remark, I, as a Chinese lawyer practicing maritime law in China for 17 years, am proud of the rapid developments in maritime law and judicial practice in China and sincerely hope that the Chinese maritime law and judicial practice can keep developing and improving, to which I appreciate contributions from not only the Chinese courts, arbitration commissions, the other relevant authorities but also our lawyers are called for.

PART III*

Status of ratifications to Maritime Conventions

Etat des ratifications aux conventions de Droit Maritime

* *Although Comité Maritime International has made all efforts to produce accurate and correct informations as at the date of 30 June 2013 regarding the status of ratifications of Maritime Conventions, readers should address to the Official Depositaries of the Conventions to verify all information contained there.*

ETAT DES RATIFICATIONS ET ADHESIONS AUX CONVENTIONS INTERNATIONALES DE DROIT MARITIME DE BRUXELLES

(Information communiquée par le Ministère des Affaires Etrangères, du Commerce Extérieur et de la Coopération au Développement de Belgique, dépositaire des Conventions).

Notes de l'éditeur

(1) - Les dates mentionnées sont les dates du dépôt des instruments. L'indication (r) signifie ratification, (a) adhésion.

(2) - Les Etats dont le nom est suivi par un astérisque ont fait des réserves. Un résumé du texte de ces réserves est publié après la liste des ratifications de chaque Convention.

(3) - Les dates mentionnées pour la dénonciation sont les dates à lesquelles la dénonciation prend effet.

STATUS OF THE RATIFICATIONS OF AND ACCESSIONS TO THE BRUSSELS INTERNATIONAL MARITIME LAW CONVENTIONS

(Information provided by the Ministère des Affaires Etrangères, du Commerce Extérieur et de la Coopération au Développement de Belgique, depositary of the Conventions).

Editor's notes:

(1) - The dates mentioned are the dates of the deposit of instruments. The indication (r) stands for ratification, (a) for accession.

(2) - The States whose names are followed by an asterisk have made reservations. The text of such reservations is published, in a summary form, at the end of the list of ratifications of each convention.

(3) - The dates mentioned in respect of the denunciation are the dates when the denunciation takes effect.

Convention internationale pour l'unification de certaines règles en matière

d'Abordage

et protocole de signature

Bruxelles, le 23 septembre 1910
Entrée en vigueur: 1er mars 1913

International convention for the unification of certain rules of law relating to

Collision between vessels

and protocol of signature

Brussels, 23rd September, 1910
Entered into force: 1 March 1913

(Translation)

Angola	**(a)**	20.VII.1914
Antigua and Barbuda	**(a)**	1.II.1913
Argentina	**(a)**	28.II.1922
Australia	**(a)**	9.IX.1930
Norfolk Island	**(a)**	1.II.1913
Austria	**(r)**	1.II.1913
Bahamas	**(a)**	3.II.1913
Belize	**(a)**	3.II.1913
Barbados	**(a)**	1.II.1913
Belgium	**(r)**	1.II.1913
Brazil	**(r)**	31.XII.1913
Canada	**(a)**	25.IX.1914
Cape Verde	**(a)**	20.VII.1914
China		
Hong Kong[(1)]	**(a)**	1.II.1913
Macao[(2)]	**(r)**	25.XII.1913
Cyprus	**(a)**	1.II.1913
Croatia	**(a)**	8.X.1991
Denmark	**(r)**	18.VI.1913
Dominican Republic	**(a)**	1.II.1913
Egypt	**(a)**	29.XI.1943
Estonia	**(a)**	15.V.1929
Fiji	**(a)**	1.II.1913
Finland	**(a)**	17.VII.1923

(1) With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Collision Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

(2) With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Collision Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

Abordage 1910		*Collision 1910*
France	**(r)**	1.II.1913
Gambia	**(a)**	1.II.1913
Germany	**(r)**	1.II.1913
Ghana	**(a)**	1.II.1913
Goa	**(a)**	20.VII.1914
Greece	**(r)**	29.IX.1913
Grenada	**(a)**	1.II.1913
Guinea-Bissau	**(a)**	20.VII.1914
Guyana	**(a)**	1.II.1913
Haiti	**(a)**	18.VIII.1951
Hungary	**(r)**	1.II.1913
India	**(a)**	1.II.1913
Iran	**(a)**	26.IV.1966
Ireland	**(r)**	1.II.1913
Italy	**(r)**	2.VI.1913
Jamaica	**(a)**	1.II.1913
Japan	**(r)**	12.I.1914
Kenya	**(a)**	1.II.1913
Kiribati	**(a)**	1.II.1913
Latvia	**(a)**	2.VIII.1932
Luxembourg	**(a)**	22.IV.1991
Libyan Arab Jamahiriya	**(a)**	9.XI.1934
Macao	**(a)**	20.VII.1914
Madagascar	**(r)**	1.II.1913
Malaysia	**(a)**	1.II.1913
Malta	**(a)**	1.II.1913
Mauritius	**(a)**	1.II.1913
Mexico	**(r)**	1.II.1913
Mozambique	**(a)**	20.VII.1914
Netherlands	**(r)**	1.II.1913
Newfoundland	**(a)**	11.III.1914
New Zealand	**(a)**	l9.V.1913
Nicaragua	**(r)**	18.VII.1913
Nigeria	**(a)**	1.II.1913
Norway	**(r)**	12.XI.1913
Papua New Guinea	**(a)**	1.II.1913
Paraguay	**(a)**	22.XI.1967
Poland	**(a)**	2.VI.1922
Portugal	**(r)**	25.XII.1913
Romania	**(r)**	1.II.1913
Russian Federation[3]	**(r)**	10.VII.1936
Saint Kitts and Nevis	**(a)**	1.II.1913

(3) Pursuant to a notification of the Ministry of foreign affairs of the Russian Federation dated 13th January 1992, the Russian Federation is now a party to all treaties to which the U.S.S.R. was a party. Russia had ratified the convention on the 1st February 1913.

Saint Lucia	**(a)**	3.III.1913
Saint Vincent and the Grenadines	**(a)**	1.II.1913
Solomon Islands	**(a)**	1.II.1913
Sao Tome and Principe	**(a)**	20.VII.1914
Seychelles	**(a)**	1.II.1913
Sierra Leone	**(a)**	1.II.1913
Singapore	**(a)**	1.II.1913
Slovenia	**(a)**	16.XI.1993
Somalia	**(a)**	1.II.1913
Spain	**(a)**	17.XI.1923
Sri-Lanka	**(a)**	1.II.1913
Sweden	**(r)**	12.XI.1913
(denunciation 19 December 1995)		
Switzerland	**(a)**	28.V.1954
Timor	**(a)**	20.VII.1914
Tonga	**(a)**	13.VI .1978
Trinidad and Tobago	**(a)**	1.II.1913
Turkey	**(a)**	4.VII.1913
Tuvalu	**(a)**	1.II.1913
United Kingdom	**(r)**	1.II.1913
Jersey, Guernsey, Isle of Man, Anguilla, Bermuda, Gibraltar, Falkland Islands and Dependencies, Cayman Islands, British Virgin Islands, Montserrat, Caicos & Turks Islands. Saint Helena, Wei-Hai-Wei	**(a)**	1.II.1913
Uruguay	**(a)**	21.VII.1915
Zaire	**(a)**	17.VII.1967

Convention internationale pour l'unification de certaines règles en matière

d'Assistance et de sauvetage maritimes

et protocole de signature

Bruxelles, le 23 septembre 1910
Entrée en vigueur: 1 mars 1913

International convention for the unification of certain rules of law relating to

Assistance and salvage at sea

and protocol of signature

Brussels, 23rd September, 1910
Entered into force: l March 1913

(Translation)

Algeria	**(a)**	13.IV.1964
Angola	**(a)**	20.VII.1914
Antigua and Barbuda	**(a)**	1.II.1913

Assistance et sauvetage 1910 *Assistance and salvage 1910*

Argentina	**(a)**	28.II.1922
Australia	**(a)**	9.IX.1930
Norfolk Island	**(a)**	1.II.1913
Austria	**(r)**	1.II.1913
Bahamas	**(a)**	1.II.1913
Barbados	**(a)**	1.II.1913
Belgium	**(r)**	1.II.1913
Belize	**(a)**	1.II.1913
Brazil	**(r)**	31.XII.1913
Canada	**(a)**	25.IX.1914
(denunciation 22.XI.1994)		
Cape Verde	**(a)**	20.VII.1914
China		
Hong Kong[1]	**(a)**	1.II.1913
Macao[2]	**(r)**	25.VII.1913
Cyprus	**(a)**	1.II.1913
Croatia	**(a)**	8.X.1991
(denunciation 16.III.2000)		
Denmark	**(r)**	18.VI.1913
Dominican Republic	**(a)**	23.VII.1958
Egypt	**(a)**	19.XI.1943
Fiji	**(a)**	1.II.1913
Finland	**(a)**	17.VII.1923
France	**(r)**	1.II.1913
Gambia	**(a)**	1.II.1913
Germany	**(r)**	1.II.1913
Ghana	**(a)**	1.II.1913
Goa	**(a)**	20.VII.1914
Greece	**(r)**	15.X.1913
Grenada	**(a)**	1.II 1913
Guinea-Bissau	**(a)**	20.VII.1914
Guyana	**(a)**	1.II.1913

(1) With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsability for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

(2) With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Salvage Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People'sRepublic of China.

Haiti	**(a)**	18.VIII.1951
Hungary	**(r)**	1.II.1913
India	**(a)**	1.II.1913
Iran	**(a)**	26.IV.1966
(denunciation 11.VII.2000)		
Ireland	**(r)**	1.II.1913
Italy	**(r)**	2.VI.1913
Jamaica	**(a)**	1.II.1913
Japan	**(r)**	12.I.1914
Kenya	**(a)**	1.II.1913
Kiribati	**(a)**	1.II.1913
Latvia	**(a)**	2.VIII.1932
Luxembourg	**(a)**	22.IV.1991
Malaysia	**(a)**	1.II.1913
Madagascar	**(r)**	1.II.1913
Mauritius	**(a)**	1.II.1913
Mexico	**(r)**	1.II.1913
Mozambique	**(a)**	20.VII.1914
Netherlands	**(r)**	1.II.1913
Newfoundland	**(a)**	12.XI.1913
New Zealand	**(a)**	19.V.1913
Nigeria	**(a)**	1.II.1913
Norway	**(r)**	12.XI.1913
(denunciation 9.XII.1996)		
Oman	**(a)**	21.VIII.1975
Papua - New Guinea	**(a)**	1.II.1913
Paraguay	**(a)**	22.XI.1967
Poland	**(a)**	15.X.1921
Portugal	**(r)**	25.VII.1913
Romania	**(r)**	1.II.1913
Russian Federation	**(a)**	10.VII.1936
Saint Kitts and Nevis	**(a)**	1.II.1913
Saint Lucia	**(a)**	3.III.1913
Saint Vincent and the Grenadines	**(a)**	1.II.1913
Solomon Islands	**(a)**	1.II.1913
Sao Tomé and Principe	**(a)**	20.VII.1914
Seychelles	**(a)**	1.II.1913
Sierra Leone	**(a)**	1.II.1913
Singapore	**(a)**	1.II.1913
Slovenia	**(a)**	13.X.1993
Somalia	**(a)**	1.II.1913
Spain	**(a)**	17.XI.1923
(denunciation 19.I.2006)		
Sri Lanka	**(a)**	1.II.1913
Sweden	**(r)**	12.XI.1913
Switzerland	**(a)**	28.V.1954
Syrian Arab Republic	**(a)**	1.VIII.1974

Timor	**(a)**	20.VII.1914
Tonga	**(a)**	13.VI.1978
Trinidad and Tobago	**(a)**	1.II.1913
Turkey	**(a)**	4.VII.1955
Tuvalu	**(a)**	1.II.1913
United Kingdom [(3)]	**(r)**	1.II.1913
Anguilla, Bermuda, Gibraltar, Falkland Islands and Dependencies, British Virgin Islands, Montserrat, Turks & Caicos Islands, Saint Helena	**(a)**	1.II.1913
(denunciation 12.XII.1994 effective also for Falkland Islands, Montserrat, South Georgia and South Sandwich Islands)		
United States of America	**(r)**	1.II.1913
Uruguay	**(a)**	21.VII.1915
Zaire	**(a)**	17.VII.1967

Protocole portant modification de la convention internationale pour l'unification de certaines règles en matière

d'Assistance et de sauvetage maritimes

Signée a Bruxelles, le 23 septembre 1910

Bruxelles, 27 mai 1967
Entré en vigueur: 15 août 1977

Protocol to amend the international convention for the unification of certain rules of law relating to

Assistance and salvage at sea

Signed at Brussels on 23rd September, 1910

Brussels, 27th May 1967
Entered into force: 15 August 1977

Austria	**(r)**	4.IV.1974
Belgium	**(r)**	11.IV.1973
Brazil	**(r)**	8.XI.1982
Croatia	**(r)**	8.X.1991
(denunciation 16.III.2000)		
Egypt	**(r)**	15.VII.1977
Jersey, Guernsey & Isle of Man	**(a)**	22.VI.1977
Papua New Guinea	**(a)**	14.X.1980
Slovenia	**(a)**	13.X.1993
Syrian Arab Republic	**(a)**	1.VIII.1974
United Kingdom	**(r)**	9.IX.1974

(3) Including Jersey, Guernsey and Isle of Man.

Convention internationale pour l'unification de certaines règles concernant la

Limitation de la responsabilité des propriètaires de navires de mer

et protocole de signature

Bruxelles, 25 août 1924
Entrée en vigueur: 2 juin 1931

International convention for the unification of certain rules relating to the

Limitation of the liability of owners of sea-going vessels

and protocol of signature

Brussels, 25th August 1924
Entered into force: 2 June 1931

Belgium	**(r)**	2.VI.1930
Brazil	**(r)**	28.IV.1931
Denmark	**(r)**	2.VI.1930
(denunciation - 30. VI. 1983)		
Dominican Republic	**(a)**	23.VII.1958
Finland	**(a)**	12.VII.1934
(denunciation - 30.VI.1983)		
France	**(r)**	23.VIII.1935
(denunciation - 26.X.1976)		
Hungary	**(r)**	2.VI.1930
Madagascar	**(r)**	12.VIII.1935
Monaco	**(r)**	15.V.1931
(denunciation - 24.I.1977)		
Norway	**(r)**	10.X.1933
(denunciation - 30.VI.1963)		
Poland	**(r)**	26.X.1936
Portugal	**(r)**	2.VI.1930
Spain	**(r)**	2.VI.1930
(denunciation - 4.I.2006)		
Sweden	**(r)**	1.VII.1938
(denunciation - 30.VI.1963)		
Turkey	**(a)**	4.VII.1955

Convention internationale pour l'unification de certaines règles en matière de

Connaissement

et protocole de signature

"Règles de La Haye 1924"

Bruxelles, le 25 août 1924
Entrée en vigueur: 2 juin 1931

International convention for the unification of certain rules of law relating to

Bills of lading

and protocol of signature

"Hague Rules 1924"

Brussels, 25th August 1924
Entered into force: 2 June 1931

(Translation)

Algeria	**(a)**	13.IV.1964
Angola	**(a)**	2.II.1952
Antigua and Barbuda	**(a)**	2.XII.1930
Argentina	**(a)**	19.IV.1961
Australia*	**(a)**	4.VII.1955
(denunciation - 16.VII.1993)		
Norfolk	**(a)**	4. VII.1955
Bahamas	**(a)**	2.XII.1930
Barbados	**(a)**	2.XII.1930
Belgium	**(r)**	2.VI.1930
Belize	**(a)**	2.XI.1930
Bolivia	**(a)**	28.V.1982
Cameroon	**(a)**	2.XII.1930
Cape Verde	**(a)**	2.II.1952
China		
Hong Kong(1)	**(a)**	2.XII.1930
Macao(2)	**(r)**	2.II.1952
Cyprus	**(a)**	2.XII.1930
Croatia	**(r)**	8.X.1991
Cuba*	**(a)**	25.VII.1977

(1) With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsability for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

(2) With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

Denmark*	**(a)**	I.VII.1938
(denunciation – 1.III.1984)		
Dominican Republic	**(a)**	2.XII.1930
Ecuador	**(a)**	23.III.1977
Egypt	**(a)**	29.XI.1943
(denunciation - 1.XI.1997)		
Fiji	**(a)**	2.XII.1930
Finland	**(a)**	1.VII.1939
(denunciation – 1.III.1984)		
France*	**(r)**	4.I.1937
Gambia	**(a)**	2.XII.1930
Germany	**(r)**	1.VII.1939
Ghana	**(a)**	2.XII.1930
Goa	**(a)**	2.II.1952
Greece	**(a)**	23.III.1993
Grenada	**(a)**	2.XII.1930
Guyana	**(a)**	2.XII.1930
Guinea-Bissau	**(a)**	2.II.1952
Hungary	**(r)**	2.VI.1930
Iran	**(a)**	26.IV.1966
Ireland*	**(a)**	30.I.1962
Israel	**(a)**	5.IX.1959
Italy	**(r)**	7.X.1938
(denunciation – 22.XI.1984)		
Ivory Coast*	**(a)**	15.XII.1961
Jamaica	**(a)**	2.XII.1930
Japan*	**(r)**	1.VII.1957
(denunciation – 1. VI.1992)		
Kenya	**(a)**	2.XII.1930
Kiribati	**(a)**	2.XII.1930
Kuwait*	**(a)**	25.VII.1969
Lebanon	**(a)**	19.VII.1975
(denunciation - 1.XI.1997)		
Malaysia	**(a)**	2.XII.1930
Madagascar	**(a)**	13.VII.1965
Mauritius	**(a)**	24.VIII.1970
Monaco	**(a)**	15.V.1931
Mozambique	**(a)**	2.II.1952
Nauru*	**(a)**	4.VII.1955
Netherlands*	**(a)**	18.VIII.1956
(denunciation – 26.IV.1982)		
Nigeria	**(a)**	2.XII.1930
Norway	**(a)**	1.VII.1938
(denunciation – 1.III.1984)		
Papua New Guinea*	**(a)**	4.VII.1955
Paraguay	**(a)**	22.XI.1967
Peru	**(a)**	29.X.1964

Règles de La Haye		*Hague Rules*
Poland	**(r)**	4.VIII.1937
Portugal	**(a)**	24.XII.1931
Romania	**(r)**	4.VIII.1937
(denunciation – 18.III.2002)		
Sao Tomé and Principe	**(a)**	2.II.1952
Sarawak	**(a)**	3.XI.1931
Senegal	**(a)**	14.II.1978
Seychelles	**(a)**	2.XII.1930
Sierra-Leone	**(a)**	2.XII.1930
Singapore	**(a)**	2.XII.1930
Slovenia	**(a)**	25.VI.1991
Solomon Islands	**(a)**	2.XII.1930
Somalia	**(a)**	2.XII.1930
Spain	**(r)**	2.VI.1930
Sri-Lanka	**(a)**	2.XII.1930
St. Kitts and Nevis	**(a)**	2.XII.1930
St. Lucia	**(a)**	2.XII.1930
St. Vincent and the Grenadines	**(a)**	2.XII.1930
Sweden	**(a)**	1.VII.1938
(denunciation – 1.III.1984)		
Switzerland*	**(a)**	28.V.1954
Syrian Arab Republic	**(a)**	1.VIII.1974
Tanzania (United Republic of)	**(a)**	3.XII.1962
Timor	**(a)**	2.II.1952
Tonga	**(a)**	2.XII.1930
Trinidad and Tobago	**(a)**	2.XII.1930
Turkey	**(a)**	4.VII.1955
Tuvalu	**(a)**	2.XII.1930
United Kingdom of Great Britain and Northern Ireland (including Jersey and Isle of Man)*	**(r)**	2.VI.1930
(denunciation – 13.VI.1977)		
Gibraltar	**(a)**	2.XII.1930
(denunciation – 22.IX.1977)		
Bermuda, Falkland Islands and dependencies, Turks & Caicos Islands, Cayman Islands, British Virgin Islands, Montserrat, British Antarctic Territories.		
(denunciation 20.X.1983)		
Anguilla	**(a)**	2.XII.1930
Ascension, Saint Helène and Dependencies	**(a)**	3.XI.1931
United States of America*	**(r)**	29.VI.1937
Zaire	**(a)**	17.VII.1967

Reservations

Australia

a) The Commonwealth of Australia reserves the right to exclude from the operation of legislation passed to give effect to the Convention the carriage of goods by sea which is not carriage in the course of trade or commerce with other countries or among the States of Australia.

b) The Commonwealth of Australia reserves the right to apply Article 6 of the Convention in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the last paragraph of that Article.

Cuba

Le Gouvernement de Cuba se réserve le droit de ne pas appliquer les termes de la Convention au transport de marchandises en navigation de cabotage national.

Denmark

...Cette adhésion est donnée sous la réserve que les autres Etats contractants ne soulèvent aucune objection à ce que l'application des dispositions de la Convention soit limitée de la manière suivante en ce qui concerne le Danemark:

1) La Loi sur la navigation danoise en date du 7 mai 1937 continuera à permettre que dans le cabotage national les connaissements et documents similaires soient émis conformément aux prescriptions de cette loi, sans que les dispositions de la Convention leur soient appliquées aux rapports du transporteur et du porteur du document déterminés par ces titres.

2) Sera considéré comme équivalent au cabotage national sous les rapports mentionnés au paragraphe 1) - au cas où une disposition serait édictée en ce sens en vertu de l'article 122, dernier alinéa, de la loi danoise sur la navigation - le transport maritime entre le Danemark et les autres Etats nordiques, dont les lois sur la navigation contiennent des dispositions analogues.

3) Les dispositions des Conventions internationales concernant le transport des voyageurs et des bagages et concernant le transport des marchandises par chemins de fer, signées à Rome, le 23 novembre 1933, ne seront pas affectées par cette Convention."

Egypt

...Nous avons résolu d'adhérer par les présentes à la dite Convention, et promettons de concourir à son application. L'Egypte est, toutefois, d'avis que la Convention, dans sa totalité, ne s'applique pas au cabotage national. En conséquence, l'Egypte se réserve le droit de régler librement le cabotage national par sa propre législation...

France

...En procédant à ce dépôt, l'Ambassadeur de France à Bruxelles déclare, conformément à l'article 13 de la Convention précitée, que l'acceptation que lui donne le Gouvernement Français ne s'applique à aucune des colonies, possessions, protectorats ou territoires d'outre-mer se trouvant sous sa souveraineté ou son autorité.

Ireland

...Subject to the following declarations and reservations: 1. In relation to the carriage of goods by sea in ships carrying goods from any port in Ireland to any other port in Ireland or to a port in the United Kingdom, Ireland will apply Article 6 of the Convention as though the Article referred to goods of any class instead of to particular goods, and as though the proviso in the third paragraph of the said Article were omitted; 2. Ireland does not accept the provisions of the first paragraph of Article 9 of the Convention.

Ivory Coast
Le Gouvernement de la République de Côte d'Ivoire, en adhérant à ladite Convention précise que:
1) Pour l'application de l'article 9 de la Convention relatif à la valeur des unités monétaires employées, la limite de responsabilité est égale à la contre-valeur en francs CFA sur la base d'une livre or égale à deux livres sterling papier, au cours du change de l'arrivée du navire au port de déchargement.
2) Il se réserve le droit de réglementer par des dispositions particulières de la loi nationale le système de la limitation de responsabilité applicable aux transports maritimes entre deux ports de la république de Côte d'Ivoire.

Japan
Statement at the time of signature, 25.8.1925.
Au moment de procéder à la signature de la Convention Internationale pour l'unification de certaines règles en matière de connaissement, le soussigné, Plénipotentiaire du Japon, fait les réserves suivantes:
a) A l'article 4.
Le Japon se réserve jusqu'à nouvel ordre l'acceptation des dispositions du a) à l'alinéa 2 de l'article 4.
b) Le Japon est d'avis que la Convention dans sa totalité ne s'applique pas au cabotage national; par conséquent, il n'y aurait pas lieu d'en faire l'objet de dispositions au Protocole. Toutefois, s'il n'en pas ainsi, le Japon se réserve le droit de régler librement le cabotage national par sa propre législation.
Statement at the time of ratification
...Le Gouvernement du Japon déclare
1) qu'il se réserve l'application du premier paragraphe de l'article 9 de la Convention; 2) qu'il maintient la réserve b) formulée dans la Note annexée à la lettre de l'Ambassadeur du Japon à Monsieur le Ministre des Affaires étrangères de Belgique, du 25 août 1925, concernant le droit de régler librement le cabotage national par sa propre législation; et 3) qu'il retire la réserve a) de ladite Note, concernant les dispositions du a) à l'alinéa 2 de l'article 4 de la Convention.

Kuwait
Le montant maximum en cas de responsabilité pour perte ou dommage causé aux marchandises ou les concernant, dont question à l'article 4, paragraphe 5, est augmenté jusque £ 250 au lieu de £ 100.
The above reservation has been rejected by France and Norway. The rejection of Norway has been withdrawn on 12 April 1974. By note of 30.3.1971, received by the Belgian Government on 30.4.1971 the Government of Kuwait stated that the amount of £ 250 must be replaced by Kuwait Dinars 250.

Nauru
Reservations: a) the right to exclude from the operation of legislation passed to give effect to the Convention on the carriage of goods by sea which is not carriage in the course of trade or commerce with other countries or among the territory of Nauru; b) the right to apply Article 6 of the Convention in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the last paragraph of that Article.

Netherlands
...Désirant user de la faculté d'adhésion réservée aux Etats non-signataires par l'article 12 de la Convention internationale pour l'unification de certaines règles en matière de connaissement, avec Protocole de signature, conclue à Bruxelles, le 25 août 1924, nous avons résolu d'adhérer par les présentes, pour le Royaume en Europe, à ladite Convention, Protocole de signature, d'une manière définitive et promettons de

concourir à son application, tout en Nous réservant le droit, par prescription légale,
1) de préciser que dans les cas prévus par l'article 4, par. 2 de c) à p) de la Convention, le porteur du connaissement peut établir la faute personnelle du transporteur ou les fautes de ses préposés non couverts par l'article 4, par. 2 a) de la Convention;
2) d'appliquer, en ce qui concerne le cabotage national, l'article 6 à toutes les catégories de marchandises, sans tenir compte de la restriction figurant au dernier paragraphe dudit article, et sous réserve:
1) que l'adhésion à la Convention ait lieu en faisant exclusion du premier paragraphe de l'article 9 de la Convention;
2) que la loi néerlandaise puisse limiter les possibilités de fournir des preuves contraires contre le connaissement.

Norway
...L'adhésion de la Norvège à la Convention internationale pour l'unification de certaines règles en matière de connaissement, signée à Bruxelles, le 25 août 1924, ainsi qu'au Protocole de signature y annexé, est donnée sous la réserve que les autres Etats contractants ne soulèvent aucune objection à ce que l'application des dispositions de la Convention soit limitée de la manière suivante en ce qui concerne la Norvège:
1) La loi sur la navigation norvégienne continuera à permettre que dans le cabotage national les connaissements et documents similaires soient émis conformément aux prescriptions de cette loi, sans que les dispositions de la Convention leur soient appliquées ou soient appliquées aux rapports du transporteur et du porteur du document déterminés par ces titres.
2) Sera considéré comme équivalent au cabotage national sous les rapports mentionnés au paragraphe 1) - au cas où une disposition serait édictée en ce sens en vertu de l'article 122, denier alinéa, de la loi norvégienne sur la navigation - le transport maritime entre la Norvège et autres Etats nordiques, dont les lois sur la navigation contiennent des dispositions analogues.
3) Les dispositions des Conventions internationales concernant le transport des voyageurs et des bagages et concernant le transport des marchandises par chemins de fer, signées à Rome le 23 novembre 1933, ne seront pas affectées par cette Convention.

Papua New Guinea
Reservations: a) the right to exclude from the operation of legislation passed to give effect to the Convention on the carriage of goods by sea which is not carriage in the course of trade or commerce with other countries or among the territories of Papua and New-Guinea; b) the right to apply Article 6 of the Convention in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the 1st paragraph of that Article.

Switzerland
...Conformément à l'alinéa 2 du Protocole de signature, les Autorités fédérales se réservent de donner effet à cet acte international en introduisant dans la législation suisse les règles adoptées par la Convention sous une forme appropriée à cette législation.

United Kingdom
...*I Declare* that His Britannic Majesty's Government adopt the last reservation in the additional Protocol of the Bills of Lading Convention. *I Further Declare* that my signature applies only to Great Britain and Northern Ireland. I reserve the right of each of the British Dominions, Colonies, Overseas Possessions and Protectorates, and of each of the territories over which his Britannic Majesty exercises a mandate to accede to this Convention under Article 13. "...In accordance with Article 13 of the above named Convention, I declare that the acceptance of the Convention given by His Britannic Majesty in the instrument of ratification deposited this day extends only to the United Kingdom of Great Britain and Northern Ireland and does not apply to any of His Majesty's Colonies or Protectorates, or territories under suzerainty or mandate.

United States of America
...*And whereas*, the Senate of the United States of America by their resolution of April 1 (legislative day March 13), 1935 (two-thirds of the Senators present concurring therein), did advise and consent to the ratification of the said convention and protocol of signature thereto, 'with the understanding, to be made a part of such ratification, that, not withstanding the provisions of Article 4, Section 5, and the first paragraph of Article 9 of the convention, neither the carrier nor the ship shall in any event be or become liable within the jurisdiction of the United States of America for any loss or damage to or in connection with goods in an amount exceeding 500.00 dollars, lawful money of the United States of America, per package or unit unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
And whereas, the Senate of the United States of America by their resolution of May 6, 1937 (two-thirds of the Senators present concurring therein), did add to and make a part of their aforesaid resolution of April 1, 1935, the following understanding: That should any conflict arise between the provisions of the Convention and the provisions of the Act of April 16, 1936, known as the 'Carriage of Goods by Sea Act', the provisions of said Act shall prevail:
Now therefore, be it known that I, Franklin D. Roosevelt, President of the United States of America, having seen and considered the said convention and protocol of signature, do hereby, in pursuance of the aforesaid advice and consent of the Senate, ratify and confirm the same and every article and clause thereof, subject to the two understandings hereinabove recited and made part of this ratification.

Protocole portant modification de la Convention Internationale pour l'unification de certaines règles en matière de connaissement, signée a Bruxelles le 25 août 1924

Règles de Visby

Bruxelles, 23 février 1968
Entrée en vigueur: 23 juin 1977

Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading, signed at Brussells on 25 August 1924

Visby Rules

Brussels, 23rd February 1968
Entered into force: 23 June, 1977

Belgium	**(r)**	6.IX.1978
China		
Hong Kong[1]	**(r)**	1.XI.1980
Croatia	**(a)**	28.X.1998
Denmark	**(r)**	20.XI.1975

[1] With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Visby Protocol will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China. Reservations have been made by the Government of the People's Republic of China with respect to art. 3 of the Protocol.

Ecuador	**(a)**	23.III.1977
Egypt*	**(r)**	31.I.1983
Finland	**(r)**	1.XII.1984
France	**(r)**	10.VII.1977
Georgia	**(a)**	20.II.1996
Germany	**(a)**	14.II.1979
Greece	**(a)**	23.III.1993
Italy	**(r)**	22.VIII.1985
Latvia	**(a)**	4.IV.2002
Lebanon	**(a)**	19.VII.1975
Lithuania	**(a)**	2.XII.2003
Netherlands*	**(r)**	26.IV.1982
Norway	**(r)**	19.III.1974
Poland*	**(r)**	12.II.1980
Russian Federation	**(a)**	29.IV.1999
Singapore	**(a)**	25.IV.1972
Sri-Lanka	**(a)**	21.X.1981
Sweden	**(r)**	9.XII.1974
Switzerland	**(r)**	11.XII.1975
Syrian Arab Republic	**(a)**	1.VIII.1974
Tonga	**(a)**	13.VI.1978
United Kingdom of Great Britain	**(r)**	1.X.1976
Bermuda	**(a)**	1.XI.1980
Gibraltar	**(a)**	22.IX.1977
Isle of Man	**(a)**	1.X.1976
British Antarctic Territories, Caimans, Caicos & Turks Islands, Falklands Islands & Dependencies, Montserrat, Virgin Islands (extension)	**(a)**	20.X.1983

Reservations

Egypt Arab Republic
La République Arabe d'Egypte déclare dans son instrument de ratification qu'elle ne se considère pas liée par l'article 8 dudit Protocole (cette déclaration est faite en vertu de l'article 9 du Protocole).

Netherlands
Ratification effectuée pour le Royaume en Europe. Le Gouvernement du Royaume des Pays-Bas se réserve le droit, par prescription légale, de préciser que dans les cas prévus par l'article 4, alinéa 2 de c) à p) de la Convention, le porteur du connaissement peut établir la faute personnelle du transporteur ou les fautes de ses préposés non couverts par le paragraphe a).

Poland
Confirmation des réserves faites lors de la signature, à savoir: "La République Populaire de Pologne ne se considère pas liée par l'article 8 du présent Protocole".

Protocole portant modification de la Convention Internationale pour l'unification de certaines règles en matière de connaissement telle qu'amendée par le Protocole de modification du 23 février 1968.

Protocol to amend the International Convention for the unification of certain rules relating to bills of lading as modified by the Amending Protocol of 23rd February 1968.

Protocole DTS

SDR Protocol

Bruxelles, le 21 décembre 1979
Entrée en vigueur: 14 février 1984

Brussels, 21st December 1979
Entered into force: 14 February 1984

Australia	**(a)**	16.VII.1993
Belgium	**(r)**	7.IX.1983
China		
Hong Kong[(1)]	**(a)**	20.X.1983
Croatia	**(a)**	28.X.1998
Denmark	**(a)**	3.XI.1983
Finland	**(r)**	1.XII.1984
France	**(r)**	18.XI.1986
Georgia	**(a)**	20.II.1996
Greece	**(a)**	23.III.1993
Italy	**(r)**	22.VIII.1985
Japan	**(r)**	1.III.1993
Latvia	**(a)**	4.IV.2002
Lithuania	**(a)**	2.XII.2003
Luxembourg	**(a)**	18.II.1991
Mexico	**(a)**	20.V.1994
Netherlands	**(r)**	18.II.1986
New Zealand	**(a)**	20.XII.1994
Norway	**(r)**	1.XII.1983
Poland*	**(r)**	6.VII.1984
Russian Federation	**(a)**	29.IV.1999
Spain	**(r)**	6.I.1982
Sweden	**(r)**	14.XI.1983
Switzerland*	**(r)**	20.I.1988
United Kingdom of Great-Britain and Northern Ireland	**(r)**	2.III.1982
Bermuda, British Antartic Territories, Virgin Islands, Caimans, Falkland Islands & Dependencies, Gibraltar, Isle of Man, Montserrat, Caicos & Turks Island (extension)	**(a)**	20.X.1983

(1) With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the SDR Protocol will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China. Reservations have been made by the Government of the People's Republic of China with respect to art. 8 of the Protocol.

Reservations

Poland
Poland does not consider itself bound by art. III.

Switzerland
Le Conseil fédéral suisse déclare, en se référant à l'article 4, paragraphe 5, alinéa d) de la Convention internationale du 25 août 1924 pour l'unification de certaines règles en matière de connaissement, telle qu'amendée par le Protocole de modification du 23 février 1968, remplacé par l'article II du Protocole du 21 décembre 1979, que la Suisse calcule de la manière suivante la valeur, en droit de tirage spécial (DTS), de sa monnaie nationale:
La Banque nationale suisse (BNS) communique chaque jour au Fonds monétaire international (FMI) le cours moyen du dollar des Etats Unis d'Amérique sur le marché des changes de Zürich. La contrevaleur en francs suisses d'un DTS est déterminée d'après ce cours du dollar et le cours en dollars DTS, calculé par le FMI. Se fondant sur ces valeurs, la BNS calcule un cours moyen du DTS qu'elle publiera dans son Bulletin mensuel.

Convention internationale pour l'unification de certaines règles relatives aux

Privilèges et hypothèques maritimes

et protocole de signature

Bruxelles, 10 avril 1926
entrée en vigueur: 2 juin 1931

International convention for the unification of certain rules relating to

Maritime liens and mortgages

and protocol of signature

Brussels, 10th April 1926
entered into force: 2 June 1931

(Translation)

Algeria	**(a)**	13.IV.1964
Argentina	**(a)**	19.IV.1961
Belgium	**(r)**	2.VI.1930
Brazil	**(r)**	28.IV.1931
Cuba*	**(a)**	21.XI.1983
Denmark	**(r)**	
(denunciation – 1.III.1965)		
Estonia	**(r)**	2.VI.1930
Finland	**(a)**	12.VII.1934
(denunciation – 1.III.1965)		
France	**(r)**	23.VIII.1935
Haiti	**(a)**	19.III.1965
Hungary	**(r)**	2.VI.1930
Iran	**(a)**	8.IX.1966
Italy*	**(r)**	7.XII.1949
Lebanon	**(a)**	18.III.1969
Luxembourg	**(a)**	18.II.1991

Madagascar	**(r)**	23.VIII.1935
Monaco	**(a)**	15.V.1931
Norway	**(r)**	10.X.1933
(denunciation – 1.III.1965)		
Poland	**(r)**	26.X.1936
Portugal	**(a)**	24.XII.1931
Romania	**(r)**	4.VIII.1937
Spain	**(r)**	2.VI.1930
Switzerland	**(a)**	28.V.1954
Sweden	**(r)**	1.VII.1938
(denunciation – 1.III.1965)		
Syrian Arab Republic	**(a)**	14.II.1951
Turkey	**(a)**	4.VII.1955
Uruguay	**(a)**	15.IX.1970
Zaire	**(a)**	17.VII.1967

Reservations

Cuba

(Traduction) L'instrument d'adhésion contient une déclaration relative à l'article 19 de la Convention.

Italy

(Traduction) L'Etat italien se réserve la faculté de ne pas conformer son droit interne à la susdite Convention sur les points où ce droit établit actuellement:

– l'extension des privilèges dont question à l'art. 2 de la Convention, également aux dépendances du navire, au lieu qu'aux seuls accessoires tels qu'ils sont indiqués à l'art. 4;

– la prise de rang, après la seconde catégorie de privilèges prévus par l'art. 2 de la Convention, des privilèges qui couvrent les créances pour les sommes avancées par l'Administration de la Marine Marchande ou de la Navigation intérieure, ou bien par l'Autorité consulaire, pour l'entretien et le rapatriement des membres de l'équipage.

Convention internationale pour l'unification de certaines règles concernant les

Immunités des navires d'Etat

Bruxelles, 10 avril 1926
et protocole additionnel

Bruxelles, 24 mai 1934
Entrée en vigueur: 8 janvier 1937

International convention for the unification of certain rules concerning the

Immunity of State-owned ships

Brussels, 10th April 1926
and additional protocol

Brussels, May 24th 1934
Entered into force: 8 January 1937

(Translation)

Argentina	**(a)**	19.IV.1961
Belgium	**(r)**	8.I.1936

Brazil	**(r)**	8.I.1936
Chile	**(r)**	8.I.1936
Cyprus	**(a)**	19.VII.1988
Denmark	**(r)**	16.XI.1950
Estonia	**(r)**	8.I.1936
France	**(r)**	27.VII.1955
Germany	**(r)**	27.VI.1936
Greece	**(a)**	19.V.1951
Hungary	**(r)**	8.I.1936
Italy	**(r)**	27.I.1937
Luxembourg	**(a)**	18.II.1991
Libyan Arab Jamahiriya	**(r)**	27.I.1937
Madagascar	**(r)**	27.I.1955
Netherlands	**(r)**	8.VII.1936
Curaçao, Dutch Indies		
Norway	**(r)**	25.IV.1939
Poland	**(r)**	16.VII.1976
Portugal	**(r)**	27.VI.1938
Romania	**(r)**	4.VIII.1937
(denunciation – 21.IX.1959)		
Somalia	**(r)**	27.I.1937
Sweden	**(r)**	1.VII.1938
Switzerland	**(a)**	28.V.1954
Suriname	**(r)**	8.VII.1936
Syrian Arab Republic	**(a)**	17.II.1960
Turkey	**(a)**	4.VII.1955
United Arab Republic	**(a)**	17.II.1960
United Kingdom*	**(r)**	3.VII.1979
United Kingdom for Jersey, Guernsey and Island of Man	**(a)**	19.V.1988
Uruguay	**(a)**	15.IX.1970
Zaire	**(a)**	17.VII.1967

Reservations

United Kingdom

We reserve the right to apply Article 1 of the Convention to any claim in respect of a ship which falls within the Admiralty jurisdiction of Our courts, or of Our courts in any territory in respect of which We are party to the Convention. We reserve the right, with respect to Article 2 of the Convention to apply in proceedings concerning another High Contracting Party or ship of another High Contracting Party the rules of procedure set out in Chapter II of the European Convention on State Immunity, signed at Basle on the Sixteenth day of May, in the Year of Our Lord One thousand Nine hundred and Seventy-two.

In order to give effect to the terms of any international agreement with a non-Contracting State, We reserve the right to make special provision:

(a) as regards the delay or arrest of a ship or cargo belonging to such a State, and (b) to prohibit seizure of or execution against such a ship or cargo.

Convention internationale pour l'unification de certaines règles relatives à la

Compétence civile en matière d'abordage

Bruxelles, 10 mai 1952
Entrée en vigueur:
14 septembre 1955

International convention for the unification of certain rules relating to

Civil jurisdiction in matters of collision

Brussels, 10th May 1952
Entered into force:
14 September 1955

Algeria	**(a)**	18.VIII.1964
Antigua and Barbuda	**(a)**	12.V.1965
Argentina	**(a)**	19.IV.1961
Bahamas	**(a)**	12.V.1965
Belgium	**(r)**	10.IV.1961
Belize	**(a)**	21.IX.1965
Benin	**(a)**	23.IV.1958
Burkina Faso	**(a)**	23.IV.1958
Cameroon	**(a)**	23.IV.1958
Central African Republic	**(a)**	23.IV.1958
China		
Hong Kong[(1)]	**(a)**	29.III.1963
Macao[(2)]	**(a)**	23.III.1999
Comoros	**(a)**	23.IV.1958
Congo	**(a)**	23.IV.1958
Costa Rica*	**(a)**	13.VII.1955
Cote d'Ivoire	**(a)**	23.IV.1958
Croatia*	**(r)**	8.X.1991
Cyprus	**(a)**	17.III.1994
Djibouti	**(a)**	23.IV.1958
Dominican Republic	**(a)**	12.V.1965
Egypt	**(r)**	24.VIII.1955
Fiji	**(a)**	10.X.1974
France	**(r)**	25.V.1957

(1) With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsability for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

(2) The extension of the Convention to the territory of Macao has been notified by Portugal with declaration deposited on 23 March 1999.

With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People'sRepublic of China.

Gabon	**(a)**	23.IV.1958
Germany	**(r)**	6.X.1972
Greece	**(r)**	15.III.1965
Grenada	**(a)**	12.V.1965
Guinea	**(a)**	23.IV.1958
Guyana	**(a)**	29.III.1963
Haute Volta	**(a)**	23.IV.1958
Holy Seat	**(r)**	10.VIII.1956
Ireland	**(a)**	17.X.1989
Italy	**(r)**	9.XI.1979
Khmere Republic*	**(a)**	12.XI.1959
Kiribati	**(a)**	21.IX.1965
Luxembourg	**(a)**	18.II.1991
Madagascar	**(a)**	23.IV.1958
Mauritania	**(a)**	23.IV.1958
Mauritius	**(a)**	29.III.1963
Morocco	**(a)**	11.VII.1990
Niger	**(a)**	23.IV.1958
Nigeria	**(a)**	7.XI.1963
North Borneo	**(a)**	29.III.1963
Paraguay	**(a)**	22.XI.1967
Poland	**(a)**	14.III.1986
Portugal	**(r)**	4.V.1957
Romania	**(a)**	28.XI.1995
Sarawak	**(a)**	29.VIII.1962
Senegal	**(a)**	23.IV.1958
Seychelles	**(a)**	29.III.1963
Slovenia	**(a)**	13.X.1993
Solomon Islands	**(a)**	21.IX.1965
Spain	**(r)**	8.XII.1953
St. Kitts and Nevis	**(a)**	12.V.1965
St. Lucia	**(a)**	12.V.1965
St. Vincent and the Grenadines	**(a)**	12.V.1965
Sudan	**(a)**	23.IV.1958
Switzerland	**(a)**	28.V.1954
Syrian Arab Republic	**(a)**	1.VIII.1974
Tchad	**(a)**	23.IV.1958
Togo	**(a)**	23.IV.1958
Tonga	**(a)**	13.VI.1978
Tuvalu	**(a)**	21.IX.1965
United Kingdom of Great Britain and Northern Ireland	**(r)**	18.III.1959
Gibraltar	**(a)**	29.III.1963
British Virgin Islands	**(a)**	29.V.1963
Bermuda	**(a)**	30.V.1963
Caiman Islands, Montserrat	**(a)**	12.V.1965
Anguilla, St. Helena	**(a)**	12.V.1965
Turks Isles and Caicos	**(a)**	21.IX.1965
Guernsey	**(a)**	8.XII.1966
Falkland Islands and Dependencies	**(a)**	17.X.1969
Zaire	**(a)**	17.VII.1967

Reservations

Costa-Rica
(Traduction) Le Gouvernement de la République du Costa Rica, en adhérant à cette Convention, fait cette réserve que l'action civile du chef d'un abordage survenu entre navires de mer ou entre navires de mer et bateaux de navigation intérieure, pourra être intentée uniquement devant le tribunal de la résidence habituelle du défendeur ou de l'Etat dont le navire bat pavillon.
En conséquence, la République du Costa Rica ne reconnaît pas comme obligatoires les literas b) et c) du premier paragraphe de l'article premier."
"Conformément au Code du droit international privé approuvé par la sixième Conférence internationale américaine, qui s'est tenue à La Havane (Cuba), le Gouvernement de la République du Costa Rica, en acceptant cette Convention, fait cette réserve expresse que, en aucun cas, il ne renoncera à ca compétence ou juridiction pour appliquer la loi costaricienne en matière d'abordage survenu en haute mer ou dans ses eaux territoriales au préjudice d'un navire costaricien.

Croatia
Reservation made by Yugoslavia and now applicable to Croatia: "Le Gouvernement de la République Populaire Fédérative de Yougoslavie se réserve le droit de se déclarer au moment de la ratification sur le principe de "sistership" prévu à l'article 1° lettre (b) de cette Convention.

Khmere Republic
Le Gouvernement de la République Khmère, en adhérant à ladite convention, fait cette réserve que l'action civile du chef d'un abordage survenu entre navires de mer ou entre navires de mer et bateaux de navigation intérieure, pourra être intentée uniquement devant le tribunal de la résidence habituelle du défendeur ou de l'Etat dont le navire bat pavillon.
En conséquence, le Gouvernement de la République Khmère ne reconnaît pas le caractère obligatoire des alinéas b) et c) du paragraphe 1° de l'article 1°.
En acceptant ladite convention, le Gouvernement de la République Khmère fait cette réserve expresse que, en aucun cas, elle ne renoncera à sa compétence ou juridiction pour appliquer la loi khmère en matière d'abordage survenu en haute mer ou dans ses eaux territoriales au préjudice d'un navire khmère.

Convention internationale pour l'unification de certaines règles relatives à la

Compétence pénale en matière d'abordage et autres événements de navigation

Bruxelles, 10 mai 1952
Entrée en vigueur:
20 novembre 1955

Internationd convention for the unification of certain rules relating to

Penal jurisdiction in matters of collision and other incidents of navigation

Brussels, 10th May 1952
Entered into force:
20 November 1955

Anguilla*	**(a)**	12.V.1965
Antigua and Barbuda*	**(a)**	12.V.1965
Argentina*	**(a)**	19.IV.1961
Bahamas*	**(a)**	12.V.1965
Belgium*	**(r)**	10.IV.1961

Belize*	**(a)**	21.IX.1965
Benin	**(a)**	23.IV.1958
Burkina Faso	**(a)**	23.IV.1958
Burman Union*	**(a)**	8.VII.1953
Cayman Islands*	**(a)**	12.VI.1965
Cameroon	**(a)**	23.IV.1958
Central African Republic	**(a)**	23.IV.1958
China		
Hong Kong[(1)]	**(a)**	29.III.1963
Macao[(2)]	**(a)**	23.III.1999
Comoros	**(a)**	23.IV.1958
Congo	**(a)**	23.IV.1958
Costa Rica*	**(a)**	13.VII.1955
Croatia*	**(r)**	8.X.1991
Cyprus	**(a)**	17.III.1994
Djibouti	**(a)**	23.IV.1958
Dominica, Republic of*	**(a)**	12.V.1965
Egypt*	**(r)**	24.VIII.1955
Fiji*	**(a)**	29.III.1963
France*	**(r)**	20.V.1955
Overseas Territories	**(a)**	23.IV.1958
Gabon	**(a)**	23.IV.1958
Germany*	**(r)**	6.X.1972
Greece	**(r)**	15.III.1965
Grenada*	**(a)**	12.V.1965
Guyana*	**(a)**	l9.III.1963
Guinea	**(a)**	23.IV.1958

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(1) With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Penal Jurisdiction Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

The following declarations have been made by the Government of the People's Republic of China:

1. The Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right not to observe the provisions of Article 1 of the Convention in the case of any ship if the State whose flag the ship was flying has as respects that ship or any class of ships to which that ship belongs consented to the institution of criminal or disciplinary proceedings before the judicial or administrative authorities of the Hong Kong Special Administrative Region.

2. In accordance with Article 4 of the Convention, the Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right to take proceedings in respect of offences committed within the waters under the jurisdiction of the Hong Kong Special Administrative Region.

(2) The extension of the Convention to the territory of Macao has been notified by Portugal with declaration deposited on 23 March 1999. With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People'sRepublic of China.

Compétence pénale 1952 *Penal jurisdiction 1952*

Haiti	**(a)**	17.IX.1954
Haute-Volta	**(a)**	23.IV.1958
Holy Seat	**(r)**	10.VIII.1956
Italy*	**(r)**	9.XI.1979
Ivory Coast	**(a)**	23.IV.1958
Khmere Republic*	**(a)**	12.XI.1956
Kiribati*	**(a)**	21.IX.1965
Lebanon	**(r)**	19.VII.1975
Luxembourg	**(a)**	18.II.1991
Madagascar	**(a)**	23.IV.1958
Mauritania	**(a)**	23.IV.1958
Mauritius*	**(a)**	29.III.1963
Montserrat*	**(a)**	12.VI.1965
Morocco	**(a)**	11.VII.1990
Netherlands*	**(r)**	
Kingdom in Europe, West Indies and Aruba	**(r)**	25.VI.1971
Niger	**(a)**	23.IV.1958
Nigeria*	**(a)**	7 XI.1963
North Borneo*	**(a)**	29.III.1963
Paraguay	**(a)**	22.XI.1967
Portugal*	**(r)**	4.V.1957
Romania	**(a)**	28.XI.1995
Sarawak*	**(a)**	28.VIII.1962
Senegal	**(a)**	23.IV.1958
Seychelles*	**(a)**	29.III.1963
Slovenia	**(a)**	13.X.1993
Solomon Islands*	**(a)**	21.IX.1965
Spain*	**(r)**	8.XII.1953
St. Kitts and Nevis*	**(a)**	12.V.1965
St. Lucia*	**(a)**	12.V.1965
St. Helena*	**(a)**	12.V.1965
St. Vincent and the Grenadines*	**(a)**	12.V.1965
Sudan	**(a)**	23.IV.1958
Suriname	**(r)**	25.VI.1971
Switzerland	**(a)**	28.V.1954
Syrian Arab Republic	**(a)**	10.VII.1972
Tchad	**(a)**	23.IV.1958
Togo	**(a)**	23.IV.1958
Tonga*	**(a)**	13.VI.1978
Tuvalu*	**(a)**	21.IX.1965
United Kingdom of Great Britain and Northern Ireland*	**(r)**	18.III.1959
Gibraltar	**(a)**	29.III.1963
British Virgin Islands	**(a)**	29.V.1963
Bermuda	**(a)**	30.V.1963
Anguilla	**(a)**	12.V.1965
Turks Islands and Caicos	**(a)**	21.IX.1965
Guernsey	**(a)**	8.XII.1966
Falkland Islands and dependencies	**(a)**	17.X.1969
Viet Nam*	**(a)**	26.XI.1955
Zaire	**(a)**	17.VII.1967

Reservations

Antigua, Cayman Island, Montserrat, St. Christopher-Nevis-Anguilla, St. Helena and St. Vincent
The Governments of Antigua, the Cayman Islands, Montserrat, St. Christopher-Nevis-Anguilla (now the independent State of Anguilla), St. Helena and St. Vincent reserve the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has as respects that ship or any class of ship to which that ship belongs assented to the institution of criminal or disciplinary proceedings before judicial or administrative authorities in Antigua, the Cayman Islands, Montserrat, St. Christopher-Nevis-Anguilla, St. Helena and St. Vincent. They reserve the right under Article 4 of this Convention to take proceedings in respect of offences committed within the territorial waters of Antigua, the Cayman Islands, Montserrat, St. Christopher-Nevis-Anguilla, St. Helena and St. Vincent.

Argentina
(Traduction) La République Argentine adhère à la Convention internationale pour l'unification de certaines règles relatives à la compétence pénale en matière d'abordage et autres événements de navigation, sous réserve expresse du droit accordé par la seconde partie de l'article 4, et il est fixé que dans le terme "infractions" auquel cet article se réfère, se trouvent inclus les abordages et tout autre événement de la navigation visés à l'article 1° de la Convention.

Bahamas
...Subject to the following reservations:
(a) the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has, as respects that ship or any class of ship to which that ship belongs, assented to the institution of criminal and disciplinary proceedings before judicial or administrative authorities of the Bahamas;
(b) the right under Article 4 of the said Convention to take proceedings in respect of offences committed within the territorial waters of the Bahamas.

Belgium
...le Gouvernement belge, faisant usage de la faculté inscrite à l'article 4 de cette Convention, se réserve le droit de poursuivre les infractions commises dans les eaux territoriales belges.

Belize
...Subject to the following reservations:
(a) the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has, as respects that ship or any class of ship to which that ship belongs, consented to the institution of criminal and disciplinary proceedings before judicial or administrative authorities of Belize;
(b) the right under Article 4 of the said Convention to take proceedings in respect of offences committed within the territorial waters of Belize.

Cayman Islands
See Antigua.

China
Macao
The Government of the People's Republic of China reserves, for the Macao Special Administrative Region, the right not to observe the provisions of Article 1 of the

Convention in the case of any ship if the State whose flag the ship was flying has as respects that ship or any class of ships to which that ship belongs consented to the institution of criminal or disciplinary proceedings before the judicial or administrative authorities of the Macao Special Administrative Region.

In accordance with Article 4 of the Convention, the Government of the People's Republic of China reserves, for the Macao Special Administrative Region, the right to take proceedings in respect of offences committed within the waters under the jurisdiction of the Macao Special Administrative Region.

Within the above ambit, the Government of the People's Republic of China will assume the responsability for the international rights and obligations that place on a Party to the Convention

Costa-Rica
(Traduction) Le Gouvernement de Costa-Rica ne reconnaît pas le caractère obligatoire des articles 1° and 2° de la présente Convention.

Croatia
Reservation made by Yugoslavia and now applicable to Croatia: "Sous réserve de ratifications ultérieure et acceptant la réserve prévue à l'article 4 de cette Convention. Conformément à l'article 4 de ladite Convention, le Gouvernement yougoslave se réserve le droit de poursuivre les infractions commises dans se propres eaux territoriales".

Dominica, Republic of
... Subject to the following reservations:
(a) the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has, as respects that ship or any class of ship to which that ship belongs, assented to the institution of criminal and disciplinary proceedings before judicial or administrative authorities of Dominica;
(b) the right under Article 4 of the said Convention to take proceedings in respect of offences committed within the territorial waters of Dominica.

Egypt
Au moment de la signature le Plénipotentiaire égyptien a déclaré formuler la réserve prévue à l'article 4, alinéa 2. Confirmation expresse de la réserve faite au moment de la signature.

Fiji
The Government of Fiji reserves the right not to observe the provisions of article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has as respect that ship or any class of ship to which that ship belongs consented to the institution of criminal or disciplinary proceedings before judicial or administrative authorities in Fiji.
The Government of Fiji reserves the right under article 4 of this Convention to take proceedings in respect of offences committed within the territorial water of Fiji.

France
Au nom du Gouvernement de la République Française je déclare formuler la réserve prévue à l'article 4, paragraphe 2, de la convention internationale pour l'unification de certaines règles relatives à la compétence pénale en matière d'abordage.

Germany, Federal Republic of
(Traduction) Sous réserve du prescrit de l'article 4, alinéa 2.

Grenada
Same reservations as the Republic of Dominica

Guyana
Same reservations as the Republic of Dominica

Italy
Le Gouvernement de la République d'Italie se réfère à l'article 4, paragraphe 2, et se réserve le droit de poursuivre les infractions commises dans ses propres eaux territoriales.

Khmere Republic
Le Gouvernement de la République Khmère, d'accord avec l'article 4 de ladite convention, se réservera le droit de poursuivre les infractions commises dans ses eaux territoriales.

Kiribati
Same reservations as the Republic of Dominica

Mauritius
Same reservations as the Republic of Dominica

Montserrat
See Antigua.

Netherlands
Conformément à l'article 4 de cette Convention, le Gouvernement du Royaume des Pays-Bas, se réserve le droit de poursuivre les infractions commises dans ses propres eaux territoriales.

Nigeria
The Government of the Federal Republic of Nigeria reserve the right not to implement the provisions of Article 1 of the Convention in any case where that Government has an agreement with any other State that is applicable to a particular collision or other incident of navigation and if such agreement is inconsistent with the provisions of the said Article 1. The Government of the Federal Republic of Nigeria reserves the right, in accordance with Article 4 of the Convention, to take proceedings in respect of offences committed within the territorial waters of the Federal Republic of Nigeria.

North Borneo
Same reservations as the Republic of Dominica

Portugal
Au nom du Gouvernement portugais, je déclare formuler la réserve prévue à l'article 4, paragraphe 2, de cette Convention.

Sarawak
Same reservations as the Republic of Dominica

St. Helena
See Antigua.

St. Kitts-Nevis
See Antigua.

St. Lucia
Same reservations as the Republic of Dominica

St. Vincent
See Antigua.

Seychelles
Same reservations as the Republic of Dominica

Solomon Isles
Same reservations as the Republic of Dominica

Spain
La Délégation espagnole désire, d'accord avec l'article 4 de la Convention sur la compétence pénale en matière d'abordage, se réserver le droit au nom de son Gouvernement, de poursuivre les infractions commises dans ses eaux territoriales. Confirmation expresse de la réserve faite au moment de la signature.

Tonga
Same reservations as the Republic of Dominica

Tuvalu
Same reservations as the Republic of Dominica

United Kingdom
1. - Her Majesty's Government in the United Kingdom reserves the right not to apply the provisions of Article 1 of this Convention in any case where there exists between Her Majesty's Government and the Government of any other State an agreement which is applicable to a particular collision or other incident of navigation and is inconsistent with that Article.

2. - Her Majesty's Government in the United Kingdom reserves the right under Article 4 of this Convention to take proceedings in respect of offences committed within the territorial waters of the United Kingdom.

...subject to the following reservations:

(1) The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has as respects that ship or any class of ship to which that ship belongs consented to the institution of criminal and disciplinary proceedings before the judicial or administrative authorities of the United Kingdom.

(2) In accordance with the provisions of Article 4 of the said Convention, the Government of the United Kingdom of Great Britain and Northern Ireland reserve the right to take proceedings in respect of offences committed within the territorial waters of the United Kingdom.

(3) The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right in extending the said Convention to any of the territories for whose international relations they are responsible to make such extension subject to the reservation provided for in Article 4 of the said Convention...

Vietnam
Comme il est prévu à l'article 4 de la même convention, le Gouvernement vietnamien se réserve le droit de poursuivre les infractions commises dans la limite de ses eaux territoriales.

Convention internationale pour l'unification de certaines règles sur la

Saisie conservatoire des navires de mer

Bruxelles, 10 mai 1952
Entrée en vigueur: 24 février 1956

International convention for the unification of certain rules relating to

Arrest of sea-going ships

Brussels, 10th May 1952
Entered into force: 24 February 1956

Algeria	**(a)**	18.VIII.1964
Antigua and Barbuda*	**(a)**	12.V.1965
Bahamas*	**(a)**	12.V.1965
Belgium	**(r)**	10.IV.1961
Belize*	**(a)**	21.IX.1965
Benin	**(a)**	23.IV.1958
Burkina Faso	**(a)**	23.IV.1958
Cameroon	**(a)**	23.IV.1958
Central African Republic	**(a)**	23.IV.1958
China		
Hong Kong[(1)]	**(a)**	29.III.1963
Macao[(2)]	**(a)**	23.IX.1999
Comoros	**(a)**	23.IV.1958
Congo	**(a)**	23.IV.1958
Costa Rica*	**(a)**	13.VII.1955
Côte d'Ivoire	**(a)**	23.IV.1958
Croatia*	**(r)**	30.VII.1992
Cuba*	**(a)**	21.XI.1983
Denmark	**(r)**	2.V.1989
Djibouti	**(a)**	23.IV.1958
Dominica, Republic of*	**(a)**	12.V.1965
Egypt*	**(r)**	24.VIII.1955
Fiji	**(a)**	29.III.1963
Finland	**(r)**	21.XII.1995
France	**(r)**	25.V.1957
France (Overseas Territories)		
Archipel des îles Marquises, Archipel des Tuamotu et des Gambier,		

(1) With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Arrest Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

(2) The extension of the Convention to the territory of Macao as from 23 September 1999 has been notified by Portugal with declaration deposited on 23 March 1999. With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People'sRepublic of China.

Iles Australes, Iles sous le Vent, Iles Saint-Pierre et Miquelon, Iles Wallis et Futuna, Nouvelle-Calédonie et dépendances, Tahiti et dépendances, Terres australes et antarctiques françaises	**(a)**	23.IV.1958
Overseas Territories	**(a)**	23.IV.1958
Gabon	**(a)**	23.IV.1958
Germany*	**(r)**	6.X.1972
Greece	**(r)**	27.II.1967
Grenada*	**(a)**	12.V.1965
Guyana*	**(a)**	29.III.1963
Guinea	**(a)**	12.XII.1994
Haiti	**(a)**	4.XI.1954
Haute-Volta	**(a)**	23.IV.1958
Holy Seat	**(r)**	10.VIII.1956
Ireland*	**(a)**	17.X.1989
Italy*	**(r)**	9.XI.1979
Khmere Republic*	**(a)**	12.XI.1956
Kiribati*	**(a)**	21.IX.1965
Latvia	**(a)**	17.V.1993
Luxembourg	**(a)**	18.II.1991
Madagascar		23.IV.1958
Mali	**(a)**	23.IV.1958
Morocco	**(a)**	11.VII.1990
Mauritania	**(a)**	23.IV.1958
Mauritius*	**(a)**	29.III.1963
Namibia	**(a)**	14.III.2002
Netherlands*	**(r)**	20.I.1983
Niger	**(a)**	23.IV.1958
Nigeria*	**(a)**	7.XI.1963
North Borneo*	**(a)**	29.III.1963
Norway	**(r)**	1.XI.1994
Paraguay	**(a)**	22.XI.1967
Poland	**(a)**	16.VII.1976
Portugal	**(r)**	4.V.1957
Romania	**(a)**	28.XI.1995
Russian Federation*	**(a)**	29.IV.1999
St. Kitts and Nevis*	**(a)**	12.V.1965
St. Lucia*	**(a)**	12.V.1965
St. Vincent and the Grenadines*	**(a)**	12.V.1965
Sarawak*	**(a)**	28.VIII.1962
Senegal	**(a)**	23.IV.1958
Seychelles*	**(a)**	29.III.1963
Slovenia	**(a)**	13.X.1993
Solomon Islands*	**(a)**	21.IX.1965
Spain *(denunciation – 28.III.2011)*	**(r)**	8.XII.1953
Sweden	**(a)**	30.IV.1993
Switzerland	**(a)**	28.V.1954
Syrian Arabic Republic	**(a)**	3.II.1972
Tchad	**(a)**	23.IV.1958

Togo	**(a)**	23.IV.1958
Tonga*	**(a)**	13.VI.1978
Turks Isles and Caicos*	**(a)**	21.IX.1965
Tuvalu*	**(a)**	21.IX.1965
Ukraine	**(a)**	16.XI.2011
United Kingdom of Great Britain* and Northern Ireland	**(r)**	18.III.1959
United Kingdom (Overseas Territories)*		
Gibraltar	**(a)**	29.III.1963
British Virgin Islands	**(a)**	29.V.1963
Bermuda	**(a)**	30.V.1963
Anguilla, Caiman Islands, Montserrat, St. Helena	**(a)**	12.V.1965
Guernsey	**(a)**	8.XII.1966
Isle of Man	**(a)**	14.IV.1993
Falkland Islands and dependencies	**(a)**	17.X.1969
Zaire	**(a)**	17.VII.1967

Reservations

Antigua
... Reserves the right not to apply the provisions of this Convention to warships or to vessels owned by or in the service of a State.

Bahamas
...With reservation of the right not to apply the provisions of this Convention to warships or to vessels owned by or in service of a State.

Belize
Same reservation as the Bahamas.

Costa Rica
(Traduction) Premièrement: le 1er paragraphe de l'article 3 ne pourra pas être invoqué pour saisir un navire auquel la créance ne se rapporte pas et qui n'appartient plus à la personne qui était propriétaire du navire auquel cette créance se rapporte, conformément au registre maritime du pays dont il bat pavillon et bien qu'il lui ait appartenu.
Deuxièmement: que Costa Rica ne reconnaît pas le caractère obligatoire des alinéas a), b), c), d), e) et f) du paragraphe 1er de l'article 7, étant donné que conformément aux lois de la République les seuls tribunaux compétents quant au fond pour connaître des actions relatives aux créances maritimes, sont ceux du domicile du demandeur, sauf s'il s'agit des cas visés sub o), p) et q) à l'alinéa 1er de l'article 1, ou ceux de l'Etat dont le navire bat pavillon.
Le Gouvernement de Costa Rica, en ratifiant ladite Convention, se réserve le droit d'appliquer la législation en matière de commerce et de travail relative à la saisie des navires étrangers qui arrivent dans ses ports.

Côte d'Ivoire
Confirmation d'adhésion de la Côte d'Ivoire. Au nom du Gouvernement de la République de Côte d'Ivoire, nous, Ministre des Affaires Etrangères, confirmons que par Succession d'Etat, la République de Côte d'Ivoire est devenue, à la date de son accession à la souveraineté internationale, le 7 août 1960, partie à la Convention internationale pour l'unification de certaines règles sur la saisie conservatoire des navires de mer, signée à Bruxelles le 10 mai 1952, qu'elle l'a été de façon continue depuis lors et que cette Convention est aujourd'hui, toujours en vigueur à l'égard de la Côte d'Ivoire.

Croatia
Reservation made by Yugoslavia and now applicable to Croatia: "...en réservant conformément à l'article 10 de ladite Convention, le droit de ne pas appliquer ces dispositions à la saisie d'un navire pratiquée en raison d'une créance maritime visée au point o) de l'article premier et d'appliquer à cette saisie la loi nationale".

Cuba
(Traduction) L'instrument d'adhésion contient les réserves prévues à l'article 10 de la Convention celles de ne pas appliquer les dispositions de la Convention aux navires de guerre et aux navires d'Etat ou au service d'un Etat, ainsi qu'une déclaration relative à l'article 18 de la Convention.

Dominica, Republic of
Same reservation as Antigua

Egypt
Au moment de la signature le Plénipotentiaire égyptien à déclaré formuler les réserves prévues à l'article 10.
Confirmation expresse des réserves faites au moment de la signature.

Germany, Federal Republic of
(Traduction) ...sous réserve du prescrit de l'article 10, alinéas a et b.

Grenada
Same reservation as Antigua.

Guyana
Same reservation as the Bahamas.

Ireland
Ireland reserves the right not to apply the provisions of the Convention to warships or to ships owned by or in service of a State.

Italy
Le Gouvernement de la République d'Italie se réfère à l'article 10, par. (a) et (b), et se réserve:
(a) le droit de ne pas appliquer les dispositions de la présente Convention à la saisie d'un navire pratiquée en raison d'une des créances maritimes visées aux o) et p) de l'article premier et d'appliquer à cette saisie sa loi nationale;
(b) le droit de ne pas appliquer les dispositions du premier paragraphe de l'article 3 à la saisie pratiquée sur son territoire en raison des créances prévues à l'alinéa q) de l'article 1.

Khmere Republic
Le Gouvernement de la République Khmère en adhérant à cette convention formule les réserves prévues à l'article 10.

Kiribati
Same reservation as the Bahamas.

Mauritius
Same reservation as Antigua.

Netherlands
Réserves formulées conformément à l'article 10, paragraphes (a) et (b):
- les dispositions de la Convention précitée ne sont pas appliquées à la saisie d'un navire pratiquée en raison d'une des créances maritimes visées aux alinéas o) et p) de l'article 1, saisie à laquelle s'applique le loi néerlandaise; et
- les dispositions du premier paragraphe de l'article 3 ne sont pas appliquées à la saisie pratiquée sur le territoire du Royaume des Pays-Bas en raison des créances prévues à l'alinéa q) de l'article 1.

Cette ratification est valable depuis le 1er janvier 1986 pour le Royaume des Pays-Bas, les Antilles néerlandaises et Aruba.

Nigeria
Same reservation as Antigua.

North Borneo
Same reservation as Antigua.

Russian Federation
The Russian Federation reserves the right not to apply the rules of the International Convention for the unification of certain rules relating to the arrest of sea-going ships of 10 May 1952 to warships, military logistic ships and to other vessels owned or operated by the State and which are exclusively used for non-commercial purposes.
Pursuant to Article 10, paragraphs (a) and (b), of the International Convention for the unification of certain rules relating to the arrest of sea-going ships, the Russian Federation reserves the right not to apply:
– the rules of the said Convention to the arrest of any ship for any of the claims enumerated in Article 1, paragraph 1, subparagraphs (o) and (p), of the Convention, but to apply the legislation of the Russian Federation to such arrest;
– the first paragraph of Article 3 of the said Convention to the arrest of a ship, within the jurisdiction of the Russian Federation, for claims set out in Article 1, paragrap 1, subparagraph (q), of the Convention.

St. Kitts and Nevis
Same reservation as Antigua.

St. Lucia
Same reservation as Antigua.

St. Vincent and the Grenadines
Same reservation as Antigua.

Sarawak
Same reservation as Antigua.

Seychelles
Same reservation as the Bahamas.

Solomon Islands
Same reservation as the Bahamas.

Tonga
Same reservation as Antigua.

Turk Isles and Caicos
Same reservation as the Bahamas.

Tuvalu
Same reservation as the Bahamas.

United Kingdom of Great Britain and Northern Ireland
... Subject to the following reservations:

1. The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right not to apply the provisions of the said Convention to warships or to vessels owned by or in the service of a State.

2. The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right in extending the said Convention to any of the territories for whose international relations they are responsible to make such extension subject to the reservations provided for in Article 10 of the said Convention.

United Kingdom (Overseas Territories): Anguilla, Bermuda, British Virgin Islands, Caiman Islands, Falkland Islands and Dependencies, Gibraltar, Guernsey, Hong Kong, Montserrat, St. Helena, Turks Isles and Caicos
... Subject to the following reservations:

1. The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right not to apply the provisions of the said Convention to warships or to vessels owned by or in the service of a State.

2. The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right in extending the said Convention to any of the territories for whose international relations they are responsible to make such extension subject to the reservations provided for in Article 10 of the said Convention.

Convention internationale sur la

Limitation de la responsabilité des propriétaires de navires de mer

et protocole de signature

Bruxelles, le 10 octobre 1957
Entrée en vigueur: 31 mai 1968

International convention relating to the

Limitation of the liability of owners of sea-going ships

and protocol of signature

Brussels, 10th October 1957
Entered into force: 31 May 1968

Algeria	**(a)**	18.VIII.1964
Australia	**(r)**	30.VII.1975
(denunciation – 30.V. 1990)		
Bahamas*	**(a)**	21.VIII.1964
Barbados*	**(a)**	4.VIII.1965
Belgium	**(r)**	31.VII.1975
(denunciation – 1.IX.1989)		
Belize	**(r)**	31.VII.1975
China		
Macao[1]	**(a)**	20.XII.1999
Denmark*	**(r)**	1.III.1965
(denunciation – 1.IV.1984)		
Dominica, Republic of*	**(a)**	4.VIII.1965
Egypt (Arab Republic of)		
(denunciation – 8.V.1985)		
Fiji*	**(a)**	21.VIII.1964
Finland	**(r)**	19.VIII.1964
(denunciation – 1.IV.1984)		
France	**(r)**	7.VII.1959
(denunciation – 15.VII.1987)		
Germany	**(r)**	6.X.1972
(denunciation – 1.IX.1986)		
Ghana*	**(a)**	26.VII.1961
Grenada*	**(a)**	4.VIII.1965
Guyana*	**(a)**	25.III.1966
Iceland*	**(a)**	16.X.1968
India*	**(r)**	1.VI.1971
Iran*	**(r)**	26.IV.1966
Israel*	**(r)**	30.XI.1967

(1) The extension of the Convention to the territory of Macao as from 23 September 1999 has been notified by Portugal with declaration deposited on 23 March 1999. With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Collision Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People'sRepublic of China.

Japan	**(r)**	1.III.1976
(denunciation – 19.V.1983)		
Kiribati*	**(a)**	21.VIII.1964
Lebanon	**(a)**	23.XII.1994
Madagascar	**(a)**	13.VII.1965
Mauritius*	**(a)**	21.VIII.1964
Monaco*	**(a)**	24.I.1977
Netherlands	**(r)**	10.XII.1965
(denunciation – 1.IX.1989)		
Aruba*	**(r)**	1.I.1986
Norway	**(r)**	1.III.1965
(denunciation – 1.IV.1984)		
Papua New Guinea*	**(a)**	14.III.1980
Poland	**(r)**	1.XII.1972
Portugal*	**(r)**	8.IV.1968
St. Lucia*	**(a)**	4.VIII.1965
St. Vincent and the Grenadines	**(a)**	4.VIII.1965
Seychelles*	**(a)**	21.VIII.1964
Singapore*	**(a)**	17.IV.1963
Solomon Islands*	**(a)**	21.VIII.1964
Spain*	**(r)**	16.VII.1959
(denunciation - 04.I. 2006)		
Sweden	**(r)**	4.VI.1964
(denunciation – 1.IV.1984)		
Switzerland	**(r)**	21.I.1966
Syrian Arab Republic	**(a)**	10.VII.1972
Tonga*	**(a)**	13.VI.1978
Tuvalu*	**(a)**	21.VIII.1964
United Arab Republic*	**(a)**	7.IX.1965
United Kingdom*	**(r)**	18.II.1959
Isle of Man	**(a)**	18.XI.1960
Bermuda, British Antarctic Territories, Falkland and Dependencies, Gibraltar, British Virgin Islands	**(a)**	21.VIII.1964
Guernsey and Jersey	**(a)**	21.X.1964
Caiman Islands, Montserrat, Caicos and Turks Isles*	**(a)**	4.VIII.1965
Vanuatu	**(a)**	8.XII.1966
Zaire	**(a)**	17.VII.1967

Reservations

Bahamas
...Subject to the same reservations as those made by the United Kingdom on ratification namely the reservations set out in sub-paragraphs (a) and (b) of paragraph (2) of the Protocol of Signature.

Barbados
Same reservation as Bahamas

China
The Government of the People's Republic of China reserves, for the Macao Special Administrative Region, the right not to be bound by paragraph 1.(c) of Article 1 of the

Convention. The Government of the People's Republic of China reserves, for the Macao Special Administrative Region, the right to regulate by specific provisions of laws of the Macao Special Administrative Region the system of limitation of liability to be applied to ships of less than 300 tons. With reference to the implementation of the Convention in the Macao Special Administrative Region, the Government of the People's Repubic of China reserves, for the Macao Special Administrative Region, the right to implement the Convention either by giving it the force of law in the Macao Special Administrative Region, or by including the provisions of the Convention, in appropriate form, in legislation of the Macao Special Administrative Region. Within the above ambit, the Government of the People's Republic of China will assume the responsability for the international rights and obligations that place on a Party to the Convention.

Denmark
Le Gouvernement du Danemark se réserve le droit:
1) de régler par la loi nationale le système de limitation de responsabilité applicable aux navires de moins de 300 tonneaux de jauge;
2) de donner effet à la présente Convention, soit en lui donnant force de loi, soit en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.

Dominica, Republic of
Same reservation as Bahamas

Egypt Arab Republic
Reserves the right:
1) to exclude the application of Article 1, paragraph (1)(c);
2) to regulate by specific provisions of national law the system of limitation to be applied to ships of less than 300 tons;
3) on 8 May, 1984 the Egyptian Arab Republic has verbally notified the denunciation in respect of this Convention. This denunciation will become operative on 8 May, 1985.

Fiji
Le 22 août 1972 a été reçue au Ministère des Affaires étrangères, du Commerce extérieur et de la Coopération au Développement une lettre de Monsieur K.K.T. Mara, Premier Ministre et Ministre des Affaires étrangères de Fidji, notifiant qu'en ce qui concerne cette Convention, le Gouvernement de Fidji reprend, à partir de la date de l'indépendance de Fidji, c'est-à-dire le 10 octobre 1970, les droits et obligations souscrits antérieurement par le Royaume-Uni, avec les réserves figurant ci-dessous.
1) In accordance with the provisions of subparagraph (a) of paragraph (2) of the said Protocol of signature, the Government of the United Kingdom of Great Britain and Northern Ireland exclude paragraph (1)(c) of Article 1 from their application of the said Convention.
2) In accordance with the provisions of subparagraph (b) of paragraph (2) of the said Protocol of signature, the Government of the United Kingdom of Great Britain and Northern Ireland will regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons.
Furthermore in accordance with the provisions of subparagraph (c) of paragraph (2) of the said Protocol of signature, the Government of Fiji declare that the said Convention as such has not been made part in Fiji law, but that the appropriate provisions to give effect thereto have been introduced in Fiji law.

Ghana
The Government of Ghana in acceding to the Convention reserves the right:
1) To exclude the application of Article 1, paragraph (1)(c);
2) To regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons;
3) to give effect to this Convention either by giving it the force of law or by including in national legislation, in a form appropriate to that legislation, the provisions of this Convention.

Grenada
Same reservation as Bahamas

Guyana
Same reservation as Bahamas

Iceland
The Government of Iceland reserves the right:
1) to regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons;
2) to give effect to this Convention either by giving it the force of law or by including in national legislation, in a form appropriate to that legislation, the provisions of this Convention.

India
Reserve the right:
1) To exclude the application of Article 1, paragraph (1)(c);
2) To regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons;
3) to give effect to this Convention either by giving it the force of law or by including in national legislation, in a form appropriate to that legislation, the provisions of this Convention.

Iran
Le Gouvernement de l'Iran se réserve le droit:
1) d'exclure l'application de l'article 1, paragraphe (1)(c);
2) de régler par la loi nationale le système de limitation de responsabilité applicable aux navires de moins de 300 tonneaux de jauge;
3) de donner effet à la présente Convention, soit en lui donnant force de loi, soit en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.

Israel
The Government of Israel reserves to themselves the right to:
1) exclude from the scope of the Convention the obligations and liabilities stipulated in Article 1(1)(c);
2) regulate by provisions of domestic legislation the limitation of liability in respect of ships of less than 300 tons of tonnage;
The Government of Israel reserves to themselves the right to give effect to this Convention either by giving it the force of law or by including in its national legislation, in a form appropriate to that legislation, the provisions of this Convention.

Kiribati
Same reservation as Bahamas

Mauritius
Same reservation as Bahamas

Monaco
En déposant son instrument d'adhésion, Monaco fait les réserves prévues au paragraphe 2° du Protocole de signature.

Netherlands-Aruba
La Convention qui était, en ce qui concerne le Royaume de Pays-Bas, uniquement applicable au Royaume en Europe, a été étendue à Aruba à partir du 16.XII.1986 avec effet rétroactif à compter du 1er janvier 1986.
La dénonciation de la Convention par les Pays-Bas au 1er septembre 1989, n'est pas valable pour Aruba.

Note: Le Gouvernement des Pays-Bas avait fait les réservations suivantes:
Le Gouvernement des Pays-Bas se réserve le droit:
1) d'exclure l'application de l'article 1, paragraphe (1)(c);
2) de régler par la loi nationale le système de limitation de responsabilité applicable aux navires de moins de 300 tonneaux de jauge;
3) de donner effet à la présente Convention, soit en lui donnant force de loi, soit en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.
... Conformément au paragraphe (2)(c) du Protocole de signature Nous nous réservons de donner effet à la présente Convention en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.

Papua New Guinea
(a) The Government of Papua New Guinea excludes paragraph (1)(c) of Article 1.
(b) The Government of Papua New Guinea will regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons.
(c) The Government of Paupua New Guinea shall give effect to the said Convention by including the provisions of the said Convention in the National Legislation of Papua New Guinea.

Portugal
(Traduction) ...avec les réserves prévues aux alinéas a), b) et c) du paragraphe deux du Protocole de signature...

St. Lucia
Same reservation as Bahamas

Seychelles
Same reservation as Bahamas

Singapore
Le 13 septembre 1977 à été reçue une note verbale datée du 6 septembre 1977, émanant du Ministère des Affaires étrangères de Singapour, par laquelle le Gouvernement de Singapour confirme qu'il se considère lié par la Convention depuis le 31 mai 1968, avec les réserves suivantes:
...Subject to the following reservations:
a) the right to exclude the application of Article 1, paragraph (1)(c); and
b) to regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons. The Government of the Republic of Singapore declares under sub-paragraph (c) of paragraph (2) of the Protocol of signature that provisions of law have been introduced in the Republic of Singapore to give effect to the Convention, although the Convention as such has not been made part of Singapore law.

Solomon Islands
Same reservation as Bahamas

Spain
Le Gouvernement espagnol se réserve le droit:
1) d'exclure du champ d'application de la Convention les obligations et les responsabilités prévues par l'article 1, paragraphe (1)(c);
2) de régler par les dispositions particulières de sa loi nationale le système de limitation de responsabilité applicable aux propriétaires de navires de moins de 300 tonneaux de jauge;
3) de donner effet à la présente Convention, soit en lui donnant force de loi, soit en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.

Tonga
Reservations:
1) In accordance with the provisions of subparagraph (a) of paragraph (2) of the Protocol of signature, the Government of the Kingdom of Tonga exclude paragraph (1)(c) of Article 1 from their application of the said Convention.
2) In accordance with the provisions of subparagraph (b) of paragraph (2) of the Protocol of signature, the Government of the Kingdom of Tonga will regulate by specific provisions of national law the system of liability to be applied to ships of less than 300 tons.

Tuvalu
Same reservation as Bahamas

United Kingdom of Great Britain and Northern Ireland
Subject to the following observations:
1) In accordance with the provisions of subparagraph (a) of paragraph (2) of the said Protocol of Signature, the Government of the United Kingdom of Great Britain and Northern Ireland exclude paragraph (1)(c) of Article 1 from their application of the said Convention.
2) In accordance with the provisions of subparagraph (b) of paragraph (2) of the said Protocol of Signature, the Government of the United Kingdom of Great Britain and Northern Ireland will regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons.
3) The Government of the United Kingdom of Great Britain and Northern Ireland also reserve the right, in extending the said Convention to any of the territories for whose international relations they are responsible, to make such extension subject to any or all of the reservations set out in paragraph (2) of the said Protocol of Signature. Furthermore, in accordance with the provisions of subparagraph (c) of paragraph (2) of the said Protocol of Signature, the Government of the United Kingdom of Great Britain and Northern Ireland declare that the said Convention as such has not been made part of the United Kingdom law, but that the appropriate provisions to give effect thereto have been introduced in United Kingdom law.

United Kingdom Overseas Territories

Anguilla, Bermuda, British Antarctic Territories, British Virgin Islands, Caiman Islands, Caicos and Turks Isles, Falkland and Dependencies, Gibraltar, Guernsey and Jersey, Hong Kong, Isle of Man, Montserrat

... Subject to the same reservations as those made by the United Kingdom on ratification namely the reservations set out in sub-paragraphs (a) and (b) of paragraph (2) of the Protocol of Signature.

Protocole portant modification de la convention internationale sur la

Limitation de la responsabilité des propriétaires de navires de mer
du 10 octobre 1957

Bruxelles le 21 décembre 1979
Entré en vigueur: 6 octobre 1984

Protocol to amend the international convention relating to the

Limitation of the liability of owners of sea-going ships
of 10 October 1957

Brussels, 21st December 1979
Entered into force: 6 October 1984

Australia	**(r)**	30.XI.1983
Belgium	**(r)**	7.IX.1983

Luxembourg	**(a)**	18.II.1991
Poland	**(r)**	6.VII.1984
Portugal	**(r)**	30.IV.1982
Spain	**(r)**	14.V.1982
(denunciation - 04.I. 2006)		
Switzerland	**(r)**	20.I.1988
United Kingdom of Great Britain and Northern Ireland	**(r)**	2.III.1982
(denunciation – 1.XII.1985)		
Isle of Man, Bermuda, Falkland and Dependencies, Gibraltar, Hong-Kong, British Virgin Islands, Guernsey and Jersey, Cayman Islands, Montserrat, Caicos and Turks Isles (denunciation – 1.XII.1985)		

Convention internationale sur les

Passagers Clandestins

Bruxelles, 10 octobre 1957
Pas encore en vigueur

International convention relating to

Stowaways

Brussels, 10th October 1957
Not yet in force

Belgium	**(r)**	31.VII.1975
Denmark	**(r)**	16.XII.1963
Finland	**(r)**	2.II.1966
Italy	**(r)**	24.V.1963
Luxembourg	**(a)**	18.II.1991
Madagascar	**(a)**	13.VII.1965
Morocco	**(a)**	22.I.1959
Norway	**(r)**	24.V.1962
Peru	**(r)**	23.XI.1961
Syrian Arab Republic	**(a)**	15.IV.2003
Sweden	**(r)**	27.VI.1962

Convention internationale pour l'unification de certaines règles en matière de

Transport de passagers par mer

et protocole

Bruxelles, 29 avril 1961
Entrée en vigueur: 4 juin 1965

International convention for the unification of certain rules relating to

Carriage of passengers by sea

and protocol

Brussels, 29th April 1961
Entered into force: 4 June 1965

Algeria	**(a)**	2.VII.1973
Cuba*	**(a)**	7.I.1963
France	**(r)**	4.III.1965
(denunciation – 3.XII.1975)		
Haïti	**(a)**	19.IV.1989
Iran	**(a)**	26.IV.1966

Madagascar	**(a)**	13.VII.1965
Morocco*	**(r)**	15.VII.1965
Peru	**(a)**	29.X.1964
Switzerland	**(r)**	21.I.1966
Tunisia	**(a)**	18.VII.1974
United Arab Republic*	**(r)**	15.V.1964
Zaire	**(a)**	17.VII.1967

Reservations

Cuba

(Traduction) ...Avec les réserves suivantes:

1) De ne pas appliquer la Convention aux transports qui, d'après sa loi nationale, ne sont pas considérés comme transports internationaux.

2) De ne pas appliquer la Convention, lorsque le passager et le transporteur sont tous deux ressortissants de cette Partie Contractante.

3) De donner effet à cette Convention, soit en lui donnant force de loi, soit en incluant dans sa législation nationale les dispositions de cette Convention sous une forme appropriée à cette législation.

Morocco

...Sont et demeurent exclus du champ d'application de cette convention:

1) les transports de passagers effectués sur les navires armés au cabotage ou au bornage, au sens donné à ces expressions par l'article 52 de l'annexe I du dahir du 28 Joumada II 1337 (31 mars 1919) formant code de commerce maritime, tel qu'il a été modifié par le dahir du 29 Chaabane 1380 (15 février 1961).

2) les transports internationaux de passagers lorsque le passager et le transporteur sont tous deux de nationalité marocaine.

Les transports de passagers visés...ci-dessus demeurent régis en ce qui concerne la limitation de responsabilité, par les disposition de l'article 126 de l'annexe I du dahir du 28 Joumada II 1337 (31 mars 1919) formant code de commerce maritime, tel qu'il a été modifié par la dahir du 16 Joumada II 1367 (26 avril 1948).

United Arab Republic

Sous les réserves prévues aux paragraphes (1), (2) et (3) du Protocole.

Convention internationale relative à la responsabilité des exploitants de

Navires nucléaires

et protocole additionnel

Bruxelles, 25 mai 1962
Pas encore en vigueur

International convention relating to the liability of operators of

Nuclear ships

and additional protocol

Brussels, 25th May 1962
Not yet in force

Lebanon	**(r)**	3.VI.1975
Madagascar	**(a)**	13.VII.1965
Netherlands*	**(r)**	20.III.1974
Portugal	**(r)**	31.VII.1968
Suriname	**(r)**	20.III.1974
Syrian Arab Republic	**(a)**	1.VIII.1974
Zaire	**(a)**	17.VII.1967

Reservations

Netherlands
Par note verbale datée du 29 mars 1976, reçue le 5 avril 1976, par le Gouvernement belge, l'Ambassade des Pays-Bas à Bruxelles a fait savoir:
Le Gouvernement du Royaume des Pays-Bas tient à déclarer, en ce qui concerne les dispositions du Protocole additionnel faisant partie de la Convention, qu'au moment de son entrée en vigueur pour le Royaume des Pays-Bas, ladite Convention y devient impérative, en ce sens que les prescriptions légales en vigueur dans le Royaume n'y seront pas appliquées si cette application est inconciliable avec les dispositions de la Convention.

Convention internationale pour l'unification de certaines règles en matière de

Transport de bagages de passagers par mer

Bruxelles, 27 mai 1967
Pas en vigueur

International Convention for the unification of certain rules relating to

Carriage of passengers' luggage by sea

Brussels, 27th May 1967
Not in force

Algeria	**(a)**	2.VII.1973
Cuba*	**(a)**	15.II.1972

Reservations

Cuba
(Traduction) Le Gouvernement révolutionnaire de la République de Cuba, Partie Contractante, formule les réserves formelles suivantes:
1) de ne pas appliquer cette Convention lorsque le passager et le transporteur sont tous deux ressortissants de cette Partie Contractante.
3) en donnant effet à cette Convention, la Partie Contractante pourra, en ce qui concerne les contrats de transport établis à l'intérieur de ses frontières territoriales pour un voyage dont le port d'embarquement se trouve dans lesdites limites territoriales, prévoir dans sa législation nationale la forme et les dimensions des avis contenant les dispositions de cette Convention et devant figurer dans le contrat de transport. De même, le Gouvernement révolutionnaire de la République de Cuba déclare, selon le prescrit de l'article 18 de cette Convention, que la République de Cuba ne se considère pas liée par l'article 17 de ladite Convention.

Convention internationale relative à l'inscription des droits relatifs aux

Navires en construction

Bruxelles, 27 mai 1967
Pas encore en vigueur

International Convention relating to the registration of rights in respect of

Vessels under construction

Brussels, 27th May 1967
Not yet in force

Croatia	**(r)**	3.V.1971
Greece	**(r)**	12.VII.1974
Norway	**(r)**	13.V.1975
Sweden	**(r)**	13.XI.1975
Syrian Arab Republic	**(a)**	1.VIII.1974

Convention internationale pour l'unification de certaines règles relatives aux

Privilèges et hypothèques maritimes

Bruxelles, 27 mai 1967
Pas encore en vigueur

International Convention for the unification of certain rules relating to

Maritime liens and mortgages

Brussels, 27th May 1967
Not yet in force

Denmark*	**(r)**	23.VIII.1977
Morocco*	**(a)**	12.II.1987
Norway*	**(r)**	13.V.1975
Sweden*	**(r)**	13.XI.1975
Syrian Arab Republic	**(a)**	1.VIII.1974
Vanuatu		26.X.1999

Reservations

Denmark
L'instrument de ratification du Danemark est accompagné d'une déclaration dans laquelle il est précisé qu'en ce qui concerne les Iles Féroe les mesures d'application n'ont pas encore été fixées.

Morocco
L'instrument d'adhésion est accompagné de la réserve suivante: Le Royaume du Maroc adhère à la Convention Internationale pour l'unification de certaines règles relatives aux privilèges et hypothèques maritimes faite à Bruxelles le 27 mai 1967, sous réserve de la non-application de l'article 15 de la dite Convention.

Norway
Conformément à l'article 14 le Gouvernement du Royaume de Norvège fait les réserves suivantes:
1) mettre la présente Convention en vigueur en incluant les dispositions de la présente Convention dans la législation nationale suivant une forme appropriée à cette législation;
2) faire application de la Convention internationale sur la limitation de la responsabilité des propriétaires de navires de mer, signée à Bruxelles le 10 octobre 1957.

Sweden
Conformément à l'article 14 la Suède fait les réserves suivantes:
1) de mettre la présente Convention en vigueur en incluant les dispositions de la Convention dans la législation nationale suivant une forme appropriée à cette législation;
2) de faire application de la Convention internationale sur la limitation de la responsabilité des propriétaires de navires de mer, signée à Bruxelles le 10 octobre 1957.

STATUS OF THE RATIFICATIONS OF AND ACCESSIONS TO THE IMO CONVENTIONS IN THE FIELD OF PRIVATE MARITIME LAW

Editor's notes

1. This Status is based on advices from the International Maritime Organisation and reflects the situation as at 30 June, 2006.
2. The dates mentioned are the dates of the deposit of instruments.
3. The asterisk after the name of a State Party indicates that that State has made declarations, reservations or statements the text of which is published after the relevant status of ratifications and accessions.

4 The dates mentioned in respect of the denunciation are the dates when the denunciation takes effect.

ETAT DES RATIFICATIONS ET ADHESIONS AUX CONVENTIONS DE L'OMI EN MATIERE DE DROIT MARITIME PRIVE

Notes de l'éditeur

1. Cet état est basé sur des informations recues de l'Organisation Maritime Internationale et reflète la situation au 30 June, 2006.
2. Les dates mentionnées sont les dates du depôt des instruments.
3. L'asterisque qui suit le nom d'un Etat indique que cet Etat a fait une déclaration, une reserve ou une communication dont le texte est publié à la fin de chaque état de ratifications et adhesions.
4. Les dates mentionnées pour la dénonciation sont les dates à lesquelles la dénonciation prend effet.

International Convention on Civil liability for oil pollution damage

(CLC 1969)

Done at Brussels, 29 November 1969
Entered into force: 19 June 1975

Convention Internationale sur la Responsabilité civile pour les dommages dus à la pollution par les hydrocarbures (CLC 1969)

Signée a Bruxelles, le 29 novembre 1969
Entrée en vigueur: 19 juin 1975

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Albania (accession)	6.IV.1994	5.VII.1994	30.VI.2006
Algeria (accession)	14.VI.1974	19.VI.1975	3.VIII.1999
Antigua and Barbuda (accession)	23.VI.1997	21.IX.1997	14.VI.2001
Australia (ratification)[1]	7.XI.1983	5.II.1984	15.V.1998
Azerbaijan (accession)	16.VII.2004	14.X.2004	
Bahamas (accession)	22.VII.1976	20.X.1976	15.V.1998
Bahrain (accession)	3.V.1996	1.VIII.1996	15.V.1998
Barbados (accession)	6.V.1994	4.VIII.1994	7.VII.1999
Belgium (ratification)[1]	12.I.1977	12.IV.1977	6.X.1999
Belize (accession)	2.IV.1991	1.VII.1991	27.XI.1999
Benin (accession)	1.XI.1985	30.I.1986	
Brazil (ratification)	17.XII.1976	17.III.1977	
Brunei Darussalam (accession)	29.IX.1992	28.XII.1992	31.I.2003
Cambodia (accession)	28.XI.1994	26.II.1995	
Cameroon (ratification)	14.V.1984	12.VIII.1984	15.X.2002
Canada (accession)	24.I.1989	24.IV.1989	29.V.1999
Chile (accession)	2.VIII.1977	31.X.1977	
China[2] **(accession)**[1]	30.I.1980	29.IV.1980	5.I.2000
Colombia (accession)	26.III.1990	24.VI.1990	25.I.2006
Costa Rica (accession)	8.XII.1997	8.III.1998	
Côte d'Ivoire (ratification)	21.VI.1973	19.VI.1975	
Croatia (succession)	–	8.X.1991	30.VII.1999
Cyprus (accession)	19.VI.1989	17.IX.1989	15.V.1998
Denmark (accession)	2.IV.1975	19.VI.1975	15.V.1998
Djibouti (accession)	1.III.1990	30.V.1990	17.V.2002
Dominican Republic (ratification)	2.IV.1975	19.VI.1975	
Ecuador (accession)	23.XII.1976	23.III.1977	
Egypt (accession)	3.II.1989	4.V.1989	
El Salvador (accession)	2.I.2002	2.IV.2002	
Equatorial Guinea (accession)	24.IV.1996	23.VII.1996	
Estonia (accession)	1.XII.1992	1.III.1993	6.VIII.2006
Fiji (accession)	15.VIII.1972	19.VI.1975	30.XI.2000
Finland (ratification)	10.X.1980	8.I.1981	15.V.1998
France (ratification)	17.III.1975	19.VI.1975	15.V.1998
Gabon (accession)	21.I.1982	21.IV.1982	31.V.2003
Gambia (accession)	1.XI.1991	30.I.1992	

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	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Georgia (accession)	19.IV.1994	18.VII.1994	
Germany[3] **(ratification)**[1]	20.V.1975	18.VIII.1975[4]	15.V.1998
Ghana (ratification)	20.IV.1978	19.VII.1978	
Greece (accession)	29.VI.1976	27.IX.1976	15.V.1998
Guatemala (acceptance)[1]	20.X.1982	18.I.1983	
Guyana (accession)	10.XII.1997	10.III.1998	
Honduras (accession)	2.XII.1998	2.III.1999	
Iceland (ratification)	17.VII.1980	15.X.1980	10.II.2001
India (accession)	1.V.1987	30.VII.1987	21.VI.2001
Indonesia (ratification)	1.IX.1978	30.XI.1978	
Ireland (ratification)	19.XI.1992	17.II.1993	15.V.1998
Italy (ratification)[1]	27.II.1979	28.V.1979	8.X.2000
Japan (accession)	3.VI.1976	1.IX.1976	15.V.1998
Jordan (accession)	14.X.2003	12.I.2004	
Kazakhstan (accession)	7.III.1994	5.VI.1994	
Kenya (accession)	15.XII.1992	15.III.1993	7.VII.2001
Kuwait (accession)	2.IV.1981	1.VII.1981	
Latvia (accession)	10.VII.1992	8.X.1992	19.VII.2011
Lebanon (accession)	9.IV.1974	19.VI.1975	
Liberia (accession)	25.IX.1972	19.VI.1975	15.V.1998
Libyan Arab Jamahiriya (accession)	28.IV.2005	26.VII.2005	
Luxembourg (accession)	14.II.1991	15.V.1991	21.XI.2006
Malaysia (accession)	6.I.1995	6.IV.1995	9.VI.2005
Maldives (accession)	16.III.1981	14.VI.1981	
Malta (accession)	27.IX.1991	26.XII.1991	6.I.2001
Marshall Islands (accession)	24.I.1994	24.IV.1994	15.V.1998
Mauritania (accession)	17.XI.1995	15.II.1996	4.V.2013
Mauritius (accession)	6.IV.1995	5.VII.1995	6.XII.2000
Mexico (accession)	13.V.1994	11.VIII.1994	15.V.1998
Monaco (ratification)	21.VIII.1975	19.XI.1975	15.V.1998
Mongolia (accession)	3.III.2003	1.VI.2003	
Montenegro (succession) [6, 7]	–	6.VI.2006	23.II.2008
Morocco (accession)	11.IV.1974	19.VI.1975	25.X.2001
Mozambique (accession)	23.XII.1996	23.III.1997	26.IV.2003
Netherlands (ratification)	9.IX.1975	8.XII.1975	15.V.1998
New Zealand (accession)	27.IV.1976	26.VII.1976	25.VI.1999
Nicaragua (accession)	4.VI.1996	2.IX.1996	
Nigeria (accession)	7.V.1981	5.VIII.1981	24.V.2003
Norway (accession)	21.III.1975	19.VI.1975	15.V.1998
Oman (accession)	24.I.1985	24.IV.1985	15.V.1998
Panama (ratification)	7.I.1976	6.IV.1976	11.V.2000
Papua New Guinea (accession)	12.III.1980	10.VI.1980	23.I.2002
Peru (accession)[1]	24.II.1987	25.V.1987	
Poland (ratification)	18.III.1976	16.VI.1976	21.XII.2000
Portugal (ratification)	26.XI.1976	24.II.1977	1.XII.2005
Qatar (accession)	2.VI.1988	31.VIII.1988	20.XI.2002
Republic of Korea (accession)	18.XII.1978	18.III.1979	15.V.1998

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Russian Federation [5] **(accession)** [1]	24.VI.1975	22.IX.1975	20.III.2001
Saint Kitts and Nevis (accession) [1]	14.IX.1994	13.XII.1994	
Saint Vincent and the Grenadines (accession)	19.IV.1989	18.VII.1989	9.X.2002
Sao Tome and Principe (accession)	29.X.1998	27.I.1999	
Saudi Arabia (accession) [1]	15.IV.1993	14.VII.1993	
Senegal (accession)	27.III.1972	19.VI.1975	
Serbia (succession) [6, 7]	–	3.VI.2006	25.V.2012
Seychelles (accession)	12.IV.1988	11.VII.1988	23.VII.2000
Sierra Leone (accession)	13.VIII.1993	11.XI.1993	4.VI.2002
Singapore (accession)	16.IX.1981	15.XII.1981	31.XII.1998
Slovenia (succession)	–	25.VI.1991	19.VII.2001
South Africa (accession)	17.III.1976	15.VI.1976	1.X.2005
Spain (ratification)	8.XII.1975	7.III.1976	15.V.1998
Sri Lanka (accession)	12.IV.1983	11.VII.1983	22.I.2000
Sweden (ratification)	17.III.1975	19.VI.1975	15.V.1998
Switzerland (ratification)	15.XII.1987	14.III.1988	15.V.1998
Syrian Arab Republic (accession) [1]	6.II.1975	19.VI.1975	
Tonga (accession)	1.II.1996	1.V.1996	10.XII.2000
Tunisia (accession)	4.V.1976	2.VIII.1976	15.V.1998
Turkmenistan (accession)	21.IX.2009	20.XII.2009	
Tuvalu (succession)	–	1.X.1978	30.VI.2005
United Arab Emirates (accession)	15.XII.1983	14.III.1984	
United Kingdom (ratification)	17.III.1975	19.VI.1975	15.V.1998
Vanuatu (accession)	2.II.1983	3.V.1983	18.II.2000
Venezuela (accession)	21.I.1992	20.IV.1992	22.VII.1999
Yemen (accession)	6.III.1979	4.VI.1979	31.VII.2009

Number of Contracting States: 36

The Convention applies provisionally in respect of the following States:
Kiribati
Solomon Islands

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[1] With a declaration, reservation or statement.

[2] Applied to the Hong Kong Special Administrative Region with effect from 1.VII.1997. Effective date of denunciation: 5.I.2000.

[3] On 3.X.1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded to the Convention on 13.III.1978.

[4] In accordance with the intention expressed by the Government of the Federal Republic of Germany and based on its interpretation of article XV of the Convention.

[5] As from 26.XII.1991 the membership of the USSR in the Convention is continued by the Russian Federation.

[6] As from 4 February 2003, the name of the State of the Federal Republic of Yugoslavia was changed to Serbia and Montenegro. The date of succession by Serbia and Montenegro to the Convention is the date on which the Federal Republic of Yugoslavia assumed responsibility for its international relations.

[7] Following the dissolution of the State Union of Serbia and Montenegro on 3 June 2006, all Treaty actions undertaken by Serbia and Montenegro continue to be in force with respect to Republic of Serbia. The Republic of Montenegro has informed that it wishes to succeed to this Convention with effect from the same date, i.e. 3 June 2006.

Declarations, Reservations and Statements

Australia

The instrument of ratification of the Commonwealth of Australia was accompanied by the following declarations:
"Australia has taken note of the reservation made by the Union of Soviet Socialist Republics on its accession on 24 June 1975 to the Convention, concerning article XI(2) of the Convention. Australia wishes to advise that is unable to accept the reservation. Australia considers that international law does not grant a State the right to immunity from the jurisdiction of the courts of another State in proceedings concerning civil liability in respect of a State-owned ship used for commercial purposes. It is also Australia's understanding that the above-mentioned reservation is not intended to have the effect that the Union of Soviet Socialist Republics may claim judicial immunity of a foreign State with respect to ships owned by it, used for commercial purposes and operated by a company which in the Union of Soviet Socialist Republic is registered as the ship's operator, when actions for compensation are brought against the company in accordance with the provisions of the Convention. Australia also declares that, while being unable to accept the Soviet reservation, it does not regard that fact as precluding the entry into force of the Convention as between the Union of Soviet Socialist Republics and Australia."
"Australia has taken note of the declaration made by the German Democratic Republic on its accession on 13 March 1978 to the Convention, concerning article XI(2) of the Convention. Australia wishes to declare that it cannot accept the German Democratic Republic's position on sovereign immunity. Australia considers that international law does not grant a State the right to immunity from the jurisdiction of the courts of another State in proceedings concerning civil liability in respect of a State-owned ship used for commercial purposes. Australia also declares that, while being unable to accept the declaration by the German Democratic Republic, it does not regard that fact as precluding the entry into force of the Convention as between the German Democratic Republic and Australia."

Belgium

The instrument of ratification of the Kingdom of Belgium was accompanied by a Note Verbale (in the French language) the text of which reads as follows:
[Translation]
"...The Government of the Kingdom of Belgium regrets that it is unable to accept the reservation of the Union of Soviet Socialist Republics, dated 24 June 1975, in respect of article XI, paragraph 2 of the Convention.
The Belgian Government considers that international law does not authorize States to claim judicial immunity in respect of vessels belonging to them and used by them for commercial purposes.
Belgian legislation concerning the immunity of State-owned vessels is in accordance with the provisions of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, done at Brussels on 10 April 1926, to which Belgium is a Party.
The Belgian Government assumes that the reservation of the USSR does not in any way affect the provisions of article 16 of the Maritime Agreement between the Belgian-Luxembourg Economic Union and the Union of Soviet Socialist Republics,

of the Protocol and the Exchange of Letters, signed at Brussels on 17 November 1972. The Belgian Government also assumes that this reservation in no way affects the competence of a Belgian court which, in accordance with article IX of the aforementioned International Convention, is seized of an action for compensation for damage brought against a company registered in the USSR in its capacity of operator of a vessel owned by that State, because the said company, by virtue of article I, paragraph 3 of the same Convention, is considered to be the 'owner of the ship' in the terms of this Convention.

The Belgian Government considers, however, that the Soviet reservation does not impede the entry into force of the Convention as between the Union of Soviet Socialist Republics and the Kingdom of Belgium."

China

At the time of depositing its instrument of accession the Representative of the People's Republic of China declared "that the signature to the Convention by Taiwan authorities is illegal and null and void".

German Democratic Republic

The instrument of accession of the German Democratic Republic was accompanied by the following statement and declarations (in the German language):

[Translation]

"In connection with the declaration made by the Government of the Federal Republic of Germany on 20 May 1975 concerning the application of the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 to Berlin (West), it is the understanding of the German Democratic Republic that the provisions of the Convention may be applied to Berlin (West) only inasmuch as this is consistent with the Quadripartite Agreement of 3 September 1971, under which Berlin (West) is no constituent part of the Federal Republic of Germany and must not be governed by it."

"The Government of the German Democratic Republic considers that the provisions of article XI, paragraph 2, of the Convention are inconsistent with the principle of immunity of States." [(1)]

The Government of the German Democratic Republic considers that the provisions of article XIII, paragraph 2, of the Convention are inconsistent with the principle that all States pursuing their policies in accordance with the purposes and principles of the Charter of the United Nations shall have the right to become parties to conventions affecting the interests of all States.

The position of the Government of the German Democratic Republic on article XVII of the Convention, as far as the application of the Convention to colonial and other dependent territories is concerned, is governed by the provisions of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514(XV) of 14 December 1960) proclaiming the necessity of bringing a speedy and unconditional end to colonialism in all its forms and manifestations."

[(1)] The following Governments do not accept the reservation contained in the instrument of accession of the Government of the German Democratic Republic, and the texts of their Notes to this effect were circulated by the depositary: Denmark, France, the Federal Republic of Germany, Japan, Norway, Sweden and the United Kingdom.

Federal Republic of Germany

The instrument of ratification of the Federal Republic of Germany was accompanied by a declaration (in the English language) that "with effect from the day on which the Convention enters into force for the Federal Republic of Germany it shall also apply to Berlin (West)".

Guatemala

The instrument of acceptance of the Republic of Guatemala contained the following declaration (in the Spanish language):

[Translation]

"It is declared that relations that may arise with Belize by virtue of this accession can in no sense be interpreted as recognition by the State of Guatemala of the independence and sovereignty unilaterally decreed by Belize."

Italy

The instrument of ratification of the Italian Republic was accompanied by the following statement (in the Italian language):

[Translation]

"The Italian Government wishes to state that it has taken note of the reservation put forward by the Government of the Soviet Union (on the occasion of the deposit of the instrument of accession on 24 June 1975) to article XI(2) of the International Convention on civil liability for oil pollution damage, adopted in Brussels on 29 November 1969.

The Italian Government declares that it cannot accept the aforementioned reservation and, with regard to the matter, observes that, under international law, the States have no right to jurisdictional immunity in cases where vessels of theirs are utilized for commercial purposes.

The Italian Government therefore considers its judicial bodies competent - as foreseen by articles IX and XI(2) of the Convention - in actions for the recovery of losses incurred in cases involving vessels belonging to States employing them for commercial purposes, as indeed in cases where, on the basis of article I(3), it is a company, running vessels on behalf of a State, that is considered the owner of the vessel.

The reservation and its non-acceptance by the Italian Government do not, however, preclude the coming into force of the Convention between the Soviet Union and Italy, and its full implementation, including that of article XI(2)."

Peru [(2)]

The instrument of accession of the Republic of Peru contained the following reservation (in the Spanish language):

[Translation]

"With respect to article II, because it considers that the said Convention will be understood as applicable to pollution damage caused in the sea area under the

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(2) The depositary received the following communication dated 14 July 1987 from the Embassy of the Federal Republic of Germany in London (in the English language):

"...the Government of the Federal Republic of Germany has the honour to reiterate its well-known position as to the sea area up to the limit of 200 nautical miles, measured from the base lines of the Peruvian coast, claimed by Peru to be under the sovereignty and

sovereignty and jurisdiction of the Peruvian State, up to the limit of 200 nautical miles, measured from the base lines of the Peruvian coast".

Russian Federation

See USSR.

Saint Kitts and Nevis

The instrument of accession of Saint Kitts and Nevis contained the following declaration:
"The Government of Saint Kitts and Nevis considers that international law does not authorize States to claim judicial immunity in respect of vessels belonging to them and used by them for commercial purposes".

Saudi Arabia

The instrument of accession of the Kingdom of Saudi Arabia contained the following reservation (in the Arabic language):
[Translation]
"However, this accession does not in any way mean or entail the recognition of Israel, and does not lead to entering into any dealings with Israel; which may be arranged by the above-mentioned Convention and the said Protocol".

Syrian Arab Republic

The instrument of accession of the Syrian Arab Republic contains the following sentence (in the Arabic language):
[Translation]
"...this accession [to the Convention] in no way implies recognition of Israel and does not involve the establishment of any relations with Israel arising from the provisions of this Convention".

USSR

The instrument of accession of the Union of Soviet Republics contains the following reservation (in the Russian language):
[Translation]
"The Union of Soviet Socialist Republic does not consider itself bound by the

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jurisdiction of the Peruvian State. In this respect the Federal Government points again to the fact that according to international law no coastal State can claim unrestricted sovereignty and jurisdiction beyond its territorial sea, and that the maximum breadth of the territorial sea according to international law is 12 nautical miles."

The depositary received the following communication dated 4 November 1987 from the Permanent Mission of the Union of Soviet Socialist Republics to the International Maritime Organization (in the Russian language):

[Translation]

"...the Soviet Side has the honour to confirm its position in accordance with which a coastal State has no right to claim an extension of its sovereignty to sea areas beyond the outer limit of its territorial waters the maximum breadth of which in accordance with international law cannot exceed 12 nautical miles."

provisions of article XI, paragraph 2 of the Convention, as they contradict the principle of the judicial immunity of a foreign State." [3]

Furthermore, the instrument of accession contains the following statement (in the Russian language):

[Translation]

"On its accession to the International Convention on Civil Liability for Oil Pollution Damage, 1969, the Union of Soviet Socialist Republics considers it necessary to state that:

"(a) the provisions of article XIII, paragraph 2 of the Convention which deny participation in the Convention to a number of States, are of a discriminatory nature and contradict the generally recognized principle of the sovereign equality of States, and

(b) the provisions of article XVII of the Convention envisaging the possibility of its extension by the Contracting States to the territories for the international relations of which they are responsible are outdated and contradict the United Nations Declaration on Granting Independence to Colonial Countries and Peoples (resolution 1514(XV) of 14 December 1960)".

The depositary received on 17 July 1979 from the Embassy of the Union of Soviet Socialist Republics in London a communication stating that:

"...the Soviet side confirms the reservation to paragraph 2 of article XI of the International Convention of 1969 on the Civil Liability for Oil Pollution Damage, made by the Union of Soviet Socialist Republics at adhering to the Convention. This reservation reflects the unchanged and well-known position of the USSR regarding the impermissibility of submitting a State without its express consent to the courts jurisdiction of another State. This principle of the judicial immunity of a foreign State is consistently upheld by the USSR at concluding and applying multilateral international agreements on various matters, including those of merchant shipping and the Law of the sea.

In accordance with article III and other provisions of the 1969 Convention, the liability for the oil pollution damage, established by the Convention is attached to "the owner" of "the ship", which caused such damage, while paragraph 3 of article I of the Convention stipulates that "in the case of a ship owned by a state and operated by a company which in that state is registered as the ship's operator, "owner" shall mean such company". Since in the USSR state ships used for commercial purposes are under the operational management of state organizations who have an independent liability on their obligations, it is only against these organizations and not against the Soviet state that actions for compensation of the oil pollution damage in accordance with the 1969 Convention could be brought. Thus the said reservation does not prevent the consideration in foreign courts in accordance with the jurisdiction established by the Convention, of such suits for the compensation of the damage by the merchant ships owned by the Soviet state".

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[3] The following Governments do not accept the reservation contained in the instrument of accession of the Government of the Union of Soviet Socialist Republics, and the texts of their Notes to this effect were circulated by the depositary: Denmark, France, the Federal Republic of Germany, Japan, the Netherlands, New Zealand, Norway, Sweden, the United Kingdom.

Protocol to the International Convention on

Civil liability for oil pollution damage

(CLC PROT 1976)

Done at London,
19 November 1976
Entered into force: 8 April 1981

Protocole à la Convention Internationale sur la

Responsabilité civile pour les dommages dus à la pollution par les hydrocarbures

(CLC PROT 1976)

Signé à Londres,
le 19 novembre 1976
Entré en vigueur: 8 avril 1981

	Date of deposit of instrument	Date of entry into force	Effective date of denunciation
Albania (accession)	6.IV.1994	5.VII.1994	
Antigua and Barbuda (accession)	23.VI.1997	21.IX.1997	
Australia (accession)	7.XI.1983	5.II.1984	
Azerbaijan (accession)	16.VII.2004	14.X.2004	
Bahamas (acceptance)	3.III.1980	8.IV.1981	
Bahrain (accession)	3.V.1996	1.VIII.1996	
Barbados (accession)	6.V.1994	4.VIII.1994	
Belgium (accession)	15.VI.1989	13.IX.1989	
Belize (accession)	2.IV.1991	1.VII.1991	
Brunei Darussalam (accession)	29.IX.1992	28.XII.1992	
Cambodia (accession)	8.VI.2001	6.IX.2001	
Cameroon (accession)	14.V.1984	12.VIII.1984	
Canada (accession)	24.I.1989	24.IV.1989	
China (accession) [1, 2]	29.IX.1986	28.XII.1986	22.VIII.2003
Colombia (accession)	26.III.1990	24.VI.1990	25.I.2006
Costa Rica (accession)	8.XII.1997	8.III.1998	
Cyprus (accession)	19.VI.1989	17.IX.1989	
Denmark (accession)	3.VI.1981	1.IX.1981	
Egypt (accession)	3.II.1989	4.V.1989	
El Salvador (accession)	2.I.2002	2.IV.2002	
Finland (accession)	8.I.1981	8.IV.1981	
France (approval)	7.XI.1980	8.IV.1981	
Georgia (accession)	25.VIII.1995	23.XI.1995	
Germany (ratification) [2]	28.VIII.1980	8.IV.1981	
Greece (accession)	10.V.1989	8.VIII.1989	
Iceland (accession)	24.III.1994	22.VI.1994	
India (accession)	1.V.1987	30.VII.1987	
Ireland (accession)	19.XI.1992	17.II.1993	15.V.1998
Italy (accession)	3.VI.1983	1.IX.1983	
Japan (accession)	24.VIII.1994	22.XI.1994	

CLC Protocol 1976

	Date of deposit of instrument	Date of entry into force	Effective date of denunciation
Kuwait (accession)	1.VII.1981	29.IX.1981	
Liberia (accession)	17.II.1981	8.IV.1981	
Luxembourg (accession)	14.II.1991	15.V.1991	
Maldives (accession)	14.VI.1981	12.IX.1981	
Malta (accession)	27.IX.1991	26.XII.1991	6.I.2001
Marshall Islands (accession)	24.I.1994	24.IV.1994	
Mauritania (accession)	17.XI.1995	15.II.1996	
Mauritius (accession)	6.IV.1995	5.VII.1995	
Mexico (accession)	13.V.1994	11.VIII.1994	
Netherlands (accession)	3.VIII.1982	1.XI.1982	
Nicaragua (accession)	4.VI.1996	2.IX.1996	
Norway (accession)	17.VII.1978	8.IV.1981	
Oman (accession)	24.I.1985	24.IV.1985	
Peru (accession)	24.II.1987	25.V.1987	
Poland (accession)[1]	30.X.1985	28.I.1986	
Portugal (accession)	2.I.1986	2.IV.1986	
Qatar (accession)	2.VI.1988	31.VIII.1988	20.XI.2002
Republic of Korea (accession)	8.XII.1992	8.III.1993	
Russian Federation (accession) [1, 4]	2.XII.1988	2.III.1989	
Saudi Arabia (accession) [3]	15.IV.1993	14.VII.1993	
Singapore (accession)	15.XII.1981	15.III.1982	
Spain (accession)	22.X.1981	20.I.1982	
Sweden (ratification)	7.VII.1978	8.IV.1981	
Switzerland (accession) [1]	15.XII.1987	14.III.1988	
United Arab Emirates (accession)	14.III.1984	12.VI.1984	
United Kingdom (ratification) [1]	31.I.1980	8.IV.1981	15.V.1998
Vanuatu (accession)	13.I.1989	13.IV.1989	
Venezuela (accession)	21.I.1992	20.IV.1992	
Yemen (accession)	4.VI.1979	8.IV.1981	

Number of Contracting States: 53

[1] With a notification under article V(9)(c) of the Convention, as amended by the Protocol.

[2] Applies to the Hong Kong Special Administrative Region with effect from 1.VII.1997. Ceased to apply to the Hong Kong Special Administrative Region with effect from 22.VIII.2003.

[3] With a declaration.

[4] As from 26.XII.1991 the membership of the USSR in the Protocol is continued by the Russian Federation.

States which have denounced the Protocol

	Date of receipt of denunciation	Effective date of denunciation
Australia	22.VI.1988	[date of entry into force of 1984 CLC Protocol]
China (in respect of HKAR)	22.VIII/2002	22.VIII.2003
Colombia	25.I.2005	25.I.2006
Ireland	15.V.1997	15.V.2008
Malta	6.I.2000	6.I.2001
Qatar	28.XI.2001	28.XI.2002
United Kingdom	12.V.1997	12.V.1998

Declarations, Reservations and Statements

Federal Republic of Germany

The instrument of ratification of the Federal Republic of Germany contains the following declaration (in the English language):
"...with effect from the date on which the Protocol enters into force for the Federal Republic of Germany it shall also apply to Berlin (West)".

Saudi Arabia

The instrument of accession of the Kingdom of Saudi Arabia contained the following reservation (in the Arabic language):
[Translation]
"However, this accession does not in any way mean or entail the recognition of Israel, and does not lead to entering into any dealings with Israel; which may be arranged by the above-mentioned Convention and the said Protocol".

Notifications

Article V(9)(c) of the Convention, as amended by the Protocol

China

"...the value of the national currency, in terms of SDR, of the People's Republic of China is calculated in accordance with the method of valuation applied by the International Monetary Fund."

Poland

"Poland will now calculate financial liabilities in cases of limitation of the liability of owners of sea-going ships and liability under the International Oil Pollution Compensation Fund in terms of the Special Drawing Right, as defined by the International Monetary Fund.

However, those SDR's will be converted according to the method instigated by Poland, which is derived from the fact that Poland is not a member of the International Monetary Fund.
The method of conversion is that the Polish National Bank will fix a rate of exchange of the SDR to the Polish zloty through the conversion of the SDR to the United States dollar, according to the current rates of exchange quoted by Reuter. The US dollars will then be converted into Polish zloties at the rate of exchange quoted by the Polish National Bank from their current table of rates of foreign currencies.
The above method of calculation is in accordance with the provisions of article II paragraph 9 item "a" (in fine) of the Protocol to the International Convention on Civil Liability for Oil Pollution Damage and article II of the Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage."

Switzerland

[Translation]
"The Swiss Federal Council declares, with reference to article V, paragraph 9(a) and (c) of the Convention, introduced by article II of the Protocol of 19 November 1976, that Switzerland calculates the value of its national currency in special drawing rights (SDR) in the following way:
The Swiss National Bank (SNB) notifies the International Monetary Fund (IMF) daily of the mean rate of the dollar of the United States of America on the Zurich currency market. The exchange value of one SDR in Swiss francs is determined from that dollar rate and the rate of the SDR in dollars calculated by IMF. On the basis of these values, SNB calculates a mean SDR rate which it will publish in its Monthly Gazette.

USSR

"In accordance with article V, paragraph 9 "c" of the International Convention on Civil Liability for Oil Pollution Damage, 1969 in the wording of article II of the Protocol of 1976 to this Convention it is declared that the value of the unit of "The Special Drawing Right" expressed in Soviet roubles is calculated on the basis of the US dollar rate in effect at the date of the calculation in relation to the unit of "The Special Drawing Right", determined by the International Monetary Fund, and the US dollar rate in effect at the same date in relation to the Soviet rouble, determined by the State Bank of the USSR".

United Kingdom

"...in accordance with article V(9)(c) of the Convention, as amended by article II(2) of the Protocol, the manner of calculation employed by the United Kingdom pursuant to article V(9)(a) of the Convention, as amended, shall be the method of valuation applied by the International Monetary Fund.

Protocol of 1992 to amend the International Convention on

Civil liability for oil pollution damage, 1969

(CLC PROT 1992)

Done at London,
27 November 1992
Entry into force: 30 May 1996

Protocole à la Convention Internationale sur la

Responsabilité civile pour les dommages dus à la pollution par les hydrocarbures, 1969

(CLC PROT 1992)

Signé à Londres,
le 27 novembre 1992
Entrée en vigueur: 30 May 1996

	Date of deposit of instrument	Date of entry into force
Albania (accession)	30.VI.2005	30.VI.2006
Algeria (accession)	11.VI.1998	11.VI.1999
Angola (accession)	4.X.2001	4.X.2002
Antigua and Barbuda (accession)	14.VI.2000	14.VI.2001
Argentina (accession)[2]	13.X.2000	13.X.2001
Australia (accession)	9.X.1995	9.X.1996
Azerbaijan (accession)	16.VII.2004	16.VII.2005
Bahamas (accession)	1.IV.1997	1.IV.1998
Bahrain (accession)	3.V.1996	3.V.1997
Barbados (accession)	7.VII.1998	7.VII.1999
Belgium (accession)	6.X.1998	6.X.1999
Belize (accession)	27.XI.1998	27.XI.1999
Benin (accession)	5.II.2010	5.II.2011
Brunei Darussalam (accession)	31.I.2002	31.I.2003
Bulgaria (accession)	28.XI.2003	28.XI.2004
Cambodia (accession)	8.VI.2001	8.VI.2002
Cameroon (accession)	15.X.2001	15.X.2002
Canada (accession)	29.V.1998	29.V.1999
Cape Verde (accession)	4.VII.2003	4.VII.2004
Chile (accession)	29.V.2002	29.V.2003
China (accession)[1, 4]	5.I.1999	5.I.2000
Colombia (accession)	19.XI.2001	19.XI.2002
Comoros (accession)	5.I.2000	5.I.2001
Congo (accession)	7.VIII.2002	7.VIII.2003
Cook Islands (accession)	12.III.2007	12.III.2008
Croatia (accession)	12.I.1998	12.I.1999
Cyprus (accession)	12.V.1997	12.V.1998
Denmark (ratification)	30.V.1995	30.V.1996
Djibouti (accession)	8.I.2001	8.I.2002
Dominica (accession)	31.VIII.2001	31.VIII.2002
Dominican Republic (accession)	24.VI.1999	24.VI.2000
Ecuador (accession)	11.XII.2007	11.XII.2008
Egypt (accession)	21.IV.1995	30.V.1996
El Salvador (accession)	2.I.2002	2.I.2003

CLC Protocol 1992

	Date of deposit of instrument	Date of entry into force
Estonia (accession)	6.VII.2004	6.VII.2005
Fiji (accession)	30.XI.1999	30.XI.2000
Finland (acceptance)	24.XI.1995	24.XI.1996
France (approval)	29.IX.1994	30.V.1996
Gabon (accession)	31.V.2002	31.V.2003
Georgia (accession)	18.IV.2000	18.IV.2001
Germany (ratification)[1]	29.IX.1994	30.V.1996
Ghana (accession)	3.II.2003	3.II.2004
Greece (ratification)	9.X.1995	9.X.1996
Grenada (accession)	7.I.1998	7.I.1999
Guinea (accession)	2.X.2002	2.X.2003
Hungary (accession)	30.III.2007	30.III.2008
Iceland (accession)	13.XI.1998	13.XI.1999
India (accession)	15.XI.1999	15.XI.2000
Indonesia (accession)	6.VII.1999	6.VII.2000
Iran, Islamic Republic of (accession)	24.X.2007	24.X.2008
Ireland (accession)[2]	15.V.1997	16.V.1998
Israel (accession)	21.X.2004	21.X.2005
Italy (accession)	16.IX.1999	16.IX.2000
Jamaica (accession)	6.VI.1997	6.VI.1998
Japan (accession)	24.VIII.1994	30.V.1996
Kenya (accession)	2.II.2000	2.II.2001
Kiribati (accession)	5.II.2007	5.II.2008
Kuwait (accession)	16.IV.2004	16.IV.2005
Latvia (accession)	9.III.1998	9.III.1999
Lebanon (accession)	30.III.2005	30.III.2006
Liberia (accession)	5.X.1995	5.X.1996
Lithuania (accession)	27.VI.2000	27.VI.2001
Luxembourg (accession)	21.XI.2005	21.XI.2006
Madagascar (accession)	21.V.2002	21.V.2003
Malaysia (accession)	9.VI.2004	9.VI.2005
Maldives (accession)	20.V.2005	20.V.2006
Malta (accession)	6.I.2000	6.I.2001
Marshall Islands (accession)	16.X.1995	16.X.1996
Mauritania (accession)	4.V.2012	4.V.2013
Mauritius (accession)	6.XII.1999	6.XII.2000
Mexico (accession)	13.V.1994	30.V.1996
Moldova (accession)	11.X.2005	11.X.2006
Monaco (ratification)	8.XI.1996	8.XI.1997
Mongolia (accession)	8.VIII.2008	8.VIII.2009
Montenegro (accession)	29.XI.2011	29.XI.2012
Morocco (ratification)	22.VIII.2000	22.VIII.2001
Mozambique (accession)	26.IV.2002	26.IV.2003
Namibia (accession)	18.XII.2002	18.XII.2003
Netherlands (accession)[5, 6]	15.XI.1996	15.XI.1997
New Zealand (accession)[2]	25.VI.1998	25.VI.1999
Nigeria (accession)	24.V.2002	24.V.2003
Niue (accession)	27.VI.2012	27.VI.2013
Norway (ratification)	3.IV.1995	30.V.1996

	Date of deposit of instrument	Date of entry into force
Oman (accession)	8.VII.1994	30.V.1996
Pakistan (accession)	2.III.2005	2.III.2006
Palau (accession)	29.IX.2011	29.IX.2012
Panama (accession)	18.III.1999	18.III.2000
Papua New Guinea (accession)	23.I.2001	23.I.2002
Peru (accession)	1.IX.2005	1.IX.2006
Philippines (accession)	7.VII.1997	7.VII.1998
Poland (accession)	21.XII.1999	21.XII.2000
Portugal (accession)	13.XI.2001	13.XI.2002
Qatar (accession)	20.XI.2001	20.XI.2002
Republic of Korea (accession)[2]	7.III.1997	16.V.1998
Romania (accession)	27.XI.2000	27.XI.2001
Russian Federation (accession)	20.III.2000	20.III.2001
Saudi Arabia (accession)	203.V.2005	23.V.2006
Samoa (accession)	1.II.2002	1.II.2003
St. Kitts and Nevis (accession)	7.X.2004	7.X.2005
St. Lucia (accession)	20.V.2004	20.V.2005
St. Vincent and the Grenadines (accession)	9.X.2001	9.X.2002
Senegal (accession)	2.VIII.2011	2.VIII.2012
Serbia (accession)	25.V.2011	25.V.2012
Seychelles (accession)	23.VII.1999	23.VII.2000
Sierra Leone (accession)	4.VI.2001	4.VI.2002
Singapore (accession)	18.IX.1997	18.IX.1998
Slovenia (accession)	19.VII.2000	19.VII.2001
Solomon Island (accession)	30.VI.2004	30.VI.2005
South Africa (accession)	1.X.2004	1.X.2005
Spain (accession)	6.VII.1995	6.VII.1996
Sri Lanka (accession)	22.I.1999	22.I.2000
Sweden (ratification)	25.V.1995	30.V.1996
Switzerland (accession)	4.VII.1996	4.VII.1997
Syria (accession)[2]	22.II.2005	22.II.2006
Togo (accession)	23.IV.2012	23.IV.2013
Tonga (accession)	10.XII.1999	10.XII.2000
Trinidad and Tobago (accession)	6.III.2000	6.III.2001
Tunisia (accession)	29.I.1997	29.I.1998
Turkey (accession)[2]	17.VIII.2001	17.VIII.2002
Turkmenistan (accession)	21.IX.2009	21.IX.2010
Tuvalu (accession)	30.VI.2004	30.VI.2005
Ukraine (accession)	29.XI.2007	29.XI.2008
United Arab Emirates (accession)	19.XI.1997	19.XI.1998
United Kingdom (accession)[3]	29.IX.1994	30.V.1996
United Republic of Tanzania (accession)	19.XI.2002	19.XI.2003
Uruguay (accession)	9.VII.1997	9.VII.1998
Vanuatu (accession)	18.II.1999	18.II.2000
Venezuela (accession)	22.VII.1998	22.VII.1999
Viet Nam (accession)	17.VI.2003	17.VI.2004
Yemen (accession)	20.IX.2006	20.IX.2007

Number of Contracting States: 130

[1] China declared that the Protocol will also be applicable to the Hong Kong Special Administrative Region.

[2] With a declaration.

[3] The United Kingdom declared its accession to be effective in respect of:

The Bailiwick of Jersey	
The Isle of Man	
Falkland Islands*	
Montserrat	
South Georgia and the South Sandwich Islands	
Anguilla	)
Bailiwick of Guernsey	)
Bermuda	)
British Antarctic Territory	)
British Indian Ocean Territory	) with effect from 20.2.98
Pitcairn, Henderson, Ducie and Oeno Islands	)
Sovereign Base Areas of Akrotiri and Dhekelia on Cyprus	)
Turks & Caicos Islands	)
Virgin Islands	)
Cayman Islands	)
Gibraltar	) with effect from 15.5.98
St Helena and its Dependencies	)

[4] Applies to the Macau Special Administrative Region with effect from 24 June 2005.

[5] Applies to the Netherlands Antilles with effect from 21 December 2005.

[6] Applies to Aruba with effect from 12 April 2006.

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* A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

Declarations, Reservations and Statements

Germany

The instrument of ratification of Germany was accompanied by the following declaration:
"The Federal Republic of Germany hereby declares that, having deposited the instruments of ratification of the protocols of 27 November 1992 amending the International Convention on Civil Liability for Oil Pollution Damage of 1969 and amending the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971, it regards its ratification of the Protocols of 25 May 1984, as documented on 18 October 1988 by the deposit of its instruments of ratification, as null and void as from the entry into force of the Protocols of 27 November 1992."

New Zeland

The instrument of accession of New Zeland contained the following declaration:
"And declares that this accession shall not extend to Tokelau unless and until a declaration to this effect is lodged by the Government of New Zeland with the Depositary".

International Convention relating to

Intervention on the high seas in cases of oil pollution casualties, 1969

(Intervention 1969)

Done at Brussels,
29 November 1969
Entry into force: 6 May 1975

Convention Internationale sur

L'intervention en haute mer en cas d'accident entraînant ou pouvant entraîner une pollution par les hydrocarbures, 1969

(Intervention 1969)

Signé a Bruxelles
le 29 Novembre 1969
Entrée en vigueur: 6 Mai 1975

	Date of signature or deposit of of instrument	Date of entry into force or succession
Algeria (accession)	21.XI.2011	19.II.2012
Angola (accession)	4.X.2001	2.I.2002
Argentina (accession)[1]	21.IV.1987	20.VII.1987
Australia (ratification)[1]	7.XI.l983	5.II.l984
Bahamas (accession)	22.VII.l976	20.X.l976
Bangladesh (accession)	6.XI.l981	4.II.l982
Barbados (accession)	6.V.1994	4.VIII.1994
Belgium (ratification)	21.X.l971	6.V.l975
Benin (accession)	1.XI.1985	30.I.1986
Brazil (ratification)	18.I.2008	17.IV.2008
Bulgaria (accession)[1]	2.XI.l983	31.I.l984
Cameroon (ratification)[1]	14.V.l984	12.VIII.l984
Chile (accession)	28.II.1995	29.V.1995
China (accession) [4, 5]	23.II.1990	24.V.1990
Côte d'Ivoire (ratification)	8.I.1988	7.IV.1988
Croatia (succession)	–	8.X.1991
Cuba (accession)1	5.V.l976	3.VIII.l976
Denmark (signature)	18.XII.l970	6.V.l975
Djibouti (accession)	1.III.1990	30.V.1990
Dominican Republic (ratification)	5.II.l975	6.V.l975
Ecuador (accession)	23.XII.l976	23.III.l977
Egypt (accession)	3.II.1989	4.V.1989
Equatorial Guinea (accession)	24.IV.1996	23.VII.1996
Estonia (accession)	16.V.2008	14.VIII.2008
Fiji (accession)	15.VIII.l972	6.V.l975
Finland (ratification)	6.IX.l976	5.XII.l976
France (ratification)	10.IV.l972	6.IV.l975
Gabon (accession)	21.I.l982	21.IV.l982
Georgia (accession)	25.VIII.1995	23.XI.1995
Germany (ratification)[1,2]	7.V.l975	5.VIII.l975
Ghana (ratification)	20.IV.l978	19.VII.l978
Guyana (accession)	10.XII.1997	10.III.1998
Iceland (ratification)	17.VII.l980	15.X.l980

Intervention 1969

	Date of signature or deposit of of instrument	Date of entry into force or succession
India (accession)	16.VI.2000	14.IX.2000
Ireland (ratification)	21.VIII.1980	19.XI.1980
Iran (Islamic Republic of) (accession)	25.VII.1997	23.X.1997
Italy (ratification)	27.II.1979	28.V.1979
Jamaica (accession)	13.III.1991	11.VI.1991
Japan (acceptance)	6.IV.1971	6.V.1975
Kuwait (accession)	2.IV.1981	1.VII.1981
Latvia (accession)	9.VIII.2001	7.IX.2001
Lebanon (accession)	5.VI.1975	3.IX.1975
Liberia (accession)	25.IX.1972	6.V.1975
Marshall Islands (accession)	16.X.1995	14.I.1996
Mauritania (accession)	24.XI.1997	22.II.1998
Mauritius (accession)	17.XII.2002	17.III.2003
Mexico (accession)	8.IV.1976	7.VII.1976
Monaco (ratification)	24.II.1975	6.V.1975
Montenegro (succession)	–	3.VI.2006
Morocco (accession)	11.IV.1974	6.V.1975
Namibia (accession)	12.III.2004	10.VI.2004
Netherlands (ratification)	19.IX.1975	18.XII.1975
New Zealand (accession)	26.III.1975	6.V.1975
Nicaragua (accession)	15.XI.1994	13.II.1995
Nigeria (accession)	24.II.2004	24.V.2004
Norway (accession)	12.VII.1972	6.V.1975
Oman (accession)	24.I.1985	24.IV.1985
Pakistan (accession)	13.I.1995	13.IV.1995
Panama (ratification)	7.I.1976	6.IV.1976
Papua New Guinea (accession)	12.III.1980	10.VI.1980
Poland (ratification)	1.VI.1976	30.VIII.1976
Portugal (ratification)	15.II.1980	15.V.1980
Qatar (accession)	2.VI.1988	31.VIII.1988
Russian Federation (accession)[1,3]	30.XII.1974	6.V.1975
St. Kitts and Nevis (accession)	7.X.2004	5.I.2005
St. Lucia (accession)	20.V.2004	18.VIII.2004
St. Vincent & the Grenadines (accession)	12.V.1999	10.VIII.1999
Senegal (accession)	27.III.1972	6.V.1975
Serbia (succession)	–	27.IV.1992
Slovenia (succession)	–	25.VI.1991
South Africa (accession)	1.VII.1986	29.IX.1986
Spain (ratification)	8.XI.1973	6.V.1975
Sri Lanka (accession)	12.IV.1983	11.VII.1983
Suriname (succession)	–	25.XI.1975
Sweden (acceptance)	8.II.1973	6.IV.1975
Switzerland (ratification)	15.XII.1987	14.III.1988
Syrian Arab Republic (accession)[1]	6.II.1975	6.V.1975
Tanzania (accession)	16.V.2006	14.VIII.2006
Tonga (accession)	1.II.1996	1.V.1996
United Republic of Tanzania (accession)	16.V.2006	14.VIII.2006
Trinidad and Tobago (accession)	6.III.2000	4.VI.2000

	Date of signature or deposit of of instrument	Date of entry into force or succession
Tunisia (accession)	4.V.1976	2.VIII.1976
Ukraine (succession)	–	17.XII.1993
United Arab Emirates (accession)	15.XII.l983	14.III.l984
United Kingdom (ratification)	12.I.l97l	6.V.l975
United States (ratification)	21.II.l974	6.V.l975
Vanuatu (accession)	14.IX.1992	13.XII.1992
Yemen (accession)	6.III.l979	4.VI.l979

Number of Contracting States: 87

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[1] With a declaration, reservation or statement

[2] On 3 October 1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded1 to the Convention on 21 December 1978.

[3] As from 26 December 1991, the membership of the USSR in the Convention is continued by the Russian Federation.

[4] Applies to the Hong Kong Special Administrative Region with effect from 1 July 1997.

[5] Applies to the Macau Special Administrative Region with effect from 24 June 2005.

The United Kingdom notified the depositary that it extended the Convention to the following territories:

Hong Kong*	12.XI.1974	6.V.1975
Bermuda	19.IX.1980	1.XII.1980
Anguilla)		
British Antarctic Territory**)		
British Virgin Islands)	8.IX.1982	8.IX.1982
Cayman Islands)		
Falkland Islands and Dependencies**)		
Montserrat)		
Pitcairn, Henderson, Ducie and Oeno Islands)		
St. Helena and Dependencies)		
Turks and Caicos Islands)	8.IX.1982	8.IX.1982
United Kingdom Sovereign Base Areas of Akrotiri and) Dhekelia on the Island of Cyprus)		
Isle of Man)	27.VI.1995	27.VI.1995

The United States notified the depositary that it extended the Convention to the following territories:

Puerto Rico, Guam, Canal Zone,)		
Virgin Islands, American Samoa,)	9.IX.1975	6.V.1975
Trust Territories of the Pacific Islands)		

The Netherlands notified the depositary that it extended the Convention to the following territories:

Suriname***, Netherlands Antilles	19.IX.1975	18.XII.1975
Aruba (with effect from 1 January 1986)	–	–

* Ceased to apply to Hong Kong with effect from 1 July 1997.

** The depositary received the following communication dated 12 August 1986 from the Argentine delegation to the International Maritime Organization:

[Translation]

"... the Argentine Government rejects the extension made by the United Kingdom of Great Britain and Northern Ireland of the application to the Malvinas Islands, South Georgia and South Sandwich Islands of the ... International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties ... and reaffirms the rights of sovereignty of the Argentine Republic over those archipelagos which form part of its national territory.

"The General Assembly of the United Nations has adopted resolutions 2065(XX), 3160(XXVIII), 31/49, 37/9, 38/12 and 39/6 which recognize the existence of a sovereignty dispute relating to the question of the Malvinas Islands, urging the Argentine Republic and the United Kingdom to resume negotiations in order to find, as soon as possible, a peaceful and definitive solution to the dispute through the good offices of the Secretary-General of the United Nations who is requested to inform the General Assembly on the progress made. Similarly, the General Assembly of the United Nations at its fortieth session adopted resolution 40/21 of 27 November 1985 which again urges both parties to resume the said negotiations.

"... the Argentine Government also rejects the extension of its application to the so-called "British Antarctic Territory" made by the United Kingdom of Great Britain and Northern Ireland and, with respect to such extension and to any other declaration that may be made, reaffirms the rights of the Republic over the Argentine Antarctic Sector between longitude 25° and 74° west and latitude 60° south, including those rights relating to its sovereignty or corresponding maritime jurisdiction. It also recalls the safeguards concerning claims to territorial sovereignty in Antarctica provided in article IV of the Antarctic Treaty signed at Washington on 1 December 1959 to which the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland are Parties."

The depositary received the following communication dated 3 February 1987 from the United Kingdom Foreign and Commonwealth Office:

"The Government of the United Kingdom of Great Britain and Northern Ireland cannot accept the statement made by the Argentine Republic as regards the Falkland Islands and South Georgia and the South Sandwich Islands. The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to the United Kingdom sovereignty over the Falkland Islands and South Georgia and the South Sandwich Islands and, accordingly, their right to extend the application of the Treaties to the Falkland Islands and South Georgia and the South Sandwich Islands.

"Equally, while noting the Argentine reference to the provisions of Article IV of the Antarctic Treaty signed at Washington on 1 December 1959, the Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to the sovereignty of the United Kingdom over the British Antarctic Territory, and to the right to extend the application of the Treaties in question to that Territory."

*** Has since become the independent State of Suriname and a Contracting State to the Convention.

Protocol relating to

Intervention on the high seas in cases of pollution by substances other than oil, 1973, as amended

(Intervention Prot. 1973)

Done at London, 2 November 1973
Entry into force: 30 March 1983

Protocole de 1973 sur

L'intervention en haute mer en cas de pollution par des substances autres que les hydrocarbures

(Intervention Prot. 1973)

Signé a London le 2 Novembre 1973
Entrée en vigueur: 30 Mars 1983

	Date of deposit of instrument	Date of entry into force or succession
Algeria (accession)	21.XI.2011	19.II.2012
Australia (accession)[1]	7.XI.l983	5.II.l984
Bahamas (accession)	5.III.l981	30.III.l983
Barbados (accession)	6.V.1994	4.VIII.1994
Belgium (ratification)	9.IX.l982	30.III.l983
Brazil (accession)	18.I.2008	17.IV.2008
Bulgaria (accession)	21.XI.2006	19.II.2007
Chile (accession)	28.II.1995	29.V.1995
China (accession) [2, 3]	23.II.1990	24.V.1990
Croatia (succession)	–	8.X.1991
Denmark (signature)	9.V.l983	7.VIII.l983
Egypt (accession)	3.II.1989	4.V.1989
Estonia (accession)	16.V.2008	14.VIII.2008
Finland (ratification)	4.VIII.l986	2.XI.l986
France (accession) [1]	31.XII.l985	31.III.l986
Georgia (accession)	25.VIII.1995	23.XI.1995
Germany (ratification) [1]	21.VIII.l985	19.XI.l985
Iran (Islamic Republic of) (accession)	25.VII.1997	23.X.1997
Ireland (accession)	6.I.1995	6.IV.1995
Italy (ratification)	1.X.l982	30.III.l983
Jamaica (accession)	13.III.1991	11.VI.1991
Latvia (accession)	9.VIII.2001	7.IX.2001
Liberia (accession)	17.II.l981	30.III.l983
Marshall Islands (accession)	16.X.1995	14.I.1996
Mauritania (accession)	24.XI.1997	22.II.1998
Mauritius (accession)	6.XI.2003	4.II.2004
Mexico (accession)	11.IV.l980	30.III.l983
Monaco (accession)	31.III.2005	29.VI.2005
Montenegro (succession)	–	3.VI.2006
Morocco (accession)	30.I.2001	30.IV.2001
Namibia (accession)	12.III.2004	10.VI.2004
Netherlands (ratification)	10.IX.l980	30.III.l983
Nicaragua (accession)	15.XI.1994	13.II.1995
Norway (accession)	15.VII.l980	30.III.l983
Oman (accession)	24.I.1985	24.IV.1985
Pakistan (accession)	13.I.1995	13.IV.1995
Poland (ratification)	10.VII.l981	30.III.l983
Portugal (accession)	8.VII.l987	6.X.l987

Intervention Prot. 1973

	Date of deposit of instrument	Date of entry into force or succession
Russian Federation (acceptance) [4]	30.XII.l982	30.III.l983
Serbia (succession) [5, 6]	–	3.VI.2006
St. Lucia (accession)	20.V.2004	18.VIII.2004
St. Vincent & the Grenadines (accession)	12.V.1999	10.VIII.1999
Slovenia (succession)	---	25.VI.1991
South Africa (accession)	25.IX.1997	24.XII.1997
Spain (accession)	14.III.l994	12.VI.l994
Sweden (ratification)	28.VI.l976	30.III.l983
Switzerland (accession)	15.XII.1987	14.III.1988
Tanzania (accession)	23.XI.2006	21.II.2007
Tonga (accession)	1.II.1996	1.V.1996
Tunisia (accession)	4.V.1976	30.III.l983
United Kingdom (ratification) [1]	5.XI.l979	30.III.l983
United States (ratification)	7.IX.l978	30.III.l983
Vanuatu (accession)	14.IX.1992	13.XII.1992
Yemen (accession)	6.III.l979	30.III.l983

Number of Contracting States: 54

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[1] With a declaration or reservation.

[2] Applies to the Hong Kong Special Administrative Region with effect from 1 July 1997.

[3] Applies to the Macao Special Administrative Region with effect from 24 June 2005.

[4] As from 26 December 1991 the membership of the USSR in the Protocol is continued by the Russian Federation.

[5] As from 4 February 2003, the name of the State of the Federal Republic of Yugoslavia was changed to Serbia and Montenegro. The date of succession by Serbia and Montenegro to the Protocol is the date on which the Federal Republic of Yugoslavia assumed responsibility for its international relations.

[6] Following the dissolution of the State Union of Serbia and Montenegro on 3 June 2006, all Treaty actions undertaken by Serbia and Montenegro continue to be in force with respect to Republic of Serbia. The Republic of Montenegro has informed that it wishes to succeed to this Protocol with effect from the same date, i.e. 3 June 2006.

The United Kingdom declared ratification to be effective also in respect of:

Anguilla	)	
Bermuda	)	
British Antarctic Territory*	)	
British Virgin Islands	)	
Cayman Islands	)	
Falkland Islands and Dependencies*	)	
Hong Kong**	)	
Montserrat	)	30.III.l983
Pitcairn, Henderson, Ducie and Oeno Islands	)	
St. Helena and Dependencies	)	
Turks and Caicos Islands	)	
United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia on the Island of Cyprus	)	
Isle of Man	)	27.VI.1995

The Netherlands declared ratification to be effective also in respect of:

Netherlands Antilles	)	30.III. 1983
Aruba (with effect from 1 January 1986)	)	

* A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

** Ceased to apply to Hong Kong with effect from 1 July 1997.

International Convention on the

Establishment of an International Fund for compensation for oil pollution damage

(FUND 1971)

Done at Brussels, 18 December 1971
Entered into force: 16 October 1978

Convention Internationale portant

Création d'un Fonds International d'indemnisation pour les dommages dus à la pollution par les hydrocarbures

(FONDS 1971)

Signée à Bruxelles, le 18 decembre 1971
Entrée en vigueur: 16 octobre 1978

Cessation: 2.XII.2002
Contracting States at time of cessation of Convention

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Albania (accession)	6.IV.1994	5.VII.1994	
Algeria (ratification)	2.VI.1975	16.X.1978	3.VIII.1999
Antigua and Barbuda (accession)	23.VI.1997	21.IX.1997	14.VI.2001
Australia (accession)	10.X.1994	8.I.1995	15.V.1998
Bahamas (accession)	22.VII.1976	16.X.1978	15.V.1998
Bahrain (accession)	3.V.1996	1.VIII.1996	15.V.1998
Barbados (accession)	6.V.1994	4.VIII.1994	7.VII.1999
Belgium (ratification)	1.XII.1994	1.III.1995	6.X.1999
Benin (accession)	1.XI.1985	30.I.1986	
Brunei Darussalam (accession)	29.IX.1992	28.XII.1992	31.I.2003
Cameroon (accession)	14.V.1984	12.VIII.1984	15.X.2002
Canada (accession)[1]	24.I.1989	24.IV.1989	29.V.1999
China[2]	–	1.VII.1997	5.I.2000
Colombia (accession)	13.III.1997	11.VI.1997	25.I.2006
Côte d'Ivoire (accession)	5.X.1987	3.I.1988	
Croatia (succession)	–	8.X.1991	30.VII.1999
Cyprus (accession)	26.VII.1989	24.X.1989	15.V.1998
Denmark (accession)	2.IV.1975	16.X.1978	15.V.1998
Djibouti (accession)	1.III.1990	30.V.1990	17.V.2002
Estonia (accession)	1.XII.1992	1.III.1993	
Fiji (accession)	4.III.1983	2.VI.1983	30.XI.2000
Finland (ratification)	10.X.1980	8.I.1981	15.V.1998
France (accession)	11.V.1978	16.X.1978	15.V.1998
Gabon (accession)	21.I.1982	21.IV.1982	
Gambia (accession)	1.XI.1991	30.I.1992	
Germany (ratification)[1]	30.XII.1976	16.X.1978	15.V.1998

Fund 1971 *Fonds 1971*

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Ghana (ratification)	20.IV.1978	16.X.1978	
Greece (accession)	16.XII.1986	16.III.1987	15.V.1998
Guyana (accession)	10.XII.1997	10.III.1998	
Iceland (accession)	17.VII.1980	15.X.1980	10.II.2001
India (accession)	10.VII.1990	8.X.1990	21.VI.2001
Indonesia (accession)	1.IX.1978	30.XI.1978	26.VI.1999
Ireland (ratification)	19.XI.1992	17.II.1993	15.V.1998
Italy (accession)	27.II.1979	28.V.1979	8.X.2000
Japan (ratification)	7.VII.1976	16.X.1978	15.V.1998
Kenya (accession)	15.XII.1992	15.III.1993	7.VII.2001
Kuwait (accession)	2.IV.1981	1.VII.1981	
Liberia (accession)	25.IX.1972	16.X.1978	15.V.1998
Malaysia (accession)	6.I.1995	6.IV.1995	
Maldives (accession)	16.III.1981	14.VI.1981	
Malta (accession)	27.IX.1991	26.XII.1991	6.I.2001
Marshall Islands (accession)	30.XI.1994	28.II.1995	15.V.1998
Mauritania (accession)	17.XI.1995	15.II.1996	
Mauritius (accession)	6.IV.1995	5.VII.1995	6.XII.2000
Mexico (accession)	13.V.1994	11.VIII.1994	15.V.1998
Monaco (accession)	23.VIII.1979	21.XI.1979	15.V.1998
Morocco (accession)	31.XII.1992	31.III.1993	25.X.2001
Mozambique (accession)	23.XII.1996	23.III.1997	26.IV.2003
Netherlands (approval)	3.VIII.1982	1.XI.1982	15.V.1998
New Zealand (accession)[3]	22.XI.1996	20.II.1997	25.VI.1999
Nigeria (accession)	11.IX.1987	10.XII.1987	
Norway (ratification)	21.III.1975	16.X.1978	15.V.1998
Oman (accession)	10.V.1985	8.VIII.1985	15.V.1998
Panama (accession)	18.III.1999	16.VI.1999	11.V.2000
Papua New Guinea (accession)	12.III.1980	10.VI.1980	23.I.2002
Poland (ratification)	16.IX.1985	15.XII.1985	21.XII.2000
Portugal (ratification)	11.IX.1985	10.XII.1985	
Qatar (accession)	2.VI.1988	31.VIII.1988	20.XI.2002
Republic of Korea (accession)	8.XII.1992	8.III.1993	15.V.1998
Russian Federation (accession)[4]	17.VI.1987	15.IX.1987	20.III.2001
Saint Kitts and Nevis (accession)	14.IX.1994	13.XII.1994	
Seychelles (accession)	12.IV.1988	11.VII.1988	23.VII.2000
Sierra Leone (accession)	13.VIII.1993	11.XI.1993	4.VI.2002
Slovenia (succession)	–	25.VI.1991	19.VII.2001
Spain (accession)	8.X.1981	6.I.1982	15.V.1998
Sri Lanka (accession)	12.IV.1983	11.VII.1983	22.I.2000
Sweden (ratification)	17.III.1975	16.X.1978	15.V.1998
Switzerland (ratification)	4.VII.1996	2.X.1996	15.V.1998
Syrian Arab Republic (accession)[1]	6.II.1975	16.X.1978	24.IV.2009
Tonga (accession)	1.II.1996	1.V.1996	10.XII.2000
Tunisia (accession)	4.V.1976	16.X.1978	15.V.1998

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Tuvalu (succession)	–	16.X.1978	
United Arab Emirates (accession)	15.XII.1983	14.III.1984	24.V.2002
United Kingdom (ratification)	2.IV.1976	16.X.1978	15.V.1998
Vanuatu (accession)	13.I.1989	13.IV.1989	18.II.2000
Venezuela (accession)	21.I.1992	20.IV.1992	22.VII.1999
Yugoslavia (ratification)	16.III.1978	16.X.1978	

Number of Contracting States: 24

Upon the entry into force of the 2000 Protocol to the FUND 1971 Convention, the Convention ceased when the number of Contracting States fell below 25.

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[1] With a declaration, reservation or statement.

[2] Applies only to the Hong Kong Special Administrative Region.

[3] Accession by New Zealand was declared not to extend to Tokelau.

[4] As from 26.XII.1991 the membership of the USSR in the Convention is continued by the Russian Federation.

Declarations, Reservations and Statements

Canada
The instrument of accession of Canada was accompanied by the following declaration (in the English and French languages):
"The Government of Canada assumes responsibility for the payment of the obligations contained in articles 10, 11 and 12 of the Fund Convention. Such payments to be made in accordance with section 774 of the Canada Shipping Act as amended by Chapter 7 of the Statutes of Canada 1987".

Federal Republic of Germany
The instrument of ratification of the Federal Republic of Germany was accompanied by the following declaration (in the English language):
"that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany."

Syrian Arab Republic
The instrument of accession of the Syrian Arab Republic contains the following sentence (in the Arabic language):
[Translation]
"...the accession of the Syrian Arab Republic to this Convention ... in no way implies recognition of Israel and does not involve the establishment of any relations with Israel arising from the provisions of this Convention."

Protocol to the International Convention on the Establishment of an International Fund for compensation for oil pollution damage

(FUND PROT 1976)

Done at London, 19 November 1976
Entered into force:
22 November 1994

Protocole à la Convention Internationale portant Creation d'un Fonds International d'indemnisation pour les dommages dus à la pollution par les hydrocarbures

(FONDS PROT 1976)

Signé a Londres, le 19 novembre 1976
Entré en vigueur:
22 Novembre 1994

	Date of deposit of instrument	Date of entry into force	Effective date of denunciation
Albania (accession)	6.IV.1994	22.XI.1994	
Australia (accession)	10.X.1994	8.I.1995	
Bahamas (acceptance)	3.III.1980	22.XI.1994	
Bahrain (accession)	3.V.1996	1.VIII.1996	
Barbados (accession)	6.V.1994	22.XI.1994	
Belgium (accession)	1.XII.1994	1.III.1995	
Canada (accession)	21.II.1995	22.V.1995	
China[3]	–	1.VII.1997	22.VIII.2003
Colombia (accession)	13.III.1997	11.VI.1997	25.I.2006
Cyprus (accession)	26.VII.1989	22.XI.1994	
Denmark (accession)	3.VI.1981	22.XI.1994	
Finland (accession)	8.I.1981	22.XI.1994	
France (accession)	7.XI.1980	22.XI.1994	
Germany (ratification)[1]	28.VIII.1980	22.XI.1994	
Greece (accession)	9.X.1995	7.I.1996	
Iceland (accession)	24.III.1994	22.XI.1994	
India (accession)	10.VII.1990	22.XI.1994	
Ireland (accession)	19.XI.1992	22.XI.1994	15.V.1998
Italy (accession)	21.IX.1983	22.XI.1994	
Japan (accession)	24.VIII.1994	22.XI.1994	
Liberia (accession)	17.II.1981	22.XI.1994	
Malta (accession)	27.IX.1991	22.XI.1994	6.I.2001
Marshall Islands (accession)	16.X.1995	14.I.1996	
Mauritius (accession)	6.IV.1995	5.VII.1995	
Mexico (accession)	13.V.1994	22.XI.1994	
Morocco (accession)	31.XII.1992	22.XI.1994	
Netherlands (accession)	1.XI.1982	22.XI.1994	
Norway (accession)	17.VII.1978	22.XI.1994	
Poland (accession)[1]	30.X.1985	22.XI.1994	
Portugal (accession)	11.IX.1985	22.XI.1994	

	Date of deposit of instrument	Date of entry into force	Effective date of denunciation
Russian Federation[2] (accession)	30.I.1989	22.XI.1994	
Spain (accession)	5.IV.1982	22.XI.1994	
Sweden (ratification)	7.VII.1978	22.XI.1994	
United Kingdom (ratification)	31.I.1980	22.XI.1994	15.V.1998
Vanuatu (accession)	13.I.1989	22.XI.1994	
Venezuela (accession)	21.I.1992	22.XI.1994	

Number of Contracting States: 31

[1] With a declaration or statement.

[2] As from 26.XII.1991 the membership of the USSR in the Protocol is continued by the Russian Federation.

[3] Applies only to the Hong Kong Special Administrative Region.

States which have denounced the Protocol

	Date of receipt of denunciation	Effective date of denunciation
China (in respect of HKAR)	22.VIII/2002	22.VIII.2003
Colombia	25.I.2005	25.I.2006
Ireland	15.V.1997	15.V.1998
Malta	6.I.2000	6.I.2001
United Kingdom	9.V.1997	15.V.1998

Declarations, Reservations and Statements

Federal Republic of Germany

The instrument of ratification of the Federal Republic of Germany contains the following declaration in the English language:

"... with effect from the date on which the Protocol enters into force for the Federal Republic of Germany, it shall also apply to Berlin (West)."

Poland

(for text of the notification, see page 458)

Protocol of 1992 to amend the International Convention on the

Establishment of an International Fund for compensation for oil pollution damage

(FUND PROT 1992)*

Done at London,
27 November 1992
Entry into force: 30 May 1996

Protocole de 1992 modifiant la Convention Internationale de 1971 portant

Creation d'un Fonds International d'indemnisation pour les dommages dus à la pollution par les hydrocarbures

(FONDS PROT 1992)

Signé a Londres,
le 27 novembre 1992
Entrée en vigueur: 30 may 1996

	Date of deposit of instrument	Date of entry into force
Albania (accession)	30.VI.2005	30.VI.2006
Algeria (accession)	11.VI.1998	11.VI.1999
Angola (accession)	4.X.2001	4.X.2002
Antigua and Barbuda (accession)	14.VI.2000	14.VI.2001
Argentina (accession)[1]	13.X.2000	13.X.2001
Australia (accession)	9.X.1995	9.X.1996
Bahamas (accession)	1.IV.1997	1.IV.1998
Bahrain (accession)	3.V.1996	3.V.1997
Barbados (accession)	7.VII.1998	7.VII.1999
Belgium (accession)	6.X.1998	6.X.1999
Belize (accession)	27.XI.1998	27.XI.1999
Benin (accession)	5.II.2010	5.II.2011
Brunei Darussalam (accession)	31.I.2002	31.I.2003
Bulgaria (accession)	18.XI.2005	18.XI.2006
Cambodia (accession)	8.VI.2001	8.VI.2002
Cameroon (accession)	15.X.2001	15.X.2002
Canada (accession)[1]	29.V.1998	29.V.1999
Cape Verde (accession)	4.VII.2003	4.VII.2004
China (accession)[2]	5.I.1999	5.I.2000
Colombia (accession)	19.XI.2001	19.XI.2002
Comoros (accession)	5.I.2000	5.I.2001
Congo (accession)	7.VIII.2002	7.VIII.2003
Cook Islands (accession)	12.III.2007	12.III.2008
Croatia (accession)	12.I.1998	12.I.1999
Cyprus (accession)	12.V.1997	12.V.1998
Denmark (ratification)	30.V.1995	30.V.1996
Djibouti (accession)	8.I.2001	8.I.2002

* The 1971 Fund Convention ceased to be in force on 24 May 2002 and therefore the Convention does not apply to incidents occurring after that date.

	Date of deposit of instrument	Date of entry into force
Dominica (accession)	31.VIII.2001	31.VIII.2002
Dominican Republic (accession)	24.VI.1999	24.VI.2000
Ecuador (accession)	11.XII.2007	11.XII.2008
Estonia (accession)	6.VIII.2004	6.VIII.2005
Fiji (accession)	30.XI.1999	30.XI.2000
Finland (acceptance)	24.XI.1995	24.XI.1996
France (approval)	29.IX.1994	30.V.1996
Gabon (accession)	31.V.2002	31.V.2003
Georgia (accession)	18.IV.2000	18.IV.2001
Germany (ratification)[1]	29.IX.1994	30.V.1996
Ghana (accession)	3.II.2003	3.II.2004
Greece (ratification)	9.X.1995	9.X.1996
Grenada (accession)	7.I.1998	7.I.1999
Guinea (accession)	2.X.2002	2.X.2003
Hungary (accession)	30.III.2007	30.III.2008
Iceland (accession)	13.XI.1998	13.XI.1999
India (accession)	21.VI.2000	21.VI.2001
Iran (accession)	5.XI.2008	5.XI.2009
Ireland (accession)[1]	15.V.1997	16.V.1998
Israel (accession)	21.X.2004	21.X.2005
Italy (accession)	16.IX.1999	16.IX.2000
Jamaica (accession)	24.VI.1997	24.VI.1998
Japan (accession)	24.VIII.1994	30.V.1996
Kenya (accession)	2.II.2000	2.II.2001
Kiribati (accession)	5.II.2007	5.II.2008
Latvia (accession)	6.IV.1998	6.IV.1999
Liberia (accession)	5.X.1995	5.X.1996
Lithuania (accession)	27.VI.2000	27.VI.2001
Luxembourg (accession)	21.XI.2005	21.XI.2006
Madagascar (accession)	21.V.2002	21.V.2003
Malaysia (accession)	9.VI.2004	9.VI.2005
Maldives (accession)	20.V.2005	20.V.2006
Malta (accession)	6.I.2000	6.I.2001
Marshall Islands (accession)	16.X.1995	16.X.1996
Mauritania (accession)	4.V.2012	4.V.2013
Mauritius (accession)	6.XII.1999	6.XII.2000
Mexico (accession)	13.V.1994	30.V.1996
Monaco (ratification)	8.XI.1996	8.XI.1997
Montenegro (accession)	29.XI.2011	29.XI.2012
Morocco (ratification)	22.VIII.2000	22.VIII.2001
Mozambique (accession)	26.IV.2002	26.IV.2003
Namibia (accession)	18.XII.2002	18.XII.2003
Netherlands (accession)[4,5]	15.XI.1996	15.XI.1997
New Zealand (accession)[1]	25.VI.1998	25.VI.1999
Nigeria (accession)	24.V.2002	24.V.2003
Niue (accession)	27.VI.2012	27.VI.2013
Norway (ratification)	3.IV.1995	30.V.1996
Oman (accession)	8.VII.1994	30.V.1996
Palau (accession)	29.IX.2011	29.IX.2012

	Date of deposit of instrument	Date of entry into force
Panama (accession)	18.III.1999	18.III.2000
Papua New Guinea (accession)	23.I.2001	23.I.2002
Philippines (accession)	7.VII.1997	7.VII.1998
Poland (accession)	21.XII.1999	21.XII.2000
Portugal (accession)	13.XI.2001	13.XI.2002
Qatar (accession)	20.XI.2001	20.XI.2002
Republic of Korea (accession)[1]	7.III.1997	16.V.1998
Russian Federation (accession)	20.III.2000	20.III.2001
St. Kitts and Nevis (accession)	2.III.2005	2.III.2006
St. Lucia (accession)	20.V.2004	20.V.2005
Saint Vincent and the Grenadines (accession)	1.II.2002	1.II.2003
Samoa (accession)	9.X.2001	9.X.2002
Senegal (accession)	2.VIII.2011	2.VIII.2012
Serbia (accession)	25.V.2011	25.V.2012
Seychelles (accession)	23.VII.1999	23.VII.2000
Sierra Leone (accession)	4.VI.2001	4.VI.2002
Singapore (accession)	31.XII.1997	31.XII.1998
Slovenia (accession)	19.VII.2000	19.VII.2001
South Africa (accession)	1.X.2004	1.X.2005
Spain (accession)[1]	6.VII.1995	16.V.1998
Sri Lanka (accession)	22.I.1999	22.I.2000
Sweden (ratification)	25.V.1995	30.V.1996
Switzerland (accession)	10.X.2005	10.X.2006
Syria (accession)	24.IV.2009	24.IV.2010
Tonga (accession)	10.XII.1999	10.XII.2000
Trinidad and Tobago (accession)	6.III.2000	6.III.2001
Tunisia (accession)	29.I.1997	29.I.1998
Turkey (accession)[1]	17.VIII.2001	17.VIII.2002
Tuvalu (accession)	30.VI.2004	30.VI.2005
United Arab Emirates (accession)	19.XI.1997	19.XI.1998
United Kingdom (accession)[3]	29.IX.1994	30.V.1996
United Republic of Tanzania (accession)	19.XI.2002	19.XI.2003
Uruguay (accession)	9.VII.1997	9.VII.1998
Vanuatu (accession)	18.II.1999	18.II.2000
Venezuela (accession)	22.VII.1998	22.VII.1999

Number of Contracting States 111

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[1] With a declaration.

[2] China declared that the Protocol will be applicable only to the Hong Kong Special Administrative Region.

[3] The United Kingdom declared its accession to be effective in respect of:
The Bailiwick of Jersey
The Isle of Man
Falkland Islands*
Montserrat
South Georgia and the South Sandwich Islands
Anguilla)

Bailiwick of Guernsey	)	
Bermuda	)	
British Antarctic Territory	)	
British Indian Ocean Territory	)	with effect from 20.2.98
Pitcairn, Henderson, Ducie and Oeno Islands	)	
Sovereign Base Areas of Akrotiri and Dhekelia on Cyprus	)	
Turks & Caicos Islands	)	
Virgin Islands	)	
Cayman Islands	)	
Gibraltar	)	with effect from 15.5.98
St Helena and its Dependencies	)	

[4] Applies to Netherlands Antilles with effect from 21 December 2005.

[5] Applies to Aruba with effect from 12 April 2006.

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* A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

Declarations, Reservations and Statements

Canada

The instrument of accession of Canada was accompanied by the following declaration:
"By virtue of Article 14 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, the Government of Canada assumes responsibility for the payment of the obligations contained in Article 10, paragraph 1."

Federal Republic of Germany

The instrument of ratification by Germany was accompanied by the following declaration:
"The Federal Republic of Germany hereby declares that, having deposited the instruments of ratification of the protocols of 27 November 1992 amending the International Convention on Civil Liability for Oil Pollution Damage of 1969 and amending the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971, it regards its ratification of the Protocols of 25 May 1984, as documented on 18 October 1988 by the deposit of its instruments of ratification, as null and void as from the entry into force of the Protocols of 27 November 1992."

New Zeland

The instrument of accession of New Zeland contained the following declaration:
"And declares that this accession shall not extend to Tokelau unless and until a declaration to this effect is lodged by the Government of New Zeland with the Depositary".

Spain

The instrument of accession by Spain contained the following declaration:
[Translation]
"In accordance with the provisions of article 30, paragraph 4 of the above mentioned Protocol, Spain declares that the deposit of its instrument of accession shall not take effect for the purpose of this article until the end of the six-month period stipulated in article 31 of the said Protocol".

Protocol of 2003 to the

International Convention on the Establishment of an International Fund for compensation for oil pollution damage, 1992

(FUND PROT 2003)

Done at London, 16 may 2003
Entry into force: 3 March 2005

Protocole de 2003 à la

Convention internationale de 1992 portant création d'un fonds international d'indemnisation pour les dommages dus à la pollution par les hydrocarbures

(FONDS PROT 2003)

Signée a Londres le 16 mai 2003
Entrée en vigueur: 3 Mars 2005

	Date of signature or deposit of of instrument	Date of entry into force
Australia (accession)	13.VII.2009	30.X.2009
Barbados (accession)	6.XII.2005	6.III.2006
Belgium (accession)	4.XI.2005	4.II..2006
Canada (accession)	2.X.2009	2.I.2010
Croatia (accession)	17.II.2006	17.V.2006
Denmark (signature) [1]	24.II.2004	3.III.2005
Estonia (accession)	14.X.2008	14.I.2009
Finland (accession) [2]	27.V.2004	3.III.2005
France (acceptance)	29.VI.2004	3.III.2005
Germany (accession) [2]	24.XI.2004	3.III.2005
Greece (accession)	23.X.2006	23.I.2007
Hungary (accession)	30.III.2007	30.VI.2007
Ireland (signature)	5.VII.2004	3.III.2005
Italy (accession)	20.X.2005	20.I.2006
Japan (accession)	13.VII.2004	3.III.2005
Korea (Republic of) (accession)	6.V.2010	6.VIII.2010
Latvia (accession)	18.IV.2006	18.VII.2006
Lithuania (accession)	22.XI.2005	22.II.2006
Montenegro (accession)	29.XI.2011	29.XI.2012
Morocco (accession)	4.XI.2009	4.II.2010
Netherlands (accession)	16.VI.2005	16.IX.2005
Norway (accession)	31.III.2004	3.III.2005
Poland (accession)	9.XII.2008	9.III.2009
Portugal (accession)	15.II.2005	5.V.2005
Slovenia (accession)	3.III.2006	3.VI.2006
Spain (ratification)	3.XII.2004	3.III.2005
Sweden (accession)	5.V.2005	5.VIII.2005
United Kingdom (accession) [3]	8.VI.2006	8.IX.2006

Number of Contracting States: 28

[1] Extended to Greenland (3 March 2005) and Faroe Islands (19 June 2006).
[2] With a declaration, reservation or statement.
[3] Extended to the Isle of Man with effect from 15 September 2008

Convention relating to Civil Liability in the Field of

Maritime Carriage of nuclear material (NUCLEAR 1971)

Done at Brussels,
17 December 1971
Entered into force: 15 July 1975

Convention relative 9 la Responsabilité Civile dans le Domaine du

Transport Maritime de matières nucléaires (NUCLEAR 1971)

Signée a Bruxelles,
le 17 décembre 1971
Entrée en vigueur: 15 juillet 1975

	Date of deposit of instrument	Date of entry into force
Argentina (accession)	18.V.1981	16.VIII.1981
Belgium (ratification)	15.VI.1989	13.IX.1989
Bulgaria (accession)	3.XII.2004	3.III.2005
Denmark (ratification)[1]	14.IX.1974	15.VII.1975
Dominica (accession)	31.VIII.2001	29.XI.2001
Finland (aceptance)	6.VI.1991	4.IX.1991
France (ratification)	2.II.1973	15.VII.1975
Gabon (accession)	21.I.1982	21.IV.1982
Germany* (ratification)	1.X.1975	30.XII.1975
Italy* (ratification)	21.VII.1980	19.X.1980
Latvia (accession)	25.I.2002	25.IV.2002
Liberia (accession)	17.II.1981	18.V.1981
Netherlands (accession)	l.VIII.1991	30.X.1991
Norway (ratification	16.IV.1975	15.VII.1975
Spain (accession)	21.V.1974	15.VII.1975
Sweden (ratification)	22.XI.1974	15.VII.1975
Yemen (accession)	6.III.1979	4.VI.1979

Number of Contracting States: 17

Declarations, Reservations and Statements

Federal Republic of Germany
The following reservation accompanies the signature of the Convention by the Representative of the Federal Republic of Germany (in the English language):
"Pursuant to article 10 of the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, the Federal Republic of Germany reserves the right to provide by national law, that the persons liable under an international convention or national law applicable in the field of maritime transport may continue to be liable in addition to the operator of a nuclear installation on condition that these persons are fully covered in respect of their liability, including defence against unjustified actions, by insurance or other financial security obtained by the operator."

(1) Shall not apply to the Faroe Islands.

This reservation was withdrawn at the time of deposit of the instrument of ratification of the Convention.
The instrument of ratification of the Government of the Federal Republic of Germany was accompanied by the following declaration (in the German language):
[Translation]
"That the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany.

Italy
The instrument of ratification of the Italian Republic was accompanied by the following statement (in the English language):
"It is understood that the ratification of the said Convention will not be interpreted in such a way as to deprive the Italian State of any right of recourse made according to the international law for the damages caused to the State itself or its citizens by a nuclear accident".

Athens Convention relating to the Carriage of passengers and their luggage by sea (PAL 1974)

Done at Athens:
13 December 1974
Entered into force:
28 April 1987

Convention d'Athènes relative au Transport par mer de passagers et de leurs bagages (PAL 1974)

Signée à Athènes,
le 13 décembre 1974
Entrée en vigueur:
28 avril 1987

	Date of deposit of instrument	Date of entry into force
Albania (accession)	16.III.2005	14.VI.2005
Argentina (accession)[1]	26.V.1983	28.IV.1987
Bahamas (accession)	7.VI.1983	28.IV.1987
Barbados (accession)	6.V.1994	4.VIII.1994
Belgium (accession)	15.VI.1989	13.IX.1989
Belize (accession)	22.VIII.2011	20.XI.2011
China (accession) [5, 6]	1.VI.1994	30.VIII.1994
Croatia (accession)	12.I.1998	12.IV.1998
Dominica (accession)	31.VIII.2001	29.XI.2001
Egypt (accession)	18.X.1991	16.I.1992
Equatorial Guinea (accession)	24.IV.1996	23.VII.1996
Estonia (accession)	8.X.2002	6.I.2003
Georgia (accession)	25.VIII.1995	23.XI.1995
Greece (acceptance)	3.VII.1991	1.X.1991
Guyana (accession)	10.XII.1997	10.III.1998
Ireland (accession)	24.II.1998	25.V.1998
Jordan (accession)	3.X.1995	1.I.1996
Latvia (accession)	6.XII.2001	6.III.2002
Liberia (accession)	17.II.1981	28.IV.1987

	Date of deposit of instrument	Date of entry into force
Libya (accession)	8.XII.2012	6.II.2012
Luxembourg (accession)	14.II.1991	15.V.1991
Malawi (accession)	9.III.1993	7.VI.1993
Marshall Islands (accession)	29.XI.1994	27.II.1995
Nigeria (accession)	24.II.2004	24.V.2004
Poland (ratification)	28.I.1987	28.IV.1987
Russian Federation[2] **(accession)**[1]	27.IV.1983	28.IV.1987
Serbia (accession)	25.V.2011	23.VIII.2011
Spain (accession)	8.X.1981	28.IV.1987
St. Kitts and Nevis (accession)	30.VIII.2005	28.XI.2005
Switzerland (ratification)	15.XII.1987	14.III.1988
Tonga (accession)	15.II.1977	28.IV.1987
Ukraine (accession)	11.XI.1994	9.II.1995
United Kingdom (ratification)[3]	31.I.1980	28.IV.1987
Vanuatu (accession)	13.I.1989	13.IV.1989
Yemen (accession)	6.III.1979	28.IV.1987

Number of Contracting States: 35 [4]

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[1] With a declaration or reservation.

[2] As from 26.XII.1991 the membership of the USSR in the Convention is continued by the Russian Federation.

[3] The United Kingdom declared ratification to be effective also in respect of:
Bailiwick of Jersey
Bailiwick of Guernsey
Isle of Man
Bermuda
British Virgin Islands
Cayman Islands
Falkland Islands*
Gibraltar
Hong Kong**
Montserrat
Pitcairn
Saint Helena and Dependencies

[4] On 3.X.1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded to the Convention on 29.VIII.1979.

[5] Applies to the Hong Kong Special Administrative Region with effect from 1.VII.1997.

[6] Applies to Macau Special Administrative Region with effect from 24 June 2005.

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* A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

** Ceased to apply to Hong Kong with effect from 1.VII.1997.

Declarations, Reservations and Statements

Argentina [1]
The instrument of accession of the Argentine Republic contained a declaration of non-application of the Convention under article 22, paragraph 1, as follows (in the Spanish language):

[Translation]

"The Argentine Republic will not apply the Convention when both the passengers and the carrier are Argentine nationals".

The instrument also contained the following reservations:

[Translation]

"The Argentine Republic rejects the extension of the application of the Athens Convention relating to Carriage of Passengers and Their Luggage by Sea, 1974, adopted in Athens, Greece, on 13 December 1974, and of the Protocol to the Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, 1974, approved in London on 19 December 1976, to the Malvinas Islands as notified by the United Kingdom of Great Britain and Northern Ireland to the Secretary-General of the International Maritime Organization (IMO) in ratifying the said instrument on 31 January 1980 under the incorrect designation of "Falkland Islands", and reaffirms its sovereign rights over the said Islands which form an integral part of its national territory".

German Democratic Republic
The instrument of accession of the German Democratic Republic was accompanied by the following reservation (in the German language):

[Translation]

"The German Democratic Republic declares that the provisions of this Convention shall have no effect when the passenger is a national of the German Democratic Republic and when the performing carrier is a permanent resident of the German Democratic Republic or has its seat there".

USSR
The instrument of accession of the Union of Soviet Socialist Republic contained a declaration of non-application of the Convention under article 22, paragraph 1.

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[1] A communication dated 19 October 1983 from the Government of the United Kingdom, the full text of which was circulated by the depositary, includes the following:

"The Government of the United Kingdom of Great Britain and Northern Ireland reject each and every of these statements and assertions. The United Kingdom has no doubt as to its sovereignty over the Falkland Islands and thus its right to include them within the scope of application of international agreements of which it is a party. The United Kingdom cannot accept that the Government of the Argentine Republic has any rights in this regard. Nor can the United Kingdom accept that the Falkland Islands are incorrectly designated".

Protocol to the
Athens Convention relating to the Carriage of passengers and their luggage by sea
(PAL PROT 1976)

Done at London,
19 November 1976
Entered into force: 30 April 1989

Protocole à la
Convention d'Athènes relative au Transport par mer de passagers et de leurs bagages
(PAL PROT 1976)

Signé à Londres,
le 19 novembre 1976
Entré en vigueur: 30 avril 1989

	Date of deposit of instrument	Date of entry into force
Albania (accession)	16.III.2005	14.VI.2005
Argentina (accession) [1]	28.IV.1987	30.IV.1989
Bahamas (accession)	28.IV.1987	30.IV.1989
Barbados (accession)	6.V.1994	4.VIII.1994
Belgium (accession)	15.VI.1989	13.IX.1989
China[5,6] **(accession)**	1.VI.1994	30.VIII.1994
Croatia (accession)	12.I.1998	12.IV.1998
Dominica (accession)	31.VIII.2001	29.XI.2001
Estonia (accession)	8.X.2002	6.I.2003
Georgia (accession)	25.VIII.1995	23.XI.1995
Greece (accession)	3.VII.1991	1.X.1991
Ireland (accession)	24.II.1998	25.V.1998
Latvia (accession)	6.XII.2001	6.III.2002
Liberia (accession)	28.IV.1987	30.IV.1989
Luxembourg (accession)	14.II.1991	15.V.1991
Marshall Islands (accession)	29.XI.1994	27.II.1995
Poland (accession)	28.IV.1987	30.IV.1989
Russian Federation [2] **(accession)** [3]	30.I.1989	30.IV.1989
Spain (accession)	28.IV.1987	30.IV.1989
Switzerland (accession) [3]	15.XII.1987	30.IV.1989
Tonga (accession)	18.IX.2003	17.XII.2003
Ukraine (accession)	11.XI.1994	9.II.1995
United Kingdom (ratification) [3, 4]	28.IV.1987	30.IV.1989
Vanuatu (accession)	13.I.1989	30.IV.1989
Yemen (accession)	28.IV.1987	30.IV.1989

Number of Contracting States: 26

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[1] With a reservation.

[2] As from 26.XII.1991 the membership of the USSR in the Protocol is continued by the Russian Federation.

[3] With a notification under article II(3).

[4] The United Kingdom declared ratification to be effective also in respect of:
Bailiwick of Jersey
Bailiwick of Guernsey
Isle of Man
Bermuda
British Virgin Islands
Cayman Islands
Falkland Islands*
Gibraltar
Hong Kong**
Montserrat
Pitcairn
Saint Helena and Dependencies

[5] Applies to the Hong Kong Special Administrative Region with effect from 1.VII.1997.

[6] Applies to Macau Special Administrative Region with effect from 24 June 2005.

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* With a reservation made by the Argentine Republic and a communication received from the United Kingdom.

** Ceased to apply to Hong Kong with effect from 1.VII.1997.

Declarations, Reservations and Statements

Argentina [(1)]

The instrument of accession of the Argentine Republic contained the following reservation (in the Spanish language):

[Translation]

"The Argentine Republic rejects the extension of the application of the Athens Convention relating to Carriage of Passengers and their Luggage by Sea, 1974, adopted in Athens, Greece, on 13 December 1974, and of the Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, approved in London on 19 December 1976, to the Malvinas Islands as notified by the United Kingdom of Great Britain and Northern Ireland to the Secretary-General of the International Maritime Organization (IMO) in ratifying the said instrument on 31 January 1980 under the incorrect designation of "Falkland Islands", and reaffirms its sovereign rights over the said Islands which form an integral part of its national territory".

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(1) The depositary received the following communication dated 4 August 1987 from the United Kingdom Foreign and Commonwealth Office:

"The Government of the United Kingdom of Great Britain and Northern Ireland cannot accept the reservation made by the Argentine Republic as regards the Falkland Islands.

The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to the United Kingdom sovereignty over the Falkland Islands and, accordingly, their right to extend the application of the Convention to the Falkland Islands".

Protocol of 1990 to amend the
1974 Athens Convention relating to the Carriage of passengers and their luggage by sea
(PAL PROT 1990)

Done at London, 29 March 1990
Not yet in force

Protocole de 1990 modifiant
La Convention d'Athènes de 1974 relative au Transport par mer de passagers et de leurs bagages
(PAL PROT 1990)

Fait à Londres, le 29 mars 1990
Pas encore en vigueur

	Date of deposit of instrument
Albania (accession)	16.III.2005
Croatia (accession)	12.I.1998
Egypt (accession)	18.X.1991
Luxembourg (accession)	21.XI.2005
Spain (accession)	24.II.1993
Tonga (accession)	18.IX.2003

Number of Contracting States: 6

Protocol of 2002
to the Athens Convention relating to the carriage of passengers and their luggage by sea, 1974

Done at London, 1 November 2002
Not yet in force

Protocole de 2002
à la Convention d'Athènes relative au Transport par mer de passagers et de leurs bagages, 1974

Fait à Londres, le 1 Novembre 2002
Pas encore en vigueur

	Date of signature or deposit of instrument
Albania (accession)	16.III.2005
Belize (accession)	22.VIII.2011
Denmark (accession)[1]	23.V.2012
European Union (accession)[1, 2]	15.XII.2011
Latvia (accession)	17.II.2005
Netherlands (accession)[1]	26.IX.2012
Palau (accession)	29.IX.2011

	Date of signature or deposit of instrument
Serbia (accession)[1]	25.V.2011
St. Kitts and Nevis (accession)	30.VIII.2005
Syrian Arab Republic (accession)	10.III.2005

Number of Contracting States: 9

[1] With a declaration

[2] Article 19(3) of the Protocol provides that: "Where the number of States Parties is relevant in this Protocol, including but not limited to Articles 20 and 23 of this Protocol, the Regional Economic Integration Organization shall not count as a State Party in addition to its Member States which are States Parties." Accordingly, the number of Contracting States remains unaltered with this accession.

Convention on
Limitation of Liability for maritime claims

(LLMC 1976)

Done at London, 19 November 1976
Entered into force: 1 December 1986

Convention sur la
Limitation de la Responsabilité en matière de créances maritimes

(LLMC 1976)

Signée à Londres, le 19 novembre 1976
Entrée en vigueur: 1 décembre 1986

	Date of deposit of instrument	Date of entry into force
Albania (accession)	7.VI.2004	1.X.2004
Algeria (accession)	4.VIII.2004	1.XII.2004
Australia (accession)	20.II.1991	1.VI.1991
Azerbaijan (accession)	16.VII.2004	1.XI.2004
Bahamas (accession)	7.VI.1983	1.XII.1986
Barbados (accession)	6.V.1994	1.IX.1994
Belgium (accession)[1, 2]	15.VI.1989	1.X.1989
Benin (accession)	1.XI.1985	1.XII.1986
Bulgaria (accession)	4.VII.2005	1.XI.2005
China[9]	–	1.VII.1997
Congo (accession)	7.IX.2004	3.II.2004
Cook Islands (accession)	12.III.2007	1.VII.2007
Croatia (accession)	2.III.1993	1.VI.1993
Cyprus (accession)	23.XII.2005	1.IV.2006
Denmark (ratification)	30.V.1984	1.XII.1986
(denunciation – 25.III.2004)		
Dominica (accession)	31.VIII.2001	1.XII.2001
Egypt (accession)	30.III.1988	1.VII.1988
Equatorial Guinea (accession)	24.IV.1996	1.VIII.1996

	Date of deposit of instrument	Date of entry into force
Estonia (accession)	23.X.2002	1.II.2003
Finland (ratification)	8.V.1984	1.XII.1986
(denunciation – 15.IX.2000)		
France (approval)[1, 2]	1.VII.1981	1.XII.1986
Georgia (accession)	20.II.1996	1.VI.1996
Germany[3] **(ratification)**[1, 2]	12.V.1987	1.IX.1987
(denunciation – 18.X.2000)		
Greece (accession)	3.VII.1991	1.XI.1991
Guyana (accession)	10.XII.1997	1.IV.1998
Hungary (accession)	4.VII.2008	1.XI.2008
India (accession)	20.VIII.2002	1.XII.2002
Ireland (accession)[1]	24.II.1998	1.VI.1998
Jamaica (accession)	17.VIII.2005	1.XII.2006
Japan (accession)[1]	4.VI.1982	1.XII.1986
(denunciation – 29.VII.2005)		
Kiribati (accession)	5.II.2007	1.VI.2007
Latvia (accession)	13.VII.1999	1.XI.1999
Liberia (accession)	17.II.1981	1.XII.1986
Lithuania (accession)	3.III.2004	1.VII.2004
Luxembourg (accession)	21.XI.2005	1.III.2006
Marshall Islands (accession)	29.XI.1994	1.III.1995
Mauritius (accession)	17.XII.2002	1.VI.2003
Mexico (accession)	13.V.1994	1.IX.1994
Mongolia (accession)	28.IX.2011	1.I.2012
Netherlands (accession) [1, 2]	15.V.1990	1.IX.1990
(denunciation – 23.XII.2010)		
New Zealand (accession) [5]	14.II.1994	1.VI.1994
Nigeria (accession)	24.II.2004	1.VI.2004
Norway (ratification) [4]	30.III.1984	1.XII.1986
(denunciation – 31.X.2005)		
Poland (accession)[6]	28.IV.1986	1.XII.1986
Romania (accession)	12.III.2007	1.VII.2007
Samoa (accession)	18.V.2004	1.IX.2004
Sierra Leone (accession)	26.VII.2001	1.XI.2001
Singapore (accession)	24.I.2005	1.V.2005
Spain (ratification)	13.XI.1981	1.XII.1986
(denunciation – 24.X.2006)		
St. Lucia (accession)	20.V.2004	1.IX.2004
Syrian Arab Republic (accession)	21.IX.2005	1.I.2006
Sweden (ratification)[4]	30.III.1984	1.XII.1986
(denunciation – 22.VII.2004)		
Switzerland (accession) [2, 6]	15.XII.1987	1.IV.1988
Tonga (accession)	18.IX.2003	1.I.2004
Trinidad and Tobago (accession)	6.III.2000	1.VII.2000
Turkey (accession)	6.III.1998	1.VII.1998
Tuvalu (accession)	12.I.2009	1.IV.2009
United Arab Emirates (accession)	19.XI.1997	1.III.1998

LLMC 1976

	Date of deposit of instrument	Date of entry into force
United Kingdom (ratification) [1, 7, 8]	31.I.1980	1.XII.1986
(denunciation – 17.VII.1998)		
Vanuatu (accession)	14.IX.1992	1.I.1993
Yemen (accession)	6.III.1979	1.XII.1986

Number of Contracting States: 53
The Convention applies provisionally in respect of: Belize

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[1] With a declaration, reservation or statement.
[2] With a notification under article 15(2).
[3] On 3.X.1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded1, 6 to the Convention on 17.II.1989.
[4] With a notification under article 15(4).
[5] The instrument of accession contained the following statement:
"AND WHEREAS it is not intended that the accession by the Government of New Zealand to the Convention should extend to Tokelau;".
[6] With a notification under article 8(4).
[7] The United Kingdom declared its ratification to be effective also in respect of:
Bailiwick of Jersey
Bailiwick of Guernsey
Isle of Man
Belize*
Bermuda
British Virgin Islands
Cayman Islands
Falkland Islands**
Gibraltar
Hong Kong***
Montserrat
Pitcairn
Saint Helena and Dependencies
Turks and Caicos Islands
United Kingdom Sovereign Base Areas of
Akrotiri and Dhekelia in the Island of Cyprus
Anguilla)
British Antarctic Territory) notification received
British Indian Ocean Territory) 4.II.1999
South Georgia and the South Sandwich Islands)
[8] With notifications under articles 8(4) and 15(2).
[9] Applies only to the Hong Kong Special Administrative Region.

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* Has since become the independent State of Belize to which the Convention applies provisionally.
** A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).
*** Ceased to apply to Hong Kong with effect from 1.VII.1997.

Declarations, Reservations and Statements

Belgium
The instrument of accession of the Kingdom of Belgium was accompanied by the following reservation (in the French language):
[Translation]
"In accordance with the provisions of article 18, paragraph 1, Belgium expresses a reservation on article 2, paragraph 1(d) and (e)".

China
By notification dated 5 June 1997 from the People's Republic of China:
[Translation]
"1. with respect to the Hong Kong Special Administrative Region, it reserves the right in accordance with Article 18 (1), to exclude the application of the Article 2 (1)(d)".

France
The instrument of approval of the French Republic contained the following reservation (in the French language):
[Translation]
"In accordance with article 18, paragraph 1, the Government of the French Republic reserves the right to exclude the application of article 2, paragraphs 1(d) and (e)".

German Democratic Republic
The instrument of accession of the German Democratic Republic was accompanied by the following reservation (in the German language):
[Translation]
Article 2, paragraph 1(d) and (e)
"The German Democratic Republic notes that for the purpose of this Convention there is no limitation of liability within its territorial sea and internal waters in respect of the removal of a wrecked ship, the raising, removal or destruction of a ship which is sunk, stranded or abandoned (including anything that is or has been on board such ship). Claims, including liability, derive from the laws and regulations of the German Democratic Republic."
Article 8, paragraph 1
"The German Democratic Republic accepts the use of the Special Drawing Rights merely as a technical unit of account. This does not imply any change in its position toward the International Monetary Fund".

Federal Republic of Germany
The instrument of ratification of the Federal Republic of Germany was accompanied by the following declaration (in the German language):
[Translation]
"...that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany".
"In accordance with art. 18, par. 1 of the Convention, the Federal Republic of Germany reserves the right to exclude the application of art. 2, par. 1(d) and (e) of the Convention"

Japan
The instrument of accession of Japan was accompanied by the following statement (in the English language):
"...the Government of Japan, in accordance with the provision of paragraph 1 of article 18 of the Convention, reserves the right to exclude the application of paragraph 1(d) and (e) of article 2 of the Convention".

Netherlands
The instrument of accession of the Kingdom of the Netherlands contained the following reservation:
"In accordance with article 18, paragraph 1 of the Convention on limitation of liability

for maritime claims, 1976, done at London on 19 November 1976, the Kingdom of the Netherlands reserves the right to exclude the application of article 2, paragraph 1(d) and (e) of the Convention".

United Kingdom
The instrument of accession of the United Kingdom of Great Britain and Northern Ireland contained reservation which states that the United Kingdom was "Reserving the right, in accordance with article 18, paragraph 1, of the Convention, on its own behalf and on behalf of the above mentioned territories, to exclude the application of article 2, paragraph 1(d); and to exclude the application of article 2, paragraph 1(e) with regard to Gibraltar only".

NOTIFICATIONS

Article 8(4)

German Democratic Republic
[Translation]
"The amounts expressed in Special Drawing Rights will be converted into marks of the German Democratic Republic at the exchange rate fixed by the Staatsbank of the German Democratic Republic on the basis of the current rate of the US dollar or of any other freely convertible currency".

China
[Translation]
"The manner of calculation employed with respect to article 8(1) of the Convention concerning the unit of account shall be the method of valuation applied by the International Monetary Fund;"

Poland
"Poland will now calculate financial liabilities mentioned in the Convention in the terms of the Special Drawing Right, according to the following method.
The Polish National Bank will fix a rate of exchange of the SDR to the United States dollar according to the current rates of exchange quoted by Reuter. Next, the US dollar will be converted into Polish zloties at the rate of exchange quoted by the Polish National Bank from their current table of rates of foreign currencies".

Switzerland
"The Federal Council declares, with reference to article 8, paragraphs 1 and 4 of the Convention that Switzerland calculates the value of its national currency in special drawing rights (SDR) in the following way:
The Swiss National Bank (SNB) notifies the International Monetary Fund (IMF) daily of the mean rate of the dollar of the United States of America on the Zurich currency market. The exchange value of one SDR in Swiss francs is determined from that dollar rate and the rate of the SDR in dollars calculated by IMF. On the basis of these values, SNB calculates a mean SDR rate which it will publish in its Monthly Gazette".

United Kingdom
"...The manner of calculation employed by the United Kingdom pursuant to article 8(1) of the Convention shall be the method of valuation applied by the International Monetary Fund".

Article 15(2)

Belgium
[Translation]
"In accordance with the provisions of article 15, paragraph 2, Belgium will apply the provisions of the Convention to inland navigation".

France

[Translation]

"...- that no limit of liability is provided for vessels navigating on French internal waterways;

- that, as far as ships with a tonnage of less than 300 tons are concerned, the general limits of liability are equal to half those established in article 6 of the Convention...for ships with a tonnage not exceeding 500 tons".

Federal Republic of Germany

[Translation]

"In accordance with art. 15, par. 2, first sentence, sub-par. (a) of the Convention, the system of limitation of liability to be applied to vessels which are, according to the law of the Federal Republic of Germany, ships intended for navigation on inland waterways, is regulated by the provisions relating to the private law aspects of inland navigation.

In accordance with art. 15, par. 2, first sentence, sub-par. (b) of the Convention, the system of limitation of liability to be applied to ships up to a tonnage of 250 tons is regulated by specific provisions of the law of the Federal Republic of Germany to the effect that, with respect to such a ship, the limit of liability to be calculated in accordance with art. 6, par. 1 (b) of the Convention is half of the limitation amount to be applied with respect to a ship with a tonnage of 500 tons".

Netherlands

Paragraph 2(a)

"The Act of June 14th 1989 (Staatsblad 239) relating to the limitation of liability of owners of inland navigation vessels provides that the limits of liability shall be calculated in accordance with an Order in Council.

The Order in Council of February 19th 1990 (Staatsblad 96) adopts the following limits of liability in respect of ships intended for navigation on inland waterways.

I. Limits of liability for claims in respect of loss of life or personal injury other than those in respect of passengers of a ship, arising on any distinct occasion:

1. for a ship non intended for the carriage of cargo, in particular a passenger ship, 200 Units of Account per cubic metre of displacement at maximum permitted draught, plus, for ships equipped with mechanical means of propulsion, 700 Units of Account for each kW of the motorpower of the means of propulsion;

2. for a ship intended for the carriage of cargo, 200 Units of Account per ton of the ship's maximum deadweight, plus, for ships equipped with mechanical means of propulsion, 700 Units of Account for each kW of the motorpower of the means of propulsion;

3. for a tug or a pusher, 700 Units of Account for each kW of the motorpower of the means of propulsion;

4. for a pusher which at the time the damage was caused was coupled to barges in a pushed convoy, the amount calculated in accordance with 3 shall be increased by 100 Units of Account per ton of the maximum deadweight of the pushed barges; such increase shall not apply if it is proved that the pusher has rendered salvage services to one or more of such barges;

5. for a ship equipped with mechanical means of propulsion which at the time the damage was caused was moving other ships coupled to this ship, the amount calculated in accordance with 1, 2 or 3 shall be increased by 100 Units of Account per ton of the maximum deadweight or per cubic metre of displacement of the other ships; such increase shall not apply if it is proved that this ship has rendered salvage services to one or more of the coupled ships;

6. for hydrofoils, dredgers, floating cranes, elevators and all other floating appliances, pontoons or plant of a similar nature, treated as inland navigation ships in accordance with Article 951a, paragraph 4 of the Commercial Code, their value at the time of the incident;

7. where in cases mentioned under 4 and 5 the limitation fund of the pusher or the mechanically propelled ships is increased by 100 Units of Account per ton of maximum

deadweight of the pushed barges or per cubic metre of displacement of the other coupled ships, the limitation fund of each barge or of each of the other coupled ships shall be reduced by 100 Units of Account per ton of the maximum deadweight of the barge or by 100 Units of Account per ton of the maximum deadweight or per cubic metre of displacement of the other vessel with respect to claims arising out of the same incident; however, in no case shall the limitation amount be less than 200,000 Units of Account.

II. The limits of liability for claims in respect of any damage caused by water pollution, other than claims for loss of life or personal injury, are equal to the limits mentioned under I.

III. The limits of liability for all other claims are equal to half the amount of the limits mentioned under I.

IV. In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of an inland navigation ship, the limit of liability of the owner thereof shall be an amount equal to 60,000 Units of Account multiplied by the number of passengers the ship is authorized to carry according to its legally established capacity or, in the event that the maximum number of passengers the ship is authorized to carry has not been established by law, an amount equal to 60,000 Units of Account multiplied by the number of passengers actually carried on board at the time of the incident. However, the limitation of liability shall in no case be less than 720,000 Units of Account and shall not exceed the following amounts:

(i) 3 million Units of Account for a vessel with an authorized maximum capacity of 100 passengers;

(ii) 6 million Units of Account for a vessel with an authorized maximum capacity of 180 passengers;

(iii) 12 million Units of Account for a vessel with an authorized maximum capacity of more than 180 passengers;

Claims for loss of life or personal injury to passengers have been defined in the same way as in Article 7, paragraph 2 of the Convention on Limitation of Liability for Maritime Claims, 1976.

The Unit of Account mentioned under I-IV is the Special Drawing Right as defined in Article 8 of the Convention on Limitation of Liability for Maritime Claims, 1976."

Paragraph 2(b)

The Act of June 14th 1989 (Staatsblad 241) relating to the limitation of liability for maritime claims provides that with respect to ships which are according to their construction intended exclusively or mainly for the carriage of persons and have a tonnage of less than 300, the limit of liability for claims other than for loss of life or personal injury may be established by Order in Council at a lower level than under the Convention.

The Order in Council of February 19th 1990 (Staatsblad 97) provides that the limit shall be 100,000 Units of Account.

The Unit of Account is the Special Drawing Right as defined in Article 8 of the Convention on Limitation of Liability for Maritime Claims, 1976."

Switzerland

[Translation]

"In accordance with article 15, paragraph 2, of the Convention on Limitation of Liability for Maritime Claims, 1976, we have the honour to inform you that Switzerland has availed itself of the option provided in paragraph 2(a) of the above mentioned article.

Since the entry into force of article 44a of the Maritime Navigation Order of 20 November 1956, the limitation of the liability of the owner of an inland waterways ship has been determined in Switzerland in accordance with the provisions of that article, a copy of which is [reproduced below]:

II. Limitation of liability of the owner of an inland waterways vessel

Article 44a

1. In compliance with article 5, subparagraph 3c, of the law on maritime navigation, the liability of the owner of an inland waterways vessel, provided in article 126, subparagraph 2c, of the law, shall be limited as follows:

a. in respect of claims for loss of life or personal injury, to an amount of 200 units of account per deadweight tonne of a vessel used for the carriage of goods and per cubic metre of water displaced for any other vessel, increased by 700 units of account per kilowatt of power in the case of mechanical means of propulsion, and to an amount of 700 units of account per kilowatt of power for uncoupled tugs and pusher craft; for all such vessels, however, the limit of liability is fixed at a minimum of 200,000 units of account;
b. in respect of claims for passengers, to the amounts provided by the Convention on Limitation of Liability for Maritime Claims, 1976, to which article 49, subparagraph 1, of the federal law on maritime navigation refers;
c. in respect of any other claims, half of the amounts provided under subparagraph a.
2. The unit of account shall be the special drawing right defined by the International Monetary Fund.
3. Where, at the time when damage was caused, a pusher craft was securely coupled to a pushed barge train, or where a vessel with mechanical means of propulsion was providing propulsion for other vessels coupled to it, the maximum amount of the liability, for the entire coupled train, shall be determined on the basis of the amount of the liability of the pusher craft or of the vessel with mechanical means of propulsion and also on the basis of the amount calculated for the deadweight tonnage or the water displacement of the vessels to which such pusher craft or vessel is coupled, in so far as it is not proved that such pusher craft or such vessel has rendered salvage services to the coupled vessels."

United Kingdom
"...With regard to article 15, paragraph 2(b), the limits of liability which the United Kingdom intend to apply to ships of under 300 tons are 166,677 units of account in respect of claims for loss of life or personal injury, and 83,333 units of account in respect of any other claims."

Article 15(4)

Norway
"Because a higher liability is established for Norwegian drilling vessels according to the Act of 27 May 1983 (No. 30) on changes in the Maritime Act of 20 July 1893, paragraph 324, such drilling vessels are exempted from the regulations of this Convention as specified in article 15 No. 4."

Sweden
"...In accordance with paragraph 4 of article 15 of the Convention, Sweden has established under its national legislation a higher limit of liability for ships constructed for or adapted to and engaged in drilling than that otherwise provided for in article 6 of the Convention.

Protocol of 1996 to amend the convention on Limitation of Liability for maritime claims, 1976

(LLMC PROT 1996)

Done at London, 2 May 1996
Entered into force: 13 May 2004

Protocole de 1996 modifiant la convention de 1976 sur la Limitation de la Responsabilité en matière de créances maritimes

(LLMC PROT 1996)

Signée à Londre le 2 mai 1996
Entrée en vigueur: 13 mai 2004

	Date of deposit of instrument	Date of entry into force
Albania (accession)	7.VI.2004	5.IX.2004
Antigua and Barbuda (accession)	12.X.2009	10.I.2010
Australia (accession)	8.X.2002	13.V.2004

LLMC Protocol 1996

	Date of deposit of instrument	Date of entry into force
Belgium (accession)	9.X.2009	7.I.2010
Bulgaria (accession)	4.VIII.2005	2.X.2005
Canada (ratification)	9.V.2008	7.VIII.2008
Cook Islands	12.III.2007	12.VI.2007
Croatia (accession)[1]	15.V.2006	
Cyprus (accession)	23.XII.2005	23.III.2006
Denmark (ratification)	12.IV.2002	13.V.2004
Estonia (accession)[1]	16.III.2011	14.VI.2011
Finland (acceptance)	15.IX.2000	13.V.2004
France	24.IV.2007	23.VIII.2007
Germany (ratification)	3.IX.2001	13.V.2004
Greece (accession)	6.VII.2009	4.X.2009
Hungary (accession)	4.VII.2008	2.X.2008
Iceland (accession)	17.XI.2008	15.II.2009
India (accession)	23.III.2011	21.VI.2011
Ireland (accession)	25.I.2012	24.IV.2012
Jamaica (accession)	19.VIII.2005	17.XII.2005
Japan (accession)	3.V.2006	1.VIII.2006
Latvia	18.IV.2007	17.VII.2007
Liberia (accession)	18.IX.2008	17.XII.2008
Lithuania (accession) [1]	14.IX.2007	13.XII.2007
Luxembourg (accession)	21.XI.2005	19.I.2006
Malaysia (accession) [1]	12.XI.2008	10.II.2009
Malta (accession) [1]	13.II.2004	13.V.2004
Marshall Island (accession)	30.I.2006	30.IV.2006
Mongolia (accession)	28.IX.2011	27.XII.2011
Netherlands (acceptance) [1]	23.XII.201	23.III.2011
Norway (ratification)[1]	17.X.2000	13.V.2004
Palau (accession)	28.IX.2011	28.XII.2011
Poland (accession)[1]	17.XI.2011	15.II.2012
Romania	12.III.2007	12.VI.2007
Russian Federation (accession) [1]	25.V.1999	13.V.2004
Samoa (accession)	18.V.2004	16.VIII.2004
Sierra Leone (accession)		1.XI.2001
Spain (accession) [1]	10.I.2005	10.IV.2005
St. Lucia (accession)	20.V.2004	18.VIII.2004
Sweden (accession)	22.VII.2004	20.X.2004
Syrian Arab Republic (accession)	2.IX.2005	1.XII.2005
Tonga (accession)	18.IX.2003	13.V.2004
Turkey (accession) [1]	19.VII.2010	17.X.2010
Tuvalu (accession)	12.I.2009	12.IV.2009
United Kingdom (ratification) [1]	11.VI.1999	13.V.2004

Number of Contracting States: 45

[1] With a reservation or statement

International Convention on Salvage, 1989 (SALVAGE 1989)

Done at London: 28 April 1989
Entered into force: 14 July 1996

Convention Internationale de 1989 sur l'Assistance (ASSISTANCE 1989)

Signée a Londres le 28 avril 1989
Entrée en vigueur: 14 juillet 1996

	Date of deposit of instrument	Date of entry into force
Albania (accession)	14.VI.2006	14.VII.2007
Algeria (accession)	26.III.2012	26.III.2013
Australia (accession) [1]	8.I.1997	8.I.1998
Azerbaijan (accession)	12.VI.2006	12.VI.2007
Belgium (accession)	30.VI.2004	30.VI.2005
Brazil (accession)	29.VII.2009	29.VII.2010
Bulgaria (accession)	14.III.2005	14.III.2006
Canada (ratification) [1]	14.XI.1994	14.VII.1996
China[4,5] **(accession)** [1]	30.III.1994	14.VII.1996
Congo (accession)	7.IX.2004	7.IX.2005
Croatia (accession) [1]	10.IX.1998	10.IX.1999
Denmark (ratification)	30.V.1995	14.VII.1996
Dominica (accession)	31.VIII.2001	31.VIII.2002
Ecuador (accession)	16.III.2005	16.III.2006
Egypt (accession)	14.III.1991	14.VII.1996
Estonia (accession) [1]	31.VII.2001	31.VII.2002
Finland (approval) [1]	12.I.2007	12.I.2008
France (accession)	20.XII.2001	20.XII.2002
Georgia (accession)	25.VIII.1995	25.VIII.1996
Germany (ratification) [1]	8.X.2001	8.X.2002
Greece (accession)	3.VI.1996	3.VI.1997
Guinea (accession)	2.X.2002	2.X.2003
Guyana (accession)	10.XII.1997	10.XII.1998
Iceland (accession)	21.III.2002	21.III.2003
India (accession)	18.X.1995	18.X.1996
Iran (Islamic Republic of) (accession) [1]	1.VIII.1994	14.VII.1996
Ireland (ratification) [1]	6.I.1995	14.VII.1996
Italy (ratification)	14.VII.1995	14.VII.1996
Jordan (accession)	3.X.1995	3.X.1996
Kenya (accession)	21.VII.1999	21.VII.2000
Kiribati (accession)	5.II.2007	5.II.2008
Latvia (accession)	17.III.1999	17.III.2000
Liberia (accession)	18.IX.2008	18.IX.2009
Lithuania (accession)[1]	15.XI.1999	15.XI.2000
Marshall Islands (accession)	16.X.1995	16.X.1996
Mauritius (accession)	17.XII.2002	17.XII.2003
Montenegro (accession)	19.IV.2012	19.IV.2013
Mexico (ratification)[1]	10.X.1991	14.VII.1996
Netherlands (acceptance)[1, 2]	10.XII.1997	10.XII.1998
New Zealand (accession)	16.X.2002	16.X.2003
Nigeria (ratification)	11.X.1990	14.VII.1996

	Date of deposit of instrument	Date of entry into force
Norway (ratification)[1]	3.XII.1996	3.XII.1997
Oman (accession)	14.X.1991	14.VII.1996
Palau (accession)	29.IX.2011	29.IX.2012
Poland (ratification)	16.XII.2005	16.XII.2006
Romania (accession)	18.V.2001	18.V.2002
Russian Federation (ratification)[1]	25.V.1999	25.V.2000
Saudi Arabia (accession)[1]	16.XII.1991	14.VII.1996
Sierra Leone (accession)	26.VII.2001	26.VII.2002
Slovenia (accession)	23.XII.2005	23.XII.2006
Spain (ratification) [1]	27.I.2005	27.I.2006
St. Kitts and Nevis (accession)	7.X.2004	7.X.2005
Sweden (ratification)[1]	19.XII.1995	19.XII.1996
Switzerland (ratification)	12.III.1993	14.VII.1996
Syrian Arab Republic (accession)[1]	19.III.2002	19.III.2003
Tonga (accession)	18.IX.2003	18.IX.2004
Tunisia (accession)[1]	5.V.1999	5.V.2000
United Arab Emirates (accession)	4.X.1993	14.VII.1996
United Kingdom (ratification)[1, 3]	29.IX.1994	14.VII.1996
United States (ratification)	27.III.1992	14.VII.1996
Vanuatu (accession)	18.II.1999	18.II.2000
Yemen (accession)	23.IX.2008	23.IX.2009

Number of Contracting States: 62

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[1] With a reservation or statement

[2] With a notification

[3] The United Kingdom declared its ratification to be effective in respect of:
The Bailiwick of Jersey
The Isle of Man
Falkland Islands*
Montserrat
South Georgia and the South Sandwich Islands
Hong Kong** as from 30.V.1997
Anguilla)
British Antarctic Territory)
British Indian Ocean Territory)
Cayman Islands)
Pitcairn, Henderson, Ducie and Oeno Islands) with effect from 22.7.98
St Helena and its Dependencies)
Turks and Caicos Islands)
Virgin Islands)

[4] Applies to the Hong Kong Special Administrative Region with effect from 1.VII.1997.

[5] Applies to Macau Special Administrative Region with effect from 24 June 2005.

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* A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

** Ceased to apply to Hong Kong with effect from 1.VII.1997.

Declarations, Reservations and Statements

Canada
The instrument of ratification of Canada was accompanied by the following reservation:
"Pursuant to Article 30 of the International Convention on Salvage, 1989, the Government of Canada reserves the right not to apply the provisions of this Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed".

China
The instrument of accession of the People's Republic of China contained the following statement:
[Translation]
"That in accordance with the provisions of article 30, paragraph 1 of the International Convention on Salvage, 1989, the Government of the People's Republic of China reserves the right not to apply the provisions of article 30, paragraphs 1(a), (b) and (d) of the said Convention".

Islamic Republic of Iran
The instrument of accession of the Islamic Republic of Iran contained the following reservation:
"The Government of the Islamic Republic of Iran reserves the right not to apply the provisions of this Convention in the cases mentioned in article 30, paragraphs 1(a), (b), (c) and (d)".

Ireland
The instrument of ratification of Ireland contained the following reservation:
"Reserve the right of Ireland not to apply the provisions of the Convention specified in article 30(1)(a) and (b) thereof".

Mexico
The instrument of ratification of Mexico contained the following reservation and declaration:
[Translation]
"The Government of Mexico reserves the right not to apply the provisions of this Convention in the cases mentioned in article 30, paragraphs 1(a), (b) (c) and (d), pointing out at the same time that it considers salvage as a voluntary act ".

Norway
The instrument of ratification of the Kingdom of Norway contained the following reservation:
"In accordance with Article 30, subparagraph 1(d) of the Convention, the Kingdom of Norway reserves the right not to apply the provisions of this Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed".

Saudi Arabia [(1)]
The instrument of accession of Saudi Arabia contained the following reservations:
[Translation]
"1. This instrument of accession does not in any way whatsoever mean the recognition of Israel; and

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(1) The depositary received the following communication dated 27 February 1992 from the Embassy of Israel:

"The Government of the State of Israel has noted that the instrument of accession of Saudi Arabia to the above-mentioned Convention contains a declaration with respect to Israel.

2. The Kingdom of Saudi Arabia reserves its right not to implement the rules of this instrument of accession to the situations indicated in paragraphs (a), (b), (c) and (d) of article 30 of this instrument."

Spain

The following reservations were made at the time of signature of the Convention:
[Translation]
"In accordance with the provisions of article 30.1(a), 30.1(b) and 30.1(d) of the International Convention on Salvage, 1989, the Kingdom of Spain reserves the right not to apply the provisions of the said Convention:

– when the salvage operation takes place in inland waters and all vessels involved are of inland navigation;
– when the salvage operations take place in inland waters and no vessel is involved.

For the sole purposes of these reservations, the Kingdom of Spain understands by 'inland waters' not the waters envisaged and regulated under the name of 'internal waters' in the United Nations Convention on the Law of the Sea but continental waters that are not in communication with the waters of the sea and are not used by seagoing vessels. In particular, the waters of ports, rivers, estuaries, etc., which are frequented by seagoing vessels are not considered as 'inland waters':

– when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed".

Sweden

The instrument of ratification of the Kingdom of Sweden contained the following reservation:
"Referring to Article 30.1(d) Sweden reserves the right not to apply the provisions of the Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed".

United Kingdom

The instrument of ratification of the United Kingdom of Great Britain and Northern Ireland contained the following reservation:
"In accordance with the provisions of article 30, paragraph 1(a), (b) and (d) of the Convention, the United Kingdom reserves the right not to apply the provisions of the Convention when:

(i) the salvage operation takes place in inland waters and all vessels involved are of inland navigation; or
(ii) the salvage operation takes place in inland waters and no vessel is involved; or .
(iii) the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed".

In the view of the Government of the State of Israel such declaration, which is explicitly of a political character, is incompatible with the purposes and objectives of this Convention and cannot in any way affect whatever obligations are binding upon Saudi Arabia under general International Law or under particular Conventions.

The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards Saudi Arabia an attitude of complete reciprocity."

International Convention on

Oil pollution preparedness, response and co-operation 1990

Done at London: 30 November 1990
Entered into force 13 May 1995.

Convention Internationale de

1990 sur la Preparation, la lutte et la cooperation en matière de pollution par les hydrocarbures

Signée a Londres le 30 novembre 1990
Entrée en vigueur: 13 Mai 1995.

Status as 30 June 2006

	Date of deposit of instrument	Date of entry into force
Albania (accession)	2.I.2008	2.IV.2008
Algeria (accession)	8.III.2005	8.VI.2005
Angola (accession)	4.X.2001	4.I.2002
Antigua and Barbuda (accession)	5.I.1999	5.IV.1999
Argentina (ratification) [1]	13.VII.1994	13.V.1995
Australia (accession)	6.VII.1992	13.V.1995
Azerbaijan (accession)	16.VII.2004	16.X.2004
Bahamas (accession)	4.X.2001	4.I.2002
Bangladesh (accession)	23.VII.2004	23.X.2004
Benin (accession)	5.II.2010	5.V.2010
Brazil (ratification)	21.VII.1998	21.X.1998
Bulgaria (accession)	5.IV.2001	5.VII.2001
Cameroon (accession)	18.IX.2009	18.XII.2009
Canada (accession)	7.III.1994	13.V.1995
Cape Verde (accession)	4.VII.2003	4.X.2003
Chile (accession)	15.X.1997	15.I.1998
China (accession)	30.III.1998	30.VI.1998
Colombia (accession) [1]	11.VI.2008	11.IX.2008
Comoros (accession)	5.I.2000	5.IV.2000
Congo (accession)	7.IX.2004	7.XII.2004
Croatia (accession)	12.I.1998	12.IV.1998
Cuba (accession)	10.IV.2008	10.VII.2008
Denmark (ratification)	22.X.1996	22.I.1997
Djibouti (accession)	19.I.1998	19.IV.1998
Dominica (accession)	31.VIII.2001	30.XI.2001
Ecuador (ratification)	29.I.2002	29.IV.2002
Egypt (ratification)	29.VI.1992	13.V.1995
El Salvador (accession)	9.X.1995	9.I.1996
Estonia (accession)	16.V.2008	16.VIII.2008
Finland (approval)	21.VII.1993	13.V.1995
France (approval)	6.XI.1992	13.V.1995
Gabon (accession)	12.IV.2005	12.VII.2005

Oil pollution preparedness 1990

	Date of deposit of instrument	Date of entry into force
Georgia (accession)	20.II.1996	20.V.1996
Germany (ratification)	15.II.1995	15.V.1995
Ghana (accession)	02.VI.2010	02.IX.2010
Greece (ratification)	7.III.1995	7.VI.1995
Guinea (accession)	2.X.2002	2.I.2003
Guyana (accession)	10.XII.1997	10.III.1998
Iceland (ratification)	21.VI.1993	13.V.1995
India (accession)	17.XI.1997	17.II.1998
Iran (Islamic Republic of) (accession)	25.II.1998	25.V.1998
Ireland (accession)	26.IV.2001	26.VII.2001
Israel (ratification)	24.III.1999	24.VI.1999
Italy (ratification)	2.III.1999	2.VI.1999
Jamaica (accession)	8.IX.2000	8.XII.2000
Japan (accession)	17.X.1995	17.I.1996
Jordan (accession)	14.IV.2004	14.VII.2004
Kenya (accession)	21.VII.1999	21.X.1999
Latvia (accession)	30.XI.2001	28.II.2002
Lebanon (ratification)	30.III.2005	30.VI.2005
Liberia (accession)	5.X.1995	5.I.1996
Libyan Arab Jamahiriya (accession)	18.VI.2004	18.IX.2004
Lithuania (accession)	23.XII.2002	23.III.2003
Madagascar (accession)	21.V.2002	21.VIII.2002
Malaysia (accession)	30.VII.1997	30.X.1997
Malta (accession)	21.I.2003	21.IV.2003
Marshall Islands (accession)	16.X.1995	16.I.1996
Mauritania (accession)	22.XI.1999	22.II.2000
Mauritius (accession)	2.XII.1999	2.III.2000
Mexico (accession)	13.V.1994	13.V.1995
Monaco (accession)	19.X.1999	19.I.2000
Morocco (ratification)	29.IV.2003	29.VII.2003
Mozambique (accession)	9.XI.2005	10.II.2006
Namibia (accession)	08.VI.2007	18.IX.2007
Netherlands (ratification) [2, 3]	1.XII.1994	13.V.1995
New Zealand (accession)	2.VII.1999	2.X.1999
Nigeria (accession)	25.V.1993	13.V.1995
Norway (ratification)	8.III.1994	13.V.1995
Oman (accession)	26.VI.2008	26.IX.2008
Pakistan (accession)	21.VII.1993	13.V.1995
Palau (accession)	29.IX.2011	29.XII.2011
Peru (accession)	24.IV.2002	24.VII.2002
Poland (ratification)	12.VI.2003	12.IX.2003

	Date of deposit of instrument	Date of entry into force
Portugal (accession)	27.II.2006	27.V.2006
Qatar (accession)	8.V.2007	8.VIII.2007
Republic of Korea (accession)	9.XI.1999	9.II.2000
Romania (accession)	17.XI.2000	17.II.2001
Russian Federation (accession)	18.IX.2009	18.XII.2009
Samoa (accession)	18.V.2004	18.VIII.2004
Saudi Arabia (accession)	30.VII.2009	30.XII.2009
Senegal (ratification)	24.III.1994	13.V.1995
Seychelles (accession)	26.VI.1992	13.V.1995
Sierra Leone (accession)	10.III.2008	10.VI.2008
Singapore (accession)	10.III.1999	10.VI.1999
Slovenia (accession)	31.V.2001	31.VIII.2001
South Africa (accession)	4.VII.2008	4.X.2008
St. Kitts and Nevis (accession)	7.X.2004	7.I.2004
St. Lucia (accession)	20.V.2004	20.VIII.2004
Spain (ratification)	12.I.1994	13.V.1995
Sweden (ratification)	30.III.1992	13.V.1995
Switzerland (accession)	4.VII.1996	4.X.1996
Syrian Arab Republic (accession)	14.III.2003	14.VI.2003
Thailand (accession)	20.IV.2000	20.VII.2000
Togo (accession)	23.IV.2012	23.VII.2012
Tonga (accession)	1.II.1996	1.V.1996
Trinidad and Tobago (accession)	6.III.2000	6.VI.2000
Tunisia (accession)	23.X.1995	23.I.1996
Turkey (accession)	1.VII.2004	1.X.2004
United Kingdom (accession)	16.IX.1997	16.XII.1997
United Republic of Tanzania (accession)	16.V.2006	16.VIII.2006
United States (ratification)	27.III.1992	13.V.1995
Uruguay (signature by confirmation)	27.IX.1994	13.V.1995
Vanuatu (accession)	18.II.1999	18.V.1999
Venezuela (ratification)	12.XII.1994	13.V.1995

Number of Contracting States: 104

[1] With a reservation.

[2] Applies to Aruba with effect from 13 October 2006.

[3] Applies to the Netherlands Antilles with effect from 18 October 2007.

Protocol on preparedness, response and co-operation to pollution incidents by hazardous and noxious substances, 2000

(OPRC-HNS 2000)

Done at London, 15 March 2000
Entered into force: 14 June 2007

Protocole sur la préparation, la lutte et la coopération en matière d'incidents de pollution par des substances nocives et potentiellement dangereuses, 2000

(OPRC-HNS Protocole)

Fait à Londres, le 15 Mars 2000
Entrée en vigueur: 14 Juin 2000

	Date of deposit of instrument	Date of entry into force
Algeria (accession)	26.III.2012	26.III.2013
Australia (accession)	16.III.2005	14.VI.2007
Chile (accession)	16.X.2006	14.VI.2007
China (accession) *	19.XI.2009	19.II.2010
Colombia (accession)	11.VI.2008	11.IX.2008
Denmark (ratification)	30.IX.2008	30.XII.2008
Ecuador (accession)	29.I.2002	14.VI.2007
Egypt (accession)	26.V.2004	14.VI.2007
Estonia (ratification)	16.V.2008	16.VIII.2008
France (accession)	24.IV.2007	24.VII.2007
Germany (ratification)	2.VI.2009	2.IX.2009
Greece (ratification)	28.V.2003	14.VI.2007
Iran (Islamic Republic of) (accession)	19.IV.2011	19.VII.2011
Japan (accession)	9.III.2007	14.VI.2007
Liberia (accession)	18.IX.2008	18.XII.2008
Malta (accession)	21.I.2003	14.VI.2007
Netherlands (accession)	22.X.2002	14.VI.2007
Norway (accession)	16.II.2012	16.IV.2012
Palau (accession)	29.IX.2011	29.XII.2011
Poland (accession)	12.VI.2003	14.VI.2007
Portugal (accession)	14.VI.2006	14.VI.2007
Korea, Republic of (accession)	11.I.2008	11.IV.2008
Singapore (accession)	16.X.2003	14.VI.2007
Slovenia (accession)	5.IV.2006	14.VI.2007
Spain (accession)	27.I.2005	14.VI.2007
Sweden (accession)	23.XII.2002	14.VI.2007
Syria (accession)	10.II.2005	14.VI.2007
Uruguay (accession)	31.VII.2003	14.VI.2007
Vanuatu (accession)	15.III.2004	14.VI.2007

Number of Contracting States: 29

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* Extended to Macao Special Administrative Region

[1] With a reservation or statement.

International Convention on
Liability and Compensation for damage in connection with the carriage of hazardous and noxious substances by sea, 1996
(HNS 1996)

Done at London, 3 May 1996
Not yet in force.

Convention Internationale de 1996
sur la responsabilité et l'indemnisation pour les dommages liés au transport par mer de substances nocives et potentiellement dangereuses
(HNS 1996)

Signée a Londres le 3 mai 1996
Pas encore en vigueur.

	Date of signature or deposit of instrument
Angola (accession)	4.X.2001
Cyprus (accession)	10.I.2005
Ethiopia (accession)	14.VII.2009
Hungary (accession)	4.VII.2008
Liberia (accession)	18.IX.2008
Lythuania (accession)[1]	14.IX.2007
Morocco (accession)	19.III.2003
Russian Federation (accession)[1]	20.III.2000
Samoa (accession)	18.V.2004
Sierra Leone (accession)	21.XI.2007
St. Kitts and Nevis (accession)	7.X.2004
Slovenia (accession)	21.VII.2004
Syrian Arab Republic (accession)	27.VI.2008
Tonga (accession)	18.IX.2003

Number of Contracting States: 14.

[1] With a reservation or statement.

International Convention on
Civil Liability for Bunker Oil Pollution Damage, 2001

(BUNKER 2001)

Done at London, 23 March 2001
Entered into force: 21 November 2008

Convention Internationale
sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures de soute
(BUNKER 2001)

Signée a Londres le 23 Mars 2001
Entrée en vigueur: 21 Novembre 2008

	Date of signature or deposit of instrument
Albania (accession)	30.IV.2010
Antigua and Barbuda (accession)	19.XIII.2008
Australia (ratification)	16.III.2009
Austria (accession)	30.I.2013

BUNKER 2001

	Date of signature or deposit of instrument
Azerbaijan (accession)	22.VI.2010
Bahamas (accession)	30.I.2008
Barbados (accession)	15.X.2009
Belgium (accession)	11.VIII.2009
Belize (accession)	22.VIII.2011
Bulgaria (accession)	6.VII.2007
Canada (accession)	2.X.2009
China (accession)[1]	9.XII.2008
Cook Islands (accession)	21.VIII.2008
Croatia (accession)	15.XII.2006
Cyprus (accession)	10.I.2005
Czech Republic (accession)	20.XII.2012
Denmark (ratification) [1]	23.VII.2008
Egypt (accession)	15.II.2010
Estonia (accession)	5.X.2006
Ethiopia (accession)	17.II.2009
France (accession) [1]	19.X.2010
Finland (accession) [1]	18.II.2009
Germany (ratification)	24.IV.2007
Greece (accession)	22.XII.2005
Hungary (accession)	30.I.2008
Iran (Islamic Republic of) (accession)	21.XI.2011
Ireland (accession)[1]	23.XII.2008
Italy (ratification)	18.XI.2010
Jamaica (accession)	2.V.2003
Jordan (accession)	24.III.2010
Kiribati (accession)	29.VII.2009
Korea (Democratic People's Republic of) (accession)	17.VII.2009
Korea (Republic of) (accession)	28.VIII.2009
Latvia (accession)	19.IV.2005
Liberia (accession)	21.VIII.2008
Lithuania (accession)	14.IX.2007
Luxembourg (accession)[1]	21.XI.2005
Malaysia (accession)	12.II.2009
Malta (accession)[1]	12.II.2009
Marshall Islands (accession)	09.V.2008
Mongolia (accession)	28.IX.2011
Montenegro (accession)	29.XI.2011
Morocco (accession)	14.IV.2010
Netherlands (accession)	23.XII.2010
Nigeria (accession)	1.X.2010
Niue (accession)	18.V.2012
Norway (ratification)	25.III.2008
Palau (accession)	28.IX.2011
Panama (accession)	17.II.2009
Poland (accession)	15.XII.2006
Romania (accession)	15.VI.2009
Russian Federation (accession)	24.II.2009
Saint Kitts and Nevis (accession)	21.X.2009
Saint Vincent and the Grenadines (accession)	26.XI.2008

	Date of signature or deposit of instrument
Samoa (accession)	18.V.2004
Serbia (accession)	8.VII.2010
Sierra Leone (accession)	21.XI.2007
Singapore (accession)	31.III.2006
Slovenia (accession)	20.V.2004
Spain (ratification) [1]	10.XII.2003
Syria (accession)	24.IV.2009
Togo (accession)	23.IV.2012
Tonga (accession)	18.IX.2003
Tunisia (accession) [1]	5.IX.2011
Tuvalu (accession)	12.I.2009
United Kingdom (ratification) [1]	29.VI.2006
Vanuatu (accession)	20.VIII.2008
Vietnam (accession)	18.VI.2010

Number of Contracting States: 68.

[1] With a reservation or declaration.

Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988 (SUA 1988)

Done at Rome, 10 March 1988
Entry into force: 1 March 1992.

Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime, 1988 (SUA 1988)

Signée a Rome le 10 Mars 1988
Entrée en vigueur: 1 Mars 1992.

	Date of deposit of instrument	Date of entry into force
Afghanistan (accession)	23.IX.2003	22.XII.2003
Albania (accession)	19.VI.2002	17.IX.2002
Algeria (accession)[1]	11.II.1998	12.V.1998
Andorra, Principality of (accession) [1]	17.VII.2006	15.X.2006
Antigua and Barbuda (accession)	12.X.2009	10.I.2010
Argentina (ratification)	17.VIII.1993	15.XI.1993
Armenia (accession) [1]	8.VI.2005	6.IX.2005
Australia (accession)	19.II.1993	20.V.1993
Austria (ratification)	28.XII.1989	1.III.1992
Azerbaijan (accession) [1]	26.I.2004	25.IV.2004
Bahamas (accession)	25.X.2005	23.I.2006
Bahrain (accession)	21.X.2005	19.I.2006
Bangladesh (accession)	9.VI.2005	7.IX.2005
Barbados (accession)	6.V.1994	4.VIII.1994
Belarus (accession)	4.XII.2002	4.III.2003
Belgium (accession)	11.IV.2005	10.VII.2005
Benin (accession)	31.VIII.2006	29.XI.2006
Bolivia (accession)	13.II.2002	14.V.2002

SUA 1988

		Date of signature or deposit of instrument
Bosnia and Herzegovina (accession)	28.VII.2003	26.X.2003
Botswana (accession)	14.IX.2000	13.XII.2000
Brazil (ratification) [1]	25.X.2005	23.I.2006
Brunei Darussalam (ratification)	4.XII.2003	3.III.2004
Bulgaria (ratification)	8.VII.1999	6.X.1999
Burkina Faso (accession)	15.I.2004	14.IV.2004
Cambodia (accession)	18.VIII.2006	16.XI.2006
Canada (ratification) [2]	18.VI.1993	16.IX.1993
Cape Verde (accession)	3.I.2003	3.IV.2003
Chile (ratification)	22.IV.1994	21.VII.1994
China (ratification) [1, 7]	20.VIII.1991	1.III.1992
Comoros (accession)	6.III.2008	4.VI.2008
Cook Islands (accession)	12.III.2007	10.VI.2007
Costa Rica (ratification)	25.III.2003	23.VI.2003
Côte d'Ivoire (accession)	23.III.2012	21.VI.2012
Croatia (accession)	18.VIII.2005	16.XI.2005
Cuba (accession) [2]	20.XI.2001	18.II.2002
Cyprus (accession)	2.II.2000	2.V.2000
Czech Republic (accession)	10.XII.2004	10.III.2005
Denmark (ratification) [1]	25.VIII.1995	23.XI.1995
Djibouti (accession)	9.VI.2004	7.IX.2004
Dominica (accession)	31.VIII.2001	29.XI.2001
Dominican Republic (accession)	3.VII.2008	1.X.2008
Ecuador (accession)	10.III.2003	8.VI.2003
Egypt (ratification) [1]	8.I.1993	8.IV.1993
El Salvador (accession)	7.XII.2000	7.III.2001
Equatorial Guinea (accession)	15.I.2004	14.IV.2004
Estonia (accession)	15.II.2002	16.V.2002
Finland (ratification)	12.XI.1998	10.II.1999
Fiji (accession)	21.V.2008	19.VIII.2008
France (approval) [1]	2.XII.1991	1.III.1992
Gambia (accession)	1.XI.1991	1.III.1992
Georgia (accession)	11.VIII.2006	9.XI.2006
Germany[3] **(accession)**	6.XI.1990	1.III.1992
Ghana (accession)	1.XI.2002	30.I.2003
Greece (ratification)	11.VI.1993	9.IX.1993
Grenada (accession)	9.I.2002	9.IV.2002
Guatemala (accession)	26.VIII.2009	24.XI.2009
Guinea (accession)	1.II.2005	2.V.2005
Guinea Bissau (accession)	14.X.2008	12.I.2009
Guyana (accession)	30.I.2003	30.IV.2003
Honduras (accession)	17.V.2005	15.VIII.2005
Hungary (ratification)	9.XI.1989	1.III.1992
Iceland (accession)	28.V.2002	26.VIII.2002
India (accession) [1]	15.X.1999	13.I.2000
Iran (Islamic Republic of)(accession) [1]	30.X.2009	28.I.2010
Ireland (accession)	10.IX.2004	9.XII.2004
Israel (ratification) [1]	6.I.2009	6.IV.2009
Italy (ratification)	26.I.1990	1.III.1992
Jamaica (accession) [2]	17.VIII.2005	15.XI.2005
Japan (accession)	24.IV.1998	23.VII.1998

		Date of signature or deposit of instrument
Jordan (accession)	2.VII.2004	30.IX.2004
Kazakhstan (accession)	24.XI.2003	22.II.2004
Kenya (accession)	21.I.2002	21.IV.2002
Kiribati (accession)	17.XI.2005	16.II.2006
Kuwait (accession)	30.VI.2003	28.IX.2003
Latvia (accession)	4.XII.2002	4.III.2003
Lao People's Democratic Republic	20.III.2012	18.VI.2012
Lebanon (accession)	16.XII.1994	16.III.1995
Lesotho (accession)	7.XI.2011	5.II.2012
Liberia (ratification)	5.X.1995	3.I.1996
Libyan Arab Jamahiriya (accession)	8.VIII.2002	6.XI.2002
Liechtenstein (accession)	8.XI.2002	6.II.2003
Lithuania (accession)	30.I.2003	30.IV.2003
Luxembourg (accession)	5.I.2011	5.IV.2011
Macedonia (former Yugoslav Republic of)	7.VIII.2007	2.X.2007
Madagascar (accession)	15.IX.2006	14.XII.2006
Mali (accession)	29.IV.2002	28.VII.2002
Malta (accession)	20.XI.2001	18.II.2002
Marshall Islands (accession)	29.XI.1994	27.II.1995
Mauritania	17.I.2008	16.IV.2008
Mauritius (accession)	3.VIII.2004	1.XI.2004
Mexico (accession) [1]	13.V.1994	11.VIII.1994
Micronesia (accession)	10.II.2003	11.V.2003
Moldova (accession) [1]	11.X.2005	9.I.2006
Monaco (accession)	25.I.2002	25.IV.2002
Mongolia (accession)	22.XI.2005	20.II.2006
Morocco (ratification)	8.I.2002	8.IV.2002
Mozambique (accession)[1]	8.I.2003	8.IV.2003
Myanmar (accession) [1]	19.IX.2003	18.XII.2003
Namibia (accession)	10.VII.2004	18.X.2004
Nauru (accession)	11.VIII.2005	9.XI.2005
Netherlands (acceptance) [5]	5.III.1992	3.VI.1992
New Zealand (ratification)	10.VI.1999	8.IX.1999
Nicaragua (accession)	4.VII.2007	2.X.2007
Niger (accession)	30.VIII.2006	28.XI.2006
Nigeria (ratification)	24.II.2004	24.V.2004
Niue (accession)	22.VI.2009	20.IX.2009
Norway (ratification)	18.IV.1991	1.III.1992
Oman (accession)	24.IX.1990	1.III.1992
Pakistan (accession)	20.IX.2000	19.IX.2000
Palau (accession)	4.XII.2001	4.III.2002
Panama (accession)	3.VII.2002	1.X.2002
Paraguay (accession) [2]	12.XI.2004	10.II.2005
Peru (accession)	19.VII.2001	17.X.2001
Philippines (ratification)	6.I.2004	5.IV.2004
Poland (ratification)	25.VI.1991	1.III.1992
Portugal (accession) [1]	5.I.1996	4.IV.1996
Qatar (accession) [1]	18.IX.2003	17.XII.2003
Republic of Korea (accession)	14.V.2003	12.VIII.2003
Romania (accession)	2.VI.1993	31.VIII.1993
Russian Federation (ratification)	4.V.2001	2.VIII.2001
St. Kitts and Nevis (accession)	17.I.2002	17.IV.2002

SUA 1988

		Date of signature or deposit of instrument
St. Lucia (accession)	20.V.2004	18.VIII.2004
St. Vincent and the Grenadines (accession)	9.X.2001	7.I.2002
Samoa (accession)	18.V.2004	16.VIII.2004
Sao Tome and Principe	5.V.2006	3.VIII.2006
Saudi Arabia (accession) [6]	2.II.2006	3.V.2006
Senegal (accession)	9.VIII.2004	7.XI.2004
Serbia (accession) [8]	–	3.VI.2006
Seychelles (ratification)	24.I.1989	1.III.1992
Singapore (accession)	3.II.2004	3.V.2004
Slovakia (accession)	8.XII.2000	8.III.2001
Slovenia (accession)	18.VII.2003	16.X.2003
South Africa (accession)	8.VII.2005	6.X.2005
Spain (ratification)	7.VII.1989	1.III.1992
Sri Lanka (accession)	4.IX.2000	3.XII.2000
Sudan (accession)	22.V.2000	20.VIII.2000
Swaziland (accession)	17.IV.2003	16.VII.2003
Sweden (ratification)	13.IX.1990	1.III.1992
Switzerland (ratification)	12.III.1993	10.VI.1993
Syrian Arab Republic (accession)	24.III.2003	22.VI.2003
Tajikistan (accession)	12.VIII.2005	10.XI.2005
Togo (accession)	10.III.2003	8.VI.2003
Tonga (accession)	6.XII.2002	6.III.2003
Trinidad and Tobago (accession)	27.VII.1989	1.III.1992
Tunisia (accession)[1]	6.III.1998	4.VI.1998
Turkey (ratification)[1]	6.III.1998	4.VI.1998
Turkmenistan (accession)	8.VI.1999	6.IX.1999
Tuvalu (accession)	2.XII.2005	2.III.2006
Uganda (accession)	11.XI.2003	9.II.2004
Ukraine (ratification)	21.IV.1994	20.VII.1994
United Arab Emirates (accession) [1]	15.IX.2005	14.XII.2005
United Kingdom (ratification) [1, 4]	3.V.1991	1.III.1992
United Republic of Tanzania (accession)	11.V.2005	9.VIII.2005
United States (ratification)	6.XII.1994	6.III.1995
Uruguay (accession)	10.VIII.2001	8.XI.2001
Uzbekistan (accession)	25.IX.2000	24.XII.2000
Vanuatu (accession)	18.II.1999	19.V.1999
Viet Nam (accession)	12.VII.2002	10.X.2002
Yemen (accession)	30.VI.2000	28.IX.2000

Contracting States: 160.

[1] With a reservation, declaration or statement.
[2] With a notification under article 6.
[3] On 3 October 1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded* to the Convention on 14 April 1989.
* With a reservation.
[4] The United Kingdom declared its ratification to be effective also in respect of the Isle of Man (notification received 8 February 1999).
[5] Extended to Aruba from 15 December 2004 the date the notification was received.
[6] With a reservation under articles 11 and 16, paragraph 1
[7] China declared that the Convention would be effective in respect of the Hong Kong Special Administrative Region (HKSAR) with effect from 20 February 2006.
[8] Following the dissolution of the State Union of Serbia and Montenegro on 3 June 2006, all Treaty actions undertaken by Serbia and Montenegro continue to be in force with respect to Republic of Serbia. The Republic of Montenegro has informed that it wishes to succeed to this Convention with effect from the same date, i.e. 3 June 2006.

Protocol for the
suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, 1988

(SUA PROTOCOL 1988)

Done at Rome, 10 March 1988
Entry into force: 1 March 1992.

Protocole pour la
répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental, 1988

(SUA PROTOCOL 1988)

Signée a Rome le 10 Mars 1988
Entrée en vigueur: 1 Mars 1992.

	Date of deposit of instrument	Date of entry into force
Afghanistan (accession)	23.IX.2003	22.XII.2003
Albania (accession)	19.VI.2002	17.IX.2002
Andorra, Principality of (accession)	17.VII.2006	15.X.2006
Antigua and Barbuda (accession)	12.X.2009	10.I.2010
Argentina (ratification)	26.XI.2003	24.II.2004
Armenia (accession)	8.VI.2005	6.IX.2005
Australia (accession)	19.II.1993	20.V.1993
Austria (accession)	28.XII.1989	1.III.1992
Azerbaijan (accession)	26.I.2004	25.IV.2004
Bahamas (accession)	25.X.2005	23.I.2006
Bahrain (accession)	21.X.2005	19.I.2006
Bangladesh (accession)	9.VI.2005	7.IX.2005
Barbados (accession)	6.V.1994	4.VIII.1994
Belarus (accession)	4.XII.2002	4.III.2003
Belgium (accession)	11.IV.2005	10.VII.2005
Benin (accession)	31.VIII.2006	29.XI.2006
Bolivia (accession)	13.II.2002	14.V.2002
Bosnia and Herzegovina (accession)	28.VII.2003	26.X.2003
Botswana (accession)	14.IX.2000	13.XII.2000
Brazil (ratification) [1]	25.X.2005	23.I.2006
Brunei Darussalam (ratification)	4.XII.2003	3.III.2004
Bulgaria (ratification)	8.VII.1999	6.X.1999
Burkina Faso (accession)	14.I.2004	13.IV.2004
Canada (ratification) [1]	18.VI.1993	16.IX.1993
Cambodia (accession)	18.VIII.2006	16.XI.2006
Cape Verde (accession)	3.I.2003	3.IV.2003
Chile (ratification)	22.IV.1994	21.VII.1994
China (ratification) [2, 6]	20.VIII.1991	1.III.1992
Comoros (accession)	6.III.2008	4.VI.2008
Cook Islands (accession)	12.III.2007	10.VI.2007
Costa Rica (ratification)	25.III.2003	23.VI.2003
Côte d'Ivoire (accession)	23.III.2012	21.VI.2012
Croatia (accession)	18.VIII.2005	16.XI.2005
Cuba (accession) [2]	20.XI.2001	18.II.2002
Cyprus (accession)	2.II.2000	2.V.2000
Czech Republic (accession)	10.XII.2004	10.III.2005

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	Date of deposit of instrument	Date of entry into force
Denmark (ratification) [2]	25.VIII.1995	23.XI.1995
Djibouti (accession)	9.VI.2004	7.IX.2004
Dominica (accession)	12.X.2004	10.I.2005
Dominican Republic (accession)	12.VIII.2009	10.XI.2009
Ecuador (accession)	10.III.2003	8.VI.2003
Egypt (ratification) [2]	8.I.1993	8.IV.1993
El Salvador (accession)	7.XII.2000	7.III.2001
Equatorial Guinea (accession)	15.I.2004	14.IV.2004
Estonia (accession)	28.I.2004	27.IV.2004
Fiji (accession)	21.V.2008	19.VIII.2008
Finland (accession)	28.IV.2000	27.VII.2000
France (approval) [2]	2.XII.1991	1.III.1992
Georgia (accession)	11.VIII.2006	9.XI.2006
Germany (accession) [3]	6.XI.1990	1.III.1992
Ghana (accession)	1.XI.2002	30.I.2003
Greece (ratification)	11.VI.1993	9.IX.1993
Grenada (accession)	9.I.2002	9.IV.2002
Guatemala (accession)	26.VIII.2009	24.XI.2009
Guinea (accession)	1.II.2005	2.V.2005
Guinea Bissau (accession)	14.X.2008	12.I.2009
Guyana (accession)	30.I.2003	30.IV.2003
Honduras (accession)	17.V.2005	15.VIII.2005
Hungary (ratification)	9.XI.1989	1.III.1992
Iceland (accession)	28.V.2002	26.VIII.2002
India (accession) [2]	15.X.1999	13.I.2000
Iran (Islamic Republic of) (accession) [1]	30.X.2009	28.I.2010
Ireland (accession)	10.IX.2004	9.XII.2004
Israel (ratification) [1]	6.I.2009	6.IV.2009
Italy (ratification)	26.I.1990	1.III.1992
Jamaica (accession) [1]	19.VIII.2005	17.XI.2005
Japan (accession)	24.IV.1998	23.VII.1998
Jordan (accession)	2.VII.2004	30.IX.2004
Kazakhstan (accession)	24.XI.2003	22.II.2004
Kenya (accession)	21.I.2002	21.IV.2002
Kiribati (accession)	17.XI.2005	16.II.2006
Kuwait (accession)	30.VI.2003	28.IX.2003
Lao People's Democratic Republic	20.III.2012	18.VI.2012
Latvia (accession)	4.XII.2002	4.III.2003
Lebanon (accession)	16.XII.1994	16.III.1995
Liberia (ratification)	5.X.1995	3.I.1996
Libyan Arab Jamahiriya (accession)	8.VIII.2002	6.XI.2002
Liechtenstein (accession)	8.XI.2002	6.II.2003
Lithuania (accession)	30.I.2003	30.IV.2003
Macedonia (former Yugoslav Republic of)	7.VIII.2007	5.XI.2007
Madagascar (accession)	15.IX.2006	14.XII.2006
Mali (accession)	29.IV.2002	28.VII.2002
Malta (accession)	20.XI.2001	18.II.2002
Marshall Islands (accession)	16.X.1995	14.I.1996
Mauritania	17.I.2008	16.IV.2008

	Date of deposit of instrument	Date of entry into force
Mauritius (accession)	3.VIII.2004	1.XI.2004
Mexico (accession) [1]	13.V.1994	11.VIII.1994
Moldova (accession) [2]	11.X.2005	9.I.2006
Monaco (accession)	25.I.2002	25.IV.2002
Mongolia (accession)	22.XI.2005	20.II.2006
Montenegro (succession) [7]	---	3.VI.2006
Morocco (ratification)	8.I.2002	8.IV.2002
Mozambique (accession)	8.I.2003	8.IV.2003
Myanmar (accession)	19.IX.2003	18.XII.2003
Namibia (accession)	7.IX.2005	6.XII.2005
Nauru (accession)	11.VIII.2005	9.XI.2005
Netherlands (acceptance) [2, 5]	5.III.1992	3.VI.1992
New Zealand (ratification)	10.VI.1999	8.IX.1999
Nicaragua (accession)	4.VII.2007	2.X.2007
Niger (accession)	30.VIII.2006	28.XI.2006
Niue (accession)	22.VI.2009	20.IX.2009
Norway (ratification)	18.IV.1991	1.III.1992
Oman (accession)	24.IX.1990	1.III.1992
Pakistan (accession)	20.IX.2000	10.XII.2000
Palau (accession)	4.XII.2001	4.III.2002
Panama (accession)	3.VII.2002	1.X.2002
Paraguay (accession) [1]	12.XI.2004	10.II.2005
Peru (accession)	19.VII.2001	17.X.2001
Philippines (ratification)	6.I.2004	5.IV.2004
Poland (ratification)	25.VI.1991	1.III.1992
Portugal (accession)	5.I.1996	4.IV.1996
Qatar (accession)	18.IX.2003	17.XII.2003
Republic of Korea (accession)	10.VI.2003	8.IX.2003
Romania (accession)	2.VI.1993	31.VIII.1993
Russian Federation (ratification)	4.V.2001	2.VIII.2001
St. Lucia (accession)	20.V.2004	18.VIII.2004
St. Vincent and the Grenadines (accession)	9.X.2001	7.I.2002
Sao Tome and Principe	5.V.2006	3.VIII.2006
Saudi Arabia (accession)	2.II.2006	3.V.2006
Senegal (accession)	9.VIII.2004	7.XI.2004
Serbia (succession) [7]	---	3.VI.2006
Seychelles (ratification)	24.I.1989	1.III.1992
Slovakia (accession)	8.XII.2000	8.III.2001
Slovenia (accession)	18.VII.2003	16.X.2003
South Africa (accession)	8.VII.2005	6.X.2005
Spain (ratification)	7.VII.1989	1.III.1992
Sudan(accession)	22.V.2000	20.VIII.2000
Swaziland (accession)	17.IV.2003	16.VII.2003
Sweden (ratification)	13.IX.1990	1.III.1992
Switzerland (ratification)	12.III.1993	10.VI.1993
Syrian Arab Republic (accession)	24.III.2003	22.VI.2003

	Date of deposit of instrument	Date of entry into force
Tajikistan (accession)	12.VIII.2005	10.XI.2005
Togo (accession)	10.III.2003	8.VI.2003
Tonga (accession)	6.XII.2002	6.III.2003
Trinidad and Tobago (accession)	27.VII.1989	1.III.1992
Tunisia (accession)	6.III.1998	4.VI.1998
Turkey (ratification)[2]	6.III.1998	4.VI.1998
Turkmenistan (accession)	8.VI.1999	6.IX.1999
Tuvalu (accession)	2.XII.2005	2.III.2006
Ukraine (ratification)	21.IV.1994	20.VII.1994
United Arab Emirates (accession) [2]	15.IX.2005	14.XII.2005
United Kingdom (ratification) [2, 4]	3.V.1991	1.III.1992
United States (ratification)	6.XII.1994	6.III.1995
Uruguay (accession)	10.VIII.2001	8.XI.2001
Uzbekistan (accession)	25.IX.2000	24.XII.2000
Vanuatu (accession)	18.II.1999	19.V.1999
Viet Nam (accession)	12.VII.2002	10.X.2002
Yemen (accession)	30.VI.2000	28.IX.2000

Number of Contracting States: 148

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[1] With a notification under article 3.

[2] With a reservation, declaration or statement.

[3] On 3 October 1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded* to the Convention on 14 April 1989.

* With a reservation.

[4] The United Kingdom declared its ratification to be effective also in respect of the Isle of Man. (notification received 8 February 1999).

[5] Applies to Aruba with effect from 17 January 2006.

[6] China declared that the Protocol would be effective in respect of the Hong Kong Special Administrative Region (HKSAR) with effect from 20 February 2006.

[7] Following the dissolution of the State Union of Serbia and Montenegro on 3 June 2006, all Treaty actions undertaken by Serbia and Montenegro continue to be in force with respect to Republic of Serbia. The Republic of Montenegro has informed that it wishes to succeed to this Protocol with effect from the same date, i.e. 3 June 2006.

Protocol of 2005 to the
Convention for the suppression of unlawful acts against the safety of maritime navigation

(SUA 2005)

Done at London, 14 October 2005
Entry into force: 28 July 2010

Protocole de 2005 à la
Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime

(SUA 2005)

Signée a Londres le 10 Octobre 1988
Entrée en vigueur: 28 Juillet 2010

	Date of signature of deposit of instrument
Algeria (accession)	25.I.2011
Austria (ratification)	18.VI.2010
Bulgaria (ratification)	7.X.2010
Côte d'Ivoire (accession)	23.III.2012
Dominican Republic (accession)	9.III.2010
Estonia (ratification)	16.V.2008
Fiji (accession)	21.V.2008
Latvia (accession)	16.XI.2009
Liechtenstein (accession)	28.VIII.2009
Marshall Islands (accession)	9.V.2008
Nauru (accession)	29.IV.2010
Netherlands[1] (acceptance)	1.III.2011
Palau (accession)	29.IX.2011
Panama (accession)	24.II.2011
Saint Lucia (accession)	8.XI.2012
Saint Vincent and Grenadines (accession)	5.VII.2010
Spain (ratification)	16.IV.2008
Switzerland (accession)	15.X.2008
Vanuatu (accession)	20.VIII.2008

Number of Contracting States: 19

[1] Acceptance for the European part of the Netherlands and Caribbean part of the Netherlands (the latter comprising Bonaire, Saint Eustatius and Saba) only.

STATUS OF THE RATIFICATIONS OF AND ACCESSIONS TO UNITED NATIONS AND UNITED NATIONS/IMO CONVENTIONS IN THE FIELD OF PUBLIC AND PRIVATE MARITIME LAW

ETAT DES RATIFICATIONS ET ADHESIONS AUX CONVENTIONS DES NATIONS UNIES ET AUX CONVENTIONS DES NATIONS UNIES/OMI EN MATIERE DE DROIT MARITIME PUBLIC ET DE DROIT MARITIME PRIVE

r	=	ratification
a	=	accession
A	=	acceptance
AA	=	approval
S	=	definitive signature

Notes de l'editeur / Editor's notes:

- Les dates mentionnées sont les dates du dépôt des instruments.
- The dates mentioned are the dates of the deposit of instruments.

United Nations Convention on a

Code of Conduct for liner conferences

Geneva, 6 April 1974
Entered into force: 6 October 1983

Convention des Nations Unies sur un

Code de Conduite des conférences maritimes

Genève, 6 avril 1974
Entrée en vigueur: 6 octobre 1983

Algeria	**(r)**	12.XII.1986
Bangladesh	**(a)**	24.VII.1975
Barbados	**(a)**	29.X.1980
Belgium	**(r)**	30.IX.1987
Benin	**(a)**	27.X.1975
Bulgaria	**(a)**	12.VII .1979
Burkina Faso	**(a)**	30.III.1989
Cameroon	**(a)**	15.VI.1976
Cape Verde	**(a)**	13.I.1978
Central African Republic	**(a)**	13.V.1977
Chile	**(S)**	25.VI.1975
China [1]	**(a)**	23.IX.1980
Congo	**(a)**	26.VII.1982
Costa Rica	**(r)**	27.X.1978
Croatia	**(r)**	8.X.1991
Cuba	**(a)**	23.VII.1976
Czech Republic	**(AA)**	4.VI.1979
Denmark (except Greenland and the Faroe Islands)	**(a)**	28.VI.1985
Egypt	**(a)**	25.I.1979
Ethiopia	**(r)**	1.IX.1978
Finland	**(a)**	31.XII.1985
France	**(AA)**	4.X.1985
Gabon	**(r)**	5.VI.1978
Gambia	**(S)**	30.VI.1975
Germany	**(r)**	6.IV.1983
Ghana	**(r)**	24.VI.1975
Guatemala	**(r)**	3.III.1976
Guinea	**(a)**	l9.VIII.1980
Guyana	**(a)**	7.I.1980
Honduras	**(a)**	12.VI.1979
India	**(r)**	14.II.1978
Indonesia	**(r)**	11.I.1977
Iraq	**(a)**	25.X.1978

[1] Applied to the Hong Kong Special Administrative Region with effect from 1.VII.1997.

Code of conduct 1974 *Code de conduite 1974*

Italy	**(a)**	30.V.1989
Ivory Coast	**(r)**	17.II.1977
Jamaica	**(a)**	20.VII.1982
Jordan	**(a)**	17.III.1980
Kenya	**(a)**	27.II.1978
Korea, Republic of	**(a)**	ll.V.1979
Kuwait	**(a)**	31.III.1986
Lebanon	**(a)**	30.IV.1982
Madagascar	**(a)**	23.XII.1977
Malaysia	**(a)**	27.VIII.1982
Mali	**(a)**	15.III.1978
Mauritania	**(a)**	21.III.1988
Mauritius	**(a)**	16.IX.1980
Mexico	**(a)**	6.V.1976
Morocco	**(a)**	l l.II.1980
Mozambique	**(a)**	21.IX.1990
Netherlands (for the Kingdom in Europe only)	**(a)**	6.IV.1983
Niger	**(r)**	13.I.1976
Nigeria	**(a)**	10.IX.1975
Norway	**(a)**	28.VI.1985
Pakistan	**(S)**	27.VI.1975
Peru	**(a)**	21.XI.1978
Philippines	**(r)**	2.III.1976
Portugal	**(a)**	13.VI.1990
Qatar	**(a)**	31.X.1994
Romania	**(a)**	7.I.1982
Russian Federation	**(A)**	28.VI.1979
Saudi Arabia	**(a)**	24.V.1985
Serbia and Montenegro	**(d)**	12.III.2001
Senegal	**(r)**	20.V.1977
Sierra Leone	**(a)**	9.VII.1979
Slovakia	**(AA)**	4.VI.1979
Somalia	**(a)**	14.XI.1988
Spain	**(a)**	3.II.1994
Sri Lanka	**(S)**	30.VI.1975
Sudan	**(a)**	16.III.1978
Sweden	**(a)**	28.VI.1985
Togo	**(r)**	12.I.1978
Trinidad and Tobago	**(a)**	3.III.1983
Tunisia	**(a)**	15.III.1979
United Kingdom	**(a)**	28.VI.1985
United Republic of Tanzania	**(a)**	3.XI.1975
Uruguay	**(a)**	9.VII.1979
Venezuela	**(S)**	30.VI.1975
Zambia	**(a)**	8.IV.1988

United Nations Convention on the

Carriage of goods by sea

Hamburg, 31 March 1978

"HAMBURG RULES"

Entered into force:
1 November 1992

Convention des Nations Unies sur le

Transport de marchandises par mer

Hambourg 31 mars 1978

"REGLES DE HAMBOURG"

Entrée en vigueur:
1 novembre 1992

Albania	**(a)**	20.VII.2006
Austria	**(r)**	29.VII.1993
Barbados	**(a)**	2.II.1981
Botswana	**(a)**	16.II.1988
Burkina Faso	**(a)**	14.VIII.1989
Burundi	**(a)**	4.IX.1998
Cameroon	**(a)**	21.IX.1993
Chile	**(r)**	9.VII.1982
Czech Republic [1]	**(r)**	23.VI.1995
Dominican Republic	**(a)**	28.IX.2007
Egypt	**(r)**	23.IV.1979
Gambia	**(r)**	7.II.1996
Georgia	**(a)**	21.III.1996
Guinea	**(r)**	23.I.1991
Hungary	**(r)**	5.VII.1984
Jordan	**(a)**	10.V.2001
Kazakhstan	**(a)**	18.VI.2008
Kenya	**(a)**	31.VII.1989
Lebanon	**(a)**	4.IV.1983
Lesotho	**(a)**	26.X.1989
Liberia	**(a)**	16.IX.2005
Malawi	**(r)**	18.III.1991
Morocco	**(a)**	12.VI.1981
Nigeria	**(a)**	7.XI.1988
Paraguay	**(a)**	19.VII.2005
Romania	**(a)**	7.I.1982
Saint Vincent and the Grenadines	**(a)**	12.IX.2000
Senegal	**(r)**	17.III.1986
Sierra Leone	**(r)**	7.X.1988
Syrian Arab Republic	**(a)**	16.X.2002
Tanzania, United Republic of	**(a)**	24.VII.1979
Tunisia	**(a)**	15.IX.1980
Uganda	**(a)**	6.VII.1979
Zambia	**(a)**	7.X.1991

[1] The Convention was signed on 6 march 1979 by the former Czechoslovakia. Respectively on 28 May 1993 and on 2 Jun 1993 the Slovak Republic and the Czech Republic deposited instruments of succession. The Czech Republic then deposited instrument of ratification on 23 Jun 1995.

United Nations Convention on the

International multimodal transport of goods

Geneva, 24 May 1980
Not yet in force.

Convention des Nations Unies sur le

Transport multimodal international de marchandises

Genève 24 mai 1980
Pas encore en vigueur.

Burundi	**(a)**	4.IX.1998
Chile	**(r)**	7.IV.1982
Georgia	**(a)**	21.III.1996
Lebanon	**(a)**	1.VI.2001
Liberia	**(a)**	16.IX.2005
Malawi	**(a)**	2.II.1984
Mexico	**(r)**	11.II.1982
Morocco	**(r)**	21.I.1993
Rwanda	**(a)**	15.IX.1987
Senegal	**(r)**	25.X.1984
Zambia	**(a)**	7.X.1991

United Nations Convention on the Law of the Sea (UNCLOS 1982)

Montego Bay 10 December 1982
Entered into force:
16 November 1994

Convention des Nations Unies sur les Droit de la Mer

Montego Bay 10 decembre 1982
Entrée en vigueur:
16 Novembre 1994

Albania	23.VI.2003
Algeria	11.VI.1996
Angola	5.XII.1990
Antigua and Barbuda	2.II.1989
Argentina	1.XII.1995
Armenia	9.XII.2002
Australia	5.X.1994
Austria	14.VII.1995
Bahamas	29.VII.1983
Bahrain	30.V.1985
Bangladesh	27.VII.2001
Barbados	12.X.1993
Belgium	13.XI.1998
Belize	13.VIII.1983
Benin	16.X.1997
Bolivia	28.IV.1995
Bosnia and Herzegovina	12.I.1994
Botswana	2.V.1990
Brazil	22.XII.1988
Brunei Darusssalam	5.XI.1996
Bulgaria	15.V.1996

Burkina Faso	25.I.2005
Cameroon	19.XI.1985
Canada	7.XI.2003
Cape Verde	10.VIII.1987
Chile	25.VIII.1997
China	7.VI.1996
Comoros	21.VI.1994
Congo, Democratic Republic of	17.II.1989
Cook Islands	15.II.1995
Costa Rica	21.IX.1992
Côte d'Ivoire	28.VII.1995
Croatia	5.IV.1995
Cuba	15.VIII.1984
Cyprus	12.XII.1988
Czech Republic	21.VI.1996
Denmark	16.XI.2004
Djibouti	8.X.1991
Dominica	24.X.1991
Egypt	26.VIII.1983
Equatorial Guinea	21.VII.1997
Estonia	26.VIII.2005
European Community	1.IV.1998
Fiji	10.XII.1982
Finland	21.VI.1996
France	11.IV.1996
Gabon	11.III.1988
Gambia	22.V.1984
Georgia	21.III.1996
Germany	14.X.1994
Ghana	7.VI.1983
Greece	21.VII.1995
Grenada	25.IV.1991
Guatemala	11.II.1997
Guinea	6.IX.1985
Guinea-Bissau	25.VIII.1986
Guyana	16.XI.1993
Haiti	31.VII.1996
Honduras	5.X.1993
Hungary	5.II.2002
Iceland	21.VI.1985
India	29.VI.1995
Indonesia	3.II.1986
Iraq	30.VII.1985
Ireland	21.VI.1996
Italy	13.I.1995
Jamaica	21.III.1983
Japan	20.VI.1996
Jordan	27.XI.1995
Kenya	2.III.1989
Kiribati	24.II.2003
Korea, Republic of	29.I.1996
Kuwait	2.V.1986

Lao People's Democratic Republic	5.VI.1998
Latvia	23.XII.2004
Lebanon	5.I.1995
Lituania	12.XI.2003
Luxembourg	5.X.2000
Madagascar	22.VIII.2001
Malawi	28.IX.2010
Malaysia	14.X.1996
Maldives	7.IX.2000
Mali	16.VII.1985
Malta	20.V.1993
Marshall Islands	9.VIII.1991
Mauritania	17.VII.1996
Mauritius	4.XI.1994
Mexico	18.III.1983
Micronesia, Federated States of	29.IV.1991
Monaco	20.III.1996
Mongolia	13.VIII.1996
Mozambique	13.III.1997
Myanmar	21.V.1996
Namibia, United Nations Council for	18.IV.1983
Nauru	23.I.1996
Nepal	2.XI.1998
Netherlands	28.VI.1996
New Zeland	19.VII.1996
Nicaragua	3.V.2000
Nigeria	14.VIII.1986
Norway	24.VI.1996
Oman	17.VIII.1989
Pakistan	26.II.1997
Palau	30.IX.1996
Panama	1.VII.1996
Papua New Guinea	14.I.1997
Paraguay	26.IX.1986
Philippines	8.V.1984
Poland	13.XI.1998
Portugal	3.XI.1997
Qatar	7.XII.2002
Romania	17.XII.1996
Russian Federation	12.III.1997
Samoa	14.VIII.1995
St. Kitts and Nevis	7.I.1993
St. Lucia	27. III.1985
St. Vincent and the Grenadines	1.X.1993
Sao Tomé and Principe	3.XI.1987
Saudi Arabia	24.IV.1996
Senegal	25.X.1984
Serbia and Montenegro	12.III.2001
Seychelles	16.IX.1991
Sierra Leone	12.XII.1994
Singapore	17.XI.1994
Slovakia	8.V.1996

Slovenia	16.VI.1995
Solomon Islands	23.VI.1997
Somalia	24.VII.1989
South Africa	23.XII.1997
Spain	15.I.1997
Sri Lanka	19.VII.1994
Sudan	23.I.1985
Suriname	9.VII.1998
Swaziland	24.IX.2012
Sweden	25.VI.1996
Switzerland	1.V.2009
Tanzania, United Republic of	30.IX.1985
Thailand	15.V.2011
The Former Yugoslav Republic of Macedonia	19.VIII.1994
Togo	16.IV.1985
Tonga	2.VIII.1995
Trinidad and Tobago	25.IV.1986
Tunisia	24.IV.1985
Tuvalu	9.XII.2002
Uganda	9.XI.1990
Ukraine	26.VII.1999
United Kingdom	25.VII.1997
Uruguay	10.XII.1992
Vanautu	10.VIII.1999
Viet Nam	25.VII.1994
Yemen, Democratic Republic of	21.VII.1987
Zambia	7.III.1983
Zimbabwe	24.II.1993

United Nations Convention on Conditions for Registration of ships

Geneva, 7 February 1986
Not yet in force.

Convention des Nations Unies sur les Conditions d' Immatriculation des navires

Genève, 7 février 1986
Pas encore entrée en vigueur.

Albania	**(a)**	4.X.2004
Bulgaria	**(a)**	27.XII.1996
Egypt	**(r)**	9.I.1992
Georgia	**(a)**	7.VIII.1995
Ghana	**(a)**	29.VIII.1990
Haiti	**(a)**	17.V.1989
Hungary	**(a)**	23.I.1989
Iraq	**(a)**	1.II.1989
Ivory Coast	**(r)**	28.X.1987
Liberia	**(a)**	16.IX.2005
Libyan Arab Jamahiriya	**(r)**	28.II.1989
Mexico	**(r)**	21.I.1988
Morocco	**(a)**	19.IX.2012
Oman	**(a)**	18.X.1990
Syrian Arab Republic	**(a)**	29.IX.2004

United Nations Convention on
the Liability of operators of transport terminals in the international trade

Done at Vienna 19 April 1991
Not yet in force.

Convention des Nations Unies sur
la Responsabilité des exploitants de terminaux transport dans le commerce international

Signée à Vienne 19 avril 1991
Pas encore entrée en vigueur.

Gabon	**(a)**	15.XII.2004
Georgia	**(a)**	21.III.1996
Egypt	**(a)**	6.IV.1999
Paraguay	**(a)**	19.VII.2005

International Convention on
Maritime liens and mortgages, 1993

Done at Geneva, 6 May 1993
Entered into force:
5 September 2004

Convention Internationale de
1993 su les Privilèges et hypothèques maritimes

Signée à Genève, le 6 mai 1993
Entrée en vigueur:
5 septembre 2004

Albania	**(a)**	9.VIII.2010
Benin	**(a)**	3.III.2010
Ecuador	**(a)**	16.III.2004
Estonia	**(a)**	7.II.2003
Lithuania	**(a)**	8.II.2008
Monaco	**(a)**	28.III.1995
Nigeria	**(a)**	5.III.2004
Peru	**(a)**	23.III.2007
Russian Federation	**(a)**	4.III.1999
Saint Kitts and Nevis	**(a)**	15.VI.2010
Saint Vincent and the Grenadines	**(a)**	11.III.1997
Serbia	**(a)**	23.XII.2011
Spain	**(a)**	7.VI.2002
Syrian Arab Republic	**(a)**	8.X.2003
Tunisia	**(r)**	2.II.1995
Ukraine	**(a)**	27.II.2003
Vanuatu	**(a)**	10.VIII.1999

International Convention on
Arrest of Ships, 1999

Will enter into force on
14 September 2011

Convention Internationale de
1999 sur la saisie conservatoire des navires

Entrera en vigueur
le 14 Septembre 2011

Albania	**(a)**	14.III.2011
Algeria	**(a)**	7.V.2004
Benin	**(a)**	3.III.2010
Bulgaria	**(r)**	21.II.2001
Ecuador	**(r)**	15.X.2010
Estonia	**(a)**	11.V.2001
Latvia	**(a)**	7.XII.2001
Liberia	**(a)**	16.IX.2005
Spain [1]	**(a)**	7.VI.2002
Syrian Arab Republic [2]	**(a)**	16.X.2002

[1] At the time of its accession, the Kingdom of Spain, in accordance with article 10, paragraph 1 (b), reserves the right to exclude the application of this Convention in the case of ships not flying the flag of a State party.

[2] The accession of the Syrian Arab Republic to this Convention shall not in any way be construed to mean recognition of Israel and shall not lead to entry with it into any of the transactions regulated by the provisions of the Convention.

STATUS OF THE RATIFICATIONS OF UNESCO CONVENTIONS

UNESCO Convention on the
Protection of the Underwater Cultural Heritage

Done at Paris 2 November 2001*
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	Date of deposit of instrument
Albania (ratification)	19.III.2009
Argentina (ratification)	12.VII.2010
Barbados (acceptance)	2.X.2008
Benin (ratification)	4.VIII.2011
Bosnia and Herzegovina (ratification)	22.IV.2009

	Date of deposit of instrument
Bulgaria (ratification)	06.X.2003
Cambodia (ratification)	24.XI.2007
Congo, Democratic Republic of (ratification)	28.IX.2010
Croatia (ratification)	01.XII.2004
Cuba (ratification)	26.V.2008
Ecuador (ratification)	01.XII.2006
Gabon (acceptance)	1.II.2010
Grenada (ratification)	15.I.2009
Haiti (ratification)	9.XI.2009
Honduras (ratification)	23.VII.2010
Iran (Islamic Republic of) (ratification)	16.VI.2009
Italy (ratification)	8.I.2010
Jamaica (ratification)	9.VIII.2011
Jordan (ratification)	2.XII.2009
Lebanon (acceptance)	08.I.2007
Libyan Arab Jamahiriya (ratification)	23.VI.2005
Lithuania (ratification)	12.VI.2006
Mexico (ratification)	05.VIII.2006
Montenegro (ratification)	18.VII.2008
Morocco (ratification)	20.VI.2011
Namibia (ratification)	9.III.2011
Nigeria (ratification)	21.X.2005
Palestine (ratification)	8.XII.2011
Panama (ratification)	20.V.2003
Paraguay (ratification)	07.IX.2006
Portugal (ratification)	21.IX.2006
Romania (acceptance)	31.VII.2007
Saint Kitts and Nevis (ratification)	3.XII.2009
Saint Lucia (ratification)	01.II.2007
Saint Vincent and the Grenadines (ratification)	8.XI.2010
Slovakia (ratification)	11.III.2009
Slovenia (ratification)	18.IX.2008
Spain (ratification)	06.VI.2005
Trinidad and Tobago (ratification)	27.VII.2010
Tunisia (ratification)	15.I.2009
Ukraine (ratification)	27.XII.2006

* In accordance with its Article 27, this Convention shall enter into force on 2 January 2009 for those States that have deposited their respective instruments of ratification, acceptance, approval or accession on or before 2 October 2008. It shall enter into force for any other State three months after the deposit by that State of its instrument of ratification, acceptance, approval or accession.

STATUS OF THE RATIFICATIONS OF AND ACCESSIONS TO UNIDROIT CONVENTIONS IN THE FIELD OF PRIVATE MARITIME LAW

ETAT DES RATIFICATIONS ET ADHESIONS AUX CONVENTIONS D'UNIDROIT EN MATIERE DE DROIT MARITIME PRIVE

Unidroit Convention on
International financial leasing 1988

Done at Ottawa 28 May 1988
Entered into force.
1 May 1995

Convention de Unidroit sur
le Creditbail international 1988

Signée à Ottawa 28 mai 1988
Entré en vigueur:
1 Mai 1995

Belarus	**(a)**	18.VIII.1998
France	**(r)**	23.IX.1991
Hungary	**(a)**	7.V.1996
Italy	**(r)**	29.XI.1993
Latvia	**(a)**	6.VIII.1997
Nigeria	**(r)**	25.X.1994
Panama	**(r)**	26.III.1997
Russian Federation	**(a)**	3.VI.1998
Ukraine	**(a)**	5.XII.2006
Uzbekistan, Republic of	**(a)**	6.VII.2000

CONFERENCES OF THE COMITE MARITIME INTERNATIONAL

I. BRUSSELS - 1897
President: Mr. Auguste BEERNAERT.
Subjects:
Organization of the International Maritime Committee - Collision - Shipowners' Liability.

II. ANTWERP - 1898
President: Mr. Auguste BEERNAERT.
Subjects:
Liability of Owners of sea-going vessels.

III. LONDON - 1899
President: Sir Walter PHILLIMORE.
Subjects:
Collisions in which both ships are to blame - Shipowners' liability.

IV. PARIS - 1900
President: Mr. LYON-CAEN.
Subjects:
Assistance, salvage and duty to tender assistance - Jurisdiction in collision matters.

V. HAMBURG - 1902
President: Dr. Friedrich SIEVEKING.
Subjects:
International Code on Collision and Salvage at Sea - Jurisdiction in collision matters - Conflict of laws as to owner-ship of vessels.

VI. AMSTERDAM - 1904
President: Mr. E.N. RAHUSEN.
Subjects:
Conflicts of law in the matter of Mortgages and Liens on ships. - Jurisdiction in collision matters - Limitation of Shipowners' Liability.

VII. LIVERPOOL - 1905
President: Sir William R. KENNEDY.
Subjects:
Limitation of Shipowners' Liability - Conflict of Laws as to Maritime Mortgages and Liens - Brussels Diplomatic Conference.

VIII. VENICE - 1907
President: Mr. Alberto MARGHIERI.
Subjects:
Limitation of Shipowners' Liability - Maritime Mortgages and Liens - Conflict of law as to Freight.

IX. BREMEN - 1909
President: Dr. Friedrich SIEVEKING.
Subjects:
Conflict of laws as to Freight - Compensation in respect of personal injuries - Publication of Maritime Mortgages and Liens.

X. PARIS - 1911
President: Mr. Paul GOVARE.
Subjects:
Limitation of Shipowners' Liability in the event of loss of life or personal injury - Freight.

XI. COPENHAGEN - 1913
President: Dr. J.H. KOCH.
Subjects:
London declaration 1909 - Safety of Navigation - International Code of Affreightment - Insurance of enemy property.

XII. ANTWERP - 1921
President: Mr. Louis FRANCK.

Subjects:
International Conventions relating to Collision and Salvage at sea. - Limitation of Shipowners' Liability - Maritime Mortgages and Liens - Code of Affreightment - Exonerating clauses.

XIII LONDON - 1922
President: Sir Henry DUKE.
Subjects:
Immunity of State-owned ships - Maritime Mortgage and Liens. - Exonerating clauses in Bills of lading.

XIV. GOTHENBURG - 1923
President: Mr. Efiel LÖFGREN.
Subjects:
Compulsory insurance of passengers - Immunity of State owned ships - International Code of Affreightment - International Convention on Bills of Lading.

XV. GENOA - 1925
President: Dr. Francesco BERLINGIERI.
Subjects: Compulsory Insurance of passengers - Immunity of State owned ships - International Code of Affreightment - Maritime Mortgages and Liens.

XVI. AMSTERDAM - 1927
President: Mr. B.C.J. LODER.
Subjects:
Compulsory insurance of passengers - Letters of indemnity - Ratification of the Brussels Conventions.

XVII. ANTWERP - 1930
President: Mr. Louis FRANCK.
Subjects:
Ratification of the Brussels Conventions - Compulsory insurance of passengers - Jurisdiction and penal sanctions in matters of collision at sea.

XVIII. OSLO - 1933
President: Mr. Edvin ALTEN.
Subjects:
Ratification of the Brussels Conventions - Civil and penal jurisdiction in matters of collision on the high seas - Provisional arrest of ships - Limitation of Shipowners' Liability.

XIX. PARIS - 1937
President: Mr. Georges RIPERT.
Subjects:
Ratification of the Brussels Conventions - Civil and penal jurisdiction in the event of collision at sea - Arrest of ships - Commentary on the Brussels Conventions - Assistance and Salvage of and by Aircraft at sea.

XX. ANTWERP - 1947
President: Mr. Albert LILAR.
Subjects:
Ratification of the Brussels Conventions, more especially of the Convention on Immunity of State-owned ships - Revision of the Convention on Limitation of the Liability of Owners of sea-going vessels and of the Convention on Bills of Lading - Examination of the three draft conventions adopted at the Paris Conference 1937 - Assistance and Salvage of and by Aircraft at sea - York and Antwerp Rules; rate of interest.

XXI. AMSTERDAM - 1948
President: Prof. J. OFFERHAUS
Subjects:
Ratification of the Brussels International Convention - Revision of the York-Antwerp Rules 1924 - Limitation of Shipowners' Liability (Gold Clauses) - Combined Through Bills of Lading - Revision of the draft Convention on arrest of ships - Draft of creation of an International Court for Navigation by Sea and by Air.

XXII. NAPLES - 1951
President: Mr. Amedeo GIANNINI.
Subjects:
Brussels International Conventions - Draft convention relating to Provisional Arrest of Ships - Limitation of the liability of the Owners of Sea-going Vessels and Bills of Lading (Revision of the Gold clauses) - Revision of the Conventions of Maritime Hypothèques

and Mortgages - Liability of Carriers by Sea towards Passengers - Penal Jurisdiction in matters of collision at Sea.

XXIII. MADRID - 1955
President: Mr. Albert LILAR.
Subjects:
Limitation of Shipowners' Liability - Liability of Sea Carriers towards passengers - Stowaways - Marginal clauses and letters of indemnity.

XXIV. RIJEKA - 1959
President: Mr. Albert LILAR
Subjects:
Liability of operators of nuclear ships - Revision of Article X of the International Convention for the Unification of certain Rules of law relating to Bills of Lading - Letters of Indemnity and Marginal clauses. Revision of Article XIV of the International Convention for the Unification of certain rules of Law relating to assistance and salvage at sea - International Statute of Ships in Foreign ports - Registry of operations of ships.

XXV. ATHENS - 1962
President: Mr. Albert LILAR
Subjects:
Damages in Matters of Collision - Letters of Indemnity - International Statute of Ships in Foreign Ports - Registry of Ships - Coordination of the Convention of Limitation and on Mortgages - Demurrage and Despatch Money - Liability of Carriers of Luggage.

XXVI. STOCKHOLM - 1963
President: Mr. Albert LILAR
Subjects:
Bills of Lading - Passenger Luggage - Ships under construction.

XXVII. NEW YORK - 1965
President: Mr. Albert LILAR
Subjects:
Revision of the Convention on Maritime Liens and Mortgages.

XXVIII. TOKYO - 1969
President: Mr. Albert LILAR
Subjects:
"Torrey Canyon" - Combined Transports - Coordination of International Convention relating to Carriage by Sea of Passengers and their Luggage.

XXIX. ANTWERP - 1972
President: Mr. Albert LILAR
Subjects:
Revision of the Constitution of the International Maritime Committee.

XXX. HAMBURG - 1974
President: Mr. Albert LILAR
Subjects:
Revisions of the York/Antwerp Rules 1950 - Limitation of the Liability of the Owners of Seagoing vessels - The Hague Rules.

XXXI. RIO DE JANEIRO - 1977
President: Prof. Francesco BERLINGIERI
Subjects:
Draft Convention on Jurisdiction, Choice of law and Recognition and enforcement of Judgements in Collision matters. Draft Convention on Off-Shore Mobile Craft.

XXXII MONTREAL - 1981
President: Prof. Francesco BERLINGIERI
Subjects:
Convention for the unification of certain rules of law relating to assistance and salvage at sea - Carriage of hazardous and noxious substances by sea.

XXXIII. LISBON- 1985
President: Prof. Francesco BERLINGIERI
Subjects:
Convention on Maritime Liens and Mortgages - Convention on Arrest of Ships.

XXXIV. PARIS - 1990
President: Prof. Francesco BERLINGIERI
Subjects:
Uniformity of the Law of Carriage of Goods by Sea in the 1990's - CMI Uniform Rules for Sea Waybills - CMI Rules for Electronic Bills of Lading -

Revision of Rule VI of the York-Antwerp Rules 1974.

XXXV. SYDNEY - 1994
President: Prof. Allan PHILIP
Subjects:
Review of the Law of General Average and York-Antwerp Rules 1974 (as amended 1990) - Draft Convention on Off-Shore Mobile Craft - Assessment of Claims for Pollution Damage - *Special Sessions:* Third Party Liability - Classification Societies - Marine Insurance: Is the doctrine of Utmost Good Faith out of date?

XXXVI. ANTWERP – 1997
CENTENARY CONFERENCE
President: Prof. Allan PHILIP
Subjects:
Off-Shore Mobile Craft - Towards a Maritime Liability Convention - EDI - Collision and Salvage - Wreck Removal Convention - Maritime Liens and Mortgages, Arrest of Ships - Classification Societies - Carriage of Goods by Sea - The Future of CMI.

XXXVII. SINGAPORE – 2001
President: Patrick GRIGGS
Subjects:
Issues of Transport Law - Issues of Marine Insurance - General Average - Implementation of Conventions - Piracy - Passengers Carried by Sea.

XXXVIII. VANCOUVER – 2004
President: Patrick GRIGGS
Subjects:
Transport Law - General Average - Places of Refuge for Ships in Distress - Pollution of the Marine Environment - Maritime Security - Marine Insurance - Bareboat Chartered Vessels - Implementation of the Salvage Convention.

XXXIX – ATHENS 2008
President: Jean-Serge Rohart
Subjects:
Places of Refuge – Procedural Rules Relating to Limitation of Liability in Maritime Law – UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – Non-technical Measures to Promote Quality Shipping – Implementation and Interpretation of International Conventions – Judicial Sale of Ships – Charterer's Right to Limit Liability – Charterer's Right to Limit Liability – Wreck Removal Convention 2007 – Draft Convention on Recycling of Ships

XL – BEIJING 2012
President: Karl-Johan Gombrii
Subjects:
Judicial Sales of Ships – Salvage Convention 1989 – Rotterdam Rules – York Antwerp Rules 2004 – Offshore Activity – Fair Treatment of Seafarers – Piracy – Maritime Issues for Judges – Marine Insurance – The Western and Eastern Cultural Influences on Maritime Arbitration and its Recent Developments in Asia – Arctic/Antarctic Issues – Cross Border Insolvencies – The Shipbuilding Industry in Asia: Problems and Challenges – Future of the CMI in the Decades to come. – Young Members Session: Arrest of Ships and Judicial Sales of Vessels – Offshore Activities, New Regulations and Contracts – Enforcement on Shipping Companies by Creditors.

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