YEARBOOK
2017-2018
ANNUAIRE

Francesco Berlingieri - 1922 to 2018

Opening speech at CMI Assemby and CMI/AIDIM Seminar by the President: Stuart Hetherington on 8 September 2017

We are here to honour Francesco Berlingieri, President Ad Honorem of the CMI.

Francesco was born in Genoa on 20 February 1922, he was awarded the Silver medal for military valor as an officer in the Italian Royal Navy. He attended his first CMI Conference in Naples in 1951, some 66 years ago.

As a young man of 34 he received instructions to act on behalf of Italia di Navigazione in relation to the collision between the "Andrea Doria" and the "Stockholm" off Nantucket on 25 July 1956, which had resulted in the rescue of 1,660 passengers with the loss of 46 lives. Ken Volk and Gordon Paulsen being two of the United States Attorneys long associated with the case arising from that collision.

He was President of the CMI from 1976 to 1991.

He is President Ad Honorem of the Italian Association of Maritime Law, he is an honorary member of the Order of the British Empire (OBE), he is a Doctor Honoris Causa in Jurisprudence from Bologna University and also from the Universities of Antwerp and Athens. He is an Honorary Member of the British Maritime Law Association, the

USMLA as well as various other organisations and the editor of "Il Diritto Marittimo".

In the wonderful collection of essays which Giorgio collected to honour Francesco on the occasion of his 88th birthday in 2010 was one by Kate Lannan of UNCITRAL. From her experience of working with Francesco on the Rotterdam Rules between 2002 to 2008, she described him as the "Consummate gentleman diplomat". In order to elaborate on that theme she cast her net widely to see what others had said about the qualities of such people. She then quoted the following:

> *"A diplomat is a person who can tell you to go hell in such a way that they actually look forward to the trip"*
>
> *"It is a necessary quality of a diplomat or a politician that he will compromise. Uncompromising politicians or diplomats get you into the most terrible trouble."*
>
> *"A gentleman is a man who can disagree without being disagreeable."*

I note that she overlooked the description of an ambassador by Sir Henry Wotton, the English author and diplomat of the late 16th and early 17th centuries. He described an ambassador as being " an honest gentleman sent to lie abroad for the good of his country." That got him into quite a lot of trouble in Italy, which possibly explains why Kate did not refer to it!

I should say, that amongst those essays was the delightful "hommage to Francesco Berlingieri" by my predecessor, Karl-Johan Gombrii. He disclosed that the Berlingieri name had been associated with the CMI at least since 1900. His research led him to identify that there was a young maritime lawyer called Francesco Berlingieri from Genoa at the CMI Conference in Paris in 1900.

He also noted that at the CMI Conference in Copenhagen in 1913, although Francesco Berlingieri headed the Italian delegation there was also a young maritime lawyer from Genoa present by the name of Giorgio Berlingieri. He also noted that in 1959 at the Rijeka Conference both Giorgio Berlingieri and a young maritime lawyer from Genoa by the name of Francesco Berlingieri were present as part of the Italian delegation and in 1977 at the CMI Conference in Rio de Janeiro, Francesco Berlingieri was the President of the CMI and a young maritime lawyer from Genoa, Giorgio Berlingieri, was also a member of the Italian delegation. (That amounted to two Francescos and two Georgios). One of the Francescos being the person that we honour today.

The others being his father and grandfather and our own Vice President

Giorgio; all have been Presidents of the Italian MLA and active within the CMI. This caused Karl to comment that the Berlingieris during the last hundred or more years do not "waste names"!

Very few of you here today need me to tell you very much more about Francesco. His attributes are well documented but let me highlight a few more of them.

Apart from the brief period after the Second World War when Lord Justice Scott was the President of the CMI for about a year, Francesco was the first non-Belgium to be President of the CMI. He is the third longest serving President of the CMI, coming in behind Albert Lilar, who he succeeded, and served in that role for 29 years (1947 to 1976) and Louis Franck who served for 16 years from 1921 to 1937.

In writing about his 15 years as President of the CMI, Francesco identified the administrative challenges which he faced. The fact that he was in Italy while the Secretary-General Executive was in Sweden and the Secretary-General Administration was in Belgium and, secondly, also the new international order which started to emerge as a result of the formation of the IMO in 1959, UNCTAD in 1964 and UNCITRAL in 1966. I can empathise with all of that. The more things change the more they remain the same.

My first exposure to the whirlwind which was Francesco was at the Paris Conference in 1990. While there had been tentative steps taken before then to resolve the problems of the Hague Visby regime and the lack of support for the Hamburg Rules it was at the Paris Conference that the first serious steps to finding a solution were launched by Francesco using his diplomatic skills. Although his role as President ceased the next year his continued involvement with that project for CMI and then as an Italian delegate to the UNCITRAL meetings is as they were set out and commented on by Kate Lannan in her 2010 essay; there is no need for further elaboration from me.

Hopefully the international community will come to its senses and finally start ratifying that Convention in large numbers and enable the next generation of maritime lawyers to appreciate one of Francesco's great legacies.

The contribution that Francesco and his wife of 68 years, Anna, who we memorialised last year, made to the CMI cannot be measured in words.

Francesco: we would like to present this salver to you as a small token of the appreciation we have for you and the esteem within which you are held by the worldwide maritime community.

Bill Birch Reynardson - 1923 to 2018

William Robert Ashley Birch Reynardson, or Bill to all, was born in 1923. When he was 6 his father was appointed ADC to Lord Athlone who was Governor General of South Africa, and Bill spent a happy 5 years in Cape Town. He loved South Africa and returned many times throughout his life.

After the Dragon School in Oxford and Eton College, Bill went up to Christ Church, Oxford, but after 2 terms he was called up to fight in the war, and after some training he was sent to North Africa, and then fought in Italy with the 9th Lancers, a tank regiment. He fought up Italy via Naples (where he found time to hear Susy Morelli and Tito Gobbi perform in *Tosca),* and he was involved in fierce fighting at Coriano Ridge where he was wounded by a mortar shell: *"I was very lucky"* he enjoyed telling his grandchildren *"one shell blew me conveniently into the nearest ditch and the shrapnel went over my head – one bit actually through the top of my tin hat – but I left parts of 2 of my fingers hanging on a barbed wire fence."*

He ended up in hospital in Rimini where he shared a room with Randolph Churchill (son of Winston) and Evelyn Waugh. *"I found myself in the middle of three beds," he wrote. "They never stopped talking (seldom to me) and constantly drank whisky day and night. I was glad to move on."*

Once he had been de-mobbed from the army he went back to Oxford to finish his law degree and then qualified for the Bar in the Middle Temple in London. His career took a change of course when he met Sir Guy Ropner of Ropner Shipping Line on a shoot in Yorkshire. Sir Guy told him that one of his ships had recently been in a collision and that he needed some legal advice. Bill knew nothing of shipping law at that stage of his career but wrote to Sir Guy having looked up what he could in his

law books, proffering advice which turned out to be correct. A few months later Sir Guy invited Bill to lunch and explained that he was going to be President of the Chamber of Shipping and that he needed a legal assistant. Would Bill be interested in applying? Bill applied for the job and when it came to the interview he was up against two other candidates. During the interview Bill noticed the General Manager pass a note to Sir Guy. Later, Bill was called back and offered the job and was asked whether he had any questions. "Yes", said Bill "may I ask what was in the note?" They showed him the note which said: "Birch Reynardson has an M.A. The other candidates only have B.A.'s". In those days, as now, an M.A. at Oxford is available to anyone who has a B.A. on payment, of £5! Fortunately the other candidates had failed to pay the necessary £5.

Bill then worked at the Chamber of Shipping for a few years and came into contact with the Miller Brothers – Cyril and Dawson Miller, who managed the UK P and I Club. Cyril, who was secretary of the British Maritime Law Association asked him whether he would be willing to be assistant secretary. It was this appointment which first got him involved with the CMI. His first involvement was as a member of the BMLA delegation to the Brighton Conference in 1954, then representing the Chamber of Shipping where the first draft of the Limitation of Liability Convention 1957 was considered. In 1960 he joined the Thos. R. Miller partnership and he continued to attend all CMI meetings thereafter. He attended the New York Conference in 1965 at which, under the Presidency of Albert Lilar, work was undertaken on revision of the 1926 Maritime Liens and Mortgages Convention. Following the *Torrey Canyon* incident in 1967 the CMI set up an International Sub-Committee to look at the private law aspects of pollution from tankers, and Bill played an important role with Lord Devlin in preparation of the CMI draft of what was to become, in 1969, the Civil Liability Convention for Oil Pollution Damage. It is said that Bill and Lord Devlin developed the first draft of the convention on his kitchen table. The text of this convention was finalised at the 1969 Tokyo Conference.

Bill became a member of the CMI Bureau Permanent in 1970 and when, under the new Constitution, the Executive Council was created in 1973, he continued to serve on that body. In 1978 he was elected Vice President and in 1996 he was elected the first CMI Member *honoris causa* in recognition of his outstanding service to CMI.

Bill and his wife Nik, who invariably accompanied him on CMI business, had the greatest fun in making friends in the CMI family, both young and old, and his support to his great friend, Francesco Berlingieri when he was President was a formidable double act which contributed greatly to the survival of the CMI into the 21st Century.

In 1985 Bill set up the CMI Charitable Trust. He was able to go round his many City contacts persuading them to contribute to the Trust and this is now a thriving fund which encourages young students to develop their knowledge of maritime law and has supported the CMI in some of its academic endeavours. The Trust awards a prize to the best IMLI student and thereby secures the close relationship between the CMI and the Institute of Maritime Law in Malta. Bill was made an honorary Doctor of Law by IMLI in 1995.

Bill was always forthright in his approach to business, and his career at Millers was a very successful one. He saw the need for Millers to develop business streams outside the traditional P & I model, and was integral in setting up the Through Transport Club, managed by the Millers partnership. It was through his friendships with James Sherwood of United States Lines, B.G Nilson of Swedish American Lines and Peter Carlsson that he became interested in container shipping and the issues which this new form of transportation threw up. With their encouragement and expertise he was able to build an insurance model in what became known as the Through Transport Club which became extremely successful and is a thriving business today. Likewise, when he had become Senior Partner of Millers he developed other business streams such as the Bar Mutual, insuring the professional indemnity risks of barristers and ITIC, insuring risks of intermediaries in the shipping business.

Bill travelled extensively meeting with Members of the Clubs under the Thos. Miller management, lawyers and governments. He enjoyed telling the story of travelling to Soviet Russia with the young Lord Fairfax, then an employee of Millers. When they were shown their rooms Lord Fairfax was embarrassed to discover that he had been put into the Presidential suite whereas his Senior Partner had been given a modest room on the first floor!

In the early ‘80’s Millers were asked to assist the Saudi government in drafting their maritime code. Bill was asked to come to Jeddah to make a presentation to Dr Fayez Badr, Saudi Arabia’s daunting Minister for Ports on the progress Millers were making. Bill spoke fluently for nearly an hour as he took the minister section-by-section through the hundred pages of legalise.

At the end, the minister expressed complete satisfaction and agreement with everything he had highlighted. Afterwards, Bill confided to a colleague that he had forgotten to bring his reading glasses and had conducted his presentation entirely from memory.

Bill’s approach to business was, in today’s terms, old fashioned. Shortly after the *Torrey Canyon* incident, the Treasury Solicitor on behalf of the UK government refused a guarantee for pollution claims issued by a

Luxembourg based Club on the grounds that it was a "foreign" entity. The Club's solicitor (CMI past president, Patrick Griggs) contacted Bill, interrupting his lunch. Bill, not in the best of moods, his lunch having been ruined, marched into the Treasury Solicitor's office to very briskly but politely point out that the UK Treasury had been consulted about the setting up of the Luxembourg office and had encouraged the Club to do so. Collapse of Treasury Solicitor. Bill was then able to go back to the City and finish his lunch!

Likewise, his approach to recruitment at Millers, for which he took responsibility shortly after he became a partner, might not be considered "politically correct" by today's standards. In an interview he gave towards the end of his career he said: "Recruiting was so different in those days – I recruited everyone, very often because I knew their fathers or cousins. But I knew these people and they owed their loyalty to the firm and they stayed, often for the whole of their working life".

Away from the office Bill had a very active life, involved in his family house, Adwell in Oxfordshire. He loved the countryside and any friend who came to stay was expected to help in the garden. There is even a Berlingieri Bridge in pride of place in the garden today! He was an enthusiastic chairman of the South Oxfordshire Hunt, and he was High Sherriff of Oxfordshire, responsible for the judges in the county.

Since the war Bill had a particular love of opera and he used to hold operas in the garden at Adwell. Later he became involved with Les Azuriales Opera company in the South of France of which he was chairman (this has a Millers connection through Sarah Miller and Mark Holford) and Garsington Opera which Bill supported for many years and became chairman of on his retirement from Millers.

In 1995 he was appointed a Commander of the British Empire for his services to the unification of maritime law.

Bill died on 4 July 2017.

Tom Birch Reynardson

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PART I

Organization of the CMI

CONSTITUTION

2017

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, 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.

Article 2
Existence and Statutory Seat

The Comité Maritime International 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. Its statutory seat is at Ernest Van Dijckkaai 8, 2000 Antwerpen. Its statutory seat may be changed within Belgium by decision of the Executive Council.

PART II –MEMBERSHIP AND LIABILITY OF MEMBERS

Article 3
Voting Members

(a) Subject to Article 28, the voting Members of the Comité Maritime International are national (or multinational) Associations of Maritime Law elected to membership by the Assembly, 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 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 this Constitution 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 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 national (or multinational) 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) National (or multinational) 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.

Article 4
Titulary Members

Individual members of Member Associations may be elected by the Assembly as Titulary Members of the Comité Maritime International upon the proposal of the Association concerned, endorsed by the Executive Council. Individual persons may also be elected by the 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 Comité Maritime International may upon the proposal of the Executive Council be elected as Provisional Members by the 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 Assembly as Titulary Members, to the maximum number of three such Titulary Members from any one State. 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 Assembly may elect to Membership honoris causa any individual person who has rendered exceptional service to the Comité Maritime International or in the attainment of its object, with all of the rights and privileges of a Titulary Member. Members honoris causa may be designated as honorary officers of the CMI if so proposed by the Executive Council. 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 Comité Maritime International may be elected by the 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 Comité Maritime International 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 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 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 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 Assembly.

(e)

i. The Member in question may offer a written response to the motion to expel, and/or may address the 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 Comité Maritime International shall be limited to the amounts of their subscriptions paid or currently due and payable to the CMI.

PART III –ASSEMBLY

Article 10
Composition of the Assembly

The Assembly shall consist of all Members of the Comité Maritime International, the members of the Executive Council and the Immediate Past President.

As approved by the Executive Council, the President may invite Observers to attend all or parts of the meetings of the Assembly.

Article 11
Functions of the Assembly

The functions of the Assembly are:

(a) To elect the Officers of the Comité Maritime International;

(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 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 Constitution 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 this Constitution pursuant to Article 14.

Article 12
Meetings and Quorum of the Assembly

The Assembly shall meet annually on a date and at a place decided by the Executive Council. The Assembly shall also meet at any other time, for a specified purpose, 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.

At any meeting of the Assembly, the presence of not less than five Member Associations entitled to vote shall constitute a lawful quorum.

Article 13
Agenda and Voting of the Assembly

Matters to be dealt with by the 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 this Constitution, provided no Member Association represented in the 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 in good standing shall have the right to vote.

Each Member Association present in the Assembly and entitled to vote shall have one vote. The right to vote cannot be delegated or exercised by proxy. The vote of a Member Association shall be cast by its president, or by another of its members duly authorised by that Member Association.

Unless otherwise provided in this Constitution and subject to Article 8(f)(ii) and Article 14, all decisions of the 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.

Article 14
Amendments to the Constitution

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

Amendments to the Constitution 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 - OFFICERS

Article 15
Designation

The Officers of the Comité Maritime International shall be the governing body of the CMI within the meaning of the Belgian Act of 27 June 1921 as later amended and shall consist of the following members who are the directors of the CMI within the meaning of the Act:

(a) The President,

(b) Two Vice-Presidents,

(c) The Secretary-General,

(d) The Treasurer (and Head Office Director)

(e) (hereafter “The Treasurer”),

(f) The Administrator (if an individual), and

(g) Up to eight Executive Councillors.

Article 16
President

The President of the Comité Maritime International shall preside over the 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 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 officers 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 officers 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 officers together may decide to institute such legal action provided notice is given to the other members of the Executive Council. The five officers 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 Comité Maritime International, 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 officers 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 Comité Maritime International.

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 Comité Maritime International, 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 financial statements for the preceding calendar year in accordance with current International Accounting Standards, and shall prepare proposed budgets for the current and next succeeding calendar years;

(d) submit financial statements 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 and approval by the Assembly not later than the first meeting of the Executive Council in the calendar year next following the year to which the financial statements relate.

(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 Director, the Treasurer shall be:

(a) 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.

(b) authorised to give, and be responsible for, all formal and informal notifications of amendments to the Constitution of the CMI; official notifications of the appointment and termination of officers 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 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 Comité Maritime International, and to that end, shall:

(a) give official notice of all meetings of the 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 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 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 Officers of the Comité Maritime International as described in Article 15.

Executive Councillors shall be elected by the 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 Executive 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 Assembly,

  ii. The Member Associations, relating to the work of the Comité Maritime International 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 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 the object of the CMI; reports of such persons shall be submitted to the Executive Council and/or the 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 Assembly, independent auditors of the annual financial statements prepared by the Treasurer and/or the accounts of the CMI, and to make interim appointments of such auditors 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 Assembly, and of Seminars, Symposia and Colloquia convened by the CMI;

(k) To propose the agenda of meetings of the 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 Assembly;

(m) To report to the 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, 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 Executive 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 Comité Maritime International 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 Executive Councillors.

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 Comité Maritime International.

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 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 officers eligible for re-election are available to serve for an additional term in which event he or she shall obtain a statement from such officers 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 an Executive Councillor, or other Officer 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 annual meeting of the 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 annual meeting of the 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 Assembly shall be the nominations of the Nominating Committee.

The Executive Council may make nominations to the Nominating Committee for election by the 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 annual meeting of the Assembly at which nominees are to be elected.

PART VII - INTERNATIONAL CONFERENCES

Article 27
Composition and Voting

The Comité Maritime International shall meet in International Conference at places approved by the 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 Officer 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 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 calendar 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 calendar 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 calendar years shall be sufficient cause for expulsion of the Member in default. A Member expelled by the 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 Assembly. The 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 calendar 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 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 Comité Maritime International, 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 Comité Maritime International.

PART IX – FINAL PROVISIONS

Article 30
Liability

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

Article 31
Dissolution and Procedure for Liquidation

The Assembly may, upon written motion received by the Administrator not less than six months prior to a regular or extraordinary meeting, vote to dissolve the Comité Maritime International. At such meeting a quorum of not less than one-half of the Member Associations entitled to vote shall be required 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 32
Governing Law

Any issue not resolved by reference to this Constitution shall be resolved by reference to Belgian law.

Article 33
Entry into Force

This Constitution 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.

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

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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STANDING COMMITTEES

[As constituted during Virtual EXCO meeting April 2019] Note: In terms of Art 16 of the CMI Constitution, the President is ex officio a member of all Committees and Working Groups.

Standing Committee on Carriage of Goods (including Rotterdam Rules)
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]

Standing Committee on General Average
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Richard CORNAH [UK-IUMI]
Daniella DE LINT [Netherlands]
Michael HARVEY [UK]
Kiran KHOSLA [UK - ICS]
Jiro KUBO [Japan]
Sveinung MÅKESTAD [Norway]
Jonathan SPENCER [USA]
Esteban VIVANCO [Argentina]

Standing Committee on General Average Interest Rates
Bent NIELSEN [Denmark] *Chair*
Taco VAN DER VALK [Netherlands]
Andrew TAYLOR [UK]

Standing Committee on Marine Insurance
Joseph GRASSO [USA] *Chair*
Donald CHARD [UK]
Felix COLLIN [Finland]
Andreas BACH [Switzerland]
Pierangelo CELLE [Italy]
Charles FERNANDEZ [UK]
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Hernan LOPEZ SAAVEDRA [Argentina]
Dieter SCHWAMPE [Germany]
Jonathan SPENCER [USA]
Rhidian THOMAS [UK]
Pengnan WANG [China]

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Taco VAN DER VALK [Netherlands] *EXCO rep*
Lorenzo FABRO [Italy]
Javier FRANCO-ZARATE [Colombia]
Mišo MUDRIĆ [Croatia]
Massimiliano MUSI [Italy]
Evangeline QUEK [Hong Kong/China]
Violeta RADOVICH [Argentina]
Harold SONDERGARD [Denmark]
Ioannis TIMAGENIS [Greece]

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Benoit GOEMANS [Belgium]
Aurelio FERNANDEZE-CONCHESO [Venezuela]

Constitution Committee
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Deucalion REDIADIS [Greece] *Chair*
Maria BORG BARTHET [UK] *Rapporteur:Implementation*
Peter LAURIJSSEN [Belgium] *Rapporteur:Promotion*
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Katerina VUSKOVIC [Peru]

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Chris GIASCHI [Canada]

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Evelien PEETERS [Belgium]

Audit Committee
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Peter CULLEN [Canada]
Luc GRELLET [France]
Andrew TAYLOR [UK]

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Andrew TAYLOR [UK] *Chair*
Stuart HETHERINGTON [Australia] Ex Officio
Giorgio BERLINGIERI [Italy]
Henry Hai LI [China]
Jorge RADOVICH [Argentina]

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Giorgio BERLIGIERI [Italy]
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Tomotaka FUJITA [Japan]
Ann FENECH [Malta]
In Hyeon KIM [S Korea]
Dihuang SONG [China]
Michael STURLEY [USA]
Edmund SWEETMAN [Ireland/Spain]

Liaison with National Associations (*Provisional)
Rosalie BALKIN *South Africa, Nigeria, Senegal*
Ann FENECH *Croatia, Greece, Italy, Malta, Romania, Slovenia, Spain, Turkey*
Aurelio FERNANDEZ CONCHESO *Argentina, Brazil, Chile, Colombia, Ecuador, Panama, Peru, Mexico, Uruguay, Venezuela*
Luc GRELLET *Cameroon, Congo, France*
Stuart HETHERINGTON *Australia & New Zealand, Indonesia, PIMLA*
John O'CONNOR *Canada, USA*
Dieter SCHWAMPE *Denmark, Finland, Germany, Japan Norway, Poland, Sweden, Ukraine*
Lawrence TEH *India, Malaysia, People's Republic of China (incl Hong Kong),Republic of Korea, Democratic People's Republic of Korea, Philippines, Singapore*
Taco VAN DER VALK *Ireland, Netherlands, United Kingdom*
Peter VERSTUYFT *Belgium*
Alexander VON ZIEGLER *Israel, Switzerland*

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PART II

The Work of the CMI

GENOA ASSEMBLY AND SEMINAR
7-8 September 2017

OPENING SPEECH
Giorgio Berlingieri

Ladies and Gentleman,
Queridos Amigos,
Bienvenue a Genes.

What a pleasure and an honor to host a CMI event.

In the program the Secretary General of the CMI John Hare rightly mentions that this is the third time that a CMI Assembly takes place in Genoa.

Also, three CMI Conferences were organized in Italy, in three most beautiful cities. The first in Venice in 1907, Monsieur Beernaert was President of CMI. The second in Genoa in 1925, with Monsieur Louis Franck President of CMI and the third in Naples in 1951 and le Baron Albert Lilar who I had the privilege of knowing was the CMI President. I am proud to say that in all the three Conferences there was a Berlingieri attending.

The President ad Honorem of CMI Francesco Berlingieri Junior, was really junior, three years old, as mentioned by John Hare when the CMI Conference was organized in Genoa in 1925 by his grandfather, Francesco senior.

Whilst he was President of the CMI from 1977 to 1991 two CMI events were organized in Italy, a Colloquium in Venice in 1986 with Francesco Berlingieri jr President of CMI and an Assembly and a Seminar in Genoa in 1992 chaired by the President of CMI Allan Philip who was elected as such in 1991 in Brussels when Francesco Berlingieri was acclaimed President ad Honorem.

I am proud to have another CMI event to take place in Italy.

Many of you were already in Genoa in 2010 for a Seminar on the occasion of the presentation of the Essays in honor of the President ad Honorem, with speakers Patrick Griggs, Jean-Serge Rohart and Jan Ramberg.

That time we met at the Old Stock Exchange Building, which is the place where the CMI Assembly will take place this afternoon.

There have been meetings of various IWGs yesterday and a full day meeting at the Executive Council with another one taking place after the Assembly.

I hope you enjoyed the cocktails yesterday at the Aquarium and all delegates and accompanying persons, who are presently in a tour of the city, will gather this evening at Villa Lo Zerbino.

As usual, John Hare will be providing you with all house keeping information.

I had the pleasure of organizing quite a number of events and seminars for my Association since 2005 when I was elected President of the Italian MLA but, as I grew with CMI in my blood, the organizing of this CMI event has been particularly enjoyable.

It also gave me the opportunity to be in contact with many of you and to appreciate once more the extraordinary competence of John Hare.

I could have done nothing without his help and without that of the Professional Congress Organizer Laura Baldi and her team at Studio B.C.

Just to mention that when the program was already corrected, approved and gone to print I found out that Francesco Berlingieri was not listed among the delegates.

My exclusive fault and mistake. But Laura and the printers managed to have his name added!

You are so numerous and coming from all parts of the world and in representation of so many National Maritime Law Associations.

Thanks for being here, it is great being together.

The CMI has always been an organization of friends with the common intent of devoting time to what is the main scope in the Constitution of the CMI: the unification of maritime law.

Let us thus continue with this tradition, passion and friendship.

Before enjoying the Seminar and leaving the floor to Mans Jacobsson, two last things:

You may have read in the page of the program concerning the history of the Genoa Light House, that in 1340 the city's coat of arms was painted at the top of the lower part of the tower.

And you see from the picture of the Lanterna in the opening page of the program the emblem consists of a red cross on a white field.

That is also the flag of the city of Genoa, the Saint George Cross, identical to the flag of England, which was adopted for the British ships entering the Mediterranean to benefit from the protection of the Genoese fleet.

Finally, many thanks to the supporters, which include a leading shipowner and a leading shipbroker, two important shipping law journals and many law firms, all members of the Italian MLA.

REPORT ON CMI /AIDIM EVENT 2017 GENOA

Giorgio Berlingieri

The Assembly of the CMI at New York resolved to name Genoa as the venue for the 2017 CMI Assembly, primarily to honour CMI President ad Honorem Francesco Berlingieri.

In 2017 the CMI was therefore back again to Italy, after the Conferences of 1907 in Venice, of 1925 in Genoa, of 1951 in Naples, The Colloquium of 1986 in Venice and the 1992 Assembly which was held in Genoa.

This gave an opportunity for the CMI and all NMLAs to greet and honour our President ad Honorem, acclaimed as such by the CMI Assembly of 12 April 1998 in Bruxelles, after he served as President of the CMI for fifteen years.

The event took place the 7 and 8 September 2017 in stunning historical buildings of Genoa such as the Old Stock Exchange Building and the Doge's Palace, whilst the elegant Bristol Palace Hotel was the venue for meetings of the CMI Executive Council and of the CMI Working Groups and International Sub-Committees.

By way of opening, CMI Exco Members and their Guests joined together for dinner at the Yacht Club Italiano the 6 September.

After a welcome cocktail on 7 September for all Delegates and accompanying Persons in the spectacular settings of the Aquarium, located in the old harbour area, and 33 NMLAs Presidents or their representatives meeting at a Presidents' breakfast the 8 September at the British Palace Hotel, a half day Seminar took place in the magnificent Sala del Maggior Consiglio of the Doge's Palace, with distinguished speakers dealing with topical issues of maritime law, who were preceded by opening welcome speeches of the Presidents of the CMI and of the Italian MLA.

An address of the President ad Honorem followed who, as brilliant and charming as ever, greeted the audience talking about his experience as President of CMI for fifteen years, the story starting with Baron Albert Lilar first tactfully inquiring with Signora Anna Berlingieri, and then Madame Suzanne Lilar with Francesco Berlingieri, whether he would be willing to take the role of President of the CMI.

Session 1 of the Seminar, titled "The significance of the Torrey Canyon – 50 years on", dealt with the "Torrey Canyon" incident. Fifty years have passed since her grounding on March 1967 between Land's End and the Isles of Scilly, which resulted in the escape of large quantities of crude oil causing massive oil pollution in the South West of England as well as in Brittany in France.

The incident showed that there were many legal issues in relation to oil spills that needed to be solved and an outline was given by Måns Jacobsson of the actions taken by the IMO and the CMI, which resulted in the adoption of the 1969 Civil Liability Convention and the 1971 Fund Convention. The developments of the CLC/Fund regime over the years were also considered, in particular the revision that resulted in the adoption of the 1992 Civil Liability and Fund Conventions and the review of their adequacy.

The analysis did not lead to any amendments of the 1992 Conventions but resulted in the adoption of the 2003 Supplementary Fund Protocol.

Session 2 titled "O.W. Bunker: National solutions to global collapse" dealt with the collapsing in a dramatic fashion on 7 November 2014 of the Danish company O.W. Bunker & Trading A/S amid allegations of fraud and improper trading. The abrupt disappearance of this important intermediary in the business of bunker supply caused immediate financial problems for bunker suppliers and ship operators all over the world, leading to litigation in many different jurisdictions. The presentation by Martin Davies dealt with a comparative analysis of the ways of allocation of the substantial losses between two innocent parties, the bunker supplier and the ship operator.

Subsequent Session 3, titled Ship Finance and Security Practices updated what considered in New York on the works of this IWG. Ann Fenech reported on the progress registered in the collation of information from various jurisdictions and on the actual ship finance security practices worldwide.

The Cape Town Convention was discussed again and its possible reference to shipping.

Offshore was covered in Session 4 of the Seminar. Lorenzo Schiano di Pepe addressed on recent developments in the area of offshore installations and liability arising therefrom. Reference was also made to existing legal instruments having a global as well as a regional scope of application, with attention devoted to the position under European Union law and to the role of Directive 2013/30/EU on safety of offshore oil and gas operations.

Session 5 considered Cross border Insolvency issues, with review of the latest EU developments in the matter of insolvency law.

An analysis was made by Sarah Derrington and Maurizio Dardani of the treatment of rights in rem, outlining that the solutions chosen by EU with article 5 of Regulation (EC) in 1346/2000, which has not been rectified by article 8 of Regulation (EU) 848/2015, appears dissatisfactory. The Session dealt also with the impact of Hanjin Shipping bankruptcy over container transportation worldwide. A survey was made of jurisdictions where creditors issued proceedings in rem or where Hanjin sought recognition of the South Korean judgment declaring its bankruptcy, with review of the provisions of UNCITRAL Model Law on Cross Border Insolvency.

Finally, in Session 6 an update was made by Valeria Eboli of legal issues arising from Refugee migration, rescue and loss at sea, with R. Adm. Frederick Kenney as panelist. As Italy is directly involved in handling such phenomenon and is currently leading an EU military operation finalized at disrupting the migrant smuggling and human trafficking, it was considered to address again on this topic after New York to give an overview of the activities conducted in the Mediterranean in relation to the ongoing migration flow and the related issues.

A networking lunch followed and then the works continued in the afternoon with a young CMI and young Italian MLA Seminar, which was opened by Florencia Otero, the winner of the CMI Young Person's Essay Prize. The lecture dealt with the Argentina's claim to an outer Continental Shelf, with legal analysis of the rights of coastal States to put forward relating claims.

The Seminar then went on with panelists Carlo Corcione, Lawrence Dardani, Kaspar Kielland and Andrea Marchese, moderated by Lorenzo Fabro, dealing with the Ballast Water Management Convention, just entered into force that very day. The issue of technical requirements was addressed, which owners of ships should comply with to perform the necessary water ballast treatment. It was also considered that, from a shipowners perspective, the Convention brings many strategic matters, including financial, commercial and compliance issues. This requires shipowners to invest significant amounts of money in times of ongoing crises in the shipping industry. It was noted that a variety of technologies are available for treating ballast water on ships and that, depending on the size of the ship, her ballast water capacity and the type of treatment, the cost of implementation of the treatment system is estimated to range from $ 500.000 to 5 million per ship.

A subsequent Session of the young Seminar, with Robert Hoepel as moderator and panelists including Blythe Daly, Marco Mastropasqua, Evangeline Quek, Miso Mudric and Javier Franco considered the issue of Recognition and enforcement of foreign judgments and arbitration awards. The procedural tools in the United States to assist in the enforcement and recognition of awards were reviewed, including Rule B of the Supplemental Rules for Admiralty of Maritime Claims and Asset Forfeiture Actions. An analysis of the position in Colombian law was then made and finally the recognition of EU decisions under Regulation (EU) 1215/2012 was considered, with focus on the recognition issues from an Italian perspective.

Concurrently with the young Seminar, the 2017 CMI Assembly took place in the stunning Sala delle Grida of the Old Stock Exchange Building, which opened with the President of CMI advising of the passing away of distinguished members of the CMI family. The Assembly included a report of the President of the CMI on CMI constitutional amendments, which were approved, and the Treasurer and the Auditors Reports.

Reports were also made on the activities of the various CMI International Working Groups, including Acts of Piracy and Maritime Violence, Fair Treatment of Seafarers, Recognition of Foreign Judicial Sales of Ships, Cross Border Insolvency, Polar Issues, Offshore Activities, Ship Finance Security Practices, Wrongful Arrest, Ship Nomenclature, Classification Societies, Cyber Crimes, Unmanned Ships.

The Assembly elected Rosalie Balkin as new Secretary General in substitution of John Hare, who was applauded for his dedicated service as Secretary General of the CMI from 2013, confirmed Ann Fench as Executive Councillor for a second term and elected Aurelio Fernandez – Concheso in substitution of Jorge Radovich as new Executive Councillor.

The Assembly also acclaimed Bent Nielsen as CMI member Honours Causa and approved the applications of Malaysia, Cameroon and Tanzania for CMI membership, whilst Russia and the Dominican Republic were expelled for their long outstanding arrears of subscriptions and the request of Portugal to withdraw from CMI was accepted.

With regard to future meetings, it was agreed for the 2018 Assembly to take place in London, hosted by the British MLA.

The proposed dates were for end of October or early November (1/2 November or 8/9 November) to coincide with the Southampton University's Donald O'May Lecture.

The Lecture should be followed by the annual British Maritime Law Association Dinner with the CMI Assembly to take place the next day.

The Agenda of the Assembly would include the election of the President of the CMI and the election of a Vice President.

It was then reported that Mexico presented a proposal for a CMI Colloquium and Assembly to take place in Mexico City or Cancun in 2019, with the Executive Council having approved Mexico City as potential venue.

The CMI President then advised that the President of the Japanese MLA proposed that the CMI 2020 Conference takes place in Tokyo in late October of that year.

It was also reported that the Belgium MLA offered to host an event in 2022, being the 125th CMI Anniversary.

The Assembly then resolved for the 2018 Assembly to take place in London, the 2019 Colloquium in Mexico City, the 2020 Conference in Japan and the 2022 Assembly in Antwerp.

A Gala Dinner at the fascinating Lo Zerbino Mansion followed after the Assembly, with some 270 Delegates and accompanying Persons attending and enjoing the event in the unique atmosphere of the Villa and of its spectacular park, which culminated with John Hare directing the ceremony of the passing of the CMI colours by the Italian MLA to the British MLA.

Although being a small event the CMI 2017 Genoa was quite participated.

In fact it was attended by 227 Delegates and 38 accompanying Persons from 33 NMLAs: Argentina, Belgium, Nigeria, Spain, Italy, Ecuador, Malta, Greece, Switzerland, Sweden, UK, Australia and New Zeland, Netherlands, France, USA, Brazil, Panama, Canada, China, Japan, Colombia, Norway, Ireland, South Africa, Germany, India, Croatia, Denmark, Finland, Ukraine, Turkey, Singapore, Perù, and representatives from the Malaysian and Cameroon MLAs.

Most unfortunately the adverse weather conditions prevailing at the time in Central America prevented Aurelio Fernandez-Concheso to attend in Genoa.

The accounts prepared by P.C.O. Studio BC Srl of Genoa, which organized the event together with the Italian MLA and the unvaluable and continuous assistance and guidance of John Hare, identified an operational income totaling Euro 118.955,05 which consisted with Euro 88.955,05 as registration fees and Euro 30.000,00 as Sponsors' contributions.

The expenses were Euro 99.692,84 inclusive of Euro 8.750,35 in respect of CMI Assembly costs (rental costs, setting for the Assembly, table cloths, candies, flowers, Xerox, website, hostesses, etc.).

The financial result of CMI 2017 Genoa therefore produced a surplus of Euro 19.262,21, which was equally divided 50/50 between the CMI and the Italian MLA, with a net profit to CMI of Euro 9.631,105.

THE SIGNIFICANCE OF THE TORREY CANYON – FIFTY YEARS ON

Måns Jacobsson

Introduction

On 18 March 1967 the Liberian tanker *Torrey Canyon*, on route from Kuwait to Milford Haven in Wales, struck a rock between Land's End and the Isles of Scilly. The tanker, which was at that time one of the largest vessels in the world, was carrying a cargo of 120,000 tonnes of crude oil. Large quantities of oil were spilled, causing massive pollution in the south west of England and in the Channel Islands as well as in Brittany in France. The oil spill necessitated extensive and costly clean-up operations at sea and on shore.

This incident showed that there were many legal issues of both a private and a public law nature that needed to be resolved. The private law issues focused on the right to compensation for pollution damage. There were uncertainties as regards rhe shipowner's right to limitation of liability for oil pollution claims and in respect of jurisdiction and applicable law, and there were doubts as to whether certain types of costs, damage or loss resulting from oil pollution would be recoverable in law. With respect to public law the main issue was the legal right of a state to intervene outside its territorial waters in response to an incident threatening to cause major pollution affecting its coast.

Fifty years have passed since the *Torrey Canyon* incident. It may be timely to take stock of the developments of the regime relating to liability and compensation for marine pollution that have their origin in this incident (hereinafter referred to as the CLC/Fund regime). This is especially appropriate at a CMI event, in view of the major role that a number of CMI personalities have played in the creation and development of this regime.[2]

* Director of the International Oil Pollution Compensation Funds 1985-2006, Visiting Professor at the World Maritime University (WMU), Malmö (Sweden), and at the Shanghai and Dalian Maritime Universities (People's Republic of China), Honorary Professor at the University of Nottingham (United Kingdom), Visiting Fellow at the Institute of International Shipping and Trade Law, Swansea University (United Kingdom) and at the IMO International Maritime Law Institute in Malta, Member of the Board of Governors of WMU; Member of the Executive Council of the CMI 2007-2014, Honorary Member of the Italian and French Maritime Law Associations, Doctor of Laws *Honoris Causa*.

Action by the IMO Council in response to the *Torrey Canyon* incident

It has often been said that the international community is slow to react when events demonstrate the need for legislative reforms. This was not the case in relation to the *Torrey Canyon* incident.

At the initiative of the United Kingdom Government the Council of IMO decided already in May 1967 to study as a matter of urgency all questions relating to liability for damage caused by discharge of persistent oil or other hazardous substances as well as the above-mentioned public law issue. The Council established a Legal Committee with the task of studying these issues.

Actions by the IMO Legal Committee and the CMI

Shortly after the *Torrey Canyon* incident, the CMI established an International Sub-Committee chaired by Lord Devlin, President of the British Maritime Law Association, to examining the private law aspects of the incident. A draft Convention prepared by the Sub-Committee was considered by a CMI Conference held in Tokyo in April/May 1969. which approved a draft Convention. The CMI draft, which dealt with damage caused by spills of persistent oil carried in bulk in a seagoing vessel, provided for a shipowner's liability based on fault, but with the burden of proof reversed.

The IMO Legal Committee worked in parallel with the CMI. The CMI draft adopted in Tokyo was submitted to the Legal Committee for consideration at its meeting in May 1969. The Legal Committee adopted, however, its own draft Convention which on some important points differed from the CMI draft. The Legal Committee was divided on several important issues, in particular as to whether liability should be strict or based on fault with reversal of the burden of proof, both draft conventions were submitted to an international conference held in November 1969.

[2] For an in depth discussion of the legacy of the *Torrey Canyon* see Måns Jacobsson, The Torrey Canyon fifty years on: the legal legacy, *Journal of International Maritime Law* 2017 p. 20.

TOVALOP

Simultaneously with the work carried out within IMO and the CMI, the oil and shipping industries developed an industry scheme, the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP). Under the scheme shipowners accepted voluntarily strict liability for pollution damage resulting from tanker oil spills up to a fixed limit. The P&I Clubs accepted to extend their cover to include claims under the scheme.

It was envisaged by the industries that the adoption of such a voluntary scheme would relieve the pressure on governments to adopt unilateral solutions rather than wait for the development of a regime in the form of an international treaty.

TOVALOP entered into force in October 1969. Ultimately, its membership represented 97 % of the world's tanker tonnage.

The 1969 International Legal Conference

An International Legal Conference held in Brussels in November 1969 adopted two international treaties, commonly known as the 1969 Intervention Convention and the 1969 Civil Liability Convention (1969 CLC).

The purpose of the Intervention Convention was to clarify the right of coastal States to take measures outside their territorial waters to protect their shorelines.

The 1969 CLC applies to pollution damage resulting from oil spills from laden tankers. The Convention governs the liability of the registered shipowner and contains two important innovations. Firstly, it lays down the principle of strict liability, i.e. liability independent of fault with only very limited defences. Secondly, it creates a system of compulsory liability insurance with right for claimants to take direct action against the insurer.

The introduction of strict liability may not seem very revolutionary today, but in 1969 it broke new grounds in maritime law. Also, the introduction of a system of compulsory third party liability insurance, and even more so of a right of direct action against the insurer, was very controversial at the time. However, all IMO Conventions dealing with third party liability adopted after 1969 include provisions on strict liability, compulsory liability insurance and right of direct action.

In maritime law the shipowner is traditionally, under certain conditions, entitled to limit his liability to an amount linked to the tonnage of the vessel. At the time of the *Torrey Canyon* oil spill, limitation of liability was governed by the 1957 Limitation Convention, and the incident

showed that the limits in that Convention were unsatisfactory. The 1969 CLC provided for limits that were considerably higher (in principle 100% higher) than the limits laid down in the 1957 Convention. In addition, the limitation amount in the 1969 CLC was made available to satisfy only claims brought under the Convention, so that these claims would not have to compete with other maritime claims arising from the same incident.

It was only possible to obtain acceptance at the 1969 Conference of such a significant increase in shipowners' liability as a result of an agreement between the governments represented at the Conference that a supplemental fund should be established, to be financed by a levy on the owners of oil cargoes, which should in principle relieve shipowners of the additional financial burden imposed by the 1969 CLC. The Conference adopted a Resolution requesting IMO to consider the establishment of such a fund.

CRISTAL

The proposal by the 1969 Conference to create a second tier of compensation in the form of an international fund to be financed by a levy on cargo owners was of great concern to oil companies. The oil industry developed, therefore, a scheme for such a second layer, which could be used as a model for the proposed convention, namely the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL).

The CRISTAL scheme provided additional compensation for oil pollution damage in cases where the incident involved an oil cargo owned by a CRISTAL member and where the aggregate of the compensation claims exceeded the amount recoverable from the shipowner under TOVALOP. The financial burden of the scheme was distributed between the oil companies that were members of CRISTAL.

Ultimately, the CRISTAL membership included several hundred oil companies representing the great majority of oil cargoes in international trade.

The 1971 Diplomatic Conference

As requested by the 1969 Conference, the IMO Legal Committee prepared a draft convention that would establish a second-tier compensation fund. A Diplomatic Conference held in Brussels late in 1971 adopted a treaty commonly known as the 1971 Fund Convention.

The 1971 Fund Convention created a system for providing additional compensation to victims of tanker oil spills when the compensation available under the 1969 CLC was inadequate to provide full compensation to them. The Convention established an intergovernmental organisation, the International Oil Pollution Compensation Fund 1971 (1971 Fund), to administer the compensation regime. The 1971 Fund was financed by contributions levied on companies or public agencies who received crude oil and heavy fuel oil in a port in a State party after sea transport.

The Resolution adopted by the 1969 Conference stated that the second-tier compensation fund should relieve shipowners of the additional financial burden imposed upon them by the 1969 CLC. It was generally expected that this 'relief' would relate to oil pollution liabilities over and above the limits under the 1957 Limitation Convention. As we all know, promises are not always honoured, in particular not political promises. The relief granted to shipowners by the 1971 Fund Convention was limited to the upper 50 per cent of the excess over the 1957 limits.

Revision of the 1969 CLC and the 1971 Fund Convention

Two major incidents in France, the *Amoco Cadiz* in 1978 and the *Tanio* in 1980, had exposed certain shortcomings of the CLC/Fund regime. After extensive preparatory work a Diplomatic Conference held in 1984 adopted two Protocols to these Conventions.

The United States, which had not become a party to the 1969 and 1971 Conventions, had been a driving force behind the revision, and there were strong reasons to believe that the United States would ratify the 1984 Protocols.

Unfortunately, the entry into force conditions of the 1984 Protocols had been drafted in such a way that the Protocols would not, for all practical purposes, come into force without ratification by the United States. Following the *Exxon Valdez* incident and the adoption in the United States of the Oil Pollution Act of 1990 (OPA-90), it became clear that the United States would not ratify the 1984 Protocols.

A State that ratified the 1992 Conventions had to denounce the 1969 and 1971 Conventions. As a result of the 1971 Fund Convention having been denounced by most of the States parties, the Convention ceased to be in

force in 2002. Before the 1971 Fund could be wound up, all pending compensation claims resulting from incidents occurring prior to that date had to be settled and all remaining assets distributed to the 1971 Fund contributors. The 1971 Fund was dissolved with effect from 31 December 2014. The 1969 CLC is still in force for a number of States.[3]

Revisions of TOVALOP and CRISTAL and their termination

The voluntary industry schemes were intended to operate until a system based on international treaties had been established. When the 1969 CLC and the 1971 Fund Convention entered into force, the Conventions had however been ratified by only a limited number of States. The industries involved decided, therefore, that these schemes should continue to operate in parallel with the Conventions and provide compensation for pollution damage in States not parties thereto.

In 1978 TOVALOP and CRISTAL were revised so as to provide a compensation system broadly similar to that established by the Conventions. After the adoption of the 1984 Protocols, the shipping and oil industries decided to update TOVALOP and CRISTAL so as to bring them more in line with the Protocols.

The voluntary schemes were terminated in 1997. It was considered by the industries concerned that the relevance of the voluntary schemes had been eroded over the years, as more States had become parties to the 1969 CLC and the 1971 Fund Convention. The industries also considered that the continued existence of the voluntary agreements could slow progress by acting as a disincentive to States to become Parties to the 1992 Protocols.

Review of the adequacy of the international compensation regime

In order to ensure that sufficient funds could be made available for compensation even in the most serious incidents, a Diplomatic Conference held in 2003 adopted a Protocol to the 1992 Fund Convention which created a Supplementary Fund, making additional funds available for pollution damage in States parties to the Protocol. The Protocol entered into force already in 2005. The total amount available for compensation in States parties to the Protocol is 750 million Special Drawing Rights (SDR) (US$1,040 million) for each incident, including the amounts available under the 1992 Conventions, compared to the amount of US$280 million available under the 1992 Conventions.[4]

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[3] For a detailed presentation of the regime under the 1992 Conventions see Måns Jacobsson, Liability and Compensation for Ship-source Pollution, *The IMLI Manual on International Maritime Law*, Volume III, Marine Environmental Law and Maritime Security Law. Chapter 9 pp. 287-321 (2016).

[4] The 1971 Fund, the 1992 Fund and the Supplementary Fund are normally collectively referred to as the IOPC Funds. As mentioned above, the 1971 Fund was dissolved with effect from 31

With respect to a possible revision of the 1992 Conventions several other important issues were discussed. As a result of strong differences of opinion between 1992 Fund Member States, there was insufficient support to move forward with even a limited revision of the Conventions.

Co-operation between the IOPC Funds and the industries involved

In the handling of compensation claims under the CLC and the Fund Convention there has been close co-operation between the IOPC Funds and the shipowners' insurers, which, in nearly all major cases, has been one of the P&I Clubs belonging to the International Group. The fact that it has been possible to handle compensation claims efficiently is to a large extent due to this co-operation. The IOPC Funds have also had valuable support from the shipping and oil industries.

Experience gained in the operation of the regime.

Since their establishment, the 1971 and 1992 Funds have been involved in some 150 incidents. Some of these incidents have given rise to thousands of compensation claims. For instance, the *Solar 1* incident (the Philippines, 2006) gave rise to some 32,000 claims, and the *Hebei Spirit* incident (Republic of Korea, 2007) resulted in some 128,000 individual claims.

The IOPC Funds have acquired considerable experience with regard to the admissibility of compensation claims. The Funds' governing bodies, composed of representatives of governments of Fund Member States, have taken a position on the interpretation of a number of provisions in the Conventions, in particular that of 'pollution damage', and adopted criteria for the admissibility of various types of compensation claims.

The fact that compensation claims under the treaties setting up the CLC/Fund regime that cannot be settled amicably are decided by national courts could result in differences in respect of interpretation and application of the treaties and consequently in lack of uniformity. It has so far nevertheless been possible to maintain a fairly high degree of uniformity in the application of the treaties.

December 2014, and after that date the expression the IOPC Funds refers to only the 1992 Fund and the Supplementary Fund. The 1992 Fund and the Supplementary Fund are administered by a joint Secretariat in London, headed by a Director; up to the end of 2014 that Secretariat administered also the 1971 Fund.

Involvement of personalities related to the CMI

Some CMI personalities have played important roles in the development of the CLC/Fund regime.

Mr. Jack Griggs of Ince & Co, active in CMI at the time, acted for the Excess Liability Insurers in the *Torrey Canyon* case. His son, Patrick Griggs, later to become President of the CMI,[5] was as a very young lawyer involved in the preparation of the firm's opinion as regards limitation of liability.

Mr. Alexander Hetherington of Shell Tankers, father of the CMI's present President Stuart Hetherington, played an important part in the drafting of the TOVALOP-agreement.

The list of participants at the 1969 Diplomatic Conference includes as a member of the Italian delegation Professor Francesco Berlingieri, who later became President of the CMI.[6] He has over the years followed very closely the development of the CLC/Fund regime, and I have during my tenure as Director of the IOPC Funds had the benefit of many interesting and helpful discussions with him on difficult issues for which I am most grateful.

Several other important CMI personalities were involved in the 1969 and 1971 Diplomatic Conferences. Dr. Albert Lilar, President of CMI at that time,[7] served as president of these Conferences and Dr. Walter Müller, former Secretary General of CMI,[8] chaired the Committee of the Whole. Dr. Thomas Mensah,[9] another active participant in the work of the CMI, was Executive Secretary at these Conferences. The Head of the Danish delegation at the 1971 Conference was Professor Alan Philip, who later became president of the CMI.[10] Another President of the organisation, Jean-Serge Rohard,[11] was during many years the lawyer representing the 1992 Fund in France in the *Erika* and *Prestige* cases and was deeply involved in the development of the Fund policy as regards the admissibility of claims arising out of these incidents.

[5] President 1997-2004.
[6] President 1976-1991, Honorary President from 1991.
[7] President 1947-1976.
[8] Secretary-General 1967-1968, Vice-President 1971-1977, Honorary Vice-President 1997-2000.
[9] At that time Director of the Legal Division of IMO, later Assistant Secretary-General of IMO and President of the International Tribunal for the Law of the Sea.
[10] President 1991-1997.
[11] President 2004-2008.

Another well-known CMI personality, Professor Hisashi Tanikawa of Japan,[12] also made very important contributions to the development of the international regime over a period of some 35 years as a member of the Japanese delegation to the IOPC Funds governing bodies.

The CMI has over the years participated actively as an observer at the IOPC Funds' meetings and made valuable contributions during the discussions. In later years CMI was represented by Patrick Griggs and the late Richard Shaw. Another key person has been the member of the Canadian Maritime Law Association Alfred Popp who – in addition to being Chairman of the IMO Legal Committee for many years - was often asked to play a leading role when difficult and sensitive issues had to be addressed in the IOPC Funds.

Concluding observations

When the CLC/Fund regime was established as a result of the *Torrey Canyon* incident, [13] great hesitations were expressed as regards its viability. In particular, many delegations considered that the scheme of an international fund would not work. They were wrong. It is submitted that it is fair to say that the legacy of the *Torrey Canyon* incident, the CLC/Fund regime, has worked reasonably well in most cases.

When the 1971 Fund was set up in 1978, it had only 14 Member States. As of 1 September 2017 137 States have ratified the 1992 CLC, and 115 States are parties to the 1992 Fund Convention. The 1992 Conventions have thus become a truly global regime. The continuous increase in the number of Fund Member States appears to indicate that governments have in general considered the international compensation regime to be working reasonably well. The 1992 Conventions have also been used as models for other compensation regimes. It is also remarkable that the IOPC Funds have been able to reach out-of-court settlements in respect of the overwhelming majority of the compensation claims arising out of incidents involving the Funds.

The CLC/Fund regime shows that international cooperation in the development of maritime law can produce results of benefit to the international community. This is certainly in line with the spirit that has guided CMI in its activities for 120 years.

[12] Vice-President 1995-2001, Honorary Vice-President 2001-2014.
[13] Three other Conventions adopted under the auspices of IMO should also be considered part of the legacy of the *Torrey Canyon* incident: the 2001 Bunkers Convention, the 1996/2010 HNS Convention and the 2008 Wreck Removal Convention.

SEMINAR AIDIM

SPEAKERS' PRESENTATIONS

A COMPARATIVE ANALYSIS OF NATIONAL RESPONSES TO THE OW BUNKER COLLAPSE

Martin Davies

1. Introduction

OW Bunker & Trading A/S was founded in Denmark in 1980. It had become the world's largest bunker supplier at the time of its collapse on November 7th, 2014. At its peak, it had operations in 29 countries and claimed to control about 7% of worldwide bunker trade. Its demise was swift, amid allegations of fraud and improper dealing. It filed for bankruptcy less than 48 hours after a fraud scandal worth $125 million was uncovered at its Singapore-based subsidiary Dynamic Oil Trading.

The sudden disappearance of OW Bunker has led to litigation all over the world, much of which is still continuing at the time of writing. The basic structure of the business operation was simple, but it has led to profoundly difficult legal questions. Ship operators (sometimes owners, more often time charterers) would order bunkers for their ships from an OW Bunker entity, which would then engage another company to make the physical supply of bunkers to the ship, usually requiring the ship's master or chief engineer to sign a bunker delivery note after delivery was completed. The physical bunker supplier would typically provide the bunkers on credit, secure (or so it thought) in the belief that it would be paid by OW Bunker, or could ultimately seek redress from the ship operator who bought the bunkers. When the intermediary OW Bunker disappeared, a legal conundrum appeared in its place. Who was to be paid for the bunkers supplied on credit? Was it the physical supplier, or was it OW Bunker, which assigned its receivables to ING Bank after its demise? Whom should the ship operator pay? Hundreds of millions of dollars have turned on those basic questions, which have been litigated all around the world since 2014. This short paper is an attempt to give a comparative overview of the various legal responses that countries have made.

2. The contracts: sale, agency, or something else entirely?

One of the key questions that courts around the world have had to consider is the nature of the contract between OW Bunker (or one of its subsidiaries) and the physical supplier of the bunkers. Another is the nature of the contractual relationship between OW Bunker and those operating the ship that bought the bunkers. The 2013 edition of the OW Bunker Group Terms and Conditions is attached to this paper as a resource for readers to make up their own minds about the second question, as these were the contractual terms upon which OW Bunker dealt with the ships to which it arranged for bunkers to be supplied.

For the most part, the OW Bunker standard terms and conditions seem unquestionably to be evidence of a contract for the sale of bunkers from OW Bunker to the ship-side purchaser. The contract describes OW Bunker as the "Seller" and those operating the ship (its owners or charterers) as the "Buyer". Although reference is made to the "Supplier" as being the person who will "supply or deliver the Bunkers" to the ship, the basic terms of the contract, with one small but possibly important exception, make it look like a sale of bunkers by OW Bunker to its counterparty, the ship operator. The contract acknowledges that OW Bunker will have to find the bunkers from a physical supplier, but that is res inter alios acta so far as the contract between OW Bunker and the ship operator is concerned. It appears to be a simple sale from OW Bunker to the ship operator, complete with a retention of title clause (cl. H), reserving to OW Bunker title to the bunkers until payment by the ship-operator/buyer has been made in full.

The contractual position is complicated considerably, however, by the fact that the physical suppliers of the bunkers generally dealt with OW Bunker on the basis of their own terms and conditions, which obviously vary considerably, but which tend to try to give the impression that the ultimate ship-side buyer is "the party or parties obligated to buy [bunkers] under the agreement", and which usually make explicit that any sale of bunkers is made on the credit of the ship to which the bunkers are supplied, as well as any person acting on behalf of the ultimate buyer. A copy of the Terms and Conditions of Sale of a Houston-based physical bunker supplier, NuStar Energy Services, Inc., is also attached to paper as an example of the terms on which physical bunker suppliers dealt with OW.

Thus, when OW suddenly disappeared from the picture, one of the key legal questions – perhaps the centrally important legal question – became: what was the nature of the contractual relationship, if any, between the physical supplier and the ship operator? Was there any privity of contract between the two? If so, that can only have occurred because OW Bunker

was acting as agent for one or other of the parties when dealing with the other. If OW Bunker was acting as principal, buying from one party and selling to the other, then there was no direct contractual nexus between the supplier and the ship, and thus no contractual basis for the former to sue the latter.

In several of the countries that have considered this OW-related question, the courts have concluded that there was no contractual relationship between the bunker supplier and the ship operator because OW Bunker acted as principal, rather than as agent for the ship, when it purchased bunkers from the physical supplier. That has been the conclusion of courts in the United States (repeatedly, although many of the decisions are currently under appeal), Singapore, Hong Kong (where the agency argument was actually abandoned by the bunker supplier after the court had refused to strike it out), Italy, and France. Indeed, the High Court of Singapore thought that the absence of a contractual nexus between bunker supplier and ship was so obvious that it awarded damages for wrongful arrest of the ship by the bunker supplier, although it should be noted that that aspect of the case is presently on appeal to the Singapore Court of Appeal.

One aspect of the OW Bunker General Terms and Conditions that has attracted attention in some, but not all, of these cases is clause L.4(a), which provides:

"These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party."

This provision has provided the basis for some bunker suppliers to argue that there is contractual privity between them and the ultimate ship-side buyer (called "the Buyer" in the OW Bunker terms and conditions), because it indicates that the relevant OW Bunker entity was acting as agent to bind the ultimate buyer to the bunker supplier's contractual terms and conditions. Such an argument has failed in the United States, was raised but not finally decided in an interpleader case in the Canadian Federal Court of Appeal, and is still pending in the Singapore Court of Appeal.

In one case in the United States, the court held that there was contractual privity between the physical bunker supplier and the ultimate ship-side buyer simply because the ship's Chief Engineer signed the supplier's bunker delivery note when the bunkers were pumped into the ship. So far, this decision has proven to be a lone outlier – indeed, other US decisions

have come to the opposite conclusion – but it should be noted that it has been cited in another US decision as a reason for allowing an interpleader proceeding to continue.

Although most courts around the world have taken the position that the relevant legal choice is between sale and agency – did the supplier sell to OW Bunker, or to the ultimate buyer through OW Bunker's agency? – the Supreme Court of the United Kingdom and the Hong Kong Court of Final Appeal have approached the question in a very different manner. The case in the Supreme Court of the United Kingdom turned on the question of whether the bunker supply contract was one for the sale of goods. It focused on the retention of title provision in the bunker supplier's terms and conditions, which purported to reserve title in the bunkers to the physical supplier until it had been paid in full (a fairly typical provision). The shipowner argued unsuccessfully that it was entitled to resist OW Bunker's claim (meaning, in truth, ING Bank's claim) for payment of the price for the bunkers because there had been a total failure of consideration under the contract between OW Bunker and the shipowner, as OW Bunker had failed to provide the shipowner with title to the bunkers, which had been retained by the physical supplier. The Supreme Court held that the contract between OW Bunker and the shipowner was not a contract for sale of goods, but a "complex sui generis transaction", by which OW Bunker did not agree to transfer property in the bunkers in return for the price, but rather gave the shipowner a licence to use them (i.e., to burn them for the ship's propulsion), while title remained in whichever entity up the chain of contracts had retained title. The Hong Kong Court of Final Appeal later followed the Supreme Court's decision, distinguishing interpleader cases in the United States and Singapore as being not relevant, because they turned on an analysis of the chain of contracts as being one for successive sales of goods.

The cases in the UK and Hong Kong differ from those from other countries considered earlier in this section in the fact that they were concerned with claims brought by the relevant OW Bunker entity (or, rather, its successor in title, ING Bank) against the ship operator, rather than claims for payment brought by the physical bunker suppliers. The most recent decisions in the United States have held that OW/ING itself does not have a claim against the ship, for reasons that will be explained in more detail below, although at least one court in India has expressly allowed a ship arrest to proceed on the basis of a claim for unpaid bunkers brought by OW/ING. The very fact that both OW/ING and the physical bunker suppliers have tried to recover from the ultimate buyers, the ship operators, leads now to a consideration of the law relating to interpleader, which is designed to deal with the situation of competing claims against the same defendant.

3. Interpleader, a.k.a. no double jeopardy

Double Jeopardy (1999, directed by Bruce Beresford; not the classic 1955 version directed by R.G. Springsteen, starring Rod Cameron, Allison Hayes and Gale Robbins)

Nick Parsons (played by Bruce Greenwood): They're tough in Louisiana, Libby. You shoot me, they'll give you the gas chamber.

Libby Parsons (played by Ashley Judd): No they won't. It's called double jeopardy. I learned a few things in prison, Nick. I could shoot you in the middle of Mardi Gras and they can't touch me.

Travis Lehman (played by Tommy Lee Jones): As an ex-law professor, I can assure you she is right.

Many jurisdictions have a version of the interpleader procedure, although the technical requirements vary quite widely from jurisdiction to jurisdiction. Because there is little international uniformity in interpleader procedures, what follows is necessarily cast in general terms. The basic idea of interpleader procedure is, however, to avoid the possibility of double jeopardy. A person who fears that he or she (or it) may be held liable to two or more competing claimants in relation to the same liability asks the court, as applicant, to determine which of the possible claimants is entitled to succeed. The person seeking interpleader relief is typically required either to pay the contested amount of money into court, to be paid to whichever of the competing claimants proves to be successful, or to give some secure undertaking that it will pay the successful competing claimant after the court has made its interpleader determination. The simple idea is that the debtor wants to pay its debt only once, and wants to leave it to the court to determine which of the possible creditors is entitled to the debt. In order for interpleader to be appropriate, the court must decide whether the competing claims are claims of the same kind, so that satisfaction of one will extinguish the possibility of the other succeeding.

Versions of the basic interpleader proceeding have been invoked in several different countries in the aftermath of the OW Bunker failure. Shipowners and operators who had not yet paid for the bunkers purchased either from or through the medium of an OW Bunker entity acknowledged that they were obliged to pay for the bunkers they had used, but said that they were not sure whom they should pay, OW/ING or the physical bunker supplier. In most interpleader cases, that question became one of whether the claims of OW/ING and the physical bunker supplier were sufficiently closely related to one another in legal terms to satisfy the requirements of the particular jurisdiction's interpleader procedure.

In the United States, most of the interpleader claims in the various federal district courts in the country were transferred to the US District Court for the Southern District of New York, which decided that interpleader relief should be granted, a decision that was then appealed to the US Court of Appeals for the Second Circuit. As explained in further detail below, the physical bunker suppliers were asserting a statutory claim for a maritime lien over the ships in question by virtue of the Commercial Instruments and Maritime Liens Act (CIMLA). In contrast, OW/ING had contractual claims for payment from the ship operators under the bunker supply contracts with OW Bunker. Although these were claims of different kinds, the US Court of Appeals for the Second Circuit ultimately decided that interpleader relief should be granted because the claims of the physical bunker suppliers and OW/ING were "inextricably interrelated", despite their different legal origins. As noted above, the very possibility that the physical bunker supplier might have a valid claim for relief, no matter what its basis, has been regarded (at least in some courts) as a sufficient reason to grant interpleader relief in the United States.

In contrast, in similar proceedings, the High Court of Singapore refused to grant interpleader relief according to the rules of that jurisdiction. The High Court of Singapore said (emphasis in the original):

The question is not whether the applicant has a genuine subjective apprehension (however acutely felt) that competing claims will be brought against him; rather, the question is whether the competing claims have an objective basis in law and fact.

Because the claims of the physical bunker suppliers were not claims to recover a contractual debt, they were not of the same kind as those advanced by OW/ING, and so the requirement of "symmetry" for interpleader relief was not available. Thus, "inextricable interrelat[ion]" was not sufficient for purposes of Singapore law, as it was found to be under US law.

An OW Bunker interpleader claim in the Federal Court of Canada is presently on appeal before the Supreme Court of Canada. The Federal Court of Appeal refused to grant interpleader relief on grounds that seem to steer a middle path between the US view and the Singaporean view, albeit for reasons that ultimately rest (as all such claims do) on the terms of the relevant interpleader procedure. The Federal Court of Appeal held that interpleader relief should be refused because the OW Bunker entity's contractual claim for recovery of the cost of the bunkers arose from the contract between OW Bunker and the time charterer of the ship, which had ordered and contracted for the bunkers, whereas the physical bunker supplier's claim, if any, was a claim for a maritime lien against the ship

itself in rem, rather than a claim against the time charterer – or, indeed, anyone else – in personam.

The careful and precise distinction between in personam and in rem claims made by the Canadian Federal Court of Appeal leads on to a consideration of the unique US legislation that was intended to give physical bunker suppliers (and other necessaries suppliers) a maritime lien over the vessels to which they supply bunkers, and the effect it has had on the OW litigation in the United States.

4. US law on maritime liens

The Commercial Instruments and Maritime Liens Act (CIMLA) confers a maritime lien on any person who supplies necessaries to a vessel "on the order of the owner or a person authorized by the owner". The necessaries provider is given a statutory right to proceed against the vessel itself in rem, without regard to the in personam liability of the person who ordered the bunkers. Thus, the contractual arrangements between the parties are not of primary concern, as the necessaries provider's right to proceed against the ship in rem is a statutory one, not a contractual one.

Nevertheless, much of the OW Bunker litigation in the United States has ended up turning on the contractual role of OW Bunker, not because CIMLA requires contractual privity between supplier and ship but because the order for the bunkers to the physical supplier must come from "a person authorized by the owner" for a maritime lien to arise. Despite the existence of earlier authority indicating that it was sufficient that the order originally emanated from someone such as a time charterer, thus making the exact role of any intermediaries irrelevant, US courts in OW Bunker litigation have uniformly held that the relevant OW Bunker entities acted as principal when dealing with the bunker suppliers, not as agent for the owner or charterer of the ship when buying the bunkers. The consequence has been that the physical bunker suppliers have been held not to have maritime liens under US law, despite the explicit intention of CIMLA to protect US necessaries suppliers.

Although previous cases had held that a supplier could "provid[e] necessaries to a vessel" for purposes of the legislation, even if it sub-contracted the task to someone else, the US District Court for the Southern District of New York recently held that OW Bunker itself did not have a maritime lien for bunkers supplied to a ship by a sub-contracting physical supplier, because it (OW Bunker) had not put itself at financial or other risk in relation to the provision of the bunkers. The court did not shy away from the conclusion that this meant that no-one had a maritime lien for the supply of the bunkers in OW Bunker cases: the physical suppliers did not have a maritime lien because the order that they satisfied did not come from "a person authorized by the owner", and OW Bunker itself did not

have a maritime lien because it did not "provide" the bunkers to the ship itself.

These decisions are significant not only for necessaries providers in the United States, but also for bunker suppliers in other parts of the world, who often include a choice of law clause in their contracts choosing American law, whether or not the supply of bunkers has anything to do with the USA. Clauses of this kind have been held in the United States to give the bunker supplier a US maritime lien, whether or not the physical supply of the bunkers has anything to do with the United States, although courts in Australia and India have recently refused to apply US law to maritime lien claims in those countries, notwithstanding a US choice of law clause. The latter view will also be followed by courts in any countries that follow the decision of the Privy Council in The Halcyon Isle, which holds that the availability of a maritime lien is a matter of procedural law to be determined by the law of the forum, rather than the substantive law of the contract.

5. Cross-border insolvency and antisuit injunctions

The interaction between the UNCITRAL Model Law on Cross-Border Insolvency and maritime claims has attracted much attention in recent years, but it has not played a significant part in the legal proceedings following the OW Bunker collapse. The UNCITRAL Model Law provides that if suit is brought in an enacting country against a person or company that has opened insolvency proceedings in its centre of main interests (COMI), then the proceedings brought in the enacting country must be stayed and the claimants sent to participate in the insolvency proceedings in the COMI, which are known as a foreign main proceeding (FMP). Although OW Bunker entities opened insolvency proceedings in several different countries, the existence of those insolvency proceedings had little impact on the litigation that followed the OW Bunker collapse. As we have already seen, physical bunker suppliers mostly tried to skirt around the insolvent OW Bunker entity with which they had dealt, to bring a claim directly against the ultimate buyer, the ship operator or the ship itself. ING Bank sued to recover debts owing to the insolvent OW Bunker entities in various parts of the world, but in that posture it was plaintiff, not defendant, thus making the jurisdictional shield provided by the UNCITRAL Model Law irrelevant. Hence, the insolvency of the OW Bunker entities generally had no effect on claims for non-payment brought in other parts of the world.

One of the many US cases in the wake of the OW Bunker collapse serves as an example of why the UNCITRAL Model Law on Cross-Border Insolvency has played a relatively small part in the worldwide OW Bunker litigation. An interpleader action was brought in the US District

Court for the Southern District of New York by vessel owners and charterers seeking interpleader relief in relation to claims for unpaid bunkers that had been bought through the medium of OW Bunker Germany, G.m.b.H. After OW Bunker Germany opened insolvency proceedings in Germany, its COMI, it applied to the US Bankruptcy Court for the Southern District of New York asking for recognition of the insolvency proceedings as a foreign main proceeding (FMP) under Chapter 15 of the Bankruptcy Code, the US enactment of the UNCITRAL Model Law on Cross-Border Insolvency. The Bankruptcy Court issued an order recognizing the German insolvency proceedings as an FMP, but then lifted the automatic stay "for cause" to allow the interpleader proceedings in the District Court to continue. OW Bunker Germany then sought to have the interpleader actions referred from the District Court to the Bankruptcy Court, presumably as a prelude to renewing its attempt to have them stayed under Chapter 15. The District Court both retained jurisdiction over the interpleader actions and transferred the Chapter 15 bankruptcy proceedings to itself, holding that there were "interesting and apparently novel questions regarding the interplay among the United States bankruptcy law, maritime law, and federal interpleader statutes", which demanded consideration by the District Court. Thus, the proceedings in New York were allowed to continue in parallel to the German insolvency proceedings.

One of the key underlying principles of the UNCITRAL Model Law on Cross-Border Insolvency is that all proceedings in relation to the liabilities of an insolvent debtor should be brought in one country, rather than having parallel proceedings in different jurisdictions around the world. If the automatic stay procedure created by the Model Law does not produce that result (as it has not in the OW Bunker cases, for the reasons just explained), the only other legal mechanism for forcing parallel proceedings in other countries to come to an end is the anti-suit injunction, a device familiar in common law countries and generally regarded as anathema in civil law countries.

In some federal circuits of the United States, an antisuit injunction is granted only with "great restraint", in acknowledgment of the fact that although the order is directed at the litigant, rather than the foreign court, it effectively interferes with the jurisdiction of the court of a foreign sovereign by precluding the litigant from initiating or continuing legal action there. Even under the "great restraint" standard, one US court has granted an antisuit injunction to restrain physical bunker suppliers who were participating in OW Bunker interpleader proceedings in New York from proceeding in other countries to arrest ships owned or operated by the ultimate buyer of the bunkers. The alternative would be to expose the ship operator to the possibility of double or even triple liability for a single

obligation if there were to be inconsistent judgments in different countries.

6. Conclusion

Much of the OW Bunker litigation around the world has come down to a battle between an unpaid physical bunker supplier and ING Bank, the successor to OW Bunker, with each of them laying claim to payment in full from the ultimate buyer, the ship operator, whose main concern is to pay for the bunkers only once, not twice or possibly three times. If the physical bunker supplier wins, then it is finally paid for the bunkers it supplied, but OW/ING gets nothing. If OW/ING wins, the physical bunker supplier still has a contractual claim against it for payment, but is likely to recover only cents in the dollar from an insolvent debtor.

If the relevant transactions had gone ahead as planned, the physical bunker suppliers would have been paid, and OW Bunker or its subsidiary would have received its profit margin reflecting the difference between what it charged the ultimate buyer and what it paid the bunker supplier. That would seem to be the most sensible and desirable outcome even after the collapse of OW Bunker but, ironically, none of the many legal devices and arguments considered in this short paper has seemed able to achieve that result, as each leads to an all-or-nothing outcome. Many physical bunker suppliers have gone unpaid and ING Bank has then netted more per transaction than OW Bunker would have done. In those cases where the physical bunker supplier has succeeded, it would seem that OW Bunker's legitimate profit margin has simply evaporated, because the bunker supplier's bill should be paid at the rate that it charged for the physical supply, not the rate charged to the ultimate buyer by OW Bunker. In other words, all the legal ingenuity poured into this debacle around the world does not seem to have been able to produce what seems obviously to be the fair outcome. C'est la vie, c'est la loi.

UPDATE ON THE WORK OF THE INTERNATIONAL WORKING GROUP ON SHIP FINANCE SECURITY PRACTICES

Ann Fenech
Chair of the IWG

Good morning Ladies and Gentlemen,

I feel truly privileged to be here this morning in these magnificent surroundings of the Palazzo Ducale in Genova and to update you on the work undertaken by the IWG on ship finance security practices. Many congratulations to Giorgio Berlingieri and the Italian Maritime Law Association for having organised such a splendid programme. Professore Francesco Berlingieri, allow me to say how wonderful it is to be with you this morning. The object of my presentation is to brief you on the work being done by the IWG.

Cape Town Convention – background

Perhaps I should start right at the beginning. It is common for us to come across colleagues who think that the Cape Town Convention is a convention which relates exclusively to aircraft. In fact this is not the case and the official title of the Cape Town Convention is

"*Convention on International Interests in Mobile Equipment 2001."* It is about the creation of a central international register where security interests in mobile equipment are registered. Attached to it currently are three protocols – aircraft, rolling stock and space assets

A main proponent of the Cape Town Convention, Prof Roy Goode is quoted as saying that:

> "*Its purpose is to provide a stable international legal regime for the protection of secured creditors, conditional sellers, and lessors of aircraft objects, railway rolling stock and space assets through a set of basic default remedies and the protection of creditors interests by registration in an international registry thus securing priority and protection in the event of the debtor's insolvency."*

In fact it provides for the constitution and effects of an international interest in certain categories of mobile equipment by virtue of the registration of such an international interest in an international register.

An international interest is defined as an interest in an identifiable object granted by the chargor under a security agreement. Put simply in the event of default the chargee can take possession or control of the object, sell or grant a lease of any such object, collect or receive any income or profits arising from the management or use of such an object. Any sum collected from the sale is applied towards discharge of the amount of the secured obligations.

Where the sums collected or received by the chargee exceed the amount secured by the security interest, unless ordered by the court, the charge is to distribute the surplus among holders of subsequently ranking interests which have been registered.

Ownership passing on a sale is free from "*any other interest over which the charge's security interest has priority under the provisions of article 29."* The buyer buys free from an unregistered interest even if the buyer has actual knowledge of such an interest and a registered interest has priority over any other interest subsequently registered and over an unregistered interest. However this means and implies that in such a sale the asset may not actually be sold completely free and unencumbered as would occur typically in a traditional judicial sale or court approved private sale.

It is this which gives rise to challenging situations related to non consensual rights which are prevalent in the maritime sector. It is thought that the problem with non consensual rights can possibly be overcome by article 39 which states that a contracting state may declare those categories of nonconsensual rights which under the State's law have a priority over an interest in an object equivalent to that of the holder of a registered international interest. However the counter argument to that is that if one starts to make exceptions to the general rule it may very well defeat the purpose of the exercise.

The convention further provides that the courts of a contracting state chosen by the parties to a transaction have jurisdiction in respect of any claim brought under the convention.

Early Drafts of the Convention

Article 2 (1) c of the first draft in 1996 contained a reference to "***registered ships***" in square brackets. There were a number of reactions to this from UNCTAD, the IMO and the CMI.

These three bodies essentially made the case for the exclusion of shipping from Cape Town and the main reasons were that international maritime law is a distinctive corpus juris which has been in existence for

centuries; that it was important to safeguard the sphere that the International Convention on Maritime Liens and Mortgages adopted in 1993; that the preparation of international rules governing shipping has always been the responsibility of specific international organisations with the full participation of the shipping community; that

there were already in place adequate systems for protecting the financial interests of those who lend money on the security of a ship and most challenging, the fact that a registered interest would have priority over any other interest subsequently registered and or any other interest, conflicted with the admiralty rules prevalent in a number of jurisdictions providing for statutory non consensual liens or privileges. The end result was that shipping was not included.

Then in the Unidroit Work Programme for 2014 – 2016 Triennium, the Agenda for the May 2013 Governing Council Meeting included "(ii) Ships and maritime transport equipment". The memorandum prepared by the secretariat sought:

"*authorisation to conduct a preliminary study which should first identify and describe the legal obstacles faced by market participants in the shipping industry concerning security over ships and maritime transport equipment in cross-border situations and give an overview of the status and development of internationally harmonised rules in this field.*"

On seeing this there were several exchanges between the President of CMI and the President of Unidroit in 2014 with Unidroit concluding that for the time being the secretariat was gathering information on the actual financing practices of the maritime industry and that Unidroit would welcome any information that the CMI were in a position to share concerning actual financing practices in the maritime industry sector.

Creation of the IWG on Ship Finance Security Practices

The Reaction of the CMI was the approval of the creation of an International Working Group on Ship Finance Security Practices at the CMI meeting in Istanbul in June 2015

The brief was and is to gather as much information as possible from our national maritime law associations on the regimes prevalent in each country on ship finance security practices and the ease or otherwise of the enforcement of maritime securities.

Members of our IWG are:

Chair:	Ann Fenech – Fenech and Fenech –Malta
Rapporteur:	David Osborne– Watson Farley and Williams
Members:	Andrew Tetley – Reed Smith - Paris
	Allen Black – Winston Strawn - Washington
	Camila Mendes Vianna Cardoso – Kincaid Mendes Vianna - Brazil
	Andrea Berlingieri – Berlingieri Maresca - Genoa
	Armstrong Chen – King &Wood Mallesons - Beijing
	Souichirou Kozuka – Japan
	Stefan Rindfleisch – Ehlermann Rindfleisch Gadow – Hamburg

Views of academics and international practitioners.

In the course of the work of the IWG we have considered several papers and views including the following:

Dr. Ole Boger – Ministry of Justice Germany – presented a paper on "*The Case for a New Protocol to the Cape Town Convention Covering Security over Ships"* at the 5th Annual Conference of the Cape Town Convention Academic Project – Oxford September 2016

He acknowledges that with some exception, most legal systems have reformed their law so as now expressly to provide for the recognition of foreign ship mortgages and hypothecations where the requirements for the valid creation and effectiveness of these rights under the law of the flag are fulfilled. He also discusses the exceptions to this encountered under the law of New Zealand and Brazil. He believes that too many jurisdictions do not follow this same rule when it comes to deciding on the priority between claims leading to uncertainty.

He believes that all these issues would be resolved in the event that there would be a protocol extended to shipping provided of course there were enough signatory states to make a tangible difference.

John Bradley – Parter at Vedder Price USA presented a paper on "*Cape Town Convention for Ships – A solution in search of a problem*" at the 17th Annual Marine Money Greek Ship Finance Forum – October 2015

He made the following observations:

1. Whether current cross-border ship finance practices are satisfactory and if not, whether the international harmonization of those practices through Cape Town provides a better working solution.
2. Whether Cape Town can do for ship finance what it has done for aviation finance by lower borrowing costs and increased financing opportunities
3. Whether ship finance has a problem in need of a Cape Town Solution or is Cape Town a solution in search of a ship finance problem.

He noted that academics see crossover benefits for ship finance; aviation finance professionals are satisfied with Cape Town and the Aircraft Protocol and that the marine sector general is sceptical quoting:

a. Growth in size and sophistication of the top 7 registries world wide.
b. Issues surrounding non consensual rights.
c. Actual remedies under Cape Town give rise to complications.

Dr. Vincent Power – Partner at A & L Goodbody – Ireland, presented a paper on *"Assessing the Legal and Economic Case for a Shipping Protocol to the Cape Town Convention"* at the

5th Annual Conference of the Cape Town Convention Academic Project – Oxford September 2016

Vincent Power asks and notes: "*Would a shipping protocol to the Cape Town convention help resolve some of the difficulties and challenges in ship finance? Or is the question, one of,* "*would a shipping protocol to the Cape Town Convention help resolve some of the difficulties and challenges in shipping finance and, if it would resolve such issues, would the protocol be adopted, ratified, enter into force and be implemented or used by sufficient in the sector to make a real difference?"*

He was of the view that the challenge in "Joining the dots" between the shipping protocol to Cape Town and the somewhat chaotic tapestry of international maritime conventions should not be underestimated. Furthermore whilst the difficulties as they exist particularly with the different ways in which priorities are dealt with in different jurisdictions, as the rationale for the creation of a shipping protocol to Cape Town, ironically these difficulties are also one of the barriers to the adoption of such a protocol. He was of the view that it was quite possible that a

shipping protocol would resolve many of the issues involved in the maritime sphere in theory but it may not do so in practice .

Questionnaire

The IWG decided that one of the most important ways of gathering important information from the various jurisdictions was to create and send out a questionnaire. The questions necessarily cut through the entire subject of how securities are registered and how they are enforced.

To date we have had replies from 16 jurisdictions being: Holland, Italy, Ireland, Japan, Malta, New Zealand, Panama, Switzerland, Argentina, Australia, Brazil, Canada, , Croatia, Finland, France and Germany.

We have prepared for you today a summary of the preliminary considerations.

Question 1 related to whether or not the jurisdictions were signatories to maritime and other Conventions.

- The Arrest Convention of 1952 and or 1999 have either been ratified or influenced the legislation of most countries who have responded
- A mortgagee can arrest a vessel registered under the laws of each jurisdiction.
- A mortgagee can arrest a vessel in most of the jurisdictions which replied even if the mortgage is registered in the register of another member state.
- Only Finland has ratified the Mortgages and Liens convention
- All jurisdictions recognise and acknowledge a form of maritime lien, privilege or hypothec
- All Jurisdictions are a party or incorporated the 1961 Hague convention abolishing the requirement for legalisation of foreign public documents.

Question 2 dealt with the Nature of the Ship's register

- The ship's register is a register of legal title or evidence of legal title in most of the jurisdictions which responded.
- Each jurisdiction has its own criteria for registration of a vessel on the ship's register

Question 3 dealt with Formalities for Mortgage Registration

- Most jurisdictions require limited details of the actual mortgage except Argentina and Brazil
- Argentina, Croatia, Germany, Italy, Netherlands and Panama require the mortgage to be notarised or legalised.
- In most jurisdictions registration of a mortgage is indefinite except in Italy, Argentina, Finland and France where the registration is for a definite period but which can be renewed.
- In most jurisdictions a mortgage is registered only in the ship's register

Question 4 dealt with Information concerning security interests in ships.

- No owner authorisation is required to obtain information on the mortgage from the ship's registry.
- In almost all jurisdictions, information is available within a few days.
- In all the jurisdictions a vessel may be sold prior to the release of the security interest with most jurisdictions having a number of conditions.

Question 5 dealt with the Arrest of a chartered vessel

- All jurisdictions allow a mortgagee to arrest vessels on bareboat or time charter.
- In most jurisdictions a mortgagee could incur liability towards the charterers or cargo interests if found responsible of the improper use of enforcement afforded to him contractually or by statute.
- In most jurisdictions, cargo is discharged as a matter of standard practice prior to enforcement proceedings such as an auction.

Question 6 dealt with Priority issues between mortgagees

- A third of the jurisdictions have a system of priority notice to enable priority between mortgagees to be reserved
- In almost all jurisdictions it is possible for a subsequent mortgage to be registered without the consent of the first mortgagee
- In all jurisdictions the order of registration of the ship mortgages determines the ranking of the ship mortgages.
- In all jurisdictions except Brazil and New Zealand a second registered mortgage can exercise enforcement remedies without the consent of the first registered mortgage.
- Roughly half of the jurisdictions have a system for registration of security or liens other than mortgages.

Question 7 dealt with General enforcement issues

- All jurisdictions except for Brazil allow for the enforcement of foreign mortgages
- Jurisdictions are split between requiring a judgement prior to enforcement and not requiring a judgement
- The time for the enforcement procedure varies from a few weeks to a few years depending on the jurisdiction.
- All jurisdictions accept Brazil have jurisdiction over a vessel in their territorial seas.

Question 8 dealt with Judicial Decisions and appeals

- All Judicial sales transfer the vessels free and unencumbered. Some jurisdictions have special admiralty courts and others have their civil court decide maritime disputes.
- Different jurisdictions have different procedural rules however as a general rule most require a judgment or an executive title against the vessel and notice to the vessel interests and other potential claimants.
- Those jurisdictions which allow the sale of vessels pendente lite allow the sale of vessels prior to the hearing of the appeal for the same reasons.

Question 9 dealt with Sale Procedures

- All jurisdictions allow for the enforcement of a mortgage in their jurisdiction by applying for a judicial sale by auction.
- Most jurisdictions require the judicial sale by auction to be preceded by the judicial arrest of the vessel or the obtaining of a judgment in the creditor's favour.
- Malta and France permit the judicial sale of a vessel without a judgement based on the mortgage being a direct enforceable title.
- All jurisdictions except for Japan and / or Germany allow for the sale of a vessel pendent lite subject to varying conditions.
- Most jurisdictions fix a minimum bid price.
- Australia, The Netherlands and Malta do not have a minimum bid price
- A number of jurisdictions allow the owner or other creditors to influence the amount of the reserve price.
- Most jurisdictions provide for the advertising of the sale in an official gazette or other local newspapers.
- Most jurisdictions, except for Ireland, Japan and Panama provide the owner and other creditors with mechanisms to influence the timetable of the sale.
- A number of jurisdictions allow mortgagees to apply for court approved private sales.
- Germany, Ireland, Italy, Japan and New Zealand do not allow private sales of vessels
- Australia does allow them but the vessels are not sold free and unencumbered
- The majority of the jurisdictions excluding Australia and the Netherlands allow, subject to varying conditions, the mortgagees to bid for the vessel animo compensandi.

Question 10 dealt with Sale Proceeds

- Some jurisdictions allow the sale proceeds to be placed in an interest bearing account whilst others do not.
- Most jurisdictions require the sale to be carried out in local currency
- The majority of jurisdictions excluding Brazil, do not appear to impose exchange control restrictions on withdrawal of sale proceeds.

Question 11 dealt with Priorities Generally

- The majority of jurisdictions excluding the Netherlands which opts for the law of the flag, appear to have the priority between creditors regulated by the lex fori.
- Almost all jurisdictions have other maritime claims that rank higher than mortgages in order of priority.
- There are no special rules on priority for local creditors except for Panama and Germany.
- Different jurisdictions have different timelines from the sale to the distribution of proceeds.
- All jurisdictions advised that the distribution is decided either by the court, a debt enforcement authority or bailiff.
- All jurisdictions except for Brazil provide for an appeal from a distribution order

Question 12 dealt with Mortgagee's Self-help Remedies

- There seems to be a distinction between Civil law countries and common law, or common law influenced countries. The latter allow self help remedies, the former generally do not.
- Self help remedies vary from taking possession, to being able to sell the vessel privately to managing and running the vessel.

Question 13 dealt with Insolvency Processes

- Only 3 - Australia, New Zealand and Japan have adopted the UNCITRAL Model law.
- There was a mixture of responses on staying or suspending a secured creditor's right to enforce its security.
- There was also a mixture of responses on the precedence of maritime courts over insolvency courts in the event of a judicial sale or court approved private sale.
- 12 out of the 15 jurisdictions hold out a risk even if small that claw-back provisions in correct circumstances may lead to a mortgage being challenged.

Question 14 dealt with Leasing

- Leasing is common in some jurisdictions like China and not in others.
- From most jurisdictions it would appear that the treatment and approach of leases depend on the terms of the lease and that there is a distinction between a finance lease and an operating "true" lease with only the former being characterised as a security interest.
- Most jurisdictions allow the lessor to expand his rights and remedies by contract.
- Jurisdictions are split between those allowing contractual self help remedies and those which do not.
- The majority of the jurisdiction recognise the lessor as having the rights and remedies of an owner.
- Most jurisdictions excluding Croatia indicate that the lessor being the owner of the vessel cannot arrest the leased vessel.

Question 15 dealt with Reservation of Titles

- Jurisdictions are split 50/50 on the treatment of a holder of title under reservation of title as the holder of a security interest.
- Most jurisdictions do not have a special registration system for the holder of title under a reservation of title agreement.
- The variety of recognition of foreign reservation of title agreements is even greater than the variety of the status of the holder of the reserved title under domestic law.

Question 16 dealt with the Extension of Registered Mortgage to Insurance Policy

This was a question which was added subsequently to the main questionnaire and unfortunately only answered by 5 jurisdictions Croatia, Germany, Italy, Malta and the Netherlands

It is too early to give a meaningful comment however it does appear that in all 5 jurisdictions mortgage rights extend over Insurance policies

Whereto from here

The main aim of the IWG will be to work on encouraging more jurisdictions to send in their questionnaire. The final conclusions are dependent on the replies we receive. If we look at the distribution of world tonnage it is evident that it is important that we receive replies from

Liberia, Marshal Islands, Hong Kong, Singapore and Greece. We need to understand if there are any issues and what are the issues with the security offered in the financing of ships and enforcement of that security in the current day to day context of vessels which ply the world's oceans.

We will most certainly seek to keep you updated with our work as it progresses.

Finally I would like to thank the Rapporteur of our IWG David Osborne for all his hard work and all the other committee members of this group for their time and dedication to our project.

Thank you.

RECENT DEVELOPMENTS OF EUROPEAN LAW IN THE MATTER OF INSOLVENCY LAW AND THE TREATMENT OF RIGHTS IN REM: A DIFFICULT MARRIAGE

Maurizio Dardani

The Hanjin Bankruptcy case has brought to the attention of the public and of the media issues in the matter of cross-border insolvency of which, in reality, maritime lawyers and practitioners were already fully aware.

We can even say that maritime insolvency law has constantly created a privileged point of view for the examination of the legal interventions in the matter of cross-border insolvency.

Before focusing the attention on the interference between cross-border insolvency and maritime (insolvency) law, I thought that it might be useful to make few considerations just in the matter of insolvency and bankruptcy law.

1. A brief historical excursus

   During different historical periods, bankruptcy law was inspired by two different – and, to a certain extent – opposite concepts.

   With some degree of approximation, one can affirm that during the history of bankruptcy law in Europe one vision has prevailed:

   (i) that Bankrupctcy should be a sanction against the entrepreneur who has become unable to honour his obligations and is trying to escape and to hide his assets;[14] and

   (ii) that bankruptcy law should give protection to the rights of the creditors through the enforced sale of all the assets of the entrepreneur by ensuring at the same time the "par condicio creditorum" (i.e. the equal treatment of creditors).

   The concept of "insolvency" is frequently coupled with the idea of "fraud"[15] of the debtor, and with the idea of an entrepreneur who tries to "escape" from creditors and to hide his assets, so that the

[14] Bankrupcty law as a part of criminal law, in Fallimento (storia) Enciclopedia del diritto. Pecorella e Gualazzini
[15] *Decoctor ergo fraudator*

creditors need to be protected and to benefit from the proper legal remedies.

Such principles can be summarized under the Latin expression "*favor creditoris*".

However, even during the hardest and toughest regimes for the insolvent entrepreneur, another and opposite idea starts to grow among "*mercatores*", the idea that some entrepreneurs may deserve a softer treatment or even the protection of the law, especially when they do not try to escape or to hide their assets, and, furthermore, when their situation of insolvency has not been caused by a fraudulent behaviour but by unfortunate circumstances.

In Venice, during the XVI Century[16] , a distinction was drawn for the first time by an eminent jurist (and lawyer) between three categories of insolvent entrepreneurs:

(i) those who have become insolvent "*fortunae vitio*";
(ii) those insolvent "*suo vitio*" and
(iii) those insolvent "*partim suo partim fortunae vitio*"[17].

The unfortunate but honest entrepreneur becomes entitled to get protection; and new legal instruments, inspired by the idea of the "*favor debitoris*", start to grow, giving rise to alternative insolvency procedures, to be applicable not only to the first of the three categories of entrepreneurs mentioned above, but also to the third one, which is obviously the must recurring and frequent: the category of the entrepreneurs who, beyond committing mistakes, have been the victims of the wheel of fortune.

The clash between "*favor creditors*" and "*favor debitoris*" is probably at the root of the ambiguity of bankruptcy law in general and might be a key for the interpretation of the recent developments of European law in the matter of cross-border insolvency law.

* * *

[16] Benvenuto STRACCA, De mercatore seu mercatura, in Tractatus Universalis Iuris, Venetiis 1584

2. The latest EU developments in the matter of insolvency law. The approach to business failure and insolvency within EU and the theory of the second chance

With a jump of six or seven centuries, now I would like to focus on the recent developments of European law in the matter of insolvency, which provide an impressive example of legal studies and proposals of legislation based on the principle of "favor debitoris".

At the beginning of the worldwide economic crisis, in 2007, the European Commission issued a Communication with a significant name: "Overcoming the stigma of business failure – for a second chance policy".

A project was launched during 2008-2010 with the main goal to find a way to minimize the "lost entrepreneurship potential associated with bankruptcy and second chance". As a result, a Report of experts was presented by the Commission in 2011, focusing on how to support the return of honest failed entrepreneurs to the market.

This 2011 Report of the Expert Group outlines four areas of the bankruptcy process, which are

1. Prevention (early warning systems, support mechanisms)
2. Out-of-court settlements
3. In court procedures
4. Treatment of the entrepreneur post-bankruptcy and conditions for a second chance

There is a passage in the 2011 Report which is extremely significant and far sighted, because it identifies a situation that many maritime law practitioners who are present today at this Seminar must have experienced in assisting their clients ship-owners when struggling to survive by ensuring that their vessels continue trading in the world whilst discussions for the restructuring of their debts are progressing.

The phrase which I wish to report is the following:

> "Allowing a business to reach a compromise with its creditors, whilst providing the freedom to trade through difficulties, can lead to a better result for all stakeholders than a court-based process".

"Freedom to trade through difficulties" is the expression on which I would like to draw your attention.

The Report of the expert group, obviously not familiar with maritime law, expanded on this point by making reference to re-financing agreements and to participation of the entrepreneurs in public tenders and public funds on equal conditions to any other company.

We all know from our experience in the maritime field that for a ship-owner, who is facing financial difficulties caused by the world financial crisis and by the sea freight market collapse, and is seeking an agreement with creditors, freedom to trade essentially means one thing: not to have his vessels arrested either in his own country or in any other country.

* * *

3. The European Commission recommendation of 12 March 2014

Following the above approach, we have assisted, during the last few years, to an increasing activity of the European Commission.

I wish to refer here to the Commission recommendation of 12 March 2014 on a new approach to business failure and insolvency[18] by which the European Member States were invited to implement the principles set out in such recommendation and to ensure, in particular (recital 1).

> …..that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at any early stage with a view to preventing their insolvency and therefore maximise the total value to creditors, employees, owners and the economy as a whole. The Recommendation also aims at giving honest bankrupt entrepreneurs a second chance across the Union.

Recital 18 is extremely important from my point of view as it states:

> A debtor should be able to request the court for a stay of individual enforcement actions and suspension of insolvency proceedings whose opening has been requested by creditors where such actions may adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business.

[18] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014H0135

When describing the "Preventive Restructuring framework", the Recommendation goes on in affirming that:

> **Art. 6 (c)**
>
> The debtor should be able to request a temporary stay of individual enforcement actions;
>
> **Art. 10**
>
> The debtors should have the right to request a court to grant a temporary stay of individual enforcement actions (hereafter 'stay') lodged by creditors, *including secured and preferential creditors***,** who may otherwise hamper the prospects of a restructuring plan. The stay should not interfere with the performance of ongoing contracts.
>
> **Art. 12**
>
> Where provided for in the laws of the Member States, the obligation of the debtor to file for insolvency, as well as applications by creditors requesting the opening of insolvency proceedings against the debtor lodged after the stay has been granted should also be suspended for the duration of the stay.
>
> * * *

The reply of European Member States to the above Recommendation has been considered insufficient and, to a certain extent, dissatisfactory.

4. The European Commission proposal of 22 November 2016 for a Directive on Insolvency, Restructuring and Second Chance.

Hence, the European Commission, under the increasing pressure of economic crisis, has undertaken additional studies in 2015 to assess the role of efficient EU pre-insolvency frameworks in fostering a culture of early restructuring and second chance[19].

Then in 2016, after publishing an Inception impact assessment [20] for an initiative on insolvency, the European Commission issued on 22

[19] The Economic Impact of Rescue and Recovery Frameworks in the EU, 2015, by Mihaela Carpus Carcea Daria Ciriaci Carlos Cuerpo Caballero Dimitri Lorenzani Peter Pont'uch/ Economic and Financial Affairs, https://ec.europa.eu/info/publications/economy-finance/economic-impact-rescue-and-recovery-frameworks-eu_en

[20] Initiative on insolvency dated 2 March 2016, in: http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_025_insolvency_en.pdf

November 2016 the Proposal for a directive on Insolvency, Restructuring and Second Chance[21], which transposes the above ideas and, in Article 6, dealing with "Stay of individual actions", reads as follows:

> 1. Member States shall ensure that debtors who are negotiating a restructuring plan with their creditors may benefit from a stay of individual enforcement actions if and to the extent such a stay is necessary to support the negotiations of a restructuring plan.
>
> 2. Member States shall ensure that a stay of individual enforcement actions may be ordered in respect of all types of creditors*, including secured and preferential creditors. The stay may be general, covering all creditors, or limited, covering one or more individual creditors, in accordance with national law.*

* * *

5. <u>The fundamental dilemma: to stay or not to stay the s.c individual actions of the Secured Claimants (i.e. the actions in rem)?</u>

The above excursus is probably sufficient to give a rough picture of the state of art of European law in the matter of insolvency and to draw this conclusive statement: that *a proper, effective and efficient administration of insolvency can only be achieved through a further harmonization and the elimination of divergences between different legal systems within EU.*

Therefore, now we can focus on the *debated question of the secured claims and actions in rem.*

We can certainly affirm that the dilemma between to stay or not to stay of such actions in rem is one of the most critical and sensitive issues of cross-border insolvency when applied to shipping.

As we can learn from the answers given by national MLAs to the questionnaire of CMI[22], different regimes are adopted in different legal systems (even within EU) for the treatment of individual

[21] Directive of the European Parliament and of The Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, in http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0723

[22] http://www.comitemaritime.org/Cross-Border-Insolvency/0,27129,112932,00.html

actions and of the rights in rem (s.c. security rights) whilst insolvency proceedings are pending.

Few examples will be sufficient. I shall examine the answers to the CMI questionnaire given by the Maritime Law Association of Canada, USA, France, Italy, Norway and Malta.

The relevant questions are contained in paragraphs 49 and 50 of the CMI questionnaire but for the purpose of this Seminar I shall reduce them just to one demand: *the enforcement of secured claims may be continued by claimant outside bankruptcy administration?*

The following schedule shows the different answers which have been given to the question by some national MLAs.

Type of claim	Canada	USA	France	Italy	Norway	Malta
Mortgages or hypothecs on a ship	YES	YES, but only with the approval of the bankruptcy court	NO	NO	YES	YES
Contractual liens	YES	YES, but only with the approval of the bankruptcy court.	NO	NO	NO	YES
Loss of life or personal injuries	YES	YES, but only with the approval of the bankruptcy court	NO	NO	YES	YES
Salvage rewards	YES	YES, but only with the approval of the bankruptcy court	NO	NO	YES	YES
General average	YES	YES, but only with the approval of the bankruptcy court	NO	NO	YES	YES
Collision	YES	YES, but only with the approval of the bankruptcy court	NO	NO	YES	YES
Unpaid supply of goods	NO	YES, but only with the approval of the bankruptcy court	NO	NO	NO	YES

* * *

6. The (EC) Regulation n. 1346/2000 on cross border insolvency and of (EU) Regulation 2015/848 on insolvency proceedings (recast)

Now, let us turn to the solution adopted by EU when regulating cross-border insolvency.

The solution which has been chosen by EU with article 5 of (EC) Regulation n. 1346/2000[23] is draconian: *actions in rem of creditors or third parties in respect of assets belonging to the debtors which are situated within the territory of another member state are not affected by the opening of insolvency proceedings.*

The text of article 5 (1) of EC Regulation reads as follows:

> The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

Such choice immediately became reason of debate and criticism.

It has been notably criticised by several authors with the argument that it is *too favourable to the banks.* Indeed, it is difficult to understand why pledged assets in another Member State should not be subject to the same rules as pledged assets in the Member State where the proceedings have been opened.

In 2011 the Directorate General for internal policies of the European Parliament severely criticised the insufficient harmonisation of the laws of the Members States contained in the Regulation n. 1346/2000.

When analysing Article 5 (1) of the Regulation, the comments were quite sharp, underlining that Article 5 (1) was inspired not only to the principle of the "favor creditoris", but was clearly written to benefit a specific category of creditors, i.e the banks.

[23] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1503759560866&uri=CELEX:32000R1346

However, with great disappointment, which I personally share, the drafting of article 5 of the 1346/2000 Regulation has not been rectified by article 8(1) of (EU) Regulation 2015/848 on insolvency proceedings (recast), which reads exactly the same as article 5(1) of (EC) Regulation n. 1346/2000.

> The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

In my opinion such solution is not satisfactory[24].

It is not desirable under different points of view:

- it justifies a discrepancy of treatment of actions in rem, depending on whether the assets of the entrepreneur are located in a country different from the one where the insolvency proceedings have been initiated;
- it contradicts the main scope of the Regulation which is supposed to grant a temporary stay of enforcement actions, brought by individual creditors where such actions could adversely affect negotiations for restructuring of the debtor's business;
- it provides a regime of favour for specific categories of creditors.

Additional criticism can be added from the point of view of maritime insolvency law, at least for three reasons:

- because vessels are constantly located in different countries;

[24] Such choice was justified as follows at Recital 68 of the Regulation: (68) There is a particular need for a special reference diverging from the law of the opening State in the case of rights *in rem*, since such rights are of considerable importance for the granting of credit. The basis, validity and extent of rights *in rem* should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of a right *in rem* should therefore be able to continue to assert its right to segregation or separate settlement of the collateral security. Where assets are subject to rights *in rem* under the *lex situs* in one Member State but the main insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights *in rem* arise if the debtor has an establishment there. If secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights *in rem* should be paid to the insolvency practitioner in the main insolvency proceedings.

- because secondary insolvency proceedings are normally not available in the Member State where the vessel is arrested (unless the debtor possesses an establishment on such State):
- because it clashes with the article 6 of the 22 November 2016 Proposal for a directive on Insolvency, Restructuring and Second Chance which we have mentioned before25.

Additional uncertainty derives from article 11 of Council Regulation (EC) N. 1346/2000 (now article 14 of (EU) recast Regulation 2015/848), specifically dealing with the law applicable to immovable property, ships and aircrafts subject to registration in a public register, according to which:

> The effects of insolvency proceedings on the rights of a debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

* * *

7. Some thoughts about the impact of the judgment of South Korean Court, declaring Hanjin Shipping bankrupt, especially with reference to the actions in rem of creditors seeking to exercise their rights before the local Courts, by arresting the Hanjin vessels calling at European ports

We are finally in a position to make a few comments on the Hanjin bankruptcy case.

Various cases handled by European Court in connection with Hanjin ships entering European ports, quite often with deteriorating cargoes on board, have given and will give different results, by producing a patchwork landscape which is just the opposite of that desirable harmonization mentioned in the works of the European Commission.

This is not surprising, first of all because of the lack of adoption of Model Law by European Countries (if I am not wrong, Model law has been adopted only by five European Countries, Greece, Poland, Romania, Slovenia and UK).

[25] For additional comments on Article 8 of Recast EIR see also Conference Report: Insolvency proceedings within EU: latest developments, ERA, 8 to 9 June 2017 in http://conflictoflaws.net/2017/conference-report-insolvency-proceedings-within-the-eu-latest-developments-era-8-to-9-june-2017/

But it is not surprising for another even more important reason: because of Article 32 of UNCITRAL Model law on cross-border insolvency which reflects the great attention and protection given by UNCITRAL to secured creditors rights.

Article 32 of UNCITRAL Model Law reads as follows:

> *Rule of payment in concurrent proceedings*
>
> Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

The position of UNCITRAL is based on the opinion (which is an updated version of the principle of the "favor creditoris") that there is a connection between the protection of the secured creditors' rights (which should be allowed to remain outside of the insolvency regimes) and the level of credit available in each country.

UNCITRAL is obviously aware of maritime insolvency law and of the interaction of the Model Law with maritime law, but the general views (recently expressed in 12th Multinational Judicial Colloquium of UNCITRAL-INSOL-World Bank held in Sydney on 18-19 March 2017) is still that such issues should not be addressed in the Model Law and that maritime law, in each specific country where the vessel can be placed under arrest, should prevail over the Model Law Regime[26].

The result, and this is the conclusion of my speech, is that we are very far from that desired harmonization in the matter of cross-border insolvency, when applied to shipping.

Unfortunately the vessels will continue to trade not only through difficulties, also with the legal uncertainty deriving from different laws which are applicable in the countries where they are sent by charterers and, in particular, from the different regimes which are applicable in those countries to the individual actions of the secured creditors.

[26] http://www.uncitral.org/pdf/english/colloquia/insolvency-2017/twelfthJC.pdf

AN UPDATE AND ITALIAN PERSPECTIVE ON LEGAL ISSUES ARISING FROM REFUGEE MIGRATION, RESCUE AND LOSS AT SEA

Valeria Eboli

Introduction

The ongoing migration crisis in the Mediterranean is without precedents. A huge number of individuals coming from African and Asian countries is using the sea route to reach Europe. Some of them are fleeing from an armed conflict, others from poverty. Some of them are also victims of human traffickers using the same way for their criminal activity.

All of them undertake a dangerous trip, using low quality unflagged boats, provided by smugglers, that are usually at risk of capsizing after a few miles from the point of departure. So all the vessels in the area are bound by the general obligation to save lives at sea. Unfortunately such events are not exceptional but occur on a daily basis.

The European Union and in particular Italy undertook several initiatives, including some military operations, to deal with the problem.

The aim of the presentation is to give an overview of such activities and the related legal framework. In fact international law of the sea is not the only relevant branch of law to deal with the issue, but also other branches of international law interplay with it. International Human rights law is applicable, but also international refugee law, as the majority of the individuals involved can be qualified as asylum seekers.

Issues such as the identification of the place of safety, the conduct of search and rescue operations and the implications of the crisis for the merchant vessels in the area will be taken into account. The code of Conduct for NGOS undertaking activities in migrants' rescue operations at sea, enacted by Italy, will be analised as well.

1. The framework: the migration flow in the Mediterranean Sea and the obligation to save lives at sea

In the last decade a massive migration flow towards Europe has been taking place, through both land and sea route. The Central Mediterranean route has become the main pathway into Europe[27].

In 2016 about 182,000 migrants used it and reached the Italian coast.

Such massive migration flow is a quite new phenomenon. It cannot be defined as a purely refugee crisis, because of the mixed nationalities and background of the individuals involved.

In fact, individuals seeking international protection may be fleeing from armed conflicts or from countries where they fear persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion, or where violations of human rights occur[28]. This is not the case for all the individuals involved. Some of them may be qualified as economic migrants, i.e. looking for better conditions of life. The economic migration is mainly related to push factors such as, for instance, social, economic and demographic inequalities, instability, environmental degradation, climate change.

Furthermore, some of the individual involved may be deemed as victims of human trafficking, in the hands of exploitative criminal organizations, which use the massive flow for their "business".

For all of them, the journeys are usually organized by criminal migrant smuggling networks[29], which help the migrants to illegally cross international borders.

So the flow is usually referred to as mixed migration flow.

Crossing the Mediterranean is just one leg of a longer and hazardous journey. Beginning the trip in the respective countries of origin, the migrants reach Libya by air (flights) or land routes. Sometimes they also cross deserts. Once in Libya they are often collected by the organizers of the journey in deplorable conditions. They usually report to face xenophobia in Libya and to be subjected to violence and abuse by migrant smugglers or human traffickers.

[27] Data available on the International Organization for Migration (IOM) portal at < https://gmdac.iom.int/data-analysis-migration-data-portal>

[28] For more details see *infra*.

[29] See Joint Europol-INTERPOL Report *Migrant Smuggling Networks Executive Summary*, 2016, at < https://www.europol.europa.eu/newsroom/news/europol-and-interpol-issue-comprehensive-review-of-migrant-smuggling-networks>.

The trip is usually organized by criminal organizations[30]. The smugglers provide the migrants different types of vessels for their trip, whose quality is quite poor[31].

involved in search and rescue (SAR) activities in the Central Mediterranean sea, in compliance with a general obligation to save lives at sea, arising from the international law[32].

on the Safety of Life at Sea (SOLAS) (1974)[33], the Maritime Search and Rescue the International Conventions on the law relating to vessels in distress. Nevertheless, beside any treaty-based obligation, which may vary from State to State, the obligation to to save lives at sea comes also from a general customary law rule.

It is also enshrined in Article 98 of Montego Bay Convention, which mentions the duty to render assistance at sea[34].

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[30] According to the law of the sea and the need to save lives at sea, the Italian Maritime Rescue Coordination Center (IMRCC) coordinates the efforts to save them. See Joint Europol-INTERPOL Report *MIGRANT SMUGGLING NETWORKS Executive Summary*, 2016, at < https://www.europol.europa.eu/newsroom/news/europol-and-interpol-issue-comprehensive-review-of-migrant-smuggling-networks>, EUROPOL, *Migrant smuggling in the EU*, 2016, at < https://www.europol.europa.eu/publications-documents/migrant-smuggling-in-eu>.

[31] The logistical simplicity of migrant smuggling by sea can mean significant profits for smugglers involved. Even at the low-cost end of sea smuggling market, low risk of detection for smugglers, combined with a high number of people who can be smuggled at once, and the lack of need for falsified or fraudulent documents, means that profits are relatively high, with all the risks being borne by migrants.

In other words, smugglers minimise their risks and maximise their profits, sometimes at the expense of the success of the undertaking and the safety of migrants.

/the-world-factbook/>.

[32] See below for more details

[33] SOLAS REGULATION V/7: SEARCH AND RESCUE SERVICES

1. Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts.
2. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons.

SOLAS REGULATION V/33

1. The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so.
2. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found.

[34] 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

–(a) to render assistance to any person found at sea in danger of being lost;–(b) to proceed with all possible speed to the rescue of persons in distress,*if informed of their need of assistance, in so far as such action may reasonably be expected of him;2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue

In particular, Search and Rescue (SAR) comprises the search for and provision of aid to persons who are, or are believed to be in distress. Even if there isn't any clear definition of the concept of "distress in any of the relevant conventional text, it is usually understood as a situation which implies the imminent danger of loss of life.

Search and rescue are two different operations and may take many forms, depending on the circumstances. They do not usually include salvage or the saving of property except where the action is indivisible from that of saving life.

Search is aimed at locating persons in distress, while Rescue is understood as an operation to retrieve persons in distress, provide for their initial medical or other needs and deliver them to a place of safety[35].

The International Maritime Organization (IMO) provides a worldwide system, so that wherever people sail, SAR services will be available if needed. It also coordinates, on a global basis, member States' efforts to provide search and rescue (SAR) services.

The legal framework for search and rescue in the Maritime domain includes the performance of distress monitoring, communication, coordination and search and rescue functions, including provision of medical advice, initial medical assistance and medical evacuation, through the use of public and private resources, including cooperating aircraft, vessels and other craft and installation.

The objectives of the Maritime Search and Rescue Convention are to standardise SAR worldwide, facilitate intergovernmental direct contact and co-operation.

Each State is responsible of a certain SAR zone, not corresponding to its territorial water, and coordinates all the SAR activities in that area through a Rescue Coordination Center (RCC), which is responsible for promoting efficient organization of search and rescue operations within the respective search and rescue region.

The relevant national RCC coordinates the rescue activities, by individuating the closest ship to be charged to intervene and the place of safety (PoS) to disembark the shipwrecked.

In Italy S.A.R. activities are coordinated by the Italian Maritime Rescue Coordination Centre (IMRCC).

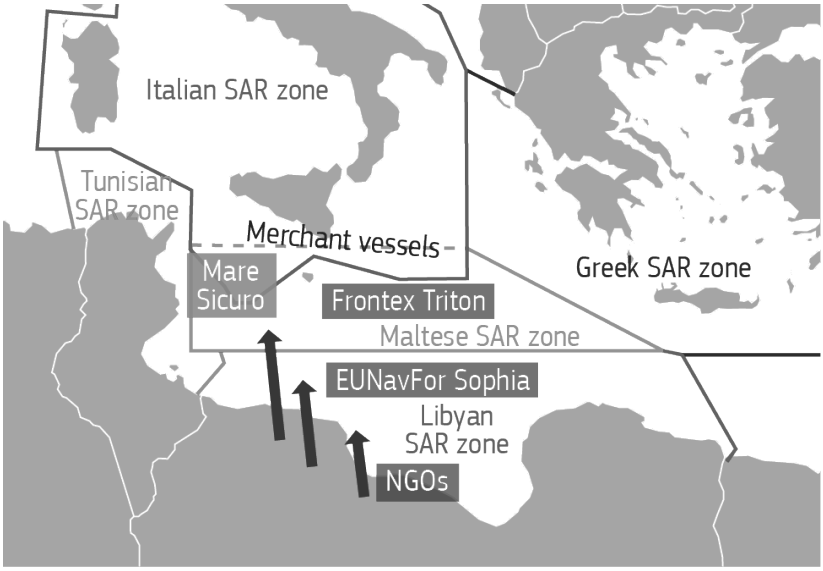
service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose.

[35] (IAMSAR, Volume 1). See also Resolution MSC 167 (78).

The Coast Guard Headquarters in fact is in charge of the I.M.R.C.C. functions - Italian Maritime Rescue Coordination Centre - which all the activities aimed at the search and rescue of human life at sea report to; these activities may be delivered through the use of air and naval components of the Coast Guard, with the possible use of other military and civilian rescue units. The I.M.R.C.C., functionally identified in the Operational Centre of the Coast Guard Headquarters, keeps contact with the rescue coordination centers in other states to ensure international cooperation as defined by the Hamburg Convention.

In fact, by Law n. 147 dated 3rd April 1989 Italy ratified the 1979 Hamburg International Convention on Maritime Search and Rescue, then implemented with Presidential Decree n. 662/1994. With this measure rescue at sea was no longer an activity delivered through the assets available at the time and entered into a highly professional stage with specifically adapted assets and specially trained crews. According to such regulation the Coast Guard is accountable for ensuring the efficient organization of search and rescue services in the entire region of interest on the Italian sea, which overcomes the territorial waters boundaries[36].

Malta, Greece, Libya, Tunisia and the other coastal States similarly are responsible to their SAR zones in the area.



Source image: https://ec.europa.eu/epsc/publications/strategic-notes/irregular-migration-central-mediterranean_en

[36] https://ec.europa.eu/epsc/publications/strategic-notes/irregular-migration-central-mediterranean_en

Several operations were also set up in the Mediterranean Sea, with the specific aim of saving lives at sea, or disrupting the smugglers and traffickers activities and networks, preventing further loss of life at sea, reducing suffering of migrants and their exploitation by criminal organisations.

Some of them are military operations, while others are purely humanitarian operations set up by some Non governamental Organizations (NGOs).

The activities deployed by the naval units belonging to such operations contribute to reduce the weight of the rescue on the merchant ships, and consequently limit the potential loss of money related to the diversion of the ship to a place of a safety to disembark the persons rescued at sea.

This is a very complex phenomenon, with several different legal implication that go beyond the international law of the sea.

Due to the fact that almost all the individuals involved seek asylum, the applicability of international refugee law comes into consideration. Additionally international human rights law is always applicable, also at sea.

So different branches of international law apply, beside relevant national laws (of the flag States) and European Union (EU) law, when EU member States are concerned.

Migrant smuggling and human trafficking also arise to transnational crimes, with the consequent applicability of the related legal framework.

So the main legal issues arising in relation to massive migration flows in the Mediterranean sea are related to the obligation to save lives at sea, but also to the protection to grant the persons rescued at sea.

All the relevant legal provisions are usually related to single or small scale phenomenon and they do not take into account so a large-scale event, so that sometimes some rules appeared to be inadequate to it.

2. The response to the migration crisis and the Italian commitment in the Central Mediterranean area

Several different actors are present in the Mediterranean.

In the central Mediterranean there is a high density of maritime traffic, including, beside the naval military assets of an average of 100 cargo and commercial ships in transit at any time[37].

When search and rescue (SAR) is required, the vessel in charge of it (identified by the IMRCC), carries on board all the people from the migrant vessel to disembark them in a place of safety designated by the IMRCC

The obligations to save life at sea is also upon merchant vessels. In this case such activity may imply some loss, due to the diversion of the commercial route to disembark the persons rescued at sea. The costs may be, for instance, related to the delay due to the deviation of the commercial route, the expenses to take care of the persons rescued at sea, the impact on the crews of such massive events, the (eventual) handling of corpses, pandemic risks, the possible security threats.

The presence of several military operations in the Mediterannean reduces such a risk.

There are several military operations ongoing and Italy is participating in several of them.

Italy is involved in different operations, such as “Mare Sicuro”, FRONTEX border control operations and EUNAVFOR MED Operation Sophia.

[37] Data available at < https://www.marinetraffic.com/>

2.1 "Mare Sicuro" Operation

The national Military Operations deployed by Italy to save lives at sea is Mare Sicuro. It was deployed on March 12, 2015 with them to conduct surveillance and maritime security activities. It was initially aimed at protecting the Italian national interests in the Central Mediterranean and ensure maritime security in relation to the terrorist threat.

It is a joint operation involving the naval and aerial components.

Following a formal request of the Libyan Government of National Accord (GNA), the area of operation has been extended to the Libyan Territorial Waters on August 2, 2017 (such decision has been taken by the Italian Government, following a favorable Parliamentary vote). The presence in the Libyan TTW is aimed at supporting the Libyan Navy Coast Guard in the fight on maritime illicit traffics and upon request coming from the Libyan Authorities.

Nowadays it is the only military operation deployed in the Libyan territorial waters.

2.2 FRONTEX

Then, Italy is also participating in some EU operations, conducted in the framework of Frontex. FRONTEX is an European Union Agency, which promotes, coordinates and develops European border management in line with the EU fundamental rights charter applying the concept of Integrated Border Management.

Frontex's tasks include monitoring migratory flows and carrying out risk analysis regarding all aspects of integrated border management. It also carries out a vulnerability assessment, including assessing Member States' capacity and readiness to face threats and challenges at their external borders.

Monitoring the management of the external borders through the Agency's liaison officers in Member States and coordinating and organising joint operations and rapid border interventions to assist Member States at the external borders, including in humanitarian emergencies and rescue at sea, are among the major tasks of the Agency.

FRONTEX supports search and rescue operations that arise during border surveillance operations at sea, but also deploys European Border and Coast Guard teams, including a rapid reaction pool for joint operations and rapid border interventions and within the framework of the migration management support teams.

Italy granted its participation in TRITON Operation.

Such operation, running from 1st November 2014, was set up to support Italy with border control, surveillance and search and rescue in the Central Mediterranean.

Its operational area covered the territorial waters of Italy as well as parts of the search and rescue zones of Italy and Malta, stretching 138 nautical miles south of Sicily. On numerous occasions, Frontex vessels and aircrafts have also been redirected by the Italian Coast Guard to assist migrants in distress in areas far away from the operational area of Triton.

To reinforce its capacity to save lives at sea, the EU significantly enhanced its maritime presence from 2015, tripling the resources and assets available for Frontex Joint Operations.

Triton Operation will be substituted by Themis from February 2018[38].

Themis Operation is mainly focused on border control, making efforts to collect intelligence to stop terrorists and foreign fighters from entering the EU, fighting cross-border crime.

It will conduct search and rescue activities, according to general international law of the sea, but it is not anymore the main focus, as it was in the previous Triton Operation.

The operational area will be reduced from 30 nautical miles from the Italian coast to 24 miles, but including the eastern Coast (Adriatic Sea).

As far as Italy is concerned, the main improvement is that Frontex Themis-rescued migrants must be delivered to the nearest EU port rather than to only Italian ports only. In particular, Italy is supposed to receive the rescued persons in the 24 miles operational area, while for those rescued outside such limit, the IMO rules should apply, so that the place of safety should be defined by time to time by the State responsible of the relevant search and rescue region.

2.3 EUNAVFOR MED Operation Sophia

Another military Operation is EUNAVFOR MED Operation Sophia, which was launched following an extraordinary EU Joint Foreign and Home Affairs Council Summit on 20 April 2015, in the aftermath of a deadly shipwreck in the Mediterranean. On the night of the 18th of April 2015 a small boat capsized some 70 nautical miles north of the Libyan coast, resulting in the death of almost 800 migrants, in their making the dangerous journey from Libya to Italy.

[38] See http://www.affarinternazionali.it/2018/02/migranti-frontex-triton-themis-ue/

It is but one point of the EU 10 points Action Plan on Migration, enacted on 20 April 2015 to address the crisis situation in the Mediterranean[39]. It indicates the immediate actions to be taken in response to it and EUNAVFOR MED operation Sophia represents the 2nd bullet point of the Action Plan, i.e. the military response to the crisis, as part of the European Union's Comprehensive Approach. To fully tackle the migration crisis, all points need, of course, to be addressed.

Some preliminary remarks are needed about the EU NAVAL FORCE MEDITERRANEAN (EUNAVFOR MED) then named Sophia.

First of all, Operation SOPHIA is a joint operation initially focused on mostly a *naval* activities. On 18 May 2015, the Council approved the Crisis Management Concept for a military CSDP operation to disrupt the business model of migrant smuggling and human trafficking networks in the Southern Central Mediterranean (Council Decision 2015/778 dated 18 May 2015)[40].

As a result, and, on 22 June 2015 the EU launched the European Union military operation in the Southern Central Mediterranean. The primary and fundamental task that Operation SOPHIA carries out is aimed at disrupting the migrant smugglers and human traffickers activities by the criminal organisations.

Therefore, the migrants' boats are also searched and all possible evidence on board collected. Once in the assigned place of safety, this evidence is transferred to the Italian judicial authorities.

Any suspected smuggler that we apprehend is brought to Italy where the Italian Judicial Authorities can launch an investigation.

On 20 June 2016, one month after a letter welcoming the EU's intention to contribute to the training of the Libyan Coastguard and Navy had been received by the HR/VP from the President of the Presidency Council of the Government of National Accord, Fayez Serraj, the Council extended the mandate of EUNAVFOR MED operation SOPHIA, reinforcing it by adding two supporting tasks: training of the Libyan coastguard and navy; and contributing to the implementation of the UN arms embargo[41].

[39] http://europa.eu/rapid/press-release_IP-15-4813_it.htm

[40] Available at https://www.operationsophia.eu/media_category/documents/page/2/

[41] Additional tasks have been added to the mandate of the operation since its launch. On 20 June 2016 European Council added: - training of the Libyan Coast Guard and Navy; - to contribute to the implementation of the UN arms embargo on the high seas off the coast of Libya according to UNSCR 2292 (2016) and UNSCR 2357 (2017). On 25 July 2017 European Council added: - to set up a monitoring mechanism of the long-term efficiency of the training of the Libyan Coastguard and Navy; - to conduct new surveillance activities and gather information on illegal trafficking of oil exports from Libya in accordance UNSCR 2146 (2014) and 2362 (2017);

Operation Sophia is led by Ital and 26 EU member States are participating in it in a joint effort to cope with migrant smuggling and human trafficking at sea.

Its activities are largely mandated by the UN Security Council too.

Sophia is operating under UN Security Council Resolution 2240 (2015), adopted under Chapter VII of the Charter authorizing the use of force, and subsequent modifications, which authorises us to board, search, seize and dispose of smugglers vessels on the high seas.

The UNSC resolutions strongly calls upon the States to act in compliance with human rights law and refugee law.

Nevertheless, although Op SOPHIA is not a Search and Rescue operation, all assets are bound by International Law to save lives at sea.

Since starting, Operation SOPHIA has given its contribution in this field too.

3. Legal issues related to the conduct of SAR activities in relation to the migration flow in the Mediterranean Sea

The ongoing migration flow in the Mediterranean is a very complex phenomenon which cannot be addressed only in a LOS perspectives but requires a more complex approach.

Beside LOS, other obligations arise from Human Rights Law, Refugee Law and, for the EU Member States, from EU Law as well. Of course domestic law (the law of the flag) is applicable.

SAR activities may be conducted by ships in the framework of a specific operation, military or humanitarian, or as a "stand alone" activity upon request of the relevant Regional Coordination Center (RCC).

In the latter case a merchant ship can be requested to save lives at sea along her commercial route.

Regarding international law of the sea, some main legal issues arise from the current situation in the Mediterranean and the related practice. They regard the functioning of the SAR system, the individuation of the place of safety, the legal status of the persons rescued at sea on board and their rights.

All these issues cannot leave out of consideration that each ship is always under the law of the flag State.

- to enhance the possibility for sharing information on human trafficking with member states law enforcement agencies, FRONTEX and EUROPOL.

3.1 Some issues related to International Law of the Sea

The first legal issue at stake is that regarding the SAR system .

As described before, each State is responsible of a SAR region. In the practice almost all the SAR events coordinated by the Italian Maritime rescue Coordination Center are happening outside the Italian SAR region. They usually happen mainly in the Libyan, the Maltese or Tunisian SAR regions. Nevertheless, the Italian RCC has been the only one answering to the distress calls, even if coming from other RCC regions.

Several cooperation efforts have been made in order to build up a Libyan RCC, even in the framework of a bilateral Italy-Libyan cooperation Project[42].

This practice shows certain gaps in the applicability of the existing conventional legal regime about SAR.

The relevant rules were imagined bearing in mind occasional and exceptional cases of distress and for sure not situations where the boat are voluntarily put in a situation of distress in a systematic way[43]. One can wonder how far such behavior may meet the requirements of an abuse of law, as for sure the norms are used for an aim different to that for which they were imagined[44].

Another topic is the Place of Safety (POS).

According to SOLAS Regulation V/33, as amended in 2006, "The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for

[42] https://euobserver.com/migration/140067

[43] See United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, Joint Report "Detained And Dehumanised" Report On Human Rights Abuses Against Migrants in Libya, 13 December 2016, European Parliament, Directorate-General For External Policies, Policy Department,Migrants in the Mediterranean: Protecting human rights, 2015; United Nations General Assembly Human Rights Council Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya, including on the effectiveness of technical assistance and capacity-building measures received by the Government of Libya Thirty-fourth session 27 February-24 March 2017 A/HRC/34/42; United Nations General Assembly Human Rights Council Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya - Report of the Office of the United Nations High Commissioner for Human Rights, 15 February 2016, A/HRC/31/47 ; Amnesty International, Report Libya 2016/2017, at https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya/; Human Rights Watch, World Reports 1016-Libya, at https://www.hrw.org/world-report/2016/country-chapters/libya; United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, Joint Report on the Human Rights Situation in Libya, 16 November 2015, at http://www.ohchr.org/Documents/Countries/LY/UNSMIL_OHCHRJointly_report_Libya_16.11.15.pdf

[44] Voluntary distress at sea is used to bypass the norms on illegal migration by smugglers, for instance.

ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a *place of safety*, taking into account the particular circumstances of the case and guidelines developed by the Organization."

The SAR Convention, as amended in 2009, addresses cooperation relating to assistance to the master in delivering persons rescued at sea to a place of safety.[45]

Chapter 4 also adds a new paragraph 4.8.5 relating to RCC's process in identifying the most appropriate place from disembarking persons found in distress at sea.

No definition of POS is provided.

A PoS could be ideally the Port in the flag state of rescuing vessel, the closest port to place of rescue, rescuing vessel's next port of call or other port selected by rescuing vessel's master, port where rescued persons embarked or state of origin, port preferred by rescued persons, port designated by the relevant RCC etc.

In the Mediterranean crisis the places of disembarkation are always in Italy, due to several reasons, including agreements based on the willingness of Italy to accept them.

Furthermore, bearing in mind that rescued persons are also asylum seekers, as better explained below, the choice of the place of safety has some reflects also on the side of EU law and on the applicability of the specific norms contained in the Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)[46].

The choice of a place of safety in the huge practice of the Mediterranean crisis is influenced by considerations arising from other fields of law, namely international refugee law and international law of human rights.

According to the former, asylum seekers cannot be sent back to the countries where they are fleeing from nor to countries where they risk to suffer violations of their fundamental rights.

[45] new paragraph 3.1.9 (Chapter 3). See 6.12-6.18 of IMO Res. MSC.167(78) (place of safety).

[46] Available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R0604.

3.2 The Applicability of International Refugee Law at sea

International refugee law is a set of rules and procedures aimed to protect, persons recognized as refugees and those seeking asylum from persecution.

The main sources of refugee law are customary law and treaty law, notably the 1951 Convention relating to the status of refugees and its 1967 Protocol[47].

As far as the territorial scope of application is concerned, it is applicable extraterritorially. It applies wherever a State has jurisdiction, *de iure* or *de facto*, including on the high seas. *De facto* jurisdiction on the high seas is established when a state exercises effective control over persons. Whether there is effective control will depend on the circumstances of the particular case. Where people are intercepted on the high seas, rescued and put on board a vessel of the intercepting state, the intercepting state is exercising such jurisdiction, as the people on board a ship are sailing under the flag of the intercepting state.

Refugees are defined by some basic features. They are outside their country of origin or outside the country of their former habitual residence; they are unable or unwilling to avail themselves of the protection of that country owing to a well-founded fear of being persecuted; and the persecution feared is based on at least one of the following five grounds: race, religion, nationality, membership of a particular social group, or political opinion.

On the one hand an individual has to fear to go back to his/her country of origin (subjective condition), and on the other hand such fear has to be "well-founded" on objective grounds, such as the context of the situation in the applicant's country and his or her personal circumstances.

Asylum-seekers are individuals seeking international protection as refugees, whose status has not yet been determined. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum seeker[48].

An exclusion from the eligibility for refugee status operate for those for whom there are serious reasons for considering that they have committed a crime against peace, a war crime or a crime against humanity or a serious non political crime outside the country of refuge prior to their

[47] Text available at http://www.unhcr.org/1951-refugee-convention.html

[48] If persons are moving inside the borders of their State, they are qualified as Internationally Displaced Persons (IDPs) and do not fall under the protection of International Refugee Law. If they cross the borders of the country, seeking international protection, they can be qualified as refugees and are instead protected by such rules.

admission to that country as a refugee; or for those who have been guilty of acts contrary to the purpose and principles of the United Nations.

Furthermore according to EU Law, some subsidiary protection has to be granted to anon-EU national or a stateless person who does not qualify as a refugee, but in respect of whom substantial grounds have been shown to believe that the person concerned, if returned to his or her country of origin or, in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and who is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country[49].

Additionally, according to Italian Law, also a humanitarian protection has to be granted for other reasons to be evaluated case by case[50].

As the migratory flows in the Mediterranean are usually mixed ones, as there are both economic migrants and asylum seekers on board of rescued boats, refugee law is applicable. According to the practice, almost all the migrants claim to be asylum seekers, even if not all of them are entitled to be granted refugee status.

The main protection granted by refugee law is the principle of *non refoulement*. It prevents the States from expelling or returning a refugee or asylum seeker to the frontiers of territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

Article 33(1) of the 1951 Convention, refers to expulsion or return (*refoulement*) "in any manner whatsoever". This means that the prohibition of *refoulement* is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions", and non-admission at the border.

[49] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

[50] See L. 189/02 Modifica alla normativa in materia di immigrazione e di asilo, Legge 6 marzo 1998, n. 40 "Disciplina dell'immigrazione e norme sulla condizione dello straniero" , D. lgs. 25 luglio 1998 n. 286 "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero", Decreto-legge 17 febbraio 2017, n. 13, coordinato con la legge di conversione 13 aprile 2017, n. 46 (in questa stessa Gazzetta Ufficiale - alla pag. 1) recante: «Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonche' per il contrasto dell'immigrazione illegale.» at http://www.sprar.it/wp-content/uploads/2017/01/immigrazione-il-testo-coordinato-del-decreto-minniti.pdf. The full protection is granted since the moment when an individual seeks asylum. Those eventually arriving to Italy without documents and not seeking asylum would be otherwise considered as irregular migrants. Illegal migration is also a crime according to Italian penal Law.

It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk. Article 33(1) was intended to prohibit any acts or omissions by a Contracting State which have the effect of returning a refugee to territories where he or she is likely to face persecution or danger to life or freedom.

Protection against *refoulement* is a cornerstone of international human rights and refugee law. In addition to being enshrined in Article 33 of the 1951 Convention and various human rights treaties, it reflects a rule of customary international law as well.

Furthermore, as far as EUNAVFOR MED operation Sophia is concerned, according to the PSC decision EEAS (2015) 855, "no person rescued or apprehended in the area of operation or outside the operation area within a SAR incident, by a participating maritime asset, will be handed over to Third Country Authorities or disembarked on the territory of that Third Country".

Generally speaking, in relation to SAR activities at sea, if an asylum seeker is at the maritime border of the State , he/she cannot be sent back. Furthermore, the applicability on the high Seas of the principle of *non refoulement* is affirmed as well.

Indirect *refoulement* is also prohibited under International Refugee Law.

The direct removal of a refugee or an asylum-seeker to a country where he or she fears persecution is not the only manifestation of *refoulement*. The removal of a refugee from one country to a third country which will subsequently send the refugee onward to the place of feared persecution constitutes indirect *refoulement*, for which several countries may bear joint responsibility.

Thus, states are obliged not to hand over those concerned to the control of a state where they would be at risk of persecution (direct *refoulement*), or from which they would be returned to another country where such a risk exists (indirect *refoulement*).

The need to ensure the safety of asylum-seekers and refugees has also been acknowledged by the International Maritime Organization Guidelines on the Treatment of Persons Rescued at Sea[51]. According to these Guidelines, disembarkation of asylumseekers and refugees recovered at sea, in territories where their lives and freedom would be threatened, should be avoided (unless maritime safety requires otherwise).

So, the host State would be barred from removing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture or to other forms of irreparable harm.

The prohibition of *refoulement* to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment extends to all persons who may be within a State's territory or subject to its jurisdiction, including asylum seekers and refugees, and applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed, where there is such a risk.

An obligation to ensure access to fair asylum procedures is upon the States.

The prohibition of *refoulement* applies to both refugees and asylum-seekers whose status has not yet been determined. Thus, the absence of an explicit and articulated request for asylum does not absolve the concerned state of its *non-refoulement* obligation. The state authorities should allow the potential asylum-seeker an effective opportunity to express his or her wish to seek international protection. This is particularly justified in the context of rescue at sea.

In this regard the position of Italy results quite clear in the practice. The protection as asylum seekers is anticipated at a very early stage. All the migrants rescued at sea are presumptively considered to be asylum seekers, even before they declare they are willing to seek asylum. So the principle of non refoulement to everybody is saved at sea.

In the framework of EUNAVFOR Med Operation Sophia, all the founding documents, make reference to the general applicability of *non refoulement* principle.

[51] Available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=556d5e544

The state exercising jurisdiction needs to ensure that asylum-seekers are able to access fair and effective asylum procedures in order to determine their needs for international protection. in which they should be expected to declare their wish to apply for asylum.

In case of transfer of an asylum seeker to another EU or non EU country, each State has an obligation to verify the compliance, in practice, of the receiving state with international obligations in asylum matters. More particularly, this assessment shall include whether the person concerned has access to an effective asylum procedure upon return, and whether he or she is subject to detention and living conditions which are in line with Article 3 of the European Convention of Human Rights (ECHR).

3.3 The Complementarity of Human Rights Law

In addition, some obligation arise, even at sea, from International Human Rights Law. They arise from both customary law as well as treaty law. Among the relevant treaties, there are the 1966 International Covenant on Civil and Political Rights and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), beside all the Conventions focusing on the protection of specific rights, such as the 1984 Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the 1987 European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 2006 Convention on the Rights of Persons with Disabilities; the 1979 Convention on the Elimination of All Forms of Discrimination against Women; the 1989 Convention on the Rights of the Child (CRC).

International Human Rights Law applies extraterritorially, at all times and protects all the individuals under the jurisdiction of the relevant State, irrespective of their citizenship.

So they for sure apply onboard the vessels flying their flag.

According to international human rights law, whose applicability is complementary to that of international refugee law, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment. This is a kind of indirect protection, so called

"par ricochet", well affirmed in the case law of the European Court of Human rights of Strasbourg[52].

For European States, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 is the main source of obligations.

The aforementioned norms are well affirmed in the jurisprudence as well.

The European Court of Human Rights issued a landmark decision in this regard in the Case "*Hirsi Jamaa and Others v. Italy"* (ECtHR Grand Chamber Decision on the Application No. 27765/09 of 23 February 2012).

In particular it affirmed that Italy violated the European Convention of Human Rights by forcibly returning a group of asylum seekers by sea to Libya, because in the case of rescue on the high seas the flag State that conducts a rescue operation has jurisdiction on the individuals because they are under its "continous and exclusive *de iure* and *de facto* control" and so is in charge to protect them. Furthermore, sending back such individuals to Libya amounted to a violation of human rights (Article 3 ECHR) as they were exposed to the risk of torture or inhuman or degrading treatment there or to the risk to be sent to third countries (such as Eritrea and Somalia) where there was such risk.

All these considerations must be taken into account as well when the choice about the place of safety is made.

As far as the protection of human rights in Europe is concerned, the related obligations arise not only by International Human Rights Law, but also by specific European Union norms which enshrine them into the EU legal system.

The European Union is founded on a strong engagement to promote and protect human ights, democracy and the rules of law worldwide. The obligation to protect human rights is stated by Article 6 of the Treaty on European Union (TEU), according to which the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, which is given the same legal value than the treaties.

[52] See European Court of Human Rights, Guide to Article 1 of the Convention - Obligation to respect human rights – Concepts of "jurisdiction" and imputability, at < https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf>

In addition, fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and as they result from the traditions common to the Member States constitute general principles of EU Law.

Furthermore, over the years, the EU has adopted important reference documents on the promotion and protection of human rights and developed a range of diplomatic and cooperation tools to support the worldwide advancement of human rights.

Therefore, such an important issue represents a core value of the EU and is implemented as far as the protection of asylum seekers and refugees are concerned as well.

Non-discrimination principle applies; however, it is not considered to be discriminatory but is instead mandatory to apply certain special measures to protect the most vulnerables.

So, States have to address the special needs of children, women, the sick or disabled persons, the elderly, people with special needs and others requiring special treatment.

As far as children are concerned, a special attention is due to unaccompanied and separated children, such as appointment of guardians, systematic 'best interest' determinations, assistance with access to asylum procedures and preparation of their claim, and alternative accommodation arrangements. Detention of children is permitted only as a measure of last resort, for the shortest possible period of time and in appropriate conditions.

Some asylum seekers can be at the same time victims of human traffickers. So it would be suitable to set up special procedures to identify potential victims, separate them from traffickers, and to prevent traffickers and smugglers from approaching them; to provide assistance in preparing asylum claims.

Whether victims of torture or trauma are identified, availability of basic medical facilities and psychological support, specific assistance with asylum applications or other procedures should be granted.

In this regard, At the European Union level, the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims also may apply[53].

[53] Text available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF

Other overlapping norms are those arising from the UN Convention against Transnational Organized Crime and its Additional Protocols, due to the fact that both migrant smuggling and human trafficking are deemed as transnational crimes. Italy ratified both of them.

The Additional Protocols to the UN Convention against Transnational Organized Crime, one to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and another against Smuggling of Migrants by Land, Sea, Air, maintain explicit references to the 1951 Convention and the 1967 Protocol and, as regards the Protocol against Smuggling of Migrants, to the principle of *non refoulement*.

Under the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, the fact that migrants, including asylum-seekers and refugees, were smuggled does not deprive them of any rights as regards access to protection and assistance measures. In the context of rescue-at-sea, it is crucial that the rights of those rescued are not unduly restricted as a result of actions designed to tackle the crime of people smuggling. Criminal liability falls squarely upon the smugglers and not on the unwitting users of their services.

With respect to the special circumstances of asylum-seekers and refugees, it should be noted that the Protocol contains a general saving clause in its Article 19 to ensure compatibility with obligations under international refugee law and makes a specific reference to the principle of *non refoulement*.

The 2005 Council of Europe Convention on Action Against Trafficking in Human Beings specifies as well in its Article 39 para. 4 that it shall not affect the 1951 Convention and its 1967 Protocol relating to the status of Refugees and the principle of *non refoulement* as contained therein.

At this point it seems clear that in this field, International law of the sea interplays with International Human rights law and international refugee law.

At sea, as it is more that well known, the law of the flag applies.

So the obligation to respect at least all the customary law norms is upon all the States.

Each state is also bound by its own treaty obligation. Furthermore, for EU member States EU law is applicable as well.

Therefore, norms can be found at the domestic level, the EU level and the international level.

In case of ships participating in military operation, the mandate may add more specific norms, as it happens, for instance, for EUNAVFOR MED operation Sophia, where some UN Security Council Resolutions give some guidance in this regard, as mentioned earlier.

The same general framework is applicable also in case of merchant vessels occasionally performing search and rescue activities and to ships engaged in humanitarian operations led by NGOs.

4. The Italian Code of Conduct for NGOs

In relation to the latter, on 7th August 2017, The Italian Home Department ("Ministero dell'Interno") enacted a Code of conduct for NGOs undertaking activities in migrants' rescue operations at sea[54].

In the premise, it is clarified that the main objective of the Italian Authorities in rescuing migrants is the protection of human life and the rights of the people, but it is also pointed out that the rescuing activity cannot be separated from a reception path, sustainable and shared with other Member States, in accordance with the principle of solidarity referred to in Article 80 of the Treaty on the functioning of the European Union (TFEU).

The nature of the Code of Conduct is that a not legally binding document, so that each NGO running a humanitarian operation in the Mediterranean is free to sign it. Nevertheless it is a precondition requested by Italy to disembark migrants in its ports.

Some NGOs disagreed and interrupted their missions in the Mediterranean.

Italy requested the NGOs to engage themselves to respect such a Code of Conduct. It contains 13 points and especially it requires the NGOs not the entry into Libyan territorial waters (which can be reached only if there is an evident danger of human life at sea); not to facilitate contacts with traffickers (light signals, telephone communications); to receive on board judicial police officers for investigation related to trafficking of human beings; to inform the Flag State of all the activities; to hold a certification attesting technical suitability for rescuing activities; to cooperate loyally with Public Security Authorities of migrants' landing location; to transmit all information of info-investigative interest to the Italian Judicial Police Authorities; to recover the boats and their engines.

[54] http://www.interno.gov.it/it/servizi-line/documenti/codice-condotta-ong-impegnate-nel-salvataggio-dei-migranti-mare

According to the code the NGOs should communicate to the competent MRCC the technical suitability (regarding the vessel, its equipment and the crew's training) for rescuing activities, without prejudice to the applicable domestic and international provisions regarding seaworthiness of vessels and other technical conditions necessary to operate ships. They are requested to be equipped with instruments and resort to personnel whose technical suitability and capabilities in mass rescue operations under all conditions are ascertained. This is required in order to guarantee their professional know-how in rescuing activities. Such a commitment concerns, inter alia, the need for providing the ship's master with proper information on stability, on- board reception capacity, individual and collective safety equipment, crew's specific training and relevant capability certification, security aspects, on board hygienic and habitability conditions, preservation capacity of possible corpses. All of the above is without prejudice to the provisions of Article IV (force majeure cases) and Article V (people transportation in emergency situations) of SOLAS.

They are consequently also requested to inform the competent MRCC about their activities and to keep it constantly updated, cooperate with it, executing its instructions and informing it in advance of any initiative undertaken independently because it is deemed necessary and urgent.

Furthermore by signing the Code they commit themselves to ensure that when SAR cases occur where no official Search and Rescue Region (SRR) is established, the ship's master immediately notifies the competent Authorities of the flag States for security purposes and the MRCC competent for the nearest SRR as "better able to assist", except in case the latter expressly refuses or doesn't respond. Notification to the competent MRCC entails an obligation of international law. The information to the flag State is aimed at recalling that they are not acting outside the law, but the law of the flag applies, and some legal obligations arise from the flag State legal framework.

The NGOs should ensure that the competent Authorities of the flag State are constantly kept updated on the activities undertaken by the vessel and immediately notified of any relevant event concerning "maritime security", in compliance with the principle of flag State jurisdiction under UNCLOS and other applicable rules of international law;

According to the code, they cannot transfer those rescued on other vessels, except in case of a request of the competent MRCC and under its coordination also based on the information provided by the ship's master.

Another commitment is not to make communications or send light signals to facilitate the departure and embarkation of vessels carrying migrants, in order to avoid to facilitate contacts with migrant smugglers and/or human traffickers. This provision does not affect the communications that are necessary in the course of SAR events to preserve the safety of life at sea.

In order to facilitate the fightt on criminal organizations gaining profit by exploiting migrants, NGOs are requested to commit themselves to receive on board, possibly and for a period which is strictly necessary, upon request by the competent National Authorities, judicial police officers for information and evidence gathering with a view to conducting investigations related to migrant smuggling and/or trafficking in human beings, without prejudice of the ongoing humanitarian activity.

Such activities will be conducted without prejudice to the exclusive jurisdiction of the flag State on the vessel under UNCLOS and other applicable rules of international law, to the competences of the shipmaster and to the different mandates and competences of the legal entities involved as provided under national and international law, with which police officers do not, and shall not, interfere.

Other commitments are about declarations to be made to the flag State, cooperation with the Public Security Authority of the migrants' intended place of disembarkation, including by providing the due. the "maritime incident report" (summary document of the event) and the "sanitary incident report" (summary document of health situation on board).

Finally another commitment regards the collection, once migrants are rescued and if possible, of the boats and the outboard engines used by migrants' traffickers/smugglers This is a very important way of cooperating against migrant smugglers and human traffickers and to comply with norms on navigation security and pollution risks.

In fact, leaving the empty boats at sea, according to the NGOs previous practice, on the one hand may constitute a risk for navigation and maritime security. On the other end, it allows smuggler to recover the boats and reuse them, facilitating their business and increasing the risk of death for the migrants embarked again on the same low-quality inflatable boats, even unsafer than new ones.

Italy recalls that the failure to subscribe the Code of Conduct or to comply with the commitments set out therein may result in the adoption by the Italian Authorities of measures addressed to the relevant vessels, in compliance with applicable domestic and international law.

Italy stresses that any failure to comply with the commitments set out in this Code of Conduct will be communicated by the Italian Authorities to the flag State and to the State where the NGO is registered.

It appears clear that there is a strong will to bring back the NGOs' activities in a legal framework, involving the State where they are registered and especially the flag State, under whose law they are acting.

The Code of Conduct has the main aim to recall some actors the need to respect some international law of the sea norms, those about the entry into the port of a foreign State and those of the flag State.

To sum up, it recalls on the respects of LOS norms on SAR. Such principles are already enshrined in some IMO Guidelines.

ARGENTINA'S CLAIM TO AN OUTER CONTINENTAL SHELF AN ANALYSIS OF ITS ENTITLEMENT AND THE RELEVANT LEGAL REGIME

A Dissertation submitted in partial fulfillment of the requirements for the award of the Degree of Master of Laws (LL.M.) in International Maritime Law at the IMO International Maritime Law Institute

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Academic Year 2015-2016

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TABLE OF INTERNATIONAL CONVENTIONS

1958

United Nations Convention on the Continental Shelf (UNCSC); done at Geneva on 29 April 1958, entered into force on 10 June 1964; United Nations, Treaty Series, vol. 499, p. 311.

1982

United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, opened for signature 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

TABLE OF NATIONAL LEGISLATION

Argentina

Decree No. 1,386/44, Official Gazette 17 March 1944.

Decree No. 1,541/99, Official Gazette 13 December 1999.

Decree No. 14,708/46, Official Gazette No. 15,641, 5 December 1946.

Law No. 17,094, Official Gazette No. 21104, 10 January 1967.

Law No. 23,968, Official Gazette No. 27,278, 5 December 1991.

Law No. 24,543, Official Gazette No. 28,256, 25 October 1995.

Law No. 24,815, Official Gazette 26 May 1997.

TABLE OF CASES

Continental Shelf (*Libyan Arab Jamahiriya/Malta*) Judgment, I.C.J. Reports 1985, p. 13, paragraph 34.

North Sea Continental Shelf Judgment, I.C.J. Reports 1969, p. 3, paragraph 19.

LIST OF ABBREVIATIONS

CLCS	Commission on the Limits of the Continental Shelf
COPLA	*Comisión Nacional del Límite Exterior de la Plataforma Continental*
EEZ	Exclusive Economic Zone
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ISA	International Seabed Authority
SPLOS	Meeting of States Parties
UN	United Nations
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCLOS	United Nations Convention on the Law of the Sea
UNCSC	United Nations Continental Shelf Convention
UNDOALOS	United Nations Division for Ocean Affairs and the Law of the Sea

INTRODUCTION

One of the most important principles set forth in the Preamble of the United Nations Convention on the Law of the Sea (UNCLOS) was the desire of States to establish a legal order for the seas and oceans with due regard to all States' sovereignty. This legal order would facilitate international communication and promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.[55]

UNCLOS provides a comprehensive set of rules which serves the purpose of regulating the seas and oceans. Not only does it recognize different maritime zones, but it also identifies their limits and parameters. In this respect, the continental shelf regime is contained in Part VI - Articles 76 through 85. In accordance with this Part, under certain circumstances, the coastal State may extend the outer limit of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. In addition, Article 76(8) sets forth a specific procedure for delineating the outer limits, by means of which the coastal State shall submit information on the limits of the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf (CLCS). The Commission shall make recommendations to coastal States based on such submission. The limits of the continental shelf established by a coastal State on the basis of these recommendations shall be final and binding.

On 21 April 2009, Argentina submitted to the CLCS, in accordance with Article 76(8) of UNCLOS, information on the limits of the continental shelf beyond 200 nautical miles. Ultimately, on March 2016, at the plenary level, the CLCS adopted, by consensus, the recommendations in respect of the submission made by Argentina.

[55] United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, opened for signature 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

Bearing in mind Argentina's claim to an outer continental shelf, the purpose of this dissertation consists of providing a legal analysis of the right of coastal States to claim an outer continental shelf. Moreover, it will examine their entitlement and the relevant legal regime, with specific reference to the legal effects of CLCS recommendations.

Chapter 1 will provide the historical background concerning the theory of the continental shelf from 1916 when Argentina drew attention to the extent of its sovereign rights over the continental shelf, through the Truman Proclamation. As will be seen, from such Proclamation, the idea of a continental shelf was reflected in the provisions of the 1958 United Nations Continental Shelf Convention (UNCSC), the developments under Argentine legislation, and the current legal regime under Part VI of UNCLOS.

Chapter 2, *Legal Regime Governing the Continental Shelf and its Resources*, will examine Article 76 of UNCLOS, as well as the criteria for establishing the outer limits of the continental shelf beyond 200 nautical miles. Moreover, this Chapter will analyze the other provisions contained in Part VI, with particular emphasis on the rights and obligations of the coastal State with respect to the continental shelf and its resources.

In so far as Chapter 3 is concerned, it will provide a general overview of the CLCS. It will also provide details on the CLCS composition and functions, and on the procedure that shall be followed in order to establish the outer limits of the continental shelf.

Chapter 4, *Argentina's Claim to an Outer Continental Shelf*, comprises two sections which will describe the National Commission on the Outer Limits of the Continental Shelf (COPLA), together with the Argentine submission to the CLCS.

In order to conclude the analysis on the regime governing the continental shelf, Chapter 5 will address the legal effects of the CLCS recommendations. It will discuss such consequences with reference to the following aspects: the superjacent waters above the outer continental shelf, the revenue sharing system set forth in Article 82 of UNCLOS, the "final and binding" outer limits to be established "on the basis of" the CLCS recommendations, and the relationship between the delimitation of maritime boundaries and the said recommendations.

Finally, a conclusion will be presented on the basis of the findings of the above mentioned Chapters in order to establish which would be the main implications of the CLCS recommendations with respect to Argentina as a coastal State which has successfully claimed an outer continental shelf. These would include an analysis of the territorial, political, as well as economic consequences.

CHAPTER 1

HISTORICAL BACKGROUND

Many scholars have argued that Argentina was one of the first States to draw attention to the extent of its sovereign rights over the continental shelf. In this regard, the development of the doctrine of the continental shelf proposed by Admiral Storni in 1916 should be mentioned. According to this doctrine, Argentina had sovereign rights over the continental shelf and all of its resources.[56] Later, in 1944, Argentine Decree No. 1,386/44 declared this maritime zone a transitory mining reserve area.[57]

On 28 September 1945, President Harry S. Truman of the United States of America issued a proclamation, which is regarded as one of the most important developments and a "decisive event in State practice" in this field.[58]

The Truman Proclamation had the purpose of declaring that the United States Government

[56] United Nations, Oceans & Law of the Sea, Commission on the Limits of the Continental Shelf (CLCS), Submission by the Republic of Argentina on the outer limits of the continental shelf beyond 200 nautical miles from the baselines, 21 April 2009, p. 1, Online Available: <http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf>.
[57] Decree No. 1,386/44, Official Gazette No. 17/03/1944 (A.I.1) as referred to in United Nations, Oceans & Law of the Sea; *loc. cit.*
[58] James Crawford, Brownlie's Principles of Public International Law, Eight Edition, Oxford University Press, Oxford, 2012, p. 270.

> Regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.[59]

The Proclamation claimed jurisdiction and control over the continental shelf contiguous to the United States coast; it did not refer to "sovereign rights". Moreover, it had a self-limiting character.[60] On the one hand, it stated that where the continental shelf extends to the coasts of another State, or is shared with an adjacent State, "the boundary shall be determined by the United States and the State concerned in accordance with equitable principles." On the other, the Proclamation made it clear that the nature of the waters above the continental shelf as high seas and the freedom of navigation were in no way affected.[61]

The Truman Proclamation was followed by several States' declarations. However, these claims did not share the same scope and content, particularly with respect to the character of the superjacent waters as high seas.[62] For instance, a number of Latin American States claimed sovereignty not only to the seabed, but also to the superjacent waters out to 200 nautical miles.[63]

In respect of the Argentine Republic, in 1946, the Executive Power passed Decree No. 14,708/46 concerning national sovereignty over the epicontinental sea and the Argentine continental shelf. Argentina went further from claiming mineral resources and wanted to protect the living resources above the continental shelf. By virtue of such Decree, the waters superjacent to the seabed were deemed as the epicontinental sea. This sea was characterized by an extraordinary biological activity, owing to the influence of the sunlight, which stimulates the life of plants, such as algae,

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[59] Department of State Bulletin, Vol. XIII, No. 314, University of Illinois, 20 July 1945, p. 485, Online available: <https://archive.org/stream/departmentofstat131945unit#page/486/mode/2up>.
[60] Roughton, Dominic and Trehearne, Colin; "The Continental Shelf" in David Attard et al. (Eds.); The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea, Oxford University Press, Oxford, 2014, p. 137 at 145.
[61] Department of State Bulletin; *loc. cit.*
[62] United Nations, Division for Oceans Affairs and the Law of the Sea (UNDOALOS); Definition of the Continental Shelf, An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, United Nations Publication, Sales No. E.93. V.16, New York, 1993, p. 1.
[63] Churchill, R.R. and Lowe, A.V.; The Law of the Sea, Third Edition, Manchester University Press, Manchester, 1999, p. 144.

mosses, among others, and the life of innumerable animal species, both susceptible of industrial utilization.[64] It is important to note that the Decree was based on principles of customary law and referred to the concept of natural prolongation of the territory.[65]

In 1949, the International Law Commission (ILC) met to codify the international law of the sea, and in 1951 decided to introduce draft Articles on the continental shelf recognizing its increasing economic and social relevance. The Articles were controversial and the definition of the continental shelf, among other aspects, was widely criticized.[66]

The final ILC's draft Articles were submitted to the UN General Assembly in 1957, and in April 1958 the First United Nations Conference on the Law of the Sea (UNCLOS I) adopted the text of UNCSC. The definition of the continental shelf was contained in Article 1, which stated as follows:

> For the purpose of these articles, the term "continental shelf" is used as referring (*a*) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (*b*) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[67]

Moreover, the Convention provided that the rights enjoyed by coastal States over the continental shelf should be "sovereign rights for the purpose of exploring and exploiting" its resources.[68]

The above mentioned definition contained the criteria of adjacency to the coast and of exploitability, which were questioned due to their imprecise and open-ended nature. It was argued that these criticisms constituted part of the pressure against UNCSC, which

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[64] Decree No. 14,708/46, Official Gazette No. 15,641, 5 December 1946, Online available: <http://faolex.fao.org/docs/pdf/arg1224.pdf>.
[65] United Nations, Oceans & Law of the Sea; *loc.cit.*
[66] Suarez, S.V.; The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment, Springer, Berlin, 2008, p. 30 as referred to in Roughton, Dominic and Trehearne, Colin; *op. cit.*, p. 146.
[67] United Nations Convention on the Continental Shelf (UNCSC); done at Geneva on 29 April 1958, entered into force on 10 June 1964; United Nations, Treaty Series, vol. 499, p. 311.
[68] Churchill, R.R. and Lowe, A.V.; *loc. cit.* See also Article 2 of the UNCSC.

eventually led to the Third United Nations Conference on the Law of the Sea (UNCLOS III).[69]

At the national level, in 1966, Law No. 17,094 concerning the extension of the Argentine sovereignty over the continental shelf and the territorial sea was enacted. This Law was, in general terms, in line with UNCSC.[70] In accordance with Article 2 of Law No. 17,094, the sovereignty of the Argentine Nation shall extend over the seabed and subsoil of the submarine zones adjacent to its territory to a depth of 200 metres or, beyond this limit, up to that depth of the overlying waters which allows exploitation of the natural resources of those zones.[71]

At that time, the principle of coastal States' rights over the continental shelf was firmly established, and in 1969 the International Court of Justice (ICJ) stated in the *North Sea Continental Shelf* cases that:

> The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is here an inherent right.[72]

In 1970, the UN General Assembly adopted, through Resolution 2749 (XXV), the historic Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction. The Assembly declared, *inter alia*, that "the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction [...] as well as the resources of the area, are the common heritage of mankind."[73] This statement reflected the need to establish clear cut outer limits to the continental shelf jurisdiction.[74]

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[69] Roughton, Dominic and Trehearne, Colin; *op. cit.*, p. 146.
[70] United Nations, Oceans & Law of the Sea; *loc. cit.*
[71] Law No. 17,094, Official Gazette No. 21104, 10 January 1967, Article 2, Online available: <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do;jsessionid=80E60303A532B07D53D5CF6C4D620EE7?id=48474>.
[72] *North Sea Continental Shelf* Judgment, I.C.J. Reports 1969, p. 23, Online available: <http://www.icj-cij.org/docket/files/51/5535.pdf>.
[73] United Nations, General Assembly, A/RES/25/2749, Online available: <http://www.un-documents.net/a25r2749.htm>.
[74] UNDOALOS; *loc. cit.*

UNCLOS III, which was convened between 1973 and 1982, resulted in the creation of UNCLOS. The need for establishing a new agreed legal definition of the outer limits of the continental shelf was stressed at the Conference. It was generally agreed that a precise definition of the outer limits of the continental shelf was required for establishing an international regime for the deep seabed and eliminating the ambiguities and uncertainties of the definition in UNCSC.[75]

During the negotiations, Argentina supported the proposal of the Special Committee on the Peaceful Uses of Sea Bed and Ocean Floor beyond the Limits of National Jurisdiction. This proposal promoted the extension of the continental shelf to the outer edge of the continental margin.[76]

In 1991, before the entry into force of UNCLOS, Argentina enacted Law No. 23,968 on the Argentine maritime zones. Article 6 of such Law establishes the outer limit of the Argentine continental shelf up to the outer edge of the continental margin or up to 200 nautical miles when the outer edge was below these limits.[77]

The first negotiating text of UNCLOS III circulated in 1975 and contained the following definition of the continental shelf:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[78]

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[75] Ibid, p. 2.
[76] United Nations, Oceans & Law of the Sea; *loc. cit.*
[77] Law No. 23,968, Official Gazette No. 27,278, 5 December 1991, Online available: <http://www.infoleg.gob.ar/infolegInternet/verNorma.do?id=367>.
[78] Official Records of the Third United Nations Convention Conference on the Law of the Sea, Vol. IV (United Nations Publication, Sales No.E.75.V.10), Document A/CONF.62/WP.8/Part II, Article 62 as referred to in UNDOALOS; *loc. cit.*

Eventually, such provision became Article 76, paragraph 1 of UNCLOS without any change, which together with Articles 77 to 85 (Part VI of the Convention), consist of the relevant provisions on the continental shelf and the legal regime governing its resources.

UNCLOS entered into force for Argentina on 31 December 1995.[79]

CHAPTER 2

LEGAL REGIME GOVERNING THE CONTINENTAL SHELF AND ITS RESOURCES

2.1 Analysis of Article 76 of UNCLOS

Part VI of UNCLOS, including Articles 76 to 85, contains provisions on the definition of the continental shelf and the rights and duties of coastal States associated with the continental shelf and its resources.[80]

The legal definition of the continental shelf is found in Article 76 of UNCLOS. In addition, Article 76 sets out the criteria by which a coastal State may establish its outer limits. It should be noted that the provision defines the continental shelf in a different way compared to Article 1 of UNCSC.

Paragraphs 1 to 3 of Article 76 of UNCLOS provide as follows:

> 1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

[79] Law No. 24,543, Official Gazette No. 28,256, 25 October 1995, Online available: <http://infoleg.mecon.gov.ar/infolegInternet/anexos/25000-29999/28913/norma.htm>.
[80] UNDOALOS; *op. cit.,* p. 5.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.
3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.[81]

In respect of the term "continental shelf", it can be said that the Article refers to a juridical term that applies to the area of the seabed, beyond the territorial sea, which is included within the sovereign rights of the coastal State for the purpose of exploring it and exploiting its natural resources.[82] It comprises the natural prolongation of the land territory of the coastal State – the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin, or to a distance of 200 nautical miles where the outer edge of the continental margin does not extend up to that distance.[83]

The term "continental margin", as defined in paragraph 3, comprises the submerged prolongation of the land mass of a coastal State. It consists of the seabed and subsoil of the continental shelf, the slope and the rise, but it does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.[84]

Moreover, Article 76(1) provides the criteria for a coastal State to determine the outer limits of its continental shelf. This provision sets forth two alternative criteria: (a) the natural prolongation of the land territory of a coastal State to the outer edge of the continental margin and (b) a distance of 200 nautical miles from the baselines from which the territorial sea is measured. The first is referred to as the geological criterion and the second as the distance criterion.[85]

[81] UNCLOS, Article 76, paragraphs 1 to 3.
[82] UNDOALOS; *op. cit.,* p. 10.
[83] UNCLOS, Article 76(1) as discussed in Roughton, Dominic and Trehearne, Colin; *op. cit.*, p. 152.
[84] Ibid, Article 73, paragraph 3.
[85] Tanaka, Yoshifumi; The International Law of the Sea, Second Edition, Cambridge University Press, Cambridge, 2015, p. 139.

In so far as the geological criterion is concerned, it is argued that the provision takes into consideration the principle set forth by the ICJ in its judgment in the *North Sea Continental Shelf* cases. The Court stated that:

> The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.[86]

As regards the distance criterion, it is based on the principle that the coastal State is allowed to claim a continental shelf in a legal sense up to 200 nautical miles irrespective of the configuration of the corresponding sea bed and subsoil. Therefore, it follows that this criterion is closely related to the concept of the exclusive economic zone (EEZ). In other words, the coastal State's jurisdiction over the continental shelf would be aligned with its jurisdiction over a 200-nautical mile EEZ.[87]

A further point of significance relates to the legal title over the continental shelf. This term has been defined as "the criteria on the basis of which a State is legally empowered to exercise rights and jurisdiction over the marine areas adjacent to its coasts."[88] However, the legal title of the continental shelf is said to be affected by the development of the concept of the EEZ, which is based on the distance criterion.[89] In relation to this, in the *Libya/Malta* case, the ICJ recognized that:

> Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that, for juridical and practical reasons, the

[86] *North Sea Continental Shelf* Judgment; *op. cit*., p. 3, paragraph 19.
[87] Roughton, Dominic and Trehearne, Colin; *op. cit*., p. 156.
[88] P. Weil, The Law of Maritime Delimitation: Reflections, Cambridge, Grotius, 1989, p. 48 as referred to in Tanaka, Yoshifumi; *loc. cit.*
[89] Tanaka, Yoshifumi; *loc. cit.*

distance criterion must now apply to the continental shelf as well as to the exclusive economic zone.[90]

Therefore, considering Article 76 of UNCLOS and the aforementioned decision of the ICJ, it can be argued that currently the distance criterion offers legal title over the continental shelf up to 200 nautical miles and the natural prolongation is the legal title over the continental shelf beyond such limit.[91]

2.1.1 *Criteria for establishing the outer limits of the continental shelf beyond 200 nautical miles*

When it comes to the criteria for the establishment by the coastal State of the outer limits of its continental shelf beyond 200 nautical miles, UNCLOS provides that wherever the outer edge of the continental margin extends beyond 200 nautical miles, the coastal State shall determine the outer limit of the continental shelf on the basis of Article 76(4). This provision refers to the geomorphological features of the submerged prolongation of the landmass of the coastal State in order to define the outer limits of the continental shelf.[92]

Additionally, paragraph 4(a) of Article 76 offers two separate criteria for establishing the outer edge of the continental margin, namely: (a) the "sedimentary rocks thickness" formula and (b) the "60 nautical miles from the foot of the slope" formula.

(a) The "sedimentary rocks thickness" formula

This formula, also known as the Irish or Gardiner formula, is contained in Article 76(4)(a)(i). In accordance with this test, the outer edge of the continental margin is fixed by a line delineated by reference to the outmost fixed points at each of which thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope. It is said that the Irish formula is related to the criterion used to evaluate the presence or absence of hydrocarbon resources, which seeks to ensure that the coastal State has the right to exploit oil.[93]

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[90] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* Judgment, I.C.J. Reports 1985, p. 13, paragraph 34, Online available: <http://www.icj-cij.org/docket/files/68/6415.pdf>.
[91] Tanaka, Yoshifumi; *loc. cit.*
[92] Roughton, Dominic and Trehearne, Colin; *op. cit*., p. 157.
[93] Tanaka, Yoshifumi; *op. cit*., p. 140.

(b) The "60 nautical miles from the foot of the slope" formula

The second test, also known as the Hedberg formula, is provided in Article 76 (4)(a)(ii). According to this formula, the outer edge of the continental margin is determined by a line delineated by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. In this respect, paragraph (b) establishes that in the absence of evidence to the contrary, the foot of the continental slope is to be determined as the point of maximum change in the gradient at its base. In any way, under paragraph 7, the outer limits of the continental shelf shall be delineated by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

Furthermore, it is important to note that although it is not expressly stated whether the State may use only one of the formulae or both, it can be said that nothing prohibits a coastal State from using one formula for a portion of its margin and another formula for other portions of its margin.[94] Thus, for delineating the continental shelf beyond 200 nautical miles, the coastal State may choose the most favourable formula to it.[95]

Nonetheless, whichever approach is taken, Article 76(5) provides that the fixed points comprising the line of the outer limits of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breath of the territorial sea is measured, or 100 nautical miles from the 2.500-metre isobath.

Another important provision refers to submarines ridges. Pursuant to Article 76(6), on submarines ridges, the outer limit of the continental shelf may not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. Though, this provision does not apply to submarine elevations that are natural components of the continental margin, such as plateau, rises, caps, banks, and spurs.[96]

[94] UNDOALOS; *op. cit.,* p. 14.
[95] Roughton, Dominic and Trehearne, Colin; *loc. cit.*
[96] UNCLOS, Article 76(6).

The last point that should be considered relates to the depositary functions of the Secretary-General. Article 76(9) states that the coastal State shall deposit with the UN Secretary-General charts and relevant information, including geodetic data, which permanently describes the outer limits of its continental shelf. It seems that reference to the term "permanently" suggests that once deposited, the coastal State may not longer modify such information on the outer limit lines, excluding circumstances of challenge by other States.[97]

2.2 The provisions of Part VI of UNCLOS

2.2.1 *Rights and obligations of the coastal State with respect to the continental shelf and its resources*

As it was previously mentioned, Part VI of UNCLOS, including Articles 76 to 85 contains provisions on the definition of the continental shelf, as well as the basic rights and obligations of coastal States with regard to the continental shelf and its resources. Concerning the current legal regime regulating the continental shelf resources, it becomes important to note that UNCLOS virtually reproduces the provisions of UNCSC.[98]

Firstly, as regards the rights of the coastal State over the continental shelf, Article 77 of UNCLOS should be addressed. Paragraph 1 allows coastal States to exercise exclusive sovereign rights over the continental shelf "for the purpose of exploring it and exploiting its natural resources."[99] Under paragraph 2, these rights are said to be exclusive in that, in the event that the coastal State does not explore the continental shelf or exploit its resources, no one may carry out such activities without the express consent of the coastal State.[100]

Moreover, the coastal State's sovereign rights "do not depend on occupation, effective or notional, or any express proclamation."[101] According to paragraph 4, the natural resources of the continental shelf include:

[97] Roughton, Dominic and Trehearne, Colin; *op. cit*., p. 158.
[98] UNDOALOS; *op. cit.,* p. 5.
[99] UNCLOS, Article 77(1).
[100] Ibid, Article 77(2).
[101] Ibid, Article 77(3).

> [...] the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.[102]

In addition to the above mentioned sovereign rights, the coastal State has jurisdiction regarding artificial islands, installations and structures, and exclusive rights with regard to drilling on the continental shelf.[103]

In respect of artificial islands, pursuant to Article 80, Article 60 dealing with the costal State's jurisdiction over artificial islands in the exclusive economic zone is applied *mutatis mutandis* to the continental shelf. Hence, on the continental shelf the coastal State has exclusive rights to construct and to authorize and regulate the construction, operation and use of (a) artificial islands, (b) installations and structures for the purposes provided in Article 56 and other economic purposes, and (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.[104] The coastal State also has exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.[105]

Further, in accordance with Article 81, the coastal State also has the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.[106] It should be noted that the phrase "for all purposes" seems to suggest that such exclusive rights are not limited to the exploration and exploitation of natural resources.[107]

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[102] Ibid, Article 77(4).
[103] Tanaka, Yoshifumi; *op. cit.*, p. 148.
[104] Ibid.
[105] UNCLOS, Article 60.
[106] Ibid, Article 81.
[107] Tanaka, Yoshifumi; *op. cit*., p. 149.

Finally, it is argued that the coastal State's sovereign rights include legislative and enforcement jurisdiction over the continental shelf concerning the exploration and exploitation of natural resources.[108] However, "these rights are not without limits, and should be exercised in accordance with the provisions of UNCLOS."[109]

On the other hand, UNCLOS imposes several obligations upon coastal States and at the same time grants certain freedoms to third States.

A basic obligation imposed on the coastal State is included in Article 84, under which the coastal State shall give due publicity to the limits of its continental shelf. The coastal State shall deposit such information with the UN Secretary-General and, in the case of a State claiming an extended continental shelf, with the Secretary-General of the International Seabed Committee.[110]

As regards the "freedoms of use on the continental shelf,"[111] in accordance with Article 79(1) all States are entitled to lay submarines cables and pipelines on the continental shelf. However, paragraph 3 establishes that the delimitation of the course for the laying of such pipelines is subject to the consent of the coastal State. The coastal State also has rights to take reasonable measures for the exploitation of the continental shelf, the exploitation of its resources and the prevention, reduction and control of pollution from pipelines, even though it may not impede the laying or maintenance of such cables and pipelines. Further, pursuant to Article 79(4) the coastal State has the right to establish conditions for cables or pipelines entering its territory or territorial sea.[112]

More importantly, Article 78 sets forth two main principles. On the one hand, it establishes that the exercise of the costal State's rights shall not "infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States"[113] provided in UNCLOS. On the other, it provides that the rights of the coastal State over

[108] Ibid, p. 147.
[109] Roughton, Dominic and Trehearne, Colin; *op. cit.*, p. 154.
[110] Ibid.
[111] Tanaka, Yoshifumi; *loc. cit*.
[112] UNCLOS, Article 79 as discussed in Tanaka, Yoshifumi; *loc. cit*.
[113] UNCLOS, Article 78(2).

the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.[114]

In this regard, it is important to note that in the event the coastal State has not claimed an exclusive economic zone, the superjacent waters above the continental shelf are high seas. Further, where the coastal State has established an exclusive economic zone, the superjacent waters above the continental shelf beyond 200 nautical are the high seas under UNCLOS. It follows that in the superjacent waters of the continental shelf all States enjoy the freedoms of navigation and fishing, and the freedom of overflight in the airspace above such waters.[115]

Ultimately, Article 82 imposes on the coastal State the obligation to make payments and contributions in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles. As it will be discussed in greater detail, this article contains a "unique system of revenue sharing"[116] under which such payments and contributions shall be made through the International Seabed Authority (ISA), which shall distribute them among the State parties to the Convention.[117]

CHAPTER 3

THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

3.1 Composition and Functions

The CLCS was established for the purpose of facilitating the implementation of UNCLOS in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[118]

Article 76(8) of UNCLOS reads as follows:

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[114] Ibid.
[115] Tanaka, Yoshifumi; *loc. cit*.
[116] UNDOALOS; *op. cit.,* p. 5.
[117] UNCLOS, Article 82(4).
[118] UNDOALOS, Commission on the Limits of the Continental Shelf (CLCS), Online available: <http://www.un.org/depts/los/clcs_new/commission_purpose.htm#Purpose>.

> Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.[119]

Thus, under the Convention, when a coastal State intends to claim a continental shelf beyond 200 nautical miles it shall submit information on the limits of the continental shelf to the CLCS. The Commission shall then make recommendations to the coastal State on matters related to the establishment of those limits.

The CLCS consists of 21 experts in the field of geology, geophysics or hydrography. They shall be elected by States parties to UNCLOS from among their nationals, having due regard to the need to ensure equitable geographical representation, and they shall serve in their national capacities.[120] Concerning this, it should be noted that no representative of the ISA is included in the membership of the Commission,[121] although the Authority is directly affected by the Commission's recommendations. Further, the members of the CLCS are elected for a term of five years and are eligible for re-election.[122]

In relation to the functions of the Commission, Article 3(1) of Annex II of UNCLOS sets forth as follows:

> (a) To consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of

[119] UNCLOS, Article 76(8).
[120] Ibid, Article 2(1) of Annex II.
[121] Tanaka, Yoshifumi; *op. cit*., p. 143.
[122] UNCLOS, Article 2(4) of Annex II.

> Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;
>
> (b) To provide scientific and technical advice, if requested by the coastal State concerned during preparation of such data…[123]

In performing its functions, Article 5 of Annex II provides that the Commission shall function by means of sub-commissions. Sub-commissions shall be composed of seven members, who are appointed in a balanced manner considering the specific elements of each submission by a coastal State. Nationals of the submitting coastal State who are members of the Commission or any member of the Commission who has provided scientific and technical advice to a coastal State shall not be a member of the sub-commission addressing that submission. Though, such member shall have the right to participate as a member in the proceedings of the Commission concerning such submission.[124]

Concerning the right to make submissions to the CLCS, Article 4 of Annex II of UNCLOS provides that a "coastal State" shall make a submission "as soon as possible but in any case within 10 years of the entry into force of this Convention for that State."[125] Due to the wide language of Article 4, a question has been raised on whether a non-State party to UNCLOS may make a submission to the CLCS claiming a continental shelf beyond 200 nautical miles. However, this seems not to be possible due to a number of reasons.

At the final session of UNCLOS III the President of the Conference stated that "a State which is not a party to this Convention cannot invoke the benefits of Article 76."[126] In addition to this, the International Law Association (ILA) Committee on the Outer Continental Shelf in its Second Report has also rejected such a possibility. The Report made it clear that although Article 4 of Annex II does not expressly refer to a coastal State party to the Convention, the right to make a submission to the CLCS, and the corollary right to establish outer limits of its continental shelf on the basis of the Commission's recommendations only

[123] Ibid, Article 3(1).
[124] Ibid, Article 5.
[125] Ibid, Article 4.
[126] UNCLOS III, Official Records, vol. XVII, A/CONF.62/SR.193, p. 136, paragraph 48 as referred to in Tanaka, Yoshifumi; *op. cit.*, p. 145.

exist for States parties to UNCLOS.[127] Moreover, the Report stated that Article 82 on revenue sharing in respect of the continental shelf beyond 200 nautical miles has not created an obligation for third States. It is remarked that it should not be assumed that the Article was intended to accord non-States parties to the Convention certain rights without imposing the collateral obligation.[128]

In so far as the competence of the Commission is concerned, it has been pointed out that it is limited to the interpretation of Article 76 and other provisions of UNCLOS, but only to the extent it is necessary for the performance of its functions. Hence, this competence should be interpreted in a restrictive manner and it does not replace the competence of State parties to interpret the Convention. However, in respect of the evaluation of scientific and technical data submitted by a coastal State, the CLCS competence should not be interpreted restrictively.[129]

As regards the documents issued by the Commission, its Rules of Procedure are considered as one of the CLCS basic documents. These Rules have been continuously reviewed and amended in order to address new issues not initially included.[130] The latest version of the Rules consists of 59 Rules and 3 Annexes, dealing mainly with issues such as sessions and meetings, members, conduct of the meetings, voting, sub-commissions and other subsidiary bodies, submission by costal States, confidentiality, and submissions in case of a dispute between States with opposite or adjacent coasts, among others.[131]

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[127] International Law Association (ILA), Committee on the Outer Continental Shelf, Conference Report Toronto 2006, Legal Issues of the Outer Continental Shelf, p. 20, Online available: <file:///F:/IMLI/DISSERTATION/EXTENDED%20CONTINENTAL%20SHELF/Articles/ILA%20Report_2006.pdf>.
[128] Ibid, p. 21.
[129] Ibid, pp.11-12.
[130] Jensen, Oystein; The Commission on the Limits of the Continental Shelf, Publications on Ocean Development, Volume 77, A series of Studies on the International, Legal, Institutional, and Policy Aspects of Ocean Development, Brill, Leiden, 2014, pp. 47-48.
[131] United Nations, Doc. CLCS/40/rev.1, 11 April 2008, Rules of Procedure of the Commission of the Outer Limits of the Continental Shelf, Online available: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CLCS/40/Rev.1&Lang=E>.

3.2 Procedure to Establish the Outer Limits of the Continental Shelf

It has been stated that the process of establishing the outer limits of the continental shelf beyond 200 nautical miles consists of four steps.[132]

1. The coastal State shall delineate the outer limits of its continental shelf pursuant to the criteria set forth in Article 76 of UNCLOS.
2. The coastal State shall submit information on such limits to the Commission, within a period of 10 years of the entry into force of the Convention for that State.[133] In this respect it becomes important to note that such time limit of 10 years has been *de facto* extended as the Meeting of States Parties (SPLOS) decided that the period may be satisfied by submitting preliminary information. The SLOPS also stated that "preliminary information" is deemed to include a description of the status of preparation and intended date of making the submission.[134]

The submission made by the coastal State shall be examined by a sub-commission composed of 7 members of the CLCS. The submitting coastal State may send its representatives to participate in the relevant proceedings; however, they shall not have the right to vote.[135] Then, the sub-commission shall submit its recommendations to the CLCS. Approval by the Commission of such recommendations shall be by a majority of two-thirds of its members present and voting. The recommendations shall be submitted in writing to the coastal State and to the UN Secretary-General.[136]

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[132] Wolfrum, R.; "The Delimitation of the Outer Continental Shelf: Procedural Considerations", in Jean-Pierre Cot (Ed.); Liber Amicorum Jean-Pierre Cot: Le process international, Bruylant, Brussels, 2009, pp. 352-353, as referred to in Tanaka, Yoshifumi; *op. cit*., p. 144.
[133] UNCLOS, Article 4 of Annex II.
[134] Tanaka, Yoshifumi; *op. cit*., p. 35.
[135] UNCLOS, Article 5 of Annex II.
[136] Ibid, Article 6.

It is noteworthy that UNCLOS contains no provision regarding public access to the information submitted by the coastal State, nor concerning the publication of the Commission's recommendations.[137] Nevertheless, Rule 50 of the CLCS Rules of Procedure provides that the executive summary of the submission is to be made public, and third States have been allowed to make observations on submissions.

The coastal State shall then establish the outer limits of its continental shelf on the basis of the recommendations of the Commission. In the event that the State disagrees with the recommendations, it shall make a revised or new submission to the Commission within a reasonable time.[138]

Pursuant to Article 76(8), the limits of the continental shelf established by a coastal State on the basis of these recommendations shall be final and binding, and more importantly, they shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.[139] These last two points will be discussed in greater detail as they require further analysis.

1. Finally, the coastal State, in accordance with Article 76(9), shall deposit with the UN Secretary-General charts and relevant information, including geodetic data describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

[137] Tanaka, Yoshifumi; *loc. cit*.
[138] UNCLOS, Article 8.
[139] Ibid, Article 76(10) and Article 9 of Annex II.

CHAPTER 4

ARGENTINA'S CLAIM TO AN OUTER CONTINENTAL SHELF

4.1 National Commission on the Outer Limits of the Continental Shelf

After the entry into force of UNCLOS, a special body was created in Argentina in order to elaborate the final submission to the CLCS for delineating the outer limit of the Argentine continental shelf.

In 1997, Argentine Law No. 24,815 established the National Commission on the Outer Limits of the Continental Shelf (*Comisión Nacional del Límite Exterior de la Plataforma Continental - COPLA* in its Spanish acronym) as an inter-ministerial commission under the authority of the Ministry of Foreign Affairs, International Trade and Worship, and also composed of the Ministry of Economic Affairs and Production as well as the Naval Hydrographic Service.[140]

According to Article 2 of the aforementioned Law, the main purpose of the Commission was to prepare the final submission aimed at delineating the outer limit of the Argentine continental shelf. The submission was to be made in accordance with the provisions of UNCLOS and Article 6 of Argentine Law No. 23,968.[141]

Concerning the functions of COPLA, the following should be considered:

a) To carry out researches and studies aimed at identifying the features of the Argentine continental shelf on the basis of hydrographic, geophysical and geological data and submit proposals to establish its outer limits;

b) To elaborate work programmes and action plans for the purpose of complying with the tasks therein established; and

[140] Law No. 24,815, Article 4, Official Gazette, 26 May 1997, Online available: <http://www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/43438/norma.htm>.
[141] Law No. 23,968; *loc. cit*.

c) To develop its own Rules of Procedure.[142]

Since its establishment, the Commission has been assisted by a General Coordinator and a Technical Sub-Committee. In order to fulfill its terms of reference, the work of the Commission is supported by the State Secretariat on Public Works, the Ministry on Science, Technology and Productive Innovation, the Secretariat on Industry, Trade and Mining, the National Commission of Geological Charts and the National Commission on Space Activities.[143]

It should be noted that COPLA has carried out its functions working with skilled professionals and State agencies specialized in the subject. Additionally, it has carried out scientific cooperation and collaboration activities with other national agencies, such as: the National Scientific Research Council (*Consejo Nacional de Investigaciones Científicas – CONICET* in its Spanish acronym), the School of Exact Sciences, Engineering and Surveying of the University of Rosario, the Geodetics Institute of the Faculty of Engineering of the University of Buenos Aires, the National Antarctic Directorate and Argentine Antarctic Institute and the Regional School of Río Grande (Ushuaia Division) of the National Technological University, among others.[144]

As regards the relevance of the activities carried out by COPLA, the Argentine Executive Power recognized, through Decree No. 1,541/99, that the tasks entrusted to the Commission were of national interest.[145]

Taking into consideration Argentina's aim of establishing its longest limit as a State policy, COPLA developed its work during twenty years in order to finalize all the studies necessary to prepare the final submission to the CLCS.

Finally, Argentina made a full submission of the outer limit of its continental shelf to the CLCS on 21 April 2009.[146]

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[142] Law No. 24,815; *op. cit.,* Article 5.
[143] UNDOALOS, CLCS; *op. cit.,* p. 3.
[144] Ibid, pp. 3-4.
[145] Decree No. 1,541/99, Official Gazette 13 December 1999, Online available: <http://editguardacostaspna.org.ar/archivos/espacios-maritimos/Decreto154199.pdf>.
[146] UNDOALOS, CLCS, Submissions to the CLCS, Online available: <http://www.un.org/depts/los/clcs_new/submissions_files/submission_arg_25_2009.htm>.

4.2 Argentina's Submission to the CLCS

As mentioned before, on 21 April 2009, Argentina submitted to the CLCS,[147] in accordance with Article 76(8) of UNCLOS, information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

For the purpose of establishing the outer limits of the Argentine continental shelf, COPLA gathered and analyzed geomorphological, geological, geophysical and hydrographic data.[148] After almost twenty years of work, it established the outer limit of its continental shelf in accordance with paragraphs 4 through 10 of Article 76 of UNCLOS.

The results of the study carried out by COPLA proved that the natural prolongation of the Argentine land territory extended beyond 200 nautical miles; thus, passing the test of natural prolongation.[149] It was argued that such scientific and technical work provided certainty on the extension of the sovereign rights of Argentina over its continental shelf beyond 200 nautical miles. This meant that the Argentine continental shelf would increase more than 1,782,000 square kilometres from its current 4,799,000 square kilometres, which represented an extension of the continental shelf of 35 per cent.[150]

It should be noted that the outer limit of the Argentine continental shelf was based on the combined application of the two formulae and two constraints provided in Article 76 paragraphs 4(a)(i)(ii), 4(b) and 5 of UNCLOS. Additionally, a three-step process was used to delineate the outer limit of the Argentine continental shelf: firstly, the two affirmative formulae were applied, which allowed to delineate the outer envelope or formulae line; secondly, the two constraints were considered, which allowed to delineate the constraint line; and finally, the combination of the abovementioned lines allowed to delineate the inner envelope indicating the outer limit of the Argentine continental shelf.[151]

Another aspect of Argentina's submission that should be considered refers to the obligation imposed on the coastal State making

[147] Ibid.
[148] United Nations, Oceans & Law of the Sea; *op. cit.,* p. 5.
[149] Ibid.
[150] *Comisión Nacional del Límite Exterior de la Plataforma Continental – COPLA,* Online available: <http://www.plataformaargentina.gov.ar/es>.
[151] United Nations, Oceans & Law of the Sea; *loc. cit.*

the submission to inform the CLCS of any case of unresolved land or maritime disputes with another State. Therefore, for the purpose of complying with the obligation set forth in Annex I, paragraph 2(a) of the CLCS Rules of Procedure, Argentina notified the Commission[152] that there was an area subject to dispute with the United Kingdom over the Islas Malvinas, Georgias del Sur and Sandwich del Sur.

Ultimately, from 1 February to 18 March 2016, the CLCS held its fortieth session at the UN Headquarters,[153] where it considered Argentina's submission. At the plenary level, it adopted, by consensus, the recommendations in respect of the submission made by Argentina. The Commission also recalled that it was not in a position to consider and qualify those parts of the submission that were subject to dispute and those parts that were related to the continental shelf appurtenant to Antarctica.[154]

CHAPTER 5

LEGAL EFFECTS OF THE CLCS RECOMMENDATIONS

With regard to the legal effects of the CLCS recommendations, it becomes essential to examine in depth issues relating to the legal nature of the superjacent waters above the continental shelf beyond 200 nautical miles, the revenue sharing system with respect to the exploitation of the continental shelf beyond 200 nautical miles, the legal significance for establishing "final and binding" outer limits "on the basis of" the CLCS recommendations, and the relationship between the recommendations and matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.

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[152] Ibid.
[153] United Nations, Meetings Coverage and Press Releases, Online available: <http://www.un.org/press/en/2016/sea2030.doc.htm>.
[154] Ibid.

5.1 The Superjacent Waters above the Continental Shelf Beyond 200 Nautical Miles

The first matter to deal with relates to the legal nature of the superjacent waters above the continental shelf beyond 200 nautical miles. As mentioned before, it is important to consider that the superjacent waters above the continental shelf beyond 200 nautical are the high seas under UNCLOS. Hence, it can be stated that in such waters all States enjoy the freedoms of navigation and fishing, and the freedom of overflight in the airspace above such waters.[155] Concerning to the last statement, it becomes useful to refer to Article 87 of UNCLOS on the freedom of the high seas. In accordance with this provision, such freedoms, granted to both coastal and land-locked States, shall be exercised under the conditions laid down by the Convention and by other rules of international law. And more importantly, they shall be exercised with due regard for the interests of other States and the rights with respect to activities in the Area. Nevertheless, it should be noted that such freedoms in the superjacent waters of the continental shelf beyond 200 nautical miles "may be qualified by the coastal State."[156] It has been argued that this is due to three main reasons which may be summarized as follows:

Firstly, by virtue of Article 80 of UNCLOS the coastal State has the exclusive right to construct artificial islands, installations and structures on the continental shelf beyond 200 nautical miles. These artificial islands and structures are constructed in superjacent waters above the continental shelf, thus it seems that the freedom to construct artificial islands is qualified by the coastal State jurisdiction, "even though literally the superjacent waters of the continental shelf beyond 200 nautical miles are the high seas."[157]

[155] Tanaka, Yoshifumi; *op. cit*., p. 149.
[156] Ibid.
[157] Ibid, p. 150.

Secondly, it is noteworthy that coastal States exercise their right to explore and exploit natural resources on the continental shelf from the superjacent waters above such maritime zone. Consequently, it seems that the fact that the coastal State exercises its jurisdiction in the superjacent waters above the continental shelf for the purpose of exploration and exploitation of natural resources cannot be avoided.[158]

Thirdly, under UNCLOS the coastal State has the right to regulate, authorize and conduct marine scientific research on its continental shelf. Such research shall be conducted with the consent of the coastal State.[159] On the contrary, Article 257 of the Convention states that all States have the right, in conformity with the Convention, to conduct marine scientific research in the water column beyond the limits of the EEZ. In this regard, it has been questioned whether the freedom to conduct such research is applicable to the waters superjacent to the continental shelf. Hence, taking into consideration that marine scientific research is normally carried out from those waters, it can be said that coastal States will exercise their jurisdiction to regulate marine scientific research there.[160] However, it is also noticeable that, on the continental shelf beyond 200 nautical miles, the coastal State may not exercise its discretion to withhold consent in respect to marine scientific research projects to be undertaken outside those specific areas designated as areas in which the coastal State has begun exploitation or detailed exploratory operations or in which it will begin such operations within a reasonable period of time.[161]

In short, it can be inferred that in some respects the freedom of the high seas may be qualified by the coastal State's jurisdiction in the superjacent waters above the continental shelf beyond 200 nautical miles and the airspace above such waters. Therefore, "their legal status should be distinguished from the highs seas per se."[162]

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[158] Oda, Shigeru; Fifty Years of the Law of the Sea: With a Special Section on the International Court of Justice, Kluwer Law International, The Hague, 2003, p. 275.
[159] UNCLOS, Article 246(1)-(2).
[160] Takei, Y.; Filling Regulatory Gaps in High Seas Fisheries: Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems, Nijhoff, Leiden, 2013, p.45 as referred to in Tanaka, Yoshifumi; *loc. cit*.
[161] UNCLOS, Article 246(6).
[162] Tanaka, Yoshifumi; *loc. cit*.

5.2 The Revenue Sharing System set forth in Article 82 of UNCLOS

In so far as the system of revenue sharing with respect to the exploitation of the continental shelf beyond 200 nautical miles is concerned, it becomes important to discuss the provisions of Article 82 of UNCLOS, as well as the role of the ISA concerning the implementation of the obligations set forth in such provision.

First, it is widely recognized that Article 82 of the Convention represents a compromise between the different interests of two groups of States at UNCLOS III, namely: States which claimed sovereign rights over their continental shelves beyond 200 nautical miles and those which supported the idea of establishing a limit to the continental shelves at 200 nautical miles.[163]

Corollary, it is possible to argue that Article 82 was drafted so as to achieve a balance between the interests of such two groups of States. The provision establishes that coastal States exploiting the non-living resources of the continental shelf beyond 200 nautical miles have the obligation to make annual payments or contributions in kind with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. Moreover, such payments or contributions shall be made through the ISA.[164]

However, an important exception to the obligation to make such payments and contributions has been established under Article 82(3). In accordance with paragraph 3, a developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource.

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[163] ILA, Committee on the Outer Continental Shelf, Conference Report Rio de Janeiro 2008, Outer Continental Shelf, p. 2, Online available: <file:///C:/Users/FLORENCIA/Downloads/outer_continental_shelf_report_2008%20(3).pdf>. See also Nandan, Satya N. (Eds.), United Nations Convention on the Law of the Sea, 1982, A Commentary, Volume II, Martinus Nijhoff Publishers, The Netherlands, 2002, p. 940.
[164] UNCLOS, Article 82(1), (2) and (4).

As regards the provisions of Article 82, there are certain aspects that should be discussed and in this respect, the ILA on its 2008 Conference Report on the Outer Continental Shelf[165] has stated that:

- The obligation to make payments or contributions in kind rests solely with the coastal State of outer continental shelf, and not with any other entity involved in the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles.[166]
- The coastal State is afforded the discretion to decide the method it will use to calculate the rate of payment or contribution; nonetheless, it shall communicate this method to the ISA.[167]
- For the purpose of clarifying the term "non-living resources" used in Article 82(1) as contrasted with that of "mineral resources" under Article 82(3), which allows developing States that are net importers of a mineral resource to be exempted from such payments or contributions, reference should be made to Article 77 of UNCLOS. The latter provides that all coastal States have sovereign rights over the natural resources of the continental shelf, and Article 77(4) defines "natural resources" as "the mineral and other non-living resources of the sea-bed and subsoil."[168] Therefore, it should be noted that those developing States which are net importers of the resources concerned are exempted from making such payments or contributions in kind, notwithstanding "the possible legal implications of the inconsistent use of the terms "non-living" and "mineral" resources in Articles 82(1) and 82(3)."[169]

[165] The ILA uses the term "outer continental shelf" to denotes the area of sea-bed and subsoil appertaining to a coastal State extending beyond the 200 nautical mile limit (drawn from the baselines from which the territorial sea is measured) to the outer limits established by the coastal State, according to the criteria and procedure laid down by Article 76 and Annex II of UNCLOS.
[166] ILA, Committee on the Outer Continental Shelf; *op. cit.*, p. 4.
[167] Ibid, p. 6.
[168] UNCLOS, Article 77(1)-(4).
[169] ILA, Committee on the Outer Continental Shelf; *op. cit.*, pp. 7-8.

Further to this, it has been argued that although the discretion given to costal States in the fulfillment of the above mentioned obligations, there are certain implied obligations imposed on them other than those set forth in Article 82. These obligations, implicit in the implementation of Article 82, refer to reporting requirements. The coastal State should report in respect of the starting date for exploitation of the non-living resources from the continental shelf beyond 200 nautical miles, the total annual production of the non-living resources, and the method applied by the coastal State for determining the value of the payments or contributions to be made.[170]

Second, when it comes to the role of the ISA in implementing the obligation provided in Article 82, paragraph 4 of such provision reads:

> The payments or contributions shall be made through the Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.[171]

Thus, the coastal State exploiting the non-living resources of its continental shelf beyond 200 nautical miles shall make payments or contributions through the ISA.

The Authority, under Article 158 of UNCLOS, consists of three principal organs, namely: the plenary Assembly, the thirty-six-State Council, and the Secretariat.[172] Among its functions, it shall distribute such payments to States Parties to the Convention, on the basis of equitable sharing criteria, taking into consideration the interests and needs of developing States, particularly the least developed and the land-locked among them.

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[170] Ibid, p. 7.
[171] UNCLOS, Article 82(4).
[172] Churchill, R.R. and Lowe, A.V.; *op. cit*., p. 240.

Finally, as far as the "equitable sharing criteria" is concerned, it is useful to note that it shall be developed by the Council in the form of recommendations to the Assembly. In this respect, Article 162(2)(o)(i) of UNCLOS grants the Council the power to

> Recommend to the Assembly rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from […] the payments and contributions made pursuant to Article 82, taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status.[173]

5.3 The "Final and Binding" Outer Limits to be Established "on the Basis of" the CLCS Recommendations

In accordance with Article 76(8) of UNCLOS, the limits of the continental shelf established by a coastal State on the basis of the CLCS recommendations shall be final and binding. In this regard, it becomes important to analyze the meaning and implications of the terms "final and binding" and "on the basis of" contained in such provision.

Concerning the term "final and binding", while it appears that what is final and binding are the CLCS recommendations, it should be noted that what is final and binding are the outer limits of the continental shelf established by the costal State.[174]

Having said that, it may be added that the term "final" means that the outer limits shall not be changed, and the term "binding" implies that there is an obligation to accept such limits. Hence, should the outer limits be established pursuant to the provisions of Article 76 they shall be final and binding not only on the coastal State concerned, but also on other States parties to UNCLOS.[175]

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[173] UNCLOS, Article 162(2)(o)(i). See also ILA, Committee on the Outer Continental Shelf; *op. cit.,* p. 9.
[174] Tanaka, Yoshifumi; *op. cit*., p. 144.
[175] ILA, Committee on the Outer Continental Shelf, Conference Report Toronto 2006; *op. cit.,* p. 15.

In respect of the term "on the basis of", it should be noted that it is an ambiguous term and no author has given firmed conclusions.[176] Nonetheless, the ILA has made a number of comments on the issue which are worth to consider.

In the first place, the Committee on the Outer Continental Shelf stated that the term "on the basis of" defines the freedom of the coastal State that intends to establish the outer limits of its continental shelf beyond 200 nautical miles in accordance with Article 76 of the Convention.[177]

In addition, the Committee explained that the requirement that the coastal State shall establish the outer limits of its continental shelf on the basis of the CLCS recommendations constitutes "a procedural guarantee to assure that the coastal State establishes the outer limits of its continental shelf beyond 200 nautical miles in accordance with Article 76."[178]

Lastly, it remarked that the Commission does not have the power to determine whether a coastal State has established the outer limits of its continental shelf on the basis of its recommendations. Therefore, other States may indicate that they consider that the coastal State has not acted on the basis of the CLCS recommendations.[179]

5.4 The Delimitation of Maritime Boundaries and the CLCS Recommendations

Even though it seems that the delimitation of maritime boundaries and the establishment of the outer limits of a coastal State's continental shelf are different concepts, it can said that both issues are closely related.[180] It has been argued that this is mainly because when a coastal State extends its continental shelf beyond 200 nautical miles, the overlapping of other States' continental shelves will increase.[181] Hence, the majority of the costal States' submissions to the CLCS involve issues relating to the delimitation of maritime boundaries between States.[182]

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[176] Jensen, Oystein; The Commission on the Limits of the Continental Shelf; *op. cit.,* p. 96.
[177] ILA, Committee on the Outer Continental Shelf, Conference Report Toronto 2006; *op. cit.,* p. 14.
[178] Ibid.
[179] Ibid.
[180] Roughton, Dominic and Trehearne, Colin; *op. cit.*, p. 164.
[181] Tanaka, Yoshifumi; *op. cit*., p. 143.
[182] Roughton, Dominic and Trehearne, Colin; *loc. cit*.

Nevertheless, Article 76(10) of UNCLOS expressly provides that its provisions are "without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."[183] Likewise, Article 9 of Annex II sets forth that the Commission's recommendations and actions shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.

Therefore, it has been argued that the aforementioned Articles are clear in the sense that the CLCS is not empowered to address issues on the continental shelf boundary between States with overlapping claims beyond 200 nautical miles or cases subject to a dispute with another State in respect of such limit.[184]

It follows that, pursuant to paragraph 2 of Annex I of the CLCS Rules of Procedure:

> In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States, or in other cases of unresolved land or maritime disputes, related to the submission, the Commission shall be:
>
> (a) Informed of such disputes by the coastal States making the submission; and
> (b) Assured by the coastal States making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of maritime boundaries between States.[185]

The Rules of Procedure also provide that where there is a land or maritime dispute, the CLCS shall not consider a submission made by any of the States concerned, unless all the States that are parties to such dispute give their prior consent.[186] Thereon, the submissions made to the CLCS and the subsequent recommendations shall not prejudice the position of the States parties to such land or maritime dispute.[187]

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[183] UNCLOS, Article 76(10).
[184] Nordquist, M.H. et al. (Eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, Martinus Nijhoff, 1993, vol. II, 1017 as referred to in Roughton, Dominic and Trehearne, Colin; *loc. cit.*
[185] CLCS, Rules of Procedure, Annex I, paragraph 2.
[186] Ibid, paragraph 5(a).
[187] Ibid, paragraph 5(a).

Finally, it is worth mentioning that such a situation is reflected in the submission made by Argentina and the subsequent recommendations of the CLCS. In this regard, the Commission made it clear that it was not its function to address those aspects of the Argentine submission that were subject to the existing dispute between Argentina and the United Kingdom over the Islas Malvinas, Sandwich del Sur and Georgias del Sur.[188] In other words, the Commission decided to defer consideration of the issue on the grounds that a dispute existed between both States, which had not been resolved yet at the time of Argentina's submission.

CONCLUSION

In light of the foregoing, it can be concluded that the regime governing the continental shelf is of a complex nature. Since the early 1900s,[189] States have drawn attention to the extent of their sovereign rights over such an area. From the Truman Proclamation, this challenging area was reflected not only in the developments of national legislation, but also in the provisions of UNCSC and the current legal regime contained in Part VI of UNCLOS.

As mentioned above, Part VI of UNCLOS, including Articles 76 to 85, contains provisions regarding the definition of the continental shelf, as well as the rights and obligations of coastal States associated with such a maritime area and its resources. Furthermore, UNCLOS provides two alternative criteria for a coastal State to determine the outer limits of its continental shelf, namely: the geological and the distance criteria. Under Part VI, wherever the outer edge of the continental margin extends beyond 200 nautical miles, the coastal State shall determine the outer limit of the continental shelf by using either the Irish formula or the Hedberg formula, or both.[190]

[188] United Nations, Meetings Coverage and Press Releases; *loc. cit.*
[189] Refer to Chapter 1 *ut supra*.
[190] Refer to Chapter 2, Section 2.1 *ut supra*.

Therefore, when a coastal State intends to claim a continental shelf beyond 200 nautical miles it shall follow a specific procedure.[191] As it was previously discussed, the coastal State shall submit information on the limits of the continental shelf to the CLCS. The Commission shall then make recommendations to the coastal State on matters related to the establishment of those limits. The limits of the continental shelf established by a coastal State on the basis of these recommendations shall be final and binding, and more importantly, they shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.

Considering Argentina's aim of establishing the longest limit of its continental shelf beyond 200 nautical miles, COPLA was established as an inter-ministerial commission in charge of delineating such limits and elaborating the final submission to the CLCS. After almost twenty years of serious and professional work, on April 2009 Argentina made a full submission to the CLCS in accordance with paragraphs 4 through 10 of Article 76 of UNCLOS. Finally, on March 2016, the CLCS adopted, by consensus, the recommendations in respect of the submission made by Argentina.[192]

In this regard, it is worth mentioning that Argentina's submission may be considered as a leading case on the grounds that it is said that Argentina is the first State which appealed to all the elements provided under the provisions of UNCLOS in a favourable way for the State. Moreover, this represents a success and a great development that leads to far-reaching consequences, which may be summarized as follows:

Firstly, there would be an extension of the Argentine continental shelf of 35 per cent approximately. This maritime area would increase more than 1,782,000 square kilometres from its current 4,799,000 square kilometres.

[191] Refer to Chapter 3, Section 3.2 *ut supra*.
[192] Refer to Chapter 4 *ut supra*.

Secondly, in so far as the political consequences are concerned, the area subject to dispute with the United Kingdom over the Islas Malvinas, Georgias del Sur and Sandwich del Sur is of outmost importance. In respect to this, the CLCS made it clear that it was not in a position to consider and qualify those parts of the submission relating to the existing dispute between Argentina and the United Kingdom over such Islands. It follows that the CLCS recognition of the said dispute is greatly significant in the sense that it would have not only political but also economic effects for both States. In other words, the United Kingdon would have to stop all drilling operations that are being carried out on such area and, at the same time, Argentina would not be able to start any kind of operation until the dispute is resolved. It seems that the conflict with the drilling campaign commenced by British oil companies around the Islands, which was loudly protested by Argentina, has come to an end.

Thirdly, other consequences of the CLCS recommendations relate to the economic aspects of the rights and obligations of Argentina in respect to the outer continental shelf and its recourses.[193] As it was deeply examined, amongst other rights, Argentina has exclusive sovereign rights over the continental shelf for the purpose of exploring it and exploring its natural resources, including the mineral and other non-living resources of the seabed and subsoil along with sedentary species. This becomes crucial in that it would allow Argentina to access valuable natural resources such as minerals, oil, gas, and sedentary species. Additionally, this situation represents a great challenge for the State owing that there would be a need for new scientific research to be carried out, as well as other investments as may be necessary to undertake such operations.

On the other hand, one of the most important obligations imposed on the coastal State that has claimed an outer continental shelf refers to the exploitation of the non-living resources of such a maritime zone. It follows that Argentina will be subject to the aforementioned revenue sharing system under which it shall make payments and contributions in kind, through the ISA, in respect of the exploitation of the non-living resources of the outer continental shelf.

[193] Refer to Chapter 2, Section 2.2.1 *ut supra*.

Finally, what is crucial is that Argentina, as a coastal State which has successfully claimed an outer continental shelf, will strengthen its position in the world. More importantly, the State will reaffirm its exclusive sovereign rights over such area, while facing not only territorial, but also political and economic wide-ranging consequences.

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*All websites correct as at 27 April 2016.

MANAGING "BALLAST WATER MANAGEMENT CONVENTION" – A SHIPOWNER'S PERSPECTIVE[194]

Carlo Corcione [195]

Abstract

As an industry, shipping is often considered old-fashioned, and reluctant to make changes. For any company involved in this industry, however, there are events beyond the company's influence and control, the impact of which force the company to change its ways or adopt new strategies. No shipping company can prevent such events from occurring, so the only viable solution is to manage the effects proactively. The entry into force of a new industry or international convention is a classic example. Such conventions impose new requirements, whose implementation, though frequently anticipated, is hard to manage in terms of timing.

The *Ballast Water Management Convention* is a case in point. Although being primarily technical, it brings – from a shipowner's perspective – an abundance of strategic issues, including financial, commercial, and compliance problems.

Compliance with this convention (and many others) invariably requires shipowners to invest significant amounts of money. A ballast water management system typically costs between $500k and $4m. These financial costs are exacerbated by the prolonged and ongoing systemic crises in the shipping industry, which make it harder for shipowners to fund new investments in order to meet new requirements.

This paper therefore tackles the impact of the *Ballast Water Management Convention* from the perspective of shipowners attempting to manage an external event that impacts on the company's entire strategy.

[194] Paper presented at the Young CMI, Genoa 2017
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Summary: 1. Background; 2. Overview of Risk and Risk Management; 3. Managing the Ballast Water Convention; 4. Remarks

1. Background

Ballast water management is one of the primary environmental issues faced by the shipping industry.[196]

The purpose of the *Ballast Water Management Convention* (BWMC) is to minimize the transfer of harmful aquatic organisms, in order to protect the marine environment and human health:

"To prevent, minimise and ultimately eliminate the risks to the environment, human health, property and resources arising from the transfer of harmful aquatic organisms and pathogens." [197]

The BWMC is indeed essential for the preservation of the marine ecosystem. With that said, this article's aim is not to present the topic from an environmental or technical perspective, but rather from a strategic company perspective. The aim is to give an overview on the strategy that a shipping company can – and indeed must – put in place when such a convention comes into force. In other words, it considers it as a risk to be managed.[198]

2. Overview of Risk and Risk Management

The risk posed to shipping companies by the BWMC can be especially severe if it is not managed correctly.

This concern is intensified at this point in the industry's history. The shipping market is trying, with great difficulty, to recover from years of crises.[199]

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[196] International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM). Adoption: 13 February 2004; Entry into force: 8 September 2017. http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Control-and-Management-of-Ships'-Ballast-Water-and-Sediments-(BWM).aspx

[197] Article 2 – General Obligations.

[198] It has to be specified that when ballast water is analysed in general terms, the immediate consideration for a shipping company is that the vessels are without cargo and therefore cannot produce the incomes and profits for which they were acquired.

[199] See Helfre, J. and Couto Boot, P. (2013) Emission Reduction in the Shipping Industry: Regulations, Exposure and Solutions, http://www.sustainalytics.com/sites/default/files/shippingemissions_july2013.pdf ; Corbett, J. and Winebrake, J. (n.d.) Global Forum on Transport and Environment in a Globalising World 10-12 November 2008, Guadalajara, Mexico; The Impacts of Globalisation on International Maritime Transport Activity: Past Trends and Future Perspectives, Energy and Environmental Research Associates, the United States. http://www.oecd.org/greengrowth/greening-transport/41380820.pdf

Risk can be defined in many ways, but it is not unreasonable, for the purposes of this discussion, to define risk as the possibility that an event will adversely impact achievement of business objectives.[200]

For a shipowner, their vessel is the essence of how they generate income and make profits. Vessels are built (or bought second-hand) to specific technical standards in order to meet certain criteria of profitability. Anything that impacts negatively on this, even a globally beneficial initiative such as the BWMC, represents a risk.[201] This paper considers three main types of risk. First, internal risks, which emerge from within the organization. Second, strategic risks, which arise from the organization's voluntary acceptance (they could, in theory, generate superior returns in contravention of the rules). Third, external risks, which are beyond company control. Often, these cannot be reduced or avoided, they can only be identified, assessed or mitigated.[202] The author believes that the implementation of an international convention falls into the last category.

As the introduction of a new international convention approaches, there is a sense of immediate risks among industry players; companies have to be prepared in order to avoid losing business opportunities.

A sense of risk is present even in the wording of the convention itself. Article 18, which deals with the entry into force of the convention, states that:

"The Convention will enter into force twelve months after the date on which not less than 30 States, the combined merchant fleets of which constitute not less than 35 % of the gross tonnage of the world's merchant shipping, have either signed it without reservation as to

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[200] Anon., 'Risk' (Business Dictionary, 2014) http://www.businessdictionary.com/definition/risk.html; Glyn A. Holton, "Defining Risk", Financial Analysts Journal Volume 60 • Number 6 ©2004, CFA Institute; Robert A. Jaeger, Risk: Defining it, Measuring it, and Managing it Evaluation Associates Capital Markets, Inc. November 2000; Peter Megens, 'Different Perspectives of Construction Risk: How Should it be Allocated?' (1996) 15 Ampla Bulletin 179, 179–180.

[201] For the purposes of this paper, the risk could impact on the vessel income and profits.

[202] http://www.ey.com/Publication/vwLUAssets/external-risks/$File/ey-insights-on-GRC-external-risks.pdf Kaplan, R., and Mikes, A. (2012) 'Managing Risks: A New Framework', Harvard Business Review 90.

ratification, acceptance or approval, or have deposited the requisite instrument of ratification, acceptance, approval or accession."[203]

In a case such as this, the risk is peculiar. Shipping companies know that there is the possibility of something happening and that it must be managed, but they do not know when it will happen. As a result, the only way to approach the problem is from a risk management perspective.

Again, risk management is a very broad topic. For the purposes of this article, however, it can be usefully described as the process of identifying, analysing and responding to risk factors throughout a project's life, and in the best interests of its objectives. Shipping companies usually have risk management systems in place in order to establish and quantify risks and predict their impact. This allows them to determine whether a risk is acceptable or unacceptable.[204]

3. Managing the Ballast Water Management Convention

Here, the focus of this paper narrows a little. When an international convention such as the BWMC soon to enter into force there are several factors to be analysed and considered: will installation of an appropriate system be economical? Should the vessel be sold or scrapped? Can the International Oil Pollution Prevention certificate (IOPP) be decoupled and renewed before the deadline specified by the convention?[205] Is it more convenient to pay upfront or seek financing?

The only way to usefully assess the issues outlined above is by carrying out an essential cost-benefit analysis.[206]

This analysis comprises examination of capital expenditure[207] and operational expenditure.[208] On top of this, a safe margin (buffer) of

[203] Article 18 – Entry into force.
[204] Berg, H. (2010) 'Risk Management: Procedures, Methods And Experiences', RT&A 2 (17): 79; Risk Management: Procedures, Methods And Experiences; Vlăduț-Severian, I. (2014) 'Risk Management And Evaluation And Qualitative Method Within The Projects' 3 (1): 4.
[205] On the issue of decoupling and renewing certificates in order to circumvent the BWMC deadline, a relevant updated is provided by here: http://www.ballastwatermanagement.co.uk/news/view,buying-time-by-decoupling-from-the-iopp_47416.htm.
[206] Dreze, J. and Stern, N. (1987) 'Chapter 14: The Theory Of Cost-Benefit Analysis' in A.J. Auerbach, A. and Feldstein, M. (eds) Handbook of Public Economics, vol. II, Elsevier Science Publishers B. V. (North-Holland);
World Health Organization (2011), Valuing Water, Valuing Livelihoods, edited by Cameron, J., Hunter, P., Jagals, P. and Pond, K., IWA Publishing, London, UK; Boadway, R. (2006) 'Principles of cost-benefit analysis', Public Policy Review 2 (1).
http://ec.europa.eu/regional_policy/sources/docgener/studies/pdf/cba_guide.pdf
http://ec.europa.eu/regional_policy/sources/docgener/guides/cost/guide2008_en.pdf
[207] In this case, these are the initial cost of the system as well as the cost of additional components required for operation.
[208] This comprises the annual cost of running the system, which usually increases over time as system efficiency decreases.

±10% is usually left for any additional capital invested during the life of the project.[209]

Moving on the benefit side of the analysis, adherence to the BWMC actually helps to prevent loss of income. It is not an immediate positive benefit but avoiding a negative one. As a matter of fact, ballast water management does not bring any immediate commercial benefit but could impact vessel revenue due to fines in case the system does not perform well or if there is a non compliance with the ballast water exchange. Consequently there could be an issue with port access restrictions.[210]

After a cost-benefit analysis has been carried out, several commercial issues require attention. First, the internal chain of command for that specific vessel must be examined in order to understand whether the responsibility of new regulation and the implementation has been outsourced or managed internally[211].

Then there are several contractual issues regarding what is generally called cargo venture: delays in the voyage being performed, issues with cargo to be loaded, time spent for ballast water exchange, time charters sampling clause, reviewing new building and the sale and purchase portfolio, and so on[212].

Finally, shipping companies must consider an assessment of sanctions and whether these costs can be recovered somehow. The other side of risk management involves attempting to transfer the risk to someone else.[213]

4. Remarks

An international convention is about to enter into force. What can and should a shipping company do?

There are many options. The answer depends on the age and type of vessel, as well as the company's broader strategy. There are two main

[209] The buffer might comprise mantainance and repair as well component replacement or upgrades. Lower capital expenditure can lead to higher long-term costs.
[210] https://www.wartsila.com/static/studio/assets/content/ss4/ballast-qa-booklet.pdf
http://www.lr.org/en/_images/229-77062_Understanding_Ballast_Water_Management_0314_tcm155-248816.0_August%202016.pdf
https://ww2.eagle.org/content/dam/eagle/publications/2014/BWTAdvisory14312rev3.pdf
[211] https://www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/Ballast_Water_Legal_Briefing_Feb2015.pdf
[212] Ibid.
[213] Today, it is quite usual to find tailor-made covers, even if such cover it is not formally present on the market. However, *ad hoc* analysis must be undertaken in order to understand the convenience and the efficiency of such cover. Only when the system is up and running, and when cases on the matter exist, can a full overview of the insurance aspects be achieved.

options. First, get rid of the vessel, either by scrapping it or by selling it. Second, continue to manage it, which will require installation of the system or renewal of the specific certificate in order to comply.

To provide a more comprehensive evaluation, a cost-benefit analysis should be undertaken, as well as examination – with the help of external consultants – of several commercial issues. This should be followed with monitoring of potential extension,[214] and analysis of other regulations on the same matter.[215]

This paper sought to evaluate vertically the risk management of an external event such as an international convention within the overall strategy of a shipping company. The author believes each of the points mentioned above warrants further examination and analysis. They would benefit not only from practical discussions, but also academic perspectives. The author hopes that the overview provided herein can serve as a starting point for anyone seeking to deepen their knowledge of the topic.

[214] In fact, the International Maritime Organisation has already given two years' extension.
[215] In this specific case, the "Global Sulphur Cap 2020" has already been in the shipping agenda.

BALLAST WATER MANAGEMENT CONVENTION 2004 AND BAREBOAT CHARTERS: WHO BEARS THE WEIGHT OF TECHNOLOGICAL IMPROVEMENT

Lawrence Dardani

Abstract. This paper opens with a description of the contents of the Ballast Water Convention 2004 and it addresses, particularly, the issue of the technical requirements, which will have to be complied with by ships, in order to perform the necessary water ballast treatment. The implementation of the Convention is thus the opportunity to assess the impact, which newly introduced legislation can have on contracts of lease. Different regimes are considered and compared as alternative solutions. The analysis then focuses on the relevant provisions contained in the standard bareboat charterparties. The paper enquires into the criteria, by which the burden of the costs involved in the implementation of newly introduced legislation should be allocated between owners and charterers.

1. Introduction.

The entry into force of the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004, s.c. Ballast Water Convention, adopted in London on 13th February 2004, requires today the examination of the impact that its provisions will have on the world's fleet and on the relevant contractual relationships.

This paper addresses the effects of the coming into force of the Convention affecting bareboat charters. The uniform instrument will be a pretext for an analysis of the contractual regulation of circumstances, in general, where technical requirements made compulsory by newly introduced legislation are to be assessed from the perspective of a bareboat charter.

2. The Ballast Water Management Convention 2004 and its entry into force.

On 13th of February 2004, the Diplomatic Conference held at the IMO Headquarters in London adopted the wording of the International Convention for the Control and Management of Ships' Ballast Water and Sediments. The implementation provisions to the Convention establish that it shall enter into force upon reaching a minimum level of participation by Member States. In particular[216], the entry into force is set twelve months after the date on which the Convention has been ratified by at least thirty Member States, the national fleets of which cover at least 35% of the world's merchant fleet. After more than twelve years from its adoption, on 8th September 2016, when Finland filed the instrument of ratification, the threshold was reached and, on 8th September 2017, the Convention enters into force in all its Member States[217].

The aim of the Convention is the protection of marine and coastal ecosystems, as well as of biodiversity. Through it, Member States endeavour to contrast the peculiar phenomenon by which organisms present in ballast waters, coming from ecosystems wholly different from those into which they are discharged can cause irreparable damages to the ecosystems of destination[218].

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* This paper is an English amended version of an article published in Dir. Mar. 2017, 336.
** Avvocato in Genoa and Barrister.
[216] Precisely, article 18(1) of the Convention provides as follows: "*This Convention shall enter into force twelve months after the date on which not less than thirty States, the combined merchant fleets of which constitute not less than thirty-five percent of the gross tonnage of the world's merchant shipping, have either signed it without reservation as to ratification, acceptance or approval, or have deposited the requisite instrument of ratification, acceptance, approval or accession in accordance with Article 17*".
[217] As of today, the Convention has been ratified by: Albania, Antigua & Barbuda, Barbados, Belgium, Brazil, Canada, Congo, Cook Island, Croatia, Denmark, Egypt, Fiji, Finland, France, Georgia, Ghana, Germany, Indonesia, Iran, Japan, Jordan, Kenya, Kiribati, Lebanon, Liberia, Malaysia, Maldives, Marshall Islands, Mexico, Mongolia, Montenegro, Morocco, Netherlands, Nigeria, Niue, Norway, Palau, Panama, Peru, Russia, Saint Kitts and Nevis, Saint Lucia, Sierra, Leone, South Africa, South Korea, Spain, Sweden, Switzerland, Syria, Tonga, Trinidad & Tobago, Turkey e Tuvalu.
On 7th July 2017, the Marine Environment Protection Committee (MEPC) of the IMO, at its 71st meeting, reached a compromise on compliance dates for ballast water discharge and a revised schedule was set, effectively postponing by two years the deadline for installing the ballast water treatment equipment for ships already existing on 8th September 2017. Indeed, ships constructed after 8th September 2017 must comply on delivery, while existing ships in general must comply by the first IOPP renewal after 8th September 2019.
[218] In the premises to the Convention, express reference is made to the International Convention on biological diversity of 22 May 1992 as well as to the decisions IV/5 of 1998 and VI/23 of 2002, adopted pursuant to the above Convention and it is reported that "*the transfer and introduction of Harmful Aquatic Organisms and Pathogens via ships' ballast water threatens the conservation and sustainable use of biological diversity*".

The Convention introduces a structured system of rules, partially aimed at the administrations of the contracting states and partially at shipowners. A duty is introduced to make port infrastructures suitable for the disposal of residues[219]; research and international cooperation are promoted[220]; a system is set to monitor vessels[221] and sanction violations[222]. Furthermore, each vessel will have to adopt a management plan for ballast waters[223], along the lines of the ISM code, and will have to have a specific record book on board [224]. But most importantly the Convention makes compulsory, on board vessels flying the flag of contracting States, the installation of specific equipment capable of treating ballast waters, neutralizing the harmful effect of the organisms contained therein[225].

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[219] Article 5, under the heading "*sediment reception facilities"*, reads*: "each Party undertakes to ensure that, in ports and terminals designated by that Party where cleaning or repair of ballast tanks occurs, adequate facilities are provided for the reception of Sediments*".

[220] Article 6. "*Parties shall endeavour, individually or jointly, to: (a) promote and facilitate scientific and technical research on Ballast Water Management; and (b) monitor the effects of Ballast Water Management in waters under their jurisdiction*".

[221] Article 4. "*Each Party shall require that ships to which this Convention applies and which are entitled to fly its flag or operating under its authority comply with the requirements set forth in this Convention, including the applicable standards and requirements in the Annex, and shall take effective measures to ensure that those ships comply with those requirements*".
Article 9. "*A ship to which this Convention applies may, in any port or offshore terminal of another Party, be subject to inspection by officers duly authorized by that Party for the purpose of determining whether the ship is in compliance with this Convention*".

[222] Article 8. "*Any violation of the requirements of this Convention shall be prohibited and sanctions shall be established under the law of the Administration of the ship concerned, wherever the violation occurs*".

[223] Regulation B-1. "*Each ship shall have on board and implement a Ballast Water Management plan. Such a plan shall be approved by the Administration taking into account Guidelines developed by the Organization.*

[224] Regulation B-2. "*Each ship shall have on board a Ballast Water record book that may be an electronic record system, or that may be integrated into another record book or system and, which shall at least contain the information specified in Appendix II*".

[225] Regulation B-3, paragraph 1, establishes the duty to make the ship conformant by reference to the standard set under Regulation D-2 and this, under the heading *Ballast Water Performance Standard*, identifies, from a biological point of view, the objective to be reached through the treatment. This last provision refers, in particular, to the expression "*Water Ballast Management*", which is defined at Article 1, paragraph 3, as "*mechanical, physical, chemical, and biological processes, either singularly or in combination, to remove, render harmless, or avoid the uptake or discharge of Harmful Aquatic Organisms and Pathogens within Ballast Water and Sediments*".

The text of the Convention provided for a gradual implementation of the rules aimed at the treatment of ballast waters, which should have allowed, for a provisional period, the exchange of ballast waters in high seas, where the quantity of harmful aquatic organisms and pathogens is minor. However, the delay in the coming into force has rendered such a provisional regime inapplicable, so that, as of 8th September 2017, the installation on board, at the first intermediate or renewal survey[226], of suitable equipment for the treatment of ballast water will become compulsory[227].

This is therefore, the primary effect of the coming into force of the Convention: the compulsory provision of technical equipment on board ships and the considerable investment which shipowners will have to undertake to install such necessary equipment[228].

The regime provided for under the Convention is applicable to all vessels flying the flag of contracting States, but it will also be imposed, by coastal contracting States, on vessels not flying the flag of contracting States, which find themselves operating under their authority[229]. So, in fact, the Convention establishes a specific regime of compulsory certification[230] and the availability of a valid certificate is made necessary to operate within the waters of contracting States. Even though indirectly, the effects of the Convention will, thus, be seen well beyond the boundaries of contracting States, effectively compelling also the owners of vessels flying the flag of non-contracting States to make their vessels conformant to the requirements of the Convention (thereby obtaining the

[226] Regulation B-3, paragraph 2. "*A ship to which paragraph 1 applies shall comply with paragraph 1 not later than the first intermediate or renewal survey, whichever occurs first, after the anniversary date of delivery of the ship in the year of compliance with the standard applicable to the ship*".

[227] It is interesting to note that, at the time when the Convention was adopted, the technology necessary for the ballast water treatment required by uniform standards, still did not exist. As a matter of fact, different technical solutions are possible today, all currently under the scrutiny of classification societies. Furthermore, if one considers that, unlike historical precedents, such as the introduction of the double hull, the ballast water treatment regime certainly has far less media appeal, it would appear that a twofold paradox can be stated: not only did the medicine come into being while many were still unaware of the disease, but the medicine itself has become compulsory even before it was invented.

[228] From an economic point of view, the cost of buying and installing the ballast water treatment equipment can vary greatly depending on the technology adopted and on the efficiency and speed of the treatment. It seems, however, that it can be considered so substantial an investment as to potentially even induce a diminution in the world's tonnage.

[229] Article 3, paragraph 1. "*Except as expressly provided otherwise in this Convention, this Convention shall apply to: (a) ships entitled to fly the flag of a Party; and (b) ships not entitled to fly the flag of a Party but which operate under the authority of a Party*".

[230] Article 7. "*Each Party shall ensure that ships flying its flag or operating under its authority and subject to survey and certification are so surveyed and certified in accordance with the regulations in the Annex*".

relevant certification), so as to be able to operate within the coastal jurisdiction of contracting States.

Italy, at the date of this publication, has not ratified the Convention, but ships of Italian flag intending to operate within ports of contracting States will have to be equipped to treat ballast water and will have to be in possession of the necessary certificates.

3. The impact on bareboat charters.

It was said that the crucial element in the Convention regime is the need to install the expensive equipment necessary for ballast water treatment on board ships.

When the perspective is that of a bareboat charter the question arises as to which of the contract parties shall bear the burden of adapting the ship to its newly introduced requirements. In other words: how will shipowners and charterers share the costs needed to purchase and install the equipment for the ballast water treatment?

The entry into force of the Ballast Water Convention hence offers the opportunity for an examination of the contractual solutions available in regulating the impact which investments, made compulsory by newly introduced legislation, can have on bareboat charters.

4. Different solutions.

The structure of lease contracts stands upon two fundamental obligations: that upon the lessor to make the goods subject of the contract available to the lessee and that of the lessee to pay the relevant consideration periodically and punctually. However, there is a grey area in between these two within which the interests of the lessor and the lessee fluctuate, determining a variety of possible equilibria.

The spectrum of solutions is wide and it reflects the nature of the leased goods and of the interest that the parties have towards it.

4.1 The Italian Civil Code.

The Italian Civil Code[231] sets a typical figure of lease contract and it provides that it is a principal obligation of the lessor to maintain the leased goods in "*such a state as to serve for the agreed use*"[232], so that any cost of adapting it to new legislation would lie with the lessor. Indeed, the rule

[231] See in legal literature G. CATELANI, *Manuale della locazione*, Milan 2001, 204 et seq.; A. TABET, *La locazione-conduzione*, in *Trattato di diritto civile e commerciale Cicu-Messineo*, XXV, Milan 1972, 388 et seq.; G. MIRABELLI, *La locazione*, in *Trattato di diritto civile italiano Vassalli*, VII, 4, Turin 1972, 383 et seq.; R. MICCIO, *La locazione*, in *Giurisprudenza sistematica civile e commerciale Bigiavi*, Turin 1980, 246 et seq.
[232] Article 1575, n. 2, of the Italian Civil Code.

would be applied according to which, for movable goods, only the "*expenses for the maintenance and ordinary administration*" lay upon the lessee and, hence, any expense made necessary for the purpose of implementing newly introduced compulsory regulation, should qualify as extraordinary administration, competence of the lessor[233].

The qualification of the bareboat charter within the scheme of the lease of productive goods arrives at a similar conclusion. The relevant body of rules, in fact, includes an express provision by which, during the duration of the lease, the lessor should perform "*extraordinary repairs*" at his expense[234].

4.2 The Italian Code of Navigation.

Also by applying the rules contained under the Italian Code of Navigation[235] the costs implied in the implementation of newly introduced compulsory regulation would fall amongst the obligations of the lessor[236]. The rules relevant to bareboat charters, in fact, include appropriate provisions whereby it is set that the lessor should take care of all "*repairs due to force majeure or to normal wear and tear of the vessel in accordance with the agreed use*"[237].

As correctly noted by Gaeta[238], the expression "force majeure" should not be interpreted literally, but it includes any cause not imputable to the lessee. Indeed, the criterion on the basis of which repairs are allocated between the lessor and the lessee is that of the cause that makes repairs necessary. The implementation of new uniform rules would, hence, qualify such works as works not imputable to the lessee and, therefore, competence of the lessee.

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[233] Article 1576, co. II, of the Italian Civil Code.
[234] Article 1621 of the Italian Civil Code.
[235] The provisions contained in the Italian Code of Navigation in respect of the contracts for the lease of ships do not contain a specific reference to the rules of the Italian Civil Code. It thus applies the ordinary order of priority of rules established under article 1 of the Code of Navigation. For the purposes of this analysis, the above is however irrelevant and the different solutions regarding the apportionment of implementation costs can be considered, in the abstract, all equivalent.
[236] See in this respect G. RIGHETTI, *Trattato di diritto marittimo*, Milan 1990, II, 318 et seq.; D. GAETA, *Locazione*, voce *Enciclopedia del diritto*, Milan 1974, 1036; G. ROMANELLI, *La locazione di nave e di aeromobile*, Milan 1965, 232 et seq.; P. MANCA, *Studi di diritto della navigazione*, II, Milan 1961, 44 et seq., S. FERRARINI, *I contratti di utilizzazione della nave e dell'aeromobile*, Rome 1947, 31 et seq. Fra i manuali, S.M. CARBONE, P. CELLE, M LOPEZ, *Il diritto marittimo*, Turin 2006, 42; S. ZUNARELLI, M. COMENALE PINTO, *Manuale di diritto della navigazione e dei trasporti*, Padova 2016, 284; A. LEFEBVRE D'OVIDIO, G. PESCATORE, L. TULLIO, *Manuale di diritto della navigazione*, Milan 2011, 288; F. QUERCI, *Diritto della navigazione*, Padova 1989, 424.
[237] Article 379 of the Italian Code of Navigation.
[238] D. GAETA, *op. cit.*, 1036.

Furthermore, with regard to the connection between the special rules provided for under the Code of Navigation and the common regime set under the Civil Code, regardless of contrary opinions[239], the view of Righetti[240] should be shared, according to whom the rules of the Code of Navigation differ both from those set under the common regime for immovable goods and from those set in relation to movables.

4.3 Standard contracts.

Yet standard contracts have adopted solutions completely different from those provided for by the law[241]. The bareboat charters widely used in the market[242] have, in fact, developed specific provisions aimed at regulating the risk connected with the implementation of new legislation.

So, the BARECON 1989 form shifts the barycentre of the maintenance obligations towards the charterer and sets the general rule by which, following delivery, it shall be the charterer's responsibility to provide any necessary repairs, so that the ship can be, at any moment, in a good state of maintenance, with valid class certificates[243].

Yet the risk connected with the implementation of new technical legislation is then made subject to a specific provision. Indeed, clause 9(a), lines 119 to 128, foresees that, if it is not agreed otherwise, when the

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[239] As regards the legal literature that reads into article 379 of the Italian Code of Navigation, through its reference to the first paragraph of article 1576 of the Italian Civil Code, see S. FERRARINI, *op. cit.*, 31. For the opposite opinion, which conversely refers to the second paragraph of article 1576, see G. ROMANELLI, *op. cit.*, 234.

[240] G. RIGHETTI, op. cit., 318 and 319.

[241] G. RIGHETTI correctly affirms, *op. cit*., 320, that the system of rule contained under the Italian Code of Navigation "*is not immune from criticisms, as it does not reflect at all that affirmed by practice". The Author carries on stating that "since ever, in fact, standard forms in use have placed upon the charterer the ordinary maintenance and today they allocate upon him almost entirely the risk inherent to the use of the ship (thereby including the extraordinary maintenance and excepted the constructive loss) and exempt him only for the* fear wear and tear *which does not affect the ship's class. Therefore, it can be stated that the duty to maintain the ship in the in the state in which she was delivered, provided for under article 1575, n. 2, of the Civil Code is no longer incumbent on the owner, but rather on the charterer*".

[242] This paper takes into consideration the BIMCO standard forms, which are the most used in the market. A brief mention should however be made to the Italscafo '92 form, once widespread in Italy. Under this charter it is provided that, also in respect of maritime laws in force, the charterer should take care of the ordinary administration of the ship. Clause 15 establishes that "*the ordinary maintenance of the ship, of its appurtenances and spares, for as it is necessary to maintain her in the same conditions of efficiency, seaworthiness and class in which she was delivered, and conformant with the maritime legislation in force, is upon the charterer*".

[243] Clause 9(a), at lines from 106 to 113, particularly, provides as follows: "*The Vessel shall during the Charter period be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and, except as provided for in Clause 13(I), they shall keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times*".

costs necessary to render the ship conformant with new technical requirements imposed by the class or by compulsory legislation exceed the measure of 5% of the insurance value of the ship, the further costs shall be shared between owner and charterer and the charter hire shall be varied accordingly. Except for mentioning the length of the period remaining under the charter, however, neither the ratio, in which the costs should be shared, nor the criteria to determine it are indicated under the wording of the clause, which – on the contrary – provides that, failing the parties agreement, recourse should be had directly to the arbitrator[244].

By effecting a general revision of the provisions contained under its previous version, the BARECON 2001 form substantially maintained its contractual balance and limited itself to foreseeing, at clause 10(a)(ii) lines 183 to 200, the possibility of indicating a percentage of the insurance value of the vessel, different from 5%, as the economic limit of the exclusive competence of the charterer. Furthermore, the 2001 version replaces the direct recourse to arbitration with a new version of the arbitration clause, which also provides, together with a more articulated arbitration agreement, the possibility of entering mediation proceedings[245].

The BARECON forms are often used also as a contractual basis for operations, where the lease has a financial nature and the reasons behind the contract include the economic function of security. In these cases, the lines from 119 to 128 of the BARECON 1989 form and the lines from 183 to 200 of the BARECON 2001 form are normally cancelled (barred). By doing so, the risk of the implementation of new legislation is shifted entirely upon the charterer and the owner is conversely freed of all obligations relating to the maintenance of the vessel.

5. A lacuna *of regulation.*

The introduction of equipment requirements imposed under the Ballast Waters Convention raises the issue of a *lacuna* in the regulation contained under bareboat charterers.

A natural conflict of interests exists under lease agreements between the interests that the owner has in the goods as opposed to the lessee's

[244] Clause 9(a), lines from 119 to 128: "*Unless otherwise agreed, in the event of any improvement, structural changes or expensive new equipment becoming necessary for the continued operation of the Vessel by reason of new class requirements or by compulsory legislation costing more than 5 per cent of the Vessel's marine insurance value as stated in Box 27, then the extent, if any, to which the rate of hire shall be varied and the ratio in which the cost of compliance shall be shared between the parties concerned in order to achieve a reasonable distribution thereof as between the Owners and the Charterers having regard, inter alia, to the length of the period remaining under the Charter, shall in the absence of agreement, be referred to arbitration according to Clause 26*".
[245] Clause 30.

interest in those same goods. Such a conflict arises, in its complexity, in the rules, which regulate the maintenance and repair of leased goods. The choice itself of which party should take care of the maintenance and repair is a difficult choice, the solution of which can vary largely from contract to contract as emerges from the analysis of the rules and clauses mentioned above. In some cases repairs are for the lessor, in other, for the lessee, and the criteria to determine the maintenance and repairs for the former and the latter can vary accordingly.

It can be affirmed that under lease contracts the allocation of burdens, relevant to the maintenance and repair of the leased goods can be differently configured, depending on the nature of the goods and on the relationship which each party has with it. When the goods are a ship, the agreements widely used in commercial practice allow the statement that the relationship that the lessee establishes with the goods justifies the normal attribution to the lessee of all obligations relating to the maintenance and repair of the goods.

Yet the antithesis between the lessor's and the lessee's interests becomes particularly complex, when the maintenance and repair of the goods involve implementation of a new compulsory technical legislation which, as in the case of the Ballast Water Convention, requires considerable investments to make ships conformant to the newly introduced requirements.

It is a risk that can have a critical impact on the economical operation incorporated under the lease and, considering that in some cases – such as this – the investments are extensive, the consequences that this can have on the running of the business, can be significant.

The drafters themselves of the BARECON 2001, commenting on the difficult choice to be made in distributing the burden of new works, have stated as follows: *"to place such a burden on the owners would be unfair, unless the hire was to be renegotiated. On the other hand, such new requirements could also place a heavy burden on charterers, for instance, in the case of compliance with the new requirements having to be made a short time before redelivery"*[246]. But this is a dilemma to which it is not easy to find an answer and in respect of which it is even harder to draft a contractual rule.

So the BARECON, both in its older version and in its more recent one, has effectively renounced finding a solution to the problem. In both cases a threshold is set; all costs involved in the implementation of legislative developments within such a threshold are for the account of the charterer; however, beyond such limit, the contract seeks that the

[246] BIMCO Bulletin, Vol. 97, No 2, 2002.

parties find an agreement, lacking which the issue shall be put directly to the arbitrator.

Yet to have recourse to solutions intended for contentious scenarios would seem, in principal, contradictory with the regulation itself of contractual performance; likewise, it is pleonastic to refer to the parties' renegotiation. Indeed, it does not seem satisfactory to foresee that the parties shall stipulate a new contract to resolve the problems of the contract; neither would it seem satisfactory to provide that the parties litigate to resolve those problems.

The entry into force of technical legislation, such as the Ballast Water Convention, which render significant costs necessary in order to make the vessel conformant, has a potentially irreversible effect on the contract, as it can radically subvert its economic balance and turn the operation for one or even for both parties from economically positive into negative. Good business can become bad business. The solution provided for by commercial practice, however, provides that once such circumstances occur, the charterer shall enter into a sort of deadlock from which it will have no other instruments to resort to but the agreement of the parties or the recourse to arbitration.

6. *The limit represented by the doctrines of supervening excessive onerousness and of frustration of contract.*

For as drastic as the consequences may be on the original balance of interests and expectations of the parties, the contract remains in place, and it will not be possible for either the owner or charterer to terminate the charter, if not within the limits set by the law.

Under Italian law, the extreme tool of termination is made available in case of supervening excessive onerousness i.e., in the wording adopted by the Italian Civil Code, *"if the performance of one of the parties has become excessively onerous as a consequence of the occurrence of extraordinary and unforeseeable events*". Such a remedy, however, would be difficult to apply in circumstances in which the parties have agreed terms analogous to those provided for under the BARECON and, in any case, it would be equally hard to object that the risk of new compulsory legislation does not come within the "*normal contractual risk*", as the management of a shipping company necessarily implies risks related to technological development.

The possibility that Italian Law finds application is, however, theoretical, as the BARECON is expressly made subject to English law[247]. As a matter of fact the contractual borderline in circumstances

[247] BARECON 89 clause 27 e BARECON 2001 clause 30.

where the contractual equilibrium has been overturned by the introduction of new compulsory legislation would be, at most, the doctrine of frustration.

This can be briefly described in the words of Chitty on Contracts, where it is stated that "*a contract may be discharged on the ground of frustration, when something occurs after the formation of the contract, which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract*"[248]. Equally eloquent is, however, the warning expressed by the House of Lords in the person of Earl Loreburn, which clarifies that "*the argument that a man can be excused from performance of his contract when it becomes 'commercially' impossible seems to me a dangerous contention, which ought not to be admitted, unless the parties have plainly contracted to that effect*"[249]. Indeed, under the doctrine of frustration a contract may be discharged only in cases of absolute *impossibility* or *illegality* of its performance, and not of mere *impracticability*.

In order to invoke the doctrine of frustration, the frustrating event should be so fundamental as to be considered something wholly beyond the foresight of the parties, something that hits the contract at its root, a drastic imbalance in the contractual relationship not being sufficient. Therefore, its application does not seem realistic in cases of newly introduced compulsory legislation, which requires ships to be made technically conformant.

7. Possible solutions for contractual regulation.

The English commentary to the wording of the BARECON highlights the *lacuna* and points out that such lack of contractual regulation should induce the parties to amend the standard wording of the relevant clause to provide "*a more precise mechanism for dealing with such matters*"[250].

All attempts of contractual regulation, however, seem arduous as, in fact, it does not seem practicable for the parties to anticipate what the characteristics of the investments shall be and thus anticipate how this shall affect the value of the vessel and the investment of the charterer.

As far as the Ballast Water Convention is concerned, possible solutions were developed only from the moment when the uniform regulation became close to its entry into force as, with time, the features and purposes of the equipment, which would soon become compulsory,

[248] Chitty on Contracts, para. 23-001, ed. XXIX.
[249] *Tennants (Lancashire) ltd v CS Wilson and Co Ltd* [1917] AC 495.
[250] M. DAVIS, *Bareboat charters*, para. 11.7.

became clearer. However, a different matter would be the case of the entry into force of new legislation which is, by no means, predictable.

Considering that the wording of the Ballast Water Convention dates back to 2004, variables were limited to its effective entry into force (by the reaching of the minimum number of ratifications), to the cost of the equipment, which would have become compulsory to install, and to their capacity to last over time. This allowed the operators to negotiate different solutions in sharing the implementation costs, variably regulating the limit below which the cost is wholly borne by the charterer and variably sharing the residual cost. Such last cost, in fact, partially competence of the owner and partially of the charterer, was shared, in some cases, at a fixed rate, in other cases, at a variable rate, depending on whether the implementation occurred at a moment closer to the delivery or to the redelivery of the vessel, so as to take into account the decreasing interest of the charterer towards the investment, when getting closer to the redelivery date. All such solutions are however speculative solutions, by which the parties have differently regulated a risk at least partially predictable.

8. A criterion for arbitrators.

The commentators of the BARECON have underlined how the lacuna in the contractual regulation leaves the arbitrator, entrusted with sharing the cost of the equipment between owner and charterer, without a valid criterion of apportionment. It is stated: "*since the clause gives no other guidance as to how the hire is to be adjusted (if at all) or how the costs of the structural change or new equipment are to be borne between the parties, it is not entirely clear as to what other matters are to be taken into account or what principles shall apply in determining such matters. The clause is also silent as to who shall bear the cost of the works in the first instance*"[251].

Yet any effort in providing a contractual regulation runs up against the hindrance represented by the impossibility of predetermining the features of the investment, which the implementation of new compulsory legislation could render necessary. A natural limit of foresight. This explains the reason behind the renunciation and the recourse to arbitration: it is, in fact, at least necessary to know the characteristics of the legislative development.

It does not follow from the above, however, the impossibility to determine a fair criterion in apportioning the implementation costs, which

[251] M. DAVIS, *ibidem.*

may be of assistance to arbitrators and may possibly find indication in the wording of the contract, as a general principle.

Once, indeed, the characteristics of the technical requirements with which the vessel will have to comply become known, a fair apportionment of the relevant costs may be determined on the basis of the characteristics of the amortization, to which the investment would be subject. The amortization period could correspond to whichever is the shorter between the residual life of the ship and the estimated duration of the installed equipment. Furthermore, the actual modality of the amortization will have to be determined on a case by case basis: the amortization may be linear, at constant rates, but it may also be determined differently.

Let us suppose that the acquisition and installation of the equipment necessary to the treatment of ballast water cost 1 million and that the class renewal service, at which the uniform regime will become compulsory, falls due two years before the end of the charter period. Let us further suppose that the insurance value of the ship is 10 million, that the average duration of the equipment is 10 years and that the ship still has at least 10 years of potential operativeness in its future. We saw how the standard BARECON clause leaves wholly upon the charterer the cost of the equipment up to the 5% of the value of the ship i.e. 500.000. However, regarding the residual cost of 500.000 it is reasonable, in similar circumstances, to suppose that the investment can be amortized in ten years for equal amortization shares of 50.000, so the cost which will have to be incurred at the renewal survey can equitably be borne for 100.000 by the charterer (2 years) and for the remained 400.000 by the owner (8 years), under the assumption that such disbursement, borne in the concurrent interest of both parties, shall be enjoyed by the charterer only for the residual duration of the charter period and, subsequently, by the shipowner until the equipment shall be exhausted. In the circumstances, a charterer shall participate to the expenses in the amount of 600.000 and the owner in the amount of 400.000.

9. The investment choice.

While the amortization could prove a useful instrument to the arbitrators in apportioning the costs deriving from the implementation of new legislation between the parties, the reference to the parties' agreement becomes necessary when determining the choice of the investment.

The entry into force of the Ballast Water Convention is, also in this case, a good testing-bench. It seems indeed, that the types of equipment suitable for the treatment of ballast water are rather various; equipment of

major and minor efficiency, to which inevitably largely different costs seem to correspond.

Yet, in determining the suitable level of expenditure, as well as in the more appropriate technical choices, it does not seem that one can prescind from the parties' collaboration. This is common to all lease contracts. Indeed, in the choice of the investment and of the relevant level of expenditure, the interest of the owner and that of the charterer may lose alignment, as each party will represent different needs towards the ship.

10. Conclusion.

Some conclusions can be drawn from this analysis. On 8th September 2017, the Ballast Water Convention will enter into force for its contracting parties. The Convention will render necessary the installation on board of equipment suitable for the treatment of ballast water.

This has induced some considerations as to the impact that newly introduced technical legislation can have on contracts of lease generally, and the review of the different solutions made available by the law and by commercial practice has allowed the verification of the different ways in which the parties' interests can place themselves.

The contractual balance, inherent to the *locatio rei*, can be shifted in favour of the owner or in favour of the charterer, and different criteria may be selected for the allocation of the relevant burdens, depending on the nature of the leased goods and of the parties' interests towards them.

The lease of immovable goods is made subject to solutions different from those available for the lease of movable goods or productive goods. Different are also the roles played under bareboat charters, where the charterer assumes the management of the vessel and, therefore, the risks involved in the management and maintenance of the ship. Even within the category of bareboat charters one can find very different allocations of the burdens collateral to the *locatio*. Think, for example, about financial leases.

Thus the versatile nature of lease contracts emerges. Yet, for as numerous the possible solutions may be, and, consequently, the possible contractual balances, the risk involved in the implementation of new technical legislation, which makes important investments necessary to make ships conformant, remains a hard subject of contractual regulation. It is, in fact, a risk which is difficult to be predetermined and is, thus, of unforeseeable significance.

Such difficulty is mirrored by the wording adopted by the standard contracts widespread in the market, which resorts to regulatory instruments that stand at the boundaries of the realm of contract. On the

one hand, a form of necessary renegotiation of contractual terms is introduced and, on the other, recourse is had directly to the jurisdiction of arbitrators.

In both cases, the parties and the arbitrators may avail themselves of the tool of amortization, so as to determine the measure by which the burden should be apportioned. Yet, it will be extremely complex to take into account the variable represented by the fluctuations in the bareboat hire market. But perhaps the risk involved in the market fluctuations and that connected with technological progress in navigation are the crucial risks in the running of a shipping business.

U.S. LAW UPDATE: ENFORCEMENT OF DOMESTIC AND FOREIGN ARBITRAL AWARDS

K. Blythe Daly

I. Overview

Pre-Arbitral Attachment and Security

Applicable Conventions

Recent New York Case

Tool(s) for Enforcement

II. Pre-Arbitral Attachment and Security

Federal Law: Supplemental Rule B of the Federal Rules of Civil Procedure for Admiralty and Maritime Claims and Asset Forfeiture Actions:

- "In an in personam action: If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process."

State-Law Provisional Remedies

New York:

- "The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition

> and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." N.Y. C.P.L.R. 7502(c)

Louisiana:

> "A writ of attachment may be obtained in any action for a money judgment, whether against a resident or a nonresident, regardless of the nature, character, or origin of the claim, whether it is for a certain or uncertain amount, and whether it is liquidated or unliquidated." La. Code Civ. Proc. art. 3542; or
>
> "A writ of attachment . . . may issue before the petition[5] is filed, if the plaintiff obtains leave of court and furnishes the affidavit and security provided in Article 3501." La. Code Civ. Proc. art. 3502; *see Daewoo Int'l Corp. v. Thyssenkrupp Manne GmbH*, No. 16-30984 (5th Cir. Sept. 1, 2017) (Louisiana law "allows for attachments to issue in aid of arbitration so long as the party seeking the attachment (1) complies with the requirements of Section 3502 and (2) shows good cause for a pre-petition attachment,…")

C. Society of Maritime Arbitrators (SMA) Rules:

- **Section 30. Scope**

  The Panel, in its Award, shall grant any remedy or relief which it deems just and equitable, including, but not limited to, specific performance. The Panel, in its Award, shall assess arbitration expenses and fees as provided in Sections 15, 36 and 37 and shall address the issue of attorneys' fees and costs incurred by the parties. The Panel is empowered to award reasonable attorneys' fees and expenses or costs incurred by a party or parties in the prosecution or defense of the case.

III. Applicable Conventions for Enforcement of Arbitral Awards in U.S.

a. Federal Arbitration Act of February 12, 1925 (9 U.S.C. §§ 1 – 16)

b. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (New York Convention) (9 U.S.C. §§ 201 – 208)

c. Inter-American Convention on International Commercial Arbitration of January 30, 1975 (Panama Convention) (9 U.S.C. §§ 301 – 307)

IV. Recent Case Law

a. Domestic ICC Award: Daesang Corp. v. NutraSweet Co., 55 Misc. 3d 1218(A) (May 15, 2017)

i. ICC ARBITRATION in New York issued award in favor of Daesang

ii. U.S. ACTION: Daesang petitioned to confirm final arbitration award pursuant to 9 U.S.C. § 207 and CPLR 7510 and 7514(a); NutraSweet moved to vacate 9 U.S.C. §§ 10, 201, 207, and CPLR 7511.

iii. DECISION: In addition to 4 grounds set forth in F.A.A. (fraud, partiality, misconduct, excess of power), Court examined controversial 5th ground: whether award "rendered in manifest disregard of the law."

iv. HOLDING: "Tribunal chose to disregard the well-established principle that a fraud claim can be based on a breach of contractual warranties where the misrepresentations are of present facts (in contrast to future performance) and cause the actual losses claimed.

v. SIGNIFICANCE: First known international arbitral award rendered in New York set-aside for manifest disregard for the law.

b. Foreign Award: Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción, 832 F.3d 92 (2d Cir. Aug. 2, 2016)

i. Panama Convention, Article V: provides that recognition and enforcement *may* be refused if one of seven exclusive grounds are provided for, including if award is annulled or suspended by a competent authority of the country in which the award was made.

ii. Held: District Court did not abuse its discretion in confirming the arbitration award despite the annulment by the Mexican courts

1. Of note, COMMISA would be barred from bringing claims again in Mexico because of intervening laws;

2. "Rather, the Southern District exercised discretion, as allowed by treaty, to assess whether the nullification of the award offends basic standards of justice in the United States. We hold that in the rare circumstances of this case, the Southern District did not abuse its discretion by confirming the arbitral award at issue because to do otherwise would undermine public confidence in laws and diminish rights of personal liberty and property."

iii. Significance: Determination by U.S. court that U.S. public policy outweighed international comity: "giving effect to the subsequent nullification of the award in Mexico would run counter to United States public policy and would (in the operative phrasing) be 'repugnant to fundamental notions of what is decent and just' in this country."

iv. District Court did not abuse its discretion.

c. Foreign Award: Thai-Lao Lignite (Thailand) Co., Ltd. V. Government of the Lao People's Democratic Republic, 864 F.3d 172 (July 20, 2017)

i. New York Convention, Article V: provides that recognition and enforcement *may* be refused if award is set aside by a competent authority of the country in which the award was made.

ii. Held: District Court did not abuse its discretion in vacating the judgment

iii. Of note, this action arose on a Rule 60 Motion to Vacate;

iv. Malaysian court had annulled award and ordered a re-arbitration of dispute before a new panel;

v. Reaffirmed significant weight of annulment of award in primary jurisdiction

vi. Significance: Second Circuit delineated lines of discretion and comity after decision in the *COMMISA* action.

d. Comparison of Daesang, Commisa, and Thai-Lao cases highlight different regimes for review/enforcement of arbitral awards in the state in which the awards made and the secondary states

V. Tool for Enforcement: 28 U.S.C. § 1782

a. Federal statute which provides for discovery in aid of foreign proceedings.

b. Elements:

i. Any "interested party" in

ii. a foreign proceeding may

iii. petition the district court of the district in which a witness or documents reside to

iv. give testimony or produce documents or things.

VALLETTA COLLOQUIUM

CMI AND UNCITRAL COLLOQUIUM ON RECOGNITION OF JUDICIAL SALES

Chamber of Commerce, 27 February 2018

WELCOME ADDRESS

Ann Fenech

Honourable Chief Justice, Mr. Justice Camilleri, Mr. Justice Mark Chetcuti, Honourable Minister, your Excellencies, dear colleagues.

As President of the Malta Maritime Law Association, it is with great pleasure that I welcome you all here this morning to the Malta Colloquium on the International Recognition of Judicial sales.

I recall a very initial discussion in Genoa in September of last year when the seed for the idea of having a colloquium in Malta was planted. That idea only sprouted a couple of months later and even then we were aiming at having 30 persons in a conference room gathered for the purposes of having a discussion on this very important subject. In a matter of a couple of short months, the idea of having 30 persons in a conference room has developed into this International colloquium to which we have gathered this morning 180 attendees.

Apart from having 180 participants, we have succeeded in having as wide a geographical spread as one can hope for. This morning we have delegates from 50 countries including:

Austria, Australia, Germany, Malaysia, Singapore, Switzerland, Turkey, Denmark, Belgium, Brazil, Italy, United Kingdom, Croatia, Ukraine, Ireland Holland France, Spain, Antigua and Barbuda, Azerbaijan, the Bahamas, Cambodia, China, Ethiopia, The Gambia, Guyana, India, Indonesia, Jamaica, Kenia, the Maldives, Myanmar, Mexico, Nigeria, Panama, The Philippines, Sierra Leone, Slovenia, Solomon Islands, Sri Lanka, The Sudan, Tanzania, Thailand, Tuvalu, Uganda, Vietnam, Uruguay, Russia.

I think that if we did not reach any objective we would have reached the objective of getting as many maritime practitioners, from as wide a geographical spread as possible, in one room to discuss the ramifications of an international instrument on the international recognition of judicial sales.

We are gathered here this morning to discuss primarily whether or not there is a need for an international instrument on the international recognition of judicial sales. Shipowners, financiers, crew, harbour authorities, service providers and those of us who assist them know only

too well the challenges faced by all, in the event of a defaulting ship owner and how a judicial sale is in a number of circumstances the only positive outcome for all including the ship owner who finds himself in financial difficulties. It therefore makes it all the more important in the interest of optimisation of price, the defaulting owner himself and judgement creditors, as well as stability in international trade, that such judicial sales are recognised internationally. It is with this in mind that the CMI did draft an international convention on the international recognition of judicial sales and it is with great satisfaction that at its 50th session, the United Nations Commission on International Trade Law considered a proposal of the CMI for possible future work on cross border issues related to the judicial sale of ships. The Commission further agreed that UNCITRAL through its secretariat and States would support and participate in a colloquium to be initiated by CM I to discuss and advance the proposal.

The idea of having such a colloquium in Malta gathered momentum and thanks to the immediate availability of Mr. Ivan Sammut, the Registrar of Maltese ships and the immediate agreement of Minister Ian Borg for the Ministry for Transport, Infrastructure and Capital Projects to co-host this event, we were able to organise and co-host this event very probably in record time.

I would also like to thank Mr. Ryan Harrington, senior legal council at UNCITRAL for making the time to attend and address this colloquium, our Maltese panellists and foreign panellists, who have agreed to attend this morning from literally the four corners of the world. Thank you so very much indeed.

Without further ado let us now proceed with our Programme which will following the introductory remarks will be followed by two panels, a legal panel and a practical panel followed by the all important question and answer.

The question and answer session is not only meant to be literally a question and answer session, but more importantly contributions from the floor. We note that we are honoured to have among us some very important players on the international scene who I am sure have their views.

Thank you.

OPENING SPEECH

Stuart Hetherington

Minister Ian Borg,

Justice de Bruin of Rotterdam,

Your Excellencies and all those representing Russia, Ghana, Britain, Germany, Greece and the Netherlands-I apologise if I have missed anyone in that category.

Registrar Ivan Summat, and other Court officers who are here

David Attard and Norman Martinez of IMLI,

Soren Larsen of BIMCO;

Ryan Harrington of UNCITRAL;

Colleagues from the Executive Council of CMI, including

Vice President Giorgio Berlingieri and Administrator Lawrence Teh

And especially Ann Fenech (who has organised this event) and Alexander von Ziegler who will moderate this morning's meeting.

Fellow practitioners and distinguished guests.

WELCOME to you all and especially the IMLI students.

THANK YOU

I would particularly like to thank Ryan Harrington and his colleagues in the UNCITRAL Secretariat, including Kate Lannan, who is currently on secondment to WHO;

AND The Maltese Government and you Minister Ian Borg personally for supporting this Colloquium and the work that CMI has done on Judicial Sales.

MALTA

I was delighted when Ann suggested that CMI should consider holding this meeting here when it was being deliberated by the Executive Council in Genoa in September. I have been very keen for CMI to hold a meeting in Malta during my tenure as President (which is fast coming to an end). It is particularly apt holding it this year when Malta is one of Europe's Cultural Capitals, Leeuwarden, being the other.) .

But much more than that. Malta has been for so many centuries such an important player in the maritime world and remains so today. And the CMI has had a long history of working together with IMLI, and provided lecturers for many years.

I have counted at least 58 countries that are represented here today.

We are of course boosted by the IMLI students of which there are I think 40 countries represented. Of the 49 students studying the Masters program, at least 40 I think are either employed by their governments in administrative roles or are in the navy or coast guard. We value your participation today, (and in the future). This provides the CMI with a wonderful opportunity to tell you something about CMI, who we are and how we work. You will hopefully learn today what CMI has been able to bring to the table in the operation of international maritime trade for the 122 years of its existence and will, I suggest, continue to do for many years to come.

I want to thank each one of you for giving your time to travel to Malta (assuming you do not live in Malta) and for those of you who are local residents (permanent or temporary) I also want to thank you for your time this morning.

I do not want to take up more time than necessary in this opening because we want to hear from you. I shall be as brief as I can be.

We are here to discuss a most important issue in world shipping: JUDICIAL SALES AND THEIR RECOGNITION

At its General Assembly meeting in July 2017 the following was noted by UNCITRAL:

> "The Commission thanked CMI for its proposal and noted the importance of the issues raised. It decided not to refer the proposal to a working group at the present time but agreed that UNCITRAL, through its secretariat, and States would support and participate in a colloquium to be initiated by CMI to discuss and advance the proposal. The Commission agreed to revisit the matter at a future session."

I have prepared a written paper which you have.

And you also have the following materials and you can read all that material at your leisure, if you wish. I make to make a few brief comments on them.

1. The CMI Brochure

The CMI was formed in 1897.

The raison d'etre of CMI is "Uniformity of Maritime Law".

CMI drafted most of the Conventions, which maritime legal practitioners deal with on a daily basis, in the first part of the 20th Century, Collision, Salvage, Limitation, Bills of Lading, Arrest etc and their work was approved at Diplomatic Conferences called by the Belgium Government- hence they are referred to as the Brussels Conventions.

Once United Nations bodies came into being after the Second World War CMI drafted many of the documents which then became Conventions as a result of diplomatic conferences organised by those bodies, (IMO, UNCITRAL, UNCTAD) such as the CLC Convention. More recently CMI drafted what UNCITRAL then took on and became the Rotterdam Rules in 2008 to reform the Hague Rules. It is the custodian of the York Antwerp Rules.

The 52 MLAs, which form the membership of CMI, are largely comprised of maritime lawyers working in private practice, in house for shipping companies, insurers, industry bodies, governments; academics and non-lawyers connected with the industry.

We also have 26 Consultative members, some of whom are represented here today, such as IMLI, BIMCO and FONASBA. We are grateful for their support. Others include IMO, IUMI, ICS, International Group of P and I Clubs, ISU etc

Unmanned ships is probably the most challenging issue we are working on today and a topic which the IMO and all national governments need to be working on strenuously.

I would like to stress that the work that CMI does is done voluntarily.

Judicial sales and their Recognition.

The Judicial Sales instrument that we are discussing today was a work project that started out in 2007 and was finalised in 2014. It is at this stage a CMI document but if UNCITRAL takes it on it will become an UNCITRAL Convention.

What is a Judicial Sale?

To put it simply for those who are not experienced or indeed have not encountered a Judicial sale scenario, let me just say that the common factual situation, which practitioners will be familiar with, is that a creditor of a shipowner arrests the shipowner's vessel and brings its claim in the jurisdiction in which the vessel is arrested. If a creditor obtains a

judgment which is not met by the shipowner it can then ask the court to sell the ship, which it would usually do by way of a public auction process. We will hear more about the processes in the panel sessions.

The problems in relation to Judicial sales were first brought to the attention of CMI by Professor Henry Li of the China Maritime Law Association and a member of the CMI Executive Council in 2007. He drew attention to the problems arising around the world from the failure in some jurisdictions to give recognition to judgments in other jurisdictions when the sale of ships had been ordered. It is significant that CMI's International Working Group which was set up at that time and chaired by Henry Li reported that in the four year period between 2010 and 2014 more than 480 ships were sold by way of Judicial sale each year in four Asian jurisdictions: the Republic of Korea, China, Singapore and Japan.

In 2014 the CMI International Working Group that was set up concluded its work with a draft Instrument. Its work product is on the CMI website as are the materials you have today.

Since then the CMI has been seeking to persuade an international organisation to take the project on and bring it to an International Convention. We are hopeful that as a result of today's meeting UNCITRAL will agree to put it on its work agenda when it meets in July 2018.

2. Judicial Pronouncements

The next document I want to mention that you have is a series of quotes taken from Judicial pronouncements. The common feature is the emphasis given to the fact on a Judicial sale the buyer obtains a clean title. and for that to happen it requires the comity of other nations to recognise it. Judges have been saying for far too long that it is time for that latter aspect to be given more formal recognition. CMI seeks to give effect in the Draft Instrument to that expressed desire of Judges worldwide, which is in the interests of the industry as a whole. CMI is looking to Judges to support this work.

3. Summary of Cases

The reason CMI took on the task of examining the issues and then deciding to draft the Instrument can be seen in the Summary of 12 cases which shows that comity does not always happen -causing great cost and expense to a buyer.

These examples highlight the need for an International Convention, and CMI has drafted the Instrument, which it is believed will go a long way

to resolve the problems. That is not to say that the document could not be improved by work which UNCITRAL will do, if it takes on this project.

Who are the stakeholders in Judicial sales?

In my paper I have identified, who I believe to be the principal stakeholders involved in Judicial sales.

1. The shipowner who is sued in admiralty and loses the case clearly has an interest in the Judicial sale.

The financier of the arrested ship and its mortgagee, who may instigate the proceedings and the order for sale.

Unsecured creditors who may have instigated the proceedings and the order for sale. (eg a Port Authority, tug operator, broker, agent, bunker supplier, cargo claimant, providore, stevedore, other ship owners, charterers and crew etc. many of whom are represented here today.

The Court (Judges). I have already referred to Judges and have referred in the paper to a recent case proceeding in Australia which has caused consternation in my country to the Admiralty Judges. We have very few Judicial sales. Perhaps one a year. It had not occurred to them that their decisions might not be recognised in other jurisdictions.

The Flag State of the defaulting shipowner and/or intended Flag State of the purchaser at the Judicial sale.

The Purchaser at the Judicial sale.

What do they have in common? The interests of certainly the first 3, and probably the Court, are to achieve the best sale price as possible.

4. The Draft Convention

It is a simple document. It has 10 Articles. Let me just highlight four of them:

Article 3 Identifies the persons who must be notified of a Judicial sale and the contents of the notice;

Article 4 Says that the sale accomplishes the extinguishment of all prior encumbrances in the ship;

Article 5 Requires the issuance of a Certificate by the State selling the vessel confirming that it has been done in compliance with its procedures; and

Article 6 Says that the production of the Certificate to the flag state requires the deletion of the prior registration.

5. Bevan Marten

The final document is an article by a distinguished academic in New Zealand and I like his opening paragraphs:

"Imagine this legal nightmare-you purchase a vessel following a court ordered sale, only to find that the flag state refuses to transfer the ship off its books.

Or you pick up the phone one morning and find that a court in some far flung jurisdiction has sold the vessel you were mortgagee of, without any prior notice that there were proceedings underway.

Even if such events seem uncommon, decisions from various courts show that they have taken place from time to time."

The CMI Instrument is designed to make sure such cases become extremely rare.

Housekeeping

Please participate and let us have your views. A report will be compiled by the Maltese Government and sent to UNCITRAL which we hope will be persuasive in July in New York in having this work placed on the UNCITRAL work Agenda and your views will matter. When speaking please identify yourself, your occupation and organisation.

PROGRAMME

High level technical Colloquium on a Draft International Instrument on Foreign Judicial Sales of Ships and their Recognition
Venue – Chamber of Commerce Valletta, Malta

Tuesday 27th February 2018

08:30 - 09:00	Registration
Moderator	Suzanne Shaw, Vice President Malta Maritime Law Association, Partner Dingli and Dingli Law Firm.
09:00 - 09:05	Welcome Ann Fenech President Malta Maritime Law Association
09:05 – 09:10	Minister Ian Borg Minister for Transport, Infrastructure and Capital Projects
09:10 - 09:25	Welcome and Introduction Stuart Hetherington, President Comité Maritime International Partner Colin Biggers & Paisley Pty Ltd - Australia
09:25 - 09:30	Welcome and Introduction Ryan Harrington, Legal Officer - UNCITRAL Secretariat
09:30 - 10:30	**PANEL ONE:** ***Available Enforcement proceedings*** This Panel will talk about the enforcement processes in various jurisdictions and the need for greater and more uniform international recognition of Judicial sales. ***Moderator - Ann Fenech*** - CMI Executive Councillor Managing Partner Fenech & Fenech Advocates Malta ***Camila Mendes Vianna Cardoso*** - Managing Partner - Kincaid, Mendes Vianna Advogados - Rio de Janeiro - Brazil ***Jan-Erik Pötschke*** - Partner - Ahlers & Vogel – Hamburg - Germany ***Lawrence Teh*** – Administrator CMI Senior Partner - Dentons Rodyk & Davidson LLP - Singapore ***Charles Buss*** - Partner - Watson Farley & Williams – London - U.K.

Brooke Shapiro - Associate - Winston & Strawn LLP - New York – USA

10:30 - 11:00 COFFEE BREAK

11:00 - 12:00 **PANEL TWO:**

Current Challenges faced by Financiers, Creditors and Owners
This panel will discuss issues and concerns of financiers, creditors and owners.

Moderator - Alexander von Ziegler - CMI Executive Councillor Partner Schellenberg Wittmer AG Switzerland

Tilman Stein - Director and Senior Counsel Deutsche Bank - Hamburg - Germany

Peter Laurijssen - Manager Legal Department - CMB Group - Antwerp - Belgium

Cornelia Zammit German - CEO Falzon Group of Companies - Malta

Simon Ward - Fellow / Chartered Shipbroker - Institute of Chartered Shipbrokers - London - UK

Ivan Sammut - Registrar General of Shipping & Seamen - Malta

Norman Martinez - Associate Professor - International Maritime Law Institute - Malta

12:00 - 12:30 QUESTION AND ANSWER SESSION

12:30 - 13:00 CONCLUDING REMARKS

Ryan Harrington and Stuart Hetherington

13:00 – 14:00 LUNCH

THE MALTA COLLOQUIUM ON RECOGNITION OF JUDICIAL SALE OF SHIPS: NOTES OF THE MEETING

Stuart Hetherington

Background to CMI

The CMI has been in existence since 1897 when it was formed by a number of far sighted representatives in both government and business who were dedicated to seeking to achieve uniformity in international law in relation to shipping. The objects of the CMI, as enunciated in Article 1 of its Constitution 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."

There are over 50 National Maritime Law Associations (NMLAs) around the world who are members of the CMI. Some of them are represented at this meeting. The CMI also has Consultative status with the IMO, UNCITRAL and UNCTAD and works together with all those organisations at various times in order to seek to achieve its objects of unifying maritime law around the world. It also has a number of organisations as Consultative members (including IMLI, BIMCO, and FONASBA).

The CMI has been responsible for drafting the following international Conventions which were agreed to at diplomatic conferences in Brussels, or the later versions as a result of a UN body's involvement:

1. Collision: 1910
2. Salvage: 1910, 1989
3. Limitation: 1924, 1927, 1976 and 1996
4. Unification of Certain Rules of Law Relating to Bills of Lading 1924 and Visby Protocol 1968
5. Liens and Mortgages: 1926, 1967
6. Arrest: 1952 and 1999

Coming closer to the present time the CMI drafted the CLC Convention for the IMO and the Rotterdam Rules for UNCITRAL for them to take them to international diplomatic conferences. It is the Custodian of the York Antwerp Rules.

The CMI has an annual Assembly meeting, similar to an AGM, it operates through its Executive Council, equivalent to its Board, and I have the honour to be its President. Ann Fenech and Alexander Von Ziegler who have assisted in organising this Colloquium are members of the Executive Council. Other members of the Executive Council are also present.

The CMI usually responds to problems which the clients of maritime lawyers or other international organisations refer to it as in need of our specialist assistance.

In other cases the CMI has taken the initiative because one or more of our colleagues has identified an issue in international law which it was thought the CMI could improve. One good example is that in relation to Unmanned Ships which is an issue which is only now coming to the attention of the international regulators although the CMI has been working on this issue for a couple of years. Another example is the topic before us today, Judicial Sales.

Judicial Sales

To put it simply for those who are not experienced or indeed have not encountered a Judicial sale scenario, let me just say that the common factual situation, which practitioners will be familiar with, is that a creditor of a shipowner arrests a shipowner's vessel and brings its claim in the jurisdiction in which the vessel is arrested. If a creditor obtains a judgment which is not met by the shipowner it can then ask the court to sell the ship, which it would usually do by way of a public auction process. We will hear more about the processes in the panel sessions.

This issue was first brought to the attention of CMI by Professor Henry Li of the China Maritime Law Association and a member of the Executive Council in 2007. He drew attention to the problems arising around the world from the failure in some jurisdictions to give recognition to judgments in other jurisdictions when the sale of ships had been ordered. In 2014 the International Working Group that was set

up concluded its work with a draft Instrument. Since then the CMI has been seeking to persuade an international organisation to take the project on and bring it to an International Convention. We are hopeful that as a result of today's meeting UNCITRAL will agree to put it on its work agenda when it meets in July 2018.

It is a serious problem. Whilst there may not be many examples in any individual country where the system of Judicial sales has not progressed smoothly for the participants the fact is that there are a large number of Judicial sales taking place all around the world and they give rise to legal problems which cause delay, cost and expense to those who have participated in them. Data that was obtained by the CMI's International Working Group indicated that in the four year period between 2010 and 2014 more than 480 ships were sold by way of judicial sale each year in four Asian jurisdictions: the Republic of Korea, China, Singapore and Japan.

Who are the stakeholders in relation to Judicial sales?

1. Where a shipowner who is sued in admiralty and loses the case and cannot afford to pay the claim it is liable to have its ship sold by way of Judicial sale.
2. The financier of a ship, the mortgagee who may instigate the proceedings and the order for sale.
3. Unsecured creditors who may have instigated the proceedings and the order for sale (eg a Port Authority, tug operator, bunker supplier, cargo claimant, providore, stevedore, other ship owners, charterers and crew etc).
4. The Court (Judges).
5. The Flag State of the defaulting shipowner and/or intended Flag State of the purchaser at the Judicial sale.

What do they have in common? The interests of, at least, the first 3 of the above are to achieve the best sale price as possible.

The benefit to financiers of obtaining the Court's sanction of a private sale as a Judicial sale can be seen in the Singapore case of the "*Turtle Bay*" (2013) SGHC 165, where Belinda Ang Saw Ean J declined to make the order sought by the financier to order, in effect, that the private sale was a Judicial sale.

Annexed to this paper are:

(1) Extracts from judgments identifying the essence of Judicial sales.

(2) Case summaries of 12 leading cases around the world on Judicial sales.

(3) An article in Lloyds List Australia by a leading New Zealand academic.

The nature of the problem can be seen with reference to two of those cases and one other.

The "*Sam Dragon*"[252]

This involved a Judicial sale in Belgium. The plaintiff in the proceedings bought the ship at the Judicial sale and sought damages in Ireland against the defendant, the company which had provided a loan facility to the original owner in Korea and held a mortgage over the vessel prior to the sale. The plaintiff's claim related to additional charges and expenses it had incurred in registering its new acquisition in Hong Kong due to the defendant finance company's alleged failure to remove the entry of its mortgage on the prior Ships Register in Korea. The purchaser needed a deletion certificate from the former registry in order to register it in Hong Kong.

The first complex question for the Irish court was: which law applied to this dispute? Did the law of Belgium apply to the arrest and sale proceedings there? What law applied to the removal of the entry in Korea? Was it Belgian or Korean? The Irish court held that the answer to the latter question was Korean but that the defendant was not obliged to delete the mortgage from the Korean register before it had received payment from the proceeds of sale and thus the plaintiff failed. We were not told in the judgment what happened thereafter and how long it took for the plaintiff to be able to re-flag its new acquisition. I am aware that many maritime lawyers in many jurisdictions around the world were involved in those proceedings. Obviously Irish lawyers were instructed in Ireland. Lawyers, however, from other jurisdictions including Belgium, Korea, and I suspect, Hong Kong, were retained to give expert evidence. It must have been a costly exercise.

[252] "Sam Dragon" (2012) IEHC 240

Under Article 5 of the draft Convention which the CMI has prepared it is provided that at the request of the purchaser from a Judicial sale the Competent Authority (for example, the court) shall issue a Certificate (in the form annexed to the draft Instrument) recording the sale to the purchaser when a ship has been sold by way of Judicial sale and the conditions required by the law of the State of the Judicial sale and the instrument, have been complied with. I suggest that that would only happen once all the financial issues have been dealt with, ie payment has been made to secured and unsecured creditors, the priorities having been determined etc). If there has been any delay, as occurred in the Irish case, presumably the purchaser could agitate the court in which the sale has proceeded to have all payments made and the Certificate issued promptly.

Importantly by Article 6 of the draft Convention, on the production of the Certificate to the prior registry it is required to make the deletion.

Accordingly, there should be no justification in the prior registry for any delay in making the deletion once the Certificate has been produced to it.

Before going on to describe the next case to you I note that when the CMI has made approaches to the European Union we have been told that there is no problem in the European Union by reason if its reciprocity regime. With respect, that overlooks the fact that sales take place outside the EU, possibly to EU buyers, and even sales in the EU might not be recognised outside the EU.

The principle that the CMI has sought to uphold in its draft Instrument was enunciated most succinctly by Mr Justice Hewson in the United Kingdom High Court in the "*Acrux*"[253], when he said that the courts must recognise *"proper sales by competent Courts of Admiralty, or prize, abroad - it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade"*.

[253] "*The Acrux*" (1962) 1 Lloyds Rep 405

The "*Galaxias*"[254]

This provides another example of the internationalisation of this issue and contains an exhortation by the Canadian judge for an international response to solve the problems that can occur.

The facts in this case were that a Greek ship had been arrested in Canada and a Judicial sale took place in that jurisdiction. The Minister of Merchant Marine in Greece refused to allow the deletion certificate to be issued until the claims of the Greek Seamen's Union had been satisfied.

The Sheriff commenced action against the purchaser in Canada seeking a declaration that the bill of sale conveyed title to the purchaser "free and clear of all encumbrances". The purchaser filed a defence and counter-claim with respect to costs and damages alleging that they were brought about by the failure to convey the ship by the Canadian court free of all encumbrances as it was unregisterable in the Greek registry.

The Court held that the Sheriff was entitled to the declaration and held as follows:

> "The purchaser will take free and clear of all encumbrances according to the laws of Canada and although it is clear that Canadian Courts desire and expect that the Courts and governments of other nations will respect its orders and judgments, particularly in the area of maritime law, this is not an area over which the Federal Court exercises control, nor is it appropriate that it attempt to do so…. I would like to add… that in order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This does not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognised in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior globally enforceable overriding jurisdiction this is what we all must live with."

[254] The "Galaxias" (1988) LMLN No. 240 (p.2)

Justice Rouleau then went on to comment on Judicial orders for the sales of ships which did not ensure the passing of "clean" title and he said:

> "However, admiralty lawyers and all lay people in the shipping world, involved in any way in the purchase and sale of ships, will invariably feel that this would greatly reduce the amounts which can be obtained from Court sales of vessels and render some ships completely unsaleable. The legitimate claims of many Canadian and foreign creditors would thus be defeated by the resulting ridiculously low payments into court of purchase prices."

Further Judicial commentary can be seen in the *Emre II (1989)*[255] where Sheen J noted that the defendant had alleged that the Turkish authorities would not delete the registration of the ship if it was sold by the English courts. His Lordship noted that the effect of such lack of comity would be to reduce the value of the ship, and that when the ship is advertised for sale it would have to be made clear to any potential purchaser that there may be some difficulty in having the vessel deleted from the Turkish register.

In another case of the "*Cerro Colorado*" (1993)[256] the same Judge said:

> "I can only express the hope that the Spanish court will, as a matter of comity, recognise the decrees made by this Court, which endeavour to give effect to the International Arrest Convention. From time to time every shipowner wants to borrow money from his bank and give as security a mortgage over his ship. The value of the security would be drastically reduced if when it came to be sold by the Court there was any doubt as to whether a purchaser from the Court would get a title free of encumbrances and debts."

Those statements are at the forefront of the collective mind of the CMI on this issue.

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[255] *The Emre II* (1989) 2 Lloyds Rep 182 at p.185

[256] "*Cerro Colorado*" (1993) 1 Lloyds Rep 58 at p.61

The "Phoenix"[257]

The question before the Court of Appeal of St Vincent and the Grenadines in the West indies was whether the financier BCEN-Eurobank which had entered into a loan with the owner in 1999 had had its registered mortgage in the St Vincent and Grenadine's ships register extinguished by subsequent Judicial sales by the Courts of both North Korea and China, and whether the Registrar had been entitled to deregister the ship as subsequent owners from both of the Judicial sales and private sales were not entitled to have the vessel registered in that jurisdiction.

The finance company was unsuccessful at both first instance and on appeal. Whilst the Court recognised the legal principles attributable to Judicial sales the sad history of what happened to this ship between 2003 and 2014 when the case concluded, provides further evidence of the need for international recognition of Judicial Sales and for uniform procedures to be introduced internationally so registrations can be deleted with less difficulty once a Judicial sale has taken place.

In conclusion can I mention, briefly, a case in my own jurisdiction.

F.V. *"Pelamis No. 68"*[258]

The vessel *F.V. "Pelamis No. 68"* was sold at a Judicial sale in Singapore to an Australian buyer. The sale took place on 22 September 2014 and the Australian buyer has still not been able to re- flag the fishing vessel in Australia. That is because section 17 of Australia's Shipping Registration Act 1981 contains the following:

[257] (2014) 1 Lloyds Rep 449

[258] Federal Court of Australia No. NSD379/2017

"No multiple registrations"

1. The Registrar must not:
   (a) register a ship in the General Register if it is registered:
      (i) in the International Register; or
      (ii) under a law of a foreign country

Since the commencement of the Australian proceedings in March 2017 the unfortunate Australian buyer has been seeking to have it deleted from the Taiwanese flag, apparently without any success.

The CMI draft Convention has sought to eliminate the likelihood of such difficulties by the provisions of Articles 5 and 6, to which I have referred.

Conclusion

I hope by outlining the circumstances of just four cases which have taken place in the last five years I have highlighted some of the problems that can occur as a result of Judicial sales. I should say that when the most recent case to which I have referred in Australia took place it caused our Admiralty judges to express horror to think that sales which they might order might cause similar problems to be visited on the purchaser. For that reason they organised a seminar in the Court to look at the whole area of Judicial sales last year and I have personally been the recipient of warm support from Judges in Australia for the work that the CMI has done. Sadly I have not received the same degree of support from those responsible for Australia's treaties who do not seem to understand the adverse repercussions that can occur (and to which Judges such as Rouleau J and Sheen J of the Canadian and English Courts have referred, and which I have quoted above).

I cannot emphasise sufficiently that the system of Judicial sales can only succeed and continue to work if purchasers and their financiers are confident that in acquiring vessels from Judicial sales the slate is wiped clean, they can reflag the vessel if they wish and they can trade the vessel without fear of having the debts of the prior owner revisited on it. Creditors, whether they are secured or unsecured (other shipowners, crew, port authorities, providores, agents, brokers, stevedores etc) will receive less from Judicial sales if confidence in the system disappears.

DRAFT INTERNATIONAL CONVENTION ON FOREIGN JUDICIAL SALES OF SHIPS AND THEIR RECOGNITION (Known as the "Beijing Draft")

(Done at Beijing on 19 October 2012, amended at Dublin in 2013 and at Hamburg in 2014)

The States Parties to the present Convention,

RECOGNIZING that the needs of the maritime industry and ship finance require that the Judicial Sale of Ships is maintained as an effective way of securing and enforcing maritime claims and the enforcement of judgments or arbitral awards or other enforceable documents against the Owners of Ships;

CONCERNED that any uncertainty for the prospective Purchaser regarding the international Recognition of a Judicial Sale of a Ship and the deletion or transfer of registry may have an adverse effect upon the price realised by a Ship sold at a Judicial Sale to the detriment of interested parties;

CONVINCED that necessary and sufficient protection should be provided to Purchasers of Ships at Judicial Sales by limiting the remedies available to interested parties to challenge the validity of the Judicial Sale and the subsequent transfers of the ownership in the Ship;

CONSIDERING that once a Ship is sold by way of a Judicial Sale, the Ship should in principle no longer be subject to arrest for any claim arising prior to its Judicial Sale;

CONSIDERING further that the objective of Recognition of the Judicial Sale of Ships requires that, to the extent possible, uniform rules are adopted with regard to the notice to be given of the Judicial Sale, the legal effects of that sale and the de-registration or registration of the Ship.

HAVE AGREED as follows:

Article 1 Definitions

For the purposes of this Convention:

1. "Certificate" means the original duly issued document, or a certified copy thereof, as provided for in Article 5.
2. "Charge" includes any charge, Maritime Lien, lien, encumbrance, claim, arrest, attachment, right of retention or any other rights whatsoever and howsoever arising which may be asserted against the Ship.
3. "Clean Title" means a title free and clear of any Mortgage/Hypothèque or Charge unless assumed by any Purchaser.
4. "Competent Authority" means any Person, Court or authority empowered under the law of the State of Judicial Sale to sell or transfer or order to be sold or transferred, by a Judicial Sale, a Ship with Clean Title.
5. "Court" means any judicial body established under the law of the state in which it is located and empowered to determine the matters covered by this Convention.
6. "Day" means calendar day.
7. "Interested Person" means the Owner of a Ship immediately prior to its Judicial Sale or the holder of a registered Mortgage/Hypothèque or Registered Charge attached to the Ship immediately prior to its Judicial Sale.
8. "Judicial Sale" means any sale of a Ship by a Competent Authority by way of public auction or private treaty or any other appropriate ways provided for by the law of the State of Judicial Sale by which Clean Title to the Ship is acquired by the Purchaser and the proceeds of sale are made available to the creditors.
9. "Maritime Lien" means any claim recognized as a maritime lien or privilège maritime on a Ship by the law applicable in accordance with the private international law rules of the State of Judicial Sale.
10. "Mortgage/Hypothèque" means any mortgage or hypothèque effected on a Ship in the State of Registration and recognized as such by the law applicable in accordance with the private international law rules of the State of Judicial Sale.

11. "Owner" means any Person registered in the register of ships of the State of Registration as the owner of the Ship.

12. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a state or any of its constituent subdivisions.

13. "Purchaser" means any Person who acquires ownership in a Ship or who is intended to acquire ownership in a Ship pursuant to a Judicial Sale.

14. "Recognition" means that the effect of the Judicial Sale of a Ship shall be accepted by a State party to be the same as it is in the State of Judicial Sale.

15. "Registered Charge" means any Charge entered in the registry of the Ship that is the subject of the Judicial Sale.

16. "Registrar" means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires.

17. "Ship" means any ship or other vessel capable of being an object of a Judicial Sale under the law of the State of Judicial Sale.

18. "State of Registration" means the state in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale.

19. "State of Judicial Sale" means the state in which the Ship is sold by way of Judicial Sale.

20. "State of Bareboat Charter Registration" means the state which granted registration and the right to fly temporarily its flag to a Ship bareboat chartered-in by a charterer in the said state for the period of the relevant charter.

21. "Subsequent Purchaser" means any Person to whom ownership of a Ship has been transferred through a Purchaser.

22. "Unsatisfied Personal Obligation" means the amount of a creditor's claim against any Person personally liable on an obligation, which remains unpaid after application of such creditor's share of proceeds actually received following and as a result of a Judicial Sale.

Article 2 Scope of Application

This Convention shall apply to the conditions in which a Judicial Sale taking place in one state shall be sufficient for recognition in another state.

Article 3 Notice of Judicial Sale

1. Prior to a Judicial Sale, the following notices, where applicable, shall be given, in accordance with the law of the State of Judicial Sale, either by the Competent Authority in the State of Judicial Sale or by one or more parties to the proceedings resulting in such Judicial Sale, as the case may be, to:

   (a) The Registrar of the Ship's register in the State of Registration;

   (b) All holders of any registered Mortgage/Hypothèque or Registered Charge provided that these are recorded in a ship registry in a State of Registration which is open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registrar;

   (c) All holders of any Maritime Lien, provided that the Competent Authority conducting the Judicial Sale has received notice of their respective claims; and

   (d) The Owner of the Ship.

2. If the Ship subject to Judicial Sale is flying the flag of a State of Bareboat Charter Registration, the notice required by paragraph 1 of this Article shall also be given to the Registrar of the Ship's register in such State.

3. The notice required by paragraphs 1 and 2 of this Article shall be given at least 30 Days prior to the Judicial Sale and shall contain, as a minimum, the following information:

   (a) The name of the Ship, the IMO number (if assigned) and the name of the Owner and the bareboat charterer (if any), as appearing in the registry records (if any) in the State of Registration (if any) and the State of Bareboat Charter Registration (if any);

(b) The time and place of the Judicial Sale; or if the time and place of the Judicial Sale cannot be determined with certainty, the approximate time and anticipated place of the Judicial Sale which shall be followed by additional notice of the actual time and place of the Judicial Sale when known but, in any event, not less than 7 Days prior to the Judicial Sale; and

(c) Such particulars concerning the Judicial Sale or the proceedings leading to the Judicial Sale as the Competent Authority conducting the proceedings shall determine are sufficient to protect the interests of Persons entitled to notice.

4. The notice specified in paragraph 3 of this Article shall be in writing, and given in such a way not to frustrate or significantly delay the proceedings concerning the Judicial Sale:

(a) either by sending it by registered mail or by courier or by any electronic or other appropriate means to the Persons as specified in paragraphs 1 and 2; and

(b) by press announcement published in the State of Judicial Sale and in other publications published or circulated elsewhere if required by the law of the State of Judicial Sale.

5. Nothing in this Article shall prevent a State Party from complying with any other international convention or instrument to which it is a party and to which it consented to be bound before the date of entry into force of the present Convention.

6. In determining the identity or address of any Person to whom notice is required to be given other parties and the Competent Authority may rely exclusively on information set forth in the register in the State of Registration and if applicable in the State of Bareboat Registration or as may be available pursuant to Article 3(1)(c).

7. Notice may be given under this Article by any method agreed to by a Person to whom notice is required to be given.

Article 4 Effect of Judicial Sale

1. Subject to:

   (a) the Ship being physically within the jurisdiction of the State of Judicial Sale, at the time of the Judicial Sale; and

   (b) the Judicial Sale having been conducted in accordance with the law of the State of Judicial Sale and the provisions of this Convention,

   any title to and all rights and interests in the Ship existing prior to its Judicial Sale shall be extinguished and any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser, shall cease to attach to the Ship and Clean Title to the Ship shall be acquired by the Purchaser

2. Notwithstanding the provisions of the preceding paragraph, no Judicial Sale or deletion pursuant to paragraph 1 of Article 6 shall extinguish any rights including, without limitation, any claim for Unsatisfied Personal Obligation, except to the extent satisfied by the proceeds of the Judicial Sale.

Article 5 Issuance of a Certificate of Judicial Sale

1. When a Ship is sold by way of Judicial Sale and the conditions required by the law of the State of Judicial Sale and by this Convention have been met, the Competent Authority shall, at the request of the Purchaser, issue a Certificate to the Purchaser recording that

   (a) the Ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Convention free of any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser; and

   (b) any title to and all rights and interests existing in the Ship prior to its Judicial Sale are extinguished.

2. The Certificate shall be issued substantially in the form of the annexed model and shall contain the following minimum particulars:
    i. The State of Judicial Sale;
    ii. The name, address and, unless not available, the contact details of the Competent Authority issuing the Certificate;
    iii. The place and date when Clean Title was acquired by the Purchaser;
    iv. The name, IMO number, or distinctive number or letters, and port of registry of the Ship;
    v. The name, address or residence or principal place of business and contact details, if available, of the Owner(s);
    vi. The name, address or residence or principal place of business and contact details of the Purchaser;
    vii. Any Mortgage/Hypothèque or Charge assumed by the Purchaser;
    viii. The place and date of issuance of the Certificate; and
    ix. The signature, stamp or other confirmation of authenticity of the Certificate

Article 6 Deregistration and Registration of the Ship

1. Upon production by a Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 5, the Registrar of the Ship's registry where the Ship was registered prior to its Judicial Sale shall delete any registered Mortgage/Hypothèque or Registered Charge, except as assumed by the Purchaser, and either register the Ship in the name of the Purchaser or Subsequent Purchaser, or delete the Ship from the register and issue a certificate of deregistration for the purpose of new registration, as the Purchaser may direct.
2. If the Ship was flying the flag of a State of Bareboat Charter Registration at the time of the Judicial Sale, upon production by a Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 5, the Registrar of the Ship's registry in such State shall delete the Ship from the register and issue a certificate to the effect that the permission for the Ship to register in and fly temporarily the flag of the State has been withdrawn.

3. If the Certificate referred to in Article 5 is not issued in an official language of the State in which the abovementioned register is located, the Registrar may request the Purchaser or Subsequent Purchaser to submit a duly certified translation of the Certificate into such language.

4. The Registrar may also request the Purchaser or Subsequent Purchaser to submit a duly certified copy of the said Certificate for its records.

Article 7 Recognition of Judicial Sale

1. Subject to the provisions of Article 8, the Court of a State Party shall, on the application of a Purchaser or Subsequent Purchaser, recognize a Judicial Sale conducted in any other state for which a Certificate has been issued in accordance with Article 5, as having the effect:

   (a) that Clean Title has been acquired by the Purchaser and any title to and all the rights and interests in the Ship existing prior to its Judicial Sale have been extinguished; and

   (b) that the Ship has been sold free of any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser.

2. Where a Ship which was sold by way of a Judicial Sale is sought to be arrested or is arrested by order of a Court in a State Party for a claim that had arisen prior to the Judicial Sale, the Court shall dismiss, set aside or reject the application for arrest or release the Ship from arrest upon production by the Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 5, unless the arresting party is an Interested Person and furnishes proof evidencing existence of any of the circumstances provided for in Article 8.

3. Where a Ship is sold by way of Judicial Sale in a state, any legal proceeding challenging the Judicial Sale shall be brought only before a competent Court of the State of Judicial Sale and no Court other than a competent Court of the State of Judicial Sale shall have jurisdiction to entertain any action challenging the Judicial Sale.

4. No Person other than an Interested Person shall be entitled to take any action challenging a Judicial Sale before a competent Court of the State of Judicial Sale, and no such competent Court shall exercise its jurisdiction over any claim challenging a Judicial Sale unless it is made by an Interested Person. No remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any bona fide Purchaser or Subsequent Purchaser of that Ship.
5. In the absence of proof that a circumstance referred to in Article 8 exists, a Certificate issued in accordance with Article 5 shall constitute conclusive evidence that the Judicial Sale has taken place and has the effect provided for in Article 4, but shall not be conclusive evidence in any proceeding to establish the rights of any Person in any other respect.

Article 8 Circumstances in which Recognition may be Suspended or Refused

Recognition of a Judicial Sale may be suspended or refused only in the circumstances provided for in the following paragraphs:

1. Recognition of a Judicial Sale may be refused by a Court of a State Party, at the request of an Interested Person if that Interested Person furnishes to the Court proof that at the time of the Judicial Sale, the Ship was not physically within the jurisdiction of the State of Judicial Sale.
2. Recognition of a Judicial Sale may be
   (a) suspended by a Court of a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that a legal proceeding pursuant to paragraph 3 of Article 7 has been commenced on notice to the Purchaser or Subsequent Purchaser and that the competent Court of the State of Judicial Sale has suspended the effect of the Judicial Sale; or
   (b) refused by a Court of a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that the competent Court of the State of Judicial Sale in a judgment or similar judicial document no longer subject to appeal has subsequently nullified the Judicial Sale and its effects, either after suspension or without suspension of the legal effect of the Judicial Sale.

3. Recognition of a Judicial Sale may also be refused if the Court in a State Party in which Recognition is sought finds that Recognition of the Judicial Sale would be manifestly contrary to the public policy of that State Party.

Article 9 Reservation

State parties may by reservation restrict application of this Convention to recognition of Judicial Sales conducted in State Parties.

Article 10 Relations with other International Instruments

Nothing in this Convention shall derogate from any other basis for the Recognition of Judicial Sales under any other bilateral or multilateral Convention, Instrument or agreement or principle of comity.

[Final clauses in respect of signature, ratification, acceptance, approval, accession, denunciation, coming into force, language, amendment etc. shall be drafted later and separately]

POSSIBLE FUTURE WORK ON CROSS-BORDER ISSUES RELATED TO THE JUDICIAL SALE OF SHIPS: PROPOSAL FROM THE GOVERNMENT OF SWITZERLAND

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Possible future work on cross-border issues related to the judicial sale of ships: Proposal from the Government of Switzerland

Note by the Secretariat

1. In preparation for the fifty-first session of the Commission, the Government of Switzerland submitted to the Secretariat a proposal for possible future work by UNCITRAL on cross-border issues related to the judicial sale of ships. The revised text received by the Secretariat is reproduced as an annex to this note.

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Annex

Proposal of the Government of Switzerland for possible future work on cross-border issues related to the judicial sale of ships

1. Introduction

At its fiftieth session (Vienna, 3 to 21 July 2017), the United Nations Commission on International Trade Law noted the importance of a proposal (A/CN.9/923) of the Comité Maritime International (CMI) drawing attention to problems arising around the world from the failure to give recognition to judgments in other jurisdictions when ordering the sale of ships.[1] While a number of delegations supported the proposal and expressed interest in taking it up, subject to the availability of working group resources and any necessary consultation with other organizations, it was agreed that additional information in respect of the breadth of the problem would be useful.[2]

It was suggested "that CMI might seek to develop and advance the proposal by holding a Colloquium so as to provide additional information to the Commission and allow it to take an informed decision in due course".[3] The Commission further "agreed that UNCITRAL, through its secretariat, and States would support and participate in a Colloquium to be initiated by CMI to discuss and advance the proposal".[4] The Commission agreed to revisit the matter at a future session.[5]

To that end, following a request from the Government of Malta, the UNCITRAL secretariat extended a formal invitation to all Member and Observer States of UNCITRAL to participate in a high-level technical Colloquium in respect of the cross-border judicial sale of ships, as well as the recognition of such sales.

Based on the outcome of the discussions during the Colloquium and based on the support of all represented industries, the government of Switzerland proposes that UNCITRAL consider taking up work on an international instrument to resolve cross-border issues on the recognition of judicial sales of ships

2. The Colloquium

The Government of Malta, through its Ministry for Transport, Infrastructure and Capital Projects, in collaboration with CMI and the Malta Maritime Law Association, co-hosted the Colloquium on 27 February 2018 at the Chamber of Commerce in Valletta, Malta. Panellists and attendees examined the scope of problems associated with judicial sales of ships, as well as possible solutions.

Participants were requested to elaborate on the proposal submitted by CMI to the Commission stating that "[p]urchasers, and subsequent purchasers, must be able to take clean title to the ship so sold and be able to de-flag the ship from its pre-sale registry and re-flag the ship in the purchaser's selected registry so as to be able to trade the vessel appropriately without the threat of costly delays and expensive litigation. This, in turn, will enable the purchased ship to trade freely; and ensures that the ship will realize a greater sale price which will benefit all the related parties, including creditors (which could include port authorities and other government instrumentalities that have provided services to a ship owner)".[6]

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[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 456–465.
[2] Ibid., para. 464.
[3] Ibid.
[4] Ibid., para. 465.
[5] Ibid.
[6] See para. 5, A/CN.9/923.

3. Participation at the Colloquium

It was noted that the lack of certainty in recognition of judgment affected a broad spectrum of industries and States. The Colloquium had 174 participants, including delegates from 60 countries. Delegates represented Governments, including Governments of flag States; the judiciary; the legal community; a number of specific industries, such as shipowners, banks/financiers, shipbrokers, ship repairers, shipbuilders, bunker suppliers, port and harbour authorities, charterers, tug operators, and ship agents; and a number of International Organizations, such as the Institute of Chartered Shipbrokers (ICS), BIMCO and the International Transport Workers Federation (ITF). The Colloquium also received a written submission by the Federation of National Associations of Ship Brokers and Agents. The participants shared how their industries and States were impacted by the lack of harmony among States in recognizing the judicial sale of a ship in another jurisdiction.

(a) Shipowners

A prominent shipowner representative identified four of the most important considerations in relation to judicial sales: (1) legal certainty; (2) maximization of the asset value; (3) availability of ship finance; and (4) ease of registration after the sale has taken place. It was stated that the failure to resolve these considerations distorted the ship sale market and caused asset value destruction to the detriment of the industry as a whole.

The presentations by shipowners, both as sellers and potential buyers, made clear that their primary interest was legal certainty, which was demonstrably absent from the current process of judicial sales. If greater certainty in the recognition process could be attained, it was thought to lead to a higher valuation in assets, in both auction and sale values, which would in turn result in greater availability of finance.

It was added that there was an interest of all involved in maritime trade (including cargo interests, trade-financing banks, insurers, and others) that the vessel employed not be stopped by unnecessary arrests instituted by former creditors or owners, despite the fact that the vessel had been sold by judicial sale. It was noted that any transit-interruption would be a nuisance to trade and shipping and would create costs and damages.

There was a clear statement by the shipowners that the situation needed to be clarified by way of an international instrument and that the points drafted by CMI could resolve the issue in a simple and pragmatic way.[7]

(b) Financiers/ship financing banks/shipbrokers

The support of many banks, regardless of their location, for an international regime to mitigate risk was emphasized. A leading ship financier, who shared the views of 11 major banks from his jurisdiction, agreed with the need for certainty and highlighted the substantial value of the assets at issue. From the perspective of lenders, it was felt that shipping markets are volatile. In light of these uncertainties, it was said that banks attempt to circumvent the problems by searching for amicable solutions, creating additional costs. Without a reliable international basis for recognition of judicial sales of vessels, it was stated that buyers would need to be satisfied with risks when obtaining the title, which would drive down the sale price.

(c) Ship registries

The registrar of the Maltese Flag, which has been the largest flag in Europe for a number of years with over 72 million tons, described the uncertainties that arise from

[7] Several references to the draft instrument were made by participants at the Colloquium. As noted in para. 3 of A/CN.9/923, "the topic has been discussed and a draft international instrument prepared at numerous meetings including the Beijing Conference in 2012, the Dublin meeting of 2013 and the Hamburg Conference of 2014 where a draft instrument was completed, and approved."

a foreign judicial sale. It was noted that most registries are national systems designed to sell domestic ships in local courts, and the difficulty of having a ship deleted from a register if it had been sold in a foreign jurisdiction was explained. It was stated that circumstances would be greatly improved for all parties by the issuance of an internationally-recognized certificate of judicial sale by the State in which a sale takes place.

It was widely felt that the creation of an instrument that retained a narrow focus on the process leading to recognition (instead of a broad project covering rules on the actual judicial sale) would be a manageable project that would increase the likelihood of having an international instrument adopted efficiently.

(d) Legal community

Legal practitioners from common law, civil law, and mixed systems cited to numerous cases, particularly cases of abuse of the process of ship arrest, in jurisdictions around the globe to highlight the lacuna in international legislation in regard to the recognition of a judicial sale by a foreign court. There was a clear consensus that the number of proceedings created unnecessary costs and frictions, thereby further devaluing assets in the commercial world. From their practical experience representing clients from all aspects of the industry, participants shared the same request of filling the legal gap and enabling a friction-free transition from the former registry to the new registry, and to the new shipowner, freeing the sold vessel from all encumbrances she may have had prior to the judicial sale.

Reference was made to the work undertaken by CMI. It was felt that CMI work not only consisted of valuable in-depth studies of the problems and their possible solutions but also demonstrated interest in adopting rules that would be suitable for industries and compliant with different legal traditions.

(e) Bunker suppliers/service providers

Typical ship creditors were represented at the Colloquium by bunker suppliers, who are often also bunker barge owners. The creditors highlighted the "need for certainty which in today's economic climate overshadows any other commercial consideration." It was noted that the main concern of such creditors is the fact that they operate with very small margins and that any step undertaken outside of unified and clear patterns involve economically unjustifiable costs and risks. Support was expressed in favour of a recognition regime at the Colloquium, as a regime would introduce clear and harmonized rules and outweigh the interest in arresting the vessel after a judicial sale in an attempt to obtain funds.

(f) Crew interests

It was widely felt that seafarers on board vessels belonging to owners who had defaulted would benefit from a simplified recognition process. It was stated that the crew languish in various ports all over the world, unable to leave the vessel, and have very little by way of provisioning and fuel to keep generators going. It was felt that the longer the proceedings took, the greater the pain for the crew members, who would struggle to be paid and repatriated. The ITF Malta branch, which handles dozens of such cases, expressed its support for an instrument to mitigate the hardships endured by the seafarers and their families during such affairs.

(g) Ports/port service providers

The Malta Harbour Master explained how important it was for judicial sale procedures to be as smooth and as quick as possible to assist in the management of the phenomenon of abandoned vessels, which causes havoc in ports and undermines smooth trading operations.

(h) Maltese Government

Minister Ian Borg, Minister for Transport, Infrastructure and Capital Projects, explained that as a direct result of being the largest flag in Europe, and being in the centre of the Mediterranean, Malta heavily focused on the provision of services to the international trading community.

It was noted that Malta has a highly developed, robust and efficient legal regime providing for both judicial sale by auctions and a renowned system of court approved private sales. It was stated that all the industries, the financiers and shipbuilders who had mortgages registered in the Maltese Register of ships, as well as the hundreds of service providers, including ship repairers, bunker suppliers, suppliers of provisioning to ships, crew, cargo handling, trans-shipment, and services given to the oil and gas industry, needed the comfort of knowing that that they could resort to judicial sales in Malta, in the event the owner defaulted, and that those sales would be recognized worldwide. This would provide certainty to interested buyers, thereby increasing the value of the vessel during the sale.

Minister Borg thanked CMI for their initiative in bringing together a cross section of the maritime industry with the aim of discussing the pertinent subject. He stated, "Having an international instrument on the recognition of judicial sales of ships is an important step which aims to introduce a substantial degree of stability and uniformity in an important aspect of maritime trade. Malta's participation in the discussion of this important instrument is imperative."

4. Possible Solutions and Feasibility

The Colloquium established that the main issues and obstacles witnessed in the trade and maritime environment were:

- The lack of legal certainty in relation to the clean title which a judicial sale is intended to confer on a buyer, leading to problems being experienced in the de-registration process in the country of the former flag;
- The obstacles in relation to the recognition of the effects of the judicial sale in respect of the clearance of all former encumbrances and liens;
- The increase of transactional costs in cases of friction in the enforcement of the ship's sale and the risk of costly proceedings and payments just for nuisance value by old creditors attempting to arrest vessels after the judicial sale;
- Factoring of those risks when evaluating the level of bidding in judicial sales, causing a loss on the recoverable assets to the detriment of all creditors (such as crew, financiers, cargoes, ports, agents, bunker suppliers, barge operators, etc.) of the old shipowner resulting from a less favourable judicial sale due to the lack of certainty in respect of its recognition by courts and authorities; and
- Reduced sales proceeds leading to a downwards trend on the brokers' vessel evaluation and thereby causing a general loss of vessel values in the entire market.

Among the delegates and panellists there was consensus that:

- All parties were affected negatively by the gap in legal certainty;
- The gap could be filled from a legal perspective by providing an instrument on recognition on judicial sale of ships;
- A draft instrument that had been prepared by CMI would provide a helpful reference if work were to be taken up on this topic by UNCITRAL;
- UNCITRAL was the appropriate forum to resolve issues involving pernicious effects on cross-border trade. It was noted that UNCITRAL has experience in closely linked issues such as transborder insolvency issues and securities. The working methods of UNCITRAL, which permit close involvement of

international industry organizations, would also facilitate the conclusion of an instrument that would be broadly supported across industries.

5. Conclusion

Broad consensus emerged from the Colloquium in support of an international instrument to remedy the problems arising from the lack of harmony among States in recognizing the judicial sale of a ship in another jurisdiction. For that reason, Switzerland proposes that UNCITRAL undertake work to develop an international instrument on foreign judicial sale of ships and their recognition. It is noted that CMI has undertaken significant work on identifying issues and possible solutions on this topic, and that this work has been endorsed by a number of industries and States. That work provides a useful starting point to further UNCITRAL work, providing guidance for a working group and indicating the direction that might be taken.

LONDON ASSEMBLY
IMO, 8-9 November 2018

WELCOME SPEECH

Stuart Hetherington

Lord Phillips, Sir Bernard Eder, Ladies and Gentlemen.

The last time I was in this building was with Patrick Griggs and Queen Elizabeth II of England,-- and a few hundred others on the occasion of a visit by Her Majesty on 6 March this year to unveil a plaque to commemorate the 70 years anniversary since the Treaty establishing the IMO was adopted.

Lord Phillips, the President of the British Maritime Law Association has kindly agreed to say a few words and introduce Sir Bernard Eder. Both of whom are alumni of Cambridge University. And Patrick Griggs is here again. I often wonder how Patrick would respond, in the unlikely event the local constabulary were to ask him to provide details of his address, and whether he would nominate his home in Essex or the IMO Building. CMI is indeed fortunate he spends so much time in this building.

As you know we have decided to break with tradition and inaugurate an occasional lecture by a distinguished person on a topic of maritime law at our meetings in order to remember one of CMI's most distinguished members who passed away in March this year, Francesco Berlingieri, President Ad Honorem of CMI since he retired from that role in 1991.

We honoured Francesco in Genoa last year, just 6 months before he died. He attended the opening session of the seminar where he was presented with a silver salver and he made a lovely short speech. He also attended the Executive Council and Assembly meetings.

The words I spoke about him are to be published in the next Yearbook and I hope will stand as a fitting tribute to a man who contributed so much to the uniformity of maritime law. His legacy will be enduring and the series of lectures, commencing today, will help to remind later generations of maritime lawyers of his outstanding service and example.

I am very grateful to Sir Bernard for agreeing to present the first of these lectures.

Lord Phillips will introduce him, but first let me introduce Lord Phillips.

Lord Phillips served his National Service in the Royal Navy and then read law at Kings College, Cambridge before being called to the Bar in 1962 at the Middle Temple. He undertook Pupillage at 2 Essex Court Chambers before moving to 1 Brick Court where he became a Queens Counsel in 1978 and commenced his Judicial career four years later in 1982 when he was appointed a Recorder, and then a full time High Court Judge in the Queen's Bench Division in 1982. In 1995 he became a Lord Justice of Appeal, and in 1999 a Lord of Appeal in Ordinary and was created a life peer as Baron Phillips of Worth Matravers. He was appointed Master of the Rolls in 2000 and was Lord Chief Justice of England and Wales from 2005 to 2008 when he was reappointed as a Law Lord. From that time he was the Senior Lord of Appeal in Ordinary until he became the First President of the Supreme Court of United Kingdom on 1 October 2009. He became a Knight Companion of the Order of the Garter on 23 April 2011 and retired on 30 September 2012. Since then he has been acting as an Arbitrator, President of the Qatar International Court at Doha and a non-permanent Judge of the Hong Kong Court of Final Appeal.

For our purposes his most significant position is President of the British Maritime Law Association.

WELCOME SPEECH
Lord Phillips

Ladies and Gentlemen,

On behalf of the British Maritime Law Association may I welcome you to the Annual General Meeting of the CMI Assembly. It was last held here in 2000. At dinner two nights ago some of us were reminiscing about the some of the great names who were involved in what was then the Inter-Governmental Maritime Consultative Organisation, before this building existed – Lord Diplock, Sir John Donaldson, Donald O'May, and Frank Wiswall, particularly notable for his pink socks. Last week I had an email from him regretting that his days of Atlantic crossing were over, but sending us his best wishes. And, of course, there was the great Francesco Berlingieri, for so long the doyen of maritime law, whose company so many of us enjoyed and now sadly miss, though we delight in the company of his son Giorgio, who is here continuing the family tradition.

I am particularly pleased to have been invited to introduce the inaugural Francesco Berlingieri lecture.

In 1957 I was commissioned in the Royal Navy and despatched to Malta, to join a unit of the Mediterranean Fleet that filled Grand Harbour.

Playing in one of the narrow streets of Valetta was a five year old schoolboy, whose parents and grand-parents had taken refuge from Austria and whose father had been released from internment to join the British Army. That boy was Bernard Eder, now Sir Bernard Eder, who is to deliver this morning's lecture. Incidentally in the same street up until 1954 there had lived a boy called Igor Judge, who was destined to be Lord Chief Justice of England and Wales.

Sir Bernard's parents moved to England, where he went to school and then to Downing College, Cambridge. He was called to the Bar by the Inner Temple in 1975 and joined that power house of shipping and commercial law, 4 Essex Court, now Essex Court Chambers. He took silk in 1990 and was appointed a High Court Judge in 2011, sitting in the Commercial Court.

Sir Bernard retired from the Bench in 2015, returned to his old chambers as an arbitrator, and devotes part of his time to lecturing at Southampton University and elsewhere and sits on the Singapore International Commercial Court.

Sir Bernard's practice embraced maritime law and he is currently the Senior Editor of Scrutton on Charterparties.

When I started at the Bar radar was in its infancy and tended to assist in bringing about the frequent collisions in the English Channel, where there were no separation zones. Courses and speeds were recorded in pencil in the ship's log, readily susceptible to improvement after a collision. Every term there were several collision actions before the Admiralty Court in London. By the time that Sir Bernard qualified, this source of work was drying up, and now it has vanished altogether. Sir Bernard is to deliver a lecture on un-manned ships. I wonder whether when these collide liability will be determined by Artificial Intelligence. Perhaps he will tell us. I have much pleasure in inviting Sir Bernard to give the inaugural Francesco Berlingieri lecture.

BERLINGIERI LECTURE UNMANNED VESSELS: CHALLENGES AHEAD

Sir Bernard Eder

Mr President, friends of the Comité Maritime International

May I join with Lord Phillips in first welcoming you all to this Conference in London; and to say that is a particular honour and pleasure to deliver this Inaugural Berlingieri Lecture.

As many of you will know, Francesco Berlingieri was a renowned lawyer and jurist, head of the leading Italian law firm which still carries his family name and, of course, the President of the Comité Maritime International for some 25 years from 1976-1991. I was still a novice in 1976. That was the year when I started as a young barrister. I soon learnt that Francesco Berlingieri was one of the great shipping lawyers of his time – like a God in the firmament. He was a great sailor and prolific author. He had an immense knowledge of shipping law with a broad vision which transcended national boundaries and a passion for the unification of maritime law in all its aspects – which is, of course, the principal object of the CMI.

What I did not know was that in 1977, he was elected a Member of the Commercial Court Users' Committee here in London; in the same year, 1977, he was elected an Honorary Member of the United States Maritime Law Association; in 1981 an Honorary Member of the Canadian Bar Association; and in 1984 an Honorary Proctor in Admiralty by the Maritime Law Association of the United States. In 1993 he was presented with the Order of the British Empire (OBE) upon the proposal of the Master of the Rolls, Lord Donaldson in recognition of his valuable service to British maritime interests.

If I might add - he was also a great listener and someone who was willing to change his mind. I know this because if you look at one of his many books, International Maritime Conventions Vol 2, you will see he says – at footnote 129 - that he had changed his mind on the topic of wrongful arrest of ships as a result of reading an article I had written. That is a topic which is currently being considered by a working group of the CMI which will, I understand, meet this afternoon. Unfortunately, I will be unable to join you later but I am sure that Francesco would join me in wishing you well in your endeavours.

I am also sure that Francesco would be excited by the present topic concerning unmanned vessels. As I recollect, he was someone who was always looking to the future as much as the past – ready to take on the challenges of the day. And there can be no doubt that unmanned vessels will be at the centre of the future of shipping and provide an important challenge to all parts of the shipping community.

At the outset, I should confess that I am very much a newcomer to this area of shipping – although in one sense everyone is a relative newcomer. We are all on a steep learning curve. What I have learnt is that the technology is developing at an incredible rate. Of that there is no doubt. Many things that were only a pipedream a few years ago now seem likely to become a reality in the very near future. And it is plainly of paramount importance to ensure that the existing international regulatory framework is reviewed and updated as necessary to accommodate this new technology and to allow it to operate safely. That is the main focus of the International Working Group on Unmanned Ships which was set by the CMI in 2015.

As I shall mention in a moment, the IWG has done much work since then; and there is much work still to do. I do not wish to encroach on that work. For present purposes, I do no more than offer a few thoughts and highlight a number of the challenges that lie ahead. I should make clear that I do not pretend that these are necessarily original thoughts. On the contrary, I am deeply grateful for the insights provided to me by a number of individuals with whom I have been in contact over the past few months including Mr Tom Birch Reynardson, Mr Robert Veal, Lina Wiedenbach and Professor Henrik Ringbom.

To go back almost to the beginning, the concept of an unmanned surface vehicle is not new. Apparently, the first demonstration was performed by Nikola Tesla in 1898 when he was granted a U.S. patent for a "Method of and Apparatus for Controlling Mechanism of Moving Vessels or Vehicles". The patent covered "..any type of vessel or vehicle which is capable of being propelled and directed such as a boat, a balloon or a carriage." Well, that was some 120 years ago. And now it is certainly a "hot topic".

Although the title of this talk refers to "unmanned vessels', that is a very wide term that is often used generically and embraces a variety of control methods that fit broadly into two main categories.

The first category relates to vessels that are remote-controlled by one or more shoreside controllers using electronic computer equipment. This is either done by using line-of-sight communication or, increasingly, the use of the global positioning system (GPS) to control vessels remotely over the horizon. In one sense, these vessels are not "unmanned" at all. Rather,

they are "manned" but the "manning" is done by personnel who are not on board.

The second category includes vessels that are pre-programmed and thereafter they use a combination of sonar radar, advanced computer software as well as very fast control algorithms to form a pre-determined nautical circuit without any human interaction whatsoever. These are generally referred to as autonomous unmanned vessels (AUVs).

However, the terms "unmanned" and "autonomous" are often used interchangeably; and, in truth, this binary distinction is an over-simplification. For example, one study refers to 5 levels of "autonomy" viz. (i) human on board; (ii) operated; (iii) directed; (iv) delegated; (iv) monitored; and (v) autonomous. It has been said that the reality is that the developers of the technology recognise up to 10 or even 15 different levels of "autonomy" and that it is more of a "continuum".

The IMO has established its own "Degrees of Autonomy" at MSC viz.

a. Ship with automated processes and decision support. Seafarers are on board to operate and control shipboard systems and functions. Some operations may be automated.
b. Remotely controlled ship with seafarers on board. The ship is controlled and operated from another location, but seafarers are on board.
c. Remotely controlled ship without seafarers on board. The ship is controlled and operated from another location. There are no seafarers on board.
d. Fully autonomous ship. The operating system of the ship is able to make decisions and determine actions by itself.

If anyone doubts the important part that unmanned vessels will play in the future, they need only carry out a quick search on the internet. You will immediately find a vast amount of information – including numerous articles, photographs and videos.

For example, in December last year, Harbin Engineering University and Shenzhen HiSiBi Boats Company revealed what Chinese state media claimed was the fastest unmanned waterborne surface vehicle, the Tianxing-1. The 12.2-metre electric-gasoline hybrid has a top speed of over 50 knots (93 km/h).

In February this year, a Chinese company, Yunzhou-Tech (along with the Zhuhai's municipal government and the Wuhan University) opened the Wansham Marine Test Field. The 771 square kilometre (225 square nautical mile) zone. This allows for the testing of autonomous maritime technology and is claimed to be the largest testing facility of its kind in the world.

Also in February this year, China celebrated the opening of its Hong Kong-Zhuhai-Macao Bridge by holding the largest cooperative unmanned boat manoeuvre in history using 81 boats. Here is a clip of 56 unmanned boats coordinating a set of manoeuvres near the Wanshan Islands south of Hong Kong. It shows the vessels avoiding "obstacles" and maneuvering into various shapes and patterns without hitting one another. It ends with the swarm recreating the shape of an aircraft carrier while a larger – but also unmanned – boat passes through them, recreating a fighter jet taking off.

This is just the tip of the iceberg. Other countries including the UK and the USA are fast developing technologies which will make unmanned vessels not only a reality – but a commonplace. Much of the current project work is for military purposes and therefore secret. But one can readily find information on the internet which shows that this is not just science fiction.

For example, Israel has developed an unmanned boat known as the Katana Unmanned Surface Vehicle (USV). It measures 11.9m in overall length and 2.81m in width, has a platform weight of 6,500kg, and can carry payloads up to 2,200kg. It can be deployed in search and rescue, intelligence gathering, protection of exclusive economic zones, homeland and harbour security, and surveillance of coastal, as well as shallow and territorial waters, fire-fighting, and public safety and security. It can also be used for surveillance and protection of oil and gas, and other critical assets.

In the UK, Rolls Royce has revealed plans for an autonomous, single role, naval vessel with a range of 3500 miles. According to their webpage, the vessel concept is capable of operating beyond the horizon for over 100 days, will displace 700 tonnes and reach speeds above 25 knots. The 60m long vessel is designed to perform a range of single role missions, for example, patrol & surveillance, mine detection or fleet screening.

Although the pioneer work has been primarily in the military field, there is no doubt that the technology will soon be introduced for use in ordinary cargo ships.

For example, last year, Rolls Royce and global towage operator, Svitzer, successfully demonstrated the world's first remotely operated commercial vessel in Copengaen harbour, Denmark. It is equipped with a Rolls-Royce Dynamic Positioning System, which is the key link to the remote controlled system. The vessel also features a range of sensors which combine different data inputs using advanced software to give the captain an enhanced understanding of the vessel and its surroundings. The data is transmitted reliably and securely to a Remote Operating Centre (ROC) from where the Captain controls the vessel.

At this very moment, the world's first fully electric and autonomous cargo ship is being built in Vard Brevik, Norway. The design is for a 120 TEU (twenty-foot equivalent units) open top container ship. It will be a fully battery powered solution, prepared for autonomous and unmanned operation with zero emissions. The ship's navigation and autonomous operations will be supported by a number of proximity sensors, including a radar, a light detection and ranging (LIDAR) device, an automatic identification system (AIS), an imaging system and an infrared (IR) camera. Loading and discharging will be done automatically using electric cranes and equipment. The ship will not have ballast tanks, but will use the battery pack as permanent ballast. The ship will also be equipped with an automatic mooring system - berthing and unberthing will be done without human intervention, and will not require special implementations dock-side.

Unmanned vessels provide obvious potential advantages both in terms of running costs and environmental considerations. For example, I have already mentioned that the Yara Birkeland will have zero emissions. Once in full operation, it will apparently replace 40,000 truckloads per year reducing NOx and CO2 emissions in the process.

However, there is no doubt that the introduction of these new unmanned vessels presents many challenges.

Plainly, the technological challenges are significant at many levels. Needless to say, the vessels must be capable of providing the particular services required. At present, the main focus would appear to be for unmanned vessels to be used on relatively short passages in inland waterways or, at least, close to the shore. For example, the Yara Birkeland will sail on two routes, between Herøya and Brevik (~7 nautical miles (13 km)) and between Herøya and Larvik (~30 nautical miles (56 km)), carrying chemicals and fertiliser. It will probably be some years before we see unmanned vessels performing longer ocean voyages but it seems likely that this is only a matter of time.

Safety is paramount. This is an area which has been the subject of a number of studies; but, once again, there is plainly a lot more work to do. For example, in its 2016 annual overview, the European Maritime Safety Agency found that 62% of the 880 accidents occurring globally during the period 2011-2015 were caused by "human erroneous action". This might suggest that unmanned ships would have fewer accidents. That conclusion is supported to some extent by another important study from March 2017 which analysed 100 accidents that occurred between 1999 to 2015. The researchers attempted to assess whether the accidents would have been more or less likely to happen if the vessel had been unmanned. They found that the likelihood of groundings or collisions might have

been decreased significantly if those vessels had been unmanned. But they also concluded that where accidents do happen, the consequences may be more severe without a crew to intervene. In particular, accidents involving fires may be more serious if there is no crew to act as firefighters. Thus, although the total number of accidents may decrease with unmanned vessels, it is very uncertain whether the overall risk of loss and damage would decrease significantly if ships were unmanned.

Unsurprisingly, the various classification societies have been hard at work. For example, last year Lloyds Register produced its own "LR Code for Unmanned Marine Systems"; and only a few months ago, DNV-GL produced its own Class Guideline entitled "Autonomous and Remotely Operated Ships". Both of these documents provide a detailed framework for the assurance of safety and operational requirements for unmanned marine systems.

The insurance position is also crucial. That is a topic that has been the subject of consideration by, in particular, the Insurance Institute of London (IIL) and the International Group of P&I Clubs which has set up a special IG autonomous vessels working group. To a large extent, insurers have historically been largely content to provide hull or cargo cover without much detailed consideration of the underlying technology of the vessels concerned; that has been left to the general regulatory framework and, more specifically, the Classification Societies. Thus, hull policies will, of course, generally include a specific warranty that the vessel will be properly classed. However, this underlines even more the importance of an adequate regulatory framework and proper classification rules.

So far as Club cover is concerned, the position is potentially more complicated for at least two reasons.

First, a threshold question arises with regard to the potential legal liability of a shipowner in circumstances where, for example, an autonomous vessel is navigated from ashore and there is a collision or grounding as a result of a software problem caused by some third party – for example, the manufacturer or installer of the automation system or internet provider. In truth, this is not necessarily very different from the legal problems which can arise in the conventional context. In each case, the broad question arises as to whether the shipowner can avoid liability because of the fault of the manufacturer or installer of the software system or the third party provider. In the context of the Hague Rules, this in turn will focus on the scope of the obligation of due diligence to make the ship seaworthy before and at the beginning of the voyage under Art III.1; and the various defences which may be available under Art IV.2 including, of course, sub-paragraph (p) – "latents defect not discoverable by due

diligence". In one sense, these are not new problems at all. However, as automation systems become more complex, one may assume that these issues will perhaps become increasingly important. Similarly, it seems to me that the question of rights of recourse will also become increasingly significant – and complex.

Second, the P&I Clubs will no doubt have to consider the scope of particular rules. For example, Club Rules generally refer to crew serving on-board. In the ordinary course, one would suppose that loss of life/personal injury of those navigating/operating the autonomous vessel from ashore would be beyond the scope of cover; and that such risks would be regarded as a matter of shoreside liability and insurance arrangements. However, it may be that the clubs may wish to extend cover to include such risks. It is noteworthy that at least one Club has produced a bespoke set of Rules for unmanned vessels.

So far as pooling arrangements are concerned, it would seem that the main pooling agreement operates to pool all claims arising in connection with the operation of a ship save to the extent excluded. Such exclusions do not appear to bite as against unmanned vessels in a way in which they would otherwise not bite against traditional vessels and therefore, in principle, autonomous vessels should not be excluded from pooling.

I leave for the last, the work of the CMI. I have already referred to the importance of the general regulatory framework. The difficulty here is that such framework is very fragmented: it is to be found in more than 50 IMO Legal Instruments and a variety of national laws.

As I have already mentioned, the CMI set up an International Working Group on Unmanned Ships in 2015. The main purpose of the IWG is to identify the legal issues surrounding the uptake of unmanned shipping and to provide an international legal perspective to the issues involved. Following the production of a Position Paper, the IWG has carried out two main exercises. These are explained in the written submission of the IWG earlier this year to the Maritime Safety Committee of IMO.

The first main exercise was the circulation in early 2017 of a Questionnaire to the 52 National Maritime Law Associations which are members of the CMI. The Questionnaire focused on how national laws will respond to unmanned shipping in the context of the various international conventions including UNCLOS, the IMO Conventions, COLREGS and the STCW Convention. The IWG has now received some 23 responses. These have now been summarised and collated. They can be viewed on the CMI website.

This was followed by a scoping exercise undertaken by members of the IWG and also students from Hamburg Maritime University and

Researchers from Tokyo University of the main international conventions with respect to Maritime Autonomous Surface Ships (MASS). As stage 1 of the project, the IWG selected what are considered to be the conventions most relevant to unmanned shipping and therefore most urgently requiring review. For that purpose, some 8 conventions were selected including the International Convention for the Safety of Life at Sea (SOLAS), The International Regulations for Preventing Collisions at Sea (COLREGS), The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) and The International Convention for the Prevention of Pollution from Ships (MARPOL). The "scoping" exercise involved an analysis of the main provisions of these 8 Conventions to see how they would apply to unmanned ships.

It is, of course, recognised by the IWG that a review of all conventions will be necessary but that work can and should proceed on the conventions selected in order to establish a modus operandi which can be applied across the legal and regulatory framework. A further complication is that the various instruments emanate from different IMO subcommittees. So effective co-ordination is very important.

In broad terms, the IWG has identified provisions in the instruments which have been examined in the course of the scoping exercise which may either require amendment or clarification.

To repeat, I do not wish to encroach upon the important work of the IWG. However, I would certainly wish to congratulate those concerned on the work that has been done so far and to emphasise the importance of the work that still needs to be done. With that in mind, it is perhaps useful to focus on a number of broad issues that arise for consideration.

The first and most fundamental question is whether ships without any crew on board are to be regarded as "ships" or "vessels" within the meaning of the conventions at all. Those terms are used interchangeably in UNCLOS but neither is defined. Other conventions contain certain definitions which do not appear to require or depend upon any particular level of crewing. However, there is obviously much sense in eliminating any uncertainty and providing a clear definition – or at least a universal term that makes it plain that the concept of a ship or vessel does not necessarily depend upon the extent to which any crew may or may not be on board. From a practical point of view, it seems to me that that makes obvious sense. After all, the risks and dangers created by vessels are broadly similar – whether they are manned or unmanned.

However, that really is only just the beginning. The real problem is that there are many provisions in the Conventions which make no sense whatever with regard to unmanned vessels or at least give rise to

fundamental difficulties of interpretation and application with regard to unmanned vessels.

For example:

a. The International Convention for the Safety of Life at Sea (SOLAS) obliges contracting states to ensure minimum standards, in particular, in construction, equipment and operation with a view to ensuring the safety of life at sea. The SOLAS Convention is supplemented by a highly detailed annex which spans 12 chapters. Chapter II-1 deals with the ships' structure, subdivision and stability, machinery and electrical. Regulation 5-1 includes a requirement that the Ship's *"…master...be supplied with information….as is necessary to enable him by rapid…process to obtain accurate guidance as to the stability of the ship under varying operating conditions."* So, the obvious question arises as to how this applies in the case of an unmanned ship. Similarly, Chapter III prescribes the life-saving appliances to be carried on board the relevant ship and corresponding arrangements. In the context of passenger ships, Regulation 10 requires that *"…there shall be sufficient crew members, who may be deck officers or certified persons on board for operating the survival craft and launching arrangements."* Although the chapter permits the use of alternative designs, it will be difficult for an unmanned ship to comply with this regulation. Even more important is Chapter V Regulation 14 which requires that all ships are *"…sufficiently and efficiently manned…."* There has been some debate about the scope and effect of this provision. On its face, it does not prohibit unmanned vessels. However, the counter-argument is that there is underlying assumption of some minimum manning by crew on board the ship. Another crucial provision is Regulation 24 which requires that in *"hazardous navigational situations*" it shall be possible to establish *"manual control of the ship steering immediately".* The concept of *"manual control"* is somewhat elusive. The suggestion has been made that it may be performed remotely. I have to say that I find it difficult to agree with that suggestion. But there is no doubt that this needs to be addressed.

b. Similar difficulties arise with regard to numerous provisions contained in the International Regulations for Preventing Collisions at Sea (COLREGs). For example, Rule 2 (Responsibility) provides: *"(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 precautions which may be required by the ***ordinary practice of seamen****, or by the special circumstances of the case."* It has been said that this is the elephant in the room: the ***"ordinary practice of seamen"*** is not an entirely satisfactory benchmark of responsibility in the case of an unmanned vessel. More specifically, Rule 5 requires that *"…every vessel…at all times [maintains] a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances….to make a full appraisal of the situation and risk of collision."* So the question arises as to what is meant by a proper look-out by *"sight and hearing"*. The view expressed by the IWG is that the reference to *"sight and hearing"* clearly requires a human input in surveying and assessing the situation and collision risk, consistently with Rule 2; and that, as such, autonomous ships relying, for instance, on algorithmic collision avoidance technology would not satisfy the requirement of appraisal by "sight and hearing". However, as the IWG Paper also points out, the present generation of unmanned craft use sophisticated aural and camera sensors to project the vessel's vicinity to shore-based remote controller; and that this arguably satisfies the Rule 5 requirement with the requisite human input still firmly in the appraisal process in the sense that the use of an electronic aids does not take the arrangement outside of the spirit or wording of Rule 5. Neither does its shore-based orientation. However, I agree with the IWG that this is a point which must be clarified.

c. The Convention on Standards of Certification, Training and Watchkeeping (STCW), amongst other things, prescribes qualification standards for masters, officers and watchkeeping personnel on board seagoing ships. It also deals with watchkeeping procedures. In terms of the STCW's watchkeeping requirements, Chapter VIII is titled "Standards regarding watchkeeping". Part 4, paragraph 10 (Watchkeeping at Sea) states *"when deciding the composition of the watch on the bridge … the following factors, inter alia, shall be taken into account"*. One of such listed factors includes "at no time shall the bridge be left unattended". In addition, paragraph 24 provides that *"the officer in charge of navigational watch shall….keep the watch on the bridge…[and]…in no circumstances leave the bridge until properly relieved"*. Furthermore, paragraph 24.2 provides that the officer in charge of the navigational watch shall "*in no circumstances leave the bridge until properly relieved"*. As pointed out by the IWG, to

the extent that the STCW Convention finds application, these provisions presents difficulty for unmanned ships.

These are just some of the difficult provisions in a few of the main Conventions. They are just a few examples – but they highlight the problems which exist with regard to the existing regulatory framework.

The challenge for all of us is what to do. How is the international regulatory framework to be updated and adapted to the new world of unmanned vessels?

The obvious solution would be to amend each and every Convention so that they all make sense with regard to unmanned vessels and make proper provision with regard, in particular, to safety. In an ideal world, that probably makes the best sense.

However, to review each and every Convention line-by-line and produce appropriate amendments as necessary which would then have to be agreed at the international level by a host of countries and a number of NGOs each with different agendas would seem to be a gargantuan task. As a matter of practical reality that may well be impossible.

The alternative is to create some overarching instrument along the lines perhaps of the Polar Code which could address specifically the issue of unmanned vessels. I should immediately make plain that this is not my idea but one that has been suggested to me over the past few months. However, it seems to me that such suggestion has much to commend it and, as I understand, has wide support.

For example, the IWG has already identified a number of generic words and terms in each of the major Conventions which they have considered so far which need to be clarified. For example, almost all of the Conventions refer to the "master". It will have to be considered whether the term "master" extends to shore-based personnel and in either case how the regulations can be adapted so that they apply effectively to the reality of command and control being exercised by one or more individuals from the shore or another ship. These generic words/terms tend to be repeated in many of the Conventions and the IWG has suggested that it may be that an overriding instrument can provide a general application of these words across the Conventions without a need to make serial amendments to each Convention.

In my view, that is a good starting point. However, it seems to me that, at the very least, serious consideration should be given to a much broader project: the creation of a separate international Code that will apply specifically to unmanned vessels.

I recognize fully the burden of that task. It will require a huge amount of work by all concerned. But I am sure that it is a project which deserves the engagement of the CMI. And I am also sure that it is one which would have the full and enthusiastic support of Francesco Berlingieri in whose memory this Lecture is dedicated.

IWG ON SHIP FINANCING SECURITY PRACTICES: DISCUSSION PAPER FOR INTERNATIONAL SUB-COMMITTEE MEETING

Thursday 8th November 2018, 9 – 11 AM
Reed Smith, Broadgate Tower, 20 Primrose Str. London.

Ann Fenech
David Osborne

Executive Summary

This discussion paper has been prepared by the International Working Group on Ship Finance Security Practices for the purposes of assisting in the debate and deliberations at the International Sub-Committee meeting on Thursday 8th November 2018.

Section 1 – Introduction – gives some background to the history and circumstances which led to the establishment of the International Working Group (IWG), some observations on the Cape Town Convention and the scope and nature of the questionnaire whose results are now being reported. The IWG had the brief "To gather as much information as possible from our national maritime law associations on the regimes prevalent in each country on ship finance security practices and the ease or otherwise of the enforcement of maritime securities."

Section 2 – Some wider background issues and developments - gives some industry content to the issues under discussion including issues related to the international shipping market since the financial crises of 2008 and how financiers and mortgagees have reacted, a summary of developments in relation to the CMI Draft Convention on the International Recognition of Judicial sales including UNCITRAL'S decision at its 51st Assembly in New York in June to add cross border issues relating to the international recognition of Judicial Sales to its working agenda, a CMI driven project. It also refers to writings which have considered the subject matter of a Shipping Protocol to the Cape Town Convention.

Section 3 – Responses to Questionnaire – gives a high level summary of, and commentary on, the responses received so far from national maritime law associations (NMLAs).

Section 4 – Some tentative conclusions – tries to draw some conclusions from the responses so far and contains some observations on the suggested next steps. Its suggestions are made in the context of the fact that it is the role of CMI to do industry' s bidding and thus far input is only from NMLAs; unlike the aircraft industry there does not appear to be a demand from industry for an international regime; thus the CMI would need to decide if it was appropriate for it to form a view on the need for such a regime and if so whether NMLAs through the means of a further Questionnaire should be asked to canvass the views of industry more fully. In that case the remit of the IWG would have to be extended by the Executive Council.

1. Introduction

Brief background

The very first set of draft articles on a "Prospective UNIDROIT Convention on International Interests in Mobile Equipment" prepared by the Study Group of UNIDROIT, provided for the application of the convention to vessels. This idea was discussed by the maritime industry in general including maritime jurists, experts and maritime organisations including the IMO and UNCTAD, and CMI and the conclusion was that whilst such a convention could be very useful indeed to aircraft, rolling stock and space assets, the very need of such a convention to ships was questioned. There was mention of the possible conflict between such a convention and the 1993 Liens and Mortgages Convention. There was also the general feeling that the entire body of maritime law with its very special sector specific rules which had been developing and evolving over the years regulated the rights of various maritime creditors. Most jurisdictions gave special rights to the entire spectrum of maritime creditors either by virtue of already existing international conventions or by virtue of local law and therefore it was difficult to see what precise value such a new regime could provide and how it could effectively improve a system devised as a direct result of the very nature of maritime trade. A number of these rights are not registrable and still enjoy a privileged status. Thus, it was perceived that conflicts between the convention rules and existing law would be rather challenging to overcome, questioning the need of embarking on a protocol related to shipping.

As a result subsequent drafts of this convention saw the reference to ships being dropped and when the Convention on International Interest in Mobile Equipment was signed in Cape Town on the 16th of November 2001, the protocols which accompanied it related to aircraft, rolling stock and space assets. The Convention became known as the Cape Town Convention.

The main proponents of the Aircraft Protocol to the Cape Town Convention consisted of persons immediately involved in the aviation business including the main leading aircraft manufacturers. The protocol was thus driven by the aviation industry.

During 2013 there was renewed interest at UNIDROIT with attempts to put the matter of extending the Cape Town Convention to ships back on the Agenda. At the 92nd session of the Governing Council of UNIDROIT held in Rome, it is noted that *"The Secretariat accordingly seeks the authorisation of the Governing council to conduct a preliminary study, which should first identify and describe the legal obstacles faced by market participants in the shipping industry concerning security over ships and maritime transport equipment in cross-border situations and give an overview of the status and development of internationally harmonised rules in this field of law."*

At the 93rd session of the Governing Council also held in Rome in 2014, UNIDROIT assigned a low priority to a possible maritime protocol *"in light of potential industry opposition expressed to some members of the Council, as well as continued, although limited use of the 1993 International Convention on Maritime Liens and Mortgages.*

In view of the above and the renewed interest of UNIDROIT in the subject matter, the President of CMI Stuart Hetherington wrote to the Secretary General of UNIDROIT in August 2014 enquiring about the level of priority assigned by UNIDROIT to this work. The reply from Jose Angelo Estrella Faria, was to the effect that other projects enjoy higher levels of priority however *"the informal consultations required to gather information on the actual financing practices of the maritime industry are a most useful activity for us to undertake at the present time and are to be considered as ongoing."*

As a result of the above, it was considered appropriate that CMI embark on the creation of an International working group chaired by Ann Fenech, Managing Partner at Fenech and Fenech Advocates Malta, made up of persons with as wide a geographical spread as possible. As a result, the following were approved Members of the IWG:

Andrew Tetley - Partner at Reed Smith, Paris

David Osborne - Partner at Watson Farley and Williams, London (Rapporteur);

Armstrong Chen - Partner at Rolmax Law Office, Beijing

Souichirou Kozuka - Professor of Law at Gakushuin University, Tokyo

Camila Mendes Vianna Cardoso - Managing Partner of Kincaid Mendes Vianna Advogados, Brazil

Allen Black - Partner at Winston and Strawn, United States

Stefan Rindfleisch - Partner at Ehlermann Rindfleisch and Gadow, Germany

Andrea Berlingieri - Partner at Studio Berlingieri Maresca, Italy

Haco van der Houven van Oordt - Partner at AKD, The Netherlands

The brief of the IWG was "*To gather as much information as possible from our national maritime law associations on the regimes prevalent in each country on ship finance security practices and the ease or otherwise of the enforcement of maritime securities."*

The Convention on International Interests in Mobile Equipment (The Cape Town Convention.)

The Cape Town Convention, attached as Annex 1 A, is about the creation of a central international register where an international interest in mobile equipment will be registered. There are currently 3 protocols on Aircraft, Railway Rolling Stock and Space Assets.

According to Prof. Roy Goode: *"Its purpose is to provide a stable international legal regime for the protection of secured creditors, conditional sellers, and lessors of aircraft objects, railway rolling stock and space assets through a set of basic default remedies and the protection of creditors interests by registration in an international registry thus securing priority and protection in the event of the debtor's insolvency."*

It provides for the constitution and effects of an international interest in certain categories of mobile equipment by virtue of the registration of such an international interest in an international register.

Article 2 of the Convention provides that an international interest in mobile equipment is an interest in a uniquely identifiable object granted by the chargor under a security agreement, or vested in a person who is the conditional seller under a title reservation agreement or vested in a person who is the lessor under a leasing agreement.

By way of summary, in the event of default the holder of an international interest can:

a. Take possession or control of the object

b. Sell or grant a lease of any such object

c. Collect or receive any income or profits arising from the management or use of such an object

d. Any sum collected from the sale is applied towards discharge of the amount of the secured obligations

e. Where the sums collected or received by the charge exceed the amount secured by the security interest, unless ordered by the court the chargee is to distribute the surplus among holders of subsequently ranking interests which have been registered.

f. Ownership passing on a sale is free from "any other interest over which the chargee's security interest has priority under the provisions of article 29."

g. The buyer buys free from an unregistered interest even if the buyer has actual knowledge of such an interest.

h. A registered interest has priority over any other interest subsequently registered and over an unregistered interest.

All these rights in the hands of the holder of an international interest would give rise to a number of substantial challenges as regards the maritime law of most jurisdictions which provide for non-consensual rights and interests by way of maritime and other liens, hypothecs or privileges given to specific category of creditors such as crew, harbour authorities, salvors, suppliers of provisions.

This was partly addressed in article 39 which provides that a contracting state may declare those categories of non-consensual right or interest which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest. [259]

These areas give a flavour of some of the challenges which would need to be addressed in developing a Shipping Protocol to Cape Town. They have not been considered by the IWG, as being outside its terms of reference. Some further and tentative observations are made in Section 4 below.

[259] This has given rise to numerous questions including what would therefore be the point in such a convention extending to ships if states could enter these caveats.

The scope and nature of the Questionnaire:

The IWG set about drafting an extensive questionnaire which was circulated to all the 52 National Maritime Law Associations. Given the nature of the subject matter it was considered imperative that the questionnaire be as extensive as possible. A copy of the Questionnaire is being attached to this paper as Annex 1. As can be seen questions ranged from whether the jurisdiction has ratified applicable maritime conventions to what rights does the ship's register in that jurisdiction confer, to the formalities of the registration of a mortgage, to the procedures for the enforcement of a mortgage, to information relating to security interests in ships, and to general enforcement issues.

Up to now the following 21 countries have replied to the questionnaire:

Argentina, Australia, Brazil, Canada, Croatia, Finland, France, Germany, Greece, Ireland, Italy, Japan, Malta, The Netherlands, New Zealand, Nigeria, Norway, Panama, Spain, Switzerland and the United Kingdom.

2. Some wider background issues and developments

The state of the shipping industry and developments in the market

The 10 years following the financial crisis of 2008 have seen a deep and widespread downturn in almost all sectors of the international shipping market. Some sectors have been affected worse than others. Different sectors have not necessarily been affected at the same time. The steep decline in oil prices which began in 2014 has resulted in the offshore oil services industry also being in considerable distress.

Chapter 11 of the United States Bankruptcy Code has been the formal insolvency proceeding of choice for shipping companies seeking protection from their creditors (including secured lenders), with the US courts liberally extending jurisdiction to companies with slim connections to the US.260 Chapter 11 is seen as unfavourable by some ship financiers but not by all. Many lenders view it favourably, especially US banks and private equity funds to whom it is familiar. This is especially the case in relation to pre-packaged or pre-negotiated Chapter 11 proceedings, as opposed to "free-fall" filings. There have been other noteworthy formal insolvency proceedings in other jurisdictions, including Korea Line and Hanjin in Korea. In the Chapter 11 proceedings involving the Taiwanese company TMT the Court in Houston granted the application of the mortgagee in requesting the court to agree to a lifting of the stay order for the purposes of proceeding with a Court approved private sale in Malta. Acute distress has occurred in the German KG market, which has not

[260] See for example Marco Polo Seatrade BV, Re Case No 11-13364 (Bankr SDNY 27 September 2011).

resulted in Chapter 11 filings and has mainly been resolved informally or through German liquidation process.

There have also been numerous work-outs of different types which have not involved formal insolvency proceedings. These can range from simple debt rescheduling to fleets of vessels being transferred into new ownership at the instigation of mortgage lenders, with varying degrees of co-operation from the distressed shipowner. Such matters are sometimes reported in the trade press, but many are not. Anecdotal evidence is that the number of shipping companies which have been involved in out of court work-outs or restructurings of one type or another is substantial.

Financiers who have faced defaulting situations have handled their situations differently. Some have opted for the full enforcement process culminating in judicial sale proceedings whilst others have opted for out of court work-outs or restructurings.

It is possible to speculate that a number of factors have contributed to a financier's chosen course of action:

- Mortgagee lenders have been reluctant to recognise the losses which would be crystallised on a court sale in a very depressed market, without a mortgagee or mortgagee – supported bid at a level sufficient to avoid a low sale price.
- Where lenders are prepared to accept losses, they have often preferred to sell loans (and loan portfolios) to exit problems rather than deal with problem loans directly. In any event banks have been under intense regulatory pressure to reduce exposure to shipping, especially when vessel values are below the level of bank debt.
- Many mortgagee lenders are unwilling or unable to bid or support bids by third parties and, where local law requires it, are especially averse to the double-funding risk arising from paying the auction price into court before receiving proceeds back. This issue is exacerbated where local procedure results in a potentially lengthy period to establish priorities of competing claims before proceeds are distributed.
- The alternative of moving vessels into new ownership through exercise of mortgage self-help (private sale) remedies[261] where the law of the mortgage permits this or consensually with the co-operation of the shipowner can sometimes be a more attractive alternative albeit a risky exercise since in most jurisdictions it

[261] Or sometimes but more rarely enforcing security over shares in a SPC ship owning company.

would be permissible for creditors to follow the vessel and seize the vessel irrespective of the sale. (Lenders have generally been increasingly wary of using self-help remedies in view of the risk-averse nature of credit committees.)

- If levels of trade debt are not high as a percentage of vessel value there is less of a compelling need to cleanse vessels of debt through a court sale.
- For a court sale to provide a successful outcome for a mortgagee it needs to take place in a suitable jurisdiction. Putting a vessel through a court sale in the 'wrong' jurisdiction can be disastrous in terms of amount and timing of recovery by the mortgagee.

These factors do not detract from the importance of ship mortgages but merely mean that they are not invariably enforced through court sale. Even where a mortgagee is prevented from pro-actively taking enforcement steps through being stayed in debtor-friendly insolvency proceedings (most notably in Chapter 11) its mortgage still gives it the enhanced rights of a secured creditor in the applicable proceedings. Where a mortgage gives the mortgagee self-help remedies it can be used to transfer ownership without putting the ship through a court sale; even if the mortgage is not expressly used for this purpose the possibility of its use can be a factor in achieving the shipowner's cooperation to a work out involving change of ownership.

In the meantime, the landscape for secured ship lending has been re-shaped since 2008 by a number of factors, which are all symptoms of an industry facing the combination of a trading downturn and the constraints suffered by financial institutions after 2008:

- A significant de-leveraging, with lending levels generally being 50/60% of vessel values rather than the 75% (or more) seen before 2008.
- A reduction in speculative ordering of new buildings by shipping companies, combined with and in part promoted by a reduction in the willingness of financiers to support such ordering.
- Increasing reliance on ECA-backed financing, which has in part filled the funding gap caused by banks' decreased appetite for shipping risk. ECAs are by nature conservative providers of credit.
- The increasing role played by non-bank providers of funds, both debt and equity, especially private equity houses of different types and appetites.

- Overall, a reduction in the availability of conventional finance.

The Brazilian case of the FPSO OSX3

Some alarm was caused in 2014 by the case involving the Liberian-registered FPSO OSX3 in Brazil. The Brazilian courts (at first instance and on initial appeal) refused on various grounds to recognise the Liberian mortgage. The case brought into sharp focus issues of recognition and enforcement of foreign mortgages in Brazil and caused many to wonder whether similar problems could arise in other jurisdictions, in view of the relatively small number of countries which have acceded to the ship mortgage recognition conventions. The case was quite swiftly overturned on appeal to the Superior Court of Justice in Brasilia in 2017 and the foreign mortgage was recognized as valid in Brazil.

The growth of (Chinese) ship leasing.

There has been one further and very significant development in the last decade which has provided an alternative to traditional mortgage-secured ship finance: the growth of leasing, specifically by the leasing arms or subsidiaries of Chinese banks. Whilst financing of ships by way of lease is by no means new[262] the growth of Chinese leasing adds a new dimension. Ships leased by way of a Chinese lease are often but not always mortgaged by the leasing company to secure its own financing, either at inception of the lease or subsequently by way of 'back-financing'. The recent growth of ship leasing has led to legislative changes being introduced by two of the major flag states – the Marshall Islands in 2014 and Liberia in 2018. These changes allow a charter which is reclassified under applicable law as a security interest granted by the charterer/lessee in favour of the registered owner/lessor[263] to be given the status of a preferred mortgage in favour of the latter

The CMI Draft Convention on the International Recognition of Judicial Sales.

An important part of this discussion is the progress made by the CMI on the draft convention on the International recognition of judicial sales. It was Professor Henry Li of the China Maritime Law Association who drew attention to the fact that there were increasing problems arising around the world from the failure in some jurisdictions to give recognition

[262] Leasing of ships can be incentivised by tax advantages, although this has been cut back or closed off in most of the jurisdictions where it was once common. The Japanese operating lease (or "JOLCO") is a significant product but has been eclipsed in volume by Chinese leasing.
[263] These legislative changes have been driven principally by the risk to lessors of reclassification of a finance lease as a security interest, most notably in US Chapter 11 bankruptcy proceedings; see *In re Lykes Bros. S.S.Co., Inc., 196 B.R.574 (Bankr – M.D. Fla. 1996)*. Their efficacy in this context is thought to be so far untested.

to judgments in other jurisdictions ordering judicial sales. This of course led to a great deal of uncertainty amongst mortgagees in particular.

An International Working Group was created with a view to carrying out research on the extent of the problem, what the implications where and to work on a draft convention.

Data was obtained by the IWG indicating that between 2010 and 2014 more than 480 ships were sold by way of judicial sales each year just in 4 Asian jurisdictions alone – the Republic of Korea, China, Singapore and Japan.

An important tenet of any judicial sale is that the vessel is sold free and unencumbered to the buyer who purchases the vessel clean from any pre-existing debt. This ensures that buyers come forward to bid and pay a price reflecting the fact that the vessel does not carry with it all its previous debts. The higher the price the better for all the creditors and ultimately her owner. However, this "rule" which is respected by a number of jurisdictions worldwide, is not universally applied.

When a judicial sale by auction ordered by a competent court is not recognised in another jurisdiction this causes huge obstacles to the smooth operation of international trade. The new buyer, the mortgagees of the new buyer, the vessel's new registry and a host of other important links in the maritime chain face substantial losses and above all uncertainty.

All of this led to the CMI Draft International Convention on Foreign Judicial Sales of Ships and their Recognition which was done in Beijing in 2012, but not concluded until after further meetings in Dublin and in Hamburg in 2013 and 2014.

The draft convention, a copy of which is attached to this paper as Annex 2 contains 10 articles which provide inter alia:

a. For a system of notification of the sale of the ship to the Registrar of the ship's register, all holders of any registered mortgage, all holders of any maritime lien and the owner of the ship.

b. That the vessel is sold free and unencumbered and that any title to and all rights and interests in the ship existing prior to its judicial sale shall be extinguished and that any mortgage shall cease to attach to the ship

c. That there is issued a certificate of judicial sale by the competent authority in the state where the judicial sale is held and for the deregistration and registration of the ship.

d. That all state parties shall recognise a judicial sale conducted in any other state for which a certificate would have been issued as

being the sale of a vessel free and unencumbered and that where a ship sold in a judicial sale is arrested for a claim arising prior to the judicial sale, such a court shall dismiss such an arrest.

e. The CMI then embarked on a mission to persuade an international organisation to take up the project and take it up to an international convention.

Part of the process was the organisation of a Colloquium held in Malta in February of 2018 by the CMI and the Malta Maritime Law Association fully supported by the Government of Malta.

The Malta Colloquium was a huge success attended by 174 participants from 60 countries representing ship owners, financiers, tug operators, suppliers of provisions, the International Transport Federation (ITF), BIMCO, the Institute of Chartered Ship brokers (ICS), and the Federation of National Associations of Ship Brokers and Agents.

There was support across the board for the absolute need for more certainty in this important area of international trade. There was much emphasis by a leading ship financier who shared the views of another 11 major banks that there was need to provide international certainty through the creation of an international convention.

Lenders emphasised how the shipping market was volatile and in light of additional uncertainties banks attempted to circumvent the problems by searching for amicable solutions very frequently adding to the cost. It was underlined that without a reliable international basis for the recognition of judicial sales of vessels buyers would need to be satisfied with risks when obtaining the title, which would drive down the sale price.

The deliberations and conclusions of the Malta Colloquium led to a Proposal from the Government of Switzerland to UNICTRAL on possible future work on cross-border issues related to judicial sale of ships. The Proposal contained a resume of the deliberations at the Malta Colloquium which clearly underlined the need for certainty in such an important aspect of international trade.

The Swiss proposal was put on the Agenda for the fifty first session of the General Assembly at UNCITRAL. The Swiss delegation was represented by Prof. Alex von Ziegler who presented the proposal supported by Stuart Hetherington and Ann Fenech on behalf of the CMI. There were several other proposals presented to the General Assembly. However the Swiss Proposal for possible future work on cross-order issues related to the judicial sale of ships received a great deal of support from a number of countries including India, Australia, Argentina, Columbia, Singapore and China. BIMCO was very supportive stating in a letter that: *"At its recent meeting in New York, BIMCO's Documentary Committee decided that*

BIMCO representing shipowners worldwide but also working in the interest of other parties engaged in the maritime transport chain should lend its support to the proposal by Malta and Switzerland of a possible future work on cross border issues related to the judicial sales of ships. While the proposal clearly strives towards the unification of maritime law and practices in respect of the judicial sales of ships, BIMCO believes that it brings along concrete benefits for the shipping industry such as legal certainty." UNIDROIT represented by the Secretary General "commended the excellent proposal of CMI."

UNCITRAL noted that the issue had the potential to affect many areas of international trade and commerce, not simply the shipping industry and agreed that priority in the allocation of working time should be given to the topics of judicial sale of ships and issues relating to expedited arbitration and that the judicial sale of ships should be allocated to the first available working group.

This has therefore cleared the way for much greater peace of mind for those financiers who decide to go down the route for enforcement proceedings through the judicial sale of a vessel. Such a convention will ensure that financiers will obtain the best possible price for such vessels sold in these forced circumstances because such sales transferring title free and unencumbered will be recognised by all state parties. This will therefore give more confidence to ship financiers when extending facilities to owners of vessels.

Academic and other interest in the topic

Whether or not the Cape Town Convention should have a Shipping Protocol has been the subject matter of several publications.

We are attaching hereto a number of articles which all put a different perspective on things.

Francesco Berlingieri's article on "News from Unidroit" attached as Annex 3.

In his paper Prof Berlingieri highlights a number of important considerations including:

- What would be the relationship between the national registry and the international registry given that no financier will take the risk of registering his interest solely in the international register?
- What would be the relationship between the registered charges and the non registerable consensual rights of so many maritime service providers including crew, suppliers of provisions and port authorities?

- How would the enforcement of claims actually work in the event that there are so many other non consensual rights?
- Would such a protocol not add even more problems rather than eliminate them?

Dr. Ole Böger from the Ministry of Justice in Germany presented the Case for a new protocol to the Cape Town Convention covering security over ships at the 5th Annual conference of the Cape Town Convention Academic Project in Oxford in September 2016, attached as Annex 4.

In his paper Dr. Böger highlights the following:

a. He underlines what in his view is the unsatisfactory legal framework especially regarding differences between the legal systems concerning the use and status of proprietary security in cross border business

b. He expresses concern on whether and under which conditions these consensual proprietary security rights would be recognised under a foreign law.

c. He acknowledges however that with some exception, most legal systems have reformed their law so they now provide for the recognition of ship mortgages and hypothecs where the requirements are fulfilled.

d. He believes that too many jurisdictions do not follow this same rule when it comes to deciding on priority between claims leading to uncertainty

e. He believes that all of these difficulties would be overcome were there to be a protocol extended to shipping.

John Bradley, partner at Vedder Price spoke on "Cape Town Convention for Ships – A solution in search of a problem" at the 17th Annual Marine Money Greek Ship Finance Forum – October 2015 – attached as Annex 5.

In his presentation he made these observations:

a. Whether current cross-border ship-finance practices are satisfactory and if not, whether the international harmonization of those practices through Cape Town provides a better working solution.

b. Whether Cape Town can do for ship finance what it has done for aviation finance by lower borrowing costs and increased financing opportunities

c. Whether ship finance has a problem in need of a Cape Town Solution or is Cape Town a solution in search of a ship finance problem.

d. That academics see crossover befits for ship finance and that aviation finance professionals are satisfied with Cape Town and the aircraft protocol

e. That the marine sector however is sceptical due to the growth in size and sophistication of the top 7 registries worldwide, the very problematic issue surrounding non consensual rights and that the actual remedies under Cape Town give rise to several complications.

Dr. Vincent Power – Partner at A & L Goodbody gave a presentation alongside Dr. Ole Böger on "Assessing the Legal and Economic case for a shipping protocol" to the Cape Town Convention at the 5th Annual conference of the Cape Town Convention Academic Project in Oxford in September 2016, attached as Annex 6.

He raised the following issues:

a. Would a shipping protocol to the Cape Town Convention help resolve some of the difficulties and challenges in shipping finance and, if it would resolve such issues, would the protocol be adopted, ratified, enter into force and be implemented or used by sufficient number in the sector to make a real difference?

b. That the challenge in "joining the dots" between the shipping protocol to Cape Town and the somewhat chaotic tapestry of international maritime conventions should not be underestimated.

c. Whilst the difficulties as they exist particularly with the different ways in which priorities are dealt with in different jurisdictions as the rationale for the creation of a shipping protocol to Cape Town, ironically these difficulties are also one of the barriers to the adoption of such a protocol.

d. That it is possible that a shipping protocol would resolve many of the issues involved in the maritime sphere in theory but it may not do so in practice.

Responses to the Questionnaire

Responses have so far been received from NMLAs in the following countries:

Argentina
Australia
Brazil
Canada
Croatia
Finland
France
Germany
Greece
Ireland
Italy
Japan
Malta
The Netherlands
New Zealand
Nigeria
Norway
Panama
Spain
Switzerland
United Kingdom

This is 21 out of the 52 NMLAs contacted. There are some responses outstanding from some important jurisdictions, including China and the United States.

The responses so far are attached as Annex 7 (a), Annex 7(b) and Annex 7 (c), sorted on a question by question basis. Some observations on the responses are made below. At some risk of subjectivity, over-simplification or over-generalisation these observations are deliberately kept brief and are more by way of executive summary than a detailed analysis

Question 1 – Maritime and other conventions

The responses reflect the relatively wide ratification of the 1952 Arrest Convention and the limited ratification of the 1999 Arrest Convention.

In any event a mortgagee generally has a right to arrest. This applies not only to vessels registered in the arrest jurisdiction but also to mortgages of foreign vessels.

The responses reflect the low level of ratification of the 1926 Maritime Liens and Mortgages Convention and the lack of traction of the 1993 Convention.

Foreign maritime liens are widely recognised in one way or another (but see further Question 11).

Question 2 – Nature of the ships' register

Not all ships' registers are registers of title and even where they are they are not always conclusive as to title.

Some jurisdictions have more than one register, and for different purposes.

The ability to register as a bareboat charterer ('bareboat charter registration in') so as to fly the flag of the bareboat charter register (with title remaining registered in the name of the owner on the 'underlying register', with entitlement to fly the flag of that register suspended) is common but not universal. It is not common to be able to note on the bareboat charter register the existence of a mortgage on the underlying register.

Some but not all registers allow 'bareboat charter registration out', i.e. the ability of an owner to allow a bareboat charterer to register a ship on, and fly the flag of, a different register from the underlying register, with the entitlement of the owner to fly the flag of the underlying register suspended (i.e. the converse of 'bareboat charter registration in').

Registers which allow bareboat charter registration in do not necessarily allow bareboat charter registration out, and vice versa.

The test for what is capable of registration as a 'ship' varies from jurisdiction to jurisdiction. In many countries it is open to interpretation whether assets used in the offshore industry – which have developed since the applicable legislation and rules were written – are capable of falling

within or without the registration requirements. Most jurisdictions do not expressly deal with these types of assets.[264]

Question 3 – Formalities and mortgage registration

It is not common for full copies of underlying loan documentation to be required to be attached to the mortgage, although sometimes important terms of the documentation (such as events of default) need to be set out in this mortgage.

Ad valorem registry fees by reference to the amount secured are not uncommon but are usually not in an amount which is prohibitive.

Registration is indefinite (i.e. does not require periodic renewal) in all but a few jurisdictions.

It is unusual for registration of the mortgage to be required in a register in addition to the ships' register.[265]

It is noteworthy that in Australia ship mortgages are not registrable in the ships' register but in the Personal Property Securities Register.

Question 4 – Information concerning security interests in ships

It is almost universal for information to be publicly available.

There are differences in the procedure for obtaining information and the time taken to obtain the results of a search.

Many jurisdictions allow a sale of a ship which is subject to a mortgage, sometimes subject to the mortgagee's consent – but in all cases in private sale scenarios, the mortgage survives in the new ownership.

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[264] Two exceptions are Nigeria and Norway which expressly provide for the registration of FSOs and FPSOs. In practice many types of such assets which are not 'ships' in the traditional sense are known to be registered on a variety of different registers. The litigation in Brazil in relation to the Liberian registered FPSO *OSX3* (see paragraph 2.2 above) was a local law challenge to the registration of such assets notwithstanding the approval of the law of the register. The Superior Court of Justice overturned two lower court decisions which did not give effect to the mortgage.

[265] This is, however, the case in the UK and certain other common law jurisdictions such as Ireland and Nigeria which have a 'company charges' registration regime. Further registration is also required in Spain. The position in Canada is complicated.

Question 5 – Arrest of a chartered ship

There is generally nothing to prevent a mortgagee from arresting a ship which is on charter.

It is rare for a mortgagee to be liable to a charterer for wrongful interference (or similar) with the charter – but in some jurisdictions such liability can arise if the arrest is wrongful or abusive (or similar).

Very few jurisdictions have express provisions relating to the discharge of cargo from arrested vessels.

Question 6 – Priority issues between mortgages registered in the ships' register in your jurisdiction

A minority of jurisdictions provide for a 'priority notice' system which allows priority to be 'reserved' in advance of registration of a mortgage.

Consent of an existing mortgagee is generally not required for the registration of a subsequent mortgage.

Priority between mortgages is almost invariably determined by the time of registration.[266]

It is rare for a registered mortgage to be deferred to a previous unregistered mortgage on the basis of a doctrine of notice, or equivalent.

Generally, a subsequent mortgagee does not require the consent of a prior mortgagee to enforce its security.[267]

It is relatively rare for interests other than mortgages to be capable of registration.

Question 7 – General enforcement issues

Most jurisdictions do not distinguish between local and foreign mortgages as regards enforcement.

Obtaining a judgment against the shipowner is necessary in some jurisdictions. In some cases this can take years.

Most countries accept jurisdiction based either on the 1952 Arrest Convention Article 7 or equivalent domestic legislation.

[266]In Greece mortgages registered on the same day have the same priority and rank pari passu.
[267]This is of course subject to any contractual agreement to the contrary.

Question 8 – Judicial decisions and appeals

Specialist admiralty courts are relatively uncommon.

Procedures for sale vary and can be delayed by intervention/appeal by the shipowner.

Question 9 – Sale procedure

Sale by court auction (or court sale by tender) is almost universally available. A judgment for the debt is often required before sale.

Most jurisdictions have some concept of sale pendente lite (i.e. before judgment) this may be in the discretion of the court and require it to be established that the ship is a wasting asset.

Most jurisdictions fix a minimum bid price, by one means or another.

Some jurisdictions allow the shipowner and/or creditors to intervene in the fixing of the minimum bid price.

Most sales are publicised locally, but more rarely internationally.

The shipowner can influence the timetable of the sale process in a number of jurisdictions.

Court approved private sale (as district from court auction or tender) is relatively rare – and in some jurisdictions requires the agreement of the shipowner.

The ability of a mortgagee to bid its debt (animo compensandi) rather than having to pay cash or provide security for the full price is possible in a number of jurisdictions.

Question 10 – Sale proceeds

Most sales take place in local currency, or with a requirement to convert the price into local currency.

The sale proceeds generally bear interest at a low rate.

Exchange control or similar restrictions on payment out of sale proceeds are relatively rare.

Court or admiralty marshals' fees vary.[268]

[268]Note the court duty fee of 10% of the sale proceeds in Ireland.

Question 11 – Priorities generally

Priorities are variously determined by the lex fori, the lex causae or the lex registri.[269] A large number of jurisdictions apply the lex fori.

The claims (i.e. maritime liens) having priority over a mortgage vary from jurisdiction to jurisdiction.

The priority position of a mortgage vis-à-vis other claims is generally not affected by whether the mortgage is local or foreign to the lex fori.

It is rare for preferential treatment as regards priority to be given to local creditors.[270]

There is wide divergence in respect of procedure and timing for distribution of sale proceeds.

Rights of appeal are common.

Question 12 – Mortgagee's self-help remedies

Self-help remedies only tend to be available in common law jurisdictions, as opposed to civil law jurisdictions.

A security power of attorney in favour of a mortgagee is allowed in a few jurisdictions which otherwise do not generally allow self-help remedies.

There is variance on whether jurisdictions of enforcement allow self-help remedies which are alien to its law but are permitted by the law of the flag.

Question 13 – Insolvency processes

The UNCITRAL Model Law on Cross-Border Insolvency has been adopted in six of the twenty one countries which have responded so far.

The 'Recast' EU Insolvency Regulation applies in EU countries.

Otherwise, the position on recognition of foreign insolvency proceedings is diverse.

There is wide variation on whether mortgage enforcement is stayed where there are insolvency proceedings and whether mortgage enforcement is generally deferred to insolvency proceedings (or vice versa) – but a stay or suspension is common in one form or another.

Reflecting the diverse position on recognition of foreign insolvency proceeding generally (where the UNCITRAL Model Law or the EU

[269] And sometimes by a combination, as in Greece.
[270] Port authorities etc. which are owed money frequently have super-priority treatment however.

Insolvency Regulation do not apply) there is a correspondingly diverse position on giving effect to a foreign insolvency stay.

'Clawback' in the context of specified pre-insolvency transactions is common in one form or another.

Even where the UNCITRAL Model Law or the EU Insolvency Regulation do not apply a 'universalist' approach claiming insolvency jurisdiction over worldwide assets is not uncommon.

Question 14 – Leasing

In some jurisdictions leasing only appears to be common in relation to small vessels and/or is not common.[271]

The responses indicate approaches that vary widely from jurisdiction to jurisdiction as regards a formal approval or functional (re-characterisation) approach to leasing. There does not appear to be a clear division of approach depending on whether a jurisdiction is a civil law or a common law jurisdiction. There are, not surprisingly, indications from some responses that the treatment and approach depends on the terms of the lease and that there might be a distinction between a finance lease (or equivalent) and an operating "true" lease (or equivalent), with only the former being characterised as a security interest.

In Australia and New Zealand the relationship between the PPSA regime and the regime for registration of ship mortgages merits further investigation.

The responses so far indicate that it is common for rights and remedies of the lessor to be capable of being expanded by contract but some jurisdictions appear to adopt a more restricted approach.

Some jurisdictions prohibit exercise of self-help remedies but others permit it - but not surprisingly only if the lease contract so provides.

The majority of responses are to the effect that a leased vessel is an asset of the lessor. It would be expected that this would be the case in jurisdictions that adopt a formal approach.272

[271] No response has yet been received from China. Leasing by leasing companies affiliated with Chinese banks has become a very major source of finance in the last few years as noted in paragraph 2.3 above. Further, although not responding countries, also as referred to in paragraph 2.3 above it is known that the Marshall Islands and Liberia have amended their laws to enable a charter which might be vulnerable to re characterisation as a security interest to be registered as a deemed mortgage granted by the charterer in favour of the registered owner.
[272] But this is also the position in Australia and New Zealand, where a functional approach is taken by virtue of statute. The responses to this question were surprisingly unequivocal.

In a few jurisdictions a lessee (as bareboat charterer) is treated at least for some purposes as having a proprietary interest.

The responses from a few jurisdictions note the distinction between legal treatment and accounting treatment.

As regards the effect of lessee insolvency on the rights and remedies of the lessor, the majority of responses are consistent with the lessor having rights and remedies of an owner. This is to be expected in jurisdictions which adopt a formal approach and where the vessel is an asset of the lessor. Some jurisdictions give some optionality to the lessee (or its bankruptcy official) to terminate or continue the lease. Many of the responses on whether the answer is affected by the type of lease are not explicit.

The responses from a number of jurisdictions are to the effect that a lessor, being owner of the vessel, cannot arrest its own asset. Other jurisdictions indicate no conceptual issue about a lessor arresting its own vessel.[273]

A number of jurisdictions indicate that in one way or another a lessor takes subject to maritime liens/claims - on the basis that the lessor is the owner of the vessel rather than a party with a claim against the owner of the vessel.

On whether there is generally a wish to promote leasing the responses were negative from ten countries, lukewarm from two countries and positive from four countries.

Question 15 – Reservation of title

The position is diverse amongst jurisdictions.

Generally there are no special registration regimes for registration of title arrangements.[274]

Question 16 – Insurance proceeds

Most but not all jurisdictions give a mortgagee an interest in insurance proceeds by operation of law.

Some tentative conclusions

What picture emerges, and what conclusions can be drawn, from the responses so far to the questionnaire? It is necessary to bear in mind that a number of responses are so far lacking; also, the nature of the questions

[273] The response from Croatia refers to a lessor having a right to arrest, and to join in arrest by third parties, provided it has a maritime claim - but without elaborating what a maritime claim is in this context. The response from Ireland is similar.
[274] But the position already noted in the Marshall Islands and Liberia on registration of charters is relevant in this context.

and that they have been addressed to NMLAs. The questions are deliberately neutral in tone and address issues of law. The questionnaire is not a wide ranging survey of industry participants. Against this background some points are tentatively made as follows.

The findings are generally what one might expect, with few surprises. The picture which emerges is diverse and disjointed but not dysfunctional. Most jurisdictions recognise and give effect to ship mortgages by one means or another. In particular, foreign ship mortgages are widely recognised.[275] However, by its nature the questionnaire does not reveal the extent to which practical difficulties or delays may be encountered.

To the extent that the responses so far indicate shortcomings it seems that these are not essentially issues of international recognition of rights as between different jurisdiction but, rather, the effects of domestic law or procedure.

It is not within the International Working Group's terms of reference expressly to consider whether there should be a Shipping Protocol to the Cape Town Convention. However, in view of the material which has been published on this issue in the last few years[276] it seems appropriate to make some observations.

There is as yet no sign of pressure from financiers to develop a Shipping Protocol. This contrasts with the strong aviation industry pressure (from both manufacturers and financiers) which led to the development of the Cape Town Convention and the Aircraft Protocol.

To our knowledge no interest either has been shown in the subject matter by any of the major shipping organisations, including ICS, BIMCO, FONASBA, or the Institute of Chartered Shipbrokers.

The shipping and ship finance industries have long been accustomed to ship registration performing a dual function: registration for operational and flagging purposes; and registration for property and mortgaging purposes. This duality of purpose is reflected in most jurisdictions. The position with aircraft was less well established as regards property and mortgaging, leading to the perceived need for Cape Town and the Aircraft Protocol.[277]

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[275] As already noted the concern caused by the *OSX3* case in Brazil has subsided after the two lower court decisions which did not recognise a Liberian mortgage were overruled by the Superior Court of Justice.
[276] See paragraph 2.5 above.
[277] The unsatisfactory treatment of property rights in aircraft under English conflict of laws rules is illustrated by the 'Blue Sky' litigation: *Blue Sky One Ltd v Mahan Air* [2009] EWHC 3314 (Com Ct); [2010] EWHC 631 (Com Ct).

The dual purpose of ship registrations is however not set in stone. The practice of bareboat registration separates the operational and flagging functions from the property and mortgaging functions.[278] A Shipping Protocol to Cape Town would add another regime dealing exclusively with a new type of international interest. It would co-exist alongside the existing ship registers in the same way that the Cape Town regime for aircraft co-exists alongside domestic aircraft registers.[279]

Developing a Shipping Protocol for Cape Town would be a major and time-consuming undertaking.[280] In order to stand any chance of success it would need to side-step any attempt to create conformity on treatment of maritime liens, i.e. the issue which has been the stumbling block to the success of the Maritime Liens and Mortgages Conventions. This alone is likely to raise numerous questions given the extent of important privileges enjoyed by non-consensual right holders.

One potential advantage would be to remove the 'bankability' issue around some registers and some enforcement jurisdictions. The ability to take a Cape Town international interest might be attractive to financiers of a ship registered on a flag which does not give satisfactory remedies to a mortgagee and/or which is operating in an unfavourable enforcement jurisdiction.[281] This is something about which industry views will need to be canvassed.

The recent and rapid growth in the financing of ships by leasing from Chinese leasing companies and anecdotal evidence of an increase in other sale and leaseback transactions introduce an important dimension to the debate which should be factored into the continuing process.

It is suggested that the next steps would be for the Executive Council to approve the following:

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[278] The position in Australia should also be noted. Ship mortgages are registered in the Personal Property Securities Register rather than the ship register.

[279] It is common for aircraft financiers to take both a Cape Town international interest and a mortgage in the applicable domestic aircraft register. The relationship between a mortgage registered on a conventional ship register and a Cape Town interest would need to be carefully addressed.

[280] It has been suggested that the task might be too great and that a more manageable and fruitful task would be to develop Cape Town Protocols for containers or for offshore oil and gas assets which are not typical 'ships'. It is understood that the fourth Protocol on the Mining, Agricultural and Construction (MAC) Equipment that UNIDRIOT is now working on diverges from the Aircraft Protocols to a greater extent than either the Protocols on Space Assets and Railway Rolling Stock. Thus a Shipping Protocol would need to be drafted to reflect the specific nature of the complex shipping industry. This will increase the time and cost necessary for drafting.

[281] The major 'open' ship registers provide bankable mortgages so might see this potential benefit of a Shipping Protocol as a commercial threat.

To complete the current survey by seeking responses from key jurisdictions which have not yet responded; and

After that, through the NMLAs, take soundings from industry sources to ascertain whether or not there is any dissatisfaction at all with the status quo or whether, if there is such dissatisfaction, the extent of it.

With the responses of the questionnaires in hand, to open the matter up to a wider group for further discussion.

This document was prepared for your consideration by the International Working Group on Ship Finance Security Practices.

IWG SHIP FINANCING SECURITY PRACTICES: MINUTES OF THE SUB-COMMITTEE MEETING

Thursday 8th November 2018, 9 – 11 am
Reed Smith, Broadgate Tower, 20 Primrose Str. London.

1. Members of the IWG:

Present:	Ann Fenech – Chair (Malta)
	David Osborne – Rapporteur (England)
	Camila Mendez Vianna Cardoso (Brazil)
	Andrea Berlingieri (Italy)
	Armstrong Chen (China)
	Haco van der Houven van Oordt (Netherlands)
Excused:	Allen Black (USA)
	Stefan Rindfleisch (Germany)
	Andrew Tetley (France)
	Souichiro Kozuka (Japan)

2. Attendees:

Ann Fenech asked all attendees to leave a visiting card so that the IWG would have details of attendees for the purposes of keeping them informed. Most left a visiting card, however it is likely that a number did not and thus remain unrecorded for that reason:

Argentina:	Nelida Beatriz Angelotti
Belgium:	Benoit Goemans
	Vincent Fransen
Brazil:	Luis Felipe Galante
	Marcelo Frazao
	Larissa Toledo
Canada:	Marc Isaacs
	William Sharpe

China:	Chu Beiping
	Yu Shihui
	Lijun (Liz) Zhao
England:	Charles Buss (WFW)
	Elaine Ashplant (WFW)
	Philip Chope (WFW)
France:	Arthur Gibson
Germany:	Rolf-Jurgen Hermes
Greece:	Deucalion Rediadis
	Yiannis Timagenis
	Maria-Angeliki P. Vlachou
Hong Kong:	Liang Zhao
India:	Shardul Thacker
Italy:	Massimiliano Musi
	Dardani jnr
	Marco Manzone
	Lorenzo Fabro
	Filippo Cassola
	Giuseppe Duca
	Corrado Bregante
Japan:	Mitsuhiro Toda
Malta:	Suzanne Shaw
	Stefan Piazza
	Adrian Attard
	Martina Farrugia
Netherlands:	Robert Hoepel
	Van Hoek
	Harmen Hoek
Nigeria:	Damilola Osinuga

Romania:	Adrian Cristea
	Ciprian Cristea
	Augustin Zabrautanu
	Carmen Zabrautanu
	Andrei Murineanu
Spain:	Diego de San Simon
Sweden:	Paula Backden
	Malin Hogberg
Turkey:	Emine Vazicioglu
	Sertac Sayhan
	Cansu Yildirim
Ukraine:	Evgeniy Sukacev
United States:	Frank Nolan
	David J. Farrell Jnr

3. Proceedings:

Ann Fenech thanked all those present for attending in such large numbers. No less than 21 jurisdictions were represented and at least 57 people attended. It was standing room only in the room made available by Reed Smith for the meeting. She briefly explained the origins of this project and explained the differences between the International Working Group and its members and the International sub committee. She went through the Discussion Paper which had been made available well in advance of the meeting and which is being attached hereto. She reminded the participants that the entire object of the exercise was to hear the views of as many national maritime law associations as possible. She explained that it was now important to hear the views of those present on whether they were aware of dissatisfaction expressed by financiers around ship mortgages under current arrangements and generally what they thought about a possible Protocol to the Cape Town Convention dedicated to shipping.

David Osborne developed on the above theme, explaining further the ideas behind the questionnaire, giving some insight into the discussion which had taken place at the Cape Town Academic Symposium at Oxford in 2016 and giving further background on the current developments in ship finance, particularly the growth of lease finance. He also noted that responses to the questionnaire from India, Japan and the United States

had arrived after the Discussion Paper had been prepared (and that the response from China was imminent).

The following countries made the following points:

China

Armstrong Chen explained how the Chinese leasing business has been developing substantially. He commented on the fact that there was not much if anything at all by way of international legislative support for the lessors in financial leasing structures. He further added that he and others were interested to see what CMI could contribute to global legislation in this field, and how this in turn might address the traditional reluctance of Chinese leasing companies to pursue business in differing jurisdictions.

Prof. Chu Beiping advised on the recent updates related to Maritime Law in China and on the New Chinese maritime code.

Malta

Suzanne Shaw stated that as a jurisdiction which came into contact with a cross section of financiers from all over the world registering mortgages against vessels, experience showed that the mortgage system worked well, that mortgagees were by and large satisfied by the manner in which their security rights were protected and thus Malta did not see any need for a protocol to the Cape Town Convention related to shipping. She added however that Malta would like to make the point that there was no international instrument which sought to deal with the rights of lessors in leasing structures and was advocating that research should be undertaken with lessors to see if there was appetite to pursue an international instrument which would deal with leasing. She concluded by saying that, such an instrument would be totally separate and distinct from Cape Town.

The Netherlands

Robert Hoeple stated that there was no strong opinion in favour of such a shipping protocol given that generally speaking the existing system worked well.

Haco van der Houven van Oordt expressed his personal view that his main concern about a shipping protocol was that it added a layer of confusion in an area which should strive to make things clearer and not more complex.

He explained how one of the main stumbling blocks was most certainly the fact that the maritime law of most jurisdictions provided protection through non consensual liens to numerous creditors including crew, harbour authorities and suppliers of provisions. He noted that whilst

article 39 and 40 provided for states to state on signing that they had such non consensual rights which pre ranked, and came before mortgagees, contrary to Cape Town, he questioned what was going to happen when most of the jurisdictions made such a reservation.

Brazil

Camila Mendes Vianna Cardozo explained that whilst issues of non consensual rights certainly gave rise to practical problems she explained the huge frustration encountered by financiers when their mortgages were not recognised as what occurred with the FPSO *OSX 3* case. She added that that matter was appropriately resolved, however it showed that more had to be done to develop a clear legal framework in respect of national maritime law and ensure consistent application by a suitably experienced judiciary. At the same time she acknowledged that there did exist problems on the ground relating to non consensual rights of creditors particularly crew.

Nigeria

Damilola Osinuga, also from the World Maritime University, felt that there was no need for a shipping protocol to the Cape Town Convention. He explained how in Nigeria, whilst enforcement may take some time, he added that the Judges making up the bench in Nigeria were not specialised Admiralty judges and it had taken them already some time to get accustomed to the special maritime rules regarding liens and priorities and he felt it would be rather problematic to get these judges to accept and adjust to a totally new regime. Furthermore he felt that any system which would appear to be interfering with traditionally accepted priority rights such as those reserved for crew would be problematic.

Italy

Andrea Berlingieri advised that the Italian Maritime Law Association had not yet taken a formal position on the matter. He advised that given the recession since 2008, the Italian ship finance sector had suffered however what remains works relatively well. Banks are used to granting loans which are secured through traditional mortgages. He added that the relationship between the entry of the mortgages in traditional registries and in the central register could be problematic especially when it came to the traditional maritime creditors who have historically always been protected such as crew. He cautioned that before any suggestion could be made a proper analysis of how such a protocol would effectively interfere with the traditional maritime rights had to be undertaken.

Romania

Adrian Cristea expressed the view that having an international convention on the international recognition of judicial sales would be of great benefit to the maritime sector and international trade generally and would give financiers greater peace of mind. Separately and when asked specifically on ship finance security practices and Cape Town, he added that in his view a protocol on shipping subject to further research and study, would strengthen the protections generally sought by the financier.

Belgium

Benoit Goemens stated that he did not have an official position of the Belgian Maritime Law Association and was therefore speaking from a personal perspective.

He was of the view that rather than focus on a shipping protocol, there was scope for a protocol to cover containers – totally separately from ships. He was of the view that the stumbling blocks to implementing a protocol in respect of ships would not arise in respect of containers. He highlighted the potential utility of a protocol in protecting security rights in containers by way of two examples.

First, he referred to recent prevalence of bankruptcy of large operators. Drawing on the recent Hanjin bankruptcy, he noted there were 950,000 containers in use in over 900 locations leased to Hanjin by the owners of the containers. Leasing companies of these containers were still struggling, or finding it impossible, to enforce their security and recover the containers. One example of difficulties faced was the impounding of such containers by terminals, which would then demand payment of "release monies" as a pre-requisite to recovery. Such "release monies" could total most or all of the intrinsic value of the containers.

Secondly, he referenced frequent cases of fraud, whereby "investment companies" would raise funds from innocent investors by claiming ownership of containers which were in fact owned by non-related companies or, indeed, entirely fictional.

Following such examples, he advocated the protection of such container owners and 3rd parties through a similar international instrument such as a protocol to Cape Town which would, inter alia, provide a central registry of ownership. He added that he felt that Cape Town was ideal for containers.

Greece

Deucalion Rediadis advised that answering the Questionnaire had enabled them to focus very clearly on the subject. He stated that Greece was a country of ship owners and of course there was a fair amount of finance. He added that from his personal opinion, it appeared highly unlikely that there would be any appetite for such a protocol. This was due to a number of reasons. First because banks had other issues to worry about right now related to their very survival and secondly because there was no discussion related to any need to have finance securities in the maritime sector regulated in any other way other than in the traditional way.

He added however that thanks to the setting up of this International Working Group to discuss this very subject of ship finance security practices, it has succeeded in bringing together two diverse yet related and interdependent sectors of the same industry being the ship finance lawyers who would be engaged in advising clients at the beginning of any sale and purchase transaction, and the marine litigation lawyers who would get involved when owners default and when the financiers need to have their rights protected and enforced.

He was of the view that even if it was decided that there was no scope for a protocol, the existence of this IWG should be maintained as a forum and platform for these two important sectors of the maritime industry to discuss issues which related to this important sector.

The United States of America

Frank Nolan, President of the USMLA, stated that in his view, there was no need for a shipping protocol to the Cape Town Convention. He stated that most of the leading shipping registries in the world had a very efficient infrastructure related to mortgages and their enforcement and provided adequate and satisfactory remedies.

He added that leases did have to be catered for by a new regime and mentioned that there existed provisions on leasing in Liberian and Marshall Islands ship registration law (which he had been instrumental in drafting) and which financiers such as Chinese leasing companies were already starting to make use of.

He added that the situation in the maritime sector is very different from say aviation. He stressed that in aviation there had been a legal vacuum which needed to be plugged due to imperfect mechanisms for perfecting security across differing jurisdictions. However there is no such vacuum in shipping, where there are effective and practical provisions for registration and perfection of security in national registries, which are well-understood by the relevant parties involved therefore he saw no point whatsoever in such a protocol.

Speaking again later, Frank Nolan, fully supported the idea of having a protocol dedicated and related solely to containers. He agreed that there was a vacuum at an international instrument level relating to security rights and interests in containers and it was a good idea to think about it.

India

Shardul Thacker gave a very clear exposition of the position in India.

He addressed the fact that there was no doubt in his mind how the greatest challenge in Cape Town for ships was indeed the rights which Indian Law gave to other creditors, first and foremost crew. He acknowledged that this was not just an Indian issue, but an issue likely to effect most jurisdictions. He therefore questioned how things would pan out if most jurisdictions exercised the rights given by article 39 and 40 of the Cape Town convention, effectively nullifying the primary aim of Cape Town which was to give the internationally registered Cape Town interest priority rights over all creditors. He asked what would happen if different jurisdictions therefore applied their own order of ranking which would differ one from the other and certainly differ from Cape Town. That would render a Cape Town protocol on shipping irrelevant. He added that India had a very sophisticated and highly developed general body of maritime law similar to that of England which offered protection to a number of other creditors.

He further explained how the Indian flag was used by only a handful of Indian owners and how Indian flagged vessels only carried around 4% of the trade from and to India. He added how Indian law therefore recognises mortgages entered against foreign registered vessels and how according to Indian law, the mortgagee would get his money after the crew get paid, and that cannot be disturbed by any other law or instrument. India is essentially a nation of sea farers.

He concluded by saying that given that there is little ship financing originating in India and given that, the political priority was the protection of seafarers and, there would be no appetite whatsoever for a protocol on shipping. It was thus most unlikely that an Indian Government would support such a protocol.

Canada

William Sharpe stated that the Canadian Admiralty courts enforce both local as well as foreign mortgages under a similar framework to that of the UK. He stated that it would be of benefit if further work is done in the area of insolvency reorganisation, however he saw that as a separate and distinct matter to a Cape Town protocol on shipping. He added that ship financing generally was underdeveloped in Canada and therefore it was felt that there would be no important financial institutions to speak of who would register any interest in, or provide impetus to, such a project.

Sweden

Paula Blacked advised that the Swedish MLA was not aware of any interest whatsoever shown by financial institutions in Sweden in such a protocol. She advised that the subject was not discussed at all which indicated that the generally applied current system was not being debated or questioned, whether by financiers or operators.

Turkey

Sertac Seyhan explained that Cape Town was not known at all in Turkey. As far as the rights of the mortgagee were concerned these are quite well protected in Turkey especially since the amendments to the Maritime Code. Prior to the amendments there were circa 15 other maritime creditors which ranked prior to the mortgagee. Today following the amendments these have been reduced to 6. He advised that banks are now placed in position number 7 in the order of priorities which is not a bad position. Of course there remains the danger at times that if a vessel is sold the mortgagee may risk getting nothing. Therefore speaking theoretically, the financier would stand to gain by Cape Town, but the reality is that no Turkish government would agree to remove the rights currently enjoyed by other maritime creditors. Any unsettling of generally developed rights in Admiralty would be a red line. Maritime law contains well developed norms for an entire body of maritime creditors including financiers - there are numerous interests which cannot but be taken into account.

Croatia

Representatives of Croatia were not present during the meeting however Gordon Stankovic, President of the Croatian Maritime Law Association sent the views of the Croatian Maritime Law Association in writing.

“We have considered the brilliantly written discussion paper on Ship Finance Security Practices and our views are that:

We at the Croatian MLA do not see a “compelling need” (if we may use the IMO language so close to our hearts) of developing a shipping

protocol to the Cape Town Convention. Moreover, we think that Croatia would probably be extremely reluctant to let go of the traditional dual function of its ship register. Also, introducing another type of interest ("the Cape Town Interest") in addition to the registered mortgages and (unregistered) maritime liens would in our opinion increase the complexity of the whole matter.

Having said the above, the Croatian MLA supports the proposals set out in caption 4.12 of the Discussion Paper."

David Osborne

As rapporteur of the group, David Osborne made a number of interventions at various stages of the discussion as follows:

1. He stated that whilst there was a degree of nervousness related to change in this sector this did not and does not exist in other areas. He explained how the major difference was that Cape Town was originally driven by the aviation industry and its financiers, particularly the manufacturers of aircraft and US Eximbank. That drive for reform was not present in shipping or had not yet manifested itself.

2. He agreed that the "legal vacuum" as Frank Nolan put it in relation to aircraft which had been a driving factor behind Cape Town indeed did not have a direct equivalent in the case of ships. Ship registries traditionally address proprietary issues alongside regulatory issues to a greater extent than aircraft registers.

3. He noted that in any ship mortgage enforcement the jurisdiction of enforcement, ie where the ship arrested, is crucial to the amount and speed of recovery by the mortgagee. A financier might be able to take steps to enforce in a favourable jurisdiction but this would often not be the case, with potentially disastrous consequences. Any Cape Town protocol for ships would most likely not be a panacea for local procedural difficulties and delays.

4. He stressed that the ship finance scenario today was facing a number of changes, principle among which were the various ship leasing structures, especially those coming out of China. Cape Town addresses leasing specifically.

5. He was of the view that it would be worth looking at the ways in which leases could be addressed from an insolvency perspective (noting the Aircraft Protocol in this context). Generally, any

review of ship security interests should take full account of insolvency regimes, in particular the UNCITRAL Model Law on Cross Border Insolvency and the Recast EU Insolvency Regulation.

6. He stated that in his anecdotal experience, post the 2008 financial crisis, resort to the traditional method of ship mortgage enforcement has been comparatively rare when taking account of the overall scale of distressed shipping loans.

7. He underlined how the Cape Town Convention provides for a number of self help remedies irrespective of any applicable law in the relevant jurisdiction which could potentially be an advantage of a shipping protocol.

8. He was of the view that a shipping protocol could have the effect of making registries in certain countries more acceptable to financiers by providing financiers with the ability to rely on a Cape Town international interest rather than an inadequate domestic ship mortgage.

9. In response to the concerns expressed regarding one of the main challenges, which was how to deal with the regimes in most countries which grant non-consensual priority rights to different categories of traditional maritime creditors, he underlined the possibility of Articles 39 and 40 of Cape Town being deployed to preserve the priority status of applicable non-consensual rights.

10. He explained that he had already floated the idea of how containers (more easily and less controversially than ships) lent themselves to a Cape Town protocol at the Cape Town meeting in Oxford in September 2016

11. In response to the view that there may be parts of Cape Town which could work for shipping which however did not justify a protocol on shipping but perhaps instead a separate instrument, he reminded the meeting that each and every protocol (on aviation, space assets, rolling stock, and mining and agricultural equipment) was or would be sector specific and different, which could be the same for shipping.

Ann Fenech

As Chair of the group, Ann Fenech, also made a number of interventions at various stages of the discussion.

1. She underlined the importance of maintaining a sense of objectivity throughout the entire discussion paper drawing attention to the fact it had referred to a number of learned articles which held different views regarding the subject matter.

2. She explained that the Maltese experience possibly having much do with the fact that Malta is bang in the middle of one of the busiest shipping lanes in the world saw its fair share of traditional mortgage enforcement in all the post 2008 bankruptcies and insolvencies with a record number of judicial sales by auction or court approved private sales during the past 5 years meaning that financiers were still ultimately seeking traditional enforcement measures which were very efficient.

3. Whilst acknowledging that one of the tenets of the Cape Town Convention was indeed the self help remedies she raised the point that in terms of the same article 8 of the Convention, these self help remedies only existed: "to the extent that the chargor has at any time so agreed." Thus these self help remedies only existed in so far as the relevant documents actually granted contractually such self help remedies to the chargee.

4. She observed that if one put the general idea of whether it was a good thing or a bad thing to have a shipping protocol to one side and if one were to look at the Convention line by line, it was of concern to note that there were a number of matters which she feared may create more problems than solve. One such example is the constant reference to "the court" as in for instance Article 9 and the definition of same leading to the unsatisfactory situation where different contracting states would refer the matter to a different court. This in her view would be a major stumbling block and lead to a great deal of uncertainty.

5. She agreed that whilst Articles 39 and 40 gave contracting states the ability to opt out of the absolute priority ranking to the mortgagee, this very fact would give rise to much uncertainty if each country would be entitled (as they are) to apply its own ranking and priority. It appears that this would defeat the object of the exercise.

6. She was of the view that whilst each protocol can be designed to suit the subject matter she reminded the meeting that there was a limit to how different to the actual convention the protocol could be, referring to Prof. Francesco Berlingieri's article in which he had stated: "***Nevertheless what is described by Mr. Stanford as "core rules" must be substantially preserved otherwise there would be no "core" at all and each protocol would become an independent convention almost unrelated to the other protocols. If this were the ultimate result the very purpose of this exercise would obviously be defeated."***

4. Conclusions.

The meeting lasted from 9 am to 11 am. In conclusion Ann Fenech thanked all those present for their interest and active participation in the discussion which was vital to enable the IWG to decide on the next steps that should be taken.

She advised that detailed minutes of the meeting will be prepared and presented to the Executive Council. Furthermore the IWG will keep everyone present and everyone who had participated in the International Sub-Committee fully informed of further work going forward.

She concluded by saying that the views expressed during the meeting would be referred to Exco which would then need to consider these views vis – a – vis the next steps recommended at the end of the Discussion Paper.

SC ON MARINE INSURANCE:

DRAFT REPORT ON THE IMPACT OF THE UK INSURANCE ACT 2015 ON ENGLISH MARINE INSURANCE LAW AS CONTAINED IN THE MARINE INSURANCE ACT 1906 AND COMMON LAW, AND ITS POTENTIAL INFLUENCE ON OTHER COMMON LAW JURISDICTIONS.

Thursday 8 November 14:30-16:30
Thomas Cooper LLP, Ibex House

D. Rhidian Thomas

INTRODUCTION

The UK Insurance Act 2015 is the most significant reform yet of the codification by the Marine Insurance Act 1906.It applies more widely than to marine insurance alone, embracing all business and commercial insurances apart from consumer insurance. It is also not a comprehensive measure, applying only to a few problematic and sometimes controversial areas of insurance law.

The Act derives from an extensive period of reconsideration by the Law Commissions for England and Wales, and for Scotland. It makes amendments to the law relating to good faith, pre-contract duties of insureds, promissory warranties and certain other contractual terms. It clarifies the law relating to fraudulent claims and introduces a new implied contractual term relating to the payment of claims.

The 2015 Act applies to non-consumer contracts of insurance, including reinsurance contracts and P&I insurance: and also to contractual variations of such contracts.

With two exceptions, the 2015 Act sets out a code of default rules. The exceptions relate to "basis of contract" agreements and the implied obligation to settle claims within a reasonable time (both are examined later). Otherwise its provisions may be excluded or amended by the express agreement of parties. The eight UK member Clubs of the International Group of P & I Clubs have exercised this power widely and new standard clauses have become available in the London insurance market to facilitate both the adoption, with or without amendments, and contracting out of the new statutory provisions. These developments are commented upon later in this Report.

The extant law of English commercial and marine insurance is now to be found principally in the Marine Insurance Act 1906, the Insurance Act 2015 and the common law.

There are occasions when the Consumer Insurance (Disclosure and Representations) Act 2012, which as its title indicates applies to consumer insurance as defined in the Act, may be relevant. This will be the case where the assured is a natural person and the vessel is used wholly or mainly for leisure. Such may be the factual situation relating to the insurance of a luxury yacht.

The focus of this report is to examine the impact of the 2015 Act on marine insurance in the UK and on certain foreign jurisdictions. It is not proposed to subject the Act to a full and detailed technical analysis. No reference is made to case-law or secondary materials and legal and market jargon is also avoided, as also are footnotes.

GENERAL PRINCIPLE OF GOOD FAITH

The principle of good faith is codified in section 17 of the Marine Insurance Act 1906 in declaratory terms. Under the reforms of the 2015 Act the section survives save to the extent that the words underlined below are omitted –

> A contract of marine insurance is a contract based upon the utmost good faith. and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party

The principal impact of this reform is to uncouple the remedy of avoidance from the breach of the duty of good faith.

Under the preceding law the only remedy available was that set out in the original section 17, namely avoidance, which resulted in the contract of insurance being expunged and the parties returned to the status quo ante. This, over the years, was the source of much judicial concern and had a less than beneficial impact on the development and application of the principle of good faith.

This position is radically changed by the 2015 Act reform. Beyond the bare statement of principle, the amended section 17 no longer specifies any remedy for breach. The effect is (a) to prepare the way for the new law relating to the pre-contract duty of insureds (discussed later) and, more widely (b) it is likely to have a material influence on the future judicial development of the concept of post-contract good faith (a topic not dealt with by the 2015 Act).

Apart from the question of remedies, the definition of the principle of good faith remains unchanged. There continues to be no legislative

definition or guidance as to its meaning. It remains an evolving concept developed incrementally by the judiciary.

Also, it is clear that the duty of good faith is owed by both parties to the contract of insurance, the insurer and insured, notwithstanding that this is not now made expressly clear by the reformulated section 17.

PRE—CONTRACT DUTY OF INSUREDS

Introduction

This aspect of good faith has been refashioned by the 2015 Act and is now described as "The Duty of Fair Presentation," the various elements of which are set out in substantial detail in Part 2 and Schedule 1 of the 2015 Act.

Section 3(1) provides-

> Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.

This provision makes it clear that the duty is owed by the insured only and arises pre-contract during the placement of the risk. The duty, therefore, terminates once the contract of insurance is entered into. On the London market, where the slip procedure is adopted, the contract is entered into once the underwriter scratches the slip. In the context of other procedures, there may exist uncertainty as to when precisely the contract of insurance is entered into. It will primarily, in all instances, be a question of fact.

The substance of the duty of fair presentation is very much in line with the former law, but it is set out in different language and in a different format, and in some regards in much greater detail. There are, however, some differences of detail and emphasis.

The most significant difference relates to what is "known by an insured" which has the effect of extending the duty of disclosure. The consequences of breach of the duty are made more flexible and proportionate. There has also been a significant change to the legal position of the placing broker, though this is considered not to have changed the duties and responsibilities of brokers.

Duty of fair presentation of the risk

The duty defined

The duty of fair presentation of the risk obliges the insured to –

(a) disclose every material circumstance which the insured knows or ought to know or, alternatively, which gives the insurer sufficient

information to put a prudent insurer on notice that it needs to make further enquires for the purpose of revealing those material circumstances, and

(b) make that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and

(c) ensure that every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

The duty as stated is identifiable with the preceding law, but there are differences. The duty of disclosure in paras (a) and (b) is set out in much greater detail than in the former law and also gives clear recognition to aspects of the common law that were in the process of evolving. To this extent the new formulation introduces momentum and certainty to the law. The duty of disclosure is also probably wider because of the way the knowledge of insureds is defined (considered later).

Para (c) addresses the duty with regard to representations made by an insured.

Observations on the duty of disclosure

With regard to disclosure the duty is discharged even if there has been a failure to disclose all material circumstances as required under the first part of para (a), provided sufficient material circumstances have been disclosed to put a prudent insurer on notice that by making further enquires such further material circumstances may be revealed. This is the effect of the second part of para (a) and hints at "waiver". An insurer who fails to make the further enquiries impliedly waives the necessity to communicate to it the further material circumstances that would have been revealed had those enquires been made.

The qualification in the second part of para (a) also makes it clear that an insurer during the pre-contract stage bears a degree of personal responsibility to take steps to ascertain material circumstances. The obligation is no longer entirely on the shoulders of the insured, with the insurer entitled to sit back and remain uninvolved. In appropriate circumstances the insurer is required to take the initiative, seek out material information, with failure to do so prejudicial to his interests.

The duty of disclosure also incorporates a procedural obligation which is set out in para (b). The disclosure must be made in a manner which is reasonable clear and accessible to a prudent insurer. It follows that an insured or broker who buries a material circumstance in a large bundle of documents and files presented to an insurer in the hope that it will not be discovered will not be considered to have made a fair presentation of the

risk. The insured and his broker have a positive obligation to bring material circumstances to the attention of the insurer. Whether this requirement has been satisfied will in each case be a question of fact.

Duty not to make misrepresentions

The substance of the legal duty relating to material representations remains the same as under the preceding law.

The test of materiality

This is a question which has received considerable judicial attention over the years. The test under the 2015 Act remains the same as under the former law –

> A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.

The test is objective, assuming the stance of a prudent insurer, not a prudent insured. The essential criterion is that the circumstance or representation would influence the judgment of a prudent insurer in assessing the risk, in the context of the decision whether or not to accept the risk, and, if acceptance, on what terms and conditions. The test of materiality extends more broadly than circumstances and representations that affect the actual decision of the insurer. Something may be material, therefore, notwithstanding that it does not ultimately weigh directly upon the decision of the prudent insurer, in the sense of being considered as decisive. It is sufficient, in a broad sense, if the prudent insurer would wish to be aware of the circumstance. This has the effect of broadening the reach of the concept of materiality.

The question what is material in any particular circumstance gives rise to a question of fact with the burden of proof on the insurer.

The 2015 Act does not provide a detailed definition of what is material. It does, nevertheless, set out the following guidelines -

(a) special or unusual facts relating to the risk,
(b) any particular concerns which led the insured to seek insurance cover for the risk, and
(c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.

Knowledge of the insured

This is a crucial concept because the duty of fair presentation relates to every material circumstance "which the insured knows or ought to know". This begs the question what does the insured know and what, beyond that, ought he to know?

The position under the 2015 Act differs according to whether the insured is an individual or other entity, such as a company.

Insured as an individual

Where the insured is an individual, the insured knows what is known to him as an individual, and to the individual(s) who is/are responsible for the insured's insurance.

Insured as a corporate entity

Where the insured is a company, the insured knows what is known to the individual or individuals who are (a) part of the insured's senior management, or (b) responsible for the insured's insurance.

Senior management

An individual is part of the insured's senior management if the individual plays a significant role in the making of decisions about how the insured's activities are to be managed or organised.

The concept of "senior management" clearly includes a member of the board of directors. It does, however, have the capacity to extend more widely into higher tiers of management below board level, but the crucial question is how far.

Constituent elements of Knowledge

What is known by an individual?

In all circumstances where the knowledge of an individual is in issue the 2015 Act adopts a broad approach. Knowledge includes –

(a) *actual knowledge* – that which the individual actually knows;

(b) *blind-eye knowledge* - matters which the individual suspected did exist but of which he had no actual knowledge because he deliberately refrained from confirming or enquiring about them

and

(c) *knowledge that ought to be known to the insured* - that which should have been revealed by a reasonable research of information available to the insured, by making enquires or by any other means.

In this context "information" includes information held within the insured's organisation or by other persons, such as the insured's agent or a person for whom cover is provided by the contract of insurance.

Knowledge of individual(s) responsible for the insured's insurance

The insured also knows what is known to an individual who is responsible for the insured's insurance.

This alludes to any individual who participates on behalf of the insured in whatever capacity in the process of procuring the insured's insurance.

This will include but it is not confined to the placing broker.

A significant feature of the 2015 Act is that the placing broker has ceased to be independently recognised as was the case under the repealed section 19 of the Marine Insurance act 1906. There is no replication of a distinct duty of disclosure.

The broker is now included in the group of individuals "responsible for the insured's insurance" and as such the broker's knowledge as an "individual" is attributed to the insured.

Of course, if the broker fails to disclose to the insured material information known to him and this results in the insured being in breach of the duty of fair presentation, there is also a breach of duty under the brokerage contract, with the insured entitled to compensation for any adverse consequences arising from the breach to make fair presentation. In this regard the position of the placing broker is in reality the same as under the 1906 Act.

If an individual who is responsible for the insured's insurance perpetrates a fraud on the insured, knowledge of the fraud is not attributable to the insured.

The insured also is not taken to know confidential information about (i) an individual who is the insured's agent or an employee of the agent, and (ii) that information was obtained by the insured's agent or an employee of the agent through a business relationship with a person who is not connected with the contract of insurance.

The persons connected with the contract of insurance are (i) the insured and any persons to whom cover is provided by the contract, and (ii) if the contract reinsures risks covered by another contract, the persons who are connected with that other contract.

To this extent the change in the framing of the law relating to pre-contract disclosure has not worked any change to the legal relation between insured and broker.

What need not be disclosed by insureds

As was the case under the former law, the 2015 Act expressly identifies categories of circumstance that need not be disclosed.

In the absence of enquiry the insured need not disclose a circumstance if

(i) *it diminishes the risk*,

(ii) *the insurer knows it* – an insurer knows what is known by one or more individuals who participate on behalf of the insurer (whether as employee or agent or as employee of an agent or other capacity) in the decision whether to take the risk and, if so, on what terms.

Where an individual identified above perpetrates a fraud on the insurer, that knowledge is not attributed to the insurer.

(iii) *the insurer ought to know it* - an insurer ought to know something if (a) an employee or agent of the insurer knows it and ought reasonably to have passed on the relevant information to an individual mentioned in (ii) above or (b) the relevant information is held by the insurer and is readily available to an individual mentioned in (ii) above;

(iv) *the insurer is presumed to know it* – an insurer is presumed to know (a) things which are common knowledge, and (b) things which an insurer offering insurance of the class in questions to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business;

(v) *it is something as to which the insurer waives information* – it is open to an insurer to expressly or impliedly waive the obligation to communicate material circumstances.

The recognition in the former law that a circumstance need not be disclosed if it was covered by a warranty is not reproduced. This, probably, is because of the different approach taken to breach of warranty in the 2015 Act (considered later).

The above categories apply only in the absence of an enquiry by the insurer. If the insurer puts specific questions to the insured, the insured is required to provide answers which are in keeping with the duty of fair presentation.

Breach of the duty of fair presentation and the consequences of breach

Requirement of causation

Beyond the establishment of a factual breach of duty, a remedy is not available unless the breach can be shown to have been causal. There must first be established the fact of causation. The 2015 Act makes express reference to this precondition, whereas in the preceding law the requirement arose by implication.

The requirement of causation means that the breach must have had a direct impact on the way the insurer responded to the presentation of the risk. The insurer must show that "but for" the breach he (a) would not have entered into the contract of insurance at all, or (b) would have done so only on different terms, which might relate to policy conditions or premium rating.

The requirement of causation has the consequence that there could be a breach of the duty of fair presentation which has had no impact on the response of the insurer, and therefore leaves the insurer without any remedy. If, had there not been a breach of duty, the insurer would have underwritten the risk on the same terms and premium rating, there is no remedy.

The burden of proof is on the insurer to establish causation.

Qualifying breaches

When a causal breach is established, it is characterised under the 2015 Act as a "qualifying breach", indicating that the breach is remediable.

A "qualifying breach" may be either (a) deliberate or reckless or (b) neither.

The former characterisation applies if the insured knew that he was in breach of the duty of fair presentation or did not care whether or not he was in breach

The burden of proof is on the insurer to establish intentional or reckless conduct on the part of the insured.

As it will be seen the characterisation of a qualifying breach is relevant to the question of remedies.

Remedies for breach

Original contract of insurance

With regard to the original contract of insurance the remedies for breach vary according to the nature of the qualifying breach.

Where the breach is deliberate or reckless the insurer (a) may avoid the contract and refuse all claims, and (b) need not return any of the premiums paid.

Where the breach is otherwise, the remedies open to the insurer depend on the way the insurer would have responded to the presentation of the risk had there not been a qualifying breach, in other words had the insured properly performed the duty of fair presentation of the risk.

If the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid.

If the Insurer would have entered into the contract but on different terms (other than terms relating to the premium), the contract is to be treated as if entered into on those terms, if the insurer so requires

If the insurer would have entered into the contract, whether on the original or different terms, but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on the claim.

The reduction is based on the ratio that the premium actually charged bears to the higher premium that would have been charged expressed as a percentage.

The burden of proof is on the insurer to show how he would have responded but for the breach of duty by the insured. It will be of interest to observe how this burden of proof will be discharged in practice. Clearly a simple assertion on the part of the insurer will not necessarily be sufficient. The test presumably cannot be wholly subjective. It would appear that there must be some supporting evidence, for example, by reference to the nature of market practice or the evidence of other experienced and reputable underwriters in the same area of insurance or the previous practice of the particular insurer.

Contract varying the original contract

Where the breach relates to the variation of a contract of insurance, the possible remedies follow the same general pattern but are adjusted to respond to the changed situation. There are now two contracts in issue, the original contract of insurance and the contract purporting to effect the variation. It is also possible that the variation may be accompanied by an increase or decrease in the premium rating.

The remedial position is set out in Part 2 of Schedule 1 of the 2015 Act.

Where the breach is deliberate or reckless, the insurer may by notice to the insured treat the contract of insurance as terminated as from the time the variation was made and is not obliged to return the premiums paid.

Where the breach is otherwise and the total premium payable has been increased or remains the same, the remedies available to the insurer will again depend on how he would have responded had there not been a breach of duty on the part of the insured.

If the insurer would not have agreed the variation on any terms, the insurer may treat the contract as if the variation had not been made, but must return any extra premium paid.

If the insurer would have accepted the risk but on different terms (other than a term relating to the premium) the variation is to be treated as if those terms were included, if the insurer so requires.

If, in the same circumstances, the insurer would have increased the premium (in the case of unchanged premium) or increased it by more (in the case of an increased premium), the insurer may reduce proportionately the amount to be paid on a claim arising out of events after the variation. The amount payable is the proportion that the total premium actually charged bears to the total premium that the insurer would have charged expressed as a percentage.

Where, by contrast, the total premium was reduced as a result of the variation, the same broad approach is adopted to remedies but with adjustments made for proportional payments.

If the insurer would not have agreed to the variation on any terms, the insurer may treat the contract as if the variation had not been made and may reduce proportionately the amount paid on claims arising out of events occurring after the (purported) variation. The ratio being that which the premium actually charged bears to the original premium.

If the insurer would have agreed to the variation on different terms (other than a term relating to the premium) the variation is to be treated as if those terms were incorporated.

If, though prepared to accept the risk, the insurer would have increased the premium or not have reduced the premium or reduced it by less, the insurer may reduce proportionately the sum payable on claims arising out of events occurring after the variation. The percentage sum payable is determined by the ratio as between the total premium actually charged and the original premium, if the insurer would not have changed it, and the increased or reduced total premium (as the case may be) the insurer would have charged.

Comment

The formulation of the possible remedies may appear densely complex but there are explanations for this state of affairs.

As previously explained, in the event of a variation there come into existence two contracts, the original contract of insurance and the subsequent contract to vary the original contract. This, in turn, raises the question as to whether the remedy for breach of the duty of fair presentation in respect to the variation should be restricted to the variation or extend to the original contract of insurance.

When it comes to the assessment of premium rating, the remedy of reducing proportionately the amount to be paid on a claim is straightforward in the case of the original contract because it applies only when the insurer would have charged a higher premium. But when it comes to a variation the total premium payable may have been increased, remained the same or decreased, and, but for the breach of duty, the insurer may have responded in anyone of these possible ways to the rating of the premium. In this regard the legislation attempts to respond to the various possibilities. There is also the question whether any proportional reduction in the payment of claims should apply to all claims arising under the varied contract or only to claims arising from events occurring after the variation is agreed.

PROMISSORY WARRANTIES AND OTHER TERMS

Marine Insurance Act 1906

The English law on warranties has long courted controversy primarily because of the consequences of breach. The pre 2015 Act law is set out in the MIA 1906, sections 33- 41, much of which is unaffected by the new law.

A promissory warranty is defined in s. 33(1) as an undertaking of the assured –

> "…that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts".

The nature of the undertaking and consequences of breach were set out in s. 33(3) which may be summarised as follows –

(a) a warranty must be exactly complied with;
(b) it may be material to the risk or not;
(c) if not complied with, subject to policy terms, the insurer is discharged from liability from the date of the breach; but

(d) the insurer is responsible for liabilities incurred before the date of breach

The discharge from liability occurs automatically and is not dependent on the exercise of an election and/or giving notice (The Good Luck [1992] 1 A.C. 233).

Further, where there has been a breach, the assured cannot cure the breach by complying with the warranty before loss has occurred (s. 34(2)).

It is always possible for an insurer to waive a breach of warranty (s. 34(3)).

Apart from express warranties the 1906 Act recognises implied warranties in relation to the seaworthiness of ships (ss.39 and 40(2)) and legality (s.41).

Reforms introduced by the 2015 Act

The 2015 Act repeals ss. 33 (3) and 34 of the MIA 1906. Otherwise the provisions of the MIA 1906 remain in force, including the definition of a promissory warranty and the recognition of implied warranties.

The new provisions in the 2015 Act are set out in sections 10 and 11 and their effect may be presented as follows –

(a) Continuing warranties

These are warranties where the undertaking of the assured extends continuously over the period of the policy or a shorter period specified in the policy.

The consequence of breach of this category of warranty is that the liability of the insurer is suspended for the period of the breach. If the breach is remedied, from that moment the liability of the insurer is restored.

In the result the insurer is liable under the policy until the occurrence of a breach of warranty and thereafter liability is suspended until the breach is cured. Once cured the insurer is again on risk. Should the breach not be cured the liability of the insurer is suspended for the remainder of the policy period.

There is in this regard a technicality to be noted. With regard to the suspension of liability it is stated that the insurer is not liable for-

> "…any loss occurring, or attributable to something happening, after the warranty (express or implied) in the contract has been breached but before the breach has been remedied". (s.10(2)).

This provision makes it clear that when the source of loss occurs during the period an insured is in breach of warranty but the actual loss is

suffered after the breach of warranty has been remedied, the insurer is not liable.

There is less clarity about the position when the source of the loss occurs before the breach of warranty but the actual loss is suffered after the breach. Under section 10(4) the insurer appears to be liable, because the loss is attributable to something happening before the breach of warranty. Nonetheless, by section 10(2) the insurer appears not to be liable for any loss occurring after the breach of warranty and before there has been a remedy.

(b) One-off warranties

The rule of suspension of liability operates most comfortably with regard to continuing warranties. There is however a class of warranties where the undertaking of the assured is of a one-off nature, relating, for example, to something specific in point of time. They are, therefore, not continuing warranties and are defined in 2015 Act as warranties which require –

> "… that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case".

It is clear that the breach of such a warranty cannot logically be cured in the traditional manner and in response to this difficulty the 2015 Act formulates a specific concept of cure. The breach is deemed to be cured "if the risk to which the warranty relates becomes essentially the same as that originally contemplated by the parties".

This provision is probably best explained by examining an unexceptional example. An insurance policy on a ship contains a warranty "that a specified safety certificate of compliance will be presented to insurers within 14 days of the date of the insurance". The insurance is dated 1st January 2018. The insured fails to present the certificate within 14 days and consequently there is a breach of warranty with cover suspended. Nonetheless the insured presents the safety certificate on 1st February 2018. Logically the breach of the express warranty cannot be cured: there is no way the insured can correct the failure to present the certificate by the due date. Nonetheless, applying the concept in the 2015 Act the breach is cured on 1st February 2018, on which date the liability of the insurer is revived.

The essential nature of the risk that the insurers were accepting was the insurance of the particular ship in respect to which the specified safety certificate had been issued. When the insureds failed to produce the certificate within 14 days this ceased to be the case and the liability of the insurers was suspended. But on 1st February 2018 when the safety

certificate was presented the risk became precisely that which the insurers had accepted when agreeing to provide the insurance. The Act deems this to amount to curing the breach.

(c) Warranties/terms protecting against the occurrence of specific risks

This provision applies to what for convenience may be characterised as specific risk terms. It also applies to promissory warranties which fall within the characterisation.

A specific risk term may be express or implied. It is a term compliance with which would tend to reduce the risk of one or more of the following – (a) loss of a particular kind, (b) loss at a particular location, and (c) loss at a particular time.

In the event of loss the insurer cannot rely on the breach of a specific risk term/warranty to exclude, limit or discharge its liability if the insured shows that the "non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred".

The burden of proof is borne by the insured to show that the breach is not material in the above sense. That it has not even in the loosest sense increased the risk of loss that has actually occurred. If it is appropriate to view the relationship between the term broken and the loss suffered in terms of causation, it is probably a very weak causal test.

If the burden of proof is not discharged the insurer can rely on the breach to avoid liability.

It may again be best to illustrate how the new law will operate by the use of a simple example. An insurance of a ship includes the following term/warranty –

> "The vessel shall at all time carry on board the most up-to-date navigational charts".

During the period of the insurance a serious fire breaks out on board the vessel which causes extensive damage. The insurance covered the risk of fire.

It is also discovered that the insured owners were in breach of the term/warranty because the ship did not have on board the most up-to-date navigational charts.

Under the new law the insurers cannot rely on the breach of the term/warranty relating to navigational charts if the insured can show that the breach did not increase the risk of fire. The term/warranty relating to

navigational charts was incorporated in the insurance to ensure safe navigation of the vessel. It had no connection to the risk of fire. Subject to the insureds being able to discharge the burden of proof, the insurers would be precluded from relying on the breach of the navigational obligation as a defence..

This statutory provision draws a distinction between a specific risk term/warranty and "a term defining the risk as a whole". The latter alludes to the definition of the cover provided by an insurance contract, to be distinguished from a term/warranty aimed at managing a risk which falls within the cover provided by the contract of insurance.

BASIS OF CONTRACT AGREEMENTS

Introduction

A basis of agreement contract is an agreement by the parties that statements made when negotiating the insurance shall form part of the contract of insurance.

The agreement may be in the slip or proposal form, or in the contract or policy, and may be incorporated from another document.

In English law these agreements were valid and construed as invariably establishing warranties. In other words the effect of these clauses was to convert pre-contract representations into promissory warranties. It followed that if any false or incorrect statements made in the placement process, it would also amount to a breach of warranty with serious consequences for the insured.

The following is a simple illustration of such a term -

> "…this proposal and the statements made therein shall form the basis of the contract between me/us and the insurer".

There had long existed disquiet about the fairness of these agreements, which concern was shared by the judiciary.

Reform

By section 9 of the 2015 Act these clauses are rendered void, as also is any agreement which purports to circumvent the prohibition.

The principal policy reason for this repeal is based on considerations of fairness. The clauses are considered to give insurers an unconscionable advantage.

When the statutory wording is considered closely it is noticeable that the prohibition is that the "representation is not capable of being converted into a warranty by means of any provision of the…insurance contract…or

any other contract…whether by declaring the representation to form the basis of the contract or otherwise".

This suggests that the objection based on considerations of policy relates to the conversion of representations into warranties and not to the principle of a basis of contract agreement. Such an agreement may exist and it may succeed in incorporating terms into the insurance contract provided they are not promissory warranties.

Also, it remains possible for a representation made in the course of the placement of risk to be made the subject of a warranty, but this can only be achieved by an express warranty in the insurance contract.

Relevance to marine insurance

These clauses appear to be more relevant to P&I insurance than to other types of marine insurance. For example -

North P&I Rules 2017-18 -Rule 7(2) - 'Accuracy of information'

> All particulars and information given in the course of applying for insurance shall, if the entry of the relevant ship is accepted, be deemed to form part of the contract of insurance between the Member and the Association and it shall be a condition precedent of such insurance that all such particulars and information were true so far as within the Member's knowledge or could with reasonable diligence have been ascertained.

It is arguable that where the 2015 Act applies this clause is void. The words underlined (for the purpose of emphasis) would probably be construed in English law as indicating an intention that the particulars and information provided are to be regarded as promissory warranties.

FRAUDULENT CLAIMS

Common law

The definition of fraudulent claim and the associated law has developed under the English common law. For reasons influenced by considerations of policy rather than logic, a fraudulent claim is not viewed as a breach of the principle of good faith: it is analysed as beach of a distinct common law rule.

A claim is fraudulent if it is made in whole or part dishonestly or with reckless indifference whether it is true or false. A claim which is substantively honest but the indemnity claimed is exaggerated (but not *de minimis*) is a fraudulent claim.

A claim which is true but is advanced by dishonest means may also be a fraudulent claim. This category is generally described as "fraudulent

devices" or "collateral lies". Recently the Supreme Court has recognised a limitation to this approach in *The DC Merwestone* [2016] UKSC 45. Where the lie or dishonest act is irrelevant to the existence or amount of the insurer's liability the fraudulent device is not to be considered as rendering the claim fraudulent.

There was continuing uncertainty in the common law as to the effect of making a fraudulent claim on the contract of insurance. Beyond striking down the fraudulent claim in its entirety, or recovering a payment already made, there was debate if it also amounted to a breach of the insurance contract, and if so, the contractual remedies that followed. In particular, did the making of a fraudulent claim justify the insurer accepting it as a repudiatory breach and terminate the contract of insurance. In other words, in addition to rejecting the claim in its entirety could the insurer also terminate the cover.

Reform

The Insurance Act 2015, section 12, follows the common law definition of fraudulent claim and focuses wholly on the remedies available to insurers. In this way it usefully introduces clarity and certainty into the law.

The 2015 Act sets out the following remedies –

(a) the insurer is not liable to pay the claim,
(b) the insurer may recover from the insured any sums paid by the insurer to the insured in respect of the claim, and
(c) in addition, the insurer may by notice to the insured treat the contract as having been terminated with effect from the time of the fraudulent act, and need not return any premium paid under the contract.

It is to be noted that under para (c) the contract of insurance is terminated from the time of the "fraudulent act" and not the time notice to terminate is communicated to the insured. The former may be at a much earlier point in time than the latter and it may not always be straightforward to pinpoint.

Para (c) is of importance because it establishes an additional statutory legal right to terminate the contract. This has the effect that the insurer (a) may refuse all liability under the insurance in respect of a relevant event occurring after the time of the fraudulent act and (b) is not under any obligation to return any of the premiums paid under the contract.

The liability of the insurer is unaffected with regard to a relevant event occurring before the time of the fraudulent act.

A "relevant event" refers to whatever gives rise to the liability of the insurer under the insurance contract. This is essentially a question of contract e.g. the occurrence of loss, the making of a claim, or notice of a potential claim.

The Act also deals with fraudulent claims in the context of group insurance which relates to insurance provided for a person(s) who is not a party to the contract of insurance, identified as the covered person. In the event of a fraudulent claim by the covered person the insurer may exercise the rights under the 2015 Act as against that person as if there is a contract between the covered person and the insurer. But this does not affect the insurance cover provided to any other person.

DAMAGES FOR LATE PAYMENT OF CLAIMS

Introduction

Section 13A of the 2015 Act, incorporated in the legislation by the Enterprise Act 2016, for the first time introduces into English law an implied term relating to the settlement of claims. It provides in sub-section (1) --

> It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.

Concept of a reasonable time

This is a question of fact to be determined having regard to the all the facts and circumstances of individual cases.

The section sets out the following framework.

A reasonable time includes a reasonable time to investigate and assess the claim.

The relevant circumstances to be taken into account include –

> (a) the type of insurance
>
> (b) the size and complexity of the claim
>
> (c) the obligation to comply with any relevant statutory or regulatory rules or guidance, and
>
> (d) any factors outside the control of the insurer

If the insurer is justified in disputing the claim on the question of liability or quantum, the insurer does not act unreasonable merely by failing to pay the claim while the dispute is continuing.

But the conduct of the insurer in handling the claim may be relevant in determining whether or not the insurer has acted reasonably.

Remedies for breach

This question is not directly addressed by the section save that it is incidentally recognised that the possible remedies include damages.

Damages will doubtlessly be the standard remedy but questions may arise as to whether in appropriate circumstances other contractual remedies may be available, such as repudiation. This will depend, at least in part, on the way the implied term is characterised as a matter of contract law.

The contractual remedy for breach is in addition to any right to enforce payment of the sum due and any right to interest.

The existence of the implied term does not preclude the parties from agreeing that the settlement of claims shall be governed by the terms of an express agreement.

Comment

Although on the face of it this appears to be a straightforward provision, in its practical application it is likely to be troublesome and of limited assistance. It is highly fact based and operates within a protective framework that may be considered to assist insurers.

On the London market the desirability of prompt settlement of claims is also governed by market practice and regulation, and this may prove to be a more effective source of protection for insureds.

CONTRACTING OUT OF THE 2015 ACT

A significant aspect of the 2015 Act is that subject to two exceptions its provisions may be excluded or amended by agreement of the parties, thereby placing an insured in a disadvantageous position compared with the position that would have been occupied had the provisions of the 2015 Act applied. To this extent the legislative provisions may be regarded as default provisions.

The first mandatory provision relates to "basis of contract agreements", which are rendered void by the Act and any agreement of the parties to the contrary is void (considered previously).

The second relates to any attempt to avoid liability for deliberate or reckless breaches of the implied obligation to pay a claim within a reasonable period of time. Such an agreement is again void (considered previously).

An exclusion agreement is one that places the insured in a worse position in respects of any relevant provisions in the 2015 Act. Although the

principle of contracting out is accepted there are certain transparency provisions which have to be satisfied for the agreement to be valid.

To achieve exclusion by what are referred to generally as "disadvantageous terms" the parties must satisfy the following procedural pre-conditions -

(a) the insurer must have taken sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed

This requirement does not apply if the insured or his agent had actual knowledge of the disadvantageous term when the contract was entered into or the variation agreed.

(b) the disadvantageous term must be clear and unambiguous as to its effect.

It is to be noted that the emphasis is on the "effect" of the agreement and in this regard the term must be "clear and unambiguous". The precise demands of this requirement are uncertain and will probably be clarified over time by judicial pronouncements. Nonetheless, it is clear that the insured must to some extent be given knowledge of the consequences of agreeing to the exclusion, but the question is how much.

In determining whether the requirements in (a) and (b) have been met the characteristics of the insured as a group to which the insured belongs, and the circumstances of the transaction, are to be taken into account.

CONTRACTING OUT BY UK P & I CLUBS

The eight UK member Clubs of the IGP&IC, the Rules of which are governed by English Law, have contracted out of the provisions indicted below. The sub-titles indicate the rules excluded, described succinctly, and the brief commentary that follows explains the consequences of the exclusion:

(i) Abolition of legal remedy of avoidance for breach of good faith in contract of insurance

Consequently, the contract of insurance between Club and owner is one of good faith and in the event of a breach of the duty the Club is entitled to avoid the contract. The original position under section 17 of the MIA 1906 is retained.

(ii) Remedy for breach of the duty of fair presentation to be proportionate.

Consequently, in the event of any breach of the duty to make fair representation of the risk the Club retains the right to avoid the policy regardless of whether the breach is innocent, deliberate or reckless. Avoidance is retained as the sole remedy.

(iii) Remedy for breach of warranty to be suspensory.

Consequently, the Clubs continue to require all warranties to be strictly complied with and in the event of breach the Club is automatically discharged from liability from the date of the breach regardless of whether the breach is subsequently remedied.

(iv) Remedy for breach of a specific risk term or warranty and causal requirement.

Consequently, the Clubs require all contractual terms, including warranties, relating to the management of specific risks, to be strictly complied with. In the event of breach the Club's liability may be excluded, limited or discharged in accordance with Club Rules, notwithstanding that the breach of the term or warranty did not cause or increase the risk of the actual loss suffered.

(v) Remedy for fraudulent claims in group insurance

Consequently, in the event of a fraudulent claim by or on behalf of the Owner and/or any Group Affiliate the Club shall be entitled to terminate the contract in respect of the Owner and all insureds.

The Clubs have adopted the remaining provisions relating to fraudulent claims, including the right to terminate the contract of insurance by giving notice.

(vi) Implied term relating to payment of claims

Consequently, there does not exist an implied term that the Club will pay any sums due in respect of a claim within a reasonable period of time except where the breach is deliberate or reckless.

RESPONSE OF THE LONDON INSURANCE MARKET

The Lloyd's Market Association (LMA) and the International Underwriters Association (IUA) have cooperated in formulating a general response to the 2015 Act. In particular they have formulated two suites of standard terms for use in insurance and reinsurance contracts, the first of a general character and the second relating to damages for late payment of claims.

On the whole the response is not as cohesive and clearly directed as that of the UK P & I Clubs .They provide a choice whether to follow or depart

from the terms of the 2015 Act, or to adopt the terms together with selected amplification of their provisions. It appears that no market position has been adopted, the choice is left to individual underwriters and the standard clauses formulated are sufficiently diverse to facilitate the choice made.

The standard clauses relating to damages for late payment of claims variously provide for damages being limited to breaches which are deliberate or reckless; a general limitation, variously designed, on damages payable; what a reasonable time to investigate a claim may involve by way of action; and the obtaining of legal advice not to be a waiver of privilege.

As for reinsurance clauses they may variously provide for the reinsurer not to be liable for liabilities for late payment under the primary insurance, or to be liable only when the breach is deliberate or reckless. Provision may also be made for the reinsurer to be liable only when the breach by the reinsured was caused by the power of the reinsurer to control the settlement of claims under the primary insurance.

A FINAL COMMENT ON THE UK APPLICATION OF THE 2015 ACT

The 2015 Act is clearly a significant development in the evolution of English marine insurance law but it may not be of momentous importance. This is particularly the case if the focus is directed to the practical effect of the Act rather than its underlying theoretical policies analysed in the abstract.

Apart from the two mandatory provisions which have been noted, and which are of limited practical significance, the Act provides a code of default rules which apply in the absence of any specific agreement by the parties. They may consequently be excluded or varied by party agreement. It follows that on the matters covered by the 2015 Act the parties can establish their own contractual regime and thereby may even elect to continue to be governed by the relevant provisions in the 1906 Act.

This has been the policy of the eight UK members of the International Group of P & I Clubs. They have effectively contracted out of the significant provisions of the 2015 Act relating to the consequence of breach of the duty of good faith, the duty to make fair presentation, warranties and specific risk terms, retaining the default regime set out in the 1906 Act. They have also excluded the implied duty to settle claims within a reasonable period of time, save to the extent the implied term is mandatory.

The London Market has not developed a coordinated response with matters left to be determined by individual underwriters. The standard clauses which have been prepared and published by market organisations in response to the 2015 Act facilitate whatever may be the choice of individual underwriters or the agreement of the parties.

WIDER IMPACT OF THE 2015 ACT

Although this is potentially an enquiry without limitations, for practical reasons it has been restricted to jurisdictions within the common law tradition which have, to differing degrees, shown an inclination to follow or be influenced by legislative developments in English law[282]. These include -

Australia

A sub-committee of the Maritime Law Association of Australia and New Zealand (MLAANZ) has noted and considered the provisions in the UK Insurance Act 2015 and proposed that the Australian Marine Insurance Act 1909 be amended, suggesting several supporting reasons, including "maintaining legal harmony with the UK marine insurance law".

The sub-committee prepared a draft Bill proposing the enactment of a Marine Insurance Amendment Act 2016, the effect of which would have been to make amendments to the Marine Insurance Act 1909.

This proposal has not to-date been acted on and the indications are that there is no enthusiasm currently on the part of government for new legislation. The insurance industry also appears to be disinterested.

New Zealand

The UK Insurance Act 2015 and developments in Australian law have resulted in renewed consideration of the state of insurance law in New Zealand.

The Ministry of Business, Innovation and Employment has instigated a process to review a range of insurance topics including those covered by the UK legislation. This process closed on the 13 July 2018 but no report has yet been published.

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[282] I am grateful to the following who generously and very helpfully responded to enquires about the position in their respective jurisdictions, namely The Hon Justice S C Derrington (Australian Law Reform Commission), Pauline Davies, Partner, Fee Langstone, Auckland, New Zealand, Associate Professor Yeo Hwee Ying, National University of Singapore and Marc D Isaacs, Isaacs & Co, Toronto, Canada.

Singapore

In Singapore marine insurance is governed by the Marine Insurance Act 1999 which is in harmony with the UK Marine Insurance Act 1906.

The Singapore Academy of Law has recently convened the Law Reform Sub-Committee on Review of Insurance Law to evaluate the deficiencies of Singapore law in the light of the UK insurance law reforms. It has yet to report.

Malaysia

The Malaysian Financial Services Act 2013, Schedule 9, makes provisions relating to insurance which amend the Malaysian Insurance Act 1996.

These provisions are adapted from the UK Consumer Insurance (Disclosure and Representations) Act 2012 and what was then the prospective Insurance Act 2015.The new law does not follow UK law in strict detail, but are adaptations taking into account national policy and circumstances. However, some of the amendments take a fundamental different course – for example, the adoption of the "reasonable proposer" test in the context of the assured's pre-contract duty and do not adopt the approach of proportional remedies for breach of this duty.

It has to be observed that some of the amendments may have been introduced before the UK reforms had become familiar or fully digested.

Hong Kong

It does not appear that the UK reforms have elicited any response.

Canada

Canadian marine insurance law follows the MIA 1906 very closely and to date there is nothing to suggest that the UK reforms have stimulated any reassessment or call for reform.

IWG ON SHIP NOMENCLATURE NOTES OF MEETING

8TH November, 2018
Offices of Reed Smith

PRESENT:

Frank Nolan (President)

Edmund Sweetman (Rapporteur)

Bulent Sozer

Jens Mathiasen

Massimiliano Musi

1. There was a general discussion about the number of responses. It was agreed that there was a need to secure more input than the 13 responses to hand. There was also a discussion of the need to consider trimming down the questionnaire and provide a better set of instructions focussing on the main issues – for those NMLA's who had yet to reply.
2. There was some discussion of the purpose, or thrust of the project – what we hoped to achieve? The decision on this could help focus any future questionnaire. Should the purpose of the project:
    a. Focus on collecting as much information from as many as possible so as to have a catalogue of the variations in the different national jurisdictions.
    b. Or just confine the analysis to the main issues of conflict.
3. In Frank's view – the subject matter seems better suited to a comparative study than an area of diversity of laws / heterogenous regulation which could be addressed by an international convention. It being notable also in countries without a lot of maritime / shipping experience – one gets extremely varying results.
4. Massimiliano gave some detail on some of the work he and his group had done, explaining that they had produced a book

comprising a comparative study taking material from a seminar on ship nomenclature – and including input from the Norwegian, Chinese and Italian jurisdictions. The result of this was that many links / similarities between the jurisdictions were identified. He explained that special legislation might exist for certain types of vessels – in the case under discussion the pleasure navigation code – they had their own definition of pleasure units – which may be ship or not.

5. It was agreed that there was a problem relating to definitions in varying conventions.

6. Frank explained how the federal law worked in the United States of America. He explained that there was a uniform commercial code – uniform law in 52 states with very small variations however where there existed the possibility of having a commentary as a guide to interpretation. By analogy with the situation of the international conventions and the definition of ship, Frank suggests a commentary would be useful – less than a formal convention, mere guidelines as to implementation.

7. There was some debate as to whether to stay with the existing questionnaire – and simply bring pressure on the different member associations to reply or to re-work the same.

8. The idea of promoting replies was supported. Edmund suggested that we might identify those countries which had not replied and "divvy them up" between the members of so as to combine a personal approach to NMLA's and official urging to the NMLA's to reply. In order for all the work involved in doing a "comparative study" to be worthwhile, we required as many responses as possible.

9. Massimiliano remarked that he found the caselaw attached to the responses very interesting – and perhaps the questionnaire could be broadened to capture more caselaw…

10. A discussion arose on the interesting situation where differences might arise in the Working Group in respect of defining a ship as between the approach of different states – where there might be a majority view and a minority view as to what the guidelines might contain – if we have to make a recommendation on what is the better view, how we might do this, and our standing to do so.

11. China would have a particular interest in seeing the treatment of these issues by other states. The Chinese judge spoke about the revision of Chinese Maritime code – proposal of definition of ship – navigable units – sea and waters adjacent to the sea. Less than 20 tons excluded. It was explained that registered vessels have separate provisions. No registered mortgage on vessels less than 20 tons. Inspection regulations determine what type of vessel may be inspected. Smaller vessels are subject to the jurisdiction of local government. In China – lower limits of liability for internal waters vessels – they are proposing to harmonise the same.

12. A question arose, discussed by Shiu Shiu – as to whether offshore units can be registered as a ship or not. Frank - Offshore units – laws bent in US to allow definition as a ship so you can get a preferred mortgage. i.e. Marshall Islands – you can register a moveable offshore platform. However, if there is an accident in Norway – who don't recognise the platform as a ship – what happens in those circumstances? A barge in US law is a vessel – unless permanently attached to land (ship is used as a definition primarily for regulatory functions) – but may not be so in other jurisdictions.

13. In China – there is a requirement for propulsion – it is a prerequisite for characterisation as a ship – if not – it is a maritime structure.

14. Bulent?? There was a discussion of the remit of the IWG – one could feel that it was a hopeless task as regards one single international definition of a ship – impossible to define a ship for all contexts.

15. The idea being proposed – and this was in agreement with a suggestion of Franks – of coming up with a catalogue of definitions of ship – with comparative definitions of ships in different jurisdictions – it was suggested that this could be of real benefit to practitioners and legislators.

16. Frank stated that he felt that as long as there is a definition which exists in domestic law, the situation was less likely to problematic, the judge applies that – the problem where the lex fori applies – and there is no definition – and the vessel/structure is regarded as ordinary mobile property.

17. Further discussion as to how to define a ship (Bulent) Two criteria might be taken – a criteria which might serve as a common denominator – navigation and carriage. How to define navigation? What is carriage? Rather than navigating – "floatability" - in many cases it is not navigation which is concerned .- it is rather some other function while floating Tug is navigating, however not carriage.

18. It was felt that in respect of new types of maritime structure, need a new definition.

In conclusion it was felt that we should tidy up the questionnaire with a view to recirculating, and that personal approaches, as well as official imprecations from the CMI would be used to get a good response.

IWG LIABILITY ON WRONGFUL ARREST: TRANSCRIPT OF THE DEBATE

Friday 9th November 2018, 14.30-16.30
Thomas Miller & Co., 90 Fenchurch Street, London, EC3M 4ST

Aleka Sheppard

88 delegates in attendance.

The Agenda for the meeting and the questions set for this debate are also attached as a point of reference for the delegates and others who receive this report.

Executive Summary and Reflections

1. We had a very interactive 2-hour session.
2. Various representatives of NMLAs spoke (such as from Canada, USA, UK, Ireland, the Netherlands, France, Spain, Greece, Malta, Nigeria, Turkey, Ukraine, Japan, Hong Kong, China, and representatives of ICS, P & I Clubs, and cargo interests' insurers).
3. There was an illuminating and constructive debate among participants, who freely expressed their views as derived from their experience of practice in their own jurisdictions.
4. As it will be seen in the transcript, most of the participating lawyers and cargo insurers were concerned about any change of the law and were more or less happy with their national law regarding wrongful arrests.
5. It was said, that although many of them have had experience of 'so called wrongful arrests', actual wrongful arrest cases are rare and, in any event, there can be other remedies in place than a claim for general damages, which can be disproportionate. As to counter security or a cross undertaking, it was said that such a provision would deter the weaker claimants, such as crew members and others who are not protected by compulsory liability schemes, to have access to justice.

6. Many expressed the view that there is no real problem, first because wrongful arrests are rare, other than the occurrence of sharp practices to put pressure on the shipowner, and second because in most cases security is provided without much delay to the ship or even arrest. In the event of a failed claim there is a costs award.

7. However, P & I Clubs and the ICS (which represent owners) expressed the view that they are unhappy with the system because it is unsatisfactory and fragmented, and it will need to be looked at further.

8. Although the IWG project and the debate were welcomed and the participants would like to have more of such debates for the purpose of learning about the various national systems on arrest of ships, there was no appetite for change. The show of hands, however, was almost evenly balanced for and against change.

9. At the end of the debate, there was consensus that the CMI Project should continue to the next stage of a further questionnaire and further communication with the industry sectors.

10. However, I think that to attempt a reform of the system of arrest at an international level would not only be an almost impossible task, but it would also be prevented by national protectionism. On reflection, I do not think that any attempted uniformity would be achievable; (and even if it were, it might have the same fate as the 1999 Arrest Convention). Model law rules will only be serving the purpose of guidance.

11. The project, once the industry became aware of it by reason of the debate (and it was commended by the Court of Appeal in the Alkyon), has had the value of learning and it may provide a stimulus to law reformers of each national system to improve their respective laws on the subject.

12. Personally, I have come to the view that Sir Bernard Eder is right to pursue improvement of the procedural rules of arrest under English law, until such a day when the Supreme Court finds an opportunity to overrule its decision in the *Evangelismos*. Perhaps Sir Bernard's approach may be taken as an example for improvement of the national laws of the other jurisdictions.

13. Looking at the matter academically, of course, one can see that the laws should be somehow harmonised. But from what transpired broadly from the debate, which was attended by the very top legal practitioners and other professionals of the shipping industry, is that, in practice, the national legal systems work satisfactorily.

14. Be that as it may, the following points emerged from this debate:

    (a) there is an important distinction between technically defective arrest and wrongful arrest which causes confusion;

    (b) different legal systems have different procedures of arrest; many do not have the concept of an action in rem;

    (c) in some jurisdictions, the court gives only permission to arrest the ship and it does not issue the actual arrest order;

    (d) counter-security or a cross undertaking as a condition for arrest would raise the threshold of arrest as the judge would have discretion whether or not to grant the arrest order;

    (e) besides, (d) above would cause unfairness to economically weaker claimants – such as the crew and those who are not protected by compulsory insurance – because they would be prevented from access to justice;

    (f) a balance must be struck between the competing interests;

    (g) other remedies should be considered for the rare eventuality of wrongful arrest instead of change;

    (h) one should look at the context of wrongful arrest, i.e. which jurisdiction, how many arrests occur there, experience of lawyers, experience of judges etc;

    (i) if the arrestor loses on the merits, he/she will have to pay costs award, being the losing party;

    (j) a distinction should be drawn between a procedurally wrongful arrest and the strength or weakness of the underlying merits.

The questions that can be considered for the next questionnaire, as arising from this debate, may be around the following:

(i) state: (a) your jurisdiction; (b) how many years you are practising; and (c) how many arrests of ships take place more or less in your jurisdiction?

(ii) have you or your colleagues dealt with a wrongful arrest case, or one that was considered to be close to wrongful?

(iii) was it in your jurisdiction – or in another one, and which?

(iv) if yes, give details of the case;

(v) was there a procedural mistake or defect?

(vi) were any tactics used by the arrestor to put pressure on the shipowner?

(vii) was the arrest aiming to challenge: (a) the inherent jurisdiction of another state; or (b) the jurisdiction agreed by the parties to the dispute in an arbitration agreement; or (c) was the arrest made for the sole purpose of obtaining security for the claim?

(viii) was security for the claim readily available?

(ix) what was the outcome in your example?

(x) do you want CMI to make proposals for unification of the law on wrongful arrest of ships, or not?

(xi) instead of unification, would you support the provision of (a) counter security or (b) cross undertraining to be provided as a condition of the arrest?

(xii) what exemptions should there be in such a provision and for whose protection?

(xiii) what should the test for wrongful arrest be (negligence, or other)?

(xiv) in the event of a finding of wrongful arrest, what damages do you consider would be fair? (a) no damages; (b) just the legal costs; (c) all losses suffered by the shipowner if it is proved they were caused solely by reason of the wrongful arrest?

(xv) would you like to propose alternatives to damages, other remedies?

Edited Verbatim Transcript

Dr Aleka Sheppard, Chairman of the IWG (hereinunder "Aleka"):

Thank you very much for attending this Meeting which is very important.

By way of an introduction, the CMI instructed us to assemble as many people from the shipping industry together (i.e. representatives of P & I Clubs, cargo insurers, and the NMLAs, so that we can have an open debate about wrongful arrest of ships. I will explain in more detail in a minute.

I am Aleka Sheppard - for those of you who do not know me. I would like to introduce you to my colleagues, the team: to my right is Edmund Sweetman (a barrister in Ireland, who practises also in Spain, I understand). He is the new Rapporteur of the International Working Group ("IWG"). Previously, I was the Rapporteur and Giorgio Berlingieri was the Chairman. When he stepped down as Chairman, I was appointed in his place. So we have a young Rapporteur, who is energetic to do the work. We are honoured also to have Dr George Theocharidis (on my left) who is a Joint Rapporteur and was appointed yesterday by the Executive Committee of the CMI. He is both an academic and a practitioner and he offers his knowledge from the continental jurisdictions, mainly Greece.

To the very left of the panel we have Reinier van Campen from Holland, who is another member of the IWG from a civil law jurisdiction.

We have more members of the IWG but, because they have had CMI engagements elsewhere, they are unable to join us today. Giorgio Berlingieri had to fly to Italy because he was instructed in a number of arrests and I hope one of them is a wrongful arrest!

Ann Fenech from Malta is presently dealing with matters of the CMI executive committee at the IMO. Another member and a great contributor to the group is Karl Gombrii - a very distinguished lawyer in Norway.

Also, a valuable contributor to and a member of this group is Sir Bernard Eder who is involved in an arbitration today and it is a great pity that he is not here with us.

I aim to include in this IWG younger people but this will be determined after this meeting. This debate, in fact, will determine whether or not we continue with the project, if there is enough appetite in the industry and the NMLAs for the furtherance of this project. In particular, if there is a need, or any reason, why the CMI should take steps to attempt uniformity of the law.

I assume you have read the discussion paper which is the basis for this debate so we can start.

You have read what is the mandate of the IWG, so I do not need to repeat that, Ok?

At this meeting, the purpose of this debate is to exchange views and it is, in fact, your opportunity to make your voices heard and we will pass your views on to the CMI, so that we can make a record of what the industry wants. It is your time to speak, it is not our time – we are going to have views from the floor.

As you can see in the Agenda, the main issues derive from the answers to the questionnaire; we sent a questionnaire out to the membership of the CMI and the analysis was fascinating, I did not expect that. We were complaining about English law being the tough one – that you cannot have a wrongful arrest case ever because of the very, very high threshold in the test. But in the civil law jurisdictions the law is really very diverse; there are some similarities between jurisdictions, but diversity is more prominent and you see that the law has got to become somehow uniform, if people want it.

Some people say they want our law to be as it is – diverse – because " it is an attraction of claimants to our jurisdiction, because we get work" – that's a lawyers' argument – but it is not really a reality, is it? So, I am raising now the first question of the debate: do you see a need for a revision of the current fragmented regime at national level and adopt a uniform regime at international level?

John Kimball (USA)- not all of us have a lot of experience of this IWG; I was wondering whether you could take a couple of minutes to set the stage a little bit more. What is the starting point of the IWG?

Aleka: OK, the results of the questionnaire and the analysis of the answers were uploaded on the CMI website. The beginning of this working group was, in fact, in 2014 after Sir Bernard Eder gave a speech at the Tulane University in 2013 when he had a robust debate with Professor Davies who was against Bernard's campaign to reform common law on the subject. Bernard has been fighting for reform of English law for over 30 years. At the same time in 2013, due to Bernard's encouragement, I wrote an article, and in my book as well, about the wrongs of wrongful arrest under English law and I compared it with some civil systems. I suggested in that article that reform might be needed at international level. That was spotted by John Hare, who was then the Secretary General of the CMI and, I guess, he was looking for an international law reform project. He invited me to speak at the CMI Hamburg in 2014 and, following on this, the CMI EXCO, officially set up the IWG. The first Chairman of it was Giorgio Berlingieri and I was the Rapporteur. The mandate was primarily to find out how wrongful arrest is treated in various national regimes and jurisdictions and then to obtain the views of the CMI members on whether

they wanted the CMI to attempt to unify or the law; assuming there was consensus for reform, the group would attempt to draft uniform rules. That was the beginning; we set up the questionnaire fairly quickly. Karl Gombrii, Giorgio Berlingieri and I drafted the questionnaire. We sent it out and Giorgio was the 'Chief Whip'; he really pushed the national maritime associations to respond and we got 38 responses as you heard at the CMI Assembly. We set the CMI record for the greatest number of responses. I had the onerous task of analysing them. It was very time consuming and I engaged 2 young assistants to summarise the results in tables

You will find the answers to the questionnaire at the CMI web-site and in this booklet at the back. Leaving aside the common law jurisdictions, the other jurisdictions are divided and some of them, to my surprise, apply strict liability as a test for wrongful arrest. Others apply the negligence test and some others use peculiar terms in their legislation which need to be defined. The diversity of these results – prompted the CMI to give us the go-ahead to explore the matter further and that is why they advised us to have this meeting to explore the industry's views, and here we are!

Aleka invites responses

So, does anybody wish to contribute to the first question – "do you see a need to revise the current fragmented regime and adopt a uniform regime at international level?" Or "do you want to just stay as we are with different legal systems and different legal tests for proving wrongful arrest?"

To warm you up, I will start with my co-panellists; Reinier are you happy with the system in Holland?

Reinier van Campen (Netherlands): In general, we have a good working system in the Netherlands, it is, in fact, and while I may not be entirely objective, I think we have a fairly balanced system – as follows: you apply to the court for permission to arrest the vessel. It is an ex parte application. The court then, having reviewed the application, grants permission to arrest a vessel. It is a big difference between common law jurisdictions and civil law jurisdictions. I think in the common law jurisdictions you get a court order and the court orders the arrest. In the Netherlands, we have a permission from the court and as the applicant, who has obtained permission – the applicant - the arrestor – instructs the bailiff to effectively arrest the vessel. That is a difference. Why did I say it is a fairly balanced system? Because in the Netherlands, you obtain permission from the court fairly easily, you submit your petition – it can be two or three pages – you set out the details of the case and why you think the ship owner is liable and you have to mention whether or not it is one of the 1952 arrest convention flag states, which vessel you want to

arrest, and it is all done ex parte – so you get permission from the courts purely on the facts as you have presented them. The fact that you obtain permission from the courts doesn't give you a real justification to actually arrest; you have the permission but it is still your risk to do so, and if you do take that risk (you need good advice prior to arresting) and you lose your case on the merits entirely, then you are strictly liable for all damages you caused; so the balance is you obtain permission to arrest fairly easily but if you do arrest you also take a risk. I have been practising close to 22 years as a lawyer and I have never arrested a vessel which turned out to be wrongful, because you know what the liability is, and you are cautious when advising clients to arrest. On the whole (I speak on different occasions on ship arrest in the Netherlands) and I think people, not coming from the Netherlands, consider the Netherlands a sort of arrest paradise – it is so easy; it is just a perception, but yes, of course, Rotterdam is a fairly big port in Europe, so there are a lot of vessels calling in the Netherlands and overall we receive many instructions to arrest, and on each and every occasion I will say, ok yes, that we can obtain permission, if we present the case right, but please know what the risks are and the risks can be quite substantial if you arrest wrongfully, but the bottom line, I think, as I experience this as a Dutchman, and as my clients experience it, it is a fairly balanced system.

Aleka: Did you have any experience of wrongful arrest or handle a case of wrongful arrest?

Reinier van Campen: the most recent case of wrongful arrest was published a number of years ago and it had a strange turnout. Basically, it was a straightforward cargo claim – groundnuts or peanuts from China – and the vessel was arrested; security was obtained and then they started litigating over the merits – things did not develop quickly and 13 years later, there was a final judgement and in the final judgement, the entire claim was entirely dismissed, rejected; the arrestor did not have a claim and he should never have arrested the vessel; then the shipowner said: well that is interesting, now we know that the arrest was wrongful, and now we are going to pursue the cargo and cargo claimants for wrongful arrest; so it ended up in court and the court said: 'well, 13 years later you are a little bit too late because you knew from day one who was the arrestor and how wrongful the arrest was'. Under Dutch law the claim for wrongful arrest or any wrongful act becomes time-barred after five years, and so you will have to take a close look at your time bars, as well, and that is the only published case I know of.

Aleka: Thank you – now, anybody from the audience with any experience of wrongful arrest? I should mention that this session is being recorded, so please state your name and jurisdiction.

Andrew Keates (UK): there is clearly, perhaps, a lack of international knowledge because Mr Reinier is clearly a very accomplished Dutch lawyer, but here in the UK we do not have to get any permission from any court to arrest. It is purely a procedural and administrative matter – I must take my instructions from my client. I must then decide if I can swear what used to be an affidavit, which is now a witness statement, using the appropriate admiralty forms to make the claim, describing the claim but more importantly describing the vessel etc, etc etc; then the Admiralty Marshall, who is not a judicial officer but what used to be known as a clerk of the court, but is now a 'manager' or something, and he will make the decision on procedural grounds more than anything else; so the whole thrust of making an arrest lies with the client and the lawyer and it has nothing to do with the court at that stage; so it is a rather different situation to the ones which we have heard Reinier describing; many civil lawyers with whom I deal (and I have dealt with many civil lawyers and other common law lawyers over the years) have, perhaps, some sort of misunderstanding, which needs to be put right first, before we can do anything, or take any steps, because if we need comparative steps to be taken then that is something maybe we should make a priority.

Aleka: – OK, well we have done the preliminary steps – we know how the 38 jurisdictions deal with wrongful arrest – what is the country and what is the test and what damages might be allowed. This meeting will determine what we do next – we are going to do another questionnaire upon your guidance people – this is the industry's forum and CMI needs your guidance – what do you suggest the next steps should be? I guess it will be another questionnaire to explore more about the subject.

Voice: The issue is dissemination of that knowledge.

Aleka: – Yes, we have disseminated it to the industry but just through the CMI website, which I presume is visited by reps of the NMLAs. However, not many people knew about this project until receiving our invitation to attend this forum.

Andrew Keates: I was incidentally involved in a wrongful arrest case, an English case back in the early 1980s, which was utterly fascinating, I am not going to go into the details now, but it can be discussed.

Aleka: Did you win in England?

Andrew Keates: We won on the fact that it was wrongful, but the court decided that it was not quite grossly negligent enough by the lawyer who had conducted the arrest!

Aleka: That is the problem with common law and all the other jurisdictions of common law. Of course, you know, as the English lawyers do, that *the Alkyon case,* which was decided by Teare J. at first instance, was recently heard by the Court of Appeal and the judgment is awaited.

Mitsuhiro Toda (Japan) I have one experience – I arrested a ship for the claim of paint supplies but unfortunately the arrest order was later cancelled, repealed, by the court; then the ship owner sued my clients for wrongful arrest damages but the court said, no, no, no, it is not wrongful arrest; of course it could be said to be defective in a situation like this. Well, my client supplied paints to A and A in fact owned the ship but the ship flies convenience flag registered by the name of B; so in such circumstances it is difficult to identify who are the real owners. But anyhow, later on, it was decided by the court that you arrested the ship alleging the ship was owned by the other party whose name was not registered; anyhow, I would suggest that defective arrest and wrongful arrest, sometimes, under the civil law country is very difficult to specify who the real owner is; and in the case of, what shall I say, provisional attachment to obtain the security, then such things happen. You arrested a ship but later you failed to prove the merits, so it could be said to be defective but defective arrest cannot be said automatically to become wrongful arrest for which the ship owner is entitled to claim damages. That is my point.

Aleka – thanks. In England, I do not know about other jurisdictions, you do a search to find the real registered owner to arrest the ship and if you arrest the wrong ship it should be wrongful, but in England it would be difficult to pass the test of malicious intent. This was the case in *The Evangelismos* where the claimants arrested the wrong ship but it was held it was not out of malice or 'crassa negligentia', so the owners whose ship was mistakenly arrested failed in the claim for wrongful arrest. In your case, one aspect is the procedural and the other is the substantive; of course, if you arrested the wrong ship, you lose on the merits. How do you define wrongful arrest in your jurisdiction? What is the test?

Mitsuhiro Toda: Negligence

Aleka: Well, was it not easy to prove negligence in that case?

Mitsuhiro Toda: No, shipowner failed to prove negligence.

Aleka: Thank you very much for your contribution. Are you happy with the system in Japan?

Mitsuhiro Toda: Yes, happy

Aleka: it gives you work!

Mitsuhiro Toda: Because we do not have procedures in rem, it makes a difference.

Aleka – would you like uniformity then?

Mitsuhiro Toda … Well, the gentleman said that under English law, you do not need to get the court's permission or a court order to arrest a ship, so perhaps I would like such a system to change, so in such sense, unification would be good.

Aleka: Yes, English law has to change anyway! (I can see you are taking notes; it is all recorded, so you do not have to make notes). Anyone else?

John Kimball: Just to follow up with the first speaker - I did not feel like I got to the end of your story – if in fact there was a wrongful arrest, what would be the financial consequences to the party who initiated that arrest and was there a requirement for counter security to be put in place to pay for that mistake?

Reinier: to answer your last point first, in the papers that were distributed, the Netherlands are mentioned as being a party where counter security is mandatory – in fact it is not. We should be at the bottom of the list – there is a provision where the judge has the discretion to order counter security but, in practice, it never happens, really it never happens. As regards the first part of your question, to what extent are you liable: – you are liable for all the damages you have caused, not only the cost of security, (basically a bank guarantee that has been out there for a number years and the interest accrued over the amount that was secured), but also if the vessel was detained for a number of days and if it lost hire over those days; you are liable to compensate that and, of course, all the damages must be proved to the court. If you do not agree to it, this may cause some difficulty but, in principle, you take a big risk if you have a flimsy case. I always advise my clients to arrest the vessel immediately when it enters the port because during the loading or discharging the vessel will not be delayed at all – other lawyers say we should arrest right before she starts sailing because the pressure is really high and we will get our security for the cargo claim much quicker because they want to leave the port; there are two ways of looking at this; yes it will create a lot of extra pressure but if you have a weaker case then you are also more likely to cause damages and the damages can be substantial.

Aleka: By the way, Reinier, the paper regarding your jurisdiction has been corrected to reflect the judge's discretion on counter security.

I think we should continue without following the order of the agenda items because John you have progressed the discussion to damages.

Would people go for strict liability like in the Netherlands and for general damages?

Nicola Cox (West of England) UK: I have one question, one observation. What is the policy reason behind why there should be such a high test under English law? It seems strange that a local authority can have a loose paving stone and be liable and negligent for substantial damages and yet you intend to arrest a vessel, albeit for security, and you are not liable, unless the defendant can prove a much higher test I cannot see the logic looking at this from scratch – I cannot see the policy reason for why there is such a high test?

Aleka: You have to read my article, it is all there!

Nicola Cox: Why is it higher than say negligence to prove wrongful arrest?

Aleka: It is rather a historical matter, in 1800 the House of Lords, in the Evangelismos case, applied the test applicable to malicious prosecution of a person because there was no precedent at common law for wrongful arrest of a ship. That test required the party to prove malice or gross negligence of the prosecutor.

Nicola Cox: so, the reason was taken from an analogous case …. Rather than first principles as to why there is policy under English law.

Aleka: Then the courts were stuck with *The Evangelismos* which has been followed for over 200 years and is still not over-ruled and the case is so far followed by the common law systems, which follow English law.

Let us have the views of more participants.

Edmund Sweetman (Ireland & Spain): it does seem to give rise to a very distinct imbalance of circumstances where a claimant can obtain security against the shipowner and even if the claimant loses the case, he is not to be liable for the damages the shipowner has suffered. It might be interesting to hear from anyone in the audience who can speak up for the common law regime and the test of mala fides.

Beatrice Witvoet (France): just to contribute to the discussion we have in front of us; in France we have really similar system as the Dutch, so we need to go to the judge to have permission and then the claimant would carry out the arrest; but we have some cases regarding wrongful arrest and the consequences and some condemnations against the claimants – it is not very often but we have had some.

Aleka – ok but the test is very, very fluid – what do you have to prove for wrongful arrest?

Beatrice: it is quite subtle, I would say – it is not straightforward, but usually there is the idea of a fault from the claimant; it is not only that he should not have arrested the vessel that he knew he did not have grounds to arrest; so it is just a little bit in between, I would say.

Aleka: so, it is not just negligence. It is an objective and subjective test?

Beatrice: Yes.

I have an example: it is in relation to the *OW Bunkers'* bankruptcy and the consequent arrest of vessels. We had a Dutch client whose vessel was arrested once in the US for first time, and a deposit was placed into the hands of the judge as security; then when the vessel arrived in France, on the west coast, she was arrested second time, for the same claim by the same claimant. So, it can happen and we had to go back to the judge who authorised the arrest and he said OK the arrest was lawful and we had to go to the court of Appeal and, at the end of the day, and owner of the ship won – it happens with the condemnation of the claimant who decided to arrest the vessel; he is usually condemned to fully indemnify the shipowners.

William Sharpe - Canadian Maritime Law Association: so, I will say a word for the *Evangelismos* test:

Yes, the Supreme Court of Canada in the *Shiller Fertiliser* case, reviewed the test and came to the conclusion that it had been settled law for so long that any change should be a matter for the legislature. So I will now discuss the policy behind that test and, first of all, it is well to remember that compulsory insurance for marine liability is by no means universal for oil cargoes, yes but for many types of claims there is no international regime for compulsory insurance; there may not be a domestic regime for compulsory insurance and there are many sorts of claims such as charter hire where there may be FD&D cover, but in others the shipowner may not necessarily have such resources. For risk management, it is a common practice among shipowners to use single purpose vessel companies and ships are mobile assets; we are not dealing with a factory that is planted in the ground; so there are many classes of claimants such as seafarers who are owed wages and tort victims whose only effective recourse is to have a low threshold right of arrest. Now this is by no means one-sided based under Canadian practice because while a ship may be arrested readily, so may a motion be brought for the release of the vessel; such motions are expedited; if the claimant is unsuccessful, then the claimant is faced with an adverse cost award so it is by no means a no risk proposition for a claimant to act imprudently in arresting a vessel - certainly among the Canadian admiralty bar the plaintiffs do take some care in trying to locate the owner to associate the owner with the claimant in rem – so certainly in the Canadian experience there has been very little

abuse of the system and interim security is often negotiated beforehand and, if it cannot be negotiated beforehand, then certainly the shipowner and their insurers do have prompt recourse to the courts to sort things out and I should say that the position of the Canadian Maritime Law Association is that - while we are very appreciative of all the analysis and we appreciate that the debate should occur - we have not yet seen evidence of such severe abuse as to suggest that the CMI might accept the policy of demanding a higher threshold and that is CMLA position.

Aleka: thank you very much – that is a great contribution and, of course, Canada is a very civilised nation. But there are jurisdictions where there are cowboy claimants and they just arrest a vessel for the sake of establishing jurisdiction there to make life difficult for the defendant in breach of a contractual jurisdiction clause or for other reasons. I have another example from Ann Fenech which happened in Malta. She told me to contribute her example here because she is not able to attend this session. Recently she has been battling with an arrest of a ship which was arrested in Jamaica first by the mortgagees. The ship was judicially sold. The courts held three million dollars for security for the mortgagees. The claim was one million and the mortgagees, out of spite, went to Malta, arrested the ship again in Malta and blackmailed the owner by maintaining the arrest; and as we know there is no P & I club cover for that type of claim. Is that right Nicola?

Nicola Cox: not just for transactional or operational costs but if there is a value dispute under the terms of the contract it will fall under FD& D claim potentially like any other claim for any other cost.

Aleka: Anne's case is similar to the *Alkyon,* really, where the mortgagee did not have a legitimate claim. But with a civilised nation like Canada and others, the lawyers would have advised the claimant properly; that is the crux of the matter, good lawyers, moral lawyers, ethical lawyers, advise their clients properly. My question now is: should we close our file on the CMI Project and report there is no desire for change or uniformity of the law?

William Sharpe: But there could be *in personam* remedies against the person who acted unreasonably in arresting. It is not that there are no other remedies; if the claimant is a financial institution they are not going to fold up their tents and steal away in the night and therefore certainly under Canadian law it would be possible to insert an *in personam* remedy against an unreasonable claimant and it would proceed to trial and a determination on the merits – the critical issue here is what should be the initial threshold and what procedures are appropriately associated with the initial threshold for arrest.

Aleka: Absolutely

Edmund Sweetman: William, just a question; given that you are standing up as a defender of the common law in that situation, what justification do you see for a situation where there is a bona fide arrest made and where ultimately the claim fails for some reason? for example, if the claim is for damage caused to a ship and it is found not to be the fault of the vessel arrested. So there is a bona fide arrest made and there is a dispute determined by the court and it is determined against the arrestor; but in those circumstances, certainly under Irish law there would be no liability for wrongful arrest; I assume that the same position would obtain in Canada [YES} - what justification can you see for allowing that situation – why shouldn't, in those circumstances, the bona fide arrestor be liable for the damage caused by the arrest?

William Sharpe: As I mentioned, ships are very mobile assets.

Edmund: so, are you worried about the chilling effect that might occur otherwise?

William Sharpe: yes, I do have an example of the chilling effect; some years ago the Canadian office in British Columbia introduced the *in rem* process and I am sure that the marine lawyers who pushed for it assumed that the *Evangelismos* test would be applied. A few months after the new procedure was introduced, an arrest came before a judge who was experienced but not in admiralty law who said, aha, this is like an interim injunction, so yes countersecurity undertaken for damages. It is not surprising that we see the *in rem* process is used very little; so it is the relevant power of the parties who are talking about a sea farer or a claimant who may not have access to insurance – the issue becomes one of access to law and a balancing of interests and, of course, it is a policy decision but there is a rationale for the *Evangelismos* test, which is to say the remedy can be pursued by means other than raising the threshold to arrest.

Edmund Sweetman: yes, I can see. You might identify a difference between the requirement for counter security and liability for an arrest in circumstances where the action fails because in the same way, an unsuccessful litigant would be liable for the costs of the action if the costs follow the event, as they do in many jurisdictions – but I can see how countersecurity might be considered a barrier to access to justice, particularly where ships are mobile assets. That is probably a distinct issue in many ways.

Aleka: Yes, we can go to that later. You said it could be unjust to the crew if we change the test but the crew have maritime lien so there is no problem for the crew or anybody who has a maritime lien which follows the ship.

An un-named Delegate: well it is an issue where the crew has no financial resources to follow the ship from jurisdiction to jurisdiction in the hope that someday it might be arrested. The interests of the crew and tort victims in liability regimes where there is no compulsory insurance, they have to be considered in the mix.

George Theocharidis (Greece); Before I comment, I would first like to thank on behalf of the International Working Group, Thomas Miller for hosting this event here in the very heart of London next to this very iconic building, IMO was really a very good headquarters, but I think we are better here.

Now there seems to be a problem which is why we have this debate, we have clashing interests. On one side you have the claimant and the claim could be something like hundreds of dollars or something substantial like a bank claim for a million or even more and on the other hand we have the ship owner. At this very initial point we do not really know the substance of the case and therefore, as was correctly said, the claimant needs to find this asset which is moved around the world in order to obtain some kind of security and therefore to know that it will be able to satisfy its claim in a convenient way because, although the counter argument to that would be, "you can find the vessel anywhere after you have a judgement on the merits"; however, by that time, the vessel has probably changed flag or shipowner which is very, very easy, so we need to find a balance on the one hand for that claimant; – how much he has to pay, how much he has to suffer in order to pursue the claim and, of course, the shipowner, on the other hand. We have given an example here of a vessel, an energy vessel, which carries 100 million value of cargo; now, if that ship stops for five or six days, somewhere, we can understand how much damage that would be for the shipowner; so in order to approach that issue we have to strike a balance and it is interesting from the reports by the different countries to see that, even in continental law jurisdictions, we still have some countries which have a hard test like the common law, not to that extent of course; Greece for example, in order to be able to get a claim for wrongful arrest, the shipowner will have to prove first of all that the right, the substantive right, which the claimant was pursuing was non-existent and either the claimant had knowledge of that or he was grossly negligent which is quite hard to prove. So even in continental law countries you can still find, like Greece, that there is quite a hard test and the rationale behind that is quite clear – you can have a good faith claimant, as Edmund said, who wants to pursue his claim; it could be for 5,000 dollars - a crew member, or a bunker provider, finds the vessel very close in the area; he does not want to change continent and does not want to pursue the claim somewhere very far; then if for any reason - even for any procedural or technical reason - his claim might fail before the court

- perhaps it is time-barred - and he might find himself in a position where he might have to pay substantial damages – lots of thousands. So, I think, and this is why we want to hear these opinions, especially from the P & I Clubs, because they deal with security, they deal with the problems of shipowners and how they see the problem. Could there be some uniform law whereby they would know the limits of security; they would know when to put up the security in place and, if something does not go well they would know to what extent they would be able to recover that.

Aleka: Thank you George. I sense that, although I have not heard from many of you yet, there is a sort of uneasiness about disturbing their national systems and you would rather stay with a fragmented international system, is that correct? How many people prefer fragmentation? Raise hands please. (Some hands are raised, perhaps half of the audience).

How many would opt for doing something to improve the system as far as we can? Perhaps unification? Raise hands please. (A reasonable show of hands).

I would like to hear from more people with practical examples of wrongful arrest.

Has anybody had wrongful arrest, in your experience, either in your jurisdiction or know of in other jurisdictions?

Andrew Chamberlain, HFW (UK): – just a couple of comments which are along the line of what you are discussing. It is quite important to distinguish defective arrest from wrongful arrest – there is a problem of definition here and I agree with our Japanese colleague that an arrest might be defective, but it is a long way short of bad faith or wrongful. I am firmly a defender of the common law jurisdictions – our Canadian colleague made excellent points as well; it is about balance. I do agree, but my one experience of a wrongful arrest claim – and I preface that by saying that wrongful arrest is relatively rare – there are a number of reasons for that, one is the high professional standard required of maritime solicitors around the world – my experience of arresting ships around the world, many of our colleagues in Holland, Belgium and France are admirably even-handed about giving an honest appraisal of the prospects of successful arrest and getting the law right. You sometimes get more difficulties in jurisdictions where there is very little expertise of maritime law at all, particularly, where the judiciary has no background in maritime law; so, my one personal experience was in Spain and I have nothing against Spanish colleagues. But one of the dangers of uniformity where you always have to have security for wrongful arrest is that when wrongful arrest is alleged in a common law jurisdiction, the question of whether an arrest is maintainable is Question 1, but actually has nothing

to do with the underlying merits, quite rightly – they are two different questions. You have a rightful arrest, a hopeless case that you then lose – that's fine. When you have an opportunity for a party to complain of wrongful arrest, what you will find (and this happened to me in Spain), is that inevitably the merits of the case then get argued in the context of whether it is a wrongful arrest or not and it was a disaster – years of litigation, huge amounts of money spent and nobody was very happy on any side; so I am firmly a defender of the status quo and I say that for a number of reasons, and I just throw out this question for perhaps Nicola and other P & I colleagues, I do wonder whether a significant liability for wrongful arrest is actually covered by P & I interests? I don't think it is. No, so that is something for the P & I community to think about carefully, I would suggest.

Aleka: So, I guess that is the feeling of common law jurisdictions – anyone else?

Kiran Khosla - ICS: ICS represents shipowners and I think, as a general principle, we would be interested in the ICS if the CMI work continued to try to improve the situation. The last attempt that was made for protecting shipowners from wrongful arrest was in 1999 at the Arrest Convention and at that point we did support Article 6 in the 1999 Arrest Convention, which provided protection for shipowners in the event that an arrest was wrongful, or unjustified or excessive and we would like to pursue that. Whether uniformity is achievable, and I think that is questionable, we certainly think it would be something to consider because there have been cases – and I think that the case you have referred to in your paper *The Alkyon,* highlights the problem of wrongful arrest where shipowners are left without any recourse and have had to incur quite considerable losses, which they are unable to recover; so some form of countersecurity is certainly what we would be looking at and we would hope that it is made mandatory as well.

Aleka – Thank you for that. May I comment on that first point. What Sir Bernard Eder is arguing is for a provision of a cross undertaking in damages like in freezing injunctions. Would that solve the problem? I personally do not think so. The problem will not be solved, unless we change the test for wrongful arrest. The 1999 Convention of course provides for a lower threshold of negligence

but you would still have to define what is unjustified arrest - so the two go together. You cannot have a cross-undertaking or counter security and not have a change to the test, because you would have to go through that loop of proving culpable conduct later on, when you try to prove your case of wrongful arrest.

Nicholas Wilson MFB (UK): If I could just answer that point about cross undertakings; I do think that there is a possibility that if you require cross undertakings that you are going to snuff out legitimate claims, that there is every possibility there; Just to go back to Mr Sweetman's point earlier, regarding say a collision action and the question of security; you often hear the phrase: "it is only security that we are after, we are not necessarily seeking to have the matter resolved there and then" and the easy answer is to put up security, if that is what somebody is seeking, and it is a very, very premature at the arrest stage, as has already been mentioned, to consider the merits. With an asset which is mobile and vulnerable, and it could change ownership, this may not be a problem with a collision because there is a maritime lien on it, obviously, but it is premature to try to determine the merits of any matter, when it is only security which you are seeking, and it could take a year, two years, before a matter gets to trial and there is a final determination in relation to the issues; and I think it is arguable, from a common law perspective, that it is a bit much to expect of the lawyer who is undertaking the arrest, if you like, and their client to ascertain the liability at that stage – you are only seeking security for your reasonably arguable best case, as it were.

Aleka: Obviously there are very complex issues to consider before any change is made. Just to refer to the possibility of a provision for a cross-undertaking to be provided by the arrestor just as it is provided when a freezing injunction is applied for, (the argument pursued by Sir Bernard). This would require the arrestor, the client of the lawyer, to undertake to be liable to the shipowner in damages, if the arrest is proved to have been wrongful, and it would require the court to have discretion to grant it as a condition of the arrest. As English lawyers know, prior to the *Varna* case, the court had discretion to grant the arrest upon consideration of the evidence given in an affidavit in which the arrestor or on his behalf the lawyer was required to state on oath to the court that he had made full and frank disclosure of all relevant information known to him. That rule was displaced by new procedural rules on arrest and the arrest became **a right,** which meant that the court was deprived of that discretion.

Emeka Akaboglu – Nigeria MLA: One of the things that I am going home with today is the distinction between wrongful arrest and defective arrest – I like that distinction and while I sympathise with the position of the ship owners, as relating to loss suffered, I think it should largely be taken care of by the need to immediately offer security and I emphasise the importance of this distinction because there are many times where a strict liability regime against the arrestor will be unfair, to say the least, particularly within the Nigerian jurisdiction, where you often find that an arrest may be vacated on technical grounds, which have nothing to do with whether the arrestor has a legitimate claim. So there is a typical

scenario where we have ship arrest being vacated for an alleged reason ie that leave was not obtained before the processes were served on the particular party. So it may be served on the correct party later, but because there is an allegation they did not obtain leave to serve outside jurisdiction before arrest, it is vacated and that has absolutely nothing to do with the merits of the claim; so in that scenario if there has been such a vacation and the ship owner comes back to start claiming for some damages because the last claim couldn't proceed, then it is unfair by all respects. So, I align myself with the submissions that the security which needs to be provided by the ship owner should be provided as quickly as possible and the ship continues doing business and the losses mitigated and essentially the status quo should remain.

Aleka: Nigeria is a common law jurisdiction, isn't it?

Edmund Sweetman: I might just intervene there, Spain has been mentioned and wearing my Spanish hat for a moment to speak about the idea of a cross undertaking, which would be perhaps what one would expect in a freezing injunction situation; obviously you have to undertake to be liable i.e. the applicant for the injunction would have to undertake to be liable for any costs or damages by reason of tying up the defendant's property. That is effectively a promise to pay, but different to counter security, such as it exists in Spain, where money must actually be lodged in court or a bank guarantee be furnished to a percentage of the amount being claimed, and that certainly has the potential to be a barrier to access to justice and to this particular and specific asset which is the ship.

Aleka: but arrests happen in Spain, don't they?

Edmund Sweetman: well I can just imagine, I can see the argument where perhaps a crew member or a person is perhaps injured on a ship, perhaps a serious injury where someone is quadriplegic and would have a very significant claim and would have to effectively post a bond of a significant amount of money in order to arrest a ship in Spain and that would certainly be an issue and as regards the test of the merits, what they say in Spain, it is very easy to arrest but you need leave from a judge; but you effectively set out in bold terms your grounds of arrest and once it comes within the convention your arrest order is issued, but you don't arrest the ship until you have actually posted the security. That is in Spain, there is then the application to balance against the ease of arrest the potential to set aside that arrest, but it is not on the merits, it has to be on a technical ground and then, if you lose your action, you are liable for costs. But I think it is an interesting question, I am wondering if anyone else has views on why shouldn't the unsuccessful litigant be liable for the cost of the failed action, but also the costs of tying up the vessel because

it is a distinct issue in those circumstances; why is it necessary to protect the unsuccessful litigant?

Aleka: we will come back to that ……

Damilola Osinuga Nigerian MLA: I would just like to echo what Emeka has said; basically, Nigeria is a common law jurisdiction and it is almost the same thing as happens in England, except for the fact that you need a cost order to get an arrest. However I seem to be in favour of a cross undertaking because what you have in Nigeria now is that there are impasses where lawyers decide to arrest a vessel so as to frustrate, maybe the charterer, knowing fully well that the vessel has to sail and knowing fully well that the charterer is not the relevant party; and they know that because the charterer will also be liable for other contracts that he may be in breach of that contract and so they arrest that vessel. So I agree that the Evangelismos test is not the best we should have now but I am definitely not in support of the strict liability regime and I feel that a cross undertaking might just be the solution; this cross undertaking should be given for the arrest. We have a situation in Nigeria where you can give security for costs after the arrest. The owners of the arrested vessel can come to court with an application to get security for costs. However, that can only be given in two conditions when the claim is above five million, or when the defendant or the claimant are not resident in Nigeria. And it is still at the discretion of the judge.

So not everyone is entitled to security for costs in Nigeria so I believe it should be a situation where cross undertakings should be given before the arrest and I am in favour of that.

Aleka: Well, if a cross undertaking as a condition to arrest were to become a requirement before arrest, we should have exceptions – i.e. for the crew and the weaker parties who are not protected by compulsory insurance.

Damilola Osinuga: Yes, I agree that crew members should be exempted, but there is an unfortunate situation in Nigeria that the court decided that the crew members did not have a maritime lien! They do not have a right of maritime lien any more, and they should go to the Industrial Court to pursue their claim. It was a High Court decision.

Aleka: that is very strange!

Nelson Otaji (Nigeria): I just want to make a little clarification about what my colleague has just said. Crews have a maritime lien in Nigeria, as is provided in the Merchant Shipping Act. But the issue that comes up now is that there was a little amendment to the Constitution, so that if the action you are filing is not an action in rem, but an action *in personam,* which means you sue the employers of the crew, – may be a mining

company owing crew wages; so therefore if you are suing them *in personam* then you have to go to the Industrial court.

Aleka: Okay, that is an *in personam action.*

Nelson Otaji: so that is the main distinction that needs to be drawn.

Kiran Khosla: we have been hearing a lot of comments about crew claims and I want to point out that there is now compulsory insurance for crew claims under the MLC and that has provided quite a significant amount of protection for particular types of claims; and I also think, and I want to come back on this, for a freezing order there is a requirement to put up counter security and we can't see why this should not apply for arrest of ships as well.

Aleka: thanks

Laurence Mc Kenzie (UK): I am an English lawyer; I just wanted to support what Mr Sweetman said about the arrest in Spain. I had a contractual claim on behalf of a client and, as far as I was concerned, there was a good contractual claim and I had taken legal advice from myself and also from Spanish lawyers; but the Spanish system requiring security through the Proctor at Law, a court official, effecting the arrest, discouraged the arrest even though we felt it was a good claim; so there are issues against counter security in certain jurisdictions.

Sertac Sayan - Turkish MLA: I am a lawyer – I would like to give you clarification about Turkish law on the arrest of vessels. Since the 1st July 2012 there were big changes in Turkish court of arrest in order to arrest a vessel and it has been simplified; also, steps have been taken for both the party who applies for the arrest and for the judge to follow in order to arrest the vessel. First of all, the vessel must be within the territory of that court and the judge writes a letter to the port authority and tries to find out whether the vessel is in that territory or not and also they go one step further and ask who the owner is.

If the vessel is found within the territorial jurisdiction of that port, then you have to pay 10,000 SDR lump sum amount of money which is the equivalent to 17,000 or 18,000 USD; then you have to submit supporting evidence to prove your right to arrest the vessel and if the judge is satisfied to arrest the vessel, they issue the arrest order in three days. So, the party who suffers the arrest has the right to oppose this and the judge must fix the date of hearing from three days to seven days to handle the oppositions, and the judge may increase or decrease the amount of security. Under these circumstances, I have not come across any wrongful arrest claim under Turkish law; it is very difficult because the defence will be: "we submitted all the supporting documents, the judge accepted this", unless you submit fraudulent documents, which may slip from the

attention of the judge; and if there is a wrongful arrest it should be examined under the law of obligations and the causing of indirect or direct losses to the party who is subject to the arrest.

Aleka: Does it not take rather long to arrest a ship?

Sertac Sayan: No, there is a very specialised maritime court in Istanbul and most of our cases and files are in front of the judge; you cannot make any false declarations to the judge because they say you will go again to the same judge – it takes only one day to arrest a vessel if all the documents are in front of the judge, otherwise it is easy.

Edmund Sweetman: There is an interesting issue, that is, with respect to what is demanded of the applicant for an arrest in English law and, certainly, it is referred to in the English answer to the questionnaire. In England there is no duty when applying for arrest, when swearing the witness statement; it is not necessary to make full and frank disclosure of all matters which might be relevant to the issue.

Under Irish law there is a certain obligation that whatever matters are deposed to should be bona fides and in utmost good faith and has a duty to make frank disclosure to the court when applying for the order.

Aleka: do you wish to add something?

Another unidentified delegate: That is correct but you still have to attest to believing what is being said is true; so there is no utmost good faith and full and frank disclosure duty, but it is not a million miles away from that; you are still having to attest the truth of what you are saying and putting forward prima facie evidence as to your claim as well. And you have to say, if it is a statutory arrest for example, which heading it falls under, i.e. under Section 20 of the Supreme Court Act 1981.

Another Delegate: I think it is fair to say from what we have been hearing today, and it has certainly been my experience, that in the English jurisdiction people do tend to be quite responsible in terms of arresting a vessel.

Aleka: True. Like in Canada. Civilised jurisdictions

John Kimball: to come back to Edmund's question, as to why an arresting party who has proceeded in good faith but ultimately loses on the merits and whether he/she should have to pay damages, I would like to talk about that, and I would also like to make a comment about the civil losses, as I am not sure that the opposite is always fair either. Under the US system, to have an arrest you have to have a maritime lien to start with and our law is not always clear exactly as to whether there is a lien or not. Under our system if you act in good faith, bringing arrest action which ultimately fails, because it turns out that you did not have a lien, that could

take a couple of years for a court to decide. Under our system, at least in my view, it would be inappropriate to penalise the plaintiff for bringing the action and to impose damages on the party for bringing the law suit. Under the American rule we don't even ask that party to pay for the other side's legal fees and it would be inconsistent with our system to impose damages on the plaintiff for bringing the case in the first place. And, I think, the American Law makes a lot of sense; But I think this group, the IWG, is a great idea and the discussion has been fantastic. I think it should continue and you should try. But to go back to the civil law system, I should just ask the question: If in the case you talked about earlier, suppose the ship owner never put up any security and just left the ship there for 13 years, or however long it took, would the arresting party be liable for damages for detention for that long period of time. How does that work?

George Theocharidis: I have not come across a situation where that happened. From a strict legal point of view yes, if you cannot put up security, post a bank guarantee or anything else, if there is no P & I cover, then you have nothing else left to do but leave your ship there under arrest; then yes, if the claim on the merits by the arrestor is fully rejected then he would be liable for the entire damages, yes.

John Kimball: There should be a debate as to whether that were really a fair outcome.

Tim: surely you would have to mitigate the loss.

Edmund Sweetman: In Spain, certainly that is the situation because you have strict liability for an arrest where it fails; – obviously, there is a lot of litigation there, but what is the quantum of that loss? There is no article dealing with it but the effective jurisprudence of the court suggests, and the way the courts normally treat it, you are only liable so long as it would take the ship owner, in normal circumstances, to post the security, so effectively it is a limited amount of time.

Aleka: ok thank you. At the moment, I feel this discussion illuminates the problems with the fragmentation of the systems between civil law jurisdictions and also, of course, the contradiction between common law and civil law. That is undesirable to me; we need to find the right balance; is there anybody from the insurance industry here, cargo insurance? I think we had some bookings by some insurers; who wants to speak? We want to find the right balance, we don't want to push reform in favour or against. It is a balanced position we are trying to find.

Mark Meredith - Xchanging Claims Services (UK): for us, having listened to the discussion, it seems quite clear when you have a big loss on a cargo claim; the first step you take is to contact the P & I Club and

hope you get security firmly in place. The prospect of an arrest is the last resort. You don't even want to go down that avenue. You have got to make sure everything is set, and you have got everything right. I think Andrew Chamberlain makes a very good point, as well; from the cargo point of view, it is quite straightforward, there is not much appetite, we understand, for unifying everything, but it is always a matter of being sensible, looking at the claim, looking at the merits, who your target is, where are your proceedings; so to us, it is reasonably straightforward in that respect, get good security in place for your claim and let's discuss the merits thereafter.

Aleka: Anyone from a P & Club here still?

Evgeniy Sukachev (Ukraine): I would like to make a short comment about my country.

Aleka: Where are you from?

Evgeniy Sukachev: **From Ukraine**. There is a new Procedure and we like it because lots of Turkish clients come to Ukraine.

Aleka: Quid pro Quo, is it?

Evgeniy Sukachev: Yes, because we are in one region. This is very interesting because last year we had also new procedural courts – a civil procedural court and a commercial procedural court, where there are new procedures to arrest and, nowadays, in our ports the judge should make a decision in two days from when the application comes to the court; so if you apply to the court today with a claim until the end of the next day the courts should make a decision anyway.

Aleka – It takes a rather long time –

Evgeniy Sukachev – no just two days so much shorter than in Turkey! – [big laugh]

Also, put joking aside, the judge does not have any time to find out any other points to make a decision; so if you apply, you have for the application all documentation you would like to show the court; if the judge finds them in order, you can have an arrest because all the documents prove your claim. If not, no arrest.

Aleka – so it seems you have to prove a prima facie case and the judge has discretion to grant the arrest order? – is it so?

Evgeniy Sukachev: of course, but his decision is based on submitted documents. Afterwards you can make a counter-claim, or anything else, but this is also a timed procedure, which is shorter than in Turkey.

Another person: (**Turkey**) In relation to cargo damage, the arrest of the vessel is such a straightforward thing because you go onboard the vessel and then you discover that the cargo is damaged. You stop discharging and call in court appointed experts to determine the damage and usually the judge comes together on board the vessel, determines the damage and they arrest the vessel so there is no problem for the cargo interests…

Reinier van Campen: can I flag maybe a difference, a problem area? We are trying to unify the arrest of ships. But if we have a different test for the arrest of ships, for instance, we now should amend the 1952 or 1999 Convention, or something similar; for my jurisdiction the rules would change – (if counter security, for example, becomes a provision before being allowed to arrest a vessel); – then all of a sudden, we might have a little bit of unification, but there will be a big new difference because bunkers are not a ship, and for bunkers the provision of counter security would not apply, so then everyone goes after the bunkers.

Currently we have a system where you say we leave it up to each national jurisdiction to set the rules; as I said, in my country, I think, in general, in Holland, we are quite happy with the way we arrest vessels and what the risks are – in fact we have currently a revision of the arrest paragraphs in our procedural code - on ships nothing is changing - and yes if we solve one problem we may create another; we have to be careful about that as well.

Aleka: Absolutely, the fragmentation is so broad, it would be very difficult to unify really. Do you want the CMI to try to find a balanced position? If you don't, the next point is: do you really want counter security, or cross undertaking? it seems to me that you do not want that either (or there may be little support for that) because that will take time to set up and it would be unfair for some parties; so that is out of the question. I will disappoint Sir Bernard about that. And then, since we are not going to be unifying anything, there is no point talking about what damages you get because we will stay as we are, and everybody is happy. Is that a fair understanding?

[Common law jurisdictions do clap], I hear the approval for doing nothing!

Laurence Mc Kenzie: (**UK**) I would like to comment in support of the Turkish lawyer that I do have experience of a vessel trying to leave Turkish port when it was under arrest and the court ordered the coastguard to fire a warning shot across the bow of the vessel – the Turkish press reported this and a lot of Turks were upset because it was a Turkish vessel being fired upon! but a lot of other people supported the rule of law because the vessel had tried to escape arrest; so I am rather fond of the Turkish jurisdiction ….

M Toda (Japan): In Japan, two days, perhaps longer, well in Japan it may be one day in most of the cases that the court will decide from the time of receiving the application for arrest, particularly, in ship collision cases; well I have a lot of experience in arresting ships involved in collision cases; just after the collision, maybe several hours after, or the next day, the court issues arrest since such claims give rise to a maritime lien; so in Japan no countersecurity is required, but it should be very, very clear that 100% liability should attach to one vessel. I would like to tell you that as regards countersecurity, we may differentiate the claims; for example, in terms of this collision claim you should put up countersecurity, but on the other hand, with another type of claim no countersecurity would be required. Such discussion perhaps may be useful.

Aleka: It is very rare to have 100% liability in collisions.

So to recapitulate from what it has been said so far: - you prefer a fragmented system, you don't want counter-security or a cross undertaking, and we dump the damages question too.

Dr Liang Zhao, City University of Hong Kong: I am from the city of Hong Kong and of course I was from China before, so I saw the response from the Hong Kong maritime association and no response from the China Maritime Association, so I can comment on Chinese law. First of all, China is not a party or State Party to any Arrest Convention; further just a couple of weeks ago, I attended a forum organised by the China's Maritime Court. I asked the question: is there a wrongful arrest concept in the view of judges? and they said: yes, theoretically there is a concept , but in practice no, we do not make the judge wrong, or if the claim is wrong, because the judge will have the primary trial of the case and decide whether there can be arrest or no arrest ……. But I had a case a few years ago with these facts: the vessel was arrested by the China Maritime Court, but it was proved it was wrongful arrest because the name of the vessel was mistaken, and the applicant wrongfully arrested a vessel with a similar name and not the vessel which should have been liable. It was wrong, but the China Maritime Court said no, it was not a wrongful arrest, because that is a human error– everyone can make a mistake! So they would not say it was wrong but theoretically in China the people could claim for the wrongful arrest against the applicant who wrongfully arrested the vessel and also claim against the court. That means claiming against the government; in China it is possible but it is complicated. But for countersecurity in China yes, it is very important; the arrested vessel is the kind of security for the claimant but for balance of interest of course the claimant should provide security except in 2 exceptions; (i) in claims for personal injury and (ii) in claims by the crew for the salary because in

China they believe they should assist the weaker party; counter security is difficult for individual claimants, not for a company.

Aleka: thank you. please raise your hands if you know, you or your colleagues, have had experience of a wrongful arrest in any part of the world - Oh many hands! So, something must be done! At least to try, am I right? Anyone who supports the CMI Project? We want to hear – yes or no? – do you want the CMI to try with another questionnaire to seek the views of the NMLAs whether uniformity is favoured or not? You must answer yes or no. You are hesitant; it seems the answer is No.

Do you say yes for us to try to pursue the project?

[Show of hands (about half of the audience more or less)]

How Many people say no – they do not wish the CMI to do anything?

it looks like it is 50:50 ….

With so many hands up with experience of wrongful arrest, the questionnaire may focus broadly on the issues arising from this debate.

Then we could have a further discussion.

John Kimball: My experience is that wrongful arrest may occur only in exceptional cases.

Reinier: So, we actually come to accept that all those hands showing that they are aware of some case of wrongful arrest we should come to accept that this is a rare phenomenon? And we accept, therefore, that the system functions well? If we see some problems and there is a need for fine-tuning, we do not want to open the whole Arrest Convention. I mean it is obvious also, as Anne said, we should go to the specific issue of arresting a ship. We just want to see through a questionnaire to be answered by practitioners, the NMALs, based on experience and real cases, what the problems have been, what damages were awarded; maybe some fine-tuning could be done on a practical level.

Hugh Bryant (UK): I am an ancient P & I man. As you have been calling for a position from P & I Clubs I just wanted to say to you that it seems to me there is a big distinction to be drawn between places where a P & I club can give security and situations where they can't. If you look at *the Alkyon* case, it was a bank that was arresting for something where there could not be security from a P & I club; there has been some suggestion that FD&D can help. It can't – FD& D never guarantees the principal amount in dispute, so it seems to me in fact that the mischief, if there is a mischief, is in those cases where there isn't readily available security to release the ship, that is in cases where a ship is arrested and security by P & I letter or whatever or bank guarantee by P & I Club is provided quickly

but, even if it is a wrongful arrest, there is actually no harm done. it is where you have actually got a case where the ship owner's ship is denied to them, but perhaps we have all been there; there is a lot of comity here – nobody is naughty. When I was in practice, a long time ago there was an expression, sometimes used, which was called 'judicial wrongful arrest' and there were certain people who did that as a way of putting pressure on people and it seems to me that that's where the mischief is and if the CMI wants to try to address that, it is really a matter of focusing on those cases where security is not easily provided.

Aleka: Yes, they are very rare though, I suppose.

Kiran, could I hear from you what the position of the ICS would be? Any examples?

Kiran Khosla: I can obtain examples, but I don't have any at the moment, but our position is that we would like to see uniformity in this area. We think it is questionable as to whether it can be achieved; past attempts have not resulted in uniformity, but we don't think that there is any reason not to try.

Aleka: I think we might be wasting our time! CMI projects take a long time; then they go to the IMO to pass the Convention, and then there will be another 50 years, if not rejected outright!

Kiran: I think you are right. It is; I can't remember whether your questionnaire obtained results of cases which have caused real problems

Aleka: No, it was not in that first questionnaire, so we must ask in a new questionnaire.

Kiran: that would be a worthwhile exercise and then we can decide whether there is merit going forward and spending the time and resources.

Aleka: that is correct and a good answer for the CMI and I believe there is consensus– we do not want to go empty-handed! By the way, this project is for the young generation because they have to continue it. They have to have something to do at the CMI!

Edmund Sweetman: I think we have all come across tactical uses of an arrest in a case whether that be legitimate, semi-legitimate or illegitimate – that is what Reinier was referring to: do you arrest the ship when she was in port, or do you arrest her when she was leaving. If you arrest when she is leaving, you put huge pressure on the shipowner to concede a greater amount to be secured plus creating a greater load on the ship owner and incentivising perhaps an earlier settlement. These are, certainly, speaking realistically, the issues that I think all of us must come across in practice where the shipowners are the victims.

Dermott Conway, Irish Maritime law Association: it strikes me that hard cases make bad law, sometimes, and certainly in the context of jurisdictions where there are no consequences for wrongful arrest. I think on the point made by my American colleague earlier about needing context in things, you really want the context of how many wrongful arrests there are in, say, common law jurisdictions before you'd want to be taking on a body of work – several hands went up when you asked the question how many people had been involved in wrongful arrest; well the other question should be how long have you been practising, how many were there and in common law jurisdictions like Ireland and UK, where there are no consequences, the question becomes well how many in the context of that jurisdiction each year are there, how many arrests are there, and then you would want to find out how many findings for wrongful arrest did you have in each year, because that is the real context – and if you find one ship owner in the context of the global shipping market who has had a wrongful arrest does that justify the moving of mountains that you described a minute ago?

Aleka: Thank you, that will go into the Minutes as part of the Executive Summary

Would you want me to round up or do you have any more contributions to make or have you had enough?

Yes, let us go for drinks, courtesy of the UK Club to whom we are grateful.

Steve Cameron – Anecdote - …. And the court proceedings were being relayed to us by a P & I Club lawyer, in a very English tone: "we went through the week and things were going in our favour and the judge called both parties into his chambers and said: at the end of the week he was minded to find in favour of the shipping line (which was us) but now we got to the second part of the proceedings, where we established who has got the biggest brown envelope; it was at that point that our lawyer, who may have been the only straight lawyer in this particular country, was incensed and had completely lost his temper, leaned over the desk and bit off the bottom of the judge's ear"!

Aleka: thank you for cheering us up and, on this note, I close the proceedings.

Jeremy Thomas – thanks were given on behalf of the LSLC and the CMI to the panel, to the audience, and to Thomas Miller for their hospitality in providing the venue, facilities and drinks generously.

JOINT ISC OF IWG'S ON MARITIME LAW FOR UNMANNED SHIPS AND CYBERCRIME AND THE ISC ON MARINE INSURANCE HYPOTHETICAL CASE FOR WORKSHOP: THE CHALLANGING CONVERGENCE OF MODERN TECHNOLOGY, CYBERCRIME AND MARINE INSURANCE

IMO, 4 Albert Embankment, Lambeth, London SE1 7SR9th November 2018 at 2.12PM

COMITÉ MARITIME INTERNATIONAL

WORKSHOP ON AUTONOMOUS SHIPS, CYBERCRIME & MARINE INSURANCE
LONDON, NOVEMBER 2018

THE CONVERGENCE OF MODERN TECHNOLOGY, CYBERCRIME AND MARINE INSURANCE

"Crossing vessel approaching off the port bow" the Second Mate tells the captain as he comes onto the bridge. "We're Stand-On, but she's coming in fast" says the Master. He looks worried. He grabs the VHF:

> "*This is UK registered container vessel MANDSHIP. Calling unidentified vessel approaching my port bow on a heading approx 315°. My course is 045°, speed 16 knots.* ***You are Give - Way vessel****. I repeat:* ***You are Give-Way Vessel****. Please alter course and speed immediately.*"

There is no reaction.

The master tries again: *"Vessel now approaching close quarters situation with my vessel. I remain Stand-on Vessel. You are Give-Way vessel.* ***Please alter course and speed immediately to avoid collision****"*
Still no reaction whatever.
But now the Master can see the other ship more clearly.

"No-one on her bridge, Cap'n" says the Second Officer. "Aye, and none on deck either. Looks like the *Mary Deare* - not a soul in sight. Maybe she's one of those drive themselves Google ships - Quartermaster, helm to manual and ready for emergency stations".

… Still the mystery vessel keeps coming ... without course or speed change.

With a collision imminent, the Master tells the Second Mate "No avoiding it now, we'll have to try to turn into her and slip past starboard to her starboard side. It's the only way we're going to avoid a head-on." He then orders hard a-port, full ahead and sounds one long blast on the horn. He reckons that with enough speed he has seaspace to clear inside of the other vessel – which is obviously not going to give way. Responding to the Second's obvious concern, he assures her "The COLREGS allow departures for extreme calls like this one."

PAGE 2/……

But the Master watches in horror as the helm fails to respond: his own ship maintains course and speed. Then a message suddenly flashes up on all the bridge computer screens:

Safe, Secure Ship? YOU ARE AT OUR MERCY

YOUR COMPUTER SYSTEMS HAVE BEEN HACKED AND TAKEN OVER BY OUR OPERATORS. YOU HAVE NO CONTROL OVER WHAT NOW WILL HAPPEN.
ONCE THE DAMAGE IS DONE, YOUR SHIP WILL BE PUT IN LIMP MODE TO ENABLE YOU TO REACH A PLACE OF SAFETY.
WE WILL CONTACT YOUR OWNERS TO MAKE OUR DEMANDS.

The Give Way vessel is the AUTOSHIP. The Master was right: she is unmanned. She collides heavily with the MANDSHIP's port side, amidships.

Deafeningly, the two vessels scrape down each other's sides. The anchor in the hawsepipe of the AUTOSHIP gouges deep into the fo'c'sle of the MANDSHIP and rips out part of her bosun's store before the two ships clear.

The mystery vessel continues, speed unabated and course unchanged, until she slows, with systems in limp mode.

The MANDSHIP is badly damaged and requires salvage into a port of refuge, where her owners declare GA. The bosun and an AB require hospitalisation for serious injury. Temporary and then permanent repairs run to many millions of dollars. Her current voyage and two future charterparty fixtures are cancelled, cargo is discharged in the port of refuge, and her entire crew is finally repatriated from the port where permanent repairs are carried out.

The AUTOSHIP is boarded by the Spanish Coast guard and a salvage crew who regain control of her and take her into a safe place in which to tranship her cargo.

Meanwhile, off the east coast of Scotland …

A products tanker is on passage from Peterhead south to Aberdeen. She is fully laden with gasoline. Without warning, the duty officer notices the vessel appears to be veering off her autopilot course – to starboard, in the direction of land. The officer calls the Master to the bridge. "Not sure what's up, Cap" the officer remarks "We seem to be heading off the course you set us for the Aberdeen roads. I'm trying to correct but the helm is becoming increasingly sluggish."

"Steer two points to port" the Master orders. But the helm becomes completely unresponsive and the ship now seems to be heading inexorably for the shore – with a mind of her own.

At that moment, the bridge screens go blank, then show a picture of a Black Hat, followed by the same notice that was flashed onto the screens of the MANDSHIP.

The tanker takes bottom just off Balmedie, on the pristine shoreline of a golf course. There she remains.

Scanning the shore with his binoculars, the Master's blood runs cold when he sees a prominent sign on the edge of the greens….
There is awful pollution, and the golf links has to be closed for a year. (The first letters of demand for consequential losses arrive via Twitter, and the incident spawns a tsunami of #TrumpPollutionLitigation.)

No sooner had the collision and the grounding occurred when a ransom demand flashes worldwide across the screens of viewers of the electronic daily edition of Lloyd's List, warning of further incidents - unless a Sultan's ransom in a selection of cryptocurrencies is paid to the hackers. The ransom notice concludes:

"We have had a little fun up till now but we will soon start to play our games in earnest. There will be loss of life and massive pollution if our terms are not met within 48 hours. Our tentacles reach wide into your Safe, Secure Shipping industry. We are The Black Hat".

An insurance investigation team chances upon a link between the three vessels: Although each came from a different yard, all three were fitted with operational and navigational software supplied by Autonav Inc of Boston Ma. Autonav's software technicians installing their systems at the three building yards were infiltrated by sophisticated hackers – the selfsame Black Hat Inc – who left their malware behind.

Further investigation finds that all three ships have similar Doxford main engines with computerised Engine Management Control Systems. All three ships' Engine Management Control Systems had been compromised by Black Hat's infiltrators substituting the regular Intel chips with a lookalike Brightspark chip – which had been preloaded with their malware.

A Marine Court of Enquiry held in London is asked to make a fault finding in relation to the collision. The Court finds that Black Hat's hackers took control of the navigation systems of MANDSHIP, having earlier broken through the ship's firewall protection while two junior officers were playing computer games with their personal laptop plugged into the ship's mainframe internet modem. This was against the vessel's standing instructions. The court accepts evidence from a mole that Black Hat had then taken control of the navigation system of the ship and that they were also able to access the EMCS of the main engine, rendering the ship unresponsive. Their control of MANDHIP was complete.

Evidence shows that the MANDSHIP's firewall protection design was wholly inadequate: the way it had been set up failed to isolate the various computer networks on board. Especially, the network used by the crew for comms was not properly isolated from the ship's operating and navigation systems. This was a flaw in her design.

The Court hears that the unmanned AUTOSHIP was being intermittently monitored by suitably qualified mariners at its control centre in London. No alert was transmitted by the AUTOSHIP to the control centre as it came into close quarters with MANDSHIP. The AUTOSHIP's Autonav software failed to respond and reduce speed and heading appropriately.

Although it is clear that AUTOSHIP's EMCS was similarly compromised, it remains unclear whether Black Hat was able to take control of the vessel before the collision, or whether their embedded malware simply overrode AUTOSHIP's collision avoidance software at the crucial time. It is also unclear whether Black Hat had infiltrated the London Control Centre – although the Centre's software was installed by Autonav. Design security safeguards are called into question.

The Court calls for expert evidence to be heard to determine whether the AUTOSHIP's Autonav on-board software and/or its London control system's software was adversely affected by the known cyber-interference and if so, to what extent. The investigators are tasked also with ascertaining how

the hackers gained control of not only the tanker's EMCS, but also of her ECDIS and navigation systems.

All three vessels are insured on the London Market, with P&I split between London and New York.

The actions on all three vessels were clearly concerted, connected and meticulously planned.

Examine the legal and insurance implications, considering inter alia:

1. COLREG and SOLAS implications of the collision
2. Seaworthiness implications in relation to all three ships - from a Carriage of Goods and a Marine Insurance perspective
3. Kidnap & Ransom insurance implications
4. Oil pollution liabilities and IOPC Fund exposure in relation to the tanker spill
5. Liabilities for other vessel collision damage, and cross liabilities of vessels, if any
6. P&I implications of crew injury, cargo damage, delay and charterparty cancellation
7. Limitation of Liability implications
8. Cybersecurity on shore and on board all three ships
9. Exposure of the Classification Societies of each vessel in failing to satisfy themselves that the vessels had been in all respects (including electronic systems protection) fit for purpose
10. Product liability for software – including failure of firewall protection and inadequate protection against malware infiltration
11. Liability exposure of the three shipyards and of the software installers.

Autonomous ship image: © Techhive.com
Collision damage: Long Kim, taken by surprise, mid Indian Ocean October 1986. Photo by John Hare
Trump International Golf Link photo from www.skygolfblog.com

YOUNG CMI SEMINAR
Stephenson Harwood Offices, 1 Finsbury Circus

London EC2M 7SH Thursday 8 November 2018, 2.00PM-4:00pm

Madeline Bailey

MS Amlin at the cutting edge of the blockchain insurance revolution

Global (re)insurer MS Amlin is using blockchain technology to help clients to better manage their risk portfolios in an increasingly digital and connected world. *Insurwave* is a pioneering blockchain platform developed initially for the marine insurance industry.

Developed by heavyweight consulting giant EY and technology provider Guardtime, and in collaboration with MS Amlin, A.P. Møller - Mærsk A/S, Willis Towers Watson, AXA XL, Microsoft and ACORD, the *Insurwave* platform launched live in production in May 2018. Paul Taffinder, MS Amlin Director of Strategy & Innovation, says he believes it is a world first for the marine insurance.

He said: "The success of the marine blockchain platform is a concrete example of where radical innovation using new technology is being deployed to drive positive change in the insurance industry."

Paul believes that blockchain and other emerging technologies, such as the "Internet of Things" (IoT) and machine learning have the potential to redefine the (re)insurance model and help the industry overcome many of its current challenges – challenges that arise largely through the lack of availability of timely, accurate and trusted data.

The features of blockchain - which is also the technology used for Bitcoin and other crypto-currencies - enables very granular pieces of asset or risk data to be added and maintained on the blockchain ledger, and shared peer to peer across a network, in a secure and immutable way. Trust in the data is enabled because of the security and integrity of the blockchain, where structured data in the form of a 'block' of information (uniquely identified by a set of numbers) is encrypted and linked together in a 'chain' of related 'blocks'. Together, this chain of blocks is an immutable digital ledger of transactions with very high integrity. These characteristics are useful for the sharing of digital asset or risk data that can be deployed in insurance transactions – like *Insurwave*. 'Smart contracts' – or pre-programmed code - allows you to automate contract changes as the asset or risk characteristics change, because not only is the asset or risk data

digitised but so is the contract data digitised on the platform. This can be done in real or near real time.

Madeline Bailey, MS Amlin Head of Strategic Initiatives, who is leading the blockchain effort at MS Amlin, says that the deployment of smart contracts can radically change how (re)insurers manage post bind contract changes, such as for war risks declarations. She said: "The combination of digitising the contract data alongside geo-fence data on the platform means that we can automate any premium changes for war risks as a ship moves though a war zone. Our clients have said this is a big win for them."

These emerging technologies open up new opportunities for global (re)insurers like MS Amlin to look at new client propositions that deliver value to clients and the industry, as well as help to alleviate the bottom line pressures for both shippers and the insurance industry alike.

Through an innovative and agile approach MS Amlin and the *Insurwave* collaborators have used blockchain to solve a concrete problem for a single very large client (Maersk, the integrated shipping and logistics company). It also puts in place the building blocks for how the platform could scale up in the future. Initially the platform will deliver significant benefit to policyholders, as it will capture exposure and loss data at a very granular level, along with premium, tax and deductible information in a structured way that can be shared digitally across the network.

Analysis of risk performance is enhanced by moving from nine data points to more than 24 data points, along with the ability to move away from deploying resource on contract administration to more value-add risk management.

Brokers also benefit from the ability to offer higher-value advisory and proactive services. Insurers and reinsurers will gain clearer insights to track their exposures across the full portfolio of risks in near real-time and be able to offer new and customised services, faster claims servicing and new products. Efficiencies can be realised for all parties in the value chain.

If we look further out to the future there is the opportunity to move to far more tailored (re)insurance coverages that reflect policyholders' individual risk profiles, which is something insurance companies hear many clients say they are looking for. The combination of blockchain with sensors and IoT data could enable preventative risk management to be in-built. Rewarding policyholders for the right behaviours, by paying a price that is fair based on the risk profile, is possible with this technology.

The use of blockchain in marine trade and risk management is new, and as with many new technologies the future is difficult to predict. There are

complexities to manage through the implementation of distributed ledger solutions, including the interoperability of multiple blockchain applications, and there must a supporting legal and regulatory model.

However the fundamentals of sharing data digitally, securely and transparently, and automating the impact of changes to an insurance contract — could really benefit shipping and marine insurance, not only hull but also other marine classes such as cargo.

The *Insurwave* collaboration is one of the radical innovation initiatives that have emerged from MS Amlin's Edge innovation programme.

MS Amlin set up Edge two years ago with the aim to start to tackle the enormous challenges faced by the insurance industry, through an innovative approach across three levels: the first is tactical - what technology is out there that might improve how we currently do business? A good example of this is our work in Robotics Process Automation; the second is radical - this is about doing things that are so different we might even come up with new a business model shifting how we operate, like the *Insurwave* platform – which is changing how we think about sharing and transacting information digitally; and the third is exploratory - here we test out ideas in a 'sandbox', or experimental environment. For example, we ask what would the insurer of the future look like with 24/7 trading and omni-channel distribution?

Another example where MS Amlin is leading adoption of new innovative insurance solutions is its partnership with InsurTech company Cytora to deploy artificial intelligence into commercial underwriting processes.

Paul Taffinder is also leading the innovation effort across MSI International and chairs the Digital Working Group seeking to look at digitisation and innovation that can be used across all of the MSI International businesses, not just MS Amlin.

For more information please email edge@msamlin.com

MS Amlin is a leading insurer and reinsurer, and part of the global top--10 insurance group MS&AD. With a 300--year record and more than 2,200 people in 24 locations worldwide, we deliver continuity for businesses facing the most complex and demanding risks. In turn, this promotes continuity and prosperity around the world. Our role places us at the forefront of the Property & Casualty, Marine & Aviation and Reinsurance markets.

We are experts in underwriting, with both technical capability and deep knowledge of the areas we insure. Our claims service sets the industry reference point for quality, with efficient, fair and timely claims management.

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 will now simply provide 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

As was done in the CMI Yearbook 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.

T. van der Valk

CMI Publications Editor

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: http://diplomatie.belgium.be/sites/default/files/downloads/i1.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: http://diplomatie.belgium.be/sites/default/files/downloads/i2a.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: http://diplomatie.belgium.be/sites/default/files/downloads/i2b.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: http://diplomatie.belgium.be/sites/default/files/downloads/i3.pdf
- the United Nations Treaty Collection: https://treaties.un.org/pages/showDetails.aspx?objid=08000002801 67705

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: http://diplomatie.belgium.be/sites/default/files/downloads/I-4a.pdf
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801 d0f51
- 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: http://diplomatie.belgium.be/sites/default/files/downloads/I-4b.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: http://diplomatie.belgium.be/sites/default/files/downloads/I-4c.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: http://diplomatie.belgium.be/sites/default/files/downloads/I-5.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: http://diplomatie.belgium.be/sites/default/files/downloads/i6.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: http://diplomatie.belgium.be/sites/default/files/downloads/i6.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: http://diplomatie.belgium.be/sites/default/files/downloads/i7.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/downloads/i8.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: http://diplomatie.belgium.be/sites/default/files/downloads/Zeerecht_9.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: http://diplomatie.belgium.be/sites/default/files/downloads/i10a.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: http://diplomatie.belgium.be/sites/default/files/downloads/i10b.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: http://diplomatie.belgium.be/sites/default/files/downloads/i11.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: http://diplomatie.belgium.be/sites/default/files/downloads/i12.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/downloads/i13.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/downloads/i14.pdf

Convention relating to Registration of Rights in respect of Vessels under Construction, Brussels, 27 May 1967
Entry into force: not yet in force

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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

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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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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

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- 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/Verdrag/Details/012371.html

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

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- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801089a9&clang=_en
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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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx
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- 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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800

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- 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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx
- the depositary, the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a599a&clang=_en
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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

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Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Brussels, 17 December 1971
Entry into force: 15 July 1975

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Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, Athens, 13 December 1974
Entry into force: 28 April 1987

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- 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

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- 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

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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

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- 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

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- the United Nations Treaty Collection: https://treaties.un.org/pages/showDetails.aspx?objid=08000002800f9404
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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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx
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- 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

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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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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

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- 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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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

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- 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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx
- Netherlands Treaty Database (in English) (Verdragenbank): https://verdragenbank.overheid.nl/en/Verdrag/Details/007429

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  Entry into force: not yet in force

  - the depositary, the (Secretary-General of the) International Maritime Organization: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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=08000002800 4c485

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=08000002800 4b4e0&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=08000002800 4a70a

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: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.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=0800000280201e615
- 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://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha
- 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/status-leasing-conv-1988

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: -
- Netherlands Treaty Database (in English) (Verdragenbank): https://verdragenbank.overheid.nl/en/Verdrag/Details/010766

CONFERENCES OF THE COMITE 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 - 1911President:
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
President: Mr. Albert LILAR
Subjects: Bills of Lading - Passenger Luggage -Ships under construction.

XXVII. NEW YORK – 1965
President: 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: Mr. Albert LILAR
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
President: 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: Patrick GRIGGS
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: Karl-Johan Gombrii
Subjects:
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

MLC 2006 Issues and Implementation.

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: Stuart Hetherington
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;

XLII. NEW YORK 2016
President: Stuart Hetherington
Subjects:
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

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