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Documents for the Conference



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PART I

**Organization of
the CMI**

Comité Maritime International

CONSTITUTION

2001¹

PART I - GENERAL

Article 1

Name and Object

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

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

Article 2

Existence and Domicile

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

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

Comité Maritime International

STATUTS

2001¹

Ière PARTIE - DISPOSITIONS GENERALES

Article 1er

Nom et objet

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

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

Article 2

Existence et siège

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

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

Part I - Organization of the CMI

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

Article 3

Membership and Liability

I

- a) The voting Members of the Comité Maritime International are national (or multinational) Associations of Maritime Law elected to membership by the Assembly, the object of which Associations must conform to that of the Comité Maritime International and the membership of which must be fully open to persons (individuals or bodies having juridical personality in accordance with their national law and custom) who either are involved in maritime activities or are specialists in maritime law. Member Associations must be democratically constituted and governed, and must endeavour to present a balanced view of the interests represented in their Association.

Where in a State there is no national Association of Maritime Law in existence, and an organization in that State applies for membership of the Comité Maritime International, the Assembly may accept such organization as a Member of the Comité Maritime International if it is satisfied that the object of such organization, or one of its objects, is the unification of maritime law in all its aspects. Whenever reference is made in this Constitution to Member Associations, it will be deemed to include any organization admitted as a Member pursuant to this Article.

Only one organization in each State shall be eligible for membership, unless the Assembly otherwise decides. A multinational Association is eligible for membership only if there is no Member Association in any of its constituent States.

The national (or multinational) Member Associations of the Comité Maritime International are identified in a list to be published annually.

- b) Where a national (or multinational) Member Association does not possess juridical personality according to the law of the country where it is established, the members of such Member Association who are individuals or bodies having juridical personality in accordance with their national law and custom, acting together in accordance with their national law, shall be deemed to constitute that Member Association for purposes of its membership of the Comité Maritime International.
- c) Individual members of Member Associations may be elected by the Assembly as Titulary Members of the Comité Maritime International upon the proposal of the Association concerned, endorsed by the Executive Council. Individual persons may also be elected by the Assembly as Titulary Members upon the proposal of the Executive Council. Titulary Membership is of an honorary nature and shall be decided having regard to the contributions of the candidates to the work of the Comité Maritime International and/or to their services rendered in legal or maritime affairs in furtherance of international uniformity of

Constitution

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

Article 3

Membres et responsabilité

I

- a) Les Membres avec droit de vote du Comité Maritime International sont les Associations nationales (ou multinationales) de droit maritime, élues Membres par l'Assemblée, dont les objectifs sont conformes à ceux du Comité Maritime International et dont la qualité de Membre doit être accessible à toutes personnes (personnes physiques ou personnes morales légalement constituées selon les lois et usages de leur pays d'origine) qui, ou bien participent aux activités maritimes, ou bien sont des spécialistes du droit maritime. Chaque Association membre doit être constituée et gérée de façon démocratique et doit maintenir l'équilibre entre les divers intérêts dans son sein.

Si dans un pays il n'existe pas d'Association nationale et qu'une organisation de ce pays pose sa candidature pour devenir Membre du Comité Maritime International, l'Assemblée peut accepter une pareille organisation comme Membre du Comité Maritime International après s'être assurée que l'objectif, ou un des objectifs, poursuivis par cette organisation est l'unification du droit maritime sous tous ses aspects.

Toute référence dans les présents statuts à des Associations membres comprendra toute organisation qui aura été admise comme Membre conformément au présent article.

Une seule organisation par pays est éligible en qualité de Membre du Comité Maritime International, à moins que l'Assemblée n'en décide autrement. Une association multinationale n'est éligible en qualité de Membre que si aucun des Etats qui la composent ne possède d'Association membre. Une liste à publier annuellement énumérera les Associations nationales (ou multinationales) membres du Comité Maritime International.

- b) Lorsqu'une Association nationale (ou multinationale) Membre du Comité Maritime International n'a pas la personnalité morale selon le droit du pays où cette association est établie les membres (qui sont des personnes physiques ou des personnes morales légalement constituées selon les lois et usages de leur pays d'origine) de cette Association, agissent ensemble selon leur droit national et seront sensés constituer l'Association membre en ce qui concerne l'affiliation de celle-ci au Comité Maritime International.
- c) Des membres individuels d'Associations Membres peuvent être élus Membres titulaires du Comité Maritime International par l'Assemblée sur proposition émanant de l'Association intéressée et ayant recueilli l'approbation du Conseil exécutif. Des personnes peuvent aussi, à titre individuel, être élues par l'Assemblée comme Membres titulaires sur proposition du Conseil exécutif. L'affiliation comme Membre titulaire aura un caractère honorifique et sera décidée en tenant compte des contributions apportées par les candidats à l'oeuvre du Comité Maritime

Part I - Organization of the CMI

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

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

- d) Nationals of States where there is no Member Association in existence and who have demonstrated an interest in the object of the Comité Maritime International may upon the proposal of the Executive Council be elected as Provisional Members. A primary objective of Provisional Membership is to facilitate the organization and establishment of new Member national or regional Associations of Maritime Law. Provisional Membership is not normally intended to be permanent, and the status of each Provisional Member will be reviewed at three-year intervals. However, individuals who have been Provisional Members for not less than five years may upon the proposal of the Executive Council be elected by the Assembly as Titulary Members, to the maximum number of three such Titulary Members from any one State. The Provisional Members of the Comité Maritime International are identified in a list to be published annually.
- e) The Assembly may elect to Membership *honoris causa* any individual person who has rendered exceptional service to the Comité Maritime International or in the attainment of its object, with all of the rights and privileges of a Titulary Member but without payment of subscriptions. Members *honoris causa* may be designated as honorary officers of the Comité Maritime International if so proposed by the Executive Council. Members *honoris causa* shall not be attributed to any Member Association or State, but shall be individual members of the Comité Maritime International as a whole. The Members *honoris causa* of the Comité Maritime International are identified in a list to be published annually.
- f) International organizations which are interested in the object of the Comité Maritime International may be elected as Consultative Members. The Consultative Members of the Comité Maritime International are identified in a list to be published annually.

II

- a) Members may be expelled from the Comité Maritime International by reason:
 - (i) of default in payment of subscriptions;
 - (ii) of conduct obstructive to the object of the Comité as expressed in the Constitution; or
 - (iii) of conduct likely to bring the Comité or its work into disrepute.
- b) (i) A motion to expel a Member may be made:
 - (A) by any Member Association or Titulary Member of the Comité;

Constitution

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

- d) Les nationaux des pays où il n'existe pas d'Association membre mais qui ont fait preuve d'intérêt pour les objectifs du Comité Maritime International peuvent, sur proposition du Conseil exécutif, être élus comme Membres Provisoires. L'un des objectifs essentiels du statut de Membre Provisoire est de favoriser la mise en place et l'organisation, au plan national ou régional, de nouvelles Associations de Droit Maritime affiliées au Comité Maritime International. Le statut de Membre Provisoire n'est pas normalement destiné à être permanent, et la situation de chaque Membre Provisoire sera examinée tous les trois ans. Cependant, les personnes physiques qui sont Membres Provisoires depuis cinq ans au moins peuvent, sur proposition du Conseil exécutif, être élues Membres titulaires par l'Assemblée, à concurrence d'un maximum de trois par pays. Une liste à publier annuellement énumèrera les Membres Provisoires du Comité Maritime International.
- e) L'Assemblée peut élire Membre honoraire, jouissant des droits et privilèges d'un Membre titulaire mais dispensé du paiement des cotisations, toute personne physique ayant rendu des services exceptionnels au Comité Maritime International. Des membres honoraires peuvent, sur proposition du Conseil exécutif, être désignés comme Membres honoraires du Bureau, y compris comme Président honoraire ou Vice-Président honoraire, si ainsi proposé par le Conseil exécutif. Les membres honoraires ne relèvent d'aucune Association membre ni d'aucun Etat, mais sont à titre personnel membres du Comité Maritime International pour l'ensemble de ses activités. Une liste à publier annuellement énumèrera les membres honoraires du Comité Maritime International.
- f) Les organisations internationales qui s'intéressent aux objectifs du Comité Maritime International peuvent être élues membres consultatifs. Une liste à publier annuellement énumèrera les membres consultatifs du Comité Maritime International.

II

- a) Des membres peuvent être exclus du Comité Maritime International en raison
 - (i) de leur carence dans le paiement de leur contribution;
 - (ii) de leur conduite faisant obstacle à l'objet du Comité tel qu'énoncé aux statuts;
 - (iii) de leur conduite susceptible de discréditer le Comité ou son oeuvre.
- b) (i) Une requête d'exclusion d'un Membre sera faite:
 - (A) par toute Association Membre ou par un Membre titulaire;

Part I - Organization of the CMI

or

- (B) by the Executive Council.
- (ii) Such motion shall be made in writing and shall set forth the reason(s) for the motion.
- (iii) Such motion must be filed with the Secretary-General or Administrator, and shall be copied to the Member in question.
- c) A motion to expel made under sub-paragraph II(b)(i)(A) of this Article shall be forwarded to the Executive Council for first consideration.
 - (i) If such motion is approved by the Executive Council, it shall be forwarded to the Assembly for consideration pursuant to Article 7(b).
 - (ii) If such motion is not approved by the Executive Council, the motion may nevertheless be laid before the Assembly at its meeting next following the meeting of the Executive Council at which the motion was considered.
- d) A motion to expel shall not be debated in or acted upon by the Assembly until at least ninety (90) days have elapsed since the original motion was copied to the Member in question. If less than ninety (90) days have elapsed, consideration of the motion shall be deferred to the next succeeding Assembly.
- e) (i) The Member in question may offer a written response to the motion to expel, and/or may address the Assembly for a reasonable period in debate upon the motion.
 - (ii) In the case of a motion to expel which is based upon default in payment under paragraph II(a)(i) of this Article, actual payment in full of all arrears currently owed by the Member in question shall constitute a complete defence to the motion, and upon acknowledgment of payment by the Treasurer the motion shall be deemed withdrawn.
- f) (i) In the case of a motion to expel which is based upon default in payment under paragraph II(a) of this Article, expulsion shall require the affirmative vote of a simple majority of the Member Associations present, entitled to vote, and voting.
 - (ii) In the case of a motion to expel which is based upon paragraph II(a)(ii) and (iii) of this Article, expulsion shall require the affirmative vote of a two-thirds majority of the Member Associations present, entitled to vote, and voting.
- g) Amendments to these provisions may be adopted in compliance with Article 6. Proposals of amendments shall be made in writing and shall be transmitted to all National Associations at least sixty (60) days prior to the annual meeting of the Assembly at which the proposed amendments will be considered.

III

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

Constitution

- (B) par le Conseil exécutif.
- (ii) Une requête d'exclusion d'un Membre se fera par écrit et en exposera les motifs.
 - (iii) La requête d'exclusion doit être déposée chez le Secrétaire général ou chez l'Administrateur et sera transmise en copie au Membre en question.
- c) Une requête d'exclusion faite en vertu de l'alinéa II (b) (i) (A) ci-dessus sera transmise pour examen au Conseil exécutif pour la prendre en considération.
- (i) Si telle requête est approuvée par le Conseil exécutif, elle sera transmise à l'Assemblée pour délibération telle que prévue à l'article 7 b) des statuts.
 - (ii) Si la requête n'est pas approuvée par le Conseil exécutif, elle peut néanmoins être soumise à la réunion de l'Assemblée suivant immédiatement la réunion du Conseil exécutif où la requête a été examinée.
- d) Une demande d'exclusion ne fera pas l'objet de délibération ou ne il n'en sera pas pris acte par l'Assemblée si au moins quatre-vingt-dix jours ne se sont pas écoulés depuis la communication de la copie de la requête d'exclusion au Membre visé. Si moins de quatre-vingt-dix jours se sont écoulés, la requête sera prise en considération à la prochaine réunion de l'Assemblée.
- e) (i) Le Membre en question peut présenter une réplique écrite à la requête d'exclusion, et/ou peut prendre la parole à l'Assemblée pendant la délibération sur la requête.
- (ii) Dans le cas d'une requête d'exclusion appuyée sur une carence de paiement, comme le prévoit l'article 3 II a) (i) ci-dessus, le paiement effectif de tous les arriérés dus par le Membre visé, constituera une défense suffisante et, pourvu que le Trésorier confirme le paiement, la requête sera présumée être retirée.
- f) (i) Dans le cas d'une requête d'exclusion appuyée sur une carence de paiement prévue à l'alinéa II(a) ci-dessus, le Membre sera exclu à la majorité simple des suffrages exprimés par les Membres en droit de voter.
- (ii) En cas de requête d'exclusion appuyée sur un motif prévu au II a) (ii) et (iii) ci-dessus, le Membre sera exclu par un vote des deux tiers des suffrages exprimés par les Membres en droit de voter.
- g) Des modifications aux présentes dispositions peuvent être adoptées conformément à l'article 6 des statuts. Les propositions de modifications se feront par écrit et seront transmises à toutes les Associations Membres au plus tard soixante jours avant la réunion annuelle de l'Assemblée à laquelle les modifications proposées seront prises en considération.

III.

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

PART II - ASSEMBLY

Article 4

Composition

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

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

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

Article 5

Meetings and Quorum

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

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

Article 6

Agenda and Voting

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

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

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

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

Constitution

2ème PARTIE - ASSEMBLEE

Article 4

Composition

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

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

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

Article 5

Réunions et quorum

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

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

Article 6

Ordre du jour et votes

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

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

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

Part I - Organization of the CMI

Article 7
Functions

The functions of the Assembly are:

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

PART III - OFFICERS**Article 8**
Designation

The Officers of the Comité Maritime International shall be:

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

Article 9
President

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

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

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

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Article 7**Fonctions**

Les fonctions de l'Assemblée consistent à:

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

3ème PARTIE- MEMBRES DU BUREAU**Article 8****Désignation**

Les Membres du Bureau du Comité Maritime International sont:

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

Article 9**Le Président**

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

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

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

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

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

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

Article 10

Vice-Presidents

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

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

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

Article 11

Secretary-General

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

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

Article 12

Treasurer

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

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

The Treasurer shall submit the financial statements and the proposed

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

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

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

Article 10 **Les Vice-Présidents**

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

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

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

Article 11 **Le Secrétaire général**

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

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

Article 12 **Le Trésorier**

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

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

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

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

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

Article 13

Administrator

The functions of the Administrator are:

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

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

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

Article 14

Executive Councillors

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

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

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

Constitution

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

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

Article 13 **L'Administrateur**

Les fonctions de l'Administrateur consistent à:

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

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

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

Article 14 **Les Conseillers exécutifs**

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

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

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

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Article 15**Nominations**

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

The Nominating Committee shall consist of:

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

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

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

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

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

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

Article 16**Immediate Past President**

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

PART IV - EXECUTIVE COUNCIL**Article 17****Composition**

The Executive Council shall consist of:

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

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Article 15**Présentations de candidatures**

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

Le Comité de Présentation de candidatures se compose de:

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

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

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

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

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

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

Article 16**Le Président sortant**

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

4ème PARTIE - CONSEIL EXÉCUTIF**Article 17****Composition**

Le Conseil exécutif est composé:

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

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

Article 18**Functions**

The functions of the Executive Council are:

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

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

Article 18

Fonctions

Les fonctions du Conseil exécutif sont:

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

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

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

Article 19

Meetings and Quorum

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

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

PART V - INTERNATIONAL CONFERENCES

Article 20

Composition and Voting

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

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

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

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

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

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

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

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

Article 19

Réunions et quorum

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

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

5ème PARTIE - CONFÉRENCES INTERNATIONALES

Article 20

Composition et Votes

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

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

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

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

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

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

PART VI - FINANCE AND GOVERNING LAW

Article 21

Arrears of Subscriptions

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

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

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

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

Article 22

Financial Matters and Liability

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

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

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

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

Article 23

Governing Law

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

6ème PARTIE - FINANCES

Article 21

Retards dans le paiement de Cotisations

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

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

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

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

Article 22

Questions financières et responsabilités

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

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

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

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

Article 23

Loi applicable

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

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

PART VII - ENTRY INTO FORCE AND DISSOLUTION

Article 24

Entry into Force ⁽²⁾

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

Article 25

Dissolution and Procedure for Liquidation

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

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

Constitution

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

7ème PARTIE - ENTREE EN VIGUEUR ET DISSOLUTION

Article 24

Entrée en vigueur ⁽²⁾

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

Article 25

Procédure de dissolution et de liquidation

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

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

RULES OF PROCEDURE*

1996¹

Rule 1

Right of Presence

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

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

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

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

Rule 2

Right of Voice

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

Rule 3

Points of Order

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

1. Adopted in Brussels, 13th April 1996.

Rules of Procedure

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

Rule 4

Voting

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

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

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

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

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

Rule 5

Amendments to Proposals

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

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

Rule 6

Secretary and Minutes

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

Part I - Organization of the CMI

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

Rule 7

Amendment of these Rules

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

Rule 8

Application and Prevailing Authority

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

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

GUIDELINES FOR PROPOSING THE ELECTION OF TITULARY AND PROVISIONAL MEMBERS

1999¹

Titulary Members

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

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

Provisional Members

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

Periodic Review

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

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

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¹ Born 1944 in Västerås, Sweden. 1971: Bachelor of law, University of Uppsala, Sweden. 1971-1972: Lecturer, School of Economics, Gothenburg, Sweden. 1972: Associate, Mannheimer & Zetterlöf, Gothenburg, Sweden. 1973-1976: Legal officer, United Nations Commission on International Trade Law, United Nations Conference on Trade and Development, Geneva, Switzerland. 1977-1981: Research fellow, Scandinavian Institute of Maritime Law, Oslo, Norway. 1982-2010: Attorney at law, Northern Shipowners Defence Club, Oslo, Norway. 2012 : Partner, Arntzen de Besche, Oslo, Norway 1993-2000: President, Norwegian Maritime Law Association, Oslo, Norway. 1994: Executive Councillor, Comité Maritime International, Antwerp, Belgium. 1996: Chairman of the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and related subjects. 1998: Mediation Workshop, arranged by Professor Frank E.A. Sander, Harvard Law School. 1999: President of the Main Committee of the Diplomatic Conference on Arrest of Ships. 2001: Vice President, Comité Maritime International, Antwerp. Delegate of Norway to several IMO, UNCTAD and UNCITRAL meetings. Participated in the drafting of several BIMCO documents, such as BARECON 2001.

² Born 1945 in Lille, France. Studied law in Lille and Paris. Lecturer at the Universities of Rheims and Paris 1969-1978. Admitted to Paris Bar in 1972, when he became an associate to Jacques Villeneau. Partner and founder-member of the present law firm Villeneau Rohart Simon, & Associés since 1978. Chairman of Committee A (Maritime and Transport Law) of the International Bar Association 1992-1995. Treasurer (1989-1997) and subsequently President (1997-2002) of the Association Française du Droit Maritime. Titulary Member, Executive Councillor (1994-2002), and subsequently elected President of the Comité Maritime International (June 2004).

Officers

*Vice-Presidents:***The Honourable Justice Johanne GAUTHIER** (2008)³

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*Secretary General:***Nigel FRAWLEY** (2005)⁵

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

⁴ Educated :Wellington College, UK; read Law at Pembroke College, Cambridge, UK, awarded Exhibition 1971, MA 1975. Partner Ebsworth and Ebsworth, Sydney. 1981-1997. Partner Withnell Hetherington 1998. Called to the Bar of England and Wales at Grays Inn 1973. Admitted as a solicitor in Victoria and New South Wales 1978. President of the Maritime Law Association of Australia and New Zealand (1991-1994). Titulary Member CMI. Author Annotated Admiralty Legislation (1989). Co-author with Professor James Crawford of Admiralty Section of Transport Section in Law Book Company's "Laws of Australia".

⁵ Nigel H. Frawley was educated at the Royal Military College in Kingston, Ontario, Canada and the Royal Naval College in Greenwich, England. He served for a number of years in the Royal Canadian Navy and the Royal Navy in several warships and submarines. He commanded a submarine and a minelayer. He then resigned his commission as a Lieutenant Commander and attended Law School at the University of Toronto from 1969 to 1972. He has practised marine and aviation law since that time in Toronto. He has written a number of papers and lectured extensively. He was Chairman of the Maritime Law Section of the Canadian Bar Association from 1993 to 1995 and President of the Canadian Maritime Law Association from 1996 to 1998.

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

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

⁸ Advocate to the Supreme Court of Cassation, Senior Partner Studio Legale Berlingieri, Titular Member Comité Maritime International, President Italian Maritime Law Association, associated editor of *Il Diritto Marittimo* and of *Diritto e Trasporti* and member of the Contributory Board of *Droit Maritime Français*.

⁹ Born 24 January 1956 in Santiago, Chile. Tulane University School of Law, *Juris Doctor, cum laude*, 1979; University of Virginia, Bachelor of Arts, with distinction, 1976; Canal Zone College, Associate of Arts, with honors, 1974. Admitted to practice in 1979 and is a shareholder in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC and currently represents maritime, energy and insurance clients in litigation and arbitration matters. He has lectured and presented papers at professional seminars sponsored by various bar associations, shipowners, and marine and

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energy underwriters in Asia, Latin America and the United States. He is a member of the Advisory Board of the Tulane Maritime Law Journal, the New Orleans Board of Trade, and the Board of Directors of the Maritime Law Association of the United States. He became a Titulary Member of the CMI in 2000 and a member of the Executive Council in 2005.

¹⁰ Born 1939 in Malmö, Sweden. Studies at Princeton University (USA) 1957-58. Bachelor of Law Lund University, Sweden 1964. Served as a judge at district court and appellate court level in Sweden 1964-1970. Appointed President of Division of the Stockholm Court of Appeal 1985. Legal advisor in the Department for International Affairs of the Swedish Ministry of Justice 1970-1981 and Head of that Department 1982-1984; responsible for the preparation of legislation in various fields of civil law, mainly transport law, nuclear law and industrial property; represented Sweden in negotiations in a number of intergovernmental organisations, e.g. the International Maritime Organization (IMO). Director of the International Oil Pollution Compensation Funds 1985-2006. Served as arbitrator in Sweden. Member of the Panel of the Singapore Maritime Arbitration Centre and of the International Maritime Conciliation and Mediation Panel. Published (together with two co-authors) a book on patent law as well as numerous articles in various fields of law. Visiting professor at the World Maritime University in Malmö (Sweden) and at the Maritime Universities in Dalian and Shanghai (People's Republic of China). Lecturer at the IMO International Maritime Law Institute in Malta, the Summer Academy at the International Foundation for the Law of the Sea in Hamburg and universities in the United Kingdom and Sweden. Member of the Steering Committee of the London Shipping Law Centre. Awarded the Honorary Degree of Doctor of Laws by the University of Southampton 2007. Elected Executive Councillor 2007.

¹¹ Born in 1934 in Sebastopol; married; graduated from the Law School of the Institute of Foreign Trade in Moscow; 1961/62 school year in the University of Michigan, USA; in 1963 got the degree of candidate of legal sciences at the Moscow Institute of International Relations where now is a professor in the Private International and Civil Law Department; acted as arbitrator in about 600 international commercial and maritime cases in Russia and abroad, particularly in Stockholm, Warsaw, London, Beijing, Geneva, Zurich, Kiev; since 1972 the president of the Maritime Arbitration Commission also a member of the Presidium of the International Commercial Arbitration Court of the Russian Chamber of Commerce and Industry; Vice-President of the Russian Association of Maritime Law and International Law; participated as an expert in international organizations including UNCITRAL (since 1970), Council of Mutual Economic Assistance, International Council for Commercial Arbitration, UN Compensation Commission, Economic Commission for Europe, Hague Conference of Private International Law and at diplomatic conferences for adoption of conventions on sale of goods (1974, 1980, 1985), sea carriage (Hamburg, 1978), liability of transport terminals (Vienna, 1990), arbitration (1972, 1976, 1985, 1998) etc.; have books, articles and other publications on legal matters of international commerce, including many writings on arbitration and maritime law. Honours Jurist of the Russian Federation (1994); member of the Russian President's Council for Judicial Reforms (appointed in 1996, reappointed in 2000 and 2004); awarded Swedish Order "Polar Star" (2003).

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Temple) Nov.1968. Called to the Nigerian Bar in June 1973 and set up law partnership Mbanefo & Mbanefo in 1974. Currently he runs the law firm Louis Mbanefo & Co. in Lagos. Has appeared as counsel in many of the leading Nigerian shipping cases and was appointed a Senior Advocate of Nigeria (SAN) in May 1988. A founder member of the Nigerian Maritime Law Association, he is the current Vice President. He has been Chairman of the Nigerian National Shipping Line and Chairman of a Ministerial Committee to review and update the Nigerian shipping laws. He is the author of the Nigerian Shipping Law series and was responsible for the preparation of the Admiralty Jurisdiction Act 1991 and the Merchant Shipping Act 2007 for the Nigerian Government. He has been involved with IMLI since its inception in 1988.

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

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

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Breakdown by industry sector

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PART II

The Work of the CMI

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Letter 2 May 2012

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by CMI IWGI

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COMITE MARITIME INTERNATIONAL, AISBL

PRESIDENT

To the Presidents of all member associations of the CMI
cc. Titulary Members

Oslo 2 May, 2012

Dear President,

By letter of 8 August 2011, I circulated a Draft Instrument on Recognition of Foreign Judicial Sales of Ships to the CMI member associations and titulary members for comments, calling on the member associations to appoint their delegates to an International Sub-Committee meeting to be held on 27 September 2011 in Oslo.

Comments on the First Draft were received from a number of associations, such as the MLA of the Dominican Republic, Italy, Germany, Brazil, Croatia and China. In addition, comments were also received from a few titulary members, including José Maria Alcantara (Spain), Michael Cohen (USA) and Francesco Berlingieri (Italy).

The meeting of the International Sub-Committee in Oslo was attended by delegates from the member associations in Australia, Belgium, Brazil, Canada, China, Croatia,

Letter 2 May 2012, by Karl-Johan Gombrii

Germany, Japan, Malta, Netherlands, Norway, Singapore, UK and USA. The provisions of the First Draft were discussed in detail. The meeting was quite successful and productive with significant progress being made.

In the light of the consensus achieved at the meeting of the International Sub-Committee and the many comments received, the International Working Group (which also did the initial preparatory work on the topic) has now prepared a Second Draft Instrument, which is attached hereto for your examination and comments. Please submit your comments and proposals in relation to the Second Draft Instrument latest by 31 July (by email to admini@cmi-imc.org.) so as to give the International Working Group the necessary time to consider the replies and submit a Third Draft Instrument to CMI 2012 Conference in Beijing in October. The so revised draft will be considered during the sessions devoted to this topic at the Conference and, hopefully, be adopted by the Plenary on the last day of the Conference (for the Programme in Beijing see www.cmi2012beijing.org).

To assist you in your work, the International Working Group has prepared the enclosed Commentary on the Second Draft Instrument. For your guidance, I also enclose a marked-up version of the Second Draft showing the changes from the First Draft.

Best regards



COMMENTARY ON THE 2ND DRAFT OF THE INSTRUMENT ON INTERNATIONAL RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

BY CMI IWG ON RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

General Comments:

It is worthy noting that in preparation of the 2nd Draft, the following principles or points were borne in mind:

1. For the purpose of facilitating efficient recognition by a State Party of a foreign judicial sale of ship, certain necessary minimal requirements for conducting Judicial Sales should be laid down in this Instrument;
2. Some basic effects of Judicial Sales of Ships to be recognized by the State Party should be provided for in this Instrument;
3. Necessary and sufficient protection should be provided to Purchasers of ships by way of Judicial Sale so as to ensure that Judicial Sales of Ships may be maintained as an effective way of enforcement of maritime claims and enforcement of judgments or arbitral awards or other enforceable instruments against the owners of ships;
4. Effects of Judicial Sales of Ships as provided for by this Instrument should be recognized by all State Parties unless existence of one of the circumstances provided for by this Instrument in which recognition may be refused is proved by an Interested Person furnishing valid evidence;
5. As a general rule, once a ship is sold by way of Judicial Sale, the ship shall not be subject to arrest for any claim arising prior to its Judicial Sale;
6. Actions, if any, challenging a Judicial Sale should be allowed to be made by an Interested Person as defined by this Instrument only and before a competent court as provided for by this Instrument only;
7. Since the most convenient forum for assessing whether or not a Judicial Sale is regular or effective should be the court of the State in which the Sale took place, therefore it should be accepted that the competent court under this Instrument as having jurisdiction over actions challenging Judicial Sales should be a court of the State in which the Judicial Sale took place, including the court having conducted the Sale or its court of appeal which will be decided by the law of the State in which the Judicial Sale took place;

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

Specific Comments:

Article 1 Definitions

1. Based upon the understanding that it is not the objective or intention of this Instrument to create any new rules of substantive or conflicts laws on maritime liens, mortgages, “hypothèques” or registrable charges on ships, words are inserted into the definitions on maritime lien, mortgage, “hypothèque” or registrable charge on ships to the effect that all maritime liens, or mortgages, “hypothèques” or registrable charges on ships referred to in this Instrument shall mean those recognized by **the law applicable in accordance with the private international law rules of the State in which the ship is sold by way of Judicial Sale**. It is hoped that this insertion may help to avoid that the “the law of the State in which the ship is sold by way of Judicial Sale” would be misinterpreted to mean the substantive law of the State in which the ship is sold by way of Judicial Sale only.
2. It is proposed that a definition on “Day” should be added to the list of definitions of the Draft, and the proposal is adopted and therefore a definition on “Day” is included in the 2nd Draft.
3. As regards the definition of “Interested Person”, for the purposes of reducing the categories and numbers of Interested Persons who are provided for by this Instrument to be entitled to challenge Judicial Sales and providing as much as possible protection to the Purchasers of ships by way of Judicial Sale, the 2nd Draft defines “Interested Person” to cover just a few categories of persons, i.e. “the owner of a ship prior to its Judicial Sale or the holder of a mortgage, “hypothèque”, charge or maritime lien attached to the ship prior to its Judicial Sale.” It is hoped that this definition may help to reduce the number of challenges on Judicial Sales.
4. As to the definition of “Judicial Sale of Ship” contained in the 1st Draft, it is proposed that reference to the three purposes of judicial sales should be avoided, since a number of jurisdictions would have problems with such reference. In the 2nd Draft, the three purposes are deleted but words to the effect that clean title to the ship is given to the Purchaser and the proceeds of sale are made available to the creditors are included in the definition.
5. Due to the fact that the words “sea-going” and “used in commercial trade” contained in the definition of ship in the 1st Draft may create unnecessary conflicting interpretations, the definition of ship in the 2nd Draft is revised to mean “any ship capable of being an object of a Judicial Sale under the law of the State in which the Sale takes place.”
6. The definition of “State of Registration” in the 1st Draft was taken from the

Judicial sales of ships

UN Convention on Conditions for Registration of Ships 1986, whereas it is correctly suggested that this definition ignored the registration for a temporary entry by a bareboat charterer. Thus, in the 2nd Draft, “State of Registration” is defined to mean “the State in whose register of ships a ship is permanently registered at the time of its Judicial Sale.”

7. Two definitions, i.e. “Flag State” and “Good faith purchaser” are deleted, for reasons that these words are not used in the 2nd Draft.

Article 2 Scope of Application

8. As to the scope of application, it is proposed that the Instrument should have a wide rather than a narrow scope of application, on the other hand, it is also proposed that the Instrument should be applicable only if (1) the sale takes place in a State Party and (2) the ship is flying a flag of a State Party at the time of the sale. For these reasons, the 2nd Draft in Article 2 on Scope of Application provides for that “This Instrument shall apply to the recognition of a Judicial Sale taking place in the territory of any State.” On the other hand, it is also made clear in Article 9 on Restricted Recognition that a State Party may declare that it will only apply the Instrument to the recognition of a Judicial Sale made in the territory of a State Party and the Ship is flying the flag of a State Part; in addition it may declare that it will apply this Instrument to Judicial Sale made in the territory of a non-Party State on the basis of reciprocity.

Article 3 Notice of Judicial Sale

9. Article 3 of the 1st Draft is a reproduction of Article 11 of the Maritime Lien and Mortgage Convention 1993. This is welcomed, as conflicts between conventions can be avoided.
10. As to the list of addressees to whom a Notice of sale should be sent, in the 1st Draft “the Embassy or Consulate of the Ship’s Flag State to the State in which the Judicial Sale takes place” is added to the list of addressees as contained in the Maritime Lien and Mortgage Convention 1993. Whereas, at the ISC meeting in Oslo, the majority view seems that this addition should be deleted, as the aim of this Instrument is to maximise the chances of the judicial sale being recognised, whilst the longer the list of addressees, the more chance of the notice being found to be sent insufficiently.
11. A brief enquiry/investigation shows that in many jurisdictions mortgages and/or “hypothèques” are not classified or grouped into “being issued to bearer” and “having not been issued to bearer”; and even if in the jurisdictions with the concept of mortgages and/or “hypothèques” being issued to bearer, such kind of mortgages and/or “hypothèques” have not been seen in practice for many decades. Therefore, it seems safe to have the wording of item (b) and (c) of paragraph 1 of Article 3 simplified as “(b) All holders of registered mortgages, “hypothèques” or charges; (c) All holders

of maritime liens, provided that the Court conducting the Judicial Sale has received notice of their respective claims; and”

Article 4 Effect of Judicial Sale

12. It is proposed that the words, “the ownership of the shipowner ” in the 1st Draft should be replaced by the words “all rights and interests in the ship”. This proposal was supported by a majority view at the ISC meeting in Oslo. Thus, this article is revised to that effect.
13. As regards the effect of Judicial Sales, it was correctly pointed out by some associations that a judicial sale should not have the effect of distinguishing any *in personam* claim for any Deficiency Amount as defined by this Instrument. As a result, a paragraph to that effect is added into Article 4.

Article 5 Issuance of a Certificate of Judicial Sale

14. Again, the words “the ownership of the shipowner ” in the 1st Draft are replaced by the words “all rights and interests in the ship” in the 2nd Draft.

Article 6 Deregistration and Registration of the Ship

15. “It is suggested that only the court of the State in which the judicial sale has been conducted should be competent to assess whether the sale has been regular and effective, and once the sale is completed, the purchase price paid and the sale documents enabling the purchaser to register the ship have been issued, the right of the Purchaser to register the ship in his name cannot be challenged, Purchasers need protection and the failure to grant them such protection would adversely affect the possibility of conducting judicial sale successfully and obtaining in the interests of the creditors a price *quasi in line* with the market.” This suggestion is supported by a majority view at the ISC meeting in Oslo. In light of this proposal, paragraph 5 of Article 6 of the 1st Draft is deleted and paragraph 4 of this Article is reworded in line with the proposal.

Article 7 Recognition of Judicial Sale

16. In light of the abovementioned suggestion and a number of other proposals regarding recognition, now Article 7 consists of 5 paragraphs, each deals with a specific rule which should be followed in recognition of a foreign judicial sale.
17. Paragraph 1 of Article 7 clarifies the specific effect that a Judicial Sale shall bring about, which may be briefed as (1) title to the ship is transferred to the Purchaser and all rights and interests of the previous owners in the ship shall be extinguished, and (2) all registered mortgages, “*hypothèques*” or charges, maritime and other liens and of all encumbrances of whatsoever nature shall be extinguished.

Judicial sales of ships

18. Paragraph 2 of Article 7 affirms that as a general rule once a ship is sold by way of Judicial Sale, the ship shall not be subject to arrest for any claim arising prior to the Judicial Sale;
19. Paragraph 3 of Article 7 iterates the rule that only a court of a State in which a Judicial Sale took place shall be accepted as a competent court as having jurisdiction to entertain an action challenging the Judicial Sale.
20. Paragraph 4 of Article 7 restates the rule that any action challenging a Judicial Sale shall be dismissed upon production by a Purchaser or Subsequent Purchaser of a Certificate provided for in Article 5 of this Instrument or a duly certified copy thereof, unless existence of one of the circumstances provided for in Article 8 of this Instrument is proved.
21. Paragraph 5 of Article 7 emphasises the rule that only an Interested Person as defined by this Instrument shall be entitled to take an action challenging a Judicial Sale before a competent court and that no competent court shall exercise its jurisdiction over any claim challenging a Judicial Sale unless it is made by an Interested Person as defined by this Instrument.

Article 8 Circumstances in which Recognition may be Refused

22. It is correctly proposed that sub-paragraph (b) of paragraph 1 of Article 8 of the 1st Draft should be deleted, as it allows refusal of recognition in case it is found the Judicial Sale was not accomplished in accordance with the law of the State in which the Judicial Sale took place or the provisions of this Instrument, which may be literally interpreted to mean even a very minor defect concerning the proceedings in relation to Judicial Sale and may result in a full refusal of the recognition. Bearing in mind the widely supported view that a court of the State in which the Judicial Sale took place should be provided for by this Instrument to be the competent court as having jurisdiction over any action challenging a Judicial Sale, now this sub-paragraph (b) is revised to be “(b) an action challenging the Judicial Sale is pending before a competent court as provided for by paragraph 3 of Article 7.
23. It is also proposed that it would be appropriate to prescribe a time limit in this Instrument for actions challenging Judicial Sales. For this reason, a sub-paragraph to that effect is inserted into paragraph 1 of Article 8, which provides for a one-year time limit not subject to any suspension, interruption or extension whatsoever.

Article 9 Restricted Recognition

24. As mentioned in the preceding paragraph 8 regarding scope of application, divergent views are expressed during the discussion. Since Article 2 of the 2nd Draft has adopted the so-called wide scope of application approach, it is appropriate to have an article to allow those who would like to take the so-called narrow scope of application approach to do so. This Article 9 is inserted into the 2nd Draft to that effect.

**INSTRUMENT ON RECOGNITION
OF FOREIGN JUDICIAL SALES OF SHIPS
(SECOND WORKING DRAFT)**

[Preamble: - - -]

Article 1 Definitions

For the purposes of this Instrument:

1. “Certificate” means the original duly authorized certificate, or a certified copy thereof, provided in terms of Article 5.
2. “Charge” means any registerable charge of the same nature as a mortgage or “hypothèque” effected on a ship and recognized as such by the law applicable in accordance with the private international law rules of the State in which the ship is sold by way of Judicial Sale.
3. “Court” means any competent judicial body defined as a court by the law of the State in which the Judicial Sale takes place which is empowered under the laws of the State to sell or order the sale of a ship free and clear of any and all mortgages, “hypothèques” or charges, and all maritime and other liens and other encumbrances of whatsoever nature, and to deal with all issues in relation to recognition of Judicial Sales of Ships accomplished in any other State.
4. “Day” means any calendar day.
5. “Deficiency Amount” means any amount of a creditor’s claim against any person personally liable on an obligation which is secured by a mortgage, or “hypothèque” or charge, which remains unpaid after application of such creditor’s share of proceeds actually received following and as a result of a Judicial Sale.
6. “Interested person” means the owner of a ship prior to its Judicial Sale or the holder of a mortgage, “hypothèque”, charge or maritime lien attached to the ship prior to its Judicial Sale.
7. “Judicial sale of a ship” or “judicial sale” or “sale” means any sale of a ship accomplished by or under the control of a Court in a State by way of public auction or private treaty or any other appropriate ways provided for by the law of the State where the sale by which clean title to the ship is given to the Purchaser and the proceeds of sale are made available to the creditors takes place.

Judicial sales of ships

8. “Maritime lien” means any claim recognized as a maritime lien on a ship by the law applicable in accordance with the private international law rules of the State in which the ship is sold by way of Judicial Sale.
9. “Mortgage” or “hypothèque” means any mortgage or hypothèque effected on a ship and recognized as such by the law applicable in accordance with the private international law rules of the State in which the ship is sold by way of Judicial Sale.
10. “Owner” or “Shipowner” means any person registered in the register of ships of the State of Registration as the owner of the ship.
11. “Person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
12. “Purchaser” means any person who has acquired title to a ship pursuant to a Judicial Sale.
13. “Ship” means any ship capable of being an object of a Judicial Sale under the law of the State in which the Sale takes place.
14. “State” means any member state of the United Nations.
15. “State of registration” means the State in whose register of ships a ship is permanently registered at the time of its Judicial Sale.
16. “Subsequent purchaser” means any person who has acquired from a Purchaser or its sub-purchaser title to a ship which was sold by way of Judicial Sale.

Article 2 Scope of Application

This Instrument shall apply to the recognition of a Judicial Sale taking place in the territory of any State.

Article 3 Notice of Judicial Sale

1. Prior to a Judicial Sale in a State, the Court in such State shall ensure that notice in accordance with this Article is provided to:
 - (a) The registered owner of the ship;
 - (b) All holders of registered mortgages, “hypothèques” or charges;
 - (c) All holders of maritime liens, provided that the Court conducting the Judicial Sale has received notice of their respective claims; and
 - (d) The authority in charge of the ship’s register in the State of Registration.
2. The notice required by paragraph 1 of this Article shall be provided at least 30 days prior to the Judicial Sale and shall contain, as a minimum, the following information:
 - (a) The name, the IMO number, the registered owner of the ship;

Instrument on Recognition of Foreign Judicial Sales of Ships

- (b) The time and place of the Judicial Sale; or if the time and place of the Judicial Sale cannot be determined with certainty, the approximate time and anticipated place of the Judicial Sale which shall be followed by additional notice of the actual time and place of the Judicial Sale when known but, in any event, not less than seven days prior to the judicial sale; and
- (c) Such particulars concerning the Judicial Sale or the proceedings leading to the Judicial Sale as the Court conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice.

The notice specified in paragraph 2 of this Article shall be in writing, and either given by registered mail, or given by any electronic or other appropriate means which provide confirmation of receipt, to the persons as specified in paragraph 1, if known. In addition, the notice shall be given by press announcement in the State in which the Judicial Sale is conducted and if deemed appropriate by the Court conducting the Judicial Sale, in other publication.

Article 4 Effect of Judicial Sale

Subject to:

- (a) the ship being in the area of the jurisdiction of the State in which the Sale is accomplished, at the time of the Sale and
- (b) the Sale having been conducted in accordance with the law of the State in which the Sale is accomplished and the provisions of this Instrument

all rights and interests in the ship existing prior to its Judicial Sale shall be extinguished and all mortgagees, “hypothèques” or charges, except those assumed by the Purchaser, all maritime and other liens, and all encumbrances of whatsoever nature, shall cease to attach to the ship and title to the ship shall be transferred to the Purchaser in accordance with the law applicable.

Notwithstanding the preceding provisions of this article, no Judicial Sale shall extinguish any *in personam* claim for any Deficiency Amount.

Article 5 Issuance of a Certificate of Judicial Sale

When a ship is sold by way of Judicial Sale and the conditions required by the law of the State where the Sale is made and by this Instrument have been met, the Court or court officer conducting the Sale shall, at the request of the Purchaser, issue a Certificate to the Purchaser containing the date of the Judicial Sale and recording that (1) the ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Instrument free of all mortgages, “hypothèques” or charges, except those

assumed by the Purchaser, of all maritime and other liens and of all encumbrances of whatsoever nature, and (2) all rights and interests existing in the ship prior to its Judicial Sale are extinguished.

Article 6 Deregistration and Registration of the Ship

1. Subject to the provisions of Paragraph 4 of this Article, upon production by a Purchaser of a Certificate provided for in Article 5 of this Instrument or a copy thereof duly certified in accordance with the law of the State in which the Sale has taken place, the Registrar of the Registry where the ship was registered prior to its Judicial Sale shall be bound to delete all registered mortgages, “hypothèques” or charges except those assumed by the Purchaser, and either to register the Ship in the name of the Purchaser or to delete the ship from the Register and to issue a certificate of deregistration for the purpose of new registration, as the case may be.
2. If the Certificate as provided for in Article 5 is not made in an official language of the State in which the abovementioned Registrar is located, the Registrar may request the Purchaser to submit a duly certified translation of the Certificate into such language.
3. The Registrar may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.
4. If, before the deletion of any registered mortgages, “hypothèques” and charges and the registration of the ship in the name of the Purchaser or the issuance of a certificate of deregistration as the case may be, the Registrar receives an objection raised by an Interested Person to the deletion or the registration or the issuance and supported by evidence proving that an action challenging the sale has been brought before a court of the State in which the Judicial Sale took place, the registration of the ship in the name of the Purchaser will be suspended until a final judicial decision is rendered over the challenge, or the objection is withdrawn.

Article 7 Recognition of Judicial Sale

1. Subject to the provisions of this Instrument, the court of each State Party at the application of a Purchaser or Subsequent Purchaser shall recognize a Judicial Sale taken place in any other State with a Certificate as provided for by Article of 5 of this Instrument issued, as having the effect:
 - (i) that title to the ship is transferred to the Purchaser and the rights and interests of the previous owner in the ship are extinguished;
 - (ii) that the Ship has been sold free of all registered mortgages, “hypothèques” or charges, except those assumed by the Purchaser, of all maritime and other liens and of all encumbrances of whatsoever nature.

Instrument on Recognition of Foreign Judicial Sales of Ships

2. Where a ship which was sold by way of a Judicial Sale is sought to be arrested or is arrested by order of a court in a State Party for a claim arising prior to the Judicial Sale, the court shall reject the application for arrest or release the Ship from arrest upon production by the Purchaser or Subsequent Purchaser of a Certificate as provided for in Article 5 of this Instrument or a duly certified copy thereof, unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument.
3. Where a ship is sold by way of Judicial Sale in a State Party, any action challenging the Judicial Sale shall be brought only before a competent court of a State Party in which the Judicial Sale took place and no court other than a court of the State Party in which the Judicial Sale took place shall be a competent court as having jurisdiction to entertain any action challenging the Judicial Sale.
4. Where an action challenging a Judicial Sale is taken by an Interested Person against a Purchaser or a Subsequent Purchaser or a Ship before a competent court, the court shall dismiss the action or reject the relevant claim upon production by the Purchaser or Subsequent Purchaser of a Certificate which is provided for in Article 5 of this Instrument or a duly certified copy thereof, unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument.
5. No person other than an Interested Person as defined by this Instrument shall be entitled to take any action challenging a Judicial Sale before a competent court, and no competent court shall exercise its jurisdiction over any claim challenging a Judicial Sale unless it is made by an Interested Person as defined by this Instrument.

Article 8 Circumstances in which Recognition may be Refused

1. Recognition of a Judicial Sale may be refused by a Court of the State Party, at the request of an Interested Person, only if that Interested Person furnishes to the Court proof that:-
 - (a) at the time of the Sale, the Ship was not physically in the area of the jurisdiction of the State in which the Court issuing the Certificate provided for in Article 5 is located; or
 - (b) an action challenging the Judicial Sale is pending before a competent court as provided for by paragraph 3 of Article 7; or
 - (c) the Certificate produced by the Purchaser or Subsequent Purchaser is not authentic.

Notwithstanding the preceding provisions of this paragraph, no such request by an Interested Person will be admitted unless it is presented within one year of the date of the Judicial Sale as recorded in the

Judicial sales of ships

Certificate. This one year period shall not be subject to any suspension, interruption or extension whatsoever.

2. Recognition of a Judicial Sale may also be refused if the Court in a State Party in which recognition is sought finds that the recognition of the Judicial Sale would be contrary to the public policy of that State Party.

Article 9 Restricted Recognition

When signing, ratifying or acceding to this Instrument, any State may declare that it will only apply the Instrument to the recognition of a Judicial Sale made in the territory of a State Party and the Ship is flying the flag of a State Party. It may also declare that it will apply this Instrument to Judicial Sale made in the territory of a non-Party State on the basis of reciprocity.

[Final clauses in respect of signature, ratification, acceptance, approval, accession, denunciation, coming into force, language, etc shall be drafted later and separately]

SALVAGE CONVENTION 1989

Letter from Stuart Hetherington, Chairman of the IWG on Review of the Salvage Convention 1989 together with a report and the attachments (1 to 11) which have been sent to all the NMLAs

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Report of the International Working Group on Review of the Salvage Convention

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COMITE MARITIME INTERNATIONAL, AISBL

TO NATIONAL MARITIME LAW ASSOCIATIONS

1 May 2012

Dear President,

Review of the Salvage Convention: Report for Consideration of Delegates to the Beijing Conference - October 14 to 19, 2012

Attached to this letter is the report of the International Working Group which has been reviewing the *Salvage Convention 1989* over the last couple of years. That report contains many annexures which are also **attached**. The first annexure contains the provisions of the Salvage Convention which are being considered, the questions which are posed for NMLAs to debate at the Conference, as well as the proposals which have been made (principally by ISU). Many of the other attachments are also available on the CMI website.

For those who attended the Argentine MLA and CMI Colloquium in Buenos Aires in 2010 you will know that this is a topic which has caused a considerable divergence of views. The International Salvage Union and the London property market insurers are strongly of the belief that the *Salvage Convention 1989* needs to be amended. The International Chamber of Shipping and the P&I Clubs are equally of the view that the Convention is working and does not need to be amended.

National Maritime Law Associations and their delegates who will be attending the Beijing Conference are invited to read the attached report and its annexures and to form a view as to whether the Convention needs to be amended and the correct approach to be taken by the CMI on this issue. They will no doubt consult with interested organisations such as shipowners, insurers and others in the industry.

The International Working Group has reproduced in the report comments which I made at a joint meeting of the Maritime Law Associations of the United States, Canada and Australia and New Zealand in Hawaii in December 2011 and for ease of reference (and because I would like to emphasise them), I repeat them here:

“All MLAs who attend the Beijing Conference will need to have formulated their opinions by that time. They need to engage with salvors in their jurisdictions who enter into salvage contracts which are subject to the Convention and, I would suggest, need to ascertain answers to the following questions:

Letter from Stuart Hetherington, Chairman of the IWG

1. Has there been an increase or a decrease in the number of salvors operating around your shores?
2. Has there been an increase or decrease in the number of employees and amount of equipment employed and owned in the salvage industry operating around your shores?
3. Do the salvors have the capacity to deal with major incidents around your shores, both in terms of personnel, skills and equipment?
4. Are salvors satisfactorily rewarded so as to encourage them to:
 - (a) remain in the industry
 - (b) retain and train sufficient employees and acquire and maintain appropriate equipment to cope with major casualties in sensitive areas?"

There has been a lot written on this topic since the appointment of the International Working Group in 2009. There are a number of papers on the CMI website (under Work in Progress/Salvage Convention 1989) including those which were given at the Buenos Aires Colloquium, a paper given earlier this year by Archie Bishop at Tulane University and a "Position Paper" recently submitted by the ISU. It is possible that between now and the Beijing Conference additional materials will be submitted and placed on the website. I will write to you further if that should be the case, but invite you (or those who will be representing your delegation in Beijing to refer to the website from time to time).

I look forward to seeing you in Beijing.

Yours sincerely,

Stuart Hetherington

Chairman, International Working Group

Review of the Salvage Convention 1989

REPORT OF THE INTERNATIONAL WORKING GROUP ON REVIEW OF THE SALVAGE CONVENTION

FOR CONSIDERATION BY DELEGATES
TO THE CMI CONFERENCE: BEIJING 2012

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The following documents are attached to this Report:

- 1 Specific questions for the meeting, including texts of relevant provisions under the Salvage Convention 1989, Brice Protocol and Proposals for Reform
- 2 Salvage Convention
- 3 First Questionnaire¹
- 4 Summary of Responses to First Questionnaire
- 5 Second Questionnaire
- 6 Summary of Responses to Second Questionnaire
- 7 Extracts from judgment of Tamberlin J in *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* (2006) 163 FCR 151²
- 8 List of ratifications of UNESCO Convention on The Protection of the Underwater Cultural Heritage³
- 9 Report of ISC Meeting of May 2010
- 10 Amendments to Lloyd's Standard Form of Salvage Agreement (LOF) and Lloyd's Standard Salvage and Arbitration (LSSA) clauses
- 11 SCOPIC Clause and Tariff

¹ CMI Yearbook 2010, p. 418.

² CMI Yearbook 2010, p. 451.

³ CMI Yearbook 2010, p. 412.

SECTION A – Introduction

In December 2008, the International Salvage Union (**ISU**) wrote to the Comité Maritime International (**CMI**) pointing out that the Salvage Convention 1989 (**the Convention**) was nearly 20 years old and it was over 30 years since work had first begun on its drafting. It suggested that there was a need for review of certain aspects of the Convention and invited CMI to undertake such a review.

The CMI set up an International Working Group (**IWG**) in 2009 and a Questionnaire was sent to National Maritime Law Associations (**NMLA**) in July 2009. Questions were asked concerning various matters identified by the ISU in relation to eight articles in the Convention, they being Articles 1, 5, 11, 13, 14, 16, 20 and 27. There have been 25 responses received, and they have been summarised.

A second Questionnaire was sent to NMLAs in 2010 in order to ascertain whether there was any empirical evidence which could be obtained in support of the ISU's complaints concerning the Convention. A synopsis of the responses has also been prepared.

An International Subcommittee (**ISC**) meeting took place in London on 12 May 2010. A report of that meeting was prepared. There have also been two IWG meetings, and a Colloquium at Buenos Aires in October 2010, which is referred to below.

An earlier version of this report took the form of the Discussion Paper which was prepared for the benefit of the ISC meeting in May 2010⁴. (Whilst this report contains some material which featured in that report readers are referred to the Discussion Paper for a more complete history of developments in the law of salvage. It can be found on the CMI website as well as the CMI Yearbook).

SECTION B – Background

Salvage of property at sea has historically been rendered on a “no cure – no pay” basis with the award being assessed by reference to the property at risk and saved, usually the ship, freight and cargo – if there is no success in salvaging property, the salvor earns no reward.

Prior to the present 1989 Salvage Convention, under the 1910 Salvage Convention, there was no provision that entitled the salvor to any remuneration for taking steps to prevent pollution independently of any action taken to save property. Thus there was little incentive for the salvor to take on such operations. As environmental concerns came increasingly to the fore in salvage operations

⁴ CMI Yearbook 2010, p. 384.

towards the end of the last century, the commercial parties to the salvage contract addressed this difficult issue through the contractual provisions of LOF 80. This introduced some new concepts such as an enhanced award, and a “safety net”. These provisions, agreed by the various parties and their insurers, were designed to provide financial remuneration to the salvor even if there was no cure (hence the term “safety net”) when the salvor provided services to a laden tanker which posed a threat to the environment. The remuneration would be in the form of expenses plus a supplement dependent upon the value of the result of the salvor’s efforts.

Alongside this development in LOF 80 the CMI (September 1979) established an International Subcommittee under the chairmanship of Professor Erling Selvig to study the subject of salvage and prepare a report for the Montreal Conference to be held in 1981. An IWG was set up which drafted a new Salvage Convention to replace the 1910 Salvage Convention (which CMI had also prepared). At the 1981 Montreal Conference a draft text was approved by the Assembly and forwarded to IMCO (which changed its name in 1982).

– **Liability Salvage**

As a first step in the work done by CMI, following on a request from IMCO, Professor Selvig prepared a “Report on the Revision of the Law of Salvage” in April 1980, which is to be found in the Travaux Préparatoires of the Convention on Salvage 1989. That report is as relevant today as it was then. In discussing salvage operations Professor Selvig made the following comments:

“In the overall context of international shipping State-organised machineries established at the national level, cannot be regarded as a viable alternative to an internationally active private salvage industry. National machineries will probably be tailor-made to the needs of the coastal State concerned and primarily for use in the waters adjacent to that State. However, most States will not be in a position to establish or maintain on its own or on a regional level a salvage machinery with the overall capacity required. Consequently, the role of national machineries can be expected to be only a supplementary one, mainly limited to the area within their respective jurisdictions.

The overall cost of such a combined system under which the private salvage industry retains a main role will probably be less than the system based only on State organised salvage. The capital intensive character of modern salvage techniques suggest that at a given cost level, the combined system will make available to international shipping and States affected thereby, a higher and permanent overall salvage capacity....

The income of the salvage industry must be sufficient to maintain an internationally adequate salvage capacity. It is probably required that total compensations reach a higher level than at present. Moreover, the risk of

incurring expenses without compensation or of incurring liabilities in connection with salvage operations, should not be such that salvors are discouraged from intervening in particular cases”.

Professor Selvig then went on to introduce the concept of “liability salvage”. He said as follows:

“Nevertheless, the concept of salvage should be extended so as to take account of the fact that damage to third party interests has been prevented. Since the ship which created the danger, will have a duty to take preventive measures in order to avoid such damage, this will mean that salvage should refer not to ship and cargo, but also to the ship’s interest in avoiding third party liabilities (liability-salvage). Thus, the ship’s liability insurers should be involved in the salvage settlement and pay for benefits obtained by the salvage operation.

In the long run the law of salvage cannot neglect to recognise that compensation for salvage is nearly always actually paid by insurers. Moreover, insurers of ship and cargo cannot reasonably be required to cover fully the expenses for salvage operations from which another group of insurers – the liability insurers – regularly benefit.

Inclusion of the liability interest within the concept of salvage will undoubtedly provide a more equitable distribution of the overall cost of salvage. It may also provide a beneficial encouragement to salvors to engage in salvage operations when third party interests outside the ship are in danger, particularly in cases where the chance of saving ship and cargo is rather remote. Finally, contributions from new sources may enable the international salvage capacity to remain at an adequate level”.

Later on in his report Professor Selvig also made the following comments:

“The salvor should be entitled to a reward on the ground that liability for damage to third party interests outside the ship has been prevented or minimised. This should be considered to be “a useful result” within the meaning of the principles of “no cure and no pay” of the 1910 Convention Article 2. ...

Some particular rules may be required to determine how the reward for liability-salvage shall be fixed. The values in danger as well as the salvaged values will as a rule have to be determined with regard to applicable limits of liabilities. In the case of oil pollution, for instance, depending upon the circumstances, both the 1969 and the 1971 limits may be relevant, also with the consequence that the liability insurer and the fund each will have to cover a proportionate part of the reward.

In cases where the salvors have prevented damage for which the ship owner would not have been liable, the salvors may only recover the cost of preventive measures...

In cases of liability-salvage as well as salvage of ship and/or cargo, the reward may be fixed in two stages, first the total amount and subsequently the apportionment determining for which amount each of the respective interests shall be responsible.”

– **CMI – Montreal Conference**

It is also worth quoting from the report of Professor Selvig, which accompanied the text of the IWG draft Convention with the papers for the CMI Montreal Conference [CMI Yearbook Montreal 1]. He said as follows:

“The main differences of view in the sub-committee related to the question of whether salvors should be entitled to payments on the ground that salvage operations have been carried out also in order to prevent damage to the environment or that by the endeavours of the salvors such damage has actually been avoided. One approach to these problems was suggested in the chairman’s initial report, another in the LOF 1980 and the draft prepared by the British MLA. The compromise, now contained in the draft Convention Articles 3.2 and 3.3, reflects the “safety net” idea of the LOF 1980 as well as certain other notions having emerged during the discussion, and assumes that, in accordance with the draft Convention Article 1.5, these articles may be departed from by contract.”

Professor Selvig’s initial report of April 1980 did not receive unanimous agreement and a compromise solution was ultimately achieved at the CMI Conference and eventually the IMO. In essence what was approved at the Montreal Conference was what had been drafted by the IWG and presented for debate at the Conference.

– **Salvage Convention 1989**

The Salvage Convention came into force internationally on 1 July 1995. The entry into force provisions required 15 States to agree to it (Article 29) and in Article 32 enabled the Secretary General to convene a Conference of the State parties for revising or amending the Convention at the request of eight parties, or one-fourth of the State parties, whichever is the higher figure. IMO Resolution A.777(18) provides that the Legal Committee will only entertain proposals for amending existing Conventions on the basis of “a clear and well-documented compelling need” to do so, as prescribed by Resolution A.500 (XII).

– **“Nagasaki Spirit”**

The next development in the story is, perhaps, the decision of “*Nagasaki Spirit*” (1997) 1 Lloyds Rep 323, described by some as the straw that broke the

camel's back. The House of Lords held that "fair rate for equipment, personnel actually and reasonably used in the salvage operation" in Article 14.3 meant a fair rate of expenditure and did not include any element of profit. As Lord Mustill said in his judgment at page 332:

"...the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purposes of preventing damage to the environment. Paragraphs 1, 2 and 3 of article 14 all make it clear that the right to special compensation depends on the performance of "salvage operations" which ... are defined by article 1(a) as operations to assist a vessel in distress. Thus although article 14 is undoubtedly concerned to encourage professional salvors to keep vessels readily available, this is still for the purposes of a salvage, for which the primary incentive remains a traditional salvage award."

– SCOPIC

The problems of interpreting Article 14 led to uncertainty and dissatisfaction. Among the many problems it is understood that it was found that claims for an uplift over actual cost brought under Article 14.2 necessitated proof that the damage to the environment would have resulted but for the salvor's intervention but also the extent of the damage had the operation been unsuccessful. A variety of experts were needed, such as naval architects, drift experts and environmental experts. In addition the accounting exercise referred to by the House of Lords in the "*Nagasaki Spirit*" was found to be a time consuming and expensive one. As a result the SCOPIC clause was negotiated.

The ISU has said that: SCOPIC is, in essence, a safety net and is not a method of remuneration; it is also not an international solution but only one for LOF; there would be problems if it were sought to apply it as a matter of law rather than contract, eg. who would negotiate rates, and how would they be determined; the present rates have only been changed twice in 10 years; and there is no currency fluctuation cause, which has caused concerns to the salvage industry.

The ICS, on the other hand, suggest that:

- SCOPIC is more than just a safety net (as that term was used to describe the changes made in LOF80 to provide compensation to a salvor who, because of "no cure no pay" principles might not receive an award although it had taken steps to prevent oil pollution), and
- Positively encourages salvors to intervene where they might otherwise not do so and therefore represents an improvement over Article 14.

The ICS also points out that LOF contracts are entered into in many

countries around the world so SCOPIC does have the potential to be used internationally. The ICS believes that SCOPIC rewards salvors generously, whilst those who represent the ISU believe that was the original intention but inflation and currency changes over recent years have diminished the generosity.

SECTION C – Changes Since 1989

– Bureau Veritas Report

Possibly the most significant developments are those referred to in the Bureau Veritas investigation into the salvage industry in the early 1990s, where it was concluded that international salvage resources were in serious decline as a result of a reduction in casualty rates, falling levels of remuneration and competition created by the availability of offshore support vessels and other ancillary craft leading to the withdrawal of professional salvors from the market, the reduction of dedicated salvage craft and the closure of additional salvage stations. This report emphasised an important point made by ISU – international salvage is in the hands of comparatively few companies. As the ISU points out those companies have shareholders seeking profit. If generous awards are made they will be encouraged to stick with it and accept the risk but if they are not or if they are not paid for what they actually do, they might well move their assets to a less risk orientated business. If this were to happen, with so few international players, it could be a problem for the shipping and insurance industry – and the environment.

The ICS contends, to the contrary, that the salvage industry is not in decline and points to the existence of new entrants to the market. It has identified a number of new entrants who perform salvage and wreck removal work as well as pure wreck removal services. The ISC also suggests that any reduction in the number of salvage companies may be a reflection of mergers and the greater range of operations being performed. The ICS does not consider that the Bureau Veritas report adds anything to this debate. It notes that it pre-dates the entry into force of the Convention.

It is regrettable that the industry has not seen fit to commission a more up to date report.

At a combined meeting of the United States, Canadian and Australian New Zealand Maritime Law Associations in Hawaii in 2011, the Chairman of the IWG urged the NMLAs prior to the Beijing Conference to ascertain answers to the following questions:

- 1 Has there been an increase or a decrease in the number of salvors operating around your shores?
- 2 Has there been an increase or decrease in the number of employees and amount of equipment employed and owned in the salvage industry operating around your shores?

- 3 Do the salvors have the capacity to deal with major incidents around your shores, both in terms of personnel, skills and equipment?
- 4 Are salvors satisfactorily rewarded so as to encourage them to:
 - 4.1 remain in the industry
 - 4.2 retain and train sufficient employees and acquire and maintain appropriate equipment to cope with major casualties in sensitive areas?

– **ETVs**

Some countries have invested in providing alternative salvage resources. For example, in Australia, the National Maritime Emergency Response Arrangement (**NMERA**) was entered into in February 2008. Pursuant to these arrangements, the NMERA has undertaken to provide an appropriate level of emergency towage capability around the Australian coastline funded through the *Protection of the Sea (Shipping Levy) Act 1981*. Interestingly, clause 5.1.9 in this agreement provides as follows:

“Subject to the right to recover costs and expenses under existing international and domestic laws and to the right to enter into commercial arrangements relating to the use of ETV assets where appropriate, **including arrangements to allow for the sharing of salvage awards**, the Australian government will fund the ongoing costs of the NMERA through the Protection of the Sea Levy ...”. (Emphasis added. It is expressly provided in s.329C of the Navigation Act 1912 that governments may participate in salvage awards).

In 2006 the Australian Government announced a \$137M eight year contract for the ETV “*Pacific Responder*”. Further regional contracts were announced costing additional amounts of \$1.8M for a 5 year contract and \$15M. Under the Oil Pollution Levy Scheme, a rate per tonne of the tonnage of a ship which is in an Australian port which had on board a quantity of oil in bulk weighing not less than 10 tonnes (whether as fuel or cargo) is liable to pay the levy. Clearly the major share of contributions is made by tanker owners. It is important to stress that this is an industry funded scheme.

There may be similar arrangements which have been made by other countries since 1989. It is understood France supports the industry and the Australian House of Representatives standing committee on transport and regional services, in June 2004, referred to the fact that the United Kingdom has four ETVs to cover its coastline of about 17,820 kilometres, excluding the larger islands. They had a value of around £44 million and cost the United Kingdom government approximately AUD\$25 million per annum to maintain and operate. In late 2010 there was an announcement by the British Government that its funding of the ETVs would cease.

The Second Questionnaire sought information on ETV's. It is apparent that some countries do own and operate ETV's which are available for salvage and towage, which are financed generally through State revenue. Very few private salvage companies keep tugs on standby for such eventualities.

SECTION D – Amendments to Lloyds Standard Form of Salvage Agreement (LOF) and Lloyds Standard Salvage and Arbitration (LSSA) Clauses

– LOF 2011

Two new clauses have been added to LOF. Pursuant to clause 3: Awards, Appeal Awards and Reasons are to be placed on the Lloyd's website, subject to the conditions set out in clause 12 of the LSSA clauses to which reference will be made below.

Clause 4 requires contractors within 14 days of their engagement to render services under the agreement to notify the Council of Lloyd's of their engagement and forward the original agreement to the Council as soon as possible.

– LSSA Clauses

Pursuant to clause 12: it is provided that the Council will publish Awards, Appeal Awards and Reasons on the Lloyd's Agency website "except where the Arbitrator or Appeal Arbitrator has ordered, in response to representations by any party to the Award or Appeal Award, that there is a good reason for deferring or withholding them."

There are also special provisions which have now been introduced dealing with container vessel cases. Under the new clause 13 it is provided that "any correspondence or notices in respect of salvaged property, which is not the subject of representation in accordance with clause 7" of the Rules may be sent to the party or parties who have provided salvage security in respect of that property. Clause 14 provides that subject to the express approval of the Arbitrator where an agreement is reached between the contractors and the owners of salvaged cargo comprising at least 75% by value of salvaged cargo represented in accordance with clause 7 of the Rules, the same agreement shall be binding on the owners of all salvaged cargo who were not represented at the time of the said approval.

Finally, the new clause 15 provides that subject to the express approval of the Arbitrator any salvaged cargo with a value below an agreed figure may be omitted from the salvaged fund and excused from liability for salvage where the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage.

SECTION E – Buenos Aires Colloquium and ISC meeting

– Buenos Aires Colloquium - October 2010

Papers were presented at this Colloquium by key stakeholders in this debate. Todd Busch⁵, the President of the ISU, commenced his paper by saying:

“ISU has been concerned for a number of years that its members are not always fairly rewarded for the benefit they confer in protecting the environment.”

He identified the significant problem which salvors face when he said:

“Let me say straight away that we recognise that salvors are in many cases rewarded for protecting the environment by virtue of the Salvage Convention’s Article 13.1(b). However, all too often the tribunal is unable to give full effect to this provision because of the low value of the salvaged property.”

He then referred to the fact that both Article 14 and SCOPIC are at best only a safety net for salvors, it is applicable in 25% of LOF cases and therefore in 25% of cases salvors are receiving what he described as the “bare minimum”.

In his paper Todd Busch identified three principal reasons why the Salvage Convention needed to be amended. Firstly, he argued that much has changed since the Salvage Convention was first drafted in 1981. He pointed in particular to environmental issues which he said are now dominating every salvage case. Secondly, whilst salvors are rewarded for saving the ship and the cargo, they are not fully rewarded for the benefit they confer in protecting the environment. Thirdly, he argued that it is not fair that the traditional salvage reward which currently, but inadequately, reflects the salvor’s efforts in protecting the environment is wholly paid by the ship and cargo owners and their insurance without any contribution from the liability insurers who cover the shipowner’s exposure to claims for pollution and environmental damage. The remainder of his paper elaborated on those principles.

Kiran Khosla, Director⁶, Legal Affairs at the International Chamber of Shipping and the International Shipping Federation, spoke on behalf of the shipping industry. In her presentation she outlined the history leading up to the 1989 Salvage Convention and stressed the significance of the “common understanding” of the diplomatic Conference which is attached to the Convention to the effect that courts are not required to fix an Article 13 award up to the maximum salvaged value of the property before assessing special compensation under Article 14. Courts are therefore entitled to calculate an

⁵ CMI Yearbook 2010, p. 493.

⁶ CMI Yearbook 2010, p. 478.

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award of special compensation in all cases where the Article 13 reward is lower than the appropriate Article 14 compensation. The second compromise that she stressed was the fact that the enhancement in the Article 13 award would be allowable in general average whereas the special compensation in Article 14 would not. This led to the amendment of the York Antwerp Rules in 1990 so that shipowners only would be liable for the Article 14 compensation.

Ms Khosla asserted that the SCOPIC tariff rates are both profitable and purposely generous for personnel, equipment and tugs and that the rates have been increased significantly in 2007. Further discussions were taking place at the time of the Colloquium which resulted in further changes to SCOPIC in 2010. She went on to say in relation to the SCOPIC clause that it has “effectively disposed of all the difficulties associated with Article 14 and when incorporated and called into use, it has resulted in an efficient and orderly provision of salvage services for the prevention of pollution to the environment and generally on an amicable basis”.

Concerning the ISU’s proposal for an environmental salvage award, Ms Khosla considered that it would:

“alter the basis of salvage operations. The prime objection would be no longer to save property. The basis of the award would be the amount of pollution that salvors prevented. This in itself would be based on a hypothetical assessment of the damage that has been prevented. It hardly needs saying that this would entail a difficult and speculative enquiry into what damage might have occurred had pollution resulted from the casualty. There is moreover no guidance on what an appropriate award amount would be in any given incident. ...This would raise the bar significantly and the increased sums at stake would inevitably result in contentious expert evidence and speculative theorising. This would no doubt result in more litigation and serve no-one’s interests”.

In relation to the ISU’s suggestions that the P&I Clubs, as the ultimate beneficiary, of the pollution prevention services provided by the salvors should be responsible for paying the environmental award. Ms Khosla emphasised that:

“governments have recognised that there is a shared responsibility, by governments, by shipowners, by cargo and by the general public. They have done this through the mechanisms created in the CLC Liability Conventions (including the Fund Convention) and the HNS Fund Convention. The Funds provide for additional compensation which is contributed to by cargo interests, once the shipowner’s liability has reached the agreed limits. By attributing the liability on to cargo interests, the governments explicitly recognise cargo’s responsibility for the environment.”

Ms Khosla also emphasised that:

“governments are not asking the salvage industry to build up capacities for preventing damage to the environment. Rather, they are accepting that this

is a task for governments as such. In Europe for example, EMSA has been entrusted with the task of pollution response, supplementing the resources and arrangements that have already been set up at national regional levels.”

Ms Khosla was supported in her comments by Hugh Hurst⁷ who represented the International Group of P&I Clubs. He stressed the element of risk sharing between property interests (and thus their insurers) and liability insurers. He argued that “Any environmental award would inevitably be subjective, speculative and hypothetical which would lead to a lack of consistency between awards. It would also severely delay any payment to salvors unlike the position under SCOPIC”.

A paper was also presented by Nic Gooding⁸ representing the London Market Marine Property Underwriters. He emphasised that the world of salvage has changed significantly since the Convention was formulated in Montreal in 1982. He referred to the fewer salvage operations performed, the reduction in the number of oil spills, the increase in the liabilities of salvors and shipowners, particularly concerning third party liabilities relating to pollution and wreck removal and far greater government interference in the conduct of salvage operations. He then said that:

“Hull and cargo underwriters mainly cover damage to property but increasingly they are being asked to pay salvage which includes remuneration covering measures which do nothing to mitigate their potential physical losses but rather those of Governments and P&I liability insurers.”

Mr Gooding therefore proposed that there be three types of award:

- (i) a marine property salvage award based on the present Article 13 criteria (excluding Article 13(1)(b))
- (ii) an environmental liability salvage award - focusing on work done to avert or minimise environmental liabilities
- (iii) SCOPIC or Article 14 only if it exceeded (i) and (ii).

The proposal made was that (ii) and (iii) were alternatives.

At the time this report is being concluded no replacement wording has been provided by the London Marine Property Underwriters. Should such a wording be forthcoming before the Conference it will be forwarded to NMLAs.

– **International Subcommittee meeting: May 2010**

This meeting was well attended by the members of the International Working Group, representatives from the International Salvage Union, the

⁷ CMI Yearbook 2010, p. 499.

⁸ CMI Yearbook 2010, p. 470.

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International Chamber of Shipping, the International Group of P&I Clubs, arbitrators, the insurance market, barristers and representatives from MLA's. There was a vigorous debate, in which many of the arguments already canvassed in this Report were discussed. Of significance were the comments made by a barrister, who has appeared in salvage cases and has sat as an arbitrator, Michael Howard QC:

“There is relatively little evidence in most cases of specific work done to prevent damage to the environment.”

He said further that:

“awards do not reflect work done in relation to environment protection by and large; Arbitrators tend to think in terms of physical benefits. Where a shipowner is saved from liabilities to third parties, that tends to be taken into account in the overall assessment of an award.”

Such an approach is consistent with that adopted by Tamberlin J in the Australian case of *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC*⁹. In that case his Honour concluded that:

“consideration of the vessel’s exposure to liability is not excluded by the Convention. It may be appropriate in particular circumstances to take into account the consideration some liability on the part of the vessel may have been awarded by the intervention of the salvors and, in appropriate circumstances, this may inform the fixing of the award as an enhancement without any determination, detailed investigation, consideration of detailed evidence or attempt to form any definitive conclusion as to the amount of any such liability.”

Another barrister Vesanti Salvaratnam QC identified from the discussion that salvors wanted greater transparency from awards and she did not see any reason why arbitrators could not address that. She queried why Article 14 could not be amended to overcome the House of the Lords’ decision in the “Nagasarki Spirit” in order to make it clear that such awards should include a profit element.

SECTION F – First Questionnaire

– Article 1 Salvage Convention

Question:

1.2 *Do you consider that the words contained in Article 1(d) of the Salvage Convention (“in coastal or inland waters or areas adjacent thereto”) should be deleted?*

⁹ (2006) FCA 1141.

Salvage Convention 1989

- 1.3 *Alternatively do you think words such as those used in the other Conventions (eg “where ever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1(d) of the Salvage Convention?*
- 1.4 *Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?*
 - 1.4.1 *If so, could you provide a copy of the decision?*
 - 1.4.2 *If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?*
 - 1.4.3 *If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?*
- 1.5 *Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words “or similar major incidents”)?*
 - 1.5.1 *If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?*
 - 1.5.2 *If so, can you suggest any wording that you think might be appropriate?*

Geographical Scope

The First Questionnaire sought to ascertain the views of NMLAs as to whether the words “in coastal or inland waters or areas adjacent thereto” should be deleted or whether words such as those found in other Conventions (CLC, HNS and Bunker Conventions) such as “wherever such may occur” or “the exclusive economic zone” or the “territorial sea” should replace those words. It is suggested by the ISU that the present wording is outdated and too imprecise. It has put forward an alternative wording. (See attachment “Specific questions for the meeting”).

The Travaux Préparatoires of the 1989 Salvage Convention shows that the proposed wording gave rise to conflicting views as to what was intended by “adjacent waters” and also whether the words “substantial” or “major” in Article 1(d) were necessary.

The Italian MLA, in its response to the First Questionnaire, drew attention to the question asked by Chile, at page 114 of the Travaux Préparatoires, which enquired as to what was intended by the meaning of the words “areas adjacent thereto”. The Italian MLA then quoted from the report of the Legal Committee of the IMO which had said:

“It had been agreed to limit the concept of environmental damage to damage in areas adjacent to coastal states, specifically the definition would

serve to make clear that cases involving only a risk of environmental damage on the high seas would be excluded.”

The Italian MLA says that that opinion still holds: “but the notion of high seas should apply beyond the EEZ to which all relevant Conventions (CLC, HNS and Bunker Convention) apply and that it might therefore be appropriate to replace the present definition of “damage to the environment” with one based on the scope of application of such Conventions, such as the following:

“(d) damage to the environment means ... in territorial waters and in the exclusive economic zone of any State, established in accordance with international law, or if a State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State, determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured”.

Hugh Hurst reminded us in Buenos Aires that there is no geographical limitation to the scope of SCOPIC.

Conclusion

Of the 24 respondents to the First Questionnaire 16 have favoured replacement of those words with words which refer to the exclusive economic zone (or an area adjacent to the territorial sea equivalent to an exclusive economic zone). Two did not express an opinion, and of six who did not want to amend the present wording, four recognised that the wording could be improved. The South Africa MLAs has referred to its domestic legislation, which has extended the scope of “damage to the environment” to any place where such damage may occur.

– *Interpretation of the word “Substantial”*

Also, in relation to Article 1, the First Questionnaire enquired as to whether the word “substantial” had been interpreted in any cases in the jurisdiction of the NMLAs or alternatively sought an expression of opinion as to whether that word is likely to create difficulties of interpretation. Apart from one Australian case *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC*¹⁰, there were no cases which explicitly discuss that word. The US MLA referred to *International Towing and Salvage Inc v F/V Lindsey Jeanette*¹¹ which found there to be a threat of damage to the environment, where a discharge of oil and other pollutants was threatened into the EEZ, (although there was no explicit discussion of the word “substantial”).

It is worth recalling that the LOF Appeal Arbitrator decided in relation to

¹⁰ (2006) 163 FCR 151; (2006) FCA 1141; and (2007) FCAFC 115.

¹¹ 1999 AMC 2465.

the “*Castor*” that its 30,000 tons of gasoline and 100 tons of bunkers off the Spanish coast was not a substantial threat, despite it having been refused a place of refuge by at least six countries.

Respondents were ambivalent as to whether or not the word “substantial” should be amended, although many States recognised that the word could cause difficulties of interpretation. The Italian MLA, in answer to the First Questionnaire, pointed out that the CMI report to the IMO (Travaux Préparatoires page 111) contained the following explanation of the word “substantial”:

“By using the words ‘substantial’ and ‘major’ as well as the reference to ‘pollution, explosion, contamination, fire’ it is intended to make clear that the definition does not include damage to any particular person or installation. There must be a risk of damage of a more general nature in the area concerned, and it must be a risk of substantial damage.”

The Italian MLA then went on to point out:

“However, during the Diplomatic Conference concern was expressed in respect of the words ‘substantial’ and ‘major’ by the Advisory Committee On Pollution of the Sea (ACOPS) who suggested their deletion. The following statement was made by them:

“The ACOPS’ proposal to Article 1(d) was fairly minor and a modest one. Its purpose was to remove the distinction between substantial and possibly non-substantial and more importantly, the distinction drawn by the use of major incident compared to any other incident. It is certainly the experience of many in environmental matters that the definition of major or minor or substantial or insubstantial are very difficult to define, are generally imprecise and generally lead to the opportunity to be able to do nothing where something should be done. So the amendment basically to remove substantial from physical damage and to remove major from similar incident in that Article. Additionally, there is a desire for completion to add to resources or property on the high seas.”

A number of delegations supported that suggestion but the majority supported their retention (Travaux Préparatoires page 117).

Conclusion

Two NMLAs did not express an opinion as to whether the word “substantial” should be deleted; seven supported deletion and the remaining 15, for the most part, considered that the courts or tribunals were well able to interpret the word satisfactorily. The Chinese MLA, for example, favoured deletion on the basis that its use is contrary to the trend of strengthening environment protection, fails to reward the ordinary, non-substantial physical damage, and finally because of the lack of clarity as to what was intended by use of the word “substantial”. The Italian, Swedish and Slovenian MLAs suggested that both the words “substantial” and “major” be deleted. The Dutch MLA however thought the inclusion of “substantial” serves to filter out bagatelle cases.

The South African MLA which suggested deletion, was uncertain whether it should be replaced and queried if it was whether words such as “not trifling nor insignificant” should qualify damage to the environment.

The British MLA pointed out the word “substantial” has had to be considered in a large number of salvage arbitrations, (and in the case of *R v Monopolies and Mergers Commission (1993) 1 WLR 23*) and attached extracts from some of them which were attached as a schedule to its response. The MLA of Australia and New Zealand referred to the discussion of this question in *United Salvage Pty Ltd v Louis Dreyfus*, which has already been referred to.

– ***Loss of Containers***

The First Questionnaire also sought to ascertain whether the definition in Article 1(d) which refers to specific means by which such damage can be occasioned (ie pollution, contamination, fire, explosion or similar major incidents) would be likely to encompass an incident which gives rise to dangers to navigation, for example a loss of containers at sea. Once again, some NMLAs considered that it would be covered but others that it would not be covered.

The question arises therefore as to whether or not the definition should be widened to cover casualties which can give rise to a danger to navigation, particularly in the case of containers carrying dangerous or hazardous cargo. In short, is a danger to navigation also a threat to the environment? It is not difficult to envisage a submerged container puncturing the side of a ship and giving rise to the potential of damage to the environment. This was the scenario that took place off the Eastern Australian coast when the “Pacific Adventurer” lost containers overboard which holed two of its fuel tanks in March 2009, causing substantial oil pollution damage to Queensland beaches. As the Finnish MLA pointed out, a container’s contents could constitute an environmental risk.

Conclusion

Nine countries opposed any change to this provision; four suggested that it should be widened to refer to this type of situation; four did not express an opinion as to whether amendment was necessary; five expressed the opinion that it would not be covered without saying whether it should be amended, and two suggested that it would be covered without expressing a view that amendment was (or was not) necessary. A number of MLAs considered that if no present arrangements were altered they should be changed for all types of vessels.

– ***Brice Protocol***

Another topic for debate at the Salvage Convention, raised by the French delegation, concerned the definition contained in Article 1(d) and whether it should make specific reference to “cultural heritage” (page 115 Travaux Préparatoires). Since then of course the UNESCO Convention on the Protection

of the Underwater Cultural Heritage has been negotiated in 2001, which largely ignores the existence of salvage. It provides in Article 4 that:

“Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

- (a) is authorised by the competent authorities, and
- (b) is in full conformity with this Convention, and
- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.”

Some 37 countries have adopted the UNESCO Convention, but many of the major Maritime countries have not adopted the Convention and show no signs of having any inclination to do so.

It is worth recalling that Article 149 of UNCLOS provides as follows:

“Archaeological and Historical Objects

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or Country of Origin, or the State of Cultural Origin, or the State of Historical and Archaeological Origin.”

Also relevant is Article 303, which provides as follows:

“Archaeological and Historical Objects found at sea

1. The States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the Coastal State, may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that Article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that Article.
3. Nothing in this Article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
4. This Article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.”

Article 33 of UNCLOS is the provision which identifies the contiguous zone, it being a zone which is contiguous to the territorial sea and permits States to exercise control to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations.

Article 30 of the Salvage Convention permits States to reserve the right not to apply the provisions of the Convention:

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“(d) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.”

Some countries, including Australia and Canada took advantage of this reservation.

The late Geoffrey Brice QC prepared a draft Protocol to the Salvage Convention. It is produced in the CMI Yearbook 2000¹² (See also attachment 1 “Specific questions for the meeting”). The Brice Protocol was discussed at the CMI Colloquium in Toledo in September 2000 and the Executive Council invited the IWG to consider the Protocol and report to the Singapore Conference on whether the Protocol was an appropriate way of dealing with the undoubted problem of protecting the cultural heritage without unreasonably restricting the rights of salvors.

An initial report was prepared by the IWG¹³. That report noted that the draft UNESCO Convention, as it was at that time, would have an impact on the law of salvage and finds as well as UNCLOS. In an important paragraph the IWG said as follows in that report:

“Although we fully support the goal of protecting and preserving underwater cultural heritage which is of historical, cultural or archaeological significance, we disagree with the basic premise of the draft Convention which would abrogate the law of salvage. In our view, the law of salvage is not incompatible with the goals of protecting and preserving underwater cultural heritage. To ensure that this position gains international recognition on a uniform basis, we support adoption of the Brice Protocol to the 1989 Salvage Convention.”

The report went on to comment on responses received to a questionnaire sent to MLA's by the IWG. It noted that many governments had already enacted local laws intended to protect and preserve underwater cultural heritage but there was no uniform international agreement or understanding on numerous critical issues such as:

- “(a) What underwater properties should be preserved and protected?
- (b) How should it be determined which underwater property should be preserved and protected?
- (c) Should underwater property be preserved in situ or should it instead be brought to the surface and taken to shore?
- (d) Who should decide these questions and many other related issues, especially with respect to property which is located in international waters?”

¹² CMI Yearbook 2000, p. 412.

¹³ CMI Yearbook 2001, p. 254.

In this report, the IWG suggested in relation to the Brice Protocol as follows:

“An amendment of the Salvage Convention along these lines would appear to be consistent with Article 303 of UNCLOS. The Brice Protocol is intended to create financial incentives to those who are engaged in salvage operations to preserve and protect what it defines as “historic wrecks”. Thus, in determining what award, if any, a salvor would be entitled to receive with respect to a historic wreck, the factors to be taken into account would include the extent to which the salvor has taken appropriate steps to preserve and/or protect the property in accordance with internationally recognised practices.”

The IWG also said, in paragraph 19:

“We can see no reason in principle why in situ preservation could not be the result under the Brice Protocol if widely accepted archaeological practices so dictated and appropriate financial incentives can be devised to reward salvors for locating, protecting and preserving the property underwater.”

A critique of the UNESCO Convention is also contained in a subsequent CMI Yearbook¹⁴. John Kimball reported in that document on the last sessions of the fourth meeting of governmental experts, which he attended as a member of the United States delegation.

A further report of the IWG is contained in the 2002 CMI Yearbook¹⁵. This followed the adoption of the Convention on 2 November 2001. This report noted that at the CMI Assembly meeting in Singapore on 16 February 2001 a resolution was passed requesting the IWG to continue to monitor progress of the draft Convention and to seek ways of ensuring that the Convention in its final form did not conflict with existing international salvage laws. The following paragraphs from that report are relevant.

“5. The CMI supports the goal of the UCH Convention of protecting underwater cultural heritage. CMI recognises that there are certain shipwrecks which have great historical, archaeological, cultural or other importance and, if at all possible should be protected and preserved. In addition, the CMI agrees with the certain parts of the Annex to the Convention to the extent they set forth generally accepted archaeological principles which should be followed in protecting underwater cultural heritage. Nonetheless, there are several fundamental aspects of the Convention which cause us to be concerned and which should be given careful consideration by any country which may be considering whether to accept it.

¹⁴ CMI Yearbook 2001, p. 615.

¹⁵ CMI Yearbook 2002, p. 154.

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6. The CMI questions Article 2 and Rule 1 of the Annex to the extent they state that in situ preservation shall be considered a first option. In situ preservation is only one of several options which should be considered and in some cases may be entirely inappropriate and lead to the destruction and loss of property which might have been preserved.
7. The CMI also questions Rule 2 of the Annex. In many instances, there should be no objection to the sale of property which is found underwater. Indeed, in our view, having the ability to sell some or all of the property may be the only viable way of obtaining adequate funding to protect UCH. This is a section of the Convention which conflicts with the law of salvage.”

This report then went on to detail its primary objections to the Convention including the definition of “underwater cultural heritage” contained in Article 1(A), which it considered to be too broad; the fact the Convention appeared to be at variance with UNCLOS in creating greatly expanded coastal state jurisdiction over shipwrecks on the continental shelf; the fact that the Convention seeks to abrogate the law of salvage or finds, (“The CMI strongly encourages an interpretation of Article 4 which permits the application of the law of salvage in appropriate circumstances” and it “is explicitly recognised in Article 303 of UNCLOS” and “The Underwater Cultural Heritage Convention cannot “abrogate” the Salvage Convention: pursuant to Article 30 of the Vienna Convention, the Salvage Convention prevails over the new UCH Convention”; Article 9 was opposed because it is intended to expand the jurisdiction of Coastal States in a manner which conflicts with UNCLOS; Article 10 was opposed because, again, it expands the jurisdiction of Coastal States in a manner which conflicts with UNCLOS.

The Second Questionnaire which the Salvage Review IWG sent to NMLAs asked whether the Brice Protocol should be considered for inclusion in the Salvage Convention. Four NMLAs answered positively (and one agreed that it was worthy of consideration) and three answered negatively. The Canadian MLA expressed concern that the reservation which Canada made to the Salvage Convention (which has no geographical limitation) may conflict with the Brice Protocol which suggests a more restricted right of reservation in Article 30 – that is where the property involved is historic wreck in the territorial sea, or inland waters. The UK MLA was unclear as to why the protection of wrecks should form part of a Salvage Convention.

It is worthy of note that the United States Court of Appeals for the Fourth Circuit in *RMS Titanic Incorporated v The Wrecked and Abandoned Vessel... believed to be the RMS Titanic*¹⁶ had determined that the law of salvage did apply to wrecks. It is worth repeating aspects of that judgment which grappled

¹⁶ 435 F.3d.521.

with the issue as to whether the law of salvage, which historically took place with a view to providing prompt and ready assistance to human suffering and protect property, by saying:

“Some courts have responded to the awkwardness of it by attempting to treat historic wrecks under the law of finds. ... But when we recognise that a case in finds would award outright title to the finder and that the public interest in long-lost historic wrecks could not be served, we readily conclude that the salvage law is must better suited to supervise the salvage of a historic wreck.”

The court went on to say:

“While we have by default applied a traditional salvage law to historic wrecks, both earlier in this case and in prior cases, we now ratify this application as appropriate to a historically or culturally significant wreck. When no person has made a claim to a historical wreck’s ownership and any insurance company that has paid a loss in connection with the wreck has relinquished its interest, the court may appoint the plaintiff to serve as salvor to further the public interest in the wreck’s historical, archaeological, or cultural aspects and to protect the site through injunctive relief, installing the salvor as its exclusive trustee so long as the salvor continues the operation. The court may, in addition to the traditional salvage remedies, also enter such orders as to the title and use of the property retrieved as will promote the historical, archaeological, and cultural purposes of the salvage operation. Indeed, to that end the salvor might be able to obtain public or private funding. Finally, the court must include in its remedies a design to provide the salvor with an appropriate reward, which may include awards in specie, full or restricted ownership of artefacts, limitations on use of the artefacts, rights to income from display and shared research, and future rights to salvage. ...

In recognising the applicability of salvage law to historic wrecks, we do not create a new cause of action or a new category of salvor. Rather we are explicitly acknowledging the application of salvage law to historic wrecks – an application that has been ongoing now for years – for the purpose of formalising the salvage trust of historic wrecks and better informing the appropriate participation in such a trust.”

A review of papers given at an Underwater Intervention Conference in New Orleans on 11 February 2010 is instructive. There is no doubt that in the past so called treasure hunters have caused damage to archaeological sites. Others would argue that significant damage is done to archaeological sites through trawl damage and environment degradation. One of the speakers said:

“The UNESCO Convention contains some valid archaeological principles, but loses its way when it tries to dictate a one size fits all policy for State signatories. This flies in the face of the legal rights of countries that might choose to consider the sale of select duplicate artefacts as part of their

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deaccessioning and collections management policy, and creates problems for States, including Australia, France, Ireland and the UK that retain a reward system, either monetary or in kind.”

The same commentator, Greg Stemm, Chief Executive Officer, Odyssey Marine Exploration of the USA continued:

“The greatest weakness in the principles behind CPUCH is the blatant prejudice against private ownership and collectors as a viable cultural heritage and management tool. On land, and, in most countries a thriving and vital regime for managing historically and culturally significant property and buildings exists by allowing people to own culturally significant structures – and care for them as their own private property.”

He continued later in his paper:

“The purpose of salvage law has always been to reward individuals and groups for risking their capital, resources and even lives to return items lost in the sea to the benefit of society. Doing away with any reward system or private ownership will serve to de-incentivize anyone from taking this initiative, except using rare government resources. Based on my own observations this is not a use of public funds that is endorsed by the public, especially in today’s economy. We can only hope that one day, faced with the reality of the benefits of private curation. UNESCO and CPUCH signatories will adjust their policies to redefine “cultural, historical or archaeological character” and “commercial exploitation” to develop a more rational policy for managing shipwrecks and collections – and give the public and the private sector their due for being responsible and able curators of our underwater cultural heritage.”

In another paper James Sinclair of Sea Rex Inc said as follows:

“One of the most outrageous statements that the UNESCO Convention advocates is that in situ preservation should be considered as a first option. This runs counter to what the overwhelming reality of shipwreck situations demand. If the working committees involved in the drafting and promulgation of this treaty had included any corrosion scientists in their fact-finding research, this idea would have been immediately discarded as a realistic first option for management.”

He had earlier commented that:

“Shipwrecks and lost cargoes are predominately man made objects that, with few exceptions, undergo rapid chemical and natural deterioration once lost in the sea. After an undetermined amount of time this process slows, but does not – as far as can be determined – cease completely. The oceans are enormous planetary engines of weather, biology and geology – the greatest recycling engine in the world. The action of the seas on cultural objects is an entire complex field within corrosion sciences.”

Conclusion

The question for delegates is whether specific provisions dealing with underwater cultural heritage should be included in the Salvage Convention, at least for the benefit of those nations who do not wish to become party to the Underwater Cultural Heritage Convention but consider that it would be appropriate to make some provision in the Salvage Convention to deal with this topic. One solution is the Brice Protocol.

– **Article 5 Salvage Convention**

Question:

- 2.1 *Can public authorities pursue claims for salvage in your jurisdiction?*
- 2.2 *If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?*

Article 5 paragraph 3 reads:

“The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.”

The First Questionnaire sought to ascertain whether public authorities can pursue claims for salvage in their jurisdiction. This was not an issue raised by the ISU but was raised in the debate within CMI on Places of Refuge. 18 countries answered to the effect that public authorities can pursue claims for salvage. The Chinese MLA considered that the provision should be deleted, although it recognised that other States might oppose the deletions, in which case it would support the creation of a right to a reservation over the deleted provision. Seven did not support any change. A number of MLAs considered that this is a matter which should be left to national law.

The British MLA identified the general rule of English law as being that a person or body that performs a pre-existing duty to a casualty is not entitled to claim a salvage reward and where, however, it performs services beyond its pre-existing duties it may be able to claim a salvage award. The South African MLA referred to *Transnet Limited t/as National Ports Authority* and the “*Cleopatra Dream*”¹⁷ where a public authority failed in its attempt to claim a salvage reward. This appears to be the position in a large number of countries.

¹⁷ (Unreported Supreme Court of Appeal of South Africa, 11 March 2011.)

Conclusion

There is therefore minimal desire to effect change to this provision, at least in so far as the answers in the First Questionnaire are concerned. The Slovenian MLA suggested that each country should be left to determine the rights and duties of public authorities, but perhaps model rules could be prepared to assist in delivering uniformity.

– **Article 11 Salvage Convention**

Question:

3.2 *Has your country ratified the Salvage Convention 1989?*

3.2.1 *If so, has it enacted any legislation or regulation to give effect to Article 11?*

3.2.2 *If so, please supply a copy, if possible with a translation into English or French.*

3.2.3 *Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) adopted in December 2003.*

This question sought to ascertain which countries had ratified the Salvage Convention, whether any specific legislation or regulation had been made to give effect to Article 11 and whether NMLAs thought it would be appropriate to make express reference to the IMO Guidelines on Places of Refuge in Article 11. Of the 24 countries who have responded to the First Questionnaire 20 countries, had either accepted or ratified the Convention; only two countries had made any express provision in relation to Article 11, some suggest that their legislation has dealt with this issue indirectly and only a couple of respondents thought that an express reference should be made to the IMO Guidelines on Places of Refuge or the new CMI Draft Convention on Places of Refuge. (It was suggested by some that the EU had taken steps to integrate the IMO Guidelines into domestic legislation by amendments to Directive 2002/59 which refers to the IMO Resolution.) The US MLA referred to the US Coast Guard Commandant Instruction entitled US Coast Guard Places of Refuge Policy of July 17, 2007 and the multi agency National Response Team Guidelines for Places of Refuge Decision Making dated July 26, 2007.

Interestingly, at the Salvage Convention 1989, the International Chamber of Shipping had recommended a stronger provision which required States to provide “ports of refuge”. One delegation had noted:

“that such a provision would be undesirable, but that the problem of obtaining port access could be addressed, at least partially, by having States adopt contingency plans which would establish a mechanism for informed decision-making.” (page 283 Travaux Préparatoires)

thus presaging the OPRC Convention 1990 and IMO Guidelines on Places of Refuge. The Canadian MLA, in supporting the inclusion of the IMO Guidelines

in the Salvage Convention regarded that support as being consistent with its support of the CMI Instrument on Places of Refuge. The Chinese and Japanese MLAs, on the other hand, considered that the Salvage Convention is, essentially, dealing with private law matters and it would not be appropriate to add material that is of a public law nature. Sweden considered that the issues raised by Article 11 would be better dealt with in a stand alone Convention, hence its support of the CMI Instrument on Places of Refuge.

Conclusion

Whilst a few countries think that the Salvage Convention could be improved by amendment the overriding sentiment appears to be that such matters are best left to stand alone instruments.

– **Article 13 Salvage Convention**

Question:

- 4.2 *Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?*
- 4.3 *Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?*

Article 13 paragraph 2 provides that:

“Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.”

The ISU has identified problems in recent years in the salvage of container ships, which are becoming larger and larger, and which has given rise to problems in collecting security from cargo interests. Sometimes it is not obtained at all or, when it is provided, the cargo often remains unrepresented and has to be given notice of pending arbitration, an award and an appeal award, all causing considerable expense and delay. In one case 6,000 TEU containers were involved comprising 4,486 individual interests. Only 3,066 were involved in the arbitration and of those 1,055 were unrepresented.

Reference has been made in Section D above to the 2001 amendments to the LOF and LSSA clauses which go some way to meeting the ISU's concerns.

Archie Bishop says that changes in LOF 2011 only partly address the consequences of the present legal position. Obtaining security from cargo in

container ship cases, he says, is a problem which increases year by year as ships get bigger. In modern ships over 10,000 cargo interests can be involved. Under current law each property interest is responsible for itself. No party is liable for the other. Each has a duty to provide security and each is entitled to be represented in subsequent legal proceedings. In large container ship cases it is impossible for a salvor to identify and obtain security from each interest within any reasonable period of time and his only remedy, detainment of the property concerned, is very often impracticable or impossible. Further, even when security is received the cost of giving to each property interest appropriate notice of arbitration and awards is not only time consuming but expensive – a cost that is ultimately born by the salvaged property. Currently under Article 21.2 the ship owner has an obligation to assist the salvor in obtaining security but no obligation to provide it if he fails to do so. Archie Bishop suggests that in the interest of all, ship, cargo and salvor, the law needs to be tightened to overcome this problem.

Some countries already have a system in place to overcome it (Netherlands and Belgium) but the vast majority do not. The Italian MLA, in its response to a general question as to whether there were any other issues or problems that needed to be considered in the first questionnaire, suggested that in relation to Article 21 the law could be amended by providing that if cargo is released before it has provided salvage security, the shipowner will be liable for that cargo's contribution to the overall salvage award. Such a change would maintain the current position of each party being principally liable for its own proportion of the award, yet protects the salvor.

A proposed amendment which adds a sentence to Article 21 paragraph 2 might be as follows:

Article 21 - Duty to provide security

1. Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.
2. Without prejudice to paragraph 1, the owner of the salvaged vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released. *If any such cargo is released without the cargo interest(s) having provided satisfactory security to the salvor, then the owner of the salvaged vessel shall be liable to provide such security to the salvor on behalf of the said cargo interest(s).*
3. The salvaged vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property."

Conclusion

Three NMLAs reported that in their countries there is a provision in their legislation which has channelled liability to the shipowners. Four NMLAs thought it would be of benefit for the Convention to identify the ship owner as being the party who should primarily be responsible for the payment of claims and the provision of security in container cases. The remainder did not consider it necessary to make special provision for container ships. The Chinese MLA, however, suggested that “Further work needs to be done to explore solutions in relation to the provision of security and handling of unrepresented cargo, both in relation to container and general cargo ships”. Finland pointed out that whether the ship or the salvor had the liability for administration or the ship had the liability for payment/security the burden could be unreasonable on both. The German MLA considered that the availability of its lien put the salvor in a better position than the shipowner. The Italian, Slovenian and Dutch MLAs favoured identifying all ships and not just containerships if change was to be made.

– **Article 14 Salvage Convention**

Question:

5.2 *Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are “political” issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of “damage to the environment” in article 1(d), to article 13, article 15 and article 20).*

This is clearly the most contentious area of potential reform in relation to the Salvage Convention 1989 and relates to what is now being termed “environmental salvage”. A broad question was posed to NMLAs as to whether they would be in favour of an investigation by CMI as to whether Article 14 should be amended to create entitlement to an environmental award.

The ISU has suggested that increasing activity by regulatory authorities has resulted in the environment being a factor in almost every salvage case, such that authorities almost always now require bunkers to be removed before any salvage work can be done, even though their removal may not be necessary for the success of the operation or even necessary to protect the environment. Such work, it is said, inevitably increases the Article 13 award to the detriment of property underwriters.

The ISU points to the “*Prestige*” as highlighting the inadequacies of the present regime. It suggests that had the ship and her cargo been provided with a place of refuge, they could probably have been salvaged. The resultant salvage

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award would have been restricted by the value of property salvaged (about \$ 20 million) and probably have been in the region of \$ 10-12 million. Although the award would be limited the salvaged fund would probably have just been sufficient to avoid the need to dig into the safety net of the SCOPIC clause. The cargo of oil remaining on board would have been contained and the cost of the cleanup of the spill would have been in the region of \$ 40-50 million. In the event the salvors were unable to salvage the ship and cargo because a place of refuge was denied, leading to claims estimated to be in the region of \$1 billion. The ISU has pointed out that very little would have been paid for protecting the environment had it been permitted to proceed with the salvage. Any enhanced award would have been capped by the salvaged value and thus would have been minimal, compared with the benefit conferred.

The ISU has suggested that whilst salvors are currently rewarded for protecting the environment under 13.1 (b) they are inadequately rewarded for what they do, because of the limit to any salvage award imposed by article 13.3 – the value of the salvaged property. As an illustration of this inadequacy they point out that like Article 14, SCOPIC is a safety net which provides for a minimum payment and that statistically SCOPIC is involved in approximately 20% of cases. Thus in 20% of all cases salvors are receiving the bare minimum. Further, whilst in the remaining cases the award may not be the bare minimum, the restriction imposed by property value means they are probably not fully rewarded for what they do in those cases.

Aside from this, it notes that such enhancement for preventing damage to the environment as is paid, is paid by property underwriters who do not insure this liability, even when Article 14, or SCOPIC, is involved. Article 14 or SCOPIC is only paid to the extent that their assessment exceeds the traditional salvage award under Article 13. Most Article 14 and SCOPIC cases also involve an Article 13 award and statistically approximately only 50% of the assessment is actually paid under either Article 14 or SCOPIC. The balance is paid as a traditional salvage award under Article 13.

The ISU's suggested solution to this is to amend Article 13 by deleting Article 13.1 (b) (the skill and effort of the salvor in preventing or minimising damage to the environment) and reintroducing it in an amended Article 14.

The ISU has explained its suggestion for reform as follows:

- under such a proposed Article 14.1, an arbitrator could make an environmental award whenever there is a threat of damage to the environment. The salvor does not have to actually prevent damage to the environment, which is the position under the existing Article 14. The major difference is that under the Convention, the recovery is limited to expenses. In circumstances in which the services do not prevent damage to the environment, the ISU anticipates that a salvor would at least be awarded the cost of the operation. Where there is success achieved, it is anticipated that a more generous reward will be

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available subject to the overall cap. However, in this draft it has been left to the discretion of the tribunal.

- the proposal in effect avoids the vexed problem of liability salvage. There is no need to prove a liability though its possibility would be relevant to Article 14.1(c).
- if its proposals for environmental salvage are accepted, there would need to be a statutory lien created against the ship for such a claim or a clarification made that environmental salvage should be considered part of the existing salvage lien. Geoffrey Brice pointed out in an LMCLQ article¹⁸ that the Arrest Convention 1952 does not include “Special Compensation” (under Article 14) as a maritime or statutory lien. The more recent Arrest Convention 1999 remedies this in Article 1.1(c) where maritime claim includes one arising from: “salvage operations or any salvage agreement, including if applicable, any special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment”.
- under the CLC 1992, the Fund Convention 1992 and the HNS Convention, an owner and its insurer may have taken into account the cost to it of any preventive measures. An environmental award would, it is thought, be a reasonable preventive measure when valid claims under those Conventions are made. Thus an owner should be able to have it taken into account when faced with other claims under the CLC or be able to reclaim it from the 1992 Fund if the CLC is exceeded. The ISU suggests that there may be circumstances in which a ship owner could participate in its own pollution limitation fund with other claimants under either the CLC or Fund Conventions, depending on whether limits are reached on the basis that an environmental salvage award was a result of its entering into a reasonable contract to prevent and/or mitigate damage to the environment. To date it seems that claims for damage caused to eco-systems are not admissible by the IOPC Fund and thus preventive measures relating to their avoidance would not be covered. (The same concepts of pollution damage and preventive measures apply under the 1992 CLC and Fund Conventions. For a discussion on these topics see the 1992 Funds Claims Manual, December 2008 edition, paragraph 3.1.15.)

It will be noted that the ISU does not suggest that SCOPIC or any similar scheme be adopted in any new Convention. The amended texts for Articles 13 and 14, put forward by the ISU is in Attachment 1 “Specific questions for the meeting”.

¹⁸ Lloyds Maritime and Commercial Law Quarterly (1990) at p. 45.

In the First Questionnaire NMLAs were asked whether there were any other issues or problems which they considered should be looked at. The MLA of Australia and New Zealand suggested that Article 13 should be amended to expressly exclude from consideration the issue of whether a salvage reward should take account of potential liability to third parties. Geoffrey Brice QC in his book “Maritime Law of Salvage” at paragraph 2.127 expressed the opinion that this did not form part of the considerations to be taken into account when assessing the nature of the damage faced by the salvor. He said:

“‘Danger’ and threat of claims or litigation

However, to take into consideration the removal by the salvor of the prospect of pure legal claims against the owners of the salvaged property as such is probably not warranted by the Convention whether as part of the services or as a danger. Such a consideration goes beyond considering threats to life or property. It might involve consideration of matters of legal responsibility (where for example shipbuilding sub-contractors could be involved in the case of a mechanical breakdown), of questions of limitation of liability and numerous other extraneous matters: it is submitted that these are not proper subjects for investigation in a salvage suit.”

Geoffrey Brice QC did however consider that prevention of third party claims arising from the casualty will be reflected in the application of criterion (c) of Article 13.1. In his book he went on to say:

“Success, benefit and third party claims

2.127A As indicated above, in most cases where the question arises prevention of third party claims will be a feature of the services and a part of the “useful result” thereby achieved. The sum of the service is the benefit that the salvaged property and its owners derive from it. The benefit conferred is likewise a measure of the success of the salvage service and its merits. Thus in most cases prevention of third party claims arising from the casualty will be reflected in the application of criterion (c) of Article 13.1.

2.127B The following are examples of services averting potential liability which it is submitted enhance the merits of a service:

- (a) Preventing fire spread to other vessels and shore installations;
- (b) Taking in tow a vessel drifting in a crowded anchorage;
- (c) Preventing a vessel from grounding and blocking the entrance to a port thereby affecting the commercial interests of the port and its users;
- (d) Preventing a casualty grounding on a coral reef which forms part of coastal resources; and
- (e) Avoiding an escape of oil likely to affect the operation of a nearby power station.

It will be noted that all of the above involve either potential physical damage to property or interference with its legitimate use as a direct result of the casualty.”

Conclusion

Ten NMLAs expressed support for considering the issue of environmental salvage and seven were opposed. Of the remainder two expressed no opinion and four recognised that some change may be necessary and one was open to persuasion. The German, MLA whilst recognising and supporting the need for a reconsideration of Article 14 hoped that the competing interested parties would first negotiate a resolution. The Norwegian MLA recognised that the increased focus on the environmental side of casualties suggested that Article 14 needed to be drafted to encourage professional salvors to maintain vessels and equipment dedicated to prevent environmental damage. A number of NMLAs pointed to the fact that SCOPIC has been introduced as indicative that Article 14 had not worked. As has been seen in Section D opposing views were expressed by the shipowners and their liability insurers (the P&I Clubs) on the one hand and the ISU and London market property underwriters on the other hand. The arguments in favour of change are based on the changing face of salvage, and the inability for salvors to be appropriately remunerated in cases where there are low salvaged values. The arguments against change focus on the unpredictability of an environmental award and the need to share with the property owners and their insurers the liability for any such award.

– Article 16 Salvage Convention

Question:

6.2 *Do you consider that the wording of this Article should be amended to ensure that any life salvage claims are made directly against a property owner rather than the salvor?*

This question asked whether NMLAs considered that Article 16 should be amended to ensure that life salvage claims should be made against the owners of property salvaged rather than the salvor. Article 16 currently provides that “A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimising damage to the environment”.

The ISU has pointed out that prior to the 1989 Convention, claims for life salvage would have been made directly against the owners of the property but as a result of the language used in the Convention, such claims now can be made against the salvor. It points out that this could create a problem for the property salvor if it was not involved in the life salvage, which is often the case. The

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salvage claim under Article 13 and special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include the effort of a third party over which it had no control. So whilst liable to the life salvor, the property salvor will have received nothing for the work done in saving life. This, it is suggested, would be an injustice to the property salvor. The ISU therefore suggests a correction to the wording to ensure that any life salvage claims are made directly against property rather than the salvor.

This matter was debated at the 1989 Convention. The ISU (*Travaux Préparatoires*, page 425) had expressed the opinion that a salvor of life, unless he was a servant, agent or subcontractor of the property salvor, should pursue his claim directly against the property and not the salvor who saved the property. Since life salvage was not an element in assessing the reward under Article 13, it would be unfair if the property salvor had to pay the life salvor when that salvage was not considered in assessing the property salvor's reward.

The Norwegian delegation (*Travaux Préparatoires*, page 426) had proposed a provision to the following effect:

“Nothing in this Convention shall prevent a contracting State from introducing national regulation in respect of salvage of persons, granting life salvors rights and remedies in addition to those granted by the Convention.”

Whilst there was some support for that proposal, many delegations opposed it. The draft prepared by the CMI for the Montreal Conference provided for an entitlement being given to a salvor of human life to a fair share of any payment due under the Convention. Furthermore a salvor who, at the request of any party concerned or a public authority, has salvaged or undertaken to save any persons from a vessel in danger was to be entitled to compensation equivalent to his expenses under the equivalent provision of Article 14. Left in square brackets was a possibility that a salvor who has actually salvaged any person from the vessel is entitled to a special reward, taking into account the criteria in the equivalent provision of Article 13 but not exceeding twice the salvor's expenses. Under those two extensions it was also provided that any recovery would not exceed any sum payable under paragraph 1 of the article. And it was also provided that any of the extended payments were to be payable by the owner of the vessel in danger or the State in which that vessel was registered. During the Conference such provisions were jettisoned and the provision which is now contained in Article 16.2 was agreed.

In New Zealand and the Netherlands, domestic legislation places the liability for the payment of life salvage on the shipowner. The South African MLA has also dealt with this by providing in its domestic legislation that the owner of a ship or wreck is liable for life salvage. The Canadian MLA suggested that consideration should be given to revising the wording to ensure that life

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salvage claims are made directly against the vessel or other property owner, rather than the salvor, and that they would be a separate reward, not a part of the property salvage award. The German MLA, on the other hand, whilst supporting a change so that claims are directed to the respective property owners, but, noted that the award would reduce the salvor's property salvage award. The Greek MLA supported change but also said that if no change is made a time limit should be imposed on claims by life salvors of more than two years (because property salvors, in practice, do not inform life salvors of the award which it has obtained).

Archie Bishop has provided the following example and proposed rewording for this Article:

A passenger liner catches fire off the coast of East Africa. She is abandoned and over 800 people are in lifeboats. They are picked up by three ships which deviate to save them. One is a VLCC with large deck space. They are taken to an island in the Seychelles. The VLCC is engaged for 5 days and incurs an off hire loss of over \$100,000. She plays no part in the property salvage. If the casualty is salvaged the property salvor may not recover anything in respect of life salvage because he played no part in it, yet under this article he would be liable to pay the life salvor say \$100,000 plus. Equally if there was a claim for special compensation under Article 14.1 alone, which basically gave the salvor his expenses and nothing else, those expenses would not include the expenses of the life salvor for they were not incurred by the property salvor. He would only get the expenses he incurred. Yet, under Article 16, he would have to share the recovery with the life salvor. In either case, it would be unjust for the property salvor to have to pay the life salvor. It should be made clear that any award to a life salvor is to be paid by the property interests.

The ISU's proposed amended provision is also contained in Attachment 1.

The First Questionnaire asked NMLAs whether there were other issues or problems which they considered should be looked at. The German MLA suggested that the salvor's misconduct (Article 18) should not affect the claim of a third party salvor of human life for a share of the salvage award pursuant to Article 16(2).

Conclusion

Ten NMLAs answered in the affirmative, including China which expressed the view that life salvage should be kept entirely separate from property and does not consider that the present provision is conducive to the encouragement of property and environmental salvage, (The Chinese MLA considered that a separate lifesaving fund should be established), and eleven NMLAs considered that no change was necessary. (Two NMLAs did not express an opinion and the South African MLA pointed out that its legislation makes the shipowner liable to pay salvage in respect of life salvage to the salvor.

– Article 20 Salvage Convention*Question:*

7.1 *If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?*

Conclusion

Seven countries thought this was appropriate; twelve considered that it was not necessary, for example, as it would be a maritime lien within its jurisdiction in any event, and five NMLAs did not express a final position. The Dutch and Norwegian MLAs suggested that such matters should be dealt with in the Mortgages and Liens Conventions or National law. (The Netherlands is considering amending its national law so as to extend it to Article 14 awards).

– Article 27 Salvage Convention*Question:*

8.2 *Do you consider that Article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?*

Article 27 provides: “State Parties shall encourage, as far as possible, and with the consent of the parties, the publication of arbitral awards made in salvage cases.”

This question to NMLAs enquired as to whether NMLAs considered that Article 27 should be amended to reflect the position achieved by the Lloyd Salvage Group, namely the publication of awards unless any party objects. As has been seen in Section D both LOF and LSSA clauses have been amended since the Questionnaire was sent out so that Awards are now more likely to be published.

The draft presented to the CMI Montreal Conference contained this provision:

“Contracting States shall take the measures necessary to make public arbitral awards made in any salvage case.”

This was in square brackets, suggesting that there was not unanimity in the drafting committee on that provision. The Montreal Conference Draft Convention which was approved contained the following provision:

“Contracting States shall encourage, as far as possible and if need be with the consent of the parties, the publication of arbitral awards made in salvage cases”

ie much the same as the Convention but with the words “if need be” deleted. There was considerable debate on this provision (Travaux Préparatoires pages

499-513). That debate principally concerned whether the words “with the consent of the parties” should remain in the text.

The ISU is in favour of awards being published. As has been seen, the LSSA clauses have been amended and the changes have been identified above.

Conclusion

Seven respondents agreed that Article 27 should be amended, 13 did not agree. The Danish MLA supported the publication of awards provided parties agreed but considered that it should be left to national law and the parties to determine this issue and not the Convention. Two NMLAs did not express an opinion. The French MLA also supported the publication of a summary of an award without names of the parties, as happens in France already. The Greek MLA believed tribunals should have the power to publish awards where they may be of interest to others. A number of MLAs referred to the basic right of parties to retain the confidentiality of their chosen mode of dispute resolution should they wish, ie the sanctity of the arbitration process.

– **General**

(1) *Question:*

9.2 *How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?*

Enquiries were also made of NMLAs as to the number of cases which had been decided in their jurisdiction under the 1989 Salvage Convention. No more than 30 were identified, although that does not include arbitrations. The British MLA identified 675 awards since 1990, of which 282 resulted in awards following appeals. The US MLA speculated that there may have been “dozens, perhaps even hundreds of arbitrations”.

(2) In response to the general question as to whether there were any other issues which needed to be considered:

- As mentioned earlier the Italian MLA referred to Article 21 and the duty to provide security. (See the commentary above concerning Articles 13 and 21).
- The German MLA suggested that the definitions of “ship” and “property” might need to be reconsidered in light of the definition of “wreck” in the Wreck Removal Convention.
- The German MLA also queried whether there needs to be a definition of “shipowner” so as to ensure that an owner “pro hac vice” (such as bareboat charterer) would be liable to meet any salvage award, as well as any owner.

Section G - Second Questionnaire

Information was sought in the Second Questionnaire with a view to seeking to ascertain how much empirical data was available to support the concerns raised by salvors. In particular data was sought as to the number of salvage claims that had resulted in a modest reward by reason of the low value of the salvaged fund. None of the eleven responses thus far received from NMLA's has identified an example of an instance where this has occurred. No examples have been cited of circumstances in which a salvor declined to be involved because of the low value of the property to be salvaged. Similarly there were no recent examples of cases in which authorities had prevented the completion of a salvage operation and thus deprived the salvor of a possible award. Responses also suggested that it is only in the UK (and possibly China) where tribunals adopt a rule of thumb principle so that a salvor is unlikely to recover more than half the salvaged value by way of a reward. Responses to date also suggest that Article 14 awards do not permit a profit element to be incorporated and there are no examples of any uplift being applied to an Article 14 award.

Section H – Conclusion

If the Conference believes that there is merit in recommending that some matters should be put forward to the IMO as amendments worthy of consideration to the Salvage Convention the options available include:

- Forwarding a draft Protocol to the Salvage Convention to the IMO (bearing in mind IMO Resolutions A500(XII) and A777(18) (see page 145 above)).
- Forwarding a report to the IMO identifying the issues which have been debated and the conclusions reached.

Alternatively the Conference may wish CMI to suggest that in the light of the debate at the Conference, consideration needs to be given to amending the LOF to take account of these discussions.

The Conference may on the other hand consider that no further action should be taken by CMI on the issue of salvage at the present time.

Stuart Hetherington

Chairman: IWG & ISC Review of Salvage Convention 1989

1 May 2012

ANNEX 1

**SPECIFIC QUESTIONS FOR THE MEETING (INCLUDING TEXTS
OF RELEVANT PROVISIONS UNDER THE SALVAGE CONVENTION,
BRICE PROTOCOL AND PROPOSALS FOR REFORM)**

Salvage Convention: Article 1(d)*Definitions*

Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosions or similar major incidents.

This definition is of course relevant to interpreting article 8, article 13(1)(b) and articles 14.1 and 14.2.

- *Should article 1(d) be amended in accordance with the ISU's proposal?*

Article 1

(d) "Damage to the environment" means significant physical damage to human health or to marine life or resources caused by pollution, contamination, fire, explosion or similar major incidents.

- Should the definition in article 1(d) be amended by inserting words such as "wherever such may occur" in place of the words "in coastal or inland waters or areas adjacent thereto"?
- Should the word "substantial" in article **1(d)** be deleted or amended?
- Should the definition in article 1(d) be extended to include an incident which gives rise to dangers to navigation, for example, a loss of containers at sea?
- Should reference be made to the UNESCO Convention on the protection of under water cultural heritage?
- Should the Brice Protocol be adopted?
- The Brice Protocol reads as follows:

Article 1

For the purpose of this Protocol:

“Convention” means the International Convention on Salvage, 1989.

“Organization” means the International Maritime Organization.

“Secretary-General” means the Secretary-General of the Organization.

Article 2

Article 1, subparagraph (a) of the Convention is replaced by the following text:

- (a) Salvage Operation means any act or activity to assist a vessel or any other property (including services to or involving historic wreck) in danger in navigable waters or in any other waters whatsoever.

Article 3

The following text is added as subparagraphs (c)-1 and (c)-2 in Article 1 of the Convention:

- (c)-1 Historic wreck means a vessel or cargo or artefacts relating thereto including any remains of the same (whether submerged or embedded or not) of prehistoric, archaeological, historic or other significant cultural interest.
- (c)-2 Damage to the cultural heritage means damage to historic wreck including damage or destruction at the salvage site of any significant information relating to the wreck or in its historical and cultural context.

Article 4

The following text is added as subparagraph (k) in Article 13 paragraph 1 of the Convention:

- (k) in the case of historic wreck, the extent to which the salvor has: protected the same and consulted with, co-operated with and complied with the reasonable requirements of the appropriate scientific, archaeological and historical bodies and organizations (including complying with any widely accepted code of practice notified to and generally available at the offices of the Organization); complied with the reasonable and lawful requirements of the governmental authorities having a clear and valid interest (for prehistoric, archaeological, historic or other significant cultural reasons) in the salvage operations and in the protection of the historic wreck or any part thereof; and avoided damage to the cultural heritage.”

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Article 5

Article 18 of the Convention is replaced by the following text:

*Article 18***Effect of the Salvor's Misconduct**

A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct. In the case of historic wreck misconduct includes a failure to comply with the requirements set out in article 13 paragraph (k) or causing damage to the cultural heritage.

Article 6

Article 30, paragraph 1(d) of the Convention is replaced by the following text:

- (d) when the property involved is historic wreck and is wholly or in part in the territorial sea (including on or in the seabed or shoreline) or wholly or in part in inland waters (including the seabed and shoreline thereof).

Salvage Convention: Article 5 Paragraph 3

The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this convention shall be determined by the law of the State where such authority is situated.

- Should this provision be amended?

Salvage Convention: Article 11

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

- Should this provision be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) adopted in December 2003?

Salvage Convention - Article 13 Paragraph 2

Payment of a reward fixed according to paragraph 1 should be made by all of the vessel and other property interests in proportion to their respective salvaged values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of the interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this Article shall prevent any right of defence.

- Should this provision be amended to provide that in container ship cases the vessel only is responsible for the payment of claims (and therefore for the provision of security) subject to a right of recourse against the other interests for their respective shares?

Salvage Convention - Article 21*Duty to provide security*

1. *Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.*
 2. *Without prejudice to paragraph 1, the owner of the salvaged vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released.*
 3. *The salvaged vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property."*
- Should this provision be amended in accordance with ISU proposal by adding to article 21 paragraph 2:

If any such cargo is released without the cargo interest(s) having provided satisfactory security to the salvor, then the owner of the salvaged vessel shall be liable to provide such security to the salvor on behalf of the said cargo interest(s).

Salvage Convention - Article 14*Article 14**Special compensation*

1. *If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall*

be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

2. *If, in the circumstances set out in paragraph 1, the salvor by his salvage operation has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor.*

However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.

3. *Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).*
4. *The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.*
5. *If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.*
6. *Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.*
- Should articles 13 and 14 be amended in accordance with the ISU's proposals?
 - (i) Deletion of article 13(1)(b) and consequential re-lettering of remaining subparagraphs.
 - (ii) Addition of new article 13(1)(j) "any reward under the revised article 14"

Revised Article 14:

Article 14.1

If the salvor has carried out salvage operations in respect of a vessel which by itself, or its bunkers or its cargo, threatened damage to the environment he shall also be entitled to an environmental award, in addition to the reward to which he may be entitled under article 13. The environmental award shall be fixed with a view to encouraging the prevention and minimisation of damage to the environment whilst carrying out salvage operations, taking into account the following criteria without regard to the order in which they are presented below.

- (a) any reward made under article 13

- (b) the criteria set out in article 13.1(b) (c) (d) (e) (f) (g) (h) and (i)
- (c) the extent to which the salvor has prevented or minimised damage to the environment and the resultant benefit conferred.

Article 14.2

Any reward payable by the shipowner in respect of services to the environment, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed an amount equivalent to:

- (a) in respect of a vessel of 20,000 gross tons or less, 'x' Special Drawing Rights
- (b) for a vessel exceeding 20,000 gross tons, 'x' Special Drawing Rights, plus 'y' Special Drawing Rights for each ton in excess of 20,000, subject always to a maximum of 'z' Special Drawing Rights.

Article 14.3

For the avoidance of doubt, an environmental award shall be paid in addition to any liability the shipowner may have for damage caused to other parties.

Article 14.4

Any environmental award shall be paid by the shipowners.

Article 14.5

If the salvor has been negligent and has thereby failed to prevent or minimise damage to the environment, he may be deprived of the whole or part of any environmental award due under this article.

Article 14.6

Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

Salvage Convention - Article 16*Salvage of persons*

1. *No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.*
 2. *A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment.*
- Should article 16 be amended as proposed by the ISU?

Replace Article 16 paragraph 2 with:

16.2 A salvor of human life, who has saved lives from a ship or property that was salvaged by another, shall be entitled to a fair reward,

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based on the criteria set out in article 13. Any such reward shall only be payable by the shipowner.

Salvage Convention - Article 20*Maritime Lien*

1. *Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.*
 2. *The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.*
- Should this provision be amended so that any proposal to introduce a new environmental salvage reward should be specifically referred to and identified as creating a maritime lien?

Salvage Convention - Article 27*Publication of Arbitral Awards*

State Parties shall encourage, as far as possible, and with the consent of the parties, the publication of arbitral awards made in salvage cases.

- Should this provision be amended?

Options for CMI

- Forwarding a draft Protocol to the Salvage Convention to the IMO.
- Forwarding a report to the IMO identifying the issues which have been debated and the conclusions reached.
- Suggesting that in light of the debate at the Conference, consideration needs to be given to amending the LOF to take account of these discussions.
- Doing nothing.

April 2012

ANNEX 2**International Convention on Salvage, 1989**
(London, 28 April 1989)

THE STATES PARTIES TO THE PRESENT CONVENTION,

RECOGNIZING the desirability of determining by agreement uniform international rules regarding salvage operations,

NOTING that substantial developments, in particular the increased concern for the protection of the environment, have demonstrated the need to review the international rules presently contained in the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, done at Brussels, 23 September 1910,

CONSCIOUS of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment,

CONVINCED of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger,

HAVE AGREED as follows:

CHAPTER I
GENERAL PROVISIONS**Article 1**
Definitions

For the purpose of this Convention:

- (a) "Salvage operation" means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.

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- (b) “Vessel” means any ship or craft, or any structure capable of navigation.
- (c) “Property” means any property not permanently and intentionally attached to the shoreline and includes freight at risk.
- (d) “Damage to the environment” means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.
- (e) “Payment” means any reward, remuneration or compensation due under this Convention.
- (f) “Organization” means the International Maritime Organization.
- (g) “Secretary-General” means the Secretary-General of the Organization.

Article 2

Application of the Convention

This Convention shall apply whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party.

Article 3

Platforms and drilling units

This Convention shall not apply to fixed or floating platforms or to mobile offshore drilling units when such platforms or units are on location engaged in the exploration, exploitation or production of sea-bed mineral resources.

Article 4

State-owned vessels

1. Without prejudice to article 5, this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognized principles of international law unless that State decides otherwise.
2. Where a State Party decides to apply the Convention to its warships or other vessels described in paragraph 1, it shall notify the Secretary-General thereof specifying the terms and conditions of such application.

Article 5

Salvage operations controlled by public authorities

1. This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.
2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.

Article 6

Salvage contracts

1. This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication.
2. The master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owner of the property on board the vessel.
3. Nothing in this article shall affect the application of article 7 nor duties to prevent or minimize damage to the environment.

Article 7

Annulment and modification of contracts

A contract or any terms thereof may be annulled or modified if:

- (a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or
- (b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered.

CHAPTER II PERFORMANCE OF SALVAGE OPERATIONS

Article 8

Duties of the salvor and of the owner and master

1. The salvor shall owe a duty to the owner of the vessel or other property in danger:
 - (a) to carry out the salvage operations with due care;
 - (b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment;
 - (c) whenever circumstances reasonably require, to seek assistance from other salvors; and
 - (d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.

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2. The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor:
 - (a) to co-operate fully with him during the course of the salvage operations;
 - (b) in so doing, to exercise due care to prevent or minimize damage to the environment; and
 - (c) when the vessel or other property has been brought to a place of safety, to accept redelivery when reasonably requested by the salvor to do so.

Article 9

Rights of coastal States

Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

Article 10

Duty to render assistance

1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.
3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.

Article 11

Co-operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

CHAPTER III RIGHTS OF SALVORS

Article 12

Conditions for reward

1. Salvage operations which have had a useful result give right to a reward.
2. Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result.
3. This chapter shall apply, notwithstanding that the salvaged vessel and the vessel undertaking the salvage operations belong to the same owner.

Article 13

Criteria for fixing the reward

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:
 - (a) the salvaged value of the vessel and other property;
 - (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
 - (c) the measure of success obtained by the salvor;
 - (d) the nature and degree of the danger;
 - (e) the skill and efforts of the salvors in salvaging the vessel, other property and life;
 - (f) the time used and expenses and losses incurred by the salvors;
 - (g) the risk of liability and other risks run by the salvors or their equipment;
 - (h) the promptness of the services rendered;
 - (i) the availability and use of vessels or other equipment intended for salvage operations;
 - (j) the state of readiness and efficiency of the salvor's equipment and the value thereof.
2. Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.
3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salvaged value of the vessel and other property.

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Article 14

Special compensation

1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.
2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.
3. Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).
4. The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.
5. If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.
6. Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

Article 15

Apportionment between salvors

1. The apportionment of a reward under article 13 between salvors shall be made on the basis of the criteria contained in that article.
2. The apportionment between the owner, master and other persons in the service of each salving vessel shall be determined by the law of the flag of that vessel. If the salvage has not been carried out from a vessel, the apportionment shall be determined by the law governing the contract between the salvor and his servants.

Article 16

Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.
2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment.

Article 17

Services rendered under existing contracts

No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.

Article 18

The effect of salvor's misconduct

A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct.

Article 19

Prohibition of salvage operations

Services rendered notwithstanding the express and reasonable prohibition of the owner or master of the vessel or the owner of any other property in danger which is not and has not been on board the vessel shall not give rise to payment under this Convention.

CHAPTER IV CLAIMS AND ACTIONS

Article 20

Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.
2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.

Salvage Convention 1989

Article 21

Duty to provide security

1. Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.
2. Without prejudice to paragraph 1, the owner of the salvaged vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released.
3. The salvaged vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property.

Article 22

Interim payment

1. The tribunal having jurisdiction over the claim of the salvor may, by interim decision, order that the salvor shall be paid on account such amount as seems fair and just, and on such terms including terms as to security where appropriate, as may be fair and just according to the circumstances of the case.
2. In the event of an interim payment under this article the security provided under article 21 shall be reduced accordingly.

Article 23

Limitation of actions

1. Any action relating to payment under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. The limitation period commences on the day on which the salvage operations are terminated.
2. The person against whom a claim is made at any time during the running of the limitation period extend that period by a declaration to the claimant. This period may in the like manner be further extended.
3. An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted.

Article 24

Interest

The right of the salvor to interest on any payment due under this Convention shall be determined according to the law of the State in which the tribunal seized of the case is situated.

Article 25

State-owned cargoes

Unless the State owner consents, no provision of this Convention shall be used as a basis for the seizure, arrest or detention by any legal process of, nor for any proceedings *in rem* against, non-commercial cargoes owned by a State and entitled, at the time of the salvage operations, to sovereign immunity under generally recognized principles of international law.

Article 26

Humanitarian cargoes

No provision of this Convention shall be used as a basis for the seizure, arrest or detention of humanitarian cargoes donated by a State, if such State has agreed to pay for salvage services rendered in respect of such humanitarian cargoes.

Article 27

Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases.

CHAPTER V FINAL CLAUSES

Article 28

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature at the Headquarters of the Organization from 1 July 1989 to 30 June 1990 and shall thereafter remain open for accession.
2. States may express their consent to be bound by this Convention by:
 - (a) signature without reservation as to ratification, acceptance or approval; or
 - (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance of approval; or
 - (c) accession.
3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

Article 29

Entry into force

1. This Convention shall enter into force one year after the date on which 15 States have expressed their consent to be bound by it.
2. For a State which expresses its consent to be bound by this Convention

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after the conditions for entry into force thereof have been met, such consent shall take effect one year after the date of expression of such consent.

Article 30

Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this Convention:
 - (a) when the salvage operation takes place in inland waters and all vessels involved are of inland navigation;
 - (b) when the salvage operations take place in inland waters and no vessel is involved;
 - (c) when all interested parties are nationals of that State;
 - (d) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.
2. Reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.
3. Any State which has made a reservation to this Convention may withdraw it at any time by means of a notification addressed to the Secretary-General. Such withdrawal shall take effect on the date the notification is received. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein, and such date is later than the date the notification is received by the Secretary-General, the withdrawal shall take effect on such later date.

Article 31

Denunciation

1. This Convention may be denounced by any State Party at any time after the expiry of one year from the date on which this Convention enters into force for that State.
2. Denunciation shall be effected by the deposit of an instrument of denunciation with the Secretary-General.
3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the Secretary-General.

Article 32

Revision and amendment

1. A conference for the purpose of revising or amending this Convention may be convened by the Organization.
2. The Secretary-General shall convene a conference of the States Parties to this Convention for revising or amending the Convention, at the request

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of eight States Parties, or one fourth of the States Parties, whichever is the higher figure.

3. Any consent to be bound by this Convention expressed after the date of entry into force of an amendment to this Convention shall be deemed to apply to the Convention as amended.

Article 33

Depositary

1. This Convention shall be deposited with the Secretary-General.
2. The Secretary-General shall:
 - (a) inform all States which have signed this Convention or acceded thereto, and all Members of the Organization, of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof;
 - (ii) the date of the entry into force of this Convention;
 - (iii) the deposit of any instrument of denunciation of this Convention together with the date on which it received and the date on which the denunciation takes effect;
 - (iv) any amendment adopted in conformity with article 32;
 - (v) the receipt of any reservation, declaration or notification made under this Convention;
 - (b) transmit certified true copies of this Convention to all States which have signed this Convention or acceded thereto.
3. As soon as this Convention enters into force, a certified true copy thereof shall be transmitted by the Depositary to the Secretary-General of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article 34

Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

DONE AT LONDON this twenty-eighth day of April one thousand nine hundred and eighty-nine.

ANNEX 3**COMITE MARITIME INTERNATIONAL, AISBL****PRESIDENT**Singapore, 9th July 2009

Presidents of All National Associations

Dear President,

Salvage Convention 1989

I enclose a Questionnaire which has been prepared by the newly constituted International Working Group to consider the Salvage Convention 1989.

Stuart Hetherington has kindly agreed to act as Chairman of the CMI IWG on this subject and the IWG consists of Executive Councillors: Chris Davis and Mans Jacobsson, as well as Archie Bishop, Jorge Radovich and Diego Chami.

Please submit your responses to the Questionnaire as soon as possible to enable the work of the IWG to progress. It is hoped that this topic will be on the agenda for the Colloquium to be held in Argentina in 2010.

Yours sincerely,

Karl-Johan Gombrii

COMITE MARITIME INTERNATIONAL SALVAGE CONVENTION QUESTIONNAIRE TO MEMBER ASSOCIATIONS

The CMI Executive Council has set up an International Working Group (NG) to consider whether any changes need to be made to the Salvage Convention 1989.

The questionnaire which follows has been developed with a view to collecting your views on areas which have been identified by the International Salvage Union as possibly needing reform.

We would be grateful if you would provide your responses to this questionnaire as soon as possible.

1. Article 1 in the Salvage Convention 1989 contains the following definition:

“For the purpose of this Convention:

- (d) Damage to the environment being substantial physical damage to human health or to marine life or resources **in coastal or inland waters or areas adjacent thereto**, caused by pollution, contamination, fire, explosion or similar major incidents.” (Emphasis added)*

Comments

1.1 **The International Convention on Civil Liability for Oil Pollution Damage, 1992**, defines “Pollution damage” in Article 1 paragraph 6 as meaning:

- “(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, **wherever such escape or discharge may occur**, provided that compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.” (Emphasis added)*

Article II of that Convention also provides:

“This Convention shall apply exclusively:

- (a) to pollution damage caused:*
- (i) in the territory, including the territorial sea, of a Contracting State, and*

- (ii) *in the **exclusive economic zone** of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;*
- (b) *to preventive measures, **wherever taken**, to prevent or minimise such damage.”* (emphasis added)

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 defines damage in Article I paragraph 6 as meaning:

- “(b) *loss of or damage to property **outside the ship** carrying the hazardous and noxious substances caused by those substances;*
- (c) ***loss or damage by contamination of the environment** caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;”* (emphasis added)

Article III of that Convention provides as follows:

“*This Convention shall apply exclusively:*

- (a) *to any damage caused **in the territory, including the territorial sea** of a State Party;*
- (b) *to damage by contamination of the environment caused in the **exclusive economic zone** of a State Party, established in accordance with international law, or, if a State Party has not established such a zone **in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;***
- (c) *to damage, other than damage by contamination of the environment, **caused outside the territory, including the territorial sea**, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and*
- (d) *to preventive measures, **wherever taken**”* (Emphasis added)

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) provides as follows:

Article I paragraph 9 defines “Pollution damage” as meaning:

- “(a) *loss or damage **caused outside the ship** by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur; provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;*” (Emphasis added)

Article II provides as follows:

“This Convention shall apply exclusively:

- (a) *to pollution damage caused:*
- (i) ***in the territory, including the territorial sea, of a State Party, and***
 - (ii) ***in the Exclusive Economic Zone of a State Party, established in accordance with international law, or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured***
- (b) *to preventive measures, **wherever taken**, to prevent or minimise such damage.”* (Emphasis added)

It will be seen that the International Conventions that deal with the liability for causing pollution are not as restrictive in the geographical scope of the Convention as the definition contained in the Salvage Convention in Article 1(d) quoted above. It will be seen that the words emphasised in that definition leave considerable scope for debate as to what is intended by those limiting words, particularly when the liability conventions seem to envisage preventive measures being taken anywhere, including on the high seas and the pollution damage itself can taken place anywhere within the exclusive economic zone.

Question:

- 1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention (“in coastal or inland waters or areas adjacent thereto”) should be deleted?
- 1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (e.g. “where ever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1(d) of the Salvage Convention?

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- 1.4 Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?
 - 1.4.1 If so, could you provide a copy of the decision?
 - 1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?
 - 1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?
- 1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words “or similar major incidents”)?
 - 1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?
 - 1.5.2 If so, can you suggest any wording that you think might be appropriate?
2. **Article 5 in the Salvage Convention 1989 provides as follows:**

“Salvage operations controlled by public authorities

 1. *This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.*
 2. *Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.*
 3. *The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.”*

Question:

- 2.1 Can public authorities pursue claims for salvage in your jurisdiction?
- 2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?
3. **Article 11 in the Salvage Convention 1989 provides as follows:**

“Co-Operation A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested

parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.”

Comment

- 3.1 The International Working Group on Places of Refuge asked questions in its first questionnaire in relation to this provision. In order to assist the IWG on the Salvage Convention we repeat the first three questions that were posed in that questionnaire as follows:

Questions:

- 3.2 Has your country ratified the Salvage Convention 1989?
- 3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?
- 3.2.2 If so, please supply a copy, if possible with a translation into English or French.
- 3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

4. **Article 13 of the Salvage Convention 1989 establishes the “Criteria for Fixing the Reward”. Paragraph 2 of Article 13 provides as follows:**

“Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.”

Comment

- 4.1 In recent years the salvage of container ships, which continue to grow in size, has given rise to problems in collecting security from cargo interests. Thousands of interests are often involved and it can take months to collect security. Often it is not obtained at all. Further, even when security is provided, cargo often remains unrepresented and has to be given notice of a pending arbitration, an award, and an appeal of an award, causing considerable expense and delay. It has been suggested that the problem could be solved if, in container ship cases, ship owners were responsible for the provision of cargo security.

Question:

- 4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?
- 4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

5. **Article 14 in the Salvage Convention 1989 provides as follows:**

“Special Compensation

1. *If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.*
2. *If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.*
3. *Salvor’s expenses for the purpose of paragraphs 1 and 2 means the out of pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).*
4. *The total special compensation under this article shall be paid only if and to the extent that such compensation is granted than any reward recoverable by the salvor under article 13.*
5. *If the salvor has been negligent and has thereby failed to prevent or minimise damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.*
6. *Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.”*

Comment

- 5.1 Over time this provision proved to be cumbersome, expensive to operate and uncertain in outcome. It also became counter-productive and discouraged rather than encouraged the salvage industry. As a result industry devised SCOPIC to replace article 14 contractually. SCOPIC has been successful and has substantially cut down the amount of litigation following a salvage operation. It is, however, only relevant in about 20% of modern cases and is still only a safety net.

Question:

- 5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are “political” issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of “damage to the environment” in article 1(d), to article 13, article 15 and article 20).

6. Article 16 of the Salvage Convention 1989 provides as follows:*“Salvage of persons*

1. *No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.”*
2. *A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment.”*

Comment

- 6.1 Prior to the Convention life salvage claims would have been made direct against the owners of the property, but as a result of the Convention it would appear that such claims now have to be made against the salvor. This could create problems for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim which the salvor makes under Article 13 and any claim for special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include any effort by some third party over which the salvor had no control.

Question:

- 6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

7. **Article 20 of the Salvage Convention 1989 provides as follows:**

“Maritime lien

1. *Nothing in this Convention shall affect the salvor’s maritime lien under any international convention or national law.*
2. *The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.”*

Question:

- 7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

8. **Article 27 of the Salvage Convention 1989 provides as follows:**

“Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases.”

Comment

- 8.1 The ISU is in favour of the publication of awards. The Lloyds Salvage Group has recently agreed to amend the LSSA clauses so that awards are published as a matter of course, unless any party to the arbitration objects. There is clearly a conflict between the expectation that arbitrations will be conducted in private.

Question:

- 8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

9. **General - Question:**

- 9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?
- 9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

ANNEX 4

**FIRST QUESTIONNAIRE
SUMMARY OF QUESTIONS AND RESPONSES FROM NMLA'S**

QUESTION 1.2 OR 1.3*Article 1(d)**Delete “in coastal or inland waters or areas adjacent thereto”?**Replace with “Wherever such may occur/eez/territorial sea”?***ARGENTINA** Favours replacement “wherever such may occur”**AUSTRALIA & NEW ZEALAND** Favours deletion but no additional words necessary**BELGIUM** Supports existing wording**BRAZIL** Favours replacement with: “in territorial waters and in the exclusive economic zone of any State”**CANADA** Support existing wording, but recognises that consistency with other conventions may be desirable; but only in the context of the Salvage Convention as a whole**CHILE** Favours deletion and extension to EEZ**CHINA** Favours deletion and extension to EEZ, but not high seas**DENMARK** Favours replacement with “EEZ or an area adjacent to the territorial sea equivalent to an exclusive economic zone”**FINLAND** Favours coordination with CLC, Bunker and HNS Conventions**FRANCE** Favours amendment: “Damage to the environment means...in territorial waters and in the exclusive economic zone of any State, established in accordance with international law, or, if a Contracting State has not or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of the territorial sea is measured”.**GERMANY** Not deletion, rather amendment, so as to refer to “Coastal waters including Territorial Sea and EEZ... or up to 200 nautical miles”, some restriction on geographical scope is needed. (It should not be necessary that EEZ belongs to a State party to the Convention)**HELLENIC** Favours amendment to include “wherever such may occur/EEZ” etc.**ITALY** Favours amendment (same wording as France)

Salvage Convention 1989

JAPAN Do not consider words should be changed but would be prepared to consider any better wording

MALTA Favours extension to all areas of the sea, i.e. “wherever such may occur” should replace “in coastal or inland waters or areas adjacent thereto

MEXICO Favours replacement and additional words, such as “in territorial waters and in the EEZ of any State as established in accordance with International law”

NETHERLANDS No, but favours reference to EEZ

NIGERIA Favours replacement of “coastal or inland waters or areas adjacent thereto” with “inland waters or exclusive economic zone”

NORWAY Agrees that the wording is too restrictive. It has extended the scope by its implementation legislation. It also queries why it is limited to marine life and resources. It favours “wherever such may occur” rather than references to EEZ etc.

SLOVENIA Favours replacement and additional words, (Territorial Sea, EEZ etc).

SOUTH AFRICA Favours deletion and replacement with “wherever such may occur”, which is consistent with South Africa’s Wreck and Salvage Act 1996 which provides that “damage to the environment” in Article 1(d) is not restricted to coastal or inland waters or areas adjacent thereto, but to any place where such damage may occur

SWEDEN Does not favour deletion but the notion of the High Seas should apply to the EEZ

TURKEY Favours consistency between Salvage Convention and CLC/Fund Conventions. (i.e. “wherever such may occur”)

UK These are matters of policy. In most cases ships will be brought within territorial waters

US The US MLA has not formed an opinion

QUESTION 1.4

Reported cases where the word “substantial” interpreted (as in “substantial damage”) - Article 1(d)?

ARGENTINA None. (Argentina is not a party to the Convention. (Maintain the word “substantial”)

AUSTRALIA & NEW ZEALAND Yes, (None in New Zealand – the word “substantial” does not cause difficulties)

BELGIUM No. The word “substantial” is unlikely to cause difficulties

BRAZIL No, “substantial” would create difficulties of interpretation – suggest deletion of “substantial” and “major”

CANADA No cases but would be interpreted by court or arbitrator

CHILE No but would be interpreted by the Tribunal

CHINA No cases, and favours deletion of the word “substantial” in view of likely inconsistent interpretations

DENMARK None

FINLAND No. “Substantial” can cause difficulties but leave to courts to interpret.

FRANCE None [1.4.2. “Substantial” translated as “important” – large discretion]

GERMANY None, “substantial” could cause difficulties, similarly “major”, but this should be left to the courts to determine.

HELLENIC None. Supports deletion of “substantial” and inclusion of “such damage does not include minor cases”

ITALY None, and supports deletion of words “substantial” and “major”

JAPAN None, and do not consider the words cause difficulties of interpretation

MALTA None. (Malta is not a party to the Convention)

MEXICO None. Whilst recognising problems with “substantial” suggests it remain

NETHERLANDS No. Courts need to interpret.

NIGERIA No. Do not consider the word causes difficulty in interpretation

NORWAY None. Norwegian Courts are well able to interpret.

SLOVENIA None. “Substantial” can cause difficulties and supports deletion of “substantial” and “major”

SOUTH AFRICA No. Believes there are interpretation difficulties and it should be deleted, perhaps replaced by words indicating that damage to the environment be “neither trifling nor insignificant”

SWEDEN None. “Substantial” creates difficulties and supports deletion of “substantial” and “major”

TURKEY None and supports deletion of words “substantial” and “major”

UK Not in salvage cases but in LOF awards (see Schedule 1: *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Limited* (1993) 1 WLR.23)

US No, but in *International Towing and Salvage Inc v F/V Lindsey Jeanette* (1999) AMC 2465 found that there had been a threat to the environment by evidence that the vessel and its contents threatened a discharge into the EEZ. The court also ordered special compensation under Article 14 so must have been satisfied as to “substantial” and that “coastal waters” extended into EEZ”

QUESTION 1.5

Article 1(d) - Would Dangers to navigation (such as containers lost at sea) be covered by “or similar major incidents” in your jurisdiction?

ARGENTINA Argentina: Were it a party to Convention it would not be covered, unless contents of containers, sensitivity of area etc made it so

AUSTRALIA & NEW ZEALAND Yes it would be covered

BELGIUM The question confuses two issues.

Salvage Convention 1989

BRAZIL No, unless it causes risk to the environment would not be in favour of expanding definition.

CANADA No

CHILE Doubtful but would depend on circumstances. Amendment not necessary.

CHINA No, it would not be covered, and do not consider definition needs to be amended.

DENMARK No

FINLAND No – it would not be covered, unless container content was an environmental risk.

FRANCE It is not clear that all incidents would give rise to damages to navigation – have to be a “major incident”. Does not consider amendment necessary

GERMANY Not covered

HELLENIC Not covered and definition should be widened

ITALY Not covered, and do not support widening the notion of “similar major incidents”, and would endanger survival of the Montreal Compromise

JAPAN It would depend on the nature of the incident, and would not support widening

MALTA Were Malta a party to the Convention, it is likely that a restrictive interpretation would be given and such a scenario would not be covered, and therefore supports amendment to refer to such an occurrence

MEXICO Yes it would be covered, but would not oppose widening the definition.

NETHERLANDS Does not consider covered but does not support widening definition.

NIGERIA Thinks the definition should be widened.

NORWAY Believes it would be interpreted by a Norwegian Court as being covered.

SLOVENIA Yes it is possible it would be covered, but the definition should not be widened.

SOUTH AFRICA No, because this approach confuses navigation hazards with threats to the environment. If it is intended to benefit salvors for preventing or minimising damage to the environment it should be dealt with separately.

SWEDEN Not necessarily – it would depend on the contents of the container. Would not support widening of the definition

TURKEY On a literal reading does not believe it would be covered and repeats the Italian MLA’s caution

UK It is unlikely that an incident that could give rise to dangers to navigation, such as loss of containers at sea, in the absence of other dangers, would be covered by definition of “substantial”

US Not responded to

QUESTION 2.1 and 2.2

Article 5 – Can Public Authorities pursue claims for salvage in your jurisdiction? If they cannot would it improve their position if Article 5 paragraph 3 were deleted or amended?

ARGENTINA Naval and Coast Guard vessels cannot seek a reward but can recover expenses. Public vessels can seek reward. No. (Deletion of paragraph 3 plus further provision needed to assist navy and coast guard)

AUSTRALIA & NEW ZEALAND Yes

BELGIUM Yes

BRAZIL Although there is no provision which prevents such claims in practice Brazilian navy, for example, only seeks to recover costs. This provision should remain unchanged

CANADA Yes

CHILE Yes

CHINA Yes, although it is unclear whether this right continues where salvage is performed under the control of the relevant competent authority. Favours Article 5 paragraph 3 being deleted so as to distinguish between possible authorities who “perform” salvage from those who “control” salvage, perhaps allowing States to reserve their position on deletion

DENMARK Yes

FINLAND Yes, unless particular national law requires performance of duties such as saving lives

FRANCE Yes, however there is an obligation on the State to maintain public properties on the coastline in good condition.

GERMANY Yes, in principle but there are conflicting views and less clear in relation to special compensation.

HELLENIC No, but public authorities are entitled to expenses and damages.

ITALY Nothing to prevent but not done by Navy and not in favour of changing the provision

JAPAN No. There is no domestic law permitting such claims. The present article should remain the same

MALTA Public authorities can bring claims for salvage

MEXICO Yes

NETHERLANDS Yes, unless fire fighting or precluded by competition law which might preclude public authority competing with private companies and offering services for free. No need to amend

NIGERIA Yes, under s.395(4) of MSA 2007 salvage services rendered by or on behalf of the Federal Government can give rise to salvage claims

NORWAY In principle public authorities can claim for salvage where performing services beyond their “obligations”.

SLOVENIA Yes, but not the military. The provision should not be amended, although Model Rules to assist in achieving uniformity may be of benefit

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- SOUTH AFRICA** Yes provided all necessary legal elements are present. Voluntariness needs to be established – an example where a public authority succeeded is *MV Mbashi Transnet Ltd v MV Mbashi and Others* [2002] 3 SA 217 cf *Transnet Limited t/as National Ports Authority re MV “Cleopatra Dream”*. (Supreme Court of Appeal of SA 11 March 2011). The position of public authorities in South Africa would improve if Article 5(3) was deleted
- SWEDEN** Yes, Article 5 paragraph 3. Provision should remain
- TURKEY** Public and private salvors will be able to claim salvage from 1 July 2012 when the Turkish Commercial Code comes into effect
- UK** If performing a public duty: no; but if doing more than that may be able to claim. Do not consider their position would be improved by deletion or amendment
- US** Yes, either when authorised by statute or when the actions of the public authority are voluntary and are not required as a pre-existing duty of the authority. Not applicable

QUESTION 3.2, 3.2.1 and 3.2.3

*Article 11 – Has the Salvage Convention been ratified by your jurisdiction?
Has “Article 11 been given effect to?*

Should the IMO Guidelines be incorporated?

ARGENTINA No

No

Yes

AUSTRALIA & NEW ZEALAND Yes

No

No

BELGIUM Yes

There is a Belgian Act dd 20.01.1999 for the Protection of the Marine Environment.

The IMO Guidelines will be integrated into domestic legislation in the EU by reason of the Dir 2009/17/EC so there will be no need to include in Salvage Convention.

BRAZIL Recently accepted but not ratified

No

No.

CANADA Yes

Only by its inclusion in the Convention

There may be merit in incorporating the IMO Guidelines.

CHILE No

Referred to by other legislation

No.

CHINA Yes

Report of the IWG on Review of the Salvage Convention 1989 – Annex 4

No

No, because Salvage Convention is essentially dealing with private law matters.

DENMARK Yes

No

No, but strengthen by replacing “take into account” with more binding words

FINLAND Yes

FRANCE Yes

No

No, because article is in general terms and reference to IMO Guidelines would be too restrictive

GERMANY Yes

No

Yes, because EEZ directive refers to IMO Resolution A.949(23) and EEZ States are required to bring the legislation into force. It would lead to greater uniformity if Convention also requires States to observe IMO Resolution.

HELLENIC Yes

No

ITALY Yes

No

No, do not consider it necessary or advisable.

JAPAN No

N/A

No – Guidelines mainly deal with public law and do not fit with the nature of the Convention

MALTA No

No

?

MEXICO Yes

Yes with reference to other, unnamed International Conventions

No

NETHERLANDS Yes

No

No

NIGERIA Yes

No (but regulations may be made)

Do not think it necessary to refer to IMO Guidelines

NORWAY Yes

Not specifically responsive to Salvage Convention.

SLOVENIA Yes

No

It is not necessary but it might improve salvage practice.

SOUTH AFRICA Yes

Yes, but only by giving effect to Article 11

Yes.

SWEDEN Yes

No

No. Better dealt with in Convention specifically dealing with these issues

TURKEY Not yet, but its provisions will come into effect from 1 July 2012 and steps are being taken to accede to the Convention

No

Supports consistency with applicable international instruments.

UK Yes

Not specifically responsive to Article 11, but indirectly eg. Erika 2 Directive – Article 20; Erika 3 Directive; UK National Contingency Plan.

Reservations about incorporating IMO Guidelines. Incorporation of the IMO Guidelines could erode the flexibility which they are intended to have.

US Yes.

Yes through Guidelines for Places of Refuge Decision-Making and US Coast Guard Places of Refuge Policy issued by National Response Team and US Coast Guard respectively.

US MLA has not taken a position.

QUESTION Question 4.2 / 4.3

Article 13 paragraph 2 – Has your jurisdiction provided for payment of reward by one of the interests?

Containership cases: Should the Convention identify only the vessel as responsible?

ARGENTINA Yes (Scholars believe falls on interest)

AUSTRALIA & NEW ZEALAND No

Yes

BELGIUM No

No. It would create practical difficulties

BRAZIL No

No – do not consider it appropriate

CANADA No

No

CHILE Yes

Yes

CHINA No

Further work needs to be done to explore solutions in relation to provision of security and handling of unrepresented cargo, both in relation to container and general cargo ships.

DENMARK No

No, opposed to any special rule for containerships.

FINLAND Yes, in respect of the first sentence only of Article 13.2.

No – too much of a burden to make the ship primarily responsible for cargo's share.

FRANCE No

No, there is no apparent reason to make specific provision for containerships.

GERMANY No

No, it is salvor's responsibility and can enforce its lien.

HELLENIC No, although the prevailing opinion is that it is permissible to submit a claim against the ship owner for the fee which relates to the cargo. Yes.

ITALY No, any change to deal with containerships would have to be for all vessels.

JAPAN No

No

MALTA No

Whilst it may be beneficial doubts whether owners and their insurers would find it acceptable.

MEXICO No

No, strongly opposes any such provision.

NETHERLANDS Yes. Liability is channelled to shipowner. Favours amendment re container ship cases but queries why limit to such ships.

NIGERIA No

Yes

NORWAY No

No, it can be dealt with by way of local legislation.

SLOVENIA No

No, unless do for all ships

SOUTH AFRICA Only to the extent that section 17(1) of the Act permits a salvage officer to "detain the ship or wreck saved or assisted or from which life is saved until payment is made for the salvage due" which could result in a practice by which shipowner provides security.

No.

SWEDEN No

No distinction should be made for container vessel

TURKEY No. (Turkey has not made use of the option granted by Article 13(2))

UK No. There are differing views as to whether this is a problem but it is under discussion by the Lloyds Salvage Group.

US No. The US MLA has not taken a position on this

QUESTION 5.2***Article 14 – Environmental Salvage award?***

ARGENTINA Yes

AUSTRALIA & NEW ZEALAND Yes, it is worth considering

BELGIUM No

BRAZIL No

CANADA Recognises that Article 14 has not worked but needs to be convinced that it is necessary to amend Article 14

CHILE No but minor amendments should be made to Article 14.

CHINA Yes. The existence of SCOPIC establishes the deficiency in the Convention. Such award should be paid for in proportion to the salvaged values of ship and other property

DENMARK No (strongly opposed) because it was firmly rejected from the Convention. Any change would lead to uncertainty and would constitute a breach of the Montreal Compromise

FINLAND In favour of investigating further.

FRANCE No, there seems no reason to create an environmental reward beyond what is already covered by Articles 13 and 14

GERMANY Yes, the existence of SCOPIC demonstrates that Article 14 has not been accepted by industry and needs to be reconsidered. Any amendment needs to be negotiated by Clubs, property underwriters and ISU. Industry support needed

HELLENIC Yes

ITALY No, but could simplify the wording of Article 14 without being so radical. The introduction of an environmental reward would disrupt the Montreal Compromise.

JAPAN No, it would damage the fundamental structure of the Convention.

MALTA Yes

MEXICO No

NETHERLANDS No, but welcomes an investigation to amend Article 14 along the lines of the SCOPIC Agreement

NIGERIA Yes, but it is important to know who pays and how it will be calculated

NORWAY No. However alternative response recognises that there are different views and agrees that it is time to revisit liability salvage/environmental award. Believes Article 14 could be amended to provide greater encouragement to professional salvors to maintain vessels and equipment dedicated to prevent environmental damage

SLOVENIA No. Concerned that amendment would cause dissatisfaction to owners and Clubs but salvors concerns need to be addressed

SOUTH AFRICA Yes

SWEDEN An investigation would need to be initiated

TURKEY It is premature for Turkey to express an opinion on this article

UK No consensus reached on this issue

US The US MLA has not taken a position on this

QUESTION 7

Article 20 – If yes to 5.2 do you agree that Article 20 should be amended to create a statutory lien against the ship for such a claim?

ARGENTINA Yes

AUSTRALIA & NEW ZEALAND No (already a maritime lien)

BELGIUM No

BRAZIL No

CANADA Doubts whether Canadian Government would support creation of new statutory lien.

CHILE No

CHINA Yes, against the ship and other property.

DENMARK N/A

FINLAND Yes

FRANCE No

GERMANY Yes. Under German law salvor has lien, Article 20 should provide statutory liens for all salvage claims including any environmental award.

HELLENIC Yes

ITALY No

JAPAN N/A

MALTA This would not be necessary in Malta (which is not a party to the Salvage Convention. Its legislation is already sufficiently wide). It queries, however, whether it would be appropriate to create such a lien in circumstances in which the Convention does not grant a lien in any other situations.

MEXICO No

NETHERLANDS No. Such issues should be left to the Mortgages and Liens Convention.

NIGERIA Yes

NORWAY No. Maritime laws should only be created by the Convention on Maritime Liens and Mortgages and national law

SLOVENIA No

SOUTH AFRICA Yes

SWEDEN No, but an investigation of the environmental salvage issue may lead to a different outcome

TURKEY See response to Article 14; (Comments re maritime liens and mortgages convention which it is in the process of acceding to)

UK It is an open question as to whether this is necessary

US The US MLA has not taken a position on this

QUESTION 6.2

Article 16 – Should life salvage claims be made against a property owner rather than a salvor?

ARGENTINA Yes

AUSTRALIA & NEW ZEALAND Yes. (NZ – domestic legislation already covers this).

BELGIUM No

BRAZIL No. This provision should not be altered

CANADA Consideration should be given to revision to ensure that life salvage claims made against the vessel or property owner.

CHILE No

CHINA Claims for life salvage should be treated separately from property. Suggests the promotion of establishment of a “fund for lifesaving”

DENMARK No, opposed to any change, as do not support giving life salvors a right of their own

FINLAND No

FRANCE No opinion

GERMANY Yes. Life salvor should be required to pursue claims against property owner. Under German law where life salvor’s claim is reduced by property salvor’s misconduct he/she can proceed directly against property owners

HELLENIC Yes

ITALY No. (It is not sure that claims on life salvage under 1910 Convention should be made against owners of the property salvaged)

JAPAN No amendment necessary.

MALTA Yes

MEXICO Yes, favours amendment to ensure that life salvage claim be made against property.

NETHERLANDS Yes. That is what is provided for in Dutch Civil Code.

NIGERIA Under s.394 of MSA 2007 it is recognised that the property salvor may not be involved in saving lives and may be financially overburdened by any claims made by the life salvor on his claims

NORWAY No change necessary

SLOVENIA No

SOUTH AFRICA Section 15 of the Wreck and Salvage Act provides that salvage is payable to the salvor by the shipowner (or owner of the wreck) when services rendered in saving life

SWEDEN No change necessary

TURKEY No change necessary

UK Do not consider that this has proved to be a problem

US The US MLA has not taken a position on this

QUESTION 8

Article 27 – Amend so that awards are published as a matter of course, but not when a party objects?

ARGENTINA Yes

AUSTRALIA & NEW ZEALAND Yes

BELGIUM No

BRAZIL No

CANADA No

CHILE Yes

CHINA No

DENMARK Support publication provided parties agree but believe national law/parties should determine, not the convention.

FINLAND No

FRANCE A compromise solution may be to publish a summary of the award without names of parties, as in *Chambre Arbitrale Maritime de Paris*.

GERMANY Yes, strongly in favour that all awards be published (after making them anonymous) and subject to a party's objection.

HELLENIC No. However Arbitration Tribunals must have the authority to publish awards when they may be of interest to others.

ITALY No

JAPAN Not necessary to amend

MALTA Yes

Mexico Yes

NETHERLANDS No

NIGERIA Yes, as long as there is a provision requiring the consent of both parties

NORWAY No

SLOVENIA No

SOUTH AFRICA No

SWEDEN No, should be a matter for the parties

TURKEY No

UK This issue is under discussion

US The US MLA has not taken a position on this

QUESTION 9.1 19.2

Any other issues or problems?

Have there been any Salvage cases in your jurisdiction under the 1989 Convention?

ARGENTINA Not a party

AUSTRALIA & NEW ZEALAND Suggests that potential liability to third parties be expressly excluded in Article 13 as a factor to take into account. Less than 10 cases (Australia); None (NZ)

Salvage Convention 1989

BELGIUM No

None

BRAZIL No

None

CANADA No

None

CHILE No

CHINA No

Data being collected

DENMARK No

Under investigation

FINLAND No

FRANCE Not responded to

GERMANY Yes – the definitions of “ship” and “property” in Articles 1(b) and (c) in light of definition of wreck in Wreck Removal Convention; “owner” as it is unclear whether this applies to operator or bareboat charterer, and Article 18 – third party claim. The salvor’s misconduct (Article 18) should not affect the claim of the third party salvor of human life (Article 16(2)).

None reported.

HELLENIC No

It is not possible to determine the number of cases. Such as they are is limited and involve minor cases. Significant cases go to London.

ITALY Too early for review but Articles 14 and 21 need to be debated and considered. In relation to the latter consideration could be given to provide that the owner has the obligation not to deliver the cargo until satisfactory security provided otherwise the owner liable for the entire reward (le problem if vessel bareboat chartered).

4 cases.

JAPAN No

None

MALTA No

None

MEXICO No

6 cases

NETHERLANDS No

At least 7

NIGERIA No

None

NORWAY No

4 cases

SLOVENIA No

None

SOUTH AFRICA No

Two

SWEDEN No. It considers it to be too early to consider amendments to the Convention.

None.

TURKEY No

No

UK No

Since 1990, 675 awards and 282 appeals

US No.

Two cases in the courts but a large number (“dozens, perhaps even hundreds”) of arbitrations.

ANNEX 5**SECOND QUESTIONNAIRE ON REVIEW
OF SALVAGE CONVENTION 1989**

This Second Questionnaire is directed to those countries that have given effect to the Salvage Convention 1989 and in order to answer the questions it is envisaged that NMLAs will need to consult with Salvors who operate in their jurisdiction.

- 1(a) Are you aware of any examples of cases in your jurisdiction in which a salvor has been unable to obtain an award under Article 13 of the Salvage Convention by reason of its being unable to complete a salvage operation because of the refusal by authorities to permit the vessel into a port and thus necessitating its scuttling?
- 1(b) If so, did the salvor benefit from an Article 14 (or equivalent, such as SCOPIC) payment (whether by way of an award from a court or tribunal or negotiated agreement between the parties)?
- 2 Do courts or tribunals in your jurisdiction apply a rule of thumb principle to the calculation of Article 13 awards such that a salvor cannot expect to recover more than a moiety, i.e. about half, of the salvaged value, except in rare cases and then 70% would be considered exceptional?
- 3 Are you aware of any cases where the salvor considers that its efforts have not been sufficiently rewarded by reason of the low value of the salvaged vessel, whether or not that arose as a result of an award by a court or tribunal or a negotiated settlement between the parties?
- 4(a) Are you aware of any awards under Article 14 in your jurisdiction (whether by way of court or tribunal award or negotiation between the parties) whereby an element of profit was permitted in the calculations under Article 14 (i.e. contrary to the House of Lords decision in the “Nagasaki Spirit”)?
- 4(b) In respect of any such Article 14 payment, was any uplift applied under Article 14 paragraph 2?
- 4(c) If so, what percentage uplift was applied?
- 5(a) Could you indicate, approximately, what percentage of salvage operations in your jurisdiction are conducted pursuant to Lloyds Open Form?

- 5(b) What contractual terms are used in your jurisdiction apart from Lloyds Open Form?
- 6(a) Do salvors in your jurisdiction have emergency towage vessels on standby?
- 6(b) Does the State own or operate ETV's in your jurisdiction?
- 6(c) If so, are they financed by:
 - (a) State Revenue
 - (b) A levy on shipowners
 - (c) Some other means
- 7 What percentage of salvage cases in your jurisdiction (whether in court or by way of tribunal decision or negotiation between the parties) results in salvors recovering only an award under Article 14 (or an equivalent such as SCOPIC)?
- 8 Are you aware of any situations which have occurred in your jurisdiction in which a salvor has declined to offer its services because of the low estimated value of the property to be salvaged and pollution has then resulted?
- 9 **Attached** is a copy of the Brice Protocol which was discussed at the Singapore conference of the CMI. Do you consider that as part of the Review of the Salvage Convention 1989 the International Working Group should give consideration to recommending that the Brice Protocol be considered in any review which is to take place of the Salvage Convention by the IMO Legal Committee?

Stuart Hetherington
Chairman, International Working Group
Review of Salvage Convention
 December 2010

ANNEX

BRICE PROCOL

Article 1

For the purpose of this Protocol:

“Convention” means the International Convention on Salvage, 1989.

“Organization” means the International Maritime Organization.

“Secretary-General” means the Secretary-General of the Organization.

Salvage Convention 1989

Article 2

Article 1, subparagraph (a) of the Convention is replaced by the following text:

- (a) Salvage Operation means any act or activity to assist a vessel or any other property (including services to or involving historic wreck) in danger in navigable waters or in any other waters whatsoever.**

Article 3

The following text is added as subparagraphs (c)-1 and (c)-2 in Article 1 of the Convention:

- (c)-1 Historic wreck means a vessel or cargo or artefacts relating thereto including any remains of the same (whether submerged or embedded or not) of prehistoric, archaeological, historic or other significant cultural interest.
- (c)-2 Damage to the cultural heritage means damage to historic wreck including damage or destruction at the salvage site of any significant information relating to the wreck or in its historical and cultural context.

Article 4

The following text is added as subparagraph (k) in Article 13 paragraph 1 of the Convention:

- (k) in the case of historic wreck, the extent to which the salvor has: protected the same and consulted with, co-operated with and complied with the reasonable requirements of the appropriate scientific, archaeological and historical bodies and organizations (including complying with any widely accepted code of practice notified to and generally available at the offices of the Organization); complied with the reasonable and lawful requirements of the governmental authorities having a clear and valid interest (for prehistoric, archaeological, historic or other significant cultural reasons) in the salvage operations and in the protection of the historic wreck or any part thereof; and avoided damage to the cultural heritage.”

Article 5

Article 18 of the Convention is replaced by the following text:

*Article 18**Effect of the Salvor's**Misconduct*

A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has

been guilty of fraud or other dishonest conduct. In the case of historic wreck misconduct includes a failure to comply with the requirements set out in Article 13 paragraph (k) or causing damage to the cultural heritage.

Article 6

Article 30, paragraph 1(d) of the Convention is replaced by the following text:

- (d) when the property involved is historic wreck and is wholly or in part in the territorial sea (including on or in the seabed or shoreline) or wholly or in part in inland waters (including the seabed and shoreline thereof).

ANNEX 6**SECOND QUESTIONNAIRE
SUMMARY OF RESPONSES****1. Cases where authorities prevent completion of salvage**

AUSTRALIA & NEW ZEALAND “Iron Baron” (1995)

BELGIUM “Attican Unity”; MS “Long Lin”

BRAZIL N/A [Brazil has not enacted Convention so Q. 1, 4 and 7 not applicable.]

CANADA “Arrow” (1970); “Kurdestan” (1970)

CHILE No

CHINA No

ITALY No

MEXICO No

NORWAY No

SOUTH AFRICA Two occasions? (“Belofin”, “Ikan Tanda”)

No Article 14 award by Court or tribunal in South Africa

TURKEY No

UK Prestige (Spain); Toledo (Ireland). Not known whether salvor benefited from an Article 14 award. “Andros Patria” (1978) and “Aeolian Sky” (1979); 2001 cases: “Buff Bay” “Bish Mihita La”

2. Rule of thumb for award

AUSTRALIA & NEW ZEALAND No

BELGIUM No reported Article 13

BRAZIL Not applicable

CANADA No. There are no recent reported cases identifying the method of calculation.

CHILE No

CHINA There is no general rule or directive but some courts or tribunals apply a rule of thumb principle that salvor cannot expect to recover more than 50% of salvaged value in Article 13 award.

ITALY No

MEXICO No

NORWAY No (1963 Court of Appeal decision where salvaged value NOK28,500 and award NLK27,000)

SOUTH AFRICA No

TURKEY Requests for salvage security tend to be for 30-50% of salvaged values and settlements tend to be in the range of 10-25%

UK A moiety is generally regarded as the maximum amount that a salvor can expect (before interest or currency adjustment and costs) except in exceptional circumstances. Awards over 50% unusual; over 70% very unusual.

ISU DATA from 1978-2008.

4.12% in 1980

12.15% in 2000

were the respective minimum and maximum of salvaged values with an average of 8.12% of salvaged values.

The highest award about 75%; rare to get a moiety. The principle is that there has to be something left for the owners of the ship and cargo.

3. Cases where low salvaged value has resulted in salvor considering it has been poorly rewarded

AUSTRALIA & NEW ZEALAND No

BELGIUM No

BRAZIL Not applicable

CANADA No

CHILE No

CHINA Yes

ITALY No

MEXICO Some cases where salvor dissatisfied

NORWAY No

SOUTH AFRICA No, although aware of one negotiated settlement where salvor unhappy

TURKEY Yes

UK This is rare since the introduction of SCOPIC

4. Any Article 14 award which showed profit element

AUSTRALIA & NEW ZEALAND No

BELGIUM No

BRAZIL Not applicable; not applicable

CANADA No

CHILE (a) No awards but believe the words “suitable rate” permit element of profit.

(b) Some uplift has been allowed.

Salvage Convention 1989

CHINA No profit is not permitted in PRC, and there have not been any cases of uplift. One judge suggested profit should be allowed: case settled

ITALY No; not applicable

MEXICO No; no

NORWAY No

SOUTH AFRICA Not aware of any such case

TURKEY Not applicable.

UK (a) No

(b)&(c) Pre-SCOPIC figures suggested 26% was average uplift (that's why 25% was chosen for SCOPIC).

5. Percentage of LOF cases

AUSTRALIA & NEW ZEALAND Perhaps a third under LOF but for all large/extended salvage operations LOF tends to be used. Small salvage operations usually under common law

BELGIUM Less than 30% LOF. (In the last three years of 55 salvages only 14 were LOF). More than 70% are done without prior agreement and resolved amicably or by ad hoc arbitration

BRAZIL Parties are free to use LOF

CANADA Generally LOF is not used for internal or coastal waters. BIMCO Towhire or the Standard Towing Conditions of Eastern Canadian Tug Owner's Association are used on the East Coast and Gulf of St Lawrence – usually in what are seen to be emergency towage operations.

CHILE Exceptional cases LOF – usually Chilean Code of Commerce.

CHINA Approximately 20%-25% under LOF; others are done pursuant to China Maritime Arbitration Commission Salvage Agreement (1994) and other forms are also used.

ITALY Small number conducted under LOF and only where foreign salvors are involved

MEXICO Mostly LOF where imminent changes. Otherwise BIMCO Forms

NORWAY (a) About 50% under LOF.

(b) Scandinavian Salvage Contract is also used (based on LOF).

SOUTH AFRICA Most, if not all, large salvage operations under LOF. Smaller fishing vessel and the like salvages are done pursuant to informal oral agreement or none at all

TURKEY No statistics available. There is a Turkish open form used by the General Directorate of Coastal Safety.

UK (a) 1978-2008: 53% = LOF

(b) JSE – Japan

Hamburg form – Germany

Turkish Open Form – Turkey

BIMCO – TOWCON or TOWHIRE

Wreck Removal

Wreckhire
 Wreckstage
 Wreck fixed
 Common law salvage

6. ETV's

AUSTRALIA & NEW ZEALAND Australia finances, (through a levy on ships carrying oil (whether as bunkers or cargo) tugs to be available at certain locations around the coast.

BELGIUM No

BRAZIL Not usual

Brazilian navy has ETV's ie financed by State Revenue but can recover salvage reward.

CANADA No.

Canadian Coast Guard will perform emergency towage if and when required, and will not compete with commercial salvage or towing interests.

CHILE No

CHINA Yes

Yes, the State owns/operates ETV's and financed by some other means.

ITALY Yes.

No State owned ETV's

MEXICO No.

No State owned ETV's

NORWAY (a) Yes.

(b) Yes, in North Norway financed by State Revenue.

SOUTH AFRICA Yes. (Agreement between SA Government and Smit).

The State does not own or operate ETV's (except pursuant to previous answer). It is financed through State revenue.

TURKEY (a) & (b) The General Directorate of Coastal Safety has a number of salvage vessels and equipment on standby; (As do salvage companies for port operators).

(c) State Revenue.

UK (a) Tsavlis – Azores, Cape Verde Islands, Colombo and Piraeus Five Oceans (J V Swires, Singapore)

(b) South Africa – 1 tug (commercial operations but supported by State)

France – 5 tugs (operated by Les Abeilles – financed by State)

Netherlands – 1 tug

Germany – 2 tugs

Norway – 5 tugs

Spain

Australia – 1 ETV

UK – 4 ETV's – cancelled from September 2011 Financed by State.

7. Percentage of salvage cases where only Article 14 or SCOPIC

- AUSTRALIA & NEW ZEALAND** Not aware of any.
BELGIUM No
BRAZIL Not applicable
CANADA Not known
CHILE Do not know
CHINA Approximately 10%
ITALY Small
MEXICO No
NORWAY A fairly large proportion of cases only involve SCOPIC
SOUTH AFRICA Not aware of any
TURKEY Not applicable
UK Apart from “Nagasaki Spirit” not aware of any

8. Cases where salvor declined to be involved because of low value

- AUSTRALIA & NEW ZEALAND** No
BELGIUM No
BRAZIL Not aware
CANADA No
CHILE Not aware, but doubt it
CHINA No
ITALY No
MEXICO No
NORWAY No
TURKEY No
UK Unlikely to arise in UK because of SOSREP, who has power to call on ETV's. Position may change in 2011 when funding of Government ceases.

9. Brice Protocol – should it be considered

- AUSTRALIA & NEW ZEALAND** Worthy of consideration but need to be sensitive to IMO
BELGIUM No
BRAZIL No. There is special legislation dealing with research and removal of wrecks
CANADA Canada made a reservation in relation to maritime cultural property, but is concerned that the Brice Protocol may conflict with the present reservation which has no geographical limitation
CHILE Yes
CHINA Yes, should give consideration to it
ITALY No

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MEXICO Yes

NORWAY Yes

TURKEY Supports consistency between International instruments

UK It is not obvious why the protection of wrecks should form part of a salvage convention. There is a separate free standing Convention on this topic which applies equally to salvage and non-salvage alike and contains a general duty of care for historic wrecks. (Mike Lacey queried whether a “historic wreck” can be salvaged from “danger” and says it is rare that the professional salvor will seek historic wrecks).

ANNEX 7

EXTRACTS

**FROM JUDGMENT OF TAMBERLIN J IN UNITED SALVAGE PTY
LTD V LOUIS DREYFUS ARMATEURS SNC (2006) 163 FCR 151**

“42. The submission raises an important question as to the basis and extent to which the court can have regard to questions of the vessel’s exposure to liability claims by third parties for losses arising from the incident giving rise to the salvage operation, as well as the operation itself. In other words, in determining the salvage amount, should the court treat as a relevant consideration whether any potential liability of the vessel or its owners may have been avoided by the actions of the salvors .

43. In these proceedings, the determination of this question had an effect in relation to the admissibility of evidence as well as to the determination of the quantum of an appropriate salvage reward. The issue of “liability salvage” was first raised by way of an objection by the defendants to certain evidence. After hearing detailed argument on the evidentiary point, I decided to allow evidence in relation to this question and to give my conclusions and reasons for my views in this judgment. I considered that it was inappropriate to finally resolve as a question of evidence this important question as to whether liability to which the salvaged vessel might be exposed is a matter that the court is required to take into account.

44. The defendants submit that under the 1989 Convention, the court cannot pay any regard to the consideration that the salvage operations may have had the effect of prevention or reducing the exposure of the vessel to liability to third parties for damage or economic loss. The defendants refer to the language used in Article 13, the *Travaux Préparatoires of 1989 Convention on Salvage* (“The *Travaux*”), the previous *Convention for the Unification of Certain Rules at Law Relating to Assistance and Salvage at Sea* (1910) (“The 1910 Brussels Convention”), and the fact that the decided cases relied on by the plaintiffs are distinguishable and preceded the 1989 Convention. They conclude that in light of these considerations, liability salvage cannot be considered either in the exercise of discretion or under any specific factor in Article 13(1) in the fixing of a salvage reward.

[...]

50. Experienced text writers differ in their approach as to whether any regard to liability salvage is totally excluded from consideration when fixing salvage reward under the 1989 Convention. In their *Shipping and the Environment* (1998), La Rue and Anderson categorically assert at 583 that liability salvage, in the context of operations which prevent the escape of pollutants, is **not** a factor recognised by Article 13. Brice in his *Maritime Law of Salvage* (1999, 3rd edn) considers at [6-79] - [6-85] that the concept of liability salvage should be considered as a distinct new form of salvage which is not yet part of the law of salvage. He notes that there are enormous practical difficulties in the path of its introduction as a separate consideration. Kennedy and Rose in *The Law of Salvage* (2002, 6th edn) conclude at 150-170 that under the 1989 Convention, liability salvage lies outside of the range of independent subjects of salvage reward. They observe that while averting or minimizing the risk of a vessel's liability to third parties has not in itself been recognised as a subject for consideration in fixing salvage reward, it is noted that the concept had been treated by some decided authorities as a valid factor in assessing the reward. They refer to five cases including "*The Whippingham*" (1934) 48 LI.L.Rep 49. These cases were decided prior to the Convention and are of little assistance.

51. The Plaintiffs placed emphasis on the decision of Lynch J, a District Judge of the US Ninth Circuit, in *Wester Marine Services v Heerema Marine Contractors, S.A.* (1985) 621 F Supp. 1135. That case was decided before the 1989 Convention but having regard to the extrinsic material surrounding its drafting. After considering the relevant decisions in the United Kingdom, his Honour concluded that the Court could not consider the prevention of liability to third parties, the public interest, or benefits to the shipowner as distinct and independent factors in arriving at a salvage reward. It is important to note that his Honour's decision was limited to a finding that such matters could not be considered independently. In the final paragraph of the reasons, his Honour noted that the Court was still left with considerable discretion as to how the specified factors should be weighed so that a fair salvage amount that best serves the interest of the parties and the public can be awarded. Ultimately, the proposition that the Court, in exercising its discretion to take account of the need for encouragement of salvage operations is not entitled to look at the question of possible liability to third parties, even in a general way, does **not** find support in this case.

A GENERAL APPROACH

52. Taking into account the language of the Convention, the *Travaux* and the Nielsen Report as well as the decided authorities, I consider that the preferable

view and approach to be taken in the present case in relation to the question of whether liability salvage can be considered is that expressed by Brice at [6-21] to [6-24]:

*Even if the prospect of damage to the property of third parties is **not expressly** included in the Convention, **national laws may, it seems, be permitted to include without there being breach of an international obligation ... the removal by the salvor of the threat** of claims against the owner of the salvaged property can properly be regarded **albeit very generally** as one of the elements showing the merit of the salvor's services and to that extent an enhancing feature. it is inappropriate in a salvage action to investigate in detail who would have been liable in damages to third parties and for how much ...*

*evidence and findings directed to answering these question are beyond the scope of a salvage action. **Save in the most straightforward case** where the existence of liability on the owner of salvaged property is self evident, all the Tribunal can say is that but for the success of the salvage services claims against the owner by third party owners of damaged property would have been made and would have had to have been investigated and defended."* (Emphasis added)

53. In consideration of this issue, there are no bright lines, controlling considerations or set formulas in fixing an appropriate award for salvage services. As outlined above, a global figure must be determined having regard to the factors in Article 13. The weight to be assigned to each factor is dependent on the circumstances. In one sense, the higher the monetary reward given, the greater is the incentive to undertake salvage operations. The fact that the Court should apply a liberal and generous assessment to fixing the reward with this aim in mind does not entitle the Court to award an unreasonable or extravagant amount.

54. In considering the interpretation of Article 13, I set out below my reasons for concluding that on a fair reading, none of the individual paragraphs calls for an investigation of the nature and extent of any possible third party liability which the property salvaged or the owners of the vessel might attract as a consequence of the circumstances leading to the salvage operation. In my view, a correct construction of each of the paragraphs does not import any obligation on the Court to investigate the extent to which third party liability has been avoided by the vessel as a consequence of the incident. Nevertheless, the question arises as to whether any consideration of potential liability is excluded by the Convention.

55. In an analysis of this issue, the starting point is that the Convention does not specifically in its terms exclude the consideration of such liability. Moreover, I do not consider that the extrinsic aids to construction prevent the Court, if it sees fit, from having regard to this consideration. In an appropriate

case, this consideration may support, in a very general way, an enhancement of the reward without the Court investigating in any degree of detail the fact that the salvors' efforts may have resulted in limiting or eliminating prospective exposure on behalf of the vessel. This is not a consideration that should be scrutinized or examined with a view to reaching any specific conclusion. Rather, it should be recognized as one circumstance in the context of the salvage operation. In the light of the fact that the specific enumerated factors listed in Article 13 have been the subject of numerous international debates and agendas, and are discussed in negotiations, proposals, counter-proposals and published opinions over many years, I consider that the paragraphs cannot be read to recognise the concept of third party liability as a specific factor.

56. In my view, the Court should approach the question in the following way. The Court should consider that the factor of potential exposure to third party liability operates generally to inform the fixation of the global figure, which results from the evaluation of the criteria listed in Article 13 that may be relevant in the particular case. It would not be appropriate to investigate, admit and consider detailed evidence as to the nature and extent of such liability.

57. Having considered the authorities, the *Travaux*, the 1989 Convention history and the detailed submissions made by the parties, I conclude that consideration of the vessel's exposure to liability is not excluded by the Convention. It may be appropriate in particular circumstances to take into account the consideration that some liability on the part of the vessel may have been avoided by the intervention of the salvors and, in appropriate circumstances, this may inform a fixing of the reward as an enhancement without any determination, detailed investigation, consideration of detailed evidence or attempt to form any definitive conclusion as to the amount of any such liability. The possible existence of such liability can be relevant but it does not warrant consideration as an independent factor. In some circumstances, it may not be of any significant weight.

58. It may be said that such an approach introduces an additional element of unpredictability in fixing a reward, but it must be kept in mind that the whole exercise is not one of arithmetic precision. It is an exercise of evaluation, judgment, and the balancing of broad considerations. In this particular case, having regard to the circumstances to which I refer below, the prospective exposure to liability of the vessel is a matter to which I have given little weight as a general enhancing factor in fixing the reward. I now turn to consider the specific considerations."

Tamberlin J then considered each of the criteria set out in Article 13 and it is also instructive to reproduce some of the comments which he made. In relation to Article 13(1)(b) he said as follows:

“74. Article 13(1)(b) is premised on the finding that there was a real risk of substantial physical damage which has been avoided **by the skill and efforts** of the salvors. This risk must be a risk arising from the circumstances in which the vessel was placed as a consequence of the grounding and the consequent movements of the vessel. In the present case, the possible risks that may have arisen had the tugs not provided assistance include the release of oil, damage to or blockage of the channel, damage to adjoining structures or resources or livestock, or even, in the worst-case scenario, the break-up of the vessel. The possible pollutants or sources of contamination include the oil and dirty ballast water that may have escaped from the damaged ship and, in the event of the break-up of the vessel, pieces of wreckage that would be scattered in the area surrounding the vessel.

75. This provision is not concerned with remote, possible or hypothetical damage to those specified aspects of the environment, but with the prevention of **substantial physical** damage. The paragraph uses the expression “**in minimising or preventing**” which points to the implementation of some process and the existence of an actual risk or danger. This stands in contrast with the term “**threatened**” damage as used in the context of Article 14(1). In Article 13(1)(b), the language does not refer to skill and efforts which “aim” to minimise or prevent damage, but to those used in the **process** of preventing or minimising damage to the environment.

76. Importantly, the provision is not concerned with economic loss which the vessel may incur by way of liability for environmental damage. Rather, it is directed to the skill and efforts of the salvors in preventing or minimising any potential damage caused by major incidents. The collocation of adjectives listed in this paragraph to describe the type of incident clearly contemplates a significant event. In my view, it is not open on any reasonable reading of this provision to open up, or give weight to, considerations relating to the extent to which the efforts of the salvors avoided any potential liability of the vessel to third parties. The provision is directed to substantial **physical** damage, and is focused on the level of skill in combination with the amount of work, and difficulty of that work, which is required to prevent physical damage to the vessel and the surrounding environment.

77. In considering this paragraph, the Court must assess whether there was some realistic prospect of significant or substantial physical damage to the environment caused by the incident that is the subject of the proceedings. In considering the events of 27 March 2002, I find that there was no major incident which seriously affected or posed a direct threat to the environment. Nor was there any notable escape of pollutants or contamination into the surrounding areas which required containment or prevention measures to be implemented. The grounding of the “La Pampa” and the consequential salvage operations could be described as incidents, but I do not consider they could be

characterised as major incidents which affected or threatened the environment in the manner required by this paragraph.

78. At the time of the incident, the “La Pampa” was carrying 2993 tonnes of heavy fuel oil and 163 tonnes of diesel oil, as well as lubricating oil and engine wastes containing oil and ballast water. Having regard to the position in which the oil was stored, I find that there was merely a remote possibility of a failure such as would lead to the release of any of that oil. Furthermore, the arrangement plans and the tank plans for the “La Pampa” indicate that the fuel tanks were at the rear of the vessel, well away from areas where there was any real prospect of rupture or failure which could lead to the escape of contaminants that might pollute the environment.

79. I have come to the conclusion that there existed only a remote possibility of the escape of any contaminants or pollutants. Although I consider that the salvors have exercised considerable skill and effort in salvaging the endangered property as specified under this paragraph, I do not consider that there was any imminent, present or substantial threat to the environment prevented by their skill and efforts.

80. In my view, there was virtually no real – as opposed to remote – possibility that oil or ballast water in any significant quantity could escape as a result of the grounding, and therefore I have not assigned any significant weight to this consideration. Nor do I consider that there was any real risk of breakage of the vessel so that the environment would be adversely affected.

81. In light of the evidence, I am not persuaded that there was any danger of substantial physical damage or injury to human health, marine life or resources due to the escape of oil or other pollutants, or the blockage of the channel. Nor was there any danger of substantial damage to marine resources caused by any major incident similar to fire, pollution or contamination. The plaintiffs have not established that there was any proximate prospect of such a consequence as opposed to pointing to the existence of a remote possibility. I also note that the time frame during which the salvage efforts were made was of relatively short duration. Therefore I have given some, but not great, weight to this consideration in forming my conclusion as to the proper quantum of the reward.”

In considering Article 13(1)(c) Tamberlin J said as follows:

“82. Article 13(1)(c) requires that the reward is fixed taking into account the “measure of success obtained by the salvor”. In this phrase, the term “success” refers to the salvaging of the property and ship in danger. The expression “success obtained by the salvor” should not be construed to mean success in avoiding the danger of the vessel or its owners or crew being sued for

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economic loss by third parties. The salvage operation, as Article 1 indicates, is the operation of salving “a vessel or property” in danger. It is directed to physical loss or damage. It is not directed to protecting the vessel from potential third party litigation claims for loss suffered by third parties by way of damage or economic loss or the expense and expenditure of time in defending any proceeding.

83. In the present case, the salvage operation was a one hundred percent success and I have given significant weight to this factor accordingly.”

In relation to Article 13(1)(d) his Honour said as follows:

“85. In my view, this paragraph does not contemplate danger to the environment but rather the focus is on the degree of danger to the salvaged vessel itself and the persons and property in it. This factor is directed to assessing the danger to human life and the risk of loss, injury or damage in relation to the salvaged property.”

ANNEX 8**LIST OF RATIFICATIONS OF UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE, PARIS 2 NOVEMBER 2001***

STATES	GROUP	DATE OF DEPOSIT	TYPE OF INSTRUMENT
ALBANIA	II	19/03/2009	Ratification
ARGENTINA	III	19/07/2010	Ratification
BARBADOS	III	02/10/2008	Acceptance
BENIN	Va	04/08/2011	Ratification
BOSNIA AND HERZEGOVINA	II	22/04/2009	Ratification
BULGARIA	II	06/10/2003	Ratification
CAMBODIA	IV	24/11/2007	Ratification
CROATIA	II	01/12/2004	Ratification
CUBA	III	26/05/2008	Ratification
DEMOCRATIC REPUBLIC OF THE CONGO	Va	28/09/2010	Ratification
ECUADOR	III	01/12/2006	Ratification
GABON	Va	01/02/2010	Acceptance
GRENADA	III	15/01/2009	Ratification
HAITI	III	09/11/2009	Ratification
HONDURAS	III	23/07/2010	Ratification
IRAN (Islamic Republic of)	IV	16/06/2009	Ratification
ITALY	I	08/01/2010	Ratification
JAMAICA	III	09/08/2011	Ratification
JORDAN	Vb	02/12/2009	Ratification
LEBANON	Vb	08/01/2007	Acceptance

* In accordance with its Article 27, this Convention shall enter into force on 2 January 2009 for those States that have deposited their respective Instruments of ratification, acceptance, approval or accession on or before 2 October 2008. It shall enter into force for any other State three months after the deposit by that State of its instrument of ratification, acceptance, approval or accession.

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STATES	GROUP	DATE OF DEPOSIT	TYPE OF INSTRUMENT
LIBYA	Vb	23/06/2005	Ratification
LITHUANIA	II	12/06/2006	Ratification
MEXICO	III	05/07/2006	Ratification
MONTENEGRO	II	18/07/2008	Ratification
MOROCCO	Vb	20/06/2011	Ratification
NAMIBIA	Va	09/03/2011	Ratification
NIGERIA	Va	21/10/2005	Ratification
PALESTINE	Vb	08/12/2011	Ratification
PANAMA	III	20/05/2003	Ratification
PARAGUAY	III	07/09/2006	Ratification
PORTUGAL	I	21/09/2006	Ratification
ROMANIA	II	31/07/2007	Acceptance
SAINT KITTS AND NEVIS	III	03/12/2009	Ratification
SAINT LUCIA	III	01/02/2007	Ratification
SAINT VINCENT AND THE GRENADINES	III	08/11/2010	Ratification
SLOVAKIA	II	11/03/2009	Ratification
SLOVENIA	II	18/09/2008	Ratification
SPAIN	I	06/06/2005	Ratification
TRINIDAD AND TOBAGO	III	27/07/2010	Ratification
TUNISIA	Vb	15/01/2009	Ratification
UKRAINE	II	27/12/2006	Ratification

ANNEX 9

REPORT OF ISC MEETING OF MAY 2010

INTERNATIONAL SUB COMMITTEE MEETING (ISC), LONDON, 12 MAY 2010 AT THE OFFICES OF REED SMITH

The meeting was opened by the Chairman, Stuart Hetherington, who welcomed everyone and invited the meeting to agree that the agenda outlined in the Discussion Paper which had been circulated be adopted. There was no dissent from that suggestion.

Stuart Hetherington then introduced the members of the International Working Group: Diego Chami as the Rapporteur, Jorge Radovich, Mans Jacobsson, and Archie Bishop, and referred to Chris Davis from the USA who is also on the Working Group but could not join the meeting.

Stuart Hetherington continued: I think it might be useful if we could just go around the table and I invite you to say your name and who you represent, so that when you are speaking later you do not have to tell everybody who you are and we all know who you are. So perhaps we could start on my left.

Stuart Hetherington continued: The CMI proceeds, once it takes on a piece of work, almost invariably by a way of sending questionnaires to the National Maritime Law Associations to find out what goes on in their countries in relation to the various issues the topic throws up. So, that is how we have started, and you have seen the answers in the synopsis and also the report of the first working group meeting we had last September. The next step is usually the stage we are at today: to try and involve industry and the people who really have an interest in the topic. We as maritime lawyers have an interest, as members of CMI have an interest, in trying to create uniformity wherever we can. However, you are the people who are at the coal face and we want to hear from you today, so you will not be hearing much, I hope from the members of the International Working Group. I would like to introduce them to you, so you know who we are.

Thank you very much, I thought that perhaps the next step to take before getting into the agenda and ask the questions, would be to ask one or two of the interested groups in this debate to tell us how they see the debate going forward, and what they would like to get out of today, what they would like the

CMI to do, or not do—just to put on the table where they see the debate has come from to get to this point and where they would like to see it going in the short to medium term.

I suppose that what prompted me to think that it would be useful to proceed this way was what was given to me in the last few days, and I suspect not everyone around the table has seen it, it is a document that is called a Position Paper by ICS. I found it to be a very helpful document, as it sets out some of the history of the last year or two, that is where the ISU and the ICS have got to. I think it would be useful for us to hear a synopsis of some of the things that emerged from that document. And then we should perhaps hear from the ISU. To some extent we heard yesterday afternoon, in those excellent presentations, some of them concerned the facts and figures that drive the ISU to think that the convention needs changing. And then we should hear from the insurance market, and the P&I Clubs should state their positions as well. So, perhaps the ICS representative would like to say a few words initially. Thank you.

Ms KHOSLA

Thank you very much; I just wanted to start by providing some background to this discussion that can be of some help to this meeting.

I think that for the last three years we have been actively engaged in these discussions in the Lloyds Salvage Group. The ISU has proposed that there be a separate award for environmental salvage, where damage has threatened the environment, which is distinct from that which they earn from the salvage operations in respect to the ship or cargo.

It was proposed as a means of “retaining a vibrant and viable salvage industry” and one which would improve salvage response for the benefit of everyone. And that will include the shipowners, the insurance, the property insurance and the liability insurance. We were informed that it would encourage salvors to invest in research, training, command and equipment to protect the environment.

We also understand that marine property underwriters were also interested in this because they were unhappy with the way liability was apportioned between them and the liability insurers, since in their view the apportionment benefits liability underwriters but at the expense of property underwriters, when it should be borne by liability underwriters.

As shipowners we are very interested in maintaining a strong vibrant and viable salvage industry, it is also in our interest to do so; we will look at any suggestion that the industry is in need of support.

The initial idea was presented by salvors on the grounds that they were facing financial difficulties. We sought an explanation about the financial difficulties; whether or how more funding was needed by the salvage industry to survive in a viable form. Unfortunately, despite our requests, we did not receive much information in relation to the funding issue by the ISU, but it

subsequently provided financial details at a relatively late stage and these made it clear that revenue from LOF, SCOPIC and related services had and continued to increase substantially.

So that was the first stumbling block we experienced in this discussion. It was then said that there was an increasing duty on salvors in relation to protection of the environment, which occurs on all salvage, over and above any operations to save property and salvors think that the efforts which have been spent in saving the environment have not been sufficiently rewarded.

We discussed the ISU proposal to amend the Salvage Convention to provide inter alia for a distinct and separate award for environmental salvage and which initially also proposed an amendment to the apportionment of liability for salvage services to minimize or prevent environmental damage as provided for under Articles 13 and 14 of the Convention.

We stressed to the ISU that in circumstances when the salvage industry was performing well financially any proposal to revise the present arrangements must satisfy certain criteria. They must (1) be sufficiently clear, substantial and tangible for ICS and the IG to understand, (2) would demonstrably improve casualty response and confer benefits on those currently paying for casualty response and (3) would identify what elements of the current casualty response regime-specifically the notable practical benefits and certainties of SCOPIC, would be either retained or adjusted.

The proposal which subsequently emerged from the ISU failed to satisfy these criteria. In particular it failed to show that there would be an improvement in environmental salvage response and that there would be any benefit to those that would be paying for it, namely shipowners and their liability insurers. Notwithstanding the ISLA failure to satisfy these basic criteria in the discussions which have taken place within the LSG, we now find that the same issues are being raised here in this forum.

We remain of the view that the ISU have failed to justify that salvors are entitled to a separate and distinct award in relation to “environmental salvage”. The proposal is similar to the concept of “liability salvage” discussed during development of the Salvage Convention and rejected in 1989. This was rejected as being unworkable and a compromise was agreed by all affected industry parties, which was reflected in Articles 13 and 14 which have in turn been supplemented with the SCOPIC scheme. SCOPIC was agreed as a commercial solution to the problems associated with Article 14, as alternative mechanism to Article 14. SCOPIC is recognized by all parties to be working well and the rates are reviewed regularly.

We do not agree that there is any necessity to re apportion the liability of insurers. We believe that the present arrangements reflect that important principle of shared responsibility which underpins the Convention. The principle is supported and recognized by States, namely that all parties to the common marine adventure are responsible for the environment and should

participate in any risk to the environment. The principle remains current and was affirmed just last month at the Diplomatic Conference on revision of the HNS Convention when the importance of retaining cargo's liability for the environment was overwhelmingly supported. We therefore do not accept that there are any grounds for reapportionment.

We also consider that with this proposal there are a lot of uncertainties as to how an environmental salvage award would be settled. The questions which had been put to the ISU in that regard had not in the view of the ICS been answered. In particular the ICS remains to be convinced how all parties would benefit from the ISU proposals. The proposal as presented now remains unclear in many respects, it still fails to identify how it would improve environmental salvage response and does not identify any benefits to ship-owners/liability insurers.

Another issue that was discussed was that it would not be feasible for an arbitrator to make an assessment – because it would be very difficult to know what damage had been prevented. So I think that there are a lot of questions remaining with regard to the environmental salvage proposal and last year we asked the ISU to state a clear proposal which would show how salvage would be improved with the environmental salvage award, how this would benefit the property and liability insurers and we were not satisfied with the information we were given. Now we are here discussing the same issue even though there are some questions that have not been resolved yet.

STUART HETHERINGTON

Thank you very much, that has been very helpful. Would somebody on the ISU side like to explain their position and perhaps respond to some of those points?

MIKE LACEY

I would like to respond in relation to the questions that had been raised in the previous meetings. It is true that we were given – 4 think – five questions in the meeting and we were asked to respond in detail to those questions, but some of the questions were almost impossible to answer. You could write a book on some of these things and never come up with the answers to satisfy all the parties.

In today's world the environment is everything. I mean, there is no salvage operation feasible without the environment being at the forefront. In fact, in the majority of cases today personnel come first, the environment comes second and the salvor and property come third.

There are a lot of actions that are taken by the salvor which relate to safeguarding the environment. Article 13.1 (b), which refers to preventing damage to the environment is insufficient to properly reflect some of the actions that are taken, and indeed some of the successes achieved by the industry in preventing further damage .

We know that the property underwriters share our concerns in relation to salvors' actions regarding the environment; their concern is that they are paying for something they do not actually insure. And this goes all the way back to the first discussion about 30 years ago, which resulted in LOF 80. Then there were the discussions of 1981 that involved the environment and the compromise which provided for special compensation, the Montreal Compromise. So all the way through there have been compromises made to reach a solution that worked, and the environment was dealt with under article 14. Later, there was a further development when SCOPIC was negotiated. It has undoubtedly been successful. By and large the Clubs and ISU like it.

But one of the problems with SCOPIC is that it is tariff-based. So, it can never be a subject of reward. So that makes it impossible for SCOPIC to involve any elements of any reward for success. But it does work.

And the problem with article 13 is that whilst there is the procedure for making a reward for success you are limited by the fund, which is the salvaged value of the ship and the cargo.

It is recognized that the real problem for the Clubs is the doubt or uncertainty surrounding the assessing of an award regarding environmental salvage. It is the uncertainty of financial exposure that they do not like. They prefer financial certainty. The Clubs considered the various proposals we put forward and we were open to different ways of setting environmental awards: one was to take the gross tonnage of a ship and multiply it by so much per gross ton, and the other one was to utilize existing funds, like the CLC fund etc., to take care of the environmental award. But some people were not in favour of using the same funds for such awards. The ISU does not want to become involved in conflicts with other claimants against existing funds such as the CLC. ISU simply wants a mechanism to identify a fund hence the reference to the various liability conventions. The ISU does not see any difference to assessing an award under Article 13 to assessing an award for environmental salvage. There is no greater certainty in the former to the latter. The methods suggested have apparently been insufficient to satisfy the ICS.

The criteria for settling an environmental reward are intended to be the same as under Article 13. I think there is no more uncertainty in assessing such an award by arbitrators in assessing other kinds of awards, there are criteria and there is experience. I think that 2/3 of the LOF cases are settled by negotiations and the system works well and will continue to work very well.

If you take a look at the whole history of the LOF in recent years (and the figures go back to 1978), you will find that the level of rewards are all less than 10% on average throughout the period. In recent years they have increased to about 20%, especially in very complicated cases. There are very few cases where the rewards go up above that figure.

We do not see why arbitrators could have any real difficulties in arriving at an environmental award. They are given certain facts and they have criteria

to assess the reward. We think they can make a proper reward under the existing article 13, and they should be quite confident in doing this. Thank you.

STUART HETHERINGTON

Does anybody else from the salvor's side like to take any of the other issues Ms Koshla rose? I think the first thing she rose was that the salvors have been unable to justify the financial concern and a bit of that came up yesterday, but not a huge amount, does anyone want to add something here?

MARK HODDINOTT

I know very few operations where the bunkers are not removed in salvage operations. This operation is very risky and it would be sometimes much better to leave the bunkers within the ship and not remove them.

What normally happens is that the national authorities require the salvors to remove the bunkers before they do anything else. Bunker removals can be time consuming operations and it is often better to keep the bunkers on the ship, because it might increase the risk to the ship by keeping her aground longer and exposing the ship to the risk of further damage. This requirement increases the need for specialised equipment for salvors. They have to persuade their companies to provide the funds to buy them. If salvors knew what award they were likely to obtain they could more easily persuade their companies to invest in that equipment. There is currently no clear figure or standard value to apportion to those services, and thereby convince the salvor to invest in that equipment. We could also invest in the future in these services if there was greater transparency.

STUART HETHERINGTON

Michael Howard, yesterday I think you mentioned an absence of evidence about such matters (to prevent damage to the environment) , is there a point you could make?

MICHAEL HOWARD

The first one I will make is the necessary impartial position of arbitrators. I think an arbitrator should be impartial and he should be concerned with the interests of both parties.

The second one is that I see very little evidence presented, in most cases, of a specific threat to the environment. And certainly also I could say that the awards do not reflect as a substantial proportion of what I might call the appropriate element, the work done in relation to environmental protection. Even though, as it has been observed, that has become a dominant feature in many salvages. And a large of the amount of the work done is in compliance with, in some cases, unnecessary government intervention. And when one comes to assess a salvage award, possibly because of the habits of thought engrained by many years affect this, one still think in terms of physical

benefits. In considering steps taken to protect the environment one will take into account the liabilities to third parties in the overall award. So you have this rather evanescent concept in relation to the environment and yet it maybe a central element of the job.

Something more could be done by way of the available evidence to establish what the threat was, what liability has been diminished. The funds available may be limited by reason of the property values and you have no other fund available. Then there must be questions as to whether it would be economic for salvors to invest in the expensive enquiries that would be needed to justify the extensive work being done. You have a record of the work being done, what you do not have is expert evidence about the scope of the danger.

We do have some evidence of course in some cases but you would tend to make cases much more complex – if you investigate this in more detail.

STUART HETHERINGTON

Thank you very much.

Does anyone from the insurance side like to say something?

SIMON STONEHOUSE

I endorse what Mike Lacey has said that personnel affairs come first, then the environment and finally property. In article 13 that part of the work done by salvors to remove bunkers, where not necessary to save the vessel, is reflected in an award and it should be the responsibility of liability insurers and not of property insurers. We have raised this question in the last few years and believe property insurers are disadvantaged, and in fact damage may be done to a vessel in the process of removing bunkers.

NIC GOODING

I agree with Simon Stonehouse. We believe that property underwriters are not liability insurers. They are not covering the liability part of a ship's operations. At the CMI conference in Sydney in 1994 we reached an agreement on the collision liability that was treated in general average and other arrangements of the like could be made for salvage.

GRAHAM DAINES

Could I just say something that is complementary probably to what Kiran Khosla outlined earlier? Just to put into context as to why we are here and discussing these issues again today, because many of these points have been discussed previously. They have been discussed in a working group, the Lloyds Environmental Salvage Working Group, on a number of occasions. When the Lloyds Environmental Salvage Group first met, I think it was the Spring of 2008, a brief summary note had been prepared by Hugh Hurst which outlined the S points which were of a particular concern and which needed to be addressed in any proposal from the ISU and the property underwriters. Perhaps I could just outline those very quickly.

The proposal would need to have worked examples showing how casualty response would be improved and the benefits to be obtained from this; would identify what, if any, of the benefits and certainties introduced through SCOPIC would either be retained or adjusted; and would address the ISU's concern that they are not adequately remunerated for what they do to protect the environment.

It would also address the property underwriters concern that there is unfairness in the apportionment of the current costs of environmental protection. All of these points were on the table for consideration.

Despite a number of constructive and interesting discussions, we did not achieve a consensus. Mike Lacey has drawn attention to the practical workings of SCOPIC – and it has worked very well from all perspectives. The use of tariffs has not been a problem (in our opinion). There have been clear advantages, which have achieved and produced certainties and resolved the problems under Article 14 which were apparent to all concerned. It is worth remembering that SCOPIC does not require the establishment of an environmental threat and no geographical restrictions apply. The latter point is to the advantage of property underwriters if a casualty has an uncertain outcome mid-ocean.

Going back as far as 1980, the IOPC Fund adopted a Resolution which, in the context of the assessment of environmental damage stated that: “the assessment of environmental damage to be paid by the IOPC Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models. In a paper published in a US MLA newsletter Colin de la Rue and Charles Anderson are quoted as commenting that “the use of such models to assess salvage awards for damage has the obvious danger of bringing the process into the realm of sheer speculation”.

And those concerns are very real for the ICS and liability underwriters, whereas the certainties which come out of SCOPIC are in danger of being destroyed. We still do not know what ISU's proposal could mean in dollar terms in practice. There is no way of knowing how arbitrators would calculate awards.

KIRAN KHOSLA

I will just endorse that. I think that also goes back to 1989.

The Salvage Convention reflects a compromise that was a complicated compromise, which resulted in Article 13(1)(b). I think that has been overlooked in other discussions but I think that a further compromise has been reached in relation to SCOPIC which does not go into general average.

JOHN NOBLE

I will address two concrete points about what we have just said. The first is that I am aware of the IOPC Funds reluctance to assess natural resource damage. In contrast however, in the last 30 years there have been responses to hundreds of collision incidents and the costs involved in them are available

within the ITOPF. ITOPF has responded for example to oil pollution, I think, in respect of 600 or 700 incidents. So you can establish from research what the true environmental cost is and you are not looking at abstracts of scientific data. And I believe that with this current information available it would be gradually possible to come to a figure that an arbitrator could use.

Since the Montreal Compromise of 1980 and the Salvage Convention Compromise of 1989 the environment has become a much more significant issue. When I used to attend casualties the environment was not really an issue. Lip service was paid to the environment.

And I think that just as the CLC Fund Convention has advanced over the recent years to change I think that the Salvage Convention needs to look at the changes in the last 30 years and give consideration to those changes. Thank you.

BEN BROWNE

I think amendments to the Salvage Convention are needed to remedy an inequity. The need to change is because Article 14 has been shown not to have worked, and the system has been shown to be useless. The need for change is not because salvors are doing badly or well financially. If the salvors get an increase in terms of the environmental award it could well be removed from Article 13. Article 13(1)(b) needs to be transferred into a stand alone environmental award. The only question here for me is whether it would be workable.

In the discussions between the property writers and the ISU there was some tension in that respect. There are two elements in every environmental award. The first one under Article 13(1)(b) is the element in preventing or minimising damage to the environment there is an inquiry into the work done to remove bunkers, lay booms etc.

The second one is the extent of environmental liabilities to third parties. Now I would suggest this would be something that will be used to calculate the uplift on expenses for minimising or preventing damage to the environment. That could be done through SCOPIC: they send an SCR on board, he will work out what is and what is not attributable to avert or minimize damage to the environment, he would calculate the cost on a tariff basis and then the arbitrator will arrive at an uplift by reference to the extent of environmental liabilities. Certainty would be achieved over time.

There could be a limitation amount based on the tonnage of the vessel. General average does not play a part in Article 13 or 14. These are expenses for a wider public other than maritime professionals. It would not take long to draft and it is quite simple.

STUART HETHERINGTON

Would anyone like to comment on that proposal? If not we can look at the items in the agenda.

DR KROGER

Could I just make some comments? The Montreal Compromise was made because the whole enterprise is regarded as a marine adventure, and this is why there is a sharing in the risks involved in the marine adventure. If we now start picking at little elements like these and removing them, then you really find that the whole compromise is destroyed. It is ok to rebuild it but we have to get back to the original point in the joint marine adventure where we all had benefits and avoid problems that could be counter productive.

STUART HETHERINGTON

Thank you. Any other general comments?

GRAHAM DAINES

Could I mention the question of bunker removal? There have been occasions when the circumstances dictate that there will be a distinct advantage in removing the bunkers. That has to do with pollution prevention activity at a very early stage of the casualty response, it certainly reduces the environmental threat. The Clubs often step in and pay for this task as clearly it reduces the environmental threat.

All parties agreed that Article 14 had become unworkable and this resulted in the introduction of SCOPIC. One of the issues of concern for the Clubs and others when Article 14 was first introduced was the reluctance on the part of salvors to eliminate pollution threats by agreeing to the removal of the bunkers early on because there was a concern in relation to the scope of the award to be made later.

There should be no suggestions in any proposal which could give rise to a similar position. This was a real frustration at the time.

HUGH HURST

I would just like to make two points. One is in response to John's point. In 1980 when the Montreal Compromise was agreed, the environment was very much in mind and property underwriters continued to accept that a salvor's award was recoverable under the existing forms of policies, notwithstanding that such awards may have been enhanced to take into account the measures taken to prevent damage to the environment. So the environment was very much in mind at the time of the Montreal Compromise.

The second is just a practical point: much has been said about SCOPIC and the industry generally thinks that SCOPIC has worked very satisfactorily. SCOPIC was developed to satisfy the concerns of salvors since Article 14 was not operating as intended. So it was a compromise that was made by shipowners and Clubs. It is worth pointing out that the SCOPIC rates are reviewed every three years. The last review took place in 2007, and there is a further review in 2010.

SIMON STONEHOUSE

Casualties such as the “Erika” and The Prestige” and the more litigious society in which we live have clearly made environmental salvage much more significant and has caused property underwriters’ views to change.

MIKE LACEY

I personally had the benefit of running a salvage company throughout the 1980s, so I can speak with some experience of how salvage operations were conducted at that time. And for sure salvors were left very much to their own devices. Coastal States did not bear down on salvors. Regarding the property insurers I think that there is an ever increasing burden placed on salvors to have regard to the environment.

So it is a different world today from the 1980’s that we are discussing now. Things have changed.

STUART HETHERINGTON

If that is all in the general discussion, could we perhaps now look at the items that we have identified in the agenda? As you will recall, in the Discussion Paper, I have used information from my own country in which the Federal Government has given significant sums of money to the salvage industry. I do not think that would have happened were the salvage industry in a position to take on board all the roles the Government obviously wanted them to take on. I do not think Australia is unique in that respect. It is funded by shipowners by way of oil pollution levies that every oil carrying ship, whether as cargo or as bunker pays. Presumably that finds its way into the freight rights.

So ultimately the tax payer is funding the salvage industry to provide a service which historically it was able to provide. My understanding is that that happens in other countries. I would be interested to know, as question 1 on the agenda was intended to try to have illicit, what is it that salvors are saying they are unable (because of insufficient awards) to provide? What sort of services or facilities are they unable to supply in order to provide the service which is required of them? And is this something that is happening in other countries? My understanding is that South Africa and the UK (which were referred to in the discussion paper) are two further examples. Are there other countries that are also financing the salvage industry to provide services they did not previously need to be funded for? And is that a problem?

Maybe the answer to all this is that every country in the world will need to pay for tugs in order to have sufficient facilities that they can meet the emergency situation that is around their particular coast. So the problem goes away, we need not worry about it. I would just be interested to hear people who run salvage companies and other countries, whether this is a common situation.

UFFE RASMUSSEN

The general opinion in Denmark is that it is of great importance that private business interests in salvage need to be retained without State support. The situation may be improved by having tugs on station. That may of course necessitate State support, but generally speaking the salvage industry should remain a private industry. I believe that there are arrangements in some other European countries to keep tugs on station.

STUART HETHERINGTON

Are there any other countries anyone knows that support the salvage industry?

MIKE LACEY

There are other ones: The Germans have two, the Dutch have one, the UK has four ETV's, the French were one of the first ones and South Africa was the first. Spain, Malta and Italy also all support harbour towage as well as the Australian Government to which reference was made in the Discussion Paper. The Chinese government also owns tugs and salvage companies. It is only developed countries which have such capabilities, as it is expensive. There are no ETV's in Africa (apart from South Africa) and the USA have a different scenario. OPA 90 places the emphasis on the clean up side rather than the prevention side.

MANS JACOBSSON

The Baltic States have an agreement.

ANNE FENWICK

As far as Malta is concerned, I can confirm that the government has special units which deal with the emergency response generally, not just talking about issues relating to the sea but air and land and part of that unit does have access to a tug. However my concern is to find whether a response would be there to the degree to which they would be able to assist in a real major situation which is always a concern. And this is where I believe the notion of the development of the environment salvage is important.

Certainly the local tug companies I believe are also obliged to offer assistance in such situations but again I think the expertise is limited so there is a major issue and we have a problem and I think that it is a concern to us and we are watching this very carefully to see how this discussion develops in terms of environmental salvage.

MATHEOS LOS

It is totally correct that the protection around the Coastline of Europe has been strengthened by the European Maritime Safety Agency and out of that experience additional oil pollution clean up capacity has built up and they are paying around 25 million Euros in doing that. There is a lot going on within the government scene to build up capacity to combat oil pollution. That is the situation.

JASON BENNETT

However, EMSA, with its headquarters in Portugal is not focused on prevention. Secondly they are saying there is going to be a spill and we should clean it up. They do not seem to be focusing on preventing. Salvage incidents are diminishing. Economic factors have led to stockpiles and people being concentrated on shore in certain locations. Shore side equipment and knowledge is now the emphasis and not just the availability of tugs.

MATHEOS LOS

I could answer that but I do not think this takes us anywhere.

STUART HETHERINGTON

Thank you. No one has really answered my question about the salvage industry. Is it that they did not want to be providing tugs and let governments do it or were they were just unable to do it?

MARK HODDINOTT

I think that if you look at the environment, we have moved on from the 1970s business model which had been followed by all the major salvors. ETVs are replacing salvage tugs. There is, however, insufficient financial reward to enable salvage companies to retain vessels but there is sufficient to retain people and specialized equipment. So we have a new model, that is people with experience that are retained ashore, they have the knowledge about the business and there is also the specialized equipment. This model has contributed to growth in the industry.

HUGH HURST

I agree with the comment. When we were first approached by the ISU we were told there were insufficient rewards being generated to be able to provide a viable industry, and we said “well, prove it!” The ISU provided figures that demonstrated the contrary and the whole ground of their argument shifted to being: “We carried out a service that benefits you and therefore we should be rewarded for it. The initial basis on which we were approached was lack of profitability.

MARK HODDINOTT

I think there is a change, with most of the major salvors now being owned by big corporations, who are more risk adverse than in the past when there were family companies that ran them. They now have to budget carefully and make a return on their investment. Big corporations do have more capital available for investment.

JASON BENNETT

Salvors activities have been brought within the field of criminal law. Some operations are more prolonged because of this and the emphasis on environmental salvage. There is greater operational risk and salvors are

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required to ask themselves whether the reward is worth taking the risks involved much more than previously. May be it is a matter of time, we will not see it now but the situation can change in the next few years as well.

DR KROGER

The question of risks of liability and the other risks run by the salvors or their equipment are taken into account under Article 13(1)(g), these are an element to consider.

JOHN NOBLE

I think that we have identified the availability of vessels issue and the knowledge and equipment issues. If you look around salvage companies there is a pollution-response capability which is not very big and I think that there has been too little investment. We should encourage the salvage industry to be in a position to invest more in more pollution-prevention or response equipment. And that is an area that needs a little bit more incentive to be able to invest more in environmental response equipment.

BEN BROWNE

SCOPIC remuneration does not provide sufficient reward to invest. The SCOPIC rate started out to be generous. The question is whether the system we are currently in makes it possible to achieve the goals we want to achieve or whether we should begin from scratch to make a new compromise, because it cannot only discuss introducing a mechanism on environmental salvage into a new convention without having Article 13 and Article 14 and SCOPIC removed. Then we are starting from scratch again dealing with a totally new compromise, and then you do not need only the two sides of the compromise, then you need government as well. And governments will take over this problem if in its opinion there is a compelling need. Both sides of the industry think that that is not the case.

DR KROGER

We actually, in the discussions we had with the P&I Clubs, the proposals were that the L01 incorporates SCOPIC. And thereafter, the salvor would have two options, three options in fact. You have to make conscious decisions. This would be an alternative for the award. SCOPIC rates were intended to encourage investment

HUGH HURST

I think that it is perhaps worth looking at the ultimate result if the CMI does put forward proposals to amend the Salvage Convention, namely whether or not they will be taken up by the IMO. I have to say that the IMO would be unlikely to want to amend the Salvage Convention, if there is no demonstrable compelling need. States believe the system is working very well. It is not really their concern in what way costs under the Convention and the LOF are actually distributed between the industries. Their concern is that the Salvage

Convention operates effectively and from the State's point of view, it does. I think that looking at the Salvage Convention is not on the IMO working program. I think the IMO would certainly not look at amending the Salvage Convention, as from the State's point of view it works very well.

UFFE RASMUSSEN

The IMO response is a matter of separate consideration. The Danish MLA has a number of objections to the proposals made by the ISU. I must say that the Convention cuts across the principle of no cure no pay which is an attractive principle. We have traditionally considered that system as very attractive and it should be retained as much as possible.

The 1989 Convention made a change to that principle. There are serious problems with the ISU proposal, there is a basic element that has been changed. In particular the unspecified nature of any award or the environmental liabilities that are referred to.

In the environmental award there has to be some major success and some might say success is pure and I think that that word does not relate to the property itself.

The limitations identified under the various Conventions are extremely high. The environmental award seeks to identify preventive measures which are taken, which is not part of the law of salvage. There are serious problems with the proposal. We see that it is unspecified which other environmental liabilities are there. So it is quite unclear which sort of liabilities are at risk here and what are their limits in reality.

MIKE LACEY

Could I just respond to that? The ISU proposal specifically did not include avoidance of liabilities because of the difficulty of quantifying them. We did not want to complicate the issue.

2/3 of all cases are still performed without any involvement of SCOPIC. So SCOPIC is not involved in 2/3 of cases. It is actually only involved in 20% of cases. You have to comply with your obligations to prevent damage and protect the environment.

The suggestion made by Ben Browne that an SCR can identify what savings have been made is not attractive to the ISU. It is not his role. It requires too much by way of calculation and would be an impossible situation.

STUART HETHERINGTON

Looking through the agenda, I think we have covered – in one way or another – the first of the four “dot” points. The next dot point asks whether there is any further mechanism that can be attached to SCOPIC to provide some benefit, some reward, within the Article 14 or SCOPIC regime that covers this environmental liability – liability salvage issue. Does anyone see any scope to debate along those lines?

If not then we can go to the next point, are there any other solutions to

meet the concerns of the salvors? If we do not mess around with SCOPIC or article 14, are there any ways of amending article 13, other than by the environmental salvage suggestion that would improve the situation of the salvors?

MARK HODDINOTT

As to whether the ISLA proposed changes to salvage law would make a significant difference to the financial capacity of salvors to react to major incidents? Can I give as an example a piece of equipment which my company would like to develop to make bunker removal easier. I would need to satisfy my treasury department of the return I would be able to get from developing and using such a piece of equipment. An environmental salvage reward might assist me in that regard.

HUGH HURST

Such a piece of equipment could also be used in relation to wreck removal as well as salvage.

MARK HODDINOTT

I agree.

STUART HETHERINGTON

Michael Howard, I am interested here whether you think in relation to the avoidance of liabilities issue, whether that is a consideration that you should take into account, the saving of the liability that a shipowner might otherwise have to a government instrumentality. My question is do you think it is covered currently by Article 13?

MICHAEL HOWARD

The duty that a salvor is placed under in relation to the environment is governed by Article 8 and it is in the interrelationship between Articles 13 and 8 that arbitrators have a role but nobody wants to require arbitrators to require such details in respect of each factor.

GRAHAM DAINES

In earlier discussions with salvors the ship owners had enquired how additional funds might be utilized by salvors and no satisfactory response was received. How would such additional funds be ring fenced?

VASANTI SELVARATNAM QC

I discern from the discussions that salvors want greater transparency from awards and do not see any reason why arbitrators could not address that. The main problem with Article 14 is the fact that the House of Lords interpreted "fair rate" as not including a profit element. A possible amendment to Article 14 would be to make it clear that it did include a profit element. Consideration should be given to making awards more transparent so that salvors know how much they are receiving for the Article 13(1)(b) element.

BEN BROWNE

SCOPIC was introduced for 10 reasons and that was one of them.

MIKE LACEY

It is very rare for salvors to introduce evidence concerning environmental element when seeking an LOF award.

BEN BROWNE

That is because salvors do not get credit for avoiding liabilities.

STUART HETHERINGTON

To what extent can you say arbitrators are constrained in enhancing an award under Article 13 1 (b) by the value of the salvaged fund?

MICHAEL HOWARD

In my estimate, in only about 1 in 5 or 1 in 10 cases, thus a minority, would an arbitrator be restrained by the extent of the fund.

ARCHIE BISHOP

SCOPIC is only a minimum payment. It is a safety net and it is the minimum payment which is received in 20% of cases.

NEIL ROBERTS

Following the Deepwater Horizon change is proposed to OPA 90 to include a potential fine of \$10 billion from \$75million.

MICHAEL HOWARD

The liability aspect does not have much significance to an arbitrator. When considering environmental damage he would look at the cost saved including liabilities to third parties. He would regard penalties and clean-up as coming within Article 13(1)(b).

SIMON KVERNDAL

Submissions characteristically put it in that way. It is a broad brush approach which looks at such questions.

MANS JACOBSSON

When considering the costs of clean-up operations etc. figures quoted are often the claimed figures which might be very different from the amounts accepted for compensation. The question as to whether the costs are admissible for compensation depends on whether the operations and the ensuing costs are reasonable.

STUART HETHERINGTON

I suggest we now give consideration to the proposed wording, contained in the Discussion Paper, of the new Article 14 proposed by the ISU.

MIKE LACEY

It uses the language of Article 13.

DR KROGER

The description “resultant benefit conferred” raises the question of liability salvage.

ARCHIE BISHOP

If no benefit is conferred the salvor will not be rewarded.

JOHN NOBLE

People do know what the costs are when oil is spilled.

HUGH HURST

There is an in-built assumption that the ship owner would have a liability but that is not always the case.

GRAHAM DAINES

Such a provision creates uncertainty.

BEN BROWNE

Arbitrators are required to make decisions.

ROBERT WALLIS

I have no difficulty with the hypothetical approach. The requirement to consider “danger” covers a multitude of things.

SIMON KVERNDAL

If a ship is near a coast there is no difficulty in stripping out that element and making a separate award.

UFFE RASMUSSEN

Just as an example that the proposal will not work: in relation to option 2 more than one Convention could apply. Words might need to be added such as “whichever is the less” to clarify this aspect.

DR KROGER

The proposed new Article 14 would create new problems in relation to the interrelationship of Articles 13 and 14.

ROBERT WALKS

It created an encouragement to protect the environment and was a decent way forward.

ARCHIE BISHOP

The method of capping the award under Article 14 is negotiable and we are happy to look at other potential caps.

MANS JACOBSSON

The IOPC Funds have been identifying the purposes of response operations when assessing claims since 1985. Some parts of the operations may be salvage and some may be pollution prevention.

MICHAEL HOWARD

The same problems arise in relation to general average.

HUGH HURST

Such problems arise after costs have been incurred and it is a different proposition when a hypothetical scenario is being considered. The convention is working satisfactorily.

BEN BROWNE

Article 14 is inoperable and SCOPIC, being tied to LOF, does not remedy the problem in other countries.

JOOP TIMERMANS

My company has been involved in many salvage operations in which no LOF is used and fixed fees are negotiated. A large proportion of claims will be non-LOF claims.

STUART HETHERINGTON

Could we consider the suggestions made earlier by Vasanti Selvaratnam that the arbitrators give greater transparency in their awards so as to show what element relates to Article 13(1)(b) and that Article 14/Scopic incorporate a greater profit element.

MARK HODDINOTT

I am wary of messing around with SCOPIC.

BEN BROWNE

It is unsatisfactory that the Convention does not include ship owners' liabilities.

UFFE RASMUSSEN

That was an essential element of the compromise in Montreal. In my view Article 13(1)(b) should remain and be paid by both property interests. The compromise is only 20 years old.

BEN BROWNE

Article 13 does not instruct the arbitrators to consider liability issues.

SIMON KVERNDAL

It is one of the dangers.

MICHAEL HOWARD

It is certainly arguable and in practice it is taken into account.

FRANCIS ROSE

It is simple enough in arbitration awards to identify pure principles of law and arbitrators can weigh factors in an informal way. I would be surprised if anybody wants arbitrators to set out these matters in detail.

MICHAEL HOWARD

Arbitrators cannot separate out the factors. They are inseparable, but they can identify with greater clarity.

JOHN NOBLE

The salvage industry has changed. The large salvors are part of very large corporations which seek a return on their investment. The salvors are small parts of larger companies. The recognition that there is to be a reward for a particular service would make it possible to justify investment.

GRAHAM DAINES

The corporate mentality can be seen in the greater amount of wreck removal work being done by salvors. That would be an example of an unwillingness to take risk.

DONALD CHARD

It is difficult to justify paying additional funds to induce people to stay in the industry.

JOHN NOBLE

It is of benefit to the PI clubs that one part of the industry can save another from paying out millions.

STUART HETHERINGTON

Let me move into the next point. Many years ago the market came up with this bizarre concept of someone paying 34 of liability and someone else paying a quarter. What if something like that happened in this arena? What is being said is that in the last 20, 30 years environmental protection features much more strongly in what is done in these situations. Does that suggest that a certain percentage of the work that goes into a salvage is to protect the environment? Whether that amounts to 1/10, 2/10, or 6/10 I have no knowledge. Should that insurer not meet that aspect of the award?

Putting that aside, if arbitrators can be persuaded, as a result of much more evidence being advanced by salvors, that they have saved the ship from millions and billions of dollars of clean-up costs and millions and billions of dollars of fines, and that should be reflected in the award do we not get into a position in which inevitably in all other awards a certain percentage is relevant to that aspect and so would the solution not be simply to adjust the insurance arrangements to have the insurer meet those liabilities?

GRAHAM DAINES

Well I suppose yes, it is certainly not off the wall to say that. But it obviously would be necessary to consider it commercially.

STUART HETHERINGTON

That is what I was looking for, this is a commercial problem. And it does seem to me there are people around this table who have been having

discussions for years and need to look outside the square a bit, to see what other solutions are potentially available.

GRAHAM DAINES

It is not such a big point, but there are incidents where the cargo proportion is not actually paid by the cargo because of reasons related to a breach of the contract of the carriage. So there are cases where property underwriters are reimbursed.

KIRAN KHOSLA

The ICS does not want to see any unravelling of the Montreal compromise.

STUART HETHERINGTON

Anyone else want to say something about that discussion?

MIKE LACEY

The Montreal corn promise had gone out of the window when SCOPIC was introduced.

MANSJACOBSSON

In order for there to be any likelihood of IMO considering a revision of the Salvage Convention a “compelling need” for amendment of the Convention would have to be established.

MIKE LACEY

The first changes to LOF was the introduction of LOF80, then the introduction of Article 14 and then SCOPIC were all variations to the established law, all of which caused great concern among all participants when first introduced.

STUART HETHERINGTON

Can I say I have some difficulties regarding what the Montreal Compromise is. Having sat through a number of CMI meetings, whether it be debating clauses, drafting conventions or whatever and I am sure everyone would have different views as to what at the end of the day has been compromised. We had a discussion about liability salvage today and it seems that liability salvage is alive and well. Where does that sit with the Montreal Compromise? I just wonder whether we have moved on from that today, particularly given what is in Article 14, the uplift is in there.

MANS JACOBSSON

Despite my age I was not involved in the Montreal Compromise. I think that law is not static; it develops and must develop to take into account other developments in society and changes in political priorities. To make such changes in national legislation is not normally too difficult. But when amendments are to be made in a treaty, it is necessary to establish whether

there is really a need because otherwise the situation may become worse; there will be a new convention ratified by some States and the old convention is still binding on other States. Whether or not to revise the Salvage Convention is a political issue but the industries involved are the ones paying and that is why I think this discussion has been useful.

STUART HETHERINGTON

Thank you Mans. Does anyone else want to say something?

STUART HETHERINGTON

We should move on to the definitional problems. You have seen the responses from the National MLAs. I think that by and large in relation to the Article 1 definitions, the MLAs were very supportive of change being necessary. Does anyone have comments or any views on those definitions that were identified, the geographical scope particularly?

BERNARD VAN HEULE

Belgium does not consider it necessary for any changes to be made to the definitions.

STUART HETHERINGTON

There was an earlier version of the MLA's responses which was circulated. There is another version on its way. There will be an update of the MLAs responses, including the BMLAs and the other countries that appear later. For those who are from other jurisdictions who have not as yet responded, please let us have your responses. Is there anything that anyone wanted to highlight or point out in relation to those definitional issues?

The definition issue concerning "substantial": the majority of the MLA did not regard this as a major issue. Does anyone have any contribution that they would like to put forward?

UFFE RASMUSSEN

The word "substantial" was part of the Montreal compromise and referred to in the report of Bent Nielson in relation to the issue concerning "dangers to navigation". We should see what is understood as substantial and the essential element. I would personally agree that substantial is not the ideal expression but all I can say is that in the CMI report of Bent Nielsen it is described in detail what is meant by this.

STUART HETHERINGTON

The next definitional issue was "dangers to navigation" and whether containers lost at sea might be covered by "or similar major incidents" and the majority felt that they would not be but there were some countries that felt they would be covered. The UK said "unlikely", I think. Would anyone would like to make any comments on that issue?

GRAHAM DAINES

Where cargo or containers become separated from the casualty it is not unusual for the Clubs to ensure that hazards to navigation are eliminated.

HUGH HURST

Hazards to navigation are also covered by the Wreck Removal Convention-if they are regarded as a hazard by the concerned State.

STUART HETHERINGTON

The next issue is as to whether or not public authorities can make salvage claims, this is something that was debated in the discussions concerning “Places of Refuge” by CMI as to whether it might provide some encouragement to public authorities to grant a place of refuge (i.e. whether a separate right should be devised for public authorities.) I think that the UK responded (and it is common to many countries) that a public body/person is performing a public duty it generally cannot claim a salvage award but where they do over and above their public duties, there is a possibility of getting a salvage award. I would be interested to know if there is anyone who has strong views on that issue.

BEN BROWNE

In Somalia the pirate situation: in the case of navies they should be able to claim salvage because they are not acting under a public duty in that State or in those waters.

STUART HETHERINGTON

Does anyone else have any further thoughts that they can share with us on this issue? Ok Article 11 that was something that rose in the course of the place of refuge discussions. The Article exhorts countries to give assistance to ships looking for a place of refuge and whether countries had in fact made any provisions in their legislation to give effect to that. Again the UK responded that they had not specifically identified something responsive to Article 11 but indirectly through the Erika 2 directives. And other countries had made reference to the Conventions and National Plans that can probably be said to be responsive, indirectly, to Article 11. And the British MLA included comments that they would not want to see the IMO guidelines expressly referred to in any draft of the Salvage Convention because they are intended to be pretty flexible. That is probably the feeling that most of the MLAs who responded had.

The next question is related to the containership issue. I suppose this issue was reinforced yesterday afternoon when we saw how much larger tonnage will be coming into operation and whether that is going to create huge practical issues both in security terms and in running salvage cases.

MIKE LACEY

The problems I see have to do with groupage cargoes – they are the problem.

STUART HETHERINGTON

Any other comments?

JASON BENNETT

It is a logistical problem which is already causing difficulties for salvors. Various solutions have been looked at including minimum values.

MIKE LACEY

Richards Hogg produced a report. There are a quite a number of cases where the values of the contents are less than the money spent in obtaining the security they paid. So it is totally counterproductive to pursue this way. Collectively it worked quite well but not individually. Whatever you suggest has a problem.

STUART HETHERINGTON

One of the last questions related to the life salvage issue under Article 16 and it is not considered by MLA's to have proved to be a problem. Is there evidence that it is a problem?

MIKE LACEY

I think it is a potential problem that the SCOPIC tariff does not have a life salvage item. However it has not resulted in a practical problem as yet.

STUART HETHERINGTON

Publication of awards is the next topic. The UK's response was this issue was under discussion presently.

KEVIN CLARKE

Lloyds will be sending very soon a proposed wording to the Lloyds' Salvage Group.

MICHAEL HOWARD

Is an Arbitrator's copyright in an award being considered?

VASANTI SELVARATNAM

It would be very useful to have awards published because there are legal issues which it is of interest for people to know. It would be better for people to know what is the current approach to, for example, allegations of negligence, (among others).

MICHAEL HOWARD

I agree. [*It has since been pointed out by Michael Howard that the Lloyds Digest which is available on the Internet does this already.]

KIRAN KHOSLA

What is the correct approach to issues like salvor and negligence and the correct approach to betterment allegations? I think it might be proper to have an institutional point addressed about arbitrators so they are not going to find a publication counterproductive.

STUART HETHERINGTON

Although there are mixed responses from the MIAs, I think that they are mainly opposed to any change in the present regime.

Next we have miscellaneous questions at the end. Are there any other issues from other parts of the world?

The final issue I had on the agenda was the cultural heritage issue on the Brice Protocol, which was produced at the CMI Conference in Singapore. Obviously we would be interested to know whether anyone has any views on that.

MIKE LACEY

It is a matter which Moya Crawford from Deep Tek Limited has an interest.

STUART HETHERINGTON

I think it would be useful to hear from someone who has actually got knowledge about it, and see what we should be doing about it.

So that brings us to the end of the agenda I think. Does anybody else have any matters that they want to raise?

As to where we go from here: We have a Colloquium in Argentina, where these gentlemen come from, in October this year. There will be some panel presentations about what has happened here and the discussion will be explained and we will see what emerges from that Colloquium and what the CMI wants to do with it. And obviously if the industry would like us to be involved in a role we would be happy to assist.

STUART HETHERINGTON

I think the position of the IMO in anything requires governments and representatives around this table to have a view if something needs to be changed. So, our task would be to produce something that has the support of the CMI, which had been required by the relevant industries, so we just do not presently know the answer to that question.

MANS JACOBSSON

I do not have the exact knowledge but I think it should be demonstrated that there is an essential need.

MATHEOS LOS

I would like to see some balance in the composition of CMI IWG. It is redundant to make the comment I feel that having different elements within the industry it should be balanced on both sides.

Salvage Convention 1989

STUART HETHERINGTON

I would be happy to receive a representation from the ICS if it is seeking to have someone join the IWG. Lloyd Watkins from the International Group was on the original CMI Working Group that had been established prior to the Montreal Conference.

NIC GOODING

The P&I Clubs and ship owners should “step up to the plate”.

STUART HETHERINGTON

If there is no one else that would like to say something, I can happily close the meeting. Thank you very much for joining us.

ANNEX 10

NEW LLOYD’S STANDARD FORM OF SALVAGE AGREEMENT (LOF) AND LLOYD’S STANDARD SALVAGE AND ARBITRATION (LSSA) CLAUSES – SUMMARY OF THE AMENDMENTS

Following lengthy, open and constructive debate at the Lloyd’s Salvage Group (LSG) meetings in 2010 and March 2011, the following amendments to LOF2000 and the LSSA Clauses have been agreed. The new LOF will be known as LOF2011.

LOF 2011

Two new clauses, details of which appear below, have been added to LOF. They appear on page 2 under IMPORTANT NOTICES and are numbered 3 and 4 respectively.

Details of LOF Awards on Lloyd’s web-site

- 3** ***Awards.** The Council of Lloyd’s is entitled to make available the Award, Appeal Award and Reasons on www.lloydsagency.com (the website) subject to the conditions set out in Clause 12 of the LSSA Clauses.*

LOF Awards, Appeal Awards and Reasons have traditionally been confidential to the parties involved. However, the LSG was unanimous in agreement that the Arbitrator’s Award (and where applicable, the Appeal Award) should be made more widely accessible. It was further agreed that such access will be via subscription to the appropriate area of Lloyd’s website at www.lloydsagency.com.

This amendment to LOF is in line with other recent changes, including the new system for appointments to the LOF Panel of Arbitrators, designed to make the LOF process a more transparent and inclusive one.

The conditions governing the making available of Awards, etc, are set out in a new LSSA Clause 12, which is referred to separately below. Details of how to apply for subscription to the website can be obtained from the Salvage Arbitration Branch (SAB) (see contact details below).

Notification of LOFs to Lloyd’s

- 4** *Notification to Lloyd's.* The Contractors shall within 14 days of their engagement to render services under this agreement notify the Council of Lloyd's of their engagement and forward the original agreement or a true copy thereof to the Council as soon as possible. The Council will not charge for such notification.

It has always been the case that LOFs have been agreed and services successfully rendered without the matter being notified to Lloyd's. In most cases this was because the salvors and salvaged interests were able to reach a quick, amicable settlement and therefore did not require the services of the SAB and the LOF arbitration system.

However, it would appear that the number of these cases has increased over recent years and it has become very difficult to gauge the actual level of use of LOF. The salvors are now being asked to report all LOFs to Lloyd's within 14 days of their engagement. It is, of course, a requirement that attracts no charge from Lloyd's.

LSSA Clauses

Security for Arbitrator's and Appeal Arbitrator's Fees

The following new Clauses have been introduced to the LSSA Clauses:

6.6 The Arbitrator shall be entitled to satisfactory security for his reasonable fees and expenses, whether such fees and expenses have been incurred already or are reasonably anticipated. The Arbitrator shall have the power to order one or more of the parties to provide security in a sum or sums and in a form to be determined by the Arbitrator. The said power may be exercised from time to time as the Arbitrator considers appropriate.

It happens from time-to-time that an Arbitrator is appointed to a particular matter in which the salvage security, which traditionally covers the fees and/or costs of the Arbitrator as well as Lloyd's, has either been provided direct to the salvors in a form that is not acceptable to Lloyd's or has not been provided at all.

The Arbitrators have become increasingly concerned at the level of their exposure to the potential non-payment of their fees. This clause gives them power to order the provision of security, for sum or sums determined by them, in respect of their reasonable fees and expenses.

10.8 The Appeal Arbitrator shall be entitled to satisfactory security for his reasonable fees and expenses, whether such fees and expenses have been incurred already or are reasonably anticipated. The Appeal Arbitrator shall have the power to order one or more of the parties to provide security in a sum or sums and in a form to be determined by the

Appeal Arbitrator. The said power may be exercised from time to time as the Appeal Arbitrator considers appropriate.

This clause gives the same powers to the Appeal Arbitrator as those invested in the first instance Arbitrators set out in Clause 6.6 above.

Details of LOF Awards on Lloyd's web-site

12 Awards

12.1 The Council will ordinarily make available the Award, or Appeal Award, and Reasons on www.lloydsagency.com (the website) except where the Arbitrator or Appeal Arbitrator has ordered, in response to representations by any party to the Award or Appeal Award, that there is a good reason for deferring or withholding them. Any party may make such representations to the Arbitrator provided a written notice of its intention to do so is received by the Council no later than 21 days after the date on which the Award or Appeal Award was published by the Council and the representations themselves are submitted in writing to the Arbitrator or Appeal Arbitrator within 21 days of the date of the notice of intention.

12.2 Subject to any order of the Arbitrator or Appeal Arbitrator the Award, or Appeal Award, and Reasons will be made available on the website as soon as practicable after expiry of the 21 day period referred to in clause 12.1.

12.3 In the event of an appeal being entered against an Award, the Award and Reasons shall not be made available on the website until either the Appeal Arbitrator has issued his Appeal Award or the Notice of Appeal is withdrawn subject always to any order being made in accordance with clause 12.1.

As stated above (see LOF new IMPORTANT NOTICE 3) these new clauses set out the conditions governing the making available of LOF Awards, etc on Lloyd's website www.lloydsagency.com

Note that Lloyd's will make available the Award and Reasons on its website 21 days after publication of the Award unless:

- (i) An appeal has been entered against an Award or
- (ii) The Arbitrator or Appeal Arbitrator has ordered, in response to representations by any party, that there is "good reason" for deferring or withholding them.

In the event of (i) above, the Award and Reasons will not be made available on the website until either the Appeal Arbitrator has issued his Appeal Award or the Notice of Appeal is withdrawn (subject always to any order referred to in (ii) above.)

Container Vessel Cases

Special Provisions

These Special Provisions shall apply to salvaged cargo insofar as it consists of laden containers.

- 13 The parties agree that any correspondence or notices in respect of salvaged property which is not the subject of representation in accordance with Clause 7 of these Rules may be sent to the party or parties who have provided salvage security in respect of that property and that this shall be deemed to constitute proper notification to the owners of such property.*
- 14 Subject to the express approval of the Arbitrator, where an agreement is reached between the Contractors and the owners of salvaged cargo comprising at least 75% by value of salvaged cargo represented in accordance with Clause 7 of these Rules, the same agreement shall be binding on the owners of all salvaged cargo who were not represented at the time of the said approval.*
- 15 Subject to the express approval of the Arbitrator, any salvaged cargo with a value below an agreed figure may be omitted from the salvaged fund and excused from liability for salvage where the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage.*

Discussions to implement the above (or similar) clauses have been taking place in the LSG forum over the past three years. These discussions originated out of concerns that the costs incurred in collecting salvage security from low-value cargo interests in cases involving container (multi-bill of lading) vessels were disproportionate to their proportion of any salvage award or settlement.

Clause 13 specifically relates to the provisions of the Arbitration Act 1986, which require notices to be given to the owners of the salvaged property, which in container vessel cases may number several hundred or even thousands. It allows the SAB, or the salvors, or their appointed representatives/agents to send any appropriate notices to the party (usually the cargo insurers) that has provided the salvage security.

This can significantly reduce the number of notices to be sent because, often, an insurer will have provided security for a number of their insureds.

It is often the case in container vessel cases that the salvors are able to reach an amicable settlement with the “represented” cargo interests, but are left with no option but to obtain an Award against the remaining interests, thereby incurring the costs associated with utilizing the full arbitration process. The provisions set out in Clause 14 above allow the salvors to apply to the Arbitrator to bind the unrepresented cargo to the terms of the settlement agreement where the agreement has been reached with owners of at least 75% by value of the salvaged cargo.

Clause 15 allows the salvors to apply to the Arbitrator to excuse any cargo below an agreed value from any liability for salvage where the cost of including it is likely to be disproportionate to its proportion of any Award or settlement.

The potential effect of these clauses (13, 14 and 15) is to reduce the cost of collecting salvage security and obtaining an Award against the unrepresented cargo.



LLOYD'S STANDARD FORM OF SALVAGE AGREEMENT

(Approved and Published by the Council of Lloyd's)

NO CURE - NO PAY

<p>1. Name of the salvage Contractors:</p> <p>(referred to in this agreement as "the Contractors")</p>	<p>2. Property to be salvaged:</p> <p>The vessel:</p> <p>her cargo freight bunkers stores and any other property thereon but excluding the personal effects or baggage of passengers master or crew</p> <p>(referred to in this agreement as "the property")</p>
<p>3. Agreed place of safety:</p>	<p>4. Agreed currency of any arbitral award and security (if other than United States dollars)</p>
<p>5. Date of this agreement</p>	<p>6. Place of agreement</p>
<p>7. Is the Scopic Clause incorporated into this agreement? State alternative : Yes/No</p>	
<p>8. Person signing for and on behalf of the Contractors</p> <p>Signature:</p>	<p>9. Captain</p> <p>or other person signing for and on behalf of the property</p> <p>Signature:</p>

A Contractors' basic obligation: The Contractors identified in Box 1 hereby agree to use their best endeavours to save the property specified in Box 2 and to take the property to the place stated in Box 3 or to such other place as may hereafter be agreed. If no place is inserted in Box 3 and in the absence of any subsequent agreement **as to the place where the property is to be taken the Contractors shall take the property to a place of safety.**

B Environmental protection: While performing the salvage services the Contractors shall also use their best endeavours to prevent or minimise damage to the environment.

C Scopic Clause: Unless the word "No" in Box 7 has been deleted this agreement shall be deemed to have been made on the basis that the Scopic Clause is not incorporated and **forms** no part of this agreement. If the word "No" is deleted in Box 7 this shall not of itself be construed as a notice invoking the Scopic Clause within the meaning of sub-clause 2 thereof.

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- D Effect of other remedies:** Subject to the provisions of the International Convention on Salvage 1989 as incorporated into English law ("the Convention") relating to special compensation and to the Scopic Clause if incorporated the Contractors services shall be rendered and accepted as salvage services upon the principle of "no cure - no pay" and any salvage remuneration to which the Contractors become entitled shall not be diminished by reason of the exception to the principle of "no cure - no pay" in the form of special compensation or remuneration payable to the Contractors under a Scopic Clause.
- E Prior services:** Any salvage services rendered by the Contractors to the property before and up to the date of this agreement shall be deemed to be covered by this agreement.
- F Duties of property owners:** Each of the owners of the property shall cooperate fully with the Contractors. In particular:
- (i) the Contractors may make reasonable use of the vessel's machinery gear and equipment free of expense provided that the Contractors shall not unnecessarily damage abandon or sacrifice any property on board;
 - (ii) the Contractors shall be entitled to all such information as they may reasonably require relating to the vessel or the remainder of the property provided such information is relevant to the performance of the services and is capable of being provided without undue difficulty or delay;
 - (iii) the owners of the property shall co-operate fully with the Contractors in obtaining entry to the place of safety stated in Box 3 or agreed or determined in accordance with Clause A.
- G Rights of termination:** When there is no longer any reasonable prospect of a useful result leading to a salvage reward in accordance with Convention Articles 12 and/or 13 either the owners of the vessel or the Contractors shall be entitled to terminate the services hereunder by giving reasonable prior written notice to the other.
- H Deemed performance:** The Contractors' services shall be deemed to have been performed when the property is in a safe condition in the place of safety stated in Box 3 or agreed or determined in accordance with clause A. For the purpose of this provision the property shall be regarded as being in safe condition notwithstanding that the property (or part thereof) is damaged or in need of maintenance if (i) the Contractors are not obliged to remain in attendance to satisfy the requirements of any port or harbour authority, governmental agency or similar authority and (ii) the continuation of skilled salvage services from the Contractors or other salvors is no longer necessary to avoid the property becoming lost or significantly further damaged or delayed.
- I Arbitration and the LSSA Clauses:** The Contractors' remuneration and/or special compensation shall be determined by arbitration in London in the manner prescribed by Lloyd's Standard Salvage and Arbitration Clauses ("the LSSA Clauses") and Lloyd's Procedural Rules in force at the date of this agreement. The provisions of the said LSSA Clauses and Lloyd's Procedural Rules are deemed to be incorporated in this agreement and form an integral part hereof. Any other difference arising out of this agreement or the operations hereunder shall be referred to arbitration in the same way.
- J Governing law:** This agreement and any arbitration hereunder shall be governed by English law.
- K Scope of authority:** The Master or other person signing this agreement on behalf of the property identified in Box 2 enters into this agreement as agent for the respective owners thereof and binds each (but not the one for the other or himself personally) to the due performance thereof.
- L Inducements prohibited:** No person signing this agreement or any party on whose behalf it is signed shall at any time or in any manner whatsoever offer provide make give or promise to provide or demand or take any form of inducement for entering into this agreement.

IMPORTANT NOTICES

- 1 Salvage security.** As soon as possible the owners of the vessel should notify the owners of other property on board that this agreement has been made. If the Contractors are successful the owners of such property should note that it will become necessary to provide the Contractors with salvage security promptly in accordance with Clause 4 of the LSSA Clauses referred to in Clause I. The provision of General Average security does not relieve the salvaged interests of their separate obligation to provide salvage security to the Contractors.
- 2 Incorporated provisions.** Copies of the applicable Scopic Clause, the LSSA Clauses and Lloyd's Procedural Rules in force at the date of this agreement may be obtained from (i) the Contractors or (ii) the Salvage Arbitration Branch at Lloyd's, One Lime Street, London EC3M 7HA.
- 3 Awards.** The Council of Lloyd's is entitled to make available the Award, Appeal Award and Reasons on www.lloydsagency.com (the website) subject to the conditions set out in Clause 12 of the LSSA Clauses.
- 4 Notification to Lloyd's.** The Contractors shall within 14 days of their engagement to render services under this agreement notify the Council of Lloyd's of their engagement and forward the signed agreement or a true copy thereof to the Council as soon as possible. The Council will not charge for such notification.

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LLOYD'S STANDARD FORM OF SALVAGE AGREEMENT

(Approved and Published by the Council of Lloyd's)

LLOYD'S STANDARD SALVAGE AND ARBITRATION CLAUSES

1 Introduction

- 1.1 These clauses ("the LSSA Clauses") or any revision thereof which may be published with the approval of the Council of Lloyd's are incorporated into and form an integral part of every contract for the performance of salvage services undertaken on the terms of Lloyd's Standard Form of Salvage Agreement as published by the Council of Lloyd's and known as LOF 2011 (or its predecessor LOF 2000) ("the Agreement" which expression includes the LSSA clauses and Lloyd's Procedural Rules referred to in Clause 6).

- 1.2 All notices communications and other documents required to be sent to the Council of Lloyd's should be sent to:

Salvage Arbitration Branch
Lloyd's
One Lime Street
London EC3M 7HA

Tel: +44 (0) 20 7327 5408/5407
Fax: +44 (0) 20 7327 6827
E-mail: lloyds-salvage@lloyds.com

2 Overriding Objective

In construing the Agreement or on the making of any arbitral order or award regard shall be had to the overriding purposes of the Agreement namely:

- a to seek to promote safety of life at sea and the preservation of property at sea and during the salvage operations to prevent or minimise damage to the environment;
- b to ensure that its provisions are operated in good faith and that it is read and understood to operate in a reasonably businesslike manner;
- c to encourage cooperation between the parties and with relevant authorities;
- d to ensure that the reasonable expectations of salvors and owners of salvaged property are met and
- e to ensure that it leads to a fair and efficient disposal of disputes between the parties whether amicably, by mediation or by arbitration within a reasonable time and at a reasonable cost.

3 Definitions

In the Agreement and unless there is an express provision to the contrary:

- 3.1 "Award" includes an interim or provisional Award and "Appeal Award" means any Award including any interim or provisional Award made by the Appeal Arbitrator appointed under clause 10.2.
- 3.2 "personal effects or baggage" as referred to in Box 2 of the Agreement means those which the passenger, Master and crew member have in their cabin or are otherwise in their possession, custody or control and shall include any private motor vehicle accompanying a passenger and any personal effects or baggage in or on such vehicle.
- 3.3 "Convention" means the International Convention on Salvage 1989 as enacted by section 224, Schedule II of the Merchant Shipping Act 1995 (and any amendment of either) and any term or expression in the Convention has the same meaning when used in the Agreement.

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- 3.4 "Council" means the Council of Lloyd's
- 3.5 "days" means calendar days
- 3.6 "Owners" means the owners of the property referred to in box 2 of the Agreement
- 3.7 "owners of the vessel" includes the demise or bareboat charterers of that vessel.
- 3.8 "special compensation" refers to the compensation payable to salvors under Article 14 of the Convention.
- 3.9 "Scopic Clause" refers to the agreement made between (1) members of the International Salvage Union (2) the International Group of P&I Clubs and (3) certain property underwriters which first became effective on 1st August 1999 and includes any replacement or revision thereof. All references to the Scopic Clause in the Agreement shall be deemed to refer to the version of the Scopic Clause current at the date the Agreement is made.

4 Provisions as to Security, Maritime Lien and Right to Arrest

- 4.1 The Contractors shall immediately after the termination of the services or sooner notify the Council and where practicable the Owners of the amount for which they demand salvage security (inclusive of costs expenses and interest) from each of the respective Owners.
- 4.2 Where a claim is made or may be made for special compensation the owners of the vessel shall on the demand of the Contractors whenever made provide security for the Contractors' claim for special compensation provided always that such demand is made within 2 years of the date of termination of the services.
- 4.3 The security referred to in clauses 4.1. and 4.2. above shall be demanded and provided in the currency specified in Box 4 or in United States Dollars if no such alternative currency has been agreed.
- 4.4 The amount of any such security shall be reasonable in the light of the knowledge available to the Contractors at the time when the demand is made and any further facts which come to the Contractors' attention before security is provided. The arbitrator appointed under clause 5 hereof may, at any stage of the proceedings, order that the amount of security be reduced or increased as the case may be.
- 4.5 Unless otherwise agreed such security shall be provided (i) to the Council (ii) in a form approved by the Council and (iii) by persons firms or corporations either acceptable to the Contractors or resident in the United Kingdom and acceptable to the Council. The Council shall not be responsible for the sufficiency (whether in amount or otherwise) of any security which shall be provided nor the default or insolvency of any person firm or corporation providing the same.
- 4.6 The owners of the vessel including their servants and agents shall use their best endeavours to ensure that none of the property salvaged is released until security has been provided in respect of that property in accordance with clause 4.5.
- 4.7 Until security has been provided as aforesaid the Contractors shall have a maritime lien on the property salvaged for their remuneration.
- 4.8 Until security has been provided the property salvaged shall not without the consent in writing of the Contractors (which shall not be unreasonably withheld) be removed from the place to which it has been taken by the Contractors under clause A. Where such consent is given by the Contractors on condition that they are provided with temporary security pending completion of the voyage the Contractors' maritime lien on the property salvaged shall remain in force to the extent necessary to enable the Contractors to compel the provision of security in accordance with clause 4.5.
- 4.9 The Contractors shall not arrest or detain the property salvaged unless:
 - (i) security is not provided within 21 days after the date of the termination of the services or
 - (ii) they have reason to believe that the removal of the property salvaged is contemplated contrary to clause 4.8, or
 - (iii) any attempt is made to remove the property salvaged contrary to clause 4.8.

5 Appointment of Arbitrators

- 5.1 Whether or not security has been provided (and always subject to Clause 6.6 and 10.8 below) the Council shall appoint an arbitrator ("the Arbitrator") upon receipt of a written request provided that any party requesting such appointment shall if required by the Council undertake to the Council's reasonable satisfaction to pay the reasonable fees and expenses of the Council and those of the Arbitrator and the Appeal Arbitrator.
- 5.2 The Arbitrator, the Appeal Arbitrator and the Council may charge reasonable fees and expenses for their services whether the arbitration proceeds to a hearing or not and all such fees and expenses shall be treated as part of the costs of the arbitration.

6 Arbitration Procedure and Arbitrators Powers

- 6.1 The arbitration shall be conducted in accordance with the Procedural Rules approved by the Council ("Lloyd's Procedural Rules") in force at the date of the LOF agreement.
- 6.2 The arbitration shall take place in London unless (i) all represented parties agree to some other place for the whole or part of the arbitration and (ii) any such agreement is approved by the Arbitrator on such terms as to the payment of the Arbitrator's travel and accommodation expenses as he may see fit to impose.

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- 6.3 The Arbitrator shall have power in his absolute discretion to include in the amount awarded to the Contractors the whole or part of any expenses reasonably incurred by the Contractors in:
- (i) ascertaining demanding and obtaining the amount of security reasonably required in accordance with clause 4.5
 - (ii) enforcing and/or protecting by insurance or otherwise or taking reasonable steps to enforce and/or protect their lien
- 6.4 The Arbitrator shall have power to make but shall not be bound to make a consent award between such parties as so consent with or without full arbitral reasons
- 6.5 The Arbitrator shall have power to make a provisional or interim award or awards including payments on account on such terms as may be fair and just
- 6.6 The Arbitrator shall be entitled to satisfactory security for his reasonable fees and expenses, whether such fees and expenses have been incurred already or are reasonably anticipated. The Arbitrator shall have the power to order one or more of the parties to provide such security in a sum or sums and in a form to be determined by the Arbitrator. The said power may be exercised from time to time as the Arbitrator considers appropriate.
- 6.7 Awards in respect of salvage remuneration or special compensation (including payments on account) shall be made in the currency specified in Box 4 or in United States dollars if no such alternative currency has been agreed.
- 6.8 The Arbitrator's Award shall (subject to appeal as provided in clause 10) be final and binding on all the parties concerned whether they were represented at the arbitration or not and shall be published by the Council in London.

7 Representation of Parties

- 7.1 Any party to the Agreement who wishes to be heard or to adduce evidence shall appoint an agent or representative ordinarily resident in the United Kingdom to receive correspondence and notices for and on behalf of that party and shall give written notice of such appointment to the Council.
- 7.2 Service on such agent or representative by letter, e-mail or facsimile shall be deemed to be good service on the party which has appointed that agent or representative.
- 7.3 Any party who fails to appoint an agent or representative as aforesaid shall be deemed to have renounced his right to be heard or adduce evidence.

8 Interest

- 8.1 Unless the Arbitrator in his discretion otherwise decides the Contractors shall be entitled to interest on any sums awarded in respect of salvage remuneration or special compensation (after taking into consideration any sums already paid to the Contractors on account) from the date of termination of the services until the date on which the Award is published by the Council and at a rate to be determined by the Arbitrator.
- 8.2 In ordinary circumstances the Contractors' interest entitlement shall be limited to simple interest but the Arbitrator may exercise his statutory power to make an award of compound interest if the Contractors have been deprived of their salvage remuneration or special compensation for an excessive period as a result of the Owners' gross misconduct or in other exceptional circumstances.
- 8.3 If the sum(s) awarded to the Contractors (including the fees and expenses referred to in clause 5.2) are not paid to the Contractors or to the Council by the payment date specified in clause 11.1 the Contractors shall be entitled to additional interest on such outstanding sums from the payment date until the date payment is received by the Contractors or the Council both dates inclusive and at a rate which the Arbitrator shall in his absolute discretion determine in his Award.

9 Currency Correction

In considering what sums of money have been expended by the Contractors in rendering the services and/or in fixing the amount of the Award and/or Appeal Award the Arbitrator or Appeal Arbitrator shall to such an extent and insofar as it may be fair and just in all the circumstances give effect to the consequences of any change or changes in the relevant rates of exchange which may have occurred between the date of termination of the services and the date on which the Award or Appeal Award is made.

10 Appeals and Cross Appeals

- 10.1 Any party may appeal from an Award by giving written Notice of Appeal to the Council provided such notice is received by the Council no later than 21 days after the date on which the Award was published by the Council.
- 10.2 On receipt of a Notice of Appeal the Council shall refer the appeal to the hearing and determination of an appeal arbitrator of its choice ("the Appeal Arbitrator").
- 10.3 Any party who has not already given Notice of Appeal under clause 10.1 may give a Notice of Cross Appeal to the Council within 21 days of that party having been notified that the Council has received Notice of Appeal from another party.
- 10.4 Notice of Appeal or Cross Appeal shall be given to the Council by letter, e-mail or facsimile.

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- 10.5 If any Notice of Appeal or Notice of Cross Appeal is withdrawn prior to the hearing of the appeal arbitration, that appeal arbitration shall nevertheless proceed for the purpose of determining any matters which remain outstanding.
- 10.6 The Appeal Arbitrator shall conduct the appeal arbitration in accordance with Lloyd's Procedural Rules so far as applicable to an appeal.
- 10.7 In addition to the powers conferred on the Arbitrator by English law and the Agreement, the Appeal Arbitrator shall have power to:
- (i) admit the evidence or information which was before the Arbitrator together with the Arbitrator's Notes and Reasons for his Award, any transcript of evidence and such additional evidence or information as he may think fit;
 - (ii) confirm increase or reduce the sum(s) awarded by the Arbitrator and to make such order as to the payment of interest on such sum(s) as he may think fit;
 - (iii) confirm revoke or vary any order and/or declaratory award made by the Arbitrator;
 - (iv) award interest on any fees and expenses charged under clause 10.8 from the expiration of 28 days after the date of publication by the Council of the Appeal Arbitrator's Award until the date payment is received by the Council both dates inclusive.
- 10.8 The Appeal Arbitrator shall be entitled to satisfactory security for his reasonable fees and expenses, whether such fees and expenses have been incurred already or are reasonably anticipated. The Appeal Arbitrator shall have the power to order one or more of the parties to provide such security in a sum or sums and in a form to be determined by the Appeal Arbitrator. The said power may be exercised from time to time as the Appeal Arbitrator considers appropriate.
- 10.9 The Appeal Arbitrator's Award shall be published by the Council in London.
- 11 Provisions as to Payment**
- 11.1 When publishing the Award the Council shall call upon the party or parties concerned to pay all sums due from them which are quantified in the Award (including the fees and expenses referred to in clause 5.2) not later than 28 days after the date of publication of the Award ("the payment date").
- 11.2 If the sums referred to in clause 11.1 (or any part thereof) are not paid within 56 days after the date of publication of the Award (or such longer period as the Contractors may allow) and provided the Council has not received Notice of Appeal or Notice of Cross Appeal the Council shall realise or enforce the security given to the Council under clause 4.5 by or on behalf of the defaulting party or parties subject to the Contractors' providing the Council with any indemnity the Council may require in respect of the costs the Council may incur in that regard.
- 11.3 In the event of an appeal and upon publication by the Council of the Appeal Award the Council shall call upon the party or parties concerned to pay the sum(s) awarded. In the event of non-payment and subject to the Contractors providing the Council with any costs indemnity required as referred to in clause 11.2 the Council shall realise or enforce the security given to the Council under clause 4.5 by or on behalf of the defaulting party.
- 11.4 If any sum(s) shall become payable to the Contractors in respect of salvage remuneration or special compensation (including interest and/or costs) as the result of an agreement made between the Contractors and the Owners or any of them, the Council shall, if called upon to do so and subject to the Contractors providing to the Council any costs indemnity required as referred to in clause 11.2 realise or enforce the security given to the Council under clause 4.5 by or on behalf of that party.
- 11.5 Where (i) no security has been provided to the Council in accordance with clause 4.5 or (ii) no Award is made by the Arbitrator or the Appeal Arbitrator (as the case may be) because the parties have been able to settle all matters in issue between them by agreement the Contractors shall be responsible for payment of the fees and expenses referred to in clause 5.2. Payment of such fees and expenses shall be made to the Council within 28 days of the Contractors or their representatives receiving the Council's invoice failing which the Council shall be entitled to interest on any sum outstanding at UK Base Rate prevailing on the date of the invoice plus 2% per annum until payment is received by the Council.
- 11.6 If an Award or Appeal Award directs the Contractors to pay any sum to any other party or parties including the whole or any part of the costs of the arbitration and/or appeal arbitration the Council may deduct from sums received by the Council on behalf of the Contractors the amount(s) so payable by the Contractors unless the Contractors provide the Council with satisfactory security to meet their liability.
- 11.7 Save as aforesaid every sum received by the Council pursuant to this clause shall be paid by the Council to the Contractors or their representatives whose receipt shall be a good discharge for it.
- 11.8 Without prejudice to the provisions of clause 4.5 the liability of the Council shall be limited to the amount of security provided to it.
- 12 Awards**
- 12.1 The Council will ordinarily make available the Award or Appeal Award and Reasons on www.lloydsagency.com (the website) except where the Arbitrator or Appeal Arbitrator has ordered, in response to representations by any party to the Award or Appeal Award, that there is a good reason for deferring or withholding them. Any party may make such representations to the Arbitrator provided a written notice of its intention to do so is received by the Council no later than 21 days after the date on which the Award or Appeal Award was published by the Council and the representations themselves are submitted in writing to the Arbitrator or Appeal Arbitrator within 21 days of the date of the notice of intention.

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- 12.2 Subject to any order of the Arbitrator or Appeal Arbitrator, the Award, or Appeal Award, and Reasons will be made available on the website as soon as practicable after expiry of the 21 day period referred to in clause 12.1.
- 12.3 In the event of an appeal being entered against an Award, the Award and Reasons shall not be made available on the website until either the Appeal Arbitrator has issued his Appeal Award or the Notice of Appeal is withdrawn subject always to any order being made in accordance with clause 12.1.

Special Provisions

These Special Provisions shall apply to salvaged cargo insofar as it consists of laden containers.

- 13 The parties agree that any correspondence or notices in respect of salvaged cargo which is not the subject of representation in accordance with Clause 7 of these Rules may be sent to the party or parties who have provided salvage security in respect of that property and that this shall be deemed to constitute proper notification to the owners of such property.
- 14 Subject to the express approval of the Arbitrator, where an agreement is reached between the Contractors and the owners of salvaged cargo comprising at least 75% by value of salvaged cargo represented in accordance with Clause 7 of these Rules, the same agreement shall be binding on the owners of all salvaged cargo who were not represented at the time of the said approval.
- 15 Subject to the express approval of the Arbitrator, any salvaged cargo with a value below an agreed figure may be omitted from the salvaged fund and excused from liability for salvage where the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage.

General Provisions

- 16 **Lloyd's documents:** Any Award notice authority order or other document signed by the Chairman of Lloyd's or any person authorised by the Council for the purpose shall be deemed to have been duly made or given by the Council and shall have the same force and effect in all respects as if it had been signed by every member of the Council.
- 17 **Contractors' personnel and subcontractors**
- 17.1 The Contractors may claim salvage on behalf of their employees and any other servants or agents who participate in the services and shall upon request provide the Owners with a reasonably satisfactory indemnity against all claims by or liabilities to such employees servants or agents.
- 17.2 The Contractors may engage the services of subcontractors for the purpose of fulfilling their obligations under clauses A and B of the Agreement but the Contractors shall nevertheless remain liable to the Owners for the due performance of those obligations.
- 17.3 In the event that subcontractors are engaged as aforesaid the Contractors may claim salvage on behalf of the subcontractors including their employees servants or agents and shall, if called upon so to do provide the Owners with a reasonably satisfactory indemnity against all claims by or liabilities to such subcontractors their employees servants or agents.
- 18 **Disputes under Scopic Clause**
- Any dispute arising out of the Scopic Clause (including as to its incorporation or invocation) or the operations thereunder shall be referred for determination to the Arbitrator appointed under clause 5 hereof whose Award shall be final and binding subject to appeal as provided in clause 10 hereof.
- 19 **Lloyd's Publications**
- Any guidance published by or on behalf of the Council relating to matters such as the Convention the workings and implementation of the Agreement is for information only and forms no part of the Agreement.

*Report of the IWG on Review of the Salvage Convention 1989 – Annex 11***ANNEX 11****SCOPIC CLAUSE**

1. **General**
This SCOPIC clause is supplementary to any Lloyd's Form Salvage Agreement "No Cure - No Pay" ("Main Agreement") which incorporates the provisions of Article 14 of the International Convention on Salvage 1989 ("Article 14"). The definitions in the Main Agreement are incorporated into this SCOPIC clause. If the SCOPIC clause is inconsistent with any provisions of the Main Agreement or inconsistent with the law applicable hereto, the SCOPIC clause, once invoked under sub-clause 2 hereof, shall override such other provisions to the extent necessary to give business efficacy to the agreement. Subject to the provisions of sub-clause 4 hereof, the method of assessing Special Compensation under Convention Article 14(1) to 14(4) inclusive shall be substituted by the method of assessment set out hereinafter. If this SCOPIC clause has been incorporated into the Main Agreement the Contractor may make no claim pursuant to Article 14 except in the circumstances described in sub-clause 4 hereof. For the purposes of liens and time limits the services hereunder will be treated in the same manner as salvage.
2. **Invoking the SCOPIC Clause**
The Contractor shall have the option to invoke by written notice to the owners of the vessel the SCOPIC clause set out hereafter at any time of his choosing regardless of the circumstances and, in particular, regardless of whether or not there is a "threat of damage to the environment". The assessment of SCOPIC remuneration shall commence from the time the written notice is given to the owners of the vessel and services rendered before the said written notice shall not be remunerated under this SCOPIC clause at all but in accordance with Convention Article 13 as incorporated into the Main Agreement ("Article 13").
3. **Security for SCOPIC Remuneration**
 - (i) The owners of the vessel shall provide to the Contractor within 2 working days (excluding Saturdays and Sundays and holidays usually observed at Lloyd's) after receiving written notice from the contractor invoking the SCOPIC clause, a bank guarantee or P&I Club letter (hereinafter called "the Initial Security") in a form reasonably satisfactory to the Contractor providing security for his claim for SCOPIC remuneration in the sum of US\$3 million, inclusive of interest and costs.
 - (ii) If, at any time after the provision of the Initial Security the owners of the vessel reasonably assess the SCOPIC remuneration plus interest and costs due hereunder to be less than the security in place, the owners of the vessel shall be entitled to require the Contractor to reduce the security to a reasonable sum and the Contractor shall be obliged to do so once a reasonable sum has been agreed.
 - (iii) If at any time after the provision of the Initial Security the Contractor reasonably assesses the SCOPIC remuneration plus interest and costs due hereunder to be greater than the security in place, the Contractor shall be entitled to require the owners of the vessel to increase the security to a reasonable sum and the owners of the vessel shall be obliged to do so once a reasonable sum has been agreed.
 - (iv) In the absence of agreement, any dispute concerning the proposed Guarantor, the form of the security or the amount of any reduction or increase in the security in place shall be resolved by the Arbitrator.
4. **Withdrawal**
If the owners of the vessel do not provide the Initial Security within the said 2 working days, the Contractor, at his option, and on giving notice to the owners of the vessel, shall be entitled to withdraw from all the provisions of the SCOPIC clause and revert to his rights under the Main Agreement including Article 14 which shall apply as if the SCOPIC clause had not existed. PROVIDED THAT this right of withdrawal may only be exercised if, at the time of giving the said notice of withdrawal the owners of the vessel have still not provided the Initial Security or any alternative security which the owners of the vessel and the Contractor may agree will be sufficient.
5. **Tariff Rates**
 - (i) SCOPIC remuneration shall mean the total of the tariff rates of personnel; tugs and other craft; portable salvage equipment; out of pocket expenses; and bonus due.
 - (ii) SCOPIC remuneration in respect of all personnel; tugs and other craft; and portable salvage equipment shall be assessed on a time and materials basis in accordance with the Tariff set out in Appendix "A". This tariff will apply until reviewed and amended by the SCOPIC Committee in accordance with Appendix B(1)(b). The tariff rates which will be used to calculate SCOPIC remuneration are those in force at the time the salvage services take place.
 - (iii) "Out of pocket" expenses shall mean all those monies reasonably paid by or for and on behalf of the Contractor to any third party and in particular includes the hire of men, tugs, other craft and equipment used and other expenses reasonably necessary for the operation. They will be agreed at cost, PROVIDED THAT:
 - (a) If the expenses relate to the hire of men, tugs, other craft and equipment from another ISU member or their affiliate(s), the amount due will be calculated on the tariff rates set out in Appendix "A" regardless of the actual cost.
 - (b) If men, tugs, other craft and equipment are hired from any party who is not an ISU member and the hire rate is greater than the tariff rates referred to in Appendix "A" the actual cost will be allowed in full, subject to the Special Casualty Representative ("SCR") being satisfied that in the particular circumstances of the case, it was reasonable for the Contractor to hire such items at that cost. If an SCR is not appointed or if there is a dispute, then the Arbitrator shall decide whether the expense was reasonable in all the circumstances.
 - (c) Any out of pocket expense incurred during the course of the service in a currency other than US dollars shall for the purpose of the SCOPIC clause be converted to US dollars at the rate prevailing at the termination of the services.
 - (iv) In addition to the rates set out above and any out of pocket expenses, the Contractor shall be entitled to a standard bonus of 25% of those rates except that if the out of pocket expenses described in sub-paragraph 5(iii)(b) exceed the applicable tariff rates in Appendix "A" the Contractor shall be entitled to a bonus such that he shall receive in total
 - (a) The actual cost of such men, tugs, other craft and equipment plus 10% of the cost, or
 - (b) The tariff rate for such men, tugs, other craft and equipment plus 25% of the tariff rate whichever is the greater.
6. **Article 13 Award**
 - (i) The salvage services under the Main Agreement shall continue to be assessed in accordance with Article 13, even if the Contractor has invoked the SCOPIC clause. SCOPIC remuneration as assessed under sub-clause 5 above will be payable only by the owners of the vessel and only to the extent that it exceeds the total Article 13 Award (or, if none, any potential Article 13 Award) payable by all salvaged interests (including cargo, bunkers, lubricating oil and stores) before currency adjustment and before interest and costs even if the Article 13 Award or any part of it is not recovered.
 - (ii) In the event of the Article 13 Award or settlement being in a currency other than United States dollars it shall, for the purposes of the SCOPIC clause, be exchanged at the rate of exchange prevailing at the termination of the services under the Main Agreement.

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- (iii) The salvage Award under Article 13 shall not be diminished by reason of the exception to the principle of "No Cure - No Pay" in the form of SCOPIC remuneration.
- 7. **Discount**
If the SCOPIC clause is invoked under sub-clause 2 hereof and the Article 13 Award or settlement (before currency adjustment and before interest and costs) under the Main Agreement is greater than the assessed SCOPIC remuneration then, notwithstanding the actual date on which the SCOPIC remuneration provisions were invoked, the said Article 13 Award or settlement shall be discounted by 25% of the difference between the said Article 13 Award or settlement and the amount of SCOPIC remuneration that would have been assessed had the SCOPIC remuneration provisions been invoked on the first day of the services.
- 8. **Payment of SCOPIC Remuneration**
 - (i) The date for payment of any SCOPIC remuneration which may be due hereunder will vary according to the circumstances.
 - (a) If there is no potential salvage award within the meaning of Article 13 as incorporated into the Main Agreement then, subject to Appendix B(5)(c)(iv), the undisputed amount of SCOPIC remuneration due hereunder will be paid by the owners of the vessel within 1 month of the presentation of the claim. Interest on sums due will accrue from the date of termination of the services until the date of payment at the US prime rate plus 1%.
 - (b) If there is a claim for an Article 13 salvage award as well as a claim for SCOPIC remuneration, subject to Appendix B(5)(c)(iv), 75% of the amount by which the assessed SCOPIC remuneration exceeds the total Article 13 security demanded from ship and cargo will be paid by the owners of the vessel within 1 month and any undisputed balance paid when the Article 13 salvage award has been assessed and falls due. Interest will accrue from the date of termination of the services until the date of payment at the US prime rate plus 1%.
 - (ii) The Contractor hereby agrees to give an indemnity in a form acceptable to the owners of the vessel in respect of any overpayment in the event that the SCOPIC remuneration due ultimately proves to be less than the sum paid on account.
- 9. **Termination**
 - (i) The Contractor shall be entitled to terminate the services under the SCOPIC clause and the Main Agreement by written notice to owners of the vessel with a copy to the SCR (if any) and any Special Representative appointed if the total cost of his services to date and the services that will be needed to fulfil his obligations hereunder to the property (calculated by means of the tariff rate but before the bonus conferred by sub-clause 5(ii) hereof) will exceed the sum of:
 - (a) The value of the property capable of being salvaged; and
 - (b) All sums to which he will be entitled as SCOPIC remuneration
 - (ii) The owners of the vessel may at any time terminate the obligation to pay SCOPIC remuneration after the SCOPIC clause has been invoked under sub-clause 2 hereof provided that the Contractor shall be entitled to at least 5 clear days' notice of such termination. In the event of such termination the assessment of SCOPIC remuneration shall take into account all monies due under the tariff rates set out in Appendix A hereof including time for demobilisation to the extent that such time did reasonably exceed the 5 days' notice of termination.
 - (iii) The termination provisions contained in sub-clause 9(i) and 9(ii) above shall only apply if the Contractor is not restrained from demobilising his equipment by Government, Local or Port Authorities or any other officially recognised body having jurisdiction over the area where the services are being rendered.
- 10. **Duties of Contractor**
The duties and liabilities of the Contractor shall remain the same as under the Main Agreement, namely to use his best endeavours to save the vessel and property thereon and in so doing to prevent or minimise damage to the environment.
- 11. **Article 18 – 1989 Salvage Convention**
The Contractor may be deprived of the whole or part of the payment due under the SCOPIC clause to the extent that the salvage operations thereunder have become necessary or more difficult or more prolonged or the salvaged fund has been reduced or extinguished because of fault or neglect on its part or if the Contractor has been guilty of fraud or other dishonest conduct.
- 12. **Special Casualty Representative ("SCR")**
Once this SCOPIC clause has been invoked in accordance with sub-clause 2 hereof the owners of the vessel may at their sole option appoint an SCR to attend the salvage operation in accordance with the terms and conditions set out in Appendix B. Any SCR so appointed shall not be called upon by any of the parties hereto to give evidence relating to non-salvage issues.
- 13. **Special Representatives**
At any time after the SCOPIC clause has been invoked the Hull and Machinery underwriter (or, if more than one, the lead underwriter) and one owner or underwriter of all or part of any cargo on board the vessel may each appoint one special representative (hereinafter called respectively the "Special Hull Representative" and the "Special Cargo Representative" and collectively called the "Special Representatives") at the sole expense of the appointor to attend the casualty to observe and report upon the salvage operation on the terms and conditions set out in Appendix C hereof. Such Special Representatives shall be technical men and not practising lawyers.
- 14. **Pollution Prevention**
The assessment of SCOPIC remuneration shall include the prevention of pollution as well as the removal of pollution in the immediate vicinity of the vessel insofar as this is necessary for the proper execution of the salvage but not otherwise.
- 15. **General Average**
SCOPIC remuneration shall not be a General Average expense to the extent that it exceeds the Article 13 Award; any liability to pay such SCOPIC remuneration shall be that of the Shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the Article 13 Award shall be made in General Average or under the vessel's Hull and Machinery Policy by the owners of the vessel.
- 16. Any dispute arising out of this SCOPIC clause or the operations thereunder shall be referred to Arbitration as provided for under the Main Agreement.

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APPENDIX A (SCOPIC)1. PERSONNEL

- (a) The daily tariff rate, or pro rata for part thereof, for personnel reasonably engaged on the contract, including any necessary time in proceeding to and returning from the casualty, shall be as follows:
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|---|-----------|
| Office administration, including communications | US\$1,275 |
| Salvage Master | US\$1,900 |
| Naval Architect or Salvage Officer/Engineer | US\$1,585 |
| Assistant Salvage Officer/Engineer | US\$1,270 |
| Diving Supervisor | US\$1,270 |
| HSE qualified diver or his equivalent but excluding saturation or mixed gas divers (whose rate should be agreed with the SCR or determined by the Arbitrator) | US\$1,140 |
| Salvage Foreman | US\$ 950 |
| Riggers, Fitters, Equipment Operators | US\$ 760 |
| Specialist Advisors – Fire Fighters, Chemicals, Pollution Control | US\$1,275 |
- (b) The crews of tugs, and other craft, normally aboard that tug or craft for the purpose of its customary work are included in the tariff rate for that tug or craft but when because of the nature and/or location of the services to be rendered, it is a legal requirement for an additional crew member or members to be aboard the tug or craft, the cost of such additional crew will be paid.
- (c) The rates for any personnel not set out above shall be agreed with the SCR or, failing agreement, be determined by the Arbitrator.
- (d) For the avoidance of doubt, personnel are "reasonably engaged on the contract" within the meaning of Appendix A sub-clause 1(a) hereof if, in addition to working, they are eating, sleeping or otherwise resting on site or travelling to or from the site; personnel who fall ill or are injured while reasonably engaged on the contract shall be charged for at the appropriate daily tariff rate until they are demobilised but only if it was reasonable to mobilise them in the first place.
- (e) SCOPIC remuneration shall cease to accrue in respect of personnel who die on site from the date of death.

2. TUGS AND OTHER CRAFT

- (a) (i) Tugs, which shall include salvage tugs, harbour tugs, anchor handling tugs, coastal/ocean towing tugs, off-shore support craft, and any other work boat in excess of 500 b.h.p., shall be charged at the following rates, exclusive of fuel or lubricating oil, for each day, or pro rata for part thereof, that they are reasonably engaged in the services, including proceeding towards the casualty from the tugs location when SCOPIC is invoked or when the tugs are mobilised (whichever is the later) and from the tugs position when their involvement in the services terminates to a reasonable location having due regard to their employment immediately prior to their involvement in the services and standing by on the basis of their certificated b.h.p.:
- | | |
|--|----------|
| For each b.h.p. up to 5,000 b.h.p. | US\$2.80 |
| For each b.h.p. between 5,001 & 12,000 b.h.p. | US\$2.00 |
| For each b.h.p. between 12,001 & 20,000 b.h.p. | US\$1.40 |
| For each b.h.p. over 20,000 b.h.p. | US\$0.70 |
- (ii) Any tug which has aboard certified fire fighting equipment shall, in addition to the above rates, be paid:
- US\$690 per day, or pro rata for part thereof, if equipped with FI Fi 0.5
 US\$1,375 per day, or pro rata for part thereof, if equipped with FI Fi 1.0
- for that period in which the tug is engaged in fire fighting necessitating the use of the certified fire fighting equipment.
- (iii) Any tug which is certified as "Ice Class" shall, in addition to the above, be paid US\$1,375 per day, or pro rata for part thereof, when forcing or breaking ice during the course of services including proceeding to and returning from the casualty.
- (iv) For the purposes of paragraph 2(a)(i) hereof tugs shall be remunerated for any reasonable delay or deviation for the purposes of taking on board essential salvage equipment, provisions or personnel which the Contractor reasonably anticipates he shall require in rendering the services which would not normally be found on vessels of the tugs size and type.
- (b) Any launch or work boat of less than 500 b.h.p. shall, exclusive of fuel and lubricating oil, be charged at a rate of US\$4.15 for each b.h.p.
- (c) Any other craft, not falling within the above definitions, shall be charged out at a market rate for that craft, exclusive of fuel and lubricating oil, such rate to be agreed with the SCR or, failing agreement, determined by the Arbitrator.
- (d) All fuel and lubricating oil consumed during the services shall be paid at cost of replacement and shall be treated as an out of pocket expense.
- (e) For the avoidance of doubt, the above rates shall not include any portable salvage equipment normally aboard the tug or craft and such equipment shall be treated in the same manner as portable salvage equipment and the Contractors shall be reimbursed in respect thereof in accordance with Appendix A paragraphs 3 and 4(i) and (ii) hereof.
- (f) SCOPIC remuneration shall cease to accrue in respect of tugs and other craft which become a commercial total loss from the date they stop being engaged in the services plus a reasonable period for demobilisation (if appropriate) PROVIDED that such SCOPIC remuneration in respect of demobilisation shall only be payable if the commercial total loss arises whilst engaged in the services and through no fault of the Contractors, their servants, agents or sub-contractors.

*Salvage Convention 1989***PORTABLE SALVAGE EQUIPMENT**

- (a) The daily tariff, or pro rata for part thereof, for all portable salvage equipment reasonably engaged during the services, including any time necessary for mobilisation and demobilisation, shall be as follows:

<u>Equipment</u>	<u>Rate – US\$</u>	<u>Equipment</u>	<u>Rate – US\$</u>
<u>Generators</u>		<u>Protective Clothing/Safety Equipment</u>	
Up to 50 kW	75	Breathing Gear	64
51 to 120 kW	158	Hazardous Environment Suit	126
121 to 300 kW	253	Cooler; Evaporative; 36", 9800 Cfm, 110v	100
Over 301 kW	443	Heater 55,000/110,000 Btu	250
		Gas Monitor; Four Gas Types	175
<u>Compressors</u>		Nitrogen Generator – 1500 SCFH @ 96%, 220v	2,450
185 Cfm	190	PPE; Ascending/Descending package: 4 Man	350
600 Cfm	317	PPE; Bunker Gear Pkg: 1 Man	125
1200 Cfm	506	PPE; Chemical Suit Pkg: Class A: 1 Man	145
Air Manifold	13	PPE; Chemical Suit Pkg: Class B: 1 Man	25
Blower; 1,500m ³ /min.	1,076	PPE; Cold Weather 1 st Response Kit	35
		PPE; Confined Space Entry 2 Man package, with Communications	525
<u>Distribution Boards</u>		PPE; Survival Suit, Immersion	10
Up to 50 kW	75	Ventilation Pkg: Vane Axial: 1,500 Cfm	100
51 to 120 kW	158	Ventilation Pkg: Venturi Type: 4,000 Cfm	115
121 to 300 kW	253		
Over 301 kW	443	<u>Pollution Control Equipment</u>	
<u>Hoses: Per 6 Metres or 20 Feet</u>		Hot Tap Machine, including support equipment	1,265
<u>Air Hose</u>		Oil Boom, 24", per 10 metres	39
¾"	5	Oil Boom, 36", per 10 metres	126
2"	10	Oil Boom, 48", per 10 metres	246
<u>Layflat</u>		Ballast/Fuel storage Bins upto 10,000 litres	75
2"	14	Ballast/Fuel storage Bins 10,000 to 25,000 litres	100
4"	19	Ballast/Fuel storage Bins 25,000 to 50,000 litres	126
6"	25		
<u>Rigid</u>		<u>Pumping Equipment</u>	
2"	19	<u>Air</u>	
3"	22	1"	65
4"	25	2"	95
6"	32	3"	110
8"	38	<u>Diesel</u>	
		2"	64
		4"	114
		6"	152
<u>Miscellaneous Equipment</u>		<u>Electrical Submersible</u>	
Air Bags, less than 5 tons lift	50	2"	64
Air Bags 5 to 15 tons lift	253	4"	190
Air Lift 4"	126	6"	759
Air Lift 6"	253	<u>Hydraulic</u>	
Air Lift 8"	379	3"	500
Air Tugger, up to 3 tons	95	6"	759
Chain Saw	25	8"	1,265
Container handling package	200		
Communications package	200	<u>Lighting Systems</u>	
Damage Stability Computer and Software	315	Halogen system	100
Echo Sounder, portable	32	Lighting String, per 50 feet	32
Extension Ladder	25	Light Tower	64
Hydraulic Jack, up to 50 tons	50	Underwater Lighting System, 1,000 watts	95
Hydraulic Jack, up to 120 tons	95		
Hydraulic Powerpack up to 40kW	60	<u>Winches</u>	
Hydraulic Powerpack 75kW	95	Up to 5 tons, including 50 metres of wire	150
Pressure washer, water	316	Up to 10 tons, including 50 metres of wire	175
Pressure washer, steam	570	Up to 20 tons, including 50 metres of wire	250
Rigging Package, heavy	506		
Rigging Package, light	253	<u>Fenders</u>	
Steel band Saw	25		
Tirfors, up to 5 tonnes	14	<u>Yokohama</u>	
Thermal Imaging Camera	316	1.00m. x 2.00m.	95
Tool Package, per set	220	2.50m. x 5.50m.	190
Ventilation Package	25	3.50m. x 6.50m.	317
VHF Radio	14	<u>Low Pressure Inflatable</u>	
Z Boat, including outboard up to 14 feet	253	3 metres	89
Z Boat, including outboard over 14 feet	443	6 metres	89
		9 metres	190
<u>Diving Equipment</u>		12 metres	316
High Pressure Compressor 3500 psi/17 Cfm	200	18 metres	316
High Pressure Compressor 5500 psi/5 Cfm	115		
Decompression Chamber with Medical Lock	325	<u>Shackles</u>	
Decompression Chamber: Two Man, including compressor	632	Up to 50 tonnes	13
Decompression Chamber: Four Man, including compressor	885	51 to 120 tonnes	25
Hot Water Diving Assembly	316	121 to 200 tonnes	39
Underwater Magnets	25	Over 200 tonnes	64
Underwater Drill	25		
Shallow Water Dive Spread	285		

Report of the IWG on Review of the Salvage Convention 1989 – Annex 11

<u>Equipment</u>	<u>Rate – US\$</u>	<u>Equipment</u>	<u>Rate – US\$</u>
<u>Welding & Cutting Equipment</u>		<u>Storage Equipment</u>	
Bolt Gun	380	12' Container	32
Oxy-acetylene Surface Cutting Gear	32	20' Container	50
Underwater Cutting Gear	64		
Underwater Welding Kit	64		
250 Amp Welder	190		
400 Amp Welder	253		

- (b) Any portable salvage equipment engaged but not set out above shall be charged at a rate to be agreed with the SCR or, failing agreement, determined by the Arbitrator.
- (c) The total charge (before bonus) for each item of portable salvage equipment, owned by the contractor, shall not exceed the manufacturer's recommended retail price on the last day of the services multiplied by 2.0.
- (d) Compensation for any portable salvage equipment lost or destroyed during the services shall be paid at the replacement cost. (Provided that the total of such compensation and the daily tariff rate (before bonus) in respect of that item does not exceed the actual cost of replacing the item at the Contractor's base with the most similar equivalent new item multiplied by 2.5.)
- (e) All consumables such as welding rods, boiler suits, small ropes etc. shall be charged at cost and shall be treated as an out of pocket expense.
- (f) The Contractor shall be entitled to remuneration at a stand-by rate of 50% of the full tariff rate plus bonus for any portable salvage equipment reasonably mobilised but not used during the salvage operation provided
- (i) It has been mobilised with the prior agreement of the owner of the vessel or its mobilisation was reasonable in the circumstances of the casualty, or
 - (ii) It comprises portable salvage equipment normally aboard the tug or craft that would have been reasonably mobilised had it not already been aboard the tug or craft.
- (g) SCOPIC remuneration shall cease to accrue in respect of portable salvage equipment which becomes a commercial total loss from the date it ceases to be useable plus a reasonable period for demobilisation (if appropriate) PROVIDED that such SCOPIC remuneration in respect of demobilisation shall only be payable if the commercial total loss arises while it is engaged in the services and through no fault of the Contractors, their servants, agents or sub-contractors.

4. DOWNTIME

If a tug or piece of portable salvage equipment breaks down or is damaged without fault on the part of the Contractor, his servants, agents or sub-contractors and as a direct result of performing the services it should be paid for during the repair while on site at the stand-by rate of 50% of the tariff rate plus uplift pursuant to sub-clause 5(iv) of the SCOPIC clause.

If a tug or piece of portable salvage equipment breaks down or otherwise becomes inoperable without fault on the part of the Contractor, his servants, agents or sub-contractors and as a direct result of performing the services and cannot be repaired on site then:

- (i) If it is not used thereafter but remains on site then no SCOPIC remuneration is payable in respect of that tug or piece of portable salvage equipment from the time of the breakdown.
- (ii) If it is removed from site, repaired and reasonably returned to the site for use SCOPIC remuneration at the standby rate of 50% of the tariff rate plus bonus pursuant to sub-clause 5(iv) of the SCOPIC clause shall be payable from the breakdown to the date it is returned to the site.
- (iii) If it is removed from the site and not returned SCOPIC remuneration ceases from the breakdown but is, in addition, payable for the period that it takes to return it directly to base at the stand-by rate of 50% of the tariff rate plus bonus pursuant to sub-clause 5(iv) of the SCOPIC clause.

Salvage Convention 1989

SCOPIC 2011

APPENDIX B (SCOPIC)

1. (a) The SCR shall be selected from a panel (the "SCR Panel") appointed by a Committee (the "SCOPIC Committee") comprising of representatives appointed by the following:
 - 3 representatives from the International Group of P and I Clubs
 - 3 representatives from the ISU
 - 3 representatives from the IUMI
 - 3 representatives from the International Chamber of Shipping
- (b) The SCOPIC Committee shall be responsible for a triennial review of the tariff rates as set out in Appendix A.
- (c) The SCOPIC Committee shall meet once a year in London to review, confirm, reconfirm or remove SCR Panel members.
- (d) Any individual may be proposed for membership of the SCR Panel by any member of the SCOPIC Committee and shall be accepted for inclusion on the SCR Panel unless at least four votes are cast against his inclusion.
- (e) The SCOPIC Committee may also set and approve the rates of remuneration for the SCR's.
- (f) Members of the SCOPIC Committee shall serve without compensation.
- (g) The SCOPIC Committee's meetings and business shall be organised and administered by the Salvage Arbitration Branch of the Corporation of Lloyd's (hereinafter called "Lloyds") who will keep the current list of SCR Panel members and make it available to any person with a bona fide interest.
- (h) The SCOPIC Committee shall be entitled to decide its own administrative rules as to procedural matters (such as quorums, the identity and power of the Chairman etc.).
2. The primary duty of the SCR shall be the same as the Contractor, namely to use his best endeavours to assist in the salvage of the vessel and the property thereon and in so doing to prevent and minimise damage to the environment.
3. The Salvage Master shall at all times remain in overall charge of the operation, make all final decisions as to what he thinks is best and remain responsible for the operation.
4. The SCR shall be entitled to be kept informed by or on behalf of the Salvage Master or (if none) the principal contractors' representative on site (hereinafter called "the Salvage Master"). The Salvage Master shall consult with the SCR during the operation if circumstances allow and the SCR, once on site, shall be entitled to offer the Salvage Master advice.
5. (a) Once the SCOPIC clause is invoked the Salvage Master shall send daily reports (hereinafter called the "Daily Salvage Reports") setting out:-
 - the salvage plan (followed by any changes thereto as they arise)
 - the condition of the casualty and the surrounding area (followed by any changes thereto as they arise)
 - the progress of the operation
 - the personnel, equipment, tugs and other craft used in the operation that day.
- (b) Pending the arrival of the SCR on site the Daily Salvage Reports shall be sent to Lloyd's and the owners of the vessel. Once the SCR has been appointed and is on site the Daily Salvage Reports shall be delivered to him.
- (c) The SCR shall upon receipt of each Daily Salvage Report:-
 - (i) Transmit a copy of the Daily Salvage Report by the quickest method reasonably available to Lloyd's, the owners of the vessel, their liability insurers and (if any) to the Special Hull Representative and Special Cargo Representative (appointed under clause 12 of the SCOPIC clause and Appendix C) if they are on site; and if a Special Hull Representative is not on site the SCR shall likewise send copies of the Daily Salvage Reports direct to the leading Hull Underwriter or his agent (if known to the SCR) and if a Special Cargo Representative is not on site the SCR shall likewise send copies of the Daily Salvage Reports to such cargo underwriters or their agent or agents as are known to the SCR (hereinafter in this Appendix B such Hull and Cargo property underwriters shall be called "Known Property Underwriters").
 - (ii) If circumstances reasonably permit consult with the Salvage Master and endorse his Daily Salvage Report stating whether or not he is satisfied and

Report of the IWG on Review of the Salvage Convention 1989 – Annex 11

- (iii) If not satisfied with the Daily Salvage Report, prepare a dissenting report setting out any objection or contrary view and deliver it to the Salvage Master and transmit it to Lloyd's, the owners of the vessel, their liability insurers and to any Special Representatives (appointed under clause 12 of the SCOPIC clause and Appendix C) or, if one or both Special Representatives has not been appointed, to the appropriate Known Property Underwriter.
- (iv) If the SCR gives a dissenting report to the Salvage Master in accordance with Appendix B(5)(c)(iii) to the SCOPIC clause, any initial payment due for SCOPIC remuneration shall be at the tariff rate applicable to what is in the SCR's view the appropriate equipment or procedure until any dispute is resolved by agreement or arbitration.
- (d) Upon receipt of the Daily Salvage Reports and any dissenting reports of the SCR, Lloyd's shall distribute upon request the said reports to any parties to this contract and any of their property insurers of whom they are notified (hereinafter called "the Interested Persons") and to the vessel's liability insurers.
- (e) As soon as reasonably possible after the Salvage services terminate the SCR shall issue a report (hereinafter call the "SCR's Final Salvage Report") setting out:
 - the facts and circumstances of the casualty and the salvage operation insofar as they are known to him.
 - the tugs, personnel and equipment employed by the Contractor in performing the operation.
 - A calculation of the SCOPIC remuneration to which the contractor may be entitled by virtue of this SCOPIC clause.

The SCR's Final Salvage Report shall be sent to the owners of the vessel and their liability insurers and to Lloyd's who shall forthwith distribute it to the Interested Persons.
- 6. (a) The SCR may be replaced by the owner of the vessel if either:
 - (i) the SCR makes a written request for a replacement to the owner of the vessel (however the SCR should expect to remain on site throughout the services and should only expect to be substituted in exceptional circumstances); or
 - (ii) the SCR is physically or mentally unable or unfit to perform his duties; or
 - (iii) all salvaged interests or their representatives agree to the SCR being replaced.
- (b) Any person who is appointed to replace the SCR may only be chosen from the SCR Panel.
- (c) The SCR shall remain on site throughout the services while he remains in that appointment and until the arrival of any substitute so far as practicable and shall hand over his file and all other correspondence, computer data and papers concerning the salvage services to any substitute SCR and fully brief him before leaving the site.
- (d) The SCR acting in that role when the services terminate shall be responsible for preparing the Final Salvage Report and shall be entitled to full co-operation from any previous SCR's or substitute SCR's in performing his functions hereunder.
- 7. The owners of the vessel shall be primarily responsible for paying the fees and expenses of the SCR. The Arbitrator shall have jurisdiction to apportion the fees and expenses of the SCR and include them in his award under the Main Agreement and, in doing so, shall have regard to the principles set out in any market agreement in force from time to time.
- 8. Any SCR appointed pursuant to this Agreement shall not be called by any of the parties hereto to give evidence relating to non-salvage issues.

Salvage Convention 1989

SCOPIC 2007**APPENDIX C (SCOPIC)****The Special Representatives**

1. The Salvage Master, the owners of the vessel and the SCR shall co-operate with the Special Representatives and shall permit them to have full access to the vessel to observe the salvage operation and to inspect such of the ship's documents as are relevant to the salvage operation.
2. The Special Representative shall have the right to be informed of all material facts concerning the salvage operation as the circumstances reasonably allow.
3. If an SCR has been appointed the SCR shall keep the Special Representatives (if any and if circumstances permit) fully informed and shall consult with the said Special Representatives. The Special Representatives shall also be entitled to receive a copy of the Daily Salvage Reports direct from the Salvage Master or, if appointed, from the SCR.
4. The appointment of any Special Representatives shall not affect any right that the respondent ship and cargo interests may have (whether or not they have appointed a Special Representative) to send other experts or surveyors to the vessel to survey ship or cargo and inspect the ship's documentation or for any other lawful purpose.
5. If an SCR or Special Representative is appointed the Contractor shall be entitled to limit access to any surveyor or representative (other than the said SCR and Special Representative or Representatives) if he reasonably feels their presence will substantially impede or endanger the salvage operation.

ROTTERDAM RULES

The Rotterdam Rules at Beijing

by MICHAEL F. STURLEY

THE ROTTERDAM RULES AT BEIJING

BY MICHAEL F. STURLEY*

The Rotterdam Rules – adopted by the UN General Assembly on December 11, 2008, and opened for signature at a Ceremony in Rotterdam on September 23, 2009 – will be discussed by a distinguished group of speakers from around the World. Many were involved in the drafting of the Rules, and all have delivered influential papers on the Rules at Conferences, Colloquia, and Seminars sponsored by the CMI and other organizations.

The first panel will provide seven updates on the current status of the Rules. The Secretary of the United Nations Commission on International Trade Law (UNCITRAL), the UN entity responsible for negotiating the Rules, will give an overall update (to be read by President Karl-Johan Gombrii). Six expert speakers will then provide updates for various countries or regions: Song Dihuang for China, Michael Sturley for the United States, Stephen Girvin for the rest of the Asia-Pacific region, Gertjan van der Ziel for Europe, José Vicente Guzmán for Latin America, and Kofi Mbiah for Africa.

The second panel, consisting of Andrew Bardot, José Vicente Guzmán, Kofi Mbiah, Si Yuzhuo, Alexander von Ziegler, and Zhang Yongjan, will deliver traditional presentations on substantive topics. Although precise topics are still being refined and finalized, the range will be broad — from the relationship between the Rotterdam Rules and the underlying sales contract to the need to update and modernize the existing cargo regimes.

In the third session, an expert panel, consisting of Stuart Beare, Tomotaka Fujita, Stephen Girvin, and Gertjan van der Ziel will address the Rotterdam Rules' treatment of various real-world problems in the context of a number of hypothetical problems. The intention is that delegates will obtain a better understanding of the Rules' effectiveness if they can see how the Rules will work in concrete situations.

Following the presentations, the floor will be open for audience participation with a general discussion and a Question-and Answer-session. Participants are invited to submit their questions in advance, either before the session starts or during the conference itself.

* University of Texas Law School.

YORK ANTWERP RULES

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**COMITE MARITIME INTERNATIONAL, AISBL****PRESIDENT**

To the Presidents of the National Maritime Law Associations

cc: Titulary Members
Consultative Members

Oslo 25 June, 2012

Dear President,

Please find attached a report on the work by an International Working Group regarding a proposed revision of the York-Antwerp Rules (YAR).

As you will see, the proposal aims at solving an impasse which has prevented a wide use and application of YAR 2004. The proposal will be considered at the CMI Conference in Beijing from 14 to 19 October this year, see www.cmi2012beijing.org.

I would be very grateful if your Association could review the proposal and submit any comments it wants to make as soon as conveniently possible and no later than by 31 August.

The comments so received will be included in the documentation for the Conference and together with the report and the draft proposal providing the basis for the deliberations in Beijing on this topic.

Best regards,

A handwritten signature in dark ink, appearing to read "K. Gombrii", written over the typed name.

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REVISION OF THE YORK ANTWERP RULES 2004 (TO BE KNOWN AS YORK ANTWERP RULES 2012)

REPORT TO THE NATIONAL MARITIME LAW ASSOCIATIONS

BY KARL-JOHAN GOMBRII, RICHARD SHAW AND BENT NIELSEN

0. Introduction

This report deals with a proposal to change the YAR 2004 to ensure that the amended Rules become acceptable to the broadest possible range of commercial interests and achieve a fast and widespread application. The draft changes are set out in Annex 2 of this Report.

National Maritime Law Associations are invited to provide their written comments to the proposal, which should be received by CMI's secretariat not later than 31 August 2012.

Comments received, together with this Report, will be included as working documents at the CMI Conference to be held in Beijing from 14 to 19 October 2012 where it is hoped that the new YAR (YAR 2012) can be finally agreed and approved by the Plenary of the Conference.

The scope of the proposed changes is limited, and the purpose is restricted to solving an impasse which has prevented a general acceptance of YAR 2004. It follows that the proposal is not meant to be a general revision of the YAR. Therefore, the CMI will on this occasion not be in a position to deal with proposals to amend the YAR which fall outside the scope of these proposed changes. Only this limited revision will be on the Agenda at the Conference in Beijing in the same way as when Rule VI was amended in Paris in 1990 as a consequence of the new rules in the Salvage Convention of 1989.

At the Conference, the proposed YAR 2012 will be considered and amendments made as may be necessary in Conference sessions chaired by Bent Nielsen and assisted by Richard Shaw as Rapporteur (for details of the Conference Programme see www.cmi2012beijing.org). The result of the deliberations by delegates at these sessions will be submitted to the Plenary of the Conference on 19 October for consideration and, hopefully, adoption.

1. Background

The YAR 2004 have been unacceptable to many shipowners and shipowners' organizations, including BIMCO which has issued circulars to its

York Antwerp Rules

members recommending against the use of the Rules and has refrained from incorporating the Rules in their standard documents. As a result, YAR 2004 are very rarely incorporated into shipping contracts and therefore very rarely used. The CMI therefore initiated informal discussions with BIMCO in order to ascertain if it would be possible to overcome obstacles to their general acceptance.

The matter was discussed in a meeting held on 12 September 2011 between Torben Skaanild and Soren Larsen of BIMCO and Karl-Johan Gombrii and Bent Nielsen for CMI, and again on 28 September between the same persons except that Karel Stes, the chairman of the BIMCO Documentary Committee, attended while Torben Skaanild did not.

Following subsequent e-mail correspondence and telephone conversations between the persons involved, the Documentary Committee of BIMCO at its meeting on 6 November 2011 accepted CMI's proposal that a joint working group should consider the matter further and try to agree on a solution/wording which could form the basis for general agreement and acceptance by all interested parties.

The joint working group met on 16 December at BIMCO House in Copenhagen with Karel Stes, Donald Chard (of the UK Chamber of Shipping), Richard Cornah (of Richards Hogg Lindley), Soren Larsen and Grant Hunter (the latter two BIMCO Secretariat) attending for BIMCO, and Bent Nielsen and Richard Shaw attending for CMI (Karl-Johan Gombrii being prevented from attending)

At this meeting possible amendments to YAR 2004 were debated *ad referendum*, on the understanding that the participants had no mandate to bind anybody. While there was agreement in principle to support a solution relating to salvage (including a new Rule of Application), the CMI representatives could not support BIMCO's proposal also to reinstate Rule XI regarding the allowance in GA of crew wages in a port of refuge which had been excluded by YAR 2004. The opposition was on the assumption that the proposed change to Rule XI would not attract general support and in particular be opposed by cargo underwriters. It was however agreed to continue the efforts to find a solution.

Subsequently informal consultations with IUMI (which had initiated the work resulting in the YAR 2004) have shown that (in their words): "the proposed reforms as a package (including the restoration of Rule XI) would carry IUMI's approval assuming no new concessions are requested, the Rule of Application goes in and BIMCO's Documentary Committee amends their standard documents as quickly as reasonably practicable to incorporate the YAR 2012 if they are adopted at the CMI's Conference in Beijing in October 2012".

On this basis CMI decided to put the revision of YAR 2004 on the Agenda for CMI's International Conference in October 2012 and to establish an International Working Group (IWG) to consider the proposed reforms further (particularly the drafting). The idea was to create a group with representation

from major stakeholders as shipowners, underwriters and average adjusters. However, for the group to be efficient and since the work was still at an initial stage and would be submitted for consideration by all interested parties and organizations at the Conference in Beijing, the IWG was limited in size.

The IWG met in Copenhagen 21 March 2012 in the offices of Kromann Reumert and consisted of Donald Chard, Paul Silver, of the Average Adjusters Association, and Soren Larsen (BIMCO), Ben Browne (IUMI), Michael Harvey (AMD – Association Mondiale de Dispatcheurs), Andrew Bardot (International Group of P&I Clubs, as observer), Karl-Johan Gombrii and Bent Nielsen (CMI).

Tentative agreement was reached regarding the principles and drafting of the proposed amendments in order to create a set of Rules (YAR 2012) which would hopefully pave the way for their general acceptance and be widely applied, it being understood that the members of the IWG participated in their personal capacities and were generally not in a position to commit the various stakeholders they may be linked to.

In subsequent correspondence the drafting has been further refined and the participants of the IWG have generally agreed to the final version of the draft clauses as annexed to this report (which in their final form were drafted by Michael Harvey).

Approval of the draft is subject to a satisfactory percentage figure in Rule VI(b) being agreed in Beijing (which figure has been left blank in the draft). The percentage figure will work as a “trigger” and decide which salvage cases will be allowed in General Average (GA) and which will be excluded. The thinking behind the draft is generally to allow salvage costs in GA only in cases where the result would be a substantial redistribution of the costs between cargo and hull interests. The proposal is that salvage will not be allowed in GA where it is the main element of GA expenditure – how main will be dependent upon the percentage agreed. In this context IUMI has expressly noted that they will only support the amendment to Rule VI if the percentage in effect excludes a substantial proportion of salvage cases from GA under the revised 2004 Rules.

To assist the reader in evaluating the proposed Rule VI (b) and the “trigger” to be inserted, a set of examples that are intended to illustrate the matter is attached hereto as Annex 2.

2. Summary of new rules in YAR 2004 as compared to YAR 1994.

The following is a summary of the amendments made to YAR 1994 by the YAR 2004:

RULE VI. SALVAGE REMUNERATION

This was amended to exclude the allowance of salvage from G.A., except in cases where one party to the salvage has paid all or any of the proportion of salvage due from another party.

York Antwerp Rules

RULE XI. EXPENSES AT PORT OF REFUGE

This was amended to exclude the allowance in G.A. of wages and maintenance of master, officers and crew while the vessel is detained at a port of refuge.

RULE XIV. TEMPORARY REPAIRS

A second sentence was added to Rule X IV b), the effect of which is that recovery in G.A. of the cost of temporary repairs of accidental damage at a port of refuge is limited to the amount by which the estimated cost of the permanent repairs at the port of refuge exceeds the sum of the temporary repairs plus the permanent repairs actually carried out. This capping of the amount allowed as temporary repairs has sometimes been referred to as the “Baily” method.

RULE XX. PROVISION OF FUNDS

This was amended to abolish commission on G.A. disbursements.

RULE XXI. INTEREST ON LOSSES

This was amended to the effect that the Interest charged is no longer a fixed rate, but a rate that will be fixed each year by the Assembly of the CMI. The CMI publishes this on its website www.comitemaritime.org.

RULE XXIII. TIME BAR

A new rule was added to the YAR 2004 providing for any rights to G.A. contribution to be time-barred after a period of one year after the date of the G.A. adjustment or six years after the date of termination of the common maritime adventure, whichever comes first. The rule recognizes that its provisions may be invalid in some countries.

POLISHING THE TEXT OF THE YAR 1994

Interchangeable terms were standardized such as “admitted in”, “allowed in” and “admitted as” now all became “allowed as”. Some terms have been modernized and a consistent numbering of paragraphs was introduced.

3. The proposed amendments of YAR 2004**3.0 *Proposed Draft Clauses***

The draft amendments as agreed by the IWG are annexed to this report as Annex 2 and commented below.

3.1 *Salvage*

Rule VI(a)

The IWG considered this rule should mirror Rule VI(a) of the 1994 Rules. Minor amendments have been made accordingly.

Rule VI(b)

This is the main proposal regarding the treatment of salvage payments.

It is appreciated that there is a strong feeling among many shipowners and shipowners' associations that Rule VI of the 2004 YAR is truly unacceptable in its present form and that this has been a major reason for their resisting YAR 2004. On the other hand it should be recalled that the allowance of salvage in all cases is of no use in the many cases where this is only a confirmation of what was already a fact when the salvage shares were paid by the parties in proportion to salvaged values. In such cases the abolition of the allowance of salvage would save considerable (and unnecessary) duplication of costs and work, as well as avoid much delay.

The IWG has considered possible solutions where salvage was only allowed in GA if this would result in a substantial redistribution. This however appeared to necessitate a complex set of new provisions with the resulting risks of difficult application and interpretation. It was therefore thought better to propose the simple and straightforward provision in Rule VI (b) which would be easier to use.

As can be appreciated, the IWG's proposal represents a broad compromise between the opposing interests and it is expected that a balanced solution can be found at the CMI conference concerning the percentage figure which should be inserted in the new rule.

Rule VI(c)

This rule restates the part of Rule VI (a) in YAR 2004 where exception is made from the rule that salvage shall not be allowed. It deals with the situation where one party has made salvage payment(s) for other parties in cases where salvage is not allowed in GA under the proposed Rule VI(b).

Rule VI (d) and (e)

These rules restate the rules in YAR 1974 (as amended in 1990) as well as YAR 1994 and 2004 regarding "enhancement" and "special compensation" under the 1989 Salvage Convention or similar provisions.

Rule VI (f)

This rule is an attempt to solve an existing uncertainty regarding the interpretation of YAR 2004, making it clear the exception of allowance of salvage money does not relate to payments for services for which there is no legal or contractual provision for apportionment between the salvaged interests. It mirrors a proposed new provision in the AAA Rules of Practice. The Rule in particular clarifies that contract towage and claims under Rule VIII are not covered by Rule VI.

3.2 Crew Wages Rule XI

It is proposed to revert to the situation under YAR 1994 and therefore reinstate allowance in GA of crew wages etc. in a port of refuge.

During the work resulting in YAR 2004, IUMI proposed that the common

benefit principle be abolished entirely. This radical proposal was much debated and met strong opposition. The final result was a decision to limit this to the abolition of allowance of crew wages etc. incurred in a port of refuge. This is estimated to have the financial effect of redistributing only 1-2 % of the sums allowable in GA. The proposed reinstatement (and IUMI's approval) may be seen against this background.

3.3 Rule of Application

Most of BIMCO's existing GA clauses provide for the application of YAR 1994 (or 1974) "and any amendments thereof" or words to that effect. The purpose of the proposed Rule is to make YAR 2012 covered by such GA clauses to the extent possible. It is realised that some courts may hesitate to accept that the new Rule of Application can have any effect on the interpretation of older GA clauses. However, other courts may accept this and find the rule useful.

The rule is expected to save the printing of new standard documents, help in solving any uncertainty whether the "new" YAR is covered by terms like "any amendments thereof" and assist in a fast and widespread application of the new amended YAR.

The IWG has proposed that this rule be inserted as the first provision of the YAR before the Rule of Interpretation.

21 June, 2012

ANNEX 1

EXAMPLES OF REDISTRIBUTION OF SALVAGE PAYMENTS IN GA

(PREPARED BY BENT NIELSEN)

In many cases it will make no difference if salvage payments are allowed in GA. The salvaged parties' shares of the reward will be approximately the same and the allowance in GA will be useless as it will not result in any noticeable redistribution.

It is only in the following 4 situations the allowance of a salvage payment in GA will result in a significant redistribution:

- 1) Where there are 2 or more casualties during the voyage leading to a significant difference between the values in the first port of refuge and the final destination.
- 2) Where there are differential settlements with salvors.
- 3) Where damage to vessel or cargo has been allowed in GA.
- 4) Where it is subsequently realized that a salvaged value was wrongly assessed.

The following examples of such cases may assist in evaluating the problems which could be caused if a salvage reward is not allowed in GA.

It should be noted that the fact that the examples all have the result that the ship-owner's share of the reward is increased in the redistribution does not mean that this will happen in all cases. Other examples may be construed in which the ship-owners gain and the cargo interest lose by the redistribution.

All examples relate to a winter-voyage from Antwerp to Montreal with a project cargo of which one large item is carried on deck. The ship's sound value is USD12mio. The total cargo value is USD10 mio. of which the value of the deck cargo is USD5 mio. The vessel suffers an engine failure and grounds on rocks near Ushant. Salvage tugs pull the vessel off and tow it to Brest. After repairs of the engine and bottom damage the voyage is resumed. The total costs of repairs are USD2 mio. The total salvage reward is USD 4 mio. It is shared in proportion to the salvaged values i.e. cargo USD10 mio and ship USD 10 mio (sound value at USD12 mio. minus repairs at USD 2mio.) Consequently the ship-owners and the cargo interests each pay USD 2 mio to salvors.

ANNEX 1**EXAMPLE 1)**

Two or more casualties during the voyage are leading to a significant difference in the values between the first port of refuge and the final destination.

In this example it is assumed that the deck cargo is lost overboard in heavy weather on the voyage from Brest to Montreal. Under YAR Rule XVII a. the contribution to GA shall be made on the basis of the values in the port of destination.

Cargo value in Montreal USD 5 mio. Vessel value USD10 mio. If salvage is allowed in the GA the ship-owners share is 10/ 15 of the reward or USD 2.67 mio. while the cargo interests share is USD1.33 mio. Thus the shipowners must now pay USD 0.67 mio. more and cargo interest USD 0.67mio. less of the reward.

EXAMPLE 2) Differential settlements with salvors.

In this example it is assumed that the ship-owners soon after the casualty settle their share of the reward at USD 1 mio. while the cargo interests insist on arbitration where their share is fixed at USD 2 mio.

If salvage is allowed in GA the total reward at USD 3 mio. is redistributed on the basis of the values in Montreal at USD 10 mio for the ship-owners and the cargo interest respectively. Thus the ship-owners must now carry USD 1.5 mio. of the reward and pay USD 0.5mio.of the arbitration reward against the cargo interest.

EXAMPLE 3) Damage to vessel or cargo has been allowed in GA.

In this example it is assumed that the vessel's bottom is heavily damaged as a result of the refloating and that USD 1 mio. of the costs of repairs relate to this. This refloating loss is allowed in GA .However, under YAR Rule XVII b. such an allowance shall be added to the value of the ship when its contributory value is assessed.

If salvage is allowed in GA the total reward at USD 4 mio. is redistributed on the basis of the ship's contributory value at USD 11 mio and a cargo value at USD 10 mio.

Thus the ship-owners share is 11/21 of the reward and the ship-owners must now carry about USD 2.1 mio and pay about USD 0.1 to the cargo-interests

EXAMPLE 4) A salvaged value was wrongly assessed.

In this example it is assumed that the deck cargo was considered undamaged when the salvage reward was settled. Subsequently however, serious faults are ascertained and the contributory value of the deck cargo assessed to USD 1 mio.

If salvage is allowed in GA the total reward of USD 4 mio. is redistributed on the basis of the ship's contributory value at USD 10 mio. and a cargo value at USD 6 mio.

Thus the ship-owners' share is 10/16 of the reward and the shipowners must now carry USD. 2.5 mio. of the reward and pay USD. 0.5 mio to the cargo-interest.

ANNEX 2**PROPOSED AMENDMENTS OF YAR 2004****Rule VI Salvage Remuneration**

- (a) Except as provided in sub-rules VI (b) and (c) expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in General Average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.
- (b) Salvage payments including interest and legal costs shall not be allowed in General Average if they exceed x per cent of the total sums allowable in general average if salvage were included. The foregoing shall not apply where salvage payments have been paid by one party on behalf of all salvaged interests.
- (c) If one party to the salvage shall have paid a proportion of salvage payments (including interest and legal costs) due from some, but not all, of the salvaged interests (calculated on the basis of salvaged values and not General Average contributory values), the unpaid contribution to salvage due from the other parties plus interest pursuant to Rule XXI shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payments were made.
- (d) Salvage payments referred to in this Rule VI shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Art. 13 paragraph 1(b) of the International Convention on Salvage 1989 have been taken into account.
- (e) Special compensation payable to a salvor by the shipowner under Art. 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance (such as SCOPIC) shall not be allowed in General Average and shall not be considered a salvage payment as referred to in this Rule.
- (f) For the purpose of applying this Rule VI the term “salvage payments” shall mean payments made in respect of salvage services and for which there is contractual and/or legal provision for apportionment and payment between the salvaged interests upon termination of the salvaged services independent of these Rules.

Delete Rule XI (c) (i) & (ii) of YAR 2004 and replace with**Rule XI (c)**

- (i) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage shall be allowed in general average. Fuel and stores consumed during the extra period of detention shall be allowed as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.
- (ii) Port charges incurred during the extra period of detention shall likewise be allowed as general average except such charges as are incurred solely by reason of repairs not allowable in general average.
- (iii) Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and stores consumed and port charges incurred during the extra detention for repairs to damages so discovered shall not be allowable as general average, even if the repairs are necessary for the safe prosecution of the voyage.
- (iv) When the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers and crew and fuel and stores consumed and port charges shall be allowed as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

Rule of Application

These York Antwerp Rules 2012 shall be considered to be an amendment or modification of previous versions of the York Antwerp Rules. Notwithstanding the foregoing, these York Antwerp Rules 2012 shall not apply to contracts of carriage entered into before the formal adoption of the Rules.

REGULATION OF OFFSHORE ACTIVITY POLLUTION LIABILITY AND OTHER ASPECTS

An introduction
by RICHARD SHAW

REGULATION OF OFFSHORE ACTIVITY POLLUTION LIABILITY AND OTHER ASPECTS

AN INTRODUCTION

BY RICHARD SHAW*

A. History

Offshore matters have been on the work programme of the CMI for many years.

Following adoption of the 1969 CLC and 1971 Fund Conventions, an attempt was made¹ to draft an international convention covering liability and compensation for pollution damage caused by offshore exploration and exploitation (the “CLEE” convention) but although this was adopted by a conference in London in 1976, it has never achieved the necessary ratifications for entry into force. This is probably because it contains alternative options for limited and unlimited liability.

Another possible reason is the existence of a private agreement called “OPOL” between certain European Governments and the major participants in their offshore industries². Within its limits however, OPOL has worked well to date, and participating states now require applicants for offshore exploration, exploitation and pipe-laying licenses to be a party to OPOL.

In 1977 the CMI drafted a Convention on Offshore Mobile Craft at its Conference in Rio de Janeiro. This draft, known as the “Rio Draft” was submitted to IMCO for consideration. However, due to other pressing matters³,

* Chairman of the Conference Session on Offshore topics.

¹ In which CMI did not participate actively.

² This agreement called “OPOL” provides for compensation, now (2011) up to a maximum of US\$250 million, to be payable by the operator of the rig causing pollution damage, with payment guaranteed by the other companies who are OPOL members. Of that sum, \$125 million is payable for remedial measures and \$125 million for pollution damage. The agreement only applies to the states the governments of which are parties to it, all of whom are in Europe, and does not apply in the Baltic or Mediterranean Seas.

³ Notably the 1989 Salvage Convention and the revision of the 1969 CLC and 1971 Fund Conventions.

this draft did not come up for active consideration by the IMO Legal Committee until 1990, when a discussion took place as to whether this should be placed on the Legal Committee's Agenda. However, it was decided that before this was done the CMI should be invited to report whether, in the light of developments since 1977, there was a need to revise the Rio Draft.

At the 1994 CMI Conference in Sydney, the plenary session adopted a revised version of the 1977 Rio Draft Convention on Offshore Mobile Craft, which became known as the Sydney Draft. The Conference resolved unanimously that "the CMI establish a working group for the further study and development, where appropriate, of an international convention on offshore units and related matters". A working group consisting of Professor Edgar Gold of Canada, Professor Hisashi Tanikawa of Japan and under the chairmanship of Mr. Richard Shaw of the United Kingdom was established. In 1995 Mr. Nigel Frawley of Canada and Mr. Winston Rice of the United States were appointed as members of the Working Group and an International Subcommittee to develop this subject was appointed.

At the October 1995 meeting of the IMO Legal Committee the Sydney Draft was presented. Mr Shaw attended to support this document. It became quickly apparent, however, that the Sydney Draft did not commend itself to the Legal Committee, which did however encourage the CMI to pursue its efforts in preparing a comprehensive draft treaty.

In 1998 the CMI submitted to the IMO Legal Committee a report⁴ containing a review of the subject, with a survey of the principal legal issues which should, in the view of the CMI International Subcommittee, be covered by such a Convention.

In 2001 the Canadian Maritime Law Association produced a draft framework document for an International Convention on Offshore activities, which was published in the CMI News Letter in 2004⁵.

B. Introduction to the Issues⁶

The original objective of the 1977 Rio draft was to clarify the application of certain recognised principles of maritime law which already applied to ships to the new types of craft developed in connection with the exploration and exploitation of offshore mineral resources, but which did not fall within the recognised definition of a ship. Thus, for example most states' laws relating to the registration of ships do not strictly permit the registration of a mobile offshore drilling unit, nor indeed of a mortgage on such a unit. In practice many such units

⁴ IMO Document LEG 78/10.

⁵ At www.comitemaritime.org then click on Newsletter 2004 no 1.

⁶ A useful survey of this may be found in the paper by Lucien Chabason of IDDRI presented to a conference in November 2011 at www.iddri.org/...pour.../WP%201111_chabason_offshore.pdf.

are in fact accepted for registration without, apparently, much scrutiny as to whether they satisfy the definition of “ship” under the applicable legislation.

The search for, and recovery of offshore oil since 1977 has produced a wide range of new craft which have made the legal position even more confused. Typical examples is the FPSO (Floating Production, Storage and Offloading Unit) which in many cases is a converted tanker sometimes with its means of propulsion removed, (although some are specially built) and in any event is not intended for use in navigation – the most common criterion of the definition of a ship.

The IMO has already recognised the need for action in this area by the adoption in 1979 and 1989 of the MODU Code on the application of the Loadline and SOLAS Conventions to mobile offshore drilling units. This code is a good example of the adaptation of established maritime law principles to craft for which they were not originally conceived.

The need for an international convention to clarify the application of legal principles relating to subjects such as registration, mortgages, salvage, limitation of liability and liability for oil pollution appears to be widely recognised, although it would not be right to overlook the view expressed in certain quarters, notably by the International Association of Drilling Contractors and the E and P Forum, that there is no need for such convention.

The bigger question, however, is whether, in attempting to develop a solution to the recognised legal uncertainties in this field the IMO should try to produce a broader based convention dealing with all offshore activities. The advocates of such a convention recognise the existence of well-established regional agreements covering, for example, the North Sea, Mediterranean, and Arabian Gulf areas, and the arguments of those who question the need for further rules of general application world wide. They argue, however, that there are areas such as South East Asia (including the South China Sea), West Africa, and the South Atlantic where there is no such regional agreement in place, and where a set of principles drawing from the best of the existing regional agreements, and embodying existing best practice in offshore operations and rules, would be of universal benefit.

A further question is whether such a broadly-based convention should encompass fixed offshore structures as well as those which float. While there is a recognisable difference in kind between fixed structures and mobile offshore craft, there are some principles, such as safety and pollution, which are equally applicable to both.

In developing legal rules appropriate to the industries working offshore, account must be taken of the potential conflict between the interests of the flag state, which traditionally has jurisdiction over ships (and, by extension, offshore mobile craft) flying its flag, and the coastal state, which generally exercises a regulatory jurisdiction over the exploitation of offshore resources within its territorial sea.

This jurisdiction has been extended by the UN Convention on the Law of the Sea (“UNCLOS”), which entered into force on 16th November 1994, to the Exclusive Economic Zone (“EEZ”) and continental shelf, which may extend far beyond the limits of the territorial sea.

C. The Impact of the “Deepwater Horizon” incident

The explosion and fire aboard the rig “Deepwater Horizon” in the Gulf of Mexico in April 2010, leading to the death of 11 workers, can have left no government in any doubt that offshore drilling for oil, particularly in deep waters, is a dangerous activity. The publicity which this incident engendered brought those dangers to a world-wide audience. However few among that audience were aware of another serious incident which had taken place in the Timor Sea between Indonesia and Australia in August 2009, when a blow-out from the Montara well, then being drilled by the rig “West Atlas” for a Thai-based oil exploration company, caused a substantial leak of crude oil. This rig was located in the Australian Exclusive Economic Zone, some 135 miles north west of the nearest coastline of the Australian mainland and a similar distance from the nearest coast of Indonesia.

Prompt action by the Australian authorities prevented any of the leaking oil from coming ashore on the coast of Australia, but the Government of Indonesia is reported⁷ to have claimed \$2.5 billion for pollution damage that was suffered in its territory.

This incident has highlighted the fact that there is no international convention in force governing compensation for oil pollution damage in such circumstances. The absence of such a convention has not prevented substantial pollution damage claims from being made in the United States as a result of the “Deepwater Horizon” incident, but fortunately for the victims of that incident, the operator of the well being drilled was BP, one of the world’s largest oil companies, which has undertaken to settle the claims of the victims in the United States.

Claims in respect of international trans-boundary damage have been filed in the US Federal Court against BP and other defendants by three States of Mexico, claiming damages to fisheries and tourism, but those claims have yet to be heard.

In the absence of an international convention governing liability for such claims, it remains an open question what is the legal basis for such claims, and this was the subject matter of a conference held in Bali, Indonesia on 21st to 23rd September 2011.

⁷ Presentation of Youna Lyons to the September 2011 Bali Conference.

The conference was sponsored by the Government of Indonesia, and was attended by representatives of many states in South East Asia, including Australia, Malaysia, Philippines, Singapore, and Thailand, together with representatives of Egypt and Norway and several non-governmental organisations involved in offshore activity⁸.

D. Action at the International Maritime Organization

In 2010 the delegation of Indonesia raised the subject of a possible convention in the Maritime Safety Committee of the IMO, but that committee suggested that the proper forum in which this issue should be raised was the Legal Committee. The matter therefore came up in the Legal Committee at its 98th session in April 2011, and a useful summary of the relevant international instruments, prepared by the IMO Secretariat, was laid before that meeting⁹.

The majority of delegations who took the floor at this meeting spoke in favour of further work on this subject, although a small number expressed doubts as to whether there was a sufficient consensus to achieve a viable international convention. Those in favour of a convention sought support in the express terms of Article 214 of UNCLOS¹⁰.

The CMI Working Group on Offshore Craft has been inactive since it presented its report to the IMO Legal Committee in 1998¹¹, but the CMI Delegate offered to place the fruits of the CMI's work on this subject at the disposal of the informal correspondence group led by Indonesia.

However a decision of the IMO Council was required to put this topic on the work programme of the Legal Committee, and until that has been done the discussions must remain "informal". This question was put to the Council of the IMO at its meeting in June 2011 when, to the evident disappointment of the Secretary General and the Chairman of the Legal Committee, the Council declined to approve this work, on the grounds that it was outside the objects of the IMO according to its governing convention. The matter was therefore referred back to the Legal Committee and was considered at its meeting in April 2012.

⁸ A full report of this conference appears in the CMI News Letter no 3 of 2011.

⁹ Document LEG98/13.

¹⁰ States shall enforce their laws and regulations adopted in accordance with article 208 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment *arising from or in connection with seabed activities* subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80 (emphasis added).

¹¹ Document LEG78/10.

The fact that the IMO was set up to deal primarily with merchant shipping issues has not prevented it from tackling important matters in the field of offshore activity in the past. The MODU Code, the 1988 Protocol to the SUA Convention dealing with the Suppression of Unlawful Acts against Fixed Platforms, and the 2005 Protocol extending the SUA Convention and Protocol are conspicuous examples. The question was raised during the debate at LEG97 whether this lay within the competence of the IMO, but the Secretary General assured delegates that there was no UN Agency with a better authority for tackling these matters.

E. Discussions at the April 2012 Meeting of the IMO Legal Committee

The debate in the Legal Committee revealed a wide divergence of views of member States, with some delegations, notably Brazil, arguing that the Legal Committee should not be considering this subject at all, while others argued that this was an important and topical subject raising current issues of international law, and that the IMO was the obvious agency to address this subject.

Attention was drawn by those delegations in favour of further work on this subject to article 235 of UNCLOS, which provides, *inter alia*:

2. *States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.*
3. *With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.*

At the conclusion of the discussion the Chairman observed that the IMO Council had asked the Legal Committee to re-examine its proposed revision of Strategic Direction no 7.2 but had not imposed a time limit within which it should respond. The informal Correspondence Group led by Indonesia would therefore continue its work on the subject. Several delegations questioned whether pollution from offshore activity was within the definition of “shipping” and thus within the powers of the IMO, but none of them suggested another UN agency which would be more appropriate to deal with this topical subject.

There was much discussion of the meaning of the IMO's strategic direction no 7.2. The paragraph of the Legal Committee Report dealing with this reads:

“The Committee agreed that, in order to have a proper basis to organise discussion of the issues relating to transboundary damage from offshore activities it was necessary to follow applicable procedures. In this regard, a delegation making a proposal which falls outside the scope of the current Strategic Plan should be invited to submit it to the Council in accordance with paragraph 8.7.3 of the Guidelines on the application of the Strategic Plan and the High Level Action Plan (resolution A.1013(26)), and in accordance with paragraph 4.12.3 of the Committee's Guidelines on the organization and method of work (document LEG.1/Circ.6).”

Meanwhile deep water drilling continues further and further offshore with corresponding increase in the risk of damage to the marine environment. The recommendations of the US and Australian Enquiries into the Macondo and Montara casualties include the establishment of tighter regulations by the coastal state in whose EEZ the drilling is to take place, but these recommendations have not so far been implemented.

However there was a widespread acceptance of the need to continue the debate, and the Indonesian delegation will continue its work with the informal consultative group, whose email address is indoffshorediscussionimo-leg@yahoogroups.com.

The Committee agreed to inform the Council that it wished to analyse further the liability and compensation issues connected with transboundary pollution damage resulting from offshore oil exploration and exploitation activities, with the aim of developing guidance to assist states interested in pursuing bilateral or regional arrangements, without revising Strategic Direction 7.2.

The Committee recognised that bilateral and regional arrangements were the most appropriate way to address this matter, although it considered that there was no compelling need to develop an international convention on this subject¹².

F. Comment

Is there a “compelling need” for this work? The pointers in favour of a positive answer are several, but most notably the comments by the Commissions of Enquiry on both the “*Montara*” and “*Deepwater Horizon*” accidents that the offshore industry is in need of better regulation, particularly in the fields of safety and risk management.

¹² This section is a synopsis of a fuller report of the debate which appears in the CMI News Letter no 1 of 2012 at www.comitemaritime.org.

While some industry operators would undoubtedly prefer to be left to manage their operations undisturbed by government inspectors, the commissioners' views are that further regulation is desirable in the interests of the safety of those who work offshore and of the marine environment generally. There is ample justification within the provisions of UNCLOS for such an initiative. Those in favour argue that it is preferable for there to be in place an international instrument setting minimum standards of best practice, and orderly compensation of pollution victims, which can apply wherever in the world the exploration and exploitation is taking place. Close involvement of the key actors in the offshore industry would be an essential element, and the existence of this initiative should not prove to be a deterrent to them, as the Norwegian experience has shown.

Whether there is such a need for a compensation scheme for the victims of oil pollution from offshore activity is more debateable. Major incidents in this field are fortunately few, and to date the victims claims have generally been met. The IOPC Fund and the CLC Convention which underlies it, have provided a remarkable success story in providing a scheme which has as its principal objective the channelling of money to the genuine victims of oil pollution accidents involving tankers. The first point of contact for this scheme is of course the P and I Club in which the polluting ship is entered. These Clubs provide liability insurance to their ship-owner members on a mutual basis. The IOPC Fund only becomes involved if the damages are large enough to exceed the agreed threshold of the CLC Convention.

The system is astonishingly effective, and all the more astonishing when it is recognised that the Fund is run from an office in London with a staff of 35, despite the enormous sums of money which they handle and the huge numbers of claims which are involved. The continuing success of OPOL has shown that a similarly small-scale operation can meet the needs for compensation for the victims of pollution accidents arising from offshore operations in Europe.

Whether this scheme could be extended, or adapted, to provide prompt and fair compensation for such accidents on a world-wide basis is a much more difficult question. The 16 companies which are members of OPOL guarantee each others' potential liabilities for pollution damage and clean-up costs. A potential new member of this agreement must obviously satisfy the existing members that it has sufficient financial strength to take on this obligation. To apply comparable criteria on a world-wide basis would undoubtedly pose problems of financial and diplomatic delicacy¹³.

¹³ Comparable problems have been encountered with the insurance requirements in the CLC and Bunkers Conventions.

The insurance arrangements underlying the offshore industry are undoubtedly different from those covering liability for oil pollution from ships, and may well be placed in different markets. Active participation by the insurers involved would be a pre-requisite to any project to develop an international convention on offshore activity, as much as that of the offshore operators themselves.

Yet none of this is impossible. If the governments of states which have active offshore industries perceive the need to provide their citizens with the knowledge that those of them who suffer pollution damage from offshore activity, whether in their own waters or those of neighbouring states, will receive prompt and fair compensation, then surely the IMO is by far the best forum for such an initiative.

G. The Way Ahead

The session of the CMI Beijing Conference dedicated to this subject will be an opportunity for National Maritime Law Associations to express their views on the issues raised by this introductory paper. It is hoped that they may be able to consult their own oil industry sector before the conference.

Typical matters which may be considered are:

1. Should the CMI continue its work on offshore matters generally?
2. In the light of recent casualties, is there a need for an international regime dealing with liability and compensation for pollution damage arising from offshore exploration and exploitation activity?
3. If so, what should be the basis of liability?
4. If that liability should, in the first instance, lie on the rig operator, should it be limited or unlimited?
5. Should damage to the environment be recoverable, and if so, how should it be quantified?¹⁴
6. Is there a need for direct legal action against the rig operator's liability insurers?
7. Is there a need for a supplementary fund to cover claims which exceed the total of the rig operator's liability insurance?
8. If so, how should that be funded?
9. Should the work of the CMI extend beyond pollution liability to encompass other matters, such as those addressed in the Canadian MLA's draft convention?¹⁵
10. The role of the IMO and in particular the Legal Committee.

¹⁴ Compare the recovery of damage to the environment under the 1992 CLC and Fund Conventions, which is limited to "the costs of reasonable measures of reinstatement actually undertaken or to be undertaken".

¹⁵ See footnote no 5 above.

FAIR TREATMENT OF SEAFARERS

Fair treatment of seafarers – International law and practice
by OLIVIA MURRAY

FAIR TREATMENT OF SEAFARERS INTERNATIONAL LAW AND PRACTICE*

BY OLIVIA MURRAY**

It is notorious that nowadays certain types of maritime accident, especially those involving pollution, can present criminal law authorities in coastal states with a difficult dilemma. The causes of these events are often complex and time-consuming to investigate. However, it is also common for media, political and public outrage to create expectations of swift and severe measures against those presumed to be responsible, typically members of the ship's crew. Foreign seafarers are entitled to return home unless charged with offences punishable by imprisonment. Prosecutors and courts may then face criticism at home for failing to act and criticism abroad if they take action considered unjustified by the evidence, or contrary to international law. In 2011, the International Maritime Organization (IMO) decided there was a need to promote awareness of the Guidelines on Fair Treatment of Seafarers which it had adopted in 2006. This article is published with that object in mind.

Introduction

The international maritime community has observed the vulnerability of seafarers in high-profile casualties, particularly those involving large-scale pollution. There is inevitably heightened political tension, given the anticipated public and media reaction to such events. The intensity of this reaction may be exacerbated by a lack of awareness of the well-established

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international compensation regimes for pollution from ships, such as the Civil Liability and Fund Conventions in relation to oil pollution from tankers and the Bunkers Convention, which covers fuel spills from most international trading ships. Concern has been expressed that a balance must be maintained between the legitimate concerns of authorities in such circumstances and the human rights of the individual.

However, the reasons behind what have sometimes been termed ‘political’ responses to such incidents are understandable. Local authorities will feel immense political pressure and, in many cases, real hardship will be endured by those suffering loss as a result of an oil spill.

While the position of seafarers involved in a serious casualty can be precarious, the decisions to be taken by coastal state law officers in such a case can be very challenging. Such an emergency may well be the first of its kind for the officials involved and may present them with the most complex set of circumstances they are ever likely to face. In cases of this nature, investigating authorities, prosecutors and courts have come under an unusual and sometimes unprecedented weight of public expectation that presumed offenders will be brought swiftly to justice. They have faced a difficult task in striking a balance which does justice to these expectations as well as to the accused.

When the accused is a foreigner and sailing under a foreign flag, the potential difficulties are compounded by international dimensions. At first, these may not appear obvious amid the furore at home. However, there are international laws designed to safeguard seafarers against controversial treatment in foreign proceedings and these apply particularly in pollution cases where seafarers have tended to be most exposed. On a number of occasions measures have been taken against them without it being evident that these safeguards were duly considered. This has had significant implications, given widespread awareness in the international maritime community of the importance of fair treatment to the morale and recruitment of seafarers, and due respect for international laws and standards.

Once measures of this kind have been initiated they are not always easily halted or reversed. A clear understanding of these safeguards is therefore important not only to do justice to the case, but also to avoid measures which may lead to unforeseen criticism, controversy or embarrassment on the international stage.

In October 2004, the Comité Maritime International (CMI) established an International Working Group on the Fair Treatment of Seafarers¹. This was

¹ The CMI is a non-governmental organisation established in Antwerp in 1897 with the object of promoting the unification of maritime law. Its membership includes 50 National Maritime Law Associations with approximately 11,000 individual members, for the most part maritime lawyers and academics, as well as representatives from the shipping industry.

in response to an invitation to participate in the joint work in this field of the IMO and International Labour Organization (ILO), which led in 2006 to the international guidelines discussed in this article. With a view to raising awareness of these issues, this article will highlight key aspects of the legal framework relevant to this area. It is hoped that this will provide a useful reference point for those involved in these cases, both ship interests and local authorities alike.

Rights of the individual – international law

The Universal Declaration of Human Rights provides that everyone has the right to leave any country and return to their own².

This principle is particularly relevant to seafarers. Indeed, it is important to all who are engaged in international transport and whose work carries with it the prospect that any accident in which they are involved may occur in a foreign jurisdiction. Shipwrecks and similar accidents are often traumatic experiences and those involved are usually keen to return home to their families. However, their right to do so is not respected if they are held as security for claims while compensation arrangements are negotiated, or if they are required to remain for an unduly long period to assist with inquiries. This is particularly the case if they are accused of causing or contributing to the incident and are charged with a criminal offence.

While criminal proceedings are generally subject to the sovereign jurisdiction of the state where they are brought, those affecting seafarers commonly raise issues of international law. Given internationally recognised human rights, including those relating to freedom of movement, it is in principle difficult to justify measures restricting the liberty of the accused – which include withholding the accused's passport, or refusing an exit visa, let alone hotel arrest or detention in custody – unless there is at least a reasonable possibility that the accused could, if convicted, be punished by a term of imprisonment.

Criminal liability for the violation of international law to prevent pollution from ships

In the circumstances described above, important issues for foreign seafarers are whether they are likely to be charged with an offence and, if so, whether it is potentially punishable by imprisonment. These questions have come to the fore particularly in incidents involving pollution, as these have

² Universal Declaration of Human Rights 1948 art 13.

tended to stimulate relatively great media interest and relatively high public expectations of severe measures against those responsible.

Offences

Under the UN Convention on the Law of the Sea (UNCLOS), coastal states may adopt laws to prevent pollution in their territorial sea³. In the exclusive economic zone (EEZ), they may adopt such laws if they are in conformity with, and give effect to, international rules and standards adopted through the competent international organisation, ie the IMO⁴. The main international instrument in which these rules and standards are set out is the MARPOL Convention⁵. UNCLOS permits coastal states to legislate in their territorial sea independently of MARPOL or other international regimes, but many states have legislated in a uniform manner on the basis of MARPOL regulations.

MARPOL Annex I is the main source of international rules and standards to prevent oil pollution from ships. It contains regulations designed to reduce the risk of pollution resulting from accidents, such as by requirements for oil tankers to be constructed with double hulls, as well as rules to control intentional operational discharges of oil or oily wastes.

In the absence of adequate reception facilities in ports worldwide it has remained necessary for ships to undertake, and international law to allow, operational discharges of oily wastes at sea. The operational discharge controls of MARPOL Annex I apply not only to oil tankers in respect of their cargo tank washings and ballast operations, but to all types of vessel in respect of oily wastes from their machinery spaces. They include requirements for ships to be equipped with oil filtering equipment (oily water separators) and for details of various shipboard operations to be entered in an oil record book.

Sometimes the operational discharge controls have been accidentally breached, eg through the malfunction of oil filtering equipment. However, what has caused particular public concern is the fact that some seafarers and ship operators – albeit only a very small minority – have continued to make or condone illicit discharges in which the MARPOL controls have been knowingly violated. The correct handling of ships' oily wastes can be a time-consuming and laborious process, but this is no justification for rogue operations in which, for example, the process is accelerated by fitting so-called 'magic pipes' to bypass the filtering equipment.

³ United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) art 211(4).

⁴ *ibid* art 211(5).

⁵ The International Convention for the Prevention of Pollution from Ships 1973, as amended by the 1978 Protocol to the Convention (MARPOL Convention).

Illicit intentional MARPOL violations of this kind are serious offences, involving a deliberate flouting of international law. By contrast, spills resulting from maritime accidents may involve no more than an error of navigation and in some cases have resulted more from causes external to the ship than from any fault of those on board.

Unfortunately, the technical issues involved are not matters of general public knowledge and the distinction between these different types of case is not universally understood. Public reaction to most incidents of pollution from ships, including genuine accidents, has tended to reflect outrage provoked by the publicity given to illicit violations. This has led in some cases to measures being taken against seafarers which both they and the international maritime community have found hard to understand.

International law recognises that very different considerations are involved in these different types of case and that seafarers require protection from prejudicial reactions. An accidental spill resulting from damage to the ship or its equipment does not involve a MARPOL violation and should not normally give rise to criminal liability in the absence of intent or recklessness⁶.

However, not all coastal states have domestic laws in conformity with the Convention. Some have adopted laws which are more stringent in their territorial seas than MARPOL and which provide for criminal liability for pollution caused by negligence or serious negligence, despite the absence of intent or recklessness which MARPOL requires.

There are different views as to the validity of such legislation in international law. While they are within the sovereign powers of a coastal state under UNCLOS, such national laws may be contrary to other international treaties to which the state is party. This is particularly the case if the state has undertaken to legislate in accordance with the terms of those international treaties in line with other contracting states. One school of thought is that MARPOL is a classic instance of such a treaty and that contracting states cannot legislate in other terms unless they denounce the Convention. A rival view is that MARPOL stipulates only minimum standards and that contracting parties are free to legislate more stringently if they wish. This controversy came to a head with the adoption of EU Directive 2005/35/EC on ship-source pollution⁷, the validity of which was challenged in the Court of Justice of the European Union (CJEU) in proceedings brought by a coalition of shipping industry bodies. The court ruled that the validity of

⁶ MARPOL Annex I reg 4.2.

⁷ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L255/11; published on 30 September 2005 and in force the following day.

the directive could not be assessed by reference to MARPOL, on the grounds that the EU itself (as distinct from its Member States) was not a party to the Convention⁸. It therefore declined to comment upon most of the substantive issues of international law which had been argued in the case⁹.

Accordingly, although the validity of such laws may be open to question, there is a possibility that a maritime accident may give rise to criminal liability for pollution under the domestic laws of some coastal states when there would be no such liability under MARPOL.

The question then arises as to whether foreign seafarers charged with such an offence can be refused permission to return to their home country pending trial on the grounds that they could, if convicted, be sentenced to a term of imprisonment. The type of penalties which may be imposed is subject to important safeguards in international law.

Penalties

Contracting parties to MARPOL undertake to impose penalties on offenders which are adequate in severity to discourage violations of the regulations set out in the Convention. Beyond this, it does not prescribe any type or level of penalty which may or should be imposed.

In many systems of law, criminal legislation stipulates a maximum penalty but otherwise allows the court a wide discretion to decide on a level of punishment appropriate to the seriousness of the particular case. Clearly, an operational discharge carried out in deliberate violation of MARPOL regulations involves a far higher level of culpability than a leakage caused by accidental error in operating valves or pipes¹⁰. While a custodial penalty may

⁸ Case C-308/06 *R v Secretary of State for Transport, ex parte Intertanko* [2008] ECR I-4057 655-56.

⁹ See further Colin de la Rue and Charles B Anderson *Shipping and the Environment* (2nd edn Informa 2009) 1117-27. The directive and CJEU decision have been strongly criticised by several commentators. See especially Jan Wouters and Philip De Man 'International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Cooperation Committee, Lloyd's Register and International Salvage Union v Secretary of State for Transport. Case C-308/06' [2009] 103(3) *The American Journal of International Law* 555-561; Mario Mendez 'The legal effect of community agreements: maximalist treaty enforcement and judicial avoidance techniques' (2010) 21(1) *The European Journal of International Law* 99; M Fang 'The analysis of criminalization of marine pollution from the adoption by the European Union of the Directive on ship-source pollution and on the introduction of sanctions for infringements' (2009) International Conference on Marine Pollution Liability and Policy Papers Collection 429; Marc A Huybrechts 'What happened with the European Directive 2005/35/EC?' (paper presented at the Seventh Annual International Colloquium on Pollution at Sea: Law and Liability Swansea September 2011).

¹⁰ Exemption from criminal liability under MARPOL for accidental spills is limited to those which result from damage to the ship or its equipment.

be considered appropriate for a serious deliberate violation, an accident of the latter kind should normally result in no more than a fine¹¹.

Sentencing policies commonly provide for account to be taken of various other factors in addition to the culpability of the defendant's acts or omissions, including the seriousness of their consequences and any need for the penalty to exact retribution to reflect public sentiment, or to have a deterrent effect. Additional factors of this kind can loom very large when a serious shipping accident results in substantial pollution. A sad fact of maritime life is that reports of shipboard fatalities are generally limited to a few column inches in the trade press, while accidents in which no-one is hurt, but which result in an oil spill, have often been headline news. Regrettable as these latter events certainly are for the pollution they cause, they are also notoriously prone to stimulate emotive public responses which are not necessarily fair to the individuals caught up in them, especially if based on incomplete or premature conceptions of the relevant facts and if there are expectations of retribution which confuse accidental spills with deliberate violations.

In some parts of the world, public sentiments of this kind can weigh heavily on courts tasked with discretionary decisions on sentencing and freedom of movement pending trial. The need for safeguards to protect the rights of foreign seafarers in pollution cases is addressed in UNCLOS Article 230, which constitutes an internationally agreed balance between public concerns about pollution on the one hand and the recognised rights of the accused on the other.

Article 230 provides:

Monetary penalties and the observance of recognised rights of the accused

1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction, and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.
2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.
3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognised rights of the accused shall be observed.

Article 230, therefore, bars coastal states from imprisoning foreign seafarers for any pollution offence beyond their territorial waters, or for one

¹¹ For examples of such cases see de la Rue and Anderson (n 9) 1099-103 and especially the *Laura D'Amato* case (spill in Sydney Harbour, August 1999).

within those waters unless involving a wilful and serious act of pollution. An accidental spill should therefore never result in a custodial penalty for a foreign seafarer, whether within or beyond the territorial sea. There has nonetheless been a series of cases in which seafarers have been detained for long periods after maritime accidents, despite these safeguards.

Cases

Concerns about fair treatment of seafarers and other defendants were brought to a head by a sequence of cases in the late 1990s and early 2000s in which criminal proceedings were brought against the masters and officers of ships involved in high-profile maritime accidents causing serious pollution. In some cases, these concerns were exacerbated by uncertainty surrounding the basis for allegations of wrongdoing on the part of the defendants; by an interest on the part of the coastal state authorities in deflecting criticism that failings on their own part had caused or contributed to the incident; and by complaints that the defendants were detained in circumstances which amounted to breaches of international law and of their human rights. To illustrate some of the key issues arising, a selection of these cases is set out below.

Nissos Amorgos (Lake Maracaibo, Venezuela, 1997)

The grounding of the Greek tanker *Nissos Amorgos* off the coast of Venezuela in 1997 provides an illustration of action being pursued with particular rigour when the actions or omissions of the coastal state authorities (or the safety of their ports) themselves are called into question.

At the time of the grounding, the *Nissos Amorgos* was carrying roughly 75,000 tonnes of Venezuelan crude oil of which some 3,600 tonnes were spilled. Criminal proceedings were brought against the master on charges of negligently causing pollution. He was required to remain in Venezuela for over a year before being permitted to return to Greece and resume work, provided that he undertook to return for his trial and reported regularly to Venezuelan embassies and consulates. However, his health had deteriorated to the extent that he was soon unable to continue work. The master was excused attendance at trial on grounds of ill health. He maintained that the damage to the cargo tanks that had led to the oil spill was substantially caused by the Republic of Venezuela's negligence but was sentenced in absentia in May 2000 to 16 months in prison. On appeal, the Maracaibo Criminal Court of Appeal held that the master had incurred criminal liability owing to negligence causing pollution damage to the environment but that, since more than four and a half years from the date of the criminal act had passed, the criminal action against him was time-barred. The appeal court held that this

decision was without prejudice to the civil liabilities of the owners which could arise from its finding that the pollution had been caused by a criminal act on the part of the master (albeit the proceedings were time-barred).

This incident highlights the difficulties which may ensue in jurisdictions where civil remedies result from findings of criminal acts or omissions. In such cases it may be felt that there is arguably an additional incentive to convict a seafarer in criminal proceedings if such a finding opens the door to civil remedies, despite the fact that a recognised compensation regime may be applicable to the case in question¹².

Erika (Brittany, France, 1999)

On 12 December 1999, the Maltese-flagged tanker *Erika* broke in two and sank some 60km off the coast of Brittany – within the EEZ of France. Almost 20,000 tonnes of her heavy fuel oil cargo of 31,000 tonnes were spilt affecting some 400km of shoreline. Nearly 7,000 claims arose from the incident relating to pollution preventive measures, the quantum of which exceeded the maximum available compensation under the CLC¹³. The incident also gave rise to considerable public outcry that the French major oil company had chartered a 25-year-old single hull tanker, which had sunk due to structural failure and the incident stimulated various proposals for legal changes, both in Europe and at international level.

The jurisdiction of states to legislate within their EEZ is limited to the adoption of laws conforming with international law¹⁴ and proceedings may only be instituted with regard to violations of international laws to prevent, reduce and control pollution. However, the French legislation under which the defendants were prosecuted and convicted did not satisfy these criteria and there was no finding of a MARPOL violation.

Criminal charges were brought not only against the four defendants ultimately found guilty of offences under French law but also against other defendants, including the master of the ship. The master was arrested and prosecuted by the French authorities for endangering life and causing marine pollution on coming ashore after the incident on 12 December 1999. He was imprisoned until 23 December 1999 and not permitted to return to his home in India until February 2000. These charges were maintained until the end of a four-month trial in 2007 at which point the prosecution recommended in its closing speeches that most of the defendants be acquitted. While the charges

¹² See further de la Rue and Anderson (n 9) 1104-06.

¹³ In the *Erika*, the CLC 1992 was applicable.

¹⁴ UNCLOS (n 3) art 211(5).

against the master were finally dismissed in January 2008, this was over eight years after the initial incident.

This case serves as a reminder of the considerable time that may elapse between an incident and judgment, which will inevitably have a detrimental impact upon those accused who will have the stigma of criminal charges hanging over them for several years and yet who may, ultimately, be acquitted¹⁵.

Prestige (La Coruña, Spain, 2002)

The *Prestige*, loaded with 77,000 metric tonnes of fuel oil, developed a list off the coast of La Coruña, Spain in severe weather conditions on 13 November 2002. Despite the conditions, Captain Mangouras chose to stay on board. All the crew escaped without injury or loss of life and the master corrected the list and stabilised the vessel. After numerous attempts to make fast the tow (which parted several times due to the prevailing conditions) the tow line was successfully connected at midday on 14 November 2002. Both the master and salvors requested the Spanish authorities to grant the vessel refuge in sheltered waters. Both these requests were refused, a decision which has been the subject of much condemnation as it has been argued that granting the ship refuge was the best way to ensure that any further pollution was minimised¹⁶ and that the authorities' actions turned the incident into a major environment catastrophe¹⁷. Instead, the authorities ordered the *Prestige* to proceed into the Atlantic in winter gale-force weather. Some six days after the initial incident, the *Prestige* broke in two and sank, with the loss of the ship and substantial pollution along many hundreds of kilometres of coastline.

The provision of places of refuge for ships in distress was an issue that was already being comprehensively reviewed within the IMO in the aftermath of the *Castor* incident in 2001¹⁸. The *Prestige* incident brought existing concerns into sharp relief and the IMO Guidelines on Places of Refuge for Ships in Need of Assistance were adopted in December 2003¹⁹.

¹⁵ See further de la Rue and Anderson (n 9) 1106.

¹⁶ Bahamas Maritime Authority 'Report of the investigation into the loss of the Bahamian registered tanker *Prestige* off the northwest coast of Spain on 19th November 2002' paras 3.7 and 4.11.4.

¹⁷ 'ISU warns that environmental salvage is undervalued' www.marinelink.com/news/-article/isu-warns-that-environmental-salvage-is/305238.aspx.

¹⁸ See further de la Rue and Anderson (n 9) 911.

¹⁹ IMO Resolution A.949(23) adopted on 5 December 2003. The CMI submitted a report to the IMO Legal Committee in April 2009 which attached a draft instrument on Places of Refuge, developed by the CMI and approved at the Plenary session of the CMI Conference in October 2008.

The master was immediately handcuffed when he had evacuated the vessel and arrested. He was charged with criminal offences relating to pollution and disobedience of the Spanish administrative authorities pursuant to the Spanish Criminal Code. Under international law²⁰, the master could only be imprisoned if he was found guilty of an offence involving a 'wilful and serious act of pollution'. However, he was transferred to jail where he remained for 83 days being released only upon payment of bail of 3 million under strict conditions, including the obligation to remain in Spain and report to a local police station every morning (including weekends). In March 2005, the master was allowed to return to Greece permanently with an undertaking to return to Spain for the trial. His treatment by the Spanish authorities has attracted much criticism, including from the European Parliament, further to a public hearing in March 2003²¹. Almost exactly 10 years after the incident, the master's criminal trial has been set to commence on 16 October 2012²².

Tasman Spirit (Karachi, Pakistan, 2003)

This Maltese-flagged tanker grounded at the entrance to Karachi Port carrying 67,800 tonnes of Iranian crude oil and with 440 tonnes of heavy fuel oil in aft bunker tanks. Efforts to refloat the vessel were unsuccessful and salvors were engaged to tranship the cargo. During these operations the *Tasman Spirit* started to break up, eventually leading to a spill of some 34,000 tonnes of crude. In the aftermath of the casualty, it was suggested that the incident had been caused by the alleged failure by the Karachi Port Trust to maintain properly the dredged channel in which the vessel was navigating at the material time and that she was called into berth after high water and once priority had been given to smaller vessels²³. The case is illustrative of a situation in which focus upon the alleged failings of the crew serves to deflect attention from suggestions that local authorities may be at fault. All the Greek crew on duty were detained (master, chief officer, chief engineer, second officer, second and third engineers and the helmsman) as well as the salvage master (who only attended after the vessel broke up). The 'Karachi 8', as they became known, were detained for almost nine months and were released only after intense political pressure and continued lobbying by many international organisations, as well as by the Greek Government and European Union²⁴.

²⁰ UNCLOS (n 3) art 230.

²¹ Parliamentary report of the European Parliament tabled 15 July 2003 paras 49-50.

²² See further de la Rue and Anderson (n 9) 1107-08.

²³ In August 2004, a report was published by the Pakistan Merchant Navy Officers' Association which concluded that the vessel had run aground owing to the corruption and negligence of top KPT officials, many of whom were nontechnical people. See further de la Rue and Anderson (n 9) 1108-09.

²⁴ See further de la Rue and Anderson (n 9) 1108-10.

IMO guidelines on the fair treatment of seafarers in the event of a maritime accident

The high-profile pollution incidents discussed above led to concerns on the part not only of shipping and seafaring bodies but also of human rights organisations, international legal bodies and governments that the recognised rights of seafarers were not being respected for domestic political reasons.

In 2005, a Joint IMO/ILO Ad Hoc Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident was established. This resulted in a joint resolution²⁵ and, in 2006, the adoption of the Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident (the Guidelines)²⁶. The stated objective of the Guidelines is to ensure that seafarers are treated fairly following a maritime accident and during any investigation and detention by public authorities and that detention is for no longer than necessary. Guidelines are set out not only for the port or coastal state, but also for the flag state, the seafarer state, shipowners and for seafarers themselves. The guidelines applicable to the port or coastal state are concerned mainly with ensuring that any investigation which they conduct to determine the cause of a maritime accident that occurs within their jurisdiction is conducted in a fair and expeditious manner and that the human rights and other legitimate interests of seafarers involved are respected at all times. The Guidelines are not legally binding but are intended to establish international norms for governments and courts to take into account. In the context of pollution cases, the risk to seafarers of extended detention has been recognised in the Guidelines which provide, inter alia, that a port or coastal state should 'use all available means to preserve evidence to minimise the continuing need for the physical presence of any seafarer' and recognise that seafarers require special protection, especially in relation to contacts with public authorities. The guidelines recommend that they be observed in all instances where seafarers may be detained by public authorities in the event of a maritime accident (such detention includes any restriction on their movement by public authorities, imposed as a result of a maritime accident, for example preventing them from leaving the territory of a state other than their country of nationality or residence).

²⁵ Joint Resolution of the Assembly of the IMO and of the Governing Body of the ILO, IMO Resolution A.987(24), adopted 1 December 2005. As mentioned earlier, the CMI was invited to participate in the joint work in this field of the IMO and ILO, which led in 2006 to the Guidelines.

²⁶ Resolution of the IMO Legal Committee LEG.3(91), adopted 27 April 2006.

The 2008 Casualty Investigation Code

In 2008, the IMO Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident was adopted (the Code)²⁷. The Code (which entered into force in January 2010) is designed to facilitate objective marine safety investigations for the benefit of flag states, coastal states, the IMO itself and the shipping industry in general. Its stated objective is the provision of a common approach for states to adopt in the conduct of marine safety investigations into marine casualties and marine incidents²⁸.

The Code recognises and addresses the potential difficulties faced by seafarers in the aftermath of a casualty. The preamble to the Code expressly refers to the Guidelines. Indeed, the Legal Committee of the IMO has expressly acknowledged that these should be implemented in tandem with the Code²⁹. Furthermore, chapter 12 of the Code provides mandatory standards in relation to obtaining evidence from seafarers. In particular, this chapter provides, *inter alia*, that where a marine safety investigation requires a seafarer to provide evidence, this evidence 'shall be taken at the earliest practical opportunity' and that the 'seafarer's human rights shall, at all times, be upheld'.

Treatment of seafarers since adoption of the Guidelines

Since adoption of the Guidelines in 2006, the joint IMO/ILO Secretariat has sought to monitor their application by way of a request that any information concerning the mistreatment of seafarers be transmitted to the IMO³⁰. Regardless of any such reports, however, it is clear, as discussed further below, that instances giving rise to concerns of potential unfair treatment of seafarers amongst the international maritime community continue to occur³¹ and concerns as to the effectiveness of existing safeguards have been expressed.

²⁷ Resolution of the IMO Maritime Safety Committee MSC.255(84), adopted 16 May 2008.

²⁸ The benefits of uniformly applicable legislation is particularly topical given that the Maritime Labour Convention (MLC) 2006 is expected to come into force in the near future, once the additional required ratifications are obtained: www.tradewindsnews.com/weekly/w2012-01-06/article661873.ece. The MLC provides comprehensive rights and protection at work for seafarers worldwide in such areas as conditions of employment and health protection and includes reference to the protection of seafarers in foreign ports and to the measures to be taken if they are detained in the territory of a Member State. See also www.ilo.org/global/standards/maritime-labour-convention/lang-en/index.htm.

²⁹ IMO Legal Committee Report, LEG 97/15, dated 1 December 2010.

³⁰ Circular Letter 2825 dated 7 November 2007.

³¹ BIMCO Study of the treatment of seafarers (Bagsværd Denmark BIMCO 2010) (also attached to IMO Doc. LEG 97/INF.3).

Effectiveness of safeguards in Article 230 of UNCLOS

In particular, concerns in relation to the application of Article 230 of UNCLOS were highlighted to the IMO by the CMI and co-sponsors at the ninety-seventh session of the IMO Legal Committee³². As has been noted above, Article 230 of UNCLOS bars coastal states from imposing sanctions, other than monetary penalties, for pollution offences by foreign vessels beyond their territorial waters. The same provision applies within territorial waters unless there has been a wilful and serious act of pollution. The CMI and co-sponsors expressed concern that seafarers may be vulnerable to charges brought where those charges fall outside Article 230 and, therefore, do not provide the seafarer with the safeguards of Article 230. If such charges are legitimately brought, there is little controversy. In practice, however, there have been occasions where the possibility of a custodial penalty should arguably have been ruled out under Article 230 but where seafarers have been detained on charges which in essence render the Article 230 safeguards ineffective. These charges will typically be unrelated to pollution, carry the potential for imposition of a custodial sentence, yet would not have been brought 'but for' the pollution. The net effect is that the safeguards under Article 230 providing for monetary penalties only may not always avail the seafarers as they should. For example in the South Korean *Hebei Spirit* case, discussed in further detail below, there was an attempt by the prosecution (subsequently endorsed by the Court of Appeal) to bring charges against the master and chief officer for damage caused to their own ship ('destruction of a vessel owing to occupational negligence'). Although it was their conviction on this particular charge which resulted in the custodial penalties imposed on them, it was clear that the severity of the sentence was intended to reflect not the damage to the ship but the pollution.

The decision to charge the crew with a non-pollution related offence carrying a custodial sentence effectively meant that the UNCLOS Article 230 safeguards were rendered meaningless. The Supreme Court has since set aside the earlier conviction for destruction of the vessel, holding that it was difficult to say that the extent of the damage to the *Hebei Spirit* arising from the collision amounted to 'destruction' as required under the relevant provision of the Criminal Code. To determine whether or not this argument is justified in a particular case, the following question can usefully be asked: Would the Court still be contemplating imposing a custodial sentence had there been no pollution? If the answer is 'no,' and a custodial sentence would not have been imposed 'but for' the pollution, it follows that it is the pollution, not the technical form of the charges, which accounts for the proposed penalty.

³² LEG 97/6/1.

In such circumstances, given that Article 230 provides for monetary penalties only in respect of pollution from foreign ships, save in the case of wilful pollution in the territorial sea, this should preclude a custodial sentence. When it is recognised that it is generally the pollution, as opposed to other alleged conduct, that provokes public outrage, it can be appreciated how such a situation has developed and why the rights enshrined within Article 230 have been perceived as threatened. The challenge is how to ensure that the rights enshrined within Article 230 are not eroded. It may be considered that the first step is to raise awareness of this situation within countries that are party to UNCLOS. In so doing, it is hoped that those defending seafarers and seeking to rely upon Article 230 may be more alive to the problem and pre-empt and address any unjustified charges which render its restrictions ineffective. It was also noted that even in states not parties to UNCLOS, that Convention may be considered applicable as part of customary international law and therefore precedential in cases of detention following marine casualties³³.

The CMI and co-sponsors invited the Legal Committee to consider raising awareness of the provisions of Article 230, highlighting its effect and importance to those countries which are party to UNCLOS and encouraging compliance with their obligations under international law. Concern was also expressed regarding the adverse impact that the mistreatment of seafarers will have inevitably upon recruitment and retention of seafarers and, as a result, upon the safety of shipping generally.

Hebei Spirit 2007 (Daesan port, South Korea, 2007)

The *Hebei Spirit* case highlights the difficulties foreign seafarers may face, despite the introduction of the Guidelines, in the politically charged context of a major oil spill. In such circumstances, it is perhaps inevitable that the pressure of public expectation faced by coastal authorities, prosecutors, courts and local authorities may be hard to reconcile with preserving the rights of the seafarer. It has been suggested that the existence of a discretion (as to whether or not to prosecute for example), as opposed to the simple application of mandatory rules, only serves to exacerbate the unenviable position of the coastal state authorities, prosecutors and courts³⁴.

This tanker was struck by a giant crane barge while at anchor off Daesan port in South Korea in 2007. The collision resulted in some 11,000 tonnes of crude oil leaking into the Yellow Sea, the largest oil spill in South Korean

³³ See also the study by BIMCO on the treatment of seafarers dated 3 September 2010: LEG 97/INF.X.

³⁴ See further de la Rue and Anderson (n 9) 1114.

history. Despite having been acquitted of all charges relating to the oil spill by the first instance court, the master and chief officer from the tanker were initially refused permission to leave South Korea while an appeal was made against the judgment by the prosecutor and owners of the crane barge. Subsequently, the appeal court found the master and chief officer of the tanker guilty on two charges, one of causing pollution and the other of causing damage to the ship. In sentencing for the offence of causing damage to the ship, the appeal court took the pollution into account and sentenced the master and chief officer to jail terms of 18 and eight months respectively.

There was significant protest at these convictions across the maritime industry³⁵. A letter from the London Embassy of the Republic of Korea strongly objected to the content of a press report into the incident stating that:

hasty expressions and words were used that could very well disturb the foundation of the judicial and administrative institutions of a sovereign state. This very regrettable piece of writing did in fact undermine the honour and prestige of the Republic of Korea³⁶.

Subsequently, on 15 January 2009, South Korea's Supreme Court released the master and chief officer on bail pending their appeal. In April 2009, the South Korean Supreme Court annulled the Court of Appeal's decision to arrest the crew members of the *Hebei Spirit* and they were allowed to leave South Korea. The decision to arrest the masters of one of the towing tugs and of the crane barge was upheld and the fines imposed by the Court of Appeal confirmed. Having been released from arrest, the master and chief officer of the *Hebei Spirit* were finally able to leave South Korea in June 2009³⁷.

Mangouras v Spain: Grand Chamber of the European Court of Human Rights (ECtHR) judgment (28 September 2010)

On 28 September 2010, the Grand Chamber of the ECtHR delivered its judgment in the case of *Mangouras v Spain*³⁸. This was a claim lodged in 2004 by the Master of the *Prestige*, Captain Mangouras, against the Kingdom of Spain.

Following the *Prestige* casualty, the Master of the *Prestige* was charged with criminal offences relating to pollution and disobedience of the Spanish administrative authorities pursuant to the Spanish Criminal Code. The

³⁵ “‘Hebei Two’ are jailed’ Lloyd’s List (London 11 December 2008) 1; “‘Shocking” verdict’ *Tradewinds* (London 12 December 2008).

³⁶ ‘South Korean rebuttal to *Lloyd’s List* opinion report’ Lloyd’s List (London 11 December 2008) 3.

³⁷ www.iopcfund.org/hebeispirit.htm; see also de la Rue and Anderson (n 9) 1112-13.

³⁸ *Mangouras v Spain* App no 12050/04 (ECtHR Grand Chamber judgment 28 September 2010).

Spanish Court granted bail to the master at the unprecedented figure of €3,000,000. The master was not in a position to pay such a sum and, consequently, was detained in a high security prison for 83 days. He was released when the insurers of the vessel put up bail on wholly humanitarian grounds, despite having no legal obligation to do so. Within Spain, the master challenged unsuccessfully the level of bail set as far as the highest court possible (the Spanish Constitutional Court). When deciding on the bail amount, none of the Spanish courts gave any consideration to his personal circumstances (other than his foreign nationality and lack of ties to Spain) nor provided any rational basis for the level of bail set. Instead, other considerations were paramount – notably the ‘public unrest’ and the alleged ‘need to secure civil compensation’. Having exhausted all domestic remedies with respect to the amount of bail set, the master lodged a claim with the ECtHR alleging, inter alia, that the €3,000,000 bail set was excessively high and had been fixed without regard for his personal situation. As such, the master alleged that Spain had violated Article 5(3) of the Human Rights Convention (ECHR) – the right to liberty and security.

The ECtHR Chamber gave judgment on 8 January 2009, ruling that there had not been a violation of the ECHR and that the amount set was proportionate and reasonable³⁹. Captain Mangouras sought, and was granted, leave to have the case referred to the Grand Chamber of the ECtHR. Numerous industry bodies, including the International Group of P&I Clubs also filed an Amicus Brief in support of the master’s position.

The Grand Chamber of the European Court of Human Rights heard Captain Mangouras’ case against Spain on the *Prestige* matter at an oral hearing in Strasbourg on 23 September 2009⁴⁰ and, on 28 September 2010, delivered a majority judgment⁴¹ ruling that there was no violation of the ECHR by Spain⁴². The majority judgment has faced heavy criticism⁴³; it has been suggested for example that the ‘growing and legitimate concern’ in

³⁹ *Mangouras v Spain* App no 12050/04 (Third Chamber judgment 8 January 2009 para 44). The most relevant provision of international law mentioned by the first instance court was referred to only in a quotation from a report of a European Council subsidiary body suggesting policy options including modification of art 230 ‘to state more clearly the possibility of imprisonment in the case of the most serious pollution breaches’.

⁴⁰ A full webcast of the hearing is available at www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?id=20090923-1&lang=lang&flow=high.

⁴¹ By 10 votes to seven.

⁴² For the judgment and dissenting opinion see <http://cmiskp.echr.coe.int/tkp197/-view.asp?action=html&documentId=874582&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁴³ ‘Intertanko horrified at ECHR decision’ www.maritime-executive.com/article/-intertanko-horrified-echr-decision.

relation to environmental offences as mentioned in the judgment⁴⁴ has clouded what should be a legal, not political, analysis of Spain's actions in this case and whether or not such actions constituted a breach of the ECHR. Similarly, the statement within the judgment that 'these new realities have to be taken into account in interpreting the requirements of Art 5(3)' might be considered revealing. Such a statement appears to suggest that because the concerns regarding pollution offences (and the desire to identify and punish those responsible for such offences) are legitimate, it is therefore acceptable to render the well-established safeguards concerning an individual's liberty meaningless. The clarity and detail of the strongly worded dissenting opinion would tend to suggest that opinion was sufficiently strong amongst the seven dissenting judges that they felt compelled to express their view in very clear terms that the approach taken by Spain was incompatible with Article 5(3) of the ECHR. The conflicting views of the majority and those dissenting is perhaps best left to the concluding paragraph of the dissenting opinion which reaches the heart of the matter:

The majority conclude by stating that sufficient account was taken by the Spanish courts of the applicant's personal situation and that, in view of the disastrous environmental and economic consequences of the oil spill, the courts were justified in taking into account the seriousness of the offences in question and the amount of the loss imputed to the applicant. We disagree. In our view, the approach of the Spanish courts in fixing the applicant's bail was not compatible with the principles established by the Court under Article 5 §3 of the Convention, the fundamental purpose of which is to ensure that no one is arbitrarily deprived of his liberty.

In summary, the majority judgment has serious implications for the right to liberty of individuals who have been accused, but not yet tried or convicted, of a criminal offence. While the shipping industry has expressed outrage and deep concern in respect of the Grand Chamber majority judgment, the potential ramifications extend far beyond the shipping industry – indeed to any industry where an individual's work involves some element of risk. Arguably, this judgment effectively permits authorities to hold employees to ransom for reasons related to the alleged civil liability of their employers.

The position in the United States

The position in the United States merits special mention as the US is not a party to UNCLOS. This has various implications of note in criminal proceedings against seafarers.

⁴⁴ John A C Cartner 'Have we lost sight of equal protection under the law?' *Lloyd's List* (London 13 October 2010) 6.

The first is that the US, although a party to MARPOL, does not have jurisdiction over MARPOL violations committed on the high seas. The jurisdiction of port states to institute proceedings in respect of such offences was created by UNCLOS Article 218 and in international law it exists only by virtue of that provision. There have consequently been a number of cases in which US port state control authorities have been unable to bring proceedings in respect of suspected MARPOL violations on the high seas, despite compelling evidence that these were committed.

This has not left the US Department of Justice (DOJ) without scope to intervene, as generally those responsible for such offences have sought to conceal them by actions in port which amount to obstruction of justice offences under US federal and state laws. Examples include the presentation of an oil record book containing false entries and the making of false statements to the competent investigating authorities⁴⁵.

A more significant consequence of UNCLOS not applying in the US is that the penalties which may be imposed for pollution offences are not subject to the restrictions of Article 230. Obstruction of justice offences carry high maximum penalties and in some cases jail sentences have been handed down on foreign seafarers involved in MARPOL violations on the high seas. UNCLOS would allow proceedings to be brought in such cases, but only monetary penalties to be imposed. Technically, the penalties imposed were for the obstruction of justice rather than pollution⁴⁶, but in practice the object of the shipboard investigations has been to uncover MARPOL violations and the express policy objective of the DOJ and the courts has been to stamp these out. It is therefore open to question whether jail terms in these cases are truly in line with international standards, although sympathy with those involved in deliberate violations may be limited unless there are genuine doubts about their guilt.

⁴⁵ See *U.S. v Petraia Maritime, Inc.*, 483 F. Supp. 2d 34, 39 (D. Me. 2007) (holding that '[t]he discharge itself and the contemporaneous failure to record it in the Oil Record Book (ORB) are acts that are *separate and distinct* from the acts that form the basis of the pending criminal charges' and citing *U.S. v Royal Caribbean Cruises Ltd* (11 F. Supp. 2d 1358, 1998 A.M.C. 1817 (S.D. Fla. 1998)) for the proposition that '[p]resentation of a false Oil Record Book seems more appropriately characterized as an essentially domestic law violation over which the United States properly has jurisdiction'); and *U.S. v Ionia Management S.A.*, 498 F. Supp. 2d 477, 487 (D. Conn. 2007) ('the gravamen of this action is not the pollution itself, or even the Oil Record Book violation occurring at that time, but the misrepresentation in port', quoting *Royal Caribbean* at 1371). Although both of these cases involved a violation of the Act to Prevent Pollution from Ships for failure to maintain an ORB for inspection upon entry into US waters and ports, rather than a prosecution under the False Statements Act, the underlying rationale of the decisions is the same, namely the knowing use or presentation of a false writing in the form of an ORB.

⁴⁶ In *U.S. v Abrogar*, 459 F.3d 430 (3d Cir. 2006), the Third Circuit implicitly recognised the distinction between the domestic law offence of maintenance and presentation of a false ORB in a US port and extraterritorial conduct (discharge of oily wastes) reflected in the false ORB entries, by holding that the latter did not constitute 'relevant conduct' for enhancement purposes in sentencing the defendant chief engineer for the former violation.

Of potentially greater concern is the possibility of accidental spills in US waters being penalised more severely than would be possible in jurisdictions where UNCLOS applies. As a party to MARPOL, the US should not (according to one school of thought) impose criminal liability for accidental spills resulting from damage to a ship or its equipment in the absence of intent or recklessness. In practice, it has been common for criminal charges to be brought under various federal and state statutes which create offences based on liability standards other than intent or recklessness, including gross negligence, negligence and in some cases, even strict liability. In such cases, there is not only an issue regarding the compatibility of domestic laws with MARPOL treaty obligations, but it is also clear that the imposition of a custodial sentence on a foreign seafarer would not be consistent with the human rights safeguards which apply in UNCLOS contracting states.

This being the case, there have been concerns about the length of time for which foreign seafarers have been required to remain in the US after an incident, not only when they are charged but indeed when the DOJ wishes them to remain available as a prosecution witness⁴⁷. The US Courts have held that 30-45 days is the maximum time that a seafarer can be required to remain in the US when not facing charges and being detained only as a 'witness'⁴⁸. However, given the freedom of movement recognised by the Universal Declaration of Human Rights, it is open to question whether the detention of foreign seafarers for this length of time against their will can ever be justified unless they are charged with an offence and the alleged offence is one for which a custodial sentence could be imposed without breach of internationally recognised standards.

While the reasons for non-ratification of UNCLOS by the US have been variously stated, it does not appear that these relate specifically to the provisions discussed above, nor that they reflect a policy of according less recognition to the human rights of seafarers than is the case in the rest of the international community. Assuming that those responsible for the administration of justice in such cases in the US are concerned to respect these rights to at least the same extent as elsewhere, the IMO Guidelines on Fair Treatment may be of interest and assistance.

⁴⁷ The removal of a seafarer's passport and seaman's book effectively means that the individual has no proper identification and may therefore be prohibited from entering many buildings with security, travelling on any mode of transportation that requires production of proper identification and carrying out any transactions that require it.

⁴⁸ See *In Re: M/V GAURAV PREM et al.*, 2011 U.S. Dist. LEXIS 153429 (S.D. Ala. 2011); see also *In re: Grand Jury Proceedings Re: Investigation of Blow Wind Shipping, S.A.*, 267 F.R.D. 32 (D. Me. 2010) (ordering detained crew members be deposed and released in less than thirty (30) days); *United States v Maniatis*, 2007 U.S. Dist. LEXIS 47543 (E.D. Cal. 2007); *Aguilar-Ayala v Ruiz*, 973 F.2d 411, 420 (5th Cir. 1992) (holding material witnesses must be released within 45 days of being detained).

**IMO Assembly adopts resolution regarding the fair treatment of seafarers
– November 2011**

The 27th Assembly of the IMO was held from 21 to 30 November 2011. Several resolutions were adopted⁴⁹ including one entitled 'Promotion as widely as possible of the application of the 2006 Guidelines on fair treatment of seafarers in the event of a maritime accident' (the Resolution)⁵⁰. This followed approval by the IMO Council in July 2011 of a draft resolution specifically relating to the Guidelines and reiterating the importance of the subject of the fair treatment of seafarers. The Resolution calls upon governments to give effect to the Guidelines and invites interested parties to assist in raising awareness of them. It is recognised that there is much to be done in this area and it remains to be seen whether the Guidelines result in consistency in the way seafarers are treated in the aftermath of a casualty.

Conclusion

A serious maritime accident, especially one involving pollution, is likely to have significant international dimensions, even though these may at first be obscured by a glare of focus on the domestic implications in the coastal state concerned.

If foreign seafarers are thought to have caused or contributed to the incident, their interest in being repatriated may appear a limited weight in the scales against a substantial public interest in the responsible parties being identified and penalised with due severity. However, the international community has made increasingly clear its resolve to ensure that the recognised rights of seafarers are duly respected and that international norms of fair treatment are observed.

Authorities responsible for the administration of criminal justice in coastal states need to be fully aware of these international dimensions, as well as of domestic implications, if undesired tensions and criticisms are to be avoided in international fora. Measures taken in oversight of these aspects are not always easily or quickly reversed.

The IMO Guidelines on fair treatment of seafarers do not establish legally binding commitments, but they do provide valuable guidance to all parties involved, including coastal state authorities who aspire to respect internationally established human rights and who wish to be seen to do so.

⁴⁹ www.imo.org/MediaCentre/PressBriefings/Pages/62-A27-ends.aspx.

⁵⁰ [ibid A1056\(27\)](#).

PIRACY

Piracy today – An update
by ANDREW D. TAYLOR

PIRACY TODAY – AN UPDATE

BY ANDREW D. TAYLOR

At the Colloquium in Buenos Aires in October 2010, former President Patrick Griggs delivered an illuminating paper on piracy. The real scale of the issue had not perhaps been appreciated by all at that time. Piracy remains a major issue and I would like to bring delegates up to date.

The thesis of Patrick Griggs's paper was that, although there were legal mechanisms for combating piracy, in principle, they were difficult to apply in practice for legal, practical and political reasons.

The nature of the problem

In International law the starting place is Part VII of UNCLOS. It is titled High Seas and includes provisions relating to piracy. Article 101 refines piracy as “*any illegal acts of violence or detention, or any act of depredation*” committed on the high seas for private ends against another vessel or persons or property on board. Arts. 105, 106, 107, 110 and 111 allow warships and other authorised ships to stop, search and seize any vessel on the high seas that they have reasonable grounds for suspecting to be engaged in piracy.

UNCLOS defines the high seas, for the purposes of acts of piracy, as those waters which lie beyond the seaward limit (generally 12 miles) of the territorial sea. Acts within the territorial sea which would be regarded as piracy if committed on the high sea are treated as ‘armed robbery at sea’ and are subject to the primary jurisdiction of the coastal state in which the acts take place.

As I have said, however, the provisions on piracy apply only on the high seas and not within territorial waters where ‘armed robbery at sea’ is exclusively subject to the jurisdiction of the courts of the coastal state. UNCLOS does not permit seizure of a pirate ship and arrest of the pirates in the territorial sea unless the ship flies the flag of that state. The theory is that the power to seize ships and pirates only on the high seas, now enshrined in UNCLOS, ensures that coastal states, which have exclusive jurisdiction within their own territorial waters, will be able effectively to control unlawful acts within those waters. This is not always the case. Somalia itself is an example. This problem has been partly solved in the case of Somalia by UN Resolutions which, in broad terms, allow States to treat acts of piracy committed within Somali territorial waters as though they were committed on the high seas.

Whilst rights to board, search and seize foreign ships and persons on board exist under international law under UNCLOS, the prosecution of pirates is subject to national law. It is therefore essential that the rights given under international law are implemented by national legislation so that national courts are able to deal efficiently with those arrested and accused of crimes at sea. Art. 100 places a duty on States to cooperate in the repression of piracy which would involve States making arrangements to transfer suspected pirates from the arresting ship to another State for prosecution. Very few States have accepted the UNCLOS mandate and legislated specifically against piracy. In this context I should mention that in August 2007 CMI submitted to the IMO Legal Committee a paper entitled ‘Maritime Criminal Acts-draft Guidelines for National Legislation’ (LEG 93/12/1). It was suggested by CMI that States with an inadequate national law on maritime criminal acts including piracy might, when carrying out a review of their national legislation, find the guidelines a useful “toolkit” from which to draft their new legislation. The Legal Committee decided to note the terms of the CMI submission but not to take the matter any further at that time.

The reasons for the reluctance of States to embrace the rights created by UNCLOS to exercise extra-territorial jurisdiction over pirates are essentially political but also economic. An example is Kenya which for a period was willing to accept the rendition of pirates and to prosecute them. But without international funding, its willingness to devote its own resources to the project soon ended. With some exceptions, other States here show no particular enthusiasm to step into the breach. However, as we shall see later, it would not be right to assume that pirates are not being prosecuted.

Finally, piracy is a crime of universal jurisdiction and pirates are criminals. However, they are not necessarily ‘individuals taking a direct part in hostilities’ in an armed conflict. This means that they cannot be targeted with lethal force. Nor are pirates necessarily terrorists.

How do matters stand today?

So that is where we were and it is against this rather gloomy background that I would like to review the legal, practical and political response since October 2010 to this insidious problem. And make no mistake it remains a pressing problem. To illustrate the scale of the issue, some statistics:

- a) According to the International Maritime Bureau (IMB) quarterly report, as of 30 June 2012¹ Somali pirates are currently holding 11

¹ ICC International Maritime Bureau Piracy and Armed Robbery Against Ships Report for the period of 1 January – 30 June 2012. This is the most current IMB report published and available at the time of writing on 16 July 2012.

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vessels with 221 hostages captive. Despite the noticeable decline in Somali piracy over the first six months of this year, the IMB has stated that Somali piracy remains a serious threat.

- b) 439 attacks were reported to the IMB in 2011 of which 275 took place off Somalia on the east coast and in the Gulf of Guinea on the west coast of Africa. This was a slight drop, compared to the 445 recorded incidents of piracy and armed robbery in 2010². Ransoms of US\$160m were paid in 2011 to release 31 hijacked ships³.
- c) Piracy cost the shipping industry and governments between US\$ 6.6bn and US\$6.9bn last year, including US\$2.7bn in extra fuel and US\$1.3bn on military operations⁴. As I have said, the shipping industry paid Somali pirates US\$160m in ransoms last year, with the average ransom being US\$5m⁵.
- d) Although the number of seafarers taken hostage in 2011 was down to 555 from 645 in 2010, captives were held for 50% longer in 2011 (an average of eight months) and the violence faced by seafarers has not subsided⁶. All hostages were subject to deprivation and unacceptable conditions when held by Somali pirates; in extreme cases of violence and deprivation, 149 hostages have been held for more than a year and 35 victims were killed at the hands of pirates last year⁷.
- e) The IMB has also recently reported that there has been a worrying increase in piracy attacks in the Gulf of Guinea: 32 incidents (including five hijackings) have been reported in 2012, compared to 25 in 2011⁸.

Recent press reports might have given the impression that the level of piracy is decreasing. Certainly it seems that attacks have shown a decrease in 2012. However the International Chamber of Shipping (ICS) has said the capability of the pirates is actually greater than it has ever been. Further, public perception that piracy is exclusively a Somali problem is still not accurate, particularly since the problem has recently spread to the West coast of Africa, off Nigeria. Additionally, some attacks by Somali pirates have taken place closer to India than to Somalia. The continued use of “mother” ships has meant that Somali pirates have a large area of operations to include waters off Kenya, the Seychelles, Madagascar, the Maldives, Oman, the Red Sea and the

² IMB figures according to IMB Annual Report of 2011. IMO's figures diverge from these.

³ One Earth Future Foundation Report - The Economic Cost of Somali Piracy 2011.

⁴ One Earth Future Foundation Report - The Economic Cost of Somali Piracy 2011.

⁵ Oceans Beyond Piracy - The Economic Cost of Somali Piracy 2011.

⁶ Oceans Beyond Piracy - The Human Cost of Piracy 2011.

⁷ Oceans Beyond Piracy - The Human Cost of Piracy 2011.

⁸ ICC International Maritime Bureau Piracy and Armed Robbery Against Ships Report for the period of 1 January - 30 June 2012.

Gulf of Aden. The IMB current Bulletin identifies as places where piracy is a risk: Bangladesh, Indonesia, Malacca Straits, Malaysia, South China Sea, Vietnam, Nigeria, Benin, Ecuador, off Oman (Arabian Sea), and off Seychelles / off Madagascar / off Maldives (Indian Ocean). Some recent piracy cases include:

- a) “FREE GODDESS” was hijacked by Somali pirates off the coast of Oman on 8 February 2012 and was still listed as a casualty on 16 July 2012. The 1995-built bulk carrier (22,051 dwt) had 21 crew on board when it was hijacked.
- b) “ROYAL GRACE” was hijacked by pirates off the coast of Oman on 2 March 2012 and was still being held by pirates as at 16 July 2012. Owners of the 1984-built chemical tanker (6,813 dwt) are said to have received an email stating the ship was being taken to Somalia.
- c) “BW RHINE”, a 2008-built product tanker, was hijacked off the coast of Togo after its automatic identification system was switched off on 28 April 2012. The vessel was released by 4 May 2012 but the pirates stole some of the vessel’s cargo of gasoline.

The International response

At the public international level States have continued with practical efforts to respond to the threat of piracy. Much of these are well known, for example the Maritime Security Centre – Horn of Africa (MSCHOA, established by EUNAVFOR), the UK Maritime Trade Operations (UKMTO), which works with the naval task forces, the 490 miles Internationally Recognised Transit Corridor (IRTC) operated by independent navies from countries such as Russia, China, India and Japan or the group transit system operated by EUNAVFOR. Three anti-piracy task forces have been assembled:

1. EUNAVFOR Somalia (“Operation Atalanta”)

- Establishment agreed by the Council of the European Union on 10 November 2008⁹, which became operational in December 2008.
- Mandate renewed by Council Decision 2012/174/CFSP until 12 December 2014. Member States have indicated their willingness to extend it further, to December 2014.
- Patrols an area extending from the Gulf of Aden and coast of Somalia to South of the Red Sea and into the Western Indian Ocean - an area of 2m square nautical miles.
- On average, the force consists of 5-10 surface combat vessels, 1-2 auxiliary ships, 2-4 patrol and reconnaissance aircraft and 1500 military personnel.

⁹ Council Joint Action 2008/851/CFSP.

2. NATO's "Operation Ocean Shield"

- Deterrence patrols provided by NATO pursuant to the UN Security Council Resolutions.
- Replaced "Operation Allied Provider" (commenced October 2008) and "Operation Allied Protector" (commenced March 2009) in August 2009.
- At-sea counter piracy operations and escorts off the Horn of Africa and in the Gulf of Aden.
- Assists regional states, on their request, to develop their own counter-piracy abilities and activities.
- EUNAVFOR and Operation Ocean Shield operate from the same headquarters in Northwood, UK.
- Participants include Italy, the USA and Portugal.

3. Combined Maritime Forces

- Formerly the Maritime Coalition.
- A multi-national naval coalition formed under the auspices of the UN Security Council Resolutions.
- Up to 36 ships available from 25 Member States (but not all necessarily deployed at the same time).
- Patrol an area of more than 2.5m square nautical miles, from the Strait of Hormuz to the Suez Canal, and from Pakistan to Kenya.
- Member States include Canada, the UK, Germany, France, Korea, the USA, Italy and Spain.
- In addition individual states, for example China, India and Russia, may also send military vessels without coming within one of these larger organisations.

One of the reasons that the IMB believes there has been a reduced number of successful Somali hijackings is the efforts and actions of the naval forces, which have harassed the mother vessels and pirate action groups.

At the same time, in cooperation with States the shipping industry has developed Best Management Practice guidelines (latest version BMP4).

The Political response

On 23rd February 2012 the UK hosted a one day meeting with leaders from more than 50 countries and international organizations which focused on a range of actions across political, security and stability priorities, and also dealt with the issue of piracy. Some of the main points agreed in relation to piracy were:

- A Memorandum of Understanding between the UK and Tanzania to transfer suspected pirates to Tanzania for prosecution (the UK wants other states in the region to sign up to similar agreements).

- Somaliland signed an agreement with the Seychelles to transfer convicted pirates to prisons in Somaliland. The plan – supported by the British government – is to set up a “conveyor belt”, where pirates are tried in the Seychelles judicial system before being sent to a UN-backed prison in Somalia.
- The UK announced the creation of an international task force on pirate ransoms to understand better the ransom business cycle and how to break it.

The taskforce has been asked to report back on piracy by autumn of this year. The report will focus particularly on a proposal to ban the payment of ransoms to pirates. This has been criticised by both the British Chamber of Shipping and the trade union Nautilus, who have lobbied the government to allow commercial organizations to pay ransoms at their own discretion. According to the British Chamber of Shipping, banning ransoms will not stop people paying them and the concept of letting seafarers die to deter pirates is both unrealistic and unacceptable given lives are at stake. Overall the reaction of industry to the Conference was mixed; it being felt that it failed to provide any firm political commitment or new actions to eliminate or significantly reduce the blight of piracy in the immediate future.

Whilst all this activity is going on ransoms continue to be paid - in fact the average ransom payment increased from US\$4m in 2010 to US\$5m in 2011¹⁰. In this respect the ICS has discouraged any further idea of prohibiting or criminalizing ransom payments since the primary concern of the industry was to the crews and their families. Further, the criminalising or prohibiting payments would lead many in the industry to refuse to sail in the affected danger area. This would have significant implications for a large portion of world trade, including about 40% of world oil shipments, which are transported via the Western Indian Ocean. Although a US Presidential Executive Order of 13th April 2010 made it an offence to pay a ransom to certain specific groups of pirates, this approach has not been followed by other states. In England, the payment of a ransom has been held not to be contrary to public policy (*Masefield AG v. Amlin Corporate Member Ltd., The Bunga Melati Dua* [2011] EWCA Civ 24), thereby easing any difficulties in making claims under policies of insurance subject to English law.

In another development, a request was submitted by Ukraine to the IMO (LEG99/7/1) at the 99th session of the Legal Committee on 16-20th April 2012 for information on the apprehension of pirates which operate in the Gulf of Aden, the Arabian Sea and the Northern Indian Ocean. Such a request was made on the basis that the prosecution of pirates had long been viewed as a complicated problem. The data provided would enable the Legal Committee

¹⁰ One Earth Future Foundation Report - The Economic Cost of Somali Piracy 2011.

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to make an informed decision on further steps to improve the legislative framework to combat piracy and armed robbery. The IMO responded (LEG 99/7/2) with data obtained from a report of the United Nations Secretary-General (S/2012/50). This detailed that the number of States prosecuting acts of piracy off the coast of Somalia in their courts was 20, and the total number of prosecutions which had taken place so far was 1,063. Interestingly, the UK has not prosecuted any of the pirates detained by naval vessels. Meanwhile, Kenya has held 143, convicting 50; and the USA has held 28, convicting 17.

The IMO Secretariat is planning to undertake a study to consolidate information regarding court decisions resulting from piracy prosecutions so that it is publicly available on the IMO website.

Piracy was also prominent on the agenda of the Asian Shipowners' Forum (ASF) that took place in Port Douglas, Australia on 22nd May 2012. The ASF urged continued and stronger political will to address the root causes of piracy, on land in Somalia. The ASF is in the process of developing a Counter Piracy Proposal in response to the continuing threat of Somali piracy – the details of which will be presented to Working Group 1 of the Contact Group for Piracy off the Coast of Somalia. The ASF was also alarmed by the increased magnitude of piracy in West African waters off Benin and Nigeria, urging the UN to take immediate action to address the problem.

The second UAE Marine Counter-Piracy Conference took place in Dubai in June 2012. The Conference welcomed the significant progress made in combating piracy on land and in the waters off the coast of Somalia in the year since the inaugural conference in April 2011. The Conference reaffirmed its commitment to strengthening public-private partnerships in the search for a sustainable solution to the violence. The Conference also emphasized the importance of state building and harmonization with local governments and other agencies to counter the destabilizing impact of piracy. A declaration was adopted by foreign ministers and senior government officials from 41 countries, as well as representatives from UN agencies, including the IMO, and top executives from 73 leading maritime companies and organisations. The Conference expressed backing for a UAE proposal to make the UN Trust Fund to Support Initiatives of States to Counter Piracy off the Coast of Somalia (affiliated to the Contact Group on Piracy off the Coast of Somalia) the central manager for new funds donated towards the development of Somalia's maritime security capacity. The UAE also made an initial pledge of US\$1m towards this new initiative within the Trust Fund.

In other relevant political developments, the UK government formally endorsed the use of armed guards on 30 October 2011, when the Prime Minister announced ships sailing under the British flag would be allowed to carry armed guards to protect themselves from pirates. The announcement was in direct contrast with previous government policy, which strongly discouraged the use of armed guards. However, the Prime Minister stressed

that the placing of armed guards on board commercial vessels was only a short-term measure and not a long-term solution to the piracy problem. Justine Greening MP, Secretary of State for Transport, recently noted, in a speech to the IMO on 16 May 2012, that perhaps as a result of these actions taken by the UK government, the number of successful attacks on shipping actually fell during the second half of 2011.

Finally, I should mention that in June 2012, the Cypriot House of Representatives approved a new counter-piracy Bill, which makes Cyprus one of the first EU countries to specifically authorize the use of force. The new laws underline the authority of the master and forbid armed guards to use their weapons without the explicit order or permission of the master. The legislation also lays down reporting requirements and other measures to be taken by the master and shipowners in order to prevent piracy attacks. It safeguards the rights of seafarers and regulates the licensing of Private Maritime Security Contractors (PMSCs) and their personnel, clarifying their responsibilities. The jurisdiction of the Cypriot courts is also established for the trial of those involved in piracy.

Industry response – Civil law

Nevertheless, there remains an uneasy feeling that enough is still not being done to rein in the problem of piracy. Many Owners are resorting to hiring PMSCs to deploy armed guards on board their vessels. The use of PMSCs has increased as a response to the fact that the task forces have not to date proved to be entirely successful. There are too few ships covering too large an area. More importantly some vessels remain uniquely vulnerable to pirate attacks: those with a low freeboard, low speed, small crew, poor manoeuvrability. Further, the cost of piracy is rising in terms of ransom payments, the economic cost of the time during which a vessel is held and insurance costs. Last but not most important is the humanitarian cost of piracy is becoming more prominent and Owners want to protect their crew.

The International Union of Marine Insurance (IUMI) spoke out publicly at its annual conference in September 2011 in support of armed guards. The major reason for doing so was that no vessel with armed guards has been hijacked. It came to light in Lloyd's List (after the IUMI gave its seal of approval) that insurers were offering a 35% discount for transits in the "High Risk Area" (this area includes the Gulf of Aden and the Arabian Sea around the Somali coast) that were carrying armed guards. As already noted, the UK Government also followed this lead with its measured endorsement of the use of PMSCs. From the most recent quarterly report of the IMB there is some evidence that the preventative measures taken by merchant vessels, including the use of citadels and employment of armed guards and PMSCs, has been a factor in the recent reduction of successful hijackings off Somalia.

The extent to which PMSCs armed or unarmed had been used prior to 2011 is unclear. However, it is perhaps fair to say that the use of passive measures was the norm. These included: Water Cannon; Sonic Devices (Long Range Acoustic Device LRAD)¹¹; trailing lines; barbed/razor Wire: recommended by BMP along with placing dummy lookouts; Citadels / Safe Rooms¹². The problem with passive measures is illustrated clearly in the case of the “BISCAGLIA” in November 2008: an unarmed 3 man security team could not repel a hijack by pirates with the use of water cannons and a LRAD.

The Shipping industry has recognised that an increasing number of Owners and Operators wish to deploy armed guards on board their vessels but made clear that deployment of armed guards is a matter for each individual Owner:

- IMO: “*a decision for the individual shipowner after a thorough risk assessment and after ensuring all other practical means of self protection have been employed*”.
- BMP4: “*a matter for individual shipowners to decide following their own voyage risk assessment and approval of respective Flag States*”.

BMP4 does not contain a specific endorsement of their use: “*this advice does not constitute a recommendation or an endorsement of the general use of armed Private Maritime Security Contractors*”.

However, the use of armed guards and PMSCs raises its own issues. Obviously, there are practical questions such as having appropriate licenses for weapons on board from the flag state and ports at which the ship calls. At the heart of the issue is the use of force. The rules that will be applied to when weapons can be used will depend on among other possible laws, the law of the flag state, the law of the state where the Owners are incorporated or have their commercial seat, and the law of the states where the vessel will call. In the UK, lethal force is only allowed where there is a serious and imminent threat to life. The decision to use lethal force must be reasonable and the force used must be proportionate. The dangers are all too obvious, on 15 February 2012, two Italian marines on the “ENRICA LEXIE” shot dead two Indian fishermen, whom they believed were pirates. The two armed guards are currently being held by Kochi City Police, India. Italy has agreed to pay US\$ 192,000 in compensation to the families of the two fishermen (these payments will not affect the pending legal action against the two guards who have been charged with murder).

¹¹ This was used by “SEABOURN SPIRIT” to repel pirates in November 2005, although the actual effectiveness of the LRAD was unknown.

¹² The “*Montecristo*” crew barricaded themselves into their citadel when attacked by pirates in October 2011 until being rescued by the Navy. Imabari Shipbuilding in Japan recently unveiled a new ship design which incorporates a citadel facility protected by security doors, bullet-proof windows and water canons.

The Chairman of International Maritime Industries Forum (IMIF), Jim Davies, has suggested that the rules on the use of force must be more clearly established, recognised by the court of human rights and defined internationally. Although, as we shall see, BIMCO's Guardcon produced additional advice on the use of force, it does not apply internationally as every country has the right to decide its own individual rules.

At the moment PMSCs sign up to the International Code of Conduct (ICOC) and other accreditation or vetting procedures on a purely voluntary basis. However, the intention is to take the guidelines from the ICOC and use them to produce a more formal oversight for PMSCs. The Security Association for the Maritime Industry (SAMI) has been set up with a view to regulating the provision of such services.

Finally, BIMCO has created Guardcon, a standard contract for employing security guards on vessels. This was launched in March 2012, to take the lead in giving shipowners and PMSCs guidance on employment and use of security guards, with or without firearms, on merchant vessels. It seeks to set an industry standard for governing relationships between the shipowner and the PMSCs as well as the master and on-board security guards. Although it is not a cure-all and should not be seen as the long-term solution, it does offer clarity on certain issues. For example, BIMCO has also published guidance on the use of force to accompany Guardcon. The desired template is for providing a layered defence, with lethal force being a last resort to be used in exceptional circumstances. The Master has overall authority and has the right to order a cease fire. This reaffirms the SOLAS position that the Master has absolute authority as to the safety of the vessel, her cargo, and her crew. However, certain issues do arise as to the authority of the Master where armed guards are deployed:

- The decision to open fire, according to Guardcon, is given to the PMSC team leader. Therefore, the Master can only decide to stop the firing – by which point the damage may have been done.
- In reality, the Master may not have authority because if there is an exchange of fire and the Master is in the citadel, he may not be in a position to control the situation.

At the 90th session of the IMO Maritime Safety Committee (MSC) in London, between 16 and 20 May 2012, the MSC agreed on interim guidance on PMSCs including, but without endorsing, the use of armed guards. Additionally, interim guidance for flag states was also approved, which provides measures to prevent and mitigate Somalia-based piracy; listing recommended practices that flag states are encouraged to apply, taking into account national laws of flag states, to maximize efforts on counter-piracy measures being implemented.

Finally, I should mention the Convoy Escort Programme (CEP). The CEP is a plan by London market insurers to set up a private fleet of armed patrol

Piracy

boats in the Gulf of Aden to provide protection for vessels, whilst also reducing the costs of insuring vessels, cargo and crews against the risk of attacks by pirates. The CEP Package includes an escort service, insurance cover and an audit of the vessel's BMP4 and compliance during the transit period. Under the plan, the CEP would control a fleet of vessels with fixed gun positions and armed crews authorized to engage the pirates. It is currently in the process of raising finance from investors. However, it has courted much controversy within the shipping industry because it is seen by many as a private army for hire.

Closing remarks

I hope this review has been helpful. I should add that it is not intended to be exhaustive. Although there have been continuous political efforts through IMO and by States to tackle piracy, these remain of uncertain effect. The most significant development has been the growing tacit or overt support for PMSCs and armed response. According to IMO, anecdotal evidence suggests that up to 25% of ships are carrying firearms when transiting the Gulf of Aden. This development and the efforts of the various naval detachments do appear finally to have had some impact on the frequency of attacks off Somalia. However, the long term effect on the incidence of piracy of the presence of armed PMSCs cannot be known. Armed guards can only be a supplementary measure to protect seafarers, vessels and cargoes. They do not solve the underlying problems that create piracy. Furthermore, many other practical and legal issues arise such as the wrongful use of force, the authority of the Master and insurance cover. The key to winning the battle is breaking the financial chain to financiers investing in piracy, successfully prosecuting pirates captured by the naval task forces, and greater political will and stability in the regions affected, particularly in Somalia. The latest report that a pirate "war lord" has been provided with diplomatic immunity by the President of Somalia emphasizes the scale of the task ahead.

MARITIME ISSUES FOR AND BY JUDGES

A first for CMI: A session by judges for judges
by JUSTICE JOHANNE GAUTHIER

A FIRST FOR CMI: A SESSION BY JUDGES FOR JUDGES

BY JUSTICE JOHANNE GAUTHIER *

1. For many years, judges have played prominent roles in the activities of some of the National Maritime Law Associations (NMLAs) such as the United Kingdom, Australia and Canada, as well as those of the CMI. Judges from the African continent, South America and Continental Europe have also attended CMI conferences.

2. During the CMI conference held in Greece in 2008, informal discussions were held with delegates from various NMLAs, in countries where there had been no such participation of the members of the judiciary, as to what CMI could do to improve the situation. Then, in Buenos Aires, the Chinese delegation indicated that they would appreciate some effort being made in that respect.

3. It was thus decided by the Executive Council that in addition to addressing topics which should be of particular interest to judges, such as judicial sales and trans-border insolvencies, we should organize a special session for judges. That closed door session will be held at the Beijing Conference on Tuesday, October 16, 2012. The attending judges will be encouraged to attend and participate in the other sessions on the conference programme as well.

4. The topics for the judges' session have been chosen by judges and should be of interest to members of the judiciary of all national associations. The NMLAs should therefore make a particular effort to publicise that fact domestically and help in any way they can to facilitate the participation of their judges.

5. During the session, three judges will make brief presentations on the following topics:

- (i) Justice Wang Yanjun (China) – on legal issues arising from the release of goods without production of a bill of lading;

* Federal Court of Appeal (Canada), Vice President, CMI.

- (ii) (Justice Steven Rares (Australia) – on the use of foreign cases in interpreting Maritime Conventions;
 - (iii) Justice Johanne Gauthier (Canada) - on anti-suit injunctions.
6. These presentations will be followed by informal exchanges among the participants as to how they deal with such issues in their own country and whether they face any particular challenges in that respect. The goal is to share experiences and best practices, as well as to improve the participants' knowledge of the different national systems.
7. It is also hoped that the participants will be able to identify in what way CMI and their own NMLAs can help them in the future. In particular, what role they can and should play.
8. This is an important endeavour as domestic courts play an essential role in the proper implementation of international conventions.
9. CMI's main objective of promoting uniformity of maritime law can best be achieved when international Conventions and soft law instruments, such as the CMI Guidelines on Pollution Damages, are well understood and applied harmoniously by domestic courts. The *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 fully recognizes this.
10. It should also be noted that in Shanghai, there will be a visit to the maritime court during which Justice Wang Yanjun will speak about 'the liability for ship oil pollution damages'.

MARINE INSURANCE

Report on the work of the International Working Group on Marine Insurance

by DIETER SCHWAMPE

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REPORT ON THE WORK OF THE INTERNATIONAL WORKING GROUP ON MARINE INSURANCE

BY DIETER SCHWAMPE*

The IWG on Marine Insurance has been recomposed by the Executive Counsel in Spring 2012 and now consists of the following members:

Dr. DIETER SCHWAMPE, Germany (Chairman)

Prof. SARAH DERRINGTON, Australia

Prof. MARC HUYBRECHTS, Belgium

JOSÉ TOMAS GUZMAN, Chile

Prof. PENGAN WANG, China

JIROU KUBO, Japan

Prof. RHIDIAN THOMAS, United Kingdom

JOSEPH GRASSO, United States of America

The current topic of the IWG is *Guidelines for Mandatory Insurances in International Conventions*. The task assigned to the IWG by the Executive Council is “to consider mandatory insurance provisions in international conventions and to give recommendations on whether Guidelines for national governments should be drafted to assist in the formulation and proper implementation of national law giving effect and providing a legal framework for them”.

Looking of the following Conventions,

- International Convention on Civil Liability for Oil Pollution Damage (CLC 1992)
- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, (HNS 2010)
- International Convention on Civil Liability for Bunker Oil Pollution Damage 2001
- International Convention on the Removal of Wrecks 2007

* Chairman

- 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974

The IWG looks at these Conventions to determine which legal framework member states to the Conventions have put in place in respect of mandatory insurance provided for in the Conventions and what national laws provide in respect of the actual exercise of the direct action provided for in the Conventions. For this purpose the IWG has prepared by Questionnaire, containing 53 questions in the areas of licensing, certification, statutory law, jurisdiction and applicable law, particulars on direct action and state liability. The Questionnaire, which had been sent to the national MLAs by the CMI Secretariat, is set out the Annex. So far 14 Associations have replied: Argentina, Australia/New Zealand, Belgium, Canada, China, Croatia, Germany, Italy, Japan, The Netherlands, Norway, Sweden, Switzerland, and the United States.

Currently the IWG is in the process of evaluating the answers to determine, whether they provide a sufficient base for recommendations to the Executive Council. The IWG will give a status report during the 2012 Conference in Beijing in October.

Hamburg, 15 July 2012

ANNEX 1**COMITE MARITIME INTERNATIONAL
THE IMPLEMENTATION IN NATIONAL LAW OF MANDATORY
INSURANCE PROVISIONS IN INTERNATIONAL CONVENTIONS****INTRODUCTION TO
QUESTIONNAIRE TO MEMBER ASSOCIATIONS**

The CMI Executive Council has requested the International Working Group (IWG) on Marine Insurance to consider mandatory insurance provisions in international conventions and given recommendations on whether Guidelines for national governments should be drafted to assist in the formulation and proper implementation of national law giving effect and providing a legal framework for them.

The Questionnaire has been developed to collect information on existing national legislation as a basis for proposals for Guidelines.

We would be grateful if you would provide your responses by October 10, 2010 so they may be collated and analysed in time for reporting and discussions at the Assembling in Buenos Aires on Wednesday, October 27, 2010.

* * *

- I. This questionnaire addresses mandatory insurance provisions of the following international conventions:
 - I.1 **CLC Convention of 1992** (International Convention on Civil Liability for Oil Pollution Damage 1992):
 - Art. VII para. 1: “The owner of a ship... carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund...”.
 - I.2 **HNS** (International Convention of 3 May 1996 on Liability and compensation in connection with Carriage of Hazardous and Noxious Substances by Sea (London),
 - Art. 12 para. 1: “Insurance or other financial security, such as the guarantee of a bank or similar financial Institution”.

*Annex 1 – Introduction to Questionnaire***I.3 Bunkers Convention** (International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage),

Art. 7 para. 1: “The registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution”.

I.4 Nairobi Wreck Removal Convention of 18 May 2008,

Art. 12 para. 1: “The registered owner of a ship of 300 gross tonnage and above and flying the flag of a State Party shall be required to maintain insurance or other financial security, such as a guarantee of a bank or similar institution”

I.5 Athens Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974,

Art. 4bis para. 1: “Any carrier who actually performs the whole or a part of the carriage shall maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution”.

II. The foregoing referenced Conventions contain the following provisions concerning requirements for coverage**II.1 CLC Convention of 1992:**

Art. VII para. 8 “Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner’s liability for pollution damage. In such a case the defendant may, even if the owner is not entitled to limit his liability according to article V paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings.”

II.2 HNS:

Art. 12 para. 8 “Any claim for compensation for damage may be brought directly against the insurer or other person providing financial security for the owner’s liability for damage. In such case the defendant may, even if the owner is not

entitled to limitation of liability, benefit from the limit of liability prescribed in accordance with paragraph 1. The defendant may further invoke the defences (other than the bankruptcy or winding up of the owner) which the owner would have been entitled to invoke. Furthermore, the defendant may invoke the defence that the damage resulted from the wilful misconduct of the owner, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the owner against the defendant. The defendant shall in any event have the right to require the owner to be joined in the proceedings.”

II.3 Bunkers Convention:

Art. 7 para. 10: “Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner’s liability for pollution damage. In such a case, the defendant may invoke the defences (other than bankruptcy or winding up of the ship owner) which the ship owner would have been entitled to invoke, including limitation pursuant to article 6. Furthermore, even if the ship owner is not entitled to limitation of liability according to article 6, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the pollution damage resulted from the wilful misconduct of the ship owner, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the ship owner against the defendant. The defendant shall in any event have the right to require the ship owner to be joined in the proceedings.”

II.4 Wreck Removal Convention:

Art. 12 para. 10: “Any claim for costs arising under this Convention may be brought directly against the insurer or other person providing financial security for the registered owner’s liability. In such a case the defendant may invoke the defences (other than the bankruptcy or winding up of the registered owner) that the registered owner would have been entitled to invoke, including limitation of liability under any applicable national or international regime. Furthermore, even if the registered owner is not entitled to limit liability, the defendant may limit liability to an amount equal to the

Annex 1 – Introduction to Questionnaire

amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the maritime casualty was caused by the wilful misconduct of the registered owner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the registered owner against the defendant. The defendant shall in any event have the right to require the registered owner to be joined in the proceedings.”

II.5 Athens Protocol of 2002:

Art. 4bis para. 10: “Any claim for compensation covered by insurance or other financial security pursuant to this Article may be brought directly against the insurer or other person providing financial security. In such a case, the amount set out in paragraph 1 supplies as the limit of liability of the insurer or other persons providing financial security, even if the carrier is not entitled to limitation of liability. The defendant may further invoke the defences (other than the bankruptcy or winding up) which the carrier referred to in paragraph 1 would have been entitled to invoke in accordance with this Convention. Furthermore, the defendant may invoke the defence that the damage resulted from the wilful misconduct of the assured, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the assured against the defendant. The defendant shall in any event have the right to require the carrier and the performing carrier to be joined in the proceedings.”

III. The foregoing referenced conventions deal with certification of the compulsory insurance in the following provisions:

III.1 CLC Convention of 1992 (International Convention on Civil Liability for Oil Pollution Damage 1992)

Art. 7 para. 2 A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a Contracting State has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a Contracting State such certificate shall be issued or certified by the appropriate authority of the State of the ship’s registry; with respect to a ship not registered in a Contracting State it may be issued

or certified by the appropriate authority of any Contracting State. The certificate shall be in the form of the annexed model and shall contain the following particulars:

- (a) name of ship and port of registration;
- (b) name and principal place of business of owner;
- (c) type of security;
- (d) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;
- (e) period of validity of certificate which shall not be longer than the period of validity of the insurance or other security.

Art. 7 para. 3: The certificate shall be in the official language or languages of the issuing State. If the language used is neither English nor French, the text shall include a translation into one of these languages.

III.2 HNS

Art. 12 para 2: A compulsory insurance certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such compulsory insurance certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This compulsory insurance certificate shall be in the form of the model set out in Annex I and shall contain the following particulars:

- (a) name of the ship, distinctive number or letters and port of registry;
- (b) name and principal place of business of the owner;
- (c) IMO ship identification number;
- (d) type and duration of security;
- (e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and
- (f) period of validity of certificate, which shall not be longer than the period of validity of the insurance or other security.

Annex 1 – Introduction to Questionnaire

Art. 12 para. 3: The compulsory insurance certificate shall be in the official language or languages of the issuing State. If the language used is neither English, nor French nor Spanish, the text shall include a translation into one of these languages.

III.3 Bunkers Convention:

Art. 7 para 2: A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This certificate shall be in the form of the model set out in the annex to this Convention and shall contain the following particulars:

- (a) name of ship, distinctive number or letters and port of registry;
- (b) name and principal place of business of the registered owner;
- (c) IMO ship identification number;
- (d) type and duration of security;
- (e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;
- (f) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

Art. 7 para. 3: (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

(b) A State Party shall notify the Secretary-General of:

- (i) the specific responsibilities and conditions of the authority delegated to an institution or organization recognised by it;
- (ii) the withdrawal of such authority; and
- (iii) the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

(c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

Art. 7 para 4: The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language of the State may be omitted.

III.4 Wreck Removal Convention:

Art. 12 para 2: A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship of 300 gross tonnage and above by the appropriate authority of the State of the ship's registry after determining that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This compulsory insurance certificate shall be in the form of the model set out in the annex to this Convention, and shall contain the following particulars:

- (a) name of the ship, distinctive number or letters and port of registry;
- (b) gross tonnage of the ship;
- (c) name and principal place of business of the registered owner;
- (d) IMO ship identification number;
- (e) type and duration of security;
- (f) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;
- (g) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other security.

Annex 1 – Introduction to Questionnaire

- Art. 12 para. 3: (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.
- (b) A State Party shall notify the Secretary-General of:
- (i) the specific responsibilities and conditions of the authority delegated to an institution or organization recognized by it;
 - (ii) the withdrawal of such authority; and
 - (iii) the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

- (c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

- Art. 12 para. 4: The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language(s) of the State may be omitted.

III.5 Athens Protocol of 2002:

- Art. 4bis para 2: A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party, such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This certificate shall be in the form of the model set out in the annex to this Convention and shall contain the following particulars:

- (a) name of ship, distinctive number or letters and port of registry;
- (b) name and principal place of business of the carrier who actually performs the whole or a part of the carriage;
- (c) IMO ship identification number;
- (d) type and duration of security;
- (e) name and principal place of business of insurer or other person providing financial security and, where appropriate, place of business where the insurance or other financial security is established; and
- (f) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other financial security.

Art. 4bis para 3: (a) A State Party may authorize an institution or an Organization recognised by it to issue the certificate. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued, and shall undertake to ensure the necessary arrangements to satisfy this obligation.

- (b) A State Party shall notify the Secretary-General of:
 - (i) the specific responsibilities and conditions of the authority delegated to an institution or organization recognised by it;
 - (ii) the withdrawal of such authority; and
 - (iii) the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date from which notification to that effect was given to the Secretary-General.

- (c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not complied with. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

Art. 4bis para 4: The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages, and, where the State so decides, the official language of the State may be omitted.

Annex I – Questionnaire

QUESTIONNAIRE**1. Licensing**

Does an insurer wanting to insure the risks under the Convention referred to above need a license?

If so,

- 1.1 must it be a national license, or do your respective authorities accept licenses issued by foreign bodies?
- 1.2 What are the consequences if an insurer issues a policy without the respective license?
- 1.3 Is there an obligation of a licensed insurer to conclude insurance contracts?

2. Certification

- 2.1 Will a certificate issued by a convention state
 - 2.1.1 be recognized in your state without any preconditions?
 - 2.1.2 be subject to investigation whether insurance satisfying the convention requirements actually exist?
 - 2.1.3 be rejected if there is evidence that there no valid insurance at all or that the insurance is not satisfying the convention requirements?
- 2.2 Does the authority in your state in charge of issuing the certificate
 - 2.2.1 require a license of your state or is it sufficient that the insurer is licensed in another state?
 - 2.2.2 investigate the insurance conditions before issuing a certificate?
 - 2.2.3 investigate the financial standing of the insurer?
 - 2.2.4 investigate the license of the insurer?

3. Statutory Law

- 3.1 Does your national law contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law?

If so, could you

 - 3.1.1 summarize the main characteristics of those provisions?
 - 3.1.2 provide the IWG with an English translation of those provisions?
- 3.2 If your national law does not contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law, does your national law then contain general provisions on mandatory insurance, which also apply to the mentioned provisions in the international conventions?

If so, could you

Marine insurance

- 3.2.1 summarize the main characteristics of those provisions?
- 3.2.2 provide the IWG with an English translation of those provisions?
- 3.3 What does your private international law provide for as the applicable law,
 - 3.3.1 if the claimants are national persons or companies, but if the insurer is a foreign company?
 - 3.3.2 if the claimants are foreign persons and companies, but if the insurer is a national company?
 - 3.3.3 if the claimants and the insurer are foreign companies?

4. Jurisdiction/Proceedings

- 4.1 Does your national law contain provisions on jurisdiction of courts for direct claims against Insurers?
If so, does your national law
 - 4.1.1 allow foreign claimants to directly sue national insurers in your national courts?
 - 4.1.2 allow foreign and national claimants to directly sue foreign insurers in your national courts?
- 4.2 Does your national law allow that the direct claims against an insurer are subject to an arbitration clause?
- 4.3 Does a judgement against the liable party bind the courts of your country in a direct action against an insurer as regards the merits and quantum?
If so,
 - 4.3.1 does this also apply to judgements in default?
 - 4.3.2 can the insurer invoke that the court having decided on the claim against the party liable has not had jurisdiction?
 - 4.3.3 can the insurer invoke that the party liable has not been properly served with proceedings and no opportunity to defend itself?
 - 4.3.4 can the party liable invoke that the party liable has not defended itself properly?
- 4.5 Can the claimant under your national law sue the person liable and the insurer in the same proceedings?
If so,
 - 4.5.1 are there any requirements as to the domicile of the party liable or the insurer?
 - 4.5.2 Does your national law contain provisions on what has to happen if the insurer requires that the party liable is joined as a further defendant?

5. Particulars of direct action

- 5.1 Does your national law contain provisions according to which a direct claimant has to fulfil requirements for commencing a direct action against an insurer?

Annex 1 – Questionnaire

- 5.2 Does your national law contain provisions on burden and measure of proof which distinguish between a claim against the party liable under the respective convention and a direct claim against the insurer of such party?
- 5.3 What defences does your national law allow an insurer against a direct claim?
- 5.4 Can the insurer take over the defence of the party liable, and has the insurer a statutory power of attorney to act for the party liable?
- 5.5 Are there any time limits in your national law for a direct action against an insurer?
If so,
 - 5.5.1 what protects such a time limit (e.g. court proceedings; demand letters)?
 - 5.5.2 can the time limit be extended by agreement? If so, is the agreement with the insurer sufficient or does the party liable have to agree to the extension as well?
- 5.6 Under your national law, are the party liable and the insurer jointly liable?
If so,
 - 5.6.1 what legal consequences does your national law provide for such joint liability?
 - 5.6.2 can the insurer file a cross action against his insured in the same proceedings?
 - 5.6.3 do your courts in such a situation give effect to a jurisdiction or arbitration clause in the insurance policy?
- 5.7 Does your national law allow that the claimant assigns his direct claims to a third party?
If so,
 - 5.7.1 are there any requirements for the validity of the assignment?
- 5.8 What qualifies under your national law as a *wilful misconduct*?
- 5.9 Does the insurer acquire rights against his own insured (the party liable) if he has to indemnify the direct claimant in circumstances, under which he would have avoided cover if he had been sued by the party liable and not by the direct claimant?
- 5.10 How is limitation of liability affected under your national law in cases of direct actions?
- 5.11 Does your national law contain consequences, if the insurance contract contains provisions which are not consistent with the Conventions referred to above?
If so,
 - 5.11.1 are such provisions invalid?
 - 5.11.2 is the whole contract invalid?
 - 5.11.3 does the contract including such conflicting conditions remain valid, so that the insurance does not fulfil the requirements of the Conventions? What effect does that have under your national law?

6. State Liability

Does your national law provide for liability of the state where to appropriate authority issues a certificate under the Convention, if it turns out

- 6.1 that there is no insurance contract at all?
- 6.2 that the insurance contract is not consistent with the provisions of the Conventions?
- 6.3 that the insurer is not financially stable and cannot satisfy all direct claims?

If you have any questions regarding this Questionnaire, please feel free to contact the Chairman of the IWG on Marine Insurance, Dr. Dieter Schwampe at d.schwampe@da-pa.com. Replies to this Questionnaire should be sent to the CMI Secretariat in Antwerp.

Your cooperation is very much appreciated.

Nigel H. Frawley, Secretary General

CROSS BORDER INSOLVENCY

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COMITE MARITIME INTERNATIONAL, AISBL

PRESIDENT

To the Presidents of all member associations of the CMI

cc: All Titulary Members

Oslo 2 May, 2012

Dear President,

Attached please find the Introduction and Questionnaire that have been prepared by the CMI International Working Group on Cross-Border Insolvency. The IWG is chaired by Christopher Davis of the United States and includes both civilian and common law practitioners and professors (Beiping Chu of China, Sarah Derrington of Australia, Sebastien Lootgieter of France, and William Sharpe of Canada).

As you know, the subject of cross-border insolvency remains topical as evidenced by recent high-profile bankruptcies that continue to receive coverage in Lloyd's List, TradeWinds and other publications. Additionally, the subject will be part of the Beijing Conference work programme in October 2012.

Thus, I would be grateful if your Association could respond to the Questionnaire in a timely manner, ideally by 30 June 2012, so as to enable the IWG to study and summarise the replies well ahead of the October 2012 Beijing Conference.

While responding to Questionnaires such as this one is time consuming, a comparative law

Letter 2 May 2012, by Karl-Johan Gombrii

analysis of cross-border insolvency will benefit the maritime industry and legal practitioners, and is likely to promote uniformity and harmonisation of the law governing cross-border insolvency. Thus, your Association's input is important, particularly if your country has adopted the UNCITRAL Model Law or is part of the European Union and is subject to EC Regulation No. 1346/2000 on insolvency law (this applies equally to countries that have adopted other domestic, regional or international instruments such as the OHADA or SAOC Treaties in Africa). Given the length of the attached Questionnaire, may I suggest that your Association focus initially on Section I (Questions 1-29), and time permitting, subsequently provide input on Section II (Questions 30-59).

I look forward to hearing from you and seeing you in Beijing and Shanghai in October 2012.

Best regards,



AN INTRODUCTION TO CROSS-BORDER INSOLVENCY

BY SARAH DERRINGTON*

Insolvency law is tricky enough to navigate in the context of domestic insolvency proceedings brought against companies registered and operating in the forum. Where foreign companies and/or windings-up are involved, they are murky and treacherous and must be navigated with care¹. However, it is impossible to ignore the interaction between the admiralty process and insolvency proceedings, however underdeveloped that interaction may be.

This does not mean that no attempt has been made to legislate for the recognition of foreign bankruptcy proceedings. For example on 8 July 1899 France and Belgium signed a convention on jurisdiction and recognition of judicial decisions which contains provisions on insolvency proceedings. Other bilateral instruments were subsequently signed with Italy (1930) and Monaco (1950). The regulation of cross-border insolvency was also foreseen by the draftsmen of the Treaty of Rome 1957. Nevertheless the creation of a true multilateral instrument providing solutions to international insolvency proceedings was a long and difficult journey. Indeed it was not until the recession in the late 1980s that European states really turned their minds to the need for such an international convention.

The first attempt by the Council of Europe, which had drafted a convention on certain international aspects of bankruptcy, proved to be a failure since it was signed by only 7 States and ratified by only one State. Another instrument was prepared in 1995 by the European Union Council on insolvency proceedings, but it never came into force.

Finally, nearly half a century after the birth of the European Community, the European Council enacted Regulation 1346/2000 on insolvency proceedings which came into force on 31 May 2002. This Regulation applies to proceedings where the centre of the debtor's main interests is located in the

* Co-Rapporteur, CMI IWG on Cross-Border Insolvency, July 2012. The author is grateful for the input provided by Sebastien Lootgieter of France and Chu Beiping of China.

¹ Derrington & Turner, *The Law & Practice of Admiralty Matters* (OUP, 2006), 200; J-P. Réméry, *"Faillite internationale et droit maritime, quelques rapprochements"* DMF 2009, 487.

European Community. Article 3 provides that the court of the Member State in which that centre is situated shall have jurisdiction to open such proceedings. Article 4.1 provides that the laws of that State shall govern the insolvency proceedings and in particular their closure and their conduct (Art.4.2):

“It shall determine in particular:

- (a) against which debtors insolvency proceedings may be brought on account of their capacity;*
- (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;*
- (c) the respective powers of the debtor and the liquidator; ...*
- (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending; ...”*

Further, Article 16 provides that:

“Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings ...”

And Article 17 states as follows:

“The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under [the] law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State ...”

Another major attempt to impose a universal approach is the UNCITRAL Model Law on Cross-Border Insolvency. In the Asia-Pacific region, it has been adopted only by Australia (*Cross-Border Insolvency Act 2008*), New Zealand, Korea and Japan but notably not in China² nor Hong Kong. The Model Law has been adopted by the United States and Canada, although Canada has not proclaimed the Model Law. Colombia and Mexico are the only Latin American countries that have adopted the Model Law to date. If one compares the number of countries that have adopted or enacted legislation based on the Model Law (18 according to UNCITRAL's website) with the more than 100 parties to the

² *The Enterprise Bankruptcy Law* Art. 5 deals with cross-border insolvency in conjunction with the *Supreme Court Judicial Interpretation*. Insolvency proceedings in China are binding on foreign parties but no recognition is given to foreign cross-border insolvency proceedings.

Hague Rules, we can see that the Model Law on Cross-Border Insolvency has some way to go to catch up with uniform régimes in maritime law.

Article 1 of the Model Law provides that Law applies where:

- (a) *Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or*
- (b) *Assistance is sought in a foreign State in connection with a proceeding under [a law of the enacting State in relation to insolvency];*
- (c) *A foreign proceeding and a proceeding under [a law of the enacting State in relation to insolvency] in respect of the same debtor are taking place concurrently; or*
- (d) *Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in a proceeding under [a law of the enacting State in relation to insolvency].*

Article 4 provides:

The functions referred to in the present Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [the courts competent to provide those functions in the enacting State].

The recognition of foreign insolvency proceedings as “main proceedings” gives rise to an automatic stay which will apply to certain types of creditor actions including: the commencement of proceedings concerning the debtor company’s assets, rights, obligations or liabilities; execution against its assets and/or the transfer or disposal of its assets³. The Model Law makes no specific reference to admiralty claims but makes reference to the preservation of rights *in rem* in Article 32 which preserves, to some extent, the position of secured claims or rights *in rem*.

Article 20 provides that upon recognition of a foreign proceeding that is a main foreign proceeding:

- (a) *Commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed;*
- (b) *Execution of the debtor’s assets is stayed;*
- (c) *The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.*

³ Article 20.

The Model Law does not define the term ‘execution.’ It has been held in Australia that the arrest and subsequent sale of a ship pursuant to the judicial order of an admiralty court does not amount to a process of execution. The English authority on this precise issue is unsettled⁴. Where, however, no security has been obtained over a ship at the time when a foreign winding-up order is made, the result is likely to be that the maritime claimant will be unable to bring *in rem* proceedings, and – unless the foreign court grants permission to sue *in rem* – will be limited to proving in the foreign liquidation. This is, in part, because a court exercising admiralty jurisdiction will not be a court exercising jurisdiction pursuant to a law relating to insolvency and so admiralty proceedings, of themselves, cannot be “foreign proceedings” within the definition of Article 2 of the Model Law. This complication within the common law is not likely to arise in those civil law jurisdictions unacquainted with the concept of the action *in rem*.

Insolvency law differentiates between a stay of proceedings in liquidation, where, as it were, the bar comes down to stop the race among creditors, and creditors’ claims can then be swiftly and economically valued and the company’s assets distributed to the creditors. In contrast, where a company is placed in administration, the purpose of a stay is to enable the company’s business to survive as a going concern, by stopping its creditors from destroying the assets and selling them to satisfy its debts.

Where a ship is involved, a stark difference of approach emerges. We have on the one hand, maritime law’s reliance on the *res*, which can be arrested and used to recoup the debt, and which is broadly understood by all ships’ creditors, especially financiers, as the primary source of the security. On the other hand, we have the emphasis that insolvency law places on protecting the interests of creditors. The lack of understanding of the interaction between admiralty and insolvency is neatly illustrated by the Canadian case of *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)* [2001] 3 SCR 907. In that case, the Bankruptcy Court in Canada, in effect, framed an anti-suit injunction to prevent the parties proceeding in the Federal Court of Canada to dispose of a ship that had been arrested.

The aim was to send the proceeds of the ship back to Belgium to satisfy the creditors in the Belgian liquidation. Happily, the Supreme Court of Canada made clear that the maritime jurisdiction was not obliterated by the supervening bankruptcy, and held that the Bankruptcy Court ought not to have made such an order.

There are already several examples of the difficulties that might arise in the application of the cross-border insolvency laws to maritime claims. One

⁴ *In re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325; *The Constellation* [1966] 1 WLR 272; *Danny Morris & Anor v The Ship “Kiama”* [1998] FCA 256; *The Zafiro* [1960] P 1;

such example arose in *Harms Offshore AHT 'Taurus' GmbH & Co KG v Bloom* [2009] EWCA Civ 632; [2009] All ER (D) 276 – a decision of the English High Court. The case involved an offshore oil and gas company incorporated in the UK which chartered the appellant's vessels "*Taurus*" and "*Magnus*" pursuant to charter parties that were subject to English law and that contained a London arbitration clause. The company went into administration, and the Companies Court made an order authorising the administrators to enter into a loan agreement with specified lenders to raise funds for the post-administration liabilities.

Without notice to the administrators, the appellants obtained a Rule B attachment order in the New York District Court, thereby attaching the loan moneys that had been authorised to be raised by the English Court. Simultaneously, the administrators sought relief in the High Court, and the UK High Court granted them an injunction restraining the appellants from taking steps in the substantive proceeding commenced in New York.

In this case the conduct of the appellants could be considered to be wholly unconscionable, and so the injunction was probably rightly granted, but what is of concern is the comment made by the English Judges. They said [26]:

The question is not as to where a dispute as to liability or damages should be determined, but whether the appellants should be able to secure the benefit of their attachments, and thus promote themselves from unsecured to secured creditors.

This is the very point of the action *in rem*: maritime claimants can promote themselves to secured creditor status.

In the case *Puglia Navigazione v. Maritima Cambiaso & Risso*⁵ the Aix-en-Provence Court of Appeal held that the arrest of an Italian vessel by a supplier should be lifted under the provisions of EC Regulation 1346/2000 because the owner of the arrested vessel had filed bankruptcy proceedings in Italy. The court added that under article 5 of the Regulation the arrest could be maintained only if the creditor had a maritime lien or a mortgage, which was not the case.

Conclusion

In light of these, and no doubt many other issues of concern to particular States, it is the view of the international Working Group on Cross-Border Insolvency that it is timely to survey the positions of National Maritime Law Associations with the object of ascertaining whether there is any scope for sensible harmonisation of the approach to the interaction between insolvency and admiralty law.

⁵ CA Aix, 29 June 2011, Rev. Dr. Transp. 2011, 196.

Questionnaire

QUESTIONNAIRE**SECTION I****CROSS-BORDER MARITIME INSOLVENCY ISSUES****Part 1 General Insolvency Principles Applicable to Foreign Creditors**

1. Has your country adopted any specific rules on cross-border insolvency (such as the UNCITRAL Model Law or any specific domestic, bilateral or multilateral instrument?) Please provide a general description based on the topics discussed in this questionnaire.
2. Do your laws recognize the standing of a foreign creditor or other person (such as a foreign flag authority of a locally domiciled shipowner or a foreign administrator of insolvency proceedings) to start or oppose an insolvency proceeding in respect of a local ship operator or in respect of assets located locally? If so, describe in detail those rights or restrictions upon such rights of such foreign entities which differ from those of local creditors, insolvency administrators or public authorities.
3. Do your laws have a procedure for supervising the activities in your country of a foreign insolvency administrator?
4. If an administrator is unwilling to pursue a claim by the insolvent ship operator, can foreign creditors apply to an insolvency tribunal for a transfer of the subject matter of the claim from the estate of the insolvent ship operator to a creditor or group of creditors?
5. Do your laws permit foreign creditors to apply to a court for supervisory orders if they consider the administrator is acting inefficiently or wrongly? Describe the procedure generally.
6. Do your laws permit foreign creditors to commence legal proceedings against administrators if they consider the administrator has acted negligently or wrongly?
7. If a foreign creditor or claimant against a ship operator foresees it will suffer a loss or commercial disadvantage because of the appointment of a private receiver or the way the private receiver is acting, does such a foreign claimant have any legal remedies against the receiver, such as applying to a court for supervisory orders or to put the ship operator into bankruptcy?

Part 2 Subject Matter or Territorial Jurisdiction

8. Do your laws permit assertion of insolvency jurisdiction generally over any asset of an insolvent ship operator domiciled in your country, regardless of the location of the asset within or outside your country? Please comment whether this scope of jurisdiction differs between a ship of your country's registry owned by persons domiciled in your country, or a ship of another flag owned by persons domiciled in your country.

Part 3 Notice to Foreign Creditors

9. Do any legal or procedural requirements have to be followed to ensure the insolvent ship operator or the insolvency administrator identifies all known foreign creditors?
10. Do your laws require administrators of insolvency proceedings to give notice of the proceedings to foreign creditors? As a general practice, how is such notice given to foreign creditors?
11. Do your laws require administrators of insolvency proceedings to give notice of time bars for filing of claims to foreign creditors? As a general practice, how is such notice given to foreign creditors?
12. If the insolvent business is a shipowner, do your laws require notice of insolvency proceedings to be given to the ship registrar for domestically registered vessels?
13. Do your laws require notice of insolvency proceedings to be given to diplomatic or consular officials of the flag states of foreign registered vessels which are assets of a local insolvent ship operator?
14. If a foreign creditor later learns of the existence of insolvency proceedings, is the foreign creditor permitted to file late claims or have a right to claim against any of the assets of the insolvent ship operator which have not yet been distributed to creditors?

Part 4 Recognition of Foreign Claims

15. Please describe the conflict of laws rules for recognition of foreign maritime claims in insolvency proceedings. For example, if the claim is a maritime lien under the law of the place where the claim arose but not in the country where the insolvency proceeding is being conducted, will the insolvency administrator or tribunal recognize the foreign maritime lien?
16. Apart from the characterization and priority of claims, are there any other procedural differences in the handling of claims between those by foreign

Questionnaire

- creditors and those by local creditors? With reference to the types of claims listed in the table, please describe any differences in detail.
17. Does your law recognize rights of claims to property rights, sale or enforcement given by foreign law to particular types of creditors, such as, for example, to financial institutions or spouses for their entitlement to business property interests of the other spouse on separation or divorce?
 18. Is the recognition of foreign arbitral awards for purposes of proof of claim in insolvency proceedings different from the recognition of foreign arbitral awards for general legal purposes? Please explain any differences.
 19. If the insolvent ship operator is a state-owned enterprise, are there any differences in the rights or procedures available to a foreign creditor under your country's insolvency law?

Part 5 Recognition of Foreign Insolvency Proceedings

20. Do your laws permit the administrator of a foreign insolvency proceeding to publish notices of such proceedings in local news media or to communicate directly with local creditors concerning proofs of claim and payment of any recoveries in the insolvency proceedings? If there any legal restrictions on direct handling of claims by foreign administrators, please provide details.
21. Will your country's courts recognize a request for the recognition of foreign insolvency proceedings?
22. Will such a request be recognized if it comes directly from a foreign trustee in bankruptcy, liquidator or administrator, or does the request have to be in the form of a letter of request issued by the foreign bankruptcy tribunal?
23. What legal standards do your country's courts apply for the purpose of recognition of foreign insolvency proceedings? Please provide details.
24. Do your laws have a procedure for a request for the recognition by a foreign insolvency administrator or insolvency court of a local insolvency proceeding? Are such requests generally made by the administrator or the insolvency court? Generally describe the procedure.
25. Can an administrator of insolvency proceedings request the courts of your country for assistance in obtaining recognition of insolvency proceedings of foreign insolvency administrators or foreign courts? Generally describe the procedure.
26. Will your courts enforce any compulsory transfer of a contractual obligation involving a vessel formerly owned by an insolvent ship operator, if this contractual obligation affects parties located in your country?

27. Does your legal system have a procedure for the coordination of concurrent insolvency proceedings involving maritime assets insolvent ship operators or creditors in your country and abroad? Is this procedure set out in laws or regulations or has it been developed through practice of insolvency tribunals? Please provide details including any generally used precedent forms of procedural orders.
28. Is your country a party to any bilateral or multilateral agreements for the coordination of multi country insolvency proceedings or the recognition of foreign insolvency proceedings? Please list such agreements.

Part 6 Need for Reform

29. Have any provisions of your insolvency law created legal uncertainty or difficulties in the administration of cross-border maritime insolvencies? Please refer to any legal commentary or case law.

SECTION II

GENERAL MARITIME INSOLVENCY ISSUES

Part 7 General Insolvency Issues Applicable to Ship Operators and Maritime Property

30. Are ships registered in your country or ship operators incorporated in your country subject to insolvency laws of general application or do your laws provide for specific rules relating to the administration of the businesses of insolvent ship operators?
31. If your laws provide for specific rules relating to the administration of the businesses of insolvent ship operators or ships under your registry as distinct from assets of commercial enterprises generally, please provide details of how these rules applying to ships or ship operators differ from general insolvency administration.
32. Is there a monetary or asset value threshold for the application of various forms of insolvency procedure? For example, is there a form of simplified insolvency administration for ship operators with assets of limited value?
33. Do rights to commence insolvency proceedings or insolvency procedures differ if the debtor ship operator is a natural person as distinct from a legal entity? Describe any differences generally.

Questionnaire

34. If creditors are asserting claims against all or substantially all the assets of an insolvent ship operator, does this result in distinct or additional procedural or legal requirements?
35. Are insolvency procedures administered by courts of general jurisdiction, or by specialized courts or tribunals exercising commercial or insolvency jurisdiction?
36. Describe generally the threshold tests set out in your law for the status of insolvency.
37. If the threshold tests for insolvency proceedings in your country differ for a foreign ship operator with assets in your country which wishes to begin insolvency proceedings in your country, describe these differences in detail.
38. Do your laws permit a private creditor to obtain a court order to begin insolvency proceedings against a ship operator? If so, describe generally what facts or legal grounds the creditor must show to obtain such an order.
39. Do your laws permit a public authority to obtain a court order or to exercise its own jurisdiction to begin insolvency proceedings against a ship operator other than procedures available to private creditors? If so, describe generally what are the factual or legal grounds for such public authority to begin such insolvency process?
40. Does a ship operator have rights to defend or oppose an insolvency proceeding begun by private creditors or public authorities? If so, describe generally what defences are available.
41. Do your laws permit a ship operator to voluntarily begin an insolvency proceeding? If so, describe generally what facts or legal grounds a ship operator must demonstrate to begin voluntary insolvency proceedings.
42. Do creditors or any other persons with a legal standing (such as public authorities, shareholders or employees of a ship operator) have rights to oppose a ship operators' voluntary insolvency proceeding? If so, describe generally what classes of persons other than creditors have such legal standing and what grounds of opposition are available.
43. Do your laws provide for a time bar for filing of claims in insolvency proceedings which is different from limitation periods or prescription for commencement of maritime claims generally? If insolvency proceedings have different time bars for filing of claims, are these time bars set out in legislation or are they decided by insolvency administrators or tribunals on a case-by-case basis?
44. Do your laws permit an insolvency administrator to carry on the ship operator's business for a temporary period in order, for example, to complete voyage or charter party commitments?

45. Do your laws permit an insolvency administrator to disclaim or otherwise set aside future contractual obligations such as charter parties or contracts of affreightment?
46. Do your laws permit or require an insolvency administrator to compulsorily transfer contractual obligations such as contracts of affreightment or employment agreements with crew from the insolvent ship operator to the purchaser of the vessel from the estate of the insolvent owner?

Part 8 Acceleration of Remedies

47. Do your laws permit a creditor to contract for immediate repayment of an entire debt, such as future obligations under a ship mortgage, if a ship owner becomes insolvent?
48. If there are differences in the application of these laws to acceleration remedies by foreign creditors as distinct from local creditors, describe these differences in detail.

Part 9 Classes of Claims and Creditors

49. Do your insolvency laws apply differently to differing types of claims or creditors? Please respond to this question using the attached table. For example, is a bank or financial institution permitted to enforce a ship mortgage by procedures outside of an insolvency which would not be available to a ship mortgagee other than a bank or financial institution?
50. Does the existence of an insolvency proceeding under your country's law alter the priority of creditors' claims against a ship owned or operated by an insolvent person? Please respond to this question with reference to the types of claims listed in the attached table.
51. If a shipowner commences proceedings to establish a limitation fund under the LLMC Convention or to establish a limitation fund under domestic law, describe the relationship between such fund and any insolvency proceedings involving that shipowner. For example, can creditors begin insolvency proceedings if a limitation fund has been established? Can an insolvent shipowner establish a limitation fund?

Questionnaire

TYPE OF CLAIM ADDITIONAL ARISING COMMENTS	SECURED CLAIM (ENFORCEMENT MAY BE CONTINUED BY CLAIMANT OUTSIDE BANKRUPTCY ADMINISTRATION)	PREFERRED CLAIM (ADMINISTERED AS PART OF BANKRUPTCY PROCESS BUT IN HIGHER PRIORITY TO GENERAL CREDITORS)	UNSECURED CLAIM (ADMINISTERED AS PART OF BANKRUPTCY PROCESS WITH SAME RANKING AS OTHER CLAIMS)	EXEMPT CLAIM (CLAIM IS NOT SUBJECT TO BANKRUPTCY OR CONTINUES TO BE AN OBLIGATION OF SHIP OPERATOR AFTER BANKRUPTCY ADMINISTRATION CONCLUDED)
title, possession or ownership of a ship or any part interest in a ship				
between co-owners of a ship including use or earnings of the ship				
mortgages or hypothecs on a ship or share in a ship				
bottomry or other contractual liens on a ship				
wages, benefits, or repatriation of master or crew				
loss of life or personal injury in connection with operation of a ship				
salvage awards				
unpaid suppliers of goods or services to a ship				
general average				
collision				
other types of tortious or delictual physical damage caused by ship				
cargo loss or damage				
contracts of carriage, including charterparties, other than for cargo loss or damage				
towage (other than salvage)				
pilotage				
hull insurance				
p&I insurance				
port, canal and harbour dues				
wreck removal by public authorities				
environmental damage				
unpaid contributions for social benefits programs (workers' compensation, health etc)				
criminal or regulatory fines or penalties				
fraud or intentional wrongdoing in connection with operation of ship				

Part 10 Proposals for Reorganization or Compromise

52. Do your laws permit an insolvent ship operator to make a proposal for the reorganization of its business or compromise of claims in which the ship operator would continue to operate into the future if the proposal is approved?
53. Do your laws permit such proposals to be conducted through private contractual arrangements between an insolvent ship operator and some of its creditors, or do such proposals need to be conducted under supervision of a court or with approval of all identifiable creditors?
54. If it is lawful to conduct a proposal through private contractual arrangements, are such private contractual arrangements affecting a ship legally binding on other claimants against that ship who have not participated in such private contractual arrangements?
55. If a proposal is required to be conducted under supervision of a court or approval of all known creditors, please provide a general description of the reorganization procedure.
56. Are secured creditors of an insolvent shipowner subject to court orders approving a reorganization or compromise?
57. Do your laws permit an insolvent ship operator to transfer an insolvency proceeding into a proceeding for reorganization or compromise?

Part 11 Receiverships

58. Does your law permit a private creditor such as a ship mortgagee to take over the business of a ship operator or to sell part or all of its fleet or generally act to recover a debt without needing to commence insolvency proceedings for the benefit of all creditors?
59. Does your law set out minimum requirements which a private receiver of an insolvent shipowner must follow such as giving notice to other registered ship mortgagees, the procedure for sale, etc.

ARCTIC/ANTARCTIC LEGAL ISSUES

Legal Issues

by NIGEL FRAWLEY

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LEGAL ISSUES

BY NIGEL FRAWLEY

In early 2011, the Executive Council established an ad hoc working group, under the chairmanship of the Secretary-General, to identify legal issues for study involving the Arctic Ocean and the Antarctic's Southern Ocean in view of climate change and increased shipping in the Polar regions. That working group consisted of Professor Aldo Chircop of Dalhousie University, Halifax, N.S., Professor Donald Rothwell of the Australian National University in Canberra, Douglas Davis of a law firm in Anchorage, Alaska, as well as Nigel Frawley. The working group met at the University of Alaska in Fairbanks on July 25, 2011 on the occasion of a Workshop Conference from July 25-27, 2011 on the subject of future governance of the Central Arctic Ocean. The working group decided that only uncontroversial matters be recommended and only those that apply to both the Arctic Ocean and the Southern Ocean. The working group thereupon identified the following public law conventions for further study by the CMI:- COLREGS, LLC, STCW, SAR, EPPR and Marpol 73/78. The following comments by the individual members of the working group follow

(i) Comments by Nigel H. Frawley on the Collision Regulations, 1972 as applicable to the Arctic and Southern Oceans

The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (herein COLREGS") sets out seamanship and technical rules for the prevention of collisions on the High Seas and in all waters connected therewith which are navigable by seagoing vessels. The rules apply to navigation in the Arctic and Antarctic, but they do not contain specific rules for ships navigating in ice-covered waters. For example, there have been collisions in the Arctic between ships in ice convoys led by ice breakers. The Central Arctic Ocean beyond National Jurisdiction and the Southern Ocean of the Antarctic can safely be described as the High Seas though presently in large part covered by ice-free conditions in much of these waters in the summer months in the next 20 years or so, the extended shipping season and increased shipping in

the Polar regions give rise to the need to examine the COLREGS as they can be expected to assume greater importance. The COLREGS do, however, cover situations where a ship is restricted in its ability to manoeuvre. Although ice is not specifically referred to, it might, given the circumstances, permit an exemption from compliance with certain rules. Further, the application of some other rules may need to be considered with reference to ice navigation. The navigation safety rules in this Convention were, no doubt, adopted with open waters in mind. Open waters in the Polar regions do not necessarily mean ice-free waters, but rather waters that are navigable under certain conditions. Those conditions frequently change and often ice breakers are needed. Compulsory Pilots or Ice Navigators will need to be considered and possibly provided for if and when the IMO Polar Code is completed and made mandatory. Some considerable revision and clarity in the rules appears to be called for.

(ii) Comments by Douglas R. Davis on International Convention on Load Lines

The First International Convention on Load Lines was adopted in 1930 and eventually became the International Convention on Load Lines in 1966 (“CLL”). The Convention was amended by the 1988 Load Lines Protocol and further revised in 2003. The Convention included provisions for determining the freeboard of ships by subdivision and damage stability calculations. The Convention’s regulations take into account the potential hazards proposed by different geographical zones and seasons. The technical annex provides for additional safety measures with respect to doors, freeing ports, hatchways and other items. The purpose of these measures are to ensure the watertight integrity of ships below the freeboard deck.

In 2008, the Intact Stability Code (“IS Code”) was adopted and became mandatory under SOLAS and the 1988 Protocol. The IS Code provides stability criteria and other measures in an attempt to ensure safe vessel operation, and minimize risks to ships, crews and the environment. Part A of the IS Code contains mandatory provisions, while Part B is recommendatory in nature, and relates to intact stability criteria for all types of ships covered by IMO instruments.

Chapter 6, Part B of the IS Code contains recommendations for ships operating in icing conditions where ice accretion is likely to occur and which may adversely affect stability. Specific recommendations are included for vessels carrying deck cargos of timber, fishing vessels and offshore supply vessels. Part B, Chapter 6, also contains guidance with respect to areas where icing considerations should apply in north and south latitudes.

The IMO's Guidelines for Ships Operating in Polar Waters, 2009, attempt to promote safety of navigation and pollution from ships operating in polar waters. The Guidelines provide various recommendations with respect to construction and operation of vessels in these waters, as well as vessel safety systems, training, and emergencies, and environmental protection and damage control.

Given recent and increased attention to Arctic and Antarctic shipping issue, the CLL and IS Code should be reviewed to determine whether their provisions are up to date and relevant for navigation in and adjacent to the central Arctic Ocean and the Southern Ocean. Any changes to the CLL should be undertaken after full review of other regulatory provisions in existing conventions as well as suggested guidelines such as the IMO's Polar Guidelines. Consideration should be given as to whether desired objectives can best be accomplished by amending the existing CLL, or by incorporating desired regulatory changes into new regulatory provisions.

(iii) Comments by Aldo Chircop on the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW) as amended

The international standards and rules concerning polar seafaring are in a state of transition. At this time, despite a number of initiatives, there are no international mandatory standards and rules. Polar seafaring requires particular education, training, experience and related qualifications. Ships navigating polar waters also require competent and experienced ice navigator(s) onboard, upon whose knowledge and skill the safety of the vessel and those on board depends and the protection of the marine environment ensured. A finding of a recent Arctic Council seminar report on Arctic shipping notes that most ice navigator training programmes are *ad hoc* and there are no uniform international training standards (*Arctic Marine Shipping Assessment*, 2009, 68). The current voluntary IMO Guidelines for Ships Operating in Polar Waters (IMO Resolution A.1024(26), 2 December 2009), provide for onboard manuals including drills and emergency instructions, and also recommend at least one ice navigator on board the ship. Particular training for polar seafarers includes skills to address certain problems without shore and support infrastructure. The recent 2010 Manila amendments to STCW (IMO Doc. CONF\STCW12\34.DOC) address aspects of polar seafaring, but again stop short of adopting detailed mandatory standards and rules in anticipation of a future mandatory polar code, currently under development at the IMO, likely to be completed not before 2015-2016. Chapter V, Section B.V/g of the amended STCW provides guidance and special training requirements of masters and officers operating in polar

waters. The amendments advise on several important matters, such as experience of masters and officers, safe routeing and passage planning, risk assessment and operating a ship in ice, local requirements for entering different regions (e.g. the Antarctic Treaty, national requirements), safety precautions and emergency procedures, safe working procedures, awareness of the most common hull and equipment damages and how to avoid them, fire-fighting systems limitations and environmental considerations. Resolution 11 adopted at the Manila Conference called upon governments to take measures to ensure competency of masters and officers of ships operating in polar waters, and in particular to be able to plan voyages taking into account the unique navigational conditions of polar regions and to supervise and ensure compliance.

(iv) Comments by Aldo Chircop on International Convention on Maritime Search and Rescue, 1979 (SAR Convention); Nuuk Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic, 2011

Maritime search and rescue (SAR) in both polar regions faces major challenges in terms of remoteness, harsh environment and insufficient SAR infrastructure. The 1979 SAR Convention establishes a duty on State Parties to ensure that necessary arrangements are made for the provision of adequate SAR services for persons in distress at sea near their coasts and calls for regional cooperation in the provision of SAR services. Both the Antarctic and Arctic have such cooperative arrangements. The IAMSAR Manual provides guidelines for implementing SAR. In the Antarctic region (defined to also include peripheral areas) Argentina, Australia, Chile, New Zealand and South Africa have agreed to share SAR coordination by dividing Search and Rescue Regions, each having a Rescue Coordination Centre under the auspices of the IMO (SAR Convention, 1979, Annex) and ICAO (Chicago Convention on International Civil Aviation, 1944, Annex 12). In the Arctic, Arctic Council members (Canada, Denmark/Greenland, Finland, Iceland, Norway, Russian Federation, Sweden, United States) implemented AMSA recommendation “E” by concluding the Agreement on Cooperation in Aeronautical and Maritime Search and rescue in the Arctic at the recent Ministerial Meeting in Nuuk in May 2011. As in the case of Antarctic SAR, SAR regions are apportioned among Parties, some peripheral areas are included and the SAR and Chicago conventions (to which all Arctic States are parties) constitute the basis for conducting operations in the region. In addition to the individual undertaking of State Parties to build their SAR capacities, the agreement provides for

information exchange, exercises and includes procedures for entry into the territory of a State Party, including for refuelling, consistently with the SAR Convention. The agreement contains provision for cooperation with non-Parties. This is useful because of the growing presence, for example, in the Arctic, of ships that are owned or flagged in non-Arctic States.

While regional agreements have gone some way in addressing deficiencies, SAR will continue to be a challenge as shipping, and in particular cruise shipping with substantial numbers of passengers, increases in these remote and harsh environments. While delivery of SAR services in this and other scenarios can be expected to be an issue, the legal framework for SAR per se is not necessarily at issue. The rationale of SAR is humanitarian assistance to persons in distress at sea and therefore there is no expectation that States that deliver the service expect to be remunerated for their services. However, the group will undertake study of particular case studies involving SAR in polar waters to determine if legal issues arose.

Any potential liability issues that could arise would more likely relate to the liability of carriers, in particular passenger carriers such as cruise and venture vessels under the Athens Convention, and which are increasing operations in these remote areas. It is possible that the seaworthiness of non-ice class passenger vessels in these waters could be questioned. Also, it is conceivable that such vessels could be operating outside their trading region for marine insurance purposes, unless special cover is obtained.

(v) Comments by Donald R. Rothwell on EPR and MARPOL

Emergency, Preparedness, Prevention and Response (EPPR)

Both the Arctic and Southern Oceans are remote from emergency response facilities. In Antarctica scientific bases along the continent have limited capacity and infrastructure to provide EPPR, and similar issues arise in the sub-Antarctic where islands are either uninhabited or have minimal infrastructures. Identical issues arise in the central Arctic Ocean due to its isolation and the potential for extreme weather to interfere with any EPPR. These issues were highlighted in the Southern Ocean by the November 2007 sinking of the m/v “*Explorer*” in the Bransfield Strait off King George Island, which resulted in a response from the Chilean mainland. An Action Group on Antarctic Fuel Spills (AGAFS) was formed following this incident. This is notwithstanding that EPPR is addressed under Article 15 of the 1991 Protocol on Environmental Protection to the Antarctic Treaty under which the parties agree to provide response to environmental emergencies and cooperate in the formulation of contingency plans. However no more detailed mechanism have been

established by the Council of Managers of National Antarctic Programs (COMINAP). The Arctic Council has a dedicated EPPR Working Group which was established in 1996 which has sought to coordinate the response of Arctic states, develop work plans and conduct emergency exercises. A Strategic Plan of Action has been devised and was updated in 2010. However a feature of the mechanisms in place in both the Arctic Ocean and the Southern Ocean is that there is no clear legal framework for EPPR and this raises particular issues in areas that are beyond the limits of national jurisdiction. This gap in the legal framework has been highlighted by the 2011 Nuuk Declaration of the Arctic Council which has decided to establish a Task Force to develop an EPPR international instrument for the Arctic.

Maritime Pollution and MARPOL

The polar marine environment is particularly susceptible to the impact of marine pollution. The 1989 “*Exxon Valdez*” maritime disaster in Prince William Sound, Alaska, while occurring in the sub Arctic, highlighted the potential impact a substantial oil spill would have upon the polar oceans and marine environment. MARPOL, as the principal international instrument regulating ship-sourced marine pollution has given some recognition to the importance of the polar oceans, however that protection is not comprehensive. The Southern Ocean is listed as a “Special Area” under MARPOL, Annex I, II and V. However, there is no equivalent listing for the Arctic Ocean. The potential for greater numbers of vessels to navigate within and through the polar oceans raises for consideration whether MARPOL and the regime for its implementation is adequate. Under MARPOL Annex VI neither the Southern Ocean or the Arctic Ocean has a designated emission control area. In 2009 the Arctic Marine Shipping Assessment (AMSA) recommended that Arctic states support the development of improved practices and innovative technologies for ships so as to reduce a number of emissions. In that regard MARPOL has given increasing attention to coastal and port state implementation. However in the Southern Ocean, with the exception of the sub-Antarctic islands, coastal states are not recognised as having sovereignty or jurisdiction and are therefore unable to exercise traditional coastal state jurisdiction with respect to marine pollution. Likewise, port states may be some considerable distance from areas where a pollution incident has occurred, which due to its isolation may never have been identified in the first instance. While coastal state jurisdiction is recognized in the Arctic, the central Arctic Ocean is beyond national jurisdiction, and extremely remote. Issues arise here also with respect to the potential for port state jurisdiction to also be effective. While the Antarctic Treaty System under Annex IV of the 1991 Protocol on Environmental Protection to the Antarctic Treaty, and the Arctic Council under the Protection of the Arctic

Marine Environment working group have sought to address some of these issues, there has to date been no comprehensive legal response. These factors suggest the need of MARPOL to be modified to reflect the particular issues that arise in regard to marine pollution in the polar regions.

The foregoing recommendations were discussed by the Executive Council at its meeting in Oslo on September 25, 2011 and approved with the important additions that an International Working Group with broad representation be established, and that private international law conventions be reviewed additionally as to their applicability to the Polar regions. The Executive Council cautioned against duplication of effort where the IMO may already have started work on some of the subjects identified.

The International Working Group presently consists of Nigel H. Frawley (Chairman), Professors Aldo Chircop (Halifax), Donald Rothwell(Canberra), Tore Henriksen(Trondheim), Alexander Skaridov(St.Petersburg) and Mr. Bert Ray(Anchorage). A search is underway for another expert on the Antarctic.

The new rules for navigation in the Northern Sea Route are of particular interest to the International Working Group in view of Russia's powers under Article 234 of UNCLOS, and the basis for a new fees schedule for ice breaking services, pilotage etc.

There will be the presentation of papers by speakers at the CMI Conference in Beijing October 14-19, 2012. The papers will be on "Legal Challenges for Maritime Operations in the Southern Ocean", and "Maritime Operations and legal issues in the Arctic Ocean, including the interests of non-Arctic States".

LEGAL CHALLENGES FOR MARITIME OPERATIONS IN THE SOUTHERN OCEAN*

BY DONALD R. ROTHWELL**

The Southern Ocean has a long and proud maritime history extending back to the late seventeenth century and the voyage of discovery by Captain James Cook, which then paved the way for other explorers, mariners and whalers over the course of the next 200 years. In 1959 the Antarctic Treaty was concluded which became the foundation for the development of the Antarctic Treaty System which has sought to regulate and manage activities not only on the continent but also in the Southern Ocean. A particular legal focus has been upon the protection and preservation of the environment, however this creates challenges in the case of the marine environment given the operation of multiple IMO conventions and the increasing presence of a variety of actors in the region, including traditional shippers, cruise ship operators, fishers, whalers and also protestors. Over the past decade increased attention has been given to shipping in the Southern Ocean partly as a result of a spike in maritime incidents, violent clashes between Japanese whalers and the Sea Shepherd Conservation Society, and the ever increasing access into the Southern Ocean as a result of climate change and increased interest in the region. This paper will address these issues, and seek to highlight the legal challenges for current and future maritime operations in the Southern Ocean.

* Abstract of a paper to be presented on the Antarctic at the Beijing Conference.

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BREAKING THE ICE: CHALLENGES FOR ARCTIC SHIPPING IN AN EVOLVING GOVERNANCE ENVIRONMENT*

BY ALDO CHIRCOP**

The continuing reduction of summer sea ice in the Central Arctic Ocean is facilitating access to the region's resources, enhancing intra-regional traffic and encouraging pilot transits of commercial vessels. There is market pressure for the search and development of new sources of hydrocarbons and other minerals in the region. Current offshore activities in the Beaufort and Barents Seas evidence intentions for major investments by global energy players. The process of definition of the outer limits of extended continental shelves in the region, to be followed by delimitation of consequential maritime boundaries, is serving to generate long-term resource interest in the region. There also appears to be incipient market interest in new transportation routes that combine benefits of shorter and cost-effective transits, safe and secure routes, and routes that are not troubled by maritime security concerns. Since the Beluga cross-regional transits without the assistance of icebreakers in 2009 there have been more successful pilot commercial transits of diverse commercial vessels through the Northern Sea Route in the Russian Arctic. Such transits are expected to increase. These activities are affected or constrained by the current underdeveloped state of international rules, standards and practices applicable to the region.

In 2009 the Arctic Council adopted the *Arctic Marine Shipping Assessment* report, which can be described as a comprehensive treatment of issues facing shipping in the region at a time of change. It identifies gaps and issues in the existing maritime legal framework with reference to the region. The report is effectively a roadmap for the development of a suitable legal framework for safer shipping in the region taking into account the sensitive marine environment and interests of indigenous peoples.

* Abstract of a paper to be presented on the Antarctic at the Beijing Conference.

** Professor of Law & Director, Marine & Environmental Law Institute, Schulich School of Law, Dalhousie University, Halifax, Nova Scotia, Canada.

The AMSA roadmap has already led or influenced further initiatives in the Arctic Council and the International Maritime Organization (IMO). There are significant developments in the areas of search and rescue and contingency planning and response. It remains to be seen the extent to which the Arctic Council can expand beyond those clearly regional issues to other more global maritime issues, which are more appropriately subject-matter within the IMO's competence. Several recent and current initiatives in the IMO have addressed polar shipping issues, especially with regard to navigation and meteorological services, search and rescue, standards of training and certification of seafarers, and most recently scaling up current voluntary guidelines for ships operating in Arctic waters to a mandatory polar code to be completed in the near future.

An additional and critical layer consists of national initiatives of Arctic coastal States, in particular Canada and the Russian Federation, the two States with the longest coastal frontages in the region, to strengthen national legal frameworks for shipping within their respective maritime jurisdictions and further to special powers granted by the United Nations Convention on the Law of the Sea, 1982. Their efforts are affected to a degree by the legal status of Arctic waters they claim as internal waters, protested by other States, but important as an integral part of prospective new maritime trade routes in the region.

Finally, the current structure and process of Arctic governance, primarily through the Arctic Council, and its growing attention to shipping in the region, raises questions of participation of non-Arctic States in the region. Asian and European non-Arctic States (including the European Union) undertake substantial marine scientific and climate research in the region, are concerned over change in the region as it might affect planetary oceanographic and weather patterns, and are likely among future consumers of Arctic resources. In particular, the development of an appropriate framework for international shipping juxtaposes the interests of regional States in maintaining full jurisdiction and control for the development of resources, the protection of a sensitive environment and increased international navigation and other uses of the region, and the interests of non-Arctic States in securing navigation access to and transit through the region. The two sets of interests should be complementary, although they might not be perceived as such. The recent adoption of new rules for observer status in the Arctic Council might not be sending the right message from Arctic States to non-Arctic States to facilitate dialogue and engagement, including on important matters such as Arctic shipping.

THE FUTURE OF THE CMI IN THE DECADES TO COME

Letter 14 July 2012

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by STUART HETHERINGTON

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The future of the CMI in the Decades to come

**COMITE MARITIME INTERNATIONAL, AISBL****PRESIDENT**

To the Presidents of all national Maritime Law Associations

Cc: Titulary Members

Oslo 14 July 2012

Dear President,

The Future of the CMI in the Decades to Come will be one of the main topics at the CMI Conference in China from 14 to 19 October this year, see www.cmi2012beijing.org. As you will note from the Programme, the morning of Friday 19 October, from 9 -10.30, is devoted to a panel discussion between the Executive Council and the CMI membership. This will be preceded by a meeting in the afternoon of Thursday 18 October between the Executive Council and the Presidents (or their nominees) of the national Maritime Law Associations, where I expect that the future of CMI will also be discussed.

In order to assist the delegates in their consideration of the topic, Stuart Hetherington, one of the two Vice-Presidents of CMI, has prepared the enclosed discussion paper, which I kindly ask you to distribute to the members of your association, including of course those who plan to attend the Conference in Beijing. Whether or not your association will be represented there, which I sincerely hope that it will, any input from the association beforehand will be most welcome and likely to be of value for the discussion.

Best regards

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THE FUTURE OF THE CMI IN THE DECADES TO COME

BY STUART HETHERINGTON*

The Centenary Conference of the CMI, held in Antwerp in 1997 devoted a session to a discussion of the Future of the CMI. Essentially it was intended to discuss the working methods of the CMI and the subjects which CMI should work on. It is proposed to hold a similar discussion at the Beijing Conference in October 2012: “Future of the CMI in the Decades to come” and this paper has been prepared to assist delegates in their deliberations at that time.

Executive Summary

The session to be held at the Beijing Conference is an opportunity for NMLAs to comment on any matters relating to the workings of CMI and its relationship with NMLAs. This paper canvasses some of the Governance issues raised at the CMI Centenary Conference in Antwerp in 1997, the work done by the Steering Committee of the Executive Council which was set up in 2007, changes and developments which have taken place since 1997 and as a result of the Steering Committee’s Report:, i.e. the Current Work Projects and Future Work Programme; the Website and Technology; Development of new NMLAs (including the setting up of a Regional office of the CMI in Singapore for a three year trial period); Young Lawyers; Future Conferences, Symposiums and Colloquia Venues and Improvement in Relationships with International Organisations.

Centenary Conference: Antwerp 1997

Annex 1 to this paper is the document which was prepared to assist delegates at the Centenary Conference. The documentation which was prepared for the Centenary Conference and the results of those deliberations can be found in CMI Yearbook 1997, Antwerp II at pages 377 to 394. The speech made at the

* Vice-President, CMI, July 2012.

opening of the conference by Professor Allan Philip, the President of the CMI, can be found in the same issue of the Yearbook at pages 143 to 147. He noted the changed role which CMI had had to adopt since the formation of International bodies that had taken over the Convention drafting role of the CMI. CMI is now the link between the public and private sectors. It provides a bridge to Government, both local and international. A question for delegates is whether we are carrying out that role effectively enough. How can we improve?

It is of interest to revisit some of the comments made by the NMLAs in responding to the President of CMI's invitation to comment on certain issues prior to the Centenary Conference and to what was said by delegates at the Conference. *Annex 2* identifies the concerns raised at the time of the Conference and comments on developments since then have been inserted in bold type beneath each concern. Delegates are asked to comment on any of these matters and state whether they consider that the concerns are still valid, whether enough has been done to respond to them or whether more needs to be done to address them.

Governance Issues

The Executive Council appointed a Steering Committee in 2007 to develop a package of reforms. Two questionnaires had been sent to NMLAs prior to the Steering Committee's Report being completed. The first questionnaire sought:

- Historical data about each NMLA, such as date of formation, year of joining CMI, whether incorporated and the number of its members
- Its work practices, such as whether it restricted itself to CMI work and if not what other work or projects it engaged in
- The age profile of its membership and whether it makes special arrangements for younger members in terms of membership fee and whether it organises conferences and seminars with younger members in mind
- Whether it has any affiliation with other organisations
- Financial information such as whether it raises funds other than by way of annual fees
- Whether it would like to host a CMI event or has done in the past
- Whether its CMI subscription is paid from general revenues and how annual fees are assessed for its membership
- Whether it is satisfied with the CMI "Questionnaire" policy
- Whether it has any problems with the management functions of the CMI or any suggestions for improvement
- Whether it is involved in the regular workings of the CMI via IWG's and ISC's
- Whether it had any advice for the CMI as to how NMLAs could become

- more involved in the decision making processes of the CMI
- Whether its membership was increasing or declining and whether there were any ways in which the CMI could help improve the NMLAs

A review of NMLA responses to the First Questionnaire was attached as Annex 6 to the Report and Recommendations made by the Steering Committee in September 2008.

Twenty nine NMLA's responded to this Questionnaire. They have about 11,000 members. Some have special arrangements for reduced fees for younger members. Some Northern European countries participate in annual regional meetings of their young lawyers with topical issues being discussed. For example, the 2011 meeting in London included a shipping mediation workshop and a case study and panel discussion on legal issues arising out of piracy. Some provide financial support to students studying maritime law. Some have close working relationships with Government, including having government employees on their Board or Executive Council. Some have regular annual conferences and raise additional funds from their annual subscriptions from hosting such events. Some obtain sponsorship for such events.

Other NMLAs organise purely social events for their membership. Some do not hold any functions or seminars. Some include other organisations in the shipping or insurance industries as members. Some, such as the South American NMLAs belong to other organisations such as Instituto Ibero Americano de Derecho Maritimo (IIDM). Some publish their own journals and newsletters. Some operate through standing committees.

About a third of the NMLAs who responded do not raise funds other than by way of subscriptions. Of the rest, apart from raising funds from seminars or conferences some obtain donations for particular expenditure and some from sponsorship.

The responses generally suggest that NMLAs are somewhat conservative and may not make the most of the opportunities to organise seminars for industry, as well as their membership, which could generate funds to defray CMI subscriptions and/or in sponsoring education or other initiatives. In relation to the operation and management of the CMI there was an overwhelming endorsement of the *modus operandi* of CMI in issuing Questionnaires, although many NMLAs, apologetically, recognised that they often needed more time (or failed to respond at all).

- Some of the suggestions made in response to the Questionnaire included:
- Greater use of email communication and websites
 - Providing an easily accessible forum for the consideration and discussion of international maritime law through the CMI website
 - Publication by NMLAs on their own or on CMI website of periodic updates of maritime legislative changes and current jurisprudence in their own jurisdiction

The future of the CMI in the Decades to come

- The shortening of periods in office of CMI councillors
- Enlarging the size of the Executive Council
- Direct contact with members of NMLAs by CMI
- Greater interaction between the CMI executive person responsible for a particular NMLA and/or regional NMLAs
- Establishment of a regional subcommittee
- Advertising for speakers for conferences, seminars, colloquia, IWG and ISC
- Making sure that CMI events do not coincide with other international or national events
- Greater consultation with NMLAs
- Discussion of the costs structure and the fairness of fees paid (including cutting costs by greater use of electronic dissemination of materials), including the introduction of three levels of fees
- Invitation to delegates to preparatory meetings and costs sharing
- Holding a CMI function in the Americas as the Central and Southern American NMLAs feel cut off
- Reintroduction of the French language
- More timely feedback in relation to responses to questionnaires once collated by CMI
- The encouragement of younger people from more national associations in the workings of CMI
- Reporting annually a summary of the relevant and focused activities, and
- Greater frequency of communication about all CMI matters, with requests for comments by NMLAs.

A Second Questionnaire was sent to NMLAs, which was responded to by 17 of them. The questions posed in this Questionnaire were more focussed and, essentially, sought information on the following topics:

- The subscriptions paid to the CMI.
- The website, whether NMLAs consulted it, whether they would be prepared to provide a regular newsletter to the CMI and whether they would be prepared to provide email addresses of their members to enable direct communication between the CMI and NMLA members.
- Young members, seeking suggestions as to how to make the CMI more relevant to younger members.
- CMI publications, such as the Yearbook and the Newsletter and how NMLAs would prefer to receive such materials.
- CMI conferences, what attracts attendance at such conferences.
- Future work agenda subjects.
- The internal organisation of NMLAs for CMI work projects and its general operation, whether it has a designated person to work with the CMI, and whether it has a contact person to work with government departments in its own jurisdiction.

In general NMLAs responded favourably to the recommendations which had been made for variations to subscriptions. Many associations confirmed that they had websites containing useful information about the legal system in its jurisdiction and links to universities, legislation and case law etc. Many agreed to provide email addresses of their members, although some were concerned about privacy issues, and to provide regular newsletters. However it did appear that many members of NMLAs were unlikely to consult the CMI website.

In so far as young members were concerned a number of useful suggestions were made, including making topics more relevant to day to day practice, keeping prices as low as possible (including reduced or zero registrations for seminars etc), involving young members in IWGs and ISC meetings, and adapting the website for greater interaction with young members.

In general NMLAs were in support of eliminating or reducing the use of hard copy publications.

In relation to the CMI Conference, price and location were considered to be the most significant factors. In terms of future agenda projects, cross-border insolvency, seafarers' issues, including personal injury, death and illness, maritime labour law, a model agreement for post casualty work and piracy were all suggested. There was a view that IWGs and ICSs needed to attract a wider representation from Asia, as well as the Executive Council, in order to reflect better the global situation.

A wide variety of methods of work within NMLAs was evident from the responses to the questionnaire. Some, such as the United States MLA have Standing Committees which are much broader than the CMI IWGs, others only set up working groups for specific purposes, such as responding to questionnaires or preparing for Conferences and Colloquia. Very few had any formal arrangements with government bodies. The Netherlands has seats on its Executive Board reserved for representatives of the Ministry of Justice, Ministry of Transport, Public Works and Water Management.

The Steering Committee Report included the following recommendations and conclusions:

- (1) Reductions to annual subscriptions
- (2) Abolition of titular membership subscriptions and a more formalised approach to the appointment of titular members by the preparation of a proposal form highlighting the need to show the contributions made by those whose appointment was sought to the work of the CMI or their NMLAs.
- (3) The reform of the website so as to include texts of conventions, pro forma letters to potential NMLAs, guidelines for conference organisers, the newsletter and yearbook and preparation of a brochure. It was also suggested that an annual report be prepared by the President of the CMI. It was also suggested that direct communication take place between the CMI and NMLA members for the distribution of materials, such as yearbooks and newsletters.

The future of the CMI in the Decades to come

- (4) Not amending the Constitution to permit individual membership, but it supported the setting up of regional associations in exceptional cases only.
- (5) Supported the continuing contact between the CMI and universities such as WMU and IMLI.
- (6) Encouraged closer contacts between Executive Councillors and NMLAs and encouraged the creation of new NMLAs in countries where they had ceased to be effective, such as Poland, Romania, India, Malaysia, UAE, Egypt, Algeria, Israel, Cyprus, Estonia, Latvia, Lithuania, Ivory Coast, Benin, Ghana, Gabon, Cameroon.
- (7) The only publication to be produced in hard copy was the Yearbook.
- (8) Not to recommend increasing the size of the Executive but it did recommend reduction in the terms of Executive Councillors from 4 to 3 years.
- (9) Future conferences devote sessions and social occasions to young lawyers.
- (10) An Executive Councillor be appointed to have responsibility for communications and public relations.

As a result of the Steering Committee Report, the following actions have been taken:

- There have been substantial reductions in subscriptions., Some subscriptions have been reduced significantly. Overall subscriptions have been reduced by at least €40,000. (At the same time the reserves of the CMI have been reduced from about €1million to €700,000).
- Fees for titular membership have been reduced to zero.
- The website has been significantly upgraded and made more informative.
- NMLAs have been asked to provide email addresses of their memberships.
- Executive Councillors have been active in seeking the creation of new NMLAs in places such as India, Egypt, Poland, Indonesia, Honduras, Kenya and Malaysia.
- The terms of officers and Executive Councillors have been reduced from 4 to 3 years.
- Conferences as well as Seminars, Symposiums and Colloquia have included sessions and social occasions for young lawyers.

Current Work Projects

- (1) Acts of Piracy and Maritime Violence
- (2) Arctic and Antarctic Issues
- (3) Cross Border Insolvency
- (4) Fair Treatment of Seafarers
- (5) Implementation and Interpretation of International Conventions
- (6) Jurisprudence on the interpretation of maritime conventions

- (7) Limitation of liability/procedural rules
- (8) Marine insurance
- (9) Recognition of foreign judicial sales of ships
- (10) Issues relating to the Rotterdam Rules
- (11) Salvage Convention 1989
- (12) York Antwerp Rules

Future Work Programme

Of the topics listed only two will be debated at the Beijing Conference with a view to producing a draft instrument if that is what the delegates decide upon (*Recognition of Foreign Judicial Sales of Ships* and *Salvage Convention 1989*). Their work may or may not conclude in Beijing. Most of the other topics are likely to continue in one form or another after the Beijing Conference.

Arctic and Antarctic Issues and Cross Border Insolvency

These topics will be discussed at the Conference and are likely to form a significant part of the ongoing work of the CMI after the Conference.

Whilst the other topics do have an end product in mind for the most part, some of them, such as *Acts of Piracy and Maritime Violence*, *Marine Insurance* and *Fair Treatment of Seafarers* are bordering on being more akin to a Standing Committee having a monitoring role on international developments.

One of the discussion points in the Centenary Conference of 1997 was the suggestion that more use be made of correspondence in the work of an ISC. This has been taken up to a certain extent but could, if still thought appropriate, be something that the Beijing Conference could decide should be further developed in the future.

The holding of more regional meetings by NMLAs, and for ISCs or IWGs to meet in more widespread geographical locations have also been referred to on various occasions. The recent joint conference of the NMLAs of US, Canada, Australia and New Zealand was declared an enormous success and the annual Asian Conference hosted by the MLA of Singapore has become a regular feature of the Conference calendar.

One topic which it is thought greater focus could be given to by the CMI is *Ratification and Implementation of International Conventions*.

Considerable work has been done on this topic over many years. It was the subject of a joint report by Professors Francesco Berlingieri and Anthony Antapassis at the Athens Conference, 2008. (See CMI Yearbook 2007-2008 Athens p.308). The work these two distinguished Professors undertook sought to identify what inhibits uniformity being achieved and to that end they investigated the methods used for implementing international conventions and

then considered what occurs after adoption. A Questionnaire sought information from NMLAs as long ago as 1987 concerning the procedures for implementation and the interpretation of a number of specific Conventions, such as Collision (1910); Salvage (1910); Protocol to Salvage Convention (1967); Hague Rules (1924); Hague Visby Protocol (1968); Liens & Mortgages (1916); Collision (1952); Arrest (1952); Limitation (1957); Protocol to Limitation (1979); Rights under Construction (1967); Liens & Mortgages (1967); CLC (1969); Protocol to CLC (1976); Athens Passengers (1976); Limitation (1976); Hamburg (1978).

There is clearly a role for CMI to play in monitoring and disseminating information concerning the implementation and interpretation by National Courts of International Conventions but it is thought that there is a further role which the CMI can undertake through NMLAs.

It is thought that the CMI and NMLAs could, with others, seek to have international conventions more widely adopted. This work could be carried out on a number of different levels. A meeting with the International Chamber of Shipping in London in May attended by the President, Karl Gombrii, the Secretary-General, Nigel Frawley, and the two Vice-Presidents Johanne Gauthier and Stuart Hetherington, agreed to investigate the possibility of working with the ICS and its affiliated members around the world with a view to identifying the most significant conventions that are failing to achieve sufficient ratifications, ascertaining why countries who have not ratified them have not as yet done so and offering to assist those countries in understanding the conventions better, clarifying any issues which they have with them and generally offering to assist where possible in having those conventions ratified. Discussions were also held with Rosalie Balkin the Assistant Secretary-General/Director Legal Affairs and External Relations Division of the IMO Legal Committee in London in May and she also expressed keenness for the IMO Legal Committee to be involved in such a process.

In order for such work to be effective it will be necessary for an International Working Group or Standing Committee (or Joint Standing Committee with ICS, IMO Legal Committee) to be set up which will work together with the IMO Legal Committee and the ICS. Their task would be to identify significant conventions and the countries that have not ratified them, and then to identify those countries which have both representatives of the ICS and NMLAs who would then be put in touch with each other. Those representatives would, it is hoped, jointly approach the relevant government departments in their country to ascertain why their country has not ratified each of the identified conventions and what help could be given in order to assist in their ratification.

Members with an interest in public international law would be extremely useful in this project. Young lawyers should be encouraged to join also. It may also emerge from such work that some countries, particularly developing countries, would be assisted in having summaries of the relevant conventions,

details of those countries that have ratified them, guidelines as to what they need to do in order to ratify them as well as guidelines or suggestions as to how they might be given effect to by their national law.

The ICS has already produced a brochure “Promoting Maritime Treaty Ratification”. It identifies the following Instruments to target:

- International Convention on Control and Management of Ship’s Ballast Water 2004
- Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims 1976
- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 and Protocol of 2010
- International Convention for the Safe and Environmentally Sound Recycling of Ships (Hong Kong) 2009
- Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974
- Marpol Protocol of 1997 (Marpol Annex V1 – Prevention of Atmospheric Pollution by Ships)
- United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) 2009
- Maritime Labour Convention 2006
- Seafarers Identity Documents Convention (Revised) 2003
- IMO Anti-Fouling Systems Convention
- IMO Bunker Spill Liability Convention

The ICS has members in the following countries which have an NMLA: Australia; Belgium; Brazil; Chile; China; Croatia; Denmark; Finland; France; Germany; Greece; Hong Kong; India; Ireland; Italy; Japan; Korea; Mexico; Netherlands; Norway; Philippines; Singapore; Spain; Sweden; Switzerland; Turkey; United Kingdom; United States.

To the extent that some of the above Conventions have not been ratified and given effect to domestically by any of the above countries it is thought that NMLAs together with the ICS member in that country could make contact with the relevant government departments to ascertain why they have not been implemented and what assistance they could be given.

It is also hoped that such a project would assist NMLAs to develop closer links with relevant government bodies.

If work upon such a project finds favour with delegates at the Beijing Conference the Executive Council would be looking for volunteers to be involved in this process, either as members of the Standing Committee or IWG or as a representative from their country who will liaise with the ICS affiliate in their country once the preliminary work by the Standing Committee has taken place. Delegates views as to how this project could best be structured would be extremely useful.

Website and Technology

The Effectiveness of the Website is only as good as the Chairs of the International Working Groups in keeping them up to date and refreshed with information. This is a vital role for the Chairs of IWGs, and the young lawyers section.

Communication with Members of the NMLAs is essential to make the CMI relevant to its membership. Whilst it is recognised that some NMLAs have privacy issues in that regard they have indicated that they have no difficulty forwarding any materials received from the CMI to their entire membership. The CMI needs to be provided with the details of the nominated person in that regard. All NMLAs are urged to provide the requisite information, which was sought by the President in his letter of 17 April 2012 to NMLAs.

The most significant addition to the website that has been identified by the Executive Council (and a number of NMLAs) would be the principal international conventions in the maritime area as well as up to date information concerning ratifications. Perhaps the most useful publication for judges, academics and practitioners that the CMI has ever produced is the Handbook of Maritime Conventions. A further, updated, version of that book is currently in the course of preparation by IMLI. When that book is ready for publication the material will also be placed on the CMI website. That will be a significant improvement to the website.

A recent new feature is the uploading of lectures given by leading academics and practitioners. (This was “launched” with the President’s letter to NMLAs of 17 April 2012). It is hoped that these will be useful for generating meetings within NMLAs that will not only be educational to their members but encourage younger persons, whether lawyers or others connected with the maritime industry to become aware of the existence of an NMLA. In addition it would provide a social opportunity for networking amongst such persons within the country of that NMLA as well as providing an opportunity to raise finances from such events. The CMI is very grateful to the academics and others who have thus far agreed to make DVDs of their lectures available for putting on the CMI website. If any NMLA is hosting a function with an informed and distinguished speaker please have it filed and send the DVD to Stuart Hetherington for uploading onto the website.

The suggestion has been made that the CMI should set up a chat room, join LinkedIn, Facebook and make greater use of the website and technology.

The CMI Executive Council looks to delegates of the Beijing Conference to advise and recommend on any further additions or aspects of the website that make it more meaningful to NMLAs and their members.

Development of New NMLAs

At the Assembly Meeting in Oslo in September 2011 the President reported that the Executive Council, at the invitation of the MLA of Singapore, was considering establishing a representative office for Asia, including India, on a 3 year trial basis. The thinking, as explained by the President, was that as a shipping hub for Asia, Singapore is an important and well placed MLA. There is a need in that region to galvanise current National Maritime Law Associations, as well as a need to recruit further member associations. In addition, there is work to be done to seek to obtain unification of maritime law in that region. It was thought that a representative office would provide a platform for that. The Assembly gave approval to the project, subject to approval by the Executive Council of the final agreement with the MLA of Singapore. Discussions regarding practicalities are ongoing and the aim is to reach a final agreement later this year and start operations in 2013.

Further, it should not be overlooked that CMI is poorly represented throughout Africa, and the Middle East and much needs to be done to encourage the formation of MLAs in those areas. Visits by members of the Executive Council to NMLAs or putative MLAs have taken place and should be continued as one way to develop these organisations, whether already formed or embryonic. Apart from that, CMI is dependent on already established MLAs to help their neighbouring countries to set up their own MLAs where they do not exist. Maybe we should set a target of developing new MLAs in Africa and the Middle East, as well as Asia.

Young Lawyers

There is clearly a lot more which can be done at an International (CMI) and National (NMLA) level to encourage the participation of young lawyers. The Regional Annual Meetings held in North Western Europe provide a precedent which could be adopted in other regions: Asia, South America, etc. Making the website more interactive and informative would clearly assist in this process. Encouraging young lawyers to join Standing Committees, IWGs or ISCs would assist CMI to identify its future leaders. Should it be obligatory that at least one young lawyer be appointed to IWGs? Should they be made Rapporteur or Joint Rapporteur?

Future Conferences, Symposiums and Colloquia

It has been decided to hold the 2016 Conference in New York. Suggestions for venues for Symposiums or Colloquia between the Beijing and New York Conferences include Dublin, Berlin, Tokyo, St Petersburg and Istanbul. The views of delegates as to their preferred venue and topics (current issues, especially) to be discussed would be welcomed by the Executive Council.

Improvement in Relationships with other International Organisations

The IMO, UNCITRAL, UNCTAD, UNIDROIT, IBA, IOPC Funds, ICS, International Group of P&I Clubs, ISU, IAPH, ICC, IUMI, EU, IIDM are all organisations that CMI could (and arguably should have) regular contact with. Contacts with IMO and IOPC Funds take place regularly thanks to the attendance at their meetings of Patrick Griggs and Richard Shaw. It is thought that with the IMO and other organisations a regular high level meeting should take place between officers of the CMI and most, if not all of those organisations, and reports made to the CMI Executive which can be included in newsletters so members of NMLAs can become aware of their work programmes and the areas in which CMI might be able to work with them. Delegates views on how these relationships can be more formalised and improved would be welcome. A concerted plan to develop links and forge relationships with all such organisations need to be developed and NMLA members with such contacts need to volunteer their services in these projects.

ANNEX 1

The document ANTW/97 Future 2 was prepared in advance of the Conference. It posed the following issues for debate:

1. Method of Work including IWGs, ISCs and Standing Committees

- (a) How to give a clear mandate to CMI observers working with UN agencies and other bodies?
- (b) Whether CMI should set up Standing Committees and if so, what subjects should be covered?
- (c) Should International Working Groups and International Sub-Committees be replaced (where possible) by correspondent groups in order to increase opportunities for National Associations to participate?

2. Future Work

- (a) Should CMI set up a Committee to monitor and encourage implementation of its own (and other) international codes, conventions etc?
- (b) Should CMI actively develop its cooperation with UN agencies and other bodies in the drafting of conventions, model laws, guidelines etc?
- (c) Should National Associations be encouraged to liaise with their national governments to identify topics of concern to them in the field of private international maritime law?
- (d) Should CMI continue to look for new work topics outside the orbit of the UN agencies?
- (e) Should CMI create a committee to produce a long range work plan for CMI?
- (f) Is CMI perceived as principally representing the interests of shipowners and insurers? If so, should CMI seek to change its image?

3. Confidence and Profile

- (a) Should CMI change its current patterns of quadrennial conferences with colloquia in between?
- (b) Should CMI be prepared to sponsor conferences organised by National Associations?
- (c) Should CMI organise conferences which are more geared to the Commercial Conference Market?
- (d) Should CMI seek to establish a higher profile? If so, what image should it project?
- (e) Should CMI invite governments to send observers to conferences?

4. National MLAs

- (a) Should National Associations be able to vote at CMI Assembly Meetings by proxy and if so, with respect to what types of issue?
- (b) There is a perception the CMI is dominated by European nations. If this is correct, what can be done about it? Should members of the Executive Council make more frequent visits to member associations (time and cost permitting)?
- (c) Some National Associations are inactive and membership criteria are restrictive. Would National Associations welcome a review of their constitutions, memberships and functions by CMI officers, aimed at improving their effectiveness?
- (d) Why do many National Associations fail to respond to questionnaires?
- (e) Should CMI actively recruit new members, in particular from the Far East?

5. Administrative Aspects including location and staffing of headquarters

- (a) Is it generally agreed that the headquarters of CMI should remain in Antwerp?
- (b) Should CMI seek financial or material aid from Governments or other sources?
- (c) Are National Associations prepared to spend money on improving the methods of communication available to the CMI secretariat?
- (d) Should CMI incur the cost of setting up an enquiry office available to give advice to National Associations?
- (e) How important to National Associations (and their members) are the CMI publications?
- (f) Why do only 12 out of 52 member states distribute these publications to their members?
- (g) What suggestions do member associations have for maintaining or reducing the costs of running the organisation?

6. Executive Council Tenure, Frequency of Meetings and Communications

- (a) Should the size of the Executive Council be increased by one or two (despite the consequential increase and expense) to give the Council a broader international base?
- (b) Should the nominating committee be urged to appoint younger people to the Executive Council?
- (c) Should the Executive Council meet more than the current twice a year?
- (d) Should CMI develop its own website on an internet and develop an email capacity?

7. Payment of dues and finances

- (a) Should Member National Associations who do not pay their dues be permitted to attend Conferences, Assemblies or vote by proxy?

ANNEX 2

GENERAL

- The balance between the civil and common law countries was being lost.
This is an area that needs to be kept under constant surveillance.
- CMI should move away from being seen to be as principally a lobby group for shipowners and restore its impartiality.
It is believed that this has been achieved but, again, is a matter which needs to be kept under constant surveillance. Clearly the CMI should not be seen to be a lobby group for any particular segment of the maritime industry.
- CMI should develop closer relationships with IMO and other bodies.
The role played by Patrick Griggs and Richard Shaw at the IMO Legal Committee and IOPC Fund has clearly raised the profile of CMI in recent years. It is believed even more can be achieved in this regard and it is suggested that an annual meeting with officers of the IMO Legal Committee and the CMI should take place.
Members of the Executive Council particularly, but also others, should be delegated to make contact on a regular basis with such bodies and report back to the Executive Council.
- The CMI was Eurocentric.
The Eurocentric nature of the CMI and the perceived bias in favour of P&I Clubs and shipowners which was referred to at the Antwerp Conference are matters that Executive Councillors have sought to change. The present Executive Council has 6 of its 14 members based in Europe whereas in 1997 at the time of the CMI Centenary Conference there were 9. It is recognised that 6 may still be seen as a disproportionate number from one continent.
This has been addressed by enlarging the geographical area from which Executive Councillors are appointed.
- Some NMLAs were moribund and their memberships were too restrictive.
The Executive Council has taken steps to remove the membership of non-financial NMLAs and to impress upon potential new NMLAs that their memberships need to be taken from a wide spectrum of the maritime industry.
- Strengthen links with international organisations.

The future of the CMI in the Decades to come

This has certainly occurred with the IMO (Legal Committee) and the IOPC Fund as a result of the activities of Patrick Griggs and Richard Shaw, as well as UNCITRAL due to the work done by the likes of Francesco Berlingieri, Stuart Beare, Michael Sturley, Alexander Von Ziegler and Gertjan Van der Ziel. It is thought that more could be done in the future.

- Hold International Sub-Committee Meetings outside Europe.
This has not occurred.
- Develop Asian membership.
Work has commenced in this regard particularly in relation to India, Malaysia and Indonesia.
- Suspend unfinancial members.
This has taken place with greater rigour in the last few years. It is hoped that the significant reduction in subscriptions will reduce this problem significantly.

METHODS OF WORK

- CMI observers attending meetings of United Nations agencies needed to have a clear mandate.
It is believed that this has been achieved but, once again, needs to be constantly monitored so that CMI observers are aware of the views of the Executive Council as to the role they should play.
- Consideration should be given to the appointment of standing committees on certain topics such as carriage of goods, limitation of liability, marine insurance, pollution and salvage.
*The following Standing Committees currently exist:
Audit committee, CMI Charitable Trust, CMI Archives, CMI Young Members, Collection of Outstanding Contributions, Conferences/-Seminars, Constitution Committee, General Average Interest Rates, Liaison with International Organisations, National Associations, Nominating Committee, Planning Committee and Publications.
Perhaps, to be added to this list at the present time, would be Fair Treatment of Seafarers, Acts of Piracy and Maritime Violence, and Rotterdam Rules. Younger members, also, should be recruited to such Standing Committees and perhaps members of international organisations such as the IMO Legal Committee, ICS and others. After the Centenary Conference the then Executive Council decided against appointing standing committees, although as has been seen a number do now exist and it might be thought that some International Working Groups are more in the nature of Standing Committees, such as those dealing with the Rotterdam Rules, Acts of Piracy and Maritime Violence and Fair Treatment of Seafarers.*

- There should be greater use of video and teleconferencing.
This has not been a matter that has been developed since the Centenary Conference. Only the Executive Council has to date taken advantage of technology to reduce the number of face to face meetings to one a year. It has one email meeting a year which takes place over a week or more.
- International Sub-Committees should operate where possible as correspondent groups.
Once again, this is not a matter that has been taken up in so far as ISC's are concerned since the Centenary Conference, although some IWG's have operated more extensively as a correspondent group than might have been the case in the past. One example is the Fair Treatment of Seafarers. Similarly both Places of Refuge and the Review of the Salvage Convention IWGs have relied extensively on correspondence between members of the IWG.
- There should be a broader representation from Africa, Asia and Latin American countries on working groups and international subcommittees.
This has been achieved to some extent but it is believed that more could be done.
- Consideration could be given to creating regional subcommittees to feed into international working groups.
This has not been adopted in practice.

Future Work Projects

- A planning committee to identify the long range work plan should be set up.
A planning committee was set up soon after the Centenary Conference which met with mixed success.
- More cosmopolitan areas of law should be looked at, such as marine insurance.
The topic of marine insurance was taken up and considerable work done under the chairmanship of John Hare. Under Dieter Schwampe, a different focus has been adopted. Another topic such as Cross-Border Insolvency and the Arctic and Antarctic are further examples of topical work being done within the CMI.
- CMI should offer expert assistance in relation to the implementation and ratification of conventions (is linked also with the suggestion that CMI should be more proactive in getting States to adopt instruments that it has worked on).
It is thought that this is an area in which the CMI can make a significant impact.
- CMI should move towards a greater emphasis on the production of model laws, guidelines etc.
This is something that needs to be considered whenever CMI works on a new project, and it is believed is taken into account.

Conferences and Profile

- Some concerns were expressed as to the length of conferences but there was general agreement that the conferences should be held every four years with a colloquium every two years.
Since 1997 conferences have been held at Singapore (2001), Vancouver (2004) and Athens (2008). There have also been colloquia, symposiums and seminars held since the Centenary Conference in Toledo (2000), Bordeaux (2003), Cape Town (2006), Dubrovnik (2007), Buenos Aires (2010) as well as the signing ceremony of the Rotterdam Rules in 2009 and the Oslo Seminar in 2011 which coincided with Assembly meetings.

Role and importance of NMLAs

- CMI risked being dominated by wealthy nations and smaller nations having a limited say.
The greater geographical spread of the membership of the Executive Council is thought to have made some inroads into this perceived problem.
- Proxy voting should be allowed.
After the Centenary Conference the Executive Council decided not to recommend any amendments to the Constitution.
- Executive Councillors should be encouraged to attend functions being organised by NMLAs.
This has occurred to a limited extent but could, if thought appropriate, be increased. Executive Councillors have attended IIDM meetings, the Singapore MLAs annual meeting, the joint meeting of the US, Canadian and Australian and New Zealand MLAs, and others.

Administrative aspects, location and staffing of headquarters

It was suggested that:

- the head office could be moved to Brussels or London which were more readily accessible than Antwerp.
This has not taken place. Belgium is clearly the home of CMI, the place where it is incorporated and where its records are maintained.
- a permanent Enquiry Office under the supervision of the Secretary-General should be set up.
The Executive Council, after the CMI Conference, decided to ensure that the assistant to the administrator would convey any enquiries received to an Executive Councillor for response.
More resources should be given to publications.
The greater use of the website has perhaps made this unnecessary.

Executive Council Tenure, Frequency of Meetings, Communications

- It was suggested that the size of the Executive Council be increased with a view to moving away from the European bias and have representatives from South East Asia, Africa and China.

After the Centenary Conference the Executive Council decided not to recommend a change to the Constitution but to seek to widen the geographical spread of the membership of the Executive Council to take account of this concern. It made such a recommendation to the nominating committee, and it is believed that this has been achieved but more can perhaps be done.

- The regular turnover of councillors and younger councillors were also recommended.

The Steering Committee (set up by President Jean-Serge Rohart which comprised the two Vice-Presidents and the Secretary-General) recommended a reduction in terms of councillors from 4 to 3 years, with the potential to serve two terms. The Constitution was amended in Rotterdam to achieve this.

- Two meetings per annum were considered by some to be insufficient and the use of video and technology was recommended.

Notwithstanding these concerns in the interests of economy the Executive Council only meets face to face once a year, together with an email meeting which has been referred to above. The practice has also developed, arising from the setting up of the Steering Committee in 2008, for an inner cabinet (known as the Management Committee) to meet annually. This consists of the President, two Vice-Presidents and Secretary-General. This is thought to have been a useful innovation particularly where the President is not someone who is fully retired.

Payment of dues and finances

- A number of suggestions were made for a review of administrative expenses at the Centenary Conference.

Whilst greater discipline was attached to the finances of the CMI after the CMI Conference it was noted at the time that the expenses of running the office in Antwerp were about 48% of the total expenses incurred annually and the expenses for the Executive Councillors, including the President and other officers were running at approximately 35% of the total expenses. It was not considered there was very much room for economy in expenses. Changes have been made not least the substantial reduction in NMLA subscriptions, the reduction in Executive Council expenses and the greater use of the Internet etc. As a result the CMI has a healthy reserve.

Report of the Plenary Session

- New ways should be developed of consulting with NMLAs, such as more seminars, bilateral meetings etc.
To an extent this has been achieved (see the list of conferences, colloquia and seminars listed above). Consideration could perhaps be given to more regional meetings for NMLAs being organised in areas such as South America, Central America, Europe and Asia.
- CMI should be a leader and not a follower and encourage more youthful representation.
Serious attempts have been made to encourage younger members to participate in the CMI. Special events (both scholastic and social) have been organised at conferences and colloquia. The Northern European Regional Grouping has held extremely successful functions for young lawyers. The Singapore MLA hosts an Asian meeting once a year.
- CMI's domination by European nations does not take account of the growing economies of Asia.
Some far sighted delegates at the Centenary Conference highlighted the need to give greater emphasis to establishing NMLAs in Asia. At the Assembly meeting in Oslo in 2011 the President reported on an approach that had been made by the Singapore MLA to establish a representative office for three years in that country. At the time of preparation of this paper discussions are still taking place in that regard. This has been addressed by enlarging the geographical area from which Executive Councillors are appointed but it is believed more can be done in the future.
- CMI should make itself “really international”.
Steps have been taken to broaden the geographical membership of the Executive Council. Efforts are being made to encourage the setting up of MLAs around the world.
- CMI should embrace modern communications.
The Executive Council, after the Centenary Conference, decided to install email and investigated establishing a website. Francesco Berlingieri is to be commended for the enormous work that he put into establishing the first website. The Steering Committee recommended investing more in changing the website but clearly more can be done. The Executive Council has certainly embraced modern communications, as has been referred to above in relation to one of the two Executive Council Meetings which takes place annually and the website has been significantly improved. There are clearly further matters that can be done to improve the website and embrace technology.
- Relationships with international bodies should be structured on a more formal basis.

Whilst steps along this path are being taken it is thought more can be done.

- Developing countries should be assisted in implementing existing conventions by CMI providing technical assistance.
This is under review.
- CMI should nominate representatives to liaise with the United Nations Agencies.
This has been done, but once again it is believed more can be done.

Conferences

- One week was too long for a conference.
The Executive Council has continued to follow the traditional format for 4 yearly conferences.
- Seminars etc should be used to raise funds for the CMI and be of no more than 3 to 4 days.
The CMI has adopted this suggestion. See the list above of conferences, colloquiums, symposiums and seminars which have taken place.

NMLAS

- Guidelines for membership of NMLAs should be produced.
These are on the website “Guidelines for the formation of national maritime law associations”.
- Executive councillors should be encouraged to visit NMLAs.
This has been done (see comments above).
- There should be a recruitment drive for new NMLAs in the Far East.
This is happening.

Administration

- Better use of the internet.
If NMLAs would provide their members contact details (or at least one central repository for messages from CMI to be forwarded to their members) more could be done in this regard.

Size of the Executive Council

- Wider representation rather than increase in size.
See comments which have been made above.

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