

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL — number 2 — January-February 1976

Introduction

Cette seconde NEWS LETTER donne un aperçu de quelques problèmes importants qui ont reçu l'attention du CMI. Il y en a d'autres, mais le cadre restreint d'une NEWS LETTER nous oblige à une certaine sélectivité.

Le lecteur voudra bien réfléchir un moment sur les informations données sous la rubrique FORTHCOMING INTERNATIONAL MEETINGS. Il verra qu'au cours de l'an-

née 1976 au moins 13 semaines (= 3 mois) seront occupées par des Conférences Internationales sur des sujets importants qui intéressent particulièrement le CMI. Fidèle à la devise choisie pour la NEWS LETTER, nous ne voyons pas très bien comment nous pourrions nous soustraire à une participation, malgré les efforts personnels et économiques qui en résultent.

Kaj Pineus.

New Literature

A book containing some of the decisions of the Court of Arbitration for Maritime Matters of Gdynia has recently been edited by Ralf Richter. The title of this book is: "Aus der Spruchpraxis des Internationalen Schiedsgerichts für die See- und Binnenschiffahrt in Gdynia" 1, Berlin DDR, December 1974. Hopefully, this will stimulate the CMI to further pursue its work on the establishment of a CMI Arbitration procedure which was initiated in 1973. The Gothenburg Maritime Law Association has in later years sponsored some further contributions to the maritime law literature, viz.

K Grönfors, Modern Transport and Sales Financing (No. 48 1974), M J Mustill, Pseudo-demurrage and the arrived ship (No. 49 1974), Nicholas J Healy, The New York Produce Exchange Time Charter (No. 51 1975) and Kaj Pineus, Ship's Value (No. 52 1975). The Institute of Comparative Law of Paris has recently produced a translation into French of the Maritime Code of the USSR together with a preface and an introduction by Professor René Rodière.

Forthcoming International Meetings

The subject of the law of combined transport, and, in particular, the fate of the so-called TCM-Convention, will be discussed in UNCTAD 16 February-6 March, 1976. UNCITRAL will consider the draft International Convention on the Carriage of Goods by Sea prepared by its Working Group in New York 12 April-7 May, 1976. IMCO's Legal Committee will meet in London 28 June-2 July and the two first weeks of September. As previously mentioned, a Diplomatic Conference will take place 1-19 November to consider the draft International Convention on Limitation of Liability for Maritime Claims prepared by IMCO's Legal Committee. It is expected that IMCO's Legal Committee will now give some priority to the question of extending the 1969 Civil Liability for Oil Pollution Damage Convention to encompass other hazardous substances than "persistent oil". Some consideration will also be given to a proposal to change the unit of account for limitation purposes of all IMCO Maritime Law Conventions as well as the subjects of wreck removal and status of ships in

foreign ports. The preliminary draft convention relating to the "International Carriage of Passengers and Their Luggage by Sea and by Inland Water Way in Air-Cushion Vehicles" prepared by UNIDROIT will be further discussed in a meeting some time during the spring of 1976.

Meeting within Unidroit on «Hovercraft»

A meeting has been held within UNIDROIT to discuss liability problems in connection with the carriage of passenger in "Hovercraft" and as a result thereof has emerged a "Preliminary Draft Convention relating to the International Carriage of Passengers and Their Luggage by Sea and by Inland Water Way in Air-Cushion Vehicles". One would perhaps have expected that this question was very much related to the carriage of passengers and their luggage by sea. However, this seems to be true only to a certain extent. It appears from the preliminary draft that the carriage of passengers in air-cushion vehicles also could be resembled to the carriage of goods by air. Consequently, while the draft reproduces quite a few of the provisions of the 1974 Athens Convention on the Carriage of Passengers and Their Luggage on Board Ships one can also discover some provisions from the 1929 Warsaw Convention insofar as it relates to the carriage of passengers. Further, the draft contains a specific regulation of the liability for delay which is missing in the Athens Convention. The basic liability provision adopts the principle of negligence but with a presumption that the carrier is responsible in the event of death or injury to the passenger or the loss of or damage to luggage other than hand luggage (the expression "hand luggage" has been used instead of cabin luggage of the Athens Convention). It is a little surprising to note that one has chosen to deviate from the principle of the Athens Convention with respect to the loss of the right to limit liability. It is expressly mentioned that the right is lost not only when acts or omissions take place on the "managerial level" but also when they can be attributed to a person for whom the carrier

is responsible, always provided that the acts or omissions are of such serious nature that they could be regarded as dolus eventualis. Further, there is no provision requiring the claimant to give notice of loss of or damage to luggage corresponding to article 15 of the Athens Convention. The draft will be further discussed in UNIDROIT in the spring of 1976.

Limitation of Shipowners' Liability

As mentioned in the previous News Letter IMCO's Legal Committee met in London 24 November-5 December in order to finalize its draft to a new "International Convention on Limitation of Liability for Maritime Claims". This draft reproduces to a very large extent the CMI Hamburg "Maxi Draft" which constituted the basic working paper. A comparison between the CMI draft and the final IMCO draft will be made by the chairman of the CMI International Sub-Committee, Mr Alex Rein, Oslo, and this will appear in the CMI Documentation 1976. The Diplomatic Conference will take place in London 1-19 November, 1976. The following observations could be made with respect to the more important issues.

The limitation amounts will as usual be decided by the Diplomatic Conference. However, indications were made that the present figures have to be substantially increased. Some delegations pointed out that the inflation since 1957 alone motivated a doubling of the present amounts. The suggestions made ranged from an increase of 50 % to 300 % of the 1957 Convention figures. It was generally agreed that the limits for smaller vessels should be substantially increased and that the minimum tonnage instead of the 300 tons of the 1957 Convention should be fixed at somewhere between 500 to 1 500 tons. Further, in order to cope with the problem of the very large ships, it was suggested that the amount per ton should be decreased by 50 % for tonnage exceeding a certain figure. The dividing line was indicated somewhere between 30 000 to 70 000 tons.

The construction of the fund has a strong bearing on the figures. The sug-

gestion contained in the CMI draft to have two separate funds did not attract a majority support (6 for, 13 against). The suggestion to retain the principle of the 1957 Convention - i.e. to have two funds with a "spill-over" from the unsatisfied personal claims into the property fund - attracted a majority (11 for, 6 against) but the suggestion to have only one fund with priority for personal claims attracted still more support (14 for, 5 against). A proposal to allow Contracting States to provide for a priority for damage caused to harbour works and similar public claims after the personal claims did not attract a majority support.

In view of the fact that the 1974 Athens Convention on the Carriage of Passengers and their Luggage on Board Ships does not contain any maximum ceiling on top of the per capita limits, the majority of delegations favoured a special limit in the Limitation Convention (16 for, 7 against). As such a special limit was suggested the number of passengers which the ship is authorized to carry multiplied by an amount indicated as the limit per capita for personal injury of the Passenger Convention (700 000 Poincaré francs) and with a specified amount on top of this as a ceiling in order to avoid an amount so high as to exceed the level of commercial insurability. The question whether salvors should be accorded a special limitation was much discussed and it was finally resolved that while salvors operating from a ship should be regarded in the same way as shipowners, salvors not operating from a ship should benefit from a limitation not less and not more than certain specified amounts to be decided later by the Diplomatic Conference.

It was pointed out that the rule on "conduct barring limitation" was related to the limitation amounts. If the limitation amounts would be substantially increased it would be much easier to accept that the right of limitation should, in principle, be unbreakable. There are two basically different questions involved. The first, and the more important one, is whether the right of

limitation should be forfeited only when the acts or omissions could be attributed to the shipowner himself (on the "managerial level") or whether it is sufficient that the acts or omissions be committed by his servants. The second question is how the acts or omissions sufficient to break limitation should be qualified. The CMI draft requires that the acts or omissions should take place on the managerial level and that they should be tantamount to dolus eventualis and it was decided by 12 votes in favour and 6 against to retain the original CMI text.

A further question was to resolve the position of inland navigation vessels, pleasure crafts, fishing vessels, air-cushion vehicles and floating platforms and the like. This was not finally resolved but a provision within brackets appears in the draft text whereby the Contracting States are suggested to be offered the possibility to determine by specific provisions of national law the system of limitation of liability applicable to inland navigation vessels, pleasure craft and fishing vessels. Further, in this provision it is suggested that the convention should not apply to air-cushion vehicles and floating platforms and the like.

Finally, a suggestion made by the Swedish delegation demonstrated the peculiar situation which arises if the limit of liability of the "basic" convention is raised above the limit of the special 1969 Civil Liability Convention for Oil Pollution Damage. It was suggested that claims for oil pollution damage not subject to the Civil Liability Convention should still not be allowed to benefit from the higher limits which finally could be determined in the basic convention. This suggestion demonstrates - a little bit late perhaps - that the wisdom to regulate by special conventions the limitation of liability in certain contingencies may well be challenged.

Limitation de la Responsabilité des Propriétaires de Navires de Mer

Le projet de Convention de la commission juridique de l'OMCI rassemble beaucoup au "projet maximum" du CMI. Le montant

de la limitation, problème réservé à la Conférence Diplomatique, fut néanmoins discuté. Une augmentation était dans le vent, avec des modalités spéciales pour les petits et pour les très grands navires.

La Convention de 1957 prévoit un fonds réservé aux pertes de vies ou lésions corporelles et un autre fonds pour pertes et dommages de biens, l'excédent du premier allant au second. Le nouveau projet ne propose qu'un seul fonds.

La Convention de 1974 sur les passagers et leur bagages n'indique pas un plafond global. La commission de l'CMI a été d'avis que le projet de Convention devrait indiquer un plafond à l'égard des créances de ce genre (nombre de passagers permis x per 700.000 Francs Poincaré).

Des discussions sur la situation des sauveteurs il résulte que les sauveteurs travaillant à bord du navire devraient pouvoir invoquer la même limitation que l'armateur; pour les autres une limitation spéciale, à décider par la Conférence Diplomatique, a été envisagée. Les objections admissibles envers le droit de se prévaloir de la limitation, étaient, d'après la commission, pour des raisons psychologiques et politiques, liées au montant du plafond que déciderait la Conférence Diplomatique. La commission décida toutefois que l'armateur serait en droit de limiter sa responsabilité à moins que des fautes ou omissions graves (*dolus eventualis*) fussent commises par une personne appartenant à un échelon élevé de l'armement.

La commission pense devoir réserver la situation des bateaux de transport intérieur, des embarcations de pêche et de plaisance au droit national et d'exclure les Rovercrafts et les plates-formes.

Une délégation indiqua qu'il ne fallait pas que le montant de la limitation envisagé dans le projet de Convention dépasse celui de la Convention de 1969 sur les hydrocarbures; ceci mettrait cette Convention hors jeu. La commission pensa que l'on pourrait y porter remède en excluant ce genre de créanciers de la nouvelle convention !

The Law of Collisions at Sea

At its Annual Meeting on March 14, 1975, the Assembly approved the Executive Council's recommendation that the CMI accept a proposal made by the International Law Association (ILA) for a joint study of the collision laws of the maritime States, with a view to the possibility of an international convention designed to minimize differences in national laws in such areas as jurisdiction, choice of law, liability, assessment of damages and enforcement of foreign judgments. In undertaking this project, the CMI is not abandoning its ultimate goal of universal acceptance of the Brussels Collision Convention of 1910, which was drafted by the CMI.

A CMI Working Group has been appointed, consisting of Professor Nicholas J. Healy, United States (chairman), J.G.R. Griggs, Esq, United Kingdom; Stuart Hyndman, Esq, Canada; Professor Alan Philip, Denmark; Dr José Domingo Ray, Argentina and Dr Hans Georg Röhreke, Federal Republic of Germany. An ILA Committee is now being formed under the guidance of Professor D.P. O'Connell, President of ILA's Australian Branch, and Professor P.E. Nygh, Honorary Secretary of that Branch, has been appointed Rapporteur.

A meeting of the CMI Working Group is to be held in London in January, and Professor O'Connell, who is presently on the faculty of All Souls College, Oxford, has been invited to attend.

As of December 1st, the CMI Secretariat had received eleven replies to a Questionnaire distributed earlier in the year. The national associations replying were those of Argentina, Canada, Denmark, the German Democratic Republic (GDR), the Federal Republic of Germany (FRG), Greece, Ireland, Portugal, the Union of Soviet Socialist Republics (USSR), the United Kingdom (UK) and the United States (US).

Of the eleven States, ten have ratified or adhered to the Collision Convention, and most have also adopted

national legislation implementing its provisions, although some differences exist in the case of Greece, Ireland and the UK. While the US has not adopted either the Convention or national legislation embodying its provisions, US law has been brought very much closer to that of the Convention States as a result of the US Supreme Court's adoption of the proportional fault rule in its landmark decision in Reliable Transfer Co. v. United States, 95 S.Ct. 1708, 1975 A.M.C. 541, discussed in the first issue of the News Letter. In some areas, for example, joint and several liability to death and injury claimants, US law was already the same as that of the Collision Convention countries. The most important remaining difference is that in the US, in a both-to-blame case, cargo may recover in full from the non-carrier, who may include its liability to cargo in the damages to be divided with the carrier in accordance with the respective degrees of fault. It is conceivable that this rule may eventually be changed by the US Supreme Court, and if it is, the remaining differences between US law and the Convention will be relatively minor.

In Argentina and Greece the Convention does not apply where all the parties concerned are nationals, but in Greece the national legislation in such cases is substantially the same as the Convention, except that the time for suit is one year.

The GDR and FRG apply the Convention on the basis of reciprocity, and in the US reciprocity must be shown before an alien may recover for collision damage caused by a warship or other public vessel; in the other States, nationals and aliens are treated alike.

Of the eleven States replying, six have neither ratified the 1957 Brussels Limitation of Liability Convention nor adopted its principles in national legislation, four have ratified it (the UK

with reservations), and Canada has enacted national legislation embodying its principal features.

Except in Denmark, where the point has not been decided, liability for damage caused by a moving vessel to a stationary vessel or object is based on fault, but there is a presumption of fault, at least when the stationary vessel or object is displaying any required lights, etc.

All Associations replying endorse the CMI Hamburg Hague Rules Recommendation that the error in navigation defence be retained, as well as the reasons for its retention, and nine agree that for the same reasons some means for preventing "indirect" recovery from the carrying vessel is called for. (Two did not respond directly to this question).

In the GDR the courts probably do not have jurisdiction in a high seas collision case between two foreign ships; in the ten other States they do. In all eleven States the courts have jurisdiction of a collision between foreign vessels in their territorial waters.

In the US a court may in its discretion decline to exercise its jurisdiction on grounds of "forum non conveniens" in certain circumstances, e.g., where no American interest is involved, the witnesses are abroad, etc.; the court will, however, usually exercise its jurisdiction when the parties are nationals of different States. The "forum non conveniens" concept is applied in Scotland, but not in England, although an English court has inherent power to decline jurisdiction if the action is oppressive. In Canada the court will exercise jurisdiction unless a shipowner has posted security in an action brought against him elsewhere. In Ireland it is necessary to show "compelling reasons" for the court to decline jurisdiction. In the other seven States the "forum non conveniens" concept is not followed at all.

There is a sharp division as to the substantive law to be applied in the deter-

mination of liability and, in both-to-blame cases, to the division of damages, when there is a 'foreign element' and the law of each of the countries involved is different. If the collision occurs in the territorial waters of a State, the lex loci delicti will be applied in Denmark, the GDR, Greece, Portugal, the US and, generally, Canada. The lex fori will be applied in the USSR, the UK (except that compulsory pilotage will be a defence if it is under the lex loci delicti), and probably in Ireland. There are no governing precedents in Argentina. In the FRG the law of the flag of the vessel at fault will be applied.

In high seas cases Portugal and both German Republics will apply the law of the flag of the vessel at fault. There are no governing precedents in Argentina or Greece. In the other States the lex fori will generally be applied, except that in some the flag law will be applied when both vessels are of the same flag.

There is also a conflict with respect to the limitation of liability law to be applied. The USSR will apply the law of the flag of the vessel at fault, whether the collision occurs on the high seas or in the territorial waters of a State. In the GDR and the FRG that law will be applied in high seas collisions, but the lex loci delicti will be applied if the collision occurred in territorial waters. That law will also be applied in Greece in such cases. In Portugal, the law of the flag of the vessel whose owner is awarded a recovery will apparently be applied in determining the limitation amount. There are not precedents in Argentina.

Foreign judgments are generally recognized in Argentina, Greece, Ireland and the US, subject to certain conditions, e.g., the court rendering the judgment must have had jurisdiction and the judgment must not be contrary to public policy. In the USSR, they will be enforced only if a treaty so provides, and in both German Republics and in the UK, they will be enforced

on the basis of reciprocity. In Canada, the Quebec courts, but not those of the other provinces, permit the same defences in actions on foreign judgments as in actions on the merits.

In Denmark, judgments of the other Scandinavian States and the FRG are enforceable under certain conditions, and it is expected that judgments of all EEC countries will soon be made enforceable in the Danish courts.

A further analysis of national laws relating to collisions will be made when answers to the Questionnaire have been received from the national associations that have not as yet replied.

Le Droit en matière d'Abordage

Dans son rapport sur les abordages le Professeur Nicholas J. Healy de New-York rappelle que l'Assemblée du CMI décida en 1975 de mettre à l'étude la question de l'abordage, étude à poursuivre avec la coopération de l'Association de Droit International (ILA). Un groupe de travail a été nommé et un questionnaire a été distribué aux Associations.

Des réponses obtenues jusqu'à présent (11) il résulte que la Convention de 1910 sur les abordages a été ratifiée ou fait l'objet d'une adhésion par 10 de ces pays et qu'une législation nationale a été introduite. La Cour Suprême des Etats-Unis (pays non contractant) vient d'accepter par une décision rendue en 1975 (voir le premier CMI NEWS LETTER) le principe de la proportion de faute de la Convention de 1910. La responsabilité solidaire des deux navires en faute pour les dommages et pertes de la cargaison, question qui ne se posait pas dans le cas tranché par la Cour Suprême, reste encore une spécialité des Etats-Unis jusqu'à ce que la Cour en dise autrement.

Le rapport explique brièvement les principes de l'application de la Convention de 1910 envers des ressortissants étrangers suivie dans divers pays, les règles du forum adoptées, la loi applicable pour décider le degré de la faute commise (lex loci delicti ou lex fori), les règles sur la limitation appliquées dans divers pays pour le navire étranger (loi du pavillon ou lex loci delicti) et don-

ne pour terminer un bref aperçu sur l'exécution des jugements.

Note: Une réunion du groupe de travail est prévue pour la fin de janvier 1976. Il nous semble que malgré la Convention de 1910 l'uniformité internationale dans ce domaine laisse à désirer. L'étude engagée mérite pleinement l'attention du CMI.

Kaj Pineus.

Meeting of Unctad on the «Uncitral Draft»

The UNCTAD Working Group on International Shipping Legislation met at Geneva 5-16 January 1976 to consider the Draft of the UNCITRAL Working Group concerning a new International Convention on the Carriage of Goods by Sea intended to replace the 1924 Brussels Bill of Lading Convention as well as the 1968 Protocol thereto (the Hague/Visby Rules). A number of amendments had been proposed by the UNCTAD Secretariat, in particular a redrafting of the liability provision intended to further increase the carrier's liability as well as a new provision entitling the shipper to limit his liability. However, the last-mentioned suggestions were not favourably received by the Working Group.

The main point, of course, was the crucial question of the carrier's liability. The CMI was courteously given the opportunity to express its views and in particular the essence of the CMI Hamburg Hague Rules Recommendation in this regard. The attention of the Working Group was drawn to a resolution of the UNCTAD Committee on Invisibles and Financing related to Trade (the "CIFT-committee") where the developing countries (the "Group of 77") had suggested the following text:

"Endorses the UNCTAD conclusion that maintaining the present system of cargo insurance is essential and cannot be dispensed with and that any shift in risk allocation from cargo insurance to carrier's liability would be detrimental to the interests of developing countries." This text was subsequently amended upon the initiative of some developed countries by the insertion of the word "radical" before "shift in risk allocation".

It seemed as if many delegations were not aware of the standpoint taken by the CIFT-committee and much confusion arose as to the meaning of the word "radical". One would have thought that it related to the suggested deletion of the traditional carrier's defences of error in the navigation and the management of the ship as well as of fire but some delegations maintained that this was not so. The delegations of Belgium, Japan, Poland, UK and USSR maintained their previous standpoint objecting the deletion of the above-mentioned defences and the delegations of the Federal Republic of Germany and the Netherlands also accepted this view. However, the great majority of delegations did not wish to re-open the issue, since the draft convention should be regarded as a kind of "package deal" which, in their view, on the whole could be considered reasonable and equitable. Unless these delegations are prepared to challenge the wisdom of a system which, in fact, would force the shipper to buy himself additional protection from the shipowner thereby losing control of the "risk costs" which would be embodied in the freight, it is probable that the suggested liability rule of the UNCITRAL draft will survive the forthcoming sessions of UNCITRAL and UNCTAD in April/May and July respectively. Whether a new convention containing such a liability rule will be signed and, if signed, ratified by a sufficient number of States for the coming into force depends i.a. upon the requirements decided by the diplomatic conference.

Gold Clause

The solution of the vexed problem of the conversion of the Poincaré franc into national currencies seems to be forthcoming within the near future. A Diplomatic Conference convened by the International Civil Aviation Organization (ICAO) decided in September 1975 to include in the 1929 Warsaw Convention relating to international carriage by air some provisions replacing the Poincaré franc by Special Drawing Rights (SDRs).

However, this is also a political problem, since all States are not members of the International Monetary Fund (IMF). For such non-members it is suggested that the Poincaré franc should still remain and that the conversion problem should be left to the law of such States. This solution, of course, is far from satisfactory and in connection with the meeting of IMCO's Legal Committee in November-December 1975 on the revision of the Limitation Convention some delegations did not favour the Warsaw solution but rather that the Poincaré franc should be abolished once and for all. Non-members of IMF could nevertheless determine how much an SDR could be worth in their country, i.e. by relating their own currency to a currency of an IMF-member which in turn could be expressed in SDRs. The matter will be further discussed i.e. within IMCO's Legal Committee in June 1976. Probably, a definite solution will be found during the Diplomatic Conference convened for the draft International Convention on Limitation of Liability for Maritime Claims in November 1-19, 1976, at the latest.

Clause Or

Le résumé de cet article en langue française sera publié dans la News Letter n° 3.

The C.M.I. Seminar

The Executive Council, at its meeting in London 1976-01-23 decided to organize a seminar on "Apportionment of risk in ma-

ritime law - Trends in modern shipping law and practice".

The seminar will take place in Aix-en-Provence September 9-11, 1976. The Rt. Hon. Lord Diplock has kindly promised to chair the seminar and professor René Rodière, Paris, Professor Pierre Bonassies, Aix-en-Provence, Marseille, Professor Nicholas J. Healy, New-York, and Mr. Alex Rein, Oslo, are expected to appear as speakers.

Invitations to the seminar will be forthcoming within the near future, but interested persons are advised to reserve time for the participation in the seminar already now.

Le Séminaire du C.M.I.

Le Conseil Exécutif, lors de sa réunion du 23 janvier 1976, a décidé d'organiser un séminaire qui aura pour thème: "Le partage des risques en droit maritime - Les orientations actuelles dans le droit et la pratique maritimes, et ses aspects économiques".

Le séminaire aura lieu à Aix-en-Provence du 9 au 11 septembre 1976. Lord Diplock a bien voulu promettre de présider le séminaire et le Professeur René Rodière de Paris, le Professeur Pierre Bonassies d'Aix-Marseille, le Professeur Nicholas J. Healy de New-York ainsi que Monsieur Alex Rein d'Oslo ont été invités d'y prendre la parole.

Les invitations au séminaire seront envoyées prochainement; en attendant, les personnes intéressées sont priées de réserver les dates en question pour pouvoir y participer.

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CMI NEWS LETTER

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COMITE MARITIME INTERNATIONAL — number 3 — July, 1976

IN MEMORIAM



Albert LILAR

Président du Comité Maritime International

Quelques jours seulement avant l'Assemblée Statutaire du C.M.I. à Bruxelles, son Président, le Baron Albert Lilar est décédé à Anvers, après une courte maladie.

M. Lilar a fait renaître le Comité Maritime International après la guerre et pendant plus d'un quart de siècle il a présidé à ses destinées avec une sage autorité. Il a été l'un des plus grands artisans de l'unification du droit maritime. Grâce à lui des Conventions internationales dans tous les domaines de cette branche du droit ont été étudiées, élaborées et signées, à l'occasion des conférences qui se sont succédées depuis 1947 jusqu'en 1974 à Anvers, Amsterdam, Naples, Madrid, Rijeka, Athènes, Stockholm, New York, Tokyo et Hambourg.

M. Lilar a toujours dirigé les travaux soit des Conférences du C.M.I., soit des Conférences Diplomatiques avec une profonde connaissance des problèmes en discussion, et en maintes circonstances en a assuré le succès grâce à ses interventions, à son habileté et aussi à sa fermeté. C'est donc bien grâce à lui que le succès de toutes ces conférences a été assuré.

M. Lilar a su s'entourer de collaborateurs qui, bénéficiant de sa grande expérience, ont peu à peu constitué dans le C.M.I. un ensemble de personnes dévouées à la cause de l'unification du droit maritime.

Avocat prestigieux, Bâtonnier du Barreau d'Anvers, professeur de droit maritime à l'Université Libre de Bruxelles, Sénateur, Ministre de la Justice, enfin Ministre d'Etat, M. Lilar n'en était pas moins demeuré un homme au coeur simple et humain.

La brusque disparition du baron Albert Lilar constitue pour la Communauté Maritime une perte irréparable.

Combined Transport, Third Meeting of «I.P.G.»

The Intergovernmental Preparatory Group on a Convention on International Multimodal Transport met at Geneva 16 February to 4 March 1976. The meeting was focused on private law questions and also dealt with the much-debated question of the liability of the Combined Transport Operator. As indicated in News Letter No 1, one has to reckon with a possibility of further changes of the so-called "network liability principle". In the meeting a new approach was suggested for consideration. First, the convention should be mandatory and apply to every contract of combined transport. Second, the basic rule of the liability of the CTO - now to be termed MTO for Multimodal Transport Operator - mainly conforms with the liability of the sea carrier as proposed in the UNCITRAL text. The network liability principle only applies with respect to the limitation amount and further only unilaterally in the favour of the shipper who may benefit from a higher limit of liability than the basic limit whenever loss or damage can be localized to a particular leg of the Multimodal Transport.

New Literature and Legislation

A new edition of Lowndes & Rudolf, General Average and York-Antwerp Rules, (British Shipping Laws Volume 7) ed. by Sir John Donaldson, C.S. Staughton and D.J. Wilson (London, 1975) contains a commentary to the 1974 York-Antwerp Rules. Professor Emmanuel du Pontavice, Paris, has published a book "Le Statut des Navires", (Paris, 1976) which i.a. deals with registration of ships, shipbuilding contracts, co-ownership, mortgages and liens, limitation of shipowner's liability, arrest and execution.

A new Maritime Code of 5 February 1976, as well as a Code on International Contracts of the same date have entered into force in the Democratic Republic of Germany (see Gesetzblatt der Deutschen Demokratischen Republik 1976-02-10 and 1976-02-16).

CMI Seminar at Aix-en-Provence 9-11 September 1976

The program for the Seminar has now been finalized and invitations for subscription dispatched to the Maritime Law Associations under the heading of "Apportionment of Risk in Maritime Law - Trends in Modern Shipping law and practice". The following speakers will take part under the chairmanship of the Rt. Honourable Lord Diplock: Messrs F. Berlingieri, W. Birch Reynardson, P. Bonassies, N. Healy, N. Kihlbom, B.G. Nilson, K. Pineus, A. Rein, R. Rodière and R. Rutherford.

Carriage of Goods by Sea - Final Session of UNCITRAL

The draft prepared by the UNCITRAL Working Group was thoroughly discussed at the ninth session of UNCITRAL in New York 12 April - 7 May 1976. The discussion with respect to the following main subjects deserves particular attention.

Scope of application

The "geographical" scope of application was not controversial and the addition compared with the 1924 Convention and the 1968 Protocol thereto that the Convention shall also apply when the port of discharge is located in a contracting State was generally accepted. The diversity of opinion mainly concerned what could be termed the "functional" scope of application. First, there was general agreement that the new Convention could not limit itself to situations where bills of lading were issued, since it was expected that the use of bills of lading will decrease in the future, at least with respect to carriage of general cargo in liner trade. The Convention will therefore apply to carriage of goods by sea under "contracts of carriage".

It was also generally agreed that contracts covered by charterparties should be excepted from the Convention. However, much confusion arose concerning the distinction between "contracts of carriage" covered by the Convention and contracts excepted therefrom. Some delegations, supported by the CMI, pointed out that nothing seems to prevent the carrier from issuing a charterparty to evidence a contract in liner trade and that, therefore, the Convention simply had to define the type of contract covered by the Convention or, alternatively, the type of contract excepted therefrom.

In view of the difficulties by such a definition to provide for a clear delimitation of the functional scope of application of the Convention - i.e. to determine to what extent successive carriage of a quantity goods over a certain period of time - should be covered, the U.K. delegation supported by the CMI suggested that the contracting parties should be able to opt out of the Convention. This proposal was a little hastily and without due consideration rejected by a great majority of delegations.

The period of responsibility

The surrender of the "tackle-to-tackle" principle was generally accepted but it appeared that the extension of the period to cover the time during which the goods are in the charge of the carrier will give rise to difficult problems in practice. First, one did not wish to enter into the field of combined transports. The Convention should only apply to what could be understood as "carriage by sea". Hence, if the goods leave the port area, the Convention will cease to apply and, if the on-carriage is performed by the sea carrier, he will be subjected to another liability regime. While this principle is clear enough, the "conversion" of the sea carrier to a warehouse-man or a "land carrier" may well be difficult to pinpoint in practice.

The liability of the carrier

Not unexpectedly the carrier's liability was considered the key question. Unless a satisfactory solution is achieved here, the Convention will have no future or will have a limited success with the danger of a chaotic situation with varying liability regimes for the carriage of goods by sea.

The delegations of the Federal Republic of Germany, Japan, USSR and the UK suggested that the carrier's defence of navigational errors be maintained and this proposal was supported by the delegations of Belgium, Bulgaria and Poland, (Netherlands having supported the proposal in its previous observations to the draft of the UNCITRAL Working Group). The majority of delegations (Australia, Barbados, Czechoslovakia, France, Ghana, Hungaria, Nigeria, Norway, Singapore and United States, as well as the observer of the Democratic Republic of Germany) were against and urged that the "compromise" achieved some years ago within the UNCITRAL Working Group be maintained. The proponents of the defence of error in navigation then suggested that, in view of the serious diversity of opinion on this point, an alternative text be inserted in the draft within brackets. This proposal was rejected by 15 no, 8 yes and 1 abstention.

Several delegations were displeased with the so-called "fire compromise". The draft does not treat fire as a carrier's defence but, by placing the burden of proving that the fire arose due to the carrier's fault or negligence upon the claimant, the provision will frequently for all practical purposes work as a defence. This, of course, is a somewhat peculiar arrangement from a pure legal point of view. It was pointed out by the CMI that it seemed to be more honest either to retain fire as a defence or to drop it all together.

The CMI explained the philosophy behind the 1974 Hamburg Hague Rules Recommendation with respect to the carrier's liability. While refraining from assessing

the inherent merits of the UNCITRAL's compromise compared with the CMI's compromise, the CMI pointed out that the very objective behind these alternative compromises was different. The UNCITRAL compromise did try to achieve a substantial change of the risk allocation between carrier and shipper, while the CMI compromise sought to achieve a clearer risk distribution but without upsetting the present balance with the ensuing repercussions on the insurance market and an increase of the total cost of insurance. It was also stressed that the deletion of the traditional important carrier's defences of error in navigation and fire would undoubtedly induce sea carriers voluntarily to take upon themselves the risks which remained on top of the mandatory liability regime and thus to present to their customers so-called insured bills of lading. This would, in fact, lead to a serious encroachment on, or even the abolishment of, cargo insurance. The likelihood of such a development would increase if the UNCITRAL "fire compromise" would not survive, which, indeed, seems probable as it cannot stand the test of even a rather modest legal scrutiny. Previous studies within UNCTAD's Committee on Invisibles and Finance related to Trade (the so-called CIFT-Committee) clearly demonstrated that such a development would be against the interests of developing countries as they would then lose the possibility to maintain and further organize cargo insurance companies in their own countries, while at the same time the possibilities to acquire a control of P & I insurance in their own countries would seem to be extremely difficult. In addition, shippers have now become increasingly aware of the danger that they may lose control of "the risk costs" if they were to be forced by mandatory legislation to buy themselves additional, or the whole, protection for loss of or damage to the cargo from the sea carrier.

The CMI underlined that it did not wish to support the interest of any parti-

cular party - be it the carrier, the shipper or their respective insurers - but that its Hamburg Hague Rules Recommendations should be understood as a kind of "market research" with a view to ascertaining what type of liability provision would stand the greatest chances of being universally adopted. The CMI expressed serious doubts as to whether a convention with the liability rule of the present draft would be generally accepted by international world trade. The strong opposition by several major maritime and trading countries was clear enough evidence that the CMI's doubts were well founded.

Summing up, the discussion with respect to the liability rule of the Convention has not yet come to an end.

Limitation of liability

The draft of the UNCITRAL Working Group contained no less than five alternatives to limit the carrier's liability and efforts were now made to reduce the alternatives and the different suggested combinations. First all basic questions had to be resolved, namely:

- Should there be a simple per kilo limitation or a dual per kilo/unit limitation as in the 1968 Protocol?
- Should there be a special limitation for liability for delay and, if so, should such special limit be related to the freight?
- Should the provision contain an express rule with respect to the possibility to agree on a higher limitation figure by a declaration of value?
- Should the limitation provision contain a "container formula" of the same type as in the 1968 Protocol?

It appeared that a great majority of delegations preferred the combined per kilo/unit limitation (12 delegations). Six delegations preferred a simple per

kilo limitation particularly stressing the wellknown complications for the application of the unit limitation in practice. Norway suggested, as an alternative to the unit limitation, a minimum limitation amount in order to achieve protection for low weight and high value cargo but this suggestion did not attract much support.

A great number of delegations preferred to have a special limitation for liability for delay and considered that it would be most proper to relate such limitation to the freight amount.

Similarly, a majority of delegations preferred an express rule entitling the parties to agree on a higher limitation amount by a declaration of value, it being understood that there should be a real contractual agreement between the parties and not merely a unilateral declaration by the shipper. Practically all delegations, with the exception of Japan, wished to see the "container formula" of the 1968 Protocol retained.

Gold or "SDRs"?

The representative of the World Bank explained that a reference to gold was now unworkable. The only practical alternative would be to use the so-called Special Drawing Rights (SDRs) of the International Monetary Fund. However, problems still remain with respect to the non-IMF members. The solution of the Montreal Protocol of 1975 amending the Warsaw Convention for international carriage by air, whereby non-IMF members may continue to express the unit in terms of Poincaréfrancs, was deemed unsatisfactory as it cannot assure international uniformity. A better alternative, it was said, would be to let such non-IMF members determine the value of the limitation unit via the relation of its own currency to the currency of a chosen IMF member. It was decided to leave this question to the Diplomatic Conference but to delete any reference to Poincaréfranc in the draft text,

merely indicating a special "unit" without any indication as to the type and the level of the limitation amount.

Loss of the right to limit liability

First, the discussion concerned the more or less juridical-technical problem to express the nature of the act or omission sufficient to defeat limitation. Here, it was decided to maintain the text of the UNCITRAL Working Group, that is "an act or omission done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result". Second, the question if the carrier should also lose his right of limitation of liability when such acts or omissions could not be attributed to himself but only to his servants or agents, appeared still to be controversial in spite of the fact that the 1974 Athens Convention relating to the carriage of passengers and their luggage by sea upheld the carrier's right of limitation also in such situations.

The result became a compromise to the effect that the carrier would also lose his right to limit liability when the relevant act or omission could be attributed to either an employee other than the master and members of the crew while he exercised within the scope of his employment a supervisory authority in respect of that part of the carriage during which such act or omission occurred or to an employee of the carrier, including the master or any member of the crew, while handling or caring for the goods within the scope of his employment. Thus, the carrier will be responsible for errors in navigation and management of the ship but his right to limit liability will be upheld in such cases even though the reckless act or omission can be attributed to his servants or agents. Although the aim to reach a compromise is apparent, the solution - as is also the case with the so-called "fire compromise" - leaves much to be desired.

In fact, the notion of error in navigation and management of the ship is re-introduced with respect to the loss of the right to limit liability.

Liability of the "carrier" and the "actual carrier"

The reference to "carrier" means throughout the contracting carrier but an "actual carrier", although he has not entered into a contract of carriage with the shipper, is also covered and responsible under the Convention. In view of the fact that the text prepared by the UNCITRAL Working Group deviated from the corresponding text of the 1974 Athens Convention relating to the carriage of passengers and their luggage by sea in that the text of the Working Group defines "actual carrier" as the person to whom the performance of the carriage has been entrusted by the carrier, while the Athens Convention refers to the person actually performing the carriage, a discussion in substance took place. It was pointed out that if a shipping line had time-chartered its vessels it should be considered an actual carrier even in cases where some other person had concluded the contract of carriage and that, therefore, the definition suggested by the Working Group was the correct one. On the other hand, the definition was too narrow since it would not cover an actual carrier to which the transport had been entrusted by some other person than the contracting carrier. The text was therefore changed to cover that situation as well. Nevertheless, the liability provision is not consistent with the definition, since no liability for the actual carrier seems to arise unless the carriage is performed by him. Apparently, the definition has to be synchronized with the liability provision. As far as the substance is concerned, it seems a little peculiar to deviate in this context from the recently adopted definition of the 1974 Athens Convention. Indeed, it would seem to be quite satisfactory to protect the shipper by holding the contracting

and the performing carrier liable jointly and severally and to leave any other intermediate parties out of the chain of liable persons.

Through carriage

Some delegations objected to offering a person issuing a through B/L the opportunity to avoid liability for the part of the carriage not performed by him, which is the traditional rule within shipping law. However, the majority pointed out that it would not serve the needs of commerce if the mandatory liability would govern the whole of the through carriage, since carriers could then be expected to avoid the issuance of through documents and to confine themselves to issue a carrier-type of document only for the part of the carriage actually performed by them. In such cases, it would for instance be impossible for a CIF-seller to fulfil his obligations according to the rules of the International Chamber of Commerce relating to documentary credits to present a carrier document covering the whole transit. The principle earlier suggested by the UNCITRAL Working Group was upheld but the wording was changed so as to ascertain that the shipper would well know beforehand what type of contract he entered into with the through-carrier and to give him adequate remedies against the actual carriers. In order to avoid liability for the part of the carriage not performed by him, the through-carrier must explicitly provide in the contract of carriage that a specified part of the carriage shall be performed by "a named person other than the carrier". Further, he has the burden to prove that the occurrence causing loss, damage or delay in delivery has taken place while the goods were in the charge of that other carrier.

Back-letters

Unfortunately, the solution suggested by the UNCITRAL Working Group to the effect that the so-called "fraudulent" back-

letters will deprive the carrier of his natural right of indemnification against the instigator - the shipper - remains. The solution has been heavily criticized by the International Chamber of Commerce and by the CMI as unjust and undesirable, as it indirectly seems to give legal recognition to "non-fraudulent" back-letters whatever that may be.

Notice of loss of damage and delay

An inflation-like development has taken place here, since the time of notice has now been extended to 15 consecutive days compared with 10 consecutive days of the earlier draft by the Working Group and the 3 days of the 1924 Brussels Conventions. But a late notice shall only have the effect that the carrier shall be considered prima-facie to have delivered the goods in good condition. If the shipper claims that this is not the case, he will under most national systems of law have the burden of proving the correctness of his allegation anyway.

Time bar (prescription)

The time bar is now suggested to apply not only to claims against the carrier but also to claims by the carrier

against the shipper, for instance the claim for freight. Further, the period has been extended from one year to two years. The time bar may be prolonged by agreement between the parties but in such cases a "declaration in writing" is required. Actions for indemnity by persons having been held liable under the Convention against other parties may be brought even after the expiration of the ordinary time bar and the time allowed for such actions shall not be less than 90 days commencing from the day when the person bringing the action for indemnity has settled the claim or has been served with process in the action against himself.

Future developments

It is difficult to foresee what will take place in the UNCTAD Meeting 26-30 July when the text will be discussed.

It should be borne in mind that the views on the main subjects were sharply divided within UNCITRAL and that therefore, perhaps, further efforts of reconciling these views may then be made. The Diplomatic Conference is envisaged to take place in the course of 1978.

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CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL — number 4 — December, 1976

The CMI September Seminar at Aix-en-Provence

The Seminar dealt with Apportionment of risk in maritime law - a vast subject of great interest for the practice and theory of maritime law. The attitude to risk apportionment cannot for ever remain the same in a changing society. This is i.a. evidenced by recent shipping legislation where for instance, the need for "consumer protection" is apparent within the law relating to the carriage of passengers and their luggage by sea (1974 Athens convention) and where the concepts of commercial insurability and an equitable division of risks between the sea carrier and third parties underlies the oil pollution (civil liability and fund) conventions and the 1976 global limitation of liability convention. But our willingness to accept a liability system solely based on practical and economical considerations seems restricted. The Uncitral draft for a new convention on the carriage of goods by sea may serve as an example. Here, generally speaking, a basic concept of negligence is preferred to the classical system of "prima facie liability" with the exceptions embodied in the so-called Hague Rules catalogue.

The primary purpose of the Seminar was to examine by a discussion between experts of the practice and theory of maritime law whether a method could be found to achieve a better economy in the apportionment of the various risks to the benefit of all interested parties.

The Seminar had attracted a great number of participants (about 200). It

was chaired by Lord Diplock who, in his introductory speech, stressed that the traditional rules pay little or no attention to the reality of insurance, its cost or its economic consequences but rather concentrated on the aspects of "morality" and "reasonableness" disregarding the sad fact that - irrespective of liability system - the victim of the risk would be the party who ultimately pays for the risk via the freight or, rather, the price for goods having been carried by sea. Hence, the traditional law is not directed to reduce to a minimum the over-all cost of the loss and the administrative expense of dealing with the various risks and the transfer of costs involved in recourse actions.

The risks dealt with during the Seminar comprised those incurred by

- (1) the parties to the same maritime adventure (e.g. shipowners and cargo owners);
- (2) the parties to some other maritime adventure (e.g. collision damage to another ship or cargo);
- (3) the "strangers" to any maritime adventure (e.g. the victims of oil pollution or other damage to property and land).

Views with respect to the risks under (1) were presented by Mr B G Nilson of the Incotrans shipping line, Rotterdam, Mr N Kihlbom of the Gothenburg cargo insurance company Atlantica, Mr W Birch-Reynardson of the P & I insurance company Thos. Miller & Son, London, our President, Professor F Berlingieri, the President of the French Maritime Law Association J Potier reading a

paper written by Professor R Rodière and, finally, by the Gothenburg Average Adjuster our Secretary-General Executive, Mr Kaj Pineus.

The risks under (2) and (3) were explained by the New York attorney, Professor N Healy (collisions), Professor P Bonassies of Marseille (third party claims) and, finally, by the Oslo attorney Mr Alex. Rein (global limitation of shipowners' liability).

Most of the introductory speeches, as well as the discussion, focused upon the allocation of risk between the sea carrier and the cargo-owner, probably as a result of the highly controversial Uncitral draft convention on the carriage of goods by sea. But the introductory speeches of Professor Healy, Professor Bonassies and Mr Rein demonstrated the possibility to consider the commercial and economical factors in the apportionment between the shipowner and other parties as well. Hence, within the field of global limitation of the shipowners' liability, the traditional link to the "fortune de mer" was in the process of being replaced by the concept of "commercial insurability". And the negligence-rule in tort law has to tolerate an increasing encroachment by the principle of strict liability (e.g. in the civil liability for oil pollution convention) which, possibly, might be more effective for the purpose of loss prevention. It was almost paradoxical to note that the recent change of the U.S. law to abandon the principle of equal division of damages in both-to-blame collision cases (the "Reliable Transfer" case) in favour of the proportional fault rule of the 1910 Brussels collision convention by some speakers was thought to contravene the need for simplification. But, as much as one could appreciate the merit of reducing recourse actions and litigations within the field of collision claims, agreements to this affect (such as "knock-for-knock agreements") were more difficult to implement than within the field of contract law.

Mr Nilson, wishing to avoid the highly expensive transfer of cost for risks incurred, pointed out that this could only be achieved by choosing one of the two extremes either to free the shipowner from liability (no liability) or to place upon him all liability (strict liability). He further suggested that the shipowners - aware of the impact of a proper handling of claims on their "market image" - would be somewhat unhappy with the first-mentioned alternative. Hence, he thought that the placing of a strict liability upon the shipowner for cargo damage would be the only "logical solution".

The views of Mr Nilson was most strongly apposed by Mr Kihlbom who stressed that the shipowner should stick to his main function - the carriage of goods - and that the cargo-owner had no interest at all to be forced into the only option of buying his protection for the risk from the shipowner. Merchants should concentrate their risk capital on their "commercial risks" and engage cargo insurers to take care of the transportation risks. This would give them a cover which was comprehensive, secure and simple. He also felt that the administrative expense involved in the present system was tolerable and that, therefore, great care should be taken not to introduce innovations such as those contained in the Uncitral draft convention which, if implemented, would wholly upset the present balance of risks between shipowners and cargo-owners.

Mr Birch-Reynardson, however, stressed the danger of overlapping P & I and cargo insurance and concluded that technological changes of transportation - such as containerization and door-to-door carriage of goods - may call for a "full carrier's liability" of the kind envisaged by Mr Nilson.

Professor Berlingieri questioned the possibility to choose one of the extremes "no liability" or "full liability", since the former would cause the de-

terrence necessary to promote greater care to disappear while, in spite of the latter, cargo insurance would still be desirable at least during the period not covered by the sea carrier's "full liability". He did, however, in his comparative analysis criticize the Uncitral draft as the small advantages contained therein would be outnumbered by the disadvantages of the lack of precedents until, over the years, a new body of jurisprudence had developed. Further, the abolition of the sea carrier's classical defences of error in the navigation of the vessel and fire would, as a result of the concentration of risks on the sea carrier, lead to a total increase of the risk cost, not to mention the increase of administrative expense following from the opening-up of a completely new field for recourse actions.

In his paper, Professor Rodière stressed the difference between the mandatory type of the sea carrier's liability in liner trade, where bills of lading are still customary to evidence the contract of carriage, and the non-mandatory contract covered by charter-parties. The distinction clearly appears from the French Maritime Code of 1966 (alas less clearly from the Uncitral draft!). Within the field of charter-parties, the contracts were negotiated and the need to restrict the freedom of the parties, which may be felt with respect to terms dictated by the sea carrier in liner trade, was not at hand.

Mr Pineus, when dealing with General Average - the oldest method of reallocation of risk stressed its function as a supplement to marine insurance. It was questionable whether an abolishment of General Average would lead to a simplification and, thus, a saving of cost. Probably, the cost of extraordinary sacrifices or expenditure would then appear under new headings, such as "particular charges to cargo" and the like. And no general wish to abolish General Average was expressed in connection with the 1974 Hamburg amendments of the 1950

York Antwerp Rules. He also indicated the possible "spin off"-effects on General Average of the liability provision of the Uncitral draft convention. Here again, the change of the traditional risk allocation would tend to upset the present refined balance of risks and threaten the very existence of General Average.

Summing-up, the Seminar did demonstrate a rather strong resistance to change. Methods to achieve saving of costs, such as non-recourse agreements, were welcomed but radical innovations did not receive much sympathy and understanding.

Under the excellent chairmanship of Lord Diplock, the Seminar - guided by the skilful introductions of well-known experts on maritime law - gave a useful and broad survey of the vast subject of apportionment of risk in maritime law. A discussion in depth directed to the crucial points was not possible owing to the limited time available and the great number of participants. However, this new CMI activity is very promising for the future and will no doubt become a worthwhile instrument for the exchange of views in the intervals between the CMI Conferences.

The new Convention on Limitation of Liability for Maritime Claims

An International Conference was convened in London on the 1st November 1976 by the Inter-governmental Maritime Consultative Organization (IMCO) to consider the replacement of the "International Convention relating to the limitation of the liability of owners of sea-going ships" (1957) by a new convention. The CMI was represented by its new President, Professor F Berlingieri (during the first days of the Conference) and by Mr Alex. Rein, Oslo, the chairman of the CMI International Subcommittee. The CMI received an acknowledgement from the President of IMCO, Mr C P Srivastava,

for its preparatory work which had formed the basis for the discussions within IMCO's Legal Committee. Mr Rein has kindly prepared the following brief summary for this Newsletter (a full report will appear in the CMI Documentation).

The draft convention which was submitted to the Conference (IMCO Draft) had been prepared by IMCO's Legal Committee, based on the so-called "maxi-draft" for a new Convention on Limitation of Liability for Maritime Claims adopted by CMI's XXX Conference in Hamburg in April, 1974 (CMI Draft). The IMCO Draft as well as the CMI Draft have been reproduced, both in English and French, in CMI Documentation 1976, Vol. III, page 198 et seq.

A new Convention was duly adopted by the Conference and signed in London on the 19th November under the title "Convention on Limitation of Liability for Maritime Claims, 1976". 40 State Parties were present when the draft elaborated by the Conference was put to the final vote. 34 States voted in favour of it, none against, while six abstained (France, Greece, Indonesia, Iran, Switzerland and the USA).

Bearing in mind the large number of proposed amendments which were tabled during the several sessions of the Legal Committee and at the final International Conference, it is remarkable to what considerable extent the original CMI Draft is reflected in the final text. This applies not only to the legal form and construction of the Convention, but also to its legal substance. The principle of "insurability" as the basis for limitation of liability was implicitly recognized by the Conference inasmuch as the limits have been made "unbreakable" to the same extent as the equivalent insurance cover. Whether or not the Conference adhered in full to that principle in fixing the monetary limits is a matter of opinion as to what limits are

"reasonably" insurable. A number of proposals were tabled - ranging from very substantial increases of the present figures to moderate adjustments to make up for the general inflation during the last 20 years. The final result was a compromise - a "package deal" worked out by a Special Committee of the Conference.

In this Newsletter we must limit ourselves to a cursory presentation of the rules of the new Convention, mainly the deviations from the IMCO Draft. The word "Article" as used below means the relevant article of the new Convention. The comparison with the IMCO Draft as found in Documentation 1976 III should create no difficulties.

Article 1 (Persons entitled to limit liability) conforms to the IMCO Draft, and the only substantial difference from the old Convention is that right of limitation may also be invoked by salvors who are not operating from any ship. It is now expressly stated that the liability insurer, when sued directly, has the same right of limitation as the assured.

Article 2 (Claims subject to limitation) is in substance identical with the IMCO Draft, but with respect to the general exceptions in Article 3 (Claims excepted from limitation) there are some changes: Claims for oil pollution damage "within the meaning" of the 1969 Convention "or any amendment or Protocol thereto which is in force" are excepted. Both IMCO and CMI had proposed that only claims actually subject to the present 1969 Convention should be exempted. - With respect to liability for nuclear damage the Conference preferred the proposal of CMI to that contained in the IMCO Draft. - Liability to passengers carried in the ship is not excepted (as proposed by IMCO), but made subject to a separate catastrophe limit as favoured by IMCO, see Article 7.

Article 4 (Conduct barring limitation) adheres to CMI's proposal to make the limitation "unbreakable" except in cases

of wilful misconduct. The alternative proposal in the IMCO Draft, making the limitation breakable in case of "gross negligence", was not favoured.

The most important - and most controversial - provision of the Convention was Article 6 (The general limits). In order to evaluate the level of liability prescribed by the new figures it is necessary to examine the changes which have been made in the construction of the limits.

First, the tonnage unit in the old Convention, the "limitation ton", has been replaced by the gross ton as defined by the Tonnage Measurement Convention of 1969.

Second, the gold unit (the Poincaré franc) has been replaced by a new Unit of Account which is the Special Drawing Right (SDR) as defined by the International Monetary Fund, converted into national currencies in accordance with certain rules (Article 8). At the time of the Conference the ratio between the SDR and the U.S. Dollar was 1 to 1.20. States who are not members of the IMF have the option of replacing the Unit of Account by an equivalent value expressed in Monetary (gold) Units (the Poincaré franc). The ratio between the SDR and the Poincaré franc was fixed at 1 to 15.

There are separate limits for claims in respect of loss of life and personal injury (personal claims) and other claims, and the respective limits are computed by a decreasing number of Units of Account per ton, in stages, as the tonnage increases, but there is a fixed minimum limit for ships with tonnage not exceeding 500 tons. The limit applicable to salvors not operating from any ship or solely operating on board the salvaged ship shall be based on a tonnage of 1500.

Finally, while the personal claim limit is exclusive for such claims, the limit for other claims is a joint limit for "property claims" and any balance of personal claims exceeding the personal claims limit; i.e. the same "spill-over" of personal claims into the property fund as in the 1957 Convention. The balance of property claims and all other claims shall rank rateably, but the State Parties have the right to provide in their national law that claims in respect of damage to harbour works, basins and waterways and aids to navigation shall take priority over other property claims.

Based on the above premises the general limits were fixed as shown in the table below. For comparison purposes the equivalent amounts in U.S. Dollars have been inserted in a separate column.

THE GENERAL LIMITS

<u>Personal claims</u>	Units of Account	Monetary Units	U.S.\$
Tonnage not exceeding 500 tons	333,000	5 million	400,000
For additional tonnage an additional amount per ton:			
501 - 3000 tons	500	7,500	600
3001 - 30000 "	333	5,000	400
30001 - 70000 "	250	3,750	300
above 70000 "	167	2,500	200
<u>Other claims</u>			
Tonnage not exceeding 500 tons	167,000	2,5 million	200,000
For additional tonnage an additional amount per ton:			
501 - 30000 tons	167	2,500	200
30001 - 70000 "	125	1,850	150
above 70000 "	83	1,250	100

As mentioned above, the shipowner's liability for loss of life or personal injury to passengers carried in the ship is not subject to limitation in accordance with the general limits. The special limit fixed in Article 7 is 46,666 Units of Account (equivalent to the per capita limitation pursuant to the Athens Passenger Convention) multiplied by the number of passengers the ship is authorized to carry, but not exceeding 25 million Units of Account. The corresponding figures in Monetary Units (and U.S. Dollars) are 700,000 (\$ 56,000) and 375 million (\$ 30 million), respectively.

The rules on "Aggregation of claims" in Article 9 are identical with those of the old Convention as regards claims against the shipowner, charterer, manager and operator and persons for whom they are responsible. Article 9, however, has special rules on aggregation of claims arising out of salvage operations. Claims against the owner of a ship rendering salvage services and salvors operating from a ship or operating on the ship to which salvage services is being rendered, shall be aggregated with claims against persons for whom he is responsible, but not with claims against the owner of the salvaged ship.

Like the old Convention, Article 10 allows limitation of liability without the constitution of a limitation fund, but a State Party may provide in its national law that the constitution of a fund shall be a prerequisite to limitation.

Article 11 (Constitution of the fund) and Article 12 (Distribution of the fund) are materially identical with the equivalent provisions of the IMCO Draft, with one exception. The Conference did not accept the proposal made both by CMI and IMCO to the effect that the person liable may claim against the fund in respect of expenses reasonably incurred by himself in order to avert or minimize the loss.

Article 13 (Bar to other actions) and Article 14 (Governing law) also conform to the proposals made in the IMCO Draft.

Article 15, dealing with "Scope of application" maintains the rule of lex fori as proposed in the IMCO Draft. This Article allows a State Party to regulate by specific provisions of national law the system of limitation to be applied to vessels of less than 300 tons and to vessels which according to national law are "intended for navigation on inland waterways". It also allows national law to regulate the system of limitation of liability in cases where the interest of persons who are nationals of other State Parties are in no way involved. The new Convention shall not apply to "air cushion vehicles" or to "floating platforms for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof". Drilling vessels which are ships in the conventional sense are, however, subject to the rules of the Convention, but when such ships are "engaged in drilling" the State Parties may apply a higher limit than provided for in the Convention or apply the rules of an international convention regulating the system of liability in respect of such ships.

Article 17 (Entry into force) provides that the Convention shall enter into force one year after it has been ratified or otherwise acceded to by twelve States. As between States which have acceded to it the Convention shall replace the previous conventions of 1924 and 1957.

According to Article 18 (Reservations) the States may reserve the right to exclude limitation of liability for wreck removal, but no other reservations are admissible.

A conference to revise the Convention may be called by IMCO (Article 20), but a Conference to revise the amounts in

Articles 6, 7 or 8 if there is a significant change in their real value shall be called by IMCO if requested by not less than one fourth of the State Parties (Article 21).

The Convention has been established in the English, French, Russian and Spanish languages, each text being equally authentic.

Summing-up, in spite of divergent views on limitation amounts and other points, the new Convention does seem to be based on a fairly solid international consensus. However, in estimating its over-all effect on insurance premiums one has to take the Uncitral draft convention on the carriage of goods by sea into consideration. The effect of an abolishment of the sea carrier's defences of error in navigation and fire as there suggested would be further accentuated by the increased limitation amounts under the new limitation of liability convention.

In connection with the Conference the so-called gold clause problem was discussed in three "mini-conferences". As a result hereof it was decided to introduce the "SDR"-system in

- the 1969 Civil Liability for oil pollution convention;
- the 1971 Fund convention supplementary to the 1969 convention;
- the 1974 Athens convention for the carriage of passengers and their luggage by sea.

The CMI 1977 Assembly and Rio de Janeiro Conference

The ordinary CMI Assembly meeting will take place at Brussels 29 - 30 March 1977.

The time and place for the 1977 CMI Conference has now been definitely decided to 25 - 30 September at Rio de Janeiro upon the kind invitation of the

Maritime Law Association of Brazil. The subjects for discussion will include

- collisions at sea
- drilling
- arbitration.

Forthcoming Meetings and Conferences

The successors of the CMI Tokyo Rules on the law of combined transport will be the subject of further deliberations within Unctad in Geneva 10 - 28 January 1977. The CMI will be represented by Professor Jan Ramberg.

The Diplomatic Conference on the Uncitral draft convention on carriage of goods by sea will be held during 1978 at a time and place yet to be decided.

CMI has now Consultative Status with Unctad

The Unctad Board, at its plenary meeting on 1976-10-18, granted the CMI consultative status which entitles the CMI to be represented at the meetings of the Unctad Committee on Shipping and of the Unctad Board when specific matters falling within the terms of reference of that Committee are considered.

New cases and Literature

The Supreme Court of the United States in the case PETER ROSENBRUCH v. AMERICAN EXPORT ISBRANDTSEN LINES, INC. upheld a ruling of the U.S. Court of Appeals for the Second Circuit, New York, that unpackaged household goods valued at \$102,917.00 in a container represent a loss of \$500.00 per container in accordance with the limits set forth in the U.S. Carriage of Goods by Sea Act. The action came in the form of a denial of

a writ of certiorari and while significant should not be considered as a final legal absolute in respects to container carriage. The household goods had been stowed in a container for carriage from New York to Hamburg aboard the CONTAINER FORWARDER. The container was lost overboard during the crossing of January, 1971.

The Supreme Court also allowed to stand the ruling by the Second Circuit that an order by the shipper on the Bill of Lading for stowage of the container below deck, crossed out by the carrier, could not be defended because the tariff of the North Atlantic Continental Conference did not permit issuance of an underdeck Bill of Lading.

Under auspices of the International Bar Association a series of books on Maritime Law is to appear. Volume I of this series, Arrest of Vessels, has recently been published. The book is edited by Lennart Hagberg, Gothenburg attorney, and written by members of the Maritime and Transport Committee of the Section on Business Law of the International Bar Association. The book can be ordered from Kluwer Publishers Law and Taxation, P.O.Box 23, Deventer, The Netherlands.

Under the above heading notes are currently made in the Newsletter of such novelties which come to the editor's knowledge and which are deemed to be of a general interest to the international maritime community. The readers of the Newsletter are kindly requested to contribute to improve these notes by reporting new legislation, literature, cases and other events, such as seminars or conferences dealing with maritime law in their respective countries. Such reports could be sent to either of the following addresses:

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