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CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL

NO. 1 - JANUARY/ APRIL 2012

NEWS FROM THE CMI

THE BEIJING CONFERENCE AND SHANGHAI ADD-ON

As is now widely known, the 40th CMI Conference will take place in Beijing in the People's Republic of China from October 14-19, 2012, with an optional Add-On Programme of an educational and social character in Shanghai from October 20-22, 2012. Distinguished speakers from around the World will focus on contemporary and important issues of maritime law. Details of the substantive programme in both cities are shown in the Conference website (www.cmi2012beijing.org). There will also be a closed session of Judges discussing various substantive and procedural topics. We hope for a good turn-out of maritime Judges. An exciting social programme is being arranged by the Chinese Maritime Law Association, including a visit to the Great Wall of China. You will also marvel at the Forbidden City, Tian'anmen Square and the Summer Palace. Fabulous Pre and Post Conference Tours have also been arranged.

Registration and Hotel bookings can now be made electronically on the Conference website. The Conference Hotel will be the Beijing Kempinski Hotel, 50 Lianmaqiao Road, Chaoyang District, Beijing 100125. The Add-On Hotel will be the Westin Bund Center Shanghai, 88 Henan Central Road, Shanghai 200002.

We look forward to seeing you in China!

Reports on some topics on the agenda

Review of the Salvage Convention 1989

One of the topics to be debated at the conference to be held in Beijing in October will be the Review of the Salvage Convention 1989. Work commenced on this topic when an international working group was set up in 2009 following an approach made to the CMI by the International Salvage Union (ISU) which considered that there was a need for a review of certain aspects of the Convention.

The International Working Group has recently finalised a report which has been sent to the Presidents of all National Maritime Law Associations (NMLA) to enable those Associations to formulate their opinions on the issues which are discussed in the report and to authorise their delegations to express the opinions of that NMLA at the Conference.

As the report concludes, there are various options available to the Conference. One is that a draft protocol to the Salvage Convention could be prepared and submitted to the IMO which adopts those changes to the Salvage Convention which the meeting finds appropriate. The meeting will need to be mindful that pursuant to IMO Resolution A.777(18) the Legal Committee will only entertain proposals for amending existing conventions on the basis of "a clear and well-documented compelling need". Another option is to report to the IMO on the issues which have been debated and the conclusions reached. Another is to do nothing and another could be to suggest that the Lloyds Open Form needs to be amended to take account of these discussions.

The most controversial area of suggested reform, which has been put forward by the ISU, concerns Article 14. The report documents the problems associated with Article 14 and the consequential development of SCOPIC.

In a rigorous debate at the Colloquium organised by the Argentine MLA and the CMI in 2010, representatives of the ISU, the International Chamber of Shipping, the International Group of P&I Clubs and London market insurers expressed competing views as to whether the Salvage Convention is working. The International Working Group's report has sought to condense the substance of those competing opinions. There is no doubt that the rigorous debate which took place in Buenos Aires will be resumed in Beijing.

The ISU has proposed that Article 14 be replaced by a new, and separate, award which it has called "Environmental Salvage Award". Whilst that is the most controversial proposal which has been put forward other issues for consideration concern the definitions contained in Article 1 of the Convention so as to remove the geographical limitation of "coastal or inland waters or adjacent thereto". Another issue is whether or not provisions need to be incorporated within the Salvage Convention to take account of the UNESCO Convention on the Protection of Underwater Cultural Heritage. Geoffrey Brice QC prepared a Protocol containing recommended changes to the text of the Salvage Convention to deal with this issue.

Other issues which will be the subject of debate concern Article 5 and the role of public authorities in performing salvage; whether Article 11, with its exhortation to States to take into account the need for co-operation between salvors should specifically refer to the IMO Guidelines on Places of Refuge; whether in container ship cases the vessel only should be responsible for the payment of claims, and therefore for the provision of security, which could be dealt with under Article 13 paragraph 2; whether the provisions of Article 21 in relation to security should be amended; whether any reward payable to salvors of human life should only be payable by the shipowner, thus necessitating amendment to Article 16; and whether any changes should be made to Article 27 dealing with the publication of arbitral awards.

The materials which have been sent to NMLAs are available on the CMI website.

Stuart Hetherington

Draft Instrument on International Recognition of Foreign Judicial sales of ships
A Brief Report on the Work done by the International Working Group and the International Sub-Committee

The proposal of preparing a draft instrument on international recognition of foreign judicial sale of ships was considered by the Executive Council of the CMI at its meeting held in Dubrovnik on 10 May 2007 and at a subsequent meeting it was decided to add this subject on the Agenda of the Athens Conference.

An International Working Group was established immediately following the CMI Athens Conference in 2008. After several months of hard work a questionnaire was drafted and submitted by the Working Group to CMI and it was circulated to the national maritime law associations in May 2010.

Answers to and comments on the questions contained in the questionnaire were received from a number of CMI member associations, based on which the Working Group produced a draft instrument on recognition of foreign judicial sales of ships. The President of CMI by his letter of 8 August 2011

circulated the 1st Draft of the Instrument on Recognition of Foreign Judicial Sales of Ships to the CMI member associations for comments and called on the member associations to appoint their delegates to the International Sub-Committee meeting to be held on 27 September 2011 in Oslo.

Comments on the 1st Draft were received from the following associations, i.e. the MLA of Dominica, Italy, Germany, Brazil, Croatia and China. In addition, comments are also received from a few CMI Titulary Members, including José Maria Alcantara (Spain), Michael Cohen (USA) and Francesco Berlingieri (Italy). The first meeting of the International Sub-Committee was held in Oslo on 27 September 2011 and attended by the delegates appointed by the member associations from the following countries, na - mely, Australia, Belgium, Brazil, Canada, China, Croatia, Germany, Japan, Malta, Netherlands, Norway, Singapore, UK and USA. The articles/provisions of the 1st Draft were considered and discussed in details and the discussion at the meeting was very successful and productive.

In light of the consensus achieved at the first meeting of the International Sub-Committee, taking account of the comments received from the CMI member associations and Titulary Members, the International Working Group after internal discussions formulated its 2nd Draft of the Instrument and a Commentary on the Second Draft, which were submitted to CMI in April 2012 for approval and circulation to the CMI member associations.

The President of CMI by his letter of 2 May 2012 circulated the Second Draft and the Commentary to the CMI member associations for comments and proposals. It is hoped that comments and/or proposals on the 2nd Draft may be received from the member associations by the end of July 2012 at latest, so that the International Working Group may have necessary time to consider and analyse the replies and to work out a 3rd Draft for the discussion and approval at the sessions during the CMI 2012 Beijing Conference and the adoption by the CMI Assembly in Beijing.

In the second draft, there are 9 articles dealing with the following issues, namely the definitions, the scope of application, the notice of judicial sales, the effect of judicial sales, the issuance of a certificate of judicial sales, the deregistration and registration of ships, the recognition of judicial sales, the circumstances in which recognition may be refused, and restricted recog - nitions.

While preparing the Second Draft, attention was paid to the principle that conflicts with other international conventions, in particular the Maritime Liens & Mortgages Conventions of 1926/1967/1993 and the Arrest Conventions of 1952/1999 should be avoided. It is believed that for the purpose of facilitating efficient recognition of a foreign judicial sale of ship, certain necessary minimal requirements for conducting judicial sales should be laid down in the Instrument and the basic effects of judicial sales of ships to be recognized by other States should be provided for in this Instrument as well. It is made clear by the Second Draft that effects of judicial sales of ships as provided for by this Instrument should be recognized by all State Parties unless existence of one of the circumstances provided for by this Instrument in which recognition may be refused is proved by an interested person furnishing valid evidence. During the discussion of the International Working Group, it is accepted that necessary and sufficient protection should be provided to purchasers of ships by way of judicial sale so as to ensure that judicial sales of ships may be maintained as an effective way of enforcement of maritime claims and enforcement of judgments or arbitral awards or other enforceable instruments against the owners of ships. It follows that once a ship is sold by way of judicial sale, the ship shall not be subject to any arrest for any claim arising prior to its judicial sale, and that any action challenging the judicial sale should be allowed to be made by an interested person as defined by this Instrument only and before a competent court as provided for by this Instrument only. For the purpose of reducing as much as possible the chance of challenges to judicial sales, the draft Instrument defines the interested person to mean only the owner of a ship prior to its judicial sale or the holder of a mortgage, "hypothèque", charge or maritime lien attached to the ship prior to its judicial sale. As to the competent court for dealing with actions challenging judicial sales of ships, it is realized that since the most convenient forum for assessing whether or not a judicial sale is regular and effective should be the court of the State in which the sale took place, therefore it should be accepted that the competent court under this Instrument as having jurisdiction over actions challenging judicial sales should be the court of the State in which the judicial sale took place, including the court having conducted the sale or its court of appeal which will be decided by the law of the State in which the judicial sale took place.

Recognition of foreign judicial sales of ships is one of the contemporary and important issues of maritime law. As mentioned by the CMI President in his letter of 11 April 2012, it is one of the three topics which may be the subject for voting at a plenary session during the forthcoming Conference in Beijing. Therefore, it is highly recommended and encouraged that preparation for the consideration and discussion on the Draft In- strument may be made in advance by the delegates of the CMI member associations planning to attend the 40th CMI International Conference in Beijing October 14-19, 2012.

HENRY HAI LI*

* Chairman of the IWG.

NEWS ON THE ROTTERDAM RULES

The United Nations Convention on the International Carriage of Goods Wholly or Partly by Sea has been ratified by Spain on 19 January 2011 and by the Republic of Congo on 30 April 2012. The future ratification of the Convention has been recommended to the respective Governments by the Danish Maritime Law Committee and by the Norwegian Maritime Law Commission. In its report the Norwegian Maritime Law Commission recommends that ratification takes place when the United States or the larger EU States ratify.

The report is available in the Commission's website (http://www.regjeringen.no/pages/37760933/PDFS/NOU201220120010000DDDPDFS.pdf) and a summary in English follows:

The Maritime Law Commission recommends that Norway should ratify the Rotterdam Rules in order to secure and promote a uniform legal regulation of carriage of goods internationally. The Commission recommends that ratification takes place when USA or the larger EU States ratify.

The recommendation on ratification is also an approval of the rules of the Convention. The mandatory character of rules of this kind has, however, not been important to the Commission's evaluation of the rules.

The Commission does not recommend that Norway adopts the chapters of the Convention on jurisdiction and arbitration. The chapter on arbitration should be treated in the same way as the chapter on jurisdiction, and it is not likely that the EU States will adopt the chapter on jurisdiction. Norway should then not opt for a different solution than that of the EU States.

Instead, the Commission recommends that the current Scandinavian rules on jurisdiction and arbitration in the Maritime Code should be retained, with amendments inspired by the Rotterdam Rules. The Lugano Convention (and the corresponding EU Rules) will also in the future take precedence.

The Rules of the Convention are to be implemented in Chapter 13 of the Norwegian Maritime Code, but not necessarily in the same order as in the Convention itself. The individual articles will however be easily recognizable.

Rules of the existing Maritime Code that are not irreconcilable with the Convention are fit into this structure. This applies to rules such as the rules on freight on a quantum meruit *basis if the carriage is not completed and some rules on the effect of breach of contract not covered by the Convention.*

The relation between the Maritime Code Chapter 13 on carriage of goods and chapter 14 on chartering has been reviewed by the Commission. It is proposed that Chapter 14 hereinafter only shall deal with the relationship between the ship owner and the charterer, while all other relations should be dealt with in Chapter 13.

A special area of concern has been multimodal transports. The Rotterdam Rules regulate such transports, but only if they include an international sea voyage. It has then been important to create clarity in relation to other transport conventions.

The recommendation of the Commission is that the transport conventions should be construed restrictively, in line with recent continental European cases, so that issues of contradictions or overlapping scopes do not arise. Hence, in relation to many contracts there will be no mandatory rules. The Commission considers this to be acceptable, in line with its policy view on mandatory rules. However, when no mandatory set of rules apply, one of the transport regimes should apply as gap-filling law, and it should primarily be for the commercial parties to clarify which one.

The Commission recommends that, as a starting point, one and only one set of rules should apply to any one transport. The same set of rules should also apply to subcarriers, to avoid the incentive for a claimant to sue the subcarrier in a direct action. The Rotterdam Rules only offer such protection of subcarriers in the maritime part of the transport.

The recommendations of the Commission in respect of multimodal transport have not been implemented in the proposed draft legislation, but are intended as recommendations contained in the travaux préparatoires. *In Norwegian law, courts will usually follow such recommendations.*

The Maritime Law Commission recommends that negotiable transport documents – bills of lading in today's terminology – shall only be negotiable in the sense that they are transferable. The rules on purchase in good faith are proposed to be abolished as redundant. This means that a pledge in a document cannot be executed by sole transfer of the document. The rules on cargo misdescription are not affected by this, but are on the contrary extended so that they will apply even to other types of documents than those to which the rules currently apply.

The reforms of the national rules on negotiability lead to uniformity in the legal framework for electronic transport records and paper documentation. The Commission also recommends that the word 'document' should be used in respect of electronic transport records. There is also a proposal for a legal basis to create statutory instruments on electronic signatures.

The Commission proposes that liability for misdescription of cargo in the Rotterdam Rules, which mimics the liability for cargo damage in the same way as section 299 of the current Maritime Code, should be supplemented by rules on liability for losses incurred by relying on the correctness of descriptions of the

document (cf. section 300 of the current Maritime Code). Such liability is, as a starting point, subject to limitation under the Rotterdam Rules, as correct cargo description is a duty under the Convention. However, the Commission proposes a separate duty for the carrier to prevent losses from occurring in this context. Breaches of this duty will not be subject to the limitation of liability under the Convention.

The Rotterdam Rules do not include provisions that the transport should be planned and carried out with a view to reducing emission of greenhouse gasses. The Commission proposes a rule of interpretation in this respect, and also a rule to the effect that slow steaming for environmental reasons as a starting point should be allowed.

Even if the Rotterdam Rules do not allow reservations, there are in a few cases openings for national variations in the implementation of the rules. The Maritime Law Commission has, i.a., recommended:

- *The rule in Article 12(3) that the carrier can be exempted from liability for the first and the last terminal period should not be implemented in national law, in line with clear statements in the travaux préparatoires of the Convention that national law could be more restrictive than the Convention in this way.*
- *Section 285 of the current Maritime Code, which provides that the carrier – on certain conditions – can be exempted from liability in respect of certain legs of the transport, should be retained as far as the first and the last leg of the transport is concerned. Likewise, this has a basis in clear statements in the* travaux préparatoires.
- *A special, national, limitation regime in favor of the shipper is not to be established, albeit the Convention apparently would allow such national rules.*
- *The rules on time limitation of actions of the Convention should be supplemented by the Limitation of Claims Act where appropriate.*

In line with the current legislation the proposal is that the international rules shall be applied also to domestic transports. The Commission proposes that the system of uniform limits of liability for domestic transports should be maintained. This means that a special limit of liability of 19 SDRs pr. kg. should continue to apply to cargo damage in domestic transports, while the Rotterdam Rules as implemented in the Maritime Code shall otherwise apply. In respect of the limit of liability for delay, the limit of the Rotterdam Rules is higher than those applying to other modes of transport. Hence, special rules for domestic transports are not required in the Maritime Code. It is proposed that the limits of liability for delay in other modes of transport shall be increased to the level of the Rotterdam Rules as far as domestic transports are concerned.

NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

NEWS FROM IMLI

CONFERMENT BY IMLI ON THE CMI OF THE AWARD FOR MERITORIOUS CONTRIBUTION TOWARDS THE PROGRESSIVE DEVELOPMENTS AND CODIFICATION OF INTERNATIONAL LAW

Motivation

WHEREAS THE IMO INTERNATIONAL MARITIME LAW INSTITUTE RECOGNIZES

The merits of

THE COMITÉ MARITIME INTERNATIONAL

Which, formally established in 1897, is the oldest international organization dedicated to the unification of maritime law;

Which is composed of National Maritime Law Associations from around the world whose membership includes highly qualified persons involved in maritime activities and specialists in maritime law, thereby ensuring the representation of the principal legal systems of the world;

Which was created with the object of contributing by all appropriate means and activities to the harmonization and unification of maritime law in all its aspects;

Which, through numerous model laws, rules, guidelines and draft conventions, has spearheaded the process of harmonization of many aspects of maritime law;

Which thereby contributed directly and in a meaningful manner towards the progressive development and codification of international maritime law;

the IMO International Maritime Law Institute acclaims

THE COMITÉ MARITIME INTERNATIONAL

A most deserving candidate for the Award for Meritorious Contribution towards the Progressive Development and Codification of International Maritime Law.

Now, therefore, by virtue of the powers vested by the Statute under which the IMO International Maritime Law Institute is established, the said Award is being conferred on the Comité Maritime International.
On this 5 day of May of the year two thousand and twelve.

PROFESSOR DAVID J. ATTARD
Director

The award was received by the President of the CMI, Karl-Johan Gombrii, on 5 May 2012 during a ceremony shown in picture below: Mr. Gombrii is to the left and Professor Attard to the right.

NEWS FROM IMO

REPORT OF THE LEGAL COMMITTEE HELD IN LONDON, 16-20 APRIL 2012

The Spring meetings of the IMO Legal Committee took place at the IMO Building in London, and as usual the CMI was represented by Patrick Griggs and Richard Shaw.
This was the second session under the Chairmanship of Mr Kofi Mbiah of Ghana. Those who had placed high hopes in this IMLI graduate, who has been a regular representative of his country for several years, were not disappointed.
The principal matters discussed were an increase in the limits of liability under the 1996 Convention on Limitation of Liability for Maritime Claims (LLMC), implementation of the HNS Convention, Piracy, and Pollution from Offshore Exploration and Exploi - tation Activity.

Limitation of Liability – Increased Limits

When the 1976 LLMC Convention was revised by the 1996 Protocol, an important addition to the legal provisions was contained in Article 8, which introduced the "tacit acceptance procedure" to allow for amendment of the limits of liability by a simplified process without the need for a protocol adopted by a diplomatic conference. This procedure was first introduced into the SOLAS Convention as a means of keeping its technical provisions in line with the changing needs of the shipping industry.
This procedure has since been incorporated into other conventions such as the Convention on the International Regulations for Preventing Collisions at

Sea, 1972, the International Convention for the Prevention of Pollution from Ships, 1973 and SOLAS 1974.

Instead of requiring that an amendment shall enter into force after being incorporated into a protocol accepted by, for example, two thirds of the Parties, the "tacit acceptance" procedure provides that an amendment shall enter into force at a particular time unless before that date, objections to the amendment are received from a specified number of States Parties.

Following the grounding of the *"Pacific Adventurer"* off Queensland in March 2009, the costs incurred in cleaning up the pollution by her bunker oil substantially exceeded the then applicable limit of liability of the vessel under LLMC 1996. The Government of Australia initiated consultations at the IMO for the increase of the limitation figures under the tacit acceptance procedure. Support was initially slow in coming, but eventually half of the States Parties (as required by Article 8.1) to the 1996 Protocol joined in requesting amendment, and the matter was submitted to the Legal Committee at this session.

The debate produced a number of surprises, and revealed some weaknesses in the working of the tacit amendment procedure and the drafting of Article 8. The first was the uncertainty as to which States Parties could participate in the discussion of the proposed amendment. Was the decision on the proposed increase to be made by the Legal Committee as a whole, or was it limited to the States who were parties to the 1996 LLMC Convention? Paragraph 2 of Article 8 provides that *"any amendment … shall be submitted to the Legal Committee of the Organization for consideration …",* but paragraph 8.3 provides: *"All Contracting States to the Convention as amended by this Protocol, whether or not Members of the Organization, shall be entitled to participate in the proceedings of the Legal Committee for the consideration and adoption of amendments."*

The Chairman, encouraged by the advice of the CMI delegates and others, concluded that it was for the Legal Committee as a whole to decide the question. He ruled that the voting provisions in paragraph 4 of Article 8 (which restrict the right to vote to Contracting States) applied only if the Legal Committee could not achieve consensus. Happily it did not prove necessary to take a vote, and the amendments to the limitation figures were adopted by consensus.

The second debate concerned the amount by which the limitation figures should be increased, and the factors to be taken into account in arriving at the amended amounts.

Paragraph 5 of Article 8 reads:

> *"When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance."*

The Australian Delegation put forward a series of papers addressing these factors, including a detailed study by KPMG, the international firm of accountants, of changes in monetary values which had affected the real value of the 1996 LLMC limits. They therefore argued for the maximum possible increase of the figures by 147%, which was the effect of adopting an increase of 6% per annum on a compound basis from 1996 to 2012. They argued that, since any increase adopted at this meeting would only come into effect (by virtue of paragraphs 7 and 8 of Article 8) in 2015, this should also be taken into account.

A more cautious approach was shown by the Japanese Delegation in their submission. This focussed on the changes in monetary values during the period from1996 to 2010, and concluded that the figures should not be increased by more than 45% equivalent to an annual increase of 2.5% compound.

The debate was a long and rich one with many different perspectives being put forward. Some delegations argued that there should be no increase at all, while a significant number of delegations supported the Australian arguments for the maximum possible increase. Many of those delegations reminded the Committee of the substantial cost of cleaning bunker spills, which are still subject to LLMC limits under the 2001 Bunker Pollution Convention, now in force.

The CMI delegation did not take the floor, since the final decision was really a political one, but CMI had made a significant contribution to the debate in the form of a document placed before the Legal Committee in 2010 (LEG97/8/4), which underlined the fact that the concept of limited liability, which has never been in question, requires that the limitation levels should be significantly below the amount of the largest incidents, otherwise the benefit of limitation to the ship owning community would be illusory. The CMI paper was referred to by several delegations.

The history of the limitation conventions demonstrates clearly the concept that limitation of liability should apply to all foreseeable claims, except those expressly excluded by the conventions. The "stand alone" limitation funds created to cover oil pollution damage, and, when that convention comes into force, pollution by HNS, are exceptions to the general rule.

At the conclusion of the debate it was clear that the view of most delegations favoured the Japanese approach, although it was considered that some

allowance should be made to take account for increases between 2010 and 2012, which had not been factored into their calculations. A pro rata increase was therefore applied, taking the figure of 45% to 51% and this was finally accepted by all delegations. It was also accepted by all that changes after 2012 should not be taken into account at this stage, although this did not exclude the possibility of such increases being considered in a future increase of the limitation figures.

A formal resolution was therefore adopted on 19th April 2012 which has annexed to it the increased figures to be applied to Article 3 of the 1996 LLMC with effect from 19th April 2015, provided that one quarter of Contracting States have not notified the Secretary-General in the meantime that they do not accept these amendments.

The new figures will be:

In respect of claims for loss of life or personal injury, the reference to:

– "2 million Units of Account" shall read "3.02 million Units of Account";
– "800 Units of Account" shall read "1,208 Units of Account";
– "600 Units of Account" shall read "906 Units of Account";
- "400 Units of Account" shall read "604 Units of Account";

In respect of any other claims, the reference to:

– "1 million Units of Account" shall read "1.51 million Units of Account";
– "400 Units of Account" shall read "604 Units of Account";
– "300 Units of Account" shall read "453 Units of Account";
– "200 Units of Account" shall read "302 Units of Account";

Unfortunately that did not mark the end of the debate. A final discussion revealed that due to an oversight, the Australian proposal had not referred to the limitation provisions applicable in contracting states which are not members of the International Monetary Fund, in which the provisions of Article 8.2 of the 1976 LLMC Convention and Article 5 of the 1996 Protocol fix the limits by reference to Gold Francs. It transpired that of the 45 Contracting States to the 1996 LLMC Convention, only one fits this category. Nevertheless a separate tacit acceptance procedure will have to be put in train to apply the increase to that state, and to any other states outside the IMF which may subsequently ratify the 1996 LLMC Convention.

The tacit acceptance procedure has been described as one of the jewels in the crown of the IMO, but the debates in the Legal committee over the increase of LLMC limits have revealed several flaws in this particular jewel. Fortunately the spirit of consensus in the Legal Committee and the wise guidance of its new Chairman enabled the 1996 figures to be brought up to date.

However further study is required to ensure that the flaws which were revealed during the debates in April 2012 are not allowed to prejudice simplified procedures for revision of other conventions. A "model" article for use in future conventions would be a worthy topic for further work, since there is a risk that such final clauses including tacit amendment procedures may be adopted without precise analysis by tired delegates at the end of a diplomatic conference.

Hazardous and Noxious Substances ("HNS")

The 2010 Protocol to the 1996 Convention on Compensation for Pollution Damage by Hazardous and Noxious Substances Transported by Sea has removed several obstacles to the entry into force of the original 1996 HNS Convention, in its amended form. The amended Convention has now been signed by eight states, and several other states have it in their legislative programme. The Legal Committee was informed of the various measures currently in hand to assist with the bringing the HNS Convention into full force and effect.

The IMO website has a section dedicated to the HNS Convention on which can be found a number of useful documents, including a consolidated text of the 1996 Convention as amended by the 2010 Protocol, and an overview of the amended convention.

The representative of the IOPC Fund outlined the measures which are in hand in advance of entry onto force, including a searchable list of hazardous and noxious substances covered by the 2010 Convention and a revised contributing cargo calculator. The meeting acknowledged that it was practical to situate the office of the HNS Fund in London and to share the services of the IOPC Fund Secretariat, although a final decision on these matters can only be taken by the first Assembly of the HNS Fund after the Convention has entered into force.

A special website has been set up by the IOPC Fund Secretariat to deal exclusively with HNS Convention matters.

The website address is www.hnsconvention.org

In the meantime preparatory work is in hand at intergovernmental level, and the report of a Special Consultative Meeting of nine of the states likely to become States Parties to the HNS Fund which was held in Rotterdam in June 2011 was placed before the Legal Committee.

Piracy

This topic remains high on the public agenda, and the Legal Committee received a report on latest developments. Noteworthy were the meetings of Working Group 2 which deals with legal aspects, and the most topical subject at present which is the use of Private Maritime Security Companies (PMSC's) providing armed guards (PCASP).
The Secretariat reported that it had started work on a database of court decisions related to piracy off the coast of Somalia, but while doing so it had learned that a similar database is maintained by the United Nations Interregional Crime and Justice Research Institute at http://www.unicri.it/maritimepiracy. It was agreed that the two agencies would share their resources, and member States were requested to submit relevant information to IMO or UNICRI.
The Committee was informed that the GISIS database on the IMO website also contains information and statistics relating to aspects such as the number of pirates captured, dates of release of hijacked ships and brief descriptions of pirate attacks.

Pollution from Offshore Activities

This topic was dealt with under "any other business", since it does not lie within the objects of the IMO as set out in its governing convention, or within the purview of Strategic Direction 7.2, which is confined to "shipping".
The debate in the Legal Committee had a looking-glass atmosphere, with some delegations, notably Brazil, arguing that the Legal Committee should not be considering this subject at all, while others argued that this was an important and topical subject raising current issues of international law, and that the IMO was the obvious agency to address this subject.
Conspicuous by its absence from the paper submitted by the delegation of Brazil was any reference to article 235 of UNCLOS, which provides, inter alia:

> *2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.*
>
> *3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.*

At the conclusion of the discussion the Chairman observed that the IMO Council had asked the Legal Committee to re-examine its proposed revision of Strategic Direction no 7.2 but had not imposed a time limit within which it should respond. The informal Correspondence Group led by Indonesia would therefore continue its work on the subject. Several delegations questioned whether pollution from offshore activity was within the definition of "shipping" and thus within the powers of the IMO, but none of them suggested another UN agency which would be more appropriate to deal with this topical subject.
There was much discussion of the meaning of the IMO's strategic direction no 7.2, but the paragraph of the Legal Committee Report dealing with this is a masterpiece of doublespeak . It reads:

> *"The Committee agreed that, in order to have a proper basis to organise discussion of the issues relating to transboundary damage from offshore activities it was necessary to follow applicable procedures. In this regard, a delegation making a proposal which falls outside the scope of the current Strategic Plan should be invited to submit it to the Council in accordance with paragraph 8.7.3 of the Guidelines on the application of the Strategic Plan and the High Level Action Plan (resolution A.1013(26)), and in accordance with paragraph 4.12.3 of the Committee's Guidelines on the organization and method of work (document LEG.1/Circ.6)."*

Meanwhile deep water drilling continues further and further offshore with corresponding increase in the risk of damage to the marine environment. The recommendations of the US and Australian Enquiries into the Macondo and Montara casualties are ignored. The arguments in favour of the IMO doing nothing are about as persuasive as those in favour of installing a man with a red flag in front of every motor vehicle. The good news is that there was a widespread acceptance of the need to continue the debate, and the Indonesian delegation will continue its work with the informal consultative group, whose email address is in offshore discussion imoleg@yahoogroups.com.
The Committee agreed to inform the Council that it wished to analyse further the liability and compensation issues connected with transboundary pollution damage resulting from offshore oil exploration and exploitation activities, with the aim of developing

guidance to assist states interested in pursuing bilateral or regional arrangements, without revising Strategic Direction 7.2.
The Committee recognised that bilateral and regional arrangements were the most appropriate way to address this matter, although it considered that there was no compelling need to develop an international convention on this subject.
That certainly came as a disappointment, but not a surprise, to this author, but demonstrated the Legal Committee's skill at addressing and managing difficult questions, which it has achieved since the days of the "*Torrey Canyon*".

RICHARD SHAW *

NEWS FROM IOPC FUND

REPORT OF THE MEETINGS HELD IN LONDON, 24-27 APRIL 2012

The spring meetings of the Governing Bodies of the IOPC Funds took place at the IMO Building from 24th to 27th April 2012.
A full record of decisions is available on the Funds' website at www.iopcfunds.org/documentservices and this report will be confined to matters of general interest.

"Plate Princess"

This incident, which occurred in Puerto Miranda, Venezuela in March 1997, continues to be a matter of concern. Despite the fact that contemporary records indicate that only 3.2 tonnes of crude oil were spilt, the Courts of Venezuela have condemned the Master, Owner and the 1971 Fund to pay a total of £59.2 million towards losses quantified by court experts at £113 million.
The case has a number of exceptional features, and a full summary of them is set out in document IOPC/APR12/3/2/Rev.1 which is on the IOPC Fund website. However the most notable recent developments are:

- in May 2006 the 1971 Fund Administrative Council decided that the claims were time barred;
- in March 2011 the 1971 Fund Administrative Council decided that in any event the judgments of the Venezuelan Courts had been obtained on the basis of fraudulent documents, and that due process of law had not been accorded to the defendants, and therefore the judgments were not enforceable against the 1971 Fund by reason of Article X of 1969 CLC and Article 8 of the 1971 Fund Convention;
- in October 2011 the FETRAPESCA fishermans' union requested the Maritime Court of First Instance to withdraw its claim, but the Court rejected this request;
- on 12th March 2012 the Director of the IOPC Funds received a communication from the Venezuelan Embassy in London requesting that the final judgment of the Venezuelan Court dated 21st November 2011 be notified to the States Parties to the 1992 Fund for the purpose of expediting immediate payment of compensation to Venezuelan nationals.

The latest developments were discussed at some length at the meeting, and the case for immediate payment was argued at even greater length by the delegate of Venezuela.
However the Administrative Council of the 1971 Fund declined to authorise payment, and authorised the Director to continue to monitor the outcome of the legal actions in Venezuela.

"Volgoneft 139"

This case in Russia continues to drag its feet, despite a genuine wish by the Fund to settle claims. The reasons have been given in our previous reports.
The principal obstacle now appears to be the failure of the Russian Government to implement the increase in the amount of the limit of the shipowner's liability under the CLC which came into effect in November 2003.
The Insurance cover of the "*Volgoneft 139*" for pollution damage at the time of this incident was therefore 3 million SDR (RUB 116.3 million) which is 1.51 million SDR below the amount required by the amended 1992 CLC Convention, and this "insurance gap" has proved a difficult sticking point in the negotiations.
All the Russian claims arising from this incident have now been assessed at a total of RUB 337.6 million, equivalent to £7.3 million, but none can be paid until the insurance gap problem has been resolved.

* CMI Observer Delegate.

"Hibei Spirit"

This very large claim in Korea moves steadily towards final settlement, despite the total number of individual claims exceeding 28,850.

Close cooperation between the Fund, the Skuld P and I Club and the Government of Korea has made this possible. The level of payments by the Fund remains at 35% of assessed clam amounts, with the Government of Korea settling the balance under the provisions of a special law.

A new development has been the implementation of a new technique for settling small non-fishery claims where the claimant has not been in a position to produce documentary proof of loss. This technique is still in the trial stage, but has enabled a further 584 claimants to receive compensation.

The recourse action brought against Samsung in the Peoples Republic of China has now been concluded, with a recovery of US$ 10 million shared between the Club and the Fund.

Claims in Nigeria

Two incidents were reported to the meeting involving pollution incidents in Nigeria, but in both cases the facts remain very uncertain. Both incidents happened in 2009, and the possibility remains that they may be time barred under Article 6 of the 1992 Fund Convention.

However a substantial delegation from Nigeria participated in the discussions, and it is hoped that this may enable these cases to be settled.

Working Group on Interim Payments to Pollution Victims

This topic has proved a difficult one to resolve. There can be no doubt that the object of the CLC and Fund system is to ensure that victims of oil pollution from tankers receive prompt payment of compensation. However the very structure of the system, based on limited liability of the ship owner and Fund respectively, means that when the total of the approved claims exceeds the total of the ship owner's CLC limit and the maximum available from the IOPC Fund, the calculation of the proportion of each claim which can be paid can only be made when all claims are known and assessed. That in turn renders the making of interim payments before that time mathematically impossible.

Hitherto the problem has been solved in the small number of cases in which it arose by arranging for the ship owner and his P and I Club to pay the full amount of the assessed proportion of each claim, until the full amount of the ship's CLC limit of liability has been reached. The Fund then takes over and continues settlement of both the ship owner's proportion and the Funds proportion of each claim at the level of payment fixed jointly by the Fund. Each payment, whether by the Club or the Fund, is specifically approved by both of them, and at the end of the case a reconciliation is carried out and a balancing payment made to ensure that each pays the appropriate amount according to the Conventions.

However this solution has not proved possible to apply in cases where the ship owner has been obliged to pay his limitation find into court.

If that happens, as in the case of the *"Prestige"*, the Fund has paid its proportion to each clamant (the Fund Convention does not require the Fund to constitute a limitation fund in court) leaving the victims to wait for the Court-appointed administrator to distribute the funds in court. In no case has that resulted in a payment which could be considered "prompt".

In an attempt to resolve this dilemma the International Group of P and I Clubs and the 1992 Fund Secretariat commissioned a study of the problem by Mr Mans Jacobsson, formerly Director of the Fund, and Mr Richard Shaw, the CMI observer delegate. Their report was tabled at a session of the working group considering this topic under the Chairmanship of Mr Volker Schofisch of Germany, and is available on the Funds website as document IOPC/APR12/10/1.

It is evident that no solution of this problem is possible without amendment of both the CLC and Fund Conventions, unless the Funds and the International Group can reach agreement on a Memorandum of Understanding recording the existing practice.

An Assembly Resolution formally approving the terms of the MOU may assist in persuading a judge charged with administering a CLC Limitation Fund to take due note of the practice, and to give effect to it in the distribution of the Limitation Fund.

The Study revealed a paragraph, of which many delegates were unaware, in Article 18.7 of the 1971 and 1992 Fund Conventions, with refers to the need for interim compensation payments (there referred to as "provisional payments") to be paid "as promptly as possible".

This paragraph clearly gives express authority under the Conventions for the making of prompt interim payments, and thus to the constructive interpretation of the convention provisions in a way which enables this to be achieved.

Further negotiations continue between the Funds and the International Group on the wording of an appropriate Memorandum of Understanding, and it is to be hoped that agreement on this will be achieved before the next meeting of the Working Group.

Definition of "ship" for the purpose of the Fund Convention

Following the debate on the Opinion by Professor Lowe of the University of Oxford on this difficult question, referred to in our previous report and available on the IOPC Fund document services website at IOPC/OCT11/4/4, the discussion continued at a session of the working group on this topic under the Chairmanship of Ms Birgit Solling Olsen.

The next formal meetings of the IOPC Fund governing bodies will take place on 15-19 October 2012, with an additional session, if required, on 9-13 July 2012.

RICHARD SHAW *

* CMI Observer Delegate.