

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

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Introduction

This is the first number of the CMI News Letter.

We should have liked to introduce it with some striking pictures, of our President Lilar guiding the Assembly, of our CLO, J. Ramberg, making a forceful intervention at an international session and of our acting Treasurer, H. Voet, checking accounts from the printers. Alas, economy would not permit it.

We hope that what follows will nevertheless catch the reader's eye. The purpose is to give a brief summary of what is on within the CMI, of our activities in various International Organisations and also glimpses from elsewhere.

Your reactions to this experiment and your suggestions for next issue are eagerly awaited.

K.P.

S.G.E.

New Literature

The practitioner of maritime law has probably already observed that some "leading" text-books have appeared in new editions. However, to whom it may concern should be mentioned Scrutton on Charterparties and Bills of Lading (1974), Gilmore & Black, the Law of Admiralty (1975) and Healy & Sharpe, Cases and materials on Admiralty (1974). The University of Genoa has published "Studies on the revision of the Brussels Convention on bills of lading (1974)" and the Institut du droit international des transports (Rouen) has published a study on a document for combined transport (1975). An account of the law of contracts of affreightment in the socialist States is given in J. Lopuski - J. Holowinski, Der Seefrachtvertrag im Recht der europäischen Sozialistischen Länder (DDR edition, Berlin, 1974 by R. Richter), H. Schadee, Transport (ed. Kluwer, Rotterdam 1974) contains a valuable "loose-leaf" compilation of texts of international regulations of the law of transport (international conventions as well as current rules and practices).

THE 1969 CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE HAS ENTERED INTO FORCE!

The above Convention entered into force 1975-06-19. The text of the Convention as well as the text of the supplementary 1971 "Fund Convention" - which has not yet entered into force - will appear in CMI Documentation II together with introductory observations. Suffice it to say that the regulation of liability for oil pollution damage in the two Conventions should be regarded as special and exceptional. It should by no means be used as a pattern for forthcoming amendments by the law relating to the shipowner's liability.

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Hague Rules

The UNCITRAL Working Group on International Legislation on Shipping finalized its draft convention on the carriage of goods by sea in its eighth session (New York, February 1975). A report from that session has been made by the chairman of the CMI International Subcommittee, Mr. J. Cunningham, and the Chief Legal Officer, Professor Jan Ramberg (Doc. 1975 I p. see also HR-21 with appendix 1-3).

An UNCTAD meeting has been scheduled for 5-16 January 1976 in Geneva to consider the draft convention. Presumably, the question of policy will be resolved at that meeting and the implementation of the resolutions will be left to a meeting of UNCITRAL in the spring of 1976 (probably April in New York). If the draft could be finalized at that meeting a diplomatic conference will probably be held already in 1977.

The draft convention does not follow the CMI 1974 Hamburg Hague Rules Recommendation with respect to the basis of liability, i.e. that the defences of error in the navigation and fire should be retained and that only the somewhat "obscure" defence of "error in the management of the ship" be eliminated. However, the resolution of the UNCITRAL Working Group was taken in spite of the strong opposition of Belgium, Japan, Poland, USSR and the United Kingdom. This matter has since then been discussed within different Shippers' Councils, particularly with respect to the economic implications of a changed distribution of risks between cargo-owners and carriers. A meeting will take place in the International Chamber of Commerce in Paris 8 October 1975 for the purpose of ascertaining the majority opinion of shippers. The CMI will be represented by the Chief Legal Officer, professor Jan Ramberg. If it should turn out that shippers are basically against a changed distribution of the risks as proposed by the UNCITRAL Working Group, it is difficult to see

what considerations could possibly induce governments to press upon the parties to contracts of carriage by sea a solution which according to their own opinion is not called for.

York Antwerp Rules 1974

The revised version of the York Antwerp Rules that was adopted at the CMI Conference in Hamburg simplified General Average and should have the overall effect of speeding up settlements.

Deductions new for old in respect of ship's damage are virtually jettisoned except for vessels more than 15 years old. Compare the long and complicated Rule XIII in the 1950 version with the rule as it now stands and you will see the difference. Cargo values will now normally be based on invoice values. The time consuming and often fruitless investigations to ascertain "market value" should virtually disappear in a number of cases if not always. Uniformity of practice will follow from the new provision that ship's value should be assessed without taking into account the effect, beneficial or detrimental of a demise or time charterparty to which the ship shall be committed. Finally, the rate of interest for GA expenditure sacrifices and allowances is made more up to date in that it is raised from 5 to 7 per cent p.a.

The CMI also decided to establish contact with the A.I.D.E. and the I.U.M.I. to try to simplify GA documents. As a result a document on GA guarantee was prepared early this year and is at the time this is written about to be examined by the I.U.M.I. Conference in Tokyo. The YAR 1974 are now gradually coming into operation, having met with the approval by the shipping and insurance world.

It is interesting to note in this connection that the "Peking Adjustment Rules of 1975" have more similarities with the YAR 1974 than differences.

Combined Transport

In connection with the 1974 Hamburg Conference the Assembly of the CMI charged Professor Kurt Grönfors, Gothenburg, with the task to follow the developments of the law of combined transports and to suggest, whenever proper and suitable, any further initiative which might be taken by the CMI. Professor Grönfors informs as follows on the present situation.

Since the introduction of the CMI Tokyo Rules in 1969 and the subsequent transformation of these Rules into the so-called TCM-Draft, resulting from the Round Table Conferences arranged by UNIDROIT, the subject has been referred to the UN-bodies (IMCO and UNCTAD). The project has been deferred due to disagreement on basic principles and the prospects of an international convention regulating the contract of combined transport within the foreseeable future are doubtful. However, a new meeting has been scheduled by UNCTAD in Geneva 16 February - 6 March 1976.

Still, the initiatives taken by UNIDROIT already in the 1930s and by the CMI in the 1960s and the "amalgamated" TCM-draft have had a considerable success. In fact, the TCM draft constitutes the governing "law merchant" in this field, since it has been embodied in the current combined transport documents, e.g. the "Combiconbill", introduced by the Baltic and International Maritime Conference (BIMCO), and the "FIATA Combined Transport Bill of Lading" (FBL) introduced by the freight forwarders' world organization. They have thereby been built on a more elaborate system and could be said to constitute "the second generation" of combined transport documents (see, e.g., Grönfors, Container bills of lading - a new trend in documentation, Festschrift für Clive M. Schmitthoff, Frankfurt a.M. 1974 pp 187-205). The impact of these documents is further evidenced by the ICC "Uniform rules for a combined transport document" (Paris 1973, proposed amendments in 1975, ICC Doc. 396/61 Bis.) and by the study performed

by the Institut du Droit international des transports (IDIT, Rouen 1975) which is based upon the FBL.

Indeed, in view of the success of the TCM draft as a model contract, the absence of an international convention has not been felt as a serious drawback. It should be borne in mind that the Tokyo Rules and the subsequent TCM-draft are based on the principle of freedom of contract. The liability system is optional in so far that it does not come into effect unless a combined transport document as described in the draft has been issued. Thus, the draft, by its own terms, is primarily intended as a model contract and, as has been said, that purpose has to a very large extent already been achieved.

Nevertheless, a further reason behind the TCM-draft was to achieve by international legislation a negotiable combined document. However, experience has shown that international commerce seems to be able to manage without such legislative support. First, the need for negotiable documents in combined transport operations seems to be very modest (one of the biggest container lines has informed that less than 10% of the goods are covered by bills of lading). Second, in some countries, it is possible for the parties themselves to achieve negotiability by a proper issuance and wording of the document and, anyway, negotiability may develop by custom of the trade or by national legislation in such countries where this is indispensable. Third, the ICC, in its amended "Uniform Customs and Practice for Documentary Credits" (Annex to Doc No 470/243) which will enter into force before the end of this year, have to a certain - although insufficient - extent taken notice of the changed transportation techniques by introducing a new article on combined transport documents (art 23). Undoubtedly, the Tokyo Rules and the TCM-draft have at the right time provided a proper solution and showed the strength of organizations, such as the

CMI, efficiently to serve international commerce when its need could not be satisfied by legislative action. But the development of the transport industry and its organizational structure has not come to an end. In the view of Professor Grönfors it may well be that the Tokyo Rules and the TCM-draft could be further developed and that the "network liability principle", which constitutes one of their main ingredients, should be modified or even discarded. Also in this regard the CMI has shown its flexibility and foresight by discussing the possibility to "translate" the "uniform liability principle" into an alternative combined transport document (the so-called "UNIDOC", CMI Documentation 1973 III p 204 et seq). True, for the time being international commerce has adopted itself to and seems to be satisfied with the "network liability principle". But, as has been said, one should reckon with the possibility of future changes. And the CMI should be proud to have been the first international organization to have initiated a study as to how such developments could be met by a combined transport document of "the third generation".

UNCTAD studies on charter-parties and marine insurance

The Executive Council of the CMI has decided to follow the further developments of the above-mentioned studies and to offer its co-operation if decisions will be taken towards unification of the law by means of legislation or the elaboration of standard conditions. It has been resolved that the subject needs to be further examined. Questionnaires have been sent out to governments by UNCTAD with respect to charter-parties as well as marine insurance. Answers to these questionnaires are expected to have reached the UNCTAD Secretariat before the end of September 1975.

Liability of sea terminals

The Executive Council of the CMI, upon the recommendation of some National Associations, has initiated a study on the above subject. The Chief Legal Officer, professor Jan Ramberg, has been charged with the task to draw the guiding lines for the study and to prepare the matter for the International Subcommittee which may later be appointed in order to draft a text to a "model contract" or an international convention as the case may be.

A questionnaire has been sent to the National Associations (ST-1, XII-74) and replies have been submitted by eleven Associations (St 2-12). Although further replies are expected in due course, professor Ramberg will give an account of his preliminary thoughts in Documentation 1975 II. It will appear that a change of the risk distribution between the cargo-owner and the sea carrier of the kind proposed in the draft international convention on the carriage of goods by sea by the UNCITRAL Working Group on International Shipping Legislation will be of comparatively little practical importance in view of the "loopholes" in the cargo-owner's protection in the initial and terminal stages of transportation. An extension of the shipowner's liability beyond the ship's tackle will be an insufficient move, since independent cargo handling and storage companies will, in many cases, intervene before the cargo is tendered to the sea carrier for shipment and after the completion of the sea voyage but before actual delivery to the consignee himself. The study will show that the liability of such independent entities varies in the different ports and that, in practice, an increased sea carrier's liability will be cold comfort for the cargo-owner, when he has to bear the greater part of the risk for loss of or damage to the cargo anyway during the "critical" periods before and after shipment.

It will be suggested that the CMI explores the possibilities to, at least as "first step", elaborate a "model contract" for sea terminals.

Equal division of damages in both-to-blame collision cases

surrendered in U.S. law!

The United States Supreme Court has in its decision of 1975-05-19 in United States v. Reliable Transfer Co surrendered the traditional principle that, when both parties are found to be guilty of contributing fault, property damages are equally divided whatever the relative degree of their fault may have been. This principle meant that the law of the United States differed from the rule of art.4 of the 1910 Brussels Collision Convention which expresses the principle of division of damages according to the parties' proportional fault. The "Reliable Transfer" case signals the adoption of the last-mentioned principle and, consequently, one of the obstacles for the United States to ratify the 1910 Brussels Collision Convention has been removed. It should perhaps be pointed out that the case did not concern a collision but an action against the State to recover for damages to the vessel caused by a stranding to which the failure to maintain a breakwater light had been one of the contributing factors. But the dicta of the Supreme Court are in general terms and definitely applicable to the division of damages between tortfeasors in maritime casualties generally. The following words deserve to be quoted:

"We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault. "

Nevertheless, there is a further, and

perhaps more significant, difference between the law of collisions of the United States and the principles embodied in the 1910 Brussels Collision Convention. According to the Convention liability for damage to property, in particular to cargo, is borne by each vessel in proportion to the degree of the respective faults. It is only in respect of death and personal injury claims that they are liable jointly and severally so that the claimants can recover in full from any one of them. Under the law of the United States, the tortfeasors are liable jointly and severally for property claims as well. This means that, in fact, the defence of error in navigation is rendered inoperative in both-to-blame collision cases, since the cargo owner may obtain full recovery from the non-carrying vessel which then in turn could obtain contribution from the carrying vessel. And the special "both-to-blame" clauses which have been designed to remedy this peculiar "back wash" have been held invalid in the United States (The Esso Belgium 343 U.S. 236). The question now arises whether or not the adoption by the Supreme Court of the principle of proportionate fault of the 1910 Brussels Collision Convention means that the principle of separate liability for damage to property will also be accepted.

This question is inextricably linked together with the pending revision of the Hague Rules. If, as suggested in the CMI 1974 Hamburg Hague Rules Recommendations, the defence of error in navigation is retained, it is difficult to see why it should not operate in both-to-blame collisions as well. The arguments presented for the retention of the defence are equally, or perhaps even particularly, valid in such contingencies.

Carriage of goods by inland waterways

The efforts to unify the law of carriage of goods by inland waterways have resulted into a draft convention (CMN) proposed by UNIDROIT in the late 1950s and the so-called 1973 Strasbourg Rules revising the text of the CMN draft. But any implementation of these proposals have so far stranded on the "be or not to be" of the defence of error in navigation. Article 14.1 of the CMN draft has been patterned upon the corresponding provision of the Hague Rules (art.4.2 (a)) - which means that the defence also includes errors "in the management of the ship" - while article 13.1 of the 1973 Strasbourg Rules limits the defence to pure navigational errors (cf. the corresponding CMI 1974 Hamburg Hague Rules Recommendation). In a meeting arranged by UNIDROIT 13-17 January 1975 further efforts were made to reconcile the different views (see Etude: XXVII - Doc.21, UNIDROIT 1975). As a result, it is now proposed that the controversial issue should be left outside the scope of mandatory legislation so that by contractual provision the carrier may exempt himself from liability i.a. when "he proves that the loss or damage was due to a cause other than a defect in seaworthiness or a lack of care owed to the goods". However, States may disallow such a contractual exemption from liability in respect of contracts which designate a place of unloading in their respective territories.

The technique to describe the mandatory scope of regulation, rather than to enumerate the permissible defences, is advantageous in so far as the error in navigation defence does not have to be conspicuously spelled out. But the practical difficulties in drawing the dividing line between permissible and non-permissible defences - which caused the CMI in its 1974 Hamburg Hague Rules Recommendations to suggest the retention of the defence of error "in the navigation of the ship" and the deletion of the defence of error "in the management of the ship" - will be maintained by the text now proposed.

Study on Shipbuilding Contracts

The first report by the Chairman of the International Subcommittee, Professor Francesco Berlingieri, was sent out to the National Associations last year (SBC 22/IX-74) and the second report together with a new questionnaire has been presented in September 1975 (SBC-35 and 36). The second report contains valuable information on the legal position and current practices of the various countries with respect to:

1. Performance guarantees of the Builder
2. Shipbuilding finance and securities in connection therewith
3. Settlement of disputes on urgent matters during construction
4. Cancellation of Shipbuilding contracts.

A new meeting of the International Subcommittee will later take place in London 23-24 Oktober 1975 where the replies of the National Associations to the second questionnaire will be discussed with a view to presenting a third report to the Assembly in 1976.

Hovercraft

Within the CMI an International Subcommittee was constituted in 1968 under the chairmanship of our distinguished late Vice President James-Paul Govare who prepared a first draft convention relating to Hovercrafts (see CMI Doc. 1969 III, p. 154). Unidroit has subsequently taken on the subject. The meetings have so far concentrated on the legal status, registration and nationality of Hovercraft and other questions of public law. However, the next meeting which is scheduled for 10-15 November 1975 will deal with the private law aspects such as liability towards passengers and third parties. Our Vice-President Dr Walter Müller, Switzerland, as well as Miss Alessandra Xerri, Italy, have kindly accepted to represent the CMI.

Limitation of shipowner's liability

The revision of the 1957 International Convention for the unification of certain rules relating to the limitation of the liability of owners of sea-going vessels has now been discussed in three meetings of IMCO's Legal Committee (3-7 June 1974, 20-24 January and 16-20 June 1975). The CMI has been represented at the first meeting by Lord Kenneth Diplock, Mr Alex Rein and the Chief Legal Officer, Professor Jan Ramberg (see report LIM 21 VII-74) and at the subsequent meetings by Rein and Ramberg. IMCO has expressed its appreciation of the preparatory work performed by the CMI and the discussion proceeds on the basis of the so-called "Maxi Draft", i.e. a full new convention text rather than a Protocol to the 1957 Convention (the "Mini Draft"), prepared at the CMI 1974 Hamburg Conference (see CMI Documentation 1974 II p. 304 et seq.). However, the decision to use the "Maxi Draft" as the working paper has been taken without prejudice to the final method of achieving the desired amendments of the present Convention.

The Legal Committee has discussed all the draft articles. However, the views expressed are so far only preliminary and the forthcoming decision with respect to the new limits of liability is still difficult to foresee. The CMI, upon the request of IMCO, has supplemented its Hamburg "Recommendations on the new limits of liability" with further information on the organization of the insurance market and the effect of limitation in the settlement of claims as well as the capacity of the insurance market to provide coverage for increased risks resulting from higher limits. It is difficult to draw any certain conclusions on the basis of the available facts. The following questions are still open and have to be further considered and resolved:

- Should the limits for smaller ships be substantially increased?
- Should there be any increase for medium sized ships and, if so, is it de-

sirable to go further than the 2.000 francs per ton limit of the 1969 Civil Liability for Oil Pollution Convention?

- Should there be a lower per ton figure for very large ships or an absolute maximum for such ships?
- What effect would a deletion of the sea carrier's defences of error in the navigation and the management of the ship and of fire - as proposed by the UNCITRAL Working Group on International Legislation on Shipping - have on the limits?
- Should there be any special "maximum" for passenger claims (no such "maximum" exists above the per capita limits of 1974 Athens Convention)?
- Should there still be two separate funds for personal claims and property claims respectively or only one fund with priority for personal claims?

It seems possible to make the general observation that IMCO's Legal Committee does not favour any substantial changes of the present principles of the 1957 Convention. Hence, the suggested enlargement of the category of persons entitled to limit contained in article 1.2. of the CMI "Maxi Draft" ("... and any person rendering service in direct connection with the navigation or management of the ship") has been rejected.

Although the Legal Committee has expressed a certain understanding for the need to give a better protection to salvors - in particular when they do not operate from their own ships or from any ship at all (cf. the "Tojo Maru" case, 1971 1 Lloyd's rep. 341) - it is still uncertain whether special rules for salvors will be accepted.

The principle to make the right of limitation less breakable suggested by the CMI (art. 4 of the "Maxi Draft") has so far been accepted by a majority of delegations in IMCO's Legal Committee, since the present "actual fault or privity rule" has led to an uncertainty which it is the very purpose of the Convention to avoid.

At the meeting in June 1975 the Legal Committee reached a compromise on the much-debated question whether the constitution of a fund should be a condition for the right to limit. It is now expressly mentioned that no such condition exists unless it is required under the law of the Contracting State where action is brought to enforce a claim subject to limitation.

Suggestions to introduce a system of compulsory insurance or evidence of financial security - patterned upon the corresponding provisions of the 1969 Civil Liability for Oil Pollution Convention - has so far attracted very little support. The need, if any, for such a system applicable to all limitable claims was not thought to outweigh the expected difficulties of administration and control.

Efforts will be made to prepare a final draft at the next meeting which will last two weeks (24.11-5.12 1975). The Diplomatic Conference has provisionally been scheduled for 1-19 November 1976.

Seminars - a new CMI activity

Seminars on legal questions are now becoming increasingly popular. In view of the expertise of maritime law available within the CMI there should be no difficulty for the CMI to successfully arrange a seminar on maritime law in spite of the competitive situation. The subject was discussed at the Assembly in March this year and the Executive Council has started the preparations. According to the preliminary plans the Seminar will take place in September or October 1976 in Genoa or Bologna. The subjects will probably include the revision of the Hague Rules and of the 1957 International Convention on the limitation of the liability of owners of sea-going vessels as well as the law of collisions at sea. Outstanding and internationally well-known experts on these matters have already agreed to participate as lecturers. The National Associations will be informed by circular letters about the further details.

Gold clause problem

The CMI, already in March 1973, referred this important question to a study under the chairmanship of Baron van der Feltz, Netherlands, and an exchange of views has also taken place with UNIDROIT where a valuable study was published in 1973 by Mr Italo Arcari (Etudes LVII Doc. 1/Rev. U.D.P. 1973). The National Associations of the CMI have been requested to submit their views. While some favour the attitude of "wait and see", others propose immediate action. The speed at which matters develop in international banking very clearly requires something to be done now in order to avoid the inevitable confusion resulting from the final disappearance of an official value of gold. A brief report on the present situation will appear in CMI Documentation 1975 III

Next meeting of the Executive Council

The Executive Council will meet at Antwerp together with the Vice Presidents of the CMI to discuss among other things the suggestions submitted by the National Associations for the election of members to the Executive Council as from 1976-04-01 and the program for the next CMI Conference.

Next Conference

The next Conference has upon the kind invitation of the Brazilian Maritime Law Association been provisionally scheduled to take place in Rio de Janeiro in the late fall of 1977.