

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL

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NEWS FROM THE CMI

THE CMI DUBLIN SYMPOSIUM 2013

At the time of writing preparations for the celebration of the 50th Anniversary of the Irish Maritime Law Association and the Symposium are well underway. There are also over 200 registrants for what promises to be an extremely successful meeting.

At the Assembly we will be remembering the passing of stalwarts of the CMI including Professor Anthony Antapassis of Greece and Michael Marks-Cohen of the United States. Both attended many CMI events and contributed significantly to the work of the CMI. They will be greatly missed.

International Sub-Committee Meetings will be taking place during the weekend prior to the Symposium on the Review of the Rules on General Average and Recognition of Foreign Judicial Sales of Ships.

The Executive Council will be proposing to the Assembly that the next meeting of the CMI take place in Hamburg from 15 to 17 June 2014.

Reports on the work being conducted by all of the Working Groups and Standing Committees will be given at the Assembly Meeting in Dublin on 1 October 2013.

STUART HETHERINGTON*

* President of CMI.

NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

NEWS FROM IMO

PAPERS PRESENTED BY PATRICK GRIGGS CBE AND MANS JACOBSSON AT THE 100TH SESSION OF THE LEGAL COMMITTEE – SEMINAR HELD IN LONDON, APRIL 18, 2013

COMITÉ MARITIME INTERNATIONAL AND THE LEGAL COMMITTEE – WORKING TOGETHER

On March 18th 1967 the oil tanker “*Torrey Canyon*” ran aground off the south west coast of England. She broke her back and 31,000 tons of crude oil cargo escaped, creating a 270 – square mile slick which contaminated 170 miles of the coasts of England and France. Lawyers representing claimants were faced with a series of legal problems when seeking to recover damages. Under English and French law the legal rights of private claimants were unclear but the principal problem was establishing jurisdiction and obtaining security for claims. The ship had sunk and therefore could not be arrested and detained. Limitation of liability was also an issue in that the then limit (based on the 1957 Limitation Convention) was a mere £1,500,000 – much less than the total claims arising.

In the event (and thanks to the co-operative attitude of the P. & I. Club and Excess Underwriters involved) all the claims, both government and private, were settled.

However, it was widely recognised that the legal regime was not satisfactory and, on April 18th 1967 the British Government submitted a Note to IMCO (IMO since 1982) calling for changes in international law governing oil pollution. IMCO responded by setting up the Legal Committee charged, inter alia, with the task of producing an international convention to tackle the twin issues of liability and compensation for oil pollution. At about the same time the Comité Maritime International (since 1897 the only international organisation involved in the harmonisation of maritime law) set up an International Sub-Committee under the chairmanship of Lord Devlin to consider the private law aspects of oil pollution and to co-operate with the IMCO Legal Committee in producing a draft convention. The CMI draft convention was finalised at its Tokyo Conference in April 1969 and was immediately submitted to IMCO. In November 1969 an International Legal Conference on Marine

Pollution Damage was held in Brussels. Delegates had before them the CMI draft and also one produced by the IMO Legal Committee. The Conference also considered the, so-called, TOVALOP agreement. This was a voluntary scheme set up jointly by the oil and shipping industries to provide compensation for oil pollution. And so, the 1969 CLC, IMO’s most successful legal maritime law convention ever, was created. This was shortly followed by the 1971 Fund Convention. Between them these two Conventions solved all the legal problems which had been faced by the “*Torrey Canyon*” claimants. For over 70 years the CMI had the field of private maritime law conventions to itself and it was a little put out when the Legal Committee became a permanent fixture and it was made plain that, if there were to be more international maritime law conventions, they would be produced by IMO or other UN bodies. The CMI has come to accept this situation and has, since the creation of the Legal Committee, assisted in the creation of many maritime law conventions by producing early drafts and by offering support from the sidelines during the drafting process. It will continue to do this. So, that is the history of how the Legal Committee came into existence and inherited the mantle of the CMI.

On October 1st 2008 many of you will have attended the annual Cadwallader Lecture held in this hall to mark the re-opening of the IMO Building after refurbishment. The topic was “Lawmaking and Implementation in International Shipping”. Quite rightly much emphasis was placed on the considerable achievements of IMO in its first 60 years. However, several speakers expressed concern at the poor rate of uptake of conventions and at the conflicts between conventions and domestic law in member states. At its peril does this committee ignore the poor rate of uptake and these conflicts. We should ask ourselves why is it that States which have enthusiastically

joined in the drafting of an instrument then fail to ratify it?

I make the following remarks as someone who has sat on the Observer benches at the back of this hall for nearly 20 years and has participated in the development of several complex instruments. It follows that any criticisms which I now make are, in part, self-criticisms. So, here are my reflections from the vantage point of the “back benches”.

1. Is this committee spending enough time establishing whether there really is a compelling need for an instrument? We are getting better at this but must understand that if there is no compelling need the convention will probably fail. There was a period in the 20th Century when there was the time and the inclination to harmonise maritime law for the sake of having a universal law on a particular topic – those days are long gone. Instruments now need to offer an improved liability regime, more compensation or higher limits to have any chance of widespread adoption.
2. I suggest that this committee should be attempting to produce instruments which states can implement without finding that its terms conflict with their national laws. I wonder whether we should consider a new method of work which would involve carrying out an initial careful survey of national laws on the proposed subject in member states? A draft built on this firm foundation of knowledge of existing national law stands a chance of achieving harmony rather than creating the conflicts which states are experiencing.
3. Should we be more suspicious of any proposal initiating a new instrument which is delivered to the Committee complete with a draft convention attached? Such a draft will, at best, reflect the national law of the proposing state or states only. An example of this is the WRC where the initial proposal came complete with a draft convention seeking to create a law relating to wreck removal outside territorial waters. Frankly, we struggled for 11 years with that initial draft with its geographically limited scope of application and it was not until 6 months before the Nairobi Dip. Con. that this committee finally decided to give states the option to apply the convention within territorial waters. Too late – we had missed a golden opportunity to create a popular, universal law on wreck removal to be applied within and without territorial waters (perhaps with a territorial waters opt-out) and the resulting instrument (which has not yet come into force) may have limited appeal for that reason. (I have just come back from IMLI

in Malta and confess that I found it difficult to explain to the students the hastily drafted “opt-in” provisions which the WRC contains.)

4. Are our instruments too wordy and complex? Probably. An outsider might look at some of our instruments and wonder why we appear to have used two words where one would have done. Many of you will remember that in the Athens 2002 Protocol it was thought necessary to define “defect in the ship” –this was a phrase which had never caused problems under the 1974 Athens Convention. We then used no less than 64 words to define “defect in the ship” which clarified nothing – we have simply provided more words for lawyers to pick holes in. This Committee should beware of using more words than are necessary - we should not seek to dot every “i” or cross every “t”. We should concentrate on the essence of the instrument and leave the detail to local legislators or courts. Good examples of this approach are the limitation conventions which leave all procedural matters to national law.

5. The more complex the instrument the more difficult will it be for legislators to find the motivation or make the time to implement it. The HNS Convention has (so far) - even with its 2010 Protocol - proved to be too complicated for state legislators to get to grips with. This is a great pity as it offers protection which will certainly be needed one of these days.

6. We have been criticised for taking too long to develop instruments.

However, meeting once or at most twice a year makes rapid progress very difficult and as long as the time is used wisely in refining (but not over-complicating) the text that is time well spent. Perhaps we should consider the creation of more Intersessional Working Groups in order to maintain momentum.

7. In the current financial climate governments are reluctant to set aside legislative time to implement conventions unless they produce tangible benefits for them or their citizens. That fact must be borne in mind when new projects are being undertaken. Needless to say any instrument which requires a state party to take on extra employees will not be popular.

8. We find ourselves in a bind over limitation figures - too high for some states, not high enough for others which results in poor take-up. Could this committee find some way round this? If we can't come up with a solution to this problem we will find, in a few years time, that a Protocol or tacit

amendment increasing limits will attract only regional support - that already shows signs of happening with Athens 2002.

On a more positive note I should mention that the CMI has recently set up a Standing Committee which is actively liaising with the ICS and the IMO Secretariat on "Promotion of Conventions". The idea is to get CMI affiliated National Maritime Law Associations and local ICS affiliates working with national government officials to find out why a

target list of conventions are not receiving support and to offer assistance by holding seminars etc. We hope that this initiative will be welcomed by Legal Committee delegates and will produce results.

These are a few of my thoughts – I have others. I suggest that they are matters which need to be addressed if the Legal Committee is to enjoy a productive future.

PATRICK GRIGGS*

BRIDGE OVER TROUBLED WATER: THE LEGAL COMMITTEE'S VOYAGE IN A CHANGING WORLD

Mr. Secretary- General
Secretary-Generals emeriti
President of the International Tribunal
for the Law of the Sea
Director of the International Maritime Law
Institute
Director of Legal Affairs and External Relations

Distinguished delegates and friends

It is a great honour for me to have been invited to address this seminar which is being held on the occasion of the 100th session of the Legal Committee of the International Maritime Organization. I have had a close relationship with this Committee for many years, first from 1970 to 1984 representing Sweden and from 1985 to 2006 as representative of the International Oil Pollution Compensation Funds (IOPC Funds). I have thus had the privilege to witness the Committee's remarkable development over the years.

Firstly, I would like to make some observations on participation in the Committee's meetings. When I started to take part in meetings of the Legal Committee in 1970, the Committee's composition was very different from that of today. The 9th session of the Legal Committee, which took place in a cramped room at the IMO Headquarters at Piccadilly in October 1970, was attended by 27 States and a few non-governmental organisations. There were hardly any developing countries represented in the Committee at that time. The number of States participating in the meetings has continuously grown over the years, and so has the

participation of developing countries, There were several reasons for the very low participation of developing countries in the work of the Legal Committee in the early years. One major reason, I suggest, may have been that, with very few exceptions, developing countries did not at that time have the expertise in maritime law and were not therefore in a position to contribute fully to the Committee's work.

Great progress has been made in this regard, to a large extent through the IMO programmes on technical assistance and through the international maritime education provided by international institutions such as the World Maritime University (WMU) in my home town of Malmö, Sweden, and the IMO International Maritime Law Institute (IMLI) in Malta. The present chairman of the Legal Committee Dr. Kofi Mbiah, a former graduate of IMLI and a PhD graduate of WMU, is an excellent example of the immense value of the efforts of IMO in this field, and many delegates attending the Legal Committee meetings, and also those participating in meetings of other IMO bodies for that matter, are alumni of WMU or IMLI.

The 100th session of the Legal Committee held this week is attended by 88 States, out of which approximately half are developing countries, and by a number of intergovernmental and non-governmental organisations. The Committee of today has therefore the benefit of input from the whole spectrum of the international community.

How things have changed!

As is the tradition within IMO, the Legal Committee has always endeavoured to work to the

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extent possible by consensus. This approach can often lead to very time-consuming discussions, and it may not be the most efficient way to develop international treaties. It has, however, the great advantage that once a draft treaty has been approved by the Committee, there is a very great likelihood that the treaty will also be adopted at the subsequent Diplomatic Conference. As far as I can recall, it has only happened once, namely in 1984, that a draft treaty elaborated by the Committee failed to get adopted by the Diplomatic Conference.

It must be recognized that it was probably easier to reach consensus within the Legal Committee when its membership was fairly small than it is today, but in my view that is clearly a price worth paying for having a much more representative and balanced composition of the Committee.

A second observation is that the character of the discussions in the Legal Committee appears to have to some extent changed over the years. In the early days the debates generally focused on strictly legal issues, where eminent lawyers debated tricky questions of maritime law. This is of course largely still the case, but it seems that the discussions today often also address issues of a more political nature. This new dimension is probably a reflection of the increased political importance of the issues under consideration by the Committee, for instance as regards questions relating to the protection of the marine environment. However, this focus on political issues may also make it more difficult to arrive at consensus solutions within a reasonable time.

It was for me a very inspiring experience to attend Legal Committee meetings. I learned a great deal from listening to and taking part in the discussions in which have participated eminent maritime lawyers from countries representing different political and legal systems, and I am convinced that my former colleagues in the Committee agree that attending the Committee's meetings is an excellent school in maritime law and often also in treaty law. The achievements of the Committee are to no small extent due to the excellent leadership of a number of outstanding Chairmen who steered the Committee with a firm hand when the seas became rough. One of the former Chairmen is with us here today, Mr. Alfred Popp, and of course the present Chairman Dr. Kofi Mbiah.

The constant support of a very knowledgeable and dedicated staff in the IMO Division for Legal Affairs and External Relations has also been of

immense value to the Committee. The Directors of that Division have played a crucial role. In fact there have only been three eminent lawyers holding that post in 45 years, Dr. Thomas Mensah, Mr. Magnus Göransson and Dr. Rosalie Balkin.

A major achievement of the Legal Committee is in my view its contribution to innovations in maritime law. It comes perhaps as no great surprise if I mention as a first example in this regard the regime on liability and compensation for oil pollution damage which was developed in the aftermath of the *Torrey Canyon* incident in 1967. Immediately after having been established by the IMO Council in 1967, the Committee became involved in the elaboration of the first tranche of this regime, namely the 1969 Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention). That Convention introduced some important new features in the field of maritime law, namely strict liability for oil pollution damage for owners of oil tankers coupled with compulsory liability insurance and right of direct action by victims against the insurer. These features may not be considered very sensational today, but 44 years ago they were quite revolutionary in the fairly conservative world of maritime law. It was actually argued that it was immoral to hold somebody liable who had not been at fault! Since then strict liability and compulsory insurance have become standard in new liability conventions.

The Legal Committee also carried out the work that resulted in the second tranche of this regime, namely the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention), and as a very young and inexperienced lawyer I took part in the work on that project. The creation of an international fund was quite a new idea, and it was suggested from many quarters that such a system just would not work. As we know now, those who expressed such pessimistic views were wrong. The International Oil Pollution Compensation Funds, which could be considered as having been conceived within the IMO Legal Committee, are of course now grown up and fully mature and independent of IMO. The Funds have also in their turn made important contributions to the development of international law relating to liability and compensation for oil pollution damage. The innovative approach to supplement the liability of shipowners by an international fund was also taken in the 1996 Convention on Liability and Compensation for Damage in Connection with the

Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), also prepared by the Committee, but which unfortunately has not yet entered into force.

The Legal Committee was instrumental in the elaboration of the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Damage (Intervention Convention). That Convention is one of the earliest treaty instruments which recognized the so-called “precautionary principle”, by allowing States, already before an oil spill has occurred, to take proportional measures outside territorial waters to prevent, mitigate or eliminate pollution damage when, following a maritime casualty, there is a grave and imminent threat of pollution of their coastline, taking into account the extent and probability of imminent damage if those measures are not taken.

The 1989 Convention on Salvage also included important new features, in the form of special provisions relating to the salvors’ duty to protect the marine environment and the deviation, in certain circumstances, from the “no cure no pay” principle, which had traditionally been a fundamental element of the law of salvage, for the purpose of creating an incentive for salvors to take measures to protect the environment. Also the 2007 Nairobi Convention on the Removal of Wrecks has broken new grounds in maritime law in that it establishes a framework for the prompt and effective removal of wrecks located beyond the territorial sea.

An important element in the work of the Legal Committee has been, in my view, the co-operation with intergovernmental and non-governmental organisations. For instance, the Committee benefitted greatly from the expertise and experience within the International Oil Pollution Compensation Fund 1971 in the revision of the 1969 Civil Liability and 1971 Fund Conventions which eventually resulted in the adoption of the 1992 Protocols to these Conventions, as well as from the preparatory work undertaken by the 1992 Fund in the development of the 2003 Protocol to the 1992 Fund Convention resulting in the establishment of a third tier of compensation in the form of the Supplementary Fund. The Committee also had important contributions from the Fund in the elaboration of the HNS Convention, and even more so in the preparation of the 2010 Protocol to that Convention.

Another example is the Committee’s long-standing and fruitful co-operation with the Comité

Maritime International (CMI), which began already in 1967 in connection with the elaboration of the 1969 Civil Liability Convention. The Committee benefitted greatly from the preparatory work carried out by CMI in relation to what became the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) and the 1989 Salvage Convention. The Committee has also been open to input from organisations representing the different private interests in the maritime community, such as the International Chamber of Shipping (ICS), the International Association of Independent Tanker Owners (INTERTANKO), the International Group of P&I Associations and the Oil Companies International Marine Forum (OCIMF).

Perhaps I may be permitted to make some reflections on the Legal Committee’s role in the future. The Committee has over the years developed a large number of international conventions and other treaty instruments in various fields of maritime law, and many of these instruments have received widespread ratifications. The majority of the treaties fall within the field of civil law, but some of the instruments deal mainly with public law issues, for instance the 1989 Salvage Convention, and two instruments relate to criminal law, namely the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its 1998 Protocol Relating to Fixed Platforms Located on the Continental Shelf (SUA Protocol). The Committee has therefore made significant contributions to the development of international law.

It appears, however, that the instruments developed under the auspices of the Committee cover most of the aspects of shipping that fall within the Committee’s field of competence. In view of this, and considering that the IMO Assembly has adopted Resolutions emphasizing that new conventions and amendments to existing conventions should be considered only if there is a clear and well-documented compelling need, the Legal Committee may become less involved than in the past in preparing new treaty instruments and amendments to existing conventions.

The Committee will nevertheless certainly be called upon in the future to carry out important work within IMO. It will for instance be requested to consider up-dating limitation amounts in certain conventions by application of the so-called tacit acceptance procedure, as was the case in 2012 in respect of the LLMC. The Committee may be able

to assist States in their ratification process, as has been evidenced by the Committee's involvement, in co-operation with the IOPC Funds, in the preparations for the entry into force of the HNS Convention.

The Committee could also play an important role in promoting uniform application of existing conventions, and as an example I refer to the work carried out in 2009 on the issue of insurance certificates for bareboat chartered ships under the 2001 Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention) which resulted in an important IMO Assembly Resolution on the subject. Furthermore, the Committee could as in the past contribute to finding solutions to important problems that have arisen after the adoption of a particular convention; an example is the development by the Committee in 2006 of a proposed reservation to the 2002 Convention relating to the Carriage of Passengers and Their Luggage by Sea (2002 Athens Convention) with respect to the difficulties in obtaining insurance cover for acts of terrorism. It is very likely that such issues will have to be addressed by the Committee also in the future. I venture to suggest that other IMO bodies could benefit in their work from input by the Legal Committee in the elaboration of conventions or on other issues of a legal character to a larger extent than has been the case in the past. The Legal Committee has already carried out important work in the development of what is normally known as "soft law" by preparing Guidelines in specific areas of maritime law. Major

examples are Guidelines developed together with ILO, namely Guidelines on provision of financial security in cases of abandonment of, personal injury to, or death of seafarers, and Guidelines on fair treatment of seafarers in the event of a maritime accident. I should of course also refer to the subject considered by the Committee this week, namely the draft Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected, which have been submitted to the Assembly for adoption. I suggest that the Committee could also in the future make valuable contributions to the development of "soft law" in the maritime field.

It should be emphasized that law is not – and should not be – static but should develop, and will develop, to take into account changes in society and in economic, social and political priorities, so as to ensure that the law meets the requirements of modern society and the concerns and aspirations of the citizens in a rapidly changing world. This applies equally to national laws and to international treaties, although as we all know it is much more difficult to amend international treaties than national laws. I am convinced that the Legal Committee will take up this challenge and that it will also in the future, during the period up to its 200th session, and beyond, play an important role in this regard in the field of maritime law.

MÅNS JACOBSSON*

REPORT ON THE IMO LEGAL COMMITTEE

The Legal Committee held its 100th session at IMO Headquarters from 15th to 19th April 2013 under the chairmanship of Dr. Kofi Mbiah.

Welcoming speeches were given by the IMO Secretary-General and by the chairman of the Committee.

Implementation of the HNS Protocol, 2010

The Canadian delegation reported (LEG 100/3) on the outcome of the workshop on HNS Reporting which had been attended by 29 states. The

Guidelines on the reporting of HNS receipts, finalised at the workshop, were welcomed and endorsed by the Committee. These Guidelines are not binding but are aimed at facilitating the entry into force and implementation of the HNS Convention of 1996 through the 2010 Protocol. All states were encouraged to ratify the Protocol as soon as possible.

Provision of Financial Security in cases of Abandonment, personal injury to, or death of

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Seafarers.

The Secretariat reported that the ILO Maritime Labour Convention 2006 will enter into force on 20th August 2013. This Convention is designed to establish a level playing field for shipowners and provide decent working and living conditions for seafarers. A Special Tripartite Committee has been set up to keep the Convention under continuous review and at its first meeting in 2014 it will look at amendments to the Code of the Convention dealing with financial security for seafarers and their families in the event of personal injury, death or abandonment.

Fair Treatment of Seafarers in the event of a Maritime Accident.

A report prepared by Seafarers Rights International (SRI) was introduced by The International Transport Workers Federation (ITF) and the International Federation of Shipmasters' Associations (IFSMA). This report, based on 3,480 questionnaires completed by seafarers from 68 different nationalities, strongly suggested that the clear rights of seafarers to fair treatment are often, in practice, violated. The report highlighted the lack of due process for seafarers facing criminal charges, intimidation and lack of legal representation and a consequent reluctance on the part of seafarers to cooperate with casualty enquiries.

Copies of this excellent report were made available to all delegates and may be found at the following link: www.seafarersrights.org

In light of this report it was agreed that this subject should remain on the agenda of the Legal Committee and delegates were urged to think of ways in which compliance with the existing Guidelines might be improved.

The delegation of the Islamic Republic of Iran (LEG 100/5) drew to the attention of the Committee the continued problems which their nationals experience in getting shore leave and access to shore-side facilities including medical services. The delegation also submitted for consideration a draft Resolution regarding shore leave and access to shore-side facilities. The Committee was reminded that at its 98th session it had decided to refer this problem to the Facilitation Committee (FAL) on the basis that this was within the remit of that committee.

There was wide support for the human rights principles covered by the Resolution and the committee confirmed that seafarers should not be discriminated against on the basis of nationality,

race, colour, sex, religion, political opinion or social origin, irrespective of the flag State of the ship on which they worked. However, as the matter was within the sole purview of FAL it was not felt that the Committee could go beyond expressing its concern at the continuing practice of discriminating against seafarers from certain states.

Piracy

Two documents (LEG 100/6 and LEG 100/WP.6) were submitted to the committee covering the work of Working Group 2 of the Contact Group on Piracy off the Coast of Somalia. It transpired that the Secretariat had approached the European Union Naval Force Somalia (EU NAVFOR) and the North Atlantic Treaty Organisation (NATO) as well as the United Nations Office on Drugs and Crime (UNODOC) for information regarding the number of pirates captured and handed ashore for investigation and about the difficulties in apprehending pirates. The committee noted, with regret, that NATO had no information available and EU NAVFOR had not responded to the request.

There was a feeling in the Committee that states were failing to share their experiences of dealing with the piracy problem and that this made devising strategies to combat piracy much more difficult to achieve.

Concern was expressed about the practice of employing armed guards on ships (the so-called Privately Contracted Armed Security Personnel (PCASP)) and the regulation of their activities. A database has been created by the Secretariat and contains information about national laws on the use of PCASPs.

Some discussion took place regarding the need for lists of approved armed security companies

In an interesting presentation the representative of the United Nations Interregional Crime and Justice Institute (UNICRI) provided the committee with statistics drawn from its Piracy Analysis which dealt with such matters as the average age of pirates, the clans from which they came, at which time of day ships were most likely to be attacked and the average number of pirates involved in each attack. Delegates were encouraged to visit the piracy portal on the UNICRI website which includes scanned copies of court decisions and details of post-trial transfers of offenders.

For those seeking information about national legislation on piracy the Secretariat advised that delegates should consult the database created by the Division for Ocean Affairs and the Law of the Sea (DOALOS) which is available on its website.

Delegates were reminded of the importance of submitting details of court decisions in piracy cases to UNICRI or to IMO.

Collation and preservation of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral care of victims.

LEG 100/7 was submitted by the UK Government and contained draft Guidelines on the procedures to be followed after the committing of a crime on board a ship. Several issues of principle were discussed in plenary but thereafter Katy Ware, from the UK delegation, chaired a Working Group in the margins which produced a final version of the Guidelines to be found in LEG 100/WP.8. When the Working Group reported back to the full meeting it was agreed that the text of the Guidelines should be adopted and forwarded to the 28th session of the Assembly in the form of an Assembly resolution.

Whilst the Guidelines are quite lengthy they are well set out and should be useful to a ship master faced with a crime on his ship.

Liability and compensation issues connected with transboundary pollution damage from offshore oil exploration and exploitation activities.

This is a topic which was first raised at LEG 99 by the delegation of Indonesia following an incident in August 2009 involving an oil spill from a rig in the Australian Montara field. The spill had caused pollution in Indonesia for which they had been unable to obtain compensation. The Legal Committee has not been persuaded that this is a suitable subject for an international treaty but the Indonesian Government has been encouraged to lead efforts to find alternative solutions. To this end the Indonesian Government has organised two International Conferences the most recent one in November 2012. At this meeting delegates agreed that this remained a very serious and pressing issue which is not adequately covered by existing laws and that a workshop of legal experts should look at the problem. Whilst the Indonesian Government remains of the view that a legally binding international agreement would be the preferred solution it accepts the position taken by the Legal Committee and is prepared to work with the Committee in the development of guidance to assist states to enter into bilateral or regional agreements to cover liability and compensation.

In LEG 100/13/2 the Indonesian Government sets

out principles for guidance on model bilateral/regional agreements on liability and compensation for transboundary spills for further consideration. During discussion in the Committee several (sometimes contradictory) points were made:

- there is a need for a fair and effective model framework but not for a binding international treaty;
- the aim should be to assist states in reaching bilateral or regional agreements by creating workshops or consultative groups;
- there is no need for direct IMO involvement which might simply delay the creation of bilateral or regional agreements;
- strict liability should be at the heart of any scheme;
- in drafting any document regard should be had to the terminology used in UNCLOS;
- under international law coastal states have sovereign rights over their outer continental shelves and these rights have to be taken into account when negotiating bilateral or regional agreements;
- those states which have entered into bilateral or regional agreements should offer assistance to those states seeking to enter into such agreements;
- regard should be had to the principles set out in Leg 100/13/2 which reflect the 1992 CLC and Fund Conventions and the 2001 Bunkers Convention;
- on environmental issues regard should be had to Arts. 192, 194 and 197 of UNCLOS.

The Committee suggested that Indonesia should pursue the subject intersessionally and that more states should participate and that a good starting point would be for states which already have bilateral or regional agreements in place to send examples to the IMO Secretariat. The online address for participating in the intersessional group is: ind_offshorediscussion_imoleg@yahoo.com. The CMI delegation informed the Committee that the subject of transboundary oil pollution would be on the agenda at its Dublin Symposium scheduled to take place from 29th September to 1st October 2013. The CMI will share the results of the Symposium with the delegation of Indonesia.

Implementation of the International Convention on Civil Liability for Oil Pollution Damage, 1992

A request (LEG 100/13/1) was received from the International Oil Pollution Compensation Funds (IOPC Funds) for advice from the Legal Committee

in connection with the case of the Alfa I. In that case the liability insurers of the ship (Aigaion) issued a blue card indicating that the vessel had insurance cover at a level to comply with the requirements of CLC 1969/92. On the strength of that blue card the Central port Authority of Piraeus issued a certificate of insurance in the form of the annex to CLC 92. In the event there were restrictions on the Aigaion cover which limited the amount of compensation to a figure substantially below the limit contained in the CLC 92. The question from IOPC Funds was whether the state issuing the certificate has an obligation to investigate the terms, conditions and cover provided in blue cards presented by an insurer and whether it (the state) would have a potential liability to the IOPC Funds should the Fund suffer a loss as a result of the insurance cover being inadequate.

This is a question which has much wider ramifications in that it could arise in connection with claims under the 2001 Bunkers Convention and under the 2002 Protocol to the Athens Convention. Delegates expressed the following views:

- The state issuing the certificate has an obligation to investigate the blue card;
- contracting states should normally be able to trust the blue card unless there is some indication that further investigation is needed;
- investigation is easy where the insurer is a member of the International Group of P & I Clubs or major insurer but less easy (but not impossible) where the insurer is foreign;
- if in doubt the state should always examine the underlying insurance policy;
- in the event of a discrepancy between the blue card and the policy it will be a matter for national law to determine the legal consequences;

- CLC 92 does not provide for the liability of the state if it issues a certificate based on insufficient or invalid insurance and therefore there is no automatic liability to pay damages;
- in some jurisdictions there may exist a duty of care which could make the state liable in negligence;
- there is no reason in international law why a state may not be liable if it fails to comply with their convention obligations;
- these liability conventions are intended to place liability on the shipowner or his insurer and not on states so channelling liability to a state is widening the intended scope of the conventions.

One delegation informed the Committee that at LEG 101 it will submit a paper proposing that the guidelines for vetting and accepting documentation from insurance companies adopted in respect of the Bunkers Convention should be extended to CLC and HNS certificates.

Status of Conventions

LEG 100/10 and LEG 100/WP.2 contain information on the ratification status of IMO conventions and other treaty instruments.

States were urged to work towards ratification of conventions in general and the 2007 Wreck Removal Convention, the 2002 Athens Protocol, the 2005 SUA Protocol and the 2010 HNS Protocol particular.

Several delegations gave notice of their governments impending ratification of named instruments and of particular significance was the announcement that a bill was placed before the Canadian Parliament in March implementing the 2010 HNS Protocol. Denmark will follow suit later this year and Sweden in 2014.

PATRICK GRIGGS

NEWS FROM IOPC FUNDS

MEETINGS OF GOVERNING BODIES – 22ND – 24TH APRIL 2013

The Spring 2013 meetings of the IOPC Funds governing bodies took place at the IMO Building during the week of 22nd – 24th April.

Particularly interesting items on the agenda were the definition of ‘ship’ under the 1992 Civil Liability and 1992 Fund Conventions, the winding up of the 1971 Fund and discussion of the recent Court de Cassation judgement in the *Erika*. Also discussed was the issue of interim payments and developments

in on-going Fund cases.

All the documents submitted by the Secretariat and the delegates and the reports of the Working Groups are available on the Funds’ website, as is the Record of Decisions. This report therefore focuses on developments of note in on-going cases and summarises the important points arising from the various debates.

Incidents involving the IOPC Funds - Current Cases of interest

Plate Princess

This is a Venezuelan incident and a 1971 Fund case. In March 2011, the 1971 Fund Administrative Council decided not to make any payments to claimants, a decision which has been reconfirmed several times since.

Since the last meeting, one of the claimants, the Puerto Miranda Union, has filed pleadings in court requesting an embargo over the 1992 Fund's assets, specifically over contributions owed to the 1992 Fund by the Venezuelan state owned oil company. This embargo was then extended to all the 1992 Fund's assets anywhere in the world. Further, in February this year the Puerto Miranda Union requested clarification of the first instance judgement obtained against the 1971 Fund, arguing that the judgement should impose liability on the 1992 Fund because Venezuela was now only a member of the 1992 Fund. The 1971 Fund has filed opposing pleadings clarifying that it was only the 1971 Fund involved in the *Plate Princess* incident and not the 1992 Fund.

The Venezuelan delegation explained their position, a full version of which is included in the Record of Decisions, that since Venezuela was no longer a party to the 1971 Fund Convention, responsibility for paying the *Plate Princess* claimants passed to the 1992 Fund. The other delegates were concerned at this development and at the Venezuelan court's (and delegation's) understanding of the Fund Conventions and the international compensation regime.

The Administrative Council has taken advice from Dr Thomas Mensah who concluded that there were no grounds to include the 1992 Fund as the 1971 Fund and the 1992 Fund were separate legal entities. Venezuela disputed the validity of this advice but all other delegates who spoke agreed with Dr Mensah's interpretation.

Erika

The Court of Cassation handed down its judgement in September 2012. It largely upheld the Court of Appeal's judgement but found TOTAL SA to be liable a long side RINA, the owner and the management company. The four accused parties each lost the protection of the channelling provisions in CLC 92 as the court considered they had been reckless. In addition, it held that RINA had waived any immunity it may have had as

representative of the flag state as it had submitted to the criminal proceedings. Once it had found that the CLC did not apply, the Court applied French law. Another noteworthy aspect was the approval of the principle under French law of the right to compensation for pure environmental damage.

A number of delegates raised concerns at this judgement. In particular, relating to the jurisdiction of member states outside of their territorial waters, the recognition of environmental damage (which is not admissible under the Conventions), the disapplication of the channelling provisions and the compatibility of French national law with MARPOL. There was general concern that, despite this judgement not being binding on the Fund, it could affect the international regime in the future and how national courts apply the Conventions.

Volgoneft 139,

There remains an 'insurance gap' in this Russian case, reducing the funds available to claimants. The favoured solution proposed by the Fund was to deduct the shortfall from the three government bodies' claims rather than pro rata from the private claimants. The delegates mostly agreed to this suggestion subject to concerns that negotiations should continue with the Russian authorities so that a formal decision can be reached.

Private claimants are now to be paid in full according to the court ruling and interim payments made to the three government claimants with pro-rated deductions to cover the 'insurance gap'.

JS Amazing/Redferm

These are both Nigerian incidents for which no compensation has yet been paid. As regards the *JS Amazing*, the Executive Committee noted in October 2012, that the claimants would likely find it very difficult to prove their losses or to establish a link of causation between the claim and the contamination caused by the spill, and that as time progressed the likelihood of obtaining accurate information relating to the incident decreased. As for the *Redferm*, there are issues as to whether the barge constituted a sea going vessel as described in article 1.1 of 1992 CLC, the divergence in views as to the extent of the damage and the fact that valuation provided were named on estimated losses of income and contained no justification and no evidence proving the losses claimed. The Nigerian delegation submitted that these issues had been satisfactorily answered but the Executive Committee did not alter its stance.

As regards other cases discussed, it was agreed that payments in would remain at 35% in the *Hebei Spirit* case; the current status of the *Prestige* case and the on-going criminal proceedings in Spain were summarised and the continuing issue of whether *Alfa I* had sufficient insurance in place was also discussed but no decisions were required at this stage.

Treaty Matters – 1971 Fund

The 1971 Administrative Council covered non-submission of oil reports, contributors in arrears and a refund of VAT in respect of Italian incidents. A decision was taken to write off contributions from contributors in successor states of the former USSR and former Socialist Federal Republic of Yugoslavia. The majority of the discussion, however, concerned the winding up of the 1971 Fund.

The 1971 Fund Convention ceased to be in force on 24 May 2002. However, under Article 44 the Fund is obliged to continue meeting its obligations until all such obligations have been met. Only then can the Fund divest itself of its assets by distributing them to contributors. The Fund currently holds £5,098,600, divided between the Major Claims Funds for the *Nissos Amorgos* and the *Vistabella* and the General Fund. There are 5 ongoing matters for which the Fund may have to pay compensation and/or legal costs which are preventing the Fund winding up. These are the *Iliad*, The *Nissos Amorgos*, The *Aegean Sea*, The *Vistabella* and *The Plate Princess*. At the October 2012 meetings, a Consultation Group was set up to look into this issue and the Group submitted its report APR13/4/1/1 with recommendations to the Fund. The Consultation Group expressed the view that if the 1971 Fund had to wait until these incidents and legal proceedings had come to an end, it would take a long time before the 1971 Fund could be wound up and that it would be difficult to collect further contributions. The Group gave recommendations in relation to each of the incidents as to how to accelerate their conclusion.

The International Group of P & I Clubs, who are involved in three of these outstanding matters where there remain claims in court against International Group Clubs, submitted a statement expressing that it is too early to make a decision to wind up the 1971 Fund, for the very reason that there remain

outstanding claims: International Group Clubs, individually and at the pooling level, remain exposed and there will still be need for financial adjustment between the Fund and the Group to ensure that compensation paid is apportioned correctly. Such further payment would not be possible if the Fund was wound up.

The various delegates who spoke were keen that the Fund should be wound up as soon as possible. However, concerns were raised that the Convention makes it very clear that the Fund has to meet all its obligations before it can wind up. Despite this, the general consensus was that the Fund should wind up as soon as possible and that this would be worked upon between now and the next meetings in October. This largely involves the Director having discussions with the relevant parties in each case and then to report back in October when he is to put forward proposals for the of the winding up of the fund.

1992 Fund sixth intersessional Working Group/1992 seventh intersessional Working Group

The topic of the sixth Working Group was interim payments. Delegates were concerned that the regime should to continue to function as it does currently and that continuing disagreements should not get in the way of P&I clubs paying compensation to victims of pollution damage as soon after the incident as possible by way of interim payments.

The final debate concerned the definition of ‘ship’ for the purposes of Article 1.1 of CLC 1992 and particularly whether FSO’s and FSU’s fall into this definition. This has become an issue due to inconsistency between the 1992 Fund’s current policy and the practice of a number of States regarding the types of vessels which are considered ‘ships’ and who therefore apply the 1992 CLC/Fund Regime in the event of a persistent oil spill from such vessels. Australia submitted a paper on this, supporting the introduction of interpretive criteria, while the Netherlands drew up its own list of which vessels should and should not constitute a ship.

The Reports on both these final two discussions are currently being prepared by the Director and will be available on the IOPC Funds’ website in due course.

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