YEARBOOK
2023
ANNUAIRE

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PART I

Organization of the CMI

CONSTITUTION

COMITÉ MARITIME INTERNATIONAL ARTICLES OF ASSOCIATION[1]

2022

PART I – GENERAL

Article 1
Name and Object

The name of this organisation is "Comité Maritime International", which may be abbreviated to "CMI". The name of the organisation may be used in full or in its abbreviated form. It is a non-governmental not-for-profit international organisation established in Antwerp in 1897 for an unlimited duration, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall co-operate with other international organisations. The CMI shall promote research, education and discussion in the field of maritime law. It can achieve its goal through the following activities:

- organising of seminars and conferences as a platform for academic discussions;
- encouraging the cooperation regarding research and education;
- organising new activities of research and education;
- providing – upon request or on its own initiative – advice and recommendations to intergovernmental organisations, other international bodies or institutions, governments, parliaments, political parties, judicial authorities, legal professions, etc.
- publishing articles, books, reviews, reports, brochures and other informative documents related to the activities of the CMI, both printed and electronical versions.

The CMI can in general develop any and all activities that contribute directly or indirectly to the achievement of the aforementioned non-profitable goals, including commercial and profitable activities within the limits of what is allowed by law and of which the proceeds shall be destined at all times for the achievement of the non-profitable goals of the CMI. The CMI can amongst others cooperate with, grant loans to, invest

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[1] *Please be advised that the amendment of art. 1 of the Articles of Association have been approved at the General Assembly of October 21 2022, under the condition precedent of approval by the Belgian King as imposed by Belgian law. The application for this approval has been filed by the CMI but it is not yet known when the approval by the King will be granted. Until that moment, the amendment of art. 1 is not yet final.*

in the capital of, or in whatever way, participate directly or indirectly in other legal incorporated bodies, associations and companies of private or public nature, governed by Belgian or foreign law.

- Establishing committees, international subcommittees, working groups, divisions or establishments within the CMI.

Article 2
Existence and Statutory Seat

The CMI is incorporated in Belgium as an *Association internationale sans but lucratif* (AISBL) / *Internationale Vereniging zonder Winstoogmerk* (IVZW) under the Belgian Act of 27 June 1921 as later amended. It has been granted juridical personality by Royal Decree of 9 November 2003. It shall at all times consist of at least 2 Member Associations. Its statutory seat is located in the Flemish Region (Vlaams Gewest). Within the Flemish Region (Vlaams Gewest), the statutory seat can be changed by decision of the Executive Council without amending the Articles of association. The actual statutory seat is located at Ernest Van Dijckkaai 8, 2000 Antwerp. Every change of the statutory seat shall be published in the annexes of the Belgian State Gazette.

PART II – MEMBERSHIP AND LIABILITY OF MEMBERS

Article 3
Member Associations

(a) Subject to Article 28, the voting Members of the CMI are national (or multinational) Associations of Maritime Law elected to membership by the General Assembly, further "Member Associations", the object of which Associations must conform to that of the CMI and the membership of which must be fully open to persons (individuals or bodies having juridical personality in accordance with their national law and custom) who either are involved in maritime activities or are specialists in maritime law. Member Associations must be democratically constituted and governed, and must endeavour to present a balanced view of the interests represented in their Association.

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

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

(d) Where a Member Association does not possess juridical personality according to the law of the country where it is established, the members of such Member Association who are individuals or bodies having juridical personality in accordance with their national law and custom, acting together in accordance with their national law, shall be deemed to constitute that Member Association for purposes of its membership of the CMI.
(e) Member Associations of the CMI are identified in a list published on the CMI Website or as may otherwise be determined by the Executive Council.
(f) Member Associations are entitled to attend and vote, each with only one vote, at General Assemblies.

Article 4
Titulary Members

Individual members of Member Associations may be elected by the General Assembly as Titulary Members of the CMI upon the proposal of the Association concerned, endorsed by the Executive Council. Individual persons may also be elected by the General Assembly as Titulary Members upon the proposal of the Executive Council. Titulary Membership is of an honorary nature and shall be decided having regard to the contributions of the candidates to the work of the CMI and/or to their services rendered in legal or maritime affairs in furtherance of international uniformity of maritime law or related commercial practice. Titulary Members presently or formerly belonging to an Association which is no longer a member of the CMI may remain individual Titulary Members at large pending the formation of a new Member Association in their State.

Titulary Members of the CMI are identified in a list published on the CMI Website or as may otherwise be determined by the Executive Council.

Article 5
Provisional Members

Nationals of States where there is no Member Association in existence and who have demonstrated an interest in the object of the CMI may upon the proposal of the Executive Council be elected as Provisional Members by the General Assembly. A primary objective of Provisional Membership is to facilitate the organisation and establishment of new Member national or regional Associations of Maritime Law. Provisional Membership is not normally intended to be permanent, and the status of each Provisional Member will be reviewed at three-year intervals. However, individuals who have been Provisional Members for not less than five years may upon the proposal of the Executive Council be elected by the General Assembly as Titulary Members, to the maximum number of three such Titulary Members from any one State where there is no Member Association. Provisional Members of the CMI are identified in

a list published on the CMI Website or as may otherwise be determined by the Executive Council.

Article 6
Members *Honoris Causa*

The General Assembly may elect to Membership *honoris causa* any individual person who has rendered exceptional service to the CMI or in the attainment of its object, with all of the rights and privileges of a Titulary Member. Members *honoris causa* shall not be attributed to any Member Association or State, but shall be individual members of the CMI as a whole.

Members *honoris causa* of the CMI are identified in a list published on the CMI Website or as may otherwise be determined by the Executive Council.

Article 7
Consultative Members

International organisations which are interested in the object of the CMI may be elected by the General Assembly as Consultative Members. Consultative Members of the CMI are identified in a list published on the CMI Website or as may otherwise be determined by the Executive Council.

Article 8
Expulsion of Members

(a) Members may be expelled from the CMI by reason of:
  (i) default in payment of subscriptions;
  (ii) conduct obstructive to the object of the CMI; or
  (iii) conduct likely to bring the CMI or its work into disrepute.

(b) (i) A motion to expel a Member may be made by:
  a) any Member Association or Titulary Member of the CMI; or
  b) the Executive Council.
  (ii) Such motion shall be made in writing and shall set forth the reason(s) for the motion.
  (iii) Such motion must be filed with the Secretary-General or Administrator, and shall be copied to the Member in question.

(c) A motion to expel made under Article 8(b)(i)(a) shall be forwarded to the Executive Council for first consideration.
  (i) If such motion is approved by the Executive Council, it shall be forwarded to the General Assembly for consideration pursuant to Article 11(b).
  (ii) If such motion is not approved by the Executive Council, the motion may nevertheless be laid before the General Assembly by the Member Association or Titulary Member at its meeting next following the meeting of the Executive Council at which the motion was considered.

(d) A motion to expel shall not be debated in or acted upon by the General Assembly until at least ninety (90) days have elapsed since the original motion was copied to the Member in question. If less than ninety (90) days have elapsed, consideration of the motion shall be deferred to the next succeeding General Assembly.

(e) (i) The Member in question may offer a written response to the motion to expel, and/or may address the General Assembly for a reasonable period in debate upon the motion.

(ii) In the case of a motion to expel which is based upon default in payment under Article 8(a)(i), actual payment in full of all arrears currently owed by the Member in question shall constitute a complete defence to the motion, and upon acknowledgment of payment by the Treasurer the motion shall be deemed withdrawn.

(f) (i) In the case of a motion to expel which is based upon default in payment under Article 8(a)(i), expulsion shall require the affirmative vote of a simple majority of the Member Associations present, entitled to vote, and voting.

(ii) In the case of a motion to expel which is based upon Article 8(a)(ii) and (iii), expulsion shall require the affirmative vote of a two-thirds majority of the Member Associations present, entitled to vote, and voting.

Article 9
Limitation of Liability of Members

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

PART III – GENERAL ASSEMBLY

Article 10
Composition of the General Assembly

The General Assembly shall consist of the Member Associations, the members of the Executive Council and the Immediate Past President.

The President shall preside all General Assemblies, and shall be accompanied by the persons designated by the Executive Council to assist in the efficient handling of the business before the General Assembly.

When approved by the Executive Council, the President may invite other classes of Members and Observers to attend all or parts of the meetings, including the General Assembly. However, the other classes of Members or Observers shall not be part of the composition of the General Assembly.

Article 11
Functions of the General Assembly

The functions of the General Assembly are:

(a) To elect the Councillors of the CMI;
(b) To elect Members of and to suspend or expel Members from the CMI;
(c) To fix the amounts of subscriptions payable by Members to the CMI;
(d) To elect auditors;
(e) To consider and, if thought fit, approve the accounts and the budget;
(f) To consider reports of the Executive Council and to take decisions on the activities of the CMI, including the location for the holding of meetings, and in particular, meetings of the General Assembly;
(g) To approve the convening of, and ultimately approve resolutions adopted by, International Conferences;
(h) To adopt Rules of Procedure not inconsistent with the provisions of this Articles of association and make such additional Rules of Procedure as may be necessary when so doing to take account of any transitional issues that arise; and
(i) To amend the Articles of association pursuant to Article 14.

Article 12
Meetings and Quorum of the General Assembly

The annual General Assembly shall meet at a time and place determined by the Executive Council in conformity with the requirements of Belgian law. A General Assembly can also be organised by means of a telephone or video conference or via any other means of telecommunication that guarantees an effective and simultaneous deliberation between all the participants. The General Assembly shall also meet at any other time, with a fixed agenda, if requested by the President, by ten of its Member Associations or by the Vice-Presidents. At least six weeks' notice shall be given of such meetings.

Unless otherwise provided elsewhere in the present Articles of association, any General Assembly shall be validly constituted if at least five Member Associations are present.

Article 13
Agenda and Voting of the General Assembly

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

Members *honoris causa* and Titulary, Provisional and Consultative Members shall enjoy the rights of presence and voice, but only Member Associations who are not in arrears of payment of their subscription, shall have the right to vote.

Each Member Association present at the General Assembly and entitled to vote shall have one vote. The vote of a Member Association shall be cast by its President, or by another of its members duly authorised by that Member Association.

The right to vote by proxy is excluded.

Unless otherwise provided in the Articles of association and subject to Article 8(f)(ii) and Article 14, all decisions of the General Assembly shall be taken by a simple majority of Member Associations present, entitled to vote, and voting. However, amendments to any Rules of Procedure adopted pursuant to Article 11(h) shall require the affirmative vote of a two-thirds majority of all Member Associations present, entitled to vote, and voting.

If it is provided in the convocation to the General Assembly, the members can be granted the right to vote via electronic way or in writing on all or some of the matters set out in the agenda, prior to the time that the General Assembly is held. These prior votes will be taken into account for the calculation of the quorum and the majority required for the relevant General Assembly. If the convocation provides that the right to vote via electronic way or in writing prior to the General Assembly only applies for a limited number of matters on the agenda, the prior votes shall only be taken into account for the calculation of the quorum and the majority required for these limited number of matters. The CMI shall verify the identity and the right to vote of members who make use of the right of prior voting. Those members shall act in accordance with the identification procedure imposed by the Executive Council.

Article 14
Amendments to the Articles of association

Amendments to the Articles of association shall be made in writing and shall be transmitted to all National Associations at least six weeks prior to the meeting of the General Assembly at which the proposed amendments will be considered.

Amendments to the Articles of association shall require the affirmative vote of a two-thirds majority of all Member Associations present, entitled to vote, and voting. Their effectiveness and entry into force shall be subject to Belgian law.

PART IV – COUNCILLORS

Article 15
Designation

The Executive Council is the governing body of the CMI. It shall consist of a maximum of 14 Councillors who shall be elected by the General Assembly. The Executive Council shall include the following:

(a) The President,
(b) Two Vice-Presidents,
(c) The Secretary-General,

(d) The Treasurer (and Head Office Councillor) (hereafter "The Treasurer"),
(e) The Administrator (if an individual), and
(f) Up to eight Executive Councillors.

Article 16
President

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

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

The President shall have authority to conclude and execute agreements on behalf of the CMI, and to delegate this authority to other Councillors of the CMI.

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

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

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

Article 17
Vice-Presidents

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

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

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

Article 18
Secretary-General

The Secretary-General shall undertake and be responsible for the tasks and duties assigned to him or her from time to time by the President or the Executive Council.

The Secretary-General shall have particular responsibility for organisation of the intellectual and social content, and all non-administrative preparations for International Conferences, Colloquia, Symposia and Seminars convened by the CMI.

The Secretary-General shall liaise with appropriate international bodies, especially Consultative Members of the CMI and may represent the CMI at any forum when so requested by the President or the Executive Council.

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

Article 19
Treasurer

The Treasurer shall undertake and be responsible for the tasks and duties assigned to him/her from time to time by the President or the Executive Council.

In particular, the Treasurer shall:

(a) be responsible for the funds of the CMI, and shall collect and disburse, or authorise disbursement of, funds as directed by the Executive Council, in accordance with protocols prescribed from time to time by the Executive Council;
(b) maintain adequate accounting records for the CMI;
(c) prepare the annual accounts for the preceding accounting year in accordance with current Accounting Standards imposed by Belgian law, and shall prepare proposed budgets for the current and next succeeding accounting years;
(d) submit the draft annual accounts and the proposed budgets for review by the auditors and the Audit Committee appointed by the Executive Council, and following any revisions, present them for review by the Executive Council, in view of their approval by the General Assembly in conformity with the requirements of Belgian law.
(e) at the request of the Executive Council, open such bank accounts and other financial facilities, such as credit cards, as are necessary to facilitate the financial operations of the CMI, and take all steps necessary to manage the finances of the CMI including arranging the deposit of funds and payment of accounts.

In his/her capacity as Head Office Councillor, the Treasurer shall be:

(f) the line manager of the Administrative Assistant in Antwerp in relation to his/her office duties and in general to oversee the day by day business of the Secretariat of the CMI.
(g) authorised to give, and be responsible for, all formal and informal notifications of amendments to the Articles of association of the CMI; official notifications of the appointment and termination of Councillors of the Executive Council; and all other notifications required by the laws of Belgium from time to time. And in this regard, the Treasurer shall appoint and liaise with a practising Belgian lawyer to ensure compliance with all formal and legislative prerequisites in

relation to the Executive Council, the General Assembly, and the CMI in general.

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

Article 20
Administrator

The Administrator shall undertake and be responsible for the tasks and duties assigned to him or her from time to time by the President or the Executive Council.

The Administrator shall have particular responsibility for the formal administrative preparations for meetings of the CMI, and to that end, shall:

(a) give official notice of all meetings of the General Assembly and the Executive Council, of International Conferences, Symposia, Colloquia and Seminars, and of all meetings of Committees, International Sub-Committees and Working Groups;
(b) circulate the agendas, minutes and reports of such meetings;
(c) make all necessary administrative arrangements for such meetings (such as the liaison with the host Maritime Law Association for the booking of venues and associated social activities);
(d) take such actions, either directly or by appropriate delegation, as are necessary to give effect to administrative decisions of the General Assembly, the Executive Council, and the President;
(e) circulate such reports and/or documents as may be requested by the President, the Secretary-General or the Treasurer, or as may be approved by the Executive Council; and
(f) keep current and ensure publication of the lists of Members pursuant to Articles 3, 4, 5, 6 and 7.

The Administrator may represent the CMI at any forum when so requested by the President or the Executive Council.

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

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

PART V – EXECUTIVE COUNCIL

Article 21
Composition, criteria for election and terms of office of the Executive Council

The Executive Council shall comprise the Councillors of the CMI as described in Article 15.

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

Each elected Councillor shall be elected to his or her specific office in the Executive Council for a term of three years and shall be eligible for re-election for one additional term to each such office, except that (as provided in Articles 18, 19 and 20) there shall be no such limit on the number of re-elections of the Secretary-General, Administrator or Treasurer.

Article 22
Functions of the Executive Council

The functions of the Executive Council are:

(a) To receive and review reports concerning contact with:
  (i) The Member Associations,
  (ii) The CMI Charitable Trust, and
  (iii) International organisations;
(b) To review documents and/or studies intended for:
  (i) The General Assembly,
  (ii) The Member Associations, relating to the work of the CMI or otherwise advising them of developments, and
  (iii) International organisations, informing them of the views of the CMI on relevant subjects;
(c) To initiate new work within the object of the CMI, to establish Standing Committees, International Sub-Committees and Working Groups to undertake such work, to appoint Chairs, Deputy Chairs and Rapporteurs for such bodies, and to supervise their work; reports of such Committees, Sub-Committees and Working Groups shall be submitted to the Executive Council and/or the General Assembly as requested by the President;
(d) To initiate and to appoint persons to carry out by other methods any particular work appropriate to further achieve the object of the CMI; reports of such persons shall be submitted to the Executive Council and/or the General Assembly as requested by the President;
(e) To encourage and facilitate the recruitment of new members of the CMI;
(f) To oversee the finances of the CMI and to appoint an Audit Committee;
(g) To make interim appointments, if necessary, to the offices of Secretary-General, Treasurer and Administrator;

(h) To nominate, for election by the General Assembly, an independent auditor for the annual financial statements prepared by the Treasurer and/or the accounts of the CMI, and to make interim appointments of an accountant or an auditor if necessary;
(i) To review and approve proposals for publications of the CMI;
(j) To set the dates and places of its own meetings and, subject to Article 11, of the meetings of the General Assembly, and of Seminars, Symposia and Colloquia convened by the CMI;
(k) To propose the agenda of meetings of the General Assembly and of International Conferences, and to decide its own agenda and those of Seminars, Symposia and Colloquia convened by the CMI;
(l) To carry into effect the decisions of the General Assembly;
(m) To report to the General Assembly on the work done and on the initiatives adopted.
(n) To pay an honorarium to the Secretary-General, Administrator and Treasurer if it considers it appropriate to do so.

Article 23
Meetings and Quorum of the Executive Council

The Executive Council shall meet at least twice annually; it may when necessary meet by electronic means, a telephone or video conference or via any other means of telecommunication guaranteeing at the same time a proper deliberation, but shall meet in person at least once annually unless prevented by circumstances beyond its control.

The Executive Council may, however, take decisions when circumstances so require without a meeting having been convened, provided that all its members are fully informed and a majority respond affirmatively in writing.

Any actions taken without a meeting shall be ratified when the Executive Council next meets. At any meeting of the Executive Council seven members, including the President or a Vice-President and at least three Councillors, shall constitute a lawful quorum. All decisions shall be taken by a simple majority vote. The President or, in his absence, the senior Vice-President in attendance shall have a casting vote where the votes are otherwise equally divided.

Article 24
Immediate Past President

The Immediate Past President of the CMI shall have the option to attend all meetings of the Executive Council, and at his or her discretion shall advise the President and the Executive Council. His or her expenses in so attending shall be met in the same way as those of the Executive Council.

PART VI – NOMINATING PROCEDURES

Article 25
Nominating Committee

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

The Nominating Committee shall consist of:

(a) A Chair, who shall have a casting vote where the votes are otherwise equally divided, and who shall be appointed by the Executive Council;
(b) The President and Immediate Past President of the CMI (provided that a Past President may resign from the Nominating Committee at any time upon giving written notice to the President);
(c) Two members proposed by Member Associations through the procedures of the Nominating Committee, *mutatis mutandis*, and thereafter nominated by the Nominating Committee for election by the General Assembly;
(d) One further member appointed by the Executive Council.

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

All members of the Nominating Committee other than the President and Immediate Past President (who respectively shall hold office *ex officio*) shall hold office for a term of three years and shall be eligible for re-appointment or re-election for one additional term.

Article 26
Nomination Procedures

On behalf of the Nominating Committee, the Chair shall determine first:

(a) whether any Councillors eligible for re-election are available to serve for an additional term in which event he or she shall obtain a statement from such Councillors as to the contributions they have made to the Executive Council or the Nominating Committee during their term(s);
(b) whether Member Associations wish to propose candidates for possible nomination by the Nominating Committee as a Councillor, or, where applicable, to serve on the Nominating Committee.

The Chair shall then notify the Member Associations and seek their views concerning the candidates for nomination. The Nominating Committee shall then make nominations taking such views into account.

Following the decisions of the Nominating Committee, the Chair shall forward its nominations to the Administrator in ample time for distribution not less than six weeks before the meeting of the General Assembly at which nominees are to be elected.

Member Associations may make nominations for election to any office independently of the Nominating Committee, provided such nominations

are forwarded to the Administrator in writing not less than 15 working days before the meeting of the General Assembly at which nominees are to be elected. In the absence of any such nominations from Member Associations, the only nominations for election by the General Assembly shall be the nominations of the Nominating Committee.

The Executive Council may make nominations to the Nominating Committee for election by the General Assembly to the offices of Secretary-General, Treasurer and/or Administrator. Such nominations shall be forwarded to the Chair of the Nominating Committee at least fourteen weeks before the meeting of the General Assembly at which nominees are to be elected.

PART VII - INTERNATIONAL CONFERENCES

Article 27
Composition and Voting

The CMI shall meet in International Conferences at places approved by the General Assembly, for the purpose of discussing and adopting resolutions upon subjects on an agenda approved by the Executive Council.

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

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

Each Member Association present and entitled to vote shall have one vote in an International Conference; no other Member and no Councillor of the CMI shall have the right to vote in such capacity. The right to vote cannot be delegated or exercised by proxy.

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

Clerical mistakes, or errors arising from an accidental mistake, omission or oversight, or an amendment to provide for any matter which should have been but was not dealt with at an International Conference can be corrected by a resolution at a subsequent General Assembly meeting.

PART VIII - FINANCE

Article 28
Arrears of Subscriptions

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

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

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

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

Article 29
Fees and Expenses

The Secretary-General, Administrator and Treasurer shall receive such *honoraria* as may be determined by the Executive Council and the accountants/auditors shall receive such fee as may be approved by the Executive Council.

Members of the Executive Council, the Immediate Past President, and Chairs of Standing Committees, Chairs and Rapporteurs of International Sub-Committees and Working Groups, when travelling on behalf of the CMI, shall be entitled to reimbursement of travelling expenses, as directed by the President or the Executive Council.

The President or the Executive Council may also authorise the reimbursement of other expenses incurred on behalf of the CMI.

Article 30
Accounting year

The accounting year of the CMI shall terminate on April 30 each year, unless otherwise determined in conformity with the requirements of Belgian law

PART IX – FINAL PROVISIONS

Article 31
Liability

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

Article 32
Languages

1. The official language of the CMI shall be Dutch. The formal working languages of the CMI however shall be English and French. The use of other languages is permitted under the condition that the Member, using such other language, shall provide a translation, by preference simultaneous translation, in a working language.
2. The official Dutch language shall prevail in case of a conflict with other languages. In the absence of a document in the official Dutch language, the English and French working languages shall prevail.

Article 33
Dissolution and Procedure for Liquidation

The General Assembly may, upon written motion received by the Administrator not less than six months prior to the meeting of the General Assembly at which the motion is debated, vote to dissolve the CMI. At such meeting a quorum of not less than one-half of the Member Associations entitled to vote have to be present in order to take a vote on the proposed dissolution. Dissolution shall require the affirmative vote of a three-fourths majority of all Member Associations present, entitled to vote, and voting. Upon a vote in favour of dissolution, liquidation shall take place in accordance with the laws of Belgium. Following the discharge of all outstanding liabilities and the payment of all reasonable expenses of liquidation, the net assets of the CMI, if any, shall devolve to the CMI Charitable Trust, a registered charity established under the laws of the United Kingdom.

Article 34
Governing Law

Any issue not resolved by reference to the Articles of association shall be resolved by reference to Belgian law.

Article 35
Entry into Force

The Articles of association shall enter into force on the tenth day following its publication in the *Annexes du Moniteur belge*.

RULES OF PROCEDURE

1996, as amended 2017

Rule 1
Right of Presence

In the Assembly, only Members of the Comite Maritime International as defined in Article 3(a) of the Constitution, members of the Executive Council as provided in Article 10, the Immediate Past President and Observers invited pursuant to Article 10 may be present as of right.

At International Conferences, only Members of the CMI as defined in Article 3 of the Constitution (including non-delegate members of national Member Associations), Officers of the CMI as defined in Article 15, the Immediate Past President and Observers invited pursuant to Article 27 may be present as of right.

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

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

Rule 2
Right of Voice

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

Rule 3
Points of Order

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

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

Rule 4
Voting

For the purpose of application of Article 13 of the Constitution, the phrase "Member Association present, entitled to vote, and voting" shall mean Member Associations whose right to vote has not been suspended pursuant to Articles 14 or 28, whose voting delegate is present at the time the vote is taken, and whose delegate casts an affirmative or negative vote. Member Associations abstaining from voting or casting an invalid vote shall be considered as not voting.

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

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

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

If no nominations for an office are made in addition to the nomination(s) of the Nominating Committee pursuant to Article 26, then the candidate(s) nominated by the Nominating Committee may be declared by the President to be elected to that office by acclamation. If the Nominating Committee nominates more candidates than there are vacancies for any office, then the Assembly shall conduct an election in accordance with the procedures of this Rule.

Rule 5
Amendments to Proposals

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

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

Rule 6
Secretary and Minutes

The Secretary-General or, in his absence, an Officer of the Comite Maritime International appointed by the President, shall act as secretary and shall take note of the proceedings and prepare minutes of Assembly meetings. Minutes of the Assembly shall be published on the CMI website (where practical) in the two official languages of the CMI, English and French, and in the CMI News Letter and/or otherwise distributed in writing to Member Associations.

Rule 7
Amendment of these Rules

Amendments to these Rules of Procedure may be adopted by the Assembly. Proposed amendments must be in writing and circulated to all Member Associations at least six weeks before the annual meeting of the Assembly at which the proposed amendments will be considered.

Rule 8
Application and Prevailing Authority

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

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

Rule 9

Carry-over of terms when electoral process is changed

Where the Assembly amends the Constitution by changing the manner in which the members of a Committee or body of the Comite Maritime International are to be elected, the Assembly may by resolution agree to permit the terms of office of members of such Committee or body, who were elected under the previous process specified under this Constitution, to be extended until the next Assembly meeting, and for such persons to carry out their functions on that Committee or body until their terms expire at the subsequent Assembly meeting.

GUIDELINES FOR PROPOSING THE ELECTION OF TITULARY AND PROVISIONAL MEMBERS

1999[1]

Titulary Members

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

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

Provisional Members

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

Periodic Review

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

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

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STANDING COMMITTEES

[As constituted during virtual EXCO meeting October 2023]

Note: In terms of Art. 16 of the CMI Constitution, the President is *ex officio* a member of all Committees and Working Groups.

Carriage of Goods by Sea
Tomotaka FUJITA [Japan] *Chair*
Michael STURLEY [USA] *Rapporteur*
Stuart BEARE [UK]
Philippe DELEBECQUE [France]
Vincent DE ORCHIS [USA]
Miriam GOLDBY [Malta/UK]
Hannu HONKA [Finland]
Kofi MBIAH [Ghana]
Mario RICCOMAGNO [Italy]
Gertjan VAN DER ZIEL [Netherlands]
José VICENTE GUZMAN [Colombia]

Ratification of Rotterdam Rules
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Eduardo ALBORS [Spain]
Paula BÄCKDEN [Sweden]
David J FARRELL [Ireland]
Ann FENECH [MALTA]
Tomotaka FUJITA [Japan]
Peter LAURIJSSEN [Belgium]
Andrew ROBINSON [South Africa]
Gertjan VAN DER ZIEL [Netherlands]
Alexander VON ZIEGLER [Switzerland]
Jose Angelo ESTELLA FARIA [UN] *Observer*

General Average (including Guidelines to the York Antwerp Rules 2016)
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Nick COLEMAN [UK-IUMI]
Michael HARVEY [UK]
Kiran KHOSLA [UK - ICS]
Jiro KUBO [Japan]
Sveinung MÅKESTAD [Norway]
Karen SCHANDY [Uruguay]
Dieter SCHWAMPE [Germany]]
Jonathan SPENCER [USA]
Esteban VIVANCO [Argentina]

General Average Interest Rates
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Andrew TAYLOR [UK]

Marine Insurance
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Robert HOEPEL [Netherlands]
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Evangeline QUEK [Hong Kong/China]
Violeta RADOVICH [Argentina]
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Liability of Classification Societies
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Alexander VON ZIEGLER [Switzerland] *Rapporteur*
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John DANIOLOS MARKIOLOS [Greece]
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Implementation of International Conventions and Promotion of Maritime Conventions
Deucalion REDIADIS [Greece] *Chair*
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Rapporteur: IMO Technical Cooperation
Dimitri CHRISTODOULOU [Greece]
Rapporteur: Implementation
Peter LAURIJSSEN [Belgium]
Rapporteur: Promotion
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Luke Chidi ILOGU [Nigeria]
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Elizabeth SALAS [Colombia]
Leven SIANO [Brasil]

Sub-Committee on the Test for Breaking the Owner's Right to limit Liability under IMO Limitation Conventions
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Eduardo ALBORS [Spain]
David BAKER [UK/IGP&I]
Rafael DIAZ-OQUENDO [Venezuela]
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Luc GRELLET [France]
Kiran KHOSLA [UK/ICS]
Darren LEHANE [Ireland]
Vassilis MAVRAKIS [Greece]
Sabine RITTMEISTER [Germany]

Sub-committee to Promote Ratification of the Main International Conventions by Latin American Countries
Aurelio FERNANDEZ CONCHESO [Venezuela], *Chair*
TBA

Database of Judicial Decisions on International Conventions
Stephen GIRVIN [Singapore] *Chair*
Lawrence TEH [Singapore]
Taco VAN DER VALK [Netherlands]
Alexander VON ZIEGLER [Switzerland]
Katerina VUSKOVIC [Peru]

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Evelien PEETERS [Belgium]
Maja RADUNOVIC [Montenegro]
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Luc GRELLET [France]
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Ann FENECH *Ex Officio Officer* [Malta]

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Jorge RADOVICH [Argentina]

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Giorgio BERLINGIERI [Italy]
Stuart HETHERINGTON [MLAANZ]
Alexander VON ZIEGLER [Switzerland]

EU Rapporteur
Dr. Vincent J. G. POWER [Ireland]

INTERNATIONAL WORKING GROUPS

[As constituted during virtual EXCO meeting October 2023]

Note: In terms of Art 16 of the CMI Constitution, the President is *ex officio* a member of all Committees and Working Groups.

Piracy, Maritime Violence and Fraudulent Activity including Fraudulent Registries
Richard NEYLON [USA] *Chair*
Charles BUSS [UK]
Patrick GRIGGS [UK]
John KIMBALL [USA]
Louis MBANEFO [Nigeria]
Pietro PALANDRI [Italy]
Lars ROSENBERG OVERBY [Denmark]
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Neil HENDERSON [UK]
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Niko OERTEL [Netherlands]

Liability for Wrongful Arrest
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George THEOCHARIDIS [Greece] Co-*Rapporteur*
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Kiran KHOSLA [UK]
Leonardo MAINERO [Argentina]
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Nicholas GASKELL [UK]
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Andrew HIGGS [UK]
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Mobile Offshore Renewables Units (MORU)
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Alexander SEVERANCE [Denmark] *Co-Chair*
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Dag ERLING ENGBERG [Norway]
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Fair Treatment of Seafarers in the Event of a Maritime Accident
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Paul GILL [Ireland] *Deputy Chair*
Michael CHALOS [USA]
Olivia HAMER [UK]
David HEBDEN [UK]
Linda HOWLETT [UK]
Kim JEFFERIES [Norway]
Kiran KHOSLA [UK]
P.K. MUKHERJEE [Canada/India]
Stephanie SCHWEITZER [France]
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Edmund SWEETMAN [Ireland/Spain]

Fair Treatment of Seafarers Subcommittee: Maritime Law & Refugee Migration at Sea
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Edmund Sweetman [Ireland/Spain]

Pandemic Response at Sea
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Revision of 1910 Collision Convention and Related Instruments
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PART II

The Work of the CMI

STANDING COMMITTEES
HALF-YEARLY AND YEARLY REPORTS

CARRIAGE OF GOODS BY SEA

YEARLY REPORT

Tomotaka Fujita, *Chair*

Standing Committee on Carriage of Goods was keeping up with the status of the Rotterdam Rules, as well as investigating the national legislation for electronic bills of lading in each state. The main conclusions on both topics are as follows:

1. Current Status of the Rotterdam Rules

First, Standing Committee on Carriage of Goods reluctantly has to report that there has been no progress in the adoption of the Rotterdam Rules. Twenty-five States have signed, and five have ratified. Although some European countries were reported to have completed their preparation for domestic implementation, it is not certain if and when they will ultimately ratify the convention.

2. National Legislations for Enabling "Electronic Bills of Lading"

Standing Committee is investigating the national legislation for electronic bills of lading since number of states seem to look for the solution on domestic level. The Committee circulated the questionnaire in August, 2022. 12 national MLAs have sent us their replies which are on CMI website. The Committee is really grateful for their input which is really valuable.

Standing Committee encourages the MLAs which have not responded the questionnaire to do so as soon as possible. Once sufficient number of replies are received the Standing Committee can make a decision what CMI can do.

One possible area of law which the Standing Committee can explore is the possible choice of law rules for electronic bills of lading which has not been well established. If domestic legislation for electronic bills of lading further spreads, the importance of choice of law rules will be increased.

UNIDROIT approved "Principles on Digital Assets and Private Law" in May 2023 which includes the choice of law rules but many aspects of choice of law relating to the electronic bills of lading are not addressed.

GENERAL AVERAGE

YEARLY REPORT

Jorn Groningen, *Chair*

Following adoption of the new "Guidelines relating to General Average" with the standard security forms in Antwerp, and after some final layout work, the texts were uploaded to the website with the secretariat's kind assistance. Furthermore, paths were searched and found for wider dissemination of the YAR 2016 and the Guidelines; adding publicity is still on the agenda.

The SC is now trying to monitor trends in the use of the YAR 2016 and of the new security forms; positive signs are noted. During the general assembly of the Association Mondiale de Dispacheurs most average adjusters indicated that they recommend use of the new forms. On the cargo side this is partly welcomed but partly also met with resistance – it may take some time and discussions to convince major cargo representing law firms and claims handlers of the new standard's advantages.

New tasks for the Standing Committee on General Average include extension of the scope of specimen G/A securities by developing a standard form of bridging or interim security which can be a very useful tool to gain time in the process of G/A security collection, particularly (but not only) in containership cases. Furthermore, we are discussing whether ways can be found to smoothen and accelerate the collection of G/A contributions once an adjustment has been issued (again, we will seek to explore these questions in close cooperation with IUMI and ICS), and the Committee is currently considering whether they should look into the inclusion of shipping into the EU's Emission Trading System.

MARINE INSURANCE

I. YEARLY REPORT

Joseph Grasso, *Chair*

The project of Marine Insurance SC on Rights of Direct Action against Insurers has culminated in a multi-country summary of information, which is now available on the CMI website. Responses have been received from many countries and and added as a resource to the CMI website.

The SC has turned its attention to insurance implications of MASS and will continue to liaise with the MASS Working Group in that regard.

Finally, the SC has been planning to prepare an annual Newsletter with brief summaries of significant court decisions (globally) on issues of marine insurance. The inaugural annual Newsletter of the Marine Insurance SC is supposed to be released in the first half of 2024.

II. QUESTIONNAIRE – RESPONSES

Countries that have contributed responses to the Questionnaire of National MLAs DAAI as of June 9, 2023

Argentina

Australia

Belgium

China

Colombia

Croatia

France

Germany (partial)

Greece

Ireland

Italy

Japan

Korea (South)

Mexico

Nigeria

Norway

Singapore

Spain

Sweden

Turkey

USA[1]

USA-Alabama

USA-Arkansas

USA-California

USA-Georgia

USA-Iowa

USA-Kansas

USA-Louisiana

USA-New Jersey

USA-New York

USA-Texas

USA-Virginia

USA-Wisconsin

Venezuela
25112\1\4888-9967-7545.v1

[1] Only those U.S. states with direct action have been listed beneath USA. We understand that those states not listed do not have direct action against insurers.

CMI YOUNG LAWYERS

YEARLY REPORT

Ioannis Timagenis, *Chair*

Mr. Timagenis was appointed as the Chair of the CMI Young Committee in June 2023 at the end of the CMI Colloquium in Montreal (14th – 16th of June 2023) so therefore there was not significant work of the Committee to report for the first half of 2023.

Several young maritime lawyers attended the Colloquium in Montreal and the Chair of the Committee attended the social event (a dinner) with them.

In the second half of 2023 the Chair of the yCMI Standing Committee has submitted a report to the Executive Council for the future of the yCMI with proposals for next steps.

Connections with young maritime lawyers, who possess significant experience and are capable of contributing to the Committee's goals, have been established.

Subsequently, Mr. Timagenis proposed the following three new members, who were approved by the Executive Council in October 2023:

- Jaime Albors, Partner at Albors Galiano Portales
- Morgane Roussel, Lawyer at Richemont Delviso
- Kierstan Carlson, Partner at Blank Rome

Additionally, Japanese MLA has been reached out for a prospective member in yCMI SC.

Concerning the future activities, the CMI Young Committee is working on the social as well as the academic yCMI event in the Gothenburg Colloquium 2024, following the guidance of the ExCo.

LIABILITY OF CLASSIFICATION SOCIETIES

YEARLY REPORT

Luc Grellet, *Chair*

Questionnaires previously circulated are being collected from the MLA's that have still not responded. These will then be analysed and the future work of this IWG determined accordingly. The IWG plans to discuss further at the Gothenburg Colloquium.

CONSTITUTION COMMITTEE

YEARLY REPORT

Jean Francois Peters, *Chair*

The Constitution Committee was involved in preparing this largely renewed CMI Constitution which has been unanimously approved at the Antwerp Assembly of 21 October 2022 and published in the annexes to the Belgian State Gazette of 31 October 2022. By virtue of this publication imposed by law the constitutional amendments have become opposable to third parties.

Specifically as to article 1 of the CMI Constitution, relating to the aim and activities of the CMI, this article was amended at the Antwerp Assembly under the suspending condition of approval by the King.

By Royal Decree dated 12 March 2023 the amended article 1 has been approved by the King. This Royal approval has been published in the annexes to the Belgian State Gazette of 31 July 2023.

The new CMI Constitution is now fully opposable to third parties.

CMI PUBLICATIONS AND SOCIAL MEDIA COMMITTEE

YEARLY REPORT

Massimiliano Musi, *Chair*

Yearbook

After having collected, in the first months of the year, all the materials that make-up the three parts of the biennial Yearbook 2021/2022, it has been published and made available also in paper version for the participants of the CMI Conference in Montreal.

During the year, the members of the Committee have collected the documents intended to be published in the Yearbook 2023, which is once again an annual rather than a biennial one.

In this latter regard, it was decided to publish in the Yearbook both the six-monthly reports of the Standing Committees and International Working Groups, and the ppt presentations with their synopsis, in case a speaker in a CMI event is not able to provide a full paper related to her/his own speech.

LinkedIn

Throughout the first couple of months of the year 2023, the Committee has launched the public LinkedIn page in addition to its already existing private members group. The audience's engagement on LinkedIn has increased exponentially month by month, attracting more and more people to find out about, and in turn form part of the CMI.

Website

The website has been updated regularly, having published all updates and ongoing matters covering a wide spectrum of news items ranging from news on Maritime Law Associations, Standing Committees, Consultative Members, MLA Meetings, the Malta Symposium, the CMI Montreal Colloquium and updates on the Convention of Judicial Sales along with obituaries amongst other matters.

Newsletter

The first months also saw the launch of the first electronic-newsletter 1/2023 which was very well received by the public. Whilst building on the foundations of the previous newsletters, the newsletter passed through an

overhaul to now include a fresh digitalised look along with the addition of new sections and headings.

In the second half of the year, the electronic-newsletter 2/2023 was released, covering the most recent news on events, activities and MLAs and prominent members of the CMI.

AUDIT COMMITTEE

REPORT FOR THE FINANCIAL YEAR 2022-2023

Måns Jacobsson, *Chair*

Up to the end of 2021 the financial year of the CMI was the calendar year. The Audit Committee has in the past received the financial documents and the External Auditor's Report early in April, and the Committee carried out its work in April and May, presenting its report to the Executive Council at the end of May or in early June.

The financial year of the CMI has, however, been changed. The financial year is from 2023 1 May-30 April, and the financial year of 2022 has been extended to 30 April 2023. The Audit Committee has not yet received the financial documents for the period 1 January 2022-30 April 2023. Consequently, the Audit Committee has not carried out any work during the first six months of 2023.

As soon as the financial documents for that period has been received, the Audit Committee will examine them and prepare its report.

In accordance with the decision taken by the CMI Assembly in Antwerp in October 2022 and the ensuing amendments to the CMI Articles of Association, the CMI accounting year, which previously had coincided with the calendar year, had been changed to run from 1 May to 30 April and that the accounting year for 2022-2023 covered a period of 16 months from 1 January 2022 to 30 April 2023.

On 25 August 2023 the Audit Committee received from the Treasurer, Mr Frank Stevens, a draft of the Treasurer's Report and draft CMI Accounts for the financial year 1 July 2022-30 June 2023, i.e. Income and Expenditure Account, Balance Sheet, Cash Flow Statement and Notes on the Financial Statements. As a result of written observations by the Committee members the Treasurer prepared and distributed to the members on 7 September 2023 revised versions of these documents.

The Committee discussed these documents by email. The discussion, in which the Treasurer took part, resulted in minor amendments to the Treasurer's Report and the financial documents.

The accounts had been audited by the CMI's External Auditor, NV Vandelanotte, represented by Mr Chris Meuldermans. The Auditor's report on the financial statements had been sent to the CMI Administrator for distribution.

The Committee's Chair interviewed the External Auditor by telephone on 12 September 2022 and reported that discussion to the Committee. The Committee then discussed and approved its Report by exchange of emails.

The Committee Report was sent to the CMI President on 20 September 2023.

The Audit Committee recommended to the CMI Executive Council: that the CMI accounts for the financial year 2022-2023 as presented to the Audit Committee be approved for submission to and adoption by the 2023 CMI Assembly together with the External Auditor's Report and that NV Vandelanotte be nominated as External Auditor for the CMI for the financial year 2023-2024.

NOMINATING COMMITTEE

YEARLY REPORT

Giorgio Berlingieri, *Chair*

At the CMI Assembly meeting on 16 June 2023 in Montreal elections were to take place to fill a number of vacancies.

In the course of first half of 2023 the Nominating Committee therefore attended with the duties referred to in art. 26 of the CMI Constitution regarding the nomination of:

- the Secretary General,
- an Executive Councillor,
- a member of the Nominating Committee.

In particular the Nominating Committee first attended with the duties and formalities regarding eligibility for re-election.

The Nominating Committee then wrote to the Presidents of the National Associations on 15 March 2023 inquiring about proposals of candidates for possible nomination.

The Nominating Committee subsequently wrote to the Presidents of the National Associations on 6 April 2023, reporting on the candidacies received for the vacant positions and asking for the relating preferences to be expresses.

On 2 May 2023 the Nominating Committee wrote again to the Presidents of the National Associations, summarizing the activities performed, listing the National Associations which made communications, reporting on the votes received by the various candidates to the vacant positions and making the relating nominations.

An Addendum to the Report of 2 May 2023 was sent to the Presidents of the National Associations on 12 May 2023, informing about the communication received by an additional National Associations and confirming the nominations made on 2 May 2023.

At the CMI Assembly in Montreal on 16 June 2023 the President of the Nominating Committee reported on the duties attended and the activities performed regarding the nominations to the vacant positions and informed that no nominations for election were made by the National Associations independently of the Nominating Committee.

He therefore proposed that a vote is asked as per nominations made by the Nominating Committee.

INTERNATIONAL WORKING GROUPS HALF-YEARLY, YEARLY REPORTS AND WORKING PAPERS

PIRACY, MARITIME VIOLENCE AND FRAUDULENT ACTIVITIES

HALF-YEARLY REPORT (JUNE-DECEMBER)

Richard Neylon, *Chair*

Richard Neylon, partner of international law firm HFW, has been appointed as the new chair of the "Piracy, Maritime Violence and Fraudulent Activities (including Fraudulent Registries)" IWG. Richard is in the process of re-constituting the IWG and tasking the IWG to engage in some of the key issues. The IWG will present on two such issues at the May annual meeting in Gothenburg, namely, (1) Hostilities and Maritime Violence in the Red Sea: Current Issues and Complexities; and (2) Problems and exposures arising from fraudulent vessel registration and the dark fleet.

DECARBONIZATION

YEARLY REPORT

Haris Zografakis, *Chair*

1. Areas of activity

1.1 The IWG has three areas of activity ("workstreams"):

1.1.1 "Greener ships": Ships are ordered, retrofitted and chartered, which are described as "dual-fuel" or "new fuel-ready" without an accepted definition or reference to legal accuracy. In collaboration with Lloyds Registry Foundation, this workstream is working towards producing standards for vessel "readiness" in the context of shipbuilding, ship finance and chartering.

1.1.2 "Greener fuels": The existing limitation of liability regime does not cover non- fossil fuels on board as fuels and as cargo. This workstream is exploring ways to cover the lacuna in the present legal framework of liability with regards to new fuels.

1.1.3 "Greener (carriage) contracts": The present contractual architecture of maritime trade is not designed for carbon efficiency. This workstream is examining standard C/Ps, sale contracts and bills of lading through a decarbonisation prism to identify clauses that need to be reconsidered.

2. Team members

2.1 The Steering Committee ("SC") is composed of the following:

2.1.1 Haris Zografakis, Partner, Stephenson Harwood in London;

2.1.2 Charles Debattista, Barrister and Arbitrator, 36 Stone in London;

2.1.3 Jolien Kruit, Partner, Van Traa Advocaten in Rotterdam;

2.1.4 Neil Henderson, Industry Liaison, Gard in London; and

2.2 The three workstreams include – in addition to members of the SC:

2.2.1 Hannah Mosmans, Junior Researcher at Erasmus University Rotterdam;

2.2.2 Andrew Rigden Green, Partner with Stephenson Harwood in Hong Kong;

2.2.3 Niko Oertel, Project Legal Counsel at Damen Schelde Naval Shipbuilding in Flushing (Netherlands);

2.2.4 Mark Broekhuisen, Trainee Solicitor with Van Traa Advocaten, and

2.2.5 Daniel-Luc Farrugia, Associate with Fenech & Fenech in Valletta.

2.2.6 Marianthi Koutri, Trainee Solicitor with Stephenson Harwood in London/Singapore, who also acts as secretary to the SC

2.3 A number of additional IWG members are currently under consideration, potentially increasing the IWG's composition to about 15-18 members and consultees. We anticipate that some of our work will also be discussed with the IMO and BIMCO, initially on an informal basis.

3. Committee meetings

3.1 The SC has met on the following occasions:

3.1.1 12 July and 4 October 2023: the founding SC members discussed their initial plans;

3.1.2 27 October 2023: the SC members further discussed the aim of the IWG and the SC's role in it.

3.1.3 20 November 2023: topics that were discussed include: the contribution of the Lloyds Register Foundation; progress, structure and deliverables of the three workstreams; and team composition.

3.1.4 11 December 2023: the SC welcomed Neil Henderson as its new member, discussed workstream composition, progress and deliverables, as well as consultee involvement.

3.1.5 8 January 2024: the SC discussed updates on the team composition with a view to finalising the team. The next SC meeting is scheduled for 31 January.

3.2 The Plenary IWG met on 22 December 2023: all team members introduced themselves and their role in the IWG. The premise and aims of the IWG were explained and the next steps were agreed. The next Plenary meetings are scheduled for February, March and April.

3.3 The participants of the separate workstreams have met separately various times to discuss drafts and progress.

4. Aims for the CMI Colloquium in May 2024

During the CMI Colloquium we intend to present reports outlining the progress of the workstreams (set out in para 1), and to determine the way forward.

MARITIME AUTONOMOUS SURFACE SHIPS (MASS)

CMI WORKING PAPER ON LIABILITY ISSUES CONCERNING MASS

Tom Birch Reynardson, *Chair*

1. Introduction

1.1 Within the scope of its mandate and mission to promote international uniformity in maritime law, the Comité Maritime International (CMI) established an International Working Group on MASS (IWG/MASS) in 2017 to undertake ongoing in-depth study of the legal issues linked to MASS in support of LEG deliberations. The IWG/MASS submitted initial results of analysis of IMO instruments under the purview of the Legal Committee in LEG 107 (LEG 107/8; LEG 107/8/Corr.1).

1.2 The IWG/MASS commenced work on a working paper focused on liability in 2022 and considered an initial draft through correspondence and preliminary discussion at the CMI Montreal Colloquium on 14-16 June 2023. At that time, the IWG chair convened a focus group to further develop the working paper through virtual meetings, correspondence and input invited from IWG members. This new submission is the outcome of that process and discusses the scope of liability for maritime torts in the MASS context. The purpose of the submission is to identify legal issues that autonomous ships raise for maritime liability and to discuss potential strategies for their resolution. The submission does not take a position on what the policy outcome of the discussions should be.

2. MASS: a unique challenge?

2.1 The technology underpinning MASS is not the first instance of innovative technology being employed in ships and the maritime domain: ships, and the various component functions underpinning their operation, are becoming increasingly automated. This raises the question of whether MASS technology, and its potential malfunction, really requires any extensive reconsideration of the established legal and liability framework. It is suggested that MASS technology *is* distinct from prior technologies and *does* require such a review, for at least three reasons.

2.2 First there is the true level complexity of the MASS technology. Not only does understanding MASS technology present formidable challenges to existing regulators and technical experts, the prospect of advanced autonomous systems with self-learning capabilities is, it is suggested, not something the legal framework has yet had to address. Second, there is the level of deference that is expected to be afforded to the MASS technology. At least one of the main advantages of MASS is to reduce the need for human involvement in the functionality of ships, to reduce human error and exposure to danger at sea. It is true that ships today have, e.g., unmanned machinery spaces, but the prospect of a ship without *any* personnel onboard and with limited or no remote human oversight whatsoever to address malfunction places a unique level of reliance on technology that requires fresh legal consideration. Third, the MASS technology will be expected to occupy a space in decision making functionality in safety-critical aspects of a ship's operations, not least its navigation: this, of course, is an area which has previously been entrusted only to the most trained and experienced human actors for whom the ship's owner is generally responsible. In tandem, the above factors an unprecedent reduction in the apparent scope from human culpability in the operation of ships, which raises significant questions about the suitability of the current liability regime.

3. Context

3.1 Errors by masters and crew, including failure to meet their duties, may have two kinds of legal consequences. First, the master or crew member may be subject to (personal) administrative, criminal, or civil liability for the wrongful act. Second, the incident may result in liability for the shipowner[1] who, as an employer retains a vicarious liability for errors committed by persons who act on his/her behalf. The focus here is on the latter question, i.e., how the changing realities regarding MASS may be expected to affect the liability of the owner. This is the key question when it comes to whether compensation will be available for incidents caused by MASS.

3.2 It should be noted at the outset, however, that this matter is not harmonized internationally and that the legal regimes of different jurisdictions may entail significant variations on these points.

3.3 The existing IMO liability regimes cover only pollution damage (the CLC, Bunkers. HNS conventions, with related protocols), wreck removal (the Nairobi Convention) or death or injuries to passengers

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[1] For reasons of convenience, the term 'shipowner' is used here, not as a term denoting ownership, but referring to the entity carrying the liability of the operations involving the ship, i.e. usually the company in charge of the commercial operation of the ship. This may include entities, such as 'reder, 'armateur' in Scandinavian, German and French law, but may also refer to entities such as 'operator', 'managers' or (certain kinds of) charterers, as the case may be.

(the 1974 Athens Convention and its 2002 Protocol). These instruments establish a strict liability regime, whereby victims of the specified types of damage need not claim that there has been an error or negligence on behalf of the ship to have the right to be compensated (up to a specified maximum limit) under the conditions of the conventions. To the extent that (future) MASS cause damage covered by these conventions, it is assumed that the conventions will apply, i.e., that it does not matter for the purpose of the applicability of the convention whether the damage was caused by a MASS or a conventionally operated ship.

3.4 Another relevant international liability instrument in shipping is the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (hereinafter the 1910 Convention), which provides for a fault-based liability for collisions, i.e., that liability for the damage arising from the collision shall be distributed based on the fault of the vessels (rather than the individuals) involved in the collision.

3.5 If shipowners are found to be liable, they have a right to limit their liability under the rules of the LLMC Convention (1976, with applicable updates). The LLMC regime does not address questions of liability as such, but applies to a broad set of maritime claims, whatever the basis of liability. Exempted claims are mainly those covered by other liability regimes, such as pollution, salvage, or general average. The maximum limitation amount is based on the tonnage of the ship or, in the case of passenger ships, the number of passengers that the ship is authorized to carry. The rights of limitation under LLMC only extend to shipowners (defined as "the owner, charterer, manager and operator of a seagoing ship"), salvors and persons "for whose act, neglect or default the shipowner or salvor is responsible". Other persons, such as shipyards, classification societies or equipment manufacturers do not enjoy a similar right to limit their liability.

3.6 As far as contractual issues are concerned, the relationship between the carrier and cargo interests is regulated by the Hague-Visby Rules (and some variations to them in the Hamburg and Rotterdam Rules), but other contracts such as charterparties, or contracts between the owner and shipyards or equipment manufacturers are not harmonized at the international level, albeit that private organizations have developed standard contracts for specific purposes (e.g., BIMCO).

3.7 This submission deals with non-contractual (tort) liability that does not appear to be covered by existing IMO conventions. This covers any 'normal' damage, economic or other damage, caused to ships or other third parties by a MASS, for example, through a collision, grounding, or stranding. These matters have not been assessed as part of the 'Regulatory Scoping Exercise' undertaken by IMO, since that exercise only considered the effect of MASS on existing IMO conventions.

4. Legal setting

4.1 Absent an international liability regime providing otherwise, in most jurisdictions shipowners' liability is fault-based. Therefore, for liability to arise, it must be shown that fault or negligence by the owner has caused or contributed to the damage. It is normal for the claimant to prove such fault or negligence. However, the errors do not need to be committed by the owner personally; the owner will usually be vicariously liable for negligence by employees and persons working on the owner's behalf. For the claimant, the vicarious liability of the owner is essential, as the employees and other persons working on the owner's behalf generally do not have the financial resources to pay substantial compensation.

4.2 MASS developments may particularly affect two main issues in relation to liability: first, the extent to which faults or negligence by new entities, such as remote operators, equipment manufacturers, system designers, shipyards and software developers will be covered by the owner's vicarious liability; and second, how the concept of fault plays out in the absence of human conduct in a highly automated context.

4.3 The implications of MASS on liability are addressed below by discussing the scope of owners' vicarious liability in a MASS context (section 5). Product liability is briefly considered in section 6 and the nature of fault in section 7. Various regulatory options to address the identified issues and challenges are discussed in section 8, with some concluding remarks offered in section 9.

4.4 A starting point for the paper is that the introduction of MASS should avoid creating higher risks for third parties, i.e., victims of damage caused by incidents involving MASS should not be worse off than they would be in a similar incident involving conventionally operated ships. A second, related starting point is that a workable liability system should minimize the risk for third parties that (e.g., due to an impossibility to meet the burden of proof) no one can be held liable for damage caused by MASS.

5. Scope of liability with respect to new entities

5.1 Extent of the owner's vicarious liability

5.1.1 MASS will bring about new players whose conduct will directly affect the operation of both MASS and other ships in their vicinity. Whether the scenario concerns remote operation or the (occasional) autonomous operation of ships, entities like suppliers of technology, system builders, software programmers, providers of communication infrastructure, as well as the usual naval architects, shipbuilders, class, and equipment providers, will in the future through MASS have a direct impact on how ships operate at sea.

5.1.2 The range of persons included within the shipowner's vicarious liability varies from one jurisdiction to another. The vicarious liability of shipowners often extends beyond a mere employment relationship, by encompassing faults of other entities who provide services to the ship. Often, however, this addition is coupled with the further condition that such services by other entities need to relate to matters for which the owner has some insight and/or control over the type of work or service provided.

5.1.3 The extent to which errors committed by such persons will trigger the vicarious liability of the shipowner also depends on contractual relationships and can be expected to vary from one jurisdiction to another, also depending on the type of error and how it has affected the operation of the ship.

5.1.4 Persons who are closely involved in the operation of ships such as (remote) crew members are more easily identified as falling within the vicarious liability of the owner, independently of contractual relationships between them. Conversely, the more remote the contribution of the person is from the actual operation of the ship (or the less control the shipowner has over the service provided), the more difficult it is to justify that the work performed by the person belongs to the sphere of liabilities for which the owner is liable.

5.1.5 If the fault is not within the liability sphere of the owner, the matter will not be governed by maritime law, but by general tort law in the jurisdiction concerned. This may have the consequence that it will be more challenging for claimants to identify the liable party, the error in question, the causal link between the error and the damage and the applicable legal framework. In addition, errors that have been committed a long time before the damage occurred may be inaccessible to claimants because of time bars in some jurisdictions.

5.1.6 On the other hand, as noted, claims outside the realm of the shipowner's liability would normally not be subject to limitation.

5.2 Remote operation

5.2.1 It follows from the broad principles outlined above that a person who operates a ship from a remote location (whether or not labelled a Master) could normally be expected to fall within the scope of the shipowner's liability. Hence, the shipowner would be vicariously liable for the negligent navigation of a ship by a remote operator. The location from which the task is performed is normally not considered to be a decisive factor in deciding whether the task is among those for which the owner is liable. A remote operator of a MASS may thus in most cases be expected to have a similar status as a conventional Master or Officer on

Watch with corresponding responsibilities. Indeed, it would be a major alteration of existing maritime law if responsibilities relating directly to the control and maneuvering of ships could be contracted out to a third party, thereby cutting the link to the owner's vicarious liability.

5.2.2 That said, physically removing the control of the ship away from the ship clearly entails certain important new risks and liability implications for the owner. For example, operating the MASS remotely is entirely dependent on reliable communication technology, such as satellite communication systems: should the shipowner or the communication system provider bear the risk of interruptions or delays in communication? While it might seem desirable from a maritime law perspective, or for reasons of simplicity, that the shipowner remains liable for this risk too, that position is difficult to justify if liability is based on attribution of fault. In many instances of communication failure, it may have been impossible for the owner or crew members to foresee the failure or even to choose the system which is used for the purpose. Hence it may well be that the owner's liability on behalf of remote operators will be more limited than for traditional crew members, as some errors linked to the operation of the ship may be due to circumstances that are beyond the control of both the remote operators and the owner.

5.3 Other service providers

5.3.1 Other key stakeholders, such as shipyards, equipment manufacturers, software developers etc., have a less immediate impact on the operation of ships and will therefore, despite their crucial importance for the safe operation of MASS, normally be outside the sphere of persons whose actions, errors or negligence give rise to liability for owners. Claims against such parties may be brought in respect of damage caused by their defective product/service. In most jurisdictions such actions would be outside the realm of maritime law and, as was noted above, claims against such persons may involve important challenges in the form of difficulties to prove the wrongdoing, the causal links, and the required proximity (in substance as well as time) between the error and the consequences. Moreover, if liability is placed with these types of entities, it could leave the shipowner, who is the person using and benefitting from the technologies that these entities produce, supply, and install, without any liability.

5.3.2 In theory, the link between the services or tasks provided by such entities and the shipowner's liability could be strengthened by focusing on and emphasizing the shipowner's overall responsibility over the safety of the ship and, through that, his responsibility to carefully choose the service

providers, shipyard and manufacturers, and to select reliable technological solutions, coupled with adequate prior testing and supervision as well as training opportunities for the crew. In this way the failure in the equipment or technology used on board the MASS could more easily be translated (also) into a fault or negligence by the owner.

5.3.3 However, placing a very high standard of care on the owner on such matters would not correspond to the legal system in many countries, for two main reasons. First, this type of responsibility, to test and control and verify technology installed on board, may be only remotely connected with the shipowners' core activities, for which he assumes vicarious liability. Second, high standards of care in this area would stretch the notion of negligence, as it could place unrealistic demands on what a shipowner is expected to know and control. More generally, without the availability of a realistic alternative course of action, the owner or those who work on his behalf, will normally not be considered to have acted negligently.

5.4 Fault by the MASS itself

5.4.1 In most jurisdictions the assumption is still that errors or negligence giving rise to liability are made by *humans*. However, there are also legal regimes, including those emanating from the *Code Napoleon*, that accept that *objects* can be 'at fault' (although it is more commonly referred to as defective objects). Liability was initially thought to be based on presumed negligence of the owner of the building or object, but it is now accepted that the liability is based on the defectiveness of the building or object, and exists even of the owner was not, or could not even have been aware of, the defect. The question of whether a machine or system by itself can be at "fault" or commit torts may seem academic, since a machine cannot be sued or (more importantly) compensate victims. However, as already noted, the question of who is at fault is not the same as who is liable to pay compensation. It is thus thinkable in such jurisdictions that the error of the machine or the object will be considered as part of the owner's vicarious liability. The fact that an object (MASS) does not have legal personality (or a bank account) is thus not in itself a reason to reject the attribution of fault to it or its navigation system, if it is clear who will be financially liable for damage caused by such faults or defects.

5.4.2 It is notable in this respect that the 1910 Collision Convention does not refer to fault of a human (master, crew member, pilot, etc.), but refers to fault 'of the vessel'. In some jurisdictions, hidden defects of the vessel are considered faults of the vessel for the purposes of the 1910 Collision Convention.

6. Product liability

6.1 A separate question is whether claims for malfunctioning technology could be directed at the developers of that technology, in the form of a product liability. Product liability is in many jurisdictions strict, and claimants are therefore not expected to identify a particular fault or act of negligence by the technology developer. Claims in negligence will, however, be important potential avenues for compensation in circumstances where the prevailing strict liability regime finds no application.

6.2 Some product liability regimes focus on the defectiveness of the relevant product with reference to the level of safety the public is entitled to expect and in view of, for instance, the way the product is presented and the uses to which the product may reasonably be put. Some "strict" regimes allow limited defenses for producers where the state of scientific knowledge is such that the relevant defect could not have been discovered: this has clear potential significance in the context of software and advanced autonomous technology. Regarding general negligence claims, the focus will likely be placed on the production process and whether appropriate degrees of care were exercised. This will inevitably be assessed in the light of the prevailing regulatory framework for the development and operation of the autonomous technology.

6.3 A commonality between most strict and fault-based product liability regimes is the need for a causal link between either fault or defectiveness, and the relevant loss. This will likely involve complex factual inquiries which fall to be made against the backdrop of the shipowner's well-established responsibilities for the safe management of vessels.

6.4 Any such a shift in the general trajectory of liability away from shipowners (and their insurers) and onto technology producers would be a significant development, not least because technology producers are not in a category of entities generally entitled to limit their liability for maritime claims under global tonnage limitation regimes such as the LLMC Convention. In turn, this raises significant questions for the existing insurance framework for maritime liability.

7. Characterization of fault in a MASS context

7.1 The development towards MASS also raises more general issues of tort law, i.e., how fault should be characterized or defined in a new environment where the liable person has less control and means of exercising control over equipment failure and other causes of damage by MASS. It has already been noted that in most countries errors or negligence giving rise to liability are presumed to be caused by humans, e.g., in the format of a negligent breach of duty or, in a contractual setting, a want of due diligence. Under the 1910 convention, liability for collisions explicitly follows fault.

7.2 However, accidents can occur at sea without any fault on the part of an entity which may be the subject of legal action. This is the case in conventional shipping and these cases may be expected to rise with the development of MASS. If liability follows fault, in principle, the loss suffered should lie where it falls. This is essentially the case with doctrine such as "inevitable accident" under English law pursuant to which a defendant will escape liability if it is shown that the loss could not have been avoided by the exercise of reasonable care.

7.3 The issue presented by MASS is the very real prospect of all relevant actors being able to demonstrate the requisite level of skill and diligence (or the victim otherwise not being able to prove otherwise) and yet an accident and loss still results because of (for instance) some glitch or error in the autonomous navigation system or the communication system on which that system relies. Fault or negligence, as was noted above, normally presumes that the person should or at least could have realized that something was wrong and therefore should have acted differently.

7.4 Whether a human may be held responsible for faults by machines will often centre around the extent to which the human was expected to supervise or be "in charge of" the system in question, i.e., the autonomy level involved. Even highly sophisticated data systems that currently in reality operate ships, such as Dynamic Positioning, do not challenge the assumption that the human is in charge, as it is expected that the Officer on watch at all times monitors the operation and intervenes where needed. This changes if humans are specifically authorized to leave supervision and control, and is only expected to return to active control if the system asks for it, or in case of alarms etc.

7.5 The risks and questions related to negligence are likely to vary with the type of MASS operations. If there are humans on board, they might be able to – and be expected to – intervene when the system navigating the vessel is unable to cope. In this case, a key question is whether the humans were provided reasonable time and opportunities to familiarize themselves with the situation before being expected to intervene. If the vessel is remotely operated, the remote operators will clearly be expected to intervene, and may well be considered negligent if they fail to do so. Yet, their negligence may be reduced or removed if the vessel provides wrongful or incomplete situational awareness information to the remote operating centre (ROC) or if the communication link between the ship and the ROC is slow or broken. Even in the case of fully autonomous vessels, there will still be humans involved, but the link between the incident and the humans whose errors were at the origin of it may be very distant. The navigation algorithms may have been developed many years ago by a team of hundreds of developers, and the only 'human in the loop' may be a shore-based emergency response team. In all these scenarios, proving fault or negligence of one of the humans involved

may prove impossible, even if the MASS as such did not function as expected and certified.

7.6 It should also be noted that "full" autonomy, from a liability perspective, is not necessarily limited to futuristic hi-technology ships operating without any intervention by humans. For liability purposes, full autonomy simply means that the ship, when the error happened, operated (and was authorized to operate) autonomously without human supervision. It may thus concern only very limited periods of time and is not dependent on whether there were crew members on board the ship. If the liability of MASS is different from conventional operation, the liability regime may thus change repeatedly during a single voyage, depending on the division of labour between the human and the machine at the critical moments in time.

8. Alternative strategies

8.1 When considering how to approach the new risk profile of MASS in terms of liability, the first, and easiest, solution would be to accept the *status quo*, i.e. the 'do nothing' option. This would leave the challenges to accommodate MASS to the existing liability framework to national courts and regulators. In some jurisdictions, failures by MASS may be regarded as just another type of 'technical failure' by ships and hence easier to accommodate in the existing liability framework. In other jurisdictions, where fault is closely linked to actions or omissions by humans, this will be more difficult and it may not, for example, be possible to claim compensation from the MASS side in a collision, and the losses would lie where they fall, with the owners of the other vessels or other third-party claimants.

8.2 At the other end of the spectrum, there is the possibility to introduce strict (faultless) liability for owners of MASS. If an incident occurs involving a MASS, the MASS is presumed to be at fault, subject to some pre-identified exceptions and defenses. Strict liability on the shipowner thus significantly eases the burden placed on claimants, but also has some preventive potential, in that liability for the new technology is placed with the person who uses and benefits from the technology and has the best opportunities to optimize actions to avoid incidents. Strict liability regimes come in various forms. One variant represents a kind of 'enterprise liability', in which the owner or operator of MASS is considered to have taken a calculated risk when introducing (and benefitting from) a new type of technology, which justifies strict liability. Other variants include liability for particularly hazardous activities or, even with respect to technical failure of devices prone to causing damage.

8.3 Strict liability, however, also raises questions of fairness. Why would the MASS in a collision with another ship be presumed to be at fault, simply because it is a MASS? If two ships behave in identical

manners, it is unfair if one of them (the MASS) is liable where the conventional ship is not. It is perfectly possible, for example, that the MASS keeps its course and speed as it should under the COLREGS, and that the collision is caused by the manned vessel suddenly turning in front of the MASS. While that example probably could be resolved by applying the habitual exemption for contributory negligence, strict liability does entail other issues of fairness. To avoid liability, the MASS shipowner would, for example, have to successfully rebut presumptions that may be difficult for him to prove, which an owner of a conventional ship will not have to deal with. This may also create an incentive for MASS operators to conceal that the ship operated in an autonomous mode at the time of the incident. It is not self-evident, therefore, that introducing a strict liability regime for MASS would be the best possible solution.

8.4 One way of addressing the difficulties for claimants to demonstrate fault in a fault-based liability system would be to redefine the traditional idea of fault itself as something other than demonstrable lack of care / due diligence, in the context of autonomous systems. This could be achieved by allowing for 'anonymous' or 'cumulative' culpa to count as errors by the owner, even without an identified single negligent person or act. While such constructions are supposedly accepted under the 1910 Collision Convention, they do not remove the need for claimants to demonstrate that some form of negligence has occurred.

8.5 Another strategy, which may also be in line with the 1910 Convention, would be to presume fault in certain circumstances with a reversal or practical qualification of the burden of proof with respect to fault: requiring those best placed to assess the safety of the technology (shipowners and/or technology developers) to prove an absence of fault. Such defendants may be required to prove the specific cause or only to show reasonable care. Yet, this strategy, too, may prove only partially helpful for claimants, since it also leaves the option of no liable party open in cases where the owner can prove that the fault was committed by a person outside the sphere of his (vicarious) liability.

8.6 In addition to presumptions relating to fault, it is also possible to use presumptions with respect to the liable person: if the presumed liable person (shipowner) cannot demonstrate that another person (outside his vicarious liability) is responsible for the wrongdoings in question, liability will rest with the owner.

8.7 As was noted in para. 5.3.2, an alternative strategy to improve the prospect of compensation without departing from the notion of fault-based liability could be to raise the standard of care expected from the owner to the extent that (latent) technical errors by the MASS would amount to a failure of the owner to maintain the safety of the ship. The mere fact that an incident happens could be regarded as evidence of insufficient testing of MASS systems or insufficient

training provided to the crew using it, wrongful choice of service providers etc., hence maintaining a link to the owner's negligence. However, it was already noted that this strategy to avoid liability gaps may stretch the notion of negligence considerably, and that circumstances over which the owner has little information and control, and few means to acquire it, will normally extend beyond the level of care expected in a fault-based liability system. Moreover, the mere fact that an incident happens with a MASS does not in itself prove that the incident was due to a technical error.

8.8 Yet another approach departs from defects in the MASS itself or its technology systems as a basis for liability. In this variant, the incident itself triggers the owner's (fault-based) liability, and it could be applied with or without a link to the owner's own awareness of the matter. The concepts and criteria developed in product liability law could be instructive in this respect, even if it is unclear whether a ship as such could be considered a "product". A product is defective when it does not offer the safety a person is reasonably entitled to expect, taking all circumstances into account. In an analogy to this approach a MASS could be considered defective if it does not offer the safety the (maritime) world is reasonably entitled to expect from it, taking all circumstances into account. For MASS owners, the duty to provide a non-defective MASS could be a continuous one. Every time a MASS starts on a voyage, it must provide the safety that the maritime public is reasonably entitled to expect, e.g. by updating systems and replacing outdated technologies. A MASS that was safe five years ago may not be safe enough today anymore, and a MASS with all updates applied may be safe whereas the same MASS without the updates may be defective.

9. Conclusion

9.1 A shift towards MASS will affect several aspects of a ship's operation and liability for any losses. The people involved in operating ships are less likely to have control over the processes which control the navigation of them and will be specifically authorized not to be in charge of navigation in cases of "full autonomy". If casualties arise it may be difficult for claimants to trace those at fault, and any error may have occurred years before, giving rise to issues of time bar. Proving error or negligence may be demanding for third parties who have suffered loss caused by MASS. Such novel elements increase the risk that victims of incidents involving MASS may not be adequately (or at all) compensated.

9.2 New risks that may not be fully covered by the existing liability regime include, *inter alia*, the increased reliance on technology for the operation to work, the increased range of persons whose decisions will directly affect how ships are operated, and the increased handing of control from humans to machines.

9.3 The legal solutions to the various risks will vary from one state to another and there is hence a risk that liability linked to MASS will suffer from a significant lack of regulatory uniformity, which is challenging in a global industry.

9.4 There is no perfect solution available to resolve the identified issues. All available strategies discussed above, including the do-nothing option, involve some question marks relating to effective protection of third parties, fairness or practicality.

9.5 A fault-based liability regime involves important risks that victims of incidents involving MASS are left without compensation. This is due to, *inter alia*, the difficulties in establishing what has happened and the fact that a person linked to the MASS-shipowner has committed a fault.

9.6 Various regulatory techniques linked to the use of presumptions, proof rules and a broader understanding of culpability would serve to reduce such drawbacks but would not do away with the fundamental problems involved. For such mechanisms to work properly, it is still necessary to know what has happened and to what extent various persons involved contributed to the events.

9.7 Another approach could be to interpret 'fault of the vessel' in the 1910 Convention as including a defective condition of the MASS itself and accept that an object such as a MASS can be 'at fault' (defective). The defect of the ship could be linked to safety levels which the (maritime) world is reasonably entitled to expect from it, to be further established by regulatory guidelines.

9.8 A strict liability regime, coupled with the relevant and necessary exceptions, would in some respects appear to be the most clear-cut of the alternatives identified in this paper. In most states, however, such a solution would need to rely on regulatory intervention, preferably guided by IMO-coordination, and a related revision of the 1910 Convention. While being the 'cleanest' option in terms of legal clarity, it also is the one that demands most regulatory intervention and policy effort by the Organization.

9.9 However, before any regulatory intervention on the topic of liability and MASS could be contemplated, several important regulatory questions need to be addressed. This includes the material scope of such an instrument. Regulating any type of MASS would fail to acknowledge that MASS represents a mode of operating ships rather than a category of ships. A ship with MASS capabilities that is operated in the lower (manually controlled) levels of autonomy by an onboard crew does not justify any alteration of the existing liability regime. Targeting, on the other hand, only MASS that operate in an autonomous or remote-controlled mode, would involve various questions of fairness in relation to conventional ships, as identified above. A more general liability instrument addressing technical failure on board ships, in turn, would expose a series of

difficult definitions between technical and human errors and their inter-relationship. An even more general liability regime covering any type of third-party liability for ships may, on the other hand, be too ambitious an exercise and an initiative to embark on since such an effort has already been turned down by the Organization in 1997.

CYBERCRIME IN SHIPPING

HALF-YEARLY REPORT (JANUARY-JUNE)

Julian Clark, *Chair*

Introduction

The Cybercrime in Shipping International Working Group was established to monitor and research this crucial area, review existing international conventions, and analyse how best can the CMI contribute to protect the maritime sector from the growing risks posed by cybercrime. The group addresses these critical issues through a collaborative and multidisciplinary approach from both legal experts and technical specialists.

Activities Undertaken

During the first six months of the 2023, the group undertook the following activities:

1. Composition of the Group

The group made significant efforts to expand its membership by inviting professionals with diverse backgrounds, including maritime lawyers and technical specialists. This approach was taken to ensure comprehensive and well-informed discussions to cope with the challenge posed by the extremely technical nature of cybercrime and cybersecurity in shipping.

2. Delimiting the Scope and Aims

The group focused on defining the scope and objectives of its work to consider how best can the CMI contribute to protect the maritime sector. The group deliberated, for instance, on whether to produce a draft instrument of a new international convention, a propose amendment to SOLAS, or a model law to be enacted by other countries.

3. Collection and Analysis of Papers and Data

Throughout the period, the group diligently gathered and analysed papers and data from its members and various other authors and scholars. This process ensured a robust knowledge base, fostering evidence-based discussions.

4. Regular Discussions through Video Conferences

The group maintained frequent and productive communications among its members through bimonthly video conferences. These discussions played a crucial role in assessing the risks posed by cybercrime in the maritime sector and monitoring the progress of the group's activities.

5. Open Session at the Montreal Colloquium

One of the key achievements of the group during the reporting period was organizing and hosting an open session at the Montreal Colloquium entitled "Cyber Threat in the Maritime Sector – A Storm on the Horizon". The session served as a platform to raise awareness about the risks posed by cybercrime in the maritime sector, provide updates on the regional and international legal positions and trends on the topic, and identify current and future weaknesses and threats. It also served to spark an open and constructive debate among the participants.

Upcoming Activities

Looking ahead, the group has planned the following activities:

1. Questionnaire Development

The group will work on developing a comprehensive and focused questionnaire to be distributed among the various member Associations. This endeavour aims at gathering valuable insights and feedback from different jurisdictions to further strengthen and develop the group's work.

2. Continued Regular Discussions

The group will continue to hold regular communications to sustain the momentum and keep track of ongoing developments in cybersecurity and cybercrime in the maritime sector.

3. Exploring Collaboration Opportunities with the MASS International Working Group

The group intends to explore alternatives for closer collaboration with the Maritime Autonomous Surface Ships International Working Group. By working together, both groups can address and anticipate shared challenges in the maritime sector more effectively.

4. Liaising with IMO for Collaborative Initiatives

The group intends to actively engage and liaise with the International Maritime Organization (IMO) to explore potential opportunities for joint initiatives and assessments.

Conclusion

In conclusion, the first six months of the year have been marked by significant progress and achievements for the group. The group's commitment to inclusivity, knowledge gathering, and meaningful discussions has laid a solid foundation for its future endeavours. The upcoming activities hold promise for further advancing the group's objectives.

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

YEARLY REPORT

Valeria Eboli, *Chair*

The appointment of a new Chair of the IWG was notified at the end of November. The last weeks of the year were dedicated to resume the activities of the IWG and start contacting its members to check their availability to remain part of it.

Then a new program will be elaborated, taking also into account eventual needs of the International Maritime Organization and the priorities of the Legal SC.

A meeting of the IWG Colloquium is supposed to take place on the occasion of the Gothenburg Colloquium.

FAIR TREATMENT OF SEAFARERS SUBCOMMITTEE ON MARITIME LAW AND REFUGEE MIGRATION AT SEA

YEARLY REPORT

Valeria Eboli, *Chair*

The Sub-Committee has been working on some questionnaires aimed at collecting information on the relevant national practice of the States about refugees and maritime law. They were sent out to all the NMLAs. The first part of the questionnaire is about general issues, such as the conduct of rescue activities and their impact on merchant vessels. The second part is about how the pandemic affected refugees and migrants at sea and how the States dealt with them.

Following an initial working document based on the first Questionnaires received and presented in the framework of the SC meeting during the Antwerp CMI Conference of October 2022, a more comprehensive document is now being prepared. Furthermore, a new questionnaire is currently under study to collect additional information about the eventual practice in relation to topics such as the compensation for merchant vessels conducting government-directed rescues during a mass migration, to identify and share good practices.

The output of the work is supposed to be discussed in the framework of the meeting of the Subcommittee on the occasion of the Gothenburg Colloquium.

RATIFICATION OF JUDICIAL SALE OF SHIPS CONVENTION

I. HALF-YEARLY REPORT (JANUARY-JUNE)

Ann Fenech, *Co-Chair*

1. Adoption of the International Convention on the Judicial Sales of Ships – 7th December 2023.

In my last report presented to the General Assembly in Antwerp in October 2022, I had reported on the momentous event when in June 2022 the Commission at UNCITRAL in its 55th session approved the final draft of the Convention on the International Effects of Judicial Sales of Ships and recommended that the United Nations General Assembly should adopt it.

In that report I had advised that "The Convention is expected to be adopted by this 77th session of the General Assembly of the UN during January of 2023 and we look forward to that greatly."

In actual fact, as you are fully aware, on the 8th of December 2022 and therefore earlier than anticipated the United Nations Information Service Vienna announced in a press release that "The United Nations General Assembly adopted the United Nations Convention on the International Effects of Judicial Sales of Ships on the 7th December 2022. The General Assembly authorized a signing ceremony for the Convention to be held as soon as practicable in 2023 in Beijing and recommended the Convention be known as the "Beijing Convention on the Judicial Sale of Ships."

This was certainly a very happy day for the CMI and for all those who have worked exceptionally hard to reach this point.

2. Signing ceremony in Beijing.

Since then we have been watching the space for confirmation of when the signing ceremony will be held. We have now received confirmation that the signing ceremony will be held on the 5th September and I have received an invitation to attend the signing ceremony and also a symposium to be held in Beijing on the same day.

3. Steps for ratification

Also as explained in our last report at the Assembly meeting in Antwerp, it has become very evident that the CMI today must work towards another deliverable. Quite apart from being the originator of ideas always seeking the unification of International maritime law and quite apart from drafting and bringing drafts to the tables of international legislators, it is vital that the CMI remains inolved in assisting with the promotion of these conventions and with the ratification processes after we succeed in turning our drafts into international law.

Our IWG has therefore been working very hard indeed over the past months, with the Secretariat at UNCITRAL principally Mr. Jose Angelo Faria as well as the representative of the European Union Commission Dr. Angele Sear DeBono to ensure that states ratify the Convention as soon as possible after the signing.

To this end we have been encouraging national maritime law associations to organise events which would announce and publicise this important convention and explain to their own administrations the importance of the ratification of this convention.

Numerous national / regional events have been held over the past few months. At the end of April the Swiss MLA organized an event in Zurich for a Swiss audience with the participation of Alex von Zeigler and Jan-Erik Pötschke and Beate Czerwenka and in March the German MLA organized a similar event in Hamburg with the same speakers as well as Tilman Stein past legal director at Deutsche Bank for a German audience.

In April the Croatian Maritime Law Association in conjunction with University of Split organised the 4th International Scientific Conference on Maritime law in Split, in which Judicial Sales featured very prominently and during which I dedicated my key note speech to the Convention. In May 2023, focus was put on the project at the United States Maritime Law Association Spring meeting when both Frank Nolan and I discussed the importance of the Convention and its ratification. I was invited to give the Healy Lecture and a substantial part of that was also dedicated to the International Convention on Judicial Sales of Ships and how important it is for states to ratify it.

In the meantime, after ongoing discussions between the UNCITRAL secretariat and the CMI, it was considered appropriate to hold a meeting in Malta to explain the convention. The original intention was that it be a small meeting for local consumption and to enable the participants at the International Maritime Law Institute representing numerous maritime and state organisations to understand the Convention and to encourage their states to ratify. However, this turned into a full-blown symposium hosted by the Ministry of Foreign Affairs. In all we had over 150 delegates from 50 countries in total.

This was a whole day event with a very interesting programme.[1]

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[1] Programme attached.

Importantly 3 Maltese ministers of state publicly expressed their support for the Convention and publicly encouraged the EU to proceed with the necessary procedures as expeditiously as possible to enable Malta as an EU Member state to ratify the Convention as soon as possible after the signing of the Convention in Beijing.

Speakers included Mr. Justice Spiteri Bailey the Judge who presides over maritime cases and in particular judicial sales in Malta, Jose Angelo Estrella Faria, principal legal officer, United Nations Commission on International Trade Law, Fred Kenney Director Legal Affairs and External relations division IMO, Beate Czerwenka Chair of Working Group V1 at UNCITRAL, Peter Laurijssen, Eduardo Albors, Petar Kragic and I disected the convention, whilst Suzanne Shaw vice President of the Malta MLA moderated a panel with the industry consisting of Tilman Stein past legal director at Deutsche Bank, Jason Korbettis, managing director of Blue fin marine, owners of the Bright Star, and Ivan Sammut registrar general of Maltese ships.

Importantly we had two presentations from 2 EU Commission representatives. Mr. Richard Sonnenschein, Director Justice Policies, Directorate General for Justice and Consumers, EU Commission and Dr. Angele Sears Debono, legal and policy officer, civil justice unit, Directorate General for Justice and Consumers, EU Commission. This was the first time after the adoption of the convention by the General Asssembly of the EU that the EU publicly acknowledged the importance of the convention to european maritime trade and indicated that the processes enabling member states to ratify the convention would be expedited as much as possible.

The audience was varied and at the end of the seminar public support was expressed by many including Stinne Taiger Ivo representing BIMCO, Julio Fuentes from the Spanish Ministry of Transport, Prof. Lorenzo Schiano di Pepe from Italy, Harmen Hoek from the IBA, and Ann Catherine de Ridder from the Belgian Registry of Shipping.

On the 29th of June the Italian Maritime Law Association organised a seminar precisely on the Convention on the international effects of judicial sales of ships. I was invited to give the Key Note address and other speakers included Avocato Giorgio Berlingieri, Prof. Stefano Zunarelli, Dr. Angele Sears Debono, Mr. Jose Angelo Estrella Faria, Dr. Jan-Erik Pötschke and Prof. Lorenzo Schiano de Pepe.

Liaison with UNCITRAL and IMO.

Throughout these past 9 months we have continued to build on strengthening our relationships with UN legislative bodies. As far as the IMO is concerned and as you are aware, following their decision in 2018 not to entertain this project, the IMO nevertheless participated fully and whole heartedly in the deliberations of Working group V1 at UNCITRAL and

eventually agreed to act as the repository under article 10 of the Convention. We could not have asked for a better relationship with the IMO. Consequently, this year I received an invitation to address LEG 110 in May on this very subject and to this end the CMI and the secretariat at UNICTRAL presented a joint submission under "any other business".[2] The scope of the submission was expressed as per the following:

"***On the 7th December 2022, the General Assembly of the United Nations adopted the Convention on the International Effects of Judicial Sales of Ships. The purpose of this memo is to provide background to the important discussion related to this new Convention and it is hoped that will be useful to the delegates attending the legal committee of the IMO at its 110th session as they explain the importance of the ratification of this Convention, to their respective States and organisations".***

I presented the paper at Leg 110 on Friday 31st March.

It was hugely gratifying when following my presentation, we received the strong and firm support of very important delegations namely the United States of America, Spain, Croatia, Japan, Singapore, China, New Zealand, Australia, Thailand, Georgia, Greece, BIMCO and ICS.

Production of the Judicial Sales Manual

In order to ensure that state administrations and authorities, maritime practitioners and others involved in encouraging states to ratify the convention had access to the right materials, we have also produced what we are referring to as the "Judicial Sales Manual."

This manual was launched in Montreal and has been put together and collated principaly by Peter Laurijssen who is a member of the core team of the IWG as well as being the Rapporteur of the Group. The Manual contains a detailed article on the convention, the text of the convention in various official languages, the UNCITRAL Secretariat's explanatory note on the Convention as well as a number of testimonials by prominent figures and entities. It was distributed to all delegates at the Colloquium.

The Judicial Sales Manual was produced jointly between the Journal of European Transport Law and the CMI. I would like to publicly express my deep gratitude to Peter Laurijssen for taking ownership of this project and producing such an excellent publication.

Engagement with the International Press

The IWG has worked to engage with the International Maritime Press. The session on Judicial sales as well as the IWG open meeting the day before the conference in Antwerp was widely covered by Rob Rust of Trade Winds and the Malta Symposium held in April was also widely covered by Davd Osler from Lloyds List. We must continue to nurture this relationship with the maritime press for the Convention to garner as much support and publicity as possible.

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[2] Copy of joint submission

Conclusion

There is little doubt that what the Convention seeks to promote can only succeed if the Convention is ratified by as many states as possible. For this reason, the Executive Committee of the CMI has approved a request by the same IWG for the IWG to be renamed the "IWG on the ratification of the Convention on the International effects of Judicial Sales."

We must therefore continue to work towards this deliverable. In explaining the importance of the Convention and its ratification we also need to underline the simplicity of the Convention and how the Convention seeks to protect private rights and is not at all concerned with what would normally be considered as political issues which could deter states from ratifying conventions. The simplicity of the convention and its totally politically neutral tone should be the reason why it ought to be ratified by several States as promptly as possible.

We would like to encourage as many national maritime law associations to engage with their administrations with a view to convincing them to ratify the Convention once this is open for signature in September.

At this juncture I would like to extend a special thank you to Dr. Angel Sears Debono from the EU Commission who has worked tirelessly within the Commission to ensure that the Convention can be ratified by the EU itself and EU member states. Throughout the 4 year period at UNCITRAL working group VI the EU Commission and the CMI enjoyed an excellent working relationship where we both worked towards finding common ground and overcoming obstacles. In fact on the 29th of June, it was announced that the EU Commission was presenting to Council a proposal for the ratification of the Convention by the Commission and EU Member states.

The Commission together with the Spanish Presidency of the EU Council will be organising a Seminar in October to explain the details of the Convention to Member states. Various members of our working group will be speaking.

In the meantime, all the members of the group are available to explain and assist any NMLA which requires assistance in explaining the uses and utility of the Convention to any governmental authority when considering the ratification of the Convention. The current members of this IWG are:

Henry Li and myself as *Co-Chairs*
Peter Laurijssen – *Rapporteur*
Stuart Hetherington
Alex Von Ziegler
Tomotaka Fujita
Frank Nolan
Jan-Erik Pötschke
Eduardo Albors
Andrew Johnson
Paula Bäckden
Beiping Chu

Would encourage you to contact any member of this IWG for any further information or assistance in your efforts to encourage your States to ratify the convention.

II. HALF-YEARLY REPORT (JULY-DECEMBER)

Ann Fenech, *Co-Chair*

Throughout this period the IWG met several times through Teams both as a lead up to the signing ceremony of the Convention in Beijing in September and post the signing ceremony with a view to working towards encouraging as many member states to sign up to and ratify the Convention.

1. August 2023
   I was invited by the World Maritime University in Malmo to give an extensive lecture on the Convention at the Maritime Law Summer School that was held in Malmo. The Summer School was attended by numerous administrators from several countries and a perfect opportunity to introduce the Convention to persons forming an integral part of their countries maritime and port administrations.
2. 5th September 2023
   The highlight of the second half of 2023 was of course the signing ceremony of the Convention on the International Effects on Judicial Sales of Ships which was held on the 5th of September 2023 in Beijing. There were many discussions and exchanges between the CMI, the Chinese organisers and UNCITRAL as a run to the signing ceremony which was organised in Beijing by the Chinese Government and UNCITRAL and held in Hall A of the National Convention Centre in Beijing where literally hundreds of persons witnessed the signing ceremony.
   Fifteen states signed the Convention – China, Burkina Faso, Comoros, El Salvador, Kiribati, Grenada, Honduras, Liberia, Sao Tomi and Principe, Saudi Arabia, Senegal, Sierra Leone, Singapore, Switzerland and Syria.
   This was indeed a hugely special moment for the CMI and UNCITRAL and it was truly wonderful for many of us to be present, myself as President, Henri Li co-chair of the IWG on Judicial sales, Administrator Lawrence Teh, Peter Laurijssen – rapporteur of the IWG on Judicial Sales and representative of ICS consultative member of CMI, Beiping Chu Exco Member, Soren Larsen Deputy Secretary General of BIMCO consultative member of the CMI, Jan de Boer Legal Officer at the IMO consultative member of the CMI, George Theocharides representing WMU consultative member of the CMI and Dihuang Song, Titulary Member of the CMI.

The signing ceremony was followed by a seminar with presentations from numerous persons including Jose Angelo Estrella Faria Principal Leal Officer and Head, Legislative Branch at UNCITRAL, Henry Li, myself and Peter Laurijssen and Lawrence Teh.
I think it is fair to say that this was probably one of the happiest professional moments for Henry Li and myself and indeed all of those present and those who were not present who have been working so hard to see this day come to light.

The signing ceremony was widely covered by Trade Winds and Lloyds List and other media

3. In September I was invited by the German Maritime Law Association to deliver the keynote speech at the 125th Anniversary of the German MLA which was held at the Rathaus. Present at this very impressive ceremony was Mrs. Anna Gallina, Senator for Justice for the Free and Hanseatic City of Hamburg. I used the opportunity to speak about the links between the CMI and the various UN legislative bodies and appealed to the German Government to ratify the Convention.
4. Also in September Peter Laurijssen wrote a comprehensive article on Judicial Sales in the 4th Issue of the official magazine of the Institute of Chartered Ship brokers.
5. In October I was invited to present the Convention at the International Colloquium on Enforcement of maritime Claims organised by Ankara University National Center for the Sea and Maritime Law and the Republic of Turkiye Court of Cassation.
6. Also in October Eduardo Albors wrote an extensive article in the Spanish Shipowner's monthly review on the Beijing Convention.
7. ˆAlso in October the Maritime Law Association of Australia and New Zealand invited Senior Admiralty Judge Mr. Justice Angus Stewart to deliver a paper on the Convention where he delved into judicial sales in Australia, case law regarding the free and unencumbered title provided to purchasers in judicial sales and the importance of giving effect to such a free and unencumbered title.
8. Developments at EU level
   In the meantime the developments at EU level continued to progress very satisfactorily.
   At the end of June the Commission approved the policy to enable EU member states to become signatories to the convention which policy was adopted by the EU Council in December. This is of course a very significant moment for EU Member states clearing the way for them to sign and ratify the Convention during 2024.
   The EU showed its commitment to the project by following up on its participation at the Malta Symposium held in April, by organising together with the Spanish Presidency a very informative workshop in Madrid in October. The workshop was attended by delegates from the ministries of justice and transport of each EU Member state and it was the perfect opportunity for them to learn more about the importance of the convention.

   Eduardo Albors, Peter Laurijssen, Jan-Erik Pötschke, Petar Kragic and I all presented papers with a view to explaining various aspects of the convention. Jason Korbetis representing the owners of the Bright Star, Tilman Stein speaking for a number of German financiers and Angelo Estrella Faria all gave their own insights into the current challenges and the solutions provided by the Convention.
   EU Commissioner for Justice Didier Reynders made it crystal clear that the EU is totally dedicated to seeing that the convention is ratified and that it comes into force.

Once again the CMI would like to thank Angele Sears Debono from the EU Commission for her unstinting efforts in seeing the project through.

9. November was particularly busy. I was invited to explain the Convention at the British Maritime law Association Autumn meeting held at Quadrant Chambers in London, at the Maritime and Transport Committee session at the IBA Annual Conference in Paris and at the International Maritime Law Seminar held in London.
10. In November Jan-Erik Pötschke was invited to give a presentation on the Convention at the Deutsche Gesellschaft fur Transportrecht in Prague
11. Also in November Henry Li delivered a presentation on the Convention at the ICMA conference in Dubai during a session entitled Arrest, sale, enforcement and insolvency.
12. Finally also in November the States of Tanzania and Ecuador signed the Convention becoming the 16th and 17th State respectively to sign up to the Convention.

In the meantime and throughout this period, other members of the IWG have been involved in one on one meetings with various administrations with a view to explaining the advantages in the signing and ratification of the Convention.

All of this activity in such a short period of time illustrates and underlines the extraordinary level of commitment which all the members of the IWG as well as a great number of national maritime law associations and consultative members have exhibited all aimed at giving our members the opportunity of getting to know more about the Convention with a view to encouraging them to play a key role in convincing their countries to sign and ratify the convention.

This also further persuades me that the role of the CMI today goes beyond drafting conventions, but that once drafted and adopted the CMI must continue to play a key role in explaining the conventions to various administrations with a view to getting them into force.

The focus during 2024 will therefore be to get more countries to sign and ratify the convention and thus bring the Beijing Convention on Judicial Sales into force in record time.

Finally a big thank you to all the members of our IWG:
Henry Li – *co-chair IWG*
Peter Laurijssen – *Rapporteur*
Stuart Hetherington.
Alex Von Ziegler
Tomotaka Fujita
Frank Nolan
Jan-Erik Pötschke
Eduardo Albors
Andrew Johnson
Paula Bäckden
Beiping Chu

We would encourage you to contact any member of this IWG for any further information or assistance in your efforts to encourage your States to ratify the convention.

REVISION OF 1910 COLLISION CONVENTION AND RELATED INSTRUMENTS

I. HALF-YEARLY REPORT (JANUARY-JUNE)

John O'Connor, *Chair*

The IWG first met at the Antwerp colloquium in October 2022, in a meeting open to all delegates, on the subject of whether, and if so how, to improve the 1910 Collision Convention. The open meeting was very animated and revealed the main lines of discussion for the IWG.

Following Antwerp, a questionnaire was submitted to all MLAs on the expediency of revising the Convention. The questionnaire touched on some of the more controversial aspects of the review such as whether there was a demonstrated need to consider mandatory insurance for collision damage and direct action against liability insurers. MLAs were asked to respond before the CMI colloquium to be held in Montreal in June 2023.

Many MLAs did respond and the IWG rapporteur, Mr. Klaus Ramming of Germany, helpfully put together a spreadsheet for IWG members setting out the replies of each MLA to the questionnaire. The length and detail of many of the answers submitted demonstrated that the MLAs invested considerable time and effort in preparing replies to the questionnaire.

In Montreal in June two sessions were held. The first, a closed session, was the first face to-face meeting restricted to the members of the IWG. It again gave rise to animated discussions and the group canvassed several topics.

One of the key points noted was that the replies received to the questionnaire did not allow the IWG to draw simple conclusions. At the time of the meeting, 17 MLAs had responded. Several more replies have since been received and it is hoped that many MLAs will respond in the coming months. The replies vary greatly on almost all questions, including the issues noted above.

The IWG determined that there are different categories of proposed amendments, including those that are less controversial (for example, definitions) and those that are more controversial (liability and insurance).

It was debated whether any amending instrument should be a protocol to the 1910 convention or a new convention altogether and the advantages and disadvantages of each approach were discussed. For example, a new instrument would require states to not only ratify or accede to the new convention, but also to denounce the 1910 convention. It was agreed the form of instrument to be proposed by the IWG would depend on what changes would be included.

The IWG debated whether to split the review of the less-controversial proposals into subgroups, leaving the controversial proposals to be decided by the whole committee, or whether to take the bull by the horns and start with the controversial subjects up front.

Having decided on the latter, each member of the IWG was invited to:

1. Review the answers of the MLAs to the questions in the questionnaire related to the channeling of liability and liability to third parties.
2. Focus on the concept of fault-based/strict/joint liability to third parties for damage or injury caused by the collision to persons or property not on board the colliding ships.
3. Carry out a similar exercise for the answers to questions concerning mandatory insurance and direct action.
4. Evaluate the conclusions of the MLAs on the concept of mandatory insurance and direct action as concerns damage or injury to third parties not on board, i.e. do these liabilities, independently of liability to persons and property on board, include a public policy aspect sufficient to warrant mandatory insurance and direct action by third parties.

Following the closed IWG meeting, an open session was held during the Montreal CMI colloquium. Attendees heard a debate on some of the above issued, as to whether the controversial items merit a revision of the convention or not. The chair invited Mr. Francesco Siccardi of Italy to take the position promoting change and Mr. Dieter Schwampe of Germany to take the opposite view. The debate was lively, and attendees took the occasion to participate actively from the floor.

A date for a future IWG meeting has yet to be set, but IWG members were encouraged to carry out the above analysis before the end of the summer. The IWG will then be invited to decide what position should be taken on these most difficult points.

The next phase of deliberations will be extremely important for the IWG. A consensus on the controversial issues must be achieved, regardless of which position is adopted, in order to allow the IWG to make recommendations to ExCo on the revision of the Collision Convention. It is hoped that a position will be arrived at over the coming year. There is much work to be done and the chair thanks all IWG members for their valuable input.

II. HALF-YEARLY REPORT (JULY-DECEMBER)

John O'Connor, *Chair*

It is a pleasure to report on the work ongoing in the Review of the Collision Conventions International Working Group (IWG).

The IWG first met at the CMI Antwerp colloquium in October 2022 and again at the Montreal colloquium in June 2023. Following a face-to-face

meeting of the IWG in Montreal, an open meeting for all delegates was held. Both sessions gave rise to animated debate of the topics considered by the IWG. Those topics had previously been canvassed in a questionnaire sent to all Maritime Law Associations to obtain input from each. Several replies had already been submitted to the IWG before the Montreal meetings and over the second half of 2023, several more replies were received.

It would be an understatement to say that not all MLAs agree on the changes proposed to the 1910 Collision Convention. That convention was the CMI's first instrument, adopted the same day as the 1910 Salvage Convention. The latter convention was replaced in 1989, leaving the 1910 Collision Convention as the CMI's oldest instrument still in force.

From a review of the questionnaire and the replies received, the IWG determined that there are different categories of proposed amendments, including those that are less controversial (for example, definitions) and those that are more controversial (liability and insurance).

At the Montreal meetings, the IWG debated whether to split the review of the less controversial proposals into subgroups, leaving the controversial proposals to be decided by all members of the IWG, or whether to take the bull by the horns and start with the controversial subjects being reviewed by the whole working group.

The IWG decided to take the latter course and asked each IWG member to revert during the second half of 2023 on the following topics:

1. Review the answers of the MLAs to the questions in the questionnaire related to the channeling of liability and liability to third parties.
2. Focus on the concept of fault-based/strict/joint liability to third parties for damage or injury caused by the collision to persons or property not on board the colliding ships.
3. Carry out a similar exercise for the answers to questions concerning mandatory insurance and direct action.
4. Evaluate the conclusions of the MLAs on the concept of mandatory insurance and direct action as concerns damage or injury to third parties not on board, i.e. do these liabilities, independently of liability to persons and property on board, include a public policy aspect sufficient to warrant mandatory insurance and direct action by third parties.

Some answers have been received to date and a formal meeting of the IWG is scheduled to be held in the upcoming Gothenburg colloquium to be held in May 2024. If enough comments are received ahead of time, an interim virtual meeting of the IWG may be held in the weeks prior to the Gothenburg event. It is hoped that, in Gothenburg, the IWG will be able to decide what position should be taken on these most difficult points.

This phase of deliberations is extremely important for the IWG. A consensus on the controversial issues must be achieved, regardless of which position is adopted, in order to allow the IWG to make recommendations to ExCo on the revision of the 1910 Collision Convention. It is hoped that a position will be arrived at within the coming year.

III. QUESTIONNAIRE

John O'Connor, *Chair*

1. Definitions

1.1 Vessel

The 1910 Collision Convention applies to the collision of vessels (Art. 1) but does not feature a definition of a vessel.

Should the revised Convention define "vessel"?

If so, should the definition include all floating structures?

1.2 Ocean/Inland Navigation Vessels

The 1910 Convention applies to collisions between sea-going vessels and between sea going vessels and vessels of inland navigation (Art. 1), and thus not to collisions between vessels of inland navigation.

Should the revised Convention apply to any collision between vessels?

1.3 Collision

The 1910 Convention applies to collisions between vessels but does not say what a collision is.

Should the revised Convention define "collision"?

If so, should it include cases where damage is caused to one vessel by the manoeuvre of another even though there was no physical contact between the two?

Should it include vessels engaged in a towing situation?

Should it include collisions where both vessels are owned by the same beneficial owner?

2. Scope of Application

2.1 Reference to the Flag

The 1910 Convention applies if all vessels involved fly the flag of Contracting States (Art. 12), in whatever waters the collision occurs (Art. 1).

Should the scope of application of the revised Convention be expanded (i) to the effect that the revised Convention applies, irrespective of the involved vessels' flags, if the collision occurred within a Contracting State's internal waters, coastal sea and/or exclusive economic zone and (ii) to the effect that the revised Convention applies to any collision in any other waters if one or more of the colliding vessels flies the flag of a Contracting State?

2.2 REIO-Clause

Should the revised Convention include a REIO-Clause (Regional Economic Integration Organisation) which would in particular allow the EU to become a contracting party? This may in particular be relevant if the revised Convention features provisions on international private law (point 5 below), jurisdiction and recognition/enforcement (points 6 and 7 below).

3. Liability

3.1 Fault-Based Liability

The principal underlying decision of the 1910 Convention is that the vessels' liability arising from a collision is fault-based (Art. 2(1), Art. 3 and Art. 4(1)) and that there is no strict liability.

Should fault-based liability be maintained? If not, can you provide your reasoning for abandoning fault-based liability?

3.2 Fault of the Vessel

The 1910 Convention's liability concept is based on the fault of the vessel. However, the Convention does not identify the persons who must act negligently, but merely refers to "the vessel" being in fault.

Should this concept be maintained in the revised Convention, or should the revised Convention identify who needs to be at fault?

3.3 Title to Sue

The 1910 Convention is silent as to who is entitled to bring an action against the liable "vessel".

Should the revised Convention identify which parties (registered shipowners, bareboat charterers, etc.) may bring suit against the liable vessel?

3.4 Crew, Pilot etc. Channelling of Negligence

The 1910 Convention does not preclude entities other than the shipowners being liable for collision damage.

Should this concept to be maintained in the revised Convention or should liability be channelled solely to the owner of the liable vessel?

3.5 Pro Rata versus Joint Liability

The 1910 Convention liability system provides for joint liability of the involved vessels in relation to third parties' personal injury claims (Art. 4 (3)). A vessel that settles the full amount of the claim may recover from the other vessel in proportion to its share of liability (Art. 4 (3)).

The 1910 Convention does not apply to damage caused to the property of third parties not on board one of the vessels involved. For example, a collision leading to damage to a bridge. It is to be presumed that national law would apply to any claim for such damage.

However, in respect of claims to property damage on board one of the colliding vessels, the 1910 Convention provides for a pro-rata liability in proportion to the degree of fault of the vessels involved (Art. 4 (1) and (2)). This becomes relevant in cases where two or more than two vessels are involved in the collision and one vessel seeks to recover from one or more of the other vessels, or where there is damage to property, in particular cargo, and the property owner claims from the two (or more) vessels involved.

Should the joint liability for personal injury claims of all involved vessels found to be at fault be explicitly extended to liability for third-party property damage in the revised convention? Even if not on board one of the colliding vessels? If so, what justifies your reasoning?

3.6 Defects in the Vessel

Under the 1910 Convention, the vessel owner will not be liable if the collision was caused by some defect in the vessel which the owner, by applying due diligence in all respects, was unable to detect.

Should there be an exception to the effect that the vessel should be strictly liable for such defects irrespective of fault?

If so, should the revised Convention then define "defects", for which no fault is required to lead to liability?

3.7 Legal Presumptions

Art. 6 (2) of the 1910 Convention provides that legal presumptions relating to fault are not applicable when it comes to determining liability under the Convention.

Should the revised Convention expressly adopt some internationally recognised presumptions, and if so, what type of presumption?

3.8 Recoverable Damages

The 1910 Convention does not address what damages are recoverable. The Lisbon Rules 1987, issued by CMI, (https://comitemaritime.org/work/collision/), include detailed principles as to the recoverable damages and their assessment in typical collision cases.

Should the revised Convention define recoverable damages?

If so, should the Lisbon Rules 1987 on recoverable damages in collision cases be made part of the revised Convention?

4. Mandatory Insurance

A number of international liability conventions, including oil pollution conventions, provide that the vessel owner must maintain insurance which covers claims under the respective conventions. These conventions often have a public policy aim and may not be an appropriate model for the 1910 Collision Convention. In Europe, EU-Directive 2009/20 provides that the vessel owner must maintain insurance that covers claims up to the limitation amounts of the 1996 LLMC relevant for the vessel. The Directive does not provide for direct action against the vessel's liability insurers.

Should the revised Convention provide for mandatory insurance? If so, what justifies this change in your view?

4.1 Direct Actions and Defences

If mandatory collision insurance is to be introduced, should the revised Convention provide for direct actions by the damaged parties against the liability insurers of the liable vessel? If so, what justifies this change in your view?

If so, how would this be achieved given the usual sharing of liability cover between the vessel's hull and machinery and P&I insurers?

If it were to be achieved, should the insurers benefit from any defence they might have had vis-à-vis their insured related to their policy? Would this include the bankruptcy or winding up of the vessel owner and pay-to-be-paid clauses?

5. International Private Law

The 1910 Convention provides for a unified liability regime covering claims arising from the collision. Any further issues, e.g., the recoverable damages, the identity of the liable parties, title to sue etc., are left to the law otherwise applicable, determined by international private law principles. These principles normally consider each claim separately, to the effect that a claim by a first vessel against a second may be decided on different rules of law than those applicable in the claim by the second vessel against the first, even though both claims concern the same collision.

Should a revised Convention include international private law rules on the law otherwise applicable to all claims, seeking to identify one law that is relevant? If so, should the revised Convention adopt the choice of law provisions of articles 4 and 5 of CMI's 1977 Draft International Convention for the Unification of certain rules concerning civil jurisdiction, choice of law, and recognition and enforcement of judgements in matters of collision (the "CMI 1977 Rio Draft Convention"), published in the CMI Yearbook 1977 Part I, p. 22, https://comitemaritime.org/publications-documents/cmi-yearbook/ ?

6. Jurisdiction

The 1910 Convention does not include any provisions as to jurisdiction.

Should a revised Convention provide for jurisdiction?

If so, should the jurisdiction be based on the International Convention on certain

rules concerning civil jurisdiction in matters of collision, 1952 or on the CMI 1977

Rio Draft Convention?

The CMI 1977 Rio Draft Convention allowed for jurisdiction:

a) where the defendant has his habitual residence or domicile, or principal place of business;
b) in the internal waters or territorial sea of which the collision occurred;
c) where a vessel involved in the collision (other than the plaintiff's own vessel) or a vessel under the same ownership lawfully subject to arrest, has been arrested or security has been provided to avoid arrest on account of the collision;
d) where the defendant has property subject to attachment under the law of that State and such property has been attached or security has been provided to avoid attachment on account of the collision; or
e) where a limitation fund has been properly constituted by the defendant in accordance with the law of that State on account of the collision.

7. Recognition and Enforcement

Neither the 1910 nor the 1952 Convention include regulations on the recognition and enforcement of judgments in collision matters. The CMI

1977 Rio Draft Convention provided that State Parties would recognize judgments from other State Parties.

Should such provisions be adopted in the revised Convention, e.g., to the effect that judgments in collision matters rendered by the court of one Contracting State may be enforced in another Contracting State?

8. Autonomous and Unmanned Ships

Maritime Automated Surface Ships are coming. It is not yet clear whether this will require amendments to several conventions or the creation of a single MASS convention.

Should the revised Convention stipulate that it applies to any vessel whether manned or autonomous or is it too early to consider including autonomous vessels?

If autonomous vessels should be included, should the revised Convention include specific rules for collisions involving autonomous ships?

9. Conclusions

In light of the above questions, do the revisions to the 1910 Collision Convention which your association supports justify the amendment of the Convention at all, or does the risk of creating a new convention which might not be as universally adopted as the 1910 Convention lead your association to the overall conclusion that the Convention should remain as it is at present?

POLAR SHIPPING

I. HALF-YEARLY REPORT (OCTOBER 2022-JUNE 2023)

Aldo Chircop, *Chair*

1. INTRODUCTION

This report covers the reporting period from 1 June October 2022 to 30 June 2023.

2. IWG ACTIVITIES SINCE THE LAST REPORT

The IWG continues to operate through subgroups. The Cruise Passengers' Rights subgroup completed its work following submission two working papers. Currently, Antarctic Shipping continues to work on a working paper. The COLREGS in Polar Environments subgroup has not reported updates. Following the Antwerp meeting, the IWG subgroups continued work through email communications.

3.1 Antarctic shipping

D. Baker chairs this subgroup composed of P. Buhler, K. Crosbie, G. Goto, K. Khosla, D. Rothwell and Haco van der Houven van Oordt (AKD Benelux Lawyers). The subgroup continued work on the IMO liability regimes and the Liability Annex of the Environment Protocol of the Antarctic Treaty. Work on the initial report, as reworked by D. Baker and Stacey Fraser, continued in view of additional extensive feedback received. D. Baker will provide an update at CMI Montreal on 14 June 2023.

3.2 COLREGS in polar environments

The IWG Chair has not received updates on the subgroup's work in a long period. At CMI Montreal the IWG will discuss whether the subgroup should be relaunched or discontinued.

3.3 Cruise passengers' rights

This subgroup successfully submitted the two working papers assigned to it. The subgroup completed the second working paper on Antarctic passenger rights following revisions undertaken by E. Mallach on the basis of comments received during CMI Antwerp. The paper has been submitted to the CMI Secretariat for uploading to the CMI website and eventual publication in the CMI Yearbook. The Chair thanks the subgroup members for the informative, thorough and timely work (L. Rosenberg Overby (chair;

lead author on Arctic passengers), P. Buhler, K. Crosbie, E. Mallach (lead author on Antarctic passengers) and D. Rothwell).

4. CMI MONTREAL

The IWG will be meeting at 09.00-13.00. The meeting will be in hybrid mode at CMI Montreal to discuss work in progress and explore proposals for new tasks. The plan is to gather as many IWG members to meet in person and provide a zoom link for virtual participants.

The provisional meeting agenda is as follows:
- Draft meeting agenda (for adoption)
- Annual report to ExCo (for information)
- Review of progress of work in subgroups:
  - Passengers' rights in Arctic and Antarctic shipping: work completed, and subgroup discontinued (for information)
  - Antarctic shipping: Discussion of draft working paper – "The New Alsatia for Liability and Compensation for Ship-Sourced Pollution Damage?" (D. Baker)
  - COLREGS: discussion on relaunching or discontinuing this work item (Chair)
- Consideration of and decision on new work items:
  - The interface between the implementation of Indigenous rights (UNDRIP) and governance of Arctic shipping (Chair)
  - Coastal states' responsibility for the establishment and maintenance of navigation aids and services in Arctic waters (I. Basaran)
  - Other topics proposed during meeting
- Any other business
- Next steps

The IWG Chair also notes that the organizers of the CMI Montreal Symposium have included a Young CMI session focused on polar shipping to be chaired by the IWG Chair.

II. HALF-YEARLY REPORT (JULY 2023-DECEMBER 2023)

1. INTRODUCTION

This report covers the reporting period from 1 July 2023 to 31 December 2023.

2. IWG ACTIVITIES SINCE THE LAST REPORT

2.1 Antarctic shipping

The subgroup chaired by David Baker finalized the working paper on the IMO liability regimes and the Liability Annex of the Environment

Protocol of the Antarctic Treaty. The working paper was kindly distributed to the Secretariats of the Antarctic Treaty, IMO, and IAATO by CMI President Ann Fenech, with a note advising the Secretariats to follow-up on the issues identified in the paper with D. Baker. The working paper was also submitted to the CMI Yearbook for publication.

2.2 Follow-up to CMI Montreal

At our meeting on 14 June 2023 in conjunction with CMI Montreal, the IWG agreed to establish two new subgroups to work on: (1) the interface between the implementation of Indigenous rights (UNDRIP) and the governance of Arctic shipping (chaired by A. Chircop); and (2) coastal states' responsibility for the establishment and maintenance of navigation aids and services in Arctic waters (chaired by I. Basaran).

To date, the subgroups have not commenced substantive work. With respect to subgroup 1, the IWG Chair followed up on the IWG's decision to invite the Inuit Circumpolar Council (ICC), which holds provisional consultative status at the IMO, to partner on the subgroup's work. Although there was an earlier indication of interest, the Chair has yet to receive a formal response.

The IWG assisted the CMI Secretariat with various follow-up requests concerning presentations at the Montreal Colloquium, contributions to the CMI Yearbook and reporting. The IWG also requested the Secretariat to update the IWG's page on the CMI website.

2.3 IWG membership

D. Baker informed the Chair that his role as representative of the International Group on the IWG would end on 31 December 2023. D. Baker indicated his interest in remaining a IWG member in a personal capacity and recommended appointment of a new International Group representative on the IWG. The Chair will follow up on this matter with the CMI President and ExCo.

3. NEXT STEPS

The IWG's next steps are as follows:

- Continuing efforts to mobilize the two new subgroups.
- Preparations for the IWG's meeting in association with CMI Gothenburg.
- Appointment of a new International Group representative in the IWG.

III. WORKING PAPER
ANTARCTICA: THE NEW ALSATIA FOR LIABILITY AND COMPENSATION FOR SHIP-SOURCED POLLUTION DAMAGE?

David Baker, Stacey Fraser, Emily Ferguson

Subgroup	**Antarctic Shipping**
Chair	David Baker
Lead author	David Baker, Stacey Fraser, Emily Ferguson
Contributors[1]	Leyla Pearson
Working paper history	• Commissioned by IWG: October 2019 • Considered by the subgroup: during 2021-2023 • Considered by the IWG: CMI Antwerp, 19 October 2022 & CMI Montreal, 14 June 2023 • Uploaded to CMI website: Anticipated in August 2023 • Published in 2022 CMI Yearbook: Anticipated in CMI Yearbook 2023

Introduction

Antarctica,[2] the world's southernmost continent is known for its frozen, remote, and mystifying landscape. Equally mystifying are the international rules governing the obligations, liabilities, and compensation for ship-sourced environmental damage in its surrounding waters.

An increasing range of vessels operate in Antarctic waters each year to undertake scientific research, tourism ventures, and commercial fishing, among other activities. The increase in maritime activities inherently carries the increased risk of a casualty. A casualty in Antarctic waters (after any risk to the safety of life at sea abates), brings the possibility of significant adverse impacts to the environment, whether through the escape of oil or other harmful substances from a ship or dealing with the wreck or equipment from on board the ship itself.

The maritime industry has long recognized the need for uniform rules for safety standards and measures to reduce the risk of a casualty and, in the event of a casualty, for the responsibilities, liabilities, and compensation for ship-sourced pollution damage.

But Antarctica has unique characteristics, and activities in Antarctica are governed through the Antarctic Treaty System. The Antarctic Treaty System includes the Antarctic Treaty and related agreements, such as the Protocol on Environmental Protection to the Antarctic Treaty (the **Protocol**).[3]

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[1] The paper also benefitted from comments provided by Dr. Didem Algantürk Light, Ilker Basaran and Peter Cullen.

[2] For the purpose of this paper, Antarctica is the area south of 60° South Latitude.

[3] The Protocol on Environmental Protection to the Antarctic Treaty (opened for signature on 4 October 1991 and entered into force on 14 January 1998).

The Protocol seeks to provide "comprehensive protection of the Antarctic environment and dependent and associated eco systems".[4] In furtherance of that objective, in 2005 the Antarctic Treaty Consultative Parties adopted Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty[5] (the **Liability Annex**), specifically to require the establishment of contingency plans and provide for prompt and effective response to environmental emergencies in the Antarctic.

However, despite being some 13 years in the making, and now almost 17 years since its adoption, the Liability Annex is yet to enter into force.[6] Even once the Liability Annex comes into force, there is uncertainty over the interplay of shipowners' rights and obligations under various International Maritime Organization (**IMO**) regimes, including whether liabilities created under the Liability Annex are subject to global limitation of liability regimes (such as the 1976 Convention on Limitation of Liability for Maritime Claims and the 1996 Protocol thereto (**LLMC**)).[7]

This paper assesses the interplay between the different international legal frameworks that might govern the allocation of responsibility, liability, and compensation in the event a ship-sourced casualty causes environmental damage in Antarctic waters.

It first provides an overview of the IMO conventions and the legal status of Antarctic waters before considering the application of existing IMO liability instruments in Antarctic waters and the measures to protect the environment under the Antarctic Treaty System. It then analyses in more detail some practical questions around the operation of the Liability Annex, in particular its relationship with the LLMC, and what that means for a shipowner's obligations and liability for an environmental emergency in Antarctic waters, both now and when the Liability Annex enters into force.

It concludes that international conventions developed through the IMO creating liability for ship-sourced pollution damage offer little assistance for incidents in Antarctic waters, due to the geographic limits on their definition of pollution damage or obligations. This means that until the Liability Annex comes into force, there is a legal vacuum of internationally agreed rules governing obligations, liabilities, or compensation for ship-sourced pollution casualties in Antarctic waters.

Arguably the position will not greatly improve once the Liability Annex comes into force. In part, this is because the liabilities are limited to the costs of responding to an environmental emergency and impose no liability

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4 The Protocol on Environmental Protection to the Antarctic Treaty, above n 2, Article 2.

5 Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty (adopted at the 28th Antarctic Treaty Consultative Parties in Stockholm, 2005).

6 The Liability Annex will enter into force once it has been approved by all required Antarctic Treaty Consultative Parties (ATCP), being all 28 ATCP at the Antarctic Treaty Consultative Meeting in 2005 in Stockholm. As of 2 August 2023, 19 of the required 28 Consultative Parties had approved the Liability Annex.

7 The 1976 International Convention on the Limitation of Liability for Maritime Claims (LLMC) was adopted by the International Maritime Organisation in 1976 and entered into force internationally in December 1986. The convention was later amended by the LLMC Protocol, which entered into force internationally on 13 May 2004.

for other types of damage or loss that may follow an incident. Of greater concern is the significant risk of inconsistency under the Liability Annex in the standards that State Parties might impose on their operators, or in determining what is a reasonable response in Antarctic waters, and whether a shipowner's right to limit liability is governed by the Liability Annex or the LLMC.

The authors suggest that the IMO, as the competent organization, is best placed to bridge the current gap on liabilities and compensation, potentially through a protocol to extend existing IMO liability conventions to apply in Antarctic waters. But the Antarctic treaty process can still serve a useful purpose for maritime emergencies in Antarctic waters by deploying the co-operation that underpins the regime towards planning for a State led response capability in Antarctic waters, with a sustainable funding system.

IMO Conventions

The maritime community has the dubious privilege of being well experienced in responding to shipping casualties and dealing with the associated issues of ship-sourced environmental damage. The *Titanic*, the *Torrey Canyon*, *Exon Valdez*, the *Erika*, *Prestige, Tricolour* and *Costa Concordia* are just some of the names etched in the collective memory of the maritime industry.

In response, the IMO has developed a broad framework of instruments that seek to minimize the risk of a casualty and/or pollution damage through ship design and/or operational means, to plan how to prepare for a potential casualty and its consequences, and to deal with a casualty that has occurred.

The IMO conventions set minimum standards for the construction, design and equipment of ships, and require systems for safety, security[8] and prevention of pollution,[9] agree search and rescue co-ordination,[10] deal with salvage,[11] and impose obligations on States to have measures in place to prepare, respond and co-operate (either nationally or with other countries) when dealing with pollution incidents.[12] There are agreed rights for States to take measures on the high seas to protect coastal interests[13] and a suite of

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[8] International Convention for the Safety of Life at Sea (**SOLAS**), 1974 (adopted 1 November 1974; entered into force 25 May 1980).

[9] International Convention for the Prevention of Pollution from Ships (**MARPOL**), 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997 (entered into force 2 October 1983).

[10] International Convention on Maritime Search and Rescue (**SAR**) (adopted 27 April 1979; entered into force 22 June 1985).

[11] International Convention on Salvage (adopted 28 April 1989; entered into force 14 July 1996).

[12] International Convention on Oil Pollution Preparedness, Response and Co-operation (**OPRC**), 1990 (adopted 30 November 1990; entered into force 13 May 1995) and Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances (**OPRC-HNS Protocol**), 2000 (adopted 15 March 2000; entered into force 14 June 2007).

[13] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (adopted 29 November 1969; entered into force 6 May 1975) and the Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil (adopted 1973; entered into force 1983).

international conventions governing liability and compensation for pollution damage from oil tankers,[14] bunker oil,[15] and (though yet to enter into force) hazardous and noxious substances (**HNS**),[16] as well as the risk to safety of navigation and pollution from wrecks.[17]

The practical operation of the IMO regimes is facilitated by a certification regime, that enables both Flag State and Port State control measures to verify compliance.[18]

The purpose of the liability and compensation conventions is to create a uniform international regime that defines the specific scope of liability imposed, makes that liability strict (subject only to limited exceptions), and ensures that there is sufficient financial security available to meet the compensation required to cover the liability imposed, and requires evidence of such security.

Originally the impetus was the effect of pollution on the interests of coastal states: primarily concerned with the costs of clean up, but increasingly responding to the economic impact of pollution damage and recognizing the importance of environmental remediation. The IMO liability and compensation regimes are supported by Protection and Indemnity Clubs (**P & I Clubs**),[19] not only by the availability of insurance for liabilities, but through the experience and practice in dealing with and managing shipping casualties and resulting claims around the world.

For liability conventions, in addition to requiring a certificate as evidence of holding the appropriate financial security, there is provision for a direct right of action against the party providing that financial security (to avoid the risk of an impecunious shipowner) and provisions to address the recognition and enforcement of judgements amongst State Parties.

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[14] International Convention on Civil Liability for Oil Pollution Damage (**CLC**) (adopted 29 November 1969; entered into force 19 June 1975); Replaced by 1992 Protocol (adopted 27 November 1992; entered into force 30 May 1996).

[15] International Convention on Civil Liability for Bunker Oil Pollution Damage (adopted 23 March 2001; entered into force 21 November 2008).

[16] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (**HNS**), 1996 (and its 2010 Protocol) (adopted 3 May 1996; Not in force); superseded by 2010 Protocol (adopted 30 April 2010; Not yet in force).

[17] Nairobi International Convention on the Removal of Wrecks (adopted 18 May 2007; entered into force 14 April 2015).

While not pollution related, for completeness there is also a convention dealing with the liabilities that arise from carrying passengers and their luggage by sea: Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (**PAL**) (adopted 13 December 1974; entry into force 28 April 1987) and its 2002 Protocol (adopted 1 November 2002; entered into force 23 April 2014).

[18] See for example, UNCLOS Articles 217 & 218; SOLAS Chapter 1, Regulations 12 & 19; MARPOL Articles 5 & 6; Bunkers Convention above n 14, Article 7(5) &(9).

[19] P & I Clubs are mutual associations whereby shipowners mutually assure each other of indemnity (subject to P & I Club Rules) against third party liabilities, as compared to traditional insurance provided by a third party. Shipowners initially developed mutual clubs to cover risk relating to hull and machinery when traditional insurance cover was difficult to obtain. P & I Clubs developed in response to those risks not covered by hull insurance.

Equally, the right to limit liability is a long-established feature of maritime law. Limitation gives a shipowner (and certain defined others)[20] a right to limit their liability for maritime claims up to a maximum sum, determined by reference to the tonnage of the ship, regardless of the actual amount of the claim arising.

Where liability exceeds the limitation amount, claims are paid on a pro rata basis. Although the concept of limitation is not without criticism, one practical advantage is certainty about financial liability and ensuring the availability of insurance coverage.[21]

While the relationship between the various IMO liability conventions and the right to limit liability under the 1976 LLMC and its 1996 Protocol is somewhat less uniform, shipowners (and the insurance market) maintain a high degree of certainty over their financial exposure.

The international conventions adopted by the IMO are born of experience, well understood, and supported by entire industries and organizations, both public and private, and domestic and international in nature. How these existing IMO instruments apply in Antarctic waters, given its unique legal status, and are affected by, or interact with, other international regimes is of practical significance. The desire for uniformity and harmonization sits at the core of international maritime law.

Legal Status of Antarctic Waters

Antarctica is the only continent without a recognized sovereign state or native human population. There are different views as to the legal status of Antarctica, and whether it is even open for territorial claims. Seven countries have made territorial claims to the continent,[22] but these claims are not recognized by any government in the international community save for the claimants themselves, and three of the claimants do not recognize the lawfulness of each other's claim.[23] Some territorial claims overlap and only 15 percent of the Antarctic continent is unclaimed.

Antarctic Claims

States have made claims based on title including occupation through establishment of scientific bases, discovery, geographical proximity, and proclamations of sovereignty.[24] Opponents say these legal theories are largely unsuitable for Antarctica; effective occupation is inherently ill-

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[20] Including salvors, charterers and insurers: see LLMC above n 6, Article 1.

[21] For maritime claims, the establishment of a limitation fund also provides a measure of protection against enforcement of a claim against other assets; LLMC Article 13, above n 6.

[22] Argentina, Australia, Chile, New Zealand, France, Norway, and the United Kingdom. Russia and the United States of America have reserved the right to make territorial claims.

[23] Chile, Argentina, and the United Kingdom. See Christopher C Joyce "Antarctica and the Law of the Sea" (Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1992), p. 75.

[24] See generally, Federica Mucci & Fiammetta Borgia "The Legal Regime of the Antarctic", in David Joseph Attard (ed) IMLI Manual of International Maritime Law, Volume 1, The Law of the Sea, (Oxford University Press, Oxford 2014); and also Mario Oyarzabal, "The Legal Regime of Antarctica", CMI Presentation, 2018.

suited to Antarctica as possession must be actual, continuous, and useful, and discovery does not assist in determining competing claims or the geographical limit of a claim.[25]

The lack of an indigenous population together with competing territorial claims, and an active scientific interest in Antarctica, gave rise to the 1959 Antarctic Treaty (the **Antarctic Treaty**).[26] The purpose of the Treaty was to ensure that Antarctica would be used for peaceful purposes only, to encourage freedom of scientific investigation and cooperation, and exchange scientific observation and results between the Parties. The negotiations were led by the 12 original signatories to the Treaty,[27] being countries whose scientists had an active interest in the Antarctic region at the time. This included those seven countries which had asserted territorial claims over Antarctica, as well as the USSR, the United States of America (who reserved their rights), Belgium, Japan, and South Africa.

There are now 54 State Parties to the Antarctic Treaty. State Parties are distinguished between Consultative and Non-Consultative Parties. In addition to the initial signatory states, acceding States will be regarded as Consultative Parties if they have carried out established scientific research. Only Consultative Parties have decision-making powers.

A core component of the Antarctic Treaty is Article IV, often referred to as the 'agreement to disagree.' Article IV effectively pauses historic territorial claims while prohibiting new claims to territorial sovereignty.[28]

While this solution under the Antarctic Treaty system has allowed cooperation between countries to conduct scientific and other peaceful activities in Antarctica, it does not provide a permanent legal solution to the question of territorial claims or resolve the question of Antarctica's legal status. These territorial claims have merely been "frozen" and could resurface at any time should a party to the Antarctic Treaty wish to rekindle its claim.[29]

Antarctic Waters

The continuing uncertainty on the legal status of the territory of Antarctica extends to the status of Antarctic waters. The Antarctic Treaty itself does not offer much assistance, providing only that the provisions of the Treaty shall apply to the area south of 60º South Latitude, including all ice shelves, and that "nothing in the present Treaty shall prejudice or in any way affect the

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[25] Linda A. Malone, "The Waters of Antarctica: Do They Belong to Some States, No States, Or All States?", 43 Wm. & Mary Envtl. L. & Poly Rev. 53 (2018), http://scholarship.law.wm.edu/wmelpr/vol43/iss1/3.

[26] The Antarctic Treaty (opened for signature 1 December 1959; entered into force in 1961).

[27] Argentina, Australia, Chile, New Zealand, France, Norway, United Kingdom, USSR, United States of America, Belgium, Japan, and South Africa.

[28] Article IV in full states: "No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting, or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

[29] Jill Grob, "Antarctica's Frozen Territorial Claims: A Meltdown Proposal". 30 B.C. Int'l & Comp L Re. 462 (2007).

rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area".[30]

Consequently, the legal status of Antarctic waters depends on the view taken of the relationship between the Antarctic Treaty system and the law of the sea (including at the time of the Antarctic Treaty and developments since), and the validity of assertions of a territorial sea, exclusive economic zone, or continental shelf by claimant States.

The issues and arguments are varied and beyond the scope of this paper. But by way of brief illustration, under the 1982 United Nations Convention on the Law of the Sea (**UNCLOS**),[31] a coastal State has rights to the adjacent territorial sea, contiguous zone, exclusive economic zone (**EEZ**) and extended continental shelf. However, most countries dispute the existence of any coastal State in Antarctica, and consequently reject the idea that a maritime zone can be claimed by any State.

Claims to a territorial sea themselves do not breach the "agreement to disagree clause", as the right to claim a territorial sea was recognized under customary international law before both UNCLOS and the Antarctic Treaty. However, at the time of the adoption of the Antarctic Treaty, recognition of a territorial sea was less than 12 nautical miles (**nm**),[32] and the EEZ was not a concept. Even if a maritime zone might be theoretically possible, practical issues around its delineation in Antarctic waters arise.[33]

Suggestions that the Antarctic Treaty system operates as an objective regime giving the waters a special legal status raises questions as to the ability of a limited number of States to determine the scope and content of international obligations and impose these on other States (including non-State parties). Alternatively, while a "common heritage of mankind" concept has been explored (in that no State can appropriate, or make sovereign claims over, the area governed by the principle), there is uncertainty over its content and therefore its ability to impose obligations.

In practical terms, the consequence of such opposing views means that Antarctic waters may be regarded variously as:

1. Part of the high seas.
2. Of special legal status.
3. Part of a territorial sea.
4. Part of the EEZ of a claimant State.

Notwithstanding the position under international law, States may still

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[30] Antarctic Treaty, above n 26, Article VI.

[31] United Nations Convention on the Law of the Sea (Montego Bay, opened for signature 10 December 1982; entered into force 16 November 1994).

[32] Prior to UNCLOS Article 3, specifying the right to a territorial sea up to 12 nautical miles (**nm**), the breadth of the territorial sea had been described by reference to the 'power of arms' or the 'canon shot rule,' consistent with its origin as a 'buffer' zone to protect a coastal State. By the 19th Century, it was generally accepted as extending up to 3 nm. See Kevin Aquilina, "Territorial Sea and the Contiguous Zone", in David Joseph Attard (ed), IMLI Manual of International Maritime Law, Volume 1, The Law of the Sea, (Oxford University Press, Oxford 2014).

[33] For example, practical problems include determining what is the baseline where the coast is formed by potentially unstable ice and ice shelves, and the problem of resolving overlapping claims. See Federica Mucci & Fiammetta Borgia, above n 24.

implement domestic legislation to reflect their internal position. For example, Australia implemented amending legislation in 1994 to delineate its EEZ and produces maps and charts with the Australian Antarctic Treaty EEZ shown.[34]

Ultimately, as things currently stand, there are no recognized maritime zones established by any States, and any maritime zone claim asserted by a State over Antarctic waters, will likely be disputed.

This highlights the challenges that may result if there are no internationally agreed rules governing obligations, liability, and compensation for ship-sourced pollution casualties in Antarctic waters. So, what exactly has been agreed by the international community?

Application of IMO liability conventions to Antarctic waters

This paper considers two IMO conventions most relevant to the types of ship-sourced marine pollution likely to occur in Antarctic waters as a result of a shipping casualty.[35] Namely, those that deal with pollution from the oil used to fuel the vessel – The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (**Bunker Convention)**[36] – and that impose obligations for dealing with the wreck itself – The Nairobi International Convention on the Removal of Wrecks 2007 (**Wreck Convention**).[37]

The Bunker Convention provides a liability regime for pollution damage caused by spills of oil when carried as fuel in ships' bunkers. It establishes strict liability for the shipowner for pollution damage. Pollution damage being defined under the convention to mean:[38]

> loss or damage caused outside of the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profits for such impairment shall be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and the costs of preventive measures and further loss or damage caused by preventive measures.

Preventive measures are further defined to mean "any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage".[39]

Meanwhile, the Wreck Convention imposes obligations and rights in relation to wrecks that constitute a hazard and have the potential to affect adversely the safety of navigation or result in major harmful consequences

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[34] Dodds, Klaus J "Sovereignty watch: claimant states, resources, and territory in contemporary Antarctica" Polar Record 47 (3) at 231-243.

[35] The carriage of Heavy Fuel Oil (**HFO**) in Antarctica is prohibited by MARPOL so the Civil Liability Convention and Fund Convention are unlikely to be triggered.

[36] Above n 14.

[37] Above n 16.

[38] Bunker Convention, above n 14 at Article 1(9).

[39] Bunker Convention, above n 14, Article 1(7).

to the marine environment or related interest of one or more States. This includes a range of interests of a coastal State, from coastal, port and fisheries activities, to tourist attractions and other economic interests, and the health of the coastal population, including conservation of marine living resources and wildlife.[40]

The Wreck Convention makes shipowners strictly liable for the costs of locating, marking, and removing a wreck that is a hazard. The onus to remove the wreck is on the registered owner, but there are also options available for the State affected by the wreck should the registered owner not cooperate or is unable to be contacted.

Under both conventions, shipowners are strictly liable for their obligations subject to only limited exceptions. Shipowners are required to have insurance or provide other financial security to cover liabilities up to a limit consistent with the LLMC (and to have evidence of such insurance/financial security), and there is a direct right of direct action against insurers.

Neither the Bunker Convention nor the Wreck Convention contain their own limits of liability,[41] but a shipowner's liability under either regime remains subject to the shipowner's right to limit liability under any applicable national or international regime, such as the LLMC.[42]

In terms of existing IMO conventions, in the event of a shipping casualty in Antarctic waters, the consequences of that casualty on the Antarctic environment are most likely to include the types of liabilities imposed on shipowners under the Bunker and Wreck conventions.

Whether these two conventions apply in Antarctic waters will inform the scope of liabilities imposed on a shipowner in the event of an incident in Antarctic waters both now, and when the Liability Annex comes into force.

Scope of Application

Both the Bunker Convention and the Wreck Convention establish obligations and liabilities by reference to maritime zones or other geographical reference points.

Although the Bunker Convention establishes liability for pollution damage (defined above), Article 2 sets out its 'scope of application' and goes on to say:

"This convention shall apply exclusively;"

a) to pollution damage caused:
   (i) in the territory, including the territorial sea, of a State Party, and
   (ii) in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

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[40] Wreck Convention, above n 16, Article 1(6).
[41] Compared to CLC above n 13 and HNS (albeit yet to enter into force) above n 15.
[42] Bunker Convention, above n 14, Article 6; Wreck Convention, above n 16, Article 10(2).

b) to preventive measures, wherever taken, to prevent or minimize such damage.

Similarly, the Wreck Convention gives rights to States to take measures in relation to wrecks that pose a hazard in the 'Convention area' which is defined as:[43]

> The exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baseline from which the breadth of its territorial sea is measured.

The Wreck Convention also has an 'opt in' provision for a State to apply the convention terms to wrecks in its territorial sea. The difference in the Wreck Convention's treatment of the territorial sea and EEZ reflects the tension between the desire for uniformity and commercial certainty, and the recognition of the sovereign rights that States have within their territorial sea. Unlike other maritime zones, States do not generally require an international convention to establish rights or impose obligations on those who voluntarily submit to its jurisdiction.

The reference to 'the territory', the 'territorial sea of a State Party' and the 'exclusive economic zone' is a reference to a maritime zone. While not defined further within those conventions, there is no question that the meaning of those terms will be the meanings as given under UNCLOS, reflecting what is (now) customary international law. But, as discussed above, there is no recognized territorial sea or EEZ or equivalent in Antarctic waters.

There may be some argument that the reference to "an area 200 miles from the baseline" could mean something different than a defined maritime zone, as it does not require a specific declaration from a State.[44]

Even if that was so, the phrase is qualified by the words "established in accordance with international law". Given the conflicting views on the legal status of Antarctica, whether there can be a coastal State, or any delineation of a maritime zone, together with the 'freezing of new claims' under the Antarctic Treaty, there is no basis on which it can be said there is any 'generally accepted principle of international law' where a State can establish an area 200 miles from a baseline. The opposite is true. No State is likely to recognize any other State's assertion of a territorial claim, associated territorial sea, or any assertion of rights over a maritime zone (however defined) in Antarctica.

The cost of preventive measures under the Bunker Convention are expressly not subject to a geographical limit. Instead, the liabilities imposed (and defined) refer to "preventive measures, *wherever taken,*" [emphasis added].[45]

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[43] Wreck Convention, above n16, Article 1(1).

[44] *Cf* the establishment of the Exclusive Economic Zone (**EEZ**).

[45] Bunker Convention, above n 14, Article 1(7).

While the words "wherever taken" might suggest a possibility of providing no geographical limitation to where they are taken, the preventative measures must be taken 'to prevent or minimize *such damage*' [emphasis added].

In this context, it is suggested the principles of interpretation would require 'such damage' to refer to the 'pollution damage' as defined.[46] It follows, that for any liability to be imposed these preventative measures would need to be taken to prevent damage to a State Party's territory, territorial sea, or EEZ rather than, for example, a response to such damage occurring on the high seas but where there is no reasonable risk of pollution damage occurring in a State Party's territory, territorial waters or EEZ.

The result is that these two conventions will not impose liabilities for:

- pollution damage from bunker oil; or
- rights and obligation in relation to wrecks that pose a hazard

in Antarctic waters.[47]

This is not to say that the broader obligations under the Bunkers and Wreck conventions do not apply in Antarctic waters. There are no geographical restrictions on the general obligations under the Bunkers or Wreck conventions and State Parties must give effect to their requirements in accordance with the basic principle that the terms of the conventions are binding and must be performed in good faith.[48] Vessels that fall under the scope of such requirements and flying the flag of a State Party to either convention, and/or calling at the port of a State Party to either convention both before or after operating in Antarctica, will be required to comply with the Bunkers and Wreck conventions' financial security requirements.

From a Flag State perspective, such vessels would be required to maintain the financial security requirements and evidence such by means of a State issued Convention certificate when operating in Antarctic waters, even though the Conventions' other provisions would not then apply in the event of an incident in those waters.

Likewise, from a Port State control perspective, such vessels would be required to evidence such financial security when calling at the port of a State Party after or before operating in Antarctic waters and will therefore have such cover in place and evidence of such cover when operating in Antarctic waters.[49]

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[46] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969; entered into force 27 January 1980), Article 31(1): A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

[47] The very limited exception is in cases where a State Party to the relevant IMO convention has an Antarctic claim and has enacted national legislation that has the effect of implementing its obligations under the IMO convention in at least a portion of the Antarctic waters. This follows more as a matter of domestic law and policy and is likely to be a theoretical possibility rather than one that offers any real prospect of a pathway for liability and compensation. From a practical perspective, most State parties to the IMO conventions will not have claims to Antarctic waters and any attempt to enforce a liability in another jurisdiction on this basis would likely be resisted.

[48] Vienna Convention 1969, above n 46, Article 26.

[49] Reference is also made to Measure 4 (2004) – ATCM XXVII – CEP VII which recommends that Parties shall require those under their jurisdiction organising or conducting tourist or

Despite this, the evidence of financial security (and the direct right of action that accompanies it) provides no security in the event of an incident in Antarctic waters. To the extent it provides some measure of assurance for liabilities under the IMO conventions, those IMO conventions are irrelevant for the purpose of establishing liability and providing compensation in the event of a pollution incident in Antarctica.

Consequently, the measures to protect the environment under the Antarctic Treaty System become of particular importance.

Measures to Protect the Environment under the Antarctic Treaty System

The Protocol on Environmental Protection to the Antarctic Treaty

In the Preamble to the Protocol on Environmental Protection to the Antarctic Treaty (the **Protocol**) the State Parties refer to being "convinced" of both "the need to enhance the protection of the Antarctic environment and dependent and associated ecosystems" and "that the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems is in the interest of mankind as a whole".

Under the Protocol, the Parties "commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science".[50]

Towards this end, the Protocol establishes a Committee for Environmental Protection (**CEP**), whose functions include providing advice on the effectiveness of measures taken pursuant to the Protocol. This includes the need to update, strengthen or otherwise improve such measures, the need for additional measures,[51] and – relevant to the current discussion – procedures for situations requiring urgent action, including response action in environmental emergencies.[52]

To provide for prompt and effective response action to environmental emergencies in the Antarctic Treaty area, the parties to the Protocol agreed to establish procedures for immediate notification of, and co-operative response to, environmental emergencies and to develop processes in relation to emergency response actions.[53]

Reference to liability is dealt with at Article 16, and while the obligation is broad ("the Parties undertake to elaborate rules and procedures relating

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other non-governmental activities in the Antarctic Treaty Area, for which advance notification is required in accordance with Article VII(5) of the Antarctic Treaty, to demonstrate …. That adequate insurance or other arrangements are in place to cover any costs associated with search and rescue and medical care and evacuation.

[50] The Protocol on Environmental Protection to the Antarctic Treaty, above n 2, Article 2.

[51] Protocol on Environmental Protection to the Antarctic Treaty, above n 2, Article 12 ("including the need for additional Annexes where appropriate").

[52] Protocol on Environmental Protection to the Antarctic Treaty, above n 2, Article 12(1)(f).

[53] Protocol on Environmental Protection to the Antarctic Treaty, above n 2 Article 15.

to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol"), rather than develop substantive rules and procedure within the Protocol itself, Article 16 provides for these to be developed through the development of additional annexures.[54]

Subsequently, Annex VI of the Protocol, titled Liability Arising from Environmental Emergencies (**Liability Annex**) was adopted.

The Liability Annex was negotiated over a 13-year period. It was adopted at the Twenty-eighth Antarctic Treaty Consultative Meeting (**ATCM**) in Stockholm in 2005 and will enter into force once it has been approved by all 28 ATCM who participated in that meeting.[55] Some 17 years later, that has yet to occur.

Nonetheless, understanding what the Liability Annex will (and will not do) if it enters into force is a necessary exercise to determine its interplay with existing rights and obligations in the maritime industry, and whether the goal of international uniformity and harmonization has been, or can be achieved, following entry into force of the Liability Annex.

The Liability Annex

The Liability Annex applies to "environmental emergencies" in the Antarctic Treaty area[56] that relate to scientific research programmes, tourism, and all other governmental and non-governmental activities for which advance notice is required under Article VII (5) of the Antarctic Treaty, including associated logistic support activities.[57]

"Environmental emergency" is defined in the Liability Annex as: [58]

any accidental event that has occurred, having taken place after the entry into force of this Annex, and that results in, or imminently threatens to result in, any significant and harmful impact on the Antarctic environment.

In broad terms, the Liability Annex encompasses three categories of obligations on State Parties by:

- prescribing requirements for preventative measures and contingency plans to reduce the risk of environmental emergencies and their potential adverse impacts;
- providing for specific action to be taken by the operator of the vessel or other State Party in the event of an incident; and
- imposing financial liability in the event of a failure to take such action.

It is helpful to briefly outline the key obligations under the Liability Annex before looking more closely at their content and implementation in practice.

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[54] Under Article 9(1) of the Protocol, Annexes I-IV form an integral part of, and entered into force with, the Protocol, while Article 9(2) provided for additional annexures to be adopted and become effective in accordance with Article IX of the Antarctic Treaty. Article IX(4) of the Antarctic Treaty provides "The measures referred to in paragraph 1 of this Article shall become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures".

[55] Protocol on Environmental Protection to the Antarctic Treaty, above n 2 Article 23, Environment Protocol.

[56] Liability Annex, above n 5, Article 1, see n 26, Antarctic Treaty Article VI.

[57] Liability Annex, above n 5, Article 1.

[58] Liability Annex, above n 5, Article 5.

The Preventative and Contingency Measures

Articles 3 and 4 of the Liability Annex require State Parties to ensure their operators undertake reasonable preventative measures or reduce the risk of environmental emergencies, which may include specialized equipment and structures, procedures, and training.

In addition, States must require operators to establish contingency plans for the purpose of assessing an incident, procedure to notify, identify and mobiles resources and response plans.

Response Action

If an environmental emergency arises from the activities of an operator, that operator is required to take prompt and effective response action.

"Response action" is further defined in the Liability Annex as:

> reasonable measures taken after an environmental emergency has occurred to avoid, minimize or contain the impact of that environmental emergency, which to that end may include clean-up in appropriate circumstances, and includes determining the extent of that emergency and its impact.

The term "reasonable", as applied to preventative measures and response action, means:

> measures or actions which are appropriate, practicable, proportionate and based on the availability of objective criteria and information, including:
>
> (i) risks to the Antarctic environment, and the rate of its natural recovery;
> (ii) risks to human life and safety; and
> (iii) technological and economic feasibility.

Liability for Costs of Response Action

The operator is liable for the costs of response action and preventative measures even if they were not at fault in causing the environmental emergency, with only limited exceptions.[59] Liability is strict liability.[60]

If the operator does not undertake prompt and effective response action, it becomes liable for the cost of the action it should have taken. Therefore, another party which undertakes the response action can directly pursue the operator for the cost of doing so.[61]

The Liability Annex also requires the operator to pay the costs of a response action even where no party undertakes it. In this scenario, the operator becomes liable for the cost of the response action that should have been taken.[62]

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[59] Liability Annex, above n 5, Article 8(1).
[60] Liability Annex, above n 5, Article 6(3).
[61] Liability Annex, above n 5, Article 6(1).
[62] Liability Annex, above n 5, Article 6(2). In addition to the two different grounds for liability, there is also a distinction between taking action against a State Operator and a non-State Operator.

Where it is a State Operator who is liable, the costs are paid into a fund[63] which is maintained and administered by the Secretariat of the Antarctic Treaty.[64] For non-State operators, a State is obliged to ensure there is a mechanism under domestic law to require either payment to the Fund, or to the State Party. The State Party is then obliged to make the equivalent contribution to the Fund.[65]

LIMITATION OF LIABILITY

The Liability Annex incorporates a specific limitation of liability provision setting out the maximum amount for which each operator may be liable under Article 6 (1) or Article 6 (2).[66]

The limits under Article 9 distinguish between an environmental emergency arising from an event which does not involve a ship (a maximum liability of three million SDR), while for an environmental emergency arising from an event involving a ship, the Liability Annex provides limits of:

(i) one million SDR for a ship with a tonnage not exceeding 2,000 tons;
(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that referred to in (i) above:
for each ton from 2,001 to 30,000 tons, 400 SDR;
for each ton from 30,001 to 70,000 tons, 300 SDR; and
for each ton in excess of 70,000 tons, 200 SDR.

The Liability Annex expressly states that it does not affect the liability or right to limit liability under any applicable international limitation of liability treaty or the application of a reservation made under any such treaty to exclude the application of the limits therein for certain claims, provided the amounts are at least as high as provided by Article 9.

EXCEPTIONS

There are exceptions to liability. Article 8 (1) of the Liability Annex excludes an operator from liability under Article 6 if it proves that the environmental emergency was caused by:

(a) an act or omission necessary to protect human life or safety.
(b) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character, which could not have been reasonably foreseen, either generally or in the particular case, provided all reasonable preventative measures have been taken that are designed to reduce the risk of environmental emergencies and their potential adverse impact;

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[63] Liability Annex, above n 5, Article 6(2)(a).

[64] Liability Annex, above n 5, Article 12 provides for the establishment of a fund, and provides for Parties to make a proposal to be reimbursed from the fund subject to certain criteria, and for the reasonable and justified costs incurred in taking response action.

[65] Liability Annex, above n 5, Articles 6(2)(b) and 7(3).

[66] Save that any right to limit liability is excluded where limited environmental emergency resulted from an act or omission of the operation which was committed with the intent to cause such emergency, or recklessly and with knowledge that such emergency would probably result: Liability Annex, above n 5, Article 9(3).

(c) an act of terrorism; [67] or

(d) an act of belligerency against the activities of the operator.

There is also an exclusion from liability for a State Party (or those acting under its authority) for any damage that arises from a response action, provided that the action taken was reasonable in the circumstances.[68]

Insurance and Financial Security

Operators are required to maintain adequate insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability for the costs of a response action, up to the limits contained in Article 9 of the Liability Annex.[69]

The Practical Issues for the Maritime Industry

What all of this means for the maritime industry, and the degree of protection afforded to the Antarctic environment in the event of an environmental incident involving a ship, requires a closer look at what the operation of the Liability Annex might look like in practice, including the relationship between the Liability Annex and existing rights and obligations under the IMO conventions.

Scope of the Liability Annex

At the outset there are gaps in the maritime activities that are covered. The Liability Annex does not capture emergencies that could arise from all activities in the Antarctic Treaty area. Environmental emergencies involving fishing vessels, for example, are excluded, as are emergencies involving other vessels exercising freedom of navigation unrelated to tourism or scientific activities.[70] Despite there being a mechanism by which the scope of the Liability Annex can be extended,[71] that would require consensus of all State Parties. The very consensus that could not be obtained at the time of its adoption.[72]

Additionally, despite Article 16 of the Environment Protocol requiring State Parties to elaborate "rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty Area", the liabilities that are actually imposed under the Liability Annex are far more limited in scope.

The liabilities are only in respect of the cost of any response action (being reasonable measures to avoid, minimize or contain the impact of the environmental emergency, discussed below), not damage to the Antarctic environment *per se*. This limited approach was a conscious decision during negotiations. State Parties elected not to pursue a single comprehensive

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[67] See below comment on the specific exclusion in the Liability Annex from an act of terrorism.

[68] Liability Annex, above n 5, Article 8(2).

[69] Liability Annex, above n 5, Article 11.

[70] Johnson M. 2006. "Liability for Environmental Damage in Antarctica: The Adoption of Annex VI to the Antarctic, Environment Protocol", The Georgetown International Environmental Law Review 19: 33-55, 42.

[71] Liability Annex, above n 5, Article 13.

[72] Johnson M, above n 70, at 42.

regime, but instead take a step-by-step approach, seemingly concerned that the former would hinder the ability of the Liability Annex to enter into force.[73] This meant the Parties decided to start with a regime dealing with a response to environmental emergencies, whilst remaining committed to taking future steps to develop a comprehensive special liability regime that would fully meet the obligations under Article 16 of the Protocol.[74]

There are real and difficult questions around imposing liability for damage to the environment itself.[75] However, despite this, and despite what may have been seen as a pragmatic reason to take a limited approach, it is not clear why the negotiating parties did not look more to how the IMO conventions have dealt with questions of pollution damage.

Pollution damage was first defined in the CLC and Fund conventions, with the same definition adopted in the Bunkers Convention and largely carried over to the HNS Convention.[76] In addition, the International Oil Pollution Compensation (**IOPC**) Fund has developed guidelines to define more precisely what is and is not covered under those definitions, including practical guidance on the reasonableness of measures taken by any person after an incident has occurred to prevent or minimize pollution damage.[77] A similar approach is likely to be soon adopted in relation to the Bunkers Convention.[78] While that is only a guidance in terms of its legal effect, it reflects a practical step taken by member states directly related to the experiences of dealing with pollution incidents and the issues that arise.

As discussed below, part of the answer to the separate approach may be because the underlying obligation under the Liability Annex is to *respond* to an environmental emergency, with liability for the costs a consequence of that failure. It may also reflect a conscious decision to try and reflect that the Antarctic environment is different, and that what is appropriate and necessary is deliberately not the same as in other contexts. Logically, however, this would suggest that the liability limits contained within the Liability Annex would be higher, and the scope of obligations and liabilities more extensive, than those contained in the corresponding IMO conventions. As will be seen, this is not the case.

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[73] Johnson M, above n 70, at 38-39; also Voeneky, Silja and Addison-Agyei, Sange, "Antarctica", (2019) at 65,available at SSRN: https://ssrn.com/abstract=3369605 or http://dx.doi.org/10.2139/ssrn.3369605.

[74] Johnson M. above n 70, at 39.

[75] Such discussions are well beyond the scope of this paper, but traditionally, have involved wrestling with the question of who has suffered harm and how harm to the natural environment is quantified beyond remedial measures.

[76] HNS refers to and defines 'damage' rather than just 'pollution damage'. This reflects that HNS also covers loss of life (except for passengers) and personal injury. But its pollution-related liabilities are framed comparatively similar to the CLC and Bunkers conventions and include the same limitations relating to impairment of the environment and a similar definition of preventative measures.

[77] For example, Guidelines for presenting claims for environmental damage; Guidance for Member States; Guidelines for presenting claims in the Fisheries sector https://iopcfunds.org/publications/other-publications.

[78] The IMO Legal Committee is developing a Claims Manual for the 2010 Bunkers Convention through a formal correspondence group with the intention to finalise a text at the 110th IMO Legal Committee session in 2023.

This limited approach means the Liability Annex will not respond to any other loss or damage, including property damage, loss of profit from impairment to the environment, and, despite the environmental significance of Antarctica, it is far from clear that it imposes any liability for remediation of the Antarctic environment.

The specific exclusion from liability where an environmental emergency arises from an act of terrorism is also worth briefly commenting on.[79]

The question of liability when loss or damage has been caused by an act of terrorism and, in particular, the availability of insurance for such liabilities, was the source of much debate at the IMO in the context of the 2002 Athens Convention (that deals with the carriage of passengers and their luggage by sea) in the years immediately following the adoption of the Convention and the 9/11 attacks when the capacity of the war risk market was much reduced.

This was of relevance given that the P & I Clubs were not, and are not, primary war risk underwriters and, although there was an 'act of war' defence in the Athens Convention, it did not extend to acts of terrorism (unless the damage was wholly caused by an act or omission done with intent). The inclusion of a liability in respect to a terrorism generated event was seen as a departure from other liability regimes and raised very real challenges that threatened the entry into force of the 2002 Athens Convention.

A compromise solution was developed that involved an agreement from the insurance industry to make certain insurance available up to a specified amount, an IMO Reservation, recommending States make a reservation or declaration limiting liability for such risk to an amount consistent with the industry assurance, and agreed guidelines that set out how evidence of insurance through the issue of certificates should be dealt with.[80] Accordingly, the exclusion of any liability for terrorism as in the Liability Annex does not exist for carriers in relation to liabilities under the Athens Convention.

Whilst the risk of an act of terrorism in Antarctic waters is somewhat remote, the differing scope of liabilities is difficult to justify on a principled policy basis.[81] The compromise solution at the IMO highlights the adage that, "where there is a will, there is a way." But equally it highlights the risk when the workability of an international convention becomes dependent on subsequent ancillary measures. A very real risk for the Liability Annex, as the subsequent discussions demonstrate.

Who has the Obligation?

While the maritime industry is accustomed to liability being imposed on shipowners, the obligations to be imposed under the Liability Annex are on "operators." This reflects that the potential environmental emergencies in

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[79] Liability Annex, above n 5, Article 8(1)(c).

[80] It should be noted that no similar approach was agreed for the Bunkers and Wreck conventions given that the financial exposure under these two regimes was much below the exposure under the Athens Convention.

[81] The exclusion is arguably a more precise and complete solution compared with the muddled, albeit necessary, approach that was agreed for the purposes of the Athens Convention.

the Antarctic are not limited to shipping casualties, or even emergencies at sea, but extend to other activities (and emergencies) on land.

An operator is the person who "organises activities to be carried out in Antarctic water",[82] but the Liability Annex does not further clarify what it means to 'organise activities.' To the extent the Liability Annex applies to specified activities in the Antarctic Treaty area for which advance notice is required under Article VII (5) of the Antarctic Treaty,[83] it may be thought that the person who gives the advance notice and prepares the Environmental Impact Assessment should be regarded as the person 'organising the activities' and therefore the operator. However, that is not expressed in the terms of the Liability Annex. Accordingly, there is scope for State Parties to have divergent views on this.

This issue, and whether there is a need for a uniform approach to be adopted by the State Parties, was raised by the International Group of P & I Clubs with the Antarctic Treaty States at the ATCM XL in Beijing in May 2017.

Logically, identifying in advance who the operator is for the purpose of the Liability Annex is essential to its effectiveness. The obligation to have preventative measures and contingency plans in place to reduce the risk of environmental emergencies and their potential adverse impacts, as well as insurance to cover any liabilities for response costs, requires steps to be taken *before* an environmental emergency occurs. This includes steps by the operator themself, and in turn, by the responsible State Party to ensure the operator has done what is required to be done.

It is feasible that in at least some cases, even where a vessel is operating in Antarctic waters or otherwise subject to the Protocol and Liability Annex, the shipowner did not organise the activities and may not be regarded as the operator and therefore not subject to the obligations or liabilities under the Liability Annex.[84] Even in these cases, how the obligations under the Liability Annex can be met in respect to the risks that arise from a ship

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[82] Liability Annex, above n 5, Article 2(c): "Operator" means any natural or juridical person, whether governmental or non-governmental, which organises activities to be carried out in the Antarctic Treaty area. An operator does not include a natural person who is an employee, contractor, subcontractor, or agent of, or who is in the service of, a natural or juridical person, whether governmental or non-governmental, which organises activities to be carried out in the Antarctic Treaty area and does not include a juridical person that is a contractor or subcontractor acting on behalf of a state operator.

[83] Liability Annex above n 5, Article 1. Article VII(5) of the Antarctic Treaty provides that "Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of (a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory; (b) all stations in Antarctica occupied by its nationals; and (c) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty."

[84] For example, the Advance Notification form in New Zealand Procedures for Non-Governmental Visitors to Antarctica that is required to be completed in respect of Tourist and non-Governmental Activities differentiates between the Tour / Expedition Organizer and requires details of company name and registration (Section A) but only seeks the name of a vessel, its country of registration, and matters such as carrying capacity, fuel and so forth.

will need to be considered and preferably agreed with some degree of co-ordination amongst the ATCM.

But what exactly does the Liability Annex require to be done?

Content and Verification

The obligation to have preventative measures and contingency plans in place to reduce the risk of environmental emergencies and their potential adverse impacts immediately raises the question of:

1. the content of the obligations in relation to 'reasonable preventative measures' and contingency plans; and
2. verification of compliance of appropriate preventative measures, contingency plans, and insurance.

While the Liability Annex sets out the types of things that should be included when considering preventative measures or contingency plans, there are no mandatory requirements as to content, and the Liability Annex does not refer to any standard or measure by which the content of such measure or plan will be assessed or set out an express mechanism for assessment or approval.[85] Nor does the Liability Annex itself set out any measures for how compliance will be evidenced or verified.

Unlike the IMO regimes, the Liability Annex contains no provision for State certification to evidence the operator meeting any of their obligations under the Liability Annex and, it would seem, no discussions took place either at the ATCM Stockholm meeting in 2005 or in the lead up to the meeting for the inclusion of such provisions.

It is unclear if this was overlooked, or if this reflects a conscious desire of the States engaged in the negotiations of the Liability Annex to follow an approach that was markedly different to the IMO given the uniqueness of the Antarctic environment and the substantive underlying regulation that already existed within the framework of the Antarctic Treaty. While there could have been be some desire to avoid the administrative burden by a State certification process, it is unlikely that the number of vessels operating in Antarctic waters either at present or in the near future would reach the numbers of vessels covered by the IMO instruments and presently requiring an IMO Convention State certificate.

The Protocol does impose an overarching obligation on States to have a process to ensure compliance. Article 13 of the Protocol requires each party to "take appropriate measures within its competence, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure compliance". That might be a basis for a State to introduce administrative measures such as certification in its domestic law, but it does

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[85] Comparatively, where UNCLOS requires another operative standard for implementation, its provisions refer to matters such as "having regard to"; "taking into account"; "consistent with"; "generally accepted standards"; "applicable international instruments"; or "generally accepted international regulations, procedure and practices." See UNCLOS Arts 21(2), 21(4), 39(2), 22(3),60, 0, 94(3), 211 and 219. More generally, Gaetana Librando "The International Maritime Organisation and The Law of the Sea", in David Joseph Attard (ed) IMLI Manual of International Maritime Law, Volume 1, The Law of the Sea, (Oxford University Press, Oxford 2014).

not resolve questions of uniformity or consistency between States or ensure the status of such administrative measures between States.

While any State from which a vessel may be departing for Antarctica would be unrestricted in its ability to exercise Port State jurisdiction,[86] unlike the IMO regimes it is not under any obligation to accept certification by a State under its domestic regime, highlighting further challenges in harmonization amongst the Antarctic Treaty States.

Unless there is uniformity between all State Parties as to agreed minimum standards of preventative measures or contingency plans for operators under their jurisdiction, the implementation of these measures will be variable as would be their effectiveness. Lack of prior agreement risks disputes as to whether State Parties have properly given effect to their own obligations under the Protocol.[87]

Preventative Measures

The obligation for preventative measures is one of the areas where there is a clear overlap between the Liability Annex and existing obligations on shipowners under the IMO regimes (SOLAS and MARPOL).

Under the Liability Annex, reasonable preventative measures are those designed to reduce the risk of environmental emergencies and their potential adverse impact and may include:[88]

(a) specialized structures or equipment incorporated into the design and construction of facilities and means of transportation;
(b) specialized procedures incorporated into the operation or maintenance of facilities and means of transportation; and
(c) specialized training of personnel.

Since January 2017, the IMO "Polar Code" has been in force.[89] The Polar Code sets out specific additional measures to be taken by ships operating in Arctic and Antarctic waters, covering design, construction, equipment, operational, training, search and rescue, and environmental protection matters.[90]

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[86] As a right of the coastal State, distinct from Port State Control provisions expressly provided for under IMO conventions SOLAS or MARPOL. See generally Molenaar, E "Port State Jurisdiction: Towards Comprehensive, Mandatory and Global Coverage" (2007) Ocean Development & International Law 38 at 225-257.

[87] Protocol, above n 2, Article 13. Also note Article 10 as regards State Liability: "A Party shall not be liable for the failure of an operator, other than its State operators, to take response action to the extent that that Party took appropriate measures within its competence, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure compliance with this Annex."

[88] Liability Annex, above n 5, Article 3. As above the lack of mandatory measures adds a further challenge to determining compliance and effective enforcement even at a domestic law level.

[89] In recognition of the additional demands placed on ships that operate in polar waters (both the Arctic and Antarctic). The Polar Code imposes additional measures for safety, environmental protection and crew training for ships operating in those waters. Owners of relevant ships must hold a Polar Ship Certificate as evidence of compliance with the additional measures. The Polar Code is implemented through amendments to SOLAS, MARPOL and Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978.

[90] UNCLOS, above n 31, Annex VIII, Article 2.

Issues of uniformity might be resolved if existing measures for ships, such as the Polar Code, were agreed as reflecting these Liability Annex requirements, if not in whole, then in part.

This idea should not be contentious. The IMO is "the competent international organization" under UNCLOS for many matters, including in respect to the safety of navigation and routing systems; the design, construction, equipment and manning of vessels; the prevention, reduction, and control of vessel-source pollution of the marine environment and dumping at sea.[91] All Consultative and Non-Consultative Parties to the Antarctic Treaty are also State Parties to the IMO conventions.

The Committee for Environmental Protections offers a potential mechanism for this. The terms of the Protocol provide that the Liability Annex forms an integral part of the Protocol and the functions of the Committee extend to providing advice on 'the effectiveness of measures taken pursuant to this Protocol'.[92] It is not a perfect fit, but advice that the measures under the Polar Code are effective for the purpose of the Liability Annex would form a basis for a consensus and consistency in approach. Consistency will provide operators and shipowners with some degree of certainty over the obligations.

Contingency Plans

The importance of uniformity and generally accepted standards is particularly pressing in relation to the requirement to include within the contingency plan matters relating to response plans, mobilization of resources, and decisions around demobilization.

There is an obvious and inherent tension between Antarctica as a pristine environment, the protection of which is in the interest of mankind as a whole, and the practical realities of its remote geographical location and what that means for a response to any environmental emergency.

This reality is reflected in the obligations under the Liability Annex which variously provides:

- Response action means reasonable measures to avoid, minimize or contain the impact of the environmental emergency.
  - What is reasonable is:
    - a measure that is appropriate, practicable and proportionate;
    - will consider the technological and economic feasibility.
  - There is no absolute obligation to undertake clean up.
  - Response action *may* include clean-up costs in appropriate circumstances [emphasis added].

As set out earlier, the maritime community is well experienced in planning for and responding to shipping casualties and the associated issues of ship-sourced environmental damage. This includes established organizations

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[91] Implications of the United Nations Convention on the Law of the Sea,1982 for the International Maritime Organization, Study by the Secretariat of IMO,doc.LEG/MISC 1(1986); Law of the sea bulletin. no. 31, 1996 UN. Division for Ocean Affairs and the Law of the Sea (1996) at 79.

[92] Protocol on Environmental Protection to the Antarctic Treaty, above n 2, Article 12(1)(a).

who specialize in salvage operations, pollution response, and extends to experience in dealing with claims and determining what are (and are not) reasonable response costs.

But the context in Antarctica is very different. Key differences that follow from the unique geographic characteristics and remoteness of Antarctica include (but certainly are not limited to):

1. Resources.
2. Timing.
3. Effectiveness.

In simple terms, Antarctica is not home to the type of vessels or equipment that would ordinarily be deployed in response to a shipping casualty. A typical response would usually involve tugs and other craft, setting up an incident command center with monitoring and surveillance equipment, including aviation support. There may be systems to disperse or contain or transfer harmful substance from a stricken vessel, equipment for shoreline response (including the rescue, treatment and rehabilitation of wildlife) as well as offshore response.

Any response requires people. Antarctica does not have a significant permanent population, much less, trained specialist people.

In any event, the effectiveness of a traditional response is questionable. Oil behaves differently in colder waters. Dispersants may be ineffective and unpalatable in such an environment. Wildlife response will likely be limited to shore-based wildlife.

Where appropriate equipment is identified and available to be deployed to Antarctica it will take time. Time during which a vessel may be incapable of being saved or salvaged. Time adds to cost.

While technological feasibility will have a relatively high objective assessment, what is proportionate or economically feasible involves a value judgement on the Antarctic environment.

Experience from international shipping casualties shows that what is reasonable or appropriate in a technical sense, is often not the same as what is expected, in the eyes of the public, or politicians.[93] That will only be enhanced in the Antarctic environment. The generally recognized intrinsic value of the Antarctic environment, the precautionary principle in international environment law, and the important role of Antarctica and increasing recognition of its importance in the global climate system, all weigh heavily in favour of action rather than inaction.

Absent agreed standards, the question of whether response action should be taken and, if so, what an appropriate response looks like, is ripe for contention given the competing considerations in Antarctic waters. In a post-incident environment in Antarctica, it is also possible that an appropriate response will be influenced more by societal and public pressure than the realities on the ground.

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[93] The IOPC Fund guidelines for presenting claims for clean-up and preventative measures expressly acknowledge this, setting out that: "While it is understood that response organisations often find themselves compelled by political pressure and concerns expressed by the public and the media to adopt measures which are not technically reasonable, such actions are unlikely to qualify for compensation.".

The Threshold Question

Determining a reasonable response in Antarctic waters is a critical threshold question. It is only when response action should have been taken, but was not, that liability for the actual or estimated cost of what should have been done, will arise. Importantly, liability for when an operator "should have taken prompt and effective response action but did not" covers three different circumstances:

- Where no response action had been taken;
- Where response action had been taken but it was not prompt; or
- Where response action had been taken but it was not effective.[94]

That is one of the fundamental differences between the Liability Annex and the IMO conventions. The obligation on an operator under the Liability Annex is to take "*prompt and effective response action to environmental emergencies arising from the activities of that operator*" in the first instance.

No such requirement is imposed on the shipowner (however defined) under the IMO instruments. IMO conventions are predicated on a coastal State rather than operator (shipowner) response and the State then seeking recompense under the IMO conventions from the liable party.

In most cases it will be the State taking action to respond to a pollution incident to protect its coastal interests and because of the lack of suitable and adequate third-party responders in most jurisdictions. Only a small number of States worldwide mandate that an operator or shipowner must contract with an approved spill response organisation for entry into port purposes (for example, the United States of America, China, and Argentina amongst others).

The benefit of imposing a response obligation on an operator is highly questionable given the further limitations on immediate access to third party responders in Antarctica, compounded by the challenges of a response in the Antarctic environment, referred to above. An effective response may also require the exercise of coercive powers, such as those expressly given to States in the IMO Conventions, such as the Intervention Convention and its Protocol[95] or that States may incorporate in domestic law.[96] Such powers are completely lacking for private operators.

While it might seem logical that the obligation to take response action will at least be informed by the response plans that have been prepared prior to the activity, that link is not express in the Liability Annex. Even where an 'appropriate' contingency plan is described, it may not be possible to implement, and/or there may be a perverse incentive on whether to implement a contingency plan where the actual costs will far exceed potential liability.

That creates an obvious gap as well as the potential for conflict between States, and between operators and States. A differing view may be taken

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94 ATCM XXVIII Final Report at 109.

95 Refer above n 12.

96 For example, New Zealand's Maritime Transport Act 1994 ("MTA"), enables the Director to instruct the master of any New Zealand ship, or of any other ship within the internal waters of New Zealand or New Zealand continental waters, to render assistance to a ship that is a pollution risk and to assist in operations for clean-up (see section 248 MTA).

by one or more other State Parties on the adequacy of contingency plans themselves (and immediately giving rise to an issue of uniformity or effectiveness).

The Liability Annex leaves open the prospect that during or after an event, an operator might reasonably conclude that it is not appropriate or necessary to act (and may make that decision consistent with its contingency plan).

It is however noted that Article 15 of the Protocol on Environmental Protection to the Antarctic Treaty establishes that each Party agrees to provide for prompt and effective response action in cases of environmental emergencies in the Antarctic Treaty area that might arise in the performance of scientific research programmes, tourism and all other governmental and non-governmental activities. On 28th January 1989, the passenger ship Bahia Paraiso ran aground and sank in the Southern Ocean. Eight hundred and thirty thousand litres of diesel fuel and oil leaked from the ship and, in accordance with the above, both the United States and Argentina shared the response costs to prevent and minimise the ship sourced pollution damage that occurred (http://www.antarcticmarc.com/bahia.html).

Limitations on Insurance & Financial Security

Where an operator has not done what it is agreed ought to have been done to respond to an environmental emergency, the question becomes, how effective are the mechanisms to ensure they pay what ought to be paid?

Insurance obviously cannot be obtained after the event. Where there is an obligation to hold appropriate insurance or financial security, the Liability Annex is silent on verification and evidence of compliance.

The general obligation on States under Article 13 of the Protocol to take appropriate measures to ensure compliance with the Liability Annex does impose an obligation on States to ensure that appropriate insurance is held by the operators.[97] But verification of insurance requires not just confirming that an insurance policy (or some other form of financial security) is in place but ensuring that the policy responds to the type of liability imposed, both in scope, financial amount and nature (strict liability).

Where a shipowner is the operator, and the shipowner holds cover with one of the P & I Clubs,[98] the P & I Clubs have indicated that cover should meet the liabilities under Article 6 of the Liability Annex.[99]

For other traditional third-party insurance policies, absent a bespoke product, a relatively sophisticated assessment will be needed. Contracts of insurance will typically include conditions and exclusion and other limits to cover, that will need to be carefully assessed against the triggers for

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[97] In addition, Article 10 of the Liability Annex suggests the potential for State Liability (A Party shall not be liable for the failure of an operator, other than its State operators, to take response action to the extent that that Party took appropriate measures within its competence, including the adoption of laws and regulations, administrative actions, and enforcement measures, to ensure compliance with this Annex).

[98] The International Group (**IG**) of P & I Clubs provide third party liability coverage for approximately 90% of the world's ocean-going tonnage: IG Paper to XLII Antarctic Treaty Consultative Meeting, Prague, 2018.

[99] IG Paper to XLII Antarctic Treaty Consultative Meeting, Beijing, 2017.

indemnity before satisfaction of appropriate cover can be determined. Will States take a uniform approach to determining what insurance policies are acceptable?

Where a State has verified and determined that insurance is held by its operator, there is no mechanism in the Liability Annex to require an operator to carry or provide evidence of such insurance, unlike the IMO conventions.

Identification of the party providing relevant insurance or financial security – important in any recovery action – will depend on the administrative measures taken by a State to maintain a record of those details. Even where an operator might be calling at the Port of another State en route to Antarctic waters, there are no provisions for inspection or compliance by other State Parties. Compliance relies heavily on the effective implementation of the State Party of the operator, albeit in circumstances where the State will be liable for any failure to discharge that obligation.

That assumes that insurance has been required. Under the Liability Annex it is only mandatory for a State Party to *require* its operators to maintain insurance or other financial security, to cover liability under Article 6(1), to pay the costs of response action taken by Parties pursuant to Article 5(2).[100]

Whether a State Party imposes a requirement in relation to an operator liable to pay an amount of money, if action that should have been taken but was not (and no other party responded), is discretionary.[101] That distinction appears to have arisen from States' (particularly those with a federal system) concern that the liability under Article 6(2) is not linked to compensation for damage, and may be seen to have a punitive element.[102]

The potential for States to take vastly different approaches, with significant implications on the availability of insurance to cover any liability, is apparent.

By way of example, New Zealand has not implemented the financial security requirements into legislation. Instead, the obligation to have insurance or a financial guarantee to cover liability will be implemented by way of conditions imposed by the Minister in the environmental impact assessments required under the Protocol.[103] When insurance is required, and how it will be assessed as being suitable, has been left to a Ministerial discretion.

More critically, the Liability Annex does not provide a direct right of action against the insurer or limit the defenses that any person providing the insurance or financial security can call upon. As the P & I Clubs have

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[100] Article 11(1) Liability Annex, above n 5.

[101] Article 11(2) Liability Annex, above n 5.

[102] Johnson M, above n 70 at 46; also Voeneky, Silja and Addison-Agyei, Sange, above n 73. at 79,available.

[103] Section 10(1)(b) of the Antarctica (Environment Protection) Act 1994 Act provides that the Minister may "direct any person carrying out ... any activity" in Antarctica to "abide by such conditions as the Minister considers appropriate in order to avoid or minimise the effects of the activity on the Antarctic environment". The same mechanism will be used for preventative measures and contingency plans. See explanatory note to Antarctica (Environmental Protection: Liability Annex) Amendment Bill at https://www.legislation.govt.nz/bill/government/2009/0037/latest/DLM2051601.html.

alluded to, the consequence is that even where an operator may have appropriate insurance, and may demonstrate evidence of that insurance, there is no certainty the insurance will respond. Even if insurance is held, whether insurance will actually cover the liability will be dependent on its own terms and exclusions, and any defenses available to the insurer.

The Fund

The Liability Annex provides for a Fund to be established, in part to provide for the reimbursement of the reasonable and justified costs incurred by a Party or Parties in taking response action pursuant to Article 5(2).[104] The funding of the Fund is largely dependent on voluntary contributions, or the enforcement of certain liabilities.

The Liability Annex is silent on how such a fund is to be maintained, the governance of such a fund and its management.

The Fund is example where the Liability Annex has features similar to other maritime liability regimes but missed the opportunity to draw on the specific experience of the maritime industry. Funds are a familiar concept under IMO regimes, designed to provide a second (and sometimes third) tier of compensation. In the IMO context the fund itself has legal personality and is funded by levies from associated industries, with clear rules on the management of those funds and the applications for which they can be used.

Limitation of Liability

The limitation of liability provisions in the Liability Annex demand particular attention because of the 1976 LLMC and its 1996 Protocol.

As set out, the right to limit liability is a long-established feature of maritime law. Certainty around financial liability is an important element of ensuring the availability of insurance coverage. The LLMC represents the IMO's global limitation regime that stipulates the financial amounts that a shipowner can limit their liability for maritime claims.

While the Liability Annex contains its own maximum amount for which each operator may be liable under Article 6(1) or Article 6(2), it also preserves the limitation of liability provisions under other limitation regimes, provided the limitation amount is at least as high as the limits provided under the Liability Annex. Given the long-standing recognition of limitation rights for maritime claim, what this means in practice has real world relevance.

The question for operators and insurers (for liability purposes) and for third parties (for recovery purposes) will be the same: What will be the applicable limit of liability in the event of an environmental emergency in Antarctic Waters? Will it be determined by the limits in the Liability Annex or by the LLMC (or a combination of both)?

The objective of international conventions is to provide for a relatively uniform and consistent response to such a question. In reality, the drafting

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[104] Article 12(1) Liability Annex, above n 5.

of the Liability Annex means the answer will be "it depends". It will depend on:

1. whether claims under the Liability Annex are claims that are subject to the LLMC;
2. the relationship between the Liability Annex and the LLMC;
3. the extent to which the provisions of the Liability Annex can properly control limitation actions; and
4. ultimately, how national laws or national courts determine such matters.

Are claims under the Liability Annex claims that are subject to the LLMC?

A question on the relationship between the Liability Annex and LLMC assumes that a claim made against a shipowner (as operator) under the Liability Annex is a claim that is subject to limitation under LLMC. That assumption warrants testing.

There is a key difference between the Liability Annex and the LLMC. While the Liability Annex imposes a liability for response costs, the LLMC, deals only with the question of limitation. Whether or how any liability arises is a separate question.[105]

The claims subject to limitation under the LLMC are set out at Article 2(1):

(a) Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
(b) Claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
(c) Claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;
(d) Claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
(e) Claims in respect of the removal, destruction, or the rendering harmless of the cargo of the ship;
(f) Claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable

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[105] The introduction of the IMO conventions establishing liability for certain matters, raised questions of the right to limit for those liabilities, and more specifically the relationship to the right to limit under the LLMC. The relationship between the LLMC and each of the IMO liability conventions is not uniform. As indicated above, claims for oil pollution under the CLC convention are expressly excluded. Claims for pollution damage under the HNS Convention are not excluded, but amendments under the 1996 Protocol added a second entitlement for States to make a reservation in relation to the HNS Convention (although it is not yet in force). The LLMC makes no express reference to the liabilities imposed under the other IMO conventions such as the Bunkers and Wreck conventions.

may limit his liability in accordance with this Convention, and further loss caused by such measures.

The LLMC expressly excludes from its application certain claims, which in simplified form, can be summarized as claims for salvage or contribution in general average, oil pollution damage under the CLC, nuclear damage, and those claims by master and crew that are subject to limitation under the contract of employment.[106]

Article 18 of the LLMC, also enables States to make limited reservations: one in respect of Article 2(1)(d) and (e)[107] and the other in respect of claims for damage within the meaning of the HNS Convention.[108]

The test for whether any liability established by a convention is a liability subject to the LLMC, requires assessing the nature not the basis of the claim.[109]

This is the approach taken in respect to liabilities under the Bunkers Convention. Article 2 of the LLMC does not refer to claims for environmental liabilities generally, or expressly refer to claims for pollution damage or for claims under the Bunkers Convention, by name. But the nature of such claims is widely regarded as falling within the LLMC (reflected in part by the reference to the LLMC at Article 6. Usually under Article 2(1)(a) or 2(1)(d) – a claim occurring in direct connection or with the operation of the ship or the rendering harmless of anything that is or has been on board such a ship or in respect of the raising of a ship which is sunk.[110]

Similarly, the nature of claims for liabilities arising under the Wreck Convention are claims relating to the raising, removal, destruction, or the rendering harmless of a ship which is sunk, wrecked, stranded, or abandoned, including anything that is or has been on board such ship[111] or claims in respect of the removal, destruction, or the rendering harmless of the cargo of the ship.[112] As discussed below, whether such claims are subject to limitation

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[106] LLMC above n 6, Article 3.

[107] The law on limitation of liability was used to distinguish between liability for damages (subject to the right to limit liability) and those liabilities that arose as a due debt, such as where costs and expenses had been incurred by public authorities in the exercise of statutory powers (*The Stonedale No. 1* [1956] A.C.1). This protected public authorities who had incurred costs to remove wrecks that were a hazard to navigation from limitation. The 1976 LLMC removed this distinction with Article 2 applying to the specified claims "whatever their basis of liability may be". But the 1976 LLMC also provided for a State to make a reservation to preserve the common law position on limitation for dealing with wrecks.

[108] The relationship between the LLMC and HNS Convention was the subject of much debate during negotiations on the 1996 LLMC Protocol and HNS Convention, including whether the limit should be 'linked' to the LLMC or be a standalone limitation within the HNS Convention. The debate from the Committee of the Whole on 1 May 1996 indicates the decision to provide for a reservation under Article 18 of the LLMC rather than an exclusion under Article 3 of the LLMC was a matter of pragmatism in reaching the same intended effect rather than a particular policy decision (see Travaux Preparatoires of the LLMC 1976 and of the Protocol 1996 at 504 and 505).

[109] *Caspian Basis* [1997] 2 Lloyd's Rep 507 at 522 per Rix J (later approved by Court of Appeal [1998] 2 Lloyds Rep 461, p 473).

[110] *The Aegean Sea* [1998] 2 Lloyds rep 39 per Thomas J (albeit obiter dicta) and APL Sydney [2009] FCA 1090.

[111] Article 2(1)(d) LLMC, above n 6.

[112] Article 2(1)(e) LLMC, above n 6.

depends on whether a State has exercised its right to make a reservation in respect to such claims.

Unless otherwise excluded, any claim within Article 2 of the LLMC will be subject to the right to limitation "whatever the basis of liability may be".[113]

There is nothing in the LLMC to limit the claims to which it applies geographically (i.e., the incident that has given rise to the claim does not need to have occurred in the waters of the LLMC State), and its potential application to liabilities that might arise in Antarctic waters was clearly recognized by the Antarctic Treaty negotiating parties.[114]

Looking at the nature, not basis of the claim, it is difficult to be exhaustive, but where response costs have been incurred, the nature of a claim comfortably fits within the LLMC, as the actions taken are likely to fall within one or more of the Article 2 claims

- Damage to property occurring on or in direct connection with the operation of the ship and consequential loss resulting therefrom. (Article 2(1)(a) LLMC)
- Claims in respect of the raising, removal, destruction, or the rendering harmless of a ship which is sunk, wrecked, stranded, or abandoned, including anything that is or has been on board such ship. (Article 2(1)(d) LLMC)
- Claims in respect of the removal, destruction, or the rendering harmless of the cargo of the ship. (Article 2(1)(e) LLMC)
- Claims of a person other than the person liable in respect of measures taken to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures. (Article 2(1)(f) LLMC)

But there is an important consequence to how the nature of a liability under the Liability Annex is framed as a claim under the LLMC given that the Liability Annex also preserves reservations made under other treaties.[115]

If the nature of response costs (where action has been taken) are claims within Article 2(1)(d) and (e), then whether they fall within the LLMC may be determined by whether a State has made a reservation in relation to those matters and, if so, how that reservation has been framed or implemented in domestic law. An example (albeit in relation to pollution from bunker oil) is the Norwegian approach. The Norwegian Maritime Code provides that claims for bunker oil pollution clean-up costs are treated in the same way as wreck removal costs for which the reservation under the LLMC applies.[116]

This issue will be avoided if the nature of the claim for response costs

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[113] Article 2(1), LLMC, above n 6.

[114] Johnson M, above n 70 at 51. Earlier drafts of the Liability Annex referenced the LLMC by name, but the final text of the Liability Annex simply provided that notwithstanding the prescribed maximum amounts, the Liability Annex shall not affect the liability or right to limit liability under any applicable international limitation of liability treaty, provided that the applicable limits are at least as high as the limits set out in Article 9(2)(a)(ii).

[115] Liability Annex, above n 5, Article 9(2)(a)(ii).

[116] Norway applies its own separate limitation.

under Article 6(1) is viewed as a claim within Article 2(1)(a) or (f). It is suggested that would be the better view.[117]

But neither of these clearly deal with the circumstances where no action has been taken, and liability is imposed under Article 6(2) for the estimated cost of response action that should have been taken but was not.

The fact such a claim may arise from a statutory liability does not prevent such a liability being subject to limitation under the LLMC. The philosophy of the changes to the LLMC (in particular to the basis of claims) was "to extend not restrict limitable claims."[118] Despite that philosophy the nature of such a claim under Article 6(2) does not sit comfortably within the scope of Article 2(1)(a) or (f). There have been no 'measures taken' and the application of Article (2)(1)(a) still suggests there must have been some actual consequential loss suffered, even if a broad interpretation of property damage or damage to waterways is adopted.

Conversely, Article 2(1)(d), and (e) of the LLMC may not require an action to have taken place to form a claim. It could be enough to bring a claim within Article 2(1)(d) or (e) of the LLMC on the basis it is a claim in respect of a *failure* (for example) to remove or render harmless a ship which is wrecked, or anything that is or has been on board such ship including its cargo. But that brings us back to the question of a reservation.

This paper does not seek to resolve those issues. It simply highlights that the greater the scope for interpretation, the more likely implementation may differ in different jurisdictions.

Part of the issue rests with the LLMC itself, and the failure to expressly and clearly provide whether liabilities imposed under other conventions are claims subject to limitation, and therefore requiring States to interpret Article 2 of the LLMC and the nature of liabilities in each case.

That has always invited difficulties for casualty and pollution claims and how they should be defined in the absence of any reference to 'pollution', or 'environment' or 'contamination' or 'clean up'. That issue is simply now extended to the relationship with the nature of liabilities imposed under the Liability Annex.

Subject to those matters of interpretation, the LLMC does – or could apply – to liabilities for response costs under the Liability Annex, whether under Article 6(1) or 6(2).

If liabilities for response costs are subject to the LLMC what then is the relationship to the maximum limit for liability under the Liability Annex itself. Can shipowners elect which regime to use, and does it matter? The short answer seems to be yes, and yes. Any choice will have a direct bearing on matters such as forum and jurisdiction, and ultimately the enforcement of any liability or recognition of the right to limit liability.

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[117] The United Kingdom expressly provides that liability for the purposes of pollution damage arising from, and in response to, a spill of a ship's bunker fuel oil is claim subject to Article 2(1)(a) of the LLMC. See section 168 of the 1995 UK MSA. That only applies in relation to damage or the threat of damage in the territory of the United Kingdom.

[118] Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd ed, Informa Law, London, 2009) p. 879.

The Relationship between the Liability Annex and the LLMC

The usual position is that a claim is either subject to the right to limit under the LLMC or under a specific limitation regime. Not both.

The Liability Annex establishes a maximum amount for which any operator may be liable in respect of an environmental emergency, and preserves the right to limit under other regimes, provided that the applicable limits are at least as high as provided by the Liability Annex.

The limitation amount specified in respect of ships under the Liability Annex (and the minimum amounts required to preserve any other right to limitation), reflect the same limits that applied to ships under the LLMC, at the time the Liability Annex was drafted. Article 9(4) of the Liability Annex provides for the ATCM to review the limits every three years, or sooner at the request of any Party.

Article 9 was drafted in recognition of the potential application of the LLMC. The negotiations had considered a minimum liability, or for the Liability Annex to 'override' the LLMC and had expressed concern at the arbitrary application of a separate limitation regime in certain cases (namely where an operator was a shipowner). Making the limits of liability between the LLMC and the Liability Annex the same was one mechanism designed to avoid inconsistency[119] and about the benefit of "insurance purposes".[120]

The preservation of the right to limit under other applicable regimes has been described as a "savings" provision.[121] The final report of the ATCM says the purpose of the drafting was "to clarify the relationship between the draft Annex and the liability or right to limit liability under existing regimes" while one commentator goes further saying the clause "would give the LLMC primacy in the case of both regimes potentially applying".[122]

This suggests an intention to have only one limitation regime apply at any one time. But that is not what the drafting does.

First, Article 9(1) establishes a maximum amount for liability under the Liability Annex:

> The maximum amount for which each operator may be liable under Article 6(1) or Article 6(2), in respect of each environmental emergency, shall be as follows…

Then it preserves the right to limit under any other applicable regime (the proviso is discussed below).

The Liability Annex does not require "the appliable limits" to be exclusively available for any specific liability[123] and the LLMC is a global regime, that entitles a shipowner to limit in respect of all claims arising from any distinct occasion.

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[119] Johnson M, above n 70, at 50-52.

[120] Final Report of the Twenty-eighth Antarctic Treaty Consultative Meeting (17 June 2005) ("ATCM XXVIII Final Report") https://documents.ats.aq/ATCM28/fr/ATCM28_fr001_e.pdf.

[121] Johnson M, above n 70, at 52 and ATCM XXVIII Final Report at 115.

[122] Above n 121.

[123] Compare CLC, above n 13, Article 7(9).

There is nothing in the Liability Annex that requires an election or choice. As drafted, it is entirely possible for a shipowner, to include any potential liability for response costs under the Liability Annex, as just one of a suite of claims, subject to the LLMC. Whether that will be warranted will depend on the nature of the incident and the range of liabilities that arise.

The extent to which the provisions of the Liability Annex can properly control limitation actions

Where liability is solely in relation to response costs imposed under the Liability Annex, can the Liability Annex otherwise limit the application of the LLMC to only apply when its limits are at least as high as the Liability Annex?

Both the LLMC and the Liability Annex are independent international conventions. A treaty is binding on any State that is a party to it, and States have obligations under international law to perform a treaty in good faith.[124]

The terms of the Liability Annex themselves cannot modify the application or operation of the LLMC. Any State that is a party to the LLMC has obligations to give effect to it. The same obligations apply to a State Party to the Liability Annex. During negotiations, the prospect of conflicting obligations under the Liability Annex and the LLMC appeared to influence the drafting. Unfortunately, the final text did not avoid the problem.

Where the provisions of the LLMC and Liability Annex are compatible, or comparable, no issue may arise. However, the provisions of the LLMC and Liability Annex may not be compatible or comparable where:

1. There is a difference between the limitation amounts under the two conventions.
2. There is a difference in interpretation on how a claim for response costs under the Liability Annex is dealt with under the LLMC.

Which provisions are to prevail may be determined by whether the relevant State Parties are a party to both the Liability Annex and the LLMC and the application of general principles of international treaty law.

The 1969 Vienna Convention on the Law of the Treaties includes rules to set out what will happen when the same subject matter is dealt with by different and successive treaties. Where both parties are a party to two treaties, the later one will prevail to the extent it deals with the same subject as the earlier treaty. In other cases, the provisions of the treaty to which both States are parties will govern its application.

That might assist to resolve any potential incompatibility where two State Parties are both party to the Liability Annex and/or the LLMC. It does not necessarily resolve the question of which provision will prevail in other circumstances, including where limitation proceedings may be brought in the State of a non-Party to the Liability Annex.

What limit applies?

The limitation amount specified in respect of ships under the Liability Annex (and the minimum amounts required to preserve any other right to

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[124] Vienna Convention above n 46, Article 25.

limitation) reflect the same limits that applied to ships under the LLMC, at the time the Liability Annex was drafted. The LLMC limits have since been increased.

While it may have been the intention of the negotiating States to keep the limits contained in Article 9(1) of the Liability Annex in line with any increases to the LLMC limits once the Liability Annex had entered into force, the differing limits have very real practical implications.

Unless and until the limitation amounts under the Liability Annex are increased, for many State Parties,[125] the limits of liability under the LLMC 1996 Protocol will be higher than those provided under the Liability Annex. In that case, which limit is to apply?

Some States have directly addressed this issue in domestic legislation. For example, the United Kingdom's Antarctic Act 2013 provides that where the LLMC and the Liability Annex limits are both potentially applicable, then it is the higher of the two limits which is to be applied.[126]

That reflects a clear domestic policy choice and makes the legal position clear where the question of liability and limitation is being determined in the same proceedings and/or jurisdiction.

The Liability Annex itself does not provide for this. Under the LLMC, the right to limit liability is just that. A right. There is no obligation on a shipowner to limit liability under the LLMC. If the limits under the Liability Annex are lower, there is no legal reason why a shipowner who is also an operator could not take advantage of that.

Forum and Jurisdiction

The issues become more complex when multiple jurisdictions become involved.

Limitation of liability can be used as a sword or a shield: the right can be invoked in response to a claim that has been made, or in anticipation of claim being made, following an incident.

The LLMC does not have a jurisdiction clause that prescribes where the right to limit can be sought. While the concept of forum shopping is often used pejoratively, there can be legitimate reasons for a shipowner to seek to limit liability and/or establish a limitation fund in a jurisdiction other than where an incident occurred, and/or before any claim has been made.

Conversely, the Liability Annex does have a jurisdiction provision. Article 7 of the Liability Annex provides that "…a Party that has taken response action pursuant to Article 5(2) may bring an action against a non-State operator for liability pursuant to Article 6(1) and such action may be brought in the courts of not more than one Party where the operator is incorporated or has its principal place of business of his or her habitual place of residence" or, where the operator is incorporated in a Party or has its principal place of business or his or her habitual place of residence in a Party, the action may be brought in the courts of the Party of the operator.

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[125] At least those who have kept up with the LLMC amendments since 2012.
[126] Schedule to Antarctic Act 2013, paragraph 2, referred IG paper para 11 Parag 2.

But this jurisdiction clause deals with bringing an action for liability. At the same time, a non-State operator may also justifiably seek to establish a limitation fund or commence limitation proceedings in another State party to the LLMC Convention. That could include limitation in the jurisdiction of a State Party:

- who is not party to the Liability Annex (and where the application of Article 9(2)(b) would not be in force);
- with a limitation regime whereby the limits are lower than those contained in the Liability Annex, where that State is not a party to the Liability Annex,

and the courts may well apply the limits as contained within Article 9 of the Liability Annex if limitation is relevant (or the limitation regime of another application treaty such as the LLMC and subject to the issue raised above in this paper).

The P & I Clubs have raised the very question of the interaction between the Liability Annex and the LLMC, and, how Article 9(2) of the Liability Annex will operate in practice, given the lack of jurisdiction clause in the LLMC.[127]

The P & I Clubs have noted that there will remain differing numbers of States Parties to the LLMC, the 1996 Protocol and the Liability Annex when it enters into force and that some State Parties to the former may not be a State Party to the latter. The very practical question of interest to shipowners, and their P & I Clubs is simple:

> whether the courts in such a circumstance would stay proceedings in light of the other related proceedings if already commenced, and whether the courts would recognize any such related proceedings.

There is no single answer. The position taken will depend as much on conflict of law issues and questions of whether limitation proceedings are seen as matters of substantive or procedural law.

Where there are gaps in an international convention, requiring the intervention of national law, the consequence of different States applying domestic laws is that the very uniformity that is at the heart of any multilateral treaty is defeated.

Conclusion

The international community recognizes that Antarctica is special and warrants special protection. The Environmental Protocol requires the Parties to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the Protocol. But as things stand there is a legal vacuum of internationally agreed rules governing obligations, liabilities, or compensation for ship-sourced pollution in Antarctic waters.

The Liability Annex, developed by the ATCM because of Antarctica's

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[127] IG Paper to XLII Antarctic Treaty Consultative Meeting, Beijing, 2017.

unique legal status, and in response to its special character, will offer no protection until it comes into effect. There is no immediate prospect of it doing so. Meanwhile, the existing IMO liability conventions offer no assistance for incidents in Antarctic waters, due to their focus on liabilities that arise in a State's territorial sea or exclusive economic zone (or equivalent). Such maritime zones simply do not exist in Antarctica, due to its unique legal status.

Even once the Liability Annex comes into force, its effectiveness is in doubt. The Liability Annex reflects the outcome of the State Parties attempt to have something agreed, rather than nothing, and so has a narrow focus on obligations to respond to an emergency rather than 'damage' as referred to in the Protocol. The liabilities are limited to the costs of responding to an environmental emergency and impose no liability for other types of damage or loss that may follow an incident. The wisdom of that approach, and the optimism for a more comprehensive regime being developed – with the benefit of hindsight – seems somewhat misplaced.

The general and undefined nature of the obligations for preventative measures and contingency plans creates a significant risk of inconsistency in the approach between States in determining when a response is required and what is a reasonable response in Antarctic waters. While shipowners should be able to meet the obligations under the Liability Annex for preventive measures and for insurance under existing industry measures, steps would need to be taken by the ATCM to recognize and take a consistent approach to this and other areas where the effectiveness of its implementation will be determined by matters of interpretation.

Measures under domestic law may be able to fill some gaps, but that increases the likelihood of differing and inconsistent standards that State Parties impose on their operators, including in relation to the right of a shipowner to limit liability under the Liability Annex or the LLMC. It is the lack of uniformity and harmonization under domestic law that international conventions are designed to avoid. Inconsistency means uncertainty for the maritime industry and detracts from the objective of uniform and harmonized international rules and standards, that underpins all multilateral agreements. Crucially here, it begs the question of the effectiveness of measures to protect the Antarctic Environment in the event of a maritime emergency.

How the international legal framework would – or could – govern the allocation of responsibility, liability, and compensation in the event a ship-sourced casualty causes environmental damage in Antarctic waters today, remains a real question. The lack of any real answer is unsatisfactory, whether viewed through the lens of the IMO or the Antarctic Treaty system.

Currently, the Liability Annex suggests the promise of an adequate international regime entering into force at some point in the future. But when in the future remains undetermined, and the likelihood is that the Liability Annex may hinder, rather than help, the maritime industry and States themselves, determine what a prompt and effective response to an environmental emergency in the Antarctic requires, and the nature of any liability that might follow.

The Protocol required the establishment of rules and procedures for

liability for damage, but instead the Liability Annex has inadvertently conflated the distinct issues of liability for damage and an obligation to take response action. The threshold question on when to take response action and what that should look like is first at the discretion of an operator, and subsequently an assessment after the fact. Neither brings a great deal of comfort for consistency in decision making to ensure prompt and effective action for protection of the Antarctic environment.

The effectiveness of any response led by an operator rather than a State is divorced from the realties demanded by a response to any maritime casualty, much less one in the Antarctic environment, given its remote and unique characteristics. At best it risks delay, and more likely, will detract from the obligations of States themselves in relation to Emergency Response Action under the Protocol.[128]

From a purely pragmatic perspective, any decision on whether to take response action in Antarctica and implement any appropriate response action is best dealt with at a State level, preferably with the full benefit of any coercive powers of the State, and assets that may be available. The strength in the Antarctic System lies in the co-operation and co-ordination of the parties. The energies of the ATCM would be best directed at enhancing preparedness and response capability at a multi-party State level considering advance assessments determining what effective response action in the Antarctic environment requires, supported by asset identification, and a more structured and sustainable Fund.

Liability for damage and such costs should (of course) remain with the operator, subject to the limitation provisions, as under the IMO conventions. The current lacuna in a liability and compensation regime for Antarctica is unnecessary and – some 20 years on – inexcusable.

The IMO framework could offer a limited solution to bridge the current gap for maritime emergencies in Antarctic waters – potentially through a new protocol to extend existing IMO liability conventions to apply in Antarctic waters.

In respect of maritime matters, the IMO is the competent organization, not just in name but in nature. IMO has been developing liability and compensation systems for more than 50 years. Informed by experience it has shown itself capable to respond to events and to develop appropriate instruments, in conjunction with industry players, and – critically – to bring them into effect.

Many of the existing IMO instruments that seek to minimize the risk of a casualty and/or pollution damage will already apply to a vessel operating in Antarctic waters. Extending the framework of liability and compensation to Antarctic waters and bringing consistency to the scope and nature of any right to limit liability could serve both protection of the Antarctic environment and the objectives of uniformity and harmonisation of international maritime law.

However, whilst this approach may seem attractive and expedient, it

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[128] Protocol above n 2, Article 15.

would not be without its difficulties. The geographical scope of the IMO liability and compensation Conventions covers those incidents where ship sourced pollution damage has occurred in the territory, territorial waters, EEZ or equivalent area in a State Party. The continuing uncertainty on the legal status of the territory of Antarctica, and the absence of an Antarctic 'State' would render any stringent extension of the IMO Conventions ambiguous at best, if not unworkable, from a jurisdiction perspective. Whilst a Protocol to the Conventions would not necessarily have to slavishly follow the existing Convention articles and a more singular approach could be sought for the Antarctic to overcome such an obstacle, in reality it may be difficult to find workable solutions to some potentially contentious issues including; what constitutes reasonable measures of reinstatement in the unique and challenging Antarctic environment and, perhaps more critically in the aftermath of an incident, who would decide this?

Likewise, the scope of the IMO Conventions, and definitions contained therein, is not consistent with the Liability Annex and extension thereof may not necessarily meet the objectives of the drafters of the Annex. Any extension of the existing IMO liability and compensation Conventions to the Antarctic will necessarily be limited to pollution by hydrocarbon mineral oil or, once the HNS Convention is in force, pollution caused by hazardous and noxious substances carried as cargo and would not for example cover pollution damage arising from the use of alternative fuels as bunkers. In addition, the Consultative Member States of the ATCM are not all corresponding States Parties to the IMO Conventions and, given that it would be a requirement for a State to be a party to the underlying Convention before becoming a Party to any Protocol, the geographical application of any such Protocol could therefore be limited for some period of time.[129]

However, the IMO has proven to be creative and resourceful in the past when faced with an urgent need to develop statute either in the light of external pressure, an absence of existing statute or as a result of a significant incident that has highlighted a need to take the lead in the framing of international rules and regulations. The development of the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, is an excellent, but

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[129] It is worth noting that following almost two decades of discussions and negotiations, a new legally binding international instrument on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, known as BBNJ, was agreed on 4 March 2023, and is expected to be adopted in 19-20 June 2023. It is too early to say whether BBNJ will provide Antarctica with any more protection than the Antarctic Treaty (and the Liability Annex) and once the text is finalised and adopted ratification by 60 states is required before it will enter into force. However, the polluter pays principle is one of the guiding principles of BBNJ and the agreement includes a mechanism to establish marine protected areas and other area based management tools in the high seas not part of the jurisdiction of any one state. Further consideration of the implications and potential benefits of BBNJ for Antarctic will be necessary once the convention is adopted.

just one, such example[130]. While there have been incidents, the international community has not yet faced a significant and serious environmental threat to the Antarctic environment from a maritime casualty. History says it is just a matter of time.

[130] The Protocol was drafted, negotiated and adopted by the IMO over a period of just a few years and in response to the Erika (1999) and Prestige (2002) oil tanker incidents in French and Spanish waters respectively.

RESTATEMENT OF THE LEX MARITIMA

HALF-YEARLY REPORT (JANUARY-JUNE)

Eric Van Hooydonk, *Chair*

The CMI's Lex Maritima project is the very first attempt to put in writing the globally accepted principles of maritime law. The Lex Maritima can be considered the Lex Mercatoria for maritime matters.

Maritime law is supported by a long tradition of international uniformity. In recent years, however, the development of a universal maritime legal order by the adoption of unifying conventions has slowed. At the same time general, non-maritime contract law has started to find a way to wider harmonisation. The existence of a Lex Maritima consisting of a complex of internationally accepted rules of maritime law that may be traced in particular back to usage and general principles is widely, and even increasingly subscribed to by legal doctrine. Moreover, this view finds support in numerous elements of positive law, including case law and recently adopted national codification of maritime law.

On the other hand, there is no instrument of practical use available in which this virtually mythical Lex Maritima with all its customs, usages and principles is clearly articulated. Preparing and promoting such a compilation is quintessentially a task for the Comité Maritime International in the exercise of its research and education role, and with the broad aim of the promotion of harmonisation of maritime laws.

The CMI IWG on the Lex Maritima is preparing an elementary – that is, concise and flexible – description of the typical concepts and rules of maritime law that may be regarded as being internationally accepted and common to most, if not all legal systems and traditions. In other words, it is an exposition of the foundations of positive maritime law, such as those encountered in the conventions, national laws and the more specific and thematic self-regulating sources. In other words, this is a search for the innermost core of maritime law, as it is expressed in the concrete, practical legal rules in daily use in the maritime and legal community. The main difference between the proposed Lex Maritima principles and previous unification efforts is that the former explore and focus on common ground, rather than tackle issues of disagreement and divergence that require resolution. Such a compliation of selected general principles of maritime law could promote the satisfactory functioning of maritime law.

The latest work of the IWG can be summarized as follows. The IWG held four online meetings in the first half of 2023 during which the draft Lex Maritima Principles proposed at the 2022 Antwerp Conference were

discussed in more detail. The meetings took place on February 28, March 29, April 27 and May 31, 2023. Based on the discussions and further research, a new draft version was prepared prior to the Montreal Colloquium. On June 14, 2023, the IWG discussed this text at a closed meeting in Montreal (meeting in person combined with a videocall). A modified version was presented at an open session of the colloquium on June 16, 2023.

MONTREAL COLLOQUIUM

SPEAKERS PRESENTATIONS

OPENING REMARKS

Ann Fenech, *President of the CMI*

1. It is with great pleasure that I welcome you all to this CMI Montreal Colloquium. This is my first visit to Canada and it will most certainly not be my last and I hope you are all as excited as I am to be here.
2. This colloquium comes very hot on the heels of our Antwerp Conference and the organising committee barely had 8 months to organise this event. As a start I would therefore like to thank the organising committee made up of a number of CMI Exco members and members from the Canadian Maritime Law Association led by their President Paul Harquil, which committee has worked very hard indeed to put up this colloquium in circumstances which became more complex when the Grand Prix changed its dates to this coming week end!
3. Notwithstanding this we were still able to pull it off and here we are.
4. Thank you Paul and thank you to all your team. In addition I would also like to thank in particular our Secretary General Rosalie Balkin, office manager Evelien Peeters, Administrator Lawrence Teh and conference organiser Amanda Curtis and her team for the sterling work done in putting up this colloquium. Thank you all.
5. I am sure you will agree with me ladies and gentlemen that this splendid location is matched by the equally excellent programme and sessions which we have for you over the next two days.
6. The subjects which will be tackled and covered evidence the fact that the CMI is determined to consolidate its position as the primary facilitator for the unification of international maritime law. We are convinced that there is further need now, more than ever before in this constantly changing world we are living in, not only to ensure that we manage the present but that we are ready for the future.
7. To this end we are thus determined to continue to identify areas within the maritime sector which either require or will require uniformity. During my meetings with Mr. Kitak Lim at the IMO as well as during IMO legal

committee 110 held only a few weeks ago, it became very apparent that the CMI is not only ready and able, but is expected to offer its assistance in numerous areas which require and demand attention. Whether it is Maritime Automated Surface ships, whether it is decarbonisation, or whether it is fraudulent registries and fraudulent activity or whether it is the unfair treatment of seafarers undergoing legal processes, the CMI is geared, through its practitioners on the ground and at the coal face to provide real life solutions.

8. Hot off the press is the work of the CMI in bringing the Draft Convention on the international effects of judicial sales of ships to UNCITRAL, in actively and intently working with UNCITRAL in working group Vl to finalise a Draft in record time during COVID leading to the adoption of the convention by the General Assembly of the United Nations on the 7th December of last year. This was a very special day for the CMI. We now look forward to the signing ceremony of the Convention in Beijing in September.
9. This convention will, once ratified by as many states as possible, end the uncertainty currently being experienced by purchasers of ships in judicial sales of vessels sold free and unencumbered, and by their new financiers, when those sales are not given full and proper effect.
10. However this experience has also underlined another path, another deliverable for the CMI which goes beyond the drafting of international maritime conventions. This additional deliverable is the role which the CMI can and must play in the ratification process of conventions once the conventions are adopted. The experience we are living through at the moment related to the Convention on judicial sales has shown us that it is not only appropriate but necessary for the CMI to act as the facilitator, broker, mediator, go between, assisting national maritime law associations in their endeavours to convince their own governments of the need for the ratification of various conventions quite apart from assisting with offering explanations on their content. We are currently doing this with the Convention on the international effects of judicial sales of ships by participating together with the Secretariat at UNCITRAL in various road shows and seminars being held literally all over the world, where we go and explain what the convention is all about, why it is important for states to ratify the convention and these efforts are being greatly appreciated by the various governmental bodies in these jurisdictions.
    Of course proof of the pudding is in the eating and we will see whether all these efforts will provide the desired result in terms of ratifications.
11. Moving swiftly on, because we do have a very full day ahead of us, I would like to welcome and thank Mr. Kitak Lim Secretary General of the IMO for accepting our invitation to address us this morning, Minister of Transportation in Canada, The Honourable Omar Alghabra, and the Honourable Sean Harrington for so very kindly accepting our invitation to deliver the Berlingieri lecture.

    Finally thank you all for coming to Montreal and attending this colloquium. On behalf of the CMI I welcome you to this colloquium, I

hope that the Montreal programme will provide you with the mentally stimulating debate that we are now accustomed to expect from CMI events and most importantly that it will also give you all the opportunity of catching up with old friends and making new ones.

Thank you.

OPENING SPEECH

J. Paul M. Harquail, *President of the Canada MLA*

Honorable members of the judiciary, representatives of the IMO, MLA presidents and delegates, distinguished officers of CMI, honored delegates and guests, on behalf of the Canadian Maritime Law Association, de la part de l'Association Canadienne de Droit Maritime, bienvenue à Montréal, welcome to Montréal.

We last were together in Antwerp to celebrate the 125th anniversary of CMI, I had the pleasure of receiving the CMI flag and, it is tradition I dutyfully brought it back to Canada in anticipation of our MLA hosting you today. During that moment, I also realized the daunting task ahead for the CMLA. A little bit of context: the Canadian Maritime Law Association was established in 1951 and this is only the third time that CMI has held a CMI conference or colloquium in Canada. The first in Montreal, second in Vancouver and here we are back in Montréal. Many will know we were set to welcome you much earlier but the pandemic had other plans for us, notwithstanding we were determined to keep our commitment to host you – as is our pleasure. I want to underscore the work that has gone into the bringing of this Colloquium together and sincerely thank the members of the joint CMLA and CMI organizing committee for their hard work. In particular I want to highlight the commitment of the officers and regional Vice Presidents of the CMLA and to BB&C, our service provider. Of course I want to thank President Ann and team CMI for their hard work and dedication. We had no less than ten teams organizational meetings which encompassed seven time zone. So a lot of hard work and in some cases, impacted sleep. The CMLA's goal for this Colloquim was to provide not only a program to allow for the usual business of CMI and its IWG's (International Working Groups) to be conducted but to deliver substantive parallel sessions worthy of professional development accreditation which is of course important for the Canadian/Us delegates. But, our overriding goal was to make sure that this Colloquim would provide an opportunity for delegates to enjoy collegial time together, set in the background of this world-class city which is Montréal. We trust that you will agree that we have achieved our goal.

As I conclude, I want to thank the CMLA for the confidence it has placed in me during my term as President and extend congratulations to Rui Ferandes as he has his first full day as our new President. A special shout-out to our own John O'Connor, elected in Antwerp as a CMI Vice-President who

serves along with Dr. Dieter Schwampe and finally, special congratulations to Ann Fenech as she chairs her first CMI Colloquim, the first woman to serve as CMI's President.

Enjoy your time here in Montréal and in Canada!

BERLINGIERI LECTURE: CANADA'S CONTRIBUTION TO MARITIME LAW

The Honourable Sean J. Harrington

Madam President, Mister President, Friends of the Comité:

Bonjour; good morning. It is a great honour for me to stand before you in my hometown to present the Berlingieri Memorial Lecture. I cannot say I knew Professor Berlingieri particularly well. I met him at various C.M.I. conferences over the years, but only served with him on one committee; the International Sub-Committee on Issues of Transport Law, in 2000. The minutes show that we had a very lively discussion concerning the legal implications of various forms of bills of lading and the intensity of the carrier's obligations under the *Hague Visby Rules*. I certainly always listened very carefully to what he had to say and read very carefully what he had to write.

I do know, of course, his son Giorgio, another prominent attorney, current President of the Italian Maritime Law Association and Vice-President *Honoris Causa* of the C.M.I. I was reading through some of the old Yearbooks, before the Canadian Maritime Law Association joined the C.M.I. in 1951. The Amsterdam 1949 Yearbook lists one Giorgio Berlingieri, Professor at the University of Genova, as a member of the Executive Council. That would be Francesco's father. But that is not all. In his tribute to Francesco Berlingieri, past President Stuart Heatherington mentioned another Francesco who goes back at least to the Paris Conference in 1900. Without a doubt the Berlingieris are the first family of the C.M.I.

We Canadians are considered to be very polite and diffident. We are not known as braggards. However I am going to break out of the mold today and brag about our contribution to the C.M.I., to the Canadian judiciary and above all about our contribution to maritime law.

The C.M.L.A. was established right here in Montreal in 1951. Since then, seven members have served on the C.M.I. Executive Council, three of whom went on to serve as Vice-Presidents: John O'Connor, the Honourable Madam Justice Johanne Gauthier and Professor William Tetley, who more than anyone else put Canada on the International Maritime Law stage. We have also had two C.M.L.A. members serve as Secretary General of the

C.M.I. One was my late law partner Nigel Frawley. The other may come as a surprise; Marko Pavliva. Marko obtained his Ph. D from McGill, under the tutelage of Professor Tetley and stayed in Montreal for a few years. He served as Secretary General of the C.M.I. until he was appointed Minister of Transport in Slovenia.

An extraordinary number of C.M.L.A. members have been elevated to Canada's high courts; at least 22 by my informal and probably inaccurate count. They include Rolland Ritchie, who served on the Supreme Court of Canada; George Strathy, Chief Justice of the Ontario Court of Appeal; and Arthur Stone of the Federal Court of Appeal, who, as President of the C.M.L.A., welcomed you to the C.M.I. conference here in Montreal in 1981.

There is good reason for these appointments. The C.M.I. 1949 Yearbook not only lists Giorgio Berlingieri as a member of the Executive Council, but also Professor Georges Ripert, a noted French scholar. I cannot find the quote, but I believe it was he who said : *La vie et le droit commencent et terminent avec la mer* (Life and the law begin and end with the sea).

Professor Ripert was right. I served almost 16 years on the Federal Court and the Court Martial Appeal Court of Canada and am firmly of the view that maritime law is the most complete, interesting and complex area of the law, primarily because of its application of the conflict of laws.

In the overall scope of things, there are other areas which may objectively be more important, such as the application of the United Nations Convention relating to the Status of Refugees, an issue very much in the news over recent years. However, maritime law has it all. It covers the law of obligations, such as contract, tort and bailment. It also covers the environment and human rights.

Admiralty lawyers should shop around to find the best solution. Mr. Justice Teare of the High Court of England and Wales put it very well in the forward to the second edition of Derrington and Turner's, *The Law and Practice of Admiralty Matters*. He said:

> Whenever a problem of Admiralty Law arises which does not appear to be covered by a clear and binding precedent (and perhaps even when it does appear to be so covered) the Admiralty court, in whatever country, will or should be assisted by knowing how the problem has been approached or solved by other courts exercising an Admiralty jurisdiction.

There are a number of reasons why Canadian maritime law may be of interest to practitioners in other jurisdictions. We have a very expansive view of maritime law, which derives from the fact that Canada is a federal state, which requires the courts to carry out a division of powers analysis in order to determine whether a matter is maritime or not, and because we are home to both the common law and the civil law.

Under our Constitution, maritime law falls within the federal legislative class of subject of "navigation and shipping", as contrasted to such provincial matters as "property and civil rights" and "local works and undertakings". This is neither the time nor the place (except in my closing remarks) to review the hoops that the courts have gone through to determine if a matter

is federal or provincial. For those interested, in an Endnote I have referred to such judge-made pronouncements as "pith and substance", "federal paramountcy" "double aspect", "interjurisdictional immunity", "watertight compartments", "co-operative federalism", "flexible understanding", "trenching on the core", "affect or impact" and statute law as opposed to the *lex non scripta* of federal common law[1].

A shortcut in deciding whether a dispute is maritime in nature is to determine whether the Federal Court, Canada's Admiralty Court, has jurisdiction. Although the creation and the organization of the courts is a provincial matter, by way of exception, the Federal Parliament may, and has, established a general Court of Appeal (The Supreme Court of Canada) and additional courts for the "better administration of the laws of Canada". Canadian laws in that context means federal statutes and federal common law. The Federal Court and the Federal Court of Appeal are two such Courts.

Our Constitution is not static. We follow the "living tree" doctrine. Our written constitution was enacted in 1867. It was only in 1929 that women were deemed to be "persons" within the meaning of the Constitution. In *Edwards* v *Canada (Attorney General)*, [1930] AC 124; [1930] 1 DLR 98, the question was whether women were "qualified persons" to serve in the Canadian Senate. In 1867 there was a general exclusion of women from public office. Consequently, our Supreme Court held that women were not "qualified persons" eligible to serve. The Judicial Committee of the Privy Council, then Canada's final Court of Appeal, disagreed. It said "The B.N.A Act planted in Canada a living tree capable of growth and expansion within its natural limits".

Modern Canadian maritime law rests on two foundations: the *Federal Courts Act*, which came into force in 1971, and the decision of the Supreme Court of Canada, on appeal from the Federal Courts, in *ITO Int'l Terminal Operators* v *Miida Electronics* [1986] 1 SCR 752 ("the Buenos Aires Maru").

The Federal Courts Act defines Canadian maritime law as including the laws its predecessor, the Exchequer Court, would have administered had it had unlimited jurisdiction in admiralty and maritime matters.

The Buenos Aires Maru was a garden variety cargo claim. An import shipment had been discharged from the ship here in Montreal into a harbour transit shed operated by ITO. The cargo was stolen after discharge but before delivery to the consignee, allegedly due to ITO's negligence. The bill of lading contained the usual after discharge loss clause exonerating the carrier from liability and Lord Denning's new Himalaya Clause, which purported to extend the carrier's benefits to its sub-contractors. The Supreme Court had yet to pronounce on the validity of the clause.

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[1] Maritime cases include *Bow Valley Husky (Bermuda) Ltd.* v *Saint John Ship Building Ltd.* [1997] 3 SCR 1210; *Marine Services International* v *Ryan Estate* [2013] 3 SCR 53; and *Desgagnés Transport Inc.* v *Wärtsilä Inc.* [2019] 4 SCR 228. The latter two have not found favour with the Admiralty Bar. My case comment *Transport Desgagnés Inc.* v *Wärtsilä Canada Inc.* can be found on the C.M.L.A. website. Madam Justice Rochester did an end around Desgagnés in *Duval* v *Seapace (Ship)* [2022] FC 575. The most recent decision of the Supreme Court on the division of powers is Murray Hall v. Quebec (Attorney General) 2023 SCC 10.

ITO did not contest the jurisdiction of the Federal Court. Rather it relied on some earlier jurisprudence which held that, absent a specific admiralty rule, the general law of the territory was applicable. Since Canada was a federal state and since Montreal was in Quebec, civil law would apply. The Himalaya Clause was perfectly valid under Quebec law as a stipulation for the benefit of a third party. One downside of this argument, of course, was that had the cargo been discharged elsewhere, such as in Toronto or Vancouver, the result might well have been different.

It was the Supreme Court itself which raised the spectre of lack of jurisdiction. The majority, however, went on to hold that the litigation was governed by Canadian maritime law, as opposed to provincial law. This was not a matter of property and civil rights in the province. The matter was governed by maritime law because of the proximity of the terminal operation to the sea, the connection between the terminal operator's activities and the contract of carriage by sea and the fact that the storage was short term pending final delivery within the area of the port.

It was held that Canadian maritime law was uniform throughout the country and did not include provincial law, except that which might be incidentally relevant. It included the laws of contract, tort and bailment administered by the English admiralty courts up to 1934, as might subsequently be altered by Canadian statute or jurisprudence.

In the result, ITO's defence was successful, not on the grounds that the claim fell within property and civil rights in the province, but rather that the maritime law of contract included the Himalaya Clause. Matters were not to be considered as having been frozen in 1934. "Maritime" and "admiralty" should be interpreted within the modern context of commerce and shipping (echoes of Edwards). The ambit of Canadian maritime law was limited only by the constitutional division of powers in the Constitution. Thus, Canadian maritime law is co-extensive with the legislative class of subject of "navigation and shipping". The issue is whether the subject-matter under consideration is so integrally connected with maritime matters to be legitimate Canadian maritime law.

Although it was held in *The Buenos Aires Maru* that the law so administered included the common law of contract, tort and bailment, the Court went on later in *QNS Paper Co.* v *Chartwell Shipping Ltd.* [1989] 2 SCR 683 to point out that English common law in turn had its early foundations in the civil law, administered in the Doctors' Commons.

Of particular interest is the concurring set of reasons of Madam Justice L'Heureux-Dubé, a civilian, who said: "In keeping with the tradition of Canadian maritime law, absent a specific maritime law rule, a comparative law method should be used to arrive at the position under Canadian maritime law. This comparative law method suggests looking to both civil law and common law sources in order to find the maritime law rule."

Our Constitution requires that at least three of the nine judges elevated to the Supreme Court of Canada be from Quebec, that is to say be civilian. A number, however, have been trained in both the civil law and the common law. Of the three civilians currently serving, one also has a common law degree, and of the six common law judges, two were also trained in the civil law.

The Supreme Court is of the view that our maritime jurisdiction is broader than that of the United Kingdom and the United States. Although in the abstract it is assumed that legal principles such as contract and tort fall within the legislative class of "property and civil rights", these legal concepts may also fall within federal common law. The courts look at the subject matter of the contract. Thus, the sale of a ship[2] and a contract of marine insurance[3] are maritime, notwithstanding that it had been held more than a century before that contracts of insurance were matters of property and civil rights.

There is no federal *Sale of Goods Act*. In the maritime context, the (U.K.) *Sale of Goods Act* is applied[4]. Likewise, before Canada enacted its own *Marine Insurance Act*, the (U.K.) *Marine Insurance Act, 1906* formed part of Canadian maritime law

The concept behind the Himalaya Clause is that the ocean carrier is contracting not only on its own behalf but also on behalf of its sub-contractors. The Supreme Court expanded upon this idea by extending third party benefits to employees of sub-contractors and even to sub-contractors who had not requested that they be included and were unaware that a Himalaya Clause even existed[5].

Claims in tort for pure economic loss

As a general rule, the common law considers claims in tort for pure economic loss to be too remote. The fear is that there could be "liability in an indeterminate amount for an indeterminate time to an indeterminate class - -" as the great American jurist Justice Cardozo put it in *Ultramares Corp* v *Touche, Niven & Co*, 255 NY 170, 74 ALR 1139 (1931) (US). On the other hand, the Quebec Civil Law permits recovery if the loss is a direct consequence of the negligent act.

The high water mark of the incorporation of civilian principles into the common law of torts is the case of the *Jervis Crown*[6]. As a result of a negligent allision with a bridge, Canadian National Railway had to reroute its trains. It did not own the bridge. The Federal government owned it. The railway simply had a contractual right of use. Nevertheless and over a strong dissent, the railway prevailed, essentially on the civil law of causality.

The Supreme Court has been backtracking ever since. It claims to have stated no general principle in the *Jervis Crown*. Now, it poses the question put by the House of Lords in *Anns* v *Merton London Borough Council* [1978] AC 728. Is there a sufficiently proximate relationship to give rise to a *prima facie* duty of care and if so, is that duty negated for policy reasons? While the

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2 *Antares Shipping Corporation* v *Ship "Capricorn"* [1980] 1 SCR 553.

3 *Zavorovalna Skupnost, (Insurance Community Triglav Ltd.)* v *Terrasses Jewellers Inc.* [1983] 1 SCR 283.

4 *National Bank of Canada* v. *Lee Rogers*, 2015 FC 1207.

5 *London Drugs Ltd.* v *Kuehne & Nagel International Ltd.* [1992] 3 SCR 299; and *Fraser River Pile & Dredge Ltd.* v *Can-Dive Services Ltd.* [1999] 3 SCR 108.

6 *Canadian National Railway Co.* v *Norsk Pacific Steamship Co.* [1992] 1 SCR 102 (The *Jervis Crown*).

Court has stated that there may be additional categories added as time goes on, recovery of claims for pure economic loss is limited. Some categories are maritime in nature such as a bailee in possession and general average. Others include joint ventures, the independent liability of statutory public authorities, negligent misrepresentation, negligent performance of a service, negligent supply of shoddy goods or services and relational economic loss. The underlying philosophy is that Courts may change the common law where necessary in order to keep in step with the "dynamic and evolving fabric of our society."[7]

Contributory negligence.

At common law, contributory negligence on the part of the Plaintiff barred recovery. The Canadian provinces passed legislation to overcome this bar based on privity of contract. However, as per *The* Buenos *Aires Maru*, Canadian maritime law did not include provincial law. Nevertheless, the Supreme Court held that since the original bar was judge-made, the Court could, on its own, in accordance with our changing society, proclaim a contributory negligence rule[8]. That pronouncement was later enshrined in section 17 of our *Marine Liability Act*.

Conflict of laws and the action *in rem*

Until recently, Canadian necessaries men, including stevedores, bunker suppliers and ship repairers were ordinary maritime creditors. They were entitled to proceed *in rem* provided that ownership had not changed and providing there was personal liability on the part of the shipowner. They enjoyed no priority over the proceeds of a judicial sale. This put them at a disadvantage when contrasted with foreign necessaries men, particularly Americans, who usually enjoyed a maritime lien. Our Supreme Court has a long history of giving effect to foreign maritime liens, notwithstanding that under our domestic law no maritime lien lay. See for example the *Ioanmis Daskalelis (Todd Shipyards Corp.)* v *Altema Compania Maritima S.A*. [1974] SCR 1248. The ship had been sold, and as is quite common, the funds generated thereby were insufficient to satisfy the claimants. The prime contenders were an American necessaries man and a Greek mortgage holder. The Court held that the U.S. maritime lien took precedence over the Greek mortgage. If this had been a purely domestic Canadian matter, the mortgage would have enjoyed precedence. The Court held that the nature of the claim was to be determined by its proper law and that ranking was determined in accordance with the laws of Canada., i.e. the *lex fori*.

Subsequently, the Supreme Court has not followed the decision of the Privy Council in the *Halcyon Isle (Banker's Trust International Ltd v Todd*

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[7] *Bow Valley Husky* (Bermuda) Ltd. v. Saint-John shipbuilding Ltd. [1997] 3 SCR 1210; *Design Services Ltd.* v *Canada* [2008] 1 SCR 737 and *1688782 Ontario Inc.* v *Maple Leaf Foods Inc.* [2020] SCC 35.

[8] Bow Valley, *supra*.

Shipyards Corp) [1981] AC 221, [1980] 2 Lloyd's Rep 325. That case held that a British mortgage outranked an American necessaries claim. It held that the status of a claim and ranking are matters of procedure to be determined by the laws of the forum. Under the laws of the forum, Singapore, like England and for that matter, Canada, a mortgage had priority over a necessaries claim.

In *The Brussel (Holt Cargo Systems Inc v ABC Containerline NV (Trustees of))*, [2001] 3 SCR 907), the Supreme Court reiterated that the status of a claim was to be decided by the proper law. Holt, an American stevedore, had provided services to the Brussel in the United States and later arrested her in Canada. Her Belgian owners subsequently went bankrupt. It was common ground that Holt would have been treated as an ordinary creditor in the Belgian bankruptcy and would have recovered little or nothing. The Court had to weigh universal theories of bankruptcy against a more ancient form of creditor protection, the maritime lien. The maritime lien won out on the basis of international comity.

Necessaries men, particularly bunker suppliers who know, or should know, perfectly well that they are contracting with a time charterer, have provided in their contracts that the charterer is also contracting on the part of the owner and have chosen American law as the proper law of the contract, notwithstanding that the matter might have nothing whatsoever to do with the United States. The Federal Court has put a damper on this practice by engaging in a choice of law analysis. It has held that such choice of law clauses are stipulations to the detriment of a third party, i.e. the shipowner and that U.S. law is not the proper law to be applied in Canada to resolve the relationship between the bunker supplier and the ship owner[9].

Canadian necessaries men, complained bitterly that they were not given a level playing field. For instance, an American necessaries man could give credit knowing it was secured, while a Canadian would be unsecured. Parliament reacted by enacting Section 251 of the *Canada Shipping Act, 2001* and section 139 of the *Maritime Liability Act*. Section 251 of the *Canada Shipping Act, 2001* provides that a stevedore who contracts with a bareboat charterer may maintain an action *in rem* in the Federal Court, as long as the ship is chartered to the bareboat charterer at the time of the arrest.

Section 139 of the *Marine Liability Act* which was enacted in 2009 provides that persons carrying on business in Canada have a maritime lien in respect of goods, materials or services WHEREVER supplied to a foreign vessel.

The "wherever" is an attempt to legislate extra-territorially. While it may well be that a Canadian Court would give effect to the provision and grant a maritime lien to a Canadian necessaries man who renders services in another jurisdiction, other jurisdictions probably would not. A good example is the Australian case of *The Sam Hawk* [2015] FCA 1005, reversed by the Full Court of the Federal Court of Australia [2016] FCA FC 26. A Canadian bunker broker had contracted with an Egyptian time charterer for the supply of bunkers in Turkey, by a Turkish sub-contractor, to a ship registered in

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[9] *World Fuel Services Corporation* v. *Nordems (Ship)* 2011 FCA 73.

Hong Kong. The ship was later arrested in Australia. Ownership had not changed. It was held that the bunker broker did not enjoy a maritime lien

Forum selection clauses

As a general rule, Canadian Courts will stay proceedings in favour of the forum, be it a foreign court or arbitration venue, selected by the parties. As most cargo claims in Canada are on import shipments, there was a great deal of complaint. The venue set out in the bill of lading often had nothing whatsoever to do with the shipment in question. Parliament responded by enacting Section 46 of the *Marine Liability Act*. It provides that contracts for the carriage of goods by water covered by a bill of lading or similar document of title may be instituted in Canada, notwithstanding a foreign jurisdiction or arbitration clause; if the actual or intended port of loading or discharge is in Canada, if the defendant resides or has a place of business, plant or agency in Canada, or if the contract was made in Canada.

In my opinion s. 46 is defective. Jurisdiction over the defendant is based upon service of the proceedings in Canada, or in some instances by authorized substituted service. Thus Canada has jurisdiction even if the matter has nothing whatsoever to do with Canada. The Court of Appeal has interpreted this clause as having the effect of somewhat watering down but not eliminating the enforceability of foreign forum selection clauses. Thus in *The Cougar Ace*[10] the Court gave effect to a Japanese jurisdiction clause on a shipment from Japan to Canada, notwithstanding that the plaintiff was Canadian. A stay will almost always be granted if the carriage is not evidenced by a bill of lading, for instance by a seawaybill.

Priorities

As aforesaid, the proceeds of a judicial sale are usually insufficient to satisfy all claims. Unless the court can be persuaded that a claim enjoys priority, the claims rank *pari-passu*. While there are Canadian statutes which accord a claim a maritime lien, or statutory lien equivalent to a maritime lien, there is no statute setting out the ranking of priorities. Ranking has been developed by the courts over time. They have been neatly summarized by one of our past presidents Will Moreira K.C. in his Admiralty Jurisdiction and Procedure chapter found in *Chircop et al. Canadian Maritime Law*, 2ed 2016.

They are as follows:

> **a)** Marshal's expenses of arrest **b)** the cost of selling the ship **c)** possessory liens, predating maritime liens **d)** maritime liens, including statutory liens equivalent thereto **e)** possessory liens arising subsequent in time to maritime liens **f)** mortgages **g)** statutory rights in rem.

However as noted therein, the court in exercising its equitable jurisdiction may shuffle the cards a bit. One claimant against the proceeds of the

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[10] *Mazda Inc. v. Cougar Ace (The) 2008 FCA 219.*

Phoenix Sun[11] was La Ville de Sorel-Tracy. It was not a port within the meaning of the *Canada Marine Act* and so it enjoyed no priority. They were two parts to the claim: berthage and the supply of electricity. For all intents and purposes, the ship had been abandoned in a Canadian winter. As the singer says "mon pays c'est l'hiver" I was of the view that had the electricity not been supplied the ship would have seriously deteriorated and would not have fetched the price she did. I ranked the electricity portion of the claim ahead of the mortgage.

The *Federal Courts Act* allows for the arrest of sister ships. It has been held that only one sister ship may be arrested, providing ownership has not changed. The creditor enjoys no priority over the proceeds of the sale of the sister ship, even if it held a maritime lien against the offending ship.

General Average

Although most General Average adjustments are made elsewhere, Canada has had a few interesting cases. In the *City of Colombo* (*Ellerman Lines Ltd v. Gibbs Nathaniel (Canada) Ltd* [1986] 2 FC 463). The ship was on a voyage from the Indian sub-continent to Montreal and Toronto. While in Montreal it was discovered that the engine was about to fail, so much so that she could not have proceeded to Toronto without repair. The owners declared general average. The bills of ladings called for adjustment according to *the York-Antwerp Rules 1974*. It was held that this was an extraordinary circumstance, so that the owners were entitled to declare general average. They offered to forward the cargo to Toronto against a non-separation agreement. Cargo refused and obtained a court order to take delivery at Montreal against posting security and paying any additional expenses. It was held that the cargo was so entitled and therefore not required to contribute to general average expenses subsequently incurred. Professor Tetley called this an example of "artificial" general average.

As a result, the *York-Antwerp Rules 1974* were amended in Sydney to add a non-separation clause.

The *Pointe Levy* (*Ultramar Canada Inc. v. Mutual Marine Office Inc [*1995] 1 FC 341) dealt with the thorney problem of excess general average. The court held that cargo's contribution was limited to its value. Excess expenses fell upon the shipowner. The case is also interesting in that it held that liabilities averted do not contribute in general average.

Artificial intelligence

I have heard so much lately about ChatGPT that I wondered what type of paper it would generate. I had no idea of how to go about this so I asked my son-in-law to help out. We might not have asked the right question. We asked "Please write the Belingieri lecture as to why Canadian Maritime Law is of international interest in the style of the Honourable Sean Harrington".

The paper was very generic. It spoke of our geographical location and

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[11] *Ballantrae Holdings Inc. v. Phoenix Sun (Ship) 2016 FC 570.*

our maritime heritage. However not one word was mentioned of Professor Belingieri and not one court case was cited. I think our jobs as maritime lawyers and judges are safe for the time being !

Closing remarks

So far my remarks have been addressed to an international audience. Now I speak to the C.M.L.A on a somewhat somber note. The goal of the C.M.I. is to foster uniformity in International Maritime Law. On the domestic front it was likewise the goal of the Supreme Court of Canada in its great decisions of the 1980's and 90's to foster a single National Maritime Law so that the result would be the same no matter which province had the closest connection to the case and no matter if suit was issued in our national Maritime Court, the Federal Court, or in the Provincial Courts which have concurrent jurisdiction.

Unfortunately, this is no longer the case. The Supreme Court has become, in my opinion, too parochial. Its current division of power analysis emphasizes "co-operative federalism", "double aspect", and most distressing of all in its decision *Desgagnés Transport inc Inc. v Wärtsilä Inc.* [2019] 4 SCR 228, which held a provincial statute overrides federal common law, which by reference incudes the (U.K.) *Sale of Goods Act*.

This shift in favour of the provinces is set out in Chircop, *Canadian Maritime Law Revisited: Quo Vadis* (2023) 46:1 DAL. L. J.

Desgagnés Transport dealt with the sale of defective engines parts. The contract contained limitation of liability clauses and provided that it was to be governed by the laws in force where the seller had its head office, which happened to be Quebec.

The Quebec Court of Appeal held that the case was governed by Canadian Maritime Law, including the (U.K.) *Sale of Goods Act*, so that the limitation of liability clauses were perfectly valid. While the majority of the Supreme Court agreed that the case was governed by *Canadian Maritime Law* it held that there was a "double aspect" to the sale and that the provisions of the Quebec Civil Code overrode Federal Common Law.

One would hope that had the contract contained a Canadian Maritime Law governing clause the result would have been different.

Left unanswered however, were situations in which the contract does not contain a governing law clause or contains a foreign governing law clause. Absent proof of foreign law our courts apply the laws of the forum.

Just recently Madam Justice Rochester, a member of the C.M.L.A., and a former member of its executive, had to wrestle with this problem in *Fraser Point Holdings Ltd v. Vision Marine Technologies Inc.* 2023 FC 738. The case deals with the sale of an allegedly unseaworthy pleasure craft. The sale was by a Quebec vendor. The contract contained no choice of law clause whatsoever.

Madam Justice Rochester, somewhat reluctantly I think, came to the conclusion that *Desgagnés Transport* required her to hold that the case was governed by the Quebec Civil Code. She did however point out that the Federal Court nevertheless had jurisdiction. This is a must read.

What then of cases that have nothing whatsoever to do with Canada save that the ship is arrested here? One would hope that the Federal Court would then apply Canadian Maritime Law in its entirety, including the (U.K.) *Sale of Goods Act*. What if the action is instituted in the Quebec Superior Court? The Quebec *Code of Civil Procedure* allows for seizures before judgment, the genesis of the Mareva Injunction. A plaintiff who has a claim against a time charterer cannot in the Federal Court arrest a ship which the time charterer happens to own. However it might obtain a seizure before judgement in the Quebec Superior Court. What is the law of the forum then?

There is an easy solution to the sale of marine goods problem. Parliament: enact a Federal Sale of Marine Goods Act!

However the problem goes far beyond the contract of sale. Much of Canadian Maritime Law is either judge made or only incorporates U.K. statutes by reference. Provincial Law, particularly in Quebec is more statute based. Under current thinking if there is a double-aspect the provincial statute triumphs.

In *Desgagnés Transport*, three of the Judges went so far as to say a contract for the sale of a ship was a matter of "property and civil rights" and not a matter of "navigation and shipping", notwithstanding that this constitutional point had been decisively determined by the Supreme Court in *Antares Shipping Corporation v. Ship "Capricorn"* [1980] 1 SCR 553.

It seems to me that a constitutional point which has been decided should remain decided unless the legislature intervenes.

As the Lord Chancellor said in *Chapman v. Chapman 1954* AC 429, a case which dealt with the jurisdiction of the Chancery division of the High Court:

> "We are as little justified in saying that a Court has a certain jurisdiction because we think it ought to have it, as we should be in declaring that the substantive law is something different from what it has always been declared to be, merely because we think it ought to be so. It is even possible that we are not wiser than our ancestors."

On May 31st, just as I was putting the final touches on this paper, the Federal Court of Appeal handed down its decision in *Canada v Boloh 1 (a)* 2023 FCA 120, a case which deals with our *Charter of Rights and Freedoms* which forms part of our *Constitution Act, 1982*.

Mr. Justice Stratas, speaking for the Court, was of the view that the Supreme Court had definitely interpreted the *Charter* in 1985, but around the year 2000 it adopted a much looser approach.

Do his following words resonate?

> "except in the rarest, most justified circumstances, once the Supreme Court lays down the law, that law must be obeyed by all – even by the Supreme Court itself... This is especially the case for foundational jurisprudence that has been around for decades..."

He went on to say that as a result of this new looser approach "sometimes new unwritten constitutional rights, far removed from the constitutional text, were "discovered' ".

However he concluded that all was now right with the world because in 2020 the Supreme court reverted back to its 1985 decision.

One can only hope that in maritime matters it will revert back to its 1986 decision. Long live the *Buenos Aires Maru!*

Thank for your attention.

THE BRIGHT STAR AND ARTICLE 8 OF THE CONVENTION ON THE INTERNATIONAL EFFECTS OF JUDICIAL SALES OF SHIPS

Ann Fenech

The speakers before me, ladies and gentlemen, have explained the first seven articles of the Convention including the notice of judicial sale, the issuing of a certificate of judicial sale following the sale as well as of course the entire raison d'etre of the Convention contained in article 6 which states:

> ***"A judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser."***

Peter Laurijssen has just explained how one of the most important effects is contained in article 7 which is that on the presentation of the certificate of judicial sale to the registrar of the flag state where the vessel was registered prior to the sale, he must on the request of the purchaser either delete the vessel, delete any mortgages or hypothecs or reregister the vessel in the name of the new owner.

Of course one of the cardinal principles which emanate from this Convention is that a vessel sold free and unencumbered in the judicial sale is not capable of re arrest by previous creditors and we find this principle enshrined in Article 8 of the Convention.

The Bright Star

The importance of having Article 8 can be fully appreciated when we go through the facts of the Bright Star which was decided by the Court of Appeal in Malta on the 12th January 2023[1] and which confirmed the judgement of the first court delivered on the 27th May 2021[2].

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1 *Ann Fenech nominee* v *Jebmed Srl – The Bright star (Malta) 2023 App.Civ 846/18/2.*

2 *Ann Fenech nominee* v *Jebmed Srl – The Bright star (Malta) 2021 846/2918.*

On the 9th of January 2018, Bluefin Marine Ltd purchased the vessel Trading Fabrizia for the sum of US$10,300,000 in a judicial sale by auction in Jamaica. The vessel had been arrested in Jamaica by the mortgagee Jebmed Srl ("Jebmed") which was followed by the vessel's judicial sale by auction in Jamaica. Subsequent to the sale the Jamaican courts ordered the sum of US$3,000,000 to be reserved in favour of Jebmed.

On the 19th of June 2018 the vessel, renamed "Bright Star" was under charter passing through the Mediterranean en route from Kavkaz to Venezuela fully loaded with a cargo of wheat. She stopped off Malta to pick up bunkers and was immediately arrested by Jebmed, the old mortgagee of the vessel prior to her sale in Jamaica. It is most ironic how this ship was arrested in Malta by the old mortgagee only a few weeks prior to the start of the fifty first session of the Commission at UNCITRAL[3] which had agreed to take on project. This arrest was clearly contrary to article 37 (D) of the Maltese Merchant Shipping Act which stated:

> *Provided further that where a ship has been sold pursuant to an order or with the approval of a competent court within whose jurisdiction the vessel was at the time of the sale, the interest of the mortgagees as well as of any other creditor in the ship shall pass on to the proceeds of the sale of the ship.*

Attempts to get Jebmed to withdraw its illegal arrest failed. The Bright Star should never have been arrested by the vessel's old mortgagee following the sale of the Bright Star free and unencumbered six months previously. Jebmed should have proceeded with seeking payment from the sale price in Jamaica out of which the sum of US$3,000,000 initially, later reduced to US1,000,000 had been reserved for its claim.

Furthermore attempts to lift the arrest by using summary proceedings also failed. The judge whilst very sympathetic to the new owners predicament, decided that summary process could not be used and that if the owners were claiming an illegal arrest then they had to start an action on the merits which they did.

The owners of the Bright Star with a ship under charter and full of wheat, had to deal with the losses associated with a disruption in the charter and immediately mobilize assistance to ensure that the vessel could continue on its journey without undue delay. Thus the owners had no option but to put up security in cash to the tune of Euro 778,000, in order to have the vessel immediately released from arrest and argue later. The security replacing the vessel had to be put up in cash because the arresting party had refused to accept a letter of undertaking from the vessel's P & I Club Steamship Mutual who had of course from the moment of the arrest gotten involved lending their support and guidance. In the meantime the charterers of the vessel were

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[3] Report of the United Nations Commission on International Trade Law fifty-first session A/73/17.

getting rather concerned about the delay caused to the voyage with potential claims looming.

The financiers who had financed the purchase of the vessel in the judicial sale in Jamaica, were also very worried about this turn of events, given that when they had agreed to finance this ship, it was on the understanding and on the basis of an opinion obtained from the Admiralty Marshall in Jamaica that the vessel was being sold free and unencumbered and that the law of the vessel's registry then which was Malta, fully accepted the transfer of the free and unencumbered title to the purchaser and provided that the interests of old mortgagees or creditors would cease to attach to the vessel under new ownership and that their interests would pass on to the proceeds. Thus they financed the vessel in the belief that all previous debts would fall and that it was they, the new financiers, who held the only mortgage against the vessel.

The illegal arrest of the Bright Star was the start of nothing short of a judicial saga lasting until the 12th January 2023 when the Court of Appeal handed down its final judgement.

This five year period witnessed no less than 73 judicial proceedings

On the 27th May 2021 the first Court declared the arrest illegal and ordered Jebmed to pay damages. The Court declared that:

> *"It is the Court's view that the proviso to article 37 D(1) ie that part which considers the consequence of the sale "with the approval of a competent court within whose jurisdiction the vessel was at the time of the sale" is clear enough to remove all doubt. There is no indication in the acts of this case that the sale was not ordered by a competent Court. The Jamaican Court conducted the sale process in terms of Jamaican law and in the process of recognizing the existence of a mortgage in favour of the defendant company, it reserved a sum of money from the proceeds to satisfy Jemed's credit once it proved its claim linked to the mortgage as required by Jamaican law.*
>
> *There is nothing in Maltese law which nullifies the effects of article 37D (1) to what has just been stated. Although the introductory part of article 37D(1) states that a mortgage continues to attach to the vessel until it is discharged, the said article imposes exceptions to this general rule including the sale pursuant to an order or with the approval of the Court as in this case. However this does not mean that the creditor loses his privileged right, rather his privileged rights are transferred from the ship to the proceeds of the sale. This means that whatever the sum constituting the proceeds may be, where there are various creditors expecting payment from those proceeds, the rules relating to the ranking of creditors come into play. According to Jamaican law Jebmed enjoyed the second highest preference by virtue of the mortgage once this claim was proved according to the laws of Jamaica.*

> *The Court considers that if this principle is hindered in its application it will constitute a big hindrance to international maritime trade which may stop entirely the transfer of ships pursuant to an order or with the approval of the Court if the title which is transferred in the sale is considered dubious, and notwithstanding the fact that as occurred in Jamaica the vessel was sold " free of all mortgages, liens and encumbrances."*

Jebmed filed an appeal. The Court of Appeal handed down its final judgment on the 12th of January 2023 and confirmed the findings of the first court.

Article 8

So the question is, would the situation have been different if we had the Convention and Malta and Jamaica would have ratified the Convention. The answer is a resounding **YES things would have been different**.

Article 8 (1) states:

> ***"If an application is brought before a court or other judicial authority in a State Party to arrest a ship or to take any other similar measure against a ship for a claim arising prior to a judicial sale of the ship, the court or other judicial authority shall upon production of the certificate of judicial sale referred to in article 5, dismiss the application."***

Article 8 (2) states:

> ***"If a ship is arrested or a similar measure is taken against a ship by order of a court or other judicial authority in a State Party for a Claim arising prior to a judicial sale of the ship, the court or other judicial authority shall, upon production of the certificate of judicial sale referred to in article 5, order the release of the ship."***

We can draw a number of considerations from the above two paragraphs of article 8.

1. The Convention uses the word "***shall***". There is therefore no discretion whatsoever in the hands of the judge in the court or other judicial authority. These must dismiss the application or release the ship as the case may be.
2. The two paragraphs may appear similar, and in fact they are, however they cater for the existence of differing processes in different parts of the world. In some countries, you cannot arrest a vessel unless you file an application, the application is heard in open court, and after hearing the parties the court decides whether or not to grant the arrest. In such a situation, if the application is filed for the arrest of a vessel which has been sold in a judicial sale, all the new owner has to do is provide the certificate of judicial sale and the court will simply dismiss the application.

3. However there are several jurisdictions where arrests are granted ex parte and the court agrees to issue warrants of arrest without a hearing and without hearing the parties. In such a case when an arrest is granted ex parte, the relative paragraph is paragraph 2. In such a case the court will release the vessel and withdraw the arrest on the presentation of the certificate of judicial sale.
4. As will be noted the Convention also provides for when arrests are not only granted by courts. During the deliberations it became evident that in a number of jurisdictions there could be other judicial authorities which have the right to order the arrest of ships.
5. It is also to be noted that the Convention speaks about a ship which is "arrested ***or similar measure is taken***." This is because not all jurisdictions use the words "arrest" and there are jurisdictions which for instance use warrants of impediment of departure, or warrants of seizure which have the effect of "arresting" a vessel and stopping a vessel from leaving the jurisdiction of the state concerned and placing that ship under the control of the court or judicial authority or any other authority as the domestic law of the country concerned will so dictate.

Paragraph 3 of Article 8 states:

> ***"If the certificate of judicial sale is not issued in an official language of the court or other judicial authority, the court or other judicial authority may request the person producing the certificate to produce a certified translation into such an official language."***

This was considered important because if there is a legitimate expectation that the state where the vessel is arrested or threatened with arrest is obliged to give effect to the certificate of judicial sale then it stands to reason that if the court of the state concerned requests the certificate to be translated into the official language of that state, that that must be respected.

Paragraph 4 of Article 8 states:

> ***"Paragraphs 1 and 2 do not apply if the court or other judicial authority determines that dismissing the application or ordering the release of the ship, as the case may be, would be*** **manifestly contrary** ***to the public policy of the State."***

This paragraph contains the only exception we find in the Convention to giving effect to a judicial sale of a ship which confers clean title in accordance with the convention.

During the deliberation of the Convention during Working Group VI there were numerous suggestions relating to the listing of various exceptions. This approach was not considered satisfactory and there was no consensus. Consensus and agreement was reached and achieved however when it was suggested that the Convention retain one central exception and we find this exception running through the whole Convention be it article 7

which speaks of the duties of the Registrar, this present Article 8 and indeed Article 10 which relates to "Circumstances in which the judicial sale has no international effect."

It however needs to be made crystal clear that the inclusion of the word "manifestly" was intended to impart the fact that what is sought, in this case in Article 8 - either the refusal of arrest or the lifting of the arrest is really and truly against public policy norms of the country concerned.

The explanatory note published by the Secretariat of the convention puts it in excellent terms[4].

> ***"This sets a high threshold, which reflects recent treaty practice. The threshold is designed to avoid an abusive or overly expansive application of the public policy exception and requires a compelling reason as to why giving effect to the foreign judicial sale is contrary to an identified matter of public policy. It emphasizes that the public policy is expected to apply only in exceptional cases."***[5]

It is to be noted that the paragraph also uses the word "***determines***." The use of this word was intended to refer to a finite and certain outcome confirming that the release of the vessel or the failure to arrest would in fact be manifestly contrary to public policy. It was not intended to cover interim applications. In fact the explanatory notes state:

> ***"The word "determines" implies a decision based on a consideration of information relevant to matters of public policy. The use of the words "would be" reflects the formulation of the public policy exception in recent treaty practice. It is not intended to suggest that a provisional or conditional assessment by the court, let alone a mere allegation, would be sufficient."***[6]

In conclusion there is little doubt that Article 8 would indeed have saved the innocent purchasers of the Bright Star from a great deal of strife and uncertainty because on the arrest of the vessel in Malta (which would have been granted ex parte) the owners would have immediately invoked Article 8 paragraph 2 and armed with the Certificate of Judicial Sale they would have obtained the immediate release of the vessel rather than have to put up security and embark on a 4 year legal battle.

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[4] United Nations Convention on the International Effects of Judicial Sales of Ships with Explanatory Note prepared by the UNCITRAL Secretariat notes 203, 211,212,213 and 214.

[5] *Ibid.* Note 212.

[6] *Ibid.* Note 214.

A NEW BABY OF THE INTERNATIONAL MARITIME LAW FAMILY

Henry Hai Li

1. Introduction

On 7th December 2022, the United Nations General Assembly during its 77th Session adopted a convention, which is contained in the annex to the Resolution A/RES/77/100 and entitled the United Nations Convention on the International Effects of Judicial Sales of Ships (the "Convention"). In the Resolution, the General Assembly also authorized a signing ceremony for the Convention to be held as soon as practicable in 2023 in Beijing and recommended the Convention be known as the "Beijing Convention on the Judicial Sale of Ships". The Chinese government in consultation with United Nations Commission on International Trade Law (the "UNCITRAL") has decided that the signing ceremony will take place on 5th September 2023 in Beijing. From then on, the Convention will be open for signature and ratification, and will enter into force 180 days after it is ratified by 3 States. Although it was once said by an UNCITRAL official that it would take some 15 years as an average for a UN convention to enter into force from its adoption, it is reported by Lloyds List that a number of States are ready to ratify the Convention, meaning the Convention is likely to enter into force by mid-2024 at the latest.

2. The Journey to the adoption of the Convention

In the Resolution A/RES/77/100, UNCITRAL is commended for preparing the draft of the Convention from 2019 to 2022. In Fact, UNCITRAL was first proposed by CMI to consider this topic at its 50th session (Vienna, 321 July 2017). Later at its 51st session (New York, 13-17 May 2019), it was agreed that the topic of judicial sale of ships should be added to the work programme of the Commission. Subsequently, at its 35th session (New York, 13-17 May 2019) the WG VI considered the topic for the first time, and decided that the "Beijing Draft" would provide a useful basis for discussion. After another 4 sessions, the WG VI at its 40th session (New

York 7-11 February 2022) completed a further review and consideration of the draft convention on the basis of a 5th revision of the "Beijing Draft". After that, the Commission at its 55th session (New York, 27 June–15 July 2022) considered the revised draft and finalized the text and approved on 30 June 2022 the draft convention and submitted it to the General Assembly for adoption.

As mentioned above, UNCITRAL's drafting and negotiation were started on the basis of a CMI document, i.e. the "Beijing Draft", which was first formulated at the 40th CMI International Conference in Beijing in 2012 and revised at the CMI Colloquium in Dublin in 2013. The "Beijing Draft" was eventually finalized at the 41st CMI International Conference and approved by the CMI Assembly in Hamburg in 2014. However, it is worth noting that the CMI project leading to the production of the "Beijing Draft" was initiated from a proposal made at the CMI ExCo meeting in Dubrovnik in 2007 and followed by setting up IWG, preparing Questionnaire, analysing responses, drafting instrument, etc.

In summary, it took some 15 years to complete the journey from a proposal made at a CMI ExCo meeting to a UN Convention adopted by the General Assembly.

3. The Purpose of the Convention

Article 1 on purpose reads: "*[T]his Convention governs the international effects of a judicial sale of a ship that confers clean title on the purchaser.*" Obviously, this article makes it clear what this Convention is intended to regulate.

It goes without saying that under this Convention a judicial sale is considered as a legal fact, but not something else, such as a court decision or arbitral award. It follows that the Convention is concerned only with the effects that are produced by operation of law with respect to the legal fact, and thus not with the court order or judgment ordering, approving or confirming the judicial sale nor the court judgement or arbitral award for enforcement of which the judicial sale is initiated.

Further, as conveyed by the language of article 1, this Convention is concerned only with the "effects" of a judicial sale, and not with the judicial sale itself, including the conduct or procedure of the judicial sale; Furthermore, this Convention is concerned only with the international effects in State Parties other than the State of judicial sale, and thus not with the domestic effects of the judicial sale in the State of judicial sale.

Bearing in mind the fact that not in all jurisdictions a judicial sale will always confer clean title, article 1 also makes it clear that the Convention is concerned only with judicial sales that confer "clean title". In other words, if a judicial sale does not confer clean title on the purchaser, the Convention would not regulate the effects of such a judicial sale.

It is worth mentioning that the term "clean title" together with other key terms contained in article 1, namely "judicial sale", "ship", "purchaser" are defined in article 2 of this Convention, but here I shall only invite your attention to the definition on "clean title" which is provided to mean "*title free and clear*

of any mortgage or hypothèque and of any charge". In addition, in light of the definitions on "mortgage or *hypothèque*" and "charge", the term "clean title" may be comprehended to refer to title free and clear of any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise; Clearly, such kind of rights would include for example a maritime lien, lien, encumbrance, right of use or right of retention, mortgage or *hypothèque* on the ship. In short, clean title to a ship means title free and clear of any right, which may be asserted against the ship.

4. The International Effects of a Judicial Sale of a Ship

Article 6 on international effects of a judicial sale reads: "*[A] judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser.*"

It is believed that this article contains the basic rule of this Convention, i.e. a judicial sale conducted in one State Party with an article 5 certificate issued shall have the effect of conferring clean title on the purchaser in every other State Party. This means that for a judicial sale to have international effects, it is triggered by the issuance of an article 5 certificate, and no other special procedure or document is required. In other words, once an article 5 certificate is issued, the domestic effects produced by operation of the law of the State of judicial sale, shall be allowed to be extended into other State Parties by operation of this Convention, in particular, the provisions of article 6. In addition, this also means that only the effect of conferring clean title to the ship on the purchaser may be extended from a State of judicial sale into other State Parties, even if various effects may have been produced by operation of the law of the State of judicial sale.

It seems that article 6 is only concerned with the effect of a foreign judicial sale in conferring clean title on the purchaser. However, the operation of article 6 may be manifested in a number of ways, including in action taken on the registration of the ship under article 7, action on the prohibition of arrest of the ship under article 8, etc.

As mentioned above, this Convention considers a judicial sale as a legal fact but not something else; Such a fact would produce by operation of law certain legal effects, and the fact is entirely different from a court judgment or arbitral award. For avoidance of confusion, article 6 and other provisions of the Convention purposefully refer to "giving effect" to a foreign judicial sale and not to "recognizing effect" of that sale. It is also true that this Convention does not contain any provision addressing its interaction with treaties on the recognition and enforcement of foreign judgments, nor does it contain any provision preserving bases for recognizing foreign judgments under domestic law. However, compared with "giving effect", I prefer the reference to "recognizing effect", as the effects of a judicial sale are in fact given or produced by operation of the law of the State of judicial sale, while the effect of conferring clean title is not given but is allowed to be extended into other State Parties by operation of this Convention, in particular, the provision of article 6.

As can be seen, for implementation of the basic rule of this Convention as contained in article 6, every State Party shall bear a treaty obligation to accept or allow the effect of a foreign judicial sale conducted in another State Party of conferring clean title to be extended into its jurisdiction. In my view, this is the primary treaty obligation imposed by this Convention upon the State Parties.

It should be noted that the said basic rule as contained in article 6 is made subject to the public policy exception, which is provided in article 10 of this Convention.

5. Conclusion

The Convention has been adopted by the UN General Assembly, and this is the first time that the international community made a milestone achievement in harmonizing the rules of maritime law in this particular area. The Convention is designated to regulate the international effects of judicial sales of ships that confer clean title to the ship on the purchaser with a hope to solve the real problems that are encountered with in international shipping and trade. Bearing in mind the fact that it took some 15 years from a proposal made at a CMI ExCo meeting to a UN convention adopted by the General Assembly, we have no reason not to cherish the enthusiasm, wisdom, efforts and hard work, which have been contributed by so many people, including many not attending here today.

In my view it is time for us to get ready and prepared to welcome the birth of the Beijing Convention on the Judicial Sale of Ships, a new baby of the international maritime law family!

SCOPE OF THE CONVENTION: WHAT IS COVERED BY THE CONVENTION AND WHAT IS NOT?

Tomotaka Fujita

1. "Judicial Sale of a Ship" covered by the Convention

(1) Judicial Sale

The Convention applies to a "judicial sale" of a ship.(Article 3(1).) "Judicial sale" is defined in Article 1(a) as "any sale of a ship: (i) which is ordered, approved, or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and (ii) for which the proceeds of sale are made available to the creditors." Several elements in the definition merit our attention.

(2) Conducted by A Court and other Public Authority

A judicial sale under the Convention should be conducted by a court or other public authority.[1] Since the procedure of a judicial sale takes different forms in different jurisdictions, the Convention allows flexibility to cover possible differences. The involvement by a court or other public authority may be to "order", "approve" or "confirm" the sale. The way of the sale may be public auction or private treaty although the latter should be carried out under the supervision and with the approval of a court. A judicial sale initiated by a public authority other than a court such as tax or customs authorities are not automatically excluded from the Convention's scope as far as it satisfies other requirements including that the proceeds of sale are made available to the creditors.[2]

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[1] The term public authority is not defined in the Convention. Compared with Article 8, which refers to "a court or other *judicial* authority" (emphasis added), it is clear that "public authority" in Article 1(a) is not limited to judicial authorities but also includes administrative bodies, etc. *See* Explanatory Note, *in* United Nations Convention on the International Effects of Judicial Sales of Ships with Explanatory Note prepared by the UNCITRAL Secretariat, United Nations, 2023, para. 34.

[2] *See* Explanatory Note, *supra* note 1, para. 41.

(3) Proceeds of Sale Are Made Available to the Creditors

A judicial sale under the Convention should be the one for which the proceeds of sale should be made available to the creditors. (Article 2(a)(ii).) There is no restriction for the nature of the claims which are enforced by the judicial sale. During the deliberation in UNCITRAL, some delegates argued that the Convention should limit its scope to the sales enforcing civil or commercial claims or claims against a ship. However, the nature of the claims that triggered the judicial sale is irrelevant from the purchaser's viewpoint. The definition of judicial sale thus has no restriction for the nature of the claim. It is sufficient that the proceeds of sale are made available to the creditors.

(4) Judicial Sale of a "Ship"

The Convention applies to a judicial sale of a "ship", which means "any ship or other vessel registered in a registry that is open to public inspection that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale." (Article 2(b)) The key to this definition is the registration and possibility of a judicial sale. Vessels for inland navigation are not excluded from the Convention's scope as far as they are registered in a registry that is open to public inspection and are subject to a judicial sale.[3] This may cause problems with some states that are party to the Convention on the Registration of Inland Navigation Vessels (1965), which could lead to conflict with the regulations of this Convention. Article 13(1) provides a safeguard for those states as follows: "Nothing in this Convention shall affect the application of the Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No. 2 concerning Attachment and Forced Sale of Inland Navigation Vessels, including any future amendment to that convention or protocol."

However, the Convention excludes a certain type of ships from its scope; warships or naval auxiliaries are outside the scope of the Convention. (Article 3(2)) The Convention also does not apply to other vessels owned or operated by a state that are used only on government non-commercial service just prior to the time of judicial sale. (Article 3(2))

(5) Transfer of Clean Title

Judicial sales do not always confer clean title to the purchaser in a number of states. One should note that the above definition of "judicial sale" does not include a transfer of clean title as an indispensable element;[4] in other words, the Convention applies to a judicial sale in a contracting state regardless of whether it confers clean title to the purchaser.

Courts in such states where judicial sales do not always convey clean

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[3] *See* Explanatory Note, *supra* note 1, para.45.

[4] Article 1(h) of the original Beijing Draft submitted by CMI included the element in the definition of a judicial sale. *See* A/CN.9/WG.VI/WP.82 – Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International.

title sometimes cannot know whether clean title is finally transferred in a particular judicial sale when the procedure commences. If the transfer of clean title is included in the definition of judicial sale, such courts should proceed with the procedure of judicial sale without knowing whether the Convention eventually applies or not.[5] It could cause problems with the application of Article 4, which provides a notice to the creditor which should be sent prior to the procedure of judicial sales.

At the same time, the purpose of the Convention, as stated in Article 1, is to govern the international effects of a judicial sale of a ship that confers clean title on the purchaser. Therefore, it would be unnecessary or even undesirable for the Convention to govern judicial sales of a ship that do not eventually confer clean title.

The solution adopted under the Convention is as follows:[6] according to Articles 1(a) and 3(1), the Convention applies to all judicial sales of a ship, whether they confer clean title or not. However, substantive provisions of the Convention that govern the situation after the judicial sale is completed apply if and only if the judicial sale conferred clean title to the purchaser in a particular case. Article 5 provides that a certificate of judicial sale is issued when a judicial sale that conferred clean title to the ship is completed, and Article 6 gives international effects of a judicial sale only to those sales to which a certificate pursuant to Article 5 is issued. Articles 7 to 10 presuppose the existence of the certificate that states clean title is transferred to the purchaser. Essentially, all substantive provisions except Article 4 apply only if clean title is transferred through a judicial sale in a particular case.

2. Geographic Scope of the Convention

(1) Judicial Sale Conducted in a State Party

The Convention applies only to a judicial sale conducted in a State Party. (Article 3(a)) A judicial sale conducted in non-contracting states is outside the scope of the Convention. The Convention establishes a "closed regime" that applies only among its State Parties.[7] There is no guarantee that judicial sales conducted in non-contracting states comply with the procedural requirements, *inter alia,* the notice requirement under the Convention. Therefore, it is sensible to restrict the Convention's scope to a judicial sale conducted in contracting states.

However, one should note that the Convention does not prohibit contracting states from giving effect to judicial sale conducted in non-contracting states

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[5] *See* Explanatory Note, *supra* note 1, para.92. The point was repeatedly raised during the UNCITRAL Working Group. *See* A/CN.9/1047/Rev.1 – Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session, paras.39-45, A/CN.9/1053 – Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-eighth session, paras.13-15 and A/CN.9/1089 – Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-ninth session, para.43.

[6] *See* 39th Session Report, *supra* note 5, para.47.

[7] In contrast, the original Beijing Draft submitted by CMI is based on "open regime," while it allows the State Parties, by reservation, to restrict the application of the Convention to judicial sales conducted in State Parties. *See* Beijing Draft Article 9.

if they wish to do so. Article 14 confirms that "nothing in this Convention shall preclude a State from giving effect to a judicial sale of a ship conducted in another State under any other international agreement or under applicable law."

(2) Ship's Physical Presence within the State Party

For the Convention to be applied, the ship must be physically within the territory of the State of judicial sale at the time of the sale. (Article 3(b)) The requirement is intended to ensure a jurisdictional link between the court of judicial sale and the ship.[8]

The meaning of the "time of the judicial sale" is not clearly defined in the Convention.[9] While the ship must be within the territory at the final stage of the judicial sale, there may be different views as to whether it should remain within the territory from the beginning of the judicial sales process. The issue is left to the law of the State of judicial sale.

3. Issues Not Governed by the Convention

As its title and Article 1 suggest, the Convention governs the international effects of a judicial sale of a ship. However, it should be noted that not all effects of a judicial sale are governed by the Convention; its focus is the transfer of clean title, and other aspects are not touched. Article 15 clarifies this point; for example, the Convention does not address how the proceeds of a judicial sale are distributed among the creditors (Article 15(1)(a)) or whether or how personal claims against the previous shipowner are affected by the judicial sale (Article 15(1)(b)).

Even certain aspects relating to the transfer of clean title of the ship are not governed by the Convention. Article 9 of the Convention provides jurisdiction regarding the avoidance or suspension of the judicial sale, but it does not address the grounds for the avoidance or suspension, or the effect of the decision rendered by the courts designated under Article 9. It is left to applicable law, which is usually the *lex fori* of the court in the judicial sale.[10]

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[8] *See* Explanatory Note, *supra* note 1, para. 87.

[9] Although it examined the possibility, the UNCITRAL Working Group finally agreed not to define "time of the judicial sale." *See* 37th Session report, *supra* note 5, paras. 22-24 and 38th Session report, *supra* note 5, paras. 50-56.

[10] The issue was intensively discussed in the UNCITRAL Working Group, and some delegates strongly stressed that the Convention itself, instead of the domestic law of contracting states, should provide the international effect of the avoidance or suspension of a judicial sale. However, many delegates hesitated to have a lengthy discussion to solve a difficult question, which would arise under only extremely rare cases in most jurisdictions. *See* 38th Session Report, *supra* note 5, paras. 57-60 and A/CN.9/1095 – Report of Working Group VI (Judicial Sale of Ships) on the work of its fortieth session, paras. 46-48.

ARTICLE 4. NOTICE OF JUDICIAL SALE

Frank Nolan

Article 4 of the Convention sets out rules and requirements for notice of judicial sale which must be satisfied in order to qualify the sale for a Certificate of Judicial Sale. The Certificate of Sale is the document which requires a State Party to issue deletion certificates from prior registry or reregister the vessel in either case upon request of the purchaser or subsequent purchaser. Also, in the event a vessel is arrested or detained in another State Party after a Judicial Sale based on a claim arising prior to the Judicial Sale, the courts of the State party where such arrest or detention occurs is required to release the vessel upon production of a Certificate of Judicial Sale.

The delegates to UNCITRAL Working Group VI struggled mightily to arrive at the agreed language of Article 4. The many maritime practitioners in the Working Group repeatedly emphasized that the primary purpose of a notice of sale was to drive interest in the vessel and thus to maximize the sale price, usually at auction, for the ultimate benefit of the vessel's creditors. Some pointed out that the commencement of arrest proceedings and delivery of an order of arrest to the master of the vessel constituted all the notice to vessel owner interests that was traditionally required. Other traditional modes of notice in vessel judicial sales were publication in local press.

Article 4 begins in paragraph 1 by stating that judicial sales "shall be conducted in accordance with the laws of the State of judicial sale" making clear that the Convention does not interfere with the domestic processes of judicial sales in the States where they are conducted. However, paragraph 1 adds that the State of judicial sale "shall also provide for challenges to the judicial sale prior to its completion…." This language was inserted at the final session of the Working Group after strenuous debate among the delegates. The insertion was ultimately agreed with the understanding that all or most States already have domestic law practices and procedure which would satisfy this requirement and that no new legislative or regulatory action would be required in such cases. (See Explanatory Notes 99 and 100). An example of an acceptable provision satisfying the Convention language would be the opportunity for challenges to the sale prior to entry of a court's final order of sale under US law. The Convention itself is silent on what

constitutes an acceptable provision. Moreover, it should be borne in mind that such procedures refer to challenges to the provisional sale remedy only and not to the filing, allowance or ranking of claims or the distribution of the proceeds of any such sale. The language of Article 4, paragraph 1 also does not apply to any post-sale challenges, which are addressed in Article 9 and which are allowed only in the State of judicial sale. The delegates were repeatedly reminded that the judicial sale of vessels is a provisional remedy intended to convert the idled vessel, a wasting asset, into cash for eventual distribution to the claimants in the proceeding and, at the same time, to cut off continuing custodial costs for the arrested vessel.

The notice provisions set forth in Article 4 reflect a compromise with some incidental and perhaps unintended benefits. Importantly, the provisions are drafted in such a way that no State is required to implement or enforce heightened notice provisions. Instead, Article 4.2 provides that a certificate of judicial sale "shall only be issued if a notice of judicial sale is given prior to the judicial sale of the ship in accordance with the requirements of paragraphs 3 to 7…" of Article 4.

Paragraph 3 requires notice be given to:

(a) the ship's registry, a feature welcomed by some ship registries which have been blind-sided by flag vessels being sold without the registry's knowledge;
(b) holders of any mortgage, hypotheque or registered charge, where in each can the register is open to the public and at which copies can be made. The public access to the registry is a requirement of other conventions and domestic laws of many jurisdictions as a fraud preventive requirement for recognition of foreign instruments;
(c) Maritime lien claimants who have notified the court or other public authority conducting the judicial sale. It is understood that this notice requirement would be satisfied by written filing of claims or intervention in the underlying arrest process. The language of paragraph 3 leaves the manner of notice to "the regulations and procedures of the State of judicial sale;"
(d) The owner of the ship's; and
(e) to the bareboat charterer registry and to the person listed on bareboat charterer therein, in any case where a ship is enrolled in such a registry.

Article 4, paragraph 4 requires that a Convention notice satisfy the laws of the State of Judicial sale and also incorporate the items set out in Annex 1 of the Convention, "Minimum information to be contained in the notice of judicial sale." The requirements set forth in Annex 1 are generally reflections of typical judicial sale requirements under a number of State domestic law requirements and are not burdensome, in any event.

Article 4, paragraph 5 retains the publication requirement typical of existing domestic law requirements, but refines it helpfully. Paragraph 5(a) refers to "press or other publications available in the State of judicial sale, a recognition that ot every State has a press establishment, but that it is recognized that many specialized publications and general media often flow through many jurisdictions beyond their place of origin or establishment.

Paragraph 5(b) sets out the most novel feature of the notice provision,

requiring that the notice be "transmitted to the repository referred to in article 11 for publication." That repository will likely be the International Maritime Organization ("IMO"). Publication would occur by entry of the individual notice into the IMO's GSIS system or its successor. The advantage of this process will be the creation of a central notice filing location, clearing away many concerns about the adequacy of notice. While the access to insert or change information in GSIS would be restricted to authorized persons, the public will have open access to the posted information.

Article 4, paragraph 6 requires that the notice filed with the reporting be in one of the working languages of the repository or be accompanied by a translation into one of the working languages. In the case of the IMO, it means that notice as filed be in one of 3 languages: English, Spanish or French.

Article 4, paragraph 7 establishes rules as to the information on which notice providers may rely for determining whom to give notice. These are specified as follows:

(a) Information in the register of ships and bareboat charters register as the case may be;
(b) Information in the registry, where mortgages or hypotheque are registered; and
(c) Information on maritime lien claims filed with the court or other public authority responsible for conducting or supervising the judicial sale.

These provisions of Article 4 provide useful bright line rules for the notice provider's reliance. Even though the notice requirements themselves exceed the minimal standards set out in many existing domestic laws, they are not exhorbitant. It is not difficult to foresee that the combination of this list of notification recipients and the public access to the repository could lead to greater uniformity in this aspect of judicial sales and itself reduce frivolous challenges to foreclosure sales.

CERTIFICATE OF JUDICIAL SALE – ARTICLE 5

Jan-Erik Pötschke

The key to the functioning of the Beijing Convention on the Judicial Sale of Ships[1] is the certification of a judicial sale that conferred clean title to the ship by way of a certificate of judicial sale according to Article 5. The Beijing Convention can develop its full legal effect by the presentation of such a Certificate whose minimum contents is describe in an Appendix to the Beijing Convention.

(a) The purpose of the certificate

The purpose of the certificate of judicial sale is to provide documentary evidence that the judicial sale which has been carried out has conferred clean title to the ship.[2] The prerequisite is that pursuant to the law of the state of judicial sale, i.e. the place where the judicial sale is conducted, which pursuant to art. 3 (1) (a) Beijing Convention is the place where the ship is physically located,[3] the purchaser acquired clean title[4] to the ship. By virtue of Art. 5 (5) the certificate of judicial sale shall be sufficient evidence of the matters contained therein.

The certificate of judicial sale is no document of title. It does not replace the order or decision of the authority conducting the judicial sale under the law of the state of judicial sale whereby the purchaser acquires ownership of the ship. Such an order or decision is a prerequisite to issue the certificate of judicial sale. Accordingly, the certificate of judicial sale is not comparable to Bills of Lading, whereby ownership of the goods can be transferred by endorsement of the Bill of Lading.

The certificate of judicial sale secures the international effects of the

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1 This name has been recommended by the UN General Assembly on 7 Dec. 2022; see A/RES/77/100. In this Chapter the reference will be to "Beijing Convention".

2 Evidentiary value was emphasized by the Working Group, see report 29 Dec 2020 A/CN.9/1047/Rev.1 para 74.

3 There was brought agreement on the requirement of physical presence, see Working Group report 15 Nov 2021, A/CN,9/1089 para 93.

4 Art. 2 (c) Beijing Convention defines "clean title".

judicial sale described in art. 6 Beijing Convention that clean title to the ship has been conferred on the purchaser and that this effect shall be accepted in every other State Party to the Beijing Convention.

(b) Time of issuance of the certificate

From the purpose of the certificate of judicial sale it is apparent that the certificate shall only be issued after completion of a judicial sale. There have been lengthy discussions, to which extent it is necessary to define or describe a completion of a judicial sale in the Beijing Convention. In order to have the full benefit of the certificate it has been the common understanding that it should only be issued at that point in time, where the certificate of judicial sale can no longer be challenged, withdrawn or is no longer subject to ordinary review. Otherwise, it would create a lot of additional problems to reset all steps which may have been carried out in the meantime by the use of the certificate of judicial sale. Due to the various different interpretations about a completion of a judicial sale pursuant to the domestic laws, it has been decided not to include an additional condition dealing with the finality of a judicial sale procedure. It has been considered that this may interfere to specific with the domestic laws and therefore this question has been left to the law of the state of judicial sale, who in accordance with its regulation and procedures shall issue the certificate of judicial sale to the purchaser.[5]

(c) Authority to issue the Certificate

Comparable to the discussion about the time of issuance was the exchange on the authority, who shall issue the certificate of judicial sale. Art. 5 Beijing Convention refers to either (aa) the court or other public authority that conducted the judicial sale, or (bb) other competent authority of the state of judicial sale. This is a compromise reflecting the fact that the various jurisdictions have different competent authorities handling a judicial sale, not necessarily always a Court.[6] This is another example that the Beijing Convention does not intend to change the domestic procedural rules in a state of judicial sale. The designation of the issuing authority shall remain a matter of the law of the state of judicial sale and the competence may be conferred to a single or multiple authorities. It has however to be a public authority.[7] The Beijing Convention shall establish a harmonised regime for giving international effect to judicial sales while preserving domestic law governing the procedure of judicial sales and the circumstances, in which judicial sales confer clean title.

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[5] See the initial discussions in the Working Group VI the report 24 May 2019, para 41-47; A/CN.9/973; see also about the additional condition of finality the Working Group VI reports 02 Dec 2019, para 90; A7CN.9/1007; 29 Dec 2020, para 66-67; A/CN.9/1047/Rev.1

[6] See Working Group VI the report 24 May 2019, para 82-84; A/CN.9/973

[7] See Working Group VI report 02 Dec 2019, para 91; A7CN.9/1007, report 15 Nov 2021 A/CN.9/1089 para 98-99.

(d) Form and Content of the Certificate

The contents of the certificate of judicial sale is described in Art. 5 (2) (a) – (k) of the Beijing Convention. With regard to the form Art. 5 (2) refers to a model of a certificate contained in Annex II to the Beijing Convention. Next to a statement that the ship was sold in accordance with the requirements of the law of the state of judicial sale and the requirements of the Beijing Convention, which basically means the compliance with the provision of a notice of the judicial sale according to Art. 4 Beijing Convention, a statement is made that the judicial sale has conferred clean title to the ship on the purchaser, names the state of judicial sale, identifies the authority issuing the certificate and the name of the court or other public authority that conducted the judicial sale, including the date of sale, and obviously, the object, i.e. name of the ship, her registry or equivalent registry, the IMO number and, last but not least, the owner of the ship immediately prior to the judicial sale and the name and address of the purchaser. The certificate of judicial sale shall identify the date and place of issuance and shall bear a signature or stamp of the authority issuing the certificate or other confirmation of authenticity. The information required under Art. 5 (2) Beijing Convention corresponds with the form in Annex II.

According to Art. 5 (6) the certificate of judicial sale may be issued in the form of an electronic record, provided the information contained therein is accessible so as to be usable for subsequent reference, a reliable method is used to identify the authority issuing the certificate and to detect any alteration to the record after the time it was generated.

The idea of a model certificate is not new to Conventions. The international working group of the CMI, who proposed in its draft a reference to a model certificate, had the practitioners in mind like ship registries, judges, banks, mortgagees, investors etc. The concept of such specimen is known from the Brussels-I-Counsel Regulation (EC) No 44/2001 of 22 December 2000 (see Article 54 +58, Annex 5) wherein the enforceability of court decisions is confirmed. A further specimen of a certificate can be found in Regulation (EC) No 805/2004 of EU Parliament and Counsel of 21.04.2004 (see Article 9, Annex I; Article 24, Annex II) for a European Enforcement order for uncontested claims. The Regulation (EC) No 1896/2006 of EU Parliament and Counsel of 12.12.2006 (see Annex 7) provides for a specimen for European orders for payment procedures. Last but not least, the shipping practice is used to work with specimen as can be seen from various publications and standard contracts issued by BIMCO.

(e) Effect following from the Certificate

With the production of a certificate of judicial sale the further procedure to deal with the ship subject to a judicial sale is facilitated in terms of de-registration and registration (art. 7 Beijing Convention, Action by the Registrar) and the prohibition of arrest pursuant to Art. 8 Beijing Convention. The contents of the certificate shall be accepted by the authorities to which it is presented. Such authority may not request additional information to identify the ship, to establish that the ship was sold be judicial sale, that the

sale was conducted in accordance with the law of the state of judicial sale or that the purchaser has acquired clean title. Persons who wish to acquire title to the vessel from the purchaser named in the certificate of judicial sale can rely on its contents. These persons are referred to as "subsequent purchasers" by definition of Art. 2 (j) of the Beijing Convention. The purchaser or the subsequent purchaser can use the certificate of judicial sale for registrations purposes. The certificate can support the for

(aa) deletion of the ship in the ships register, where the vessel is registered at the time of the judicial sale, and

(bb) new registration of a ship in either the same or any other ship register. With regard to a new registration it should however be noted that the certificate does not substitute the additional requirements of registration of the sips register. The Beijing Convention does not interfere with the administrative procedures and local requirements of the ships register. It is understood that a subsequent purchaser would need to prove that he became the new owner of the ship and that he qualifies for registration in the state of the ships register according to the rules and procedures applying in that new state of registration. It is commonly accepted that a certificate of judicial sale alone does not substitute the further conditions required by the state of the ships registry for a new registration of the vessel. There are additional requirements to be complied with such as condition of the vessel, classification of the vessel, insurances, safe manning etc.

The certificate of judicial sale is not confuted or irrefutable evidence. The authority can consider other information as to the matters certified and in the proceedings mentioned in Art. 9 and 10 Beijing Convention, a court in the state of judicial sale or in a state party to the Beijing Convention can consider information outside the certificate. These are proceedings to either set aside the effect of the judicial sale by invoking the public policy ground (Art. 10 Beijing Convention) or proceedings to avoid or suspend the effects of the judicial sale or to challenge the issuance of a certificate of judicial sale.

(f) Summary

Next to the notice of judicial sale pursuant to Art. 4 of the Beijing Convention the certificate of judicial sale is the most visible product of the Beijing Convention. It shall safeguard and harmonize the further actions required to give full effect to a judicial sale conducted in a state party to the Beijing Convention. There is no obligation for states, which are no state party to the Beijing Convention, to accept the certificate of judicial sale, but the certificate of judicial sale nevertheless will constitute reliable evidence about the completion of a judicial sale that conferred clean title to the ship on a purchaser under the law of the state of judicial sale. It will facilitate the ship registration procedure and prohibits the arrest of the ship in state parties to the Beijing Convention for claims which have arisen prior to the judicial sale. The new owner producing the certificate to the authority is protected from the ship arrests resulting from claims occurred prior to the judicial sale.

JUDICIAL SALE COMPLETED AND CERTIFICATE ISSUED, NOW WHAT? ARTICLE 7

Peter Laurijssen

Once the judicial sale has been completed and the certificate of judicial sale has been issued in accordance with Article 5, the purchaser of the vessel will wish to delete the vessel from its old register and register her in the register of his choice. In this overview, we will be looking into Article 7 (*Action by registry*), dealing with the action to be taken by the registry in state parties.

Article 7, Action by registry

Article 7.1 contains a list of actions to be taken by the registries of state parties. These actions are among the main objectives of the convention. Indeed, when looking at the final paragraph of the preamble to the convention, we read that the convention's purpose is inter alia to "give international effects to judicial sales of ships sold free and clear of any mortgage or hypothèque and of any charge, *including for ship registration purposes*". Article 7 could be read as containing a number of conditions for the registry in the state party concerned to take certain actions.

The first condition is that the registry should be approached by the purchaser or subsequent purchaser of the ship. The subsequent purchaser has been defined in Article 2 (*Definitions*) as the person who purchases the ship from the purchaser named in the certificate of judicial sale referred to in Article 5 (*Certificate of judicial sale*). A further condition is that the purchaser should submit the certificate of judicial sale to the registry in question. The third condition is that any action required to be taken by the registry shall be subject to the rules and regulations of the state party (registry) but always without prejudice to Article 6 (*International effects of a judicial sale*). Reference is made to these rules and regulations mainly with flag states' requirements in mind such as a genuine link between the owner and the flag state or technical vessel specifications in the area of safety.

Subject to these conditions, the registry of a state party shall take the following actions:

(a) Delete from the register any mortgage or hypothèque and any registered charge attached to the ship that had been registered before completion of the judicial sale. It goes without saying that this action pertains the ship's old registry, i.e. the register the ship was registered in at the time of the judicial sale.

(b) Delete the ship from the register and issue a certificate of deletion for the purpose of new registration. So, after the ship has been cleansed of all registered encumbrances in her old registry, the ship as such is also deleted from the registry.
(c) Register the ship in the name of the purchaser, provided that the ship and the person in whose name the ship is to be registered meet the requirements of the law of the state of registration. Here the ship's new registry, i.e. the purchaser's registry of choice upon acquiring the ship in a judicial sale, is concerned. In connection herewith reference can be made to the third condition referred to above and contained in the chapeau of Article 7.1, i.e. the rules and regulations of the relevant state party. A good example, as mentioned above, is the requirement of a genuine link between the ship owner and the flag state.
(d) Final action required from the registry is to update the register with *"any other relevant particulars in the certificate of judicial sale"*. These may consist of any of the particulars as listed in the model certificate of judicial sale as contained in Annex II to the convention.

It goes without saying that, if the purchaser or subsequent purchaser wish to keep the vessel registered in her initial flag state, the registrar will not have to delete the ship from that register pursuant to letter (b). This is covered by the proviso "at the request of the purchaser or subsequent purchaser" at the outset of paragraph 1.

Article 7.2 regards the situation where the vessel has a dual registration, i.e. in her primary register and in an underlying bareboat registry. Here too, the purchaser or, as the case may be, the subsequent purchaser is to approach the registry in the state party in which the ship was granted bareboat registration, whereupon that registry shall delete the ship from the bareboat registry and issue a certificate of deletion.

It is to be noted that there's a public policy exception to the requirements of Articles 7.1 and 7.2, namely if a court in the state of the registry, whether it is the old or the new registry, determines under Article 10 (*Circumstances in which judicial sale has no international effect*) that the effect of the judicial sale under Article 6 (*International effects of a judicial sale*) would be manifestly contrary to the public policy of that State. Consequently, only such a court decision can prevent the registry from taking the action or actions required from it. In nos. 211 and following of its Explanatory Note, the UNCITRAL Secretariat, clearly sets out that the public policy exception is to be interpreted very strictly in accordance with recent treaty practice setting a high threshold (no. 212).

Article 7.3 and 7.4 deal with rather formal requirements in respect of the certificate of judicial sale. If the certificate is not issued in an official language of the registry, the registry may request the purchaser to produce a certified translation into such an official language (Article 7.3). The registry may also request the purchaser to produce a certified copy of the certificate (Article 7.4).

CHALLENGES OF THE JUDICIAL SALE AND ITS EFFECTS – ARTICLES 9 AND 10

Alexander von Ziegler

1. The Challenge of a Challenge

The effectiveness of the Judicial Sales Convention[1] depends on the level of robustness, which its provisions will provide to defend the interests of a bona fide purchaser having paid good moneys in reliance on the international effects provided by Article 6 JSC. The pillars of the Convention are rooted in a judicial sale in a contracting State which – thanks to an adequate and effective notice-scheme (Article 4 JSC) – has been concluded by a production of a Certificate (Article 5 JSC). This will generate the international effects pursuant to Article 6 JSC and guaranteed by the Convention, which translates into a swift and secured de- and re- registration mechanism in the registries in a Contracting State (Article 7 JSC) as well as in a clear anti-arrest protection in foreign harbors in other Contracting States (Article 8 JSC).

This system would of course have been best protected, if there was no access to review or appeal by interested entities, e.g. some unsatisfied parties having had interests in the vessel under the former (and insolvent) ownership before the judicial sale was performed and the Certificate issued. However, the Convention would not have found the necessary acceptance by many states, if it had not addressed the possibilities, the scope and jurisdiction of challenges to the judicial sale. To find a good and feasible balance between finality and international protection vs the general principles of due process and granting access to courts posed a substantial and at the same time very interesting challenge for the delegations at UNCITRAL. Thus, in other words, the question of a "challenge" became one of the key challenges for the Working Group, to the extent that is was only thanks to an ad hoc break-away meeting in the very last moments of the discussions at the UNCITRAL Commission meeting in 2022, that a compromise to this issue was found,

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[1] Beijing Convention on the International Effects Of Judicial Sales of Ships ("Beijing Convention"), UN General Assembly on 7 Dec. 2022; see A/RES/77/100.

which allowed the Convention to find full support by the Assembly of the UNCITRAL Commission and later the UN General Assembly in 2022.

The issues for the UNCITRAL Working Group and later at the Commission were:

- Why should such a challenge be possible at all?
- What should be challengeable?
- In what circumstances?
- Where?
- Why should this be the absolute exception?
- What should be the threshold
- What are the consequences of any successful challenge?
- What are the commercial implications
- How can a potential purchaser of an auctioned vessel shield itself from possible challenges?
- **What are the policy considerations governing the legislative decisions as to the scope of the challenge of a judicial sale and its effects?**

The basic agreement between the delegations was to safeguard the following key elements and principles in balance of the interests involved:

- **Predictability** – the purchaser needs to be sure that he or she buys a vessel with clean title and is not chased by claims of old creditors (robust clean title).
- **International Harmonization and Clarification –** all authorities / registries, courts and industries involved in international shipping can now rely on a robust system and in an internationally recognized Certificate.
- Contracting States are in a mutual agreement upholding and formalizing the **international comity** and respect of foreign sovereigns.
- Maintain and defend the clear **focus on the judicial sale** and full separation from all litigious steps between the creation of the (old) claims, the arrest of the vessel, the decision to sell the vessel in a judicial sale and the allocation / distribution of the asses after the judicial sale.
- **Protection of the interests of old creditors**
  - By the system of the advance notice of the fact that the ship will be sold in a judicial sale (Article 4 JSC), reinforced by the notice to the repository.
  - By building the basis for achieving a higher purchase price in exchange for the protection of obtaining clean title (Article 6 JSC).
- **Right of Access to Court** – judicial actions such as selling the vessel in a judicial sale need to be subject to judicial review but without endangering the predictability goal.

2. Challenges of the Judicial Sale and the Certificate – Article 4 para 1 and Article 9 JSC

When embarking on the issue of whether and how to provide a possibility to challenge the acts related to the judicial sale and the issuing of a Certificate the main challenge was to make clear to delegations that the challenges we

were discussing were only the challenges (and the related access to court) for the judicial sale itself. The challenges the Convention was envisaged to address were limited to issues related to actual sale of the vessel by judicial or similar authorities falling under the Convention. Not more, not less. Thus, all issues relating the pre-dated arrest applications, proceedings and decisions, even all matters leading to the pre-dated judicial decision to sell the vessel and all subsequent judicial steps of collecting assets and their allocation amongst claimants and holders of rights in the vessel, or even the validity or level of priority of such rights and claims, are all neither within the scope of the Convention nor subject of the challenges we are talking here. This distinction is crucial, as, any bona fide purchaser should not be dragged into such issues and disputes, as its involvement is purely having purchased (against good money) in reliance of a protection the Convention was providing; providing by the way in the broad interests of all parties, as the purchase price would most probably be closer to the market value of the vessel thanks to the protection of Article 6 of the Convention. What could be challenged, was the act of selling the vessel, the only act the purchaser was a party to and therefore could to a certain degree with its own due diligence possibly mitigate all remaining risks that a possible challenge would mean to him, to his bankers and customers (charterers).

This focus to the scope of a challenge was rightfully also contained geographically. It was clear that the only possible venue for such challenge would be the courts and competent authorities of the State where the judicial sale was conducted.

For some delegations the due process principles and the right to an access to court was so important that they would have preferred a clear provision in the Convention. For others, it was clear that, while access to court could be made possible, this would have to be the utmost exception and that all negative effects for the purchaser should be mitigated. Any access to court would weaken the robustness in the validity of the sale or question its effect under the Convention including questioning the value of the Certificate the Convention had provided with the aim to provide a robust and fully predictable legal situation for the bona fide purchaser, its banks and charterers that all rely on such effect.

A compromise was found, in stating in Article 4 para. 1 JSC, which was drafted to focus all legal issues for the judicial sale to the State where the judicial sale was conducted, also that such State shall provide procedures for challenging the judicial sale. It added – fully in line with the goal of the Convention – that such challenge was to be made prior to the completion of such judicial sale, a moment in time that would again be determined by the laws of the State of the judicial sale. With this limitation in time, the ultimate goal of predictability is also met, as by receiving the Certificate the bona fide purchase the purchaser will have the certainty that all matters of challenge – if they had existed – were cleared and the sale and its effect fully achieved[2].

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[2] See also Explanatory Notes to the United Nations Convention on the International Effects of the Judicial Sales, notes 99 and 100; in UNITED NATIONS PUBLICATION ISBN 978-92-

The relevant section reads as follows:

> ***Article 4 Notice of judicial sale***
>
> – *1. The judicial sale shall be conducted in accordance with the law of the* ***State of judicial sale, which shall also provide procedures for challenging the judicial sale prior to its completion*** *and determine the time of the sale for the purposes of this Convention.*
> – *2. […]*

Once this important point was settled, the Convention then, in Article 9 JSC, sets out the principles relating to any challenge directed to avoid and/or suspend the judicial sale. The key notion is the full exclusivity for such challenges to be made in the courts of the judicial sale and also pursuant to the laws applicable there. This means (a) giving such exclusive jurisdiction to the courts of the State of the judicial sale (Article 9 para. 1 JSC) but at the same time to (b) exclude jurisdiction of any other Contracting State (Article 9 para. 2 JSC). This leads to the following key principles:

– *the* **law applicable based on the rules of the State of Judicial Sale** *decides on whether or not the Judicial Sale is avoided / suspended.*
– *the* **law applicable based on the rules of the State of Judicial Sale** *will decide what will be the effect of such a decision on the certificate.*
– *All other courts in other contracting States have to* **decline jurisdiction** *on those issues.*

The relevant section reads as follows:

> ***Article 9***
>
> *Jurisdiction to avoid and suspend judicial sale*
>
> – *1.* ***The courts of the State of judicial sale shall have exclusive jurisdiction*** *to hear any claim or application to avoid a judicial sale of a ship conducted in that State that confers clean title to the ship or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale referred to in article 5.*
> – *2.* ***The courts of a State Party shall decline jurisdiction*** *in respect of any claim or application to avoid a judicial sale of a ship conducted in another State Party that confers clean title to the ship or to suspend its effects.*
> – *3. The State of judicial sale shall require the decision of a court that avoids or suspends the effects of a judicial sale for which*

1-101468-6 e-ISBN 978-92-1-002625-3, 2023, pages 21-93, reproduced in Beijing Convention, ETL, 2023, pages 114 et seqq. The Explanatory Notes cite also all Reports of the Working Group VI, which report the discussions of the Working Group on those issues.

> *a certificate has been issued in accordance with article 5, paragraph 1, to be transmitted **promptly** to the **repository** referred to in article 11 for publication.*

The third provision in Article 9 para. 3 JSC touches upon the inherent problem one has to accept but which is acceptable if applied within the very restraints of its scope and if used with the utmost care and reluctance to interfere into the effects provided and defended by the Convention. Any decision to interfere into this system must be made with the clear view on what such avoidance and suspension would cause to the vessel now sailing, trading with the new owners, possibly on-sold to third party ship-owners, under charters and financed by banks – all on the basis of a vessel which had been purchased free of all encumbrances by way of a judicial sale under this Convention. Any successful challenge, whether leading to an avoidance or suspension, should be the absolute exception and should only be envisaged if the *bona fide* interest of all subsequent commercial entities, which had made such sale possible (also in the interest of the former creditors and the former owners of such vessel) had been adequately balanced and its effects mitigated. Such challenge if successful, would constitute a legal and commercial mess in the system the Convention has established, a fact that would certainly be in the future taken into consideration by any potential creditor arresting in such jurisdiction (risking to loosing substantial assets due to the lack of predictability) and certainly by any interested purchaser and its banks and business partners (traders) when offered to bid for a judicial sale in such a jurisdiction. For the vessel and its old creditors this would obviously mean a substantial loss in obtainable assets in a jurisdiction that had "messed" a judicial sale to the extent of having to avoid or suspend its effect by means of Article 9 JSC.

The consequences of a successful challenge are not just restricted to matters concerning the jurisdiction of the judicial sale. A case of avoidance or suspension under Article 9 JSC may well become a challenge also for any other court (whether or not in a Contracting State), which – for issues and purposes other than the judicial sale – might have to weight in to the consequences such avoidance-decision might have on related issues before them, e.g. issues of ownership and registration in the new registry, validity of finance arrangements, mortgages, charter parties, insurance contracts etc. That is why the JSC has provided that the law applicable in any other court (by means of their conflicts of law rules) will determine the potential effect of an avoidance decided in the State of Judicial Sale (e.g. in the context of a dispute over the ownership of the vessel or on the survival of old maritime liens or charges). This is what is provided for in Article15 para. 2 JSC (matters not governed by this Convention). This is yet another reason why any such avoidance or suspension under Article 9 JSC should remain the **absolute exception** within the scope of application of this Convention.

Any abuse of this possibility would immediately lead to an avoidance of that State for purposes of ship arrests and even more so for any judicial sale by any interested purchaser. What creditor would want to arrest ships in a

jurisdiction, in which the judicial sale can be challenged without predominant and justified reason and without mitigating the rightful exceptions of a *bona fide* purchaser. What *bona fide* purchaser would even think bidding for a vessel put up for judicial sale, if the track record in that state shows instances of challenges that have led to unexpected problems for the *bona fide* purchaser?

The good news is, that any interested *bona fide* purchaser can – e.g. with local legal experts at the place of the judicial sale – engage in a proper due diligence exercise and limit any Article 9 JSC risk, by monitoring the judicial sale and all matters that could possibly become a basis for a later challenge under Article 9 JSC. As long as this risk can be evaluated, the purchaser will be able to rely both on the Article 6 JSC effect and its own due diligence result carried out before and during the process of a judicial sale.

3. Circumstances in which the Judicial Sale has no International Effect – Article 10 JSC

We know – and experience has proven this to be the case – that the most likely place of where the international effects of a judicial sale will have to be enforced are the place where the vessel will have to be de-registered (and the former owners and former mortgages) under Article 7 JSC and where old creditors would – despite the rules and provisions of the Convention – attempt to have the vessel arrested in a foreign jurisdiction (Article 8 JSC). Article 7 and 8 JSC are therefore – what concerns the effective translation of the Convention into practice – the two key tools to bring to the Article 6 JSC effects a robustness that withstands the practical challenges in jurisdictions of Contracting States other than the State of the judicial sale. A robust system must provide to any *bona fide* purchaser and to all interested parties in that vessel (banks and others) a predictable finality and clarity on their position in relation to their rights towards the old registry and towards old creditors. That is why Article 7 and 8 JSC oblige contracting States to follow the purchaser's instruction in the registration process (Article 7 JSC) and to reject all attempts of old creditors to arrest the vessel which was sold and purchased in a judicial sale (Article 8 JSC).

These two pillars are the key of the Convention. Only if they are robustly defended, the Convention is able to achieve its aim. They are of such paramount importance – if not the "raison d'être" – the backbone of the entire making of the Convention within UNCITRAL that they may not be questioned without absolute proof and determination of an *exceptional and manifest situation* that amounts to what the international legal community calls a manifest violation of "ordre public" or "*public policy*". While the adherence to the rules of the Convention will bind any Contracting State and therefore also to the Articles 7, 8 and 9 para. 2 JSC, the comity so provided and re-enforced in form of the State-obligations of the Convention can only be put into question in those extremely narrow and exceptional and even almost not conceivable situations where the respective contracting State, faced with an obligation under Article 7 or 8 JSC, would see its *own interest as a State*

(not the ones of any of the parties involved in the proceedings leading to the sale of the vessel) to be violated in a *manifest manner* amounting to a case, where adhering to the Convention's key pillars would be manifestly against its public policy.

This is what both Article 7 and 8 have stated for the respective purposes (Article 7 para. 5[3] for the registration issues and Article 8 para. 4 JSC[4] for the issues of subsequent arrest).

It is repeated for the purpose of overall clarity in a specific provision, i.e. Article 10 JSC, which reads as follows:

> ***Article 10***
>
> ***Circumstances in which judicial sale has no international effect***
>
> *A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a* ***court in the other State Party determines*** *that the effect would be* ***manifestly contrary*** *to the* ***public policy of that other State Party.***

The crucial and limiting criteria for such an exceptional step by a State party are:

- The effect can only be avoided in a Contracting State if the effect provided for by Article 6 JSC would be a **case of manifest violation of public policy in that Contracting State**.
- The avoidance of the effects of Article 6 JSC is limited to the cases, where there is a **determination** by the courts of such a Contracting State that the threshold of "manifestly against public policy" is met.
- Such determination would have an effect only in that Contracting State and not in any other jurisdiction, whether in the State of the judicial sale, any other Contracting State or any state which is not party of the Judicial Sales Convention.

3.1 No effects in a Contracting State in cases of manifest violation of public policy

Article 10 JSC (mirroring the equivalent Article 7 para. 5 and Article 8 para. 4 JSC) gives a very limited and exceptional possibility to a State Party in cases, where upholding the treaty obligation agreed by ratifying to the Convention to accept the effects provided for by Article 6 JSC (free title purchase of the vessel by a *bona fide* purchaser) would violate the Public Policy of that State in a manifest manner. Again, this can only be related to issues

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[3] Article 7 para 5 JSC.
Paragraphs 1 and 2 do not apply if a court in the State of the registry or of the other competent authority determines **under article 10** that the effect of the judicial sale under article 6 would be manifestly contrary to the public policy of that State.

[4] Article 8 (4) (in relation to further Arrests).
Paragraphs 1 and 2 do not apply if the court or other judicial authority determines that dismissing the application or ordering the release of the ship, as the case may be, would be **manifestly contrary to the public policy of that State**.

of the judicial sale itself and not any pre-dated or post-dated proceedings or judgments. The threshold is purposely set to the highest international level[5]. In looking for any scope for such a determination by the Courts of such State one has to heavily weight the factor that the acceptance of the Article 6 JSC effects after a judicial sale under the Convention is the core treaty obligation the respective Contracting State has entered into. Thus, the issues to be tested against the criterion of "manifestly against public policy" are extremely limited and cannot be of a more general nature but rather relate to something so manifestly adverse and unacceptable occurring during the judicial sale that it would effectively dispense and relieve the Contracting State of the one and utmost treaty obligation it entered into when ratifying the Convention. It is very difficult to see any instance where an issue of public policy would be of such a gravity that it would justify a dispensation of a Contracting State of its core obligation under the Convention. This even more so, as the public policy criteria was added by the word "manifestly", displaying again that cases of Article 10 JSC should in practice almost be unconceivable.

3.2 Determination

Registration proceedings (e.g. de-registration of vessel and / or mortgages) are time sensitive. A vessel once purchased and payed-for needs to sail and needs for that purpose have gone through all formalities required by law and commercial arrangements with all parties involved in the commercial trading of the vessel. Should a case of Article 7 para. 5 JSC be raised in the Contracting State where the registries are confronted with the Certificate and its effect, determination – in favor or against – needs to be made very swiftly. This is the raison d'être all Contracting States have accepted and therefore they must be bound to apply Article 10 JSC expediently and without procedural delay.

This is even more urgent in cases where the old creditors – despite Article 8 para. 4 JSC have attempted to arrest the vessel after a judicial Sale under the Convention in a Contracting State. If a Contracting State is considering the application of Article 10 JSC then it is obliged to determine this issue very swiftly and without procedural delay. Any prolongation of such determination would in effect mean to block the vessel, which – as a core feature of the Convention – should be released immediately from any arrest. This also means, as it is very well put in the Explanatory Notes by the UNCITRAL Secretariat, that provisional or conditional assessments by the Court, let alone mere allegations, would not be sufficient[6].

This restriction is in line with the overall goal of the Convention to hand

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[5] See Explanatory Notes, para 211: "While the public policy exception in article 10 has been inspired by recent treaty practice, including article 7, paragraph 1 (c), of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019),43 it is adapted to the international effects of judicial sales (recalling that the Convention is not concerned with the recognition and enforcement of foreign judgments; see remarks above on article 6). Matters of public policy can differ between judicial sales and foreign judgments."

[6] Explanatory Notes, para. 214.

to a *bona fide* purchaser in a judicial sale a vessel free of encumbrances, i.e. with clean title, and this in a robust way. It also is aligned with the decision by the Convention to concentrate all challenges relating to the judicial sale within the jurisdiction and the laws of the State where the judicial Sale was conducted. This means that all issues concerning the judicial sale are to be brought exclusively in the State of judicial sale (Article 9 para. 1 JSC) and that all other States, including the ones Article 10 is directed to, are obliged to reject jurisdiction on those issues (Article 9 para. 2 JSC). The subject matter scope for a determination on the issue of the "manifest public policy" remains therefore extremely small if – following the scope and purpose of the Convention – not almost not existing.

In any case, a Contracting State whose courts interfered outside the scope and below the threshold of Article 10 JSC into the Article 6 effects in the registration process would become a flag state that would be considered an obstacle for any interested bidder. This would be a consideration that any financing bank for a vessel under such flag would take into account. Also, in case of a judicial sale of such vessel sailing under such flag this obstacle would be most probably detected in a proper due diligence process by any *bona fide* purchaser causing such interested bidder most probably become reluctant to bid (where the old registry is in such a State). No secret that such flag State would therefore become most unattractive for financing banks as even with the Convention the situation would have become unsatisfactory in relation to such a Contracting flag State.

The same applies for any *bona fide* purchaser in its decision to sail with the vessel to the harbors of a Contracting State which has a track record of having – without sufficient reason in a particular extreme case and beyond the scope of Articles 8 and 10 JSC – either delayed the determination or – even worse – allowed and maintained such arrest despite the production of a Certificate and despite the Article 6 JSC effects.

3.3 Effect of such Determination only for the Respective Contracting State

One important feature of Article 10 JSC is, that the effects of any determination pursuant to this provision has only and exclusively effects for the jurisdiction of the Contracting State which has determined that the effects of a particular judicial sale was manifestly against its public policy. No Contracting is bound in any way to follow such ruling. This flows from Article 10 JSC itself but is also a logical consequence of the duties of Contracting States to refrain from establishing jurisdiction for all challenges to the judicial sale pursuant to Article 9 para. 2 JSC.

4. Conclusion

To put it bluntly, the issue of the challenge to a judicial sale and its "clean title effects" was most probably the one biggest challenge when negotiating the terms and provisions of the Convention within UNCITRAL's Working Group VI and the UNCITRAL Assembly in 2022. The results achieved during the negotiations mirrors this search for a balance and has achieved

both, i.e. a continued robustness of the Article 6 JSC effects when dealing with registries (Article 7 JSC) and with potential attempts of old creditors to arrest the vessel for old claims (Article 8 JSC). At the same time, it provides both for a focused pattern for challenges of the judicial sale and very restricted public policy exceptions for Contracting States. Thus, in summary:

- The Convention protects the *bona fide* purchaser (and its banks) after a purchase of a vessel through judicial sale. It provides an international clean title protection by Article 6 JSC and by the Certificate Article 5 JSC.
- "Old" Creditors are protected by an effective notice system providing additional protection in order for them to participate – if they so desire – in the judicial sale and subsequently in the proceedings leading to the distribution of assets (notice Article 4 / repository Article 11 / IMO).
- Due process is protected by Article 9 JSC.
- The Public Policy of Contracting States remains protected by Article 10 JSC.

Frederick J. Kenney – IMO

BEIJING CONVENTION ON THE JUDICIAL SALE OF SHIPS ARTICLE 11. IMO AS REPOSITARY

Frederick J. Kenney

ARTICLE 11

Repository

1. The repository shall be the Secretary-General of the International Maritime Organization or an institution named by the United Nations Commission on International Trade Law.

2. Upon receipt of a notice of judicial sale transmitted under article 4, paragraph 5, certificate of judicial sale transmitted under article 5, paragraph 3, or decision transmitted under article 9, paragraph 3, the repository shall make it available to the public in a timely manner, in the form and in the language in which it is received.

3. The repository may also receive a notice of judicial sale emanating from a State that has ratified, accepted, approved or acceded to this Convention and for which the Convention has not yet entered into force and may make it available to the public.

HOW DID WE GET HERE, AND HOW WILL IT WORK?

- ACTIONS OF THE IMO LEGAL COMMITTEE
  - LEG 103
  - LEG 107
  - C 125

"invite the Secretariat to make the necessary arrangements to host a possible online repository under the United Nations Commission on International Trade Law (UNCITRAL) draft instrument on the foreign judicial sale of ships and their recognition, as an additional GISIS module"

- LEG 110

3

GISIS System

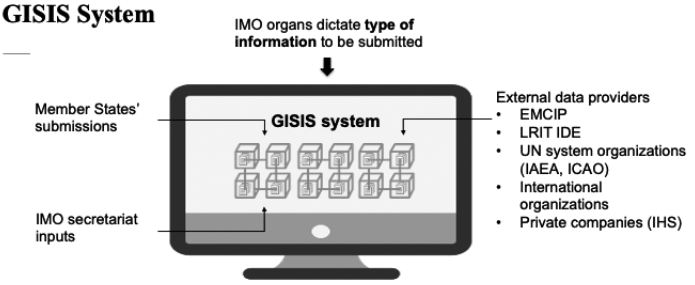
- **Global Integrated Shipping Information System (GISIS) -** Launched in 2005
- **Purpose of GISIS** A.1029(26):
  1) To allow direct reporting by Member States in **compliance with reporting requirements**
  2) To enable Member States and public to **access to data** compiled by the Secretariat

Centralized information repository

A tool for supporting research work and the adoption of international and national policies on maritime safety, security and environemntal protection

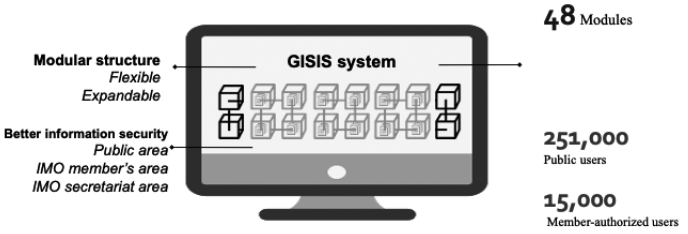
GISIS Analysis 4

GISIS System



GISIS Analysis 5

GISIS System



GISIS Analysis 6

Global Integrated Shipping Information System

7

SPECIFICS OF THE GSIS MODULE

- Specifics discussed as UNCITRAL Working Group VI, Session 39
  - See report of the WG (A/CN.9/1089, paras 85-91)
  - IMO to serve only as information pass-through – will not verify accuracy of data, not liable for errors
- What is submitted?
  - Notices (Article 4), Certificates (Article 5) and Avoidances (Article 9)
- Who can submit to GSIS?
  - In discretion of Member States – only authorized user accounts can submit
- Languages: IMO will not provide translation services, GSIS will accept data in any language
  - Notices: Article 4(6): Submission must be in working language of IMO (EN, FR, SP) or contain a translation.
  - Certificates: Article 5(2)(4) refers to translations but does not require them.
  - Avoidances: Article 9 – no reference to languages
- Overall GSIS system under review by IMO Secretariat and Council. Implementation may change based on out comes. Module development 6-12 months prior to entry into force.

8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JUDICIAL SALES CONVENTION, ARTICLES 16-23 AND EXPLANATORY NOTE

Stuart Hetherington

Articles 16 to 23 and Explanatory Note

My role is to discuss the procedural material in the final clauses. These provisions are unlikely to trouble legal practitioners, but a knowledge of their contents might come in handy, especially for MLAs having conversations with their governments. These provisions are consistent with other UNCITRAL instruments.

Article 16: Depositary

This, the Depositary, (is to be distinguished from the Repository in Article 11, for the receipt of the Notice of sale and Certificate under Articles 4 and 5 to which Fred Kenny refers in his comments), designates the Secretary-General of the United Nations as the Depositary of this Convention.

Article 17 Signature, ratification, acceptance, approval, and accession

This provides that the Convention is open for signature by all States; is subject to ratification, acceptance or approval by the signatory States; but is open for accession by all States that are not signatories as from the date it is open for signature; and instruments of ratification, acceptance, approval or accession are to be deposited with the Secretary-General of the United Nations. The signature is merely symbolic of a future intention.

Article 18: Participation by regional economic integration organisations (REIO)

Such organisations, in addition to States may participate in a range of trade related treaties. They are not defined in the Convention, but Article 18 identifies two critical elements, that is the grouping of States in a certain region for the realisation of common purposes, and the transfer of

competencies relating to those common purposes from those States to the REIO. Accordingly paragraph 1 of Article 18 provides that an REIO may only express its consent to be bound if it "has competence over certain matters governed by this Convention". Such competence may be only partial or concurrent with the member States and thus the REIO and any or all of its Member States may become a party to the Convention. Where an instrument is deposited by the REIO it is not counted in addition to those deposited by its Member States for the purposes of the entry into force of the Convention, or of any adopted amendment.

Paragraph two of Article 18 requires the REIO to make a declaration specifying the matters governed by the Convention in respect of which competence has been transferred to it by its Member States. It is also required to promptly notify the depositary of any changes to the distribution of competence.

Article 19: Non-unified legal systems

This Article is sometimes referred to as "the federal clause", but is not limited to federations. It applies to a State which has two or more territorial units applying different systems of law in relation to matters dealt with in this Convention. It can declare that the Convention shall extend to all its territorial units or only to one or more of them. A central government may not have power to implement a treaty. Under Article 29 of the Vienna Convention a treaty is binding on all the territory of a State, unless a different intention appears from the Treaty. If a State does not make such a declaration the Convention will extend to all the territorial units of that State.

Article 20: Procedure and effects of declarations

Declarations made under the two previous articles (18 and 19) which are made at the time of signature are subject to confirmation upon notification, acceptance or approval. A declaration takes effect simultaneously with the entry into force of the Convention in respect of the State concerned. They may be modified or withdrawn by formal notification in writing, addressed to the Depositary.

Article 21: Entry into force

The Convention enters into force 180 days after the date of deposit of the **third instrument of ratification, acceptance, approval, or accession**. This does not include REIOs. The Convention only applies to judicial sales ordered or approved after its entry into force in respect of the State of judicial sale. Where a State Party ratifies after the entry into force of the Convention in so far as that State is concerned it comes into force 180 days after its ratification is deposited. Paragraph 3 in this Article is also significant from a time point of view, as it provides that "This Convention shall apply only to judicial sales, ordered or approved after its entry into force in respect of the State of judicial sale," as Henry Li has discussed: after identifiable actions have been taken with respect to a judicial sale.

Article 22: Amendment

This provides that any State Party may propose an amendment by submitting it to the Secretary-General of the United Nations. The Secretary-General is then required to communicate the proposed amendment to the States Parties with a request that they indicate whether they favour a conference of States Parties to consider and vote upon the proposal. Provided that within 120 days from the date of such communication at least one third of the States Parties favour such a conference the Secretary-General is required to convene the conference under the auspices of the United Nations.

Pursuant to paragraph 2 of Article 22 if consensus is unable to be achieved in respect of a proposed amendment, as a last resort, it may be adopted by a two-thirds majority vote of the States parties present and voting at the conference (for these purposes the vote of a regional economic integration organisation shall not be counted). When an amendment is adopted, it is then required to be submitted by the depositary to all States Parties for ratification, acceptance or approval and will enter into force 180 days after the date of deposit of the third instrument of ratification, acceptance or approval. Thereafter it shall be binding on those States Parties that have expressed consent to be bound by it.

Article 23: Denunciation

This permits a State Party to denounce the Convention by a formal notification in writing addressed to the depositary, ie to release a State party from its obligations under the Treaty. It may be limited to certain territorial units of a non-unified legal system to which the Convention applies. The denunciation, pursuant to paragraph 2 of Article 23, will take effect 365 days after the date of the receipt of the notification by the depositary although a longer period for the denunciation to take effect can be specified in the notification of the denunciation. The Convention will continue to apply to a judicial sale for which a certificate of judicial sale referred to in Article 5 has been issued before the denunciation takes effect.

UNCITRAL'S Explanatory Note on the Beijing Convention

This document is commended to anyone concerned with understanding the Convention and is an extremely well-prepared document in respect of which the UNCITRAL Secretariat is to be warmly congratulated. It comprises 74 pages and 264 paragraphs.

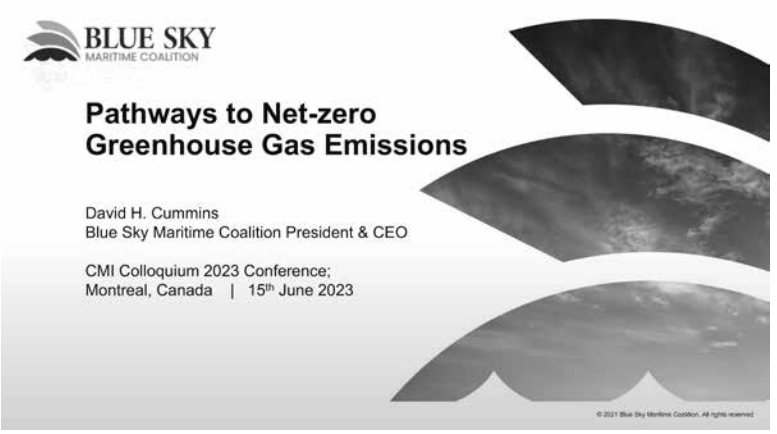
As the first footnote in the document explains: "The present Explanatory (Note) was prepared by the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes. It is not an official commentary on the Convention." A draft Explanatory Note was discussed at UNCITRAL sessions in Working Group VI, and at its concluding session the Secretariat was requested to publish the text reflecting the discussions that had taken place at the concluding session.

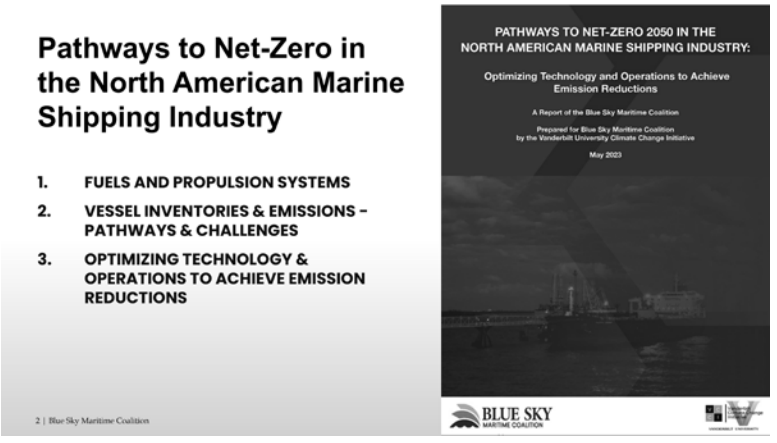
As well as containing an overview of the Convention, its objective, an outline of its provisions, and the drafting history in the first four pages, it

contains commentary on the Preamble and each of the Articles, as well as an annexure which tabulates the "concordance between the Convention and earlier drafts from the CMI's "Beijing draft", through each of the revisions to the final text.

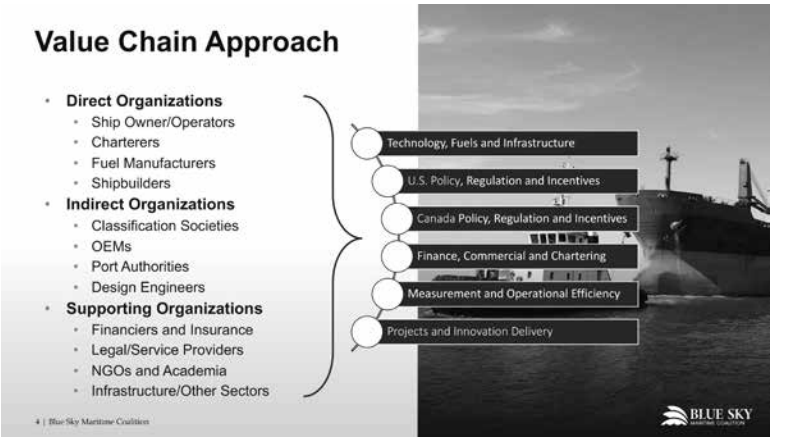
PATHWAYS TO NET-ZERO GREENHOUSE GAS EMMISSIONS

David H. Cummins






Who is the Blue Sky Maritime Coalition?
Funding, Grants and Public Demand
Policy Makers / NGOs / Academia / End Consumers
Regulation and Operational Efficiency
Joint Innovation Projects and Pilots
Technology and Research Fuels/Vessel Design Infrastructure
Ship Owner/Operators Charterers/Cargo Owners Port Authorities
Demonstration and Commercialization
We are a non-profit group of like-minded companies, NGOs, public entities and individuals in North America coming together to:
• Collaborate among stakeholders on how to achieve net zero emissions through various workstreams
• Evaluate, encourage and engage -- through varying pathways and projects -- innovation that reduces emissions
• Accelerate the North American maritime value chain's pathway to net zero emissions
3 | Blue Sky Maritime Coalition
BLUE SKY


Value Chain Approach
• Direct Organizations
  • Ship Owner/Operators
  • Charterers
  • Fuel Manufacturers
  • Shipbuilders
• Indirect Organizations
  • Classification Societies
  • OEMs
  • Port Authorities
  • Design Engineers
• Supporting Organizations
  • Financiers and Insurance
  • Legal/Service Providers
  • NGOs and Academia
  • Infrastructure/Other Sectors
Technology, Fuels and Infrastructure
U.S. Policy, Regulation and Incentives
Canada Policy, Regulation and Incentives
Finance, Commercial and Chartering
Measurement and Operational Efficiency
Projects and Innovation Delivery
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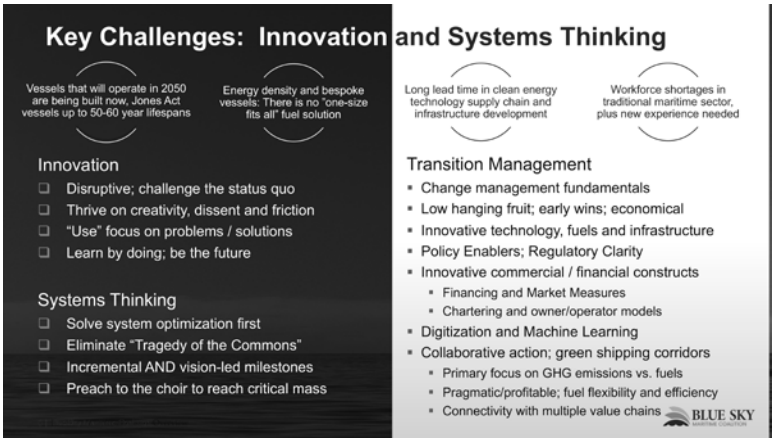
BLUE SKY


Roadmap To 2050: Vision Led; Action Oriented
Collaboration
• Public Sector
• Private Sector
• Academia/Research
• Customers/consumers
2050 Vision
INCREMENTAL MILESTONE
INCREMENTAL MILESTONE
VISIONARY MILESTONE
VISIONARY MILESTONE
Working Backward From Success
Incremental Improvement
Current Reality
Collaboration
• Technology, Fuels, Infrastructure
• Policy, Regulation, Incentives
• Commercial, Financing, Chartering
• Measurement and Operational Efficiency
5 | Blue Sky Maritime Coalition
BLUE SKY


Key Challenges: Innovation and Systems Thinking
Vessels that will operate in 2050 are being built now, Jones Act vessels up to 50-60 year lifespans
Energy density and bespoke vessels: There is no "one-size fits all" fuel solution
Innovation
Disruptive; challenge the status quo
Thrive on creativity, dissent and friction
"Use" focus on problems / solutions
Learn by doing; be the future
Systems Thinking
Solve system optimization first
Eliminate "Tragedy of the Commons"
Incremental AND vision-led milestones
Preach to the choir to reach critical mass
Long lead time in clean energy technology supply chain and infrastructure development
Workforce shortages in traditional maritime sector, plus new experience needed
Transition Management
Change management fundamentals
Low hanging fruit; early wins; economical
Innovative technology, fuels and infrastructure
Policy Enablers; Regulatory Clarity
Innovative commercial / financial constructs
Financing and Market Measures
Chartering and owner/operator models
Digitization and Machine Learning
Collaborative action; green shipping corridors
Primary focus on GHG emissions vs. fuels
Pragmatic/profitable; fuel flexibility and efficiency
Connectivity with multiple value chains
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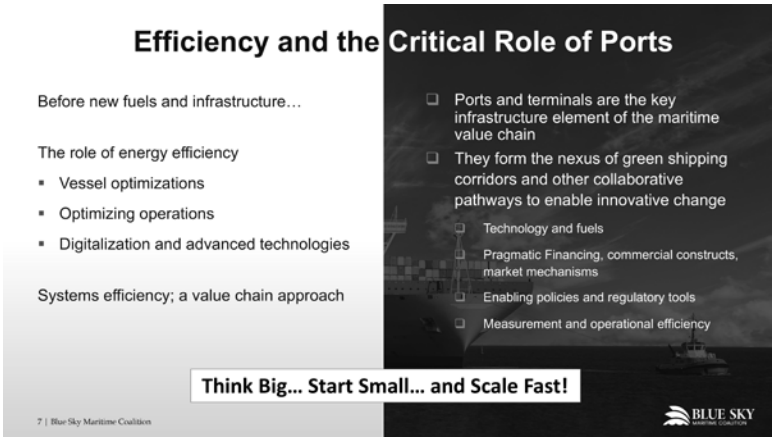
Efficiency and the Critical Role of Ports
Before new fuels and infrastructure…
The role of energy efficiency
Vessel optimizations
Optimizing operations
Digitalization and advanced technologies
Systems efficiency; a value chain approach
Ports and terminals are the key infrastructure element of the maritime value chain
They form the nexus of green shipping corridors and other collaborative pathways to enable innovative change
Technology and fuels
Pragmatic Financing, commercial constructs, market mechanisms
Enabling policies and regulatory tools
Measurement and operational efficiency
Think Big… Start Small… and Scale Fast!
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NAVIGATING LIABILITY IN A MASS WORLD

Tom Birch Reynardson

1. THE CURRENT LIABILITY REGIME IN COLLISION CLAIMS

1.1 History

1.1.1 The principles of collision law have developed over many years and can abe traced back to the Roles of Oleron in about 1150 when the principle appears to be one of a divided damages law, where regardless of fault, damages were divided 50/50. This principle was picked up in the Laws of Wisby which provided also for divided damages unless the act was wilful.

1.1.2 Interestingly. The Napoleonic Code de Commerce contemplates that where there is a collision between two moving vessels, there is an equal division of liability.

1.1.3 It was only towards the end of the 18th Century that it seems to have been established that there were different levels of liability in collision cases depending upon the level of fault.

1.2 Modern Law of Collision

1.2.1 Trinity House published the first Collision Regulations in 1840. These were enacted in the Steam Navigation Act 1846, and this act in effect is the origin of the Collision Regulations (COLREGS).

1.2.2 5 The COLREGs provide guidance to mariners on how to prevent collisions at sea and serve as the basis for apportioning blame when collisions do occur.

2. AUTONOMOUS SHIPS AND THE COLLISION REGULATIONS

2.1 As autonomous and unmanned ships will operate in the same waters as manned ships, all vessels must follow the COLREGs and behave in an expected manner to avoid accidental collisions.

2.2 However, suppose the navigation system that is navigating autonomously slavishly follows the COLREGs where it would be safer to depart from them to avoid danger. In that case, this could not only create dangerous situations but render the ship unseaworthy if the system cannot make safe decisions. Given that a defective passage plan can render a ship unseaworthy, a system that cannot navigate to the standard of a prudent seafarer is likely to point to unseaworthiness.

2.3 Rule 2(b)

2.3.1 Rule 2(b) of the COLREGs, is particularly problematic for a vessel navigated at Degree Four (total autonomy).

2.3.2 Rule 2(b) permits a departure from the COLREGs in certain circumstances:

> *In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.*

2.3.3 Rule 2(b) does not permit a vessel to depart from the COLREGs because it is advantageous and, for this reason, Dr Lushington stated that:

> *"You may depart, and you must depart, from a rule if you see with perfect clearness, almost amounting to a certainty, that adhering to the rule will bring about a collision, and violating a rule will avoid it"*[1]

2.3.4 Given that rule 2(b) only applies when there is an 'immediate danger, perfectly clear' the navigation system will be required to take action that would be expected as meeting the standard of prudent seamanship.

2.3.5 A further challenge is that a departure from the COLREGs may not only be justified but may in fact be a duty and required in certain circumstances.

2.3.6 The difficulty with this rule at Degree Four, is that if the system is self-learning it will be impossible to interrogate the reason for its decision in the event of a collision.

2.3.7 This leads to an ethical question, whether autonomous ships should be held to the same standards as a prudent mariner, or ought the standards be higher given that there is no risk to human life on board the autonomous vessel but potential risk to life by the autonomous vessel?

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[1] The Boanerges and The Anglo-Indian (1865) 2 Mar L Cas (OS) 239, 240.

3. COLLISION AND TORT LAW

3.1 To be held liable for a collision claim the wrongdoer must be at fault. This means that it must be established that the tortfeasor failed to take reasonable care:

> *The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay*[2].

3.2 The starting point is to establish which human agencies were responsible for the collision and whether their faults can be attributed to the shipowner. This will involve the application of the principles of vicarious liability.

3.3 As Nick Healy said, the proportionate fault rule is necessary in collision law because *"...it makes little sense to say that in the event two vessels are at fault, each must be held strictly liable to the other and pay 100% of the other's damages*[43].

3.4 Where the negligence arises by some person (or entity) other than a crew member, it becomes critical to establish whether the wrongdoer was acting as a servant or agent of the shipowner, or as an independent contractor. In the case of an independent contractor, the shipowner will be liable only if it is proved to have not taken reasonable care in choosing the contractor. The relevant test was set out in Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Ltd5.

3.5 Lord Uthwatt said:

> *To establish the power of control requisite to fasten responsibility on him, the hirer must in some reasonable sense have authority to control the manner in which the workman does his work, the reason being that it is the manner in which a particular operation (assumed for this purpose to be in itself a proper operation) is carried out that determines its lawful or wrongful character.*

3.6 The development of AI is not within the control of the shipowner. The supplier of the software embedded in the hardware is initially in control but as the system self-learns based on the data it is gathering and monitoring, control moves to the developer. AI systems make decisions by running historical data through an algorithm but currently it is not possible to know how the system has made the decision. This is known as the black box of AI.

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[2] Donoghue v Stevenson [1932] AC 562 (HL), per Lord Atkins.

[3] Nicholas J Healy 'The apportionment of risk between shipowners and third parties – Shipowner & Shipowner Collisions' CMI Yearbook Report of Proceedings at a seminar held in Aix-en-Provence 9-11 September 1976.

4. STRICT LIABILITY

4.1 Strict liability entails absolute liability for damage caused by an act even though the damage is the result of pure accident or another person's wrongdoing and is neither intentional nor negligent.

4.2 Strict liability does not apply in collision cases because the inequities that could arise if absolute liability applied in cases of collision between vessels of greatly disparate values.

4.3 However, in the context of ships operating at Degree Four, strict liability seems to be the most appropriate way of determining liability in the event of a collision as it will be difficult, perhaps impossible, to determine fault when artificial intelligence is navigating the ship.

4.4 A further argument supporting making the owner of an autonomous ship strictly liable for harm caused to third parties is that at this stage no-one can say definitively that such ships are safer than crewed ships. While there are statistics that point to the number of collisions caused by human error, there are no converse statistics to indicate the number of collisions that have been averted by the presence of an onboard crew.

4.5 Fault-based liability for collisions has been in place for centuries but the removal of human actors from the navigation and control of a ship suggests that strict liability for autonomous ships in collision cases ought to be considered.

4.6 In the maritime context, the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC) places strict liability on the owners of ships that carry 'persistent hydrocarbon mineral oil'.

4.7 Likewise the 2002 Protocol to the Athens Convention places strict liability for death or personal injury of a passenger on the carrier unless the carrier can prove that the incident:

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) was wholly caused by an act or omission done with the intent to cause the incident by a third party. If and to the extent that the loss exceeds the above limit, the carrier shall be further liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

5. IN DEFENCE OF STRICT LIABILITY

5.1 Channeling liability to the owner for damage caused by an autonomous vessel does not upset the existing delicate balance between shipowners' liabilities for third-party losses as developed over centuries. Strict liability does not mean that the shipowner is always liable. Rather, the shipowner bears the burden of showing that it did not cause the plaintiff's loss instead of the claimant being required to establish a prima facie case of negligence.

5.2 The Convention on Limitation of Liability for Maritime 1976 (LLMC) and its Protocol of 1996 allow a shipowner to limit its liability for certain claims 'whatever the basis of liability may be for claims arising from 'any distinct occasion'.

5.3 The LLMC extends to 'any person for whose act, neglect or default the shipowner ... is responsible to prevent claimants from circumventing the limits in the LLMC by claiming against the shipowner's agents or servants. The shipowner is not responsible for the acts of the developer of the artificial intelligence which is neither agent nor servant of the shipowner but the supplier of a product.

5.4 If product liability is the basis for a claim against the designer of the system following a collision, this would circumvent the LLMC. The supplier of the system may well have an indemnity or 'hold harmless' clause in its supply contract with the shipowner and a claim based on product liability (which is not limited by the LLMC) could circle back liability to the shipowner.

5.5 If the developers are potentially exposed to unlimited liability, insurance costs will increase, making the technology unfeasibly expensive.

5.6 The software developer or provider of the technology is not the servant or agent of the shipowner. Under a fault-based regime, if there is a collision that is caused by the negligence of the software developer, the shipowner will only be liable to the extent of its responsibility to exercise due diligence in the selection of that supplier.

6. OTHER CONSIDERATIONS

6.1 The general function of tort law to discourage wrongful conduct could potentially be undermined by strict liability if this circumvents the producer of the artificial intelligence.

6.2 Further, it may be unjust to hold the shipowner of an unmanned ship strictly liable for a collision where an onboard crew would not have had any effect on the outcome.

6.3 Allocation of fault-based liability may still be possible if the burden of proof is reversed. Negligence may be inferred from facts without the need for further proof and the doctrine of *res ipsa loquitur* could be useful for autonomous ships at Degree Four.

6.4 The application of *res ipsa loquitur* places the burden on the defendant to prove that it was not negligent and appears to be connected with the principle that the burden of providing facts that are only within the knowledge of the defendant lies upon it.

FRENCH REGULATIONS ON MASS

Morgane Roussel

I. INTRODUCTION

1. Maritime law is an ancient law, designed for ships that are armed and equipped, and for which seafarers are inseparable. Whether in terms of the semantics attributed to embarked personnel or those relating to navigation permits, maritime law was built on the principle of the presence of a crew on board a ship to face the inherent risks of the maritime expedition**.**
2. Arrival of MASS represents a technological and cultural metamorphosis. Technologically viable, autonomous unmanned vessels, are set to revolutionize the maritime sector. It must be said that maritime law has yet to grasp this major innovation.
3. To date, 4 types of autonomous vessels seem to stand out:
    i. The vessel with automated processes and decision support: personnel on board the vessel *operate and control on-board systems and functions, but some operations may also be automated*.
    ii. The remotely controlled vessel with on-board personnel: *the vessel is controlled and operated from another location, but humans are still on board*.
    iii. The unmanned remote-controlled vessel: *the vessel is controlled and operated from another location*, with no human presence on board. Cameras, microphones and other sensors are used to transmit information to the driver. Although there is no there is no longer a crew, but a human being can still influence the ship's progress in real time.
    iv. The fully autonomous ship: the ship's operating system is capable of making decisions and actions on its own. The autonomous vessel processes the data collected by its sensors, makes decisions about navigation and optimizes its response to traffic. Thanks to

deep-learning technology, the autonomous vessel learns from its mistakes, acquires experience and improves its practice.

4. Necessity to define the legal scope of autonomous vessels in creating a special regime or in amending the provisions (of national regulations and international conventions) which exclude the operation of unmanned vessels so far, or do not cover the operation of unmanned vessels, since they apply exclusively to the operation of manned vessels, or ignore this issue, and to rethink some of traditional "concepts" of maritime law which seem to be not compatible with the autonomous ships so far.
5. In this perspective, France has become one of the first country to introduce the concept of autonomous ships (and also maritime drones) into its legal corpus.

Traditionally, French law referred to the crew with the term "equipped" in its corpus as ship was defined as *"a floating craft, equipped with a means of propulsion and able to face the perils of the sea."*

With the **Law No. 2016-816 of 20 June 2016** for the blue economy the article L 5511-1-1 of the French Transport Code and refers for the first time to the MASS as "*craft on which no person is embarked*":

> *"A floating surface or underwater craft, on which no person is embarked, operated from a vessel flying the French flag, must bear external identification markings defined by regulation."*

The Law of 24 December 2019 has incorporated a broad maritime section designed to improve the body of legislation both to implement new social and environmental rules and to anticipate the adaptation of the law to the digital revolutions.

With the article 135. III.1 of the law of 24 December 2019 : 5 objectives were set out and Government was empowered to legislate by Decree to enable the navigation of autonomous or remotely controlled vessel, define the conditions under which these new vessels can be used to preserve the safety of maritime navigation and the environment, specify the corresponding liability and insurance regime, as well as the labor and social laws applicable to the personnel concerned, and finally define the conditions under which failure to comply with these provisions will be investigated, monitored and punished.

The Decree of 13 October 2021 has authorized the navigation of fully autonomous or remotely controlled vessels with the creation of a specific experimental operating regime for these ships.

Indeed, this Decree *authorizes these vessels to sail in French territorial waters, for a maximum period of two years while maintaining an overall level of safety and environmental protection* (article L. 5241-3-1 of the French Transport Code) while providing a legal definition of the autonomous vessels and a clear distinction between unmanned vessels and drones through technical characteristics (size, speed and power limits). Also, the Decree confirms that the master is "the person who commands these ships"

II. LEGAL ISSUES SOLVED WITH FRENCH REGULATIONS ON MASS :

The definition of autonomous vessels has been set and also the distinction between unmanned vessels and drones through technical characteristics (size, speed and power limits) **(1)**, and the command of the ships assuring through the figure of Master has been confirmed **(2)**.

1. *Legal and technical definition of MASS and distinction with the drones:*

With the Decree, the definition of the MASS has been adapted to integrate the use of fully autonomous and remotely operated vessels:

Article L.5000-2-1 of the French Transport Code provides that:

> *"(...) an autonomous vessel is a vessel* operated remotely or by its own operating systems*, whether there are seafarers on board. The person in command of the autonomous vessel is the master."*

We can imagine that in addition to the usual ship identification criteria referred to in Article L5111-1 of French Transport Code which are the name of the vessel, the port, the nationality and the tonnage, some other elements such as for example the model of software used or the types of sensors, cameras could be elements of identification.

Also, a distinction with the drone has been made through technical characteristics (size, speed and power).

Therefore, on the basis of the elements provided by the article L.5000-2-2 of the French Transport Code (created by the Decree) which gives the definition of the drones and also on the basis of various consultations which were carried out, we can understand that:

> *"A maritime drone is a floating surface or underwater craft operated remotely or by its own operating systems. or by its own operating systems that meets the following cumulative conditions:*
> - *No personnel, passengers or cargo on board;*
> - *A gross tonnage of less than 100 UMS;*
> - *Its overall length is greater than 1 meter and less than 16 meters;*
> - *Its maximum speed is less than or equal to 20 knots;*
> - *Its kinetic energy is less than 300 kJ."*

Therefore, as soon as a maritime craft does not meet these criteria, it will be a MASS.

2. *The command of the MASS:*

2.1 As already mentioned by Professor G. PIETTE, with the digitalization of maritime sector and arrival of MASS "*the first master*[1] *on board is no longer the captain, but the means of communication*."

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[1] G. PIETTE, Droit Maritime, Ed. 2017, Pedone.

However, the Decree of 13 October 2021 confirms the institution of Master in stipulating that these autonomous ships remain under the command of the master, *i.e.* the person in charge of the maritime expedition – even if no human is on board:

- L. 5000-2-1 of the French Transport Code states: "*(...) an autonomous vessel is* a vessel operated remotely or by its own operating systems*, whether there are seafarers on board.* The person in command of the autonomous vessel is the master."
- L. 5511-3-1 of the French Transport Code states that*:* "*When persons participating in the operation of an autonomous vessel, including the captain, are seafarers, they are deemed to be embarked within the meaning of this section*";

These provisions have removed the impossibility of exercising command from the land as seafarers were defined before this Decree as "*the persons on board a ship*" (article L.5511-1 of French Transport Code).

It would mean that the team responsible for pilotage from land could be defined as the crew and the chief as Master.

A very recent draft application Decree has been submitted by the Government following the session of February 2023 to amend the French Decree no. 84-810 related to the protection of human life at sea and pollution prevention, in which it is stated that the ship's "place of command" will necessarily have to be defined in order to provide for or extend certain obligations in terms of equipment and control of these areas, which are seen as a dismemberment of the ship's "shipboard". To date, it proposes amending the said Decree by using the term "remote control center", deemed more appropriate than "remote operation center", as it covers both remote operation and supervision functions.

For the level 4 of MASS i-e ships operated and controlled by their own operating systems (with deep learning and AI) these new provisions do not give any clue to identify who could be the (last) person(s) in command of the autonomous vessel (technology supplier or the developer / programmer) and where can be this "command location"?

2.2 Master will not benefit from the prerogatives of public authority:

The Decree has created the article L. 5521-6 of Transport Code which provides that*:*

> *"Masters of autonomous vessels and their deputies do not benefit from the prerogatives of public authority."*

Traditionally, as Professor G. PIETTE stated that "*the ship is a microcosm of the state and so sovereign's powers must be represented.*"

That is the reason why the Master used to assume the prerogatives of public authorities during the expedition by acting in the place of public officers in intervening as Civil registrar (he was competent for example, to draw up birth or death certificates), or as Public Notary by receiving the authentic wills.

He used also to have powers in matters of disciplinary and penal/

criminal misconduct to maintain the safety and security of the ship (and of all the persons on board).

With the MASS, master is losing one of his prerogatives i-e public authority powers. But as Humans are becoming rare species on board, these specific prerogatives are no longer necessary.

III. LEGAL ISSUES UNSOLVED WITH THE FRENCH REGULATIONS ON MASS:

Finally, while the decree of 13 October 2021 provides some guidance for adapting French maritime law (or even International maritime law in the future) to the use of MASS), it raises more questions and uncertainties.

Indeed, the core of these questions remains the exact identification of the Master, and as developed above, it is not clear in the 4 types of MASS who will wear the master's hat.

This question is not purely academic as defining who the Master is, has direct consequences on the determination of his duties / functions (**1**), and his liability (**2**).

1. *Silence on the determination of the functions and liability of the MASS' Master:*

- **Duties and Functions:**

The Master is traditionally referred to as "*the only master on board after God*" which corresponds to the combination of his several functions.

Indeed, the Master has various missions and represents the owner on board to execute operational and technical functions (for the safety, execution of the voyage, record keeping), employment/working functions, commercial functions, judicial functions…

In fact, the identification of the Master is fundamental especially regarding the environmental and safety issues:

Environmental issues: For example, the Montego Bay Convention recognizes a significant role for the Master in preventing and controlling pollution of the marine environment, by informing coastal states (art. 211). The BWM Convention, entrusts the master and his crew with the management of ballast water (Rules B-1, B-2 and B-6).[2]

Safety issues: Many provisions of international conventions focus on this issue. This is the case for the rules requiring a sufficient number of crew members (SOLAS, chapter V, regulation 14), and appropriate skills and qualifications (CMB, art. 2). qualifications (CMB, art. 94.4; ISM, art. 6; STCW) or master's powers, authority and responsibility in terms of safety and security. (ISM, art. 5; ISPS, art. 6 chap. XI-2, regulation 8) or obligations of assistance and salvage obligations (CMB, art. 98; SOLAS, chap. V, regulation 33; London Conv. London, art. 8 and 10.[3]

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[2] G. PIETTE, Droit Maritime, Ed. 2017, Pedone.

[3] Ivi.

We can wonder how these functions will be adjusted to the MASS's Master as the French law remains silent on this point.

- **Liability:**

In the civil liability system, based on the notion of risk and correlatively on human intervention on ships, the human behavior plays a central role in the civil liability rules therefore most liabilities, in contract or in tort, are triggered by a human wrongful act or a negligence, a human breach of rules, or a human lack of due diligence.

In maritime law, shipowner can be responsible for his own negligence and for the negligence of his servants which traditionally includes the master and the crew.

But in this new landscape, where the captain is no longer what he used to be, where new players are involved and where, at the same time, human is disappearing in favor of the machine, this will certainly lead to seek other types of negligence, new responsible players, and associated liabilities of a different nature.

For fully autonomous ships (level 4) which navigate independently of human real-time decision making and on the basis of programs, it is difficult to find room for an assessment of fault – unless the shipowner has failed to exercise due diligence in his operation and use of the autonomous ships or in relation to maintenance or software updates – which would probably lead to use strict liability scheme to cover these new issues.

Two liability systems could be considered in this context of disappearance of humans in favor of machines: liability for things (C. civ., art. 1242) or liability for defective products (C. civ., art. 1245 et seq.)

2. *Silence on the traditional maritime concepts which rely on or involve master (and its crew) intervention?*

Autonomous ships put on test many traditional maritime concepts which rely on or involve human intervention on board (Master and the crew) and the answers brought by French law do not give any clue to know how these concepts could be adapted (or perhaps discarded).

We can focus on 4 concepts:

- **Limitation of liability**

Shipowners have for long been entitled to limit their liability.

In the light of the 1976 Convention of London on Limitation of Liability for Maritime Claims, the question shall be whether the right to limit liability can be extended to the new actors (technology suppliers such as analysts and developers and programmers)?

It is reminded that under the LLMC Convention, the persons entitled to the limitation of liability are shipowners (such term covering the owners, charterers, managers and operators of the ship) but also « *a person for whose act, neglect or default the shipowner is responsible*[4]» (article 1).

---

[4] Extension to crew and Master (even if in French law since Costedoat case law 2000 « servants » are protected from claimant actions)

As we understand from French law the unmanned vessel still has a master, the limitation would still be justified. There is therefore, in our view, no reason to deny limitation of liability to the owner of an unmanned vessel without crew

But if we consider that the equipment and system supplier /programmers monitor the navigation of ships and assume liability for such duties, they should be entitled to limit the liability as they perform a « *work function* » on behalf of the shipowner and could be regarded as his « servants »?

- **Nautical fault: exception in the carriage of goods**

Under the Hague-Visby rules, the same would apply as all the circumstances provided to exclude the liability of the carrier would also exclude that of the master and of each servant of the carrier.

For example, the nautical fault, based on the article IV.2(a) of the Hague-Visby Rules provides that carrier nor ship shall be responsible for loss and damage to cargo resulting from *"act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship"*.

With the new technologies and especially with the use of MASS, we can wonder if the fault committed in the "management" of the ship through the MASS shall fall within the scope of provisions of said rules.

However, it is important to remind that historically, the nautical fault exception was justified on the basis that shipowners lacked the ways to control their ships by communication on long voyages and so masters had to act in their own judgement.

I gather that this exemption already controversial could become even more irrelevant in the context of MASS under permanent communication and multiple actors (exception in the Rotterdam Rules has been abolished).

- **Collision**

The collision between sea-going and/or inland navigation vessels flying the flag of 2 different member states is a fault-based liability « by the fault of a vessel » (article 3 & 4 Convention 1910) which refers to:

> *"Human negligence" as a minimum which is heard as a "negligence in navigation of the ship" or "negligence in the management of the ship."*

The International Regulations for Preventing Collisions at Sea (ColReg 72) refers to :

> *"Every ship shall at all times keep a proper lookout by sight and sound, using also all available means appropriate to the prevailing circumstances and conditions, so as to enable the situation and the risk of collision to be fully appreciated (Regulation 5)."*
>
> *"Nothing in these Rules shall relieve any ship, its owner, master or crew from the consequences of any negligence in the observance of these Rules or of any precaution required by the ordinary experience of the seafarer or by the particular circumstances in which the ship is engaged (Regulation 1)."*

The shipowner is liable for his own negligence or vicariously liable for negligence of his crew and members of his organization.

But in the context of MASS we can wonder whether "*fault of the vessel*" could cover fault from the actors who will be part of the decision-making process.

- **Seaworthiness**

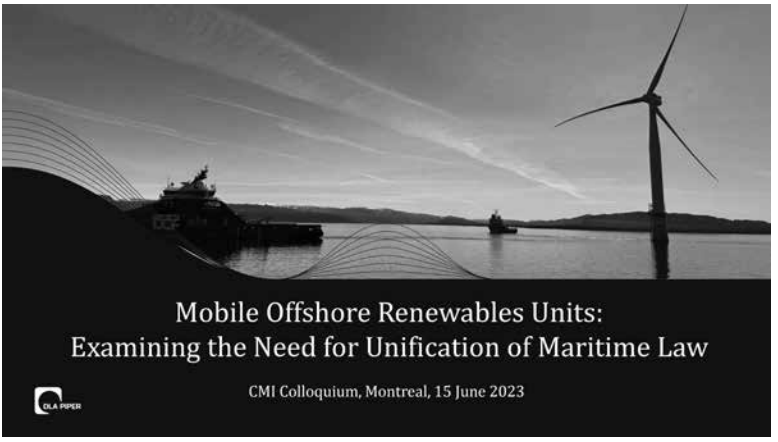
In its most fundamental sense, providing a seaworthy vessel requires the vessel being fit for the intended voyage, 'fit to meet and undergo the perils of sea and other incidental risks to which of necessity she must be exposed in the course of a voyage.

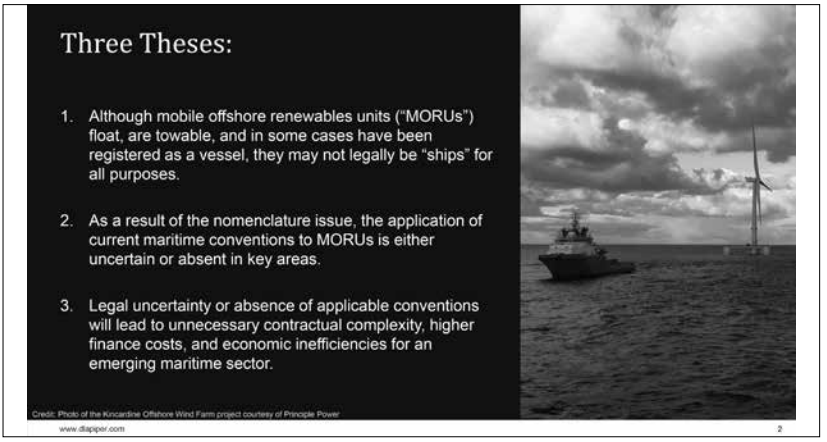
Seaworthiness is linked to have a sufficient, efficient and competent crew and also adequate and sufficient systems on board to address matters that might be encountered during the relevant voyage.

However, in this context, the question is whether we can adapt this concept in extending it to the new actors (data users, analysts, developers, programmers of software operating on MASS) or to limit this notion to the system (captor, sensor, camera …)?

MOBILE OFFSHORE RENEWABLE UNITS: EXAMINING THE NEED FOR UNIFICATION OF MARITIME LAW

Alexander Severance






Mobile Offshore Renewable Units ("MORUs"):
What are we talking about?
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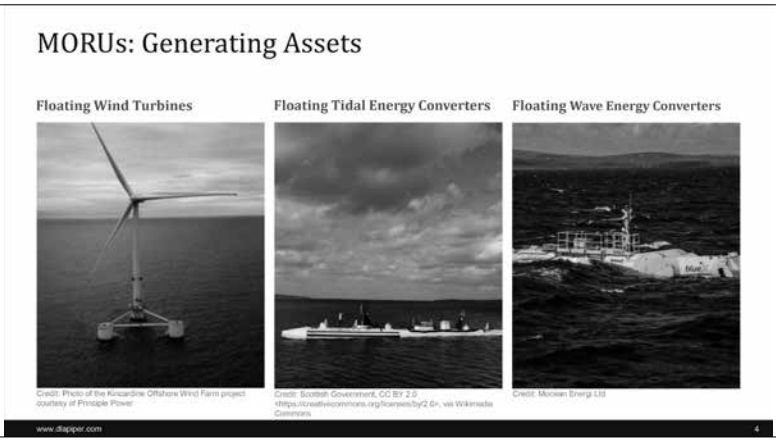
MORUs: Generating Assets
Floating Wind Turbines
Floating Tidal Energy Converters
Floating Wave Energy Converters
Credit: Photo of the Kincardine Offshore Wind Farm project courtesy of Principle Power
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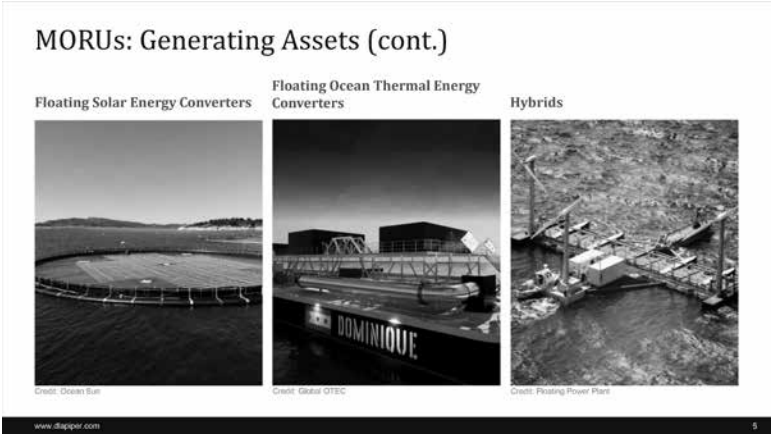
MORUs: Generating Assets (cont.)
Floating Solar Energy Converters
Floating Ocean Thermal Energy Converters
Hybrids
DOMINIQUE
Credit: Ocean Sun
Credit: Global OTEC
Credit: Floating Power Plant
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5

MORUs: Auxiliary Units

Floating Grid Integration Systems (e.g. Floating Substations)

Credit: Bill Ideal / Hitachi Energy

Floating O&M Facilities

?

Floating Measurement Units

?

Mobile Offshore Renewables Units' Advantages Over Other Forms of Renewable Energy

Territorial Advantages

Floating Renewables can be deployed where comparable fixed-bottom or onshore facilities can not

- This includes
  - Shallow waters where fixed-bottom foundations can't be used
  - Deeper waters (>60m)
- This can significantly expand the usable portion for wind of Producing Coastal State's EEZ
  - 80% of Europe's EEZ
  - 80% of Japan's EEZ
  - 90+% of US West Coast & Hawaii

Technological Advantages

- Floating wind average capacity factors approaching 60% (vs. 40-50% for fixed-bottom offshore)
- Floating Solar can have higher production (10-15% vs onshore)
- Tidal+storage/OTEC = baseload generation
- Greater design standardization?
- Serial production with lower cost
- Fewer expensive installation vessels (?)

Legal / Commercial Advantages

In the right legal environment

- A Mobile Asset allows:
  - New finance structures
    - Asset finance vs. project finance
    - Charter vs. ownership concepts
  - New business models
    - Lease, energy as a service, etc.
- State as both licensor and property owner of offshore areas
- Further from shore = Less NIMBY Issues

… BUT new conflicts?

Some Questions to Keep in Mind When Considering Legal Challenges to Greater International Deployment of MORUs

What is a Mobile Offshore Renewables Unit, and is it a "ship"/ "sea going ship" / "vessel" (at least legally for purposes of a relevant convention)?

When, what, and where could something go wrong? While in transit or at site? In whose waters?

Is there relevant international convention, treaty, or agreement which might apply in those circumstances?

Which (and how many) States are party to that convention?

If there is no international convention which: (i) is applicable to MORUs, (ii) covers the circumstances which have occurred, and (iii) is binding on the relevant States, then which State's domestic law applies?

How does this lack of uniformity & legal uncertainty impact MORU projects':

- Cost of capital?
- Insurability?
- Bankability?
- LCoE?


Floating Wind Turbines:
Floating Towards the Future
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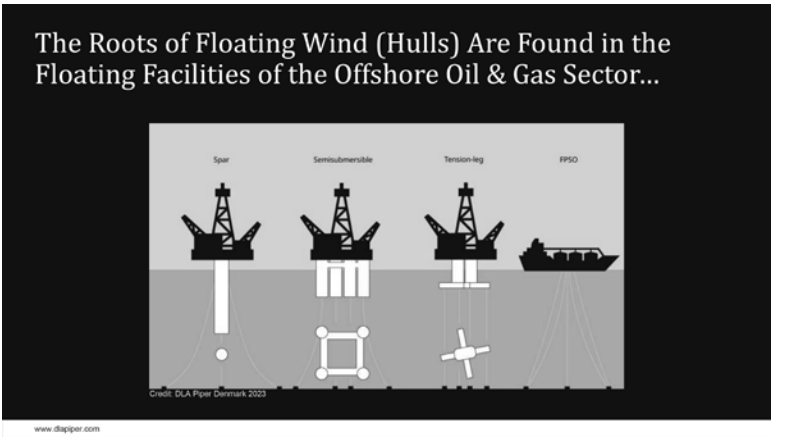
The Roots of Floating Wind (Hulls) Are Found in the Floating Facilities of the Offshore Oil & Gas Sector...
Spar
Semisubmersible
Tension-leg
FPSO
Credit: DLA Piper Denmark 2023
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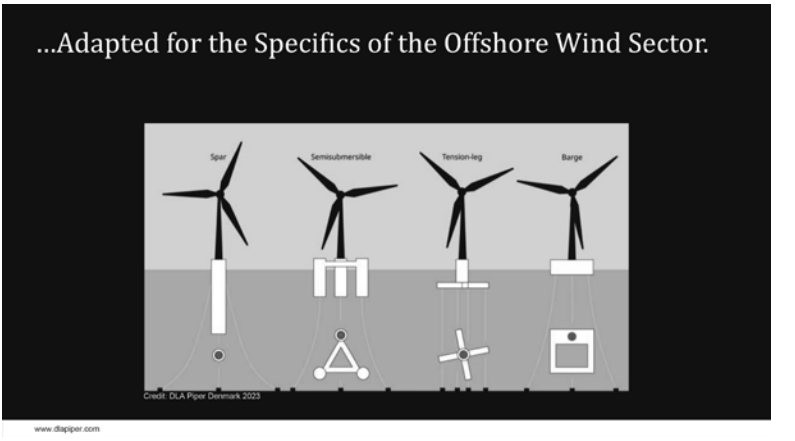
...Adapted for the Specifics of the Offshore Wind Sector.
Spar
Semisubmersible
Tension-leg
Barge
Credit: DLA Piper Denmark 2023
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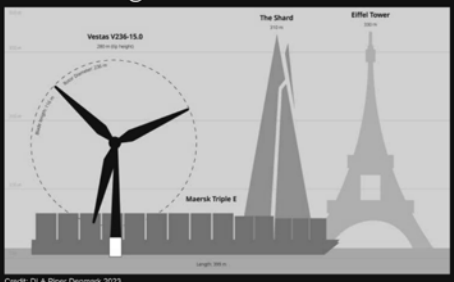
How Big Are Floating Wind Turbines?



Credit: DLA Piper Denmark 2023

Now imagine a wind farm of 50…100…150…or even 200 FWTs.
1,5 GW wind farm = 100 x 15 MW WTGs, over ~500km^2

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Unlike Fixed-bottom Turbines, the Assembly of Floating Wind Turbines is Typically in Harbour

Credit: Ole Jørgen Bratland / © Equinor

Credit: Jan Arne Wold / © Equinor

Credit: Ole Jørgen Bratland / © Equinor

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Once mechanically complete, they are towed to site. Consequently, Floating Wind Turbines must be mobile.

Credit: Photo of the Kincardine Offshore Wind Farm project courtesy of Principle Power

Credit: Jan Arne Wold / © Equinor

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Is MORU Mobility Closer to an "Installation" or a "Ship"?

Owner/Operator Commercial Grid-connected MORU Arrays:
- 25+ year Project lifetime
- All O&M at site
- Disconnection contemplated but not planned

Owner/Operator Commercial Grid-connected MORU Arrays:
- 25+ year Project lifetime
- Some O&M at site, some in port
- Disconnection planned

Owner/Operator Microgrid-Connected MORU Arrays & Units:
- Potentially Shorter Project Lifetime
- Relocation/Re-use / Resale contemplated
- Disconnection planned and relatively simple

Leased or Chartered MORU Units & Arrays:
- Potentially Shorter Project Lifetime / Lease Term
- Return of MORU at end of term/default contemplated
- Disconnection planned and relatively simple

Installations ——— Ships

Fixed-bottom O&G and Wind Installations:
- 25+ years Project lifetime
- All O&M in situ
- Disconnection only at decommissioning

Floating O&G Production Platforms:
- 25+ year Project lifetime
- All O&M in situ
- Disconnection very difficult

FPSOs:
- Potentially Shorter Project lifetime, measured in years
- All O&M in situ
- Disconnection planned and simpler than other floating O&G production platforms

Leased and Chartered Traditional Power ships & Power barges:
- Potentially Shorter Project Lifetime / Lease Term
- Return of Unit at end of term/default contemplated

Mobile Offshore Drilling Units:
- Project lasts for a specific drilling campaign measured in months
- Relocated many times in lifetime

Traditional Merchant Vessels endlessly circling the Globe

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In its lifetime, a particular MORU might be:

(i) built in a shipyard and registered under the laws of a Flag State;

(ii) upon completion, re-registered in a second Flag State;

(iii) towed through a third state's territorial sea and EEZ;

(iv) moored and operated by its owner in a fourth state's EEZ;

(v) serviced by offshore workers from fifth and sixth states;

(vi) towed to a seventh state's port for repairs before returning to the fourth state's EEZ to resume operation;

(vii) sold to a new owner, who repowers the MORU with updated generating equipment, prior to reflagging it in an eighth state;

(viii) leased by that owner to an offshore developer/lessee, who deploys and operates the repowered MORU in a ninth state's waters for the remainder of its operational life; and

(ix) decommissioned and broken up in a tenth state.

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Where in the World Will You Find Floating Wind Turbines?

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Rapidly increasing government ambitions

Some headlines…

- North Sea nations target 260 GW offshore in 'windiest locations on the globe'
- Germany, Denmark, Netherlands and Belgium sign €135 Billion Offshore Wind Pact
- Dutch set vast 70 GW offshore wind target 'to electrify large part of Netherlands'
- 'Cross border collaboration key': Baltic Sea countries target 20 GW offshore wind by 2030
- Norway Launches 30 GW by 2040 Offshore Wind Investment Plan
- Spain Targets up to 3 GW of Floating Wind by 2030
- US sets 15 GW Floating Wind Target for 2035
- South Korea unveils EUR 27 Billion Floating Wind Project
- Pilots to gear up 'hundred-fold growth' in Chinese floating wind power to 2026: Westwood
- China starts building a 1 GW floating offshore wind project in Hainan

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Three Distinct Floating Wind subsectors evolving…

Large Arrays connected to onshore grids

Credit: Odfjell Oceanwind 2023

Small Arrays connected to offshore O&G Installations

Credit: Odfjell Oceanwind 2023

Offshore Power-to-X

Credit: HydelPoint AS and Vergia AS

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Completed or near-term auctions for floating wind

Country	Name	Year	GW	Source[a]	Approx. Number of Floating Wind Turbines (based on a single 15MW WTG / floating wind turbine)	Approx. displacement tonnage (based on assumed steel semisubmersible foundation with 408 tons per MW)[b]
United Kingdom	Scotwind (Floating)	2022	15.0	F,D	1,000	6,118,500
	INTOG	2022-23	6.2	B	413	2,528,980
	Celtic Sea	2023	4.0	A, B,D	267	1,631,600
United States	California	2022	4.6	B	307	1,876,340
	Oregon	2023	3.0	B	200	1,223,700
	Gulf of Maine	2024	?	B		
Korea (EBL License giving site exclusivity)	Ulsan	2021-22	6.7	B	447	2,732,930
France	Brittany	2022	0.25	B	17	101,975
	Mediterranean	2023	0.5	B	33	203,950
Japan	Goto City	2021	0.016	D	1	6,526
Norway	Utsira Nord	2023	1.5		100	611,850
Portugal	?	2023	10.0?		667	408,000

- The Netherlands has also announced a 3GW offshore floating solar auction

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Estimates

	2030				2035			
	GW	Source[a]	Approx. Number of Floating Wind Turbines (based on a single 15MW WTG / floating wind turbine)	Approx. Displacement tonnage (based on assumed steel semisubmersible foundation with 408 tons per MW)	GW	Source[a]	Approx. Number of Floating Wind Turbines (based on a single 15MW WTG / floating wind turbine)	Approx. Displacement tonnage (based on assumed steel semisubmersible foundation with 408 tons per MW)[b]
Bloomberg NEF	5.3	E	353	2,161,870	20.9	E	1,393	8,525,110
4C Offshore Operational	8.0	B	533	3,263,200	38.0	B	2,533	15,500,200
Rystad Energy Unclear stage	13.0	A	867	5,302,700	60.0	A	4,000	24,474,000
4C Offshore Installation commenced	14.0	B	933	5,710,600	46.0	B	3,067	18,763,400
GWEC Floating Offshore Wind Report (March 2022)	16.5	C	1,100	6,730,350				
GWEC Offshore Wind Report (June 2022)	18.9	D	1,260	7,709,310				
AVG	12.6		841	5,146,338	41.2		2,748	16,815,678
MEAN	13.5		900	5,506,650	42.0		2,800	17,131,800

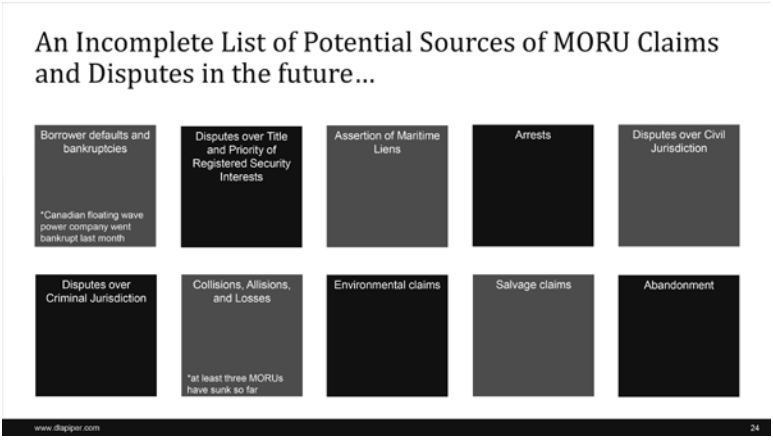
Mobile Offshore Renewable Units and Maritime Conventions

DLA PIPER

Inevitably, Bad Things Will Happen…

- MORUs will be towed to foreign waters and ports
- Ownership and creditor rankings will be contested
- Contractual breaches and defaults will be committed
- Arrests will be attempted
- Bankruptcies will result
- Accidents and environmental incidents will occur
- Criminal acts will be (allegedly) perpetrated
- Collisions, allisions, and losses will happen
- The Kraken will be released…

But then what?


An Incomplete List of Potential Sources of MORU Claims and Disputes in the future...
Borrower defaults and bankruptcies
*Canadian floating wave power company went bankrupt last month
Disputes over Title and Priority of Registered Security Interests
Assertion of Maritime Liens
Arrests
Disputes over Civil Jurisdiction
Disputes over Criminal Jurisdiction
Collisions, Allisions, and Losses
*at least three MORUs have sunk so far
Environmental claims
Salvage claims
Abandonment
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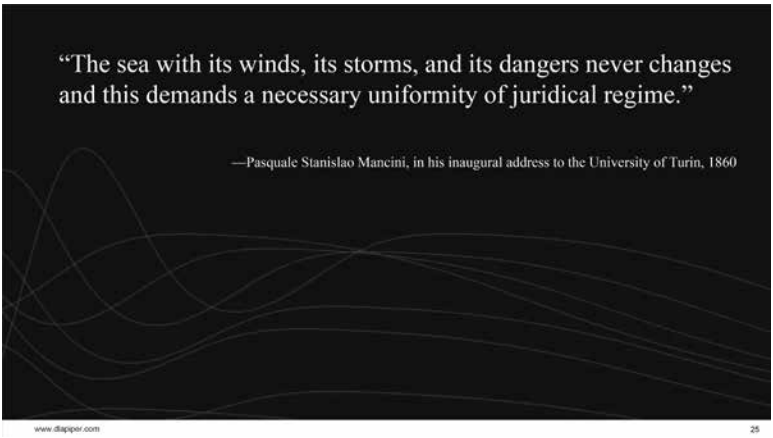
24


"The sea with its winds, its storms, and its dangers never changes and this demands a necessary uniformity of juridical regime."
—Pasquale Stanislao Mancini, in his inaugural address to the University of Turin, 1860
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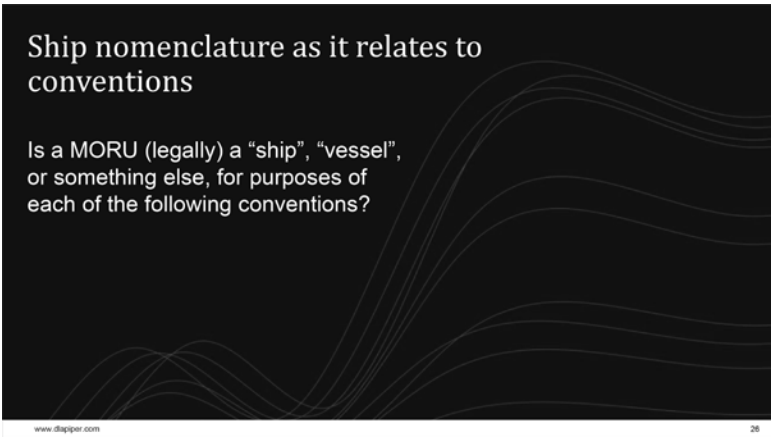
Ship nomenclature as it relates to conventions
Is a MORU (legally) a "ship", "vessel", or something else, for purposes of each of the following conventions?
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Credit: Photo of the Kincardine Offshore Wind Farm project courtesy of Principle Power

Registration of MORUs

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UN Convention on the Law of the Sea

(1982) (168 Parties)

Description of craft within scope:

The terms "ship", "artificial island" and "Installation" are used throughout UNCLOS, but are undefined.

Are MORUs currently within scope?

Probably, although exactly how is not clear.

Under Article 91, each state has the right to determine the conditions for registration of "ships" under its flag.

Article 60 grants the Coastal State the exclusive right to construct and to authorize and regulate the construction, operation, and use of "installations and structures" for the purposes of the production of energy from the water, currents, and winds, and, furthermore, grants the Coastal State exclusive jurisdiction over such installations and structures, including jurisdiction over customs, fiscal, health, safety, and immigration laws and regulations.

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UN Convention on Conditions for Registration of Ships

1986 (15 Parties—NOT YET IN FORCE)

Description of craft within scope:

"any self-propelled seagoing vessel used in international seaborne trade for the transport of goods, passengers, or both with the exception of vessels of less than 500 gross registered tons."

Are MORUs currently within scope?

No. They are neither self-propelled, nor used in the seaborne trade of goods or passengers.

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Convention relating to Registration of Rights in Respect of Vessels under Construction

1967 (NOT YET IN FORCE)

Description of craft within scope:

"Vessel" is undefined.

Are MORUs currently within scope?

Maybe.

Notes

Credit: SBM Offshore

Mortgages of, and Maritime Liens, on MORUs

In rem non possessory collateral rights

Cape Town Convention on International Interests in Mobile Equipment

(2001) (85 Contracting States)

Description of craft within scope:

Under article 2(1), an "international interest" is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol.

Paragraph 3 references (i) airframes, aircraft engines, and helicopters; (ii) railway rolling stock; and (iii) space assets.

Are MORUs currently within scope?

No. Although there have been discussions of a hypothetical maritime asset protocol to the Cape Town Convention at various points, no such protocol have been adopted to date.

Notes:

Discussion of inclusion of maritime assets in the CTC have not progressed.

See the next slide for an estimate of the impact the Cape Town Convention has had on the economics of aircraft finance.

Uniform and Internationally Enforceable Legal Regimes (e.g. Binding Conventions) Reduce Legal Uncertainty and the Cost of Cross-border Capital

The Cape Town Convention & Aircraft Protocol's effect on cross-border aircraft finance

- The CTC creates a non-possessory international security interest in mobile assets covered by a Protocol
- Airlines in markets with uncertain collateral rights gain access to global secured debt markets at commercial basis
- Borrowers avoid some of the conventional country risk premium associated with that legal uncertainty
- Airlines in markets with uncertain collateral rights gain access to global secured debt markets at commercial basis

One analysis* estimated:

1. **A drop in lending costs of up to ~250 basis points** (i.e. CTC secured *vs de facto* unsecured)
2. **An interest savings of between 13% and 20% per principal dollar borrowed** (depending borrowers' credit ratings, secured vs. unsecured interest rates, loan tenor, bullet payments, and discount rates before / after CTC ratification, etc.)
3. **Increases in approx. 10% in stock market valuation of publicly traded companies** post-CTC ratification
4. A 20-year global **cost savings of $267-$299 Billion on a forecasted $2 Trillion global demand for aircraft**

*Saunders, Anthony and Srinivasan, Anand and Walter, Ingo, Innovation in International law and Global Finance: Estimating the Financial Impact of the Cape Town Convention (March, 29, 2006). Available at SSRN: https://ssrn.com/abstract=934027 or http://dx.doi.org/10.2139/ssrn.934027

International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages

(1926) (21 Parties as of 2021)

Description of craft within scope:

"Vessel" is undefined.

Are MORUs currently within scope?

Maybe.

Notes

Beijing Convention on the International Effect of Judicial Sales of Ships

(2022) (NOT YET IN FORCE)

Description of craft within scope:

"'Ship' means any ship or other vessel registered in a register that is open to public inspection that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale".

Are MORUs currently within scope?

Probably, although maybe an unequivocal yes is premature.

Notes

MORUs currently registered by Norway and the Republic of the Marshall Islands. Query whether they are subject to arrest leading to a judicial sale in a particular State?

Arrests of MORUs

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Convention for the Unification of Certain Rules relating to Arrests of Sea-going Ships

(1952) (71 Parties—as of 2016)

Description of craft within scope:

"Ship" is undefined.

Are MORUs currently within scope?

Maybe.

Notes

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International Convention on Arrests of Ships

(1999) (13 Parties)

Description of craft within scope:

"Ship" is undefined.

Are MORUs currently within scope?

Maybe.

Notes

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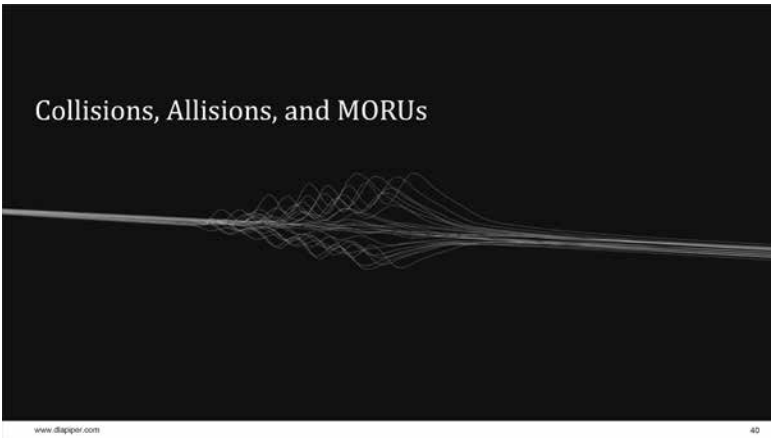

Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels

(1910) (81 Parties—as of 2016)

Description of craft within scope:

"Sea-going vessel" is undefined.

Are MORUs currently within scope?

Maybe.

Notes

International Convention for the Unification of Certain Rules Relating to Civil Jurisdiction in Matters of Collision

(1952) (63 Parties—as of 2016)

Description of craft within scope:

"Sea-going vessel" is undefined.

Are MORUs currently within scope?

Maybe..

Notes

Convention on the International Regulations for Preventing Collisions at Sea

(1972) (164 Contracting States)

Description of craft within scope:

"'Vessel' includes every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water."

Are MORUs currently within scope?

Yes, at least partially.

Notes:

There are various defined subcategories of "vessel" (e.g. "vessel not under command," "vessel restricted in her ability to manoeuvre," and "vessel constrained by her draught") that are subject to special provisions and are particularly relevant to MORUs. Conversely, there are other defined subcategories of "vessel" (e.g. "power-driven vessel," "sailing vessel," "vessel engaged in fishing," "vessel engaged in laying, servicing or picking up a navigation mark, submarine cable or pipeline") subject to special provisions, which would not apply to MORUs.

Credit: © Equinor

Other Safety Rules and MORUs

International Convention for the Safety of Life at Sea

(1974) (168 Contracting States)

Description of craft within scope:

"Ship" is not defined.

Are MORUs currently within scope?

Maybe (partially).

Notes:

Unless expressly stated otherwise, the provisions of SOLAS do not apply to ships not on "international voyages," which might exclude MORUs towed to offshore sites and moored indefinitely, or be subject to a Flag State exemption to the extent that such MORUs are not regularly engaged in "international voyages." However, Chapter V (Safety of Navigation) applies to all ships (including non-propelled vessels) on any voyage (international or not) unless otherwise provided in that chapter or granted a Flag State exemption.

At the same time, it is important to remember that the vast majority of MORUs will be unmanned and unpropelled.

Chap. IX of SOLAS 1974, implementing International Safety Management Code (ISM Code)

(1974)

Description of craft within scope:

Although the original limited its application to MODUs and certain classes of ship, the revised ISM Code may now be applied to all ships.

Are MORUs currently within scope?

Maybe?

Notes:

The ISM Code and MODU Code, and subsequent amendments on the application of those to to mobile offshore drilling units, were not applicable to MORUs. However, the revision suggests it *may* be applied to all "ships", begging the question of whether and to what extent the ISM Code, LL 1966 and SOLAS should be extended to MORUs.

Chap. XI-2 of SOLAS 1974, implementing International Ship & Port Facility Security Code (ISPS Code)

(1974)

Description of craft within scope:

The ISPS Code forming part of Chapter XI-2 of SOLAS includes MODUs within the meaning of the baseline SOLAS term "ship," but does not mention MORUs.

Are MORUs currently within scope?

No. Even for MODUs, the requirement to be self-propelled remains.

Notes

Code for the Construction and Equipment of MODUs (MODU Code)

(2009)

Description of craft within scope:

"Mobile offshore drilling unit"…[(MODU) or unit] is a vessel capable of engaging in drilling operations for the exploration for or exploitation of resources beneath the seabed such as liquid or gaseous hydrocarbons, sulphur or salt.

Are MORUs currently within scope?

No.

Notes:

It seems likely that some Flag States may see fit to apply the MODU Code *mutatis mutandis* to MORUs (at least on an ad hoc basis in the absence or more specific MORU guidance). Query whether there is a need for a MORU Code.

End of Life Issues: Salvage, Wreck Removal, and Recycling of MORUs

www.dlapiper.com 49

International Convention on Salvage

(1989) (77 Contracting States)

Description of craft within scope:

"Vessel means any ship or craft, or any structure capable of navigation."

Are MORUs currently within scope?

Yes.

Notes:

Art. 3 expressly states that the Salvage Convention "shall not apply to fixed or floating platforms or to mobile offshore drilling units *when such platforms or units are on location engaged in the exploration, exploitation or production of sea-bed mineral resources.*" Presumably, therefore it does apply to MORUs as a form of platform or unit otherwise engaged.

TBD—whether MORUs providing power to offshore oil and gas facilities are (indirectly?) "engaged in the production of sea-bed mineral resources" for purposes of this convention?

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International Convention on Removal of Wrecks

(2007) (65 Contracting States)

Description of craft within scope:

"'Ship' means a seagoing vessel of any type whatsoever and includes hydrofoil boats, aircushion vehicles, submersibles, floating craft and floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources."

Are MORUs currently within scope?

Yes.

Notes

Given the similar terminology, the same logic of the Salvage Convention on the prior page applies to the Wreck Removal Convention.

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International Convention for the Safe and Environmentally Sound Recycling of Ships

(2009) (NOT YET IN FORCE)

Description of craft within scope:

"Ship" means a vessel of any type whatsoever operating or having operated in the marine environment and includes submersibles, floating craft, floating platforms, self elevating platforms, Floating Storage Units (FSUs), and Floating Production Storage and Offloading Units (FPSOs), including a vessel stripped of equipment or being towed.

Are MORUs currently within scope?

Yes.

Notes:

This Convention shall not apply to ships of less than 500 GT or to ships operating throughout their life only in waters subject to the sovereignty or jurisdiction of the State whose flag the ship is entitled to fly. However, each Party shall ensure, by the adoption of appropriate measures, that such ships act in a manner consistent with this Convention, so far as is reasonable and practicable.

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Credit: Ocean Wind 2023

Limitations of Liability and MORUs

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Convention on Limitation of Liability for Maritime Claims

(1976) (56 Contracting States)

Description of craft within scope:

"Ship" is undefined.

Are MORUs currently within scope?

Maybe.

Notes:

LLMC 1976 does not apply to "Floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof."

However, is it clear enough (ie. bankable) that a MORU would certainly be considered a "ship" for purposes of LLMC 1976 simply because it does not fall the exclusion?

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Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims

(1996) (63 Parties)

Description of craft within scope:

As per LLMC 1976.

Are MORUs currently within scope?

Maybe.

Notes:

As per LLMC 1976.

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Environmental Liabilities and MORUs

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International Convention on Civil Liability for Bunker Oil Pollution Damage

(2001) (105 Contracting States)

Description of craft within scope:

"'Ship' means any seagoing vessel and seaborne craft, of any type whatsoever."

Are MORUs currently within scope?

Yes.*

Notes:

MORUs will likely hold some amount of petroleum products on board, even though not self-propelled.

* Art. 6 of BUNKER 2001 assumes an applicable limitation of liability under a national or international regime [e.g. LLMC 1976/1996], but see those slides…

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Convention on Liability for Damage in Connection with the Carriage of Hazardous & Noxious Substances at Sea

(1996) (NOT YET IN FORCE)

Description of craft within scope:

"Ship means any seagoing vessel and seaborne craft, of any type whatsoever."

Are MORUs currently within scope?

Maybe.

Notes:

HNS 1996 defines "Hazardous and noxious substances" by reference to "(a) any substances, materials and articles carried on board a ship *as cargo*,…"

Are the hazardous and noxious substances carried by a MORU *cargo*? In the case of a stationary MORU producing, e.g., green ammonia, is that *product* or *cargo*?

Credit: Photo of the Kincardine Offshore Wind Farm project courtesy of Principle Power

Criminal Jurisdiction and MORUs

Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or Other Incidents of Navigation

(1952) (68 Contracting states)

Description of craft within scope:

"Sea-going ship" is undefined.

Are MORUs currently within scope?

Maybe.

Notes:

This convention doesn't really contemplate mixed international crews stationed offshore in a country's EEZ for long periods. Conversely, most MORUs would be unmanned and stationary in operation (and its application potentially less relevant). See also UNCLOS Part V, and Art. 27.

Convention for the Suppression of Unlawful Act against the Safety of Maritime Navigation

(1988) (166 Contracting States)

Description of craft within scope:

"'Ship' means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft."

Are MORUs currently within scope?

Maybe.

Notes:

Is a MORU "permanently attached to the sea-bed" for purposes of SUA 1988? Relative to what? See next slide on SUA PROT 1988.

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Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf

(1988) (156 States)

Description of craft within scope:

Extends application of Art. 5,7, and 10-16 of SUA 1988, *mutatis mutandis*, in relation specified offences "on board or against fixed platforms located on the continental shelf". In this context, "'fixed platform' means an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes."

Are MORUs currently within scope?

Maybe.

Notes:

Is a MORU "permanently attached to the sea-bed" for purposes of SUA PROT 1988? Relative to what? See previous slide on SUA 1988.

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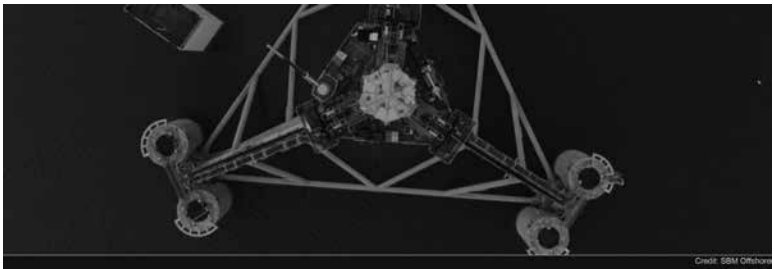

Credit: SBM Offshore

UNFCCC, Paris Agreement NDCs, and (flagged) MORUs

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Summary

Convention	In force?	Applicable
UNCLOS		
Registration of ships 1986	No	
Vessels under construction 1967	No	
Maritime liens and mortgages 1926		
Maritime liens and mortgages 1993		
Judicial sales 2022	No	
Arrest of ships 1952		
Arrest of ships 1999		
Collision 1910		
Civil Jurisidiction (collisions) 1952		
COLREG 1972		
SOLAS 1974		

Convention	In force?	Applicable
ISM Code		
ISPS Code		
MODU Code		
Salvage 1989		
Wreck removal 2007		
Ship recycling 2009	No	
LLMC 1976		
LLMC PROT 1996		
Bunker 2001		
HNS 1996	No	
Penal jurisdiction 1952		
SUA 1988		

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Three possible routes to bring MORUs into the traditions of Maritime Law

Amend the existing Maritime Conventions

- **Pros**
  - Would limit emergence of divergent threads in how traditional ships and MORUs are treated.
  - Greatest familiarity: the Conventions are known to maritime bar, banks.
- **Cons**
  - Amendment processes vary.
  - Convention Parties vary widely
  - No "grand bargain" between stakeholders possible.

Draft a new Multi-topic MORU Convention from Scratch

- **Pros**
  - Not limited by prior outcomes
  - "Grand Bargain" possible
  - Either you are in or you are out
- **Cons**
  - Completely unfamiliar to bar, banks
  - Takes the greatest amount of effort, with potentially least chance of success.
  - Repeats work already done.

Build on the Work the CMI has already done

- Prior CMI work on a O&G MOU Convention:
  - From late 1970s to 2001
- Adapt CMI work to reflect renewables specifics:
  - e.g. environmental risk less
- Pros
  - Not starting from scratch
  - Within existing traditions = more familiar to maritime bar, banks
  - Least amount of effort short of nothing.

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The CMI's prior work and MORUs

Topic		Rio 1977[1]	Norwegian Alternative 1977[2]	Sydney 1994[3]	Vancouver 2001[4]	Relevant to MORUs?
Nationality/Registration		Yes	Yes	Yes	Yes	Yes
Liens		Yes	Yes	Yes	Yes	Yes
Mortgages		Yes	Yes	Yes	Yes	Yes
Vessels under construction		Yes		Yes		Yes
Arrest		Yes	Yes	Yes	Yes	Yes
Other creditors' remedies					Yes	Yes
Judicial Sales						Yes
Collisions		Yes	Yes	Yes	Yes	Yes
Civil jurisdiction					Yes	Yes
Penal jurisdiction					Yes	Yes
Removal					Yes	Yes
Salvage		Yes	Yes	Yes	Yes	Yes
Safety					Yes	Yes
Limitations of Liability		Yes	Yes	Yes	Yes	Yes
Liability for polution		Yes	Yes	Yes	Yes	Yes
Limitation Fund					Yes	Yes
Apportionment of liability					Yes	Yes
Financial responsibility / maintenance of insurance					Yes	Yes

1 Under the Rio draft, Convention parties which were also parties to certain maritime topical conventions would agree amongst themselves to apply those referenced conventions to "craft" as well.

2 Under the Norwegian alternative, "craft" shall be "subject to the rules applicable to sea-going ships under the law of a State Party to this Convention". (i.e. the parties would treat MOUs as vessels as they would under their own law (including international obligations).

3 Under the Sydney draft, Convention parties which were also parties to certain maritime topical conventions would agree amongst themselves to apply those referenced conventions to "craft" as well, and if not a party to those conventions, apply State Party law applicable to vessels generally.

4 The Vancouver draft ended the incorporation of topical convention by reference approach as unworkable, and provided stand-alone substantive provisions governing Offshore Units on selected topics.

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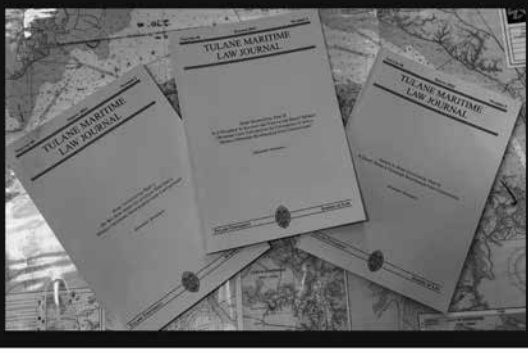
If you would like to read a bit more…



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Thank you

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Appendix 1 – Briefly about DLA Piper's Offshore Wind Experience

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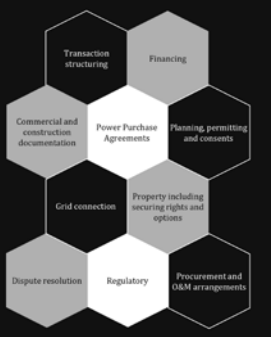
Our Offshore Wind Practice

We hold knowledge and expertise from our experience working on offshore wind transactions across the entire lifecycle, from the development and pre-development phases through construction and operations. We also advise lenders and borrowers on financings and refinancings of wind assets around the globe.

Clients rely on the depth and breadth of our team to provide market leading advice on the entire spectrum of legal issues which can arise on any offshore wind investment. Details on the projects we have worked on can be found within this presentation.

We frequently work on cutting edge deals in the wind industry which will drive the market forward. Recent mandates include advising clients on pre-auction joint venture arrangements, acquisitions, procurement strategy and processes, project contract development and negotiations, financings and refinancings. Combined with our global renewables practice, we offer investors benefit of our experience to structure an array of tried and tested solutions to any issues arising from their investments in offshore wind.

We work on cutting edge deals in the fixed and floating offshore wind sectors which will drive the market forward.



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- Global Law Firm of the Year 2021, Financing Wind 2021
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- Energy Law Firm of the Year — The Best Lawyers in Australia 2021
- Middle East and Africa Wind Project of the Year — IJ Global 2019 – for the Dumat Al Jandal IPP
- Tier 2 in Industry Focus: Energy and Infrastructure — Legal 500 UK 2021
- Natasha Luther-Jones and Peter Ihrfelt: most influential individuals in wind industry — A Word About Wind's Legal Power List 2020
- Firm of the Year: Projects, Energy and Natural Resources — Legal 500 UK 2020
- Insolvency and Restructuring Deal of the Year Award — Australasian Law Awards 2019 – for Paladin Energy
- Energy and Resources Law Firm of the Year — ALB Macallan Hong Kong Law Awards 2019
- Legal Adviser of the Year — International (Projects) Partnerships

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Alexander Severance

Special Counsel, Denmark

Alexander Severance's energy and renewables practice has a special focus on fixed and floating offshore wind projects. He has worked extensively in the offshore wind space since 2011.

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Alex regularly writes and publishes on a variety of legal topics related to the offshore wind sector.

Selected highlights

- Multiple Turbine Supply Agreements and Service and Warranty Agreements for award-winning offshore wind projects totaling more than 6,000 MW of nameplate capacity, including projects in in the UK, the US, the Netherlands, Germany, Norway, and Taiwan, including:
  - **Hornsea 1, Walney Extension East, Racebank, Westermost Rough** (UK)
  - **Bay State 1** (including Southfork, Revolution, and Sunrise projects) (USA)
  - **Borssele 1&2** (NL)
  - **Galloper** (UK)
  - **Gode Wind 1 &2** (DE),
  - **Westermeerwind** (NL)
  - **Hywind Tampen** (NO)
  - and others.
- Multi-year, multi-project supply and service framework agreement for fixed-bottom wind turbines in the United Kingdom.
- Multi-year, multi-project, global turbine supply-only framework agreements.
- Multi-year, multi-project supply and service framework agreement for floating wind turbines
- Multi-year, multi-project, multi-jurisdictional supply and service framework agreement.

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- B.A., Texas A&M University, 1997

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2 Severance, Alexander and Sandgren, Martin, Flagging the Floating Turbine Unit: Navigating Towards a Registerable, First-Raking Security Interest in Floating Wind Turbines (November 1, 2014). Tulane Maritime Law Journal, Vol. 39, No. 1, 2014, Available at SSRN: https://ssrn.com/abstracts=3694505

3 Severance, Alexander, Mare Incognitum, Part I: Do We Now Need (to at least Discuss) a Mobile Offshore Renewables Unit Convention?, Tulane Maritime Law Journal Vol. 45, No. 2, (2021), Available at SSRN: https://ssrn.com/abstract=3695041 or http://dx.doi.org/10.2139/ssrn.3695041

4 Severance, Alexander, Mare Incognitum, Part II: Is it Feasible to Salvage the Vancouver Draft Mobile Offshore Unit Convention by Converting It into a Mobile Offshore Renewables Unit Convention? (February 3, 2021). 46(1) Tulane Maritime Law Journal 1 (2022), Available at SSRN: https://ssrn.com/abstract=3898433

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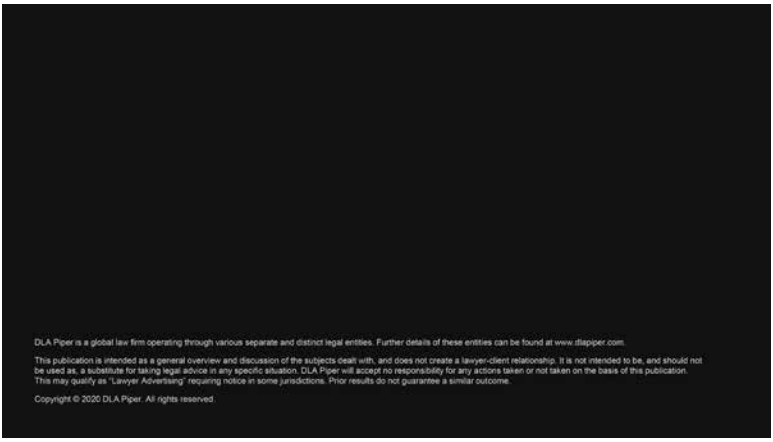
B 4COffshore, Floating Wind Progress Update:H2 2022
C GWEC, Floating Offshore Wind—A Global Opportunity
D GWEC, Global Offshore Wind Report 2022
E BloombergNEF, Wind-10 Predictions for 2022
F WindEurope (https://windeurope.org/newsroom/press-releases/Scotland-awards-seabed-rights-for-massive-amounts-of-offshore-wind-most-of-it-floating/)
G https://auroraer.com/media/upcoming-subsidies-key-to-unlocking-Italian-offshore-wind-potential/

7 Please note that the assumed tons of displacement per MW in the table above and the text of this paper are meant only as a rough proxy for the purposes of a high level understanding of potentially registerable tons, and is based on the following general assumptions: (i) most floating wind turbines will consist of a single WTG mounted on a steel semi-submersible foundation (a common design); and (ii) 408 MW per MW (based on a simple average of the listed weight per MW (if any) for steel semisubmersible floating wind turbines specified in the "Technology Tracker" slide (p.39) in 4C's report). These assumptions in no way preclude the use of other floating wind turbine hull shapes (including spars, tension leg platforms, or barges) or hulls made of other materials (e.g. concrete) which would inevitably result in different figures.

(From B above)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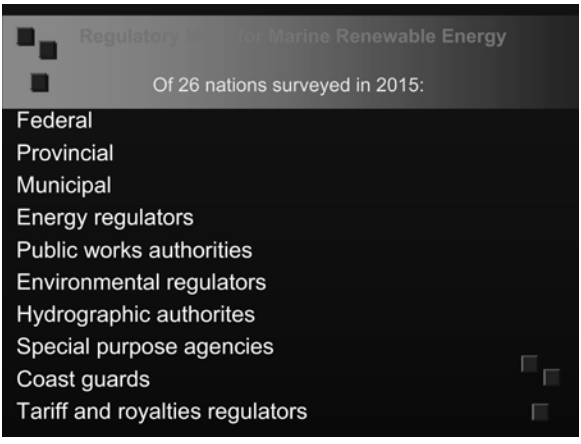
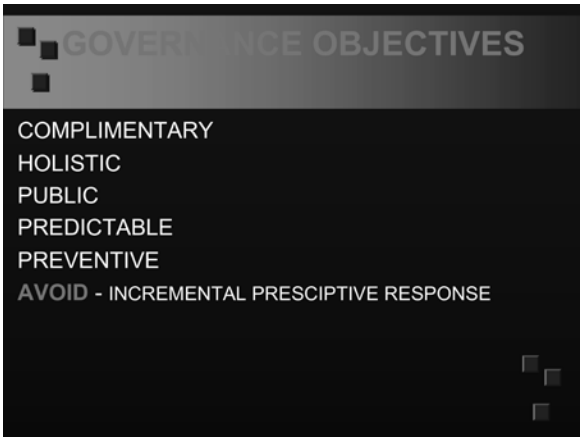
WATER COLUMN STRUCTURES GOVERNANCE – THE CHALLENGE

William Sharpe



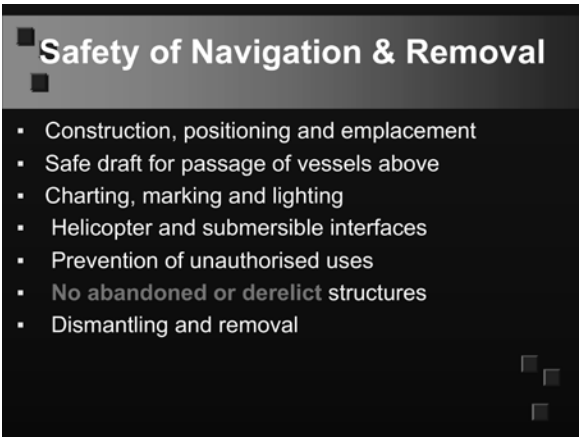

JURISDICTION
UNCLOS Exclusive Economic Zone and Area
Art. 56.1 - coastal state - establishment and use of artificia
islands installations & structures
Arts 56.2, 78 - no unjustifiable interference with rights and
duties of other states e.g. freedom of navigation
Art 87 - Freedom to construct high seas artificial islands
Art 167 - No sovereignty over installations in the Area
Annex III - Basic Conditions of Prospecting, Exploration
and Exploitation (in the Area)

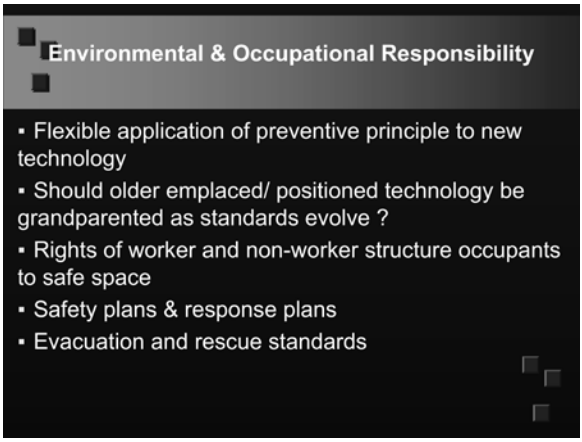

COMPLIMENTARY
HOLISTIC
PUBLIC
PREDICTABLE
PREVENTIVE
AVOID - INCREMENTAL PRESCIPTIVE RESPONSE


APPLICATION
Ownership
Financing
Civil Jurisdiction
Penal Jurisdiction
Safety of Navigation
Environmental Responsibility
Occupational Health and Safety
Removal
Stakeholders Remedies


Ownership & Financing
GOAL - attractive land based realty and equipment
Applicable only outside UNCLOS Area
No stateless structures
Security of ownership over useful life
Ownership and mortgages registerable
Identified and responsible regulator
Known risk management environment for creditors
Capetown Convention model - international registry


Civil & Penal Jurisdiction
Predictable application of laws & standards
Coastal state and/or state of registry and /or multinational or international agency but somebody
Role of International Seabed Authority
Clear application of laws
Spatial and subject matter power of a) courts to adjudicate and b) power of regulators to regulate
No double or multiple jeopardy
Contractual choice of law permissible?

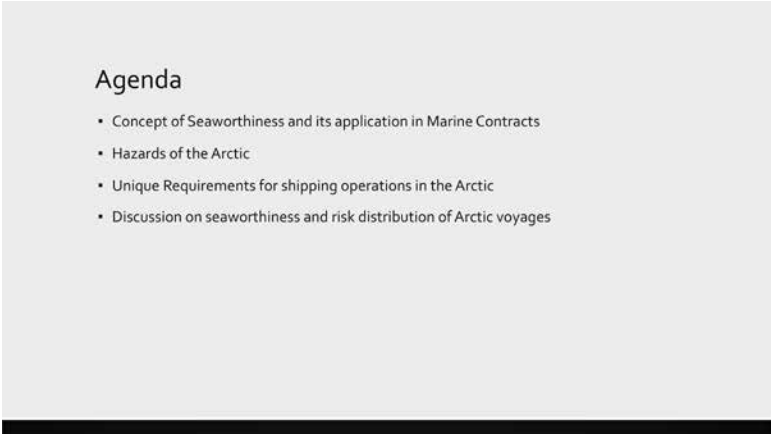

Safety of Navigation & Removal
Construction, positioning and emplacement
Safe draft for passage of vessels above
Charting, marking and lighting
Helicopter and submersible interfaces
Prevention of unauthorised uses
No abandoned or derelict structures
Dismantling and removal


Environmental & Occupational Responsibility
▪ Flexible application of preventive principle to new technology
▪ Should older emplaced/ positioned technology be grandparented as standards evolve ?
▪ Rights of worker and non-worker structure occupants to safe space
▪ Safety plans & response plans
▪ Evacuation and rescue standards


Stakeholders Remedies
▪ Secured financiers remedies - what to bite on ?
▪ Responsibilties of receivers and trustees
▪ Compensation for expropriation?
▪ Structure workers access to OH&S, workers' compensation and union organization
▪ Goods and services suppliers remedies
▪ Interface of remedies with responsible regulator - the EEZ state - the flag state - the International Seabed Authority
Other issues and questions ?

THE CONCEPT OF SEAWORTHINESS IN THE CONTEXT OF ARCTIC SHIPPING: REASONABLY FIT IN ALL RESPECTS?

Seamus Ryder



Seaworthiness

- Generally described as "a ship that is reasonably fit to confront the perils of the sea"[1]
- Seaworthiness is a relative or "dynamic" term and is defined with reference to the vessel's cargo, its intended voyage, hazards likely to be encountered and the vessel's ability to withstand those hazards [2]
- The features of a seaworthy vessel change over time as more advanced navigational equipment and technology become available. [3]
- The notion of seaworthiness now underlines almost all aspects of private maritime law

Carriage of Goods Contracts

Hague -Visby Rules, Article III:

"The carrier shall be bound, before and at the beginning of the voyage, to exercise **due diligence** to:

(a) make the **ship seaworthy**;

(b) properly man, equip and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."[4]

Marine Insurance Contracts

"37 (1)There is an implied warranty in every voyage policy that, at the commencement of the voyage, the ship will be **seaworthy** for the purpose of the particular marine adventure insured.

(2) Where a voyage policy attaches while the ship is in port, there is an implied warranty in the policy that the ship will, at the commencement of the risk, be **reasonably fit** to encounter the ordinary perils of the port.

(3) Where a voyage policy relates to a voyage performed in different stages during which the ship requires different or further preparation or equipment, there is an implied warranty in the policy that, at the commencement of each stage, the ship is **seaworthy** for the purposes of that stage.

(4) There is **no** implied warranty in any time policy that the ship will be seaworthy at any stage of the marine adventure, but where, with the privity of the insured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

(5) A ship is deemed to be **seaworthy** if it is reasonably fit in all respects to encounter the ordinary perils of the seas of the marine adventure insured."[5]

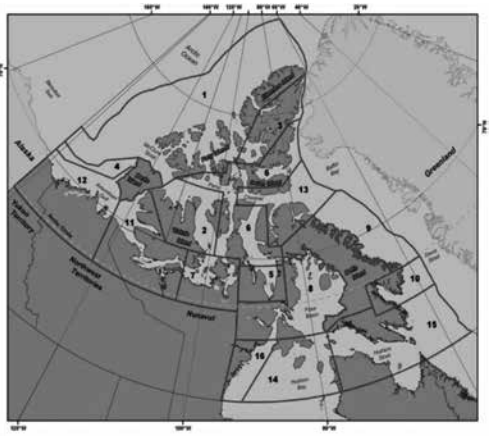
Unique Hazards of the Arctic

The hazards to which Arctic shipping is exposed presents significantly higher risks than in most other trading regions, such as[6]:

- Poor weather conditions and the relative lack of good charts ,communication systems and other navigational aids pose challenges for mariners.
- The remoteness of the area makes rescue or clean up operations difficult and costly.
- Extreme cold temperatures may reduce the effectiveness of numerous components of the ship, including deck machinery and emergency equipment.
- When ice is present, it can impose additional loads on the hull, propulsion system and appendages.

Shipping Safety Control Zones

Arctic waters are divided into 16 shipping safety control zones. Navigation in each zone is permissible only for designated classes of ships depending on their technical capabilities. [7]



Unique Requirements

Ships intending to operate within Canadian Arctic waters are subject to certain unique requirements in addition to those common to vessels operating elsewhere in Canada, such as [8]:

- The *Arctic Waters Pollution Prevention Act (AWPPA)*
- The *Arctic Shipping Safety and Pollution Prevention Regulations*, which contain a range of safety and pollution prevention requirements and also incorporates:
  - the *International Code for Ships Operating in Polar Waters* (Polar Code), with the addition of Canadian modifications to ensure that strict safety measures and discharge requirements are maintained.
  - SOLAS Chapter XIV "Safety Measures for Ships Operating in Polar Waters"

The Polar Code

- Goal of the polar code is "to provide for safe ship operation and the protection of the polar environment by addressing risks present in polar waters and not adequately mitigated by other instruments of the organization". [9]
- The polar code addresses a wide range of requirements concerning maritime safety, including [10]:
  - Design: ice strengthened hull, materials suitable for polar temperatures, varying structural requirements based on thickness of ice, stability considering ice accretion
  - Equipment: special equipment for ice removal, fire safety & lifesaving equipment operable in cold temperatures, thermal protection
  - Operations: navigational aids for ice conditions
  - Crew: advanced training for ice infested waters
  - Environmental protection: prohibits or strictly limits discharges of oil, chemicals, sewage, garbage, food wastes and many other substances.[11]
- Affected vessels are required to be surveyed and certified according to the polar code and to be issued the Polar Code Certificate [12]

Seaworthiness and the Polar Code

For a vessel entering Arctic waters, can it be concluded that non-compliance with the Polar Code constitutes unseaworthiness for the purposes of the implied warranty in a marine insurance contract?

The answer should be in the affirmative if non-compliance with the Polar Code leads to the vessel not being fit in all respects for its intended purpose, namely, traversing the waters of the Arctic. [13]

Concept of Seaworthiness and the Arctic

Reasonably fit in all respects ?

Risk Distribution

- How will risk be assumed or distributed in a maritime contract involving an Arctic voyage?

THANK YOU

References

1 Canadian Maritime Law, Aldo Chircop, 2nd ed, pg. 72
2 Ibid
3 supra note 3, pg. 507
4 Marine Liability Act, Schedule 3, Art III
5 supra note 1, s. 37(1)-(5)
6 International Code for Ships Operating in Polar Waters (Polar Code) (imo.org)
7 Supra note 3, pg. 1010-1011
8 https://www.rcaanc-cirnac.gc.ca/eng/1648145733596/1648145784817
9 Polar Code Ship Safety - Infographic_smaller_.pdf (imo.org)
10 ibid
11 Milestone for polar protection as comprehensive new ship regulations come into force (imo.org)
12 supra note 3, pg. 997
13 "Legal Regime of Marine Insurance in Arctic Shipping: Safety and Environmental Implications", Proshanto K. Mukherjee and Huiru Liu, pg. 209

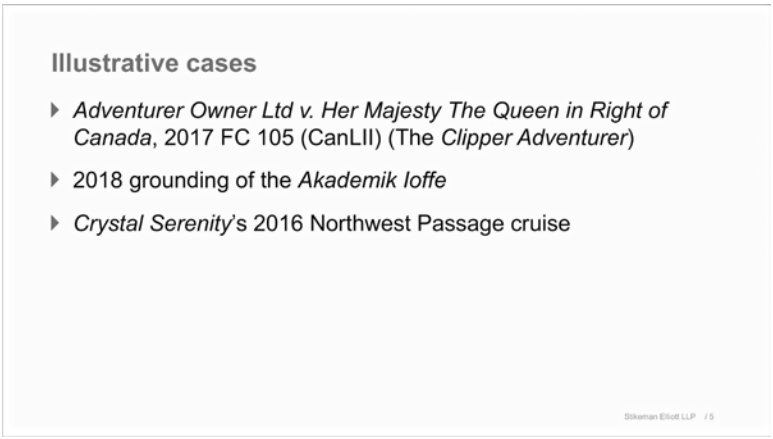
Photo on 1st slide: Arctic Shipping Routes Are Feeling the Heat – Eos
Photo on 5th slide: Ice Navigation in Canadian Waters (dfo-mpo.gc.ca)
Photo on 11th slide: https://pame.is/arctic-shipping

PASSENGER RIGHTS AND RISKS IN THE CANADIAN ARCTIC AND THE "ADVENTURE TOURISM" EXCEPTION

Simon Ledsham


Arctic trends and risks
Decreased ice coverage / longer navigation season
Increased passenger (and other) traffic
Shore excursions
Limited surveys / incomplete charts
Limited SAR capabilities
Sparse infrastructure (e.g., hospitals)
Stikeman Elliott LLP / 3


Relevant Canadian legislation
Arctic Waters Pollution Prevention Act
Arctic Shipping Safety and Pollution Prevention Regulations
Canada Shipping Act, 2001
Northern Canada Vessel Traffic Services Zone Regulations
Marine Liability Act
Regulations Respecting Compulsory Insurance for Ships Carrying Passengers
Stikeman Elliott LLP / 4


Illustrative cases
Adventurer Owner Ltd v. Her Majesty The Queen in Right of Canada, 2017 FC 105 (CanLII) (The Clipper Adventurer)
2018 grounding of the Akademik Ioffe
Crystal Serenity's 2016 Northwest Passage cruise
Stikeman Elliott LLP / 5

The "Adventure Tourism" exception

- *Marine Liability Act,* s. 37.1(1):

Exception — adventure tourism activities

37.1 (1) This Part does not apply to an adventure tourism activity that meets the following conditions:

(a) it exposes participants to an aquatic environment;

(b) it normally requires safety equipment and procedures beyond those normally used in the carriage of passengers;

(c) participants are exposed to greater risks than passengers are normally exposed to in the carriage of passengers;

(d) its risks have been presented to the participants and they have accepted in writing to be exposed to them; and

(e) any condition prescribed under paragraph 39(c).

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The "Adventure Tourism" exception

- *Regulations Respecting Compulsory Insurance for Ships Carrying Passengers*, s. 2(2)(a):

Non-application

(2) These Regulations do not apply to

(a) an adventure tourism activity that meets the conditions set out in subsection 37.1(1) of the Act;

[…]

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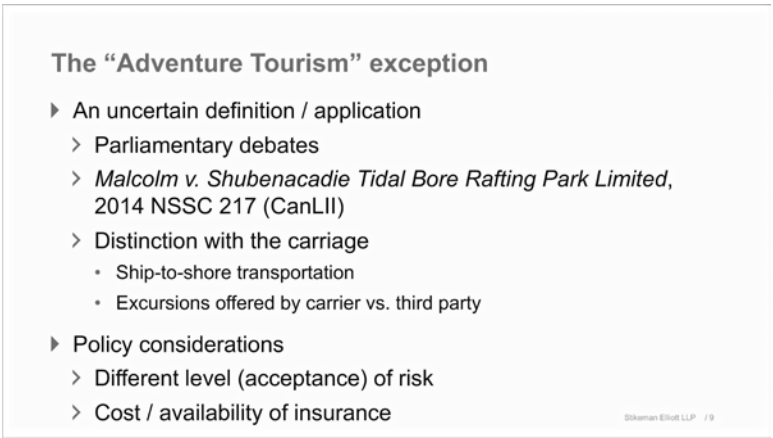
The "Adventure Tourism" exception
An uncertain definition / application
Parliamentary debates
Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited, 2014 NSSC 217 (CanLII)
Distinction with the carriage
Ship-to-shore transportation
Excursions offered by carrier vs. third party
Policy considerations
Different level (acceptance) of risk
Cost / availability of insurance
Stikeman Elliott LLP / 9


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IGP&I International Group of P&I Clubs
The Test for breaking shipowner's right to limit liability: IMO Conventions
A Unified Interpretation (UI): The Journey from start to conclusion
David Bolomini - International Group of P&I Clubs' accredited representative to the IMO

CLAIMS FOR DAMAGE ARISING IN THE ICEBREAKING CONTEXT: CONSIDERATIONS IN THE APPLICATION OF THE COLREGS

DAVID COTÉ[1]

Presented during the Young Lawyers' Panel on Arctic Shipping
On 15 June 2023[2]

Overview

This accompanying paper – in no way exhaustive – seeks to highlight certain legal issues that might arise during a collision with an icebreaking vessel, or other damage caused during an icebreaking escort or tasking, in light of prophesised increases in Arctic shipping activity in years to come.

We will review certain Rules of the COLREGS as they are incorporated into or broadened by Canadian domestic legislation, and then ask how these Rules might be applied to a discussion of liability in negligence for damage caused in the icebreaking context.

We will then ask how regulations, other government publications, and contracts might vary these Rules and therefore impact the allocation of risk or liability between icebreakers, escorted vessel, and passing or by-standing vessels.

[1] The Author is a maritime and admiralty lawyer practicing with the Department of Justice Canada where he provides advice to the Canadian Coast Guard and other maritime actors within the Department of Fisheries and Oceans. The view expressed in his panel discussion and this accompanying paper are his own, and do not represent the views of the Department of Justice Canada, the Canadian Coast Guard, or the Government of Canada as a whole, unless expressly stated otherwise. Of course, none of the views expressed in his panel discussion and this accompanying paper are to be taken to constitute legal advice, nor should they be relied on as such by anyone.

[2] With special thanks to Elizabeth Benoy and Yvette Marie Kieran.

1. Legal Framework

Before we dive in, we will summarily set out the legal framework applicable to liability for vessel collisions and other claims for damage caused by a ship – both grounded in the law of negligence in Canada.

A. Common Law of Negligence

Following the consolidation of the Courts of Law, Equity, and Admiralty in the United Kingdom with the *Supreme Court of Judicature Act, 1873* creating what is now the England and Wales High Court, Canada – which was still legally tethered to the United Kingdom until 1931 and the *Statute of Westminster*, (UK), 22 Geo V, c 4, reprinted RSC 1985, App II, No 27 – followed suit by consolidating the jurisdiction of its Colonial Courts of Admiralty into Canada's Exchequer Court. This Court was the predecessor of today's Federal Courts, and its jurisdiction mirrored and expanded that of the High Court of Admiralty in the UK (*Admiralty Act, 1934*, SC 1934, c 31)[3]. Up until the mid-1800s, Admiralty law was considered a form of civilian law practiced by Doctors of civil law, rather than common lawyers[4].

However, today, no Canadian maritime lawyer would object to the statement that ordinary common law principles of tort, including negligence, contract, and bailment apply at Canadian Maritime Law (*The Clipper Adventurer*, 2017 FC 105 at para 62; aff'd 2018 FCA; 34; leave to appeal to the SCC denied 2018 CanLII 113696; citing *The Buenos Aires Maru*, [1986] 1 SCR 752).

Canadian Maritime Law

"Canadian Maritime Law" is an all-encompassing Federal, common law. In is international and domestic, and includes conflicts of law rules, partly inherited from English maritime law. It thereafter supplemented and/or amended by substantial Federal statutory codification, and a broadening of the Admiralty Court's jurisdiction. It remains influenced by the old Admiralty law of civilian origins, as well as today's civil law practiced in the province of Québec (*The Seapace*, 2022 FC 575 at paras 28 to 39; see also sections 2, 22, 42, 43, and 44 of the *Federal Courts Act*, RSC 1985, c F-7). All the while, it is, in theory, uniform in its interpretation across Canada and the Canadian Courts, though not always so in practice (see e.g. *The Camilla Desgagnés*, 2019 SCC 58; or *The Ryan's Commander*, 2013 SCC 44).

---

[3] For a fulsome discussion, consult: "Canada's Admiralty Court in the Twentieth Century", Arthur J. Stone, (2002) 47 McGill L.J. 511, presented at the 50th anniversary celebration of the Canadian Maritime Law Association in Toronto in June 2001; "The *In Personam* Jurisdiction of the Federal Court", George R. Strathy, (2007) *citation missing*, Toronto; "Admiralty Jurisdiction and Canadian Maritime Law in the Federal Courts: The Next Forty Years", (2011) National Judicial Institute Federal Courts Education Seminar.

[4] "Canadian Interpretation and Construction of Maritime Conventions", William Tetley, (1991) 22-1 Revue générale de droit 109-128, 1991 CanLIIDocs 375; "Canadian Maritime Law", Aldo Chircop *et al*, (2016) Irwin Law 2nd Ed at p 168.

Elements of the Tort of Negligence

The 5 elements of the classic test for negligence are the following (see e.g. *Nelson (City) v Marchi*, 2021 SCC 41):

1. The Plaintiff must show the Defendant owed it a Duty of Care;
2. The Defendant must have breached the applicable Standard of Care in the circumstances;
3. Causation: "but for" the Defendant's breach of the Standard of Care, the Plaintiff would not have suffered all or part of the harm;
4. Proximity or Remoteness (sometimes called causation at law, as opposed to causation of fact, above); and
5. Proving Damages (and then apportioning them).

In actions against the Federal Crown, which is a large shipowner, operating the Canadian Coast Guard fleet and Royal Canadian Navy, certain immunities and other wrinkles apply that parties should consider (see e.g. sections 2, 3, 4, 5, 7, 14, and 36 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50; see also subsection 43(7) of the *Federal Courts Act*; or section 2 and 7 of the *Canada Shipping Act, 2001*, SC 2001, c 26; and *The ex HMCS Fraser*, 2010 FC 865).

In collision cases, there is a general acceptance that both ships are likely partly to blame, such that most litigation focusses on the issue of apportionment of liability between vessels at fault. This dispenses with the formal discussion of the tort of negligence. However, given not all actions for damage caused by a ship involve an actual collision, this analysis remains of relevance, in order to bring the COLREGS into application on particular factual situations.

Before moving on to the legal framework surrounding the Standard of Care in collision and situations of damage caused by a ship, a quick word on the Duty of Care and the issue of Causation.

Duty of Care

Firstly – unlike under civil law where every person owes everyone around them an obligation not to harm them (see e.g. article 1457 of the *Code civil du Québec*, RLRQ c CCQ-1991) – in order to find someone liable in negligence for harm they caused, a Plaintiff has to show that the Defendant had to look out for their condition in the first place; in other words, that the circumstances disclose reasonably foreseeable harm and proximity between the parties in the circumstances sufficient to establish a duty of care (*Donoghue v Stevenson* [1932] AC 562 (HL); *Anns v Merton London Borough Council* [1978] AC 728 (HL); *Cooper v Hobart*, 2001 SCC 79; and *City of Nelson*, above). However, it has been generally established, as a matter of maritime law, that vessels owe other users of the maritime highway, so to speak, a Duty of Care (*The Hua Lien* [1991] 1 Lloyd's Rep 309; see also *The Dundee*, (1823) 1 Hag Ad 109). Accordingly, little time is spent, if ever, on

this issue before the Courts, though how far inland and to what bordering commercial activity or peoples that duty extends is likely to see more consideration in the Arctic shipping context.

Causation

Secondly, a word on Causation.

Sometimes, Courts use references to "sole cause" or "last clear chance" (*The Clipper Adventurer*, above). Other times, Courts speaks of "proximate cause", as we would in the marine insurance context (see e.g *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, 1995 CanLII 9867 (NLCA); or *CSL Group inc v St Lawrence Seaway Authority,* 1996 CanLII 6038 (QCCA)). And, Courts may speak of "causative potency" while dealing with apportionment of liability between two or more at-fault vessels, which was a recent focal point of Sir Nigel Teare's analysis in *The FMG Sydney and The MSC Apollo* [2023] EWHC 328).

In *The CCGS Samuel Risley et al*, 2023 FC 155, the Federal Court recently had to consider the issue of causation in a negligence action for non-collision damage caused by a ship in an icebreaking escort context.

In an action filed in the Ontario Superior Court of Justice, the Plaintiff, a small ferry operator operating a service between the US and Canadian side of the river, alleged that a convoy of five vessels[5] lead by the icebreaker CCGS SAMUEL RISLEY, as a result of the icebreaking escort, caused $6,000,000.00 in damage to its causeway and other associated losses. Specifically, the Plaintiff alleged the icebreaker broke off large chucks of fast ice which, combined with the effect to the convoy proceeding at too great a speed, caused that ice to collide with its causeway. The Owners of the small tugs filed separate, later consolidated limitation actions in the Federal Court[6]. It is in this consolidated proceeding that both the Plaintiff and the Convoy shipowners filed for respective summary judgment: the former on liability of the convoy, and the latter to dismiss the Plaintiff's claim.

On summary judgment, Madam Justice Rochester held the Plaintiff, on the balance of probabilities, could not prove that the ice that damaged its causeway was dislodged by the convoy (*The CCGS Samuel Risley et al* paras 86, 92, and 95). More specifically, the Plaintiff could not succeed on causation by only circumstantially showing that the ice pack *may* have contributed to the damage it suffered. Accordingly, as no causation could be shown, there was no reason to examine whether the conduct of any of the vessels in the convoy fell below the standard of care in the circumstances (*The CCGS Samuel Risley et al* para 96).

[5] The other vessels were the ATB JOSEPH H THOMPSON (JR); the tug MICHIGAN; the tug BARBARA ANDRIE; and M/V HERBERT C JACKSON.

[6] Section 32 of the *Marine Liability Act*, SC 2001, c C-6 gives the Federal Court exclusive jurisdiction in relation to the declaration and distribution of a limitation fund established pursuant to the *Convention on Limitation of Liability for Maritime Claims, 1976*, as amended 1996.

This decision highlights the important role that evidence, particularly expert evidence, will play in claims for damage to moored vessels or other works being passed by an icebreaker and escorted convoy. It also highlights the diminished favour of the Latin maxim *Res Ipsa Loquitur*, meaning "the things speaks for itself", particularly outside catastrophic vessel collisions. Commercial interests along the water will have to show more than the mere circumstantial fact that damage has occurred on/around the time of a passing icebreaker or convoy in order to be able to recover in damages.

Moreover, Icebreakers break ice; it is in their name. Perhaps these types of situations will more properly be dealt with through marine insurance and other forms of contractual allocation of risk?

Lastly, the decision leaves for another day the discussion below on the interplay between icebreakers being in charge of icebreaking escorts as a matter of fact with allocation of risk for those escorts as a matter of law, under contract or otherwise.

B. The Standard of Care and the COLREGS

In Canada, jurisdiction to legislate and regulate "navigation and shipping" is a federal head of power within the responsibility of the Department of Transport (subsection 91(10) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3)[7]. Transport Canada is responsible for the *Canada Shipping Act, 2001*, Schedule 1(17) of which lists the Convention on the *International Regulations for Preventing Collisions at Sea, 1972* as being within its regulation-making ambit. Canada is also a dualistic State, meaning ratification of international conventions alone is insufficient to give those conventions force of law in Canada[8]. Accordingly, Canada enacted the *Collision Regulations*, CRC, c 1416 which incorporates the Convention text at its own Schedule 1. To these Rules are added "Canadian Modifications". Combined, this is what we will refer to as the Canadian "COLREGS" through the panel and this accompanying paper.

It is trite law that the Rule 2(a) of the COLREGS, the chapeau of which is "Responsibility", sets out the general Standard of Care applicable in the navigation/operation of a ship, namely that of "good seamanship". It requires one, and/or a scrutinizing Court[9], to ask what behaviour would fall within the ordinary practice of seamen, or in other words what would have been the conduct of a reasonably prudent seafarer in the circumstances.

[7] See also the maritime matters in subsections 91(7) – Naval Service, 91(9) – beacons, buoys, and lighthouses, 91(11) – quarantine and maritime hospitals, 91(12) – coastal and inland fisheries, and 91(13) – interprovincial or international ferries of the *Constitution Act, 1867*.

[8] See also section 12 of the *Arctic Waters Pollution Prevention Act*, RSC 1985, c A-12.

[9] With the assistance of a Nautical Assessor, should it so desire, pursuant to subparagraph 46(1)(a)(ix) of the *Federal Courts Act*, and Rule 52 of the *Federal Courts Rules*, SOR/98-106; see also *The Federal Danube*, [1997] 3 SCR 1278.

Rule 2	**Règle 2**
Responsibility	**Responsabilité**
(a) Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.	a) Aucune disposition des présentes règles ne saurait exonérer soit un navire, soit son propriétaire, son capitaine ou son équipage des conséquences d'une négligence quelconque quant à l'application des présentes règles ou quant à toute précaution que commandent l'expérience ordinaire du marin ou les circonstances particulières dans lesquelles se trouve le navire.

Each subsequent Rule of the COLREGS is a manifestation of the principle of good seamanship[10].

However, Rule 2(b) of the COLREGS reminds us that blind adherence to the Rules is not appropriate; the Rules should be departed from where the circumstances require to avoid immediate danger.

(b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.	b) En interprétant et en appliquant les présentes règles, on doit tenir dûment compte de tous les dangers de la navigation et des risques d'abordage, ainsi que de toutes les circonstances particulières, notamment les limites d'utilisation des navires en cause, qui peuvent obliger à s'écarter des présentes règles pour éviter un danger immédiat.

Canadian Modifications

One notable example of a Canadian "Modification" to the COLREGS, which could easily see increased application in an Arctic shipping context, or in the context of icebreaking escorts, because of the amount of waterfront installations and works that may well grow in support of commercial development, is Rule 6(c). Rule 6(c) is a Canadian Modification to the Safe Speed Rule. It stipulates that, within certain waterways such as harbours, vessels passing other vessels or works, must proceed at such a speed that will not harm that vessel or works – subject always to applicable Notices to Mariners and NAVWARNs (formerly known as NOTSHIPS)[11].

Rule 6(d) stipulates that, where a doubt exists as to whether a vessel or works will be affected by a wake, speed shall be presumed to be excessive and should be reduced. The burden is thus placed on the passing, moving vessel.

[10] "Boating Law of Canada", Rui Fernandes, (1989); *The Calrossie*, [1990] 3 SCR 1273.
[11] See also section 142 of the new *Navigation Safety Regulations, 2020*, SOR/2020-216 (replacing the *Charts and Nautical Publications Regulations, 1995*, SOR/95-149).

(c) In the Canadian waters of a roadstead, harbour, river, lake or inland waterway, every vessel passing another vessel or work that includes a dredge, tow, grounded vessel or wreck shall proceed with caution at a speed that will not adversely affect the vessel or work being passed, and shall comply with any relevant instruction or direction contained in any Notice to Mariners or Notice to Shipping.	c) Dans les eaux canadiennes d'une rade, d'un port, d'un cours d'eau, d'un lac ou d'une voie de navigation intérieure, tout navire qui passe un autre navire ou un ouvrage, y compris une drague, un train de remorque, un navire échoué ou une épave, doit passer prudemment à une vitesse qui n'aura pas d'effet néfaste sur le navire ou l'ouvrage dépassé et respecter les directives ou instructions applicables contenues dans tout Avis aux navigateurs ou Avis à la navigation.
(d) For the purpose of paragraph (c), where it cannot be determined with certainty that a passing vessel will not adversely affect another vessel or work described in that paragraph, the passing vessel shall proceed with caution at the minimum speed at which she can be kept on her course.	d) Lorsque, aux fins de l'alinéa c), il est impossible de déterminer avec certitude que le passage d'un navire n'aura pas d'effet néfaste sur un autre navire ou sur un ouvrage décrit audit alinéa, le navire passant doit avancer prudemment à la vitesse minimale nécessaire pour le maintenir sur sa route.

We now turn to a discussion of some specific Rules, and how those Rules might be further altered or apply differently in the icebreaking escort context.

2. Icebreaking Collisions and Other Damage Caused by Ships

Not being privy to confidential commercial icebreaking terms, we will use Canadian Coast Guard icebreaking publications[12] as an example of how a collision between an icebreaker and escorted vessel is regulated, and how normal principles or assumptions as to good seamanship are varied through the use of terms, contractual or otherwise.

Recall, the Minister of Fisheries and Oceans has a mandate to provide coast guard services, including icebreaking, which it fulfills acting through the Canadian Coast Guard (see subparagraph 41(1)(a)(iii) of the *Oceans Act*, SC 1996 c 31).

We will then – assuming a both to blame collision – examine some of the well-known principles surrounding apportionment of liability and damages, and how those principles may need tempering in this particular context.

A. Standard of Care, COLREGS, and Special Icebreaking Rules

As we saw above, the Standard of Care that vessels are held to, including during an icebreaking escort, is informed by the COLREGS.

Icebreaking Service Fee

Pursuant subsection 41(2) of the *Oceans Act*, the Minister of Fisheries and Oceans should attempt to provide services such as icebreaking in a cost-effective manner. Furthermore, section 47 of the

[12] Generally, see https://www.ccg-gcc.gc.ca/icebreaking-deglacage/program-programme-eng.html.

Oceans Act gives the Minister authority to fix fees for such services. The Minister has done so in the form of the Icebreaking Service Fee[13], which fee schedule is published in the Canada Gazette[14].

In *The Stormont*, 2012 FCA 93, the Federal Court of Appeal held that such fees for service could and did include the Canadian Coast Guard's standard terms (and conditions) for an icebreaking escort[15]. But, the Arctic is not currently within the scope of application of the fee. Therefore, we cannot look to those terms and conditions in the context of this discussion.

Ice Navigation in Canadian Waters

However, the *Navigation Safety Regulations, 2020* does set out a number of additional publications that vessels navigating in Canada are deemed to have aboard, read, understood, integrated, etc (*The Clipper Adventurer*, above). Notably, paragraph 142(1)(h) of the *Navigation Safety Regulations, 2020* requires that vessels assimilate the document "Ice Navigation in Canadian Waters" published by the Canadian Coast Guard[16].

This publication sets out certain requirements for vessels and places pre-agreed upon duties on the escorted vessel. We will examine some notable examples below.

Direction not Control

Item 4.6 of "Ice Navigation in Canadian Waters" provides that an escort operation is "under the *direction*" of the Commanding Officer of the icebreaker, and that the "fullest cooperation" is requested. Note the use of under the "direction" rather than "control" of the icebreaker; the Master of the vessel always retain control, and therefore liability for the conduct of the vessel.

This is similar to the relation between vessels and compulsory pilots, wherein pilot provide advice but are not technically controlling the vessel (see section 41 of the *Pilotage Act*, RSC 1985, c P-14).

Consider the interplay between the statement that the vessel escorted is under the "direction" of the icebreaker and Rule 2 of the COLREGS set out above.

Further, consider the possibility that restricted visibility – which is common during such escorts – occurs, triggering the additional requirements of Rule 19 of the COLREGS.

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[13] Generally, see https://www.ccg-gcc.gc.ca/navigation/marine-services-fees-droits-services-maritime/icebreaking-fees-droits-deglacage-eng.html.

[14] See https://gazette.gc.ca/rp-pr/p1/2019/2019-06-15/html/notice-avis-eng.html.

[15] "Management of the Great Lakes-St. Lawrence Maritime Transportation System", Mike Piskur, (2018) 42-1 Canada-United States Law Journal 228, 2018 CanLIIDocs 11124 at p 245.

[16] Full publication at https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/347665.pdf.

SECTION III — CONDUCT OF VESSELS IN RESTRICTED VISIBILITY

Rule 19

Conduct of Vessels in Restricted Visibility

(a) This Rule applies to vessels not in sight of one another when navigating in or near an area of restricted visibility.

(b) Every vessel shall proceed at a safe speed adapted to the prevailing circumstances and conditions of restricted visibility. A power-driven vessel shall have her engines ready for immediate manoeuvre.

(c) Every vessel shall have due regard to the prevailing circumstances and conditions of restricted visibility when complying with the Rules of Section I of this Part.

(d) A vessel which detects by radar alone the presence of another vessel shall determine if a close-quarters situation is developing and/or risk of collision exists. If so, she shall take avoiding action in ample time, provided that when such action consists of an alteration of course, so far as possible the following shall be avoided:

(i) an alteration of course to port for a vessel forward of the beam, other than for a vessel being overtaken,

(ii) an alteration of course towards a vessel abeam or abaft the beam.

(e) Except where it has been determined that a risk of collision does not exist, every vessel which hears apparently forward of her beam the fog signal of another vessel, or which cannot avoid a close-quarters situation with another vessel forward of her beam, shall reduce her speed to the minimum at which she can be kept on her course. She shall if necessary take all her way off and in any event navigate with extreme caution until danger of collision is over.

SECTION III — CONDUITE DES NAVIRES PAR VISIBILITÉ RÉDUITE

Règle 19

Conduite des navires par visibilité réduite

La présente règle s'applique aux navires qui ne sont pas en vue les uns des autres et qui naviguent à l'intérieur ou à proximité de zones de visibilité réduite.

b) Tout navire doit naviguer à une vitesse de sécurité adaptée aux circonstances existantes et aux conditions de visibilité réduite. Les navires à propulsion mécanique doivent tenir leurs machines prêtes à manœuvrer immédiatement.

c) Tout navire, lorsqu'il applique les règles de la section I de la présente partie, doit tenir dûment compte des circonstances existantes et des conditions de visibilité réduite.

d) Un navire qui détecte au radar seulement la présence d'un autre navire doit déterminer si une situation très rapprochée est en train de se créer et/ou si un risque d'abordage existe. Dans ce cas, il doit prendre largement à temps des mesures pour éviter cette situation; toutefois, si ces mesures consistent en un changement de cap, il convient d'éviter, dans la mesure du possible, les manœuvres suivantes :

(i) un changement de cap sur bâbord dans le cas d'un navire qui se trouve sur l'avant du travers, sauf si ce navire est en train d'être rattrapé;

(ii) un changement de cap en direction d'un navire qui vient par le travers ou sur l'arrière du travers.

e) Sauf lorsqu'il a été établi qu'il n'existe pas de risque d'abordage, tout navire qui entend, dans une direction qui lui paraît être sur l'avant du travers, le signal de brume d'un autre navire, ou qui ne peut éviter une situation très rapprochée avec un autre navire situé sur l'avant du travers, doit réduire sa vitesse au minimum nécessaire pour maintenir son cap. Il doit, si nécessaire, casser son erre et, en toutes circonstances, naviguer avec une extrême précaution jusqu'à ce que le risque d'abordage soit passé.

Continuous Close Communication

Item 4.6.1 of "Ice Navigation in Canadian Waters" provides that the escorted vessel must keep continuous, close communication with the icebreaker.

Furthermore, item 4.6.2 of "Ice Navigation in Canadian Waters" provides that the escorted vessel must provide a list of particulars of said vessel to the icebreaker, and during said disclosure inform the icebreaker of any issues in operation or manoeuvring that might affect the escort.

Consider the interplay between the statements above and, for example, the requirement to keep a proper (audio) lookout under Rule 5 of the COLREGS.

Rule 5	**Règle 5**
Look-out	**Veille**
Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.	Tout navire doit en permanence assurer une veille visuelle et auditive appropriée, en utilisant également tous les moyens disponibles qui sont adaptés aux circonstances et conditions existantes, de manière à permettre une pleine appréciation de la situation et du risque d'abordage.

Keeping a Safe Distance

Item 4.6.3(c) of "Ice Navigation in Canadian Water" provides the escorted vessel has a duty to maintain a minimum escort distance (see also 4.6.3(e) of "Ice Navigation in Canadian Water"). Item 4.6.3(d) of "Ice Navigation in Canadian Water" provides that the Commanding Officer of the icebreaker will state maximum recommended escort distance the escorted vessel should avoid exiting for risk of become beset.

Consider the interplay between the requirement of the capacity to stop without colliding, at any kept distance, when going full astern under item 4.6.2, as well as these duties to adhere or keep minimum, steady, and maximum distance under item 4.6.3. of "Ice Navigation in Canadian Water" and Rules 7 of the COLREGS on gauging the risk of a collision – when the entirety of an icebreaking escort could be considered highly at risk of collision.

Rule 7	**Règle 7**
Risk of Collision	**Risque d'abordage**
(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.	A) Tout navire doit utiliser tous les moyens disponibles qui sont adaptés aux circonstances et conditions existantes pour déterminer s'il existe un risque d'abordage. S'il y a doute quant au risque d'abordage, on doit considérer que ce risque existe.
(b) Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early	b) S'il y a à bord un équipement radar en état de marche, on doit l'utiliser de façon appropriée en recourant, en particulier, au balayage à longue portée afin de déceler à l'avance un

warning of risk of collision and radar plotting or equivalent systematic observation of detected objects.

(c) Assumptions shall not be made on the basis of scanty information, especially scanty radar information.

(d) In determining if risk of collision exists the following considerations shall be among those taken into account:

(i) such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably change,

(ii) such risk may sometimes exist even when an appreciable bearing change is evident, particularly when approaching a very large vessel or a tow or when approaching a vessel at close range.

risque d'abordage, ainsi qu'au plotting radar ou à toute autre observation systématique équivalente des objets détectés.

c) On doit éviter de tirer des conclusions de renseignements insuffisants, notamment de renseignements radar insuffisants.

d) L'évaluation d'un risque d'abordage doit notamment tenir compte des considérations suivantes :

(i) il y a risque d'abordage si le relèvement au compas d'un navire qui s'approche ne change pas de manière appréciable;

(ii) un tel risque peut parfois exister même si l'on observe une variation appréciable du relèvement, particulièrement lorsque l'on s'approche d'un très grand navire, d'un train de remorque ou d'un navire qui est à courte distance.

Furthermore, consider the decreased manoeuvrability of escorted vessels within a track, beset by ice, or in a harbour in need of a breakout tasking[17], and Rule 8 of the COLREGS preferring large, decisive, and obvious alterations of course.

Rule 8

Action to avoid Collision

(a) Any action to avoid collision shall be taken in accordance with the Rules of this Part and shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.

(b) Any alteration of course and/or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course and/or speed should be avoided.

(c) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation provided that it is made in good time, is substantial and does not result in another close-quarters situation.

(d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

Règle 8

Manoeuvre pour éviter les abordages

a) Toute manœuvre entreprise pour éviter un abordage doit être conforme aux règles énoncées dans la présente partie et, si les circonstances le permettent, être exécutée franchement, largement à temps et conformément aux bons usages maritimes.

b) Tout changement de cap ou de vitesse, ou des deux à la fois, visant à éviter un abordage doit, si les circonstances le permettent, être assez important pour être immédiatement perçu par tout navire qui l'observe visuellement ou au radar; une succession de changements peu importants de cap ou de vitesse, ou des deux à la fois, est à éviter.

c) Si le navire a suffisamment de place, le changement de cap à lui seul peut être la manœuvre la plus efficace pour éviter de se trouver en situation très rapprochée à condition que cette manœuvre soit faite largement à temps, qu'elle soit franche et qu'elle n'aboutisse pas à une autre situation très rapprochée.

d) Les manœuvres effectuées pour éviter l'abordage avec un autre navire doivent être telles qu'elles permettent de passer à une distance suffisante. L'efficacité des manœuvres doit être

[17] Rule 3(f) of the COLREGS sets out a definition of "vessel restricted in their ability to manoeuvre", which does not expressly include icebreakers engaged in icebreaking activities, or vessel escorted, beset, or in the process of being broken-out.

(e) If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.

(f) (i) A vessel which, by any of these Rules, is required not to impede the passage or safe passage of another vessel shall, when required by the circumstances of the case, take early action to allow sufficient sea room for the safe passage of the other vessel.

(ii) A vessel required not to impede the passage or the safe passage of another vessel is not relieved of this latter obligation if approaching the other vessel so as to involve risk of collision and shall, when taking action, have full regard to the action which may be required by the rules of this Part.

(iii) A vessel the passage of which is not to be impeded remains fully obliged to comply with the rules of this Part when the two vessels are approaching one another so as to involve risk of collision.

attentivement contrôlée jusqu'à ce que l'autre navire soit définitivement paré et clair.

e) Si cela est nécessaire pour éviter un abordage ou pour laisser plus de temps pour apprécier la situation, un navire doit réduire sa vitesse ou casser son erre en arrêtant son appareil propulsif ou en battant en arrière au moyen de cet appareil.

f) (i) Un navire qui, en vertu de l'une quelconque des présentes règles, est tenu de ne pas gêner le passage d'un autre navire ou de permettre son libre passage doit, lorsque les circonstances l'exigent, manœuvrer sans tarder afin de laisser suffisamment de place à l'autre navire pour permettre son libre passage.

(ii) Un navire qui est tenu de ne pas gêner le passage d'un autre navire ou de permettre son libre passage n'est pas dispensé de cette obligation s'il s'approche de l'autre navire de telle sorte qu'il existe un risque d'abordage et il doit, lorsqu'il effectue sa manœuvre, tenir dûment compte des manœuvres qui pourraient être requises en vertu des règles de la présente partie.

(iii) Un navire dont le passage ne doit pas être gêné reste pleinement tenu de se conformer aux règles de la présente partie lorsque les deux navires se rapprochent l'un de l'autre de telle sorte qu'il existe un risque d'abordage.

Moreover, certain icebreaking taskings relate to harbour breakout. In those circumstances, an icebreaker will come into deliberate close-quarters with the beset vessel requesting the assistance. Risk of collisions in close-quarters, with limited manoeuvrability, is significantly higher. Looking beyond the public context to activities by and between commercial parties in the Arctic, perhaps allocation of risk as a matter of contract, for example knock-for-knock clauses, could be used by industry? Perhaps indemnity might be read-in, as a result of the acceptance of risk by the requesting vessel?

Holding a Safe Speed

Item 4.6.3(i) of "Ice Navigation in Canadian Waters" provides an escorted vessel must maintain a speed fast enough not to become beset by ice, but not so fast as to cause itself damage from colliding with ice packs. The speed will be affected by the concentration of ice in the area, with higher concentration requiring shorter distance between vessels and higher speeds, both of which are determined by the Commanding Officer of the icebreaker (see also 4.6.3(f) of "Ice Navigation in Canadian Waters").

Consider the interplay between these requirements and Rule 6 of the COLREGS requiring a vessel to consider a number of factors in order to determine safe navigating speed. Furthermore, recall

Rule 6(c) of the COLREGS set out above, and the effect of vessels moving through and displacing dense ice at high speeds on commercial or other interests on the waterfront.

Rule 6	**Règle 6**
Safe Speed — International	**Vitesse de sécurité — International**
Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.	Tout navire doit maintenir en permanence une vitesse de sécurité telle qu'il puisse prendre des mesures appropriées et efficaces pour éviter un abordage et pour s'arrêter sur une distance adaptée aux circonstances et conditions existantes.
In determining a safe speed the following factors shall be among those taken into account:	Les facteurs suivants doivent notamment être pris en considération pour déterminer la vitesse de sécurité :
(a) By all vessels:	a) Par tous les navires :
(i) the state of visibility,	(i) la visibilité;
(ii) the traffic density including concentrations of fishing vessels or any other vessels,	(ii) la densité du trafic et notamment les concentrations de navires de pêche ou de tous autres navires;
(iii) the manoeuvrability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions,	(iii) la capacité de manœuvre du navire et plus particulièrement sa distance d'arrêt et ses qualités de giration dans les conditions existantes;
(iv) at night the presence of background light such as from shore lights or from back scatter of her own lights,	(iv) de nuit, la présence d'un arrière-plan lumineux tel que celui créé par des feux côtiers ou une diffusion de la lumière des propres feux du navire;
(v) the state of wind, sea and current, and the proximity of navigational hazards,	(v) l'état du vent, de la mer et des courants et la proximité de risques pour la navigation;
(vi) the draught in relation to the available depth of water.	(vi) le tirant d'eau en fonction de la profondeur d'eau disponible.
(b) Additionally, by vessels with operational radar:	b) De plus, par les navires qui utilisent un radar :
(i) the characteristics, efficiency and limitations of the radar equipment,	(i) les caractéristiques, l'efficacité et les limites d'utilisation de l'équipement radar;
(ii) any constraints imposed by the radar range scale in use,	(ii) les limitations qui résultent de l'échelle de portée utilisée sur le radar;
(iii) the effect on radar detection of the sea state, weather and other sources of interference,	(iii) l'effet de l'état de la mer, des conditions météorologiques et d'autres sources de brouillage sur la détection au radar;
(iv) the possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range,	(iv) le fait que les petits bâtiments, les glaces et d'autres objets flottants peuvent ne pas être décelés par le radar à une distance suffisante;
(v) the number, location and movement of vessels detected by radar,	

(vi) the more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.	(v) le nombre, la position et le mouvement des navires détectés par le radar; (vi) le fait qu'il est possible d'apprécier plus exactement la visibilité lorsque le radar est utilisé pour déterminer la distance des navires et des autres objets situés dans les parages.

B. Apportionment of Liability in Collision Cases

Finally, we will briefly set out the law on apportionment of liability based on fault where two or more ships are to blame for a collision or other action for damage caused by a ship.

In Canada, apportionment is statutory, provided for by section 17 of the *Marine Liability Act.* This provision, two-fold, does away with the old 50/50 liability split in Admiralty cases, as well as the common law contributory negligence bar (*The Bow Drill 3*, [1997] 3 SCR 1210).

That provision mirrors section 187 of the UK *Merchant Shipping Act, 1995* (c 21). While Canadian Courts are not bound by decisions of UK Court, generally, UK decisions on matter of maritime law will be regarded persuasively by Canadian Courts (see e.g. *The Nel*, [1998] 4 FC 388). Accordingly, we will refer to those principles and English law cases which are understood to be the accepted statement of the law on this matter[18].

Firstly, apportionment of liability depends on (1) blameworthiness, and (2) causative potency (*The Samco Europe & The MSC Prestige* [2011] 2 Lloyd's Rep 579).

Secondly, we look to the principles of apportionment set out by Sir Henry Brandon in his extra-judicial article in the Tulane Law Review[19], summarised by Mr Justice Teare as follows (paraphrasing from *The Nordlake & The Seaeagle* [2015] EWHC 3605 (Admlty)):

1. The number of faults (of the vessel) alone is not decisive; it is the nature/degree and quality of the faults that matters;
2. Breaches of the COLREGS are usually seriously culpable;
3. "Causative potency" has two parts: the extent to which the fault contributed to the fact that the collision occurred; and the extent to which the fault contributed to the damage;
4. In most cases, the first ship that caused the fault of another will be at greater fault that the "reactive" ship which was subsequently at fault;
5. A deliberate act or omission may be more culpable than fault by mere omission;
6. The act of apportioning is broad, qualitative, and based on common sense.

[18] Caveat, see *The PT 25,* 2010 BCSC 1675 for a discussion of how apportionment within and outside the maritime law context might differ in Canada, perhaps only in British Columbia.
[19] "Apportionment of Liability in British Courts under the Maritime Conventions Act 1911", Sir Henry Brandon, (1977) 51 Tulane Law Review 1025.

The Court then tallies the faults on each side and, assuming both are at fault, weighs the two elements of causative potency in order to come to an apportionment that one vessel is X more times at fault than the other.

In light of the duties and statements from "Ice Navigation in Canadian Waters" set out above, consider how the entirety of an icebreaking operation could constitute conduct that, in open water, would likely be considered a breach of the COLREGS, but not falling below the standard of good seamanship.

Furthermore, consider how the ship requesting the ice escort, or the breakout tasking, is inviting an icebreaker into close quarters, and possibly not moving at all, such that it cannot "react", while the tasked icebreaker is putting itself in a position to collide at the request of the other vessel.

Moreover, consider how icebreaking implies a higher risk of contact between vessels, and that ice density may increase contacts by "omission" (using the term as opposite to "deliberate").

Lastly, consider how one of the vessels might suffer more or less harm despite little to no action on its part, and the equities at play.

Conclusion

If, in fact, Arctic shipping is set to increase as assumed, we will likely see a rise in public and private icebreaking capacity, and therefore escort taskings in order to meet shipping demand. Additional vessel traffic means additional risk, and therefore litigation.

It will be for the Courts to interpret the COLREGS in light of the particularities of the Arctic shipping context, such as dense ice limiting manoeuvrability, the close-quarters, high-risk nature of icebreaking escorts and breakout operations, and the contractual or other terms displacing or reallocating risk and liability between vessels that might become standard in that trade.

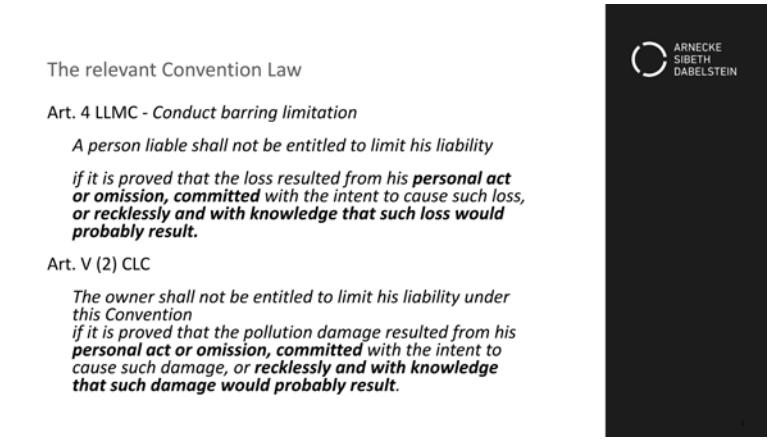
It will also be particularly interesting to see how the Courts deal with the issue of direction as opposed to control of an icebreaking escort, as well as interpret certain Canadian Modifications to the COLREGS such as Rule 6(c).

Lastly, is it possible to say that the well-known principles of apportionment of liability, are fit for purpose when it comes to collisions in the icebreaking context? Or, will we see a return to the 50/50 split of the Admiralty of old? Only time, and caselaw, will tell.

One thing, however, is certain and that is that, in light of the ruling in *The CCGS Samuel Risley*, Plaintiffs are going to need to show more than damage arising in harsh, icy-cold circumstances (such as exist in the Arctic) in order to recover from vessel owners – a fact that should please their H&M underwriters.

THE UNIFIED INTERPRETATIONS ON THE TEST FOR BREAKING THE SHIPOWNER'S RIGHT TO LIMIT LIABILITY – THE CONTENT

Dieter Schwampe



Combined assessment of recklessness and knowledge

ARNECKE SIBETH DABELSTEIN

- Twofold subjective test:
  - "recklessly"
  - *"with knowledge that such loss would probably result"*
- Sec. 1 (c) Unified Interpretations

  the two terms establish a level of culpability that must be met in their combined totality and should not be considered in isolation of each other

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Only conduct of the shipowner relevant

- Section 1 (d) Unified Interpretation

  article 4 of the 1976 LLMC Convention is to be interpreted that the conduct of parties other than the shipowner, for example the master, crew or servants of the shipowner, is irrelevant and should not be taken into account when seeking to establish whether the test has been met

- Increasingly relevant as there seems to be a readiness to look not only on the shipowner himself
- Piraeus Court of First Instance, decision number 1291/2018

https://www.ukpandi.com/news-and-resources/articles/2022/the-latest-developments-in-limitation-of-liability-under-greek-law-losing-the-right-to-limit-liability/

LSLC – London 23 January 2023

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The Content:

Level of Culpability

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Level of Culpability

- Section 1 (b) (i) Unified Interpretation

  article 4 of the 1976 LLMC Convention is to be interpreted to mean a level of culpability analogous to wilful misconduct, namely a level higher than the concept of gross negligence

- Widespread tendency of courts to accept (objective) gross negligence for *recklessness* (including Germany)
- Piraeus Court of First Instance, decision number 1291/2018

https://www.ukpandi.com/news-and-resources/articles/2022/the-latest-developments-in-limitation-of-liability-under-greek-law-losing-the-right-to-limit-liability/

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Virtual Unbreakability

- Section 1 (a) Unified Interpretations

  Article 4 of the 1976 LLMC Convention is to be interpreted as virtually unbreakable in nature i.e. breakable only in very limited circumstances and based on the principle of unbreakability

- Requires the Judge to consider whether the facts of his case are unique enough to avoid that limitation is broken on similar facts so often in the future that the circumstances are no more "very limited"

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Nexus between Loss of insurance cover and loss of right to limit

- *article 4 of the 1976 LLMC Convention is to be interpreted a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends*

(Section 1 (b) (ii) and (iii) Unified Interpretation

"The words 'recklessly and with knowledge that such loss would probably occur' come very near to the English legal term 'wilful misconduct', which normally is the degree of blame required if the insurance cover shall be forfeited (Marine Insurance Act (1906) Sect. 55 (2) a). The proposed text, therefore, implies that there will be right of limitation where the insurance cover is intact".

Alex Rein, Chairman CMI International Sub-Committee in his report to IMCO, 1974

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Nexus between Loss of insurance cover and loss of right to limit

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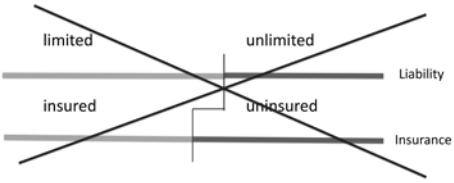
(Section 1 (b) (ii) and (ii) Unified Interpretation



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Owner's Concern

Nexus between Loss of insurance cover and loss of right to limit

- *article 4 of the 1976 LLMC Convention is to be interpreted a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends*

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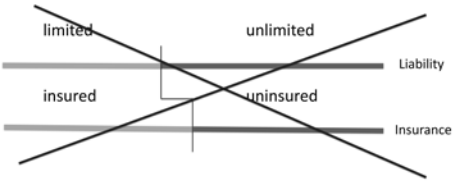

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Insurer's Concern

Nexus between Loss of insurance cover and loss of right to limit

- ***article 4 of the 1976 LLMC Convention is to be interpreted a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends***

(Section 1 (b) (ii) and (iii) Unified Interpretation

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Conclusions

- The effects of the Unified Interpretations depend on what test the Courts so far have applied for breaking limitation
- Gross negligence is ruled out
- Unbreakability is the principle and must be borne in mind for every judgment
- Loss of limitation shall mean loss of insurance cover
- Breaking limitation becomes less attractive
- Many open questions:
  - what are the *very limited circumstances* for breaking limitation?
  - nexus between limitations and insurance cover proceedings?
  - test for loss of insurance cover?
  - relevance of the actual policy / P&I entry?

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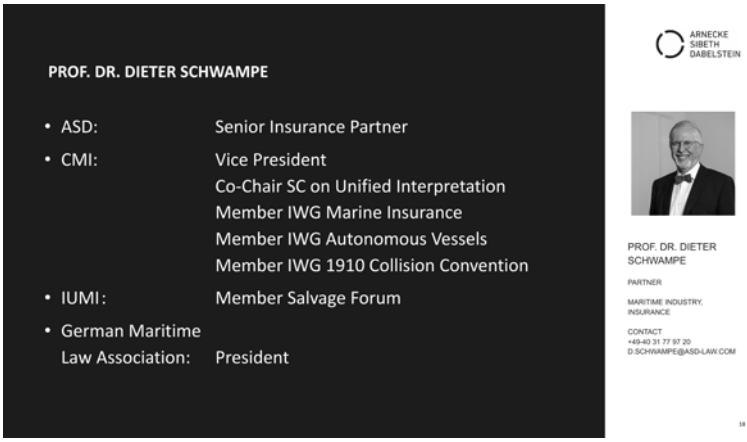
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18

THE UNIFIED INTERPRETATIONS OF THE SHIPOWNERS' RIGHT TO LIMIT LABILITY – A DEFENCE OF THE INDEFENSIBLE?

Leyla Pearson

Within the Legal department at ICS, our remit is to provide shipowners' views on all legal and insurance matters affecting shipowners, especially concerning their liabilities, for example, for pollution caused by ships and the compensation that shipowners are required to provide.

This is the precisely the area which is the subject of our discussion today and in particular, we are here to discuss the ground breaking and remarkable agreement reached at the IMO in 2021, that is a Unified Interpretation of the test for breaking shipowners' right to limit liability, which confirms that their right to limit liability is…. virtually unbreakable.

Some of you may already be familiar with this Unified Interpretation from the work of the CMI WG, the members of which are listed on the screen.

BUT it is really important that, and the purpose of this talk today is to ensure that, we take this important decision out from the plenary hall of the IMO and place it firmly on the radar of all of you, the legal practitioners, because, although still relatively rare, as the recent case of the Princess Empress highlights we do see cases where the claims exceed the shipowner's limitation, and next time there is another incident of for example oil pollution at sea from ships, any one of you might be involved. So the aim of this talk is to ensure that you have all the tools available on the meaning and intention of the shipowners' right to limit liability.

In my section of the talk today I will give some background on what led to this remarkable achievement of the IMO.

So, let's start with what exactly is a Unified Interpretation?

A Unified Interpretation,.. or UI for short,.. is the term that is used at the IMO to describe an Agreement as to how a convention should be interpreted.

Under the Vienna Convention on the Law of Treaties, 1969, a UI would be categorised as a *subsequent Agreement* to a Treaty under Article 31 (3) (a) and as such, it *"shall"* be taken into account when interpreting the convention.

At the IMO, UIs have been agreed prior to this one many times….But before now these have been on the technical aspects of a convention and

on matters which are relatively straightforward and non-controversial. For example a U.I has been issued by the Maritime Safety Committee at IMO for SOLAS in the context of the Fire Safety Systems and Fire Test Procedures.

This UI however is the first to have been agreed on a legal issue and on a matter which has historically, been fairly controversial. So, to have obtained unanimous agreement on such a difficult and controversial issue, is why we say this particular U.I is ground breaking.

As I said, the UI we are discussing today relates to the shipowners' right to limit liability, and more specifically the conduct that would deny the shipowner the right to limit liability, as it appears in three conventions agreed at the IMO. These are: the International Convention on Civil Liability for Oil Pollution Damage as amended (CLC 1992), the Convention on Limitation of Liability for Maritime Claims (LLMC 1976) and the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims (LLMC Protocol 1996).

As you know the CLC, was first adopted in 1969 and subsequently amended in 1976 and then 1992 and this convention deals with the consequences of oil pollution from oil cargo carried on board tanker ships. It is the first of the conventions that make up the liability and compensation regime for pollution agreed at the IMO. Other conventions in this "suite" of IMO liability and compensation conventions include: the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, the Nairobi International Convention on the Removal of Wrecks, 2007 and the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 – as amended by the Protocol of 2010 (HNS Convention) [the latter is not yet in force but we are getting closer on that].

The CLC was agreed in the aftermath of the Torrey Canyon disaster and the main aim of the regime is to ensure prompt and adequate compensation is provided. The CLC achieves this through concepts that were, when they were first introduced, a radical departure from the general practice in most jurisdictions regarding shipowner's liability, but which were consider necessary and accepted by shipowners to address issues of public international law and an overriding public interest, namely protection of the environment and compensation for innocent third parties.

While I am sure you are all familiar with the CLC, just to recap these concepts are:

- First, a strict liability of the shipowner, meaning that they will be liable even when there is no fault on their part, with only very limited defences available to the shipowner such as act of war.
- Secondly, all claims are channelled to the registered owner who is easily identifiable, even when another party, such as the charterer, might actually be responsible.
- Thirdly, the shipowner is obliged to insure the ship for all their liabilities under the Convention.
- And finally the Convention also provides for a right of direct action against the insurer, in this way, ensuring that claims are compensated even if the shipowner cannot pay, and this is – a significant departure

from the "pay to be paid" rule applied by the IG P&I Clubs.
and as the quid pro quo for giving up defences and accepting strict liability and the channeling of all liability towards the shipowner, the IMO liability and compensation conventions provide shipowners with a limit of liability.

Now I should just say that although the IMO liability and compensation conventions are not all drafted in the same way. They do all include the principles of strict liability and the channeling of liability, compulsory insurance, etc, however only two of them have express limits of liability and the test to break the right to limit. Others refer to the right to limit liability where this may apply and refer to the LLMC 1976 as an example. It is beyond the scope of this discussion to examine the detail of this aspect. I would just say that having the UI in relation to the LLMC 1976 and the 1996 Protocol is very important for the purposes of uniform application of all the liability and compensation conventions.

The current test setting out the conduct barring limitation [owner's right to limit liability] was first set out in the LLMC 1976 and this test was subsequently carried across to the CLC when it was amended in 1992.

The test – which I have extracted here from the LLMC 1976, reads as follows:

Article 4. CONDUCT BARRING LIMITATION

> *A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly AND with knowledge that such loss would probably result*[1].

This limit of liability is fundamentally important to shipowners not only to balance out the increased range of liabilities which they have agreed to through the concepts of strict liability and channeling of liability, but also to ensure that they can continue to obtain insurance at commercially available rates. As we know, insurers need to have certainty as to their ultimate financial liability if they are to be encouraged to insure the risk.

In recent years however, the shipowners' right to limit liability has been under attack:

A lot of this is due to pressure on governments to call "polluters" of the environment to account for all the damage they cause and they question why the shipowner should not compensate the full amount of the claim. In short, the concept of limitation of liability is considered to be strange, and unfair.

There are many examples of cases that illustrate these attacks on the right to limit liability but the one that I will focus today is the high profile case of the *Prestige* – the oil tanker that broke up in European waters in 2002 causing pollution to the coastline of several countries with a large part affecting the

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[1] NB The wording of the clause says "person" but Article 1 of the LLMC concerns persons entitled to limit liability and Art 1 (1) provides: Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.

Spanish coastline and resulting in litigation against the master and the ship.

Most of you will be familiar with this incident so I am not going to go into the details of the case, suffice to say that in January 2016 the Spanish Supreme Court decided that the Master was guilty of the crime of *reckless damage* to the environment and that as a result of this conduct, the shipowner was not entitled to limit liability under the CLC. The decision was used by the Spanish Government to claim against the shipowner for enormous amounts in excess of the CLC limit.

There were several points of concern to the industry when this decision was examined:

First, the court had decided that the *master's* conduct was the deciding factor as to whether the right to limit liability should be broken. The test in the CLC however applies only to the *shipowner's* conduct; and;

Secondly, the decision was based on the master having caused reckless *damage*, in other words, the *extent* of the pollution was interpreted as being reckless for the purposes of the test.

The test in the convention however is not to be by reference to the scale of the damage but rather it is the conduct that led to the damage that must have been reckless and, very importantly, this conduct must be accompanied by knowledge as to what the consequences would be.

There was concern that the courts did not appear to have applied the test as it is written in the Convention (to which Spain was a party).

In addition, the shipowner's P&I Club insurer was also held directly liable above the CLC limit for US$1 billion – which amount coincidentally is the limit of cover provided by International Group clubs for oil pollution damage.

The judgement against the insurer was contrary to the provisions in the convention which expressly provide that the insurer may limit their liability even if the owner is denied that right.

Art VII paragraph 8 as amended provides:

> *....In such case the defendant may, even if the owners is not entitled to limit his liability according to Article V, paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1*

Now at best we could perhaps explain these developments as being due to a loss of understanding over the years as to how the principles in the conventions are designed to operate together and at worst, they could be a demonstration of law and policy makers determined to extract the maximum financial compensation from the perceived "deep pockets" of the insurance market for their own national interests.

But whatever the motives, these developments threatened to disturb the balance of interests on which the system is based. Indeed, we, as the industry paying for the large part of the claims had serious concerns that a tipping point had been reached, threatening the very system designed and introduced to protect claimants.

So within ICS and the International Group of P&I Clubs (IG), we had to

decide what we could do as an Industry to protect the international system and encourage courts to apply the test uniformly and as intended. We realised that to do this, we needed to address the perception that a right to limit liability was unfair, and outdated. Contrary to common perception, shipping is not unique in having limited liability. The fact is that the use of limited companies in other industries is done with the same intention and achieves the same result. The difference is that the ship itself is the unit on which the limits of liability are based whereas in limited companies, the concept is to limit liability to the value of its shareholding.

Consequently we embarked on a journey to understand the basis of the concept starting with a detailed examination of the record of negotiations that had led to the establishment of the test in the LLMC 1976 and its adoption in the CLC.

Our investigations confirmed that the drafters of the test in the LLMC had indeed recognized the importance of insurance in the liability and compensation system and recognized that a limit of liability which was virtually unbreakable, was important to include in order to ensure the availability of insurance.

That is why the test was framed as it is – and not to allow simple negligence or even gross negligence conduct to break the right to limit liability.

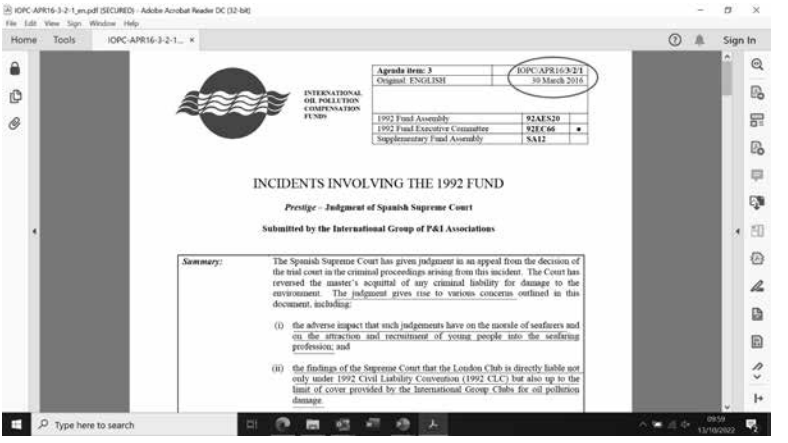
As this understanding was not reflected in the *Prestige* decisions, it was clear that there was a need to remind all stakeholders - states parties, and their national courts of the wording of the convention and why it is framed as it is, and we thought that this might be achieved through a Resolution of the IMO Assembly or, even better a Resolution of the States Parties to the conventions where this test appears.

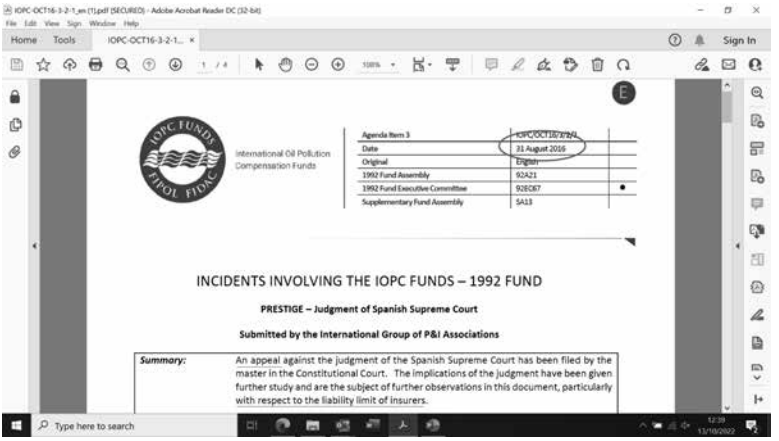
After extensive work at the Legal Committee of the IMO, the principles underlying the test were agreed by the States Parties of each of the three conventions where this test expressly appears, in the form of a Unified Interpretation for each.

The UI affirms that the test for breaking the right to limit liability is to be interpreted as virtually unbreakable, i.e., breakable only in very limited circumstances.

THE TEST FOR BREAKING SHIPOWNER'S RIGHT TO LIMIT LIABILITY: IMO CONVENTIONS, A UNIFIED INTERPRETATION (UI): THE JOURNEY FROM START TO CONCLUSION

David Bolomini





International Oil Pollution Compensation Funds

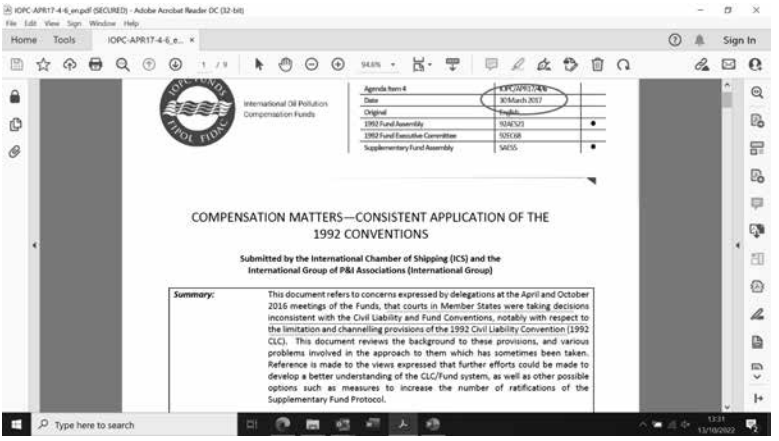
Agenda Item 3	IOPC/OCT16/3/2/1
Date	31 August 2016
Original	English
1992 Fund Assembly	92A21
1992 Fund Executive Committee	92EC87 •
Supplementary Fund Assembly	SA13

INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

PRESTIGE – Judgment of Spanish Supreme Court

Submitted by the International Group of P&I Associations

Summary: An appeal against the judgment of the Spanish Supreme Court has been filed by the master in the Constitutional Court. The implications of the judgment have been given further study and are the subject of further observations in this document, particularly with respect to the liability limit of insurers.



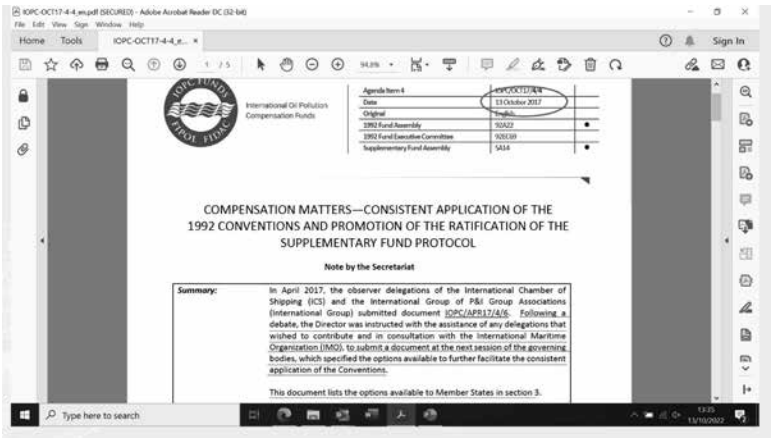
International Oil Pollution Compensation Funds

Agenda Item 4	IOPC/APR17/4/6
Date	30 March 2017
Original	English
1992 Fund Assembly	92A23 •
1992 Fund Executive Committee	92EC68
Supplementary Fund Assembly	SA15 •

COMPENSATION MATTERS—CONSISTENT APPLICATION OF THE 1992 CONVENTIONS

Submitted by the International Chamber of Shipping (ICS) and the International Group of P&I Associations (International Group)

Summary: This document refers to concerns expressed by delegations at the April and October 2016 meetings of the Funds, that courts in Member States were taking decisions inconsistent with the Civil Liability and Fund Conventions, notably with respect to the limitation and channelling provisions of the 1992 Civil Liability Convention (1992 CLC). This document reviews the background to these provisions, and various problems involved in the approach to them which has sometimes been taken. Reference is made to the views expressed that further efforts could be made to develop a better understanding of the CLC/Fund system, as well as other possible options such as measures to increase the number of ratifications of the Supplementary Fund Protocol.



International Oil Pollution Compensation Funds

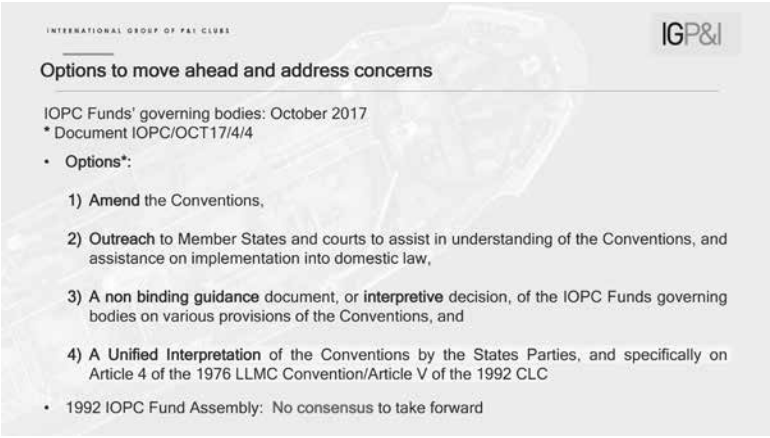
Agenda Item 4	IOPC/OCT17/4/4
Date	13 October 2017
Original	English
1992 Fund Assembly	92A22
1992 Fund Executive Committee	92EC69
Supplementary Fund Assembly	SA14 •

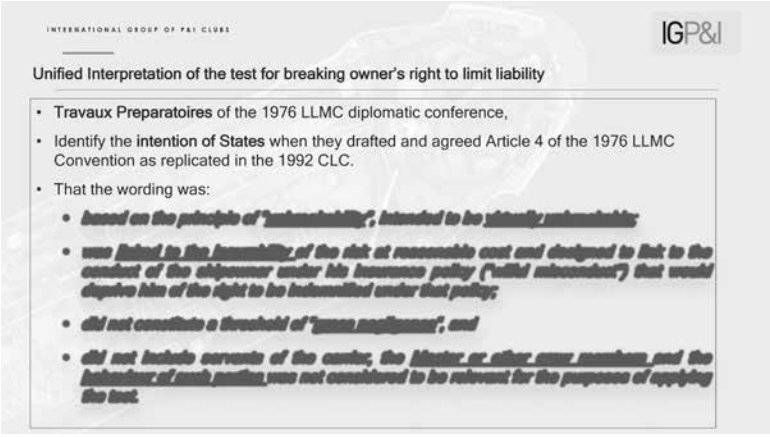
COMPENSATION MATTERS—CONSISTENT APPLICATION OF THE 1992 CONVENTIONS AND PROMOTION OF THE RATIFICATION OF THE SUPPLEMENTARY FUND PROTOCOL

Note by the Secretariat

Summary: In April 2017, the observer delegations of the International Chamber of Shipping (ICS) and the International Group of P&I Group Associations (International Group) submitted document IOPC/APR17/4/6. Following a debate, the Director was instructed with the assistance of any delegations that wished to contribute and in consultation with the International Maritime Organization (IMO), to submit a document at the next session of the governing bodies, which specified the options available to further facilitate the consistent application of the Conventions.

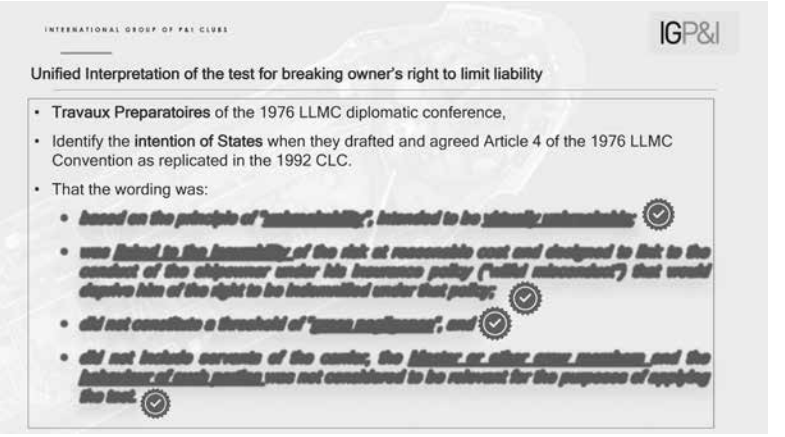
This document lists the options available to Member States in section 3.


INTERNATIONAL GROUP OF P&I CLUBS
IGP&I
Options to move ahead and address concerns
IOPC Funds' governing bodies: October 2017
* Document IOPC/OCT17/4/4
• Options*:
1) Amend the Conventions,
2) Outreach to Member States and courts to assist in understanding of the Conventions, and assistance on implementation into domestic law,
3) A non binding guidance document, or interpretive decision, of the IOPC Funds governing bodies on various provisions of the Conventions, and
4) A Unified Interpretation of the Conventions by the States Parties, and specifically on Article 4 of the 1976 LLMC Convention/Article V of the 1992 CLC
• 1992 IOPC Fund Assembly: No consensus to take forward


INTERNATIONAL GROUP OF P&I CLUBS
IGP&I
Unified Interpretation of the test for breaking owner's right to limit liability
• Travaux Preparatoires of the 1976 LLMC diplomatic conference,
• Identify the intention of States when they drafted and agreed Article 4 of the 1976 LLMC Convention as replicated in the 1992 CLC.
• That the wording was:


INTERNATIONAL GROUP OF P&I CLUBS
IGP&I
Next step and key dates:
106th session of IMO LEG: March 2019
Document LEG 106/13: Greece, Marshall Islands, IG P&I, ICS
Proposal for a new work output on LEG agenda to develop a UI
107th session of IMO LEG: March 2020
Document LEG 107/9: Canada, Greece, Italy, Malta, Poland, IG P&I, ICS
Findings presented on the intention of States when drafting the test
108th session of IMO LEG: July 2021
Document LEG 108/8: Co-Ordinator of the IMO LEG Correspondence Group
Draft IMO Assembly Resolution and accompanying draft UI wording
IMO Assembly (A/32): December 2021: AGREEMENT!


INTERNATIONAL GROUP OF P&I CLUBS
IMO Assembly Resolutions:
E
ASSEMBLY
32nd session
Agenda item 13
A 32/Res.1163
28 January 2022
Original: ENGLISH
Resolution A.1163(32)
Adopted on 15 December 2021
(Agenda item 13)
INTERPRETATION OF ARTICLE 4 OF THE CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976
ASSEMBLY
32nd session
Agenda item 13
Resolution A.1165(32)
Adopted on 15 December 2021
(Agenda item 13)
INTERPRETATION OF ARTICLE 6 OF THE PROTOCOL OF 1992 TO AMEND THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, 1969 AMENDING ARTICLE V(2) OF THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, 1969
THE STATES PARTIES TO THE PROTOCOL OF 1992 TO AMEND THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, 1969, PRESENT AT THE THIRTY-SECOND SESSION OF THE ASSEMBLY OF THE INTERNATIONAL MARITIME ORGANIZATION,
THE STATES PARTIES
MARITIME CLAIMS, 19
ASSEMBLY OF THE INTI
E
ASSEMBLY
32nd session
Agenda item 13
A 32/Res.1164
28 January 2022
Original: ENGLISH
Resolution A.1164(32)
Adopted on 15 December 2021
(Agenda item 13)
INTERPRETATION OF ARTICLE 4 OF THE CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976
THE STATES PARTIES TO THE PROTOCOL OF 1996 TO AMEND THE CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976, PRESENT AT THE THIRTY-SECOND SESSION OF THE ASSEMBLY OF THE INTERNATIONAL MARITIME ORGANIZATION,


INTERNATIONAL GROUP OF P&I CLUBS
IGP&I
Unified Interpretation of the test for breaking owner's right to limit liability
• Travaux Preparatoires of the 1976 LLMC diplomatic conference,
• Identify the intention of States when they drafted and agreed Article 4 of the 1976 LLMC Convention as replicated in the 1992 CLC.
• That the wording was:
• based on the principle of "unbreakability", intended to be [illegible]
• was linked to the [illegible] of the risk at reasonable cost and designed to link to the conduct of the shipowner under his insurance policy ("wilful misconduct") that would deprive him of the right to be indemnified under that policy;
• did not constitute a threshold of "gross negligence", and
• did not include servants of the owner, the Master or other crew members and the behaviour of such parties was not considered to be relevant for the purposes of applying the test.


INTERNATIONAL GROUP OF P&I CLUBS
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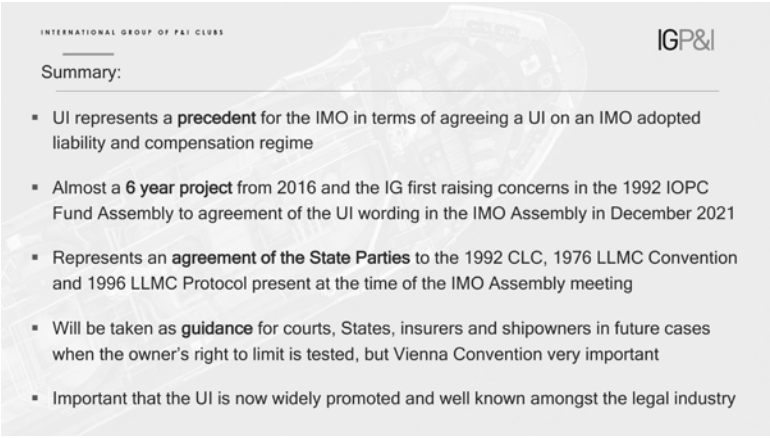
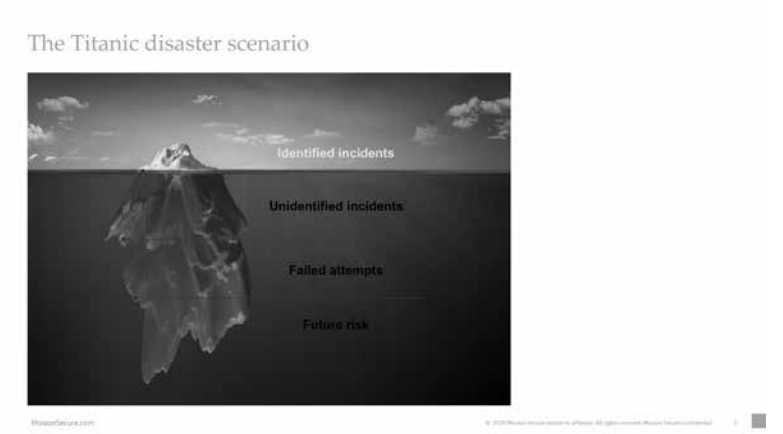
Vienna Convention on Law of Treaties, 1969
RECOGNIZING that, under the Vienna Convention on the Law of Treaties, 1969, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (article 31(1)) and that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 (...)" (article 32)
Whaling in the Antarctic (Australia v. Japan: New Zealand intervening),
Judgment, I.C.J. Reports 2014,
p. 226
83..... many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation ....,, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.

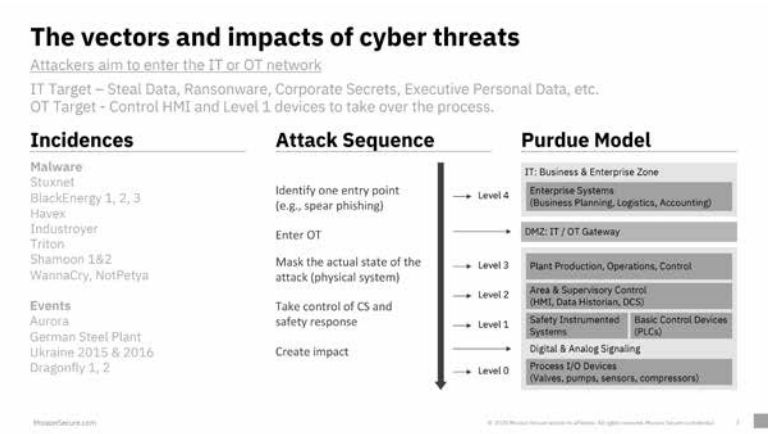

INTERNATIONAL GROUP OF P&I CLUBS
IGP&I
Summary:
UI represents a precedent for the IMO in terms of agreeing a UI on an IMO adopted liability and compensation regime
Almost a 6 year project from 2016 and the IG first raising concerns in the 1992 IOPC Fund Assembly to agreement of the UI wording in the IMO Assembly in December 2021
Represents an agreement of the State Parties to the 1992 CLC, 1976 LLMC Convention and 1996 LLMC Protocol present at the time of the IMO Assembly meeting
Will be taken as guidance for courts, States, insurers and shipowners in future cases when the owner's right to limit is tested, but Vienna Convention very important
Important that the UI is now widely promoted and well known amongst the legal industry

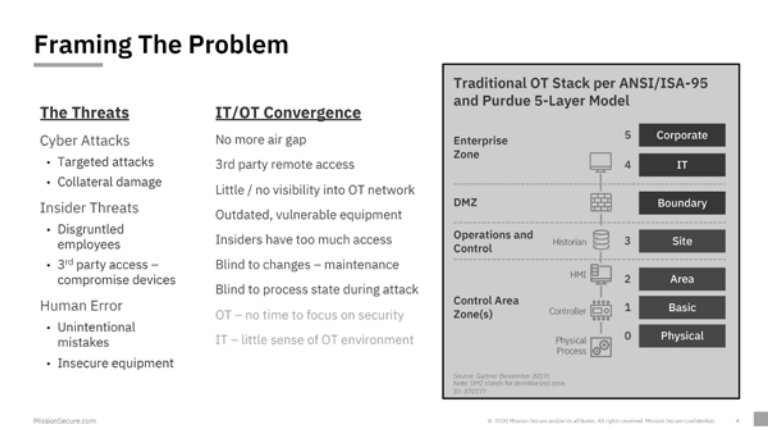

IGP&I
Thank you!
David Bolomini
International Group of P&I Clubs
IGP&I International Group of P&I Clubs

OT CYBER RISKS IN MARITIME-PROTECTING OT NETWORKS AND SAFEGUARDING OPERATIONS WITH A PATENTED OT CYBERSECURITY PLATFORM

Rick Tiene




The vectors and impacts of cyber threats
Attackers aim to enter the IT or OT network
IT Target – Steal Data, Ransonware, Corporate Secrets, Executive Personal Data, etc.
OT Target - Control HMI and Level 1 devices to take over the process.
Incidences
Malware
Stuxnet
BlackEnergy 1, 2, 3
Havex
Industroyer
Triton
Shamoon 1&2
WannaCry, NotPetya
Events
Aurora
German Steel Plant
Ukraine 2015 & 2016
Dragonfly 1, 2
Attack Sequence
Identify one entry point (e.g., spear phishing)
Enter OT
Mask the actual state of the attack (physical system)
Take control of CS and safety response
Create impact
Purdue Model
IT: Business & Enterprise Zone
Enterprise Systems (Business Planning, Logistics, Accounting)
DMZ: IT / OT Gateway
Level 4
Level 3
Level 2
Level 1
Level 0
Plant Production, Operations, Control
Area & Supervisory Control (HMI, Data Historian, DCS)
Safety Instrumented Systems
Basic Control Devices (PLCs)
Digital & Analog Signaling
Process I/O Devices (Valves, pumps, sensors, compressors)
MissionSecure.com


Framing The Problem
The Threats
Cyber Attacks
• Targeted attacks
• Collateral damage
Insider Threats
• Disgruntled employees
• 3rd party access – compromise devices
Human Error
• Unintentional mistakes
• Insecure equipment
IT/OT Convergence
No more air gap
3rd party remote access
Little / no visibility into OT network
Outdated, vulnerable equipment
Insiders have too much access
Blind to changes – maintenance
Blind to process state during attack
OT – no time to focus on security
IT – little sense of OT environment
Traditional OT Stack per ANSI/ISA-95 and Purdue 5-Layer Model
Enterprise Zone
DMZ
Operations and Control
Control Area Zone(s)
Historian
HMI
Controller
Physical Process
5 Corporate
4 IT
Boundary
3 Site
2 Area
1 Basic
0 Physical
MissionSecure.com


Vessel OT Cybersecurity Risks
MSI
Liquified natural gas (LNG) vessels and tankers combine the complexities of maritime, offshore, cryogenics and beyond with connectivity to onshore and third-party vendors, suppliers and contractors.
Cybersecurity Vulnerabilities
No clear understanding of all systems and devices on the OT network across a fleet or operation
A lack of visibility into each vessel's OT network
No real-time monitoring or segmentation of the OT network
Inadvertently connected IT and OT networks
24/7 remote access granted to third-party OEMs
No visibility into OEM's networks (black box)
Poor physical security controls
Lack of cyber awareness among the crew, employees and contractors
Potential Cybersecurity Attacks
An attack on an OEM network or third-party supplier spreads to their client's on-vessel OT network
Infected USB drive plugged into the IT/OT network
Exploiting cyber vulnerabilities grants access to a vessel's OT network with various attack options:
GPS/navigation system attack
Open/close critical valves
Propulsion and steering control
Ballast control
Ransomware
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tiene@MissionSecure.com
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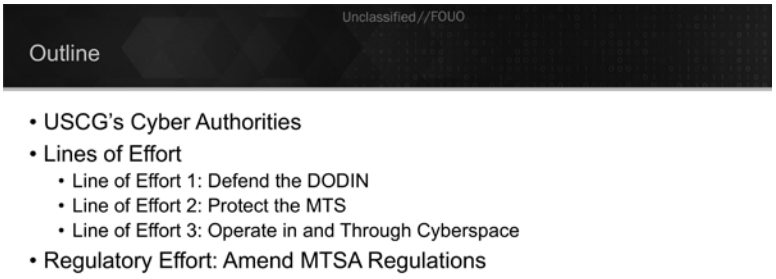
www.missionsecure.com

CYBERSPACE REGULATION

Lars T. Okmark



Unclassified//FOUO

Cyber Authorities

The USCG has broad law enforcement and regulatory authority that apply to all threats and all hazards, including cyber.

- Limitations:
  - Geography (Jurisdiction)
  - The 4th Amendment
- Partners: DOD, NSA, CIA, and CISA have cyber authorities that are generally broader and more flexible in the cyber domain.

3

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Lines of Effort

	LOE 1: Defend the DODIN	LOE 2: Protect the MTS	LOE 3: Operate in & Through Cyberspace
Constitution	POTUS C-in-C	Interstate Commerce 4th Amendment	POTUS C-in-C 4th Amendment
International Law	Law of Armed Conflict	IMO / ISPS	Law of Armed Conflict
Statutory Law	FISMA	MTSA, PWSA, Magnuson	10 U.S.C. § 394
Executive Orders & Presidential Directives	EO 14028 / NSM-8	PPD-21, PPD-41, PPD-44 *Proposed Magnuson EO*	Classified
Regulatory Law	N/A	33 C.F.R. Parts 6, 104-106 *Draft MTSA Rule*	Classified
Policy	2017 DoD-DHS MOU	NVIC 01-20, 5P PL 08-16	Classified

4

Unclassified//FOUO

LOE 2: Protect the MTS

- Most complex and sensitive part of the portfolio
  - Requires collaboration with CG legal, cyber, & HQ offices
- Maritime Transportation Security Act of 2002 (MTSA)
  - 46 U.S.C. Ch. 701 & 703
- Ports and Waterways Safety Act of 1972 (PWSA)
  - 46 U.S.C. Ch. 700
- Magnuson Act (National Security)
  - 46 U.S.C. § 70051
  - History: Espionage Act of 1917
- Policy
  - NVIC 01-20
  - 5P Policy Letter 08-16
  - CVC-WI-027 (Vessel SMS)

Other Key Statutes

- Cybersecurity Information Sharing Act of 2015 (CISA 2015)
- Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA)

5

Unclassified

Maritime Cyber Authorities

- Statutory Authority
  - 46 U.S.C. 70102 - United States facility and vessel vulnerability assessments
    - Identify weakness in cybersecurity risks
  - 46 U.S.C. 70103 - Maritime transportation security plans
    - Vessel and facility must submit security plans addressing detecting, responding to, and recovering from cybersecurity risks
  - 46 U.S.C. 70116 - Port, harbor, and coastal facility security
    - Prevention and response to cyber incidents; USCG may,
      - Inspect vessel or facility, establish safety/security zones, require contingency plans and procedures
  - 46 U.S.C. 70051 - Regulation of anchorage and movement of vessels during national emergency
    - National emergency exists by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance

6

Unclassified

Regulatory Authority

- 33 CFR part 6 - Protection and Security of Vessels, Harbors, and Waterfront Facilities (national security)
- 33 CFR part 101- Maritime Security: General
  - 101.305 – Reporting of Transportation Security Incidents, Breaches of Security, and Suspicious Activity
  - 101.405 – Issuance of Maritime Security (MARSEC) Directives
- 33 CFR part 104 - Maritime Security: Vessels
  - 104.305 – Vessel Security Assessment; Radio and telecommunication systems, including computer systems and networks
  - 104.400, .405 – Vessel Security Plan
- 33 CFR part 105 – Maritime Security; Facilities
  - 105.305 – Facility Security Assessment…
  - 105.400, 405 – Facility Security Plan
- 33 CFR part 160 – Ports and Waterways Safety
  - 160.216 – Hazardous condition

7

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Regulatory Effort: Amend MTSA Regulations

Notice of Proposed Rulemaking (NPRM); Unified Agenda 1625-AC77

- Background: USCG seeks to update its maritime security regulations by adding cybersecurity requirements to existing Maritime Security regulations. This proposed rulemaking is part of an ongoing effort to address emerging cybersecurity risks and threats to maritime security by including additional security requirements to safeguard the marine transportation system.
- General Content:
  - Scope: U.S. vessels & facilities
  - Cybersecurity Officer (CySO)
  - Cybersecurity Assessments & Plans
  - Security Measures & training
  - Supply Chain Risk Management
  - Timeline and Waivers

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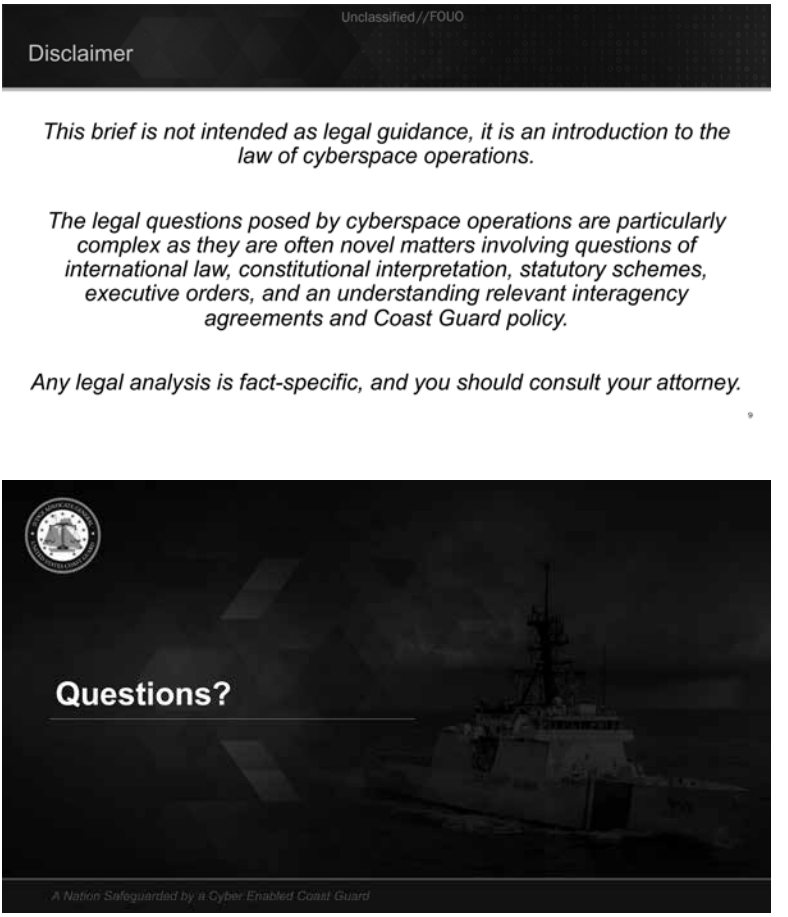
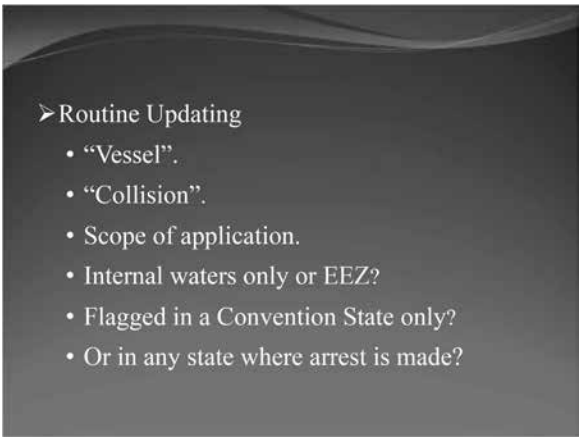
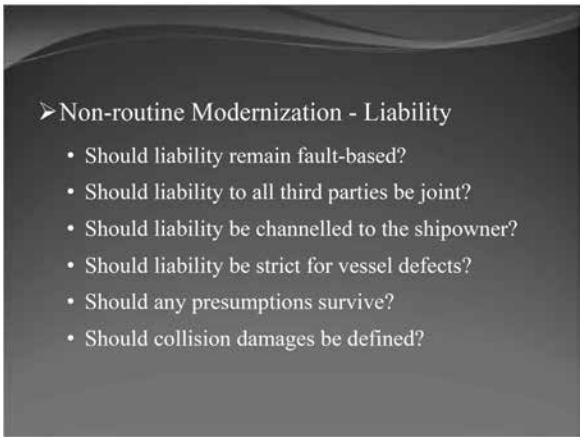

Unclassified//FOUO
Disclaimer
This brief is not intended as legal guidance, it is an introduction to the law of cyberspace operations.
The legal questions posed by cyberspace operations are particularly complex as they are often novel matters involving questions of international law, constitutional interpretation, statutory schemes, executive orders, and an understanding relevant interagency agreements and Coast Guard policy.
Any legal analysis is fact-specific, and you should consult your attorney.
Questions?
A Nation Safeguarded by a Cyber Enabled Coast Guard

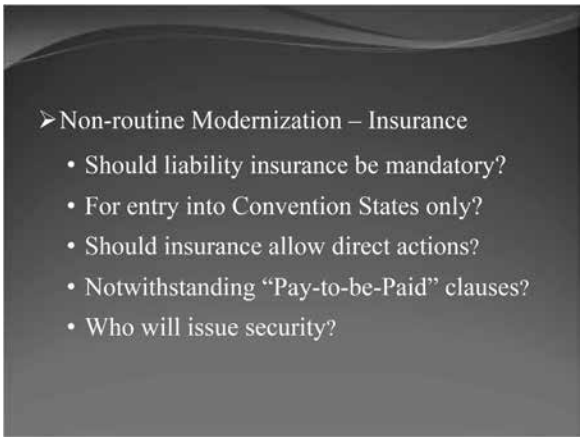
THE COLLISION CONVENTION 1910 – IS CMI'S OLDEST CONVENTION IN NEED OF MODERNIZATION

John O'Connor




➢Modernization of Application
• The Convention v. international private law.
• A jurisdiction clause even for the EU?
• A regional economic integration clause?
• Recognition and enforcement provisions?
• Even from a non-party state court?
• What about contractual relations with cargo?

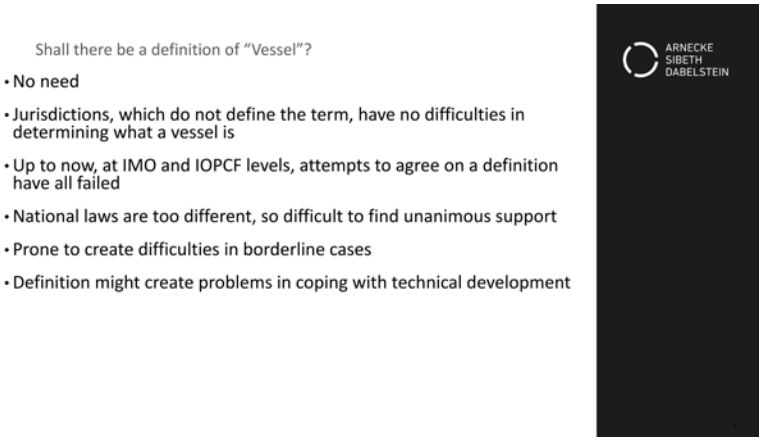

➢Non-routine Modernization - Liability
• Should liability remain fault-based?
• Should liability to all third parties be joint?
• Should liability be channelled to the shipowner?
• Should liability be strict for vessel defects?
• Should any presumptions survive?
• Should collision damages be defined?

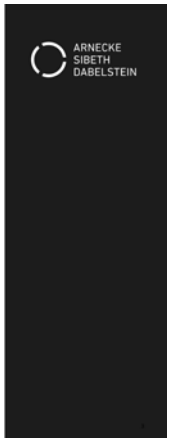

➢Non-routine Modernization – Insurance
• Should liability insurance be mandatory?
• For entry into Convention States only?
• Should insurance allow direct actions?
• Notwithstanding "Pay-to-be-Paid" clauses?
• Who will issue security?

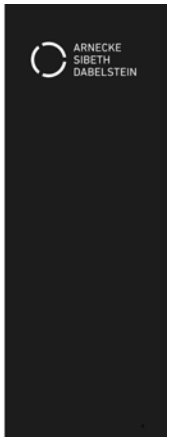

➢The Way Ahead
• The CMI's International Working Group.
• A draft text or draft protocol.
• The CMI Executive Council.
• The CMI Assembly.
• The IMO or other organization.

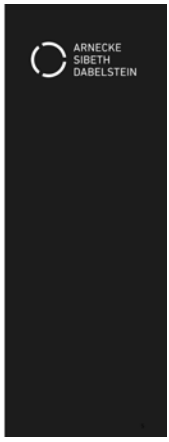
THE COLLISION CONVENTION 1910 – IS CMI'S OLDEST CONVENTION IN NEED OF MODERNIZATION? – THE CONS

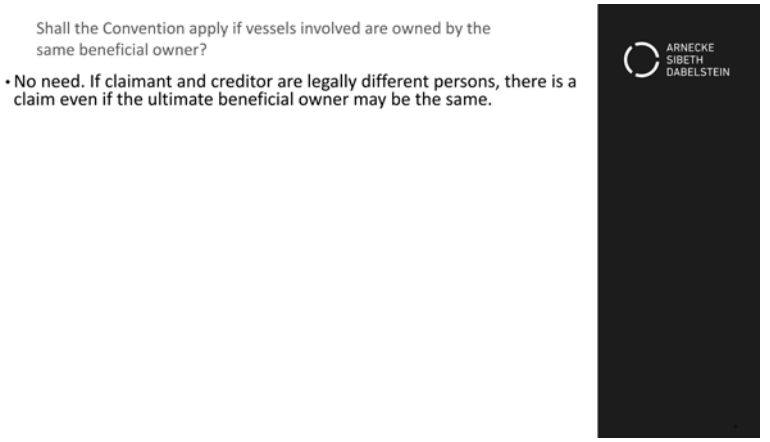
Dieter Schwampe

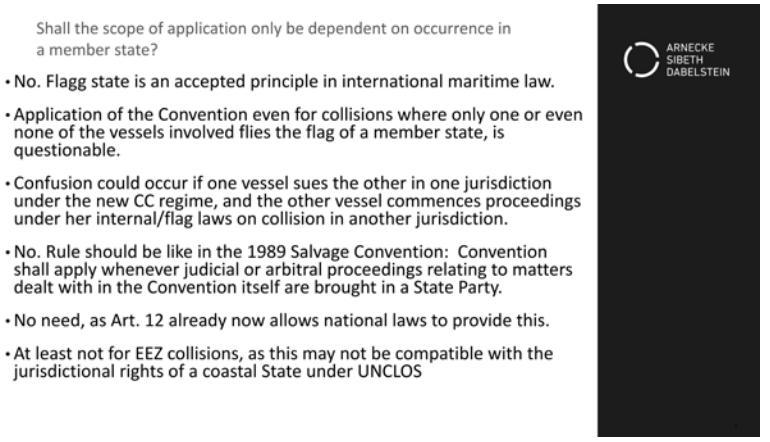


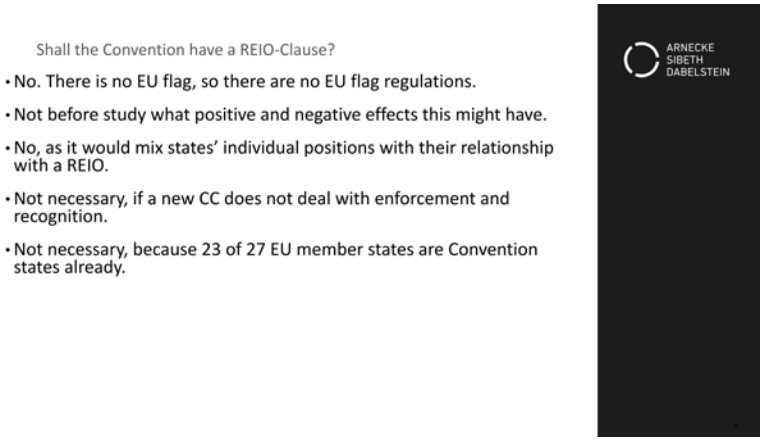

Sall the Convention be applicable to any collision between vessels?
• This is a domestic issue
• Convention states should remain free to regulate this as they like
• Already now states can adopt the Convention principles for inland vessel collisions
• Conflict with other legal regimes
• Differences in regulations and standards between sea-going vessels and inland navigation vessels
• Potential impact on the liability and compensation regimes in different jurisdictions, current legal regulations on the collision of vessels of inland navigation
• Would bear the risk of less acceptance of w revised Convention
ARNECKE SIBETH DABELSTEIN

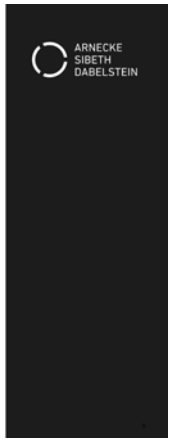

Shall there be a definition of "Collision"?
• No need, as Art. 13 of the Convention includes non-contact-damage. That is sufficient
• Other conventions (1952 Arrest Convention) uses the term without definition, which has not created a problem.
• No need, as term is generally understood.
• In the more than 100 years of the Convention there never appeared the need for a definition
• No need, as Art. 1 of the Convention already includes a brief "notion" of collision when referring to an impact, causing damage, occurred between ocean-going vessels, two or more, or between those and inland navigation crafts. This is sufficient.
• No serious requirement due to the "collision" concept's non-complexity
ARNECKE SIBETH DABELSTEIN

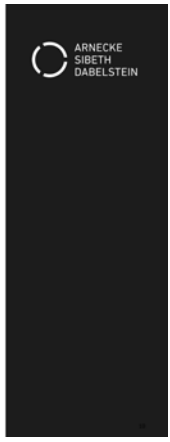

Shall the Convention apply to vessels in towage situation?
• Not between tug and two, as this is subject to contractual agreements
• No, as in many jurisdictions tug and tow are considered one unit
ARNECKE SIBETH DABELSTEIN

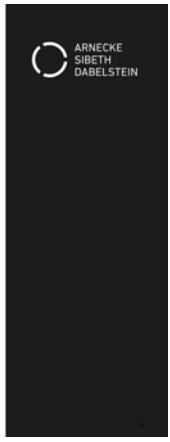

Shall the Convention apply if vessels involved are owned by the same beneficial owner?
• No need. If claimant and creditor are legally different persons, there is a claim even if the ultimate beneficial owner may be the same.
ARNECKE SIBETH DABELSTEIN

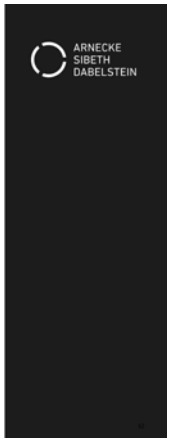

Shall the scope of application only be dependent on occurrence in a member state?
• No. Flagg state is an accepted principle in international maritime law.
• Application of the Convention even for collisions where only one or even none of the vessels involved flies the flag of a member state, is questionable.
• Confusion could occur if one vessel sues the other in one jurisdiction under the new CC regime, and the other vessel commences proceedings under her internal/flag laws on collision in another jurisdiction.
• No. Rule should be like in the 1989 Salvage Convention: Convention shall apply whenever judicial or arbitral proceedings relating to matters dealt with in the Convention itself are brought in a State Party.
• No need, as Art. 12 already now allows national laws to provide this.
• At least not for EEZ collisions, as this may not be compatible with the jurisdictional rights of a coastal State under UNCLOS
ARNECKE SIBETH DABELSTEIN


Shall the Convention have a REIO-Clause?
• No. There is no EU flag, so there are no EU flag regulations.
• Not before study what positive and negative effects this might have.
• No, as it would mix states' individual positions with their relationship with a REIO.
• Not necessary, if a new CC does not deal with enforcement and recognition.
• Not necessary, because 23 of 27 EU member states are Convention states already.
ARNECKE SIBETH DABELSTEIN


ARNECKE
SIBETH
DABELSTEIN
Shall there be no-fault liability?
• Other conventions providing for n-fault liability (like CLC and Fund) are public policy instruments. The concept cannot be transferred to private property claims in a collision scenario. Regarding loss of life/personal injury, passengers and seamen are properly protected by the Athens Convention and the Maritime Labor Code
• No-fault liability would be an obstacle to ratification for many current member states.
• No convincing arguments why no-fault liability should be necessary.
• Apportionment of liability on basis of respective fault is a main principle of the Convention. No-fault liability would inconsistent with this.
• May be different in respect of MASS


ARNECKE
SIBETH
DABELSTEIN
Shall there be a determination whose fault is required??
• No need. Current reference to fault of the vessel has proven sufficient.
• If the Convention specified the person, the claimant would have to prove this, but may not have access to the information required.
• Specification of who must be at fault could narrow the application of the Convention


ARNECKE
SIBETH
DABELSTEIN
Shall there be a determination who has the right to bring suit?
• No need. Current system works.
• No, this could limit the application of the Convention.
• No, this could be an obstacle for ratification.
• No. There may be various parties who should be entitled to pursue their claims.
• No, this should be left to national law.


Shall liability be channeled to the owner only?
• No need. Current system works.
• No reasonable ground why channeling should be introduced.
• No reason why a person at fault and subject to tort liability should be released from such liability because it is channeled to the owner.
• Collision claims being substantially tort claims, any limitation of those who have a right to bring suit would be problematic and against the general tort concepts which have no such limitation.
• No, this could limit the application of the Convention.
• Channeling of liability is a concept for public interest no-fault conventions. It has no place in the area of collision liability.
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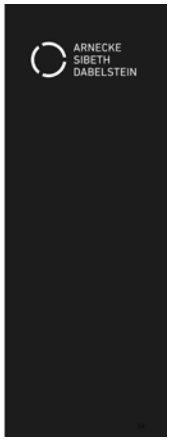
Shall there be joint liability for property damage?
• No. No compelling need.
• Separate liability is in line with the error in navigation defence. Joint liability would disturb this.
• No. If it were introduced, "both to blame collision clauses" would wipe out the effect anyhow.
• Joint liability could lead to attempts to circumvent limitation under LLMC.
• No need, as property usually is insured.
• Other conventions provide for joint liability only in the area of public interest. Property claims are no such claims.
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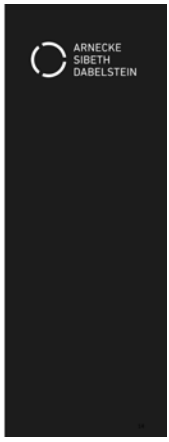
Shall the Convention include damage to property not on board?
• No. This should be left to national law.
• No compelling need for the Convention to deal with it.
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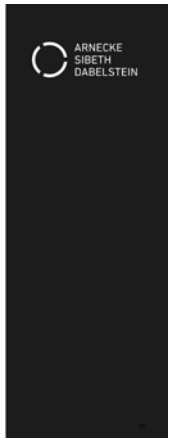
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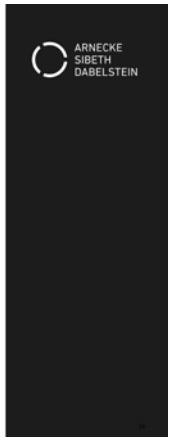
Shall there be strict liability for damage by defective vessels?
• No, should remain completely fault-based.
• No, that goes too far. Perhaps define defects, which lead to liability.
• No. In particular it would be difficult to define what is a defect.
• No. No-fault liability for defects would be in contradiction with fault-based liability under the Hague-Visby-Rules.
• Also in respect of defective vessels, liability should require fault of the owner in respect of the defect.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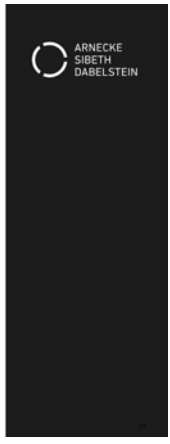
DABELSTEIN
Shall there be rules on presumptions?
• It would be difficult and time-consuming to find out what presumptions are internationally accepted and how they deviate from local rules.
• It is just impossible to do so.
• Such rules might prevent wide acceptance of a revised Convention.
• Presumptions are a procedural aspect and should be subject to the lex fori.
• There is no evidence why there should be a need for such rules. The system is working well.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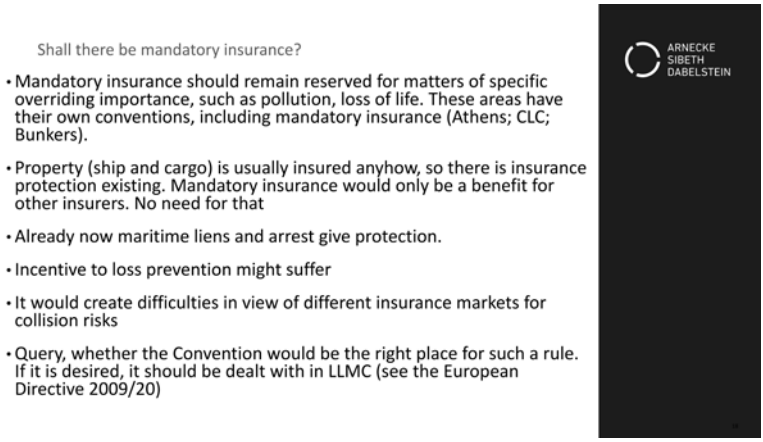
DABELSTEIN
Shall there be rules on recoverable damage?
• Not, if there is strong opposition.
• No need, as the current system based on national laws is working.
• Such rules could create conflicts with different national legal systems.
• National rules on damages differ significantly. If the Convention contained own rules, it might not be accepted by many states.
• In any event, the particulars listed in the Lisbon Rules are too detailed.
• If such rules are incorporated, at least moral damages should be left out and remain subject to national applicable laws.


Shall there be mandatory insurance?
• Mandatory insurance should remain reserved for matters of specific overriding importance, such as pollution, loss of life. These areas have their own conventions, including mandatory insurance (Athens; CLC; Bunkers).
• Property (ship and cargo) is usually insured anyhow, so there is insurance protection existing. Mandatory insurance would only be a benefit for other insurers. No need for that
• Already now maritime liens and arrest give protection.
• Incentive to loss prevention might suffer
• It would create difficulties in view of different insurance markets for collision risks
• Query, whether the Convention would be the right place for such a rule. If it is desired, it should be dealt with in LLMC (see the European Directive 2009/20)
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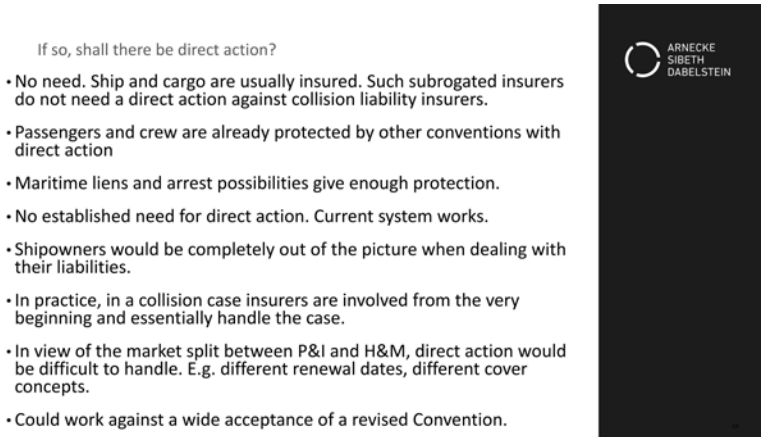
If so, shall there be direct action?
• No need. Ship and cargo are usually insured. Such subrogated insurers do not need a direct action against collision liability insurers.
• Passengers and crew are already protected by other conventions with direct action
• Maritime liens and arrest possibilities give enough protection.
• No established need for direct action. Current system works.
• Shipowners would be completely out of the picture when dealing with their liabilities.
• In practice, in a collision case insurers are involved from the very beginning and essentially handle the case.
• In view of the market split between P&I and H&M, direct action would be difficult to handle. E.g. different renewal dates, different cover concepts.
• Could work against a wide acceptance of a revised Convention.
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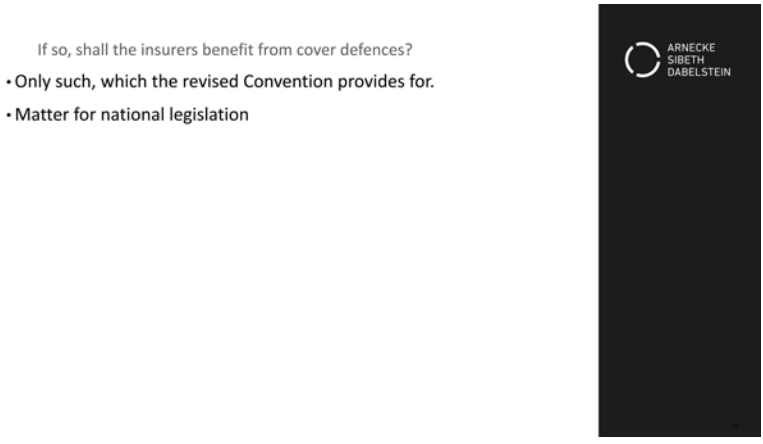
If so, shall the insurers benefit from cover defences?
• Only such, which the revised Convention provides for.
• Matter for national legislation
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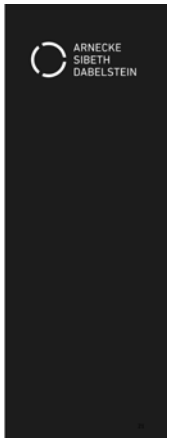
Shall there be private international law rules on the applicable law?
• Not necessary, current system works.
• Purpose of the Convention is to harmonize "certain rules"!, not tp provide a complete regulation.
• Probably will not find enough support and prevent wide acceptance of a revised Convention.
• With EU, the Rome II Regulation is in force. EU states have no own competence.
• CMI Rio 1977 draft convention contains such rules, but did not get in force.
• Rules like Art. 4 of the CMI Rio 1977 draft convention ("law of the court") leads to an unwanted "race to the court".
• Applicable law will anyhow mostly be agreed between the parties to the dispute.
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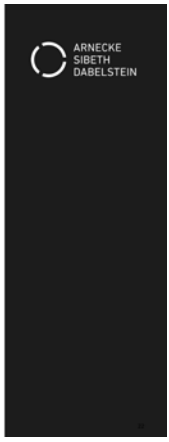
shall there be rules on jurisdiction?
• Not necessary, Rules of the 1952 Convention suffice.
• Revised Convention should njot be in conflict with the 1952 Convention
• Purpose of the Convention is to harmonize "certain rules", not to provide a complete regulation.
• Probably will not find enough support and prevent wide acceptance of a revised Convention.
• With EU, the Brussels Regulation is in force. EU states have no own competence.
• Jurisdiction will anyhow mostly be agreed between the parties to the dispute.
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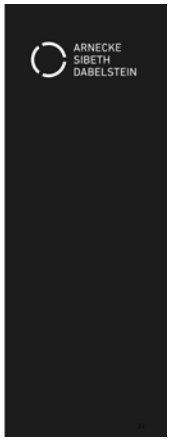
Shall there be rules on recognition and enforcement?
• No need, as probably all jurisdictions will have their own rules in this respect.
• Any rules on this should, if at all, become rules of the 1952 Convention.
• Conventions containing such rules are such of public interest. This is not the case with collision liability.
• Liability is usually insured, and insurers will usually honor a judgment.
• Probably will not find enough support and prevent wide acceptance of a revised Convention.
• Such rules would likely be in conflict with EU legislation. EU states have no own competence.
• Guarantees provided by insurers will usually deal with this as well.
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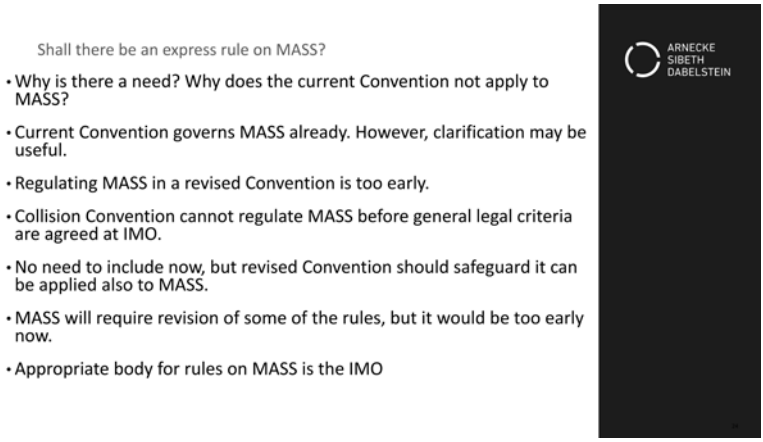
Shall there be an express rule on MASS?
• Why is there a need? Why does the current Convention not apply to MASS?
• Current Convention governs MASS already. However, clarification may be useful.
• Regulating MASS in a revised Convention is too early.
• Collision Convention cannot regulate MASS before general legal criteria are agreed at IMO.
• No need to include now, but revised Convention should safeguard it can be applied also to MASS.
• MASS will require revision of some of the rules, but it would be too early now.
• Appropriate body for rules on MASS is the IMO
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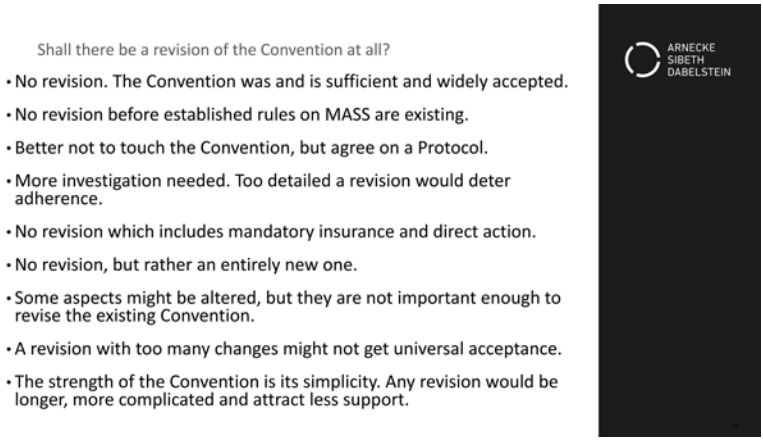
Shall there be a revision of the Convention at all?
• No revision. The Convention was and is sufficient and widely accepted.
• No revision before established rules on MASS are existing.
• Better not to touch the Convention, but agree on a Protocol.
• More investigation needed. Too detailed a revision would deter adherence.
• No revision which includes mandatory insurance and direct action.
• No revision, but rather an entirely new one.
• Some aspects might be altered, but they are not important enough to revise the existing Convention.
• A revision with too many changes might not get universal acceptance.
• The strength of the Convention is its simplicity. Any revision would be longer, more complicated and attract less support.
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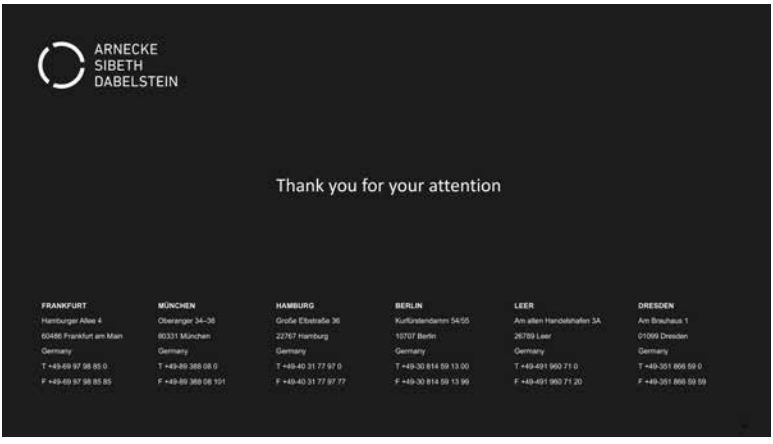
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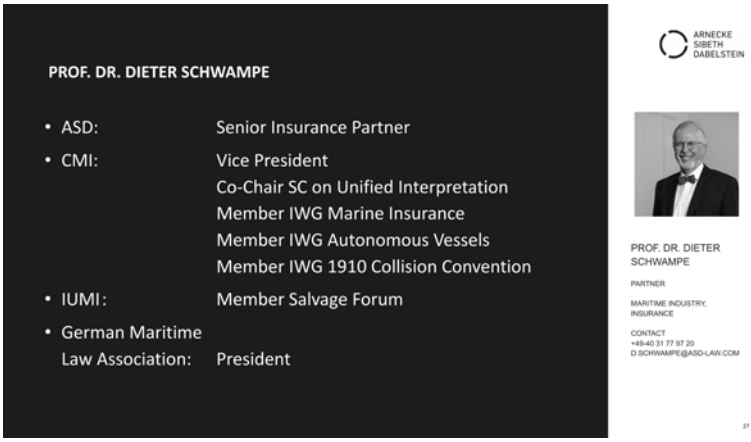
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Member IWG Autonomous Vessels
Member IWG 1910 Collision Convention
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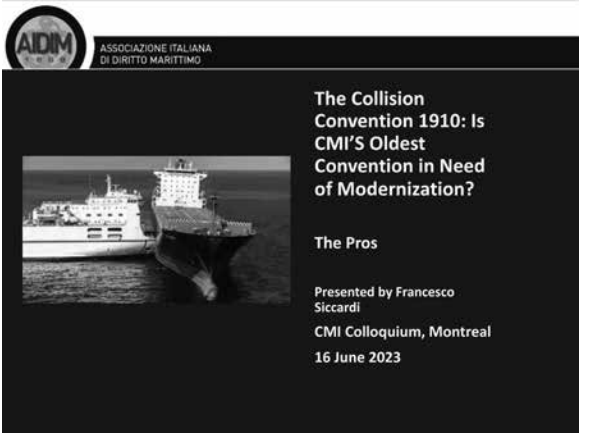
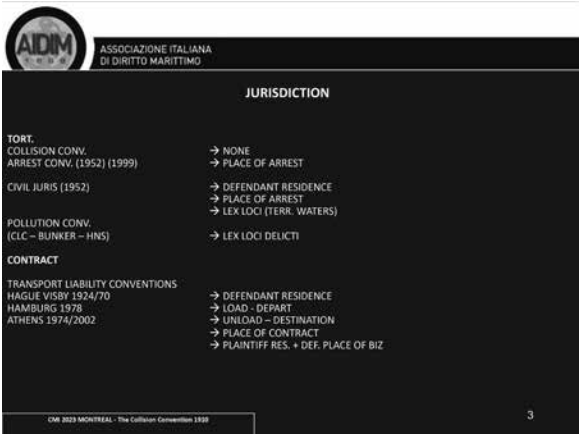
27

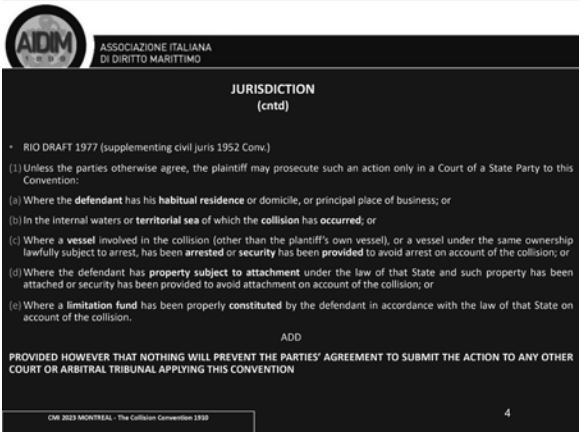
THE COLLISION CONVENTION 1910 – IS CMI'S OLDEST CONVENTION IN NEED OF MODERNIZATION? – THE PROS

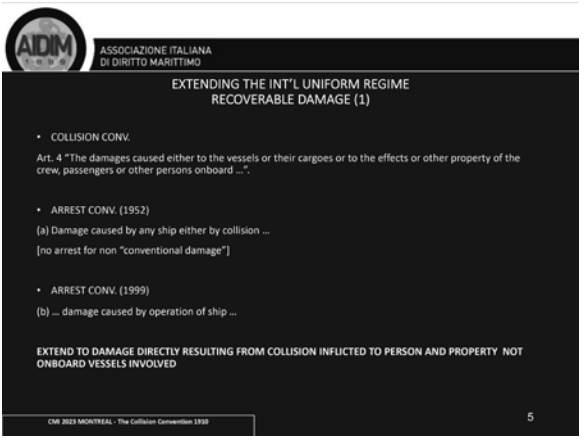
Francesco Siccardi

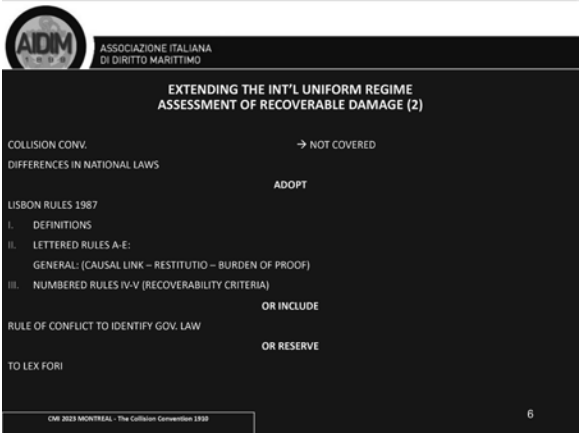



ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
SCOPE OF APPLICATION
COLLISION CONVENTION → NONE
BUT → Article 14
Any one of the High Contracting Parties shall have the right, three years after this Convention comes into force, to call for a fresh conference with a view to possible amendments therein, and particularly with a view to extend, if possible, the sphere of its application.
Any Power exercising this right must notify its intention to the other Powers, through the Belgian Government, which will make arrangements for convening the conference within six monts.
ARREST CONV. (1952) → FLAG
CIVIL JURIS (1952) → FLAG
POLLUTION CONV.
(CLC – BUNKER – HNS) → LEX LOCI DELICTI
«NEW» CONVENTIONS
(LLMC – SALVAGE – ARREST '99) → JURISDICTION IN STATE PARTY
FLAG RULE ABANDONED CURRENT RULE:
... WHENEVER CIVIL OR ARBITRAL PROCEEDINGS RELATING TO MATTERS DEALT WITH IN THIS CONV. ARE BROUGHT IN A STATE PARTY (SALVAGE 1989 ART. 2)
CMI 2023 MONTREAL - The Collision Convention 1910
2

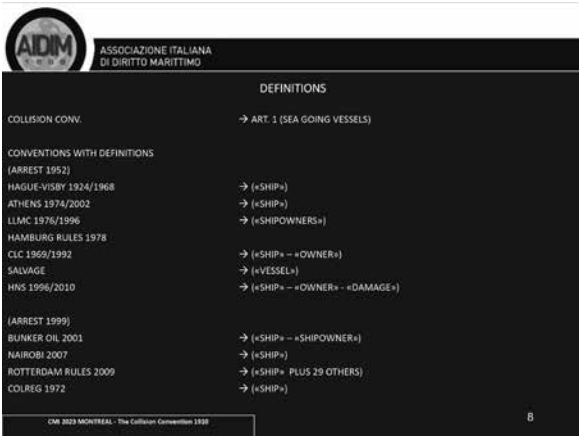

ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
JURISDICTION
TORT.
COLLISION CONV. → NONE
ARREST CONV. (1952) (1999) → PLACE OF ARREST
CIVIL JURIS (1952) → DEFENDANT RESIDENCE
→ PLACE OF ARREST
→ LEX LOCI (TERR. WATERS)
POLLUTION CONV.
(CLC – BUNKER – HNS) → LEX LOCI DELICTI
CONTRACT
TRANSPORT LIABILITY CONVENTIONS
HAGUE VISBY 1924/70 → DEFENDANT RESIDENCE
HAMBURG 1978 → LOAD - DEPART
ATHENS 1974/2002 → UNLOAD – DESTINATION
→ PLACE OF CONTRACT
→ PLAINTIFF RES. + DEF. PLACE OF BIZ
CMI 2023 MONTREAL - The Collision Convention 1910
3


ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
JURISDICTION
(cntd)
• RIO DRAFT 1977 (supplementing civil juris 1952 Conv.)
(1) Unless the parties otherwise agree, the plaintiff may prosecute such an action only in a Court of a State Party to this Convention:
(a) Where the defendant has his habitual residence or domicile, or principal place of business; or
(b) In the internal waters or territorial sea of which the collision has occurred; or
(c) Where a vessel involved in the collision (other than the plantiff's own vessel), or a vessel under the same ownership lawfully subject to arrest, has been arrested or security has been provided to avoid arrest on account of the collision; or
(d) Where the defendant has property subject to attachment under the law of that State and such property has been attached or security has been provided to avoid attachment on account of the collision; or
(e) Where a limitation fund has been properly constituted by the defendant in accordance with the law of that State on account of the collision.
ADD
PROVIDED HOWEVER THAT NOTHING WILL PREVENT THE PARTIES' AGREEMENT TO SUBMIT THE ACTION TO ANY OTHER COURT OR ARBITRAL TRIBUNAL APPLYING THIS CONVENTION
CMI 2023 MONTREAL - The Collision Convention 1910
4


ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
EXTENDING THE INT'L UNIFORM REGIME
RECOVERABLE DAMAGE (1)
• COLLISION CONV.
Art. 4 "The damages caused either to the vessels or their cargoes or to the effects or other property of the crew, passengers or other persons onboard ...".
• ARREST CONV. (1952)
(a) Damage caused by any ship either by collision ...
[no arrest for non "conventional damage"]
• ARREST CONV. (1999)
(b) ... damage caused by operation of ship ...
EXTEND TO DAMAGE DIRECTLY RESULTING FROM COLLISION INFLICTED TO PERSON AND PROPERTY NOT ONBOARD VESSELS INVOLVED
CMI 2023 MONTREAL - The Collision Convention 1910
5


ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
EXTENDING THE INT'L UNIFORM REGIME
ASSESSMENT OF RECOVERABLE DAMAGE (2)
COLLISION CONV. → NOT COVERED
DIFFERENCES IN NATIONAL LAWS
ADOPT
LISBON RULES 1987
I. DEFINITIONS
II. LETTERED RULES A-E:
GENERAL: (CAUSAL LINK – RESTITUTIO – BURDEN OF PROOF)
III. NUMBERED RULES IV-V (RECOVERABILITY CRITERIA)
OR INCLUDE
RULE OF CONFLICT TO IDENTIFY GOV. LAW
OR RESERVE
TO LEX FORI
CMI 2023 MONTREAL - The Collision Convention 1910
6


ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
IDENTIFYING GOVERNING
LAW FOR SPECIFIC MATTERS
COLLISION CONV. → NOT COVERED
RIO DRAFT 1977
Art. 4 (governing law)
Internal/territ. Waters → Law of the STATE
Beyond/territ. Waters → Law of the COURT
(except for same FLAG VESSELS)
Art. 5 (matters governed)
Basis of liability
grounds for exemption
Kind of damage recoverable (LISBON)
Quantum of damage (LISBON)
Title to claim (LISBON)
Burden of proof (LISBON)
Prescription
CMI 2023 MONTREAL - The Collision Convention 1910
7


ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
DEFINITIONS
COLLISION CONV. → ART. 1 (SEA GOING VESSELS)
CONVENTIONS WITH DEFINITIONS
(ARREST 1952)
HAGUE-VISBY 1924/1968 → («SHIP»)
ATHENS 1974/2002 → («SHIP»)
LLMC 1976/1996 → («SHIPOWNERS»)
HAMBURG RULES 1978
CLC 1969/1992 → («SHIP» – «OWNER»)
SALVAGE → («VESSEL»)
HNS 1996/2010 → («SHIP» – «OWNER» - «DAMAGE»)
(ARREST 1999)
BUNKER OIL 2001 → («SHIP» – «SHIPOWNER»)
NAIROBI 2007 → («SHIP»)
ROTTERDAM RULES 2009 → («SHIP» PLUS 29 OTHERS)
COLREG 1972 → («SHIP»)
CMI 2023 MONTREAL - The Collision Convention 1910
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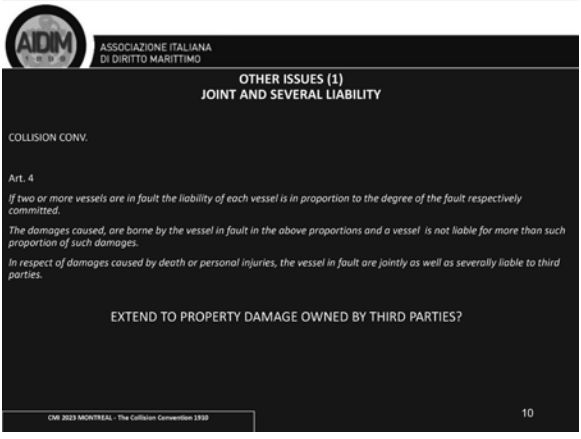
ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
DEFINITIONS (cntd)
DEFINE ? VESSEL (ColReg?)
DEFINE EXTEND SCOPE ? COLLISION
DEFINE – IDENTIFY ? (PERSON(S) LIABLE
CMI 2023 MONTREAL - The Collision Convention 1910
9


ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
OTHER ISSUES (1)
JOINT AND SEVERAL LIABILITY
COLLISION CONV.
Art. 4
If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the fault respectively committed.
The damages caused, are borne by the vessel in fault in the above proportions and a vessel is not liable for more than such proportion of such damages.
In respect of damages caused by death or personal injuries, the vessel in fault are jointly as well as severally liable to third parties.
EXTEND TO PROPERTY DAMAGE OWNED BY THIRD PARTIES?
CMI 2023 MONTREAL - The Collision Convention 1910
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ASSOCIAZIONE ITALIANA
DI DIRITTO MARITTIMO
OTHER ISSUES (2)
COMPULSORY INSURANCE DIRECT ACTION
CONVENTIONS ADOPTING REGIME
1. CLC 1969/1992
2. ATHENS 1974/2002
3. HNS 1996/2010
4. BUNKER 2001
5. NAIROBI 2007
IS THE REGIME JUSTIFIED BY REASONS OF PUBLIC POLICY, IN PARTICULAR AS PROTECTION OF THE GENERAL PUBLIC IN THE EVENT OF POTENTIALLY CATASTROPHIC EVENTS??
ARE CURRENT INT'L INSTRUMENTS ALREADY ANSWERING THIS ISSUE?
CMI 2023 MONTREAL - The Collision Convention 1910
11

THE CRIMINAL LIABILITY OF THE MASTER IN FRENCH LAW: THE AZURA CASE

Gaël Piette

La responsabilité pénale du capitaine: le cas de l'*Azura*
The criminal liability of the Master in French Law: the Azura case

Gaël PIETTE

CMI, Montréal, 16 juin 2023
CMI, Montreal, June 16, 2023

Les faits / Facts

⚓ *Azura*: Paquebot (Carnival) battant pavillon des Bermudes	⚓ *Azura*: Cruise ship (Carnival) flying the Bermuda flag
⚓ 28 mars 2018: approvisionnement en carburant à Barcelone	⚓ March 28, 2018: bunkering in Barcelona
⚓ 29 mars 2018: escale à Marseille	⚓ March 29, 2018: call in Marseille
⚓ Contrôle par le Centre de sécurité des navires	⚓ Control by the Center for Ships' security
⚓ Taux de soufre du carburant: 1,68% (au lieu de 1,5%)	⚓ Sulphur Content of fuel oil: 1.68% (instead of 1.5%)

Le contexte juridique / Legal framework

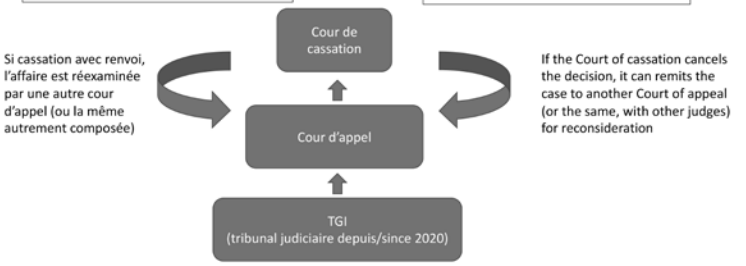
- Au moment de l'incident: réglementation OMI (ann. VI MARPOL) pas encore en vigueur
- Mais Directive UE 11 mai 2016, art. 6.5:
- Taux de soufre maximum de **1,50%** pour les navires à passagers assurant des services réguliers à destination ou en provenance de ports d'un Etat membre de l'Union européenne.

- At the time of the incident: IMO regulations (ann. VI MARPOL) not yet entered into force
- But Directive EU May 11, 2016, art. 6.5:
- Maximal Sulphur content: **1.50%** for passenger ships operating on regular services to or from any European Union port

La procédure / Proceedings

Rappel de l'organisation judiciaire française:

Reminder about judiciary of France:



La procédure / Proceedings

Tribunal de Marseille, 26 nov 2018:

- Condamne le capitaine à une amende de 100 000 euros (dont 80% à la charge de l'armateur).
- En application des dispositions de l'art. L 5412-2 alinéa 2 du Code des Transports, le capitaine « répond de toute faute commise dans l'exercice de ses fonctions ».
- « il est le chef de l'expédition maritime »
- « il est maître de décider du combustible à utiliser notamment au regard des diverses législations qu'il ne peut que connaître au regard de ses fonctions, ses compétences et de sa responsabilité »
- « le capitaine avait une autorité suprême sur son navire, et pouvait notamment à tout moment intervenir sur le combustible à consommer ».

Marseille Court, Nov 26, 2018

- The Master was found guilty and fined €100,000 (80% of which was put upon shipowner)
- in accordance with the provisions of art. L 5412-2 paragraph 2 of the Transport Code, the Master is liable for all faults committed in the performance of his duties.
- he is the head of the maritime expedition.
- he is in control of the decision on the fuel to be used, particularly with regard to the various legislations which he must know in consideration of his duties, his skills and his responsibility.
- the captain had supreme authority over his ship, and could, in particular, intervene at any time on the fuel to be consumed.

La procédure / Proceedings

Cour d'appel, Aix en Provence, 12 nov 2019	**Court of Appeal, Aix en Provence, Nov 12, 2019**
⚓ Réforme le jugement et relaxe le capitaine:	⚓ Overturned the judgment and acquitted the Master:
⚓ Le capitaine «qui suivait les instructions de sa compagnie pouvait légitimement penser que celles-ci étaient conformes à la réglementation. Aussi, l'élément intentionnel de l'infraction qui lui est reprochée fait défaut ».	⚓ The Master who was following the instructions of his company could legitimately believe that these were in accordance with the regulations. Therefore, the criminal intent of the offence with which he is charged is lacking.

La procédure / Proceedings

Cour de cassation, chambre criminelle, 24 nov 2020	**Court of cassation, criminal division, Nov 24, 2020**
⚓ Casse l'arrêt de la CA Aix	⚓ Cancelled the decision of the CA Aix
⚓ « le capitaine, garant de la sécurité du navire et de son équipage, de la protection de l'environnement et de la sûreté, et tenu personnellement à ce titre de connaître et de faire respecter les règles relatives à la pollution par les rejets des navires, devait s'assurer de la conformité à la législation du combustible utilisé »	⚓ the Master, who is responsible for the safety of the ship and her crew, the protection of the environment and security, and as such is personally responsible for knowing and ensuring compliance with the rules on pollution from ships' discharges, should ensure that the fuel used complies with the legislation
⚓ Renvoie devant la CA de Rennes	⚓ Remitted the case to the Court of appeal of Rennes for reconsideration

La procédure / Proceedings

Cour d'appel, Rennes, 6 oct 2021	**Court of Appeal, Rennes, Oct 6, 2021**
⚓ Confirmation du jugement de Marseille, et condamnation du capitaine	⚓ Confirmed the judgement of Marseille, and condemned the Master
⚓ « en sa qualité de capitaine du navire *Azura*, en ne s'assurant pas des règles relatives à la pollution par les rejets des navires dans les eaux territoriales françaises et en ne faisant pas respecter ces règles, le capitaine a commis une faute caractérisée exposant l'environnement à un risque d'une particulière gravité qu'il ne pouvait ignorer, les effets du soufre sur la santé humaine étant connus ».	⚓ In his capacity as Master of the vessel *Azura*, by not ensuring compliance with the rules relating to ships pollution in French territorial waters and by not enforcing these rules, the Master committed a serious fault exposing the environment to a particularly serious risk that he could not have been unaware of, as the effects of sulphur on human health were known.

La procédure / Proceedings

Cour de cassation, chambre criminelle, 6 déc 2022	**Court of cassation, criminal division, Dec 6, 2022**
⚓ Rejette le pourvoi contre l'arrêt de la CA de Rennes	⚓ Dismissed the appeal against the judgment of the CA of Rennes
⚓ « le capitaine, garant de la sécurité du navire et de son équipage, de la protection de l'environnement et de la sûreté, est tenu personnellement, à ce titre, de connaître et faire respecter, sans pouvoir invoquer son ignorance de la loi, les règles relatives à la pollution par les rejets des navires, et doit s'assurer de la conformité du combustible utilisé à la législation applicable »	⚓ the Master, who is responsible for the safety of the ship and her crew, of the protection of the environment and of security, is personally bound, in this capacity, to know and enforce, without being able to invoke his ignorance of the law, the rules relating to ships pollution, and must ensure that the fuel used complies with the applicable legislation

Les sanctions / Punishment

Le droit français prévoit:	In French Law, the maximum punishment is:
⚓ 1 an d'emprisonnement	⚓ 1 year imprisonment
et/ou	and/or
⚓ 200 000 euros d'amende	⚓ a €200,000 fine
(art. L. 218-15 du code de l'environnement)	(Environmental code, art. L. 218-15)

Les sanctions / Punishment

⚓ Le capitaine de l'Azura est condamné à une amende d'un montant de 100 000 euros	⚓ The Master was fined €100,000
⚓ Mais 80 000 euros sont mis à la charge de l'armateur (art. L. 218-23 du code de l'environnement)	⚓ But €80,000 must be paid by the shipowner (art. L. 218-23 environmental code)
⚓ Ce texte permet au tribunal, compte tenu des circonstances de fait et notamment des conditions de travail de l'intéressé, de mettre à la charge de l'armateur (partiellement ou totalement) le paiement des amendes prononcées à l'encontre du capitaine.	⚓ This text allows the court, taking into account the factual circumstances and in particular the working conditions of the person concerned, to charge the shipowner (partially or totally) with the payment of fines pronounced against the Master.

Appréciation critique / Critical assessment

⚓ En droit français, l'infraction comporte 2 éléments:	⚓ In French Law, an offence has two components:
⚓ L'élément matériel (une action ou une omission interdite par la loi)	⚓ Material element (Actus reus)
⚓ L'élément intentionnel (volonté ou conscience de violer la loi)	⚓ Criminal intent (Mens rea)
⚓ Dans l'affaire *Azura*, l'élément intentionnel de l'infraction est presque présumé (capitaine présumé avoir connaissance de la législation environnementale)	⚓ In the *Azura* case, the criminal intent is almost presumed (the Master is presumed to know the environmental law)

Appréciation critique / Critical assessment

⚓ Solution très sévère pour le capitaine (qui n'est qu'un préposé)	⚓ Very harsh for the Master (he is merely an employee)
⚓ Instructions de soutage communiquées par l'armateur	⚓ Bunkering instructions provided by the shipowner
⚓ Difficultés pour un capitaine américain de connaître le droit français	⚓ Difficulties for an American Master to know French law
⚓ Erreur de l'armateur dans les données ISM…	⚓ Shipowner's ISM data were wrong…

Appréciation critique / Critical assessment

⚓ Sévérité habituelle des tribunaux français (notamment pour les rejets d'hydrocarbures)	⚓ Usual severity of French courts (particularly for oil pollution)
⚓ C'est au capitaine de prouver son innocence	⚓ The Master must prove his/her innocence

Appréciation critique / Critical assessment

⚓ Problème du casier judiciaire du capitaine. ⚓ Art. L. 5521-4 du code des transports: « Nul ne peut exercer les fonctions de capitaine (…) s'il ne satisfait à des conditions de moralité et si les mentions portées au bulletin n° 2 de son casier judiciaire sont incompatibles avec l'exercice de ces fonctions ».	⚓ Matter of the Master's criminal record. ⚓ Art. L. 5521-4 of the transport code: ⚓ No one may be a Master (...) if he does not meet the conditions of morality and probity and if the entries in bulletin No. 2 of his criminal record are incompatible with the performance of these duties

Appréciation critique / Critical assessment

⚓ Il faudrait sanctionner l'armateur plutôt que le capitaine ⚓ Impossible dans l'affaire *Azura*, pour des raisons procédurales (l'armateur n'avait pas été attrait à la procédure en qualité de prévenu, mais simplement mis en cause)	⚓ The shipowner should be punished rather than the Master ⚓ Impossible in the *Azura* case, for procedural reasons (the shipowner had not been summoned to the proceedings as a defendant, but merely "mis en cause")

Depuis l'affaire Azura… Since the Azura case…

⚓ Entrée en vigueur de l'annexe VI de MARPOL: harmonisation internationale des taux de soufre. Réglementation OMI plus facile à connaître pour les capitaines ⚓ Abrogation de l'alinéa 2 de l'article L. 5412-2 du code des transports ⚓ Convention judiciaire d'intérêt public environnementale: Navires *Mein Shiff 2* (2022) et *CS Crystal* (2023)	⚓ Entry into force of the Annex VI of MARPOL : international harmonization of sulphur content. IMO Regulations are easier for Masters to know ⚓ Repeal of art. L. 5412-2 §2 (Master is no longer liable for all faults) ⚓ Environmental public interest Judicial agreement: Vessels *Mein Shiff 2* in 2022 (€60,000) et *CS Crystal* in 2023 (€140,000)

Thank you for your attention !

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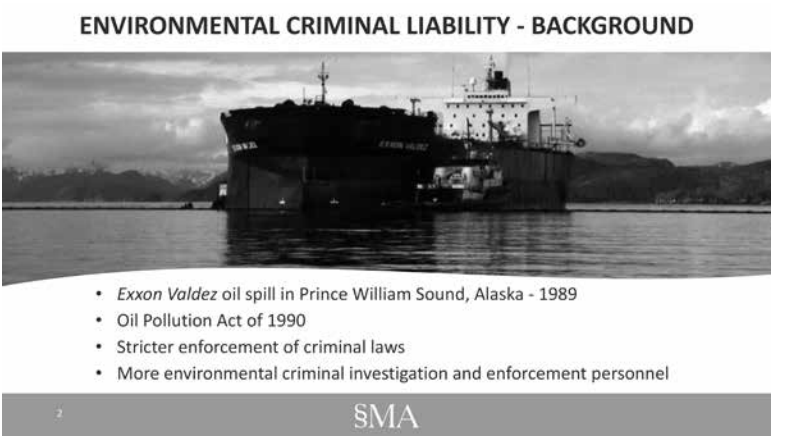
CRIMINALIZATION OF SHIPMASTERS IN U.S. MARINE CASUALTY AND POLLUTION CASES

Charles B. Anderson



DOJ POLICY

"DOJ will vigorously prosecute those companies caught polluting the nation's waterways. Our oceans are not dumping grounds for pollution. We will vigorously enforce the laws designed to protect our oceans and criminally prosecute those who break them."

3 SMA

WHO IS AT RISK?

- Ship's officers and crew
- Shipowners
- Ship managers/operators
- Corporate officers, managers, directors

4 SMA

CRIMINAL STATUTES

- Refuse Act of 1899
- Migratory Bird Treaty Act
- Seaman's Manslaughter Statute
- Federal Water Pollution Control Act (FWPCA)
- Oil Pollution Act of 1990 (OPA-90)
- Ports and Waterways Safety Act
- MARPOL Protocol
- General Criminal Statutes

5 SMA

REFUSE ACT OF 1899

- Strict liability
- Applies to individuals and corporations
- Prohibits discharge of "refuse matter" from any ship in U.S. navigable waters
- "Refuse matter" includes gasoline and oil
- $25,000 fine / 1 year imprisonment

6 §MA

MIGRATORY BIRD TREATY ACT

- Strict liability
- Applies to killing of migratory birds
- Misdemeanor violation
- $15,000 fine / 6 months imprisonment

7

SEAMAN'S MANSLAUGHTER STATUTE

Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.

18 USC §115

8 §MA

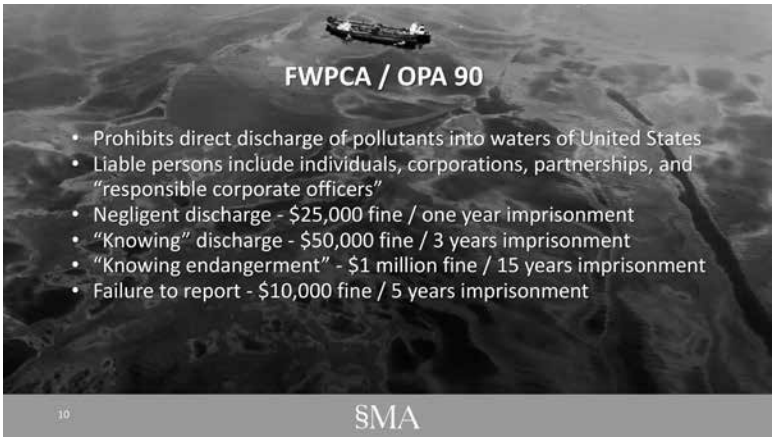
SEAMAN'S MANSLAUGHTER STATUTE

United States v. Ryan, 365 F. Supp. 2d (E.D.N.Y. 2005) - Staten Island ferry collided with terminal, resulting in passenger deaths and injuries. Shoreside operations manager indicted and sentenced to serve concurrent prison terms.

United States v. O'Keefe, 426 F.3d 274 (5th Cir. 2005) - Tug master indicted for negligence in capsizing of tugboat causing death of passenger. Sentenced to twelve months in prison and three years of supervised release.

United States v. Schroder, 2006 U.S. Dist. LEXIS 38915 (S.D. Ala. 2006) - Gross negligence or knowledge of risk not required to indict Master whose ship collided with shore crane causing fatality.

9 SMA



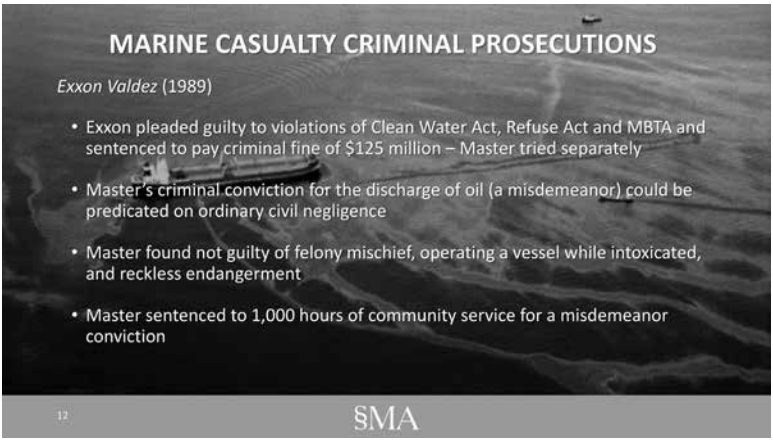
10 SMA

RESPONSIBLE CORPORATE OFFICER DOCTRINE

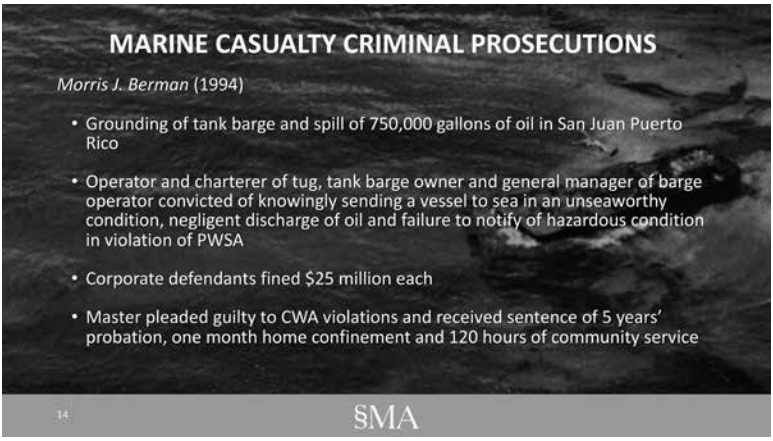
- Criminal liability may be imposed on corporate officers if they were in a position to know about or prevent the criminal act
- Need not actually commit the crime
- Limited to "public welfare statutes"

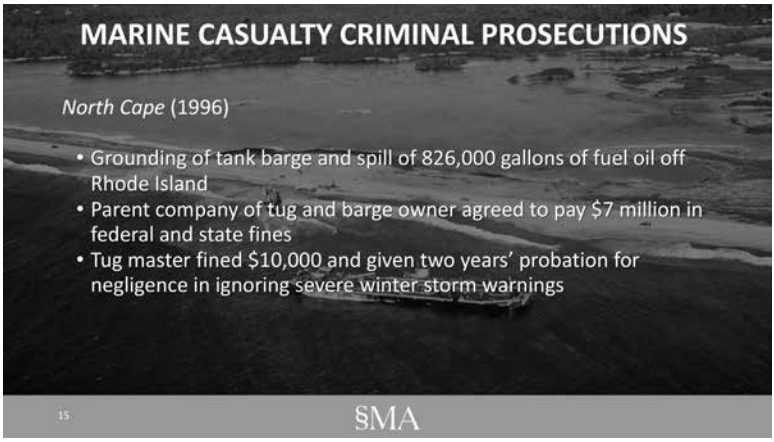
United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 860 (2000) - Liability extends to persons having authority to exercise control over the polluting activity

11 SMA


MARINE CASUALTY CRIMINAL PROSECUTIONS
Exxon Valdez (1989)
• Exxon pleaded guilty to violations of Clean Water Act, Refuse Act and MBTA and sentenced to pay criminal fine of $125 million – Master tried separately
• Master's criminal conviction for the discharge of oil (a misdemeanor) could be predicated on ordinary civil negligence
• Master found not guilty of felony mischief, operating a vessel while intoxicated, and reckless endangerment
• Master sentenced to 1,000 hours of community service for a misdemeanor conviction
12
SMA


MARINE CASUALTY CRIMINAL PROSECUTIONS
World Prodigy (1989)
• Vessel owner and master convicted of negligent discharge of 290,000 gallons of home heating oil from grounding off Newport, Rhode Island
• Vessel owner ordered to pay $500,000 in fines and $500,000 contribution to environmental trust fund
• Master ordered to pay a $10,000 fine
13
SMA


MARINE CASUALTY CRIMINAL PROSECUTIONS
Morris J. Berman (1994)
• Grounding of tank barge and spill of 750,000 gallons of oil in San Juan Puerto Rico
• Operator and charterer of tug, tank barge owner and general manager of barge operator convicted of knowingly sending a vessel to sea in an unseaworthy condition, negligent discharge of oil and failure to notify of hazardous condition in violation of PWSA
• Corporate defendants fined $25 million each
• Master pleaded guilty to CWA violations and received sentence of 5 years' probation, one month home confinement and 120 hours of community service
14
SMA

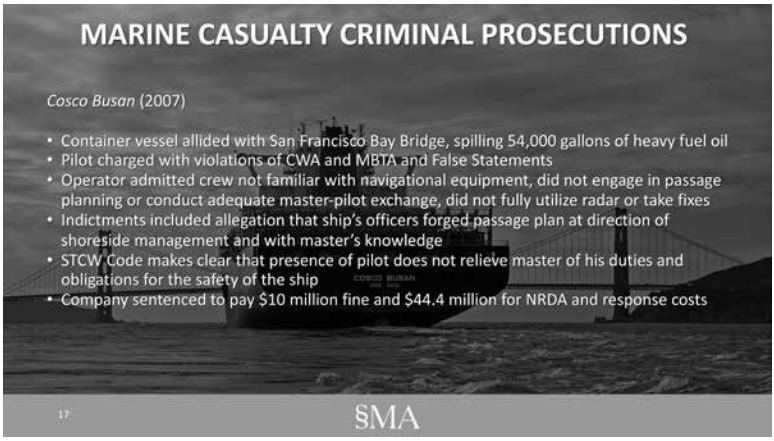


MARINE CASUALTY CRIMINAL PROSECUTIONS

Ocean Chemical Carriers (1997)

- Shipowner and master convicted of knowing discharge of 60,000 gallons of oily waste and failure to report discharge
- Vessel owner fined $50,000 and placed on two years' probation
- Master received 24-month license suspension

16 SMA



PORTS AND WATERWAYS SAFETY ACT

- Master must ensure vessel is navigated by competent persons
- Failure to report hazardous condition that may affect the vessel, shore structures or environmental quality of US waters

United States v. D/S Progress - Vessel owner sentenced to pay $250,000 fine for conspiring to conceal a hazardous leak in hull of oil tanker entering Baltimore Harbor

18 §MA

MARPOL PROTOCOL

- Act to Prevent Pollution from Ships (APPS)
- "Master or other person in charge of the ship" must maintain the oil record book
- Knowing discharge of oil
  - Fine of $250,000 for individuals / $500,000 for corporations
  - Imprisonment for 6 years
- Master unlikely to have personal knowledge of engine room operations
- Chief engineers are the primary target

19 §MA

GENERAL CRIMINAL STATUTES

WITNESS TAMPERING - 18 U.S.C. §1512
- Anyone who knowingly uses intimidation or physical force, threatens, or corruptly persuades another person with intent to prevent or hinder communications with a law enforcement officer or judge

CONSPIRACY - 18 U.S.C. §371
- Two or more persons who conspire to defraud or commit an offense against the United States or any agency thereof

FRAUD AND FALSE STATEMENTS - 18 U.S.C. §1001
- Prohibits written or oral false statements to government agency

OBSTRUCTION OF JUSTICE - 18 U.S.C. §1505
- Anyone who influences, obstructs or impedes the proper administration of law under any proceeding before any department or agency of the United States

20 §MA

OILY WATER SEPARATOR (OWS)

21 SMA

MARPOL OWS PROSECUTIONS

United States v. Apex Oil Co., 132 F.3d 1287 (9th Cir. 1997)
- Indictments of vessel owner and four masters for discharge of cargo related oil residues dismissed on basis of rule of lenity

United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358 (S.D. Fla. 1998)
- Cruise ship operator indicted for presenting false statement to Coast Guard in the form of false ORB entries
- False Statements Act complements MARPOL/APPS and does not violate international law

United States v. Jho, 534 F. 3d 398 (5th Cir. 2008)
- Chief engineer and vessel owner charged with failure to maintain ORB, conspiracy and false statements
- "Maintain" imposes a duty to ensure ORB is accurate on entering US ports
- Chief engineer aided and abetted master in failing to maintain ORB

22 SMA

MARPOL OWS PROSECUTIONS

United States v. Ionia Mgmt. S.A., 555 F.3d 303 (2nd Cir. 2009)
- Vessel owner charged with separate violations of APPS
- Duty to "maintain" includes insuring a complete and accurate record

United States v. Fafalios, 817 F. 3d 155 (5th Cir. 2016)
- Chief engineer charged with failure to maintain ORB, obstruction of justice and witness tampering
- APPS indictment dismissed because only the master or other person having charge of the ship is responsible for maintaining ORB and failure to record discharge occurred in international waters

23 SMA

CONCLUSIONS

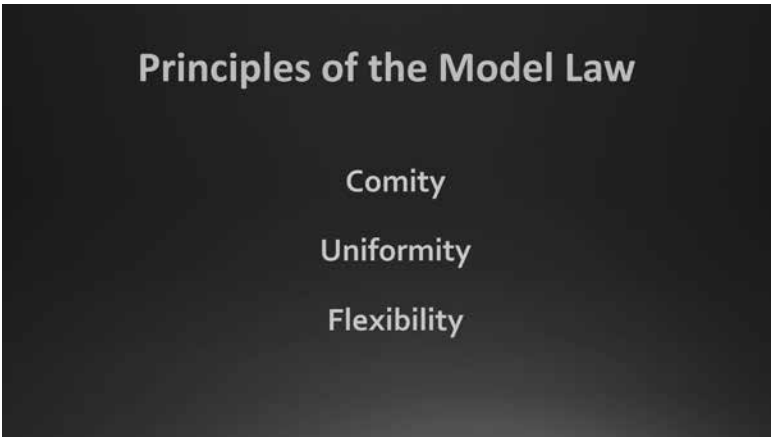
- Criminal prosecutions of masters and crew members in US marine casualties are relatively rare but more commonplace since the EXXON VALDEZ
- Masters are generally not prosecuted for MARPOL OWS violations; Chief Engineers are the primary target
- Shipowners and operators may be prosecuted on the basis of vicarious or direct liability
- Monetary penalties are not an effective deterrent

24 §MA

25 §MA

RELIEF IN CROSS-BORDER INSOLVENCY AND MARITIME LAW

Rosalie van Dael



United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (1997)

UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation

UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective

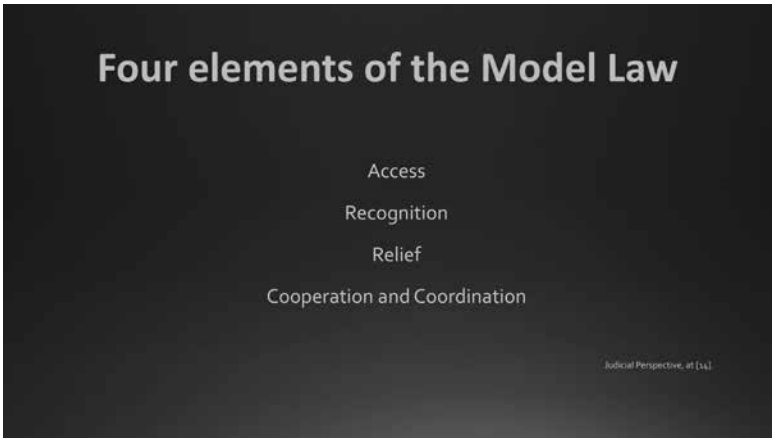
Pre-Model Law case

Turners & Growers Exporters Ltd v Cornelis Verlome (1996) 1 BCSLR 334 350

In practical terms?

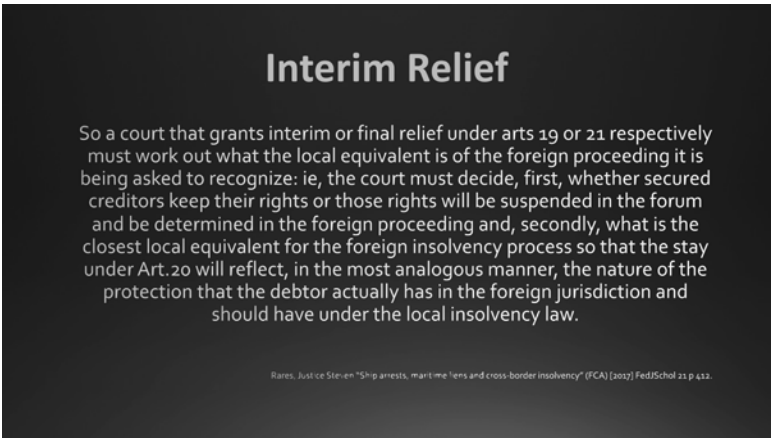
in practical terms, no single approach is possible or desirable.

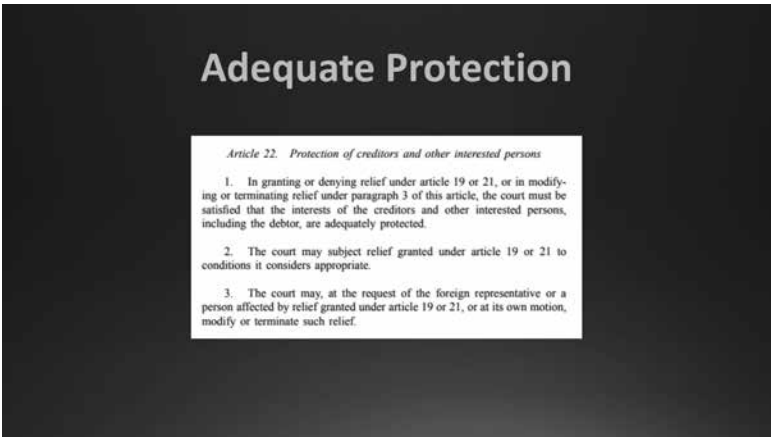
Judicial Perspective, Introduction.


Four elements of the Model Law
Access
Recognition
Relief
Cooperation and Coordination
Judicial Perspective, at [14].

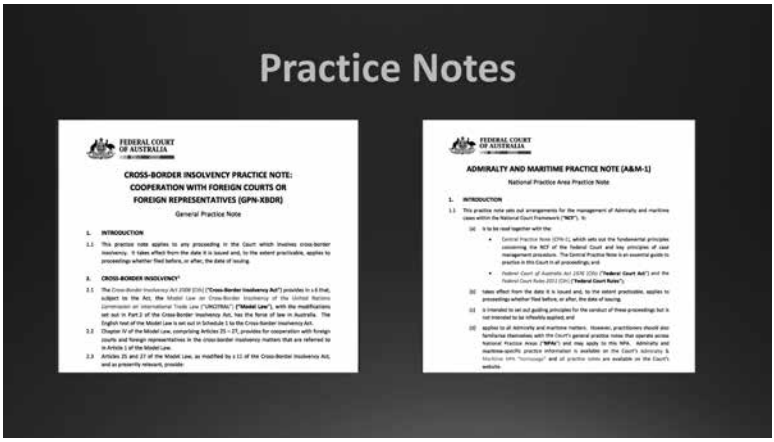

Relief
(a) Interim (urgent) relief that can be sought at any time after the application to recognize a foreign proceeding has been made (Article 19);
(b) Automatic relief consequent upon recognition of a foreign proceeding as a "foreign main proceeding" (Article 20); and
(c) Discretionary relief consequent upon recognition of the foreign proceedings as either a main or non-main proceeding (Article 21).
Judicial Perspective, at[14].


Clash of the Titans

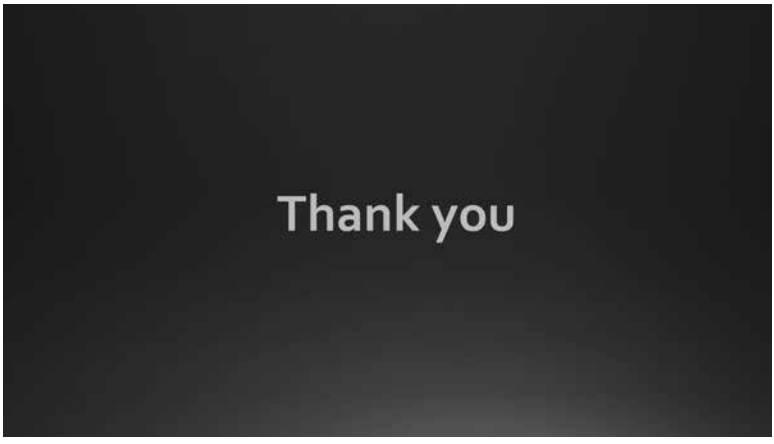

Interim Relief
So a court that grants interim or final relief under arts 19 or 21 respectively must work out what the local equivalent is of the foreign proceeding it is being asked to recognize: ie, the court must decide, first, whether secured creditors keep their rights or those rights will be suspended in the forum and be determined in the foreign proceeding and, secondly, what is the closest local equivalent for the foreign insolvency process so that the stay under Art.20 will reflect, in the most analogous manner, the nature of the protection that the debtor actually has in the foreign jurisdiction and should have under the local insolvency law.
Rares, Justice Steven "Ship arrests, maritime liens and cross-border insolvency" (FCA) [2017] FedJSchol 21 p 412.


Adequate Protection
Article 22. Protection of creditors and other interested persons
1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.


Treatment: Case Law
Yu v STX Pan Ocean Co Ltd (South Korea) [2013] FCA 680
Any application for the issue of a warrant of arrest in Australia of any vessel owned or chartered by the defendant be dealt with by a Judge of this Court and these Reasons for Judgment be drawn to the attention of the Court at the time any such application is made.


Practice Notes
FEDERAL COURT OF AUSTRALIA
CROSS-BORDER INSOLVENCY PRACTICE NOTE:
COOPERATION WITH FOREIGN COURTS OR
FOREIGN REPRESENTATIVES (GPN-XBDR)
General Practice Note
1. INTRODUCTION
2. CROSS-BORDER INSOLVENCY
FEDERAL COURT OF AUSTRALIA
ADMIRALTY AND MARITIME PRACTICE NOTE (A&M-1)
National Practice Area Practice Note
1. INTRODUCTION


What a relief!


Thank you

PART III

Status of Conventions

(Guidance as to where information can be obtained)

STATUS OF SIGNATURES, RATIFICATIONS, ACCEPTANCES, APPROVALS, ACCESSIONS, RESERVATIONS AND NOTIFICATIONS OF SUCCESSION WITH REGARD TO MARITIME LAW CONVENTIONS

Since 1951 CMI has published information about the status of maritime law conventions in its CMI Bulletins, and later in its CMI Yearbooks. The information was initially limited to the Brussels' conventions which were the result of the work of CMI itself. But over time information about maritime law conventions produced by IMO and other organizations was also published by CMI. For its information CMI relied on the kind co-operation with the Ministry of Foreign Affairs of Belgium (the depositary of the Brussels' conventions), and the secretariats of the relevant international organizations.

Over the years the Belgian Ministry and the international organizations have proceeded to publish information on the status of conventions on the internet. These internet publications are updated as soon as new information becomes available. Therefore, spending a lot of time on the gathering of the same information for an annual publication in a paper yearbook would now seem to serve a very limited purpose. It was therefore decided to stop publishing the status of conventions in the CMI Yearbook and switch to publication on the CMI website. In order to prevent the unnecessary duplication of information already publicly available (and kept up to date) on the websites of the Belgian Ministry of Foreign Affairs and the international organizations, CMI now simply provides a list of the relevant maritime law conventions with links to the websites of convention depositaries and international organizations. References to national treaty databases which provide trustworthy information on the status of multilateral conventions are also included.

The conventions are listed under six headings:
- Status of Brussels (CMI) Maritime Law Conventions
- Status of IMO Maritime Law Conventions
- Status of UN and UN/IMO Maritime Law Conventions
- Status of UNESCO Maritime Law Conventions
- Status of UNIDROIT Maritime Law Conventions
- Status of Antarctic Maritime Law Conventions

The conventions are listed within these categories in chronological order, but keeping protocols to conventions grouped together with the original convention.

It should be noted that the information provided on the websites referred to may vary in detail and accuracy. Just as in the past, CMI cannot guarantee that all the information is complete and correct. In the end it is advisable to contact the official depositary of each convention. Experience has shown that even then the information provided may be subject to debate.

Taco van der Valk
5 January 2023

Status of Brussels (CMI) Maritime Law Conventions

International Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels, Brussels, 23 September 1910

Entry into force: 1 March 1913

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM1.%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/003382

Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, Brussels, 23 September 1910

Entry into force: 1 March 1913

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM2.%20A)%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf

Protocol to amend the Convention for the Unification of Certain Rules of law relating to Assistance and Salvage at Sea Signed at Brussels on 23rd September 1910, Brussels, 27 May 1967

Entry into force: 15 August 1977

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM2.%20B)%20Protocole%20de%20modification%2C%20sign%C3%A9%20%C3%A0%20%5B...%5D.pdf

International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-going Vessels, Brussels, 25 August 1924

Entry into force: 2 June 1931

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM3.%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/pages/showDetails.aspx?objid=0800000280167705

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25 August 1924

Entry into force: 2 June 1931

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM4.%20A)%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801d0f51
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/004127

Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25th August 1924, Brussels, 23 February 1968

Entry into force: 23 June 1977

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM4.%20B)%20Protocole%20de%20modification%2C%20sign%C3%A9%20%C3%A0%20Bruxelles%20le%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ea4ab
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/003112

Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924 as amended by the Protocol of 23 February 1968, Brussels, 21 December 1979

Entry into force: 14 February 1984

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM4.%20C)%20Protocole%2C%20sign%C3%A9%20%C3%A0%20Bruxelles%20le%2021%20d%C3%A9cembre%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d54ea
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/000840

International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 10 April 1926

Entry into force: 2 June 1931

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM5.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20r%C3%A8gles%20relatives.pdf
- the United Nations Treaty Collection: https://treaties.un.org/pages/showDetails.aspx?objid=080000028016775a

International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, 10 April 1926

Entry into force: 8 January 1937

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM6.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20r%C3%A8gles%20concernant%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/pages/showDetails.aspx?objid=0800000280166914
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/003839

Additional Protocol to the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, 24 May 1934

Entry into force: 8 January 1937

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM6.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20r%C3%A8gles%20concernant%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/pages/showDetails.aspx?objid=0800000280166914
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/005942

International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, Brussels, 10 May 1952

Entry into force: 14 September 1955

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM7.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801338d5

International Convention for the Unification of Certain Rules Relating to Penal jurisdiction in matters of collision and other incidents of navigation, Brussels, 10 May 1952

Entry into force: 20 November 1955

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM8.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801338c3&clang=_en

International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952

Entry into force: 24 February 1956

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM9.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/pages/showDetails.aspx?objid=08000002801338ba
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/007235

International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, Brussels, 10 October 1957

Entry into force: 31 May 1968

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM10.%20A)%20Convention%20internationale%20sur%20la%20limitation%20de%20la%20responsabilit%C3%A9%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ea54a
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/006826

Protocol amending the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships dated 10 October 1957, Brussels, 21 December 1979

Entry into force: 6 October 1984

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/Etats%20li%C3%A9s1979.pdf
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d549d

International Convention relating to Stowaways, Brussels, 10 October 1957

Entry into force: not yet in force

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM11.%20Convention%20internationale%20sur%20les%20passagers%20clandestins%2C%20%5B...%5D.pdf

International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea, Brussels, 29 April 1961

Entry into force: 4 June 1965

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM12.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20r%C3%A8gles%20en%20%5B...%5D.pdf
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ea435
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/009010

International Convention on the Liability of Operators of Nuclear Ships, (Brussels, 25 May 1962

Entry into force: not yet in force

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM13.%20Convention%20relative%20a%201a%20responsabilit%C3%A9%20des%20exploitants%20de%20%5B...%5D.pdf
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/009108

International Convention for the Unification of Certain Rules relating to Carriage of Passenger Luggage by Sea, Brussels, 27 May 1967

Entry into force: not yet in force

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM14.%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf

Convention relating to Registration of Rights in respect of Vessels under Construction, Brussels, 27 May 1967

Entry into force: not yet in force

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM15.%20Convention%20internationale%20relative%20%C3%A0%20l'inscription%20%5B...%5D.pdf

International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 27 May 1967

Entry into force: not yet in force

- the depositary, the Belgian Government:
- https://diplomatie.belgium.be/sites/default/files/documents/CDM16.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20%5B...%5D.pdf

Status of IMO Maritime Law Conventions

International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969

Entry into force: 19 June 1975

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801083db&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/003096

Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969, London, 19 November 1976

Entry into force: 8 April 1981

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800e815e&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Treaty/Details/001655

Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, London, 25 May 1984

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/000115

Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, London, 27 November 1992

Entry into force: 30 May 1996

- the depositary, the (Secretary General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a5777&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Treaty/Details/005146

International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, Brussels, 29 November 1969

Entry into force: 6 May 1975

- the depositary, the (Secretary General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801089a9&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/003095

Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, London, 2 November 1973

Entry into force: 30 March 1983

- the depositary, the (Secretary General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ddf24&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/002394

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, 18 December 1971

Entry into force: 16 October 1978

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f5af6&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/002837

Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, London, 19 November 1976

Entry into force: 22 November 1994

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ad4bc&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/001657

Protocol of 1984 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, London, 25 May 1984

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/000116

Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, London, 27 November 1992

Entry into force: 30 May 1995

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the depositary, the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a599a&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/012374

Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, London, 16 May 2003

Entry into force: 3 March 2005

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/010844

Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Brussels, 17 December 1971

Entry into force: 15 July 1975

- the depositary, the International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/pages/showDetails.aspx?objid=0800000280107d4b
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/002836

Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, Athens, 13 December 1974

Entry into force: 28 April 1987

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cdbb3

Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, London, 19 November 1976

Entry into force: 30 April 1989

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en

Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, London, 29 March 1990

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx

Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, London, 1 November 2002

Entry into force: 23 April 2014

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/011547

Convention on Limitation of Liability for Maritime Claims, London, 19 November 1976

Entry into force: 1 December 1986

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/pages/showDetails.aspx?objid=08000002800f9404
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/001656

Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, London, 2 May 1996

Entry into force: 13 May 2004

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/007428

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, Rome, 10 March 1988

Entry into force: 1 March 1992

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b9bd7&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/002231

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, Rome, 10 March 1988

Entry into force: 1 March 1992

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b9af3&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/002232

Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, London, 14 October 2005

Entry into force: 28 July 2010

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/011471

Protocol of 2005 to the Protocol for the Suppression on Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, London 14 October 2005

Entry into force: 28 July 2010

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/011470

International Convention on Salvage, 1989, London, 28 April 1989

Entry into force: 14 July 1996

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a58b3
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/003805

International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, London, 30 November 1990

Entry into force: 13 May 1995

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800aada6&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/004459

Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000, London, 15 March 2000

Entry into force: 14 June 2007

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/009370

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, London, 3 May 1996

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/007429

Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, London 30 April 2010

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/012292

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, London, 23 March 2001

Entry into force: 21 November 2011

- the depositary, the (Secretary-General of the) International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/011005

Nairobi International Convention on the Removal of Wrecks, Nairobi, 18 May 2007

Entry into force: 14 April 2015

- the depositary, the International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/009962

Status of UN and UN/IMO Maritime Law Conventions

United Nations Convention on a Code of Conduct for Liner Conference, Geneva, 6 April 1974

Entry into force: 6 October 1983

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028003a445&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/002264

United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978

Entry into force: 1 November 1992

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280042179

United Nations Convention on International Multimodal Transport of Goods, Geneva, 24 May 1980

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025033&clang=_en

United Nations Convention on the Law of the Sea, Montego-Bay, 10 December 1982

Entry into force: 16 November 1994

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280043ad5&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/000493

United Nations Convention on Conditions for Registration of Ships, Geneva, 7 February 1986

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028004c485

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, Vienna, 19 April 1991

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028004b4e0&clang=_en

International Convention on Maritime Liens and Mortgages, 1993, Geneva, 6 May 1993

Entry into force: 5 September 2004

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028004a70a

International Convention on Arrest of Ships, 1999, Geneva, 12 March 1999

Entry into force: 14 September 2011

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028004ce27
- the International Maritime Organization: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea, New York, 11 December 2008

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028021e615
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/010533

Status of UNESCO Maritime Law Conventions

UNESCO Convention on the Protection of Underwater Cultural Heritage, Paris, 2 November 2001

Entry into force: 2 January 2009

- the depositary, the (Director-General of the) United Nations Educational, Scientific, Cultural Organization (UNESCO):
- http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/010501

Status of UNIDROIT Maritime Law Conventions

UNIDROIT Convention on International Financial Leasing, Ottawa, 28 May 1988

Entry into force: 1 May 1995

- the depositary, the Government of Canada: -
- the originating organization, the International Institute for the Unification of Private Law (UNIDROIT):
- https://www.unidroit.org/instruments/leasing/convention/status/

Status of Antarctic Maritime Law Conventions

Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: Liability Arising From Environmental Emergencies, Stockholm, 14 June 2005

Entry into force: not yet in force

- the depositary, the Government of the United States:
- https://www.state.gov/annex-vi-antarctic-treaty/
- Netherlands Treaty Database (in English) (*Verdragenbank*): https://verdragenbank.overheid.nl/en/Verdrag/Details/010766

CONFERENCES OF THE COMITÉ MARITIME INTERNATIONAL

I. BRUSSELS – 1897
President:
Mr. Auguste BEERNAERT.
Subjects:
Organization of the International Maritime Committee - Collision -Shipowners' Liability.

II. ANTWERP – 1898
President:
Mr. Auguste BEERNAERT.
Subjects:
Liability of Owners of sea-going vessels.

III. LONDON – 1899
President:
Sir Walter PHILLIMORE.
Subjects:
Collisions in which both ships are to blame - Shipowners' liability.

IV. PARIS – 1900
President:
Mr. LYON-CAEN.
Subjects:
Assistance, salvage and duty to tender assistance - Jurisdiction in collision matters.

V. HAMBURG – 1902
President:
Dr. Friedrich SIEVEKING.
Subjects:
International Code on Collision and Salvage at Sea - Jurisdiction in collision matters - Conflict of laws as to owner-ship of vessels.

VI. AMSTERDAM - 1904
President:
Mr. E.N. RAHUSEN.
Subjects:
Conflicts of law in the matter of Mortgages and Liens on ships - Jurisdiction in collision matters - Limitation of Shipowners' Liability.

VII. LIVERPOOL - 1905
President:
Sir William R. KENNEDY.
Subjects:
Limitation of Shipowners' Liability - Conflict of Laws as to Maritime Mortgages and Liens - Brussels Diplomatic Conference.

VIII. VENICE – 1907
President:
Mr. Alberto MARGHIERI.
Subjects:
Limitation of Shipowners' Liability - Maritime Mortgages and Liens - Conflict of law as to Freight.

IX. BREMEN – 1909
President:
Dr. Friedrich SIEVEKING.
Subjects:
Conflict of laws as to Freight -Compensation in respect of personal injuries - Publication of Maritime Mortgages and Liens.

X. PARIS – 1911
President:
Mr. Paul GOVARE.
Subjects:
Limitation of Shipowners' Liability in the event of loss of life or personal injury - Freight.

XI. COPENHAGEN – 1913
President:
Dr. J.H. KOCH.
Subjects:
London declaration 1909 - Safety of Navigation - International Code of Affreightment - Insurance of enemy property.

XII. ANTWERP – 1921
President:
Mr. Louis FRANCK.
Subjects:
International Conventions relating to Collision and Salvage at sea.
- Limitation of Shipowners' Liability -Maritime Mortgages and Liens -Code of Affreightment - Exonerating clauses.

XIII LONDON – 1922
President:
Sir Henry DUKE.
Subjects:
Immunity of State-owned ships - Maritime Mortgage and Liens.
- Exonerating clauses in Bills of lading.

XIV. GOTHENBURG – 1923
President:
Mr. Efiel LÖFGREN.
Subjects:
Compulsory insurance of passengers -Immunity of State owned ships -International Code of Affreightment - International Convention on Bills of Lading.

XV. GENOA – 1925
President:
Dr. Francesco BERLINGIERI.
Subjects:
Compulsory Insurance of passengers - Immunity of State owned ships - International Code of Affreightment - Maritime Mortgages and Liens.

XVI. AMSTERDAM – 1927
President:
Mr. B.C.J. LODER.
Subjects:
Compulsory insurance of passengers - Letters of indemnity - Ratification of the Brussels Conventions.

XVII. ANTWERP – 1930
President:
Mr. Louis FRANCK.
Subjects:
Ratification of the Brussels Conventions - Compulsory insurance of passengers - Jurisdiction and penal sanctions in matters of collision at sea.

XVIII. OSLO – 1933
President:
Mr. Edvin ALTEN.
Subjects:
Ratification of the Brussels Conventions -Civil and penal jurisdiction in matters of collision on the high seas - Provisional arrest of ships - Limitation of Shipowners' Liability.

XIX. PARIS – 1937
President:
Mr. Georges RIPERT.
Subjects:
Ratification of the Brussels Conventions -Civil and penal jurisdiction in the event of collision at sea - Arrest of ships - Commentary on the Brussels Conventions - Assistance and Salvage of and by Aircraft at sea.

XX. ANTWERP – 1947
President:
Mr. Albert LILAR.
Subjects:
Ratification of the Brussels Conventions, more especially of the Convention on mmunity of State-owned ships - Revision of the Convention on Limitation of the Liability of Owners of sea-going vessels and of the Convention on Bills of Lading - Examination of the three draft conventions adopted at the Paris Conference 1937 - Assistance and Salvage of and by Aircraft at sea - York and Antwerp Rules; rate of interest.

XXI. AMSTERDAM – 1948
President:
Prof. J. OFFERHAUS
Subjects:
Ratification of the Brussels International Convention - Revision of the York-Antwerp Rules 1924 - Limitation of Shipowners' Liability (Gold Clauses) -Combined Through Bills of Lading -Revision of the draft Convention on arrest of ships - Draft of creation of an International Court for Navigation by Sea and by Air.

XXII. NAPLES – 1951
President:
Mr. Amedeo GIANNINI.
Subjects:
Brussels International Conventions - Draft convention relating to Provisional Arrest of Ships - Limitation of the liability of the Owners of Sea-going Vessels and Bills of Lading (Revision of the Gold clauses) - Revision of the Conventions of Maritime Hypothèques and Mortgages - Liability of Carriers by Sea towards Passengers - Penal Jurisdiction in matters of collision at Sea.

XXIII. MADRID – 1955
President:
Mr. Albert LILAR.
Subjects:Limitation of Shipowners' Liability -Liability of Sea Carriers towards passengers - Stowaways - Marginal clauses and letters of indemnity.

XXIV. RIJEKA – 1959
President:
Mr. Albert LILAR
Subjects:
Liability of operators of nuclear ships - Revision of Article X of the International Convention for the Unification of certain Rules of law relating to Bills of Lading - Letters of Indemnity and Marginal clauses. Revision of Article XIV of the International Convention for the Unification of certain rules of Law relating to assistance and salvage at sea - International Statute of Ships in Foreign ports - Registry of operations of ships.

XXV. ATHENS – 1962
President:
Mr. Albert LILAR
Subjects:
Damages in Matters of Collision - Letters of Indemnity - International Statute of Ships in Foreign Ports - Registry of Ships - Coordination of the Convention of Limitation and on Mortgages - Demurrage and Despatch Money - Liability of Carriers of Luggage.

XXVI. STOCKHOLM – 1963
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Mr. Albert LILAR
Subjects:
Bills of Lading - Passenger Luggage - Ships under construction.

XXVII. NEW YORK – 1965
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Mr. Albert LILAR
Subjects:
Revision of the Convention on Maritime Liens and Mortgages.

XXVIII. TOKYO – 1969
President:
Mr. Albert LILAR
Subjects:

"Torrey Canyon" - Combined Transports -Coordination of International Convention relating to Carriage by Sea of Passengers and their Luggage.

XXIX. ANTWERP – 1972
President:
Mr. Albert LILAR
Subjects:
Revision of the Constitution of the International Maritime Committee.

XXX. HAMBURG – 1974
President:
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Subjects:
Revisions of the York/Antwerp Rules 1950 - Limitation of the Liability of the Owners of Seagoing vessels - The Hague Rules.

XXXI. RIO DE JANEIRO - 1977
President:
Prof. Francesco BERLINGIERI
Subjects:
Draft Convention on Jurisdiction, Choice of law and Recognition and enforcement of Judgements in Collision matters. Draft Convention on Off-Shore Mobile Craft.

XXXII. MONTREAL – 1981
President:
Prof. Francesco BERLINGIERI
Subjects:

Convention for the unification of certain rules of law relating to assistance and salvage at sea - Carriage of hazardous and noxious substances by sea.

XXXIII. LISBON- 1985
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Prof. Francesco BERLINGIERI
Subjects:
Convention on Maritime Liens and Mortgages - Convention on Arrest of Ships.

XXXIV. PARIS – 1990
President:
Prof. Francesco BERLINGIERI
Subjects:
Uniformity of the Law of Carriage of Goods by Sea in the 1990's - CMI Uniform Rules for Sea Waybills - CMI Rules for Electronic Bills of Lading -Revision of Rule VI of the York-Antwerp Rules 1974.

XXXV. SYDNEY – 1994
President:
Prof. Allan PHILIP
Subjects:
Review of the Law of General Average and York-Antwerp Rules 1974 (as amended 1990) - Draft Convention on Off-Shore Mobile Craft - Assessment of Claims for Pollution Damage - Special Sessions: Third Party Liability -Classification Societies - Marine Insurance: Is the doctrine of Utmost Good Faith out of date?

XXXVI. ANTWERP – 1997
CENTENARY CONFERENCE
President:
Prof. Allan PHILIP
Subjects:
Off-Shore Mobile Craft - Towards a Maritime Liability Convention - EDI -Collision and Salvage - Wreck Removal Convention - Maritime Liens and Mortgages, Arrest of Ships -Classification Societies - Carriage of Goods by Sea - The Future of CMI.

XXXVII. SINGAPORE – 2001
President:
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Subjects:
Issues of Transport Law - Issues of Marine Insurance - General Average -Implementation of Conventions - Piracy -Passengers Carried by Sea.

XXXVIII. VANCOUVER – 2004
President:
Patrick GRIGGS
Subjects:
Transport Law - General Average - Places of Refuge for Ships in Distress - Pollution of the Marine Environment - Maritime Security - Marine Insurance - Bareboat Chartered Vessels - Implementation of the Salvage Convention.

XXXIX. ATHENS 2008
President:
Jean-Serge Rohart
Subjects:

Places of Refuge – Procedural Rules Relating to Limitation of Liability in Maritime Law – UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – Non-technical Measures to Promote Quality Shipping – Implementation and Interpretation of International Conventions – Judicial Sale of Ships – Charterer's Right to Limit Liability – Charterer's Right to Limit Liability – Wreck Removal Convention 2007 – Draft Convention on Recycling of Ships

XL. BEIJING 2012
President:
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Judicial Sales of Ships – Salvage Convention 1989 – Rotterdam Rules –York Antwerp Rules 2004 – Offshore Activity – Fair Treatment of Seafarers –Piracy – Maritime Issues for Judges – Marine Insurance – The Western and Eastern Cultural Influences on Maritime Arbitration and its Recent Developments in Asia – Arctic/Antarctic Issues – Cross Border Insolvencies – The Shipbuilding Industry in Asia: Problems and Challenges – Future of the CMI in the Decades to come. – Young Members Session: Arrest of Ships and Judicial Sales of Vessels – Offshore Activities, New Regulations and Contracts –Enforcement on Shipping Companies by Creditors.

XLI. HAMBURG 2014
President:
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Subjects:
Judicial Sales of Ships – York Antwerp Rules 2004 – Ships in hot water: Ship Financing and Restructuring; Cross Border Insolvencies; Liability of classification societies; Wrongful arrest of ships; Piracy – Ships in cold water: Arctic Issues – Maritime Miscellany: Ships Emissions; Wreck Removal Convention; Young CMI Panel; MLC 2006 Issues and Implementation.

XLII. NEW YORK 2016
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General Average – Costa Concordia – Cybercrime in Shipping – Offshore Activities – Pandemic Response – Polar Shipping – Unmanned Ships –Lex Maritima – Ship financing and Security Practices – Refugee Migration at Sea – Cross-border insolvencies – Maritime Arbitration – Marine Insurance –Liability for Wrongful Arrest

XLIII. ANTWERP 2022
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