

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL

NO. 2 - APRIL / SEPTEMBER 2010

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NEWS FROM THE CMI

MINUTES OF THE EXECUTIVE COUNCIL MEETING HELD BY E-MAIL CONFERENCE DURING THE WEEK COMMENCING JUNE 21 2010, CHAIRED BY THE PRESIDENT IN HIS OFFICE IN SINGAPORE

Participating:

<i>President:</i>	Karl-Johan GOMBRII
<i>Past President:</i>	Jean-Serge ROHART
<i>Vice-Presidents:</i>	Stuart HETHERINGTON Johanne GAUTHIER
<i>Councillors:</i>	Giorgio BERLINGIERI Christopher DAVIS José Tomás GUZMAN Måns JACOBSSON Sergei LEBEDEV Henry LI Louis MBANEFO Andrew TAYLOR
<i>Publications Officer:</i>	Francesco BERLINGIERI
<i>Secretary-General:</i>	Nigel FRAWLEY
<i>Administrator:</i>	Wim FRANSEN
<i>Treasurer:</i>	Benoit GOEMANS

1. *Opening remarks of the President*

The President opened the meeting by explaining the procedure to be followed.

He then reported on his schedule since the last virtual ExCo meeting in March. He attended and gave presentations on various topics, always including a presentation of the CMI, at the following events all of which were organised in Singapore:

The 20th Annual Conference of the Inter-Pacific Bar Association, the 3rd Asian Maritime Law Conference and the University of Southampton Maritime Law and Practice Course.

He advised he had been in touch with groups in Indonesia, Malaysia, Poland and India and trusts that the CMI will receive at least a few applications from new member associations at the Buenos Aires Assembly.

He otherwise noted that the preparations for the Colloquium in Buenos Aires are proceeding according to plan and that, as of June 17, 2010, 65 participants had registered. The hope is that we will get 150 -200.

2. *Meeting of the IOPC Funds – Week commencing June 28, 2010*

The President referred to recent correspondence with Colin de la Rue, who had been asked to address the IOPC Funds at their June 29th meeting on behalf of the CMI on legal problems associated with interim payments from the IOPC Funds. The President had endorsed the idea, subject to the ExCo's approval. He thereupon asked the ExCo to give its approval of the appointment of Colin de la Rue as an observer for CMI at the relevant meeting, and with the mandate to give legal advice as requested. Richard Shaw will also attend as a CMI observer, which has already been approved.

Following discussion, the appointment of Colin de la Rue as an observer for CMI was approved.

3. *Finances*

a) Audited accounts for 2009

There was considerable discussion on the audited accounts for the 2009 year which were tabled by the Treasurer. It was concluded that:

- i) The 2009 accounts should be circulated to NMLAs well in advance of the Assembly at Buenos Aires on October 27, 2010 with a recommendation of the Executive Council that they be approved.
- ii) The Treasurer's proposal that the budget for 2010 be revised as set forth in his Report shall be forwarded to NMLAs well in advance of the Buenos Aires Assembly with a recommendation of the Executive Council that it be approved.

- iii) The alternative budgets for 2011 shall be forwarded to the NMLAs for the Assembly in October, 2010 with a recommendation that the Buenos Aires Budget 1 be approved by the Assembly and, consequently, that the subscriptions for 2011 should be set at zero for all members, the latter being regarded as an extraordinary step, in view of the current CMI financial reserve and the difficult economic time for the shipping industry and many member associations.
- iv) Further discussions, recommendations and decisions on the size of the financial reserve, as well as the use of any resulting "surplus" is to be further considered and recommendations to the Assembly adopted at subsequent meetings of the ExCo, starting with the one at Buenos Aires on October 24, 2010.
- v) The use of a "Liquidity Fund" for accounting purposes shall be discontinued, the funds in question being regarded as part of the general assets of the CMI.
- vi) Discussion and a possible decision on the use of another currency than the Euro for purposes of CMI accounting and subscription were deferred for further consideration.
- vii) The Treasurer was commended for his extensive and valuable work.

b) Audit Committee Recommendations

The Audit Committee Report was tabled and, following discussion, was approved with the following Recommendations:

- 1) THAT the CMI Accounts for 2009 be approved for submission to and adoption by the 2010 Assembly in Buenos Aires, along with the Auditor's Report;
- 2) THAT Messrs De Mol, Meuldermans & Partners bvba be nominated as external auditors for CMI for 2010; and
- 3) THAT the Liquidity Fund be eliminated as a separate accounting item.

Items 1 and 3 were acted upon in connection with item 3a) above and it was then decided to also forward the second Recommendation to the Assembly with a suggestion that it be approved.

In the interventions it was noted by several Executive Councillors:

- (i) that the level of CMI's future financial reserve will have to be decided by the Assembly on the basis of a recommendation by the Executive Council;
- (ii) that it would need to be significantly higher than the levels which the Chair of the Audit Committee had found when researching not-for-profit organizations generally; and
- (iii) that the views of the members associations should be obtained before a final

recommendation is made to the Assembly and a decision taken there.

The Audit Committee and particularly its Chair, Elizabeth Burrell, were commended for the comprehensive work and very valuable contributions to the decisions on financial matters by the Executive Council and the Assembly.

4. *CMI Conference in Beijing, October 14-19, 2012*

The Secretary-General tabled a report on the planning to date. He has suggested that the excursion during the Conference be a trip to see the Great Wall and the Ming Tombs. He also proposed that an optional side trip to Shanghai following the Conference be explored. He advised that he is dealing with Ms. An Rui, Deputy Secretary-General of the MLA of China, with Henry Li as liaison as necessary.

Mr. Frawley's report was noted with appreciation and it was decided to propose to the Assembly that it formally approve that the next CMI Conference in Beijing be held between October 14 – 19, 2012 and that an "add on" in Shanghai be further explored.

The Secretary-General was authorised to develop the plans for the Conference on that basis, in co-operation with the China MLA.

The plans for the Beijing Conference will be further discussed at the ExCo meeting on October 24th, 2010 in Buenos Aires.

5. *IVR (www.ivr.nl) / Consultative Membership*

The Secretary-General reported that the IVR (International Association the Rhine Ships Register of Rotterdam) has formally accepted the CMI's invitation to become a Consultative Member. Francesco Berlingieri was asked to include them in the next Yearbook. The IVR has now asked the CMI to be one of their Consultative Members.

It was decided to recommend to the Buenos Aires Assembly that the IVR should be made a Consultative member of CMI and that CMI should accept to become a Consultative member of the IVR the understanding being that consultative membership of another organisation does not amount to full or ordinary membership of that organization and does not necessarily imply a subscription to its objectives, but simply an expression of interest in the activities of that

organization, a wish to be able to learn about them and give views as appropriate.

6. *Law of the Sea Tribunal / Summer Academy*

It was decided to accept the offer of an informal partnership with the International Foundation for the Law of the Sea and to offer to it a Consultative membership in the CMI.

7. *Fair Treatment of Seafarers*

Giorgio Berlingieri, Nigel Frawley and Karl-Johan Gombri were authorised to finalise the mandate for the International Working Group on Fair Treatment of Seafarers, bearing in mind the comments made in the interventions to this meeting.

8. *Approval of CMI submission to IMO Legal Committee re Australian proposal to increase limits in 1996 LLMC*

The draft CMI submission to the IMO Legal Committee re the 1996 LLMC was received with thanks to the International Working Group (Mans Jacobsson, Richard Shaw and Patrick Griggs, with Francesco Berlingieri and Giorgio Berlingieri as an informal reference group). The draft was approved for submission, subject to any events between now and the time for submission in September which would require a revision, in which case the revised draft will be resubmitted to the Executive Council. The final submission will then be tabled as an Executive Council document.

9. *Closing remarks of the President*

The President thanked all participants for their contributions, which were constructive and, in his view, resulted in a useful outcome of the meeting.

He also thanked Nigel Frawley for his preparatory work, and Pascale Sterckx in Antwerp and Faustina Tan in Singapore for their support and assistance throughout the meeting.

The President then said that he has been in communication with the Norwegian Maritime Law Association about the 2011 Executive Council meeting and Assembly being held in Oslo. He has also written Det Norske Veritas about the possibility of a seminar in conjunction with the Assembly. The dates being discussed are September 25 and 26, 2011.

NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

NEWS FROM IMO

MEETINGS OF THE EXECUTIVE COMMITTEE AND WORKING GROUP 28TH TO 30TH JUNE 2010

The ash cloud which covered much of northern Europe in April 2010 made air travel almost impossible, and one of the results was the cancellation of the IOPC Fund meetings scheduled for the 21 to 23 April. These meetings were rescheduled for the 28-30 June, and duly took place at the IMO Building in London. A number of major cases were reviewed, and the first session took place of the Working Group of the 1992 Fund tasked with a review of the handling of casualties involving large numbers of relatively small claims, and the study of possible ways of speeding up payment of such claimants.

Executive Committee

A full Record of the Decisions of the Executive Committee was prepared by the IOPC Funds Secretariat and approved by delegates at the final session. This is available on the Funds' website¹ and what follows is a short summary.

Erika – 12 December 1999. Of a total of 7,131 claims for compensation submitted to the Fund totalling 399.9 million Euros in all, compensation payments totalling 129.7 million Euros have been paid in respect of 5,939 claims, and 1,016 claims have been rejected. A small number of claims remains before the French Courts, but it appears unlikely that the Fund will be required to pay any further significant sums.

Prestige – 13 November 2002. Here again steady progress has been achieved in the agreement and payment of claims in Spain, France and Portugal. The action brought in the United States by the Government of Spain against ABS is also being followed closely by lawyers appointed by the Fund. Both the Erika and Prestige cases have given rise to criminal proceedings in which a judgment of civil damages has been made. This is a procedure which does not occur in countries applying the common law, and has given rise to problems in reconciling the resulting judgments. It is evident for example that the French Criminal Courts have not scrutinised the claims for damages with the rigour which the 1992 CLC Convention requires. This has led to judgments

for pure environmental loss in favour of local authorities who would not, in a common law jurisdiction, be able to make good such a claim. These judgments are still subject to appeal, and the position is being carefully followed by lawyers retained by the Funds.

Solar 1 – 18 August 2006. This case is the first in which the "Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006" applies. This agreement between the Funds and the International Group of P and I Clubs, raises the threshold at which the CLC liability of the ship owner and his club ceases and the Fund takes over. It appears clear that the total claims admitted will not reach the STOPIA limit, and the Fund will not be concerned financially. However the reports from the Philippines highlighted an unusual aspect of the claims settlement procedure. There was a significant number of cases in which claims had been agreed by the claimants and a settlement cheque has been made available, but had not been collected or cashed by the claimant. The claims office in Iloilo has now been closed, which means that the claimants in question must now address themselves to the Correspondents of the Shipowners P and I Club in Manila.

Volgoneft 139 – 11 November 2007. This tanker sank in a storm while at anchor in the Kerch Strait, which leads from the Black Sea to the Sea of Azov, in a period of strong winds. It has raised a number of unusual issues, in particular because the Ukraine, on one side of the strait, is not a party to the 1992 CLC or Fund Conventions, whereas Russia, on the other (Eastern) shore of the strait is a party to both. The ship's insurers Ingostrakh cover liabilities up to the old CLC Limit, but the amount of cover was not increased when the CLC Limits were amended², and there is therefore an insurance gap. The Russian Courts have held that the relevant limit in accordance with Russian law was the "old" CLC limit, A further complication has arisen due to the fact that the Russian Ministry of Natural Resources has presented a claim for environmental damage based on the "methodika" formula (a theoretical model expressly excluded from the 1992 Convention). This

¹ www.iopcfund.org.

² With effect from 1st November 2003.

is in spite of the ratification by Russia of the 1992 Fund Convention, in which Article 1.2 adopts the definition of “pollution damage” in the 1992 CLC, which provides that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to reasonable measures of reinstatement.

The meetings were informed that extensive discussions had taken place with the Russian governmental authorities since the previous Fund Meetings and significant progress made. It appears that the Russian authorities are making a major effort to achieve a settlement of the claims themselves without reference to the “methodika” and to resolve the delicate legal issues raised by the insurance gap. This was duly noted by the meeting, but the Executive Committee was not willing at this stage to authorise the Director to arrange payment of any claims until the outstanding legal issues have been resolved, but it is hoped that this may be possible by the time of the next meeting.

Hibei Spirit – 7th December 2007. The claims arising out of this spill off the west coast of Korea have been enormous, and the number of claims very numerous. Despite the daunting statistics good progress in settlement has been achieved, thanks in large measure to the close cooperation of the Government of Korea with the Fund and the P and I Club involved (Skuld). Particular difficulties have been encountered with the claims of individual fishermen, whose lack of record keeping renders it impossible to prove their losses to the standard normally required by the CLC and Fund Conventions. The Korean delegation proposed that guidelines on the assessment of small claims should be added to the Claims Manual, but after careful consideration the Committee decided not to do so at this stage, although the matter will be kept under review, and will also be considered by the Working Group currently considering such matters.

Intersessional Working Group

This Working Group, set up by the Fund Assembly, has two principal objectives³:

1. the exploring of possible ways to speed up the handling of claims arising from incidents giving rise to very large numbers of small claims, and also

2. the resolution of difficulties arising when interim payments are sought to be made in order to relieve hardship suffered by claimants.

The meeting of the Working Group on Tuesday 29th July 2010 enabled a wide ranging debate of these matters to take place, with a view to identifying the specific issues and questions which the Working Group could explore further. A full report of the proceedings of the Working Group will be prepared by the Secretariat in consultation with the Chairman, Mr Volker Schofisch of Germany and published in due course.

In the meantime, however Mr Schofisch produced at the end of the debate a helpful working paper⁴ setting out the topics requiring further study in the Working Group.

The key topics on this list are:

1. How the Fund and P and I Club should deal with claimants who lack the necessary evidence to prove their claims.
2. Time to assess claims, and possible policies on the making of advance or interim payments to claimants by the P and I Club concerned and the Fund.
3. Possibility of agreeing claims where the cost of assessing such claims was high in relation to the amount claimed, if it was clear that the claimant had suffered an admissible loss, and that there is a sufficiently close link of causation between the contamination and the loss.
4. Role of Member States in facilitating the claims assessment process.

The Working Group will research, in consultation with the Secretariat and some observer delegations such as those representing insurers and P and I Clubs, how incidents involving large numbers of claimants are handled in various jurisdictions.

The CMI Delegation gave a short statement outlining potential problems encountered in such situations, particularly in the context of interim payments, and will continue to contribute actively to the work of the Working Group.

The next meeting of the Working Group will take place in the spring of 2011, probably in Marrakech, Morocco at the invitation of the Government of Morocco.

RICHARD SHAW⁵

³ The Mandate of the Working Group is set out in the annex to document IOPC/JUN10/5/1. This document, prepared by the Director of the IOPC Funds, is a succinct summary of the problems encountered by the Funds in these particular areas.

⁴ Document IOPC/JUN10/5/WP.1 entitled “What next?”

⁵ Senior Research Fellow, University of Southampton Institute of Maritime Law, CMI Observer Delegate to the IOPC Funds.

The Autumn meetings of the IMO Legal Committee took place at the IMO Building in London during the week of 15 to 19 November 2010. The principal matters discussed were the topical issues of Piracy, Oil Pollution from Offshore Rigs, a possible increase of the limits of liability under the 1976 and 1996 LLMC⁶ Conventions, and the entry into force of the Bunkers Convention and the 1996 HNS⁷ Convention, as amended by the Protocol adopted last April.

Piracy

This topic continues to dominate the news media, particularly in the light of the release of Paul and Rachel Chandler after more than one year's captivity. The Secretary General of IMO, Efthimios Mitropoulos, gave a succinct summary of the measures being undertaken by organisations supported by IMO to ensure that captured pirates can be submitted to the judicial process in a court of competent jurisdiction. The establishment of the Contact Group on Piracy off the Coast of Somalia (CGPCS)⁸ pursuant to UN Security Council Resolution 1851(2008) has led to the establishment of four Working Groups tasked respectively with:

1. military and operational coordination;
2. judicial aspects;
3. strengthening of shipping self awareness of piracy;
4. improving diplomatic and public information on all aspects of piracy.

Details of the work done by these working groups is set out in a paper⁹ presented to the meeting, which concentrates particularly on the possible courses of action in the legal field. The rule of customary international law set out in article 105 of the UN Convention on the Law of the Sea (UNCLOS) states that a pirate ship and the persons on board may be apprehended outside the jurisdiction of any state wherever they may be found. This should deprive the pirate of the argument that any actions on the high seas do not fall within the jurisdiction of a shore-based court.¹⁰ However it seems that this rule was not applied in a recent case in Kenya, but the meeting was informed that this decision is now under appeal.

Clearly the establishment of the Rule of Law in Somalia is a primary objective, without which the safe passage of merchant ships off its coasts will remain a distant prospect. However the measures already in place show a clear determination on the part of the International Community to combat this menace, and the Secretary General commended those states which have sent warships, and their support craft, to the area, and urged others to follow suit.

The delegation of the Russian Federation suggested that it might be helpful to have some guidelines or a model law on piracy which states might consult when reviewing their domestic laws on piracy. The CMI Delegation reminded delegates of the CMI document on "Maritime Criminal Acts – Draft Guidelines for National Legislation"¹¹ which was submitted to the IMO Legal Committee in April 2008.

Pollution from Offshore Activities

The spectacular pictures of the fire on the rig *Deepwater Horizon* and of the oil escaping from the Macondo well have brought this subject to the attention of a wider audience. 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. The MODU (Mobile Offshore Drilling Units) 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 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.

There was a rather absurd discussion of the need to amend the IMO's "Strategic Plan" and "High Level Action Plan" to enable the organization to take this on, and indeed the necessary action cannot be undertaken until the amendments have been approved by Council in a year's time. Whoever devised this piece of bureaucratic nonsense has some explaining to do. Fortunately the IMO spirit of pragmatism has prevailed and an "unofficial" working group will start work right way.

⁶ International Convention on Limitation of Liability for Marine Claims 1976.

⁷ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996.

⁸ The Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and Gulf of Aden was adopted in January 2009 at a meeting set up by IMO. It has now been adopted by 16 states in the region.

⁹ Document LEG.97/9/1.

¹⁰ This rule was also recognised by the UK Privy Council in an important consultative case called *Re Piracy iure gentium* [1934] A.C. 586.

¹¹ Document LEG 93/12/1 See also CMI Yearbook 2000 pages 415 – 434, and Yearbook 2001 pages 214-223.

The working group will be convened by Indonesia, whose coasts were polluted by an escape of oil in 2009 from the rig Montara in the adjacent waters of the Australian EEZ. This relatively minor spill would not of itself have given rise to an international initiative to draft an international convention on compensation for pollution from offshore drilling units, but the coincidence of the Deepwater Horizon casualty has added impetus to the Indonesian initiative.

The CMI has in the 1990's studied the possibility of a wide ranging international convention on offshore craft and activities, and a detailed paper¹² was submitted to the IMO Legal Committee in 1998, but this did not receive the necessary governmental support to take the matter further. The CMI has however offered to place the results of its past work at the disposal of the Indonesian delegation.

An Increase of the Limits of Liability?

The delegation of Australia put forward a proposal to invoke the Tacit Acceptance Procedure provisions in the 1996 Protocol to the 1976 LLMC¹³ Convention to increase the limit applicable to property damage claimants in the light of the bunker spill claims arising out of the *Pacific Adventurer* casualty off Queensland in March 2009.

The terms of article 8 of the 1996 Protocol to the 1976 Convention require an initiative from no less than half the States Parties to this Protocol proposing an amendment to the limits of liability provided in the 1976 Convention as amended by that Protocol. Notice of that proposal must be given to the Secretary General of the IMO who in turn must circulate the notice to all States Parties. The amendment must then be submitted to the meeting of the Legal Committee which takes place at least six months after the notice. If the proposal is adopted by at least two thirds of the states present and voting, it will come into force for all States Parties, unless one quarter of all states parties inform the Secretary General of IMO that they do not accept the amendment, in which case the amendment will lapse. In four detailed papers¹⁴ the delegation of Australia set out the grounds for this initiative, including statistical data on the purchasing power of money and on recent claims which exceeded the limit of

liability of the ship concerned. The CMI contributed a paper setting out the history of the international conventions on Limitation of Liability, and arguing that if the limit for property damage were to be increased, the equivalent limit for death and personal injury claims should be increased proportionately, so that the present 1:2 ratio should be maintained.

Here lies a catch, for if the death and personal injury limits are to be increased in proportion to the increment of the physical damage fund sought by Australia, this will take them well above the levels provided for in the 2002 Protocol to the Athens Convention. This Protocol has not yet entered into force, largely because the insurance industry cannot offer liability cover for death and personal injury claims at the levels set out in that Protocol. More precisely the insurance market can offer cover at those high levels which would respond to a single claim for any insured ship, but it cannot offer the automatic reinstatement after such a casualty which is required if the ship's Certificate of Financial Responsibility is to remain in force as required by the Protocol.

At first sight it seemed that the delays imposed before an increase adopted under the "tacit acceptance procedure" provided for in Article 8 can come into force are rather long, but the problems of harmonising the legal effects of the proposed increase with related provisions in other conventions mean that the time involved may well be necessary. In the meantime the CMI has offered to submit a further paper which will address the ratio of the property and personal injury limitation funds, and also the effect on other existing conventions, such as the Athens Conventions, on the proposal to increase the LLMC limits.

The Australian proposal, with its 19 supporting states' documents, was not received by the Secretary General in time to enable the required six month period to elapse before the next meeting of the Legal Committee in April 2011, so this subject will no doubt come up at the Legal Committee meeting scheduled to take place next October.

The HNS Convention¹⁵ and Protocol

The adoption of the Protocol to the 1996 HNS Convention by a diplomatic conference in April 2010 has hopefully removed four obstacles to the ratification of this convention.¹⁶ Progress is now being

¹² Document LEG 78/10.

¹³ International Convention on Limitation of Liability for Marine Claims 1976.

¹⁴ Documents LEG 97/8, LEG 97/8/1, LEG 97/8/2, and LEG 97/8/3.

¹⁵ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

¹⁶ See the previous papers on this topic in (2009) 15 JIML 192 and (2010) 16 JIML 76.

made with the administrative measures to ensure a smooth entry into force. The 1992 IOPC Fund has agreed to finance these measures and to set up an HNS Secretariat within its own Secretariat, and the knotty subject of the definition of HNS substances is being addressed there.

The Legal Committee adopted a document listing the substances to which the provisions of the HNS Convention will apply. This is strictly speaking an indicative list, as Dr. Balkin, Director of Legal Services of the IMO, explained, since Article 1 of the HNS Convention defines such substances by reference to the relevant IMO Codes, which are subject to regular revision to meet changes in the industries producing such goods.

States contemplating ratification of the HNS Convention and Protocol are obliged to assemble statistical data on imports of such substances into their territory and to deposit with their instrument of ratification data on the quantities received during the preceding calendar year¹⁷. This is to enable the IMO to calculate whether the tonnage of HNS cargo received in ratifying states has reached the level required by Article 46 for entry into force.¹⁸ As explained in previous issues, the definition of Hazardous and Noxious Substances in Article 1.1.5 of the HNS Convention is long and complicated, but the IMO Secretariat submitted two helpful documents¹⁹ to the Legal Committee which should help states to assemble the necessary statistical data. The complete text of the IMDG Code, incorporating amendment 27-94, which was in effect in 1996, will be placed on the IMO website in PDF Format. The complete "Contributing Cargo Calculator" is expected to be placed on the IOPC Fund website early in 2011.

The delegations of several states, including several members of the EU, reported that measures were in hand within their legislatures to adopt the legislation necessary to implement the HNS Convention.

Implementation of the 2001 Bunkers Convention

A number of problems have been encountered in implementing the provisions of the 2001 Bunkers Convention, notably concerning the issue of Certificates of Financial Responsibility. A Working Group under the chairmanship of Ms Birgit Solling Olsen of Denmark presented a report²⁰ to the meeting which offers pragmatic solutions to most of these problem areas. Notable among these was that tankers should be obliged to carry not only a certificate issued in accordance with the Civil Liability Convention but also a Bunkers Convention Certificate.

More difficult was the position of Mobile Offshore Drilling Units (MODU's) which are not generally subject to the regime of limited liability. Indeed article 15.5(b) provides that the LLMC Convention "shall not apply to platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof." In those circumstances it is difficult to calculate the amount of the Certificate of Financial Responsibility which a MODU is required to carry under Article 7.1 of the Bunkers Convention.

The recommendations of the Working Group were all approved.

The next meeting of the Legal Committee will take place during the week 4th to 6th April 2011.

RICHARD SHAW

NEWS FROM IOPC FUND

MEETINGS OF GOVERNING BODIES 18TH TO 22ND OCTOBER 2010

The autumn sessions of the IOPC Fund Governing Bodies took place at the IMO Headquarters during the week 18th to 22nd October 2010. Two shadows lay over the proceedings. The first was the death during the previous week of Mr John Wren, formerly Head of the UK Delegation between 1993 and 2005, and subsequently a member of the Funds' Audit Body. The second was the serious illness of the Director of

the IOPC Funds, Mr Willem Oosterveen, which rendered his presence at the meetings impossible. Delegates sent warm wishes to Mr Oosterveen for a speedy recovery, and their condolences to Mrs Wren. Meanwhile Mr Jose Maura, Head of Claims, has taken over the Director's duties, and his position as Acting Director was confirmed by the Meeting.

¹⁷ Article 43.

¹⁸ 40 million tonnes of contributing cargo.

¹⁹ LEG 97/4/1 and LEG 97/4/1/Add.1.

²⁰ Document LEG 97/7.

Current Claims

Fortunately no new claims were reported, but delegates were informed of the progress in settlement of a number of important claims. Progress to close the files on the outstanding claims against the 1971 Fund, which has ceased to provide indemnity for claims since May 2002, continues, with several outstanding files being closed, notably the *Evoikos*, and *Al Jaziab 1*. Two cases outstanding against the 1971 Fund continue to give cause for concern, namely the *Nissos Amorgos* and *Plate Princess*, in which legal proceedings are still outstanding in Venezuela despite the fact that the incidents in question took place in 1997.

The evolution of the Venezuelan legal proceedings against the Funds is complex, but suffice it to say that in the case of the *Plate Princess* no formal service on the Funds of any legal proceedings took place until more than six years after the date of the incident. The Administrative Council of the 1971 Fund has already ruled that the claims are time-barred, an opinion not shared by the Courts of Venezuela handling the case. The CLC and Fund Conventions provide expressly that where an incident has caused pollution damage in the territory of a Contracting State...actions for compensation may only be brought in the Courts of such Contracting State²¹. Likewise a judgment given by a Court with jurisdiction...enforceable in the State of Origin where it is no longer subject to ordinary forms of review shall be recognised in any Contracting State, except

- a. where the judgment was obtained by fraud; or
- b. where the defendant was not given reasonable notice and a fair opportunity to present his case.²²

It was clear at the recent meetings that some delegations considered that a final judgment rendered by the Courts of Venezuela should not be enforceable against the Fund by the Courts of England, but such a position is premature until all judicial avenues in Venezuela have been explored. Certainly the facts as reported by the Acting Director raised some serious doubts.

Similar doubts were expressed concerning the judgment of the Venezuelan Courts in the case of the *Nissos Amorgos*, which has ordered payment of claims which are time barred under the Conventions, or are in respect of environmental damage which is not admissible under the Conventions, or concerned damage included in individual claims that have already been compensated by the Fund or the ship's P and I Club.

These decisions, like those in the case of the *Erika* in France, highlight the different approach to the assessment of damage claims by Courts of Criminal Jurisdiction. In the common law systems this would simply never happen²³, but it would appear that the Criminal Judges are not familiar with the detailed analysis of damage claims which is carried out by non-criminal courts, and which was clearly envisaged by the draftsmen of the CLC and Fund Conventions.

From the strategic perspective these two cases are causing practical difficulties in completing the "run-off" of the 1971 Fund. Until these files are closed the 1971 Fund cannot be completely wound up, but the Administrative body of the 1971 Fund appears to be willing to wait as long as is necessary to ensure that these cases are concluded on a consistent basis, and that the Funds' cardinal policy of equal treatment of victims is respected.

For those readers interested in the fine detail of the *Plate Princess* and *Nissos Amorgos* cases, they will find it in the Record of Decisions published by the IOPC Funds Secretariat²⁴. They will also find the lengthy transcripts of the interventions by the delegate of Venezuela attached to the Report. Some readers of those transcripts may be forgiven for recalling the old French adage "Qui s'excuse, s'accuse."

The three major cases involving the 1992 Fund, the *Erika*, *Prestige* and *Hibei Spirit*, reported at length in previous issues, continue their steady progress to final resolution.

The last of the three, the *Hibei Spirit*, is by far the largest case handled by the IOPC Funds and it is a tribute to the relatively small team of specialists assessing these claims that out of a total of 26,083 claims so far registered, totalling 2,145,000,000 Korean Won (£1,195,000,000), 2,025 claims have been assessed and 5,576 claims have been rejected.

The Acting Director reported that the most recent estimate of the total amount of the losses caused by the spill is KRW438,500 million (£244.2 million), and therefore despite the progress made to date, it was not possible to increase the level of Fund payments beyond the 35% so far authorised. The Fund, together with the P and I Club concerned (Skuld) is working closely with the Government of Korea to progress the settlements. Delegates could not fail to admire the steady progress made in this case by all the surveyors, Secretariat personnel, and Korean Government staff, despite the daunting figures. The Korean delegation informed the meeting that they

²¹ Art. IX Para 1 of the 1969 CLC Convention.

²² Art. X.

²³ In England, such claims are brought in the Commercial and Admiralty Court, and the assessment of claims is referred to the Admiralty Registrar. C.P.R. Practice Direction 61, paragraphs 11 and 13.

²⁴ Available at the time of writing only as a draft working paper IOPC/OCT10/11/wp.1/1.

hoped to complete the negotiations towards an agreement with the Fund which would enable the Fund to increase the level of payments to 100% by the time of the March 2011 meetings.

Good progress was also reported in the case of the *Volgoneft 139*, which broke in half and sank in 2007 in the straits of Kersh between the Black Sea and the Sea of Azov. Of the three major problem areas in this case, two have now been resolved in the Courts of Russia, namely the application of the “methodika” to calculate environmental damage, (a “theoretical model” expressly excluded from the 1992 Convention), and the allegation that the accident was caused by “force majeure”.

The only problem area yet to be resolved concerns the limit of the shipowner and insurers liability under the 1992 CLC. When the limits under this Convention were increased in November 2003 the increase was not reported in the Official Gazette of the Russian Federation. That has now been done, but the Courts have declined to give this change retrospective effect back to the date of this casualty. However discussions with the Russian Government and the claimants are continuing, but until the amount of the insurance coverage applicable to the *Volgoneft 139* has been resolved, and thus the proportion of each claim to be borne by the insurers and Fund respectively, it is not possible for the Fund to agree a procedure with the insurers for payment of the claims arising from this incident.

Other Matters

i. Working Group on the handling of cases involving large numbers of claims for relatively small amounts.

The Report of the Chairman of this Working Group, Mr Volker Schofisch of Germany, on the debates at the first meeting in June 2010 was tabled²⁵. It was agreed that further research would be conducted, particularly with marine insurers and the CMI, as to how such claims are handled in the insurance and judicial contexts. In particular delegations were interested to learn how all claimants could be treated on a consistent basis, and how a pragmatic approach could be developed to enable all claimants to be treated fairly despite that fact that many such claimants lacked documents to prove their claims.

The next session of this Working Group will take place in March 2011.

ii. Definition of “ship”

The Acting Director introduced Mr Thom Payne of Douglas – Westwood, consultants retained by the Secretariat to research the different types of ship to which the provisions of the Funds might apply, and in particular those which might be considered to be Floating Storage Units. Mr Payne delivered a lucid exposition of the different types of craft in use for the storage of oil.

Delegates recalled the case of the “*Slops*” which caused pollution damage following a fire off Piraeus Greece in June 2000. The “*Slops*” was a former tanker whose engines were immobilised and whose propeller was removed. She was anchored in a bay off Piraeus to receive oily ballast from other ships. The IOPC Fund Assembly decided that the “*Slops*” was not a “ship” within the meaning of article 1.1 of the 1992 Conventions, but this view was not shared by the Greek Supreme Court, which decided that she was a ship and that the Fund was liable to make good the cost of cleaning up the pollution damage. The owners had no insurance cover for such risks. That decision led the Funds to study the relevant provisions more carefully with an eye to the future, hence the Douglas Westwood consultation.

The amendments made in 1992 to the definition of ship in the 1969 CLC Convention primarily were intended to address the growth of combination carriers, which could carry oil or solid bulk cargoes, and did not go into any detail concerning floating storage units. Since then the oil industry has given birth to even more unfamiliar craft, such as the FPSO²⁶, the FDPSO²⁷ and the cylindrical FPSO. The extent to which the provisions of the IOPC Fund system should apply to such craft will give the Funds food for much further thought.

iii. Conventional tankers performing Floating Storage

A paper submitted by Denmark²⁸ gave a foretaste of the complexity of such considerations. The Danish Government has noted a increasing number of laden tankers which anchor off the Danish coast. Usually they tranship part of their cargo in order to reduce their draft to enable them to pass through the shallow waters of the Great Belt or Sound and enter the Baltic Sea to reach their ultimate destination.

However on some occasions they remain at anchor for a long period, sometimes several months, while the owners of the cargo trade it on the “spot” market. The difficult question is whether such ships, while

²⁵ Document IOPC/OCT10/4/2. See also the author’s report on the June 2010 meetings.

²⁶ Floating Storage, Production and Offloading.

²⁷ Floating Drilling, Production, Storage and Offloading.

²⁸ Document IOPC/OCT10/4/3/1.

anchored for an indefinite, and possibly prolonged, period, can be regarded as being on a “voyage” within the meaning of Article 1.1 of the 1992 CLC and Fund Conventions. If they are, then any spill of their cargo will be covered by the provisions of those Conventions, but if not, then the Danish Authorities must either forbid such prolonged “floating storage”, or insist on the provision of, and payment for, a special insurance policy to cover pollution damage caused while such floating storage is taking place. No instant solutions to these questions emerged from the debate, but the Acting Director agreed to seek legal advice, particularly on the meaning of “ship” in the context of the 1992 Conventions, and to report back to a future meeting of the 1992 Fund Assembly in due course.

*iv. Entry into Force of the HNS Convention*²⁹

The adoption in April 2010 of the Protocol to the 1996 HNS Convention has paved the way for its

entry into force. The Secretariat of the 1992 Fund has accepted appointment as Secretariat of the HNS Fund, and preparations are already in hand for the time when the HNS Convention enters into force. The persistent problems concerning the list of substances to which the new Convention will apply are still causing difficulty for some governments in their implementation procedures, and it is hoped that the final adoption by the IMO Legal Committee of an indicative list at their forthcoming meeting in November 2010 will assist.

The next meetings of the IOPC Fund Governing Bodies will take place during the week of 28th March 2011 in Marrakech, at the invitation of the Government of Morocco. As delegates left the IMO Building under leaden skies and persistent rain, that distant prospect seemed attractive indeed.

RICHARD SHAW

²⁹ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.