ISSN 0778-9882

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL

NO. 2 - MAY / AUGUST 2002

This Issue Contains:

NEWS FROM THE CMI

CMI UP-DATE

Letter of the President of CMI to the Presidents of National Maritime Law Associations

September 4th, 2002

The purpose of this letter is to keep you up-to-date on progress with various CMI projects and to give you advance notice of our Bordeaux Colloquium in June 2003 and of the CMI 38th International Conference which is to be held in Vancouver in June 2004.

Draft Instrument on Transport Law

You will be aware that after 4 years of hard work, the CMI, in December 2001, delivered to UNCITRAL a Draft Instrument on Transport Law which was designed to end the multiplicity of liability regimes applying to carriage of goods by sea and also to up-date maritime transport law to better meet the needs and realities of international maritime transport in the 21st Century. I must emphasise that the work of CMI on this project could not have proceeded so rapidly and produced such a comprehensive draft Instrument were it not for the contributions made by a substantial number of member associations.

On receipt of the CMI Draft Instrument UNCITRAL referred the document to Working Group III on Transport Law which was composed of all State members of the Commission. The Working Group met in New York from 15-26 April 2002 and, under the Chairmanship of Mr Rafael Illescas (Spain), proceeded to an article by article consideration of the Draft Instrument.

Prior to this analysis, delegates considered the fundamental question of whether the Draft Instrument should deal with carriage of goods door-to-door or only port-to-port. I am pleased to report that the decision reached by the Working Group was that consideration of the Instrument

should continue to be on a door-to-door basis. The Report of the Working Group – New York, 15-26 April 2002, is available on the CMI website at **www.comitemaritime.org**.

A further meeting of the Working Group III on Transport Law is scheduled for the week beginning September 16th at UNCITRAL's headquarters in Vienna. The CMI will be represented at that meeting by Stuart Beare, in his capacity as Chairman of the CMI IWG and ISC together with other members of the IWG.

You may have read a certain amount of press comment on the project. It would be foolish to pretend that all governments and NGOs are in favour of the project. However, there remains a strong desire to re-unify the law in relation to the carriage of goods and there is a general recognition that this is the best (and probably the last) opportunity of doing so.

General Average

At the Plenary Session held at the end of the CMI 37th International Conference in Singapore in February 2001 it was resolved that the International Working Group set up to consider amendments to the York-Antwerp Rules 1994 should continue its work with a view to producing proposals for amendment to the York-Antwerp Rules before the next CMI International Conference.

The International Working Group, under the Chairmanship of Bent Nielsen (Denmark) has recently met and I understand that the topics under discussion are:

1. restricting recovery in G.A. of expenditure to those incurred for the common safety – ignoring common benefit;
2. re-definition of and greater restriction on the right to recover substituted expenses;
3. restricting right to recover expenses incurred at a port of refuge once ship and cargo are in a place of safety;
4. possible introduction of a time bar provision rather than leaving it to national law;
5. possibility of stipulating a fixed rate of interest on general average expenditure;
6. possible abolition of commission on general average disbursements;
7. amendment of rules to accommodate absorption clauses in hull policies;
8. possible abolition of re-adjustment of salvage charges incurred.

Whilst these are not radical changes, there was some support in Singapore for a review of the Rules and removal of some of the more artificial elements of general average which have accreted.

It is hoped that at the Bordeaux Colloquium in June 2003 (for details see below) the Chairman of the International Working Group will be able to give us a progress report on the work of his Group.

Marine Insurance

Professor Malcolm Clarke of St John's College, Cambridge has temporarily taken over Chairmanship of the International Working Group on this subject. I am hoping that Professor John Hare will be able to resume his CMI duties in the near future.

At the 37th International Conference of the CMI held at Singapore in February 2001, it was resolved that the International Working Group should continue its study of national laws of marine insurance in order to identify and evaluate areas of difference in the national laws in certain topics. Specifically the IWG was to consider the following 4 topics:

1. the duty of disclosure;
2. the duty of good faith;
3. the effect of alteration of risk; and
4. warranties.

These 4 topics have been allocated to individual members of the International Working Group and it is hoped that they will produce working papers between now and the Bordeaux Colloquium. A further period of consultation with National Maritime Law Associations will then lead us to a full discussion of these 4 topics at the 38th International Conference in Vancouver in June 2004 (see below for details).

We are not seeking to draft a new Instrument or new insurance contract clauses. Our hope, however, is that by identifying the most commonly encountered solutions to the problems raised we may be able to influence prospective national legislation or new market clauses.

Places of Refuge

At the 83rd Session of the IMO Legal Committee, CMI offered to conduct an investigation amongst its member National Associations to ascertain the extent to which their domestic law (based on international conventions or otherwise), dealt with the problem of vessels in distress and seeking refuge. This offer was accepted and a questionnaire was sent out in November 2001 to all National Associations. The responses received have now been analysed and a report has been prepared and submitted to the IMO Secretariat. The subject will be back on the Agenda at the 85th Session of the IMO Legal Committee which will take place in October this year.

The survey has revealed that a substantial number

of States have failed to pass the necessary legislation to implement obligations undertaken under existing international conventions which would directly affect their ability to deal with ships requesting a place of refuge following an accident. These convention obligations are to be found in Article XI of the Salvage Convention, various articles of UNCLOS as well as the International Convention on Oil Pollution Preparedness Response and Co-operation 1990.
The information provided by the submission to the Legal Committee will give the Legal Committee and also the IMO Maritime Safety Committee important background information on which they can draw should they decide to prepare an instrument designed to tackle this problem on an international basis.
Again, my thanks go to those National Associations which responded to the questionnaire.

Classification Societies

It will be recalled that in May 1998 CMI published Principles of Conduct for Classification Societies. In May 1999 the CMI published a further document entitled Model Contractual Clauses for use in agreements between Classification Societies etc.
The publication of these documents followed a series of meetings with representatives of the International Chamber of Shipping and the International Association of Classification Societies. The Contractual Clauses contained an article providing a limit of liability for Classification Societies in the event of the negligent performance of their duties. Despite all efforts, it proved impossible to agree on the limit.
Recently, further interest has been shown by ICS and IACS and it does seem possible that agreement on the limitation provision may eventually be reached.

Implementation of International Conventions

Professor Francesco Berlingieri continues to collect jurisprudence on the implementation and interpretation of maritime conventions. It is intended that this material will be published on the CMI website (and possibly elsewhere) to act as a guide to national courts when faced with interpretation of international conventions.
Professor Berlingieri continues to seek reports from National Associations of cases involving interpretation of international maritime conventions.

CMI Administration

I am pleased to be able to report that Wim Fransen (Belgium) has agreed to act as CMI Administrator. In this position he works closely with our Treasurer, Benoit Goemans and our Assistant Administrator, Pascale Sterckx.
The CMI administrative office has now settled into its new premises at Mechelsesteenweg 196, B-2018 Antwerp, Belgium. This new office has plenty of storage space. Should you have cause to visit Antwerp, you and your colleagues would be more than welcome to call.

Bordeaux Colloquium – Tuesday, June 10th to Friday, June 13th: Bordeaux, France

Please note these dates in your diary. We have developed a provisional programme. The first day of the Conference, Wednesday, June 11th, will be occupied by a consideration of "Trade and Transport Law in the Electronic Age". This session will be lead by Johanne Gauthier who is the member of the CMI Executive Council charged with the electronic aspects of carriage of goods by sea.
On Thursday, June 12th, the morning will be devoted to a consideration of progress with the CMI/UNCITRAL Draft Instrument on Transport Law. It is anticipated that by that time the principle controversial issues will have been identified and delegates will be invited to join in a debate of these issues.
In the afternoon of Thursday, June 12th, there will be an excursion. On Friday, June 13th, the morning session will be devoted to Developments in International Maritime Law. Specifically speakers will address issues of Maritime Security – post September 11th, the Protocol to the Athens Convention, the Bunker Convention, the HNS Convention, and the Draft Wreck Removal Convention and other IMO and CMI topics. In the afternoon the CMI Assembly 2003 will be held and the proceedings will finish with a Gala Dinner.
I hope that representatives of National Associations will come in numbers to this Colloquium. Booking details will be sent out in due course.

CMI 38th International Conference – Vancouver, May 30th–June 6th 2004

I am delighted to report that the Canadian Maritime Law Association has agreed to co-host this event. I am in close contact with the CMLA Organising Committee and in August this year was able to stop over in Vancouver to meet the members of the Committee, to discuss arrangements and stay at the Westin Bayshore Resort and Marina Hotel which will be the venue for the Conference.
The hotel has a spectacular waterside situation on Coal Harbour overlooking the marina and Stanley Park. The hotel is in a relatively open situation and despite this is within walking distance of the downtown area of Vancouver.

Accommodation at the hotel is excellent and we shall be using their own newly built conference centre which is attached to the hotel.
This will be an excellent venue for the Conference. Vancouver is a thriving commercial port and its position in the north-west of the North American Continent makes it readily accessible from the Far East whilst there are many direct flights from Europe.
At this stage the programme for the Conference has not been fixed though it is anticipated that marine insurance and a revision of the York-Antwerp Rules will be on the Agenda.
I again urge you and your colleagues to note the date for this event and, as you did in Singapore, support this Conference in large numbers.
To keep up-to-date with CMI affairs, please visit our website at www.comitemaritime.org.

Yours sincerely,

PATRICK GRIGGS

PLACES OF REFUGE

Paper submitted by CMI to IMO*

Executive Summary

At the 83rd Session of the IMO Legal Committee, CMI offered to conduct an investigation amongst its Member National Associations to ascertain the extent to which their domestic law (based on International Conventions or otherwise) dealt with the problem of vessels in distress and seeking refuge. The attached report has been prepared by an International Working Group of the CMI consisting of Stuart Hetherington (Chairman), Gregory Timagenis (Vice Chairman), Prof Eric van Hooydonk, Richard Shaw and Dr Derry Irvine. It is hoped that this document will prove a useful background to discussions within the MSC and the Legal Committee on ways in which the international community can deal with the problem of vessels seeking places of refuge. The responses do not indicate that any states have imposed legal liabilities on the owners of such vessels, but the CMI is currently analysing such liability issues.

Action to be taken

The Legal Committee is invited to note the results of the CMI urvey.

Related Documents

See paragraph 2 below.

1. This paper reports on the responses received from National Maritime Law Associations to a questionnaire which sought information on the following matters: Article 11 of the *Salvage Convention;* Articles 17, 18, 21, 192 to 199 and 221 of the *United Nations Convention on the Law of the Sea 1982* ("UNCLOS"); and Articles 3, 4, 5 and 6 of the *International Convention on Oil Pollution Preparedness, Response and Co-Operation 1990* ("OPRC").CMI has, in addition to canvassing its member Associations in relation to those three Conventions, sought to ascertain the extent of experience which member countries have had of casualties needing salvage assistance or a Place of Refuge and has also sought information as to any other legislation which member States have adopted dealing with the admission of a distressed vessel to a Place of Refuge.

2. The CMI had lodged in the IMO Library a file containing the following further materials: a more detailed version of this paper; a summary of the responses to the CMI questionnaire in tabulated form; a Schedule of Casualty Experience; Guidelines published by the State of Queensland, Australia; and Extract from US Coast Guard's Marine Safety Manual.

[A] The Salvage Convention 1989

3. Article 11 of the Salvage Convention provides:

"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."

* This paper was based on responses by National Associations to a Questionnaire prepared by the CMI International Working Group.

Commentary

4. Slightly less than 50% of the states whose National Associations responded to the questionnaire have not ratified the Salvage Convention but even amongst those states who have ratified the Salvage Convention none have introduced any legislation which specifically gives effect to Article 11 and only three countries Germany, Norway and UK have designated any particular Places of Refuge. Germany has by Regulation, identified Places of Refuge along the German coast. (Access to such places is not guaranteed, and is at the discretion of the Authorities). The National Coast Guard and the Port Authorities in Norway provide several Ports of Refuge along the Norwegian coast (none are designated for environmental hazards). In the UK places of refuge have been designated but they are not made known to the public. In Hong Kong there are no designated places but by reason of repeated use such places are well known to local salvors and others in the maritime community.

[B] UN Law of the Sea Convention 1982

5. Articles 17 and 18 of UNCLOS provide that ships of all States have a right of innocent passage through the territorial sea, and passage is defined as meaning "navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility." Article 18 requires such passage to be "continuous and expeditious" but it does include stopping and anchoring if incidental to ordinary navigation or "are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress".

6. Article 21 of UNCLOS expressly allows the coastal State to adopt laws and regulations relating to innocent passage through the territorial sea in respect of various matters which are enumerated such as "the preservation of the environment" and the "prevention, reduction and control of pollution".

7. Article 39(1)(c) of UNCLOS provides that ships and aircraft while exercising the right of transit passage shall "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress."

Commentary

8. Whilst the governments of the great majority of respondents to CMI's questionnaire have ratified the Law of the Sea Convention very few have given effect to any legislation with respect to ships which are the victims of force majeure or distress and their rights to seek shelter in a Place of Refuge. China and Norway have however enacted such legislation. For example: China has enacted legislation under its Law on Maritime Safety 1983 and Rules Governing Vessels of Foreign Nationality 1979 which go some way to making specific provision for vessels in distress. For example, the prohibition on vessels entering the internal waters and harbours of the PRC does not apply where there have been unexpected circumstances, provided they report immediately to the competent authority. Vessels seeking a place of refuge are required to seek approval and take shelter or temporary berth at any place designated by the authorities. Norway has likewise made provision to enable vessels in distress to stop or anchor in the territorial sea and to enter internal waters when seeking a port of refuge and are required to notify the authorities (Regulation of 23/12/94 No.1130).

9. Articles 192 to 199 and 221 of UNCLOS touch on the topic of protection of the marine environment from pollution. Article 195 provides:

"In taking measures to prevent, reduce or control pollution of the marine environment, States shall so act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another."

Commentary

10. Only four countries, Brazil, China, UK and the U.S. appear to have enshrined this principle in their National legislation, albeit somewhat indirectly in the case of the U.S. Brazil has ratified the 1989 Basel Convention on the control of transboundary movements of Hazardous wastes, and by Regulation where a ship flying the flag of a foreign state but diverted for operations in Brazilian waters, causes maritime boundary problems with another State it is liable to have its temporary licence revoked. In China, pursuant to Article 11 of the Regulations of the PRC on the Prevention of Vessel Induced Pollution, 1983, the use of oil-elimination chemicals without the approval of harbour authorities is prohibited. Under the Merchant Shipping Act s.130 (UK) the transfer of, inter alia, fuel between ships is regulated and U.S. law bars, indirectly, the transfer of "damages" by requiring containment and clean-up measures.

11. Article 198 of UNCLOS requires a State which becomes aware of cases in which the marine

environment is in imminent danger of being damaged or has been damaged by pollution to "immediately notify other States it deems likely to be affected by such damage, as well as the competent international organisation." Article 199 requires States to "jointly develop and promote contingency plans for responding to pollution incidents in the marine environment."

Commentary

12. Whilst the governments of the majority of respondents to the CMI questionnaire have adopted contingency plans there are a number of significant maritime nations who have not, and very few of those which have been adopted contain provisions for the admission into a place of refuge of a vessel in distress which may threaten to cause pollution. Those countries which have adopted such provisions are Australia, Denmark, Germany and New Zealand.
Australia: While no Places of Refuge have been designated in Australia most Australian States have guidelines (or plans) for considering requests for Places of Refuge. They set out criteria which the authorities will take into account when considering any request on a case by case basis. For example they take into account: adequate depth of water, good holding ground, shelter from effects of prevailing wind/swell, relatively unobstructed approach from seaward, environmental classification of adjacent coastline and fisheries activity, access to land/air transport, access to loading/unloading facilities for emergency equipment.
Denmark: Under the Danish Marine Pollution Act Sections 43 and 43a a vessel in distress which threatens to cause pollution can be forced into a repair yard, or denied access to a Place of Refuge.
Germany: Pursuant to Chapter 26 Volume 2 of the Bonn Agreement Counter Pollution Manual.
New Zealand: Annexure 15 to its National Oil Spill Contingency Plan envisages either safe havens being designated by Regional Councils or during an incident by the National on Scene Commander. In determining a safe haven Annexure 15 states: "Priority should be given to the crew of ships, then the environment, then the ship itself. Detection of the safe haven on the day will depend on sea state, weather conditions and the location of the ship and will be made by the National on Scene Commander in Consultation with the Regional on Scene Commander and/or the Local Harbour Master."

[C] The International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 ("OPRC")

13. Article 3 of OPRC requires State parties to pass legislation requiring ships which fly its flag to have on board a Shipboard Oil Pollution Emergency Plan ("SOPEP") complying with Internationally agreed standards.

14. Article 4 of OPRC requires State parties to pass legislation requiring the masters of ships which fly its flag to report any event on their ship involving a discharge or probable discharge of oil to the flag State and the nearest coastal State.

15. Article 5 of OPRC requires the Authorities of the State receiving such a report to assess the nature, extent and possible consequences of such an incident and to inform without delay all States likely to be affected together with details of its assessment and any action it has taken, or intends to take, to deal with the incident. Such action may involve the admission of the ship involved to a Place of Refuge.

Commentary

16. Almost all states who have responded to the CMI questionnaire have ratified the OPRC Convention. Of those states almost all have adopted legislation to give effect to Articles 3, 4 and 5 and have adopted oil pollution response contingency plans, but some of those have not as yet reported them to the IMO.Very few of the oil pollution contingency plans contain provisions dealing with the admission of ships in distress which may prove a threat of pollution. Those countries which do have such contingency plans are Australia, Germany, New Zealand. (See comments in relation to UNCLOS above.) None of those plans contain provisions requiring financial or other security as a condition of entry.

[D] Casualty Experience

17. Some countries have had experience of ships in distress being refused entry. Specific examples provided by National Associations of the ships concerned and the reasons for the refusal. (4.1) are contained in the more detailed version of this paper. (see para 2)

18. Some countries have had experience of vessels needing salvage assistance in a Place of Refuge and have been permitted entry. Specific examples provided by National Associations of the ships concerned are contained in the more detailed version of this paper. (see para 2)

19. Not surprisingly many countries require detailed information of the vessel and its cargo and their condition before considering requests for assistance and impose conditions with agreement

to permit the entry of vessels in distress. It would seem to be rare for time limitations to be imposed on vessels in such situations when permission is granted, although on occasions time limitations are known to have been set by the authority concerned. Similarly proof of adequate insurance or guarantees, or tugs on standby are sometimes required.

[E] Other Legislation

20. Many states give to Ministers, harbour authorities or delegated persons the power to permit the entry, or conversely, the power to order the removal of vessels, or to take unilateral action to remove or destroy a vessel, in certain circumstances, such as where there is a risk to the safety of a port, or the maritime and coastal environment. Examples of states which have enacted such legislation are Australia, Brazil, Canada, Chile, China, France, Hong Kong, Italy, New Zealand, Netherlands, Norway, South Africa, Spain, Sweden, UK, and USA. Full details of such delegated powers and the legislation granting them are set out in the documents lodged in the IMO Library. A brief summary is set out in the Annexe to this paper.

21. The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969) and London Protocol (1973) (to which at least 77 countries are parties) is of relevance to this topic, as are the bilateral contingency arrangements between countries such as Japan and Korea; Japan and Russia, UK and France, Norway and UK). Reference has been made to the Copenhagen Agreement; the Lisbon Agreement and the Bonn Agreement (1983) which contains the following:

"When permission of access to a port or sheltered area is requested, there is no obligation on the part of a Contracting Party to grant it …..granting access to a port or sheltered area (so called "safe haven") could involve a political decision which can only be taken on a case-by-case basis with consideration of the balance between the advantage for the damaged ship and the environment from that ship being near the coast."

22. Article 17 of the EU Draft Directive will require States in the EEC to create Places of Refuge and plans for handling vessels in distress. ("Member States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority. Plans for accommodating ships in distress shall be made available upon demand. Member States shall inform, within 12 months of the date of application of this Directive, the Commission of the measures taken in application of the preceding paragraph.")

Conclusions

23. Whilst the principles dealing with the obligations and responsibilities of States when dealing with stricken vessels are mostly identified in the International Conventions some countries have clearly not become parties to those Conventions and of those which are parties very few have followed through on the Conventions and developed National laws to give detailed effect to those principles in their local jurisdictions. Most significantly there is a paucity of National legislation which relates to the provisions of Article 11 of the Salvage Convention or Articles 17, 18 21 or 39 (1)(c) of UNCLOS. Similarly it appears that National Plans do not, for the most part, give guidance to those who might be in distress as to what they should do in such situations or to those with the power and responsibility to administer National laws as to what criteria will be adopted in considering requests for assistance.

24. It may be that Governments (particularly in those countries where there are Federal/ State/ Regional issues to be taken into account) are unaware of the various responsibilities, duties and powers which they may have both under International law and their own domestic law where casualties occur in or near their Territorial waters, and seek a Place of Refuge. Governments, it is suggested, need to have consistent (but not inflexible) processes for dealing with requests for Places of Refuge. Such places may need to be identified in advance and published and Governments may need to identify the controls, or conditions, that they may want to apply before permitting entry into a Place of Refuge, (such as security, guarantees undertakings, length of stay involvement of salvors, the survey of the vessel etc). Related to such issues which Governments may need to consider are questions concerning the availability of equipment and the power to requisition/commandeer equipment which might be necessary in an emergency.

September 2002

ANNEXE

Summary of relevant legislation

1. Australia, both by Federal (Protection of the Sea (Powers of Intervention) Act) 1984 and by State law, there are wide powers given to ministers and local authorities to remove vessels in certain circumstances.

2. Brazil. The Naval Authorities have a wide discretion in relation to the admission of a ship in distress and may require as preconditions of entry: proof of insurance, appointment of reputable salvors etc. In its Act on Safety of Traffic in Jurisdictional Waters, 1997, in Articles 5, iii and iv authorities are empowered to order a foreign vessel which by reason of "operational conditions representing a threat of damage to the environment, crew, third parties or to water traffic" either not to enter a port, not to leave a port, to leave jurisdictional waters or call at a National port.

3. Canada. Minister, Pollution Prevention Officers and Port authorities are given wide powers to direct vessels to go to certain places (or not to enter Canadian waters or particular areas) under the *Canada Shipping Act 1985* and the *Canada Marine Act 1998.*

4. Chile. Article 32 of the Law of Navigation: "In certain qualified cases the Directorate may restrict or forbid the passage or stay of vessels in determined areas or places, or prohibit the passage or stay of vessels in determined areas or places, or prohibit their transit through waters of national jurisdiction if their passage through same is not innocent or is dangerous."

5. China. Article 18 of the Law of the PRC on Maritime Traffic Safety permits the competent authority, where a ship is believed to be dangerous to the safety of a port, to refuse entry to the ship or order the ship to leave the port so threatened.

6. France. The Code des Ports give to Harbour Masters a wide discretion to refuse entry of a vessel to a Port, having regard to commercial interests, the interest of the port and the risks to the maritime and coastal environment.

7. Hong Kong: The Director of Marine has wide power under various legislation to refuse entry, give directions generally and for the prevention of pollution etc. MS (Shipping and Port Control) Ordinance; MS (Prevention of Oil Pollution) Ordinance.

8. Italy: Article 83 of the Code of Navigation provides that the Ministry of Transport may limit or prohibit for reasons of "ordre public", the transit or the stoppage of merchant ships in the territorial sea; Article 59 of the Regulation empowers the port authorities to regulate the arrival, mooring and departure of ships and Article 256 of the Decree of the President of the Republic (1991) provides that all ships are bound to observe the traffic separation rules issued by the Ministry of Transport.

9. New Zealand: Under Section 248 of the Maritime Transport Act the Director of Maritime Safety is empowered to issue instructions to a ship and/or salvors if the Director is satisfied the ship is a hazardous ship. (These include directions to relocate the vessel).

10. Netherlands: Wet Bon (1992) allows Minister of Transport to give directions to the Master, owners and salvors for the purpose of preventing damage to the environment. Such a measure may include the appointment of a place or port of refuge. Under its Rampenplan the admission of vessels in distress is decided by the Government and factors such as reasonableness, fairness and principles of proportionality will be considered. The Government could also require security to be provided.

11. Norway: Regulation 2 of May 1997, No. 396 concerning the access of Foreign Military Vessels and Aircraft to Norwegian Territory in Peacetime:

> "When subject to force majeure or to sea peril or rendering assistance to persons, ships or aircraft which are in danger or distress such ships have access to innocent passage, without having obtained permission by diplomatic means."

12. South Africa: Wreck & Salvage Act places obligations on Masters of South African ships to assist ships or persons in distress; the South African Marine Safety Authority may direct the master or owner of a ship that is wrecked, stranded or in distress to move to a specified place, or to raise, remove or destroy such a ship itself if it is unable to contact the master of owner. South Africa is drafting a Disaster Management Act which may impact on the topic of Places of Refuge.

13. Spain: Spanish Port and Merchant Marine Act 1992. Section 107 The Port Authority, after report by the Marine Captain and in case a vessel is in danger of sinking inside the Harbour Waters may, if neither the owner nor the ship agent remove nor repair the vessel at request of the Authorities remove the vessel out of the port or destroy and sink her in place where port activity sailing and fishing are not prejudiced, at the expense of the owner." (The same powers apply to outside the port but within Spanish Maritime Waters.)

14. Sweden: Pollution from Ship's Act (980-424). Swedish Maritime Administration is entitled to order a ship to take measures necessary for preventing pollution, to order a ship to a place of refuge, to use only certain routes etc.

15. UK: Merchant Shipping and Maritime Security Act (MSA) 1995 enables the Secretary of State or an authorised representative to declare a temporary exclusion zone for the purpose of promoting maritime safety or protecting the maritime environment (s.100A). MSA 1995 also contains power to detain dangerously unsafe ships (s.95). MSA 1995 enables orders in Council to be passed "specifying areas of sea above any of the areas for the time being designated under s.1(7) of the *Continental Shelf Act* (1964) as waters within which the jurisdiction and rights of the UK are exercisable in accordance with Part XII of UNCLOS for the protection and preservation of the marine environment" (s.129(2)(b))

> Guide to Good Practice on Port Operations and Contingency Planning for Marine Pollution Preparedness and Response: Guidelines for Ports (March 2002) reinforces the UK obligations under SOLAS to provide shelter for maritime casualties (paragraph 2.5 provides: "Beyond providing shelter for a casualty a harbour authority may be called upon to take a casualty into port."
>
> Dangerous Vessels Act 1985 ss 1 and 3 empowers Harbour Masters to give directions to prohibit vessels from entering areas within their jurisdiction, and to

remove vessels, where they present a grave and imminent danger to the safety of any person or property or risk of obstruction to navigation. However the Secretary of State (through SOSREP) has the power under s.137 of MSA to override the power of a Harbour Master, and direct a casualty to a place of refuge.

Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 give effect to Articles 3 and 4 of OPRC Convention and Article 5 in the National Contingency Plan, the Port Marine Safety Code; Guide to Good Practice in Marine Operations and Port and Guidelines for Ports.

16. United States: The US' Coast Guard has promulgated regulations which bear on the above topics. A vessel in a hazardous condition is required to comply with various conditions prior to entry into US waters. The Coast Guard Captain of the Port (COTP) may waive any such conditions upon finding that circumstances are such that their application is "unnecessary or impractical for purposes of safety, environmental protection, or national security." Furthermore whilst foreign merchant vessels are prohibited from entering US waters unless they comply with the ISM Code an exception is allowed for vessels under force majeure. A district commander or COTP may also prohibit a vessel from operating in the navigable waters of the US if it is determined that the vessel's serious repair problems create reason to believe that the vessel may be unsafe or pose a threat to the marine environment. Provisional entry may be allowed if the owner/operator proves to the satisfaction of the District Commander or COTP that the vessel is not unsafe or does not pose a threat to the marine environment and that such entry is necessary for the safety of the vessel or the persons on board. (See appendix for extract from US Coast Guard's Marine Safety Manual). On Scene Coordinators are empowered to remove, and if necessary destroy a vessel discharging or threatening to discharge – where there are spills or the threat of spills which pose a threat to the public health or welfare of the U.S.

NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

NEWS FROM IMO

84TH SESSION OF THE IMO LEGAL COMMITTEE

The IMO Legal Committee met for its 84th Session at IMO headquarters from 22nd to 26th April 2002 under the Chairmanship of Mr A.H.E. Popp, QC (Canada).

Introduction

The Session was opened by Bill O'Neil, the Secretary General of IMO.

In opening the meeting the Secretary General drew attention to two items which related directly to the events of September 11th 2001. These involved a review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms (the SUA Treaties). The other item concerned the need for greater transparency regarding the ownership and control of ships wishing to enter State ports.

The Secretary General drew attention to the fact that a Working Group of the Maritime Safety Committee had been asked to consider possible amendments to SOLAS aimed at deterring terrorist acts directed against or involving ships.

The Secretary General urged delegates to devote as much time as possible to consideration of the draft Wreck Removal Convention in respect of which a Diplomatic Conference is anticipated in the reasonably near future.

Draft Convention on Wreck Removal

The delegation from the Netherlands introduced a substantial re-draft of this Convention which had been designed to deal with such matters as consistency with UNCLOS, whether the Convention should cover both navigational dangers and environmental threat and how financial responsibility should be established.

One delegation came up with the interesting and novel suggestion that instead of developing a separate Wreck Removal Convention it might be possible to draft a Protocol to the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (Intervention Convention). Whilst this idea was thought to be worth pursuing it was agreed that the Committee would continue to consider the Wreck Removal draft as a separate instrument.

The Committee then proceeded to consider certain specific points arising under the draft, in particular:

1. "Wreck": The definition of wreck which appears in the draft Convention is:

"(a) a sunken or stranded ship, or any part thereof, including anything that is or has been on board such a ship or that is stranded, sunken or in danger at sea and lost at sea from a ship;

(b) a ship that is about, or that may reasonably be expected, to sink or strand."

It was generally felt that some re-drafting of this definition was necessary and several delegations suggested that sub-paragraph (b) should be deleted.
There was discussion regarding the inclusion of the words "or in danger". Some delegations took the view that these words needed clarification to allow for the situation where the crew was still on board and in control of the vessel.
It was pointed out that a sunken or stranded ship is not necessarily a wreck if the shipowner is considering a salvage operation. A ship generally only becomes a wreck once it has been abandoned. This could have an impact on the requirement to report wrecks under Article 6 of the draft Convention.
Reference during the discussions was made to the sinking of the *Crystal* and in the context it was suggested that sub-paragraph (b) should be amended to include parts of a ship.
The Committee concluded that both sub-paragraphs of Article 13 required substantial further work.

2. "Hazard": The definition of hazard which appears in the draft Convention draws the distinction between damage or threat of damage to the marine environment and, separately, danger or impediment to navigation. Concern was expressed that extending the definition of hazard to include damage to the marine environment could conflict with the Intervention Convention and might not be consistent with UNCLOS. There was considerable criticism of the drafting of sub-paragraph (b) of Article 15 which deals with danger to navigation but also includes a reference to "substantial physical damage to the marine environment" which may well be in the wrong sub-paragraph of this Article.
Further work by the Correspondence Group, lead by the Netherlands, was proposed.

3. "Shipowner": It was agreed that throughout the draft Convention the word "shipowner" should be replaced by "registered owner".

4. "Convention area": This is defined in the draft Convention as the EEZ of a state party (or equivalent) but in no circumstances is it to extend more than 200 nautical miles from the coast.

This definition gave rise to considerable discussion with particular reference to the situation where the wreck of a vessel might lie within an area where two or more defined maritime zones overlap. This could give rise to considerable doubt and confusion. Further work will be done on this provision.

5. "Liability, compensation and financial security": These matters are covered by Articles 11, 12 and 13 of the Convention. The delegation of the Netherlands explained that these Articles were intended to act as a safeguard in the event that the shipowners failed to remove the wreck. Article 11 imposes liability on the shipowner for locating, marking and removing wrecks; Article 12 lists the exclusions from liability by reference to other international instruments whilst Article 13 provides for compulsory insurance or other financial security. There was a general view that the new instrument should deal with issues of liability, compensation and security much in the same way as the 2001 Bunker Convention. Some time was taken considering various detailed issues including the limited defences available to the shipowner and whether any liability for wreck removal expenses should be imposed upon cargo. The right of the shipowner to limit liability for wreck removal expenses was discussed and it was pointed out that most states had taken advantage of the rights of reservation to exclude the right to limit liability for wreck removal expenses granted by the 1976 LLMC.
Further time was devoted to the need to be able to prove financial security. Two observer delegations felt that it should be sufficient for a shipowner to produce a certificate of entry in a recognised International Group P&I Club. Others felt that provisions similar to those in other liability Conventions should be incorporated.
The vexed question of the right of direct action by a claimant against the liability insurers was discussed and seems likely to be a feature of this Convention.

6. "Obligations to remove wrecks": This requirement is contained in Article 10 and entitles a state whose interests are most directly threatened by a wreck to determine if the wreck constitutes a hazard and give notice of removal to the owner and the flag state.

The SUA Treaties

Since this item came onto the Agenda as a direct response to the events of September 11th 2001, it was appropriate that the US delegation should propose the creation of a Correspondence Group to consider revision of the SUA Treaties for consideration at the 85th Session of the Legal Committee. The long term aim would be to make a recommendation to the IMO Assembly at its 23rd Session to convene a conference to consider amendments to the SUA Treaties.
Supporting this proposal the delegation of Turkey suggested that the title of the Treaties needs to be amended to cover terrorist acts at sea and other types of criminal acts not currently covered.
It was agreed that a Correspondence Group should be formed and that all States and interested international organisations should be invited to join the Group – the latter to include ICAO who

were thought to be conducting a similar exercise in the aviation context. Terms of reference were drawn up for the Correspondence Group and these were scheduled as an annex to the report of the Legal Committee (LEG 84/WP5).

Places of Refuge

This matter was first raised at the 83rd Session of the Legal Committee when it was agreed that there was a serious problem in finding places of refuge for disabled ships and ships in distress. Before the Committee was a paper prepared by the Legal Affairs Secretariat of IMO which established that there was nothing to prevent IMO drafting Guidelines on this subject. The note indicated that the real challenge was to find the proper balance between the duty of States to render assistance to ships in distress and the right of States to regulate entry into its ports and to protect its coastline from pollution or the threat thereof.

The representative of the International Association of Ports and Harbours (IAPH) submitted a detailed paper which outlined some of the basis elements required for a joint approach to the issue of places of refuge. Apart from supporting operational guidelines the IAPH suggested that consideration should be given to developing a framework of financial and liability arrangements for ports to apply when shelter has been offered.

The CMI advised delegates that its review of national laws on places of refuge had not been completed but that a paper would be ready for presentation at the 85th Session of the Legal Committee scheduled for October 2002.

The Director of the Maritime Safety Division advised delegates of recent progress made on developing operational guidance on places of refuge. He confirmed that the MSC would be looking to the Legal Committee to advise on the legal consequences of applying these guidelines. He advised that the guidelines would concentrate on:

1. Actions which the Master of a ship should take when in need of a place of refuge;
2. Evaluation of risks associated with the provision of a place of refuge;
3. Actions expected of coastal states to identify and designate suitable places.

One delegation drew the Committee's attention to the fact that a number of general provisions contained in UNCLOS already placed obligations on states to assist ships in distress. It was accepted that rather more specific provisions would be needed than the general statements appearing in UNCLOS.

There was general support for the development of guidelines on places of refuge rather than any other form of instrument. There was some debate as to whether States should be expected to pre-designate places of refuge. This was strongly opposed by a number of delegations who felt that pre-designation could create problems not only in the State concerned but also for the Master of a ship in distress who might feel that he had rights of entry to a designated place of refuge whereas this should be judged by States on a case-by-case basis. Reference was made to the problems faced by a coastal State in the event that it agreed to accept entry of a ship which resulted in damage to the marine and coastal environment. Issues of liability and compensation needed to be addressed. Concern was also expressed at the possible liability consequences for a State where entry was refused and pollution of the coast of another State resulted. In this context, reference was made to the proposal of IAPH that a special fund might be set up to cover damage caused by offering shelter to a ship in distress though several delegations thought that the existing liability and compensation system (CLC and Funds Conventions) should be adequate.

At the end of this discussion it was agreed that the CMI would be invited to examine the question of liability and compensation for damage arising from the entry of a ship in distress into a place of refuge.

Code of Practice for the investigation of Crimes of Piracy and Armed Robbery at sea

This topic had come onto the Legal Committee Work Programme following Assembly Resolution A.922(22) whereby the Maritime Safety Committee and the Legal Committee had been invited to keep this Code under review. The lack of consistency in the treatment and investigation of robberies in port and those at sea was highlighted and the Legal Committee agreed to maintain this topic in its Work Programme for further review in future as necessary.

The HNS Convention – monitoring the implementation

As co-ordinator of the Correspondence Group, established by the Committee at its 80th Session to monitor the implementation of the HNS Convention, the delegation of the United Kingdom introduced document LEG 84/9. To this document is attached a short over-view of the HNS Convention designed to draw attention to problems of implementation which had been identified and possible solutions. This over-view was welcome and delegates were requested to give the document as much publicity as possible to encourage States to believe that the implementation of this important Convention is of major significance.

In passing, the UK delegation drew delegates

attention to the fact that to date there had only been two ratifications of the Convention and hoped that the process of ratification could be speeded up.
The delegation of the Russian Federation (which is one of the two countries that has ratified the Convention) offered to make available through the Secretariat an electronic version in the English language of the Chapter of the Russian Shipping Code which implements the first tier of the HNS Convention. He advised that legislation regulating the second tier had not yet been prepared.
The Director of the IOPC Funds, who will be responsible for administering the HNS second tier confirmed that he and his colleagues had produced a prototype programme to be used in the identification and tracking of contributing cargoes. He advised that this prototype would be demonstrated during the course of the 2002 Funds Assembly.

Liability and Compensation Regarding Claims for Death Personal Injury and Abandonment of Seafarers – provision of Financial Security

This project arose out of the work of the Legal Committee to produce a Protocol to the Athens Convention designed to give added protection to passengers carried by sea. The joint IMO/ILO Working Group continues to work on this project which will give greater protection to seafarers.

Maritime Security

Post the events of September 11th 2001 the Maritime Safety Committee had set up the Inter-Sessional Working Group on Maritime Security (ISWG). The aim of this Group is to deter and detect terrorist incidents involving ships. Crucial to this exercise is the need to monitor ships entering State ports. The fact that the true ownership or control of a ship is not always easily identifiable has resulted in a call for greater transparency in this respect. The Legal Committee was invited to consider how the terms "ownership" and "control" of ships could be defined in such a way as to ensure that port states could determine the operation and control of all vessels visiting their ports.
The delegation from Greece suggested that it was more important to know the identity of those responsible for the management and operation of ships rather than details of ownership. In this context the managers or operators of a vessel are more important than the owners. On the other hand ICFTU invited the Committee to study the OECD Report "Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes". The ICFTU generally supported greater transparency both in relation to ownership and management and control.
The United States delegation suggested that a model for determining ownership and control could be found in the definition of "company" in the ISM Code.
The observer delegation of the CMI drew delegates attention to Article 6(2) of the UNCTAD Convention on Ship Registration 1986 which requires the state of registration to ensure that "the owner or owners, the operator or operators, or any other person or persons who can be held accountable for the management and operation of ships flying its flag" can be easily identifiable. The CMI delegation suggested that this might be the most appropriate route to the degree of transparency required.
The Chairman of the ISWG suggested that the answer to the following three questions might identify the person who is "in effective operational control of a ship":

1. Who appoints the crew?
2. Who fixes the use of the ship?
3. Who signs the Charterparty on behalf of the owner?

He suggested that answers to these three questions might enable those responsible for security to carry out the necessary investigations for clearance purposes prior to port entry.
A short debate developed regarding the ability to "pierce the corporate veil" in the shipping industry. It was suggested by one delegation that this issue went beyond questions of maritime security. The representative of the ICS insisted that issues of beneficial ownership related to financial and tax considerations and was irrelevant in the context of maritime security where the real target was the person responsible for operating the ship. This line was generally supported by delegations though the ICFTU expressed his regret at this decision.
Most delegations finally agreed that the ISM Code provided a good reference point for framework for identifying the person who was responsible for the operation of the ship. It was decided that the work on this subject would proceed on that basis.

Protocol to the Athens Convention 1974

It is to be noted that the next Session of the Legal Committee and the Diplomatic Conference to adopt a Protocol to the Athens Convention will be run jointly. The Session will commence on Monday, October 21st and will run through to Friday, November 1st with the allocation of time between the Athens Protocol and the other work of the Legal Committee to be determined at the time.
The Committee finally agreed to place the subject of wreck removal on the Agenda of the 85th Session of the Legal Committee and to establish a Working Group to develop the draft Convention further. The Working Group is to be lead, as before, by the Netherlands delegation.

PATRICK GRIGGS